V. Prior Restraint of Expression

"[L]iberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally, although not exclusively, immunity from previous restraints or censorship."—Chief Justice HUGHES

"The decision of the court ... gives to freedom of the press a meaning and a scope not heretofore recognized and construes 'liberty' in the due process clause of the 14th Amendment to put upon the states a Federal restriction that is without precedent."—Justice BUTLER

Near v. Minnesota

283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931).

In a series of articles published during Prohibition for the alleged purpose of pushing reform in Minneapolis' government, *The Saturday Press* vilified, among others, the mayor, the police chief, and the city's two largest newspapers for taking orders from "Jew Gangsters." One article asserted that "Practically every vendor of vile hooch, every owner of a moonshine still, every snake-faced gangster and embryonic yegg in the Twin Cities is a JEW," and urged Jews to "rid themselves of the odium and stigma the RODENTS OF THEIR OWN RACE HAVE BROUGHT UPON THEM."

The local prosecutor invoked a state statute that allowed a court to enjoin, as a public nuisance, a "malicious, scandalous and defamatory newspaper, magazine or other periodical." The trial court issued an order against the publisher, J.M. Near, barring future issues of the paper. The state supreme court affirmed. Near appealed to the U.S. Supreme Court.

Mr. Chief Justice **HUGHES** delivered the opinion of the Court. ...

This statute ... 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 14th Amendment from invasion by state action. ... Gitlow v. New York [1925]; Whitney v. California [1927]; Stromberg v. California [1931]. In maintaining this guaranty, the authority of the State to enact laws to promote the health, safety, morals and general welfare of its people is necessarily admitted. The limits of this sovereign power must always be determined with appropriate regard to the particular subject of its exercise. ... [T]his court has held that the power of the state stops short of interference with what are deemed to be certain indispensable requirements of the liberty assured. ... [Like liberty of contract,] [l]iberty of speech and of the press is also not an absolute right, and the state may punish its abuse. ... Liberty, in each of its phases, has its history and connotation and, in the present instance, the inquiry is as to the historic conception of the liberty of the press and whether the statute under review violates the essential attributes of that liberty. ...

... [I]n passing upon constitutional questions the court has regard to substance and not to

mere matters of form, and ... in accordance with familiar principles, the statute must be tested by its operation and effect. ... If we cut through mere details of procedure, the operation and effect of the statute ... 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 ... 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 distinction was early pointed out between the extent of the freedom with respect to censorship under our constitutional system and that enjoyed in England. Here, as Madison said, "The great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the executive, as in Great Britain, but from legislative restraint also."

... 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. This was the law of criminal libel apart from statute in most cases, if not in all. ...

... [I]t is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions. ... In the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment. For whatever wrong the appellant has committed or may commit, by his publications, the state appropriately affords both public and private redress by its libel laws. ... [T]he statute in question does not deal with punishments; it provides for no punishment, except in case of contempt for violation of the court's order, but for suppression and injunction, that is, for restraint upon publication.

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." Schenck v. United States [1919]. 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." Gompers v. Bucks Stove & Range Co. [1911]; *Schenck.* These limitations are not applicable here. ...

The exceptional nature of its limitations places in a strong light the general conception 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. The conception of the liberty of the press in this country had broadened with the exigencies of the colonial period and with the efforts to secure freedom from oppressive administration. That liberty was especially cherished for the immunity it afforded from previous restraint of the publication of censure of public officers and charges of official misconduct. ...

... Madison, who was the leading spirit in the preparation of the 1st Amendment of the Federal Constitution, thus described the practice and sentiment which led to the guaranties of liberty of the press in state constitutions:

> In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men of every description which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this footing it yet stands. ... Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the states, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits. 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 beneficent 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? Had "Sedition Acts," forbidding every publication that might bring the constituted agents into contempt or disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press, might not the United States have been languishing at this day under the infirmities of a sickly Confederation? Might they not, possibly, be miserable colonies, groaning under a foreign yoke?

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. ...

The importance of this immunity has not lessened. ... [T]he administration of government has become more complex, the opportunities for malfeasance and corruption have

multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. 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. ...

For these reasons we hold the statute, so far as it authorized the proceedings in this action under clause (b) of section one, to be an infringement of the liberty of the press guaranteed by the 14th Amendment. We should add that this decision rests upon the operation and effect of the statute, without regard to the question of the truth of the charges contained in the particular periodical. ...

Mr. Justice **BUTLER,** dissenting:

The decision of the court in this case declares Minnesota and every other state powerless to restrain by injunction the business of publishing and circulating among the people malicious, scandalous and defamatory periodicals that in due course of judicial procedure has been adjudged to be a public nuisance. It gives to freedom of the press a meaning and a scope not heretofore recognized and construes "liberty" in the due process clause of the 14th Amendment to put upon the states a Federal restriction that is without precedent. ...

In his work on the Constitution, ... Justice [Joseph] Story [, John Marshall's colleague, said] ...:

> That this amendment was intended to secure to every citizen an absolute right to speak, or write, or print whatever he might please, without any responsibility, public or private, therefor, is a supposition too wild to be indulged by any rational man. This would be to allow to every citizen a right to destroy at his pleasure the reputation, the peace, the property, and even the personal safety of every other citizen. ... Civil society could not go on under such circumstances. Men would then be obliged to resort to private vengeance to make up for the deficiencies of the law. ... It is plain, then, that the language of this amendment imports no more than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so always that he does not injure any other person in his rights, person, property, or reputation; and so always that he does not thereby disturb the public peace, or attempt to subvert the government. ...

The Minnesota statute does not operate as a *previous* restraint on publication within the proper meaning of that phrase. It does not authorize administrative control in advance such as was formerly exercised by the licensers and censors but prescribes a remedy to be enforced by a suit in equity. In this case there was previous publication made in the course of the business of regularly producing malicious, scandalous and defamatory periodicals. ... The restraint authorized is only in respect of continuing to do what has been duly adjudged to constitute a

nuisance. ... As that resulting from lewd publications constitutionally may be enjoined it is hard to understand why the one resulting from a regular business of malicious defamation may not. ...

Mr. Justice **VAN DEVANTER,** Mr. Justice **McREYNOLDS,** and Mr. Justice **SUTHERLAND,** concur in this opinion.

Editors' Notes

(1) **Query**: How useful for this case was a *textualist* approach? What other sort(s) of approach(es) did Hughes use? Butler? Did either consider the Constitution as including *only* the text? If not, what more?

(2) *Near* was the first case in which the Court held that the Fourteenth Amendment "incorporated" the First Amendment's protection of freedom of the press. Perhaps it is the fact that this was an initial voyage that made Hughes's opinion so cautious, so careful to point out limitations on freedom of the press rather than to explain its breadth. Court have since reduced many of the limitations that Hughes mentioned, especially libel laws where public officials have allegedly suffered injury. See *New York Times* (1964; reprinted above, p. 634) and *Hudnut* (1985; reprinted above, p. 710). Moreover, even judges now have very limited power to punish criticism as contempt.

(3) **Query:** Is there a theory, internally coherent and consistent with both the First Amendment and democratic theory, that would accord standards of "civility" the weight that Butler assigned them?

(4) Hughes said that Minnesota's statute was unusual if not unique, implying widespread legal support for freedom of communication. Such nostalgia may have been misplaced. See David M. Rabban, "The First Amendment in its Forgotten Years," 90 *Yale L.J.* 514 (1981), who argues that there was much litigation involving claims to freedom of speech and press during the early twentieth century and that the "overwhelming majority of pre [World War I] decisions in all jurisdictions rejected free speech claims. ... No court was more unsympathetic to freedom of expression than the Supreme Court. ..."