Constitutional Law for a Changing America

Rights, Liberties, and Justice

10th Edition

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PRIOR RESTRAINT

No concept is more important to an understanding of freedom of the press than prior restraint, which occurs when the government reviews material to determine whether its publication will be allowed. Prior restraint is government censorship and antithetical to freedom of the press. If the First Amendment means anything, it means that no government has the authority to decide what may be published. The government may punish press activity that violates legitimate civil or criminal laws, but such government sanctions may take place only *after* publication, not before.

Establishing a Standard

The principle that prior restraint runs contrary to the Constitution was established in the formative case *Near v. Minnesota* (1931). The justices took a strong stance against censorship, but does their decision imply that the government may never block the publication of material it considers inappropriate or harmful? Are there exceptions to the constitutional prohibition against prior restraint? Consider these questions as you read Chief Justice Charles Evans Hughes's opinion in *Near*.

Near v. Minnesota

283 U.S. 697 (1931)
http://caselaw.findlaw.com/us-supreme-court/283/697.html
Vote: 5 (Brandeis, Holmes, Hughes, Roberts, Stone)
4 (Butler, McReynolds, Sutherland, Van Devanter)
OPINION OF THE COURT: *Hughes*
DISSENTING OPINION: *Butler*

FACTS:

A 1925 Minnesota statute, known as the Minnesota Gag Law, provided for "the abatement, as a public nuisance, of a 'malicious, scandalous, and defamatory newspaper, magazine, or other periodical.'" The law permitted a judge to issue an order banning the future publication of any periodical found to have violated statute. In the fall of 1927, a county attorney asked a state judge to prohibit the publication of the *Saturday Press*. In the attorney's view, the newspaper, owned by Jay Near and his partner Howard Guilford, was the epitome of a malicious, scandalous, and defamatory publication.[3] The *Saturday Press* committed

[3]For an in-depth account of this case, see Fred W. Friendly, *Minnesota Rag* (New York: Random House, 1981). The quotes in this and the next paragraph come from this account.

itself to exposing corruption, bribery, gambling, and prostitution in Minneapolis. The paper attacked specific city officials for being in league with gangsters and chided the established press for refusing to uncover the corruption. The newspaper's reports quickly offended certain powerful forces in Minneapolis. Shortly after the *Saturday Press* began publishing, Guilford was the victim of an attempted murder. And three years after the Supreme Court decision in this case, Guilford was killed in a drive-by shooting, a crime that was never solved.

The *Saturday Press*, however, was not a paragon of good journalism. Its charges of corruption were laced with Near's racist, anti-Semitic attitudes. He was also highly critical of Catholics and the labor union movement. In one issue, Near wrote:

> I simply state a fact when I say that ninety per cent of the crimes committed against society in this city are committed by Jew gangsters. . . . It is Jew, Jew, Jew, as long as one cares to comb over the records. I am launching no attack against the Jewish people AS A RACE. I am merely calling attention to a FACT. And if people of that race and faith wish to rid themselves of the odium and stigma THE RODENTS OF THEIR OWN RACE HAVE BROUGHT UPON THEM, they need only to step to the front and help the decent citizens of Minneapolis rid the city of these criminal Jews.

In a piece attacking establishment journalism, Near proclaimed: "Journalism today isn't prostituted so much as it is disgustingly flabby. I'd rather be a louse in the cotton shirt of a [n-word] than be a journalistic prostitute." Based on the paper's past record, a judge issued a temporary restraining order prohibiting the sale of printed and future editions. Believing that this action violated his rights, Near contacted the American Civil Liberties Union, which agreed to take his case. He grew uncomfortable with the organization, however, and instead obtained assistance from the publisher of the *Chicago Tribune*. Together, they challenged the Minnesota law as a violation of the First Amendment freedom of the press guarantee, arguing that the law was tantamount to censorship.

ARGUMENTS:

For the appellant, Jay Near:

- The Minnesota law violates freedom of the press by imposing restraints prior to publication. Prior restraints violate traditional notions of a free press, which allow publication of any material, regardless of its nature. Any abuses should be punished only after publication.
- The state does not have the power to prevent publication of any material unless it advocates violent overthrow of the government or breach of law. General concern for the public welfare is insufficient to overcome the right to a free press.

Minnesota Historical Society

The only known photo of *Saturday Press* editor Jay Near appeared April 19, 1936, in the *Minneapolis Tribune*. Near's successful appeal to the Supreme Court in 1931 marked the first time the Court enforced the First Amendment's guarantee of freedom of the press to strike a state law that imposed a prior restraint on a newspaper.

For the appellee, State of Minnesota:

- The right to a free press does not extend to press that is obscene, scandalous, or defamatory. The Minnesota law is narrow, applying only to irresponsible press that is "malicious, scandalous, or defamatory" and, therefore, not protected by the First Amendment.
- The state has the power to restrict press that is injurious to public health, safety, and morals; the law promotes public peace by prohibiting dangerous press.
- Publications can demonstrate that the material to be published is true and published in good faith; therefore, lawful publications will not be affected by the statute.

MR. CHIEF JUSTICE HUGHES DELIVERED THE OPINION OF THE COURT.

[The Minnesota] statute, for the suppression as a public nuisance of a newspaper or periodical, is unusual, if not unique, and raises questions of grave importance

transcending the local interests involved in the particular action. It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property. *Gitlow v. New York, Whitney v. California, Fiske v. Kansas.* . . .

. . . The object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical. The reason for the enactment, as the state court has said, is that prosecutions to enforce penal statutes for libel do not result in "efficient repression or suppression of the evils of scandal." Describing the business of publication as a public nuisance does not obscure the substance of the proceeding which the statute authorizes. It is the continued publication of scandalous and defamatory matter that constitutes the business and the declared nuisance. In the case of public officers, it is the reiteration of charges of official misconduct, and the fact that the newspaper or periodical is principally devoted to that purpose, that exposes it to suppression. . . .

This suppression is accomplished by enjoining publication, and that restraint is the object and effect of the statute.

. . . The statute not only operates to suppress the offending newspaper or periodical, but to put the publisher under an effective censorship. When a newspaper or periodical is found to be "malicious, scandalous and defamatory," and is suppressed as such, resumption of publication is punishable as a contempt of court by fine or imprisonment. Thus, where a newspaper or periodical has been suppressed because of the circulation of charges against public officers of official misconduct, it would seem to be clear that the renewal of the publication of such charges would constitute a contempt, and that the judgment would lay a permanent restraint upon the publisher, to escape which he must satisfy the court as to the character of a new publication. Whether he would be permitted again to publish matter deemed to be derogatory to the same or other public officers would depend upon the court's ruling. . . .

If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter—in particular that the matter consists of charges against public officers of official dereliction—and, unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship.

The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. The liberty deemed to be established was thus described by Blackstone: "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published." . . .

The criticism upon Blackstone's statement has not been because immunity from previous restraint upon publication has not been regarded as deserving of special emphasis, but chiefly because that immunity cannot be deemed to exhaust the conception of the liberty guaranteed by State and Federal Constitutions. . . .

The objection has also been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases. "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government. The constitutional guaranty of free speech does not "protect a man from an injunction against uttering words that may have

all the effect of force." These limitations are not applicable here. . . .

The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right. Public officers, whose character and conduct remains open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals. . . .

. . . The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege. . . .

The statute in question cannot be justified by reason of the fact that the publisher is permitted to show, before injunction issues, that the matter published is true and is published with good motives and for justifiable ends. If such a statute, authorizing suppression and injunction on such a basis, is constitutionally valid, it would be equally permissible for the Legislature to provide that at any time the publisher of any newspaper could be brought before a court, or even an administrative officer (as the constitutional protection may not be regarded as resting on mere procedural details), and required to produce proof of the truth of his publication, or of what he intended to publish and of his motives, or stand enjoined. If this can be done, the Legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends and restrain publication accordingly. And it would be but a step to a complete system of censorship. . . .

Equally unavailing is the insistence that the statute is designed to prevent the circulation of scandal which tends to disturb the public peace and to provoke assaults and the commission of crime. Charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication. . . . There is nothing new in the fact that charges of reprehensible conduct may create resentment and the disposition to resort to violent means of redress, but this well-understood tendency did not alter the determination to protect the press against censorship and restraint upon publication. As was said in *New Yorker Staats-Zeitung v. Nolan,* "If the township may prevent the circulation of a newspaper for no reason other than that some of its inhabitants may violently disagree with it, and resent its circulation by resorting to physical violence, there is no limit to what may be prohibited." The danger of violent reactions becomes greater with effective organization of defiant groups resenting exposure, and, if this consideration warranted legislative interference with the initial freedom of publication, the constitutional protection would be reduced to a mere form of words.

For these reasons we hold the statute, so far as it authorized the proceedings in this action . . . , to be an infringement of the liberty of the press. . . .

Judgment reversed.

Chief Justice Hughes's opinion appears to take a definitive position against prior censorship. He wrote, "The statute not only operates to suppress the offending newspaper . . . but to put the publisher under an effective censorship." But he acknowledged that the protection against "previous restraint is not absolutely unlimited." There may be exceptional circumstances under which government restraint is necessary. Hughes cited three vital interests that may justify government censorship: the protection of national security, the regulation of obscenity, and the prohibition of expression that would incite acts of violence.