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Free Speech And Prior Restraints - Kovach v. Maddux

Comments and Casenotes

Free Speech And Prior Restraints

Kovach v. Maddux[1]

Plaintiffs Kovach and Tennessean Newspaper, Inc. brought an action against the speaker and sergeant-at-arms of the Tennessee State Senate seeking to enjoin the enforcement of a resolution of the State Senate[2] which forbade the plaintiffs' access to the press section of the Senate floor until the publisher of the plaintiff newspaper agreed in writing that his reporters would abide by the rules of the Senate. Prior to this action the newspaper had been vehement in its criticism of the use of secret sessions by the State Senate. The editor of the newspaper, believing the secret sessions violated the right of the press to cover the legislative process, had instructed his reporters to refuse to leave the Senate floor when a secret session was called until asked to leave by the sergeant-at-arms. The plaintiff Kovach was a reporter. Following his editor's instruction, he refused to leave the Senate floor when a secret session was called. The sergeant-at-arms could not be found and the Senate adjourned for the day. The following day, the Senate adopted the above-mentioned resolution conditioning the entrance to the Senate floor of any members of the staff of the *Nashville Tennessean* upon the editor's agreement that they would abide by the Senate rules.

The District Court granted the injunction, basing its decision in part[3] on the fact that the resolution was a prior restraint of the plaintiff's right to collect and distribute news under the first amendment to the Constitution of the United States, enforceable against the state through the fourteenth amendment. The distinction was made by the court that although the Senate could hold the plaintiff Kovach in contempt for unproper actions, they could not restrain the newspaper's right to criticize the Senate by coercing it to agree to "abide by" the

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1. 238 F. Supp. 835 (M.D. Tenn. 1965).
2. Senate Resolution No. 9 reads as follows:

> BE IT RESOLVED by the Senate of the State of Tennessee that all representatives of the NASHVILLE TENNESSEAN are hereby denied access to the floor of the Senate for the remainder of the Session of the 84th General Assembly as a result of the defiance by the representatives of that publication on February 3, 1965 of the rules of the Senate and the ruling of the Chairman of the Committee on Local Government in enforcement of its orderly procedures.
>
> This order will remain in effect until such time as the publisher of the offending publication by letter informs the Clerk of the Senate that the offending publication's representatives will henceforth abide by the rules of this body.

Id. at 837.

3. The court also relied in part on the conclusion that the requirement of a "serious, direct and immediate" threat to a legitimate state interest had not been met, and on the fact that the Senate had failed to demonstrate that there was no alternative to the resolution enacted.

rules of the Senate. The court noted that "abide by" could well mean acquiescence and acceptance. Pursuing this semantic possibility, the court characterized the resolution as conditioning "the availability of the conveniences and advantages of the press section of the Senate floor upon the plaintiff newspaper pledging itself to a condition which virtually requires it to surrender any opposition to Senate rules. . . ."[4]

Although the challenged restriction had been imposed solely upon staff of the plaintiff's newspaper, the District Court did not explicitly claim that the plaintiff newspaper was denied equal protection of the law. Rather it seems to have wanted to reach the issue of whether a legislative body can lawfully impose a prior restraint on the freedom of the press as a means of enforcing its rules. Thus the case appears to say that the legislature could not have imposed such a restraint even by a statute applying equally to all newspapers and including adequate procedural safeguards. The examination of the prior restraint cases which follows will attempt to test this very broad statement of the decision of the District Court.

There are three types of cases in which the prior restraint doctrine has been deemed relevant to the analysis of a problem involving limitations on free speech. The first situation arises where the content of the material suppressed is not relevant to the application of a statutory restraint. The second type exists where an administrative official has been granted a discretionary power over who may exercise certain first amendment rights. In these cases the content may be made relevant by the official's selective or discriminatory enforcement of a statute or ordinance. In the last situation the content of the exercise of the right is made specifically relevant by the language of the statute or ordinance itself. In the cases where the content is relevant, no speech is censorable prior to the act or punishable subsequent to the act unless it creates a "clear and present danger of a serious substantive evil."[5]

Anglo-American law, being especially wary of infringement on the exercise of a legitimate freedom, has scrutinized the prior restraint much more carefully than the subsequent punishment. Blackstone considered prior censorship the essence of state control of the press.[6] The Supreme Court came to the same conclusion in *Near v. Minnesota,*[7] which is considered the landmark case on the subject.[8] The Court in the *Near* case went so far as to say that the major purpose of the first amendment was protection from previous restraints on publication.[9]

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4. *Id.* at 845.

5. Terminiello v. Chicago, 337 U.S. 1, 4 (1949). Generally, the Supreme Court has said that subsequent punishments are only enforceable where the speech presents a "clear and present danger" of producing action which the state has a valid interest in preventing. See Dennis v. United States, 341 U.S. 494 (1951); Gitlow v. New York, 268 U.S. 652 (1925); Schenck v. United States, 249 U.S. 41 (1919). A discussion of the "clear and present danger" test is not within the scope of this note. For further investigation see Mendelson, *Clear and Present Danger — From Schenck to Dennis,* 52 COLUM. L. REV. 313 (1952); Schmandt, *The Clear and Present Danger Doctrine, A Reappraisal in the Light of Dennis v. U.S.,* 1 ST. LOUIS U.L.J. 265 (1951).

6. 4 BLACKSTONE COMMENTARIES 151–52 (Lewis ed. 1922).

7. 283 U.S. 697 (1931).

8. Emerson, *The Doctrine of Prior Restraint,* 20 LAW & CONTEMP. PROB. 648, 654 (1955).

9. 283 U.S. 697, 713 (1931).

The Court also attempted to outline the situations where expression could properly be suppressed prior to public dissemination.[10] These were: (1) publication of matters concerning national security; (2) obscenity; and (3) incitement to acts of violence which threaten the security of community life.[11]

However, the prior restraint doctrine of *Near* has often been argued in cases not involving any of the types of restrictions enumerated in *Near* but instead in cases challenging state or local statutes limiting other types of activity.[12] For example, the Supreme Court has stated that a city or state may constitutionally limit the times and places where first amendment rights are exercised, if the statute is safeguarding the public order.[13] In cases where the statute is so drawn as to make the content of the freedom to be exercised irrelevant, the court should merely weigh the value of the conflicting interests. In respect of such a statute, the Court, in *Saia v. New York*,[14] said: "Courts must balance the various community interests in passing on the constitutionality of local regulations of the character involved here. But in that process they should be mindful to keep the freedoms of the First Amendment in a preferred position."[15]

In weighing these factors the Court has on occasion decided that the statute in question, although in effect limiting the exercise of a first amendment freedom, was sufficiently restrictive in application as to be a proper exercise of the state's or municipality's duty to safeguard the public order.[16] In *Lovell v. City of Griffin*,[17] a city ordinance which restricted the right to distribute circulars without a permit from city officials was held unconstitutional. The avowed purpose of the statute was to prevent the harrying of the local citizenry on the streets and the littering of the streets.[18] The ordinance was not limited to those things and places which the Court believed could have been

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10. *Id.* at 716.

11. This attempted listing of fields in which prior restraints may be valid has been called "not carefully considered and scarcely be said to have settled the issue." Emerson, *supra* note 8, at 661.

12. See, *e.g.*, Staub v. City of Baxley, 355 U.S. 313 (1958); Kunz v. New York, 340 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. State, 308 U.S. 147 (1939); Hague v. C.I.O., 307 U.S. 496 (1939); Lovell v. Griffin, 303 U.S. 444 (1938). A good review of the cases dealing with licensing can be found in State v. Corbisiero, 67 N.J. Super. 170, 170 A.2d 74 (1961).

13. See, *e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 304 (1940): "It is equally clear that a State may by General and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment." See also Lovell v. Griffin, 303 U.S. 444, 451 (1938), where the Court indicates that a state may have the right to restrain speech if the statute is sufficiently limited in application and promotes a vital state interest.

14. 334 U.S. 558 (1948).

15. *Id.* at 562.

16. See, *e.g.*, Poulos v. New Hampshire, 345 U.S. 395 (1953); Cox v. New Hampshire, 312 U.S. 569 (1941). In *Poulos* the Court said, at page 405: "The ordinance merely calls for the adjustment of the unrestrained exercise of religions with the reasonable comfort and convenience of the whole city." Cox deals with a right to parade.

17. 303 U.S. 444 (1938).

18. See argument for the appellee, 303 U.S. 444, 445 (1938).

properly regulated by the city.[19] The Court could have stopped here, but instead went on to discuss the fact that the ordinance applied prior to the act, and in part based its decision on the opinion in the *Near* case.[20]

The fact that the court did proceed to discuss prior restraints was not only unnecessary, but also misleading. The opinion would lead one to believe that finding the restraint prior and not subsequent was a necessary holding of the case. However, the fallability of such reasoning is indicated by the case of *Schneider v. State*,[21] decided only one year after the *Lovell* case. The Court in *Schneider* was faced with four statutes. Three were criminal statutes which prohibited the distribution of handbills to the public and which applied sanctions subsequent to the violation.[22] The other required the obtaining of a license before such distribution could take place.[23] The Court held all four unconstitutional. Regarding the first three, the Court balanced the interest involved and said: "We are of opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it."[24] As to the fourth ordinance, the court emphasized the priorness of the application of the ordinance and held it to be an unconstitutional prior restraint.

When a court considers one of these non-content ordinances, it is apparent that the primary question to be asked, especially in the light of those cases finding some such ordinances applying prior to the act constitutional and valid,[25] is whether the state interest being protected is substantial enough to allow the state to restrict certain actions, not whether the restraint is prior or subsequent to the act. If not, then the statute or ordinances should be invalidated without a discussion of prior restraints. It would seem that the same reasoning utilized regarding the validity of criminal ordinances could have been equally well applied to the licensing statute. The Court could have concluded that the state is not justified in punishing or licensing a person rightfully on a public street from handing literature to one willing to receive it.

In broaching the prior restraint element of the case, the Court in *Schneider* was presented with a type of ordinance where the question of the application of the prior restraint doctrine is a closer one, even

19. The Court said of the statute: "It is not limited to ways which might be regarded as inconsistent with the maintenance of public order or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets." *Id.* at 451.

20. *Id.* at 451–52.

21. 308 U.S. 147 (1939).

22. These ordinances were from Los Angeles, Milwaukee, and Worcester, Massachusetts. The Los Angeles ordinance provided: "No person shall distribute any handbill to or among pedestrians along or upon any street, sidewalk or park, or to passengers on any street car, or throw, place or attach any hand-bill in, to, or upon any automobile or other vehicle." *Id.* at 154. The other two were very similar to the Los Angeles ordinance. *Id.* at 155–56.

23. This ordinance was from Irvington, New Jersey and provided: "No person except as in this ordinance provided shall canvass, solicit, distribute circulars, or other matter, or call from house to house in the Town of Irvington without first having reported to and received a written permit from the Chief of Police or the officer in charge of Police Headquarters."

24. *Id.* at 162.

25. See note 16 *supra*.

though the Court need not have reached that issue in the case. The Irvington ordinance[26] was one where the right to distribute hand-bills was left to the discretion of an administrative official. Even though the ordinance was on its face a non-content ordinance, the right of discretion makes such an ordinance different from those discussed above, in that here the content may become relevant by the exercise of the discretionary power of the administrator. The problem raised by such a statute is distinguishable from one where the standards for the granting of a license are clear.[27] In the cases holding unconstitutional such discretion over the granting of a license in the hands of an administrator, the Court has invalidated this discretionary power as a prior restraint on the freedom sought to be exercised.[28] But, the fact that the restraint comes prior or subsequent to the act is also not material in these cases. In *Cox v. Louisiana*[29] the appellants were arrested and charged on two counts. One was the violation of a statute which prohibited the obstruction of streets and sidewalks.[30] This statute applied subsequent, not prior, to the acts restricted. The Court recognized the right of the state to regulate such behavior, but found that in fact the police were allowed to discriminate in their arrests for violations of the statute. Holding the statute unconstitutional as applied by the police, the Court said

> It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups *either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute.*[31]

This distinction then between restraints prior and subsequent in these discretionary cases is also illusory.

A rule is therefore suggested for cases where the statute on its face is one whose apparent purpose is not the suppression of a first amendment right, but the protection of a local interest, regardless of whether the restriction applies prior or subsequent to the act. Accordingly, if the value to the state of the protection secured by the ordinance

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26. See note 23 *supra*.

27. Where the statute or ordinance allows an administrator the right to discriminatorily license, the statute can no longer be regarded as one whose purpose is to safeguard the public's interest in order, clean streets or whatever. Therefore, the purpose is no longer one which the state may use to regulate the exercise of first amendment freedoms.

28. See, *e.g.*, Staub v. City of Baxley, 355 U.S. 313 (1958); Kunz v. New York, 340 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951); Saia v. New York, 334 U.S. 558 (1948); Hague v. C.I.O., 307 U.S. 496 (1939).

29. 379 U.S. 536 (1965).

30. The state statute provided: "No person shall willfully obstruct the free, convenient and normal use of any public sidewalk, street, highway, bridge, alley, road, or other passageway, or the entrance, corridor or passage of any public building, structure, watercraft or ferry, by impeding, hindering, stifling, retarding or restraining traffic or passage thereon or therein." LA. REV. STAT. § 14:100.1 (Cum. Supp. 1962) quoted in Cox v. Louisiana, 379 U.S. at 553.

31. *Id.* at 557. (Emphasis added.)

is not enough to justify the restriction of first amendment rights then the ordinance should be declared unconstitutional. If, however, the ordinance passes this test, and the power is granted to an administrator to regulate the content of speech through an arbitrary or discriminatory exercise of his discretion so that in effect he may censor or punish those who have ideas with which he does not agree, then the ordinance must be invalidated. Even where there is a statute aimed at a legitimate local interest, the power to restrict the exercise of a first amendment freedom must not depend on the content of the freedom to be enjoyed. If a non-content ordinance passed both of these tests it should be considered valid, with no reference to prior restraints at all.

In the third class of cases in which the prior restraint doctrine has been argued, the statute has as its express purpose the restricting of certain first amendment freedoms.[32] Here the content is made relevant, not by the vague powers granted, but by the express terms of the restriction. In such cases the state must show either a clear and present danger[33] or that the content of the speech is not protected by the first amendment[34] before the speech may be restrained or punished.

Again, the test for what is a permitted exercise of a first amendment freedom should be the same whether the statute applies prior or subsequent to the act.[35] The majority of the statutes in these cases have dealt with the censorship of obscenity in movies and books. Obviously the standard for what is obscene cannot vary depending on the point in time when the restraint or punishment is imposed, and that standard was in fact developed in cases where the statute applied subsequent to the act.[36] In the latter obscenity cases it has been recognized that labeling a statute a "prior restraint" does not automatically invalidate it,[37] and it has been demonstrated that the only true danger of prior restraint arises in the absence of adequate procedural "safeguards for confining the censor's action to judicially determined constitutional

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32. See, *e.g.*, Freedman v. Maryland, 380 U.S. 51 (1965); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Times Film Corp. v. Chicago, 365 U.S. 43 (1961); Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931).

33. In Terminiello v. Chicago, 337 U.S. 1, 4 (1949), the Court said: "That is why freedom of speech, though not absolute . . . is nevertheless protected against *censorship or punishment*, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." (Emphasis added.)

34. Obscenity is not protected by the first amendment. See Roth v. United States, 354 U.S. 476 (1957).

35. See note 3 *supra*.

36. See Jacobellis v. Ohio, 378 U.S. 184 (1964); Roth v. United States, 354 U.S. 476 (1957).

37. See Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961), where the Court, confronted with the issue of whether a theater owner had the right to exhibit his movies once without going through the censor board, decided that he did not have such a right.

It has been suggested that the Supreme Court in *Times Film* was faced with three alternatives: (1) to continue the prior restraint rule in its present form, that is, that the mere form of prior restraint is unconstitutional when it may suppress protected speech; (2) to expand the exceptional cases; (3) to change from a form to a substance test, that is, to uphold a statute which may in form appear to be an unconstitutional prior restraint, but in substance provides sufficient safeguards against suppression of expression to be constitutional. It has been suggested that the Court chose the last alternative. See Note, 7 WAYNE L. REV. 589, 593 (1960–1961).

limits. . . ."[38] The Court, therefore, has adopted certain procedural requirements which make the procedural rights of one faced with a censorship statute similar to those of one faced with a criminal punishment taking effect after the act. If an analogy can be drawn from these obscenity cases, it would seem that political speech could also be restricted prior to publication if it was determined that it presented a clear and present danger, so long as summary procedures for review of the prior restraints are available.

In order to classify the nature of the prior restraint in the principal *Kovach* case, the Senate Resolution must first be analyzed. It would appear that the resolution was not drawn for the purpose of restraining the content of the plaintiff's newspaper.[39] Even though the Senate members may have been motivated by the newspaper's objections to their secret sessions, on its face the purpose of the resolution purported to promote "a vital state interest."[40] Obviously the case is not one where the content is made specifically relevant by the language of the statute; rather it is a case where the content is not relevant to the application of the statute.

The court felt that the Senate could enforce their rules by the use of a contempt proceeding punishing an offender for a failure to abide by its rules.[41] If this is so, then, according to the non-content cases discussed above, the Senate should also have been allowed to require those interested in being in the press section to agree to "abide by" the rules of that body. However, as the court interpreted "abide by" to mean more than merely not breaking the rules, the phrase "virtually requires it [the newspaper] to surrender any opposition to Senate rules."[42] Under such a reading of the resolution the court found that it goes "far beyond any reasonable measures required to protect the Senate in the discharge of its duties or to preserve its dignity and decorum."[43] If the Senate had tried the plaintiffs for contempt subsequent to the act for refusal to cease opposition to Senate rules, conviction would be just as invalid as Senate Resolution No. 9, since it would go far beyond reasonable measures to protect the Senate's decorum.

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38. Freedman v. Maryland, 380 U.S. 51, 57 (1965). See also Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1963), where the court stated that the state must be certain that the procedures used "will ensure against the curtailment of constitutionally protected expression."

Earlier Supreme Court cases indicated that procedure was not the only concern in these cases. See, *e.g.*, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952), where the Court invalidated censorship of movies on the basis of their being sacrilegious. The Court in its opinion emphasized the prior application of the statute; however, it would seem that censoring a film on the basis of its being sacrilegious is never a proper ground for the restriction of speech, be it prior or subsequent.

As to the nature of these procedural requirements, see Trans-Lux Distrib. Corp. v. Maryland State Board of Censors, 240 Md. 98, 213 A.2d 235 (1965), discussed in 26 MD. L. REV. 176 (1966).

39. The District Court stated the apparent purpose as protecting "the right of a state legislative body to conduct its proceedings according to orderly procedures free from interference or obstruction by non-members." 238 F. Supp. at 840.

40. *Ibid.*

41. *Id.* at 841.

42. *Id.* at 845.

43. *Id.* at 844.

Therefore, the court's discussion of the distinction between prior restraints and subsequent punishments was irrelevant. The court interpreted the Senate Resolution to prohibit criticism by the newspaper of rules with which it did not agree. But the court assumed that the subsequent punishment available, that is, a contempt proceeding, would punish not criticism but disruption of the Senate proceedings. Thus, the court used different standards in deciding what the Senate could constitutionally prohibit. In order to fairly compare prior restraints and subsequent punishments, the court should have constructed a contempt proceeding which would punish for criticizing the Senate rules.