ENCYCLOPEDIA OF THE FIRST AMENDMENT

VOLUME II

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uith and worship, which some believe could ernal destinies, a basis for the argument that ın made in his "Memorial and Remonstrance" rginia Statute for Religious Freedom.
lative to speech, press, peaceable assembly, and esigned to promote discussion and debate con- ind of governmental policies that suit a repub- sentative, form of government, and arguably to development of the individual's personality. esult, courts were slow to recognize rights sur- ımercial speech.
ful that George Mason and the authors of the the First Amendment would have claimed to ed the rights inherent in the amendment; it is at they would have traced their origins to con- cuments, including state bills or declarations of , the Federalists' initial opposition to the Bill of ed in part from the belief that such rights were ties that did not need to be stated. By contrast, e provisions—such as the Fifth Amendment's against double jeopardy or the Sixth requirement of trial by jury—that are clearly echanisms for enforcing fundamental princi- s, not morally mandated rights per se.
ɔodied within documents are constitutional, or hich serve to shape the values shared by a peo- S. system, individuals can bring claims of such rts, which have the power to enforce them. ible exception of equality, which was later rec- e equal protection clause of the Fourteenth 1868), it is difficult to identify any rights out- Amendment that are more closely associated ept of natural rights; from this stem the argu- ese rights should enjoy a "preferred position" are relatively absolute. Embodying such rights en text is designed to preclude the necessity o extralegal means for securing their protec- ı rights would arguably be legitimate moral they were not embodied in the constitutional ple, the Supreme Court has on occasion made ıe basis of unenumerated general moral prin- al rights, rather than on the basis of a specific provision. Some believe the modern right to a judicially created right.

laration of Independence; Jefferson, Thomas; Locke, ımes; Mason, George; "Memorial and Remonstrance"; Natural Law; Preferred Position Doctrine; Privacy; Virginia Declaration of Rights; Virginia Statute for Religious Freedom.

John R. Vile

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Nazis

See *American Nazi Party and Related Groups*

Near v. Minnesota (1931)

In the landmark decision in *Near v. Minnesota,* 283 U.S. 697 (1931), the Supreme Court reaffirmed the emerging view that the Fourteenth Amendment incorporated the First Amendment against the states and fashioned the First Amendment doctrine opposing prior restraint. The decision is considered one of the pillars of American press freedom.

Jay Near was the muckraking editor of *The Saturday Press.* In fall 1927, Near published a series of articles attacking several Minneapolis city officials for dereliction of duty. The *Near* Court summarized *The Saturday Press* accusations as charging, ". . . in substance, that a Jewish gangster was in control of gambling, bootlegging, and racketeering in Minneapolis, and that law enforcing officers and agencies were not energetically performing their duties." One of the targeted law enforcement officers was Floyd B. Olson, the Hennepin county attorney at the time and future Minneapolis governor; he filed an action to enjoin publication of *The Saturday Press* permanently as "malicious, scandalous and defamatory." A state court enjoined further publication of *The Saturday Press* under the Minnesota Public Nuisance Law.

The Supreme Court reversed, 5-4. Writing for the majority, Chief Justice Charles Evans Hughes began by affirming: "It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by

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See also *Blackstone, W Restraint.*

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the due process clause of the Fourteenth Amendment from invasion by state action." Hughes then recast William Blackstone's famous definition of press freedom in First Amendment terms. In his *Commentaries on the Laws of England* (1765–1769), Blackstone had defined "liberty of the press" as consisting of "laying no prior restraints upon publications." Referring to the Minnesota Public Nuisance Law, Chief Justice Hughes observed that the law was "the essence of censorship."

Understood in these terms, the permanent injunction of *The Saturday Press* runs counter to the conception of liberty deeply embedded in Anglo-American jurisprudence: "The fact that for approximately 150 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." Although individuals could sue Near for libelous remarks, the government did not have the power to bar publication of his writings in advance. This would constitute an impermissible prior restraint on expression.

Justice Pierce Butler and three other dissenters rejected both the *Near* majority's view of the First Amendment's applicability to the states and its interpretation of the First Amendment. "The decision of the Court," Butler argued, "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 . . . [have] been adjudged . . . 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 Fourteenth Amendment to put upon the states a federal restriction that is without precedent.

See also *Blackstone, William; Censorship; Libel and Slander; Prior Restraint.*

James C. Foster

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Nebraska Press Association v. Stuart (1976)

In *Nebraska Press Association v. Stuart*, 427 U.S. 539 Supreme Court unanimously ruled that a trial c did not have the authority to place gag orders o about a specific crime prior to jury impanelmen a form of prior restraint and in violation o Amendment right of freedom of the press.

The controversy arose after Edwin Simants w with murdering six people in their home in S Nebraska, a town of about 850 people located in a part of the state. Hugh Stuart, a Nebraska state t feared that publicity surrounding the crime wou impossible to find an impartial jury, so he issued a on news coverage until a jury was impaneled. The Supreme Court modified the gag order but restrai papers and other media from publishing or br accounts of confessions or admissions made by th to law enforcement officers or third parties, except of the press, or other facts "strongly implicativ accused. The Supreme Court granted *certiorari* to c whether the order violated the First Amendment.

Writing for the majority, Chief Justice Warren explained that although restraints on freedom of possible under some circumstances, any prior restra be presumed to violate the First Amendment. Ev trying to balance two such important rights as the of press with the Sixth Amendment right to a fai should be presumed that reporting on criminal pro will take priority.

Burger reasoned that pretrial publicity, even whe sive and adverse, does not inevitably lead to an un After reviewing past cases that had been adversely by publicity, the Court believed that Judge Stuart h responsibly out of a legitimate concern for the ef adverse publicity would have on the trial in an effor tect the defendant's right to a fair trial. Despite this c the Court emphasized that in this particular case th no evidence in the record to demonstrate that other short of prior restraint on the press would not hav the interest of ensuring Simants a fair trial.

Chief Justice Burger noted that most of the other tives had been discussed with approval in *Sheppard v.* (1966). These options included: (a) change of trial (b) postponement of the trial to allow public atten