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## The Supreme Court and Freedom of Expression from 1791 to 1917

### Cover Page Footnote

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# THE SUPREME COURT AND FREEDOM OF EXPRESSION FROM 1791 TO 1917

MICHAEL T. GIBSON\*

## INTRODUCTION

SILENCE often is important: to Sherlock Holmes, for example, a dog's failure to bark during the night was significant and suspicious.<sup>1</sup> The failure of American courts and legal scholars to discuss more than a century of the history of freedom of speech and freedom of the press is also cause for suspicion. Scholars have analyzed freedom of expression from colonial times to the battle over the Sedition Act of 1798,<sup>2</sup> yet for the period after the expiration of that statute in 1801,<sup>3</sup> there is little but silence. Except for a few studies of isolated incidents concerning the first amendment,<sup>4</sup> scholars jump from the Sedition Act of 1798 to the Espio-

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1. A. Doyle, *Silver Blaze*, in *The Memoirs of Sherlock Holmes* (1894) (investigating the disappearance of a race horse, Holmes deduces from the watchdog's failure to bark that the horse was taken by his trainer with whom the dog was familiar).

2. The Sedition Act, ch. 74, 1 Stat. 596 (1798). See, e.g., 5 *The Founders' Constitution* 112-85 (P. Kurland & R. Lerner eds. 1987); *Freedom Of The Press From Zenger To Jefferson* (L. Levy ed. 1966); L. Levy, *Emergence Of A Free Press* (1985) [hereinafter Levy II]; L. Levy, *Legacy Of Suppression* (1960) [hereinafter Levy I]; J. Miller, *Crisis In Freedom* (1951); J. Smith, *Freedom's Fetters* (1956); Berns, *Freedom of the Press and the Alien and Sedition Laws: A Reappraisal*, 1970 Sup. Ct. Rev. 109; Farber, *Reflections on the Sedition Act of 1798*, 62 A.B.A. J. 324 (1976); Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 Stan. L. Rev. 661 (1985); Kahane, *Colonial Origins of Our Free Press*, 62 A.B.A. J. 202 (1976); Kurland, *The Original Understanding of the Freedom of the Press Provision of the First Amendment*, 55 Miss. L.J. 225 (1985); Levy, *The Legacy Reexamined*, 37 Stan. L. Rev. 767 (1985); Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History* (Book Review), 37 Stan. L. Rev. 795 (1985).

3. The act expired by its own terms on March 3, 1801. The Sedition Act, ch. 74, § 4, 1 Stat. 596, 597 (1798).

4. *Freedom of the Press from Hamilton to the Warren Court* (H. Nelson ed. 1967) (selection of historical documents discussing freedom of the press); Anderson, *The Formative Period of First Amendment Theory, 1870-1915*, 24 Am. J. Legal Hist. 56 (1980) (municipal ordinances and academic debate affecting first amendment rights); Martin, *Freedom of Speech in North Carolina Prior to Gitlow v. New York*, 4 Camp. L. Rev. 243 (1982); McCullough, *The History of the First Amendment and the Acts of September 24, 1789, and March 2, 1831*, 12 S.D.L. Rev. 171 (1967) (survey of questionable media coverage of legal profession and judicial proceedings); Roper, *James Kent and the Emergence of New York's Libel Law*, 17 Am. J. Legal Hist. 223 (1973) (examining law of libel as a deterrent to freedom of the press after expiration of Sedition Act of 1798); Tarrant, *To "insure domestic Tranquility": Congress and the Law of Seditious Conspiracy, 1859-1861*.

nage Act of 1917<sup>5</sup> and Justice Holmes's "clear and present danger" opinions of 1919,<sup>6</sup> paying little, if any, attention to the intervening period.<sup>7</sup> The silence of a watchdog during a single night is puzzling; a one hundred and twenty year gap in the history of one of the most important parts of the Constitution is quite disturbing. It would be troubling if, for over a century, litigants and judges neither invoked nor discussed freedom of speech and of the press; and it would also be cause for concern if courts had discussed those freedoms but had interpreted them in a manner inconsistent with modern interpretations of the first amendment.

These concerns bode ill for the traditional American view that this nation always has valued and zealously protected the right to free expression.<sup>8</sup> Discussions of the amendment's formation and its relation to the Sedition Act have suggested that the original meaning of the first amend-

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15 Am. J. Legal Hist. 107 (1971) (examining attempt to pass a law of seditious conspiracy in immediate pre-Civil War period).

5. Espionage Act, ch. 30, 40 Stat. 217 (1917), *as amended by* Act of May 16, 1918, ch. 75, § 1, 40 Stat. 553 (1918) (repealed 1948).

6. *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting); *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Schenck v. United States*, 249 U.S. 47 (1919).

7. Rabban, *The First Amendment in Its Forgotten Years*, 90 Yale L.J. 514, 516-17 (1981) (scholars and judges accepted Professor Chafee's interpretation of the history of free speech cases that "essentially ignored the years between the Sedition Act of 1798 and the Espionage Act of 1917"); *see also* Currie, *The Constitution in the Supreme Court: Full Faith and the Bill of Rights, 1889-1910*, 52 U. Chi. L. Rev. 867, 870 (1985) ("Study of this area tends to begin with the great espionage cases of the First World War."); *see, e.g.*, E. Barrett & W. Cohen, *Constitutional Law* 1050-53 (7th ed. 1984); N. Dorsen, P. Bender, & B. Neuborne, *Political and Civil Rights in the United States* 17-31 (4th ed. 1976) (brief discussion of first amendment events during nineteenth century); D. Gillmor & J. Barron, *Mass Communication Law* 96 (1974) (Supreme Court gave no serious attention to first amendment until World War I); G. Gunther, *Constitutional Law* 972-76 (11th ed. 1985) (Court's first major free speech cases came after World War I); W. Lockhart, Y. Kamisar, & J. Choper, *The American Constitution* 650 (5th ed. 1980) (no discussion); R. Rotunda, *Modern Constitutional Law Cases And Notes* (1985) (no discussion).

Even contemporary scholars devoted relatively little space to freedom of expression. *See, e.g.*, 2 Kent's Commentaries On American Law 16-26, 35-37 (O. Holmes Jr. 12th ed. 1884) (eleven pages discussing libel and four discussing religion in a four-volume work); 2 Story's Commentaries On The Constitution Of The United States 613-47 (5th ed. 1891) (thirty-five pages discussing first amendment in two-volume work); Yale Law School Faculty, *Two Centuries' Growth Of American Law* (1980) (no mention of first amendment); J. Thayer, *Cases On Constitutional Law* 732, 869 (1895) (discussion limited to regulation of parades and the mails). The first authoritative history of the Supreme Court makes frequent, though brief, references to the Sedition Act, *see* 1 C. Warren, *The Supreme Court in United States History* 164-65, 180, 191, 215, 225-26, 267, 273, 282, 358, 363-65 (rev. ed. 1932); and discusses *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812). *see* 1 C. Warren, *supra*, at 437-39; Civil War censorship, *see* 2 C. Warren, *supra*, at 373 & n.1; *Ex parte Curtis*, 106 U.S. 371 (1882), *see* 2 C. Warren, *supra*, at 651-52; and *Lewis Publishing Co. v. Morgan*, 229 U.S. 288 (1913), *see* 2 C. Warren, *supra*, at 723.

8. Professor Levy, for example, acknowledged the dangers that historical research presented to what he called the "Holmes-Chafee traditional liberal position," after Justice Oliver Wendell Holmes, and Harvard Professor Zechariah Chafee, Jr. *See* Levy II, *supra* note 2, at viii-ix.

ment was far narrower than its current meaning,<sup>9</sup> and one might expect that nineteenth and early twentieth century judicial interpretations of the first amendment would reflect or confirm that narrow, original meaning. Recently, it has been argued that the Supreme Court's decisions from that period constituted "an established pattern of hostility to First Amendment concerns."<sup>10</sup> Indeed, several cases would seem to support those who would use *stare decisis* or framers' intent to constrict modern first amendment law.<sup>11</sup> Furthermore, neither Justice Holmes nor Harvard Professor Zechariah Chafee, Jr., who influenced Holmes,<sup>12</sup> cited any cases to support their new clear and present danger doctrine,<sup>13</sup>

9. Levy I, *supra* note 2; Levy II, *supra* note 2; Kurland, *supra* note 2, at 232-48.

10. Rabban, *supra* note 7, at 524-25.

11. A number of judges have advocated the use of the framers' intent to interpret the Constitution. *See, e.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 91-106, 113-14 (1985) (Rehnquist, J., dissenting) (framers' intent indicates that prayer in elementary public schools does not violate first amendment); *Marsh v. Chambers*, 463 U.S. 783, 787-93 (1983) (Burger, C.J.) (Congress' 200 year old practice of opening its sessions with prayer authorizes hiring of Presbyterian chaplain by state legislature); *Trimble v. Gordon*, 430 U.S. 762, 778 (1977) (Rehnquist, J., dissenting) (fourteenth amendment cannot be read apart from the "original understanding at Philadelphia"); Rehnquist, *The Notion of a Living Constitution*, 54 *Tex. L. Rev.* 693, 695 (1976) (impermissible to substitute "some other set of values for those which may be derived from the language and intent of the framers"). Some legal scholars have seriously questioned the value of the framers' intent in constitutional interpretation. *See, e.g.*, Powell, *The Original Understanding of Original Intent*, 98 *Harv. L. Rev.* 885 (1985); Sandalow, *Constitutional Interpretation*, 79 *Mich. L. Rev.* 1033 (1981).

12. *See* Rabban, *supra* note 7, at 586-94 (discussing Chafee's approach and its influence on the dissents by Justices Holmes and Brandeis in first amendment cases); Ragan, *Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and The Clear and Present Danger Test for Free Speech: The First Year, 1919*, 58 *J. Am. Hist.* 24 (1971) (attributing Justice Holmes's later, more liberal free speech opinions to the influence of Chafee). *But see* Bogen, *The Free Speech Metamorphosis of Mr. Justice Holmes*, 11 *Hofstra L. Rev.* 97, 98-99 (1982) (arguing that the perceived change in Justice Holmes's view of free speech was due to a misreading of his earlier opinions rather than Chafee's influence); Ginsburg, *Afterward to Ernst Freund and the First Amendment Tradition*, 40 *U. Chi. L. Rev.* 243 (1973) (discussing possible influence of Judge Learned Hand on Justice Holmes); Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 *Stan. L. Rev.* 719 (1975) (discussing correspondence between Judge Learned Hand and Justice Holmes); Kalven, *Professor Ernst Freund and Debs v. United States*, 40 *U. Chi. L. Rev.* 235 (1973) (discussing Professor Freund's criticism of Holmes's opinion in *Debs*).

13. Justice Holmes made very little use of precedent dealing with freedom of expression in his Espionage Act opinions. *See* *Abrams v. United States*, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting) (citing *Schenck*, *Frohwerk*, and *Debs*); *Debs v. United States*, 249 U.S. 211, 213, 215 (1919) (citing *Schenck*, *Frohwerk*, and *Ruthenberg v. United States*, 245 U.S. 480 (1918)); *Frohwerk v. United States*, 249 U.S. 204, 206, 207, 210 (1919) (Holmes, J., dissenting) (citing *Schenck* and *Robertson v. Baldwin*, 165 U.S. 275 (1897)); *Schenck v. United States*, 249 U.S. 47, 51-52 (1919) (citing *Patterson v. Colorado*, 205 U.S. 454 (1907), *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911), and *Goldman v. United States*, 245 U.S. 474 (1918)).

Chafee's first article on freedom of speech also paid little attention to federal case law before World War I. *See* Chafee, *Freedom of Speech in War Time*, 32 *Harv. L. Rev.* 932 (1919). His later work paid even less attention to pre-World War I precedent. *See* Z. Chafee, *Free Speech in the United States* 16-30 (1941) (citing *Gompers v. United States*, 233 U.S. 604 (1914), one colonial case, and three state court decisions, but giving some attention to eighteenth century freedom of expression); Chafee, *Thirty-Five Years with*

suggesting that either no case law existed on the subject or that stare decisis was more of a hindrance than a help. Chafee dismissed the value of all precedent in a one sentence, unsupported assertion that earlier cases were too few and varied to be of value,<sup>14</sup> suggesting that he might have been slipping a muzzle on a somewhat uncooperative dog. Of course, one should also ask if there was a dog to muzzle: it might be very revealing if for one hundred and twenty years the courts had overlooked or ignored the amendment.

This Article attempts to address these concerns by examining the Supreme Court's treatment of freedom of speech and the press from the adoption of the first amendment in 1791 to the enactment of the Espionage Act in 1917. The Court issued opinions in over sixty cases that today we would consider as concerning the first amendment.<sup>15</sup> Part I

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*Freedom of Speech*, 1 U. Kan. L. Rev. 1, 1 (1952) (all authoritative judicial interpretation of first amendment occurred after 1917).

14. Z. Chafee, *supra* note 13, at 16 ("The pre-war cases were too few, too varied in their character, and often too easily solved to develop any definite boundary between lawful and unlawful speech.").

15. *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917) (labor); *Marshall v. Gordon*, 243 U.S. 521 (1917) (legislative criticism); *Badders v. United States*, 240 U.S. 391 (1916) (mail); *Weber v. Freed*, 239 U.S. 325 (1915) (movies); *Fox v. Washington*, 236 U.S. 273 (1915) (advocacy); *Mutual Film Corp. v. Hodges*, 236 U.S. 248 (1915) (movies); *Mutual Film Co. v. Industrial Comm'n*, 236 U.S. 247 (1915) (movies); *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230 (1915) (movies); *Coppage v. Kansas*, 236 U.S. 1 (1915) (labor); *Ocampo v. United States*, 234 U.S. 91 (1914) (libel); *Gompers v. United States*, 233 U.S. 604 (1914) (labor); *Baker v. Warner*, 231 U.S. 588 (1913) (libel); *Nalle v. Oyster*, 230 U.S. 165 (1913) (libel); *Lewis Publishing Co. v. Morgan*, 229 U.S. 288 (1913) (mail); *Lewis Publishing Co. v. Wyman*, 228 U.S. 610 (1913) (mail); *Bartell v. United States*, 227 U.S. 427 (1913) (obscenity); *Smith v. Hitchcock*, 226 U.S. 53 (1912) (mail); *Pickford v. Talbott*, 225 U.S. 651 (1912) (libel); *Gandia v. Pettingill*, 222 U.S. 452 (1912) (libel); *Fifth Ave. Coach Co. v. New York City*, 221 U.S. 467 (1911) (advertising); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911) (labor); *United States v. Press Publishing Co.*, 219 U.S. 1 (1911) (seditious libel); *Peck v. Tribune Co.*, 214 U.S. 185 (1909) (privacy); *Pickford v. Talbott*, 211 U.S. 199 (1908) (libel); *Loewe v. Laylor*, 208 U.S. 274 (1908) (labor); *Adair v. United States*, 208 U.S. 161 (1908) (labor); *Houghton v. Meyer*, 208 U.S. 149 (1908) (mail); *Patterson v. Colorado*, 205 U.S. 454 (1907) (court criticism); *Halter v. Nebraska*, 205 U.S. 34 (1907) (advertising); *Dorr v. United States*, 195 U.S. 138 (1904) (libel); *Public Clearing House v. Coyne*, 194 U.S. 497 (1904) (mail); *Turner v. Williams*, 194 U.S. 279 (1904) (free speech and aliens); *Bates & Guild Co. v. Payne*, 194 U.S. 106 (1904) (mail); *Smith v. Payne*, 194 U.S. 104 (1904) (mail); *Houghton v. Payne*, 194 U.S. 88 (1904) (mail); *American School of Magnetic Healing v. McAnulty*, 187 U.S. 94 (1902) (mail); *Western Union Tel. Co. v. Call Publishing Co.*, 181 U.S. 92 (1901) (telegraph rates); *Abbott v. Tacoma Bank of Commerce*, 175 U.S. 409 (1899) (libel); *Davis v. Massachusetts*, 167 U.S. 43 (1897) (speech in public parks); *Dunlop v. United States*, 165 U.S. 486 (1897) (obscenity); *Price v. United States*, 165 U.S. 311 (1897) (obscenity); *Robertson v. Baldwin*, 165 U.S. 275 (1897) (original intent of the Constitution); *Andrews v. United States*, 162 U.S. 420 (1896) (obscenity); *Swearingen v. United States*, 161 U.S. 446 (1896) (obscenity); *Rosen v. United States*, 161 U.S. 29 (1896) (obscenity); *In re Debs*, 158 U.S. 564 (1895) (labor strike); *Grimm v. United States*, 156 U.S. 604 (1895) (obscene); *Horner v. United States*, 143 U.S. 207 (1892) (mail advertising for lottery); *In re Rapier*, 143 U.S. 110 (1892) (mail use for lottery); *Holden v. Minnesota*, 137 U.S. 483 (1890) (exclusion of reporters from witnessing execution); *United v. Chase*, 135 U.S. 255 (1890) (obscenity); *Vogel v. Gruaz*, 110 U.S. 311 (1884) (libel); *Ex parte Curtis*, 106 U.S. 371 (1882) (government employees); *Ex parte Jackson*,

will suggest some caveats to the use of these cases in evaluating freedom of speech. Part II will analyze cases dealing with criticism of government, showing that the Court had been indecisive, never endorsing but never firmly rejecting the doctrine of seditious libel. In addition, one of the Court's most important decisions in this area was shaped by contemporary pressures and the personal emotions of the justices, not the first amendment.<sup>16</sup> In Part III, cases involving government control over methods of communication will be discussed. It will be shown that contemporary pressures and personal emotions also played an important role in these decisions. Hampered by these factors and the lack of a first amendment specialist, the Court's opinions often were illogical or inconsistent. Part IV argues that the failure of Justice Holmes and Professor Chafee to consider earlier first amendment decisions was justified by the unresolved inconsistency of those precedents with the language and framers' intent of the first amendment. It will be demonstrated that the Court paid only lip service to the intent of the framers and in one crucial case reached an opinion that was flatly inconsistent with the intent of the drafters.<sup>17</sup>

On the whole, the Court's early decisions present no threat to the modern interpretation of the first amendment developed by Holmes and Chafee. Instead, the early decisions are examples of how the Constitution's guarantees of free speech and a free press should not be interpreted. They deservedly have been left dormant.

## I. THE LIMITATIONS OF EARLY SUPREME COURT DECISIONS

The Supreme Court's early decisions are the best source of information for the meaning of freedom of expression in the United States before World War I. They are authoritative; they are readily available to scholars; and while they cover many aspects of freedom of expression, they are few enough in number to be analyzed in a single article. Still, they present an incomplete and somewhat misleading picture for three reasons.

First, many disputes involving freedom of expression never reached the Court. The first amendment was not held to apply to the states until 1925, when the Court "incorporated" it into the due process clause of the

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96 U.S. 727 (1877) (mail); *Pollard v. Lyon*, 91 U.S. 225 (1875) (libel); *United States v. Kirby*, 74 U.S. (7 Wall.) 482 (1868) (mail); *Teal v. Felton*, 53 U.S. (12 How.) 284 (1851) (mail); *United States v. Bromley*, 53 U.S. (12 How.) 88 (1851) (mail); *White v. Nicholls*, 44 U.S. (3 How.) 266 (1845) (libel); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821) (legislative criticism); *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812) (seditious libel).

16. See *Patterson v. Colorado*, 205 U.S. 454 (1907), discussed *infra* at notes 134-69 and accompanying text.

17. See *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230 (1915), discussed *infra* at notes 442-68 and accompanying text.

fourteenth amendment.<sup>18</sup> Nineteenth century procedural<sup>19</sup> and substantive<sup>20</sup> rules also prevented the Court from considering many cases from the lower federal courts and nearly all of the thousands of state court cases. In addition, extrajudicial factors such as threats of violence,<sup>21</sup>

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18. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). During the debates on the Bill of Rights, the House of Representatives approved a provision that said that "[n]o State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." 1 *Annals of Congress* 755 (J. Gales ed. 1834). The Senate, however, rejected the proposal. 2 B. Schwartz, *The Bill of Rights: A Documentary History* 1146 (1971).

The Court seldom interpreted state laws. *See, e.g.*, *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230, 241-45 (1915) (decision construing free speech provision of the Ohio Constitution); *Patterson v. Colorado*, 205 U.S. 454 (1907) (dicta analyzing the effect of the first amendment on contempt order issued under state law by state court). However, digests, treatises and court opinions refer to hundreds of state cases involving freedom of expression. *See, e.g.*, *Post Publishing Co. v. Hallam*, 59 F. 530, 541-42 (6th Cir. 1893) (Taft, J.); 32 *Am. Dig.* 1850-2494 (Century ed. 1902); 2 *Kent's Commentaries*, *supra* note 7, at 16-26. State decisions varied widely in protection afforded speech. *Compare* *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908) (broad protection given to commentary about public officials) *with* *Commonwealth v. Blanding*, 20 Mass. (3 Pick.) 304 (1826) (truth is not a defense in criminal libel action); *compare also* *State ex rel. Attorney General v. Circuit Court*, 97 Wisc. 1, 72 N.W. 193 (1897) (overturning trial court judge's order of contempt against newspaper editor who had opposed judge's campaign for reelection) *with* *In re Chadwick*, 109 Mich. 588, 67 N.W. 1071 (1896) (affirming contempt order by trial judge for criticism of him made outside the courtroom).

19. The limitations on Supreme Court review of lower court decisions were the greatest barrier to consideration. *See* *The Judiciary Act of 1789*, ch. 20, §§ 22, 25, 1 Stat. 73, 84-85; *see also infra* notes 48-51. General federal question jurisdiction was not provided until 1875. *See* *Act of March 3, 1875*, ch. 137, § 1, 18 Stat. 470. Moreover, during the 1890's the Supreme Court suffered severe backlogs, and the average time from docketing to decision was four years. 12 J. Moore, H. Bendix & B. Ringle, *Moore's Federal Practice* ¶ 300.02[5], at 1-35 (2d ed. 1982).

20. For example, declaratory judgments were not available. Therefore, a statute could be contested only if someone could be found who was willing to violate the law and suffer arrest. *See* 6A J. Moore, *supra* note 19, ¶ 57.02[1]. The federal Declaratory Judgment Act was not adopted until 1934. *See* ch. 512, 48 Stat. 955 (1934) (codified as amended at 28 U.S.C. §§ 2201-02 (1982)); *see also* *Perez v. Ledesma*, 401 U.S. 82, 112-13 (1971) (Brennan, J., concurring in part and dissenting in part) (legislative history of Declaratory Judgment Act indicates that Congress sought to avoid forcing parties to violate a statute in order to secure an adjudication of their rights). The absence of declaratory relief also meant that there were more physical confrontations between protestors and police, provoking violence that reduced the willingness of courts to sympathize with the protestors.

States and cities tended to regulate free speech through criminal charges of nuisance or breach of peace. *See* P. Murphy, *The Meaning of Freedom of Speech* 17 (1972); Anderson, *supra* note 4, at 65-66. The Supreme Court had only limited power to review these cases because habeas corpus was severely restricted. *See* W. Duker, *A Constitutional History of Habeas Corpus* 182-204 (1980); *see also* R. Sokol, *Federal Habeas Corpus* 17-18 (2d ed. 1969) (prior to 1867 habeas corpus only available for prisoners in federal custody and no appeal from denial of writ).

21. During one week in 1835, a contemporary writer found five hundred stories about mob violence in U.S. newspapers. R. Nye, *Fettered Freedom* 176-77 (1963); *see also In re Debs*, 158 U.S. 564, 566-73 (1895) (discussing violence related to labor movement); J. Daniels, *They Will Be Heard* 157-62 (1965) (in 1863, the *New York Times* sent two breech-loading machine guns and sixteen riflemen to protect Horace Greeley's *Herald Tribune* from a mob); E. Emery & M. Emery, *The Press and America* 174 (5th ed. 1984)



economic and social pressures,<sup>22</sup> and limited financial resources<sup>23</sup> may

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(abolitionist editor killed by pro-slavery mob); L. Goodwyn, *The Populist Movement* 190, 193-95 (1978) (violence against Populist party).

22. For example, in 1896 many employers allegedly told their workers not to report for work if William Jennings Bryan was elected president. J. Hicks, *The Populist Revolt* 375 (1961). Social pressures, augmented in many cases by physical violence and economic forces, also severely infringed the free expression rights of black Americans, *see* C. Woodward, *The Strange Career of Jim Crow* (2d ed. 1966), but little mention of those pressures appear in published court decisions. Several early cases held that neither slave nor free blacks were entitled to any civil, social, or political rights, *see, e.g.*, *Bryan v. Watson*, 20 Ga. 480 (1856); *Heim v. Bridault*, 37 Miss. 208 (1859), but an extensive examination of contemporary digests and scholarly works has revealed only two published decisions involving the first amendment rights of blacks. *See United States v. Mall*, 26 F. Cas. 1147 (C.C.S.D. Ala. 1871) (No. 15,712) (one paragraph report of decision holding that a federal statute protected the free speech rights of blacks and was constitutional); *African Methodist Episcopal Church v. City of New Orleans*, 15 La. Ann. 441 (1860) (upholding city ordinance barring blacks from assembling for worship without white supervision); *see also* H. Kalven, *The Negro and the First Amendment* (1965) (mentioning only three cases during this period, none directly involving blacks and the first amendment). There were at least thirty regularly published black newspapers in the nation by 1891, I. Penn, *The Afro-American Press* 112-13 (1981), which suggests that opportunity for cases involving the first amendment rights of blacks certainly existed.

The suppression of the rights of women to speak and publish is more difficult to assess. A multi-volume work by three advocates of women's rights does not mention a single lawsuit involving the free speech of women. *See* E. Stanton, S.B. Anthony, & M. Gage, *History Of Woman Suffrage* (1881) [hereinafter *E. Stanton*]. The digests, while full of cases concerning the rights of women to vote and hold public office, do not mention any cases involving women and the first amendment. Women were excluded as delegates from an international anti-slavery conference held in London in 1840, *see* T. Smith, *The American Philosophy of Equality* 95 (1927), and soon thereafter the Methodist and Congregationalist Churches reversed their earlier policy of allowing women to serve as preachers. *Id.* at 96. Moreover, the Supreme Court affirmed a decision by the Illinois Supreme Court to deny women admission to the bar. *Bradwell v. State*, 83 U.S. (16 Wall.) 130 (1872). *But see* E. Emery & M. Emery, *supra* note 19, at 160-61, 265-66 (discussion of female reporters during nineteenth century); 2 E. Stanton, *supra*, at 340-41 (Susan B. Anthony as delegate to 1868 Democratic National Convention); 2-3 E. Stanton, *supra*, (detailing lobbying efforts for woman suffrage).

Moreover, the unwillingness or inability of executive officials to follow legislative and judicial directives may have discouraged reliance on the courts. *See* A. Millett & P. Maslowski, *For The Common Defense* 241-47 (1984) (describing the inability of U.S. army to protect civil rights in Reconstruction South); *see also* Schroeder, *The Historical Interpretation of "Freedom of Speech and of the Press,"* 70 Cent. L. J. 223, 224 (March 25, 1910) (describing Postal Department's refusal before World War I to transmit material that Congress and the courts had said was mailable).

Finally, the population was substantially lower, resulting in fewer cases.

23. Corporations were the appellants in nearly all of the mail, motion picture, and commercial speech cases decided by the Supreme Court. Appellants in the obscenity cases were presumably motivated by the financial benefits of selling sexually explicit material. Wealthy individuals who financed important free speech litigation included Joseph Pulitzer, owner of the *New York World* and namesake of the Pulitzer Prize, who led the fight in *United States v. Press Publishing Co.*, 219 U.S. 1 (1910), and Thomas Patterson, a United States Senator and owner of one of Colorado's two largest newspapers, who was the defendant in *Patterson v. Colorado*, 205 U.S. 454 (1907). The labor cases could not have been possible without the financial support of labor unions. Political organization by socialists and anarchists enabled members of those groups to present *Spies v. Illinois*, 123 U.S. 131 (1887) and *Turner v. Williams*, 194 U.S. 279 (1904) to the Supreme Court. Similarly, proponents of religious rights under the first amendment were primarily those

have discouraged many people from appearing in any court—let alone the Supreme Court—to protect their rights. Thus, even during its most prolific period between 1890 and 1917 the Court issued only a few freedom of expression opinions a year.<sup>24</sup>

The limited number of Supreme Court cases also affected the doctrine the Court developed. Not only was the Court unable to address many important areas, it also never developed a first amendment specialist. During the Warren Court era, Justices Frankfurter, Black, and Brennan regularly grappled with problems of speech and the press. Between 1791 and 1917, however, only Justice Holmes wrote as many as seven opinions on first amendment issues, and most justices wrote only three or four opinions on that subject during their entire tenures on the bench.<sup>25</sup> Lack of regular attention, and the absence of a specialist on the Court who would ponder the intricacies of the amendment and the long-range effects of the Court's decisions, stunted the amendment's growth.<sup>26</sup> This is reflected in a number of cases where the Court ignored or misread its earlier decisions or used superficial analysis.<sup>27</sup>

Secondly, the Court's decisions present an incomplete picture of freedom of expression during this time because they do not reveal popular

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with access to financial support. For example, one case concerned the religious aspects of a will involving millions of dollars, *Vidal v. Girard's Executor*, 43 U.S. (2 How.) 127 (1844); and four cases concerned the ownership of public lands assigned to churches for charitable purposes and were brought by parties seeking to gain the property, *Terret v. Taylor*, 13 U.S. (9 Cranch) 43 (1815); *Pawlet v. Clark*, 13 U.S. (9 Cranch) 291 (1815); *Beatty v. Kurtz*, 27 U.S. (2 Pet.) 565 (1829); and *Society for the Propagation of the Gospel in Foreign Parts v. Pawlett*, 29 U.S. (4 Pet.) 480 (1830). One case concerned the disposition of assets owned by the Methodist Church, *see Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1853); another involved government attack on the burial practices of the Roman Catholic Church of New Orleans, *see Permoli v. New Orleans*, 44 U.S. (3 How.) 589 (1845); and four involved merchants' attacks on laws requiring businesses to close on Sunday. *See Petit v. Minnesota*, 177 U.S. 164 (1900); *Powhatan Steamboat Co. v. Appomattox R.R.*, 65 U.S. (24 How.) 247 (1860); *Richardson v. Goddard*, 64 U.S. (23 How.) 28 (1859); *Philadelphia, W. & B. R.R. v. Philadelphia Harre de Grace Steam Towboat Co.* 64 U.S. (23 How.) 539 (1845). A number of religion cases involved attacks on the Church of Jesus Christ of Latter Day Saints, which had considerable property and financial resources, or on its members, whom the Church supported. *See, e.g., Reynolds v. United States*, 98 U.S. 145 (1878); *Late Corp. of the Church of Jesus Christ of Latter Day Saints v. United States*, 136 U.S. 1 (1890). Very few religious cases did not involve disputes over property rights or litigants with considerable financial support.

24. From 1791 to 1889, the Court heard twelve cases involving speech and press issues, or one every eight years. Between 1890 and 1917, the Court heard 53 cases, or an average of two every year. *See supra* note 15.

25. *See supra* note 15. Even the presence of several cases on a given issue in a few years did not produce a specialist. The Court's six obscenity decisions between 1895 and 1897 had five different authors; the nine mail decisions between 1901 and 1916 had six authors (Justice Brown wrote three opinions and Justice Holmes wrote two). *Id.*

26. *Cf. Cox, Federalism and Individual Rights Under the Burger Court*, 73 Nw. U.L. Rev. 1, 13 (1978) (arguing that state court judges would develop more liberal and enthusiastic attitudes toward civil rights if more lawsuits claiming under 42 U.S.C. § 1983 were filed in state courts).

27. *See, e.g., Patterson v. Colorado*, 205 U.S. 454 (1907), discussed *infra* at notes 148-51 and accompanying text.

perceptions. Even a brief examination of contemporary newspapers reveals that editors were only slightly restrained by the Court's doctrines. The editorial treatment of President Lincoln,<sup>28</sup> the exposures of the Credit Mobilier scandal<sup>29</sup> and Tammany Hall,<sup>30</sup> and the development of the muckraker<sup>31</sup> are quite inconsistent with the idea that the press felt shackled by the Court's interpretation of the first amendment.

The third limitation upon the value of the early Court decisions is the most important: the federal government simply did not regulate speech or the press for much of the nineteenth century and therefore the Court did not address the amendment. Except for the Sedition Act, which expired in 1801,<sup>32</sup> the Postmaster General's acquiescence in Southern censorship of abolitionist mail,<sup>33</sup> and censorship of correspondents during the Civil War,<sup>34</sup> the federal government did little to provoke litigation over first amendment rights to freedom of speech and the press until after the Civil War.<sup>35</sup> It was not until the 1870's that Congress enacted statutes regulating obscenity,<sup>36</sup> the use of the mails,<sup>37</sup> immigration of aliens with unpopular beliefs,<sup>38</sup> and the Mormon Church.<sup>39</sup> Thus, not until the 1870's did Supreme Court decisions on freedom of expression become more frequent. The relative silence of the Court regarding freedom of expression during the first three-quarters of the nineteenth century re-

28. For example, Northern newspapers during the Civil War described Abraham Lincoln as a "half-witted usurper," and "the head ghoul at Washington," see J. Tebbel, *The Compact History of the American Newspaper* 117 (1963), and accused him of war-time profiteering, making crucial decisions while intoxicated, and outright treason. See E. Emery & M. Emery, *supra* note 21, at 194.

29. See E. Emery & M. Emery, *supra* note 21, at 215-16 (Credit Mobilier and other newspaper revelations of scandals in the Grant administration).

30. See A. Paine, Thomas Nast, *His Period And Pictures* 135-205 (1904) (newspaper campaign against Tammany Hall of New York).

31. See *The Muckrakers* (A. Weinberg & L. Weinberg ed. 1961) (collection of most important articles by leading muckrakers); L. Steffens, *The Autobiography Of Lincoln Steffens* 357-84, 392-435 (1931) (describing the muckraking campaigns by McClure's Magazine during late nineteenth and early twentieth century). See generally L. Hand, *The Spirit Of Liberty* 189-90 (3d. ed. 1960) (protection of liberty lies in "the hearts of men and women" rather than constitutions, laws and courts).

32. The Sedition Act, ch. 74, § 4, 1 Stat. 596 (1798).

33. See *infra* notes 203-05.

34. See E. Emery & M. Emery, *supra* note 21, at 238-45; see also H. Nelson, *supra* note 4, at 232-47 (series of letters between Edwin M. Stanton and Abraham Lincoln concerning closing a New York City newspaper for printing false stories about the Civil War). Another scholar points out that Stanton and Secretary of State William H. Seward had several Copperhead editors imprisoned, see J. Tebbel, *supra* note 28, at 119, but asserts that, generally, Civil War field correspondents enjoyed more freedom than do modern war correspondents. *Id.* at 116.

35. See L. Beth, *The Development of the American Constitution* 209 (1971). See generally, H. Hyman & W. Wiecek, *Equal Justice Under Law* 237 (1972) (few government restrictions on whites before the Civil War).

36. See *infra* notes 281-85.

37. See *infra* notes 206-84, 288-325 and accompanying text.

38. See *infra* notes 350-58 and accompanying text.

39. See *Late Corp. of the Church of Jesus Christ of Latter Day Saints*, 136 U.S. 1 (1890); *Reynolds*, 98 U.S. 145 (1878).

flects that the federal government was not attempting to limit the rights of its citizens. Whatever hostility the Court may have displayed toward freedom of expression after 1875 must be balanced against the federal government's lack of hostile action for the preceding seventy-five years.

Despite these limitations, the decisions of the Supreme Court provide valuable insight into the meaning of freedom of speech and the press before World War I. Although they do not present a complete picture, these decisions represented the precedent that Justice Holmes, Professor Chafee, and other scholars and judges had to confront after World War I in developing what we regard as modern first amendment doctrine.

## II. CRITICISM OF THE GOVERNMENT

Modern writers find the concept of seditious libel to be flatly incompatible with the existence of a republican form of government in which the people are sovereign,<sup>40</sup> let alone with the existence of the first amendment. It seems self-evident that the electoral process can have meaning only if voters can engage in frank and vigorous discussion about the merits of the candidates, including criticism of incumbent government officials. If the people, not government officials, are sovereign, it should follow that those officials have no right to silence their critics. The unconstitutionality of a modern equivalent to the Sedition Act of 1798 seems clear.<sup>41</sup> Nevertheless, the Supreme Court did not expressly condemn the concept of seditious libel until 1964, one hundred and seventy years after the adoption of the first amendment, and then only in dictum.<sup>42</sup> The Court's failure to condemn prosecution of seditious libel or to fully legitimize attacks on government and on government officials during the period from 1791 to 1917, however, should not be read as a tacit endorsement of the idea that citizens could be punished for criticizing the government.<sup>43</sup> For various reasons, the Court never was able to confront the issue directly, and, in cases in which it indirectly considered the issue, its reactions were mixed.

40. See, e.g., Z. Chafee, *supra* note 13, at 18-19, 22, 31; Levy II, *supra* note 2, at xii; Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191, 205; see also J. Madison, Report On The Virginia Resolutions (1800), reprinted in 5 *The Founders Constitution*, *supra* note 2, at 142-43, 145-47 (sovereignty of the people and elective nature of government requires freedom of the press).

41. See Kurland, *supra* note 2, at 246.

42. See *New York Times v. Sullivan*, 376 U.S. 254, 276 (1964) (restraint on criticism of government and public officials imposed by the Sedition Act inconsistent with first amendment). Individual justices also had attacked the Act. See, e.g., *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *Beauharnais v. Illinois*, 343 U.S. 250, 272 (1952) (Black J., dissenting); *id.* at 288-90 (Jackson, J., dissenting).

43. Seditious libel never has been clearly defined. Levy II, *supra* note 2, at 8. The inclusion of a section on contempt of court under this topic suggests a slightly broader meaning than usual, but is consistent with Levy's discussion of several contempt cases. See *id.*, at 206-11 (discussing *Republica v. Oswald*, 1 U.S. (1 Dall.) 319 (Pa. 1788)).

A. *The Sedition Act*

One of the anomalies of first amendment history is that the Supreme Court never addressed the constitutionality of the Sedition Act while the Act was in force. The Act made it illegal to conspire with the intent "to oppose any measure or measures of the government of the United States" or "to intimidate or prevent" any federal official from performing his duties.<sup>44</sup> The Act imposed criminal penalties on anyone who published false, scandalous, and malicious writing against the federal government, Congress, or the President with the intent to defame them, and the Act made it illegal to excite against those entities "the hatred of the good people of the United States," or to "excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President."<sup>45</sup> The Sedition Act was largely a partisan statute drafted to protect incumbent members of the Federalist party from criticism.<sup>46</sup> Indeed, the Act was to expire on the last day of the term of office of President John Adams, a Federalist.<sup>47</sup>

At least fourteen persons were prosecuted under the Act,<sup>48</sup> yet the Supreme Court remained silent as to the constitutionality of those prosecutions for the legitimate reason that it lacked jurisdiction. Under the Judiciary Act of 1789, only the federal circuit courts had jurisdiction in criminal matters.<sup>49</sup> Nor did the Court's habeas corpus powers enable it to consider the constitutionality of a statute under which a person had been convicted.<sup>50</sup> The lack of appellate criminal jurisdiction is particularly strange because most of the first amendment issues of the time—as well as matters involving the fourth, fifth and sixth amendments—would have been raised by criminal defendants.<sup>51</sup>

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44. Ch. 74, § 1, 1 Stat. 596 (1798).

45. *Id.* at § 2.

46. See Levy II, *supra* note 2, at 297-300; cf. J. Miller, *supra* note 2, at 136 ("The Federal judges defined patriotism by their own narrow partisan standards and interpreted seditious libel in such a way as to preclude ordinary political activity."). For example, one defendant was convicted under the Sedition Act for saying that President Adams "thirst[ed] for ridiculous pomp." Lyon's Case, 15 F. Cas. 1183, 1183 (C.C.D. Vt. 1798) (No. 8,646).

47. Ch. 74, § 4, 1 Stat. 596 (1798).

48. See Levy II, *supra* note 2, at 297-300; J. Miller, *supra* note 2, at 136.

49. The Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 76-79. Section 13 of the Act gave the Supreme Court appellate jurisdiction "in the cases herein after specially provided for," but § 22, which lists those cases, does not mention criminal prosecutions. 1 Stat. at 81, 84-85. On the other hand, Justice Chase said at one circuit court trial, "if I am not right, it is an error in judgment, and you can state the proceedings on the record so as to show any error, and I shall be the first man to grant you the benefit of a new trial by granting you a writ of error in the supreme court." *United States v. Callender*, 25 F. Cas. 239, 251 (C.C.D. Va. 1800) (No. 14,709).

50. See *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201-03 (1829) (section 14 of the Judiciary Act of 1789 only permits Court to inquire whether a court of competent jurisdiction convicted the defendant, and not as to the grounds for conviction).

51. Most federal cases involving the first amendment's speech and press clauses were statutory and common law prosecutions for seditious libel, and ordinary common law criminal libel actions. There was little or no federal activity in areas that today would

Although the Court as a whole did not discuss the Sedition Act, individual members of the Court did. All six justices during the 1798 and 1799 terms were members of the Federalist party, and four of them endorsed the Act while trying cases in the circuit courts.<sup>52</sup> Justice Chase's conduct was the most blatantly partisan: he campaigned for the Act's passage,<sup>53</sup> actively sought to enforce it,<sup>54</sup> engaged in improper conduct

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prompt civil lawsuits against the federal government. *See* Hyman, *supra* note 35, at 300-01.

Conceivably, Congress believed that juries, not judges, would be the major source of protection for unjustly persecuted defendants. A number of contemporary politicians and drafters stressed the role of juries in protecting individuals from government oppression. *See, e.g.*, Letter from the Continental Congress to the Inhabitants of the Province of Quebec (Oct. 26, 1774) *reprinted in* 1 *The Founders' Constitution*, *supra* note 2, at 442 (jury trial as fundamental right); Virginia Ratifying Convention, Proposed Amendments To The Constitution (June 27, 1788), *reprinted in* 1 *The Founders' Constitution*, *supra* note 2, at 473 (trial by jury as "one of the greatest securities to the rights of the people"). Justice Chase, while exhorting a jury to convict a defendant of violating the Sedition Act, said that "we all know that juries have the right to decide the law, as well as the fact," but refused to concede during a discussion with the defense counsel that the jury could declare a statute unconstitutional, insisting that task was for the court. *United States v. Callender*, 25 F. Cas. 239, 253-57 (C.C.D. Va. 1800) (No. 14,709). Chase did not satisfactorily explain his inconsistency, which may have been motivated by fear that the jury would invalidate the Sedition Act.

52. Justice Chase vigorously endorsed the Act. *See* J. Smith, *supra* note 2, at 324-27, 335, 352-56; 1 C. Warren, *supra* note 7, at 164-65. He also went to great lengths to ensure its enforcement. For example, in the trial of James Callender for seditious libel, Justice Chase refused to allow the testimony of any witness unless the testimony would, standing alone, show the truth of the entire statement which was alleged to be libelous. *See* *United States v. Callender*, 25 F. Cas. 239, 251 (C.C.D. Va. 1800) (No. 14,709). At Justice Chase's impeachment trial, Chief Justice Marshall commented that he had never heard "that objection made by the court except in this particular case." L. Baker, *John Marshall: A Life In Law* 433 (1974). Justice Chase also refused to allow the defendant to argue the unconstitutionality of the Act to the jury. *See supra* note 51.

Justice Washington apparently upheld the Act's constitutionality in the trial of Charles Holt, *see* J. Smith, *supra* note 2, at 381, but the only description of that jury charge comes from the Federalist newspapers, *see id.*, since the case does not appear in the Federal Cases Reporters. Justice Iredell, in a charge to a grand jury, held the Act to be constitutional. *Case of Fries*, 9 F. Cas. 826, 836-40 (C.C.D. Pa. 1799) (No. 5,126). Justice Paterson, like Chase, prevented the jury from considering the Act's constitutionality and said that its validity could not be disputed until it was declared void "by a tribunal competent for the purpose." *Lyon's Case*, 15 F. Cas. 1183, 1185 (C.C.D. Vt. 1798) (No. 8,646). Neither Paterson nor Chase explained which tribunal would be competent. Chase suggested that constitutionality was an issue for the Court because appellate review by the Supreme Court would ensure a uniform rule, *see Callender*, 25 F. Cas. at 257, which ignored the Court's lack of appellate criminal jurisdiction. *See supra* note 49.

Chief Justice Marshall, who took his seat after the Act had expired, defended its constitutionality, in the Report Of The Minority On The Virginia Resolutions (Jan. 22, 1799), *reprinted in* 5 *The Founders' Constitution*, *supra* note 2, at 136-39. On the other hand, he questioned the wisdom of the Act, *see* Letter from John Marshall to a Freeholder (Sept. 20, 1798), *reprinted in* 5 *The Founders' Constitution*, *supra* note 2, at 131, and, as a member of Congress, voted for its repeal. *See* L. Baker, *supra*, at 304-06, 326.

53. Dilliard, *Samuel Chase*, in 1 *The Justices Of The United States Supreme Court* 185, 194 (L. Friedman & F. Israel ed. 1969).

54. *Id.*; *see* A. Beveridge, 3 *The Life of John Marshall* 37, 41 (1919); J. Smith, *supra* note 2, at 184, 343.

during prosecutions tried in his court,<sup>55</sup> and missed part of the August 1800 term in order to campaign for President Adams.<sup>56</sup> Partisan conduct by Chase and several other justices led Jefferson and the Anti-Federalists to condemn the judiciary,<sup>57</sup> a charge with which historians have agreed.<sup>58</sup>

The conduct of the federal judiciary helped provoke the popular reaction that doomed the statute.<sup>59</sup> Congress refused to renew the Sedition Act<sup>60</sup> and President Jefferson pardoned those who had been convicted and halted almost all pending prosecutions, including those instituted against Federalist editors.<sup>61</sup> Congress impeached Justice Chase, in part for his zealous use of the statute,<sup>62</sup> and Congress later refunded all fines collected under the Act.<sup>63</sup> The nation realized that it had made a mistake.

Indeed, when a federal prosecution of two Federalist editors under the common law of seditious libel reached the Court (having been overlooked by Jefferson), the result was so predictable that both parties de-

55. See A. Beveridge, *supra* note 54, at 34-41; J. Smith, *supra* note 2, at 325-26, 356-57; Dilliard, *supra* note 53, at 194.

56. C. Haines, *The Role of The Supreme Court in American Government and Politics* 176 (1944); 1 C. Warren, *supra* note 7, at 156 n.1.

57. Jefferson said that the federal bench had turned the grand jury system into a "political engine." Letter from Jefferson to P. Fitzhugh (June 4, 1797), *reprinted in* 1 C. Warren, *supra* note 7, at 165. Congressman William Giles likened the bench to "executive missionaries pronouncing political harangues." 7 *Annals of Cong.* 583 (1802).

58. See A. Beveridge, *supra* note 51, at 42-43, 49; C. Haines, *supra* note 56, at 175-77; 1 C. Warren, *supra* note 7, at 165-66; Kraus, *William Paterson*, in 1 *The Justices Of The United States Supreme Court*, *supra* note 53, at 170. See generally J. Smith, *supra* note 2 (detailed depiction of the trials conducted under the Sedition Act and the political biases displayed by members of the Court).

Specific instances of bias deserve to be noted. Justice Paterson, in a grand jury charge, described the Act's opponents, the Anti-Federalists, as "Jacobins," an epithet commonly used to refer to French revolutionaries and anarchists. A. Beveridge, *supra* note 54, at 30 n.1; C. Haines, *supra* note 56, at 175; 1 C. Warren, *supra* note 7, at 166 n.2. While more temperate than Chase, Paterson also earned a reputation as an avenger of the Federalist cause. Kraus, *supra*, at 171. Justice Iredell lectured grand juries on political issues, see 1 C. Warren, *supra* note 7, at 165-66, issued one grand jury charge that declared that the Adams administration had been "grossly abused" by its critics, see *Case of Fries*, 9 Fed. Cas. 826, 827 (C.C.D. Pa. 1799) (No. 5,126), lectured the same grand jury on the need for the Alien and Sedition Acts, see *id.* at 830-41, and, at the request of several Federalists, authorized widespread distribution of those comments, see *id.* at 841 n.3. Justice Ellsworth, while a member of the Court, served as an ambassador under President Adams, 1 C. Warren, *supra* note 7, at 167, leading Jefferson to label the Court as an auxiliary to the executive branch. *Id.*

59. See A. Beveridge, *supra* note 54, at 41, 49.

60. See 6 *Annals of Cong.* 404, 419-20, 423 (1800).

61. Letter from Thomas Jefferson to Abigail Adams (July 22, 1804), *cited in* *New York Times v. Sullivan*, 376 U.S. 254, 276 (1964); Letter from Thomas Jefferson to Wilson Carey Nicholas (June 13, 1809), *cited in* Levy II, *supra* note 2, at 344. Levy points out, however, that Jefferson tolerated, if not encouraged, common law prosecutions in state courts. Levy II, *supra* note 2, at 340-41, 344-47; see also L. Levy, *Jefferson and Civil Liberties* (1963).

62. 1 C. Warren, *supra* note 7, at 281-82.

63. Act of July 4, 1840, ch. 45, 6 Stat. 802.

clined to appear for argument.<sup>64</sup> The defendants had been indicted for common law, rather than statutory, seditious libel, and the Court held that the validity of any indictment under federal common law had "been long since settled in public opinion."<sup>65</sup> The Court said that there was no federal common law of crimes and therefore the lower federal court lacked jurisdiction over the case.<sup>66</sup>

Given the lack of federal criminal statutes, the Court's decision transformed the United States from a country where it was illegal to criticize a government official to a nation in which advocating insurrection was not a federal crime. And while Justices Chase and Paterson had refused to give juries a chance to serve as the protectors of personal rights, the Court in 1828 would assume that role, going out of its way to warn Congress against violating the rights of dissenters.<sup>67</sup>

### B. *Contempt of the Legislature*

The death of the Sedition Act did not eliminate the danger that the federal government would find other ways to stifle criticism. One potential means for chilling debate produced *Anderson v. Dunn*<sup>68</sup> and the Supreme Court's first reference to freedom of speech and of the press. The House of Representatives had "adjudged" Anderson guilty of breaching the privilege of the House and of high contempt of the House's dignity,<sup>69</sup> although the record did not indicate the factual basis for the findings.<sup>70</sup> After Anderson was arrested, examined, reprimanded, and released by the House, he sued the sergeant-at-arms for assault, battery, and false imprisonment, claiming that the House had exceeded its authority.<sup>71</sup>

The Court held that while the Constitution did not expressly give Congress the power to punish outsiders for contempt, the right of Congress to preserve itself and its authority meant that Congress had to be able to punish those who disobeyed its subpoenas and orders.<sup>72</sup> The Court acknowledged that Parliament had abused this power in the past,<sup>73</sup> and tried to prevent similar congressional abuse by limiting the punishment that Congress could inflict for contempt. Holding that the contempt power should be "the least possible power adequate to the end proposed,"<sup>74</sup> the Court said that contempt could only be punished by im-

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64. *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 32 (1812).

65. *Id.*

66. *Id.* at 33-34

67. *See infra* text accompanying notes 82-85.

68. 19 U.S. (6 Wheat.) 204 (1821).

69. *Id.* at 208-09.

70. *Id.* at 234.

71. *Id.* at 206-12. In the course of his arrest, Anderson alleged, he was subjected to "beating, bruising, battering and ill-treating." *Id.* at 204.

72. *Id.* at 224-27.

73. *Id.* at 231.

74. *Id.* (emphasis deleted).



prisonment, and could last only until the House had adjourned.<sup>75</sup> In addition, the Court suggested that public opinion would deter congressional abuse of its contempt powers.<sup>76</sup>

Curiously, however, the Court limited only the extent of Congress' ability to punish; it expressly did not restrict the grounds for which Congress could punish. After noting that the record did not reveal the reason for Anderson's arrest, the Court said it would "presume" that the House would not have issued the warrant for Anderson's arrest without adequate factual justification.<sup>77</sup> This presumption was less blind deference to Congress than a recognition that a more complete record would have shown that Anderson had been arrested for trying to bribe a member of the House.<sup>78</sup> The House debate over the incident consumed several full days of debate,<sup>79</sup> of which the Court could hardly have been ignorant, and, indeed, the Court did make a thinly-veiled reference to the actual facts of the case.<sup>80</sup> The Court's informal knowledge of the facts and the light punishment that Anderson received<sup>81</sup> may have convinced the Court to forgive the deficient record.

Given the facts of the case, it is surprising and significant that the Court chose to consider the effect its decision might have on freedom of speech and of the press. In what apparently was the Court's first reference to those two rights, Justice Johnson asked what would insure that the House would "confine its punishing power to the limits of imprisonment, and not push it to the infliction of corporal punishment, or even death, and exercise it in cases affecting the liberty of speech and of the press?"<sup>82</sup> His answer was that the members' own stake in the reputation of the House plus the responsiveness of an elective body to public opinion would serve to prevent such abuses.<sup>83</sup>

One could argue that the Court was being either naive or extremely deferential. But the Marshall Court was neither,<sup>84</sup> and a naive or deferential court would not have raised the issue in the first place. It is more reasonable to conclude that the Court was cajoling Congress, giving notice that it would be alert to congressional activity that impinged on the

75. *Id.* at 230-31.

76. *Id.* at 226.

77. *Id.* at 234.

78. *See* 31 *Annals of Cong.* 592-609, 611-702, 786-90 (1818).

79. The House first heard of Anderson's attempt on January 8, 1818, and devoted almost its full attention to the matter from Jan. 9th to Jan. 16th. *Id.*

80. In discussing whether congressional contempt power extended outside the District of Columbia, the Court said that an inhabitant of Louisiana or Maine was just as likely as a resident of the District to attempt, by letter, to bribe or corrupt a Congressman, which was precisely Anderson's alleged crime. *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 234 (1821).

81. Anderson was confined during the House's week-long debate on his case and then released after a reprimand. *Id.* at 210-12.

82. *Id.* at 232.

83. *See id.*

84. *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

first amendment. The change in the Court was clear. During the prior tenure of Chief Justice Ellsworth, several justices had individually endorsed Congress' power to silence its critics, and Justices Chase and Paterson had blocked discussion as to constitutionality of that power.<sup>85</sup> The Marshall Court, by contrast, acted as a single body to warn Congress that it would remain on guard against congressional activity that endangered first amendment rights.

The Court remained silent on this issue for the next one hundred years, but not because it had abandoned *Anderson's* dicta. Congress did not again act to punish a critic until 1916,<sup>86</sup> and, when it did, the Court fulfilled *Anderson's* promise that the judiciary would protect citizens against legislative excess. *Marshall v. Gordon*<sup>87</sup> arose out of an investigation into the activities of a labor organization to which a Congressman belonged.<sup>88</sup> A grand jury indicted the Congressman, who demanded that a House subcommittee be formed to investigate the federal district attorney's activities.<sup>89</sup> The attorney publicly charged the subcommittee with attempting to frustrate the grand jury's activities,<sup>90</sup> and used language that the House found insulting.<sup>91</sup> It held the attorney in contempt.<sup>92</sup>

The attorney's request for habeas corpus enabled the Court to transform *Anderson's* dicta into law. The Court admitted that the attorney's language had been "manifestly ill-tempered" and "well calculated to arouse the indignation" of the House.<sup>93</sup> Although the Court also conceded that *Anderson* had recognized that the Constitution impliedly gave Congress the contempt power,<sup>94</sup> it stressed that the contempt power included "the least possible power adequate to the end proposed."<sup>95</sup> That end was the preservation of the legislature's ability to perform its duties, and the Court flatly declared that criticism of the House, although it might irritate or offend the members of the House, did not impede the House's ability to perform its duties.<sup>96</sup> It therefore was beyond the bounds of the legislature's contempt authority, and the Court ordered Congress to release the attorney.<sup>97</sup>

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85. *See supra* notes 51, 52.

86. *See* *Marshall v. Gordon*, 243 U.S. 521, 543 n.1 (1917) (listing cases involving Congressional contempt power; all involved either physical assaults on members of Congress or witnesses who refused to answer questions). *But see Ex parte Nugent*, 18 Fed. Cas. 471, 482-83 (C.C.D.C. 1848) (No. 10,375) (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821) in dicta to support broad Congressional contempt power).

87. 243 U.S. 521 (1917).

88. *Id.* at 530-31.

89. *Id.*

90. *Id.* at 531-32.

91. *Id.* at 532.

92. *Id.*

93. *Id.* at 531-32.

94. *Id.* at 541.

95. *Id.* (emphasis deleted) (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821)).

96. *Marshall*, 243 U.S. at 541, 543, 545-46.

97. *Id.* at 548.

The *Marshall* decision effectively eliminated Congress' power to punish its critics by means of contempt. The Court limited the use of that contempt power to parties that had obstructed the ability of Congress to perform its tasks, and the Court established that criticism did not constitute such an obstruction. Congress could punish those who physically assaulted its members or refused to answer its questions,<sup>98</sup> but it could not punish those who disagreed with it.

### C. *The Developing Law of Libel*

The law of libel, criminal and civil, remained in a state of flux throughout the nineteenth century. As Professor Levy has shown, the conflict over the Sedition Act caused new libertarian concepts of freedom of speech and of the press to germinate,<sup>99</sup> leading to the death of the Act itself,<sup>100</sup> the more frequent use of truth as a defense in criminal actions,<sup>101</sup> and a significant increase in the power of juries in libel actions.<sup>102</sup> These developments provided additional protection to the press. However, nearly all of this development occurred in the state courts and the state constitutions. The Supreme Court heard only eleven cases related to defamation before 1917,<sup>103</sup> and these decisions, for the most

98. *See id.* at 543.

99. *See Levy II, supra* note 2, at 282-348.

100. *See supra* notes 56-60 and accompanying text.

101. *Compare* *People v. Croswell*, 3 Johns. Cas. 337 (N.Y. 1804) (criminal libel defendant not permitted to prove truth of charges against governor) with *Coleman v. MacLennan*, 78 Kan. 711, 723, 98 P. 281, 285-86 (1908) (no liability for good faith but false criticism of public official). Justice Brennan devoted three pages to *Coleman* in his landmark opinion in *New York Times v. Sullivan*, 376 U.S. 254, 280-82 (1964). Before 1789 no state had said that truth was a defense in criminal trials. *Levy II, supra* note 2, at 196-98. A number of state constitutions adopted after 1789 however, did admit truth as evidence in criminal libel actions. *See infra* note 149. The use of truth as a defense in civil libel actions had long been recognized. *See* 4 W. Blackstone, *Commentaries* \*150-51.

102. *See, e.g.,* Ark. Const. of 1836, art. II, § 8 (in all criminal libel indictments, jury to determine law and facts); Conn. Const. of 1818, art. I, § 7 (jury determines law and facts "under the direction of the court" in criminal libel indictments); Del. Const. of 1792, art. I, § 5 (jury determines facts and law in all criminal libel indictments); Ky. Const. of 1792, art. XII, § 8 (jury determines law and facts "under the direction of the court" in criminal libel indictments); N.J. Const. of 1844, art. I, § 5 (jury determines law and fact in all libel prosecutions or indictments); N.Y. Const. of 1846, art. I, § 8 (same); Pa. Const. of 1790, art. III, § 7 (jury to determine law and facts under court's direction in all criminal libel indictments).

103. *See supra* note 15. This section does not discuss two cases that dealt with libel of private individuals regarding private matters. *See Peck v. Tribune Co.*, 214 U.S. 185 (1909) (unauthorized use of woman's likeness in whiskey advertisement); *Pollard v. Lyon*, 91 U.S. 225 (1875) (accusation of immoral conduct against a woman). Although these eleven cases constitute the largest single group of free speech and press cases before World War I, they are a minute fraction of the defamation cases that state courts heard. Actions for libel and slander were quite common even in the early state courts: Virginia courts published twenty opinions in defamation cases between 1791 and 1820; Kentucky courts issued 43 between 1801 and 1835; Massachusetts published forty during the same time; and New York courts issued 29 between 1799 and 1833. Contemporary treatises cite thousands of state defamation cases. *See, e.g.,* 2 J. Kent's *Commentaries* \*16-26; M.

part, merely reflected developments in state law. Nonetheless, the Supreme Court cases reveal nineteenth century attitudes toward criticism of government and its officials.

The most striking thing about the Supreme Court cases is the source of the law they used. The Supreme Court made frequent use of treatises, English cases, and state court cases.<sup>104</sup> Curiously, however, it used state cases without considering the appropriate state constitutions, many of which had provisions guaranteeing freedom of the press and providing special rules of evidence for libel.<sup>105</sup> Those provisions differed from state to state and should have affected the decisions of the particular state courts. The Supreme Court's use of state decisions without considering the state constitutions indicates that the Court did not believe the provisions significantly influenced the actions of state supreme courts.<sup>106</sup> Furthermore, this belief may have been justified, for state courts rarely, if ever, discussed the free press provisions of their state constitutions in connection with libel.<sup>107</sup> Similarly, after the lower federal courts gained jurisdiction over federal questions, libel cases from the District of Columbia and the territories that made their way to the Supreme Court did not invoke the first amendment.<sup>108</sup>

In deciding libel cases, the major concern of the nineteenth century courts was malice. This was the primary issue of the first Supreme Court libel case, *White v. Nicholls*.<sup>109</sup> By the time the Court reached the issue, most state courts recognized that truth could be a defense to a charge of criminal libel, provided the truth was published with good intentions and

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Newell, *The Law of Slander and Libel* (1914); J. Townshend, *Treatise on the Wrongs Called Slander and Libel* (1890). Very few of these state decisions found their way to the U.S. Supreme Court, because they were considered to involve only issues of state law not a federal right. See *Abbott v. Tacoma Bank of Commerce*, 175 U.S. 409, 411-14 (1899) (denying for lack of jurisdiction an appeal from Washington Supreme Court decision as to existence of absolute privilege for court pleadings). Thus, the failure of the Court to apply the first amendment to the states until 1925 is only part of the reason for the perceived absence of appellate jurisdiction. See *supra* text accompanying notes 18-23.

104. See, e.g., *Dorr v. United States*, 195 U.S. 138, 151-53 (1904) (citing state cases and treatises); *Spalding v. Vilas*, 161 U.S. 483, 496-97 (1896) (citing cases from Queen's Bench and House of Lords); *Vogel v. Gruaz*, 110 U.S. 311, 316-17 (1884) (citing state court and English cases); *White v. Nicholls*, 44 U.S. (3 How.) 266, 285-292 (1845) (citing state court cases, English cases, and treatises).

105. See *supra* note 99 and *infra* note 146.

106. The only free press case that did discuss a state constitutional provision made no attempt to distinguish it from the first amendment. See *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230, 241-45 (1915).

107. Indeed, a number of state constitutions expressly said that citizens, though enjoying freedom of the press, were responsible for the abuse of that right. See, e.g., Ala. Const. of 1819, art. I, § 8; Ark. Const. of 1836, art. II, § 7; Conn. Const. of 1818, art. I, § 5; Del. Const. of 1792, art. I, § 5; Ky. Const. of 1792, art. XII, § 7; N.J. Const. of 1844, art. I, § 5; N.Y. Const. of 1821, art. VII, § 8.

108. See, e.g., *Ocampo v. United States*, 234 U.S. 91, 101 (1914); *Baker v. Warner*, 231 U.S. 588, 591-94 (1913); *Nalle v. Oyster*, 230 U.S. 165 (1913); *Gandia v. Pettinhill*, 222 U.S. 452, 458-59 (1912); *Pickford v. Talbott*, 211 U.S. 199 (1908); *Dorr v. United States*, 195 U.S. 138, 150-55 (1904); *Spalding v. Vilas*, 161 U.S. 483, 495-99 (1904).

109. 44 U.S. (3 How.) 266 (1845).

for justifiable ends, that is, without malice.<sup>110</sup> Unfortunately, as *White* demonstrates, it was difficult to apply such a standard to the normal political libel action and risky for a defendant to allow a jury to try a libel case. *White* sued the defendants after they wrote a letter opposing his appointment to a federal government position. The letter contended that *White* had uttered "one of the vilest calumnies ever issued by a band of thoughtless and irresponsible individuals" against a presidential candidate.<sup>111</sup> The defendants' letter also requested the appointment of one of their colleagues instead of *White*.<sup>112</sup> *White* sued, asking the Court to decide what protection against criticism public officials or candidates for public office should be accorded.<sup>113</sup>

Before the Court confronted that issue, it addressed the issue of malice, albeit in a somewhat confusing manner. It began by saying that *White's* allegations satisfied the requirement that malice be specially pleaded.<sup>114</sup> Although one might conclude from the wording of the opinion that malice and falsity were two different matters, the Court also said that an allegation that the criticism was "false" sufficiently pleaded malicious intent.<sup>115</sup>

The Court's explanation of implied malice created additional potential for confusion. The Court said that a statement that was calculated to make the plaintiff appear "infamous, or odious, or ridiculous" would imply that it was made with malice.<sup>116</sup> But what if that infamy or ridicule was deserved? And how should the Court's rule apply when a speaker's motivations were mixed? The defendants in *White* may have ridiculed *White* in an attempt to rid government of an unworthy servant, but, as their nomination of a replacement suggests, they also may have been motivated to advance a friend's interest. Was that enough to justify a finding of malice? The Court's concern with the speaker's motivation rather than the speaker's belief in the truthfulness of his or her statement posed a significant danger to would-be critics of government officials.

That danger was increased by the means that plaintiffs could use to prove malice. *White* recognized that malice could be inferred simply from the publication itself. Indeed, the *White* Court ruled that the plaintiff was entitled to present the libelous material to the jury for precisely that purpose.<sup>117</sup> *White* also said that malice could be shown by the facts and circumstances connected with the material or with the situation of the parties, although the trial court could never require more proof of

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110. *Id.* at 289 (citing *Commonwealth v. Clap*, 4 Mass. 149 (3 Tyng) 154 (1808)).

111. *White v. Nicholls*, 44 U.S. (3 How.) 266, 268 (1844).

112. *Id.* at 269.

113. *Id.* at 285.

114. *Id.* *White* alleged that defendants "falsely, wickedly, and maliciously composed and published" the criticism and that the defendants acted "maliciously and wickedly, intending to injure the plaintiff in his character." *Id.* at 284.

115. *Id.*

116. *Id.* at 291.

117. *Id.* at 287, 292.

malice from the plaintiff than the publication itself.<sup>118</sup> The basic rule was that when publication was proved, malice could be inferred from the publication's language, although the defendant had the opportunity to explain the language.<sup>119</sup>

At first glance, *White* and the nineteenth century libel law it represents seem inconsistent with modern libel law, especially the pronouncement of *New York Times v. Sullivan* that the first amendment bars liability for criticism of a public official unless the statement was made with knowledge that it was false or with reckless disregard for whether it was false or not.<sup>120</sup> *White* itself, however, approvingly quoted an early Massachusetts decision that said "that if the defendant had proceeded with honest intentions, believing the accusation to be true, although in fact it was not, he would be entitled to protection, and that the occasion of the publication would prevent the legal inference of malice."<sup>121</sup> *White* also cited an English case that spoke of statements made "maliciously, and without probable cause."<sup>122</sup> Later Supreme Court cases also made this connection.<sup>123</sup> Thus, although the Court did not base its probable cause language on constitutional grounds, the Court's repeated references to probable cause as a libel defense provides historical support for the modern standard for libel of public officials.

Nineteenth century Supreme Court libel cases also reflected the growth of the doctrine of privilege, the concept that some types of statements should enjoy special protection. By 1844, qualified privilege was given to statements made in discharge of a public or personal duty (such as words of caution spoken to a friend), an employer's assessment of his servant's character, words used in judicial proceedings, and publications made in legislative proceedings, such as petitions to Parliament.<sup>124</sup> In a normal libel case, the existence of malice was presumed from the fact of publication, and the defendant had to show that the statement was made without malice.<sup>125</sup> With qualified privilege, there was no such presump-

118. *Id.* at 287.

119. *Id.* at 286.

120. *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

121. *White v. Nicholls*, 44 U.S. (3 How.) 266, 290 (1844) (quoting *Bodwell v. Osgood*, 20 Mass. 408, 412, 3 Pick. 379, 384 (1825)). *White* did not base this rule on the Constitution but presumably proclaimed it as a matter of federal common law. *Cf.* *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 17-18 (1842) (applying federal common law to a contract dispute based on diversity jurisdiction).

122. *White*, 44 U.S. (3 How.) at 289 (quoting *Fairman v. Ives*, 5 Barn. & Ald. 642, 648, 106 Eng. Rep. 1325, 1328 (K.B. 1822)).

123. *See, e.g., Nalle v. Oyster*, 230 U.S. 165, 182 (1913) (Court discussing school system's criticism of a teacher, said that the rule of *White* is "that [a statement] is not to be deemed malicious unless found to be false, as well as without probable cause."); *Philadelphia, W. & B. R.R. v. Quigley*, 62 U.S. (21 How.) 202, 214 (1858) (because corporation had investigated its allegations about the skills of a builder, the trial court should have instructed the jury that the presumption of malice had been rebutted).

124. *See White v. Nicholls*, 44 U.S. (3 How.) 266, 286-87 (1844).

125. *Id.* at 286.

tion, so the plaintiff had to prove malice.<sup>126</sup>

Later Supreme Court cases reflect the growth of the scope of privilege. In 1884, the Court held that complaints presented to a district attorney about allegedly illegal acts were absolutely privileged for public policy reasons.<sup>127</sup> In 1899, the Court dismissed, for lack of jurisdiction, a Washington Supreme Court case that held that statements made in petitions or complaints filed with a court also enjoyed absolute privilege because of public policy.<sup>128</sup> The Court also recognized that statements made by an executive officer in pursuit of his official duties should enjoy absolute immunity.<sup>129</sup> Furthermore, Justice Holmes, writing for the Court in 1912, discussing accusations of "monstrous immorality" against the U.S. Attorney for Puerto Rico,<sup>130</sup> said that the plaintiff was a "public officer in whose course of action connected with his office the citizens of [Puerto] Rico had a serious interest, and anything bearing on such action was a legitimate subject of statement and comment. It was so at least in the absence of express malice."<sup>131</sup> The Court held that the comments did not go beyond "reasonable limits."<sup>132</sup>

In short, the Court's early libel decisions do not fully reflect the tremendous changes in libel law that occurred during the nineteenth century. But the use of probable cause as a defense, the recognition of qualified privilege, and the development of absolute privilege indicate that the Court was concerned with giving some protection to political commentary, and those decisions set the stage for the development of modern libel law.

#### D. *A Bastion of Seditious Libel*

In its decisions involving critics of government institutions or officials, the Supreme Court gave the least protection to the single litigant who criticized the judiciary.<sup>133</sup> Although the Court protected those who questioned the other branches of government, a critic of the judiciary was quite another matter.

Three reasons may account for this difference. Public comments and criticism can pressure a judge, influence his decisions and deprive liti-

126. *Id.* at 287.

127. *Vogel v. Gruaz*, 110 U.S. 311, 314-16 (1884).

128. *Abbott v. Tacoma Bank of Commerce*, 175 U.S. 409 (1899).

129. *Spalding v. Vilas*, 161 U.S. 483, 498-99 (1896).

130. *Gandia v. Pettingill*, 222 U.S. 452, 457 (1912).

131. *Id.*

132. *Id.*

133. Prior to the decisions on judicial contempt power, the Court rebuffed efforts by the legislative and executive branches of government to punish detractors. *See supra* text accompanying notes 64-85, 99-109 (discussing *United States v. Hudson and Goodwin*, *Anderson*, and *White* and its successors). Following *Patterson v. Colorado*, the Court blocked President Roosevelt's efforts to gag the press, *see United States v. Press Publishing Co.*, 219 U.S. 1 (1911) and *infra* text accompanying notes 172-94, and barred Congress from applying the legislative contempt power to those who criticized it. *See Marshall v. Gordon*, 243 U.S. 521 (1917), and *supra* notes 86-92 and accompanying text.

gants of the impartial decision-maker that they deserve. Unlike most public officials, judges are prevented by judicial ethics from responding to attacks. Furthermore, Supreme Court protection of a critic of a state court might boomerang: if criticism of a lower court was protected, would not criticism of the nation's highest court also be protected? The tensions between these concerns and the first amendment culminated in *Patterson v. Colorado*,<sup>134</sup> a harsh and irrational decision that rests more on the Court's concern with protecting courts from criticism than on any reasoned interpretation of the first amendment.

In 1905, a Colorado newspaper owned by a Democratic United States Senator, Thomas Patterson, attacked the five Republicans on the Colorado Supreme Court.<sup>135</sup> Charged with contempt, Patterson claimed truth as a defense, and his answer described the court's alleged corruption in deciding several interrelated cases.<sup>136</sup> The court had not issued an opinion in one of the cases, and petitions for rehearing were awaiting the court's attention in the others.<sup>137</sup> Patterson's accusations and his political status made it clear that he was pressuring the court to change its decisions. The Colorado court, in a purely partisan opinion,<sup>138</sup> held Patterson in contempt for attempting to influence it in pending cases, and he appealed.

Justice Holmes writing for the Court upheld the state court in a three-part opinion. The first part accepted the state court's finding that the cases still were pending when Patterson commented on them.<sup>139</sup> Justice

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134. 205 U.S. 454, 462-63 (1907).

135. The articles are reprinted in *People v. News-Times Publishing Co.*, 35 Colo. 253, 256-71, 84 P. 912, 913-19 (1906).

136. The articles and the answer charged that the court had issued injunctions that allowed and endorsed wide-spread election rigging in order to secure the confirmation of two Republicans as members of the court. 35 Colo. at 281-355, 84 P. at 921-44 (answer of respondent).

137. Patterson and the court agreed that one case had not been decided at the time of the articles. 35 Colo. at 281, 84 P. at 921 (answer of respondent), 35 Colo. at 357, 84 P. at 945 (opinion of the court). The Colorado court did not say whether any other articles appeared before the rehearing petitions were filed, only that the motions were on file before the last offensive article appeared. The court also said that it granted all but one of the rehearing motions and modified substantially each of its original decisions. 35 Colo. at 356-57, 84 P. at 944-45.

138. Neither Justice Goddard nor Justice Bailey, whose appointments allegedly were secured through the claimed election-rigging, recused themselves. They and the three other justices whom Patterson had lambasted provided five of the six votes that convicted their accuser. 35 Colo. at 256-57, 84 P. at 913-19. The sole dissent was by Justice Steele, who had dissented in all of the criticized cases and who had been praised by Patterson in his articles. Curiously, Patterson also had praised Justice Gunter, who wrote the majority opinion.

The partisanship of state judges was widespread at the time. In 1906, Roscoe Pound said that the selection of state judges by partisan election had "almost destroyed the traditional respect for the bench." Address to the American Bar Ass'n Annual Convention (1906), *The Causes of Popular Dissatisfaction with the Administration of Justice*, reprinted in 46 J. Am. Judicature Soc'y 55, 66 (1962).

139. *Patterson v. Colorado*, 205 U.S. 454, 460 (1907). Justice Holmes' broad deference to the state court's determination was disturbing, for it would have allowed a state court



Holmes further agreed that Patterson improperly had tried to influence the Colorado court in regard to several pending cases.<sup>140</sup> Importantly, however, Justice Holmes drastically limited the scope of his rule. He declared that once a decision was final, the court that had issued it was "subject to the same criticism as other people."<sup>141</sup> In effect, this meant that although a court must base its decision solely on evidence and arguments presented in the courtroom and therefore should be shielded from public commentary, once the judicial process is complete, the public's interest in a robust discussion of the court's decision becomes paramount.<sup>142</sup>

In the second part of *Patterson*, Justice Holmes said that he would not decide whether the fourteenth amendment applied the first amendment

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to broadly define the term "pending case" to prevent the Supreme Court from considering the federal free speech issues involved. See *Pennekamp v. Florida*, 328 U.S. 331, 368 (1946) (Frankfurter, J., concurring). Today, the Supreme Court considers the facts of the situation and the state's general practice to determine if anything remains to be judged; the state court's determination is not controlling. See, e.g., *Flynt v. Ohio*, 451 U.S. 619, 620 (1981); *Market St. Ry. v. Railroad Comm'n*, 324 U.S. 548, 551 (1945); *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942); *Wick v. Superior Court*, 278 U.S. 574, 575 (1928).

The cases involved in *Patterson* were pending even under this less deferential test, for one case had not been decided and the court was considering motions for rehearing in the others. See *Department of Banking*, 317 U.S. at 266 (timely rehearing petition in state court stays finality of the judgment).

Holmes would have restricted free speech had he said that a case was pending until the time to seek a rehearing had expired, because a state court could establish a long filing period to delay criticism and reduce its effectiveness. In *Craig v. Hecht*, 263 U.S. 255 (1923), the trial court had held that a case was pending as long as it was open to modification, appeal, or rehearing. See *Ex parte Craig*, 274 F. 177, 187 (2d Cir. 1921), *rev'd*, 282 F. 138 (2d Cir. 1922), *aff'd sub nom. Craig v. Hecht*, 263 U.S. 255 (1923). But see *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 560-61 (1976) (prompt publication important if the press is to fulfill its duties). There is no evidence that Holmes favored this rule, and later he expressly rejected it, saying that the test should be whether anything is awaiting decision at the time the criticism is published, which is the essence of the modern rule. See *Craig*, 263 U.S. at 281 (Holmes, J., dissenting).

140. *Patterson v. Colorado*, 205 U.S. 454, 462 (1907). It is possible that the Colorado court's contempt decision would have been upheld even under the test used in *Bridges v. California*, 314 U.S. 252 (1941). In that case, the Court reversed a state contempt conviction, saying that the state court should have expected the criticism that was published and that courts can punish only those utterances whose substantive evil is extremely serious and highly imminent. *Id.* at 263, 270, 273. Arguably, Patterson's articles satisfied that test.

141. *Patterson v. Colorado*, 205 U.S. 454, 463 (1907). A number of state cases prior to *Patterson* had also held that criticism about completed cases could not be punished for contempt. See, e.g., *Storey v. Illinois*, 79 Ill. 45, 48-53 (1875); *Cheadle v. State*, 110 Ind. 301, 11 N.E. 426, 430-32 (1887); *State v. Anderson*, 40 Iowa 207, 208-09 (1875); *State v. Dunham*, 6 Iowa 254, 261-66, 6 Coles 246, 253-58 (1858); *Percival v. State*, 45 Neb. 741, 64 N.W. 221, 222-23 (1895).

142. It is worth mentioning that other public officials can defend themselves in the media, but judicial ethics prevent a judge from responding to his critics. Indeed, *Patterson* has been cited for the proposition that no publication about a completed case can be punished as contemptuous. *State ex rel. Pulitzer Publishing Co. v. Coleman*, 347 Mo. 1238, 1257-58, 152 S.W.2d 640, 647 (1941).

to the states.<sup>143</sup> The Court had rejected explicitly incorporation arguments in earlier cases,<sup>144</sup> but Holmes did not cite those decisions. Whatever the significance of this omission in Holmes's opinion, it was overshadowed by the grounds on which he based the decision. Holmes went on to explain why the first amendment, even if it applied, would not protect Patterson.

In the first place, the main purpose of such constitutional provisions is "to prevent all such *previous restraints* upon publications as had been practiced by other governments," and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. . . . The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false.<sup>145</sup>

This was a narrow and dangerous interpretation of the first amendment. Developed by Sir William Blackstone, this theory of press held that although the government could not prevent publication of even false speech, after publication it could punish even true speech.<sup>146</sup> This interpretation provided little protection for publishers. Although it prevented formal licensing systems to block publication of offensive material, the government could effectively block such publications merely by imposing severe post-publication penalties.<sup>147</sup>

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143. 205 U.S. 454, 462 (1907). Justice Harlan's dissent argued that while the first amendment expressly barred only Congress from abridging freedom of speech, the amendment also implicitly recognized freedom of speech and of the press as rights enjoyed by all United States citizens. *Id.* at 464-65 (Harlan, J. dissenting). If this was true, then the privileges and immunities clause of the fourteenth amendment barred the states from infringing those first amendment rights. *Id.*

144. The Court had said for decades that the Bill of Rights did not apply to the states. *See, e.g.,* *Ohio ex rel. Jack v. Kansas*, 199 U.S. 372, 379-80 (1905); *Lloyd v. Dollison*, 194 U.S. 445, 447 (1904); *Maxwell v. Dow*, 176 U.S. 581, 586-87 (1900); *Spies v. Illinois*, 123 U.S. 131, 166 (1887); *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833). The Court also had considered whether the privileges and immunities clause rectified that lack of coverage in *Spies*, but did not decide the question. 123 U.S. at 165-66, 170. In *Maxwell*, Justice Peckham's opinion for the Court rejected the idea, stating that under the *Slaughter-House Cases*, 83 U.S. 36 (1873) and *United States v. Cruikshank*, 92 U.S. 542 (1875), responsibility for the protection of life and liberty within a state rested with that state alone. *See Maxwell*, 176 U.S. at 592-93. Peckham regarded federal privileges to be the right to conduct business, to own, buy and sell property, to make contracts, to enforce them and to protect one's property in a court of law, and the right of a non-resident to be free of taxes and burdens that were not imposed on a state's residents. *Id.* at 593-94. This distinction between civil rights (rights necessary to live and work in a society) and political rights (rights used to participate in governing society) was a common nineteenth century concept. *See, e.g.,* *Hodges v. United States*, 203 U.S. 1, 15 (1906); *The Civil Rights Cases*, 109 U.S. 3, 22 (1883); *Ex parte Virginia*, 100 U.S. 339, 367-68 (1879) (Field & Clifford, J.J., dissenting); *Hall v. DeCuir*, 95 U.S. 485, 508 (1877) (Clifford, J., concurring). The Court finally held in 1925 that the equal protection clause applied the first amendment to state conduct. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

145. *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (citations omitted) (emphasis in original).

146. 4 W. Blackstone, *Commentaries* \*151-52.

147. *See Z. Chafee, supra* note 13, at 9-12. Professor Chafee also condemned Black-

Furthermore, there was little support for Holmes's endorsement of Blackstone. The authority Holmes cited was flawed,<sup>148</sup> and he ignored a number of early state constitutions that made truth a defense in libel actions, thereby repudiating Blackstone's theory.<sup>149</sup> The weakness of

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stone's doctrine because it protected blackmailers but not political dissenters and because of Blackstone's anti-republican sentiments. *Id.*

148. See *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (citing *Commonwealth v. Blanding*, 20 Mass. (3 Pick.) 304 (1825) and *Respublica v. Oswald*, 1 U.S. (1 Dall.) 319 (1788)). In *Commonwealth v. Blanding*, 20 Mass. (3 Pick.) 304 (1825), the Massachusetts Supreme Court said that truth was not a defense,

not . . . because the law makes no distinction between truth and falsehood, but because the interest of the public requires that men not invested with authority by the laws, shall not usurp the power of public accusation, and arraign before the public, with malicious motives, their neighbours and fellow citizens, exposing them to partial trials in forms not warranted by the constitution or laws.

*Blanding*, 20 Mass. at 312. Under this theory, accusations were to be made solely to the government or other body that had the authority to deal with them. Thus, the court said complaints about a government officer should be made to the legislature and those against a minister to his church. *Id.* at 316-17. The theory has some attraction: it seems aimed at preventing trial by the press, in which the victim often has little or no means to defend himself. Cf. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (Florida statute requiring newspaper to give reply space to political candidate it criticized held unconstitutional). But the theory has several problems. First, as the court mentioned, legislative and court proceedings are public, *Blanding*, 20 Mass. at 314, so accusations made to those bodies could be as damaging as those made through the press. Second, in many cases, the accusations should be made to the public, because they concern people (such as political candidates and elected public officials) who are responsible only to the public. Third, *Blanding* recognized that in certain cases involving emergencies, public accusations were permissible because the delays inherent in official proceedings could not be tolerated. *Id.* at 319. Quite frequently, the difference between an emergency and a non-emergency would be difficult to discern.

Under these justifications, it could be argued that Patterson's articles were proper: the Colorado Supreme Court was responsible to the public, and the dangers of a corrupt judiciary are at least as imminent and serious as "gross swindling," which the *Blanding* court had said was an emergency situation.

Moreover, *Blanding* had provided examples of cases in which truth was a defense. The court said these included, but were not limited to, reports of legislative and judicial proceedings, complaints made to any "public constituted body" of the wrongdoing of one of its officers, and "cases of mere private import," such as an honest but erroneous assessment of a servant's character and abilities. *Id.* at 314-15. The court said that these exceptions "go far to render harmless that much decried rule, that the truth is no defense." *Id.* at 315.

Finally, neither *Blanding* nor *Respublica v. Oswald*, 1 U.S. (1 Dall.) 319 (1788), cited in *Patterson*, 205 U.S. at 462, were sound precedent. The *Blanding* court pointed out that after the opinion's oral reading and its publication, Massachusetts enacted legislation allowing evidence of the truth to be admitted in all defamation actions. 20 Mass. (3 Pick.) at 315 n.1. Although *Oswald* appeared at 1 U.S. (1 Dall.) 319 (1788), that volume contains only cases from the Pennsylvania state courts and the Pennsylvania Constitution of 1790 should have overturned the *Oswald* decision. See Pa. Const. of 1790 art. IX, § 7 (truth admissible in actions stemming from discussion of public officials or public matters).

149. See, e.g., Ark. Const. of 1836, art. II, § 8 (truth admissible in libel action concerning discussion of public officials or public matters); Cal. Const. of 1849, art. I, § 9 (truth published with good motives and justifiable ends defense in criminal libel actions); Colo. Const. of 1876, art. II, § 10 (truth always admissible); Conn. Const. of 1818, art. 1 § 7 (truth admissible in all libel actions); Del. Const. of 1792, art. I, § 5 (truth admissible in

Holmes's position was made quite clear within a decade, when federal prosecutors in the Espionage Cases recognized that truth was a defense.<sup>150</sup> Indeed, Holmes privately described this aspect of *Patterson* quite simply: "I surely was ignorant."<sup>151</sup>

The reason for Holmes's statements appeared in the final part of his opinion, where he argued that criticism of a court in a pending case could influence a jury.<sup>152</sup> Since Senator Patterson had criticized an appellate court, and hence no jury could be influenced, Holmes added that outside criticism also could improperly influence a judge.<sup>153</sup> Therefore, the judge should cite a publisher for contempt if the publication interfered with the court's judicial function.<sup>154</sup> This meant that the judge would decide a case in which he was the target of criticism.<sup>155</sup> Holmes's justification for this conflict was feeble. Holmes failed to cite a 1905 Supreme Court case that had stressed the right of every contempt defendant to an impartial judge.<sup>156</sup> The case that he did cite, *United States v. Shipp*, was easily distinguishable—it involved a defendant who had failed to obey a Supreme Court order to protect a prisoner from a lynch mob.<sup>157</sup> Patterson had not merely offended the Colorado court in its official capacity by failing to obey an order; he had offended the court's members in their individual capacities by attacking their integrity. The Colorado justices were precisely the partial judges that the Court had earlier warned against.<sup>158</sup> Furthermore, Holmes's argument was internally inconsistent.

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libel actions concerning discussion of public officials or public matters); Fla. Const. of 1838, art. I, § 15 (truth admissible in libel actions concerning public officials or public matters); Ill. Const. of 1818, art. VIII, § 23 (truth admissible in libel actions concerning public officials or public matters); Ind. Const. of 1816, art. I, § 10 (same); Iowa Const. of 1857, art. I, § 7 (truth published with good motives and justifiable ends is defense); Ky. Const., art. XII, § 8 (truth admissible in libels of public officials or public matters); Mich. Const. of 1835, art. I, § 7 (truth published with good motives and justifiable ends is defense); Miss. Const. of 1817, art. I, § 8 (truth always admissible); Mo. Const. of 1820, art. XII, § 16 (same); N.J. Const. of 1844, art. I, § 5 (truth published with good motives and justifiable ends is defense); N.Y. Const. of 1897, art. I, § 8 (truth published with good motives and justifiable ends is defense in all criminal libel actions); Pa. Const. of 1790, art. IX, § 7 (truth admissible in actions stemming from discussion of public officials or public matters).

150. See Bogen, *supra* note 12, at 148 (quoting from Brief for United States 80-82, *Debs v. United States*, 249 U.S. 211 (1919)).

151. Bogen, *supra* note 12, at 100 (quoting Letter from Oliver Wendell Holmes, Jr. to Zechariah Chafee, Jr. (June 12, 1922) Box 14, folder 12, Zechariah Chafee, Jr. Papers (on file at Manuscript Division, Harvard Law School Library)).

152. *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

153. *Id.*

154. *Id.* at 463.

155. Justice Holmes argued that the grounds for punishing contempt are impersonal: "No doubt judges naturally would be slower to punish when the contempt carried with it a personally dishonoring charge, but a man cannot expect to secure immunity from punishment by the proper tribunal, by adding to illegal conduct a personal attack." *Id.* at 463 (citing *United States v. Shipp*, 203 U.S. 563, 574 (1906)).

156. See *McGuire v. Blount*, 199 U.S. 142, 143 (1905).

157. *United States v. Shipp*, 203 U.S. 563, 571-72 (1906).

158. See *McGuire v. Blount*, 199 U.S. 142, 143 (1905); see also *State ex rel. Attorney*

If judges were able to ignore personal attacks and punish contempt on impersonal grounds, then why was Holmes's concerned that outside criticism could influence a judge's decision on the merits of the case? Holmes completely failed to recognize the personal involvement of the Colorado judges in the cases.

The best—though far from satisfactory—explanation for the flaws in Holmes's opinion is that he was concerned about attacks on courts in Colorado and across the nation. Patterson's attacks were part of an intense, often violent, conflict between labor and business in Colorado, with frequent pitched battles between miners and state troops.<sup>159</sup> Holmes clearly abhorred this violence: two years after *Patterson* he approved the conduct of a Colorado governor who had declared one county to be in a state of insurrection and then jailed the county's labor leader for nearly three months without charges or the benefit of habeas corpus.<sup>160</sup> Meanwhile, the Populist and Progressive parties were levying equally threatening political attacks on the judiciary. Theodore Roosevelt advocated popular recall of state court decisions,<sup>161</sup> Samuel Gompers and several congressmen contended that Congress could overturn Supreme Court decisions,<sup>162</sup> and at least one bill introduced in Congress would have made all federal judges subject to regular elections.<sup>163</sup> It may have been that these factors, coupled with Patterson's irregular conduct, pushed Holmes too far.<sup>164</sup>

Significantly, Holmes recanted after pressures had eased. He privately repudiated Patterson,<sup>165</sup> and he dissented in two later cases in which the majority upheld contempt orders against newspaper editors.<sup>166</sup> In one case, a newspaper repeatedly had criticized a judge in a pending case.<sup>167</sup> Holmes said that contempt was improper unless the criticism actually

General v. Circuit Court, 97 Wisc. 1, 12, 72 N.W. 193, 196 (1897) (reversing contempt conviction of newspaper editor by judge who had been criticized by the editor).

159. See C. Abbott, S. Leonard & David McComb, *Colorado: A History of the Centennial State* 138-55 (rev. ed. 1982). At least one Colorado court was treated to a display of military power by a reluctant litigant. In 1903, the state's adjutant general arrested several labor leaders without a warrant and then produced them in response to a habeas corpus order only after he had surrounded the courthouse with armed troops, placed snipers on nearby rooftops, and stationed a Gatling gun outside. *Id.* at 147-48.

160. *Moyer v. Peabody*, 212 U.S. 78, 82-83 (1909).

161. A. Bickel & B. Schmidt, Jr., *The Judiciary and Responsible Government, 1910-1921*, at 14 (1984); A. Ekirch, *Progressivism in America* 163 (1974).

162. P. Murphy, *The Meaning of Freedom of Speech* 259 (1972).

163. See Robbins, *Abolishing Life Tenure for Federal Judges*, 70 Cent. L.J. 338 (May 6, 1910); see also A. Bickel & B. Schmidt, *supra* note 161, at 14; 2 C. Warren, *supra* note 7, at 743 n.1.

164. In an earlier case, the Court had taken a much more restrained approach to a newspaper's editorial attacks on the Court's expected position on cases then being argued before it. See 2 C. Warren, *supra* note 7, at 55-56.

165. See *supra* text accompanying note 151.

166. See *Craig v. Hecht*, 263 U.S. 255, 280-82 (1923) (Holmes, J., dissenting); *Toledo Newspaper Co. v. United States*, 247 U.S. 402, 422-26 (1918) (Holmes, J., dissenting).

167. *Toledo Newspaper Co.*, 247 U.S. at 422-23 (Holmes, J., dissenting).

would obstruct the administration of justice,<sup>168</sup> a far more lenient test than he had used in *Patterson*. The trial judge had said that he had tolerated six months of abusive criticism before issuing the contempt, but Holmes said that this showed that no emergency existed and that the administration of justice probably had not been blocked.<sup>169</sup>

In the end, *Patterson* is of little value as an early interpretation of the first amendment. *Patterson* reflects its own unique factual circumstances and the Court's desire to protect judicial authority. This protective instinct was particularly strong when *Patterson* was decided due to prevalent political conflicts at the time. Therefore, it cannot be considered a reasoned interpretation of the first amendment.

### E. *The Last Gasp of Seditious Libel*

Just three years after *Patterson*, the Supreme Court produced an important victory for the press. In *United States v. Press Publishing Co.*,<sup>170</sup> the Court prevented an angry president from using federal prosecutors and federal courts to resurrect seditious libel to punish his critics.

Shortly before the 1908 presidential election, articles in the *Indianapolis News* and Joseph Pulitzer's *New York World* suggested that friends of President Theodore Roosevelt and presidential candidate William Howard Taft had profited from the government's purchase of the Panama Canal.<sup>171</sup> Roosevelt attacked both newspapers, and the *World* responded by charging him with deliberate misstatements of fact.<sup>172</sup> In a special message to Congress, Roosevelt described the *World's* charges as "a libel upon the United States Government" and said that Pulitzer should be prosecuted for libel by the government.<sup>173</sup> The government began criminal proceedings in federal court, alleging that since copies of the *World's* editorials had been distributed on federal land at West Point Military Academy in New York, the *World* had committed a federal crime.<sup>174</sup>

The indictment presented three dangers to the nation's press. First, as

168. *Id.*

169. *Id.* at 425 (Holmes, J., dissenting).

170. 219 U.S. 1 (1911).

171. D. Seitz, *Joseph Pulitzer: His Life and Letters* 352-54 (1924). For other accounts of *Press Publishing's* factual background, see J. Barrett, *Joseph Pulitzer and His World* 227-252 (1941); W. Bleyer, *Main Currents in the History of American Journalism* 346-49 (1927 & photo. reprint 1973); W. Swanberg, *Pulitzer* 365-78 (1967); J. Tebbel, *supra* note 28, at 210-13.

172. D. Seitz, *supra* note 171, at 357-64.

173. *Id.* at 364.

174. *See* *United States v. Press Publishing Co.*, 219 U.S. 1, 2 (1911). Roosevelt had initially ordered federal attorneys to file an indictment in Indianapolis, but the local federal attorney refused and resigned, and the federal court dismissed the case. *See The Roosevelt Indictments*, 38 Nat'l Corp. Rep. 153, 153 (March 18, 1909); J. Tebbel, *supra* note 28, at 212. Indictments were also filed against the *World* in Washington, D.C., but they were also withdrawn. Finally, under pressure from the President, an indictment was obtained in the Southern District of New York, *see Press Publishing*, 219 U.S. at 2, one of the last acts of Roosevelt's administration. *The Roosevelt Indictments*, *supra*, at 153.

Roosevelt's address to Congress had shown, he was trying to revive seditious libel, and contemporary law journals criticized him for this.<sup>175</sup> The second concern was Roosevelt's use of the Assimilative Act<sup>176</sup> to establish a federal common law of libel, thereby avoiding important safeguards of state libel laws.<sup>177</sup> The third danger was that a federal criminal libel law—whether labeled seditious libel or not—would enable a thin-skinned president to invoke the full resources of the federal government against a newspaper.<sup>178</sup>

The threat to the nation's press was clear. Even though the federal trial court dismissed the indictment against officials of the *World* for lack

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175. See *The Roosevelt Indictments*, *supra* note 174, at 153 (indictments "based upon a policy differing only in degree" from seditious libel); Robbins, *The Action of the Government Against the New York World as a Revival of the Offense of Scandalum Magnatum*, 68 Cent. L.J. 135, 135 (Feb. 19, 1909) (criticizing charges as based on English concepts of seditious libel that had been repudiated by the American colonies); Kerr, *World Libel*, 68 Cent. L.J. 253, 254 (April 2, 1909) ("a dangerous and unnecessary precedent,—a rolling back of the wheels of time and the development of society"); see also *The Panama Libel Case*, 24 Bench & Bar 43, 47 (1911) (stating that the days of seditious libel are long gone). But see *Authority and Precedent in Libel Cases*, 44 The Law Journal 42 (Jan. 23, 1909) (English journal defending President relying solely on English law).

176. Assimilative Act, ch. 576, 30 Stat. 717, § 2 (1898) (codified as amended at 18 U.S.C. § 13 (1948)).

177. The Act assimilated state criminal law by providing that a person accused of committing a crime on federal land was to be tried in federal court under federal law, although any punishment was to be the same as that specified under state law. See *id.* The Assimilative Act was necessary because the Court had said that there were no federal common law crimes, see *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 33-34 (1812), and Congress had not passed special statutes making such crimes as robbery and murder into federal crimes when committed on federal land.

Federal lands included post offices, and the government contended that a separate crime occurred each time a libelous article was brought onto federal property. *United States v. Press Publishing Co.*, 219 U.S. 1, 4-6 (1911) (argument of government). A newspaper that mailed copies to subscribers in several states would have found itself subject to prosecutions in each of the federal districts through whose post offices the copies had travelled, with the attendant high costs of defending against multiple lawsuits. In contrast, many states—including New York—had statutes that allowed only a single criminal action to be filed anywhere in the nation in connection with the publication of a libelous article. *Id.* at 14-15. Roosevelt's lawsuit was a clear attempt to evade New York law and to create a chilling effect through the threat of multiple prosecutions.

178. The dangers of presidential abuse are illustrated by the *World* officials' allegations that the postal service had opened and read their mail, that government agents had stopped *World* messengers and examined the documents they carried, and that the government had planted spies on the newspaper's staff. D. Seitz, *supra* note 171, at 373.

Furthermore, if the government's argument had been adopted, a president could order local federal attorneys to file criminal libel actions in every jurisdiction in which the alleged libel had entered federal property, and these actions would be prosecuted at no cost to the president. A president claiming seditious libel would be in a much better position than a private victim of libel, and would have an extraordinary advantage over the alleged libeler, who would lack the unlimited legal resources that the president enjoyed.

An ordinary citizen who sought to bring multiple libel actions faced three problems. state statutes limited him to one action, he would have to convince state district attorneys to prosecute, and he would have to bear the legal costs of any civil actions.

of jurisdiction,<sup>179</sup> Pulitzer wanted a more authoritative decision.<sup>180</sup> The *World's* editorials goaded the government until the latter appealed its loss to the Supreme Court,<sup>181</sup> where Pulitzer won a unanimous victory. The Court ruled that the Assimilative Act did not create a new body of federal criminal law, but merely made an act committed on federal land punishable in a federal court on the same grounds and to the same extent that it would have been punishable if the act had been subject to state jurisdiction.<sup>182</sup> The Court also said that merely circulating libelous material on federal property did not constitute a publication of that material on federal property, and therefore could not be prosecuted under the Assimilative Act.<sup>183</sup> The Court held that publication occurred when materials were printed, so that Pulitzer should be prosecuted only in the state courts of New York.<sup>184</sup> This meant that Roosevelt's efforts to prosecute several suits would be barred by New York's single-suit provision.<sup>185</sup> That provision also would prevent Roosevelt from relying on an earlier Supreme Court decision that had said that a separate offense was committed each time a single letter was deposited with the post office in violation of postal law,<sup>186</sup> a holding that could have been used to justify a separate lawsuit for each mailed copy of a newspaper containing an allegedly libelous article. The Court thus affirmed the indictment's dismissal for lack of jurisdiction.

It has been argued that *Press Publishing* supports a narrow interpretation of the first amendment, since the Court used a jurisdictional argument to avoid deciding the merits of seditious libel.<sup>187</sup> It also has been argued that since state law provided adequate means for punishing the defendants, the Court was hinting that it might uphold the constitutionality of a state seditious libel conviction.<sup>188</sup> But since the lower court had dismissed the indictment for lack of jurisdiction, jurisdiction was the only issue before the Court. And in this case, state law provided considerable protection to the press, which is why Roosevelt tried to circumvent it by filing in federal court. Furthermore, there is no evidence that New York recognized seditious libel as a ground for criminal or civil

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179. *United States v. Press Publishing Co.*, 219 U.S. 1, 3-4 (1911) (the lower court concluded that the indictment was not authorized by the Assimilative Act, and dismissed for lack of jurisdiction).

180. *See* J. Barrett, *supra* note 171, at 248.

181. *See id.*; W. Swanberg, *supra* note 171, at 383.

182. *Press Publishing*, 219 U.S. at 9.

183. *Id.* at 15.

184. *See id.*

185. *See supra* note 177.

186. *See* *Badders v. United States*, 240 U.S. 391, 394 (1916) (mail fraud); *In re Henry*, 123 U.S. 372, 374 (1887) (same).

187. *See* Rabban, *supra* note 7, at 540. *But see* *Beauharnais v. Illinois*, 343 U.S. 250, 289-90 (1952) (Jackson, J., dissenting) (interpreting *Press Publishing* as a repudiation of the Sedition Act).

188. Rabban, *supra* note 7, at 540.



action.<sup>189</sup> Finally, if one reads the Court's opinion as inviting Roosevelt to proceed in New York state courts, it is difficult to explain why he did not accept that invitation, especially since the *World* had no factual evidence to support the allegations in its articles.<sup>190</sup>

More important, the Court's jurisdictional arguments exempted libel from the scope of the Assimilative Act. The Court earlier had held that depositing obscene material in a post office for mailing was a federal crime,<sup>191</sup> but in *Press Publishing* it rejected the government's attempt to analogize that earlier ruling to a publisher who deposits allegedly libelous material in a post office for mailing.<sup>192</sup> The Court's decision did nothing to defend the president from those who had attacked his use of seditious libel. The *World* correctly predicted that the Court's opinion would deter any president from repeating Roosevelt's attempt to revive seditious libel,<sup>193</sup> and a neutral law journal declared that because the decision would insure that seditious libel never would be revived, the decision would be "a landmark, one of the substantial guarantees of the continued freedom of the press."<sup>194</sup>

### III. GOVERNMENT CONTROL OF METHODS OF COMMUNICATION

#### A. *The Mails*

The postal system was vital to freedom of speech and of the press during the nineteenth century. The Constitution recognized the importance of the postal service and authorized Congress to establish postal offices and roads.<sup>195</sup> Well into the nineteenth century, most newspaper editors received out-of-town news by exchanging newspapers with each other.<sup>196</sup> This practice was so important that the Postal Act of 1792 allowed this exchange via the mails free of charge.<sup>197</sup> In 1794, newspapers constituted seventy percent of all mail,<sup>198</sup> and reduced postage rates helped increase the number of periodicals from less than one hundred in 1825 to more than six hundred in 1850.<sup>199</sup> Although the invention of the telegraph in 1842 and the development of road and rail networks after 1830 significantly improved methods of communication,<sup>200</sup> throughout the nine-

189. Rabban cites no evidence, and an examination of the American Digests from 1658 to 1906 does not reveal any seditious libel actions in New York after the case of *People v. Coswell*, 3 Johns. Cas. 337 (N.Y. 1804).

190. When Pulitzer asked his editors what proof they had of their charges, the *World's* highest ranking editor answered "None at all." J. Barrett, *supra* note 171, at 233; W. Swanberg, *supra* note 171, at 367.

191. *See Price v. United States*, 165 U.S. 311 (1897).

192. *United States v. Press Publishing Co.*, 219 U.S. 1, 15 (1911).

193. *See New York World* (Jan. 4, 1911), *quoted in* W. Bleyer, *supra* note 171, at 348.

194. *The Panama Libel Case*, *supra* note 175, at 48.

195. U.S. Const. art. I, § 8, cl. 7.

196. W. Fuller, *The American Mail* 112 (1972).

197. Act. of Feb. 20, 1792, ch. 7, § 21, 1 Stat. 232, 238.

198. *See* W. Fuller, *supra* note 196, at 117.

199. *Id.* at 123.

200. *Id.* at 158-78.

teenth century the mails were the primary method of distributing ideas.<sup>201</sup>

Because the mails were a means of communication owned by the government, tension existed between the first amendment and congressional authority to operate the postal service. Early statutes produced no first amendment litigation because they did not regulate the content of mailed material. But competition from private mail carriers caused Congress to forbid private citizens from carrying messages on postal roads,<sup>202</sup> transforming the post office into a monopoly. This development made it even more crucial to determine whether the government had to accept for mailing, and thus aid in disseminating, ideas it found offensive or dangerous. The problem became apparent before the Civil War, when Southerners tried to convince Congress to bar abolitionist literature from the mails.<sup>203</sup> Their efforts, although notably unsuccessful in Congress,<sup>204</sup> persuaded the post office to follow state laws in the South that barred delivery of abolitionist literature.<sup>205</sup> The post office regulations, however, produced no reported decisions.

After the Civil War, litigation began in response to statutes that prohibited the use of the mails to certain non-political material, such as obscene photographs and lottery advertisements. The Supreme Court's early decisions recognized Congress's right to impose such regulations but tried to protect political material. In the late 1890's, however, the Court began to defer to the postmaster general's decisions as to which periodicals qualified for favorable rates. This deference culminated in the postmaster general's blatant content-based regulation of the mails during World War I.

### 1. General Matters

The Supreme Court first seriously considered congressional power over the mails in *Ex parte Jackson*,<sup>206</sup> in which it upheld the constitution-

201. *See id.* at 146-47.

202. *See id.* at 148-65 (discussing competition between the post office and privately owned methods of communication). *See* Act of Feb. 20, 1792, ch. 7, § 14, 1 Stat. 232, 236; Act of Mar. 3, 1825, ch. 64, § 19, 4 Stat. 102, 107; Act of Mar. 2, 1827, ch. 61, § 3, 4 Stat. 238, 238; Act of July 2, 1836, ch. 270, § 42, 5 Stat. 80, 89; Act of July 7, 1838, ch. 172, § 2, 5 Stat. 271, 283.

203. *See* Address by President Jackson to Congress (Dec. 7, 1835), *reprinted in* 3 Messages And Papers Of The Presidents 175-76 (J. Richardson ed. 1896); *see also* Letter from Postmaster General Amos Kendall to postmaster at Charleston, South Carolina (Aug. 4, 1835), 48 Niles' Register 448 (1835), *reprinted in* H. Nelson, *supra* note 4, at 212-13; H. Hyman, *supra* note 35, 13-14; R. Nye, *supra* note 21, 41-85.

204. Congress made it a crime for any postmaster to unlawfully detain any mail. Act of July 2, 1836, ch. 270, § 32, 5 Stat. 80, 87.

205. *See* Letter from Postmaster General J. Holt to Charles Orton (Dec. 5, 1859), *reprinted in* 26 Cong. Rec. 4 (1894) *and in* H. Nelson, *supra* note 4, at 218-20.

206. 96 U.S. 727 (1877). The Court earlier had issued three minor decisions concerning the mails. *See* United States v. Kirby, 74 U.S. (7 Wall.) 482 (1868) (criminal prosecution against sheriff for obstructing the mail by arresting carrier for murder); Teal v. Felton, 53 U.S. (12 How.) 284 (1851) (suit to recover value of undelivered mail); United

ality of a statute that prohibited the use of the mails to promote or conduct lotteries.<sup>207</sup> Justice Field said that, because the Constitution gave Congress complete control of the postal system,<sup>208</sup> Congress did not have to furnish "facilities for the distribution of matter deemed injurious to the public morals."<sup>209</sup> This broad statement endangered first amendment values. If one believed that criticism of Congress or the President injured public morals—a belief reflected in the Sedition Act of 1798—then Justice Field's comment could be read as authorizing the postal system to refuse to carry letters and newspapers that attacked the government. But, in context, the opinion does not support that interpretation. Justice Field's statement concerned statutes that regulated lotteries<sup>210</sup>—the prevalence and ill-effects of which were a major concern of the times<sup>211</sup>—schemes to obtain money by false pretenses,<sup>212</sup> and obscenity.<sup>213</sup> Nothing in those statutes dealt with political material, and there is no reason to believe that Justice Field's statement intended to address freedom of the press issues. Indeed, his discussion of freedom of the press occurred in a different section of the opinion.<sup>214</sup>

While Justice Field recognized congressional power over the mails, he placed limits on this power. He wrote that letters and sealed packages in the mail were still protected from unreasonable searches and seizures, so that a person's right to privacy was extended from his house to material that he had deliberately placed in the hands of government.<sup>215</sup> This rule, although based on the fourth amendment, had important consequences for the first amendment. Without its protection, a political dissident had no assurance that government agents would not open and examine his mail without a warrant.<sup>216</sup>

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States v. Bromley, 53 U.S. (12 How.) 87 (1851) (criminal prosecution for violating postal monopoly).

207. *Ex parte* Jackson, 96 U.S. 727, 736-37 (1877) (upholding Act of July 23, 1868, ch. 246, § 13, 15 Stat. 194, 196).

208. *Ex parte* Jackson, 96 U.S. 727, 732 (1877).

209. *Id.* at 736.

210. *Id.*

211. *See* Phalen v. Virginia, 49 U.S. (8 How.) 167, 172-73 (1850).

212. *See* Act of Mar. 2, 1889, ch. 393 § 5480, 25 Stat. 873. Many schemers advertised "green goods" for sale, but when the greedy customer sent in legal tender, the schemer often would not send even the advertised counterfeit bills. If the exchange was arranged by mail but consummated in person, the recipient usually received a box full of sawdust or slips of paper.

213. *See Ex parte* Jackson, 96 U.S. 727, 736.

214. *See infra* notes 216-22 and accompanying text.

215. *See Ex parte* Jackson, 96 U.S. 727, 733 (1877).

216. Government intrusion into sealed mail was a long standing practice by other governments. Charles II hired employees who were experts at opening and resealing mail, *see* W. Fuller, *supra* note 196, at 7, and letters in early America were opened so often by postmasters and carriers that important messages were sent in code. *Id.* at 38. During the Taft Administration, Sen. Robert La Follete of Wisconsin charged that the post office had opened mail sent to him by disgruntled postal employees. G. Cullinan, *The Post Office Department* 124 (1968).

Another rule was needed to protect newspaper editors, whose products could not be sealed. Justice Field warned:

Nor can any regulations be enforced against the transportation of printed matter in the mail, which is open to examination, so as to interfere in any manner with the freedom of the press. Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.<sup>217</sup>

This seemed to say that the federal government had to open its mails to all newspapers, even those criticizing it.

But Field's language was confusing. Having just recognized the importance of unrestricted circulation, he said that "[i]f, therefore, printed matter be excluded from the mails, its transportation in any other way cannot be forbidden by Congress."<sup>218</sup> In one sentence he appeared to protect the press from censorship; in the very next sentence he appeared to say Congress could prohibit its critics from using the mails.

This apparent inconsistency can be understood only in the context of the early nineteenth century, when individuals had private letters delivered by travelers or concealed messages in periodicals to avoid high postal rates.<sup>219</sup> This competition created severe financial problems for the post office, prompting Congress to require all mail to go through the federal postal system and ban any other transportation of letters, newspapers, and other material on postal routes.<sup>220</sup> If this authority was coupled with congressional power to establish postal routes on any highway, waterway or railway, Congress could require all political literature distributed through a given route to go through the mails and then bar the postal service from delivering it.<sup>221</sup> Not only did Justice Field recognize the dilemma, he produced an intriguingly effective solution. Congress could exclude matter from the mails only if it permitted that material to be transported by other means,<sup>222</sup> a move that would reinstitute the same kind of private competition that earlier had undercut the federal post office.<sup>223</sup> Unfortunately, Justice Field's idea was doomed by technology. In 1850, the post office's services were so rudimentary that private individuals could—and often did—effectively supplant these services by carrying a few private letters and newspapers for distribution in the course

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217. *Ex parte Jackson*, 96 U.S. 727, 733 (1877).

218. *Id.* The paragraph was subsequently cited both to support and oppose post office censorship. Compare *United States ex rel. Milwaukee Democratic Publishing Co. v. Burleson*, 255 U.S. 407, 411 (1921) (opinion of the Court) with *id.* at 431 (Brandeis, J., dissenting).

219. See W. Fuller, *supra* note 196, at 61-63.

220. See *supra* note 202; see also Priest, *The History of the Postal Monopoly in the United States*, 18 J. L. & Econ. 33, 58-68 (1975) (discussing financial problems of the post office due to competition).

221. See *Ex parte Jackson*, 96 U.S. 727, 734-35 (1877).

222. *Id.* at 735.

223. See *supra* note 201 and accompanying text.

of their travels.<sup>224</sup> But the post office's development of free home delivery in urban and rural areas and vastly improved transit schedules,<sup>225</sup> required an infrastructure that a few individuals could not replace.

The next case to address the power of Congress over the mails was *In re Rapier* in 1892.<sup>226</sup> Two defendants were indicted for mailing a newspaper containing an advertisement of a lottery, in violation of the Anti-Lottery Act.<sup>227</sup> They petitioned the Court for writs of habeas corpus, arguing that the statute was unconstitutional.<sup>228</sup>

The arguments of counsel in *Rapier* confirm the implicit distinction in *Ex parte Jackson* between lotteries, which the Court said could be banned because they were always criminal, and speech, which was protected. The defendant tried to show that *Jackson* was wrong and that lotteries were not criminal per se, but instead belonged in the fuzzy area between crime and protected speech.<sup>229</sup> The defendant sought to blur the distinction even further by pointing out that prohibiting the advertisement of lotteries was like banning a book that might be said to promote murder.<sup>230</sup> The government's response was *Jackson's* point: lotteries could be banned because they were inherently criminal.<sup>231</sup> The government also argued that the Supreme Court was a sufficient safeguard if Congress tried to regulate anything but lotteries.<sup>232</sup>

Chief Justice Fuller's opinion relied heavily upon *Jackson*, but added disturbing dictum. Although he quoted extensively from the *Jackson* Court's proclamation that restrictions on lotteries merely protected the public from immoral material, Chief Justice Fuller said that the mails could not be required to tolerate every purpose,<sup>233</sup> and that the government could not be required to distribute "printed matter which it regards as injurious to the people."<sup>234</sup> Unlike the Court in *Jackson*, he failed to

224. See W. Fuller, *supra* note 196, at 61-63; see also Priest, *supra* note 220, at 58-61 (discussing competition from private messengers in the early 19th century).

225. The Post Office began free home delivery in major cities in 1863 and expanded the service to 2000 cities by 1919. W. Fuller, *supra* note 196, at 71-74. Rural free delivery was started on a limited basis in 1896. *Id.* at 76.

226. 143 U.S. 110 (1892). The opinion was written under somewhat unusual circumstances. Justice Bradley, who originally had been assigned to write the opinion, had died. Chief Justice Fuller noted that as a result the Court would "waive any elaboration of our views, and confine ourselves to the expression of the general grounds on which our decision proceeds." *Id.* at 133. In addition, Justice Field, the author of the *Jackson* opinion, was probably senile at this point. See W. King, Melville Weston Fuller 222-24 (1967) (Justice Gray noted Justice Field's senility in 1892, and by 1893, Field was assigned to write only nine opinions, instead of his usual twenty-five or thirty. He resigned in the spring of 1897.).

227. *In re Rapier*, 143 U.S. 110, 111 & n.1 (1892) (citing Act of September 19, 1890, ch. 908, 26 Stat. 465).

228. *In re Rapier*, 143 U.S. 110, 120-26 (1892) (argument for petitioner).

229. 143 U.S. at 119, 124-25 (argument for petitioner).

230. *Id.* at 125.

231. *Id.* at 129 (argument for respondent).

232. *Id.* at 131.

233. *Id.* at 134.

234. *Id.*

limit this holding to lotteries and other criminal activities, implying that the government could regulate other types of content.

The next decision, *American School of Magnetic Healing v. McAnnulty*,<sup>235</sup> is startlingly modern. After a hearing, the Postmaster General had stopped all mail addressed to a school of "magnetic healing," on the grounds that its owners were using the mails to obtain money by false pretenses.<sup>236</sup> The School's owners contended that their operation was legitimate and that they had been deprived of property without due process of law because they had not received a judicial hearing before the Postmaster General stopped delivery of their mail.<sup>237</sup> Although these arguments were couched in terms of the fourth and fifth amendments, they had strong first amendment overtones. If due process did not require a court hearing before the postmaster halted mail delivery, the postmaster would be relatively free to deny the use of the mails to people and institutions with whose political views he disagreed. By a seven-to-two vote, the Court held that the Postmaster General was not authorized to stop the publication of opinions that he considered to be false.<sup>238</sup>

Writing for the majority, Justice Peckham said that the school's sale of information about magnetic healing, a process that claimed to heal a variety of ills by large doses of magnetism, was not fraudulent because the effectiveness of treatment was a matter of opinion.<sup>239</sup> He observed that "[e]ven intelligent people may and indeed do differ among themselves"<sup>240</sup> as to the treatment's efficacy, so that there was "no exact standard of absolute truth by which to prove the assertion false and a fraud,"<sup>241</sup> and the question could not be "reduced to one of fact as distinguished from mere opinion."<sup>242</sup> Justice Peckham also set forth limits to government regulation of the mail. Instead of citing *Jackson* and *Rapier* to show that the government completely controlled the mails, Justice Peckham merely conceded that point "for the purpose of this case."<sup>243</sup> He stressed that because the School's activities could not be considered fraudulent, the Postmaster's actions exceeded the jurisdiction given by Congress.<sup>244</sup> Earlier postmasters had ignored federal statutes on occasion,<sup>245</sup> but Justice Peckham declared that a postmaster could not refuse to deliver mail unless authorized by Congress.<sup>246</sup>

Justice Peckham went one step further in limiting the postmaster's

235. 187 U.S. 94 (1902).

236. *Id.* at 96-98.

237. *Id.* at 101-02.

238. *Id.* at 106.

239. *Id.* at 104-06.

240. *Id.* at 104.

241. *Id.*

242. *Id.* at 106.

243. *Id.* at 107.

244. *Id.* at 105-06.

245. See *supra* notes 202-205 and accompanying text.

246. *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 109 (1902).

power. Again conceding for the sake of argument that the postmaster's factual determinations concerning violation of statutes were conclusive, he further explained that if on the facts there was no violation of a federal law, the Postmaster's determination would "not be the determination of a question of fact, but a pure mistake of law."<sup>247</sup> Now that the issue was one of law, not fact, the lower courts would have to pay less deference to the Postmaster General's decisions and could better serve as a shield against improper executive action.

*Magnetic Healing* was a complete victory for freedom of speech. The Court protected a questionable philosophy; it limited the power of the bureaucracy to infringe upon personal liberties; it reinforced *Jackson's* distinction between criminal activity and speech; and it required an exact standard of absolute truth before speech can be determined to be a fraud. This recognition that opinion was not a grounds for criminal prosecution would have protected many individuals prosecuted under the Sedition Act of 1798 or the Espionage Act of 1917. But the spirit of *Magnetic Healing* soon fell ill, and reappeared later only in dissents.<sup>248</sup>

Three cases decided in 1904 signaled a change in the Court's attitude toward the use of the mails. In *Houghton v. Payne*<sup>249</sup> a large publishing house sought to have its material declared eligible for second-class mail rates as a periodical. Houghton wanted to receive the special mail rates by publishing the works of an author in series form and numbering each edition consecutively.<sup>250</sup> The Postmaster General rejected this novel idea and said that the publications were books, which went at the higher third-class rate.<sup>251</sup> Writing for the Court, Justice Brown described the question as purely ministerial.<sup>252</sup> He did not discuss any particular political or ideological position that the books might have taken; he simply and briefly upheld the Postmaster's decision.

Two justices disagreed strongly. Justice Harlan, joined by Chief Justice Fuller, argued that such publications had been treated as periodicals for many years.<sup>253</sup> Harlan extensively quoted legislative history that showed that the special second-class rate was intended to encourage the spread of inexpensive editions of literature among the masses.<sup>254</sup> Finally, Justice Harlan repeated *Magnetic Healing's* attack on the power of the Postmaster General.<sup>255</sup>

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247. *Id.*

248. *See, e.g.,* *Pierce v. United States*, 252 U.S. 239, 266-67 (1919) (Brandeis, J., dissenting); *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U.S. 407, 427 (1920) (Brandeis, J., dissenting).

249. 194 U.S. 88 (1904).

250. *Id.* at 95-96.

251. *Id.* at 98.

252. *Id.* at 99 (government merely revoked publication's classification as second class mail).

253. *Id.* at 102 (Harlan, J., dissenting).

254. *Id.* at 101 (Harlan, J., dissenting).

255. *See id.* at 103 (Harlan, J., dissenting).

The disagreement within the Court continued in a companion case, *Bates & Guild Co. v. Payne*.<sup>256</sup> The publisher claimed that its consecutively numbered publication that featured the sheet music of a different composer each month was entitled to second-class status; the Postmaster General disagreed. Justice Brown easily disposed of the publisher's contention on the same grounds he used in *Houghton*,<sup>257</sup> and increased the deference accorded the Postmaster General.<sup>258</sup> The Court thus discarded the protection established in *Magnetic Healing* that the Postmaster could only decide questions of fact and that the Court would overturn convictions if the facts determined by the Postmaster did not show a violation.<sup>259</sup> Justice Brown's majority opinion gave the bureaucracy the power to decide both questions of fact and law and clothed the bureaucracy with a strong presumption of correctness. Again, Justice Harlan and Chief Justice Fuller dissented for substantially the same reasons as they had in *Houghton*.<sup>260</sup>

But the dangerous implications of *Bates* did not go unnoticed. When Justice Brown continued down the same path in *Public Clearing House v. Coyne*,<sup>261</sup> a short time later, his opinion received only four other votes. This decreased support was surprising because the facts in the case obviously favored Brown's position. The defendants were running a pyramiding scheme.<sup>262</sup> The postmaster seized the defendants' mail, stamped it as fraudulent, and returned it under a statute that authorized him to block the use of the mails to obtain money by false pretenses.<sup>263</sup>

But Justice Brown went beyond the obvious decision to include some distressing dicta that split the Court's opinion despite the clear cut nature of the crime.<sup>264</sup> Twenty-seven years after *Ex parte Jackson*, during

256. 194 U.S. 106 (1904).

257. *Id.* at 107.

258. Justice Brown's opinion for the majority noted that:

where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing.

*Id.* at 109-10.

259. See *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 109 (1902).

260. See *Bates & Guild Co. v. Payne*, 194 U.S. 106, 110 (1904).

261. 194 U.S. 497 (1904).

262. *Id.* at 500. The scheme was a fairly blatant fraud. The defendants had collected \$137,390.66, taken \$36,000 as "salaries," distributed less than \$170 apiece to between 600-700 investors, and left over 10,000 other investors with nothing. *Id.*

263. *Id.* at 498; see Act of Sept. 19, 1890, ch. 908, § 2, 26 Stat. 465, 466; Act of March 2, 1895, ch. 191, 28 Stat. 963.

264. *Public Clearing House v. Coyne*, 194 U.S. 497 (1904). Justice Peckham, the author of *Magnetic Healing*, dissented without an opinion. 194 U.S. at 516. Justices Brewer, White, and Holmes also were distressed enough to concur without opinion. 194 U.S. at 516. One suspects they agreed that fraud was present but opposed Brown's dicta. Curiously, Chief Justice Fuller and Justice Harlan did not dissent, but their majority



which time the postal service had expanded its services extensively,<sup>265</sup> Justice Brown argued that mail service was still not an indispensable part of a civil government because messages had been carried by private individuals for thousands of years.<sup>266</sup> Because of this, he said, the government did not have to provide postal service and could attach any conditions to the use of the service that it chose.<sup>267</sup> Next, Justice Brown contended that since the courts could oversee the decisions of the postmaster general—an oversight power that he had just weakened in *Bates*<sup>268</sup>—Congress could safely entrust the postmaster to seize letters whenever the postmaster determined that there was sufficient evidence that the contents of those letters violated the law.<sup>269</sup> Finally, Brown's opinion in *Public Clearing House* undermined Jackson's declaration that the postmaster could not open sealed letters and packages;<sup>270</sup> Brown asserted that because this would prevent the postmaster from determining which packages contained unmailable material, the postmaster could simply refuse to transmit all mail addressed to the defendants.<sup>271</sup>

The Court's final mail decision during this period, *Lewis Publishing Co. v. Morgan*,<sup>272</sup> was a sheep in wolf's clothing for the press. The newspaper lost its case but the press as a whole gained Supreme Court approval of its mail subsidy and the seeds of modern content-neutrality doctrine. The Court approved a post office requirement that each newspaper using second-class mailing rates clearly label all advertisements that might be mistaken for news or editorial matter and identify the newspaper's publishers, editors, owners, and major investors.<sup>273</sup> The newspaper argued that the required disclosure of business information violated the first and fourteenth amendments<sup>274</sup>—an argument that has some validity.<sup>275</sup> The newspaper probably protested because revealing

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votes must be considered to be less than solid in light of their dissenting opinions in *Houghton v. Payne*, 194 U.S. 88, 101 (1904) and *Bates & Guild Co. v. Payne*, 194 U.S. 106, 110 (1904).

265. The postal service had almost completed its extension of free urban delivery by 1900; free rural delivery was instituted in 1897. See W. Fuller, *supra* note 196, at 71-76. Congress had also, in 1885, provided extremely cheap mailing rates for periodicals. Thus, while the argument that Congress did not have to provide mail service was weak in 1877, when *Ex parte Jackson* was decided, it was completely unrealistic in 1904.

266. See *Public Clearing House v. Coyne*, 194 U.S. 497, 506 (1904).

267. *Id.*

268. See *Bates & Guild Co. v. Payne*, 194 U.S. 106, 109-10 (1904).

269. See *Public Clearing House v. Coyne*, 194 U.S. 497, 509-10 (1904).

270. See *Ex parte Jackson*, 96 U.S. 727, 732-33 (1877).

271. See *Public Clearing House v. Coyne*, 194 U.S. 497, 510 (1904).

272. 229 U.S. 288 (1912).

273. *Id.* at 315.

274. *Id.* at 298-99 (argument for petitioners).

275. The English and American seditious libel prosecutions of the late 1700's would have been more successful if printers were required to publicly disclose their identities. Many important pieces of American political literature were published anonymously, or under pseudonyms such as "Brutus," "Cato," the "Federal Farmer," and "Centinel." See, e.g., *The Federalist; The Complete Anti-Federalist* (H. Storing ed. 1981) (7 volume collection of writings by opponents of the Constitution). There were, however, many

the names of the men who controlled a newspaper would have seriously undermined the newspaper's credibility.<sup>276</sup>

The most important part of Chief Justice White's opinion in *Lewis Publishing*<sup>277</sup> is easily overlooked. At that time, the second-class rate was one-eightieth of the rate for letters, so that while the post office made \$70 million a year moving letters, it lost the same amount moving newspapers.<sup>278</sup> This was a substantial subsidy for the dissemination of information, and Chief Justice White sustained that subsidy.

Chief Justice White's second theme was a repetition of earlier case law on Congress' power to regulate the mails. Recognizing that this power could be used for impermissible purposes, White said that the Court would judge the validity of postal regulations by their intent.<sup>279</sup> He noted that these regulations did not affect the content of the newspapers,<sup>280</sup> implying that content-neutrality was essential, and held that the main purpose of the regulation was to prevent any abuse of the special rates.<sup>281</sup> Having found that Congress did not intend to curtail press freedoms, White observed that the press was to be protected and subsidized, not for its own sake, but for the sake of the public.<sup>282</sup>

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demands for a bar on anonymous publications. See *Respublica v. Oswald*, 1 U.S. (1 Dall.) 319, 325 (Pa. 1788); B. Franklin, *An Account Of The Supreme Court Of Judicature in Pennsylvania*, viz., *The Court Of The Press (1789)*, reprinted in 5 *The Founders' Constitution*, *supra* note 2, at 130. Charles I's licensing act had required all books to identify their authors and printers. *An Act For Preventing The Frequent Abuses In Printing Seditious Treasonable And Unlicensed Books (1662)*, 14 Chas. 2, ch. 33, reprinted in 5 *The Founders' Constitution*, *supra* note 2, at 112. But newspapers had radically changed since then: a newspaper was now a major business enterprise in which anonymity had little value. For example the *New York Herald* had been started in 1835 with only \$500 capital. In 1883, just fifty years later, Joseph Pulitzer paid \$346,000 for the almost bankrupt *New York World*. See E. Emery & M. Emery, *supra* note 21, at 143, 256. Newspaper printing presses and staffs made operations immobile and conspicuous, and even if the authors remained anonymous, processes for libel, etc., could be served on their publishers' offices just as easily as advertisers could contact the newspaper.

276. *United States v. Press Publishing Co.*, 219 U.S. 1 (1911), furnishes an interesting example. The *World's* initial report of President Roosevelt's involvement in a scandal was relatively innocuous, but a month later—the day before the Presidential election of 1908—the *Indianapolis News* printed a much stronger version of the article, drawing Roosevelt's wrath upon itself and the *World*. Unbeknownst to the public, the *News* was owned by Vice-President Charles Fairbanks, whom Roosevelt had ignored by endorsing William Howard Taft for President. See D. Seitz, *supra* note 171, at 354.

277. 229 U.S. 288 (1913).

278. *Id.* at 303-04.

279. *Id.* at 308-09.

280. *Id.* at 316.

281. *Id.*

282. Chief Justice White quoted:

The extremely low postage rate accorded to second-class matter gives these publications a circulation and a corresponding influence unequalled in history. It is a common belief that many periodicals are secretly owned or controlled, and that in reading such papers the public is deceived through ignorance of the interests the publication represents. We believe that, since the general public bears a large portion of the expense of distribution of second-class matter, and since these publications wield a large influence because of their special conces-

In retrospect, the Court's decisions in this area were inconsistent, and that inconsistency had important consequences for government control of the mails during World War I. The pre-war decisions protected liberty of circulation, tolerated an unpopular and questionable opinion, and restricted the Postmaster General's power to exclude material from the mails because of its political content. The later cases, however, removed those restrictions without explanation or analysis. The onslaught of the World War and the passage of the Espionage Act<sup>283</sup> exacerbated this change.<sup>284</sup>

## 2. Obscenity

Although the Supreme Court frequently considered convictions under federal statutes that barred obscene materials from the mails, it never confronted the two crucial issues presented by obscenity. Its opinions neither reconciled those statutes with the first amendment nor defined obscenity. Instead, the Court focused on issues only indirectly related to the first amendment—issues that today seem trivial.<sup>285</sup>

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sions in the mails, it is not only equitable but highly desirable that the public should know the individuals who own or control them.

*Id.* at 312 (quoting the report of the House Committee that had approved the bill).

283. Act of June 15, 1917, ch. 30, 40 Stat. 217; amended by Act of May 16, 1918, ch. 75, § 1, 40 Stat. 553.

284. See *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U.S. 407 (1921).

The Court upheld the right of the postmaster general to revoke the second-class mailing privileges of a socialist newspaper that had opposed the war. *Id.* at 408-09, 414-15. The clash between the majority opinion by Justice Clarke and the dissent by Justices Holmes and Brandeis reflected the inconsistencies of the Court's earlier mail decisions.

Justice Clarke cited *Jackson, Public Clearing House* and *Lewis Publishing* to show that congressional power over the mails was "practically plenary." *Id.* at 418. He further noted the Court's decisions granting deference to the postmaster's decisions. *Id.* at 409, 413.

Justice Brandeis argued that the first amendment limited Congress' power over the mails, and reiterated *Jackson's* language concerning the importance of liberty of circulation. *Id.* at 430-31 (Brandeis, J., dissenting). Brandeis also cited *Magnetic Healing* and *Lewis Publishing* to rebut the majority's broad deference to the postmaster's discretionary authority. *Id.* at 427, 431-32 (Brandeis, J., dissenting).

Justice Holmes joined the dissent of Justice Brandeis, *id.* at 436, and also issued a short dissent of his own. His dissent, unsupported by authority, flatly declared that the postmaster had claimed "practically despotic power," *id.* at 437, and that, by making the circulation of a newspaper impossible, constituted "a serious attack upon liberties that not even the war induced Congress to infringe." *Id.* at 438 (Holmes, J., dissenting).

Thirteen months after the armistice, Burleson still kept the *New York Call* and the *Milwaukee Leader* from the mails because of their earlier opposition to the war. Z. Chafee, *supra* note 13, 104. One contemporary legal scholar complained that the Post Office could censor the press and the mails more thoroughly than the Russian government could. Byrd, *The Decay of Personal Rights and Guarantees*, 18 Yale L.J. 252, 254 (1908).

285. A brief history of obscenity regulation in England and the United States is related in the Report of the Commission on Obscenity and Pornography 348-542 (1970) [hereinafter *Comm'n Report*]. The report contends that obscenity per se was not regulated until about 1850; instead only obscene material that also attacked religious institutions was

Congress first regulated obscenity in 1842, when it barred the importation of obscene pictures and drawings.<sup>286</sup> An 1865 statute barred books and pictures of obscene or indecent character from the mails but did not mention letters;<sup>287</sup> an 1872 statute added letters with envelopes that displayed "scurrilous epithets."<sup>288</sup> The creation, possession or sale of obscene materials in a territory within the exclusive jurisdiction of the federal government was not barred until 1873 in the Comstock Act.<sup>289</sup>

The Supreme Court first discussed obscenity in 1877. In *Ex parte Jackson*<sup>290</sup> the Court cited federal obscenity statutes in support of its ruling that the exclusion of lottery materials from the mails did not interfere with the freedom of the press but only prevented the use of government facilities for the distribution of "matter deemed injurious to the public morals."<sup>291</sup> After that brief dictum, the Court did not address obscenity again until 1890.<sup>292</sup> Between 1895 and 1897, however, the Court issued six opinions on obscenity,<sup>293</sup> and briefly mentioned the subject in another decision.<sup>294</sup> The Court did not issue another opinion on obscenity until 1913.<sup>295</sup> This sudden burst of cases was unusual,<sup>296</sup> and the three major

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prohibited by English and state statutes. In *Roth v. United States*, 354 U.S. 476 (1957), Justice Brennan, in his majority opinion, said that obscenity per se was regulated by the states at the time of the Constitution's adoption, even in states with constitutions guaranteeing freedom of expression. See *Roth*, 354 U.S. at 481-83. But he supported this by noting that thirteen of the first fourteen states made "blasphemy or profanity" a crime, *id.* at 482, and he conceded that "profanity and obscenity were related offenses." *Id.* at 483.

286. Act of Aug. 30, 1842, ch. 270, § 28, 5 Stat. 548, 566-67. The statute said nothing about non-pictorial obscenity, apparently leaving that area unregulated.

287. Act of March 3, 1865, ch. 89, § 16, 13 Stat. 504, 507. Violations were punishable by a \$500 fine, one year's imprisonment, or both.

288. Act of June 8, 1872, ch. 335, § 148, 17 Stat. 283, 302. The statute did not alter the penalties for such violations.

289. Comstock Act, ch. 258, § 1, 17 Stat. 598 (1873), amended by Act of July 12, 1876, ch. 186, § 1, 19 Stat. 90 (adding jurisdictional limitation). The jurisdictional limitation was included to prevent regulation of intrastate commerce. Cf. *Wickard v. Filburn*, 317 U.S. 111 (1942) (federal wheat quota upheld under Commerce Clause, despite extension of federal regulation to production wholly for consumption on farm, because these intrastate activities so affect interstate commerce).

290. 96 U.S. 727 (1877).

291. *Ex parte Jackson*, 96 U.S. at 736.

292. *United States v. Chase*, 135 U.S. 255 (1890).

293. See *Dunlop v. United States*, 165 U.S. 486 (1897); *Price v. United States*, 165 U.S. 311 (1897); *Andrews v. United States*, 162 U.S. 420 (1896); *Swearingen v. United States*, 161 U.S. 446 (1896); *Rosen v. United States*, 161 U.S. 29 (1896); *Grimm v. United States*, 156 U.S. 604 (1895).

294. See *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897) (regulation of obscenity permissible as one of several exceptions to the first amendment).

295. See *Bartell v. United States*, 227 U.S. 427 (1913).

296. The reason for this flurry of activity between 1895 and 1897 is not clear. The Comstock Act was over twenty years old by that time, and Comstock's efforts had been in full swing for over a decade. See A. Comstock, *Traps for the Young* (1884), reprinted in part in H. Nelson, *supra* note 4, at 269, 276-77 (claiming 700 arrests before 1883 resulting from work of New York Society for the Suppression of Vice); *Comm'n Report, supra* note 285, at 353 (Comstock made special agent of the Post Office, where he vigorously sought out obscene publications). The explosion of federal cases contrasts with the grad-

issues discussed in the opinions seem unimportant compared to the unaddressed issues of defining obscenity and reconciling the regulations with the first amendment.

The first question addressed was whether an indictment for obscenity must include an actual copy of the allegedly obscene material. Several defendants complained of indictments in which grand juries had said that the material was too indecent to appear upon the records of the court.<sup>297</sup> The exclusion from the record caused problems for defendants for two reasons. First, as the Court conceded in *Bartell*, the omission of the obscene material created a double jeopardy problem. When a convicted defendant was later charged with distributing obscene material, it was difficult to tell if both charges concerned the same material.<sup>298</sup> The Court said this problem could be solved through parol evidence at the second trial as to the subject matter of the first trial.<sup>299</sup> The second problem became apparent when an indictment referred only to a particular edition of a newspaper, and the defendant had to wait until trial to discover which part of the newspaper was the subject of dispute.<sup>300</sup> The Court held that the trial court, in its discretion, could include the material in the court records, and that where this was not done, introduction of the material at trial gave the defendants sufficient notice.<sup>301</sup> Given the lack of any federal rules governing criminal procedure at the time, any effect this procedure may have had on the jury is unclear. If the jury learned that the judge had declined to include the allegedly obscene material in the indictment, it might conclude that the judge already had decided that the material was obscene.<sup>302</sup>

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ual increase of prosecutions in the state court. The digests reveal five reported state cases dealing with obscene publications (as opposed to indecent exposure or profanity) before 1870, four during the next decade, nine during the 1880s, and fourteen between 1890 and 1900. See 37 Am. Dig. 1757-66 (century ed. 1902) (collecting cases on obscenity from 1658-1896); 15 Am. Dig. 670-73 (first decennial ed. 1906) (collecting cases from 1897-1906).

297. See *Bartell v. United States*, 227 U.S. 427, 431-33 (1913); *Dunlop v. United States*, 165 U.S. 486, 490-91 (1897); *Price v. United States*, 165 U.S. 311, 314 (1897); *Rosen v. United States*, 161 U.S. 29, 33-35 (1896); *Grimm v. United States*, 156 U.S. 604, 608-09 (1895).

298. See *Bartell*, 227 U.S. at 431.

299. See *id.* at 433.

300. *Dunlop v. United States*, 165 U.S. 486, 490-91 (1897).

301. *Bartell v. United States*, 227 U.S. 427, 432-34 (1913); *Dunlop v. United States*, 165 U.S. 486, 491 (1897); *Rosen v. United States*, 161 U.S. 29, 34-35 (1896). Justices White and Shiras dissented in *Rosen* for this reason, asking if it would be sufficient to allege the publication of obscene material in a twenty-volume encyclopedia without identifying the page or describing the specific material in issue. *Rosen*, 161 U.S. at 47-48 (White, J., dissenting).

302. The extent to which the material must be described in the indictment still varies among different jurisdictions. See, e.g., *United States v. New Orleans Book Mart, Inc.*, 328 F. Supp. 136, 146-47 (E.D. La. 1971) (it is sufficient if material lacking in the indictment is later provided by the prosecution); *State v. Lavin*, 204 N.W.2d 844, 847 (Iowa 1973) (material need not be included or described; defendant can file bill of particulars); *State v. Boyd*, 35 Ohio App. 2d 147, 300 N.E.2d 752, 757 (1972) (material need not appear in indictment; parol evidence may be used to prove double jeopardy claim); *State*

A second recurrent issue was the question of entrapment. To enforce the Comstock Act postal agents placed orders with advertisers of obscene material.<sup>303</sup> The Court said this was not entrapment, holding that such efforts did not induce the commission of a crime but only ascertained if a defendant was operating an illegal business.<sup>304</sup>

The third major issue raised in these cases concerned statutory construction. The federal statutes did not encompass all traffic in obscene materials, and in two early cases the Court construed those statutes narrowly. In *United States v. Chase*,<sup>305</sup> the defendant mailed an obscene letter in a wrapper with nothing but the addressee's name and address on it. Chase was convicted under the 1876 statute, which applied to any obscene "book, pamphlet, advertisement, circular, paper, writing, print, picture, drawing or other representation,"<sup>306</sup> but the Court ruled that none of these categories included letters.<sup>307</sup> This was not merely an exercise in literalism. Noting that the lower federal judges had said that Congress intended to exclude all obscene material from the mails, the Court rejected such a "sweeping" policy and said that the statute's purpose was only to purge the mails of obscene material "as far as was consistent with the rights reserved to the people, and with a due regard to the security of private correspondence from examination."<sup>308</sup> The Court's concern for individual liberties is obvious; and its supporting citation to *Jackson* makes the liberal meaning of that decision clear. The Court noted that a later amendment had added the term "letter" to the statute but specifically said that it declined to decide if that amendment included such a "strictly private sealed letter."<sup>309</sup> Such a restrictive statutory interpreta-

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v. Simpson, 56 Wis. 2d 27, 32, 201 N.W.2d 558, 561 (1972) (attaching copy of material to indictment is commendable but not required).

303. See *Grimm v. United States*, 156 U.S. 604, 609 (1895); *Comm'n Report*, *supra* note 285, at 353.

304. *Grimm v. United States*, 156 U.S. 604, 609 (1895); see also *Andrews v. United States*, 162 U.S. 420, 423 (1896) (agents opening mail addressed to imaginary addressee not entrapment as it did not violate federal laws). These cases formed the basis for the modern law of entrapment and are still cited. See, e.g., *Lewis v. United States*, 385 U.S. 206, 208-09 (1966); *Sorrells v. United States*, 287 U.S. 435, 441 (1932); *Wager v. Pro*, 575 F.2d 882, 884 (D.C. Cir. 1976).

305. 135 U.S. 255 (1890).

306. See Comstock Act, ch. 258, § 1, 17 Stat. 598 (1873), as amended by Act of July 12, 1876, ch. 186, § 1, 19 Stat. 90.

307. *Chase*, 135 U.S. at 258-60.

308. *Id.* at 261 (citing *Ex parte Jackson*, 96 U.S. 727 (1877)).

309. *Id.* at 262. The Court maintained that attitude in *Swearingen v. United States*, 161 U.S. 446 (1896), where it held that the Comstock Act was "highly penal" and so should be narrowly construed. *Id.* at 451. *Swearingen* was convicted by a lower court of distributing a newspaper editorial judged obscene because it vilified a certain Populist politician, using coarse and vulgar language. For instance, the editorial stated that the politician would "pimp and fatten on a sister's shame with as much unction as a buzzard gluts in carrion" and "'would sell a mother's honor with less hesitancy and for much less silver than Judas betrayed the Savior.'" *Id.* at 447 n.1. The majority, despite a dissent by four Justices, said the language was coarse and vulgar, but not obscene, because it was not immoral in terms of sexual impurity. *Id.* at 450-51 (quoting editorial).

tion would have seriously threatened the Post Office's enforcement of the obscenity laws, for, if it was adopted in a later decision, distributors of obscene material could protect themselves from investigation merely by sending their products in sealed, letter-sized envelopes.

*Chase*, however, was short-lived. In *Andrews v. United States* the defendant was convicted under the amended statute of mailing an obscene letter in a plain wrapper.<sup>310</sup> Again, the circuit courts had split on whether that new language included private, sealed letters, but the Court disposed of the issue with a one-sentence citation to *Grimm v. United States*.<sup>311</sup> The *Andrews* court said *Grimm* controlled because *Grimm* had held that a private sealed letter with a plain wrapper and obscene contents violated the statute.<sup>312</sup> The defendant in *Grimm*, however, had not sent obscene materials through the mail; he had been convicted of mailing information on how to obtain obscene material, an entirely different offense under a different part of the statute.<sup>313</sup> Furthermore, *Grimm* did not discuss whether the presence of obscene material in a plain wrapper violated the statute. By erroneously interpreting *Grimm*, the *Andrews* Court avoided serious discussion of the free speech issues, thereby surreptitiously weakening *Jackson's* protection of personal privacy.

The Court's discussion of these issues camouflaged its failure to address two issues of much greater importance. First, the Court never defined obscenity; American courts therefore looked to England, where *Regina v. Hicklin*<sup>314</sup> had set forth an extremely restrictive definition. *Hicklin* said that a book could be banned if it contained even a few obscene passages, even though the work as a whole had literary merit.<sup>315</sup> *Hicklin* also said that a work was obscene if it tended to "deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall,"<sup>316</sup> thereby defining obscenity in terms of the most susceptible audience that might encounter it.

Lower federal courts tended to follow *Hicklin*<sup>317</sup> because the Supreme

310. *Andrews v. United States*, 162 U.S. 420, 423-24 (1896).

311. *Andrews*, 162 U.S. at 424 (citing *Grimm v. United States*, 156 U.S. 604 (1895)).

312. *Id.*

313. *Grimm v. United States*, 156 U.S. 604, 607-08 (1895).

314. L.R. 3 Q.B. 360 (1868).

315. *Regina v. Hicklin*, L.R. 3 Q.B. 360, 371 (1868).

316. *Id.*

317. The federal courts made frequent use of *Hicklin*. See, e.g., *United States v. Kennerley*, 209 F. 119, 120-21 (S.D.N.Y. 1913); *United States v. Moore*, 129 F. 159, 161 (W.D. Mo. 1904); *United States v. Smith*, 45 F. 476, 477 (E.D. Wis. 1891); *United States v. Harmon*, 45 F. 414, 417 (D. Kan. 1891); *United States v. Clarke*, 38 F. 732, 733 (E.D. Mo. 1889); *United States v. Bennett*, 24 F. Cas. 1093, 1104 (C.C.S.D.N.Y. 1879) (No. 14,571). Several state courts also used *Hicklin*. See, e.g., *Commonwealth v. Allison*, 227 Mass. 57, 61, 116 N.E. 265, 266 (Mass. 1917); *Halsey v. New York Soc'y for the Suppression of Vice*, 234 N.Y. 1, 10, 136 N.E. 219, 222 (1922) (Crane, J., dissenting); *People v. Muller*, 96 N.Y. 408, 411, 48 Am. Rep. 635, 637. Other courts said that the meanings of obscenity and immorality were well-known to the average person and need not be defined. See, e.g., *Block v. City of Chicago*, 239 Ill. 251, 253, 87 N.E. 1011, 1015 (1909); *Commonwealth v. Buckley*, 200 Mass. 346, 352, 86 N.E. 910, 911 (1909).

Court's discussion of the definition issue was sketchy and inconsistent. In *Rosen v. United States*,<sup>318</sup> the Court said that it was not error for the judge to let the jury decide whether the material in question was obscene; thus, the Court impliedly approved of an instruction based on *Hicklin*.<sup>319</sup> Only a year later, however, the Court approved, with little discussion, an instruction that told the jury to use its own conscience to determine whether the material was calculated to deprave the ordinary reader.<sup>320</sup> On paper, this was much more tolerant than the *Hicklin* test. Instead of merely having a tendency to deprave, the material had to be calculated to deprave, and the effect was to be judged on the ordinary reader, not the most susceptible reader. The Court, however, never directly acknowledged this inconsistency, nor did it express its reasons for approving either instruction.<sup>321</sup> As a result, so many courts used the *Hicklin* test that in 1913 Learned Hand said he was bound to use it, even though he criticized it as being more consonant with "mid-Victorian morals" than with the "understanding and morality of the present time."<sup>322</sup>

The Court's failure to define obscenity was accentuated by its failure to explain why the federal government's regulation of obscenity did not violate the first amendment.<sup>323</sup> *Ex parte Jackson* provided little support for its statement that the federal government could bar from the mails material that would injure public morals,<sup>324</sup> and later cases simply adopted that conclusionary declaration as it concerned obscenity.<sup>325</sup> The Court never examined whether the framers intended to authorize federal regulation of obscenity, nor did it analyze the text of the first amendment. And while it said in *Robertson v. Baldwin* (again, with no analysis) that regulation of obscenity was an exception to the first amendment,<sup>326</sup> it did not explain why Congress had waited at least fifty years to recognize that exception.

318. 161 U.S. 29 (1896).

319. *Id.* at 43.

320. *Dunlop v. United States*, 165 U.S. 486, 500-01 (1897).

321. *See id.* The *Hicklin* test survived for several decades but died in the hands of the lower federal courts. *See United States v. Levine*, 83 F.2d 156, 157 (2d Cir. 1936); *United States v. One Book Entitled Ulysses by James Joyce*, 72 F.2d 705, 708 (2d Cir. 1934); *United States v. Dennett*, 39 F.2d 564, 568 (2d Cir. 1930); *see also Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 78-93 (1973) (Brennan, J., dissenting) (discussion of Court's failure to define obscenity and declaration that obscenity cannot be defined).

322. *United States v. Kennerley*, 209 F. 119, 120-21 (S.D.N.Y. 1913) (citing *United States v. Bennett*, 24 Fed. Cas. 1093 (C.C.S.D.N.Y. 1879) (No. 14,571); *United States v. Smith*, 45 F. 476 (E.D. Wis. 1891); *United States v. Harmon*, 45 F. 414 (D. Kan. 1891); *United States v. Clarke*, 38 F. 500 (E.D. Mo. 1889).

323. *But see Clark v. United States*, 211 F. 916, 918 (8th Cir. 1914) ("freedom of the press has enough to answer for without making it a protecting shield for the commission of crime").

324. 96 U.S. 727, 737 (1877) (the Court merely expressed, without citation, that it had "no doubt" concerning the constitutionality of the Act).

325. *See Roth v. United States*, 354 U.S. 476, 481 (1957) (*Ex parte Jackson* and other early cases "assumed" that obscenity was not protected by the first amendment).

326. 165 U.S. 275, 281 (1897).



As a result, when Justice Brennan wrote on the constitutionality of criminal obscenity statutes in *Roth v. United States*, in 1957<sup>327</sup> the slate on which he wrote truly was clean.

### B. Government Employees

The spoils system of the nineteenth century gave incumbent politicians a new means of retaining office and abridging the free speech rights of government employees. Many government positions were patronage jobs, and employees were expected or required to donate time and money to the campaigns of their superiors.<sup>328</sup> This prevented employees from exercising their rights to speak for candidates of their choice; even worse, it forced some to speak for candidates whom they did not support.<sup>329</sup> Taxpayers also were affected. Some government salaries were increased so that employees could "kick back" their raises to the campaign chests of the politicians who controlled their jobs,<sup>330</sup> which meant that tax dollars were used to support politicians and political parties.

These abuses, combined with revelations of corruption involving President Grant's private secretary, Secretary of War Belknap, and Vice-President Colfax,<sup>331</sup> created considerable pressure for reform. President Grant made only half-hearted efforts to solve the problem,<sup>332</sup> but in 1876, Congress made it a misdemeanor for a federal employee to request of, give to, or receive from a fellow employee any campaign contributions.<sup>333</sup> Pressure for further reform revived in 1881, when a man who unsuccessfully had sought a federal position assassinated President Garfield,<sup>334</sup> and Congress began work on what was to become the Pendleton Civil Service Act.<sup>335</sup>

It was in that climate that the Supreme Court considered *Ex parte Curtis*,<sup>336</sup> which tested the constitutionality of the 1876 measure. Both Chief Justice Waite's majority opinion upholding the statute and the dis-

327. 354 U.S. at 476 (1957).

328. See 14 Cong. Rec. 294-96 (1882) (statement of Sen. Pendleton); 14 Cong. Rec. 319 (1882) (statement of Sen. George); D. Rosenbloom, *Federal Service And The Constitution* 59, 62-64 (1971).

329. See D. Rosenbloom, *supra* note 328, at 60-64.

330. See 14 Cong. Rec. 295-96 (1882) (statement of Sen. Pendleton); 14 Cong. Rec. 319 (1882) (statement of Sen. George).

331. See 1 B. Bailyn, D. Davis, D. Donald, J. Thomas, R. Wiebe, G. Wood, *The Great Republic* 804-06 (1940) [hereinafter *Bailyn & Davis*]; 1 S. Morison, H. Commanfer, & W. Leuchtenburg, *The Growth Of The American Republic* 778-80 (1969) [hereinafter *S. Morison*].

332. See 2 Bailyn & Davis, *supra* note 331, at 806; H. Kaplan, *The Law of Civil Service* 8-9 (1958); 1 S. Morison, *supra* note 331, at 775-76.

333. See Act of August 15, 1876, ch. 287, § 6, 19 Stat. 143, 169.

334. See 1 Bailyn & Davis, *supra* note 331, at 8072; S. Morison, *supra* note 331, at 157-58.

335. Act of Jan. 16, 1883, ch. 27, § 7, 22 Stat. 403, 406.

336. 106 U.S. 371 (1882).

sent showed concern for the law's effect on freedom of speech, and the opinion has served as the basis for modern law.

Chief Justice Waite's opinion had two major premises. First, he stressed the limited scope of the statute. Noting that the law merely forbade federal employees from giving or receiving contributions from other federal employees, he was quick to point out that the act did not restrict their political privileges in any other way.<sup>337</sup> Employees still could contribute to state and local campaigns, provide services to any campaign, and express their opinions about all candidates. Curiously, Chief Justice Waite even said that

managers of political campaigns, not in the employ of the United States, are just as free now to call on those in office for money . . . as ever they were, and those in office can contribute as liberally as they please, provided their payments are not made to any of the prohibited officers or employees.<sup>338</sup>

Second, he found that the clear goal of the act was to promote integrity among government workers,<sup>339</sup> and he argued that the law also protected federal employees, contending that contributions made by a subordinate to a superior employee were as often caused by pressure from the superior (and fear of consequent discharge) as they were by a desire to express the political views of the contributor.<sup>340</sup> The Chief Justice held that these legitimate goals made the statute permissible under the necessary and proper clause.<sup>341</sup>

Justice Bradley responded with a vigorous dissent that contained the seeds of the "least restrictive means" test used in modern first amendment law.<sup>342</sup> Bradley did not contest the legitimacy of the statute's purpose but argued that it could have been achieved by prohibiting only involuntary contributions. His concern was that the act also barred voluntary contributions by employees, thus abridging their freedom of speech.<sup>343</sup> Although sound in theory, Bradley's dissent ignored a harsh reality. If a superior could pressure a subordinate into donating to the superior's campaign, he or others in his political machine also could pressure the subordinate to testify that the gift was made voluntarily. It was

337. *Id.* at 371-72.

338. *Id.* at 373. Justice Waite's comment created a loophole that effectively emasculated the statute. An officeholder could appoint a campaign manager who was not a federal employee to extort contributions from the officeholder's underlings. As a result, coerced campaign contributions continued to be commonplace. *See* D. Rosenbloom, *supra* note 329, at 84-85.

339. *See Ex parte Curtis*, 106 U.S. 371, 373 (1882).

340. *See id.* at 374.

341. *Id.* at 372 (citing U.S. Const. art. I, § 8).

342. *Ex parte Curtis*, 106 U.S. 371, 378-79 (1882) (Bradley, J., dissenting). The least restrictive means test holds that even when the governmental purpose is legitimate, it cannot be pursued by means that stifle civil liberties if the goal can be achieved by a narrower statute. *First National Bank v. Bellotti*, 435 U.S. 765, 786 (1978); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

343. *Ex parte Curtis*, 106 U.S. 371, 377-78 (1882) (Bradley, J., dissenting).

not until Congress passed a complete ban on all gifts that subordinates received fuller protection from abuse by superiors.<sup>344</sup>

Both opinions in *Curtis* show sincere concern for the political rights of federal employees. Speaking only two years later, the Virginia Supreme Court said that *Curtis* would have been decided differently if the statute had barred federal employees from all political privileges.<sup>345</sup> Congress later imposed further limitations on the political rights of federal employees,<sup>346</sup> and the Court upheld these new limits, citing *Curtis* to show that their purpose was to promote government integrity, not to silence federal employees.<sup>347</sup> Later cases have recognized Bradley's concern that such statutes infringe on the first amendment rights of employees who want to contribute,<sup>348</sup> but the Court—including Justice Brennan—has repeatedly endorsed the *Curtis* majority's result, on the grounds that such limitations protect the first amendment rights of those employees who do not want to contribute.<sup>349</sup>

### C. Immigrants and Aliens

Just as the government contended that its authority over the post office allowed it to bar from the mails material it found offensive, the government argued that its control over immigration enabled it to bar from the country aliens whose beliefs offended its officials. Although the Court's mail decisions had shown concern for freedom of speech and of the press, when the justices confronted a foreign labor-organizer who sought admission to the United States, they failed to recognize the first amendment issues involved. *Turner v. Williams*<sup>350</sup> arose from the arrest of an English labor-organizer by immigration officers. Based on a speech Turner gave and a list of proposed lectures found in his pocket, an administrative board determined that Turner was an anarchist and ordered him deported under a statute barring the admission of anarchists to the United

344. The Pendleton Civil Service Act, ch. 27, 22 Stat. 403 (1883), which established the foundation of the modern civil service, was enacted one month after *Curtis* was decided. Section 7, the most important part of the Act, required appointments and promotions to be made on the basis of competitive examinations. *Id.* at 406. Sections 11 through 15 greatly expanded the prohibitions of the 1876 Act against coerced contributions to political campaigns. *Id.* at 406-07. Those sections barred all government employees, including members of Congress, from directly or indirectly soliciting or receiving contributions from federal employees, and forbade superiors from firing their subordinates for refusing to contribute to campaigns, upon penalty of a five thousand dollar fine or three years in prison. Despite these statutes, coerced campaign contributions continued to be a problem. See D. Rosenbloom, *supra* note 328, at 84-85.

345. See *Louthan v. Commonwealth*, 79 Va. 196, 202 (1884).

346. See The Hatch Act, ch. 410, 53 Stat. 1147 (1939) (codified as amended at 5 U.S.C. §§ 7321-27).

347. See *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 555 (1973); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 96-98 (1947).

348. See *Letter Carriers*, 413 U.S. at 564-66; *Mitchell*, 330 U.S. at 96-98.

349. See *Mitchell*, 330 U.S. at 94-98.

350. 194 U.S. 279 (1904).

States.<sup>351</sup> Turner's attorney, Clarence Darrow, used the first amendment as a major argument<sup>352</sup> but lost a near-unanimous decision<sup>353</sup> because the Court saw the case as one of equality, not liberty.

The first part of Chief Justice Fuller's opinion said that the deportation order and the statute authorizing it were constitutional because every sovereign power could exclude aliens whom it believed endangered the nation.<sup>354</sup> Darrow did not disagree. Instead, he argued that the statute exceeded that authority when it barred all anarchists and not just dangerous anarchists. Darrow presented several authoritative sources that defined "anarchist" as including political philosophers who believed the absence of government was a noble goal but who would never have used violent means to obtain it, and he argued that such anarchists did not endanger the nation and therefore could not be excluded.<sup>355</sup>

Chief Justice Fuller's response was to misread the statute, quoting it as barring the admission of "anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States . . . ."<sup>356</sup> When presented in that manner, the second clause seems to explain or define the first, and Fuller concluded that when Turner said in a speech that he was an anarchist, he thereby admitted he believed in the violent overthrow of the nation and, therefore, was a danger to the country.<sup>357</sup> But the statute actually barred the admission of "polygamists, anarchists, or persons who believe in or advocate the overthrow by force or violence of the government of the United States."<sup>358</sup> The final clause did not define "anarchists" as violent any more than it defined "polygamists" as violent; each of the three categories was separate and distinct. Darrow was right: the act did allow the government to exclude anarchists who were not a danger to it.

The Chief Justice tried to reinforce his argument by saying that even if Turner did not seek to attain anarchy through violence, his support for a universal strike and his discussion of the Haymarket riots created the justifiable inference that he contemplated the use of force and that his

351. *Id.* at 280-83. Turner was ordered deported under the Act of March 3, 1903, ch. 1012, § 2, 32 Stat. 1213, 1214. 194 U.S. at 284.

352. *Turner*, 194 U.S. at 285-86. Darrow's co-counsel was Edgar L. Masters. *Id.*

353. Justice Brewer issued a short concurrence that questioned the majority's endorsement of administrative deportation proceedings without judicial oversight, complained that too little effect had been given to the tenth amendment (although without explaining its relevance), and criticized the majority for considering Darrow's argument about peaceful anarchists despite Turner's failure to introduce any evidence that he was a peaceful anarchist. *See id.* at 295-96 (Brewer, J., concurring).

354. *See Turner v. Williams*, 194 U.S. 279, 290 (1904).

355. *Id.* at 292-93; *cf. Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir.) (government's authority to exclude dangerous aliens may not be used to bar alien member of Communist party unless government shows a threat other than alien's party membership), *cert. granted*, 107 S. Ct. 666 (1986).

356. *Turner v. Williams*, 194 U.S. 279, 293 (1904).

357. *See id.* at 294.

358. Act of March 3, 1903, ch. 1012, § 2, 32 Stat. 1213, 1214.

speeches were incitements to that end.<sup>359</sup> It is significant that Chief Justice Fuller felt obligated to show incitement rather than mere advocacy. It is also important that he had to stretch so far to do it. Fuller was unable to point to any solid evidence that Turner even had advocated—let alone incited—any violence. Instead, he was forced to “infer” at least partially from the prepared titles of speeches that had not been given that Turner “contemplated” the use of force.<sup>360</sup> Fuller’s conclusions were unsupported by the evidence, and his use of undelivered speeches clashes with the Court’s pronouncement three years later that the main purpose of the first amendment was to prevent any prior restraint of speech or the press.<sup>361</sup>

But Chief Justice Fuller went one step further. In a cryptic paragraph, he wrote that even if the statute barred some anarchists who lacked “evil intent,” Congress must have believed that their views were so dangerous that they could be barred from the country.<sup>362</sup> Without explanation, Fuller said this part of the act was constitutional.<sup>363</sup> He did not indicate whether this was because Congress had had an adequate reason for barring anarchists or because he believed that Congress could determine that any group of foreigners posed a danger to the nation. The former reading seems more probable, if only because it is narrower.<sup>364</sup>

Chief Justice Fuller’s deference also was consistent with then-prevalent fears of anarchy and socialism. Anarchists were linked to the Haymarket bombing of 1886, the attempted assassination of a major financier during the Homestead steel strike, and the killing of President McKinley in 1901, creating tremendous public hostility toward anarchists and socialists alike.<sup>365</sup> President Roosevelt demanded the exclusion of anarchists and socialists,<sup>366</sup> and Congress adopted the statute under which Turner was deported.<sup>367</sup> Nor did the Court remain unaffected.<sup>368</sup>

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359. See *Turner v. Williams*, 194 U.S. 279, 294 (1904).

360. See *id.*

361. See *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

362. See *Turner v. Williams*, 194 U.S. 279, 294 (1904).

363. See *id.*

364. A narrow reading also is more consistent with the Fuller Court’s famous response to legislative assertions of broad authority. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905) (New York had no authority to interfere with freedom of contract by imposing hour guidelines on employment); *Pollock v. Farmers’ Loan and Trust Co.*, 158 U.S. 601 (1895) (Congress’ authority did not extend to a “direct” tax on property); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (Congress could not act to restrain the granting of a state monopoly).

365. See H. David, *The History of the Haymarket Affair* 206-18 (1936); W. Preston, *Aliens And Dissenters* 21, 25-33 (1963); G. Woodcock, *Anarchism*, 463-65 (1962).

366. See W. Preston, *supra* note 365, at 31; D. Shannon, *The Socialist Party Of America* 5 (1955).

367. See E. Hull, *Without Justice for All* 15 (1985); M. Konvitz, *The Alien and the Asiatic in American Law* 35-36 (1946); W. Preston, *supra* note 365, at 28, 30-32.

368. For example, in 1913, Justice Holmes told a gathering of Harvard Law School alumni that he had long thought that a “vague terror” of socialism had been “translated

In *Turner*, that fear was exacerbated by widespread hostility to aliens. Many believed that the anarchist and socialist movements in America were led by and comprised of foreign visitors and immigrants.<sup>369</sup> Racial prejudice was another factor. The immigrants of the 1890's and 1900's came primarily from southern and eastern Europe, China, and Mexico,<sup>370</sup> provoking accusations that their inferior blood and racial characteristics would weaken the country.<sup>371</sup>

These attitudes<sup>372</sup> were reflected in a series of Supreme Court decisions that gave the government unlimited authority to exclude aliens and to deport aliens by administrative proceedings with neither a jury trial nor judicial intervention.<sup>373</sup> In so holding, the Court had determined the fifth amendment did not limit Congress because deportation could not be considered a punishment depriving anyone of life, liberty, or property.<sup>374</sup>

Although these decisions ostensibly were based on the government's power to preserve itself and to regulate commerce with foreign nations, the Court candidly had admitted that the "differences of race added greatly to the difficulties of the situation."<sup>375</sup> Each decision concerned the immigration of Chinese laborers to the West Coast, and the Court did not hide its beliefs. Criticizing the Chinese for refusing to assimilate with Californians of European stock, the Court described their immigration as "approaching the character of an Oriental invasion," "a menace to our civilization."<sup>376</sup> After analogizing the immigration movement to warfare, the Court said Congress could determine that "foreigners of a different race" were dangerous to the nation and exclude them even

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into doctrines that had no proper place in the Constitution or the common law." Address by Justice Holmes to Harvard Law School dinner (New York City, February 1913), reprinted in 2 S. Morison, *supra* note 331, at 99-100.

369. See M. Konvitz, *supra* note 367, at 60 n. 34; W. Preston, *supra* note 365, at 21, 26, 30-31; P. Smith, *America Enters the World* 138, 141 (1985). Popular suspicions were reinforced by the fact that some immigrants were involved in these movements. See D. Shannon, *supra* note 366, at 43-48; G. Woodcock, *supra* note 365, at 460-62, 465.

370. See 5 Cong. Rec. 5769 (1902) (statement of Rep. Underwood); E. Hull, *supra* note 367, at 11-16; P. Smith, *supra* note 369, at 127.

371. See 35 Cong. Rec. 5769-70, 5771 (1902) (statement of Rep. Underwood); 35 Cong. Rec. 5774 (1902) (statement of Rep. Kleberg); E. Hull, *supra* note 367, at 15; P. Smith, *supra* note 369, at 129-30, 137, 139-40.

372. See W. Preston, *supra* note 365, at 4, 23-26, 30-31. This perceived link between anarchy and aliens was solidified when President McKinley's assassination was attributed to a Polish anarchist, see Stephenson, *A History Of American Immigration* 151 (1926 & photo reprint 1964), even though the killer was a native American. See W. Preston, *supra* note 365, at 30-31.

373. *The Japanese Immigrant Case*, 189 U.S. 86, 97 (1903); *Wong Wing v. United States*, 163 U.S. 228, 235 (1896); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893); *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892); *Chae Chan Ping v. United States*, 130 U.S. 581, 609-10 (1889).

374. See *Fong Yue Ting v. United States*, 149 U.S. 698, 713-14 (1893); see also *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (decision by executive or administrative officer to deport alien is sufficient due process).

375. *Chae Chan Ping v. United States*, 130 U.S. 581, 595 (1889).

376. *Id.*

before actual hostilities began.<sup>377</sup> Since the Court saw the Chinese as invaders, it was natural for the Court to refuse to accord them the rights of American citizens.

This concern for race and this strident opposition toward treating immigrants as equals of American citizens reappeared in *Turner*. Fuller cited the Chinese exclusion cases and quoted Justice Shiras's language in *Wong Wing v. United States*: "No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens. . . ."<sup>378</sup>

Given these racial fears and the Court's repeated refusal to treat potential immigrants as being equal in any way to American citizens,<sup>379</sup> it is easy to understand the Court's view of *Turner* as an immigration case in which the plaintiff happened to raise a few minor first amendment arguments rather than as a first amendment case in which the plaintiff happened to be an alien. It also explains why the Court failed to understand and summarily rejected Darrow's efforts to persuade the court that its decision, although ostensibly limited to aliens, could affect the first amendment rights of American citizens.

Darrow argued that if the authority to regulate commerce with foreign nations gave Congress the power to regulate the beliefs of people passing between this Country and other nations, then Congress' authority over interstate commerce gave it a similar power to regulate the beliefs of American citizens passing between states.<sup>380</sup> The Court did not even respond to this argument. Darrow also argued that the first amendment was an absolute prohibition on any government regulation of speech or belief. Darrow pointed out that the amendment did not bar the government from regulating citizens' beliefs while authorizing it to regulate aliens' beliefs; the amendment simply barred any federal regulation of speech and press, without distinguishing between citizen and alien.<sup>381</sup> He further contended that this meant that while it would be correct for the government to exclude aliens when they posed a danger to the United States, it could not exclude aliens for their political beliefs.<sup>382</sup> Fuller apparently did not understand. He wrote that Darrow's argument "seems to be that, though Congress has the power to exclude any alien, that power does not extend to some aliens,"<sup>383</sup> an erroneous summary that confirms the Chief Justice's lack of understanding.

Chief Justice Fuller ended his opinion with two intriguing points.

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377. *Id.* at 606.

378. *Turner v. Williams*, 194 U.S. 279, 290-91 (1904) (quoting *Wong Wing v. United States*, 163 U.S. 228, 237 (1896)).

379. *Cf. Plessy v. Ferguson*, 163 U.S. 537, 550-51 (1896) (holding that separate but equal accommodations are constitutionally permissible).

380. *See Turner v. Williams*, 194 U.S. 279, 288-89 (1904) (argument of appellant).

381. *See id.* at 287.

382. *See id.* at 288-89.

383. *Id.* at 292 (Fuller, C.J.).

First, he warned that the Court was not “deprecating the vital importance of freedom of speech and of the press, or as suggesting limitations on the spirit of liberty, in itself unconquerable” for the case did not involve those considerations.<sup>384</sup> Later scholars have used this as an example of how the Court paid mere lip service to the first amendment, extolling its virtues in flowery language while ignoring it in practice.<sup>385</sup> The context of the decision, however, shows that the Court did not reach its decision because it believed the first amendment was meaningless, but because its fears of domestic violence and its racial concerns prevented it from understanding how the first amendment was involved. *Turner* was a decision about equality: a decision that aliens did not enjoy the same rights as did citizens. It was not a decision about what rights American citizens enjoyed.

The final part of Chief Justice Fuller’s opinion was his effort to distinguish the statute in *Turner* from the Alien and Sedition Acts of 1798.<sup>386</sup> It is true that his distinctions were conclusionary, without any argumentative or evidentiary support. But it also is true that this Court, which several scholars contend took an extremely narrow interpretation of the first amendment, still felt compelled to distinguish the problem before it from that of the Alien and Sedition Acts, for fear that its decision might be read as endorsing those Acts.

#### D. *Speech in Public Places*

Modern first amendment doctrine recognizes the right of individuals to make reasonable use of public parks and streets as fora for expressing their beliefs.<sup>387</sup> Indeed, under some circumstances private property may constitute a public forum for first amendment purposes.<sup>388</sup> In this context, *Davis v. Massachusetts*,<sup>389</sup> in which the Supreme Court denied a speaker the right to preach in a public park, seems a narrow interpretation of the meaning of freedom of speech. But, like many other cases,

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384. *Id.* at 294.

385. See Rabban, *supra* note 7, at 523, 538. Rabban also argues that *Turner* seems to apply a “bad tendency” rationale. See *id.* at 538. Fuller, in discussing Congress’ decision to bar even anarchists of innocent intent, did say that this must have been because Congress believed that “the tendency of the general exploitation of such views is so dangerous”, *Turner*, 194 U.S. at 294. However, in the preceding paragraph, he argued that Turner’s speeches were incitements towards a violent goal. *Id.* at 294.

386. See *Turner*, 194 U.S. at 294-95.

387. See *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969); *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969); *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941); *Hague v. Committee For Indus. Org.*, 307 U.S. 496, 515 (1939).

388. See *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 319-20 (1968) (company town held to be public forum); *Marsh v. Alabama*, 326 U.S. 501, 507-08 (1946) (same); cf. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 88 (1980) (free speech provision of California constitution requires owner of private shopping mall to permit distribution of handbills whose subject is unrelated to mall). But see *Lloyd Corp. v. Tanner*, 407 U.S. 551, 563 (1972) (requiring connection between site of the speech and subject of the speech).

389. 167 U.S. 43 (1897).



*Davis* must be understood not in the context of the 1980's, but in the context of the 1890's.

*Davis* was convicted of preaching without a permit on Sunday morning in the Boston Common, in violation of a Boston ordinance.<sup>390</sup> The Massachusetts Supreme Court, in an opinion by Oliver Wendell Holmes, Jr., upheld the conviction despite arguments that the ordinance abridged *Davis's* freedom of speech.<sup>391</sup> Holmes wrote that regulation of speech in "a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."<sup>392</sup>

The United States Supreme Court affirmed that decision. *Davis* had admitted to the Court that he never had requested a permit, and the record contained no evidence that anyone ever had been denied a permit.<sup>393</sup> Instead, *Davis* argued that if anyone could get a permit, they served no purpose and any denial would be arbitrary.<sup>394</sup> Justice White responded that *Davis* wrongly assumed that he had an absolute right to use the Common to preach, quoting Holmes's earlier language that *Davis* had no more right to speak in a park than to speak in someone's private house.<sup>395</sup> Just as the legislature could bar the public from entering the land and so end its dedication to public use, it could impose less drastic restrictions on use.<sup>396</sup>

This language was not as harsh as it sounds. Holmes's parallel between a city's control of its parks and a person's control of his front yard was quite consistent with the nineteenth century's view of parks.<sup>397</sup>

390. See Petitioner's List of Exceptions, Record of the Appeal to the U.S. Supreme Court at 5, *Davis v. Massachusetts*, 167 U.S. 43 (1897). *Davis* previously was convicted of a similar offense, but failed to raise any free speech arguments. *Commonwealth v. Davis*, 140 Mass. 485, 486-87, 4 N.E. 577, 578-79 (1886).

391. See *Commonwealth v. Davis*, 162 Mass. 510, 511, 39 N.E. 113, 113 (1895), *aff'd*, 167 U.S. 43 (1897).

392. *Davis*, 162 Mass. at 511, 39 N.E. at 113.

393. See Petitioner's Brief to the U.S. Supreme Court at 6, 16, *Davis v. Massachusetts*, 167 U.S. 43 (1897). The defendant in *Commonwealth v. Abrahams*, 156 Mass. 57, 30 N.E. 79 (1892), was convicted of giving a Fourth of July speech in Boston's Franklin Park without a permit, but the record does not indicate, why the permit request was denied. See 156 Mass. at 58-60, 30 N.E. at 78-80.

394. See Petitioner's Brief to the U.S. Supreme Court at 6, *Davis v. Massachusetts*, 167 U.S. 43 (1897).

395. See *Davis v. Massachusetts*, 167 U.S. 43, 47 (1897) (quoting *Davis*, 162 Mass. at 511, 39 N.E. at 113).

396. See *Davis*, 167 U.S. at 47.

397. The operation of a park was not yet considered to be a traditional government function, see *Garcia v. San Antonio Metro. Transit. Auth.*, 469 U.S. 528, 544 n.9 (1985); *Shoemaker v. United States*, 147 U.S. 282, 297 (1893), since municipal corporations owned parks in a quasi-private capacity for the exclusive benefit of the members of the corporation. See *State ex rel. Wood v. Schweickhardt*, 109 Mo. 496, 512-13, 19 S.W. 47, 52 (1891) (quoting T. Cooley, *The Law on Taxation* 688-89 (2d ed. 1881)). Cooley had said that when a city acted in its quasi-private capacity, the state could no more force the city to act than it could force a private corporation to act. See 109 Mo. at 513, 19 S.W. at 52. Furthermore, the parks or commons in older cities, including Boston, had been intended for providing pasture for domestic animals. *Shoemaker*, 147 U.S. at 297. The use

It is tempting to say that *Davis* was the first case to uphold time, place, and manner restrictions on speech,<sup>398</sup> but the record is too sketchy to support that conclusion. Justice White's opinion did say that the ordinance gave the mayor the authority to grant permits in order to effectuate the purpose for which the Common was maintained and to regulate its use.<sup>399</sup> But both Justice Holmes and Justice White expressly based their decisions on the absence of any property right by *Davis* to use the Common.<sup>400</sup> Furthermore, neither justice discussed one of the keystones of the modern time, place, and manner doctrine, which is that a permit may not be denied because of the speaker's political affiliation or ideology.<sup>401</sup> In short, *Davis'* apparently harsh language is not relevant today, for it was based on the then-prevalent attitudes toward government ownership of land, not on the first amendment.<sup>402</sup>

### E. Labor

Near the end of the nineteenth century, conflicts between organized labor and business began to reach the Supreme Court. Labor unions were a new means for workers to exchange views, obtain information, and influence public opinion. But these aspects, all of which involved first amendment rights, were not raised in the early labor cases, and the violence of labor-business confrontations, combined with a now-discredited concept of due process, caused the Court to adopt a decidedly pro-

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of parks for human exercise and recreation was a recent development. *Id.* The *Shoemaker* Court observed that New York City's Central Park was the first park in the nation deliberately provided for the inhabitants' recreational use, *Shoemaker*, 147 U.S. at 297, and there were probably some who simply could not accept a further expansion of uses. Even if they did, the original use of parks for common grazing, which had meant that no single person had a right to control any particular part of the park, affected their view of how parks should be used. The *Davis* Court pointed out that *Davis* failed to include any proof as to the nature of ownership in the common which he enjoyed. *See Davis v. Massachusetts*, 167 U.S. 43, 46 (1897). One state court noted in 1892 that park commissioners had the authority, within their "discretion," to say whether a person could orate in a park, because that would require a part of the park to be set aside temporarily for the sole use of a portion of the public. *See Commonwealth v. Abrahams*, 156 Mass. 57, 60, 30 N.E. 79, 79 (1892).

398. For a description of the doctrine, see *Hudgens v. NLRB*, 424 U.S. 507, 520 (1976); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152-53 (1969); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308, 320-21 (1968); *Poulos v. New Hampshire*, 345 U.S. 395, 405-08 (1953); *Cox v. New Hampshire*, 312 U.S. 569, 575-76 (1941).

399. *Davis v. Massachusetts*, 167 U.S. 43, 48 (1897).

400. *See id.* at 46-47.

401. *See Cantwell v. Connecticut*, 310 U.S. 296, 304-05 (1940). This may have been because *Davis* failed to present any evidence of partiality.

402. The Massachusetts Supreme Court briefly said that the permit requirement did not abridge freedom of speech, in an apparent reference to the Massachusetts constitution. *Commonwealth v. Davis*, 162 Mass. 510, 511, 39 N.E. 113, 113 (1895). *But cf.* *Commonwealth v. Abrahams*, 156 Mass. 57, 60, 30 N.E. 79, 79-80 (1892) (rejecting defendant's argument based on the fourteenth amendment equal protection clause). The U.S. Supreme Court's opinion did not mention freedom of speech. *See Davis v. Massachusetts*, 167 U.S. 43, 46-48 (1897).

business attitude. By the time the unions did present freedom of the press claims, the Court's philosophy was set. The justices rejected the unions' contentions in a series of opinions that ignored the Court's own precedent regarding prior restraints and treated the speech of unions differently than the speech of other organizations.<sup>403</sup>

The Supreme Court's pro-business attitude became clear in the first major labor case, *In re Debs*.<sup>404</sup> The Court held that a federal court of equity could enjoin a strike by union members against their employer.<sup>405</sup> The Court had never before allowed a court of equity to enjoin the commission of allegedly criminal acts, and, indeed, it continued to refuse requests for injunctions against the publication of libels.<sup>406</sup> *Debs* enabled an employer to obtain an ex parte temporary restraining order by claiming it was necessary to preserve the status quo while his labor dispute was resolved, even though the injunction probably would cause the strike to collapse for lack of momentum,<sup>407</sup> and such orders became one of the most effective weapons in an employer's arsenal.<sup>408</sup> The Court further strengthened the position of employers when it held unconstitutional a federal statute that prohibited employers from firing or refusing to hire union members.<sup>409</sup> The Court said that the statute violated the rights of the employer and employee to freely contract,<sup>410</sup> ignoring that the decision would force employees to deal with employers from a position of severe economic weakness. The third blow came in the *Danbury Hatters* case,<sup>411</sup> where the Court found that primary and secondary boycotts by a national union in support of a local union's dispute with a manufacturer constituted an illegal combination in restraint of trade in violation of the Sherman Antitrust Act.<sup>412</sup> The decision drastically weakened the strength of national unions.

The surprising aspect of the *Danbury Hatters* case was that the Court endorsed an injunction that, among other things, barred the national union from using its own circulars and the public press to spread word of

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403. See L. Friedman, *A History of American Law* 555-61 (2d ed. 1985); A. Paul, *Conservative Crisis and the Rule of Law* 105-58, 219-20 (1960); L. Stein & P. Taft, *The Pullman Strike* (1960).

404. 158 U.S. 564 (1895).

405. See *id.* at 599-600.

406. See *American Fed'n of Labor v. Buck's Stove & Range Co.*, 33 App. D.C. 83, 108, 32 L.R.A. (N.S.) 748, 762 (D.C. Cir. 1909).

407. See *In re Debs*, 158 U.S. 564, 597-98 (1895). Other federal courts went even farther. In one case, the Court reversed a trial court that convicted several union officials of criminal contempt for disobeying an injunction of which they had not been notified. *Pettibone v. United States*, 148 U.S. 197, 203-04, 209-10 (1893).

408. L. Friedman, *supra* note 403, at 487-88; A. Paul, *supra* note 403, at 107-28. Congress stripped the federal courts of jurisdiction to issue such injunctions in the Norris-LaGuardia Act, ch. 90, § 4, 47 Stat. 70 (1932) (codified at 29 U.S.C. § 104 (1982)).

409. *Adair v. United States*, 208 U.S. 161, 179-80 (1908).

410. See *id.* at 173 (citing *Lochner v. New York*, 198 U.S. 45 (1905)).

411. *Loewe v. Lawlor*, 208 U.S. 274 (1908).

412. *Id.* at 304.

the boycott.<sup>413</sup> Only one year earlier, Justice Holmes had declared in *Patterson v. Colorado* that the primary purpose of the first amendment was to prevent all prior restraints, even those aimed at preventing the publication of false words.<sup>414</sup> The *Danbury Hatters'* injunction flatly had barred the union from publishing, but the Court did not reconcile the injunction with *Patterson*.

That problem was left to *Gompers v. Bucks Stove & Range Co.*<sup>415</sup> The American Federation of Labor (AFL) had supported a local union's dispute with a manufacturer by putting the company on the AFL's "Unfair" and "We Don't Patronize" list, and publishing those lists in its own papers and the public press.<sup>416</sup> The trial court enjoined such action; the union violated the order; and the trial court convicted several union officials of criminal contempt.<sup>417</sup>

On appeal, the defendants argued that the injunction violated *Patterson's* prohibition against prior restraints,<sup>418</sup> and all three members of the circuit court panel recognized the legitimacy of that concern. The two majority judges ruled that the union's efforts had been accompanied by threats of physical violence and coercion, and therefore that the publications were part of a conspiracy to illegally destroy the manufacturer's trade.<sup>419</sup> Although the judges recognized that the injunction violated the defendants' first amendment rights, they also said that the first amendment could not be used to accomplish illegal ends, such as conspiracy to injure another's business.<sup>420</sup> In such circumstances, the defendants' rights of expression had to be balanced against the plaintiff's property rights.<sup>421</sup> As the majority pointed out, however, this meant that when the conspiracy ended, that is, when the violence and threats of violence ceased, the union's first amendment rights would allow it to publish the censored lists.<sup>422</sup> Accordingly, the majority approved only a modified, narrowed version of the trial court's injunction.<sup>423</sup> The single dissenter maintained that *Patterson's* prohibition against prior restraints was absolute, although he noted that this did not prevent the manufacturer from seeking civil damages from the union after the list had been published.<sup>424</sup>

Ignoring those opinions, the Supreme Court went to great lengths to

413. *See id.* at 291-92 n.1.

414. 205 U.S. 454, 462 (1907).

415. 221 U.S. 418 (1911).

416. *See id.* at 421 n.1.

417. *See id.* at 420-25.

418. *See American Fed'n of Labor v. Buck's Stove & Range Co.*, 33 App. D.C. 83, 107-08, 32 L.R.A.(N.S.) 742, 751 (D.C. Cir. 1909) (argument of appellant).

419. *See* 33 App. D.C. at 109-10, 32 L.R.A.(N.S.) at 762-63; *id.* at 125-26, 32 L.R.A.(N.S.) at 769-70 (Van Orsdel, J., concurring).

420. *See id.* at 107-08, 32 L.R.A. (N.S.) at 762.

421. *See id.* at 112-13, 32 L.R.A. (N.S.) at 764 (Van Orsdel, J., concurring).

422. *See id.* at 109-10, 32 L.R.A. (N.S.) at 762-63, *see also id.* at 126, 32 L.R.A. (N.S.) at 769 (Van Orsdel, J., concurring).

423. *See id.* at 110, 32 L.R.A. (N.S.) at 763.

424. *See id.* at 129-32, 32 L.R.A. (N.S.) at 771-02 (Shepard, C.J., dissenting).

approve the original injunction. By the time the case reached the Court, the injunction's validity no longer was in issue; the only concern was the legitimacy of Gompers' conviction for violating the injunction.<sup>425</sup> The Court's decision that Gompers should have been tried for civil, rather than criminal contempt, made it unnecessary to discuss the injunction itself.<sup>426</sup> Therefore, Justice Lamar's statements for the majority that the trial court's order had not violated any first amendment rights must be classed as dicta. It was unpersuasive dicta. First, Justice Lamar pointed out that the *Danbury* injunction had been quite similar to the injunction in *Gompers*;<sup>427</sup> he failed to mention that the former case had not considered the first amendment aspects of the injunction. Second, Lamar wrote that conspiracy to destroy a business may exist whenever outsiders intervened in a dispute between a manufacturer and a local union, and the presence of a conspiracy made all acts in furtherance of the conspiracy, such as publishing information, illegal.<sup>428</sup> The circuit court had said that a conspiracy existed only when threats of violence were present;<sup>429</sup> but Lamar noted that different courts had different requirements for conspiracy.<sup>430</sup> That was unimportant he said, because "whatever the requirement of the particular jurisdiction," when a conspiracy was present the injunction could issue.<sup>431</sup> Since the federal courts then enjoyed the power to create common law even in areas traditionally reserved to the states,<sup>432</sup> it is unclear why Justice Lamar did not establish a single rule. His loose language, however, indicated that a state could define any group, especially a union, to be a conspiracy.

If Justice Lamar had stopped at that point, it could be argued that *Gompers* merely said that acts to further a conspiracy were illegal. But Justice Lamar went further. After recognizing that workers had the right "to unite and to invite others to join their ranks," he wrote that this union of workers gave them an unfair advantage over individual businesses, transforming their speech into "verbal acts" which enjoyed less first amendment protections than did the speech of individuals or businesses.<sup>433</sup> Justice Lamar's reference to the rights of an individual implied that a single person might be entitled to publish a "Don't Patronize" list. But if the publication of such a list showed an intent to destroy another's business (which was illegal), then how could a single person possibly en-

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425. See *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 451 (1911); *Buck's Stove & Range Co. v. American Fed'n of Labor*, 219 U.S. 581 (1911) (per curiam) (dismissing for mootness original challenge to the injunction).

426. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 449, 452 (1911).

427. See *id.* at 438-39.

428. See *id.* at 437-38.

429. See *American Fed'n of Labor v. Buck's Stove & Range Co.*, 33 App. D.C. 83, 109-10, 32 L.R.A. (N.S.) 748, 762-63 (1909); *id.* at 125-26, 32 L.R.A. (N.S.) at 765 (Van Orsdel, J., concurring).

430. See *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 437 (1911).

431. *Id.*

432. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

433. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 439 (1911).

joy such a right to publish? Apparently Justice Lamar believed that an individual had greater first amendment rights than did an organization. More precisely, Justice Lamar believed the individual's first amendment rights exceeded those of unions.<sup>434</sup> Even though the AFL's members had assembled to form a union, a single entity, Justice Lamar saw the membership as individuals acting by temporary agreement. Since the workers still were individuals, they could comprise a conspiracy. Justice Lamar made no suggestion, however, that when individual property owners or stockholders joined together to form a company, their decisions not to buy from certain workers should be considered decisions of a group as a conspiracy. What Lamar saw was a single entity, the corporation, and a corporation's subparts cannot conspire with each other. In short, workers had developed a new tool for communicating among themselves, a tool which paralleled in some ways the new corporation of the late eighteenth century, but Justice Lamar refused to allow it to function.

The next decision, *Hitchman Coal & Coke Co. v. Mitchell*,<sup>435</sup> made the Court's desire to destroy the union as a means of communication between workers abundantly clear. The defendants were union representatives who tried to persuade workers at a company mine to join the union, although the workers had signed yellow dog contracts that barred them from joining any union.<sup>436</sup> The majority opinion admitted that there had been no picketing or threats of physical violence,<sup>437</sup> but nevertheless ruled that the defendants' attempted persuasion was an illegal conspiracy in restraint of trade that interfered with the rights of the company to enjoy the benefits of its contracts.<sup>438</sup> The Court recognized that *Gompers* had declared that workers had the right to join unions and to invite other workers to join, but said this right could only be used for lawful purposes, which did not include inducing workers to violate their yellow dog contracts.<sup>439</sup> Despite a strong dissent by Justice Brandeis,<sup>440</sup> the Court endorsed the trial court's injunction that prohibited the union from telling people that the mine's failure to unionize would injure them.<sup>441</sup>

The effect of *Hitchman* was strikingly clear: if an employer required his workers to sign contracts in which they agreed not to join a union, union representatives could not talk to them, nor presumably could the workers talk to each other about joining a union. But *Hitchman* merely was the culmination of a long series of labor cases in which the Court

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434. *But cf.* *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 533 (1980) (corporation's speech protected by first amendment); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777, 784 (1978) (first amendment protections not abrogated merely because speaker is corporation).

435. 245 U.S. 229 (1917).

436. *See id.* at 239-46.

437. *See id.* at 262.

438. *See id.* at 259-60.

439. *See id.* at 258-59.

440. *Id.* at 263-74. Justices Holmes and Clarke joined the dissent.

441. *See id.* at 261-62.

persuaded itself that the goal of inhibiting the development of unions as major political and economic forces justified severely restricting the ability of workers to use the new communication tool that they created.

#### F. *New Methods Of Communication—Motion Pictures*

The birth of the motion picture at the turn of the century created a new first amendment problem. Should guarantees of freedom of expression developed in an era where ideas were presented by street-corner orators, pamphleteers, town-meeting speakers, and small-town newspaper editors also apply to a means of communication that was unlike anything the world had ever seen? The problem was not limited to the motion picture, and the Court's decision to tolerate government regulation of movies despite the first amendment presaged later decisions to allow the government to oversee the other broadcast media.

In *Mutual Film Corp. v. Industrial Commission of Ohio*,<sup>442</sup> the Court addressed the government's authority to regulate the new form of communication. The decision upheld an Ohio statute that forbade the display of films until they had been approved by a state censorship board, despite arguments that this violated the first amendment and the Ohio constitution.<sup>443</sup> The Court based its decision on the state constitution's free speech provision,<sup>444</sup> and discussed neither the first amendment nor its applicability to the states. This decision to construe the Ohio constitution was puzzling because earlier decisions had said that the Court lacked jurisdiction to declare a state law void because of a conflict with a state constitution.<sup>445</sup> The Court also would not consider whether the state law violated the first amendment to the Constitution, because the Court repeatedly had said that the Bill of Rights did not apply to the states.<sup>446</sup> The Court, of course, could have discussed whether the state law violated another part of the Constitution, but no such issue was raised. Furthermore, the Court's construction of the Ohio constitution's free speech provision could be applied to the first amendment because of the similarity of the two provisions' language and the Court's failure to base its decision on factors unique to the Ohio constitution.<sup>447</sup> Unfortunately, the Court did not explain why it had authority to interpret Ohio's

442. 236 U.S. 230 (1915).

443. *See id.* at 231-36, 237-38 (argument of petitioner).

444. *See id.* at 241.

445. *See* *Leeper v. Texas*, 139 U.S. 462, 467 (1891); *Congdon v. Goodman*, 67 U.S. (2 Black) 574, 575 (1862); *Withers v. Buckley*, 61 U.S. (20 How.) 84, 88-89 (1857); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 392 (1798). Since the adoption of the doctrine of incorporation, the Court has said that a state constitution may give greater protection to individual liberties than does the Bill of Rights, and that it will interpret a state constitution only to determine if it violates a federal constitutional right. *See PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980).

446. *See* cases collected *supra* note 143.

447. Ohio Const. art. 1, § 11 (providing "[e]very citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press.").

constitution, why it did so unnecessarily, or why its ruling should not also apply to the first amendment.

Justice McKenna's majority opinion revealed a view of the first amendment deeply hostile to freedom of speech. In *Patterson*, the Court had said that the main—if not the only—purpose of the first amendment was to prevent prior restraints on the press,<sup>448</sup> and the Ohio censorship system clearly was a form of prior restraint. Justice McKenna, while recognizing the special power of the motion picture to educate and persuade,<sup>449</sup> distinguished *Patterson* by saying that motion pictures were not “within the principle” of “freedom of opinion and its expression . . . by speech, writing or printing.”<sup>450</sup> Though the petitioner contended that moving pictures and drama were forms of both speech and the press, and pointed out that the Court said movies could violate a copyright,<sup>451</sup> Justice McKenna wrote that the “first impulse of the mind is to reject the contention. We immediately feel that the argument is wrong. . . .”<sup>452</sup> The reason, he argued, was that “the exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio constitution, we think, as part of the press of the country or as organs of public opinion.”<sup>453</sup> This, of course, did not explain why freedom of the press protected profit-motivated spectacles that were printed on paper. His main objection seemed to be that moving pictures had a special power for evil because of their attractiveness and manner of exhibition.<sup>454</sup> In other words, Justice McKenna believed that a medium of expression could be too effective to be protected by a constitutional provision intended to protect methods of expression.

*Mutual Film* had far-reaching consequences, the least of which was that it served as precedent for upholding other state censorship schemes.<sup>455</sup> With the application of the first amendment to the states in 1925, *Patterson*'s absolute prohibition against prior restraint<sup>456</sup> should have invalidated all state censorship systems. However, it was not until 1952 that the Court declared that motion pictures were protected by the first amendment and that censorship systems infringed upon freedom of

448. *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

449. See *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230, 242, 244 (1915).

450. *Id.* at 243.

451. See *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 60 (1911).

452. *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230, 243 (1915).

453. *Id.* at 244.

454. See *id.*

455. See *Mutual Film Co. v. Industrial Comm'n*, 236 U.S. 247 (1915) (upholding state censorship of films on the authority of *Mutual Film Corp.*); *Mutual Film Corp. v. Hodges*, 236 U.S. 248 (1915) (same).

456. “[T]he main purpose of such constitutional provisions is ‘to prevent all such *previous restraints* upon publications as had been practiced by other governments’ . . . . The preliminary freedom extends as well to the false as to the true. . . .” *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (emphasis in original) (citations omitted).



expression.<sup>457</sup>

More important, *Mutual Film* reaffirmed the Court's inability to harmonize the first amendment with new technology. Early Court decisions had protected and encouraged new methods of communication: *Ex parte Jackson* protected the distribution of ideas by the new mail system,<sup>458</sup> and other cases encouraged the effective use of the first amendment by impliedly upholding special low rates for newspapers and periodicals.<sup>459</sup> But in *Rapier*,<sup>460</sup> the compromise upon which *Jackson* was based was destroyed by further developments in technology, developments that the Court ignored. In *Mutual Film*, the Court implied a new attitude towards the constitutional protections, when it, and the petitioner, assumed that the question was whether these protections should be *extended* to moving pictures.<sup>461</sup> Furthermore, in other areas the Court had been more than willing to expand the scope of constitutional protections to include new technology. In *Debs*, the Court was willing to expand constitutional provisions to apply to new social organizations in order to prevent expression of opinion by a labor union.<sup>462</sup> In *Mutual*

457. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (expressly overruling *Mutual Film*).

458. 96 U.S. 727 (1877), discussed *supra* at notes 206-25 and accompanying text.

459. See *Bates & Guild Co. v. Payne*, 194 U.S. 106, 107-08 (1904); *Houghton v. Payne*, 194 U.S. 88, 94 (1904).

460. *In re Rapier*, 143 U.S. 110 (1892).

461. The Court wrote that "the argument is wrong or strained which *extends* the guaranties of free opinion and speech . . . and which seeks to *bring* motion pictures and other spectacles into practical and legal similitude to a free press and liberty of opinion." *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230, 243-44 (1915) (emphasis added). The petitioner argued that the constitutional guaranties were not limited to forms of publication known at the time the Constitution was adopted. *Id.* at 238. Neither the petitioner nor the Court cited *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897), where the Court had said that the Bill of Rights protected only "certain guaranties and immunities which we had inherited from our English ancestors."

462. 158 U.S. 564 (1895). When Eugene Debs, accused of leading a strike which interfered with interstate commerce by blocking railroads, argued that the commerce clause did not give Congress control over forms of transportation that did not exist when the Constitution was adopted, the Court flatly declared:

Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. . . . The power is the same. But it operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop.

*In re Debs*, 158 U.S. 564, 591 (1895); see also *Holden v. Hardy*, 169 U.S. 366, 385 (1898) (law is "a progressive science"); *Hurtado v. California*, 110 U.S. 516, 530-31 (1884) (spirit of personal liberty developed by progressive growth and wise adaption to circumstances). *But cf.* *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897) (Bill of Rights was "not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case").

*Robertson* does not rebut the contention that the Constitution's provisions should be expanded to reflect new technology. Justice Brown said that the exceptions to free speech and free press that were part of the first amendment included prohibitions against libels,

*Film*, it refused to expand the scope of the freedom of speech and the press to apply to new technology where that would encourage expression of opinion.

The Court's attitude in *Mutual Film* toward new technology was reflected in later events. In 1919, the Postmaster General prevented the *New York World* from using the previously unregulated telegraph to distribute an article that criticized him;<sup>463</sup> two years later, the Court upheld his decision to deny special mail rates to a newspaper because of its editorial content.<sup>464</sup> Censorship systems of motion pictures were upheld until 1952.<sup>465</sup> It later said that state censorship systems with certain procedural safeguards may be constitutional.<sup>466</sup> In 1943, the Court upheld federal regulation of radio stations,<sup>467</sup> although Justice Frankfurter based the decision on the limited number of radio frequencies and warned that regulations could not consider a station's editorial views.<sup>468</sup> Although

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blasphemous or indecent articles, and publications injurious to public morals or private reputation. A reading that argues this supports a narrow interpretation of the first amendment, see Rabban, *supra* note 6, at 539-40, suffers from a basic flaw. Justice Brown described those exceptions in general terms, such as "libel" and matter "injurious to public morals." *Robertson*, 165 U.S. at 282. If he meant that the first amendment recognized these general categories as exceptions, but that courts were free to develop new definitions of these terms, thereby restricting the scope of his exceptions, then his argument is consistent with *Debs*, *Hurtado*, and *Holden*. If he meant that the first amendment recognized as exceptions those categories as they were defined by the courts of the United Kingdom when the Constitution was adopted, then his argument has several problems. First, he does not explain what those definitions were. Second, he does not explain why the drafters, having just declared independence from England because of the invasion of their personal rights intended to incorporate English definitions of those rights. Third, since seditious libel was recognized in England until at least 1909, *Authority and Precedent in Libel Cases*, 44 *The Law Journal* 42 (Jan. 23, 1909) he does not explain the decline of seditious libel in the United States during the nineteenth century.

In any case, *Robertson* does not support *Mutual Film's* holding that motion pictures are not entitled to constitutional protection. *Robertson* said that certain types of statements are not protected. *Robertson* would allow a libel action against a motion picture producer for defamatory statements contained in a film yet it said nothing to indicate that even non-defamatory statements in a film are not protected. Indeed, if the *Robertson* court had believed that the framers did not intend to protect new forms of expression, it could have added those new forms to its list of exceptions.

463. See Z. Chafee, *supra* note 10, at 99 n.105 (citing *Collier's Weekly*, May 17, 1919, p.16).

464. See *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U.S. 407 (1921).

465. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 499-506 (1952).

466. See, e.g., *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 682 (1968); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961).

467. See *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

468. See *id.* at 226-27. Later courts, however, have said that the federal government may require broadcast stations to give equal time to political candidates and to those who disagree with the station's positions, but that state governments may not impose similar requirements on newspapers. Compare *Red Lion Broadcasting Co. v. Federal Communications Comm'n*, 395 U.S. 367 (1969) (fairness doctrine constitutional as applied to broadcasters) with *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (state governments may not impose equal time requirements on newspapers).

these cases do not cite *Mutual Film*, its legacy is reflected in the Court's willingness to permit, by comparison to traditional press cases, far more regulation of media that did not exist at the time of the Constitution.

#### IV. THE FRAMERS' INTENT

In the past decade, the original intent of the Constitution's framers has assumed new importance as a means for interpreting the document.<sup>469</sup> Many advocates of this interpretational tool have used it to limit the protections and scope of the fourteenth amendment<sup>470</sup> and the Bill of Rights.<sup>471</sup> The first amendment's free speech and press clauses are not immune to such attacks. Professor Leonard Levy and Justice Hugo Black worried that *Legacy of Suppression's* analysis of the original intent of those clauses would be used to narrow their meanings,<sup>472</sup> and any discussion of the Supreme Court's earlier decisions about freedom of expression should provoke similar concern. On first glance, cases like *Patterson*, *Davis*, and *Mutual Film* appear to give ample ammunition to those who would narrow modern first amendment doctrine.<sup>473</sup> But such use of the Court's early opinions is improper, and not just because of the inconsistencies and irrationalities revealed by this Article. Advocates of the original intent theory must consider these cases flawed because the early cases themselves make little use of the framer's intent. The justices, and the attorneys who appeared before them, rarely supported their arguments with any references to the framer's intended meaning of the first amendment. Furthermore, the justices seldom supported their statements with any historical evidence, so that their discussions reveal more about

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469. See, e.g., Rehnquist, *supra* note 11; Powell, *supra* note 11; 1 The Founders' Constitution, *supra* note 2, at xi-xiii.

470. See, e.g., Trimble v. Gordon, 430 U.S. 762, 777-78 (1977) (Rehnquist, J., dissenting); Jaffree v. Board of School Comm'rs, 554 F. Supp. 1104, 1123-29 (S.D. Ala.), *aff'd in part, rev'd in part*, 705 F.2d 1526 (11th Cir. 1983), *rev'd sub nom.* Wallace v. Jaffree, 472 U.S. 38 (1985); Rehnquist, *supra* note 13, at 699-700, 703-04.

471. See, e.g., Wallace v. Jaffree, 472 U.S. 38, 91-107 (1985) (Rehnquist, J., dissenting) (use of framers' intent to limit scope of establishment clause); Marsh v. Chambers, 463 U.S. 783, 787-93 (1983) (same); Payton v. New York, 445 U.S. 573, 607-11 (1980) (White, J., dissenting) (use of framers' intent to limit fourth amendment); Rehnquist, *supra* note 11, at 695 (criticism of view of eighth amendment that ignores framers' intent).

472. Levy warned against reliance on framers' intent to construe the first amendment, see Levy I, *supra* note 2, at 5, 309, and concluded the book by suggesting that because the framers "were Blackstonians does not mean that we cannot be Brandeisians," *id.* at 309, a reference to the narrow views he ascribed to the framers and the broader interpretation of the first amendment advanced by Justice Brandeis. In his later book, *Emergence Of A Free Press*, Levy recounts how *Legacy* appalled some liberals, including Justice Black, who labeled it "probably one of the most devastating blows that has been delivered against civil liberty in America for a long time." Levy II, *supra* note 2, at xvii-xviii. Levy notes, however, that Black's fears that conservatives would use the book to attack first amendment doctrine have not materialized. *Id.* at xviii.

473. See Lawrence v. Bauer Publishing & Printing, 89 N.J. 451, 470, 446 A.2d 469, 478 (1982) (Schreiber, J., dissenting) (citing Rabban, *supra* note 7, to support a narrow view of the first amendment in libel case).

the Court's attitude toward the use of the framers' intent than about the actual substance of that intent. Indeed, in a crucial decision that authorized government regulation of the motion picture industry, the Court plainly contravened the original intent of the framers.<sup>474</sup>

Attorneys who invoked the intentions of the founders regarding freedom of speech and of the press did so in an attempt to maintain or strengthen first amendment liberties, and invariably they were unsuccessful. One attorney argued that a federal statute that barred lottery advertisements from the mails was unconstitutional because the framers intended to bar primarily prior restraints and to allow post-publication restraints only in cases of libel.<sup>475</sup> The attorney's three-page discussion, which made extensive use of Alexander Hamilton's brief in the famous libel case of *People v. Croswell*,<sup>476</sup> was more extensive than the Court's discussion of the framers' intent in any other decision, but the Court ruled against the attorney's client without discussing the intent argument.<sup>477</sup> In a later case, Clarence Darrow cited a considerable amount of historical material to show the framers had not intended to allow the government to exclude aliens with unpopular political beliefs;<sup>478</sup> the Court also ignored his contentions.<sup>479</sup> A publisher's attorney in *Lewis Publishing Co. v. Morgan*<sup>480</sup> argued that since the framers had intended to prevent censorship by prior restraint or by the retrospective tactics of obstruction and punishment, the government could not limit the use of cheap mail rates to publishers who satisfied certain government requirements.<sup>481</sup> One of the requirements to use the mail was that a publisher divulge the names and addresses of its editor, publisher, business manager, owners, stockholders, and creditors.<sup>482</sup> The publisher's attorney pointed out that the Constitution itself had been adopted in part because

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474. See *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230 (1915), discussed *supra* at text accompanying notes 442-61.

475. See *In re Rapier*, 143 U.S. 110, 120-21 (1892) (argument of petitioner). Counsel also argued that in free press litigation, the framers had wanted the jury to decide all matters of fact and law. Counsel conceded, even at this late date, that a criminal libel defendant had to show not only that his statements were true, but also that they were published with good motives and for justifiable ends. *Id.* at 121. An attorney who represented a publisher in a later case also said that the first amendment prohibited restrictions on the press, "excepting only in matters of recognized morality and subject always to responsibility at common law for libelous statements." *Lewis Publishing Co. v. Morgan*, 229 U.S. 288, 292 (1913) (argument for appellant). Both statements support Professor Levy's contention that the first amendment did not change the law of libel—including seditious libel—in the United States. Levy II, *supra* note 2, at 220-28.

476. 3 Johns. Cas. 336 (N.Y. 1804); see also Forkosch, *Freedom of the Press: Croswell's Case*, 33 Fordham L. Rev. 415 (1965) (detailed discussion of the argument in the case).

477. *In re Rapier*, 143 U.S. 110, 134-35 (1892).

478. See *Turner v. Williams*, 194 U.S. 279, 286-87 (1904) (argument for appellants) (citing Madison's notes on the constitutional convention, *The Federalist*, No. 46, the Kentucky Resolutions, J. Madison, Virginia Resolutions, and Elliott's Debates).

479. See *supra* text accompanying notes 354-83.

480. 229 U.S. 288 (1913).

481. See *id.* at 292 (argument for appellant).

482. See Post Office Appropriation Act, ch. 389, § 2, 37 Stat. 539, 553-54 (1912).

of anonymous publications.<sup>483</sup> His arguments were ignored.

The Court also ignored efforts to invoke the framers' intent in *Mutual Film*. Movie industry attorneys contended that the framers did not intend to limit first amendment protections to those types of publications that existed in 1791.<sup>484</sup> Their argument had strong evidence to support it.

Many of the framers opposed the first amendment because they believed the Constitution did not give the federal government the power to regulate opinion, speech, or the press. To their minds, the first amendment was unnecessary.<sup>485</sup> Alexander Hamilton asked, "why declare that things shall not be done, which there is no power to do?"<sup>486</sup> Their concern was that the first amendment would be read, not as an affirmation that the government lacked certain powers, but rather as a declaration of the sole limitations on government power concerning expression.<sup>487</sup> Arguably, under that theory, the burden was on the government to show that the Constitution granted it the power to control the telegraph and the motion picture. The *Mutual Film* Court, however, said that its "first impulse" was to reject that argument.<sup>488</sup> Instead, *Mutual Film* seemed to give the user of the new technology the burden of showing that the Constitution's protections should be *expanded* to include the new technology.

When the Court did use the framers' intent regarding the first amendment's speech and press clauses, it was to justify a narrow interpretation of those provisions. Several decisions cited very early state court cases or statutes passed by the First Congress,<sup>489</sup> presumably equating such mate-

483. See *Lewis Publishing*, 229 U.S. at 292-93 (argument for appellant).

484. See *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230, 238 (1915) (argument for appellants).

485. *Levy II*, *supra* note 2, at 221, 224-26, 269-70.

486. The Federalist No. 84, at 574 (A. Hamilton) (P. Ford ed. 1898); J. Wilson, *State House Speech* (Oct. 6, 1787), *reprinted in* 1 *The Founders' Constitution*, *supra* note 2, at 449.

487. See J. Wilson, *Address to the Pennsylvania Ratifying Convention* (Nov. 28 and Dec. 4, 1787), *reprinted in* 1 *The Founders' Constitution*, *supra* note 2, at 453, 454 ("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."); see also The Federalist No. 84, at 573-74 (A. Hamilton) (P. Ford ed. 1898) (Bill of Rights would "contain various exceptions to powers [which are] not granted; and on this very account, would afford a colorable pretext to claim more than were granted.").

488. *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230, 243 (1915).

489. See *Public Clearing House v. Coyne*, 194 U.S. 497, 506 (1904) (status of postal service at time of Constitution and first Congress); *Rosen v. United States*, 161 U.S. 29, 36 (1896) (citing *Commonwealth v. Sharpless*, 2 Serg. & Rawle 91 (Pa. 1815) and *Commonwealth v. Holmes*, 17 Mass. 336 (1821) to show the required elements of indictment for obscenity); *Ex parte Curtis*, 106 U.S. 371, 372 (1882) (citing federal statutes of 1789 and 1791 concerning conflict of interest rules for federal workers); *Ex parte Jackson*, 96 U.S. 727, 733 (1877) (citing 1836 Postal Act). As noted earlier, the Court on one instance felt compelled to distinguish the statute that formed the basis of its decision from the Sedition Act of 1802. See *Turner v. Williams*, 194 U.S. 279, 294-95 (1904), and *supra* text accompanying note 386.

rial with the framers' intent. Not a single decision cited to the debates in the House of Representatives about the amendment. Indeed, the Court usually referred to the framers' intent in a single paragraph or sentence without providing any documentary support.<sup>490</sup> Nor did the Court value consistency in its use of the framers' intent. When the Court wanted to justify post-publication restraints on the press, it said the original purpose of the first amendment was to prevent prior restraints; when the Court wanted to endorse a prior restraint of the press, the original purpose was ignored.<sup>491</sup> When the Court wanted the government to regulate railroads, a form of interstate commerce that did not exist when the Constitution was adopted, it argued that the operation of constitutional provisions extended to new matters as business practices and the habits of people changed,<sup>492</sup> but when motion picture makers tried to use the same principle to extend first amendment protections to their new form of publication, the Court summarily rejected the argument.<sup>493</sup>

At best, one could say that the Court's use of the original intent of the Constitution was quite selective. Since many of the first amendment cases that appeared before the Court were cases of first impression, it is surprising that the Court's use of the amendment's original intent was so infrequent and so sketchy in nature. The reasons for this are difficult to ascertain. The Court made extensive use of history and the framers' intent regarding the religion clauses,<sup>494</sup> and the fourth and fifth amendments.<sup>495</sup> It may have been that the Court recognized the legislative history behind the free speech and press clauses was too sparse to be of value; it also may have been that the Court believed that history would not support its generally narrow interpretations of those clauses.

One of the Court's references to original intent, however, does deserve special notice. In *Robertson v. Baldwin*,<sup>496</sup> the Court held that the thirteenth amendment's ban on involuntary servitude contained an unwritten exception that prevented seamen from breaching labor contracts. To justify that ruling, the Court said that the Bill of Rights simply embodied

490. See, e.g., *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230, 243 (1915); *Gompers v. United States*, 233 U.S. 604, 610 (1914); *Patterson v. Colorado*, 205 U.S. 454, 462 (1907); *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897).

491. Compare *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (purpose of first amendment is to prevent all previous restraints) with *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 438 (1911) (approving injunction against publication of boycott list) and *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230, 241-46 (1915) (approving censorship system for motion pictures).

492. *In re Debs*, 158 U.S. 564, 591 (1895) ("Constitutional provisions do not change, but their operation extends to new matters as the modes of business and habits of life of the people vary with each succeeding generation.").

493. See *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230, 243-44 (1915) ("we immediately feel that the argument is wrong or strained which extends the guarantees of free opinion and speech to the multitudinous shows which are advertised on the billboards of our cities").

494. See, e.g., *Reynolds v. United States*, 98 U.S. 145, 162-65 (1878).

495. See, e.g., *Boyd v. United States*, 116 U.S. 616, 622-31 (1886).

496. 165 U.S. 275 (1897).

guarantees and immunities inherited from England and contained certain well-recognized, unwritten exceptions. One exception was that the first amendment "does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation."<sup>497</sup> This language was dicta unsupported by citation, but it appears consistent with Levy's position about the effect of the first amendment on the law of libel and seditious libel.<sup>498</sup> On the other hand, a few years later Justice Holmes argued that constitutional provisions were organic living institutions transplanted from English soil, whose meaning must consider their origin and the line of their growth.<sup>499</sup> Curiously, Holmes cited the above passage from *Robertson* for support.<sup>500</sup>

In short, the Court's decisions provide very little evidence as to what the framers intended regarding the rights of expression. The Court's infrequent and selective use of original intent and its failure to provide any in-depth analysis to support its contentions about such intent suggest that the Court did not see original intent as the basis for all constitutional interpretation, but merely as an interpretative tool that could be used when it suited the Court's purpose.

#### CONCLUSION

Although the freedom of expression doctrines which the Supreme Court developed between 1791 and 1917 were not as broad or as libertarian as modern doctrines, it would be an exaggeration to say that the Court was thoroughly hostile to freedom of speech and of the press. It would be an even greater error to suggest that the Court's decisions during this time should be considered when confronting first amendment issues today.

The Court's record on speech and the press was, for the most part, mixed. It warned against and finally abolished Congress' use of a legislative contempt power to silence those who criticized that body;<sup>501</sup> it recognized claims of privilege and probable cause as defenses in libel actions;<sup>502</sup> it protected criticism of courts for decisions in completed cases,<sup>503</sup> and it blocked President Roosevelt's use of seditious libel.<sup>504</sup> In the important area of the use of the postal system, it initially prohibited censorship of the mail,<sup>505</sup> it recognized the importance of protecting unpopular opinions,<sup>506</sup> and it endorsed huge subsidies which encouraged

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497. *Id.* at 281.

498. See Levy I, *supra* note 2, at 247-48.

499. See *Gompers v. United States*, 233 U.S. 604, 610-12 (1914).

500. *Id.* at 610.

501. See *supra* text accompanying notes 68-98.

502. See *supra* text accompanying notes 109-32.

503. See *supra* text accompanying notes 140-42.

504. See *supra* text accompanying notes 170-94.

505. See *supra* text accompanying notes 217-25.

506. See *supra* text accompanying notes 235-48.

the dissemination of information.<sup>507</sup> Such decisions were important and deserve to be noted.

A number of decisions presented, however, a narrow view of the first amendment's scope. These decisions should not be overlooked, but many should be given little weight. The two most negative opinions—*Patterson v. Colorado* and *Turner v. Williams*—were badly written products of the Court's concern for matters unrelated to the first amendment. Similarly, the Court's efforts to block the use of parks, labor unions, and motion pictures as new methods of communication did not reflect the Court's attitude toward freedom of speech and the press, but rather reveal the Court's hostility to change, to new technology, and, in the labor cases, the Court's personal and class biases.

These criticisms point up a striking coincidence which profoundly affects the modern value of these early Supreme Court decisions. The number of first amendment cases that appeared before the Court began to increase dramatically after 1890, even as the Court began to sink into perhaps the lowest and most embarrassing period of its history, a period marked by abysmal writing laced with doctrinal rigidity,<sup>508</sup> racial bias,<sup>509</sup> and a strong prejudice in favor of certain economic and social interests,<sup>510</sup> characteristics which mirrored the attitudes of the Victorian era. This was the Court that said segregation was permissible,<sup>511</sup> that control of ninety-eight percent of the sugar manufacturing capacity in the nation was not a monopoly in violation of interstate trade,<sup>512</sup> that maximum hour laws intended to protect workers from exploitation were violations of the workers' freedom of contract,<sup>513</sup> and that the national income tax was unconstitutional.<sup>514</sup> Modern scholars and judges would not think of using *Plessy v. Ferguson*<sup>515</sup> as the basis for equal protection law or *United States v. E. C. Knight*<sup>516</sup> as the foundation of antitrust doctrine; and there is no more reason to use the freedom of expression cases of that same period as the basis for modern first amendment law.

It might have been better if Justice Holmes, Chafee, and their early successors had written on the subject of this Article and had explained why they were ignoring over a century of precedent. But their silence on this matter should not be read as a decision born of fear that such precedent would destroy their ideas or as a plot to hide information from the

507. See *supra* text accompanying notes 277-78.

508. See G. Gilmore, *The Ages Of American Law* 62-64 (1977).

509. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896); see also *supra* text accompanying notes 369-74.

510. See *supra* text accompanying notes 403-41.

511. See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

512. See *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

513. See *Lochner v. New York*, 198 U.S. 45 (1905).

514. *Pollock v. Farmers' Loan and Trust Co.*, 158 U.S. 601 (1895); see also 2 C. Warren, *supra* note 7, at 699-700, 700 nn.1-2 (discussion of decision and public opposition to it).

515. 163 U.S. 537 (1896).

516. 156 U.S. 1 (1895).



public. It was instead a recognition that existing case law was illegitimate because of factors which, as has been shown, were too complex and lengthy to be the stuff of which persuasive public arguments were made. Their decision to proceed as if the Court had remained quiet on first amendment issues for one hundred and twenty years was valid; first amendment doctrine as it exists today has little to fear from a reasoned analysis of the cases they relegated to the silent and empty night.

