St. John's Law Review

Volume 40
Number 2 *Volume 40, May 1966, Number 2*

Article 6

April 2013

Constitutional Law--Postal Restriction of Communist Propaganda Deemed Invalid (Lamont v. Postmaster Gen., 381 U.S. 301 (1965))

St. John's Law Review

demand interpretation and construction, processes which are basic to the very nature of the jurist.

Dym v. Gordon is a "guidepost" case, the first of many whose clarifications are essential to the precise utilization of the approach outlined in *Babcock*. Although, as such, its significance is limited, it performs well in providing a direction to be followed and new impetus for the principle.

CONSTITUTIONAL LAW—POSTAL RESTRICTION OF COMMUNIST PROPAGANDA DEEMED INVALID.—The addressees of unsealed mail, containing "communist political propaganda," originating in a foreign country, attacked the constitutionality of a federal statute[1] which authorized detention of such mail upon its arrival in the United States, until a written request for its delivery was made. On appeal, the United States Supreme Court *held* that the statute was violative of the first amendment, since its requirement of a written request to obtain the mail constituted a restriction on the unfettered exercise of the *addressees'* right to free speech. *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965).

The freedoms of speech and press, at the time they were embodied in the Constitution, consisted primarily of immunity from prior restraints, *i.e.*, censorship.[2] Prevention of censorship, however, was not their exclusive purpose. Any action on the part of the Government which might prevent free discussion of public matters was also prohibited,[3] thus the unconditional phrasing of the first amendment: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

Nevertheless, the first amendment does not protect every utterance; the right to speak is not absolute.[4] The right to express one's views freely, however, has come to enjoy a preferred status.[5]

---

[1] Postal Serv. and Fed. Employees Salary Act, 39 U.S.C. § 4008(a) (1964).

[2] Deutsch, *Freedom of the Press and of the Mails*, 36 MICH. L. REV. 703, 714 (1938). See generally CHAFEE, FREEDOM OF SPEECH (1920).

[3] 2 COOLEY, CONSTITUTIONAL LIMITATIONS 886 (8th ed. 1927); Grosjean v. American Press Co., 297 U.S. 233, 245 (1936).

[4] Near v. Minnesota, 283 U.S. 697, 708 (1931). For example, the following types of speech are not protected by the first amendment: obscenity, Roth v. United States, 354 U.S. 476 (1957); "group libel," Beauharnais v. Illinois, 343 U.S. 250 (1952); advocacy of the violent overthrow of the government, Dennis v. United States, 341 U.S. 494 (1951). *But see* the dissenting opinions of Mr. Justice Black in Konigsberg v. State Bar, 366 U.S. 36, 56 (1961); Wilkinson v. United States, 365 U.S. 399, 415 (1961).

[5] See Board of Educ. v. Barnette, 319 U.S. 624 (1943). *But see* the concurring opinion of Mr. Justice Frankfurter in Kovacs v. Cooper, 336 U.S. 77, 89 (1949).

The test used to determine whether speech is of a character which permits limitation has been stated to be "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger" [6]—the evil being that which the speech advocates. Invasion of the right is justified when the Government has a "substantial interest" in limiting the speech. However, the problem is to determine what constitutes a substantial interest. The courts have attempted to balance the interests of the Government in the regulation of certain utterances with that of the individual's interest in disseminating his ideas, in order to ascertain whether the Government's interest is substantial enough to warrant restriction of freedom of speech. For example, in *Thomas v. Collins,*[7] the United States Supreme Court invalidated a state statute requiring labor organizers to register and procure a card before soliciting members, reasoning that such restriction was a prior restraint on the exercise of free speech. The Court noted that although the state had power to regulate labor in the public interest, it could not trespass on the domains of free speech and assembly. The state's interest in labor regulation and the prevention of fraud was not considered substantial enough to warrant the restriction of speech. However, in *Dennis v. United States,*[8] the Court upheld the Smith Act, which prohibited speech advocating the violent and forcible overthrow of the Government. The Court indicated there that the Government's interest in internal security was substantial enough to limit this type of speech.

In a recent elaboration on this "balancing test," the Supreme Court has indicated that, as a result of the preferred status of first amendment rights, only a compelling state interest can justify a statute burdening the exercise of these rights. Moreover, even if such an interest exists, the onus remains upon the state to prove that no alternative means would prevent the evil.[9] Therefore, any attempt, direct or indirect, to limit the freedom of speech, without such a compelling reason, will be an unlawful abridgment of the constitutional guarantee.[10]

The question arose early as to what extent Congress' power to regulate the mails was limited by these standards. In 1878, the Supreme Court held, in *Ex parte Jackson,*[11] that the exclusion

---

[6] Dennis v. United States, *supra* note 4, at 510. The test was a refinement of the "clear and present danger" test formulated by Mr. Justice Holmes in Schenck v. United States, 249 U.S. 47 (1919).

[7] 323 U.S. 516 (1945).

[8] *Supra* note 4. The Smith Act, however, does not prohibit mere advocacy or teaching of the violent usurpation of power as an abstract principle. The urging of action is a necessary element of the prohibited speech. Yates v. United States, 354 U.S. 298 (1957).

[9] Sherbert v. Verner, 374 U.S. 398, 406-07 (1963).

[10] See Talley v. California, 362 U.S. 60 (1960).

[11] 96 U.S. (6 Otto) 727 (1878).

of lottery circulars from the mails did not constitute an infringement on freedom of speech, since the use of the mails was a privilege granted by Congress and was, therefore, retractable at will. The Court's decision was based on the assumption that there were other suitable means of distribution readily available to persons who were denied the use of the mails. Although this theory was never directly repudiated by the Supreme Court, many doubts have been expressed in a succession of judicial opinions [12] concerning its efficacy. In fact, the Supreme Court itself, in *Speiser v. Randall*,[13] stated that "Congress may not by withdrawal of mailing privileges place limitations upon the freedom of speech which if directly attempted would be unconstitutional." [14]

Freedom of speech embraces distribution and circulation of ideas whether or not they are unpopular, annoying or distasteful.[15] On the other hand, it does not always protect utterances which may constitute a danger to the public. Consequently, political propaganda advocating the *violent* overthrow of, or forcible resistance to, the laws of the United States is banned from the mails.[16] From 1951 to 1961, however, the Post Office maintained a program which excluded from the mails other types of political propaganda in addition to that advocating violent overthrow of the Government.[17] The authority for this action was based on a written opinion of Attorney General Jackson in 1940, which sanctioned the exclusion of a large quantity of Nazi propaganda.[18] Statutory support for this opinion was found in various provisions of the Espionage Act [19] and the Foreign Agents Registration Act.[20]

---

[12] See, *e.g.*, Leach v. Carlile, 258 U.S. 138, 140 (1922) (Holmes, J., dissenting); United States *ex rel.* Social Democratic Publishing Co. v. Burleson, 255 U.S. 407, 430 (1921) (Brandeis, J., dissenting); 1 CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 276-86 (1947); Deutsch, *Freedom of the Press and of the Mails*, 36 MICH. L. REV. 703 (1938); Note, 28 VA. L. REV. 634 (1942).

[13] 357 U.S. 513 (1958).

[14] *Id.* at 518.

[15] See, *e.g.*, Murdock v. Pennsylvania, 319 U.S. 105, 116 (1943); Lovell v. Griffin, 303 U.S. 444 (1938); Grosjean v. American Press Co., 297 U.S. 233 (1936); see also Note, 13 ST. JOHN'S L. REV. 81 (1938).

[16] 18 U.S.C. § 1717 (1964).

[17] See Schwartz & Paul, *Foreign Communist Propaganda in the Mails: A Report on Some Problems of Federal Censorship*, 107 U. PA. L. REV. 621 (1959).

[18] 39 OPS. ATT'Y GEN. 535 (1940).

[19] 40 Stat. 217 (1917).

[20] 52 Stat. 631-33 (1938), 22 U.S.C. §§ 611-21 (1964). As a result of the Attorney General's opinion, the act was held to apply to both resident and non-resident agents of foreign nations. However, the postal authorities expressed doubt as to the validity of the opinion since the statute was intended to apply solely to resident agents. (Congress had feared that Americans would be duped into believing that certain political proposals were being supported by American organizations.) See H.R. REP. No. 1381, 75th Cong., 1st Sess. 2 (1937).

Thus, the federal government, through the Post Office, undertook to censor and withhold from American addressees *all* political propaganda coming from behind the Iron Curtain, even without direct congressional authorization.[21] Neither the sender nor the addressees received any notice of such action. In 1958, however, the Government instituted a new procedure whereby a form note was sent to each recipient of communist propaganda describing the item and the reason for its detention. If the addressee desired to receive the mail he would return the notice with his signature duly affixed.[22]

In 1961, President Kennedy discontinued this entire administrative procedure. The program itself had escaped judicial review throughout this period, no doubt, because few people knew that the Government had been screening their mail; in addition, under the 1958 procedure, when individuals complained of the interference or returned the form, the Post Office would release the detained mail and would not withhold any subsequent mail of that nature addressed to them. Moreover, there was much doubt as to whether an addressee, or a non-resident alien had "standing" to test the legality of the confiscatory procedure.[23] Neither issue had been decided by the Supreme Court. Congress, in March 1962, enacted the Postal Service and Federal Employees Salary Act.[24] The act was essentially a congressional authorization of the administrative program which had been discontinued by the President in 1961. In the instant case, the constitutionality of this statute was attacked by two *addressees*. Each had originally instituted separate suits,[25] claiming that the statute violated his first amendment rights. The communist literature addressed to one plaintiff, a distributor of pamphlets, was detained. The other plaintiff, whose communist political propaganda was similarly detained by the Post Office, was merely a willing recipient of this type of writing. Both plaintiffs, after notification of the seizure, refused to respond to the notice sent by the Post Office and instituted suit. Subsequently, the Post Office notified them that it considered their action to be an expression of their

---

[21] Postal employees segregated all mail coming from communist countries and sent it to one of three major post offices. At these segregations centers, all unsealed mail was screened and all publications deemed to contain propaganda were detained. When an item was classified as propaganda, it was either destroyed or forwarded to other governmental agencies. See Schwartz & Paul, *supra* note 17, at 623, 648.

[22] See Schwartz & Paul, *supra* note 17, at 647-48, 666.

[23] *Id.* at 649.

[24] 39 U.S.C. § 4008(a) (1964). The procedure provided that the addressee be notified that communist political propaganda had been received, and would be delivered only upon his request, except that such detention would not be made when the recipient manifested a desire to receive such mail.

[25] Heilberg v. Fixa, 236 F. Supp. 405 (N.D. Cal. 1964); Lamont v. Postmaster Gen., 229 F. Supp. 913 (S.D.N.Y. 1964).

desire to receive "communist political propaganda" and that thereafter none of their mail would be detained. A federal district court held that the addressee could not contest the statute since his mail would no longer be impeded, rendering the question moot.[26] However, the other district court reached the merits, and unanimously held the statute unconstitutional.[27] In so doing, the court stated that to render this case moot would be to approve a device which would effectively preclude any potential recipient from ever testing the constitutionality of the statute.[28]

The Supreme Court found that there was not even a "colorable question" of mootness since a new procedure, introduced subsequent to the lower court rulings, required a separate request for each item desired. Therefore, the Court concluded: "The Act as construed and applied is unconstitutional because it requires an official act (viz., returning the reply card) as a limitation on the unfettered exercise of the *addressee's* First Amendment rights." [29]

The Court indicated that the use of the mails is "almost as much a part of free speech as the right to use our tongues," [30] and concluded additionally that the obligation imposed on the addressee, *i.e.*, to request his mail, would have a deterrent effect on individuals who fear the social disapprobation which might result from sending for literature which a federal agency has condemned as "communist political propaganda." Therefore, the "regime of this act is at war with the 'uninhibited, robust, and wide-open' debate and discussion that is contemplated by the First Amendment." [31]

The concurring Justices stated that the plaintiff-addressees asserted first amendment claims in their *own* right; the underlying issue, therefore, was the question of whether the right to *receive* publications was included within the protection of the first amendment, as one of those "fundamental personal rights" necessary to make the express guarantees fully meaningful. While this issue was not expressly discussed by the majority, it is obvious that they predicated their decision on this right. Only by such recognition could they proceed to apply the protection of the first amendment to the parties bringing suit. Thus, the concurring Justices reasoned that since the Government did not demonstrate that there existed a compelling interest to protect the public from this type of propaganda,[32] *any* restriction on the exercise of first amendment freedoms,

---

[26] Lamont v. Postmaster Gen., *supra* note 25.

[27] Heilberg v. Fixa, *supra* note 25.

[28] *Id.* at 407.

[29] Lamont v. Postmaster Gen., 305 U.S. 301, 81 (1965). (Emphasis added.)

[30] *Ibid.*

[31] *Id.* at 307.

[32] On appeal, the Government did not attempt to justify the statute in terms of "compelling interest." However, the Government had raised, but failed to prove, "compelling interest" in the lower court. Heilberg v. Fixa, *supra* note 25, at 409.

including a mere inconvenience, was prohibited. The majority stated: "we cannot sustain an intrusion on First Amendment rights on the ground that the intrusion is only a minor one." [33]

The Court's recognition that the first amendment protects the rights of an *addressee* to receive publications will have a considerable impact in the area of free speech. In the past, attacks on statutes imposing regulations on the mails were made primarily by *senders*; and, in the area of free speech, it has always been the party seeking to disseminate his ideas, *i.e.*, the writer, speaker or publisher, as opposed to the reader or listener, who brought suit. Statutory provisions dealing with the freedom of speech, or affecting it indirectly, will now have to be scrutinized, keeping in mind the fact that prospective addressees now have a constitutional right to receive the communication.

The decision in *Lamont* follows the recent trend of Supreme Court decisions in expanding the protections of the first amendment to certain "derivative rights" such as "freedom of association" and "non-disclosure." [34] The soundness of this policy has been criticized and it has been suggested that the first amendment should be applicable only to direct infringement of the enumerated freedoms.[35] According to this view these derivative rights should be protected under the due process clauses of the fifth or fourteenth amendments.[36]

It is submitted, however, that it is reasonable and just to consider the right to receive publications as a derivative right, necessary to render the freedom of speech fully meaningful, and to invoke the first amendment to prevent its abridgment. "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." [37]

The position taken by the Court in *Lamont* appears to be a direct repudiation of earlier holdings that the use of the mails was merely a privilege. In addition, Congress' power to impede, in any manner, the delivery of communist propaganda of a non-violent nature to addressees in the United States is severely restricted.

---

[33] *Supra* note 29, at 309.

[34] See Shelton v. Tucker, 364 U.S. 479 (1960), wherein the Supreme Court invalidated a statute requiring teachers in state-supported schools to file affidavits each year listing each organization to which they had belonged or contributed during the past five years; the Court stated that the "teachers' right of free association . . . [is] a right, which like free speech, lies at the foundation of a free society." *Id.* at 486. In Louisiana v. NAACP, 366 U.S. 293 (1961), the Court considered a requirement that all members of the organization living in the state be listed; it was unanimously held an unconstitutional infringement of the members' first amendment rights.

[35] Nutting, *Is the First Amendment Obsolete?*, 30 GEO. WASH. L. REV. 167 (1961).

[36] *Id.* at 174-80.

[37] *Supra* note 29, at 308 (concurring opinion).

However, this is not to say that Congress' hands are tied in dealing with propaganda of this type. The purpose of the statute in the instant case was to protect the American people from the subversive ideas disseminated by this propaganda. This purpose can just as easily be attained if Congress apprises the citizenry of the fact that large quantities of propaganda are being introduced into the United States from abroad, and that all citizens who do not wish to receive this mail can so notify the Post Office, and have it detained there.

In conclusion, the principal case indicates the Supreme Court's growing discontent with indirect governmental interference with freedom of speech through control of the mails. The case represents a further judicial extension of first amendment's guarantees and will provide a precedent for future cases in which petitioners allege unconstitutional restrictions upon derivative first amendment rights.

CONSTITUTIONAL LAW — RIGHT TO TRAVEL — PROHIBITION ON TRAVEL TO CUBA UPHELD AS VALID AREA RESTRICTION.—In compliance with a requirement of the Department of State, the plaintiff applied for validation of his passport for travel to Cuba. The request was denied on the ground that it was not in the best interest of the United States to allow tourist travel to Cuba, and the plaintiff brought suit against the Secretary of State. In affirming a special three-judge district court's dismissal of the action, the United States Supreme Court, on direct appeal,[1] *held* that refusal to validate a passport for travel to Cuba was a proper exercise of power by the Secretary of State under the Passport Act of 1926, and was not an unconstitutional deprivation of plaintiff's right to travel. *Zemel v. Rusk*, 381 U.S. 1 (1965).

The use of passports and the concept of the right to travel have distinct histories which did not merge until recent years. The term passport arose in relation to a privilege afforded an alien or foreign ambassador to pass safely through the territory of the issuing sovereign.[2] Later, passports evolved into documents issued to the citizens of a country, solely for the purpose of identifying the bearer in order to insure his safety while traveling in foreign countries.[3] It was never a requirement that a traveler obtain a passport in order to leave the United States.[4]

---

[1] 28 U.S.C. § 1253 (1964).

[2] Jaffe, *The Right to Travel: The Passport Problem*, 35 FOREIGN AFFAIRS 17 (1956).

[3] Urtetiqui v. D'Arbel, 34 U.S. (9 Pet.) 692, 699 (1835).

[4] *Ibid.*