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# Circulation as an Essential Element of a Free Press

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It would seem, therefore, that the *Erie Ry.* v. *Tompkins*[75] case will result in a divergence of views in the federal courts, a situation which could not have arisen with the earlier doctrine. In its place, however, there is the long-awaited advantage of consistency within the realm of the particular state, and a single set of laws for the state, with no possibility of altering the legal result by a diversity of citizenship plea.

The broad principle on which the *Swift* doctrine[76] was based may yet be attained. The principal reason for the *Swift* doctrine[77] was repeatedly stated to be that it would lead to uniformity among the states when they all adopted the federal views. This result was clearly not accomplished by a continuation of the doctrine. It would seem, therefore, that other forces must be used to gain that desired end, particularly the exchange of learning and the constant agitation of bar associations throughout the country for the cause of uniformity through action of state legislatures.

EDYTHE R. DUCKER.

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## CIRCULATION AS AN ESSENTIAL ELEMENT OF A FREE PRESS.

In order to comprehend completely the scope of the question under consideration here, it is essential to examine at some length the significance of the phrase "freedom of the press", as the framers of the First Amendment understood it.

### I.

The constitutional guaranty of a free press is found, not in the Constitution of the United States itself, but in the First Amendment which reads:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The generally recognized common law definition of the term "freedom of the press" is that stated by Blackstone:[1] "The liberty

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[75] 304 U. S. 64, 58 Sup. Ct. 817 (1938).
[76] 16 Pet. 1 (U. S. 1842).
[77] *Ibid.*

[1] 4 BL. COMM. 151, 152. For state constitutions that have been influenced by Blackstone's definition in wording their free press provisions see Index

of the press is indeed essential to the nature of a free state; *but this consists in laying no previous restraints upon publications,* and not in freedom from censure for criminal matter when published. * * *" [2] (Italics ours.)

This definition,[3] stressing the fact that freedom of the press consists solely in "laying no previous restraints upon publications", has been, from our earliest history, the subject of much heated discussion and bitter controversy by both the courts and the writers of legal treatises.[4] Madison argued forcefully against the acceptance of the Blackstonian theory.[5] He said: [6] "In every state, probably, in the Union, the press has exercised a freedom in canvassing the merits of measures and public men of every description *which has not been confined to the strict limits of the common law.*" (Italics ours.) He urged that the very nature of our government was incompatible with Blackstone's view.[7] However, judges in the early American cases

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Digest of State Constitutions (Legis. Draft. Res. Columbia Univ. 1915) 700–702. The following state cases have upheld the Blackstonian doctrine: Citizen's Light H. & P. Co. v. Montgomery Light, 171 Fed. 553 (N. D. Ala. 1909); Willis v. O'Connell, 231 Fed. 1004 (S. D. Ala. 1916); Dearborn Pub. Co. v. Fitzgerald, 271 Fed. 479 (E. D. Ohio 1921); New York Juvenile Guardian Society v. Roosevelt, 7 Daly 188 (N. Y. 1877); Star v. Brush, 185 App. Div. 261, 172 N. Y. Supp. 851 (2d Dept. 1918); Ulster Square Dealer v. Fowler, 58 Misc. 325, 111 N. Y. Supp. 16 (1908); Varnum v. Townsend's Adm'x, 21 Fla. 431 (1885); Commonwealth v. Blanding, 20 Mass. 304 (1826); Howell v. Bee Publishing Co., 100 Neb. 39, 158 N. W. 358 (1916); Respublica v. Oswald, 1 Dall. 319 (Pa. 1788); Respublica v. Dennie, 4 Yeates 269 (Pa. 1805); Mitchell v. Grand Lodge, 56 Tex. Civ. App. 306, 121 S. W. 178 (1909); Sweeney v. Baker, 13 W. Va. 158 (1878).

[2] See CHAFEE, FREEDOM OF SPEECH (1920) 8. "The time where legitimate suppression begins is fixed chronologically at the time of publication. The government cannot interfere by a censorship or injunction before the words are spoken or printed, but can punish them as much as it pleases after publication, no matter how harmless or essential to the public welfare the discussion may be."

[3] Lord Mansfield, in King v. Dean of St. Asoph, 3 T. R. 428, 431 (1784), approved Blackstone's view, saying: "The liberty of the press consists in printing without any previous license, subject to the consequence of law."

[4] See Walsh, *Is the New Judicial and Legislative Interpretation of Freedom of Speech and of the Freedom of the Press, Sound Constitutional Development?* (1933) 21 GEO. L. J. 162 *et seq.;* also, Near v. Minn., 283 U. S. 697, 51 Sup. Ct. 625 (1931); Grosjean v. American Press Co., 297 U. S. 233, 56 Sup. Ct. 444 (1936).

[5] This view developed the law of seditious libel. See CHAFEE, *op. cit. supra* note 2, at 20, 21. "There was no need to prove any intention on the part of the defendant to produce disaffection or excite an insurrection. It was enough if he intended to publish the blame, because it was unlawful in him merely to find fault with his masters and betters." Also, Madison, *Report on the Virginia Resolutions,* 1799, 4 Ell. Deb. (2d) 596 *et seq.;* 9 SCHOFIELD, PUBLICATIONS OF AM. SOCIAL. SOC. (1914) 70 *et seq.*

[6] 6 WRITINGS OF JAMES MADISON (Hunt ed. 1901) 386.

[7] Madison placed his explanation of the First Amendment on the "essential difference between the British Government and the American Constitution." In England, he pointed out, it was necessary to guard against royal prerogative only; but, in the United States, the legislature as well as the executive is under limitations of power. Therefore, "the effective security of the press requires

tended to adopt the common law definition.[8] Writers of early texts on the Constitution likewise followed the lead of Blackstone, and asserted that all freedom of the press meant was freedom from previous restraint.[9]

Nor are the recent cases entirely free from Blackstone's influence. In *Patterson* v. *Colorado*,[10] where the court held that the main purpose of the free speech and free press provision was to prevent previous restraint, and not to prevent subsequent punishment for abuse considered contrary to public welfare, Justice Holmes stated: "The main purpose of such constitutional provisions (freedom of speech and of the press) 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." [11] "The Blackstonian theory dies hard",[12] and thus we find that the decision in the *Near* v. *Minnesota* case [13] is called "a resurgence of the eighteenth century doctrine of the privilege of free speech." [14] This case ruled that the statute widely known as the Minnesota Gag Law [15] is, in part, a previous restraint and, as a result, an encroachment upon freedom of the press

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that it should be exempt not only from previous restraint by the executive as in England, but from legislative restraint also through subsequent penalty of laws." Madison, *op. cit. supra* note 5; see SPEECHES OF CHARLES PINCKNEY (1800) 116 *et seq.*

[8] See cases cited in note 1. For an excellent criticism of these cases see CHAFEE, *op. cit. supra* note 2, at 21 *et seq. Cf.* Corwin, *Freedom of Speech and Press Under the First Amendment* (1920) 30 YALE L. J. 48.

[9] 2 KENT COMM. (1867 ed.) 17 *et seq.;* RAWLE, CONSTITUTION, c. 10.

[10] 205 U. S. 454, 27 Sup. Ct. 556 (1907).

[11] Justice Holmes subsequently modified this view in Schenck v. United States, 249 U. S. 47, 39 Sup. Ct. 247 (1919), and in Abrams v. United States, 250 U. S. 616, 40 Sup. Ct. 17 (1919). In the *Schenck* case, he said: "It may well be that the prohibitions of laws abridging the freedom of speech is not confined to previous restraints * * *"

[12] CHAFEE, *op. cit. supra* note 2, at 8.

[13] 283 U. S. 697, 51 Sup. Ct. 625 (1931).

[14] Note (1931) 31 COL. L. REV. 1148.

[15] MINN. STAT. (Mason, 1927) § 10, 123—1 to § 10, 123—3. Section 1 reads:

> "Any person, who, as an individual, or as a member or employee of a firm, or association or organization, or as an officer, director, member or employee of a corporation, shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away,
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> (a) an obscene, lewd and lascivious newspaper, magazine or other periodical, or
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> (b) a malicious, scandalous and defamatory newspaper, magazine or other periodical,
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> is guilty of a nuisance and all persons guilty of such nuisance may be enjoined as hereafter provided * * *"

as protected from state invasion by the Fourteenth Amendment.[16] In the course of its opinion, the majority sets forth "that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally, although not exclusively, immunity from previous restraints or censorship".[16a]

But the men who wrote the First Amendment must have meant more by "freedom of the press" than the absence of censorship.[17] The expiration of the Licensing Act[18] in England removed the menace of previous restraint by censorship forever in that country. It follows then that it was not the evil of censorship by licensing that the framers had uppermost in their minds. Highly pertinent evidence of the meaning of the First Amendment is the reason set forth by the Maryland Convention of 1788 for including the freedom of the press clause in the Bill of Rights.[19] "In prosecutions in the federal courts, *for libels,* the constitutional preservation of this great and fundamental right may prove invaluable." (Italics ours.) The Blackstonian doctrine affords no defense against subsequent punishment through libel prosecutions.[20] Therefore, one must concur with Professor Chafee's belief that the statement of the Maryland Convention is "absolutely inconsistent with any Black-

[16] Gitlow v. New York, 268 U. S. 652, 666, 45 Sup. Ct. 625 (1925); Whitney v. California, 274 U. S. 357, 362, 373, 47 Sup. Ct. 641 (1927); Fiske v. Kansas, 274 U. S. 380, 382, 47 Sup. Ct. 655 (1927); Stromberg v. California, 283 U. S. 359, 51 Sup. Ct. 532 (1931); Near v. Minnesota, 283 U. S. 697, 707, 51 Sup. Ct. 625 (1931).

[16a] 283 U. S. 697, 716, 51 Sup. Ct. 625 (1931).

[17] See MACAULAY, HISTORY OF ENGLAND (1860) c. 21; DUNIWAY, FREEDOM OF SPEECH IN MASSACHUSETTS (1906) 89n.

[18] 13 & 14 CAR. II c. 33 (1661); see 2 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 880; DUNIWAY, FREEDOM OF THE PRESS IN MASSACHUSETTS (1906) cc. I, II; 3 HALLAM, CONSTITUTIONAL HISTORY OF ENGLAND (1827) 445; 6 HOLDSWORTH, HISTORY OF ENGLISH LAW (1924) 360; LOLME, THE CONSTITUTION OF ENGLAND (1793) c. XII; 4 MADISON, LETTERS AND OTHER WRITINGS (1865) 542; 2 MAY, CONSTITUTIONAL HISTORY OF ENGLAND (1863) 104; PATERSON, LIBERTY OF THE PRESS, SPEECH AND PUBLIC WORSHIP (1880) c. III; STORY, CONST. (5th ed. 1905) § 1882.

[19] 2 ELL. DEB. (2d ed. 1835) 511. See PENNSYLVANIA AND THE FEDERAL CONSTITUTION, ed. McMaster and Stone, 151, 181. Here the possibility of an excessive stamp tax—obviously not a "previous restraint"—of the type that had been passed in Massachusetts was suggested. Sutherland, J., in Grosjean v. Am. Press, 297 U. S. 233, 248, 56 Sup. Ct. 444 (1936), "In 1785, only four years before Congress had proposed the First Amendment, the Massachusetts legislature, following the English example, imposed a stamp tax on all papers and magazines. Both taxes met with such violent opposition that the former was repealed in 1786 and the latter in 1788." See also DUNIWAY, *op. cit. supra* note 17, at 136, 137.

Opposition newspapers had been crushed by a stamp duty in England. See MAY, *op. cit. supra* note 18, at 108; 10 Anne c. 19, § 101, 118 (1711).

[20] See Note (1902) 16 HARV. L. REV. 56. "* * * there were reported in Howell's State trials alone fifty-three cases of libel and 'seditious words' during the eighteenth century * * * This trend of affairs in England Americans must have seen with concern, and it seems a fair conclusion, therefore, that our forbears meant by the constitutional guarantee to preserve freedom of public discussion, and not merely freedom from censorship."

stonian limitation of the right to absence of a censorship".[21] Moreover, Professor Chafee points out the intolerable paradox involved in the common law position.[22] "In some respects this theory goes too far in restricting state action. The prohibition of previous restraint would not allow a government to prevent a newspaper from publishing the sailing dates of transports or the number of troops in a sector.

"On the other hand, it is hardly necessary to argue that the Blackstonian definition gives very inadequate protection to the freedom of expression. A death penalty for writing about socialism would be as efficient suppression as a censorship."

Professor Chafee has pleaded that the Blackstonian theory ought "to be knocked on the head once for all".[23] It would seem that the Supreme Court in the case of *Grosjean* v. *American Press Co.*[24] has done just that. There, Justice Sutherland said: "It is impossible to concede that by the words 'freedom of the press' the framers of the amendment intended to adopt merely the narrow view then reflected by the law of England that such freedom consisted only in immunity from previous censorship, for this abuse had then permanently disappeared from English practice." [25] Then, approving [26] as the test to be applied the following statement by Judge Cooley,[27] Justice Sutherland attenuates the Blackstonian doctrine: "The evils to be prevented were not the censorship of the press merely, *but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.*" (Italics ours.)

## II.

It seems clear then that the protection afforded to the press by the First Amendment goes beyond the absence of previous restraint and extends to any action of the government that might hinder the "free and general discussion of public matters." [28] And there can be no surer method of curtailing the freedom of the press—as the framers of the First Amendment envisioned it—than by preventing the distribution and circulation of matter after it has been published. As a select committee of the Senate, under the chairmanship of Senator Calhoun,

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[21] CHAFEE, *op. cit. supra* note 2, at 19.
[22] CHAFEE, *op. cit. supra* note 2, at 10.
[23] CHAFEE, *op. cit. supra* note 2, at 8.
[24] 297 U. S. 233, 56 Sup. Ct. 444 (1936).
[25] *Id.* at 248.
[26] *Id.* at 249.
[27] COOLEY, *op. cit. supra* note 18, at 886.
[28] *Ibid.*

clearly analyzed the nexus between circulation and freedom of the press: [29]

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

Or as Justice Field succinctly stated in *Ex parte Jackson:* [30] "Liberty of circulating is as essential to that freedom [of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value."

How, then, have these essential elements—circulation and distribution—fared? In seeking an answer, we shall consider two aspects: (1) the more extensive method of circulation by mails, and (2) distribution by hand, somewhat less important from the viewpoint of coverage, but no less important from the viewpoint of constitutional liberty.

### *Circulation by Mail.*

While it is undoubtedly true that "the liberty of the press is not confined to newspapers and periodicals," [31] it is likewise true that today these are the chief molders of public opinion, and the very bulwarks of protection in a democratic society.[32] And since a medium of inexpensive circulation is the very lifeblood of newspapers and periodicals, the power to exclude them from the second-class mailing privilege constitutes the power to crush them.[33] "From these re-

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[29] SEN. REP. No. 118, 24th Cong., 1st Sess. (1836) 3.

[30] 96 U. S. 727, 733 (1878).

[31] Chief Justice Hughes in Lovell v. City of Griffin, 303 U. S. 444, 58 Sup. Ct. 666, 669 (1938). "The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."

[32] Sutherland, J., in Grosjean v. Am. Press Co., 297 U. S. 233, 250, 56 Sup. Ct. 444 (1936). "The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality * * *"

[33] Deutsch, *Freedom of the Press and of the Mails* (1938) 36 MICH. L. REV. 703, 732. "One must remember also that, in the course of time, the mails became strengthened in their position as the only practical modern method of inexpensive circulation to a large part of the reading public, entitled, under the First Amendment, to information disseminated without restriction by undue governmental burdens." Chief Justice White in Lewis Publishing Co. v.

marks, it must be apparent that to prohibit publications on one side, and circulation through the mails on the other of any paper on account of its religious, moral, or political character * * * is equally an abridgement of the freedom of the press, and a violation of the constitution." [34]

In 1878, the case of *Ex parte Jackson*,[35] the first adjudication concerning the postal power as an element in freedom of the press, and the foundation upon which later cases rest, was decided. In the course of its opinion, the court points out: (1) that Congress has the right to determine the physical characteristics of the matter to be mailed, (2) that exclusion from the mails does not bar the use of other means of transportation; therefore, we are left to imply, such exclusion is not a lethal blow to freedom of the press. But this decision has been rightly criticized in this manner: "The justification for exclusion, if one exists, must be based on the Congressional power to prohibit circulation of matter injurious to the public welfare and not on a discretion of Congress 'to refuse its facilities for distribution'." [36]

In 1890, Congress passed a bill [37]—which had, incidentally, failed twice before [38]—to close the mails to newspapers and periodicals printing lottery information and advertisements.[39] The cases of *In re Rapier* and *In re Dupre* [40] were criminal actions brought under the statute against two publishers for mailing newspapers announcing and advertising the lottery of Louisiana. The defense of unconstitutionality was set up under the First Amendment. The court, basing its decision [41] upon *Ex parte Jackson*,[42] ruled that the First Amendment did not prevent Congress from exercising its power to regulate the mails. Thus the court sanctioned the censorship of the morals of a

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Morgan, 229 U. S. 288, 304, 33 Sup. Ct. 867 (1913), "* * * the rate for first class or letter mail [produces] a profit of seventy millions a year * * * while for the second class or newspaper class the rates are such as to entail a loss of seventy millions each year." He points out that the letter rate is eighty times higher than that given newspapers under the second-class privilege. See Report of the Commission on Second-class Mail Matter, H. R. Doc. No. 559, 62d Cong., 2d Sess. (1912) 56, for history of mailing privileges with relation to the press.

[34] SEN. REP. No. 118, 24th Cong., 1st Sess. (1836) 3.

[35] 96 U. S. 727 (1878).

[36] Deutsch, *Freedom of the Press and of the Mails* (1938) 36 MICH. L. REV. 703, 733.

[37] 26 STAT. 465, § 1 (1890), 18 U. S. C. § 336 (1935).

[38] See H. R. REP. No. 2678, 49th Cong., 1st Sess. (1886); H. R. REP. No. 787, 50th Cong., 1st Sess. (1888).

[39] This bill was aimed particularly at the widespread lottery activity in Louisiana "which stands almost alone in her toleration of the evil." See SEN. REP. No. 11, 49th Cong., 1st Sess. (1886) 11.

[40] 143 U. S. 110, 12 Sup. Ct. 374 (1892).

[41] Decision criticized by H. Taylor in 155 North American Review 694 (Dec. 1892).

[42] 96 U. S. 727 (1878).

state [43] in the highly questionable manner of closing the mails to publications deemed objectionable.[44]

By the time the Supreme Court came to consider the case of *Lewis Publishing Co.* v. *Morgan* [45]—arising under the amendment of the postal laws in 1912, which extended requirements concerning statements of circulation, ownership and indebtedness to newspapers and periodicals availing themselves of the second-class mailing privilege [46]—it could say these new requirements were "concerned solely and exclusively with the right on behalf of the publishers to continue to enjoy great privileges and advantages at the public expense".[47]

This doctrine that the second-class mailing privilege—so utterly essential to the circulation of a free press—was a "favor" found support in the famous case of *United States ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson.*[48] The second-class mailing privileges of the "Milwaukee Leader" had been revoked by Postmaster General Burleson on the grounds that it had repeatedly violated the Espionage Act,[49] which closed the mails to publications printing articles that were considered an obstruction to a successful termination of the war.[50] The publisher challenged the validity of the statute on the ground that it was "destructive of the rights of a free press".[51]

Although acknowledging the fact that the history of the First Amendment justified the low second-class mailing privileges as a means of "disseminating current intelligence" in an inexpensive manner, Justice Clarke, writing for the majority, persisted in following the

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[43] See Deutsch, *Freedom of the Press and the Mail* (1938) 36 MICH. L. REV. 703, 707; Weker, *The Power to Exclude from the Mails* (1930) 10 BOST. UNIV. L. REV. 346; Cushman, *National Police Power Under the Postal Clause of the Constitution* (1920) 4 MINN. L. REV. 402; Rogers, *The Extension of the Federal Control Through the Regulation of the Mails* (1913) 27 HARV. L. REV. 27; Schroeder, *On the Implied Power to Exclude "Obscene Ideas" from the Mail* (1907) 65 CENT. L. J. 177.

[44] See Deutsch, *Freedom of the Press and of the Mail* (1938) 36 MICH. L. REV. 703, 736.

[45] 229 U. S. 288, 33 Sup. Ct. 867 (1913).

[46] 37 STAT. 539, § 2 (1912), 39 U. S. C. § 233 (1935).

[47] Chief Justice White in Lewis Publishing Co. v. Morgan, 229 U. S. 288, 316, 33 Sup. Ct. 867 (1913).

[48] 255 U. S. 407, 41 Sup. Ct. 352 (1921).

[49] CHAFEE, *op. cit. supra* note 2, at 106. "In truth, the passage of the simple language of the Espionage Act of 1917 was little as we thought it at the time the deadliest blow ever struck at a free press in the United States."

[50] See Masses Publishing Co. v. Patten, 244 F. 535 (S. D. N. Y. 1917).

[51] See CHAFEE, *op. cit. supra* note 2, at 107. "After Mr. Burleson had suppressed the August number of the Masses, he refused to admit the September or any future issues to the second-class mailing privilege, even if absolutely free from any objectionable passages, on the ground that since the magazine had skipped a number, *viz.*, the July number, it was no longer a periodical, since it was not regularly issued! He took the same position as to Berger's Milwaukee Leader, and in both instances the courts sustained him, thus confirming his right to drive a newspaper or magazine out of existence for one violation as determined by him."

questionable statement made in *Lewis Publishing Co.* v. *Morgan.*[52] He spoke of second-class mailing privileges as "a frank extension of special favors to publishers",[53] as though the First Amendment were written primarily for the pecuniary profit of a few instead of for the intellectual growth of a nation![54]

The danger to our democratic conceptions of a free press—inherent in the doctrines being established by the preceding decisions—was not unseen by all the men on the Supreme Court bench. It was Mr. Justice Brandeis, dissenting in *Schaefer* v. *United States,*[55] who wrote that the liberty of the press was "already seriously curtailed in practice under powers assumed to have been conferred upon postal authorities." And in his masterly dissent in *Milwaukee Publishing Co.* v. *Morgan,*—concurred in by Mr. Justice Holmes, who in spite of his decision in *Lewis Publishing Co.* v. *Morgan,* had now been converted to the view that a general exclusion from the mails was a menace to the First Amendment[56]—Justice Brandeis touches upon the very crux of the instant discussion in this excellent fashion:[57]

"It is argued that, although a newspaper is barred from the second-class mail, liberty of circulation is not denied, because the first and third-class mail and also other means of transportation are left open to a publisher. Constitutional rights should not be frittered away by arguments so technical and unsubstantial * * *." Thus, "* * * to carry newspapers generally at a sixth of the cost of the service, and to deny that service to one paper of the same general character, because to the Postmaster General views therein expressed in the past seem illegal, would prove an effective censorship, and abridge seriously the freedom of expression.

"The contention that, because the rates are noncompensatory, use of the second-class mail is not a right but a privilege which may be granted or withheld at the pleasure of Congress, rests upon an entire misconception, when applied to individual members of a class. The fact that it is largely gratuitous makes clearer its position as a right; for it is paid for by taxation." [58]

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[52] See note 47, *supra.*

[53] United States *ex rel.* Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U. S. 407, 410, 41 Sup. Ct. 352 (1921).

[54] Note (1931) 31 COL. L. REV. 1149, 1152. "The Supreme Court decisions seem to hold the power of Congress to impose conditions upon use of the mails, particularly the second-class privilege, to transcend the guaranty of the First Amendment." See *Ex parte* Jackson, 96 U. S. 727 (1878); *In re* Rapier, 143 U. S. 110, 12 Sup. Ct. 374 (1892); Public Clearing House v. Coyne, 194 U. S. 497, 24 Sup. Ct. 789 (1904); Lewis Publishing Co. v. Morgan, 229 U. S. 288, 33 Sup. Ct. 867 (1913). See Rogers, *Federal Interference with the Freedom of the Press* (1913) 23 YALE L. J. 559.

[55] 251 U. S. 466, 40 Sup. Ct. 259 (1920).

[56] See Milwaukee Publishing Co. v. Burleson, 255 U. S. 407, 436, 41 Sup. Ct. 352 (1921).

[57] *Id.* at 430, 431, 433.

[58] See Leach v. Carlisle, 268 U. S. 138, 45 Sup. Ct. 424 (1922), where Mr. Justice Holmes in a fine dissenting opinion shows his complete acceptance

Unhappily, this was the dissenting opinion, but its inherent logic was not to be without weight in future judicial considerations of the question. In recent years, two significant decisions have come down from the Supreme Court that, indirectly, nourish the hope that the voices of Justice Holmes and Brandeis were not cries wasted on the desert air. In 1936, the Supreme Court, by unanimous decision, in *Grosjean* v. *American Press Co.*,[59] held that a state statute imposing a license tax on gross receipts for the privilege of publishing a newspaper, magazine, periodical or publication of more than a stated number of copies per week, is invalid as a violation of the due process clause of the Fourteenth Amendment which extended the guaranty of a free press to state action. The court pointed out that the First Amendment was intended to check "any form of previous restraint upon printed publications or *their circulations.*" [60] If taxes of the nature condemned here invade a constitutional right, how much greater an invasion occurs with the denial of the second-class mailing privilege to a publication—a privilege made possible by general taxation of the people, justified by their desire for a free press? [61]

> "It is hoped and believed that the effect of *Grosjean* v. *American Press Co.* will be to solidify into authoritative decision, at some early propitious occasion, the historical data, the early scattered *dicta* and the recent strong dissents, to the effect that abridgement of the use of the mails or of the second-class mailing privilege is abridgement of a free press." [62]

That the *Grosjean* case will exert a great influence in future pronouncements of the highest court in cases involving distribution and circulation is already placed beyond peradventure by the court's latest decision in a case of that type. In *Lovell* v. *City of Griffin*,[63] Chief Justice Hughes, in stressing the importance of distribution to a free press and in the course of ruling a city ordinance restricting distribution unconstitutional, significantly notes that: "The license tax on *Grosjean* v. *American Press Co.* was held invalid because of its direct tendency to restrict circulation." [64]

### *Distribution by Hand.*

Cases involving restrictions on the distribution of newspapers, circulars, and pamphlets on the city streets normally arise because of

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of the principle that an abridgement of the use of the mails strikes at the freedom of speech and of the press.

[59] 297 U. S. 233, 56 Sup. Ct. 444 (1936).

[60] *Id.* at 249.

[61] See Deutsch, *Freedom of the Press and of the Mails* (1938) 36 MICH. L. REV. 703, 751.

[62] *Ibid.*

[63] 303 U. S. 444, 58 Sup. Ct. 666 (1938). For a discussion of this case see (1938) 13 ST. JOHN'S L. REV. 141.

[64] *Id.* at 669.

alleged violations of municipal ordinances. These ordinances are put on the statute books largely to prevent having city streets littered with commercial advertising broadsides.[65] But, commendable as this purpose is, local authorities have at times misused these laws in such manner as to menace a constitutional right. Fortunately, a vigilant judiciary has been quick to detect and to censure these encroachments on a free press.

The New York case of *People* v. *Johnson,* et al.,[66] well illustrates the point made in the preceding paragraph. There the defendants were charged with the violation of an ordinance [67] designed to limit the promiscuous scattering of commercial and business matter. Actually, however, the defendants were passing out circulars entitled "Stop the Ku Klux Klan Propaganda in New York" in front of a theatre displaying a film which they believed was a factor in causing prejudice and animosity against certain races and religions. Therefore, they were protesting in a manner guaranteed by the Constitution of the State of New York.[68] The court, dismissing the complaint, held that no city ordinance could be allowed a construction that violated a fundamental constitutional right. "It would be a dangerous and un-American thing to sustain an interpretation of a city ordinance which would prohibit the free distribution by a body of citizens of a pamphlet setting forth their views against what they believe to be a movement subversive of their rights as citizens." [69]

Another type of municipal ordinance which threatens the press is the one condemned by the Supreme Court in *Lovell* v. *City of Griffin.*[70] The ordinance [71] forbade the distribution in Griffin, Georgia, "of circulars, handbooks, advertising or literature of any kind," without a permit from the City Manager. The defendant was convicted of distributing a religious tract without procuring the required permission. Among other defenses, the defendant argued that the statute was unconstitutional as violating the freedom of the press. After

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[65] A good example of this type of ordinance is N. Y. C. CODE OF ORDINANCES, c. 22, art. 2, § 15 (1914), which reads: "No person shall throw, cast or distribute, or cause to be thrown, cast or distributed, any handbill, circular, card or other advertising matter whatsoever, in or upon any street or public place, or in any front yard or court yard, or on any stoop, or in the vestibule or any hall of any building, or in a letterbox therein; provided that nothing herein contained shall be deemed to prohibit or otherwise regulate the delivery of any such matter by the postal service."

[66] 117 Misc. 133, 191 N. Y. Supp. 750 (1921).

[67] See note 65, *supra.*

[68] N. Y. CONST. art. I, § 8, reading: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

[69] Talley, J., in People v. Johnson, 117 Misc. 133, 134, 191 N. Y. Supp. 750, 751 (1921). See Star v. Brush, 185 App. Div. 261, 172 N. Y. Supp. 851 (2d Dept. 1918); *Ex parte* Campbell, 64 Cal. App. 300, 221 Pac. 952 (1923); Coughlin v. Sullivan, 100 N. J. L. 42 (1924).

[70] 303 U. S. 444, 58 Sup. Ct. 666 (1938).

[71] *Id.* at 667.

pointing out that municipal ordinances adopted under state authority are within the prohibitions of the First Amendment by virtue of the Fourteenth Amendment,[72] Chief Justice Hughes, in a compelling, cogent decision, held the ordinance invalid and unconstitutional on its face.

Of transcending importance to the future of a free press, and with utmost pertinency to the instant discussion, the court said:[73]

> "The ordinance is comprehensive with respect to the method of distribution. It covers every sort of circulation 'either by hand or otherwise'. * * * The ordinance prohibits the distribution of literature of any kind, at any time, at any place, and in any manner without a permit from the city manager.
>
> "We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship * * *."

The court finds that such legislation "would restore the system of license and censorship in its baldest form".[74] Such an unequivocal recognition of the basic position distribution holds in a free press, when enunciated by the highest court in the land, constitutes a propitious augury.[74a] A court that hands down the *Lovell* decision is not apt to allow a further growth of an administrative censorship by closing the mails to newspapers and periodicals, since a censorship is as effectively detrimental to a true democracy, whether enforced by a Postmaster General or a City Manager.

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[72] Raymond v. Chicago Union Tractor Co., 207 U. S. 20, 28 Sup. Ct. 7 (1907); Home Telephone & Telegraph Co. v. Los Angeles, 227 U. S. 278, 33 Sup. Ct. 312 (1912); Cuyahoga River Power Co. v. Akron, 240 U. S. 462, 36 Sup. Ct. 402 (1915).

[73] Lovell v. City of Griffin, 303 U. S. 444, 58 Sup. Ct. 666, 669 (1938).

[74] *Ibid.*

[74a] The salutary influence that both the *Grosjean* and *Lovell* cases tend, and will tend, to exert in keeping the press free is strikingly illustrated by the recent case of People v. Banks, 6 N. Y. S. (2d) 41 (July 20, 1938). Here the court, relying upon the *Grosjean* decision, and quoting copiously from the *Lovell* case, held that Sections B36-90.0, B36-91.0 and B36-95.0 of Article 6 of the Administrative Code of the City of New York, in so far as the provisions thereof prohibited the *sale* of pamphlets on the public streets, without first paying a license tax, are void and unconstitutional as infringing upon the First and Fourteenth Amendments to the Constitution of the United States.

City Magistrate Rothenberg, in course of his opinion, said: "* * * it is clear that the imposition of a license fee or tax as a prerequisite to the sale of pamphlets on the streets has a direct tendency to restrict circulation * * *. Free circulation depends as much and, conceivably, more upon sale than upon free distribution, considering the cost involved in the free distribution of literature. Adequate circulation may only be rendered possible through sale defraying the cost of production. * * *"

*Conclusions.*

We have seen, then, that the First Amendment guarantees more than "mere absence from previous restraints", and that its aegis extends to any governmental action that tends to shackle a free press. We have observed that liberty of circulation is as essential as liberty of publishing to a press that is to be kept "free" in more than name alone; and that, in the past, our highest court has sometimes failed to detect invasions upon the freedom of circulation, especially in the cases dealing with distribution by mail.

However, we have marked that the Supreme Court, as evidenced by the *Grosjean* and *Lovell* cases, is no longer unaware of the dangerous trend of the past decisions. And that now, it would seem, the court is fully cognizant of the precarious paradox involved in guaranteeing a free press with one hand, and fettering the circulation of its fruits with the other. "And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflect that to the same beneficial source the United States owe much of the lights which conducted them to the ranks of a free and independent nation, and which have improved their political system into a shape so auspicious to their happiness?" [75]

LAWRENCE JARETT.

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## RESTRICTIVE COVENANTS IN NEW YORK.

In the law of real property a restrictive covenant refers to an agreement whereby an owner of some interest in land has agreed not to use it in a particular way for the benefit of some other interest in the same or related land. Properly speaking, the term "restrictive covenant" should be limited to covenants running with the land,[1] but so many courts [2] and writers [3] have used the word "covenant" when

[75] Report on the Virginia Resolutions (1799) 4 MADISON'S WORKS 544.

[1] At common law a covenant was said to be synonymous to a contract under seal. 2 TIFFANY, REAL PROPERTY (2d ed. 1920) § 388. Equitable restrictions, on the other hand, required no such formality, any simple agreement, whether or not in the language or form of a covenant being sufficient. Giddings, *Restrictions Upon the Use of Land* (1891) 5 HARV. L. REV. 274; Note (1928) 14 VA. L. REV. 647.

[2] Trustees of Columbia College v. Lynch, 70 N. Y. 440 (1877); Korn v. Campbell, 192 N. Y. 490, 85 N. E. 682 (1908); Neponsit Property Owners' Association, Inc. v. Emigrant Industrial Savings Bank, 278 N. Y. 248, 15 N. E. (2d) 793 (1938).

[3] 4 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1919) 3958 n.