Prior Restraints

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Prior Restraints

Prior restraints are legal actions by the government to prevent publication, in advance, of words, pictures, or other communications. There are two principal types of prior restraint: licensing and injunctions. Licensing schemes require that one seek permission from a state agent prior to speaking. An injunction is a court order that, when applied to communications, forbids future publication or distribution of a particular communication.

A system of prior restraint stands in contrast to a system providing for subsequent punishment. That is, ‘‘prior restraint’’ refers to the timing of regulation: a prior restraint may be unconstitutional even though the particular communication might be validly restricted under a system of subsequent punishment. Because of the special harms associated with prior restraints, they are presumptively unconstitutional.

The First Amendment was enacted against a background of English press licensing. English law once required submission of all publications to government officials in advance of publication. Anything published without a license was a crime—even if the censor would have approved the publication had it been properly submitted. In 1769, William Blackstone (http://uscivilliberties.org/historical-overview/3207-blackstone-and-common-law-prohibition-on-prior-restraints.html), the renowned English law scholar, criticized licensing schemes because they subject the press ‘‘to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government.’’

In 1694, English law had abandoned the system of prior restraint—a hundred years before the First Amendment was adopted. Yet, many scholars have debated whether the framers of the First Amendment intended to prohibit anything more than prior restraints. The better view is that the Framers were also reacting to English ‘‘seditious libel,’’ the crime of criticizing the behavior of the government or government officials.

Special Harms Associated with Licensing; Procedural Safeguards

Prior restraints embody harms unassociated with subsequent punishment. For example, licensing schemes grant enormous discretion to a single person or agency to decide what ideas may be circulated to the public. In Lovell v. Griffin (303 U.S. 444, 1938), for example, the Supreme Court invalidated a city ordinance that prohibited distribution of ‘‘literature of any kind’’ within the city without first obtaining written permission from the city manager. The Court emphasized the sheer breadth of the ordinance, which covered any type of publication, anywhere in the city, at any time, through any means of distribution, at the city manager’s sole discretion. In other cases, the Court has underscored ‘‘the difficulty of effectively detecting, reviewing, and correcting content based censorship, without standards by which to measure the licensor’s action.’’

When preclearance is required, abuse of power is very difficult to prevent. When the censor is charged with keeping ‘‘obscenity’’ (for example) out of circulation, the pressures all tilt towards overinclusion. With a stroke of a pen, it is easy to ban problematic publications; the censor is likely to face less trouble if he or she denies publication rights to marginal cases, and censors tend to respond more to the immediate pressure of containing ‘‘dangerous ideas,’’ than to an abstract interest in ‘‘free speech.’’

Licensing schemes are also pernicious because they often lead to self-censorship by speakers. When those who wish to communicate must seek permission before publishing, they often anticipate how the censor will respond and thus ‘‘reform’’ their communication before even seeking a license. If one is turned down for a license, he or she must start the process all over again or else fight with the censor. Meanwhile, the effort takes time and energy, and whatever benefits lodged with timely communications are lost. The system of communication thus risks becoming trite, routine, and responsive only to the arbitrariness of the censor’s personal predilections.

The fact that licensing schemes are presumptively unconstitutional does not mean that they are invariably unconstitutional. The harms of licensing may be ameliorated if the licensing official is given ‘‘objective’’ standards to administer and incorporates other procedural safeguards.

In one case (Freedman v. Maryland, 380 U.S. 51, 1965), a distributor had exhibited a movie without first submitting the picture to the censorship board, violating Maryland’s statutes forbidding the exhibition of obscene films. He was convicted for failing to obtain preclearance, even though the state would have licensed the movie had it been properly submitted. In its review, the Court emphasized the ‘‘heavy presumption’’ against licensing, but described procedural requirements (in addition to the ‘‘objective standards’’) that would save such a statute from a finding of unconstitutionality. First, the burden rests with the censor. Second, the censor must expeditiously act to grant the license or to seek a judicial determination that the communication may be barred. Furthermore, the final determination must be made by a court, not the censor, and any temporary restraint on publication must be severely limited to the time absolutely essential to prompt judicial resolution.

These Freedman guidelines have proven important in contexts other than obscenity. The end result is that government may adopt licensing schemes to guard against certain carefully delineated harms of speech, but must adopt appropriate procedures designed to forestall arbitrary censorship decisions.

Injunctions

A second major type of prior restraint is injunctions against speech activities, classically illustrated by Near v. Minnesota, 283 U.S. 697 (1931). In Near, a Minnesota statute authorized prosecutors to seek ‘‘abatement’’ against nuisance ‘‘malicious, scandalous and defamatory’’ publications. A newspaper published several articles charging that gangsters controlled Minneapolis and that law enforcement failed in its duties. The publication made vague allegations against the chief of police, including ‘‘illicit relations with gangsters [and] participation in graft.’’ Acting on the authority of the statute, a prosecutor sought an order of abatement against the newspaper, and a state judge permanently enjoined the publishers from circulating in the future any ‘‘malicious, scandalous or defamatory’’ publication.

On the basis of past offenses, the order forbade all future publications that might, after the fact, be found ‘‘scandalous.’’ Thus, the publishers would have to take the risk that anything they ever published in the future might violate the lower court’s order. The Supreme Court held that by setting up a system of prior restraint, the statue violated the First Amendment, as did any injunctions issued under the statute’s authority.

The Court reached a similar result in the Keefe case (Organization for a Better Austin v. Keefe, 402 U.S. 415, 1971), where it held invalid as a prior restraint an injunction preventing distribution of eighteen thousand pamphlets attacking alleged ‘‘blockbusting’’ real estate activities. As the Court later described, the injunction against Keefe ‘‘operate[d], not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature ‘of any kind’ in a city of 18,000.’’

One of the key characteristics of an injunction is that violation is punishable by a contempt prosecution, a violation separate from the underlying offense. Consider Walker v. City of Birmingham (388 U.S. 307, 1967), a case arising out of the civil right movement in 1963. In Birmingham, Alabama, a group of black ministers, including the Rev. Martin Luther King, Jr., refused to obtain a parade permit prior to marching during Good Friday. City officials wishing to stop the march obtained an injunction from a cooperative state court judge, who, without hearing from the marchers, issued an order requiring them to comply with the vaguely worded city ordinance. Indeed, the city’s ordinance was ultimately found unconstitutional as an invalid licensing scheme. However, rather than comply with the judge’s order, the marchers openly flouted it and were held in contempt.

The Supreme Court held that the marchers could be held in contempt of the injunction ordering compliance with the ordinance, even though the ordinance was unconstitutional. Moreover, they were not permitted to defend against the contempt charges by asserting the unconstitutionality of the

ordinance. This latter rule, adopted five to four by the Court in Walker, became known as the ‘‘collateral bar rule.’’

Because injunctions are so powerful, the Court has emphasized the very limited circumstances under which courts may grant them in cases involving speech. For example, the procedure followed in Walker in obtaining the injunction—that is, without giving the marchers notice or an opportunity to be heard—is unconstitutional in all but the most extreme circumstances, such as lack of time or inability to notify. A similar procedure was found unconstitutional in Carroll v. President & Commissioners of Princess Anne, 393 U.S. 175 (1968), when local officials obtained an injunction forbidding a rally. They feared violence because, at a rally the previous day, the right-wing organizers made ‘‘militantly racist’’ speeches to a crowd of whites and blacks and promised to continue the next day. The Supreme Court held that even in those circumstances, injunctions barring speech activities may not be issued unless the speakers are given an opportunity to be heard.

Although many injunctions against speech might qualify as ‘‘prior’’ restraints, not all injunctions restricting speech activities are prior restraints. The key question is often whether there has been a full adjudication of the merits prior to the issuance of an injunction. Consider a judicial determination that particular materials are obscene and thus may be regulated by the government. May further distribution of the obscene material be enjoined? The answer is yes: the Court has upheld the use of injunctions to restrain continued publication of material deemed obscene. In Kingsley Books v. Brown, 354 U.S. 436 (1957), the Court distinguished Near v. Minnesota as a case in which a state had ‘‘empowered its courts to enjoin the dissemination of future issues of a publication because its past issues had been found offensive.’’

A similar result occurred when a newspaper published ‘‘help wanted’’ job listings under headings designating job preference by sex, which was illegal in the jurisdiction. The Court explained in Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973), that an injunction forbidding the practice was not a prior restraint where the lower court had enjoined the practice only after a full hearing on the merits that the underlying practice was unlawful. On the basis of the Pittsburgh case, some scholars have argued that only preliminary injunctions are presumptively unconstitutional. On this reading, injunctions entered against communications are not prior restraints if they follow a full hearing on the merits that the communication may constitutionally be regulated.

In the obscenity context and Pittsburgh Press, courts enjoined particular publications that were unprotected communications. A related issue concerns a context in which a speaker has in the past engaged in unprotected communicative activities, and an injunction is sought to prevent the speaker from engaging in future similar behavior. An injunction issued in such a context begins to resemble the Near injunction, which predicated a future-oriented injunction against the press based on the newspaper’s past behavior.

The Court has wrestled with this problem in addressing several abortion-related protests. In Madsen v. Womens' Health Center, 512 U.S. 753 (1994), abortion protesters surrounded an abortion clinic, obstructing entrances and public thoroughfares and interfering with the rights of patients entering the clinic to seek medical assistance. The state court issued an injunction to protect access to the clinic, including erecting a 36-foot ''buffer zone'' around the clinic, after narrower orders had not succeeded in protecting clinic access. The injunction applied to the leaders of the protest ''and all persons acting in concert'' with them.

On appeal, the Supreme Court concluded that the injunction was not a prior restraint because it had been issued ''not because of the content of '' the demonstrator's expression, but ''because of their prior unlawful conduct'' in earlier demonstrations. Yet, because injunctions against speech activities pose ''greater risks of censorship and discriminatory application than do general ordinances,'' the Court reviewed the injunction with a heightened standard of review. The test is whether the injunction ''burdens no more speech than necessary'' to protect the important governmental interest.

Applying this standard, the Madsen Court upheld the buffer zone around street and sidewalk entrances to the clinic, but reversed the order as it applied to the side and rear of the clinic because access had not been impeded in those areas. In this and several subsequent cases, the Court has affirmed a fixed 15-foot protected zone around clinic entrances, but overturned a 15- foot ''floating bubble'' injunction—one that followed persons entering or leaving clinics. The Court has also overturned a ban on carrying signs or other images outside clinics, but affirmed a noise ban that protected patients within a clinic from raucous noises likely to interfere with medical treatment.

The doctrine of prior restraint came into play in 1977 when Neo-Nazis announced their intention to march through the largely Jewish community of Skokie, Illinois, where one in six residents was a Holocaust survivor. The village obtained an injunction against the Nazis banning parading in uniform, displaying swastikas, or distributing pamphlets that ''promote hatred against persons of Jewish faith.'' State courts refused to stay the injunction pending appeal. The Supreme Court reversed, concluding that the delay of a year or more while the case was appealed was a burden on the Nazis' First Amendment rights and that the state was required to adopt ''strict procedural safeguards'' including immediate appellate review of any such injunctions restraining speech activity.

In general, injunctions restraining speech activity are not always invalid, but because they restrict communicative activity, lower courts must ensure that procedural protections are afforded. Reviewing courts, in turn, must evaluate such injunctions to ensure that they restrict no more speech than necessary to protect important governmental interests.

Injunctions to Protect National Security

An important context in which the appropriateness of a previous restraint forbidding speech has arisen is national security. In Near, the Court had suggested that an injunction might be properly issued against speech to ''prevent actual obstruction to [the government's] recruiting service or the publication of the sailing dates of transports or the number and location of troops.''

Subsequently, in the important decision in New York Times Co. v. United States, 403 U.S. 713 (1971), the Supreme Court explored the extent to which ‘‘national security’’ could justify a prior restraint on publication. The government sought to enjoin publication of a series of studies called ‘‘The Pentagon Papers,’’ which analyzed the history of U.S. involvement in Indochina, from clandestine operations in the 1950s to the invasion of Vietnam. By the time of the 1971 study, the American invasion of Vietnam involved over a half-million troops and incited the mobilization of millions of Americans in antiwar protests. The government asserted that publication could interfere with national security, risk lives, and prolong the war. The newspapers countered that, at most, publication would embarrass government officials, but would satisfy the extraordinary public interest in the history of how the war started and was maintained.

The Supreme Court ruled six to three against the government. In addition to an opinion by the Court, every justice authored a separate opinion. Because the majority did not speak with one voice, the reasoning of the justices varied. Some justices argued that a prior restraint is never justified. Others argued that, in any event, no injunction could ever be justified based on bald assertion: the government would have to prove a great threat to national security. Another key group of justices argued that, in the absence of a statute authorizing the issuance of an injunction, the Court had no authority to act. The three dissenting judges were unhappy about the race through the courts and were willing to trust the national security assertions by government officials. Nonetheless, because of the splits on the Court, the key question left open for a future case is whether an injunction would have been granted if Congress had authorized such an extraordinary remedy.

This latter question was addressed in United States v. Progressive, 467 F.Supp. 990 (W.D. Wisc. 1979), a case that did not get to the Supreme Court. A monthly magazine, The Progressive, planned to publish a technical article on hydrogen bomb design in an article entitled, ‘‘The H-Bomb Secret: How We Got It, Why We’re Telling It.’’ The Progressive claimed that the article merely summarized information already available to the public, but at the request of the government a lower federal court issued a preliminary order forbidding publication. The lower court ruled that the case was different from the Pentagon Papers case because the earlier case had involved historical material; the government had not proved that publication affected national security; here, there was a statutory basis for issuing an injunction. Progressive never reached final decision, however. Before a full hearing, a different magazine published similar information, and the government abandoned its case.

Even if it cannot prevent the press from publishing merely embarrassing information, may the government prevent its employees from disclosing secrets? In Snepp v. United States, 444 U.S. 507 (1980), a former CIA employee had agreed not to publish any information without obtaining preclearance from the agency. Without doing so, he published a book about his activities while he was an agent in Vietnam. Even though the book contained no classified information (http://uscivilliberties.org/themes/3609-classified-information.html), the Court regarded the government’s preclearance procedure as a reasonable means of enforcing its interests in protecting

state secrets. It then granted the CIA the relief it sought: all Snepp's profits from the sale of his book, Injunctions to Ensure Fair Trials, Protect Functioning of Governmental Offices, & Guard Privacy were turned over to the CIA.

In addition to national security cases, some courts have issued injunctions to protect the right to a fair trial. The Constitution guarantees criminal defendants the right to a fair trial, which includes the presumption of innocence. Extensive pretrial coverage can jeopardize these rights, especially when potential jury members are likely to be prejudiced against the accused by pretrial publicity.

In Nebraska Press Association v. Stuart, 427 U.S. 539 (1976), a trial court attempted to protect the fair trial rights of the accused by prohibiting the press from publishing the accused's confessions or any other facts ''strongly implicative'' of guilt. The Supreme Court overturned the order. Although finding that publicity might impair the defendant's rights, the Court held that alternatives were available short of a gag order on the press that would have protected the defendant without impeding the important public interest in reporting on criminal trials. Such alternatives included moving the trial to another location; sequestering jurors; and issuing gag orders directed to participants in the criminal trial, including the lawyers, police, and witnesses in the case.

Indeed, such gag orders directed to trial participants, which operate like prior restraints, are frequently issued in criminal trials. The Court upheld gag orders directed at lawyers in Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991), holding that lawyers participating in an active case can be prohibited from making statements that have ''substantial likelihood of materially prejudicing'' the outcome.

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See also Abortion Protest Cases (http://uscivilliberties.org/cases/2964-abortion-protest-cases.html); Anti-Abortion Protest and Freedom of Speech (http://uscivilliberties.org/themes/3130-anti-abortion-protest-and-freedom-of-speech.html); Blackstone (http://uscivilliberties.org/historical-overview/3207-blackstone-and-common-law-prohibition-on-prior-restraints.html) and Common- Law Prohibition on Prior Restraints; Captive Audiences and Free Speech (http://uscivilliberties.org/themes/3304-captive-audiences-and-free-speech.html); Content-Based Regulation of Speech (http://uscivilliberties.org/themes/3645-content-based-regulation-of-speech.html); Content-Neutral Regulation of Speech (http://uscivilliberties.org/themes/3646-content-neutral-regulation-of-speech.html); Freedom of Access to Clinic Entrances (FACE) Act, 108 Stat. 694 (1994); Gag Orders in Judicial Proceedings; Gag Rule; King, Martin Luther, Jr.; Madsen v. Women's Health Center, 512 U.S. 753 (1994); Marches and Demonstrations; Movie Ratings and Censorship; National Security and Freedom of Speech; National Security Prior Restraints; Near v. Minnesota, 283 U.S. 697 (1931); New York Times Co. v. United States, 403 U.S. 713 (1971); Obscenity; Picketing; Public Forum Doctrines; Snepp v. United States, 444 U.S. 507 (1980); Traditional Public Forums; United States v. The Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979); Viewpoint Discrimination in Free Speech Cases

Related:

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