AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 8: The New Deal/Great Society Era—Democratic Rights/Free Speech/Media

**Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495** (1952)

*New York state adopted a law that prohibited the public exhibition of any motion picture without a license from the education department, and it empowered a government official in the department to examine every motion picture to be exhibited in the state and provide license unless the film was in whole or in part “obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime.” The Joseph Burstyn corporation sought to distribute in the United States an Italian filmed directed by Roberto Rossellini entitled “The Miracle.” The company received a license to exhibit the film in New York. Meanwhile, the Vatican’s censorship agency declared the film “an abominable profanation,” but did not invoke its right to have the Italian government ban the film. The National Legion of Decency, a Catholic American group, declared the film to be sacrilegious, but the American movie industry’s National Board of Review designated the film “especially worth seeing.” The leadership of Christian churches in the United States took conflicting views of the film. A protest aimed at the Board of Regents, which was the head of the state education department, led them to review the film and determine that it was sacrilegious. After a public hearing, the license was rescinded.*

*The company filed suit in state court seeking a review of the actions of the regents, but lost. The state appellate courts affirmed that ruling. The U.S. Supreme Court reversed. The Court unanimously held that motion pictures were subject to First Amendment protections and that boards of censors were particularly disfavored as prior restraint on speech. The Court found the charge of “sacrilege” to be too vague and encompassing to be a constitutional basis for banning films, but it left open the question of whether the state could continue to prohibit films on other grounds, such as those of obscenity.*

JUSTICE CLARK delivered the opinion of the Court.

. . . .

As we view the case, we need consider only appellant's contention that the New York statute is an unconstitutional abridgment of free speech and a free press. In *Mutual Film Corp. v. Industrial Commission* (1915), [the Supreme Court held that moving pictures were “not to be regarded . . . as part of the press of the country or as organs of public opinion” entitled to constitutional protection.]. In a series of decisions beginning with *Gitlow v. New York* (1925), this Court held that the liberty of speech and of the press which the First Amendment guarantees against abridgement by the federal government is within the liberty safeguarded by the Due Process Clause of the Fourteenth Amendment from invasion by state action. . . . Since this series of decisions came after the *Mutual* decision, the present case is the first to present squarely to us the question whether motion pictures are within the ambit of protection which the First Amendment, through the Fourteenth, secures to any form of "speech" or "the press."

It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform. *Winters v. New York* (1948). . . .

It is urged that motion pictures do not fall within the First Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit. We cannot agree. That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures.

It is further urged that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression. Even if one were to accept this hypothesis, it does not follow that motion pictures should be disqualified from First Amendment protection. If there be capacity for evil it may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship such as we have here.

For the foregoing reasons, we conclude that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments. To the extent that language in the opinion in *Mutual Film Corp. v. Industrial Commission* is out of harmony with the views here set forth, and we no longer adhere to it.

To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. That much is evident from the series of decisions of this Court with respect to other media of communication of ideas. Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule. There is no justification in this case for making an exception to that rule.

The statute involved here does not seek to punish, as a past offense, speech or writing falling within the permissible scope of subsequent punishment. On the contrary, New York requires that permission to communicate ideas be obtained in advance from state officials who judge the content of the words and pictures sought to be communicated. This Court recognized many years ago that such a previous restraint is a form of infringement upon freedom of expression to be especially condemned. *Near v. Minnesota* (1931). The Court there recounted the history which indicates that a major purpose of the First Amendment guaranty of a free press was to prevent prior restraints upon publication, although it was carefully pointed out that the liberty of the press is not limited to that protection. . . . In the light of the First Amendment's history and of the *Near* decision, the State has a heavy burden to demonstrate that the limitation challenged here presents such an exceptional case.

New York's highest court says there is "nothing mysterious" about the statutory provision applied in this case: "It is simply this: that no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule. . . ." This is far from the kind of narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society. In seeking to apply the broad and all-inclusive definition of "sacrilegious" given by the New York courts, the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies. New York cannot vest such unlimited restraining control over motion pictures in a censor. Under such a standard the most careful and tolerant censor would find it virtually impossible to avoid favoring one religion over another, and he would be subject to an inevitable tendency to ban the expression of unpopular sentiments sacred to a religious minority. Application of the "sacrilegious" test, in these or other respects, might raise substantial questions under the First Amendment's guaranty of separate church and state with freedom of worship for all. However, from the standpoint of freedom of speech and the press, it is enough to point out that the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures.

. . . .

*Reversed*.

JUSTICE REED, concurring.

Assuming that a state may establish a system for the licensing of motion pictures, an issue not foreclosed by the Court's opinion, our duty requires us to examine the facts of the refusal of a license in each case to determine whether the principles of the First Amendment have been honored. This film does not seem to me to be of a character that the First Amendment permits a state to exclude from public view.

JUSTICE FRANKFURTER, with whom JUSTICE JACKSON joins, concurring. JUSTICE BURTON, having concurred in the opinion of the Court, also joins this opinion.

. . . .

. . . . We are asked to decide this case by choosing between two mutually exclusive alternatives: that motion pictures may be subjected to unrestricted censorship, or that they must be allowed to be shown under any circumstances. But only the tyranny of absolutes would rely on such alternatives to meet the problems generated by the need to accommodate the diverse interests affected by the motion pictures in compact modern communities. It would startle Madison and Jefferson and George Mason, could they adjust themselves to our day, to be told that the freedom of speech which they espoused in the Bill of Rights authorizes a showing of "The Miracle" from windows facing St. Patrick's Cathedral in the forenoon of Easter Sunday, just as it would startle them to be told that any picture, whatever its theme and its expression, could be barred from being commercially exhibited. The general principle of free speech, expressed in the First Amendment as to encroachments by Congress, and included as it is in the Fourteenth Amendment, binding on the States, must be placed in its historical and legal contexts. The Constitution, we cannot recall too often, is an organism, not merely a literary composition.

. . . .

To criticize or assail religious doctrine may wound to the quick those who are attached to the doctrine and profoundly cherish it. But to bar such pictorial discussion is to subject non-conformists to the rule of sects.

Even in *Mutual Film Corp.*, it was deemed necessary to find that the terms "educational, moral, amusing or harmless" do not leave "decision to arbitrary judgment." Such general words were found to "get precision from the sense and experience of men." This cannot be said of "sacrilegious." If there is one thing that the history of religious conflicts shows, it is that the term "sacrilegious" —if by that is implied offense to the deep convictions of members of different sects, which is what the Court of Appeals seems to mean so far as it means anything precisely—does not gain "precision from the sense and experience of men."

. . . .

To the extent that English law took jurisdiction to punish "sacrilege," the term meant the stealing from a church, or otherwise doing damage to church property. This special protection against "sacrilege," that is, property damage, was granted only to the Established Church. Since the repeal less than a century ago of the English law punishing "sacrilege" against the property of the Established Church, religious property has received little special protection. The property of all sects has had substantially the same protection as is accorded non-religious property. At no time up to the present has English law known "sacrilege" to be used in any wider sense than the physical injury to church property. It is true that, at times in the past, English law has taken jurisdiction to punish departures from accepted dogma or religious practice or the expression of particular religious opinions, but never have these "offenses" been denominated "sacrilege." Apostasy, heresy, offenses against the Established Church, blasphemy, profanation of the Lord's Day, etc., were distinct criminal offenses, characterized by Blackstone as "offences against God and religion." These invidious reflections upon religious susceptibilities were not covered under sacrilege as they might be under the Court of Appeals' opinion. Anyone doubting the dangerous uncertainty of the New York definition, which makes "sacrilege" overlap these other "offenses against religion," need only read Blackstone's account of the broad and varying content given each of these offenses.

. . . .

From all that has been said one is compelled to conclude that the term "sacrilegious" has come down the stream of time encrusted with a specialized, strictly confined meaning, pertaining to things in space not things in the mind. The New York Court of Appeals did not give the term this calculable content. It applied it to things in the mind, and things in the mind so undefined, so at large, as to be more patently in disregard of the requirement for definiteness, as the basis of proscriptions and legal sanctions for their disobedience, than the measures that were condemned as violative of Due Process in *United States v. Cohen Grocery Co.* (1921). . . .

. . . .