

Prior Restraint vs. Subsequent Punishment

- Prior Restraint means preventing publication of speech before it is published by an injunction.
 - These are considered much more restrictive on free speech.
 - As long as the speech is in a public forum, prior restraint is presumptively unconstitutional.
 - The only way this will be allowed is if the court agrees there is an imminent and compelling threat.
- Subsequent Punishment means punishing the purveyor of illegal speech after it is published.
 - This can be through civil or criminal actions.
 - The normal rules of free speech discussed last class apply.

When is Prior Restraint Allowed?

- To stop speech not protected, like:
 - Obscenity
 - False advertising
 - Fraud
- Where national security is at risk by the publication
 - Under the NY Times v. United States case though, this is very difficult to establish
 - Prior restraint would require an “immediate, direct, irreparable harm to the interests of the United States”
- Where there is a pre-publication agreement to not publish the information (like in an employment contract)
 - There, the court is enforcing the contract, not limiting free speech

Other Candidates for Prior Restraint

- Military Security Review
 - The military can usually dictate to press outlets covering the war what they can and cannot publish about troop movements, etc.
- Publications that violate licensing and other intellectual property rules
- Even displays on public property can be enjoined if it's based on a proper time, place and manner restriction
 - It's important, though, that the government officials not have too much unbridled control over the licensing process.

Prior Restraints of Visual Media

- Movies and films originally were held to be outside of free speech and subject to full government control.
- Today, movies have full first Amendment rights.
- Licensing can be used to bar obscene films, but there must be procedural safeguards:
 - The burden is on the authority denying the license to show that the film contains unprotected speech
 - Prior restraint can only be used pending a quick judicial resolution
- Broadcasting
 - The FCC can regulate over the air speech only by threatening to remove the license of the broadcaster (or actually doing it).
 - The reason for the allowance is its limited availability.

Public Communications Law Lecture 3

Slide 4

Broadcasting (continued)

- The FCC can require over-the-air stations to conform to the public interest, including:
 - Not showing certain objectionable programming elements
 - especially during certain hours that children are more likely to watch
 - Requiring networks to show certain programming in the public interests (like a Presidential debate)
 - FCC restrictions can certainly be content-based
 - Can they be viewpoint-based?
 - Fairness Doctrine (discussed later in the course)
- Cable television
 - The companies that operate cable are given franchise licenses
 - This, in effect, gives the authorities the power to regulate cable to some extent, but less than in the case of broadcasting stations.

Discriminatory Taxes

- Historically, special taxes have been used to fight or punish media outlets.
- The general Supreme Court rule has been that it's a question of intent behind the tax:
 - If it's designed simply to raise revenues, it can be applied, even if it will hurt the expression of speech.
 - If it's content-based (it's targeted to punish papers who espouse certain viewpoints), it will not be allowed.
 - The Supreme Court has even allowed taxes that apply to some media outlets but not others, as long as it isn't content-based.
 - But if it's discriminatory within one medium (i.e., certain types of newspapers have to pay) it may well be unconstitutional.
- A "Son of Sam" law was struck down for similar reasons .

Post-Publication Punishment

- The Supreme Court has ruled that this cannot be applied if it would “chill” the publication of constitutionally protected speech in the future.
- In general, if a news outlet legally obtains information and then publishes it, it’s very difficult to punish the outlet after the fact
 - (even if the information was obtained illegally by the source).
- This has been applied to allow publication of:
 - Illegally recorded phone calls
 - Juvenile criminal records that would normally be sealed
 - (both when the news outlet did not commit illegal activity in obtaining it)

Content-Neutral Regulations

- Examples of laws that were held to be content-neutral:
 - Law making it illegal to destroy draft cards allowed punishment of people who did so as a public protest.
 - Law disallowing sleeping in public parks could be applied to prevent people from doing so for protest.
- Example of a law that was struck down even though it seemingly was content-neutral because it was fundamentally based on a message:
 - Law disallowing mutilation or defiling of the American flag
 - This was allowed as an exercise of free speech
 - (even spurring a movement to outlaw it by Constitutional Amendment)

Limits on Content-Neutral Restrictions

- The fact that a restriction is content-neutral doesn't give the government *carte-blanche* to restrict anything.
- This kind of restriction still requires that the regulation:
 - Protect a substantial government interest
 - e.g., preventing traffic disruption during rush hour
 - Actually advance that government interest
 - Is the regulation a pretext?
 - Regulation prohibiting picketers around court rejected!
 - Narrowly tailored to achieve that government interest
 - Is there any way to achieve the interest without restricting speech?
 - Leave reasonable alternative channels for the speech
- This is not quite strict scrutiny, but it's pretty close.