1953 WL 78568 (U.S.) (Appellate Brief)
Supreme Court of the United States.

SUPERIOR FILMS, INC., Appellant,
v.
DEPARTMENT OF EDUCATION OF THE STATE OF OHIO, Division of Film Censorship, Clyde Hissong, Superintendent, Appellee.

No. 217.
October Term, 1953.
December 31, 1953.

Brief of Motion Picture Association of America, Inc. and Independent Theatre Owners of Ohio, Inc., as Amici Curiae.

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***i** INDEX

CASES CITED

STATUTES CITED AND OTHER MISCELLANEOUS AUTHORITIES

1 Summary Statement of Position and Interest of *Amici Curiae.

With consent of the parties, this brief is filed on behalf of the Motion Picture Association of America, Inc., and the Independent Theatre Owners of Ohio, Inc., as *amici curiae,* in support of the brief filed by Superior Films, Inc., appellant herein.

Motion Picture Association of America, Inc.

Motion Picture Association of America, Inc., is a membership corporation organized in March, 1922, under the Membership Corporations Law of the State of New York. Its membership is composed of the largest and most important producers and distributors of motion pictures in the United States.

***2** The Association files this brief, in general, because the time, money and efforts of its member companies are constantly in jeopardy in those states and municipalities of the United States in which government censorship prevails, and, in particular, because "M", the motion picture involved in this appeal, was distributed by Columbia Pictures Corporation (a member company) throughout the United States, with the exception of the State of Ohio.

For years, the Association has been opposed to government censorship.[1] Indeed, the Association's Production Code was designed in 1930 as a workable alternative to official restraint. Member companies and other producers voluntarily adhere to the provisions of this Code, whose principles reflect the social and moral values of American culture. The Association's Production Code Administration issued a certificate to the motion picture "M", stating that it was approved as conforming to the Production Code; the title frame of that motion picture bears the Association's insignia.

The pictures which member companies produce and distribute reflect the latest developments in production. Constant research and the application of new ideas have been responsible for the familiar progression---the silent film, the advent of sound, modern technicolor and, most recently, three-dimension, the wide-angle screen and stereophonic sound.

During the year 1952 the Association's distributing company members distributed in the United States 304 feature ***3** films (excluding re-issues) out of an estimated total number of 463 feature films, domestic and foreign, released in the United States in that year from all sources. They also released more than 400 short subjects (features of less than 3,000 feet in length), including serials.

Subsidiaries of five of the Association's member companies---Fox-Movietone News, MGM News of the Day, Paramount News, Universal Newsreel and Warner-Pathe News ---produce newsreels for distribution to theatres in the United States and abroad.

In addition to Ohio, there are five states in the United States---New York,[1] Pennsylvania,[2] Maryland,[3] Kansas,[4] and Virginia,[5] ---in which government censorship prevails. Every film which enters any of these states must be examined and passed by the censor before it can be shown in a motion picture theatre. For this service, the censor exacts a fee, the amount of which differs from state to state. The provisions of the censorship statutes themselves also vary with the states, so that it is not at all uncommon for a picture to be passed in one of the states and either banned in its entirety or drastically cut in another. Cuts imposed by censorship bodies can no longer be accomplished with the relative ease and avoidance of mutilation as was the case before the recent technical advances.

***4 Independent Theatre Owners of Ohio, Inc.**

The Independent Theatre Owners of Ohio, Inc., incorporated in 1934, represent more than 50% of the total number of theatres (about 700) in the State of Ohio. These theatre owners file this brief by direction of the organization's board of directors, not only because they consider censorship a violation of their constitutional rights, but because they feel that it imposes an inordinate economic burden upon the usual and customary pursuit of their business.

The state exacts a fee of $3.00 per thousand feet (or fraction thereof) on each print of a film examined, regardless of whether or not any cuts are made. Because feature films run anywhere from 6,000 to 15,000 feet, fees *per print* therefore run from $18.00 to $45.00. In view of the fact that many theatres pay as little as $15.00 for a two-day engagement, it is evident that each print must have many bookings over a sufficient period of time to amortize the cost of the prints. These fees are such a penalty on the distributor that he often finds it economically prohibitive to supply more than five prints to an exchange as large as Cleveland, for example, which covers the whole northern part of Ohio from border to border. A typical result of this situation was experienced with regard to the film "Skirts Ahoy," which was due in downtown Columbus on July 1st of last year. Because the only available prints were being used in Dayton and Cincinnati, the film was not brought to Columbus until 75 days later---far too late for maximum effectiveness of its expensive sales campaign. Hence, although the picture was highly successful in Dayton and Cincinnati, box office returns were significantly poor in Columbus.

***5** An alternative to compensate for the paucity of prints would be for an exchange like Cleveland to borrow additional prints from a nearby exchange in a neighboring state---such as Detroit, Michigan. But Michigan has no government censorship, and any prints crossing the border into Ohio would have to be examined and/or excised, with excisions being restored when the print was returned. The usual fee would be exacted by the Ohio censors, and the use of special cutting-room equipment and skilled labor would be necessitated. Again, the expense incurred by censorship would be prohibitive.

Were censorship not the stumbling block in transporting prints from one state to another, trucking charges could be drastically reduced. Toledo, Ohio, for example, is only 57 miles from Detroit; if exhibitors in Toledo could call upon the Detroit exchange for prints, it would cost considerably less than having the film hauled by truck from Cleveland which is 115 miles away.

The re-issue of older films which enjoyed great popularity in the past is virtually impossible in Ohio because of censorship. Recently Paramount Pictures furnished to its Ohio exchanges three new prints of "Going My Way," to be shown as re-issues. The censor demanded a fee of $42.00 per print, despite the fact that the picture had already been examined and passed at the time of its original release and the re-issue prints were identical in every way with the originals. Hence, the distributor realized too little revenue to encourage further re-issues for exhibition in Ohio.

"Art" theatres in Ohio's larger cities which cater almost exclusively to adult audiences interested in foreign films, are particularly hard-pressed for product because of censorship. Recently three popular foreign feature films---"The ***6** Miracle," [1] "Devil and the Flesh," and "Seven Deadly Sins" ---all of which were passed by the New York censors---were banned in Ohio, contracting the already short supply of these specialized houses.

In border cities, Ohio exhibitors suffer, because patrons cross over to cities of the neighboring state to see films barred or cut in Ohio.

From 1948 to 1952, 1,836 pictures were shown over television in Ohio. Of these, 546 had never been submitted to censors; 484 had been submitted and cut when originally shown, but were shown in unexpurgated versions in the home; 5 films were totally rejected by the Board of Censors for theatre showing, but were shown in homes by the television broadcasts. [2]

ARGUMENT

POINT I

SECTIONS 154-47 ET SEQ. OF THE OHIO GENERAL CODE, WHICH CONSISTS OF A SYSTEM OF INSPECTION AND LICENSING OF MOTION PICTURES, IMPOSES A CENSORSHIP WHICH, ON ITS FACE, IS REPUGNANT TO THE FIRST AMENDMENT AS MADE APPLICABLE TO THE STATES BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Until the decision in *Burstyn v. Wilson,* 343 U. S. 495, motion pictures had been excluded from the protection of the first and fourteenth amendments despite technical and juridical developments which had rendered anachronistic this Court's decision in *Mutual Film Corporation v. Industrial Commission of the State of Ohio,* 236 U. S. 230. ***7** In the *Burstyn* case, this Court overruled that part of *Mutual* which held that motion pictures were not part of the press.

In *Mutual* it was said (236 U. S. p. 243) "freedom of opinion and expression are too certain to need discussion". The Court thus implied that a member of the press would be immune from censorship. In *Burstyn,* however, after holding that motion pictures *were* members of the press, the Court warned that that was not the "end of our problem" and that each method of expression "tends to present its own peculiar problems" and each is not "necessarily subject to the precise rules governing other particular methods of expression" (343 U. S. p. 502-503). In short, this Court failed to indicate, as *Mutual* had implied, that immunity from censorship follows as a normal concomitant of membership in the press.

Instead, this Court cited *Near v. Minnesota,* 283 U. S. 697, for the proposition that the immunity of the press "even as to previous restraint is not absolutely unlimited" (283 U. S. p. 716).

The Court then left open the question as to "whether a State may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films" (343 U. S. p. 506). It cited opposing dicta as alternative resolutions of the question.[1] In a footnote, the ***8** following sentence was quoted from the paragraph in the *Near* case which discussed limitations on absolute immunity from previous restraint:

"The primary requirements of decency may be enforced against obscene publications. 283 U. S. 697, 716."

A. Prior to the Decision in *Burstyn,* the Near Dictum Did Not Include Censorship Within its Scope.

(1) *Internal evidence of Chief Justice Hughes' limitation of the term "previous restraint" to restraints other than censorship.*

The statute under consideration in the *Near* case did not, in contradistinction to Sections 154-47 et seq. of the Ohio General Code, impose a system of inspection and licensing, *i.e.* censorship, of newspapers. It provided for the issuance of temporary and permanent injunctions to suppress publications which had been adjudged obscene or defamatory in nature.

This Court split 5 to 4 on the question of whether the type of previous restraint presented in *Near* should be assimilated to the system of inspection and licensing, *i.e.* censorship, which is found in ancient English and American Colonial licensing statutes.

Chief Justice Hughes, speaking for the majority, said that the operation and effect of the statute, as applied to suppress defamatory publications, approached a system of censorship. This was particularly true because, with respect to defamatory publications, there was available the defense "that the truth was published with good motives and justifiable ends". In disposing of the contention that this defense removed the sting of unconstitutionality from the statute, the Chief Justice said that the *Near* system was ***9** "... but a step to a complete system of censorship" and its recognition "... necessarily would carry with it the admission of the authority of the *censor* against which the constitutional barrier was erected" (283 U. S. 697, at 721). (Emphasis added.)

It should be observed that when the Chief Justice referred to censorship, as distinguished from previous restraint, he intimated no exception to the absolute immunity from censorship.

(2) *Justice Butler's Dissent.*

Justice Butler considered that the dictum was attempting to distinguish between obscene and defamatory publications under the statute, and concluded that the distinction had no constitutional relevance. [1]

B. The Transposition of the *Near* Dictum from the Context of Previous Restraint to that of Censorship in *Burstyn.*

The question presented is whether the transposition of context renders the *Near* dictum incompatible with the requirement that the First Amendment must be considered as a "... command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." (*Bridges v. California*, 314 U. S. 252, at 263); but first, a word on the origin of the dictum.

10 (1) *The Genesis of the* Near *Dictum.

Here "a page of history is worth a volume of logic". *New York Trust Co. v. Eisner*, 256 U. S. 345, 349.

The history starts with this Court's decision in *Mutual* which held that:
(1) motion pictures were *not* part of the press

(2) motion pictures could, therefore, be subjected to inspection and licensing---i.e. censorship

Five years after *Mutual*, in 1920, Zechariah Chafee's book, *Freedom of Speech*, was published. [1]

He discovered that Blackstone's concept of the "liberty of the press", that is, its immunity from a system of inspection and licensing, *i.e.*, "previous restraint", had been approved by commentators [2] and followed by Courts. [3]

Blackstone's classic formulation, which admits no exception to immunity from inspection and licensing, is as follows:
***11** "... 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 consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the Revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government ... and to this we may add, that the only plausible argument heretofore used for the restraining the just freedom of the press 'that it was necessary to prevent the daily abuse of it' will entirely lose its force, when it is shown (by a feasible exertion of the laws) that the press cannot be abused to any bad purpose without incurring a suitable punishment; whereas it never can be used to any good one when under the control of an inspector. So true will it be found, that to censure the licentiousness is to maintain the liberty of the press." Blackstone, Commentaries on the Law of England (New York, 1847, pp. 151-152).

***12** Professor Chafee's research persuaded him that Blackstone's formula was too restrictive, since it allowed punishment of utterances which the First Amendment, in his opinion, was designed to protect. Then, in reliance in part upon *Mutual*, he added [1]:

"... In some respects this theory goes altogether too far in restricting state action. The prohibition of previous restraint would not allow the government to prevent a newspaper from publishing the sailing dates of transports or the number of troops in a sector. It would render illegal removal of an indecent poster from a billboard or the censorship of moving pictures which has been held valid under a free speech clause...." [2]

The *Near* dictum (283 U. S. 697, 715-716) was part of a paragraph, a portion of which reads as follows:
"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*, 249 U. S. 47, 52. No one would question but that a government might prevent actual obstruction to its ***13** recruiting service or the publication of the sailing dates of transports or the number and location of troops. [1] On similar grounds, the primary requirements of decency may be enforced against obscene publications."

A comparison of Chief Justice Hughes' dictum in *Near* with the relevant parts of the paragraph from Chafee's 1920 edition of *Freedom of Speech* reveals the debt that the former owes the latter.

Discussion of Blackstone's theory of the liberty of the press precedes in each instance reference to the limitations upon absolute immunity from previous restraint. In *Near*, Chief Justice Hughes stated (p. 714) that the theory "cannot be deemed to exhaust the conception of the liberty guaranteed by State and Federal Constitutions". Chafee stated (p. 9) that Blackstone's interpretation was "contrary to modern decisions, thoroughly artificial, and wholly out of accord with a common sense view of the relations of State and citizen".

The reference in the *Near* opinion to "the sailing dates of transports or the number and location of troops" is supported by a citation to page 10 of Chafee's book (p. 716). [2] But the very next sentence is the dictum which expresses compendiously the Chafee sentence dealing with "removal of an indecent poster from a billboard or the censorship of moving pictures"; he cites as a footnote *Mutual Film Corp. v. Ohio Industrial Commission, supra,* to sustain ***14** the proposition that censorship under a free speech clause is permissible. [1]

The *Mutual* case was decided in 1915, and four years later Professor Chafee first expressed his views as to limitations on immunity from previous restraint. [2] But it is indeed unfortunate that he felt impelled to question Blackstone's doctrine at its most invulnerable point, viz.: its undeviating adherence to the idea of absolute immunity from censorship which Dean Roscoe Pound deemed "its best title to consideration". [3]

(2) *The Near dictum, as transposed by the* Burstyn *case, is repugnant to the First and Fourteenth Amendments to the Constitution of the United States.*

The limitation which Professor Chafee engrafted on the absolute immunity from censorship which the First Amendment affords members of the press, was unfortunate. Its adoption in *Near*, however, did not affect this principle. But its transposition to the context of a censorship statute ***15** implied this Court's approval of that "regressive" form of restraint which, until *Burstyn*, it had been considered, the First Amendment prohibited.

Despite the statement in Chafee's 1920 edition that there were exceptions to the rule of absolute immunity from previous restraint, and despite the fact that Chafee presumably, by the context of his paragraph, included censorship, at least of motion pictures, within the term "previous restraint", a careful examination of the entire chapter entitled "Freedom of Speech in War Time" reveals that he appreciated fully that censorship was the most restrictive form of restraint against which the prohibitions of the First Amendment had been directed. [1]

Further proof that Professor Chafee did not consider the *Near* dictum, which had adopted his position, as applicable to censorship, appears in a revision of his earlier work. [2]

Professor Chafee's views have been considered and compared with those of Dean Pound. There is not the faintest suggestion of exceptions in the other secondary ***16** authorities upon which Chief Justice Hughes relied in *Near*.[1] Blackstone,[2] De Lolme,[3] Madison,[4] May,[5] Story,[6] Bancroft,[7] Duniway[8] and Cooley[9] all emphasize the importance of immunity from censorship of the press and assert no exceptions to the principle.

In the *Near* dictum (283 U. S. 697, at 716), in support of the proposition that there are exceptional situations which permit a previous restraint, Chief Justice Hughes quoted from *Schenck v. United States*, 249 U. S. 47, 52, the seminal case on the extent of freedom of speech and of the press under the Constitution. It should be observed that this case presented the question of the limitations which the First Amendment imposes upon the Federal Government under conditions of war. For this reason, it is distinguishable.

The *Schenck* case was not concerned with censorship or even a previous restraint. In sustaining a conviction for a conspiracy to violate the Espionage Act by distributing pamphlets and circulars among those subject to the draft, this Court said that the prohibitions of the First Amendment were not confined to previous restraint "* * * although to prevent them may have been the main purpose, as intimated ***17** in *Patterson v. Colorado*, 205 U. S. 454, 462". There is no intimation here that even wartime conditions can create an occasion for the imposition of a censorship which would be consistent with the terms of the First Amendment. Moreover, the wartime objectives which the Chief Justice adopted from Chafee's book (preventing obstruction to recruitment and maintaining secrecy as to sailing dates and location of troops) were accomplished, it has been demonstrated, without official censorship.[1]

The peacetime objective, "removal of an indecent poster", certainly can be accomplished without resort to censorship. This leaves the censorship of films. Chafee relied upon *Mutual* to sustain the proposition that movies can be censored under "a free speech clause". But this Court did not reach that question in *Mutual*, because it held that motion pictures were not part of the press. Furthermore, it implied that, if motion pictures were part of the press, they would be immune from censorship (236 U. S. p. 243).

C. The State's Selection of Censorship as the Method of Control for Motion Pictures Violates the "Command" of the First and Fourteenth Amendments.

(1) *Ancient English and Early American Colonial Licensing Constitutions.*

The prototypes for Section 154-47 *et seq.* of the Ohio General Code can be found in the English and Colonial licensing statutes.

The annals of Anglo-American law reveal that since the introduction of the printing press on a large scale in 15th ***18** century England, as new inventions and improvements occurred in the area of communications and information, there has been inevitably a concomitant resolve on the part of the government to control and regulate the operations of new media. In 1587 and in 1637, when it was found that less direct methods of control failed to achieve the desired uniformity of expression, the Crown resorted to the methods of inspection and licensing---i.e., censorship---of printers and printing. The statutes remained in effect, with but few interruptions until 1694, at which time the licensing statute was not renewed.[1]

The American colonies had a similar experience; it was not until approximately 1725 that freedom from colonial licensers was achieved. The last effort of the colonial licensers involved attempts of Massachusetts to compel James Franklin, editor and publisher of the *New England Courant*, to submit to a system of inspection and licensing of matters which he expected to publish. He defied the ordinances and the Grand Jury refused to indict him.[2]

(2) ***Original State Constitutions.***

At the time the colonists were establishing new state governments following the Declaration of Independence, they incorporated, either in constitutions or declarations of rights provisions, to secure the freedom of the press from a system of inspection and licensing.

***19** Georgia,[1] Maryland,[2] Massachusetts,[3] New Hampshire,[4] North Carolina,[5] Pennsylvania,[6] South Carolina,[7] Vermont,[8] and Virginia,[9] all provide, in substance, that the liberty of the press should remain inviolate forever.

***20** Connecticut did not have a state constitution until 1818.[1] Rhode Island did not adopt a constitution until 1842.[2] New Jersey[3] and Delaware[4] adopted constitutions in 1776; New York[5] in 1777; but there was no mention of freedom of the press in the latter three.

In commenting upon a survey of the constitutions and the declarations of rights of all of the forty-eight states, Cooley concludes:[6]

"It is to be observed of these several provisions, that they recognize certain rights as now existing, and seek to protect and perpetuate them, by declaring that they shall not be abridged, or that they shall remain inviolate. They do not assume to create new rights, but their purpose is to protect the citizen in the enjoyment of those already possessed..."

This observation is equally applicable to the original state constitutions.

(3) ***The Federal Constitutional Convention of 1787.***

"A declaration for freedom of the press was thought to be unnecessary, as the power of Congress did not extend ***21** to the press.[1]" And it might be added, as has been shown, that the various state constitutions assured its freedom[2].

(4) ***The Submission Of The Bill of Rights, Including The First Amendment, To The States By The First Congress.***

Despite the assertion by the authors of the Federalist Papers that the Constitution needed "no Bill of Rights",[3] the First Congress submitted the first Ten Amendments in the form of a Bill of Rights.

Of the proposals which James Madison, representing Virginia, submitted to the House of Representatives on June 8, 1789, the fourth and fifth related to freedom of the press.[4] At the time that he introduced them, Madison made a few brief comments on the need for a provision for "liberty of the press".[5] He then moved, unsuccessfully, for the appointment of a Select Committee to consider the matter.[6] This elicited the following protest from Representative Jackson of Georgia:

***22** "The gentleman endeavors to secure the liberty of the press, pray how is this in danger? There is no power given to Congress to regulate this subject as they can commerce, or business or war. Has any transaction taken place to make us suppose such an amendment necessary? ... These are liberties which will always prevail ... where, then, is the necessity of taking measures to secure what neither is not or can be in danger ?"[1]

Representative Gerry of Massachusetts then adverted to the paramount need of establishing the departments of the new Federal government.[2] Representative Lawrence's motion to refer Madison's proposals to the Committee of the Whole on the State of the Union was approved.[3]

After the House had succeeded in establishing the essential departments to implement the new Constitution, Madison, on July 21, 1789, "begged the House to indulge him in further consideration of the Amendments to the Constitution," since the House had apparently achieved a "moment of leisure." [4] Representative Jackson characterized the proposal as a "mere waste of time," [5] and after desultory discussion the matter was referred to a Select Committee, consisting of Representatives Vining, Madison, Baldwin, Sherman, Burke, Gilman, Clymer, Benson, Goodhue, Boudinot, Gale. [6]

On August 13, 1789, the report of the Committee was submitted to the entire membership of the House. [7]

***23** After a discussion of the manner in which the Amendments were to be added to the Constitution, [1] the House on August 14 resumed discussion of the substance of the Amendments. [2]

Debate on the cognate rights of freedom of religion [3] and assembly [4] occupied the House, and there was no distinct discussion of liberty of the press; but in the midst of debate upon the right of assembly, Madison stated the scope of the clause relating to the press in the following uncompromising terms:

"The liberty of the press is expressly declared to be beyond the reach of this Government." [5]

In addition to this affirmative statement, Madison, who as one of the authors of the Federalist Papers was well aware of the arguments against the new Constitution, replied to the criticisms of Representative Burke as follows:

> "Have not the people been told that * * * the liberty of the press [was] in jeopardy? * * * that they ought not to adopt the Constitution until those important rights were secured to them * * *" [6]

***24** No doubt Madison was referring to the original State Constitutions, which, as a rule, provided for liberty of the press. [1] Moreover, at the time of the conventions called to ratify the Federal Constitution, various states had recommended that a Bill of Rights [2] be added.

The amendments, including that which later emerged as the First Amendment, were approved on August 22d [3] and a committee, consisting of Representative Benson, Sherman and Sedgwick, were empowered to fix the order of the Amendments to the Constitution of the United States.

The Senate on September 25th merely "concurred" in the amendments proposed by the House. [4]

At no point in these proceedings is there an intimation that there are circumstances which will permit the imposition of censorship.

Later views of Madison on the purpose and intent of the framers of the First Amendment are instructive. In 1799, at the time he drafted the Virginia Resolutions in opposition to the Alien and Sedition Act of 1798, Madison stated as follows: [5]

"The freedom of the press under the common law is, in the defenses of the Sedition Act, made to consist in an exemption from all *previous* restraint on printed publications by persons authorized to inspect and prohibit them. It appears to the committee ***25** that this idea of the freedom of the press can never be admitted to be the American idea of it; since a law inflicting penalties on printed publications would have a similar effect with a law authorizing a previous restraint on them. * * *

"* * * Hence, in the United States, the great and essential rights of the people are secured against legislative as well as 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; * * *."

D. No Case But *Burstyn* Intimates That A Member of the Press Should Be Subject To Censorship, and There is No Valid Reason For Creating an Exception With Respect to Motion Pictures.

In *Burstyn v. Wilson,* 343 U. S. 495, this Court suggested that each medium of communication creates its own peculiar problems which require different methods of control (502-503). [1] It should be stated at the outset that the *amici curiae* do not question that motion pictures may create problems which differ in kind and intensity from those of other media of communication, but it is submitted that the state must not impose censorship as a method of control of any medium of communication.

***26** The *Near* dictum has been demonstrated to be an unreliable foundation for the establishment of a system of inspection and licensing of motion pictures. The historical materials and other authorities which have been considered in this brief refute the notion that the framers of the original state constitutions and the First Amendment contemplated exceptions to the principle of absolute immunity from censorship. Now it is appropriate to consider whether the nature of motion pictures, the effects which their exhibition creates or the circumstances under which they are exhibited, justify a judicially created exception to this principle. This phase of the case has been presented in some detail in the appellant's brief.

It would hardly seem appropriate or beneficial to restate all the arguments advanced in *Burstyn* and *Gelling v. Texas,* 343 U. S. 960, and accepted by this Court in those cases, to include motion pictures within the purview of the First and Fourteenth Amendments. These arguments are equally relevant to the question of whether immunity from censorship should accompany membership in the press.

Motion pictures are not essentially different from other media of communication which depend upon pictorial techniques to educate and entertain. Nor do they affect their viewers differently from other media which maximize the use of pictorial techniques. This Court has indicated that the utilization of pictorial techniques has not deprived earlier forms of the press of their immunity from censorship, even though their use by those media has occasioned attempts to impose a censorship. [1]

***27** In *Hannegan v. Esquire,* 327 U. S. 146, the drawings of Varga and Petty prominently displayed in Esquire, *inter alia*, were characterized by the Office of the Postmaster General as "morally improper and not for the public welfare and the public good" (149). This Court held that the Postmaster General's construction of his powers under the second-class mailing privilege clause "would grant the Postmaster General a power of censorship," and this Court would not infer that Congress intended to confer a power "so abhorrent to our traditions" (327 U. S. at 151).

Motion pictures represent a composite of visual and audio techniques. The presence of a sound track containing dialogue, which adds the element of speech in modern pictures to the older pictorial technique and enhances the effectiveness of the medium, will not permit the imposition of a censorship. [1]

CONCLUSION.

It is no answer to state that Madison and Jefferson could not have visualized the advent of motion pictures and their impact on American life. [2]

***28** The immunities which the Constitution provides for the protection of the press apply to such improvements of communication as motion pictures to the same extent as to earlier forms of the press. [1]

Events have not sustained Madison's latitudinarian views on freedom of the press under the First Amendment. But the primordial source of that freedom---immunity from inspection and licensing---must be preserved in order to maintain its essence.

Motion pictures, as part of the press, can not remain half slave and half free.

Footnotes

1 "Blue-Pencil Freedom", address by Eric Johnston, President of the Motion Picture Association of America, Inc., to The Inland Daily Press Association, New York Times, October 25, 1950 (Theatrical Section).

1 N. Y. Educ. Law, 120-132.

2 Pa. Stat. tit. 4, 41-58 (1930), Pa. Stat. tit. 71, 119 (Supp. 1949), Pa. Stat. tit. 71, 356 (1942).

3 Md. Ann. Code, Gen. Laws, art. 66A (Cum. Supp. 1947).

4 Kan. Gen. Stat. Ann., 51-101 to 51-112, 74-2201 to 74-2209 (1935).

5 Va. Code Ann., 2-98 to 2-116 (1950).

1 "The Miracle", by a decision of the Ohio Censor Board made subsequent to and despite this Court's decision in *Burstyn v. Wilson*, is barred in Ohio as not "harmless."

2 Cincinnati Post, Nov. 30th, 1953, p. 6.

1 This Court quoted from the *Near* dictum and continued: "In *Chaplinsky v. State of New Hampshire,* 1942. 315 U. S. 568, 571-572, Mr. Justice Murphy stated for a unanimous Court: 'There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words---those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.' But see *Kovacs v. Cooper,* 1949, 336 U. S. 77, 82: 'When ordinances undertake censorship of speech or religious practices before permitting their exercise, the Constitution forbids their enforcement.' " (*Burstyn v. Wilson,* 343 U. S. 495, 506 fn. 20.)

1 "The opinion seems to concede that under clause (a) of the Minnesota law the business of regularly publishing and circulating an obscene periodical may be enjoined as a nuisance. It is difficult to perceive any distinction, having any relation to constitutionality, between clause (a) and clause (b) under which this action was brought. Both nuisances are offensive to morals, order, and good government. 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." (*Near v. Minnesota,* 283 U. S. 697, at 737.)

1 The intervening years had witnessed our participation in the First World War and the triumph of Bolshevism in the Russian Revolution. In this first edition, Professor Chafee described their impact on the protections of the First Amendment. At that time, he was particularly concerned with the effect on the First Amendment of the enactment of the Espionage Act of 1917 (40 Stat. 217, 219, now 18 U. S. C. 794) and other wartime acts and judicial decisions thereunder. *Schenck v. United States,* 249 U. S. 47; *Abrams v. United States,* 250 U. S. 616. These events prompted Professor Chafee to examine the whole question of freedom of speech and of the press under the First Amendment, with particular emphasis upon wartime prosecution and punishment of utterances held outside the scope of the Amendment.

2 See 2 Kent, Commentaries on American Law, pp. 17-21 (13th edition, 1884); 2 Story, Commentaries on the Constitution of the United States, Sections 1880-1892 (5th edition, 1891); 2 Cooley, Constitutional Limitations, pp. 876-886 (8th edition, 1927).

3 The term "previous restraint" was employed in the earliest State (*Commonwealth v. Blanding,* 3 Pick., Mass. 304, 313-314) and Federal cases (*Respublica v. Oswald,* 1 Dallas 319, 325). Eventually the statement from *Commonwealth v. Blanding* (that the First Amendment was "intended to prevent all such previous restraints upon publications as had been practiced by other governments, and in early times here") was cited with approval in *Patterson v. Colorado,* 205 U. S. 454, 462, where immunity from previous restraint was characterized as the "main purpose" of the First Amendment. See also *Schenck v. U. S.,* 249 U. S. 47, 52, in which a conviction under the Espionage Act of 1917 (18 U. S. C. 794) was sustained. In none of these cases was there an intimation that there was any exception to the rule of absolute immunity from previous restraint.

1 Chafee. Freedom of Speech, pp. 9-10 (1920).

2 *Mutual Film Corp. v. Industrial Commission of Ohio,* 236 U. S. 230. (Chafee's footnote.)

1 Chafee, Freedom of Speech, p. 10. Court's Footnote.

2 Chafee states (p. 10): "The prohibition of previous restraint would not allow the government to prevent a newspaper from publishing the sailing dates of transports or the number of troops in a sector."

1 It is not difficult to understand how Professor Chafee, in his laudable determination to correct the excesses of wartime prosecution, was led to assail Blackstone's doctrine with respect to subsequent punishment. That aspect of the doctrine had been responsible for what Professor Chafee conceived to be numerous injustices.

2 See Chafee, *Freedom of Speech in Wartime*, 32 Harvard Law Review, 932, 939-40.

3 See Pound, *Equitable Relief against Defamation and Injuries to Personality*, 29 *Harvard Law Review*, 640, 651: "Blackstone's doctrine has usually been criticized as not going far enough in securing against imposition of liability after publication upon arbitrary or unreasonable grounds. Equally, it goes too far in denying to the law *all* power of restraint before publication. Although its best title to consideration is in the history of the subject, it goes beyond what *history indicates as the main purpose, namely, freedom from a regime of general censorship and license of printing"* (Emphasis added).

1 See Chafee. Freedom of Speech (1920), pp. 19-20, 25, 31-33.

2 See Chafee, Free Speech in the United States (Cambridge, 1941); footnote 11, p. 10, states as follows:

> "Mutual Film Corporation v. Industrial Commission of Ohio, 236 U. S. 230, 241 (1915). See *infra*, Chapter XIV, section v, for a discussion of the possible unconstitutionality of film censorship in view of a Supreme Court decision in 1931."

If Chapter XIV, section v, is examined, it will be found that it is devoted exclusively to a discussion of the censorship of motion pictures. Professor Chafee cites *Near v. Minnesota*, 283 U. S. 697, as authority for the proposition that motion picture censorship is invalid.

1 In so far as possible, the same editions or editors upon which the Chief Justice relied have been consulted.

2 Commentaries on the Law of England, (N. Y., 1847), 151-152.

3 Commentaries on the Constitution and the Laws of England (Western, London, 1838), 315 *et seq.*

4 Madison's Works, Vol. 4, 543. 544.
See also Writings of James Madison, (Hunt ed., N. Y. and London, 1906), Vol. VI, 387.

5 2 Constitutional History of England (N. Y. 1874), 102 *et seq.*

6 Commentaries on the Constitution of the United States (5th ed., 1891), Sees. 1880-1892.

7 2 History of the United States (1892), 261.

8 The Development of Freedom of the Press in Massachusetts (New York and London, 1906), 1-8; 11-15; 41-62; 77; 83-106; 163-166.

9 Constitutional Limitations, (8th ed., 1927), 876-886.

1 See 1 Chafee, Government and Mass Communications (Chicago, 1947), 453 *et seq.*

1 VI Holdsworth, A History of English Law, 367-378 (2nd Ed., 1937).

2 Duniway, The Development of Freedom of the Press in Massachusetts (London, 1906) pp. 97-103; 163-166.

1 Constitution (1777), Article LXI: "Freedom of the press ... to remain inviolate forever." Thorpe, Federal and State Constitutions (Government Printing Office, 1909), Vol. 2, p. 785.

2 Declaration of Rights (1776). Article XXXVIII: "That the liberty of the press ought to be inviolably preserved." Thorpe, Federal and State Constitutions (Government Printing Office, 1909), Vol. 3, p. 1690.

3 Declaration of Rights (1780), Article XVI: "The liberty of the press is essential to the security of freedom in a state it ought not, therefore, to be restrained in this Commonwealth." Thorpe, Federal and State Constitutions (Government Printing Office, 1909), Vol. 3, p. 1892.

4 Bill of Rights (1784), Article XXII: "The liberty of the press is essential to the security of freedom in a state, it ought, therefore, to be inviolably preserved." Thorpe, Federal and State Constitutions (Government Printing Office, 1909), Vol. 4, p. 2456.

5 Constitution (1776), Article XV: "That the freedom of the press is one of the greatest bulwarks of liberty, and therefore ought never to be restrained." Thorpe, Federal and State Constitutions (Government Printing Office, 1909), Vol. 5, p. 2788.

6 Declaration of Rights (1776), Article XII: "That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained." Thorpe, Federal and State Constitutions (Government Printing Office, 1909), Vol. 5, p. 3083.

7 Constitution (1778), Article XLIII: "That the liberty of the press be inviolably preserved." Thorpe, Federal and State Constitutions (Government Printing Office, 1909), Vol. 6, p. 3257.

8 Declaration of Rights (1777), Article XIV: "That the people have the right to freedom of speech, and of writing and publishing their sentiments; therefore, the freedom of the press ought not to be restrained." Thorpe. Federal and State Constitutions (Government Printing Office, 1909), Vol. 6, p. 3741. Technically, of course, Vermont was not admitted to the Union until 1792. Claims of

Connecticut, Massachusetts and New York prevented its admission until that date. When New York surrendered its claims in 1790, the path was cleared for its adherence to the Union.

9 Bill of Rights (1776), Section 12: "That the freedom of the press is one of the great bulwarks of liberty and can never be restrained but by despotic governments." Thorpe, Federal and State Constitutions (Government Printing Office. 1909), Vol. 7, p. 3814.

1 Thorpe, Federal and State Constitutions (Government Printing Office, 1909), Vol. I, p. 536.

2 Thorpe, Federal and State Constitutions (Government Printing Office, 1909), Vol. 6, p. 3222.

3 Thorpe, Federal and State Constitutions (Government Printing Office, 1909), Vol. 5, p. 2594.

4 Thorpe, Federal and State Constitutions (Government Printing Office, 1909), Vol. 1, p. 562.

5 Thorpe, Federal and State Constitutions (Government Printing Office, 1909), Vol. 5, p. 2623.

6 2 Cooley, Constitutional Limitations (8th ed., 1927), p. 880.

1 Farrand, Framing of the Constitution of the United States, p. 189 (New Haven, 1913). Cf. 1 Annals of Congress, p. 441.

2 See 2 Farrand, Records of the Federal Convention (New Haven, 1911), p. 334, 341, 617: 3 Farrand, *op. cit.*, Appendix A. CLXXIII, CXCII. See also 5 Elliot's Debates, p. 131, 445-446 (1st edition, 1861) (the Pinckney proposal to declare the freedom of the press inviolate).

3 Beard, The Enduring Federalist, #84, p. 361 (New York, 1948).

4 See 1 Annals of Congress, 424; 432; 434. The fourth proposal stated that "the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." The fifth provided that "no *state* shall violate the freedom of the press * * *" (emphasis added).

5 1 Annals of Congress, 436-437; 440-442. These general remarks, including the reference to the various state bills and declarations of rights (see footnote 2, et seq., p. 22-23 of this brief) are more fully explained in the famous Virginia Resolutions of 1799, of which Madison was the author, in protest against the Alien and Sedition Acts of 1798. See p. 24-25 of this brief for their consideration.

6 1 Annals of Congress, p. 442.

1 1 Annals of Congress, 442-443.

2 1 Annals of Congress, 444-445.

3 1 Annals of Congress, 450.

4 1 Annals of Congress, 660.

5 1 Annals of Congress, 661.

6 1 Annals of Congress, 665; cf. p. 746.

7 1 Annals of Congress, 704.

1 Representative Sherman introduced a resolution to incorporate the Amendments in the appropriate articles and sections of the Constitution (see 1 Annals of Congress, 708). Representative Benson, also of the Committee, defended the Sherman proposal as responsive to the "recommendation of the State Conventions which had proposed amendments in this very form" (713). Cf. Writings of James Madison (Hunt ed., London and New York, 1906), Vol. VI, p. 391.

2 1 Annals of Congress, 717; 729.

3 1 Annals of Congress, 729-731.

4 1 Annals of Congress, 731-749.

5 1 Annals of Congress, 737.

6 1 Annals of Congress, 746.

1 See footnote 1, et seq. p. 19-20 of this brief.

2 See Writings of James Madison, Vol. VI (New York and London, 1906), 391.

3 1 Annals of Congress, 773-778.

4 1 Annals of Congress, 88.

5 Writings of James Madison (Hunt, ed.), Vol. VI, 386, 387. See also p. 336; and, generally, 385-392. See also Burns, James Madison, Philosopher of the Constitution, (New Brunswick, 1938), 82.

1 There had been an adumbration of this in earlier individual and minority opinions. See *Saia v. New York,* 334 U. S. 558, 566 (Mr. Justice Frankfurter's dissent); *Kovacs v. Cooper,* 336 U. S. 77, 96-97 (Mr. Justice Frankfurter's concurring opinion), 97 (Mr. Justice Jackson's concurring opinion); *Kunz v. New York,* 340 U. S. 290, 307-308 (Mr. Justice Jackson's dissenting opinion).

1 The State of Georgia, in a law approved February 19, 1953 (House Bill No. 247), provided for the establishment of a State Literature Commission. Under the Georgia statute, which exempts daily and weekly newspapers, Life Magazine would presumably be subject to the kind of censorship that "Lost Boundaries" experienced in Atlanta, Georgia. It is a matter of record that the Board of Censors of the City of Atlanta banned the exhibition of "Lost Boundaries." See *RD-DR Corporation v. Christine Smith,* 340 U. S. 853. If the Georgia

statute had been in effect at the time of the ban of "Lost Boundaries," Life Magazine might have been subject to a similar censorship with respect to stills which were incorporated in it at the time "Lost Boundaries" was in distribution. See issue of July 4, 1949, p. 64.

1 Cf. *Terminiello v. Chicago,* 337 U. S. 1. See *Kunz v. New York,* 340 U. S. 290, 306.

2 See *Kovacs v. Cooper,* 336 U. S. 77, at 96-97 (Mr. Justice Frankfurter's concurring opinion).

1 See *Kovacs v. Cooper,* 336 U. S. 77, at 105-106; Mr. Justice Rutledge concurring:

> "* * * But that the First Amendment limited its protection of speech to the natural range of the human voice as it existed in 1790 would be, for me, like saying that the commerce power remains limited to navigation by sail and travel by the use of horses and oxen in accordance with the principal modes of carrying on commerce in 1789. The Constitution was not drawn with any such limited vision of time, space and mechanics. * * *"

Cf. *Home Building & Loan Assn. v. Blaisdell,* 290 U. S. 398, 442-443.

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