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Historical and Ideological Interpretations of the U.S. Press Freedom Environment——An Analysis of Prior Restraints as a Case Study

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Abstract: *The First Amendment and Section 1 of the Fourteenth Amendment not only protect freedom of speech, but also provide institutional safeguards for freedom of speech and the press. In practical judicial application, courts have tended to protect a particular ideology regarding freedom of expression through the interpretation of the boundaries of the scope of the amendment's protection. This article hopes to discuss how the jurisprudential and ideological interpretations of these two amendments have been made in the U.S. judicial and public opinion environment, using Near v. Minnesota, 283U.S. 697 (1931) as an example.*

Keywords: *prior restraint, first amendment, fourteenth amendment, press liberty*

1. Introduction

The freedom of the press in the West came into public area in the 17th century along with the struggle between the British bourgeoisie and the feudal dynasty of The House of Stuart. In 1644, John Milton made a speech to the British Parliament in order to fight for the freedom of speech of the people and further develop the revolutionary forces. After ratification until the early twentieth century the First Amendment protected citizens against censorship by the federal government, while state governments regularly censored newspapers. An example is that abolitionist newspapers in the South and slave-holding newspapers in the North faced censorship before the Civil War. State regulation of the press continued until 1931, when the Supreme Court used the due process requirements of the Fourteenth Amendment to apply the First Amendment's protection of press freedom to state governments in *Near v. Minnesota* (the doctrine of incorporation).

Back to that time, Minnesota law gave courts the right to stop the publication of any "malicious, scandalous and defamatory newspaper, magazine or other periodical." This law was used to stop a paper named The Saturday Press, published by Jay Near, who challenged the constitutionality of the law in the U.S. Supreme Court subsequently.

The court, eventually, in a 5 to 4 opinion led by Chief Justice Hughes, reversed, finding "the chief purpose" of the First Amendment being to prevent prior restraints. The Supreme Court has announced that "[t]he special vice of a prior restraint is that communication will be suppressed……The prohibition on prior restraint, thus, is essentially a limitation on restraints until a final judicial determination that the restricted speech is not protected by the First Amendment."[1]

2. Amendments and Prior Restraint History

As a key concept often mentioned, prior review has long faced the dilemma of the lack of legal rationality, and the understanding of this concept is divided by the very different references to legal provisions. There are no references to prior restraint in the First Amendment or any other context of the Constitution[2], and accordingly there are no linguistic interpretive constrains to consider[3].

However, a tacit interpretive community seems to have formed between the judicial system (including legislators, courts, and lawyers)[4]. By tracing the history of prior review and comparing the differences in Anglo-American judicial practice and the application of constitutional amendments to adjudication, the American legal system (with constitutional amendments as the most critical text) has adopted a severe limitation on prior review.

Restraint came almost along with printing at the same time in 1476, England. In 1538, the first

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comprehensive licensing system was formally issued by a new edict, Proclamation Antiquity 2(97). In 1559, Queen Elizabeth's loyal injunctions required prior review to all the publications. The revolt against prior restraint, though never ending, has had little success for quite some time.

The first major turning point in the battle against prior restraint was in the eighteenth-century, aiming to transfer the power to determine from the judge to the jury. During this time occurred the famous trial of William Penn. Eventually, by the time the First Amendment was ratified, a consensus had developed in England, which believe that liberty of the press required the ability to put forth to the world what one wanted. Sir William Blackstone admirably comment that[5]:

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. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.

Significantly influenced by this doctrine, the U.S. judiciary became inclined to link prior restraint closely to freedom of speech and press, and thus to pay special attention to the potentially serious consequences of the loss of press freedom. This tendency was translated into a decision through the opportunity provided by the Near case, and has since significantly influenced the basic attitudes of the American public and government on this issue. After *Near*, court-imposed prior restraint orders received little support in the United States. The Court appeared to be more serious about taking First Amendment claims, which made a real difference in the strength of the press freedom argument. As an unintended consequence, out of intense fear of other states enacting laws similar to Pennsylvania's, the press, which had been clearly divided along partisan and political lines, historically united as a community to take on the obligation to uphold the First Amendment and continue that honorable role to now. This sense of community has culminated in the creation of various press-freedom interest groups, such as the Reporters Committee, and helped shaped First Amendment doctrine.

The First Amendment, like the rest of the Bill of Rights, originally restricted only what the federal government may do and did not bind the states. In 1868, however, the Fourteenth Amendment was added to the U.S. Constitution, and it prohibited states from denying people "liberty" without "due process." Since then the U.S. Supreme Court has gradually used the due process clause to apply most of the Bill of Rights to state governments.

3. Ideological Implications of the History of Prior Restraint

The deeper connotation behind this extremely cautious approach to prior censorship, which is related to the U.S. constitutional guarantee of freedom of speech and press, is a shift from a more political to a more individualistic view of freedom. The absence of restraints is reflected as well in the very terms in which these rights and privileges are described. What would once have been referred to as "freedom of speech and of the press" (drawing upon the language of the First Amendment to the Constitution of the United States) is now often referred to as "freedom of expression."

The history of prior restraint is actually a process in which two ideologies play off each other[6], with different interpretations of freedom of expression at its core. One view of freedom holds that citizens should be trusted with the full capacity for political autonomy and be given ample space to cultivate and exercise their political literacy, and that freedom of expression provides this valuable opportunity. The other view asserts that only law-abiding citizens can properly exercise their liberty rights and that the law should not be used for rehabilitation but for prevention. The Near case seems to be seen as giving a definitive interpretation of the argument[7].

Liberty of the press to scrutinize closely the conduct of public affairs was essential, said Chief Justice Hughes for the Court. [8]"[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. "

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4. Discussion

This article focuses on two dimensions, historical and ideological, and compares specific precedents to sort out the protection of freedom of speech and press in the U.S. constitutional amendments. As many scholars have noted, the United States is in an era of minimal persecution of freedom of speech and the press, and it is reasonable to believe that the establishment of such an order depends on a well-established rule of law and a consistent understanding of the law. Prior restraint——as an entry point for this paper——has a history almost as long as that of press publication, but it has been strictly curtailed by constitutional amendments in the United States. This conclusion facilitates a rethinking of the relevant parts of the world's press and publication history, the establishment and improvement of censorship that is appropriate to different national contexts, and the protection of freedom of expression and the full realization of press freedom.

References

[1] Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376, 390 (1973); see also Vance v. Universal Amusement Co., 445 U.S. 308, 315–316 (1980) ("the burden of supporting an injunction against a future exhibition [of allegedly obscene motion pictures] is even heavier than the burden of justifying the imposition of a criminal sanction for a past communication").

[2] Redish, M. H. (1984). The Proper Role of the Prior Restraint Doctrine in First Amendment Theory. Virginia Law Review, 53-100.

[3] Bendor, A. L. (1999). Prior Restraint, Incommensurability, and the Constitutionalism of Means. Fordham L. Rev., 68, 289.

[4] Mayton, W. T. (1981). Toward a Theory of First Amendment Process: Injunctions of Speech Subsequent Punishment and the Costs of the Prior Restraint Doctrine. Cornell L. Rev., 67, 245.

[5] Meyerson, M. I. (2000). Neglected History of the Prior Restraint Doctrine: Rediscovering the Link between the First Amendment and the Separation of Powers. Ind. L. Rev., 34, 295.

[6] Hunt, F. K. (1850). The fourth estate: Contributions towards a history of newspapers, and of the liberty of the press (Vol. 1). D. Bogue.

[7] Meyerson, M. I. (2000). Rewriting Near v. Minnesota: Creating a Complete Definition of Prior Restraint. Mercer L. Rev., 52, 1087.

[8] Murphy, P. L. (1981). Near v. Minnesota in the Context of Historical Developments. Minn. L. Rev., 66, 95.