

Near v. Minnesota

Learner Outcomes

Students will:

1. Understand the historical basis of a free press and the protections provided by the First Amendment.
2. Learn about acceptable limitations on free press.
3. Consider the dangers of a free press.
4. Learn about free press today.

Materials Needed: Copies of **CASE SUMMARY: *Near v. Minnesota***
Student Handout: NEAR v. MINNESOTA
Student Handout: FACTS NOT THEORIES
Tabloids
Daily newspapers

Time needed: 2-3 class periods

Grade level: Grades 9-12

Procedure:

1. Introduce the concept of free press by asking students what they think it means. Discuss the differences between metropolitan daily newspapers (*Minneapolis Star Tribune*, *St. Paul Pioneer Press*) and tabloids (*National Inquirer*). Should they be treated the same? If possible, share copies of both publications with the students.
2. Explain that free press was simply an ideal when it was considered by the country's founders and that the U.S. Supreme Court has shaped its meaning through many court decisions. One of the Court's most significant decisions is *Near v. Minnesota*.
3. Have students read the **CASE SUMMARY. *Near v. Minnesota***. Individually or as a group, study the case using the case study method (included in introductory materials).
4. Explain to students that they will be further exploring the opinion of the court (the majority opinion) and the dissenting opinion, as well as looking at viewpoints of the country's founders.

Procedure cont.

5. Divide the class into seven small groups. Assign each group one of the problems (quotations and questions for consideration). Provide each student with a copy of the assigned problem. Ask each group to discuss the questions provided with the quotation.
6. Shift the groups so that each new group has one representative from each problem. Each representative is to share the information discussed in step five with the new group.
7. As a large group, discuss the meaning and development of freedom of the press. Ask them if they would have voted with the *Near* majority or the dissent.
8. If students need to have their commitments to a free press challenged in a provocative way, share the news article that appeared in the last issue of the *Saturday Press* that was published before it was stopped under the Public Nuisance Law. **Student Handout: FACTS NOT THEORIES.** Would they change their minds? Should such articles be limited? What is the danger of limitation?
9. Inviting a newspaper publisher or reporter to the classroom to address these issues and talk about current practices would provide students with an opportunity to consider the meaning of the First Amendment in a very personal way.

CASE SUMMARY: *Near v. Minnesota*

283 U.S.696 (1930)

In the 1920s, Minnesota was the site of lumber and iron ore exploitation, gambling, prostitution, and gangsters. Minneapolis was described by Lincoln Steffens in *The Shame of the Cities* as a classic example of a town “where the people were sober, satisfied, busy with their own affairs, and left the law enforcement and the running of the city to the corrupt politicians and strong-armed gangsters.”

Nate Bomberg, a veteran reporter for the St Paul *Pioneer Press* wrote “Everybody was in on the take. You can’t have an underworld without an overworld, if you know what I mean. You can’t have rackets unless you have the mayor, the chief of police, and the county attorney in your corner.”

During those years, Jay M. Near was the publisher of the *Saturday Press*, a sleazy Minneapolis newspaper that contained bigoted, scandalous stories filled with rumors, feeding the city a diet of gossip. However, Mr. Near was also a crusader against corruption in government. His newspaper attacked the mayor and the chief of police, claiming that city hall was in on the take. The political corruption in Minneapolis and St. Paul and the truce between the criminals and the police and the city fathers provided endless material for Near.

The *Saturday Press* had a short, but colorful four-month life. Near’s attacks offended many people in power, and each issue of the newspaper became more intense. Eventually the attacks did not end with political corruption but blamed all of Minneapolis’s problems on the Jews.

In November 1927, a complaint was filed in Hennepin District Court, alleging that the *Saturday Press* had violated the Public Nuisance Law, which had been pushed through the Minnesota Legislature in 1925 to silence similar newspapers, published in Duluth and on the Iron Range, attacking northern Minnesota elected officials.

The Public Nuisance Law said “Section 1. Any person who . . . shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away (a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or (b) a malicious, scandalous and defamatory newspaper, magazine or other periodical, is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided. . . . In actions brought under (b) above, there shall be available the defense that the truth was published with good motives and for justifiable ends. . . .”

The Public Nuisance Law did not punish Near for having published statements that defamed public officials (that could have been accomplished under laws of libel and defamation). Rather, Near was forced under the law to stop future publications. The government tried to "**enjoin**" or stop his newspaper business.

Although Near was forced to stop publishing new newspapers, he did not give up his cause. He challenged the Minnesota law as being an unconstitutional **prior restraint** and, with the help of Chicago *Tribune* publisher Bertie McCormick (who joined because he feared the development of similar restraints on more respectable newspapers), took the question of freedom of the press to the Minnesota Supreme Court and the U.S. Supreme Court.

On June 1, 1931, the U.S. Supreme Court, in a five-to-four decision, said that it agreed with Near, stating:

“The fact that for approximately one hundred and fifty 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. Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain

CASE SUMMARY: *Near v. Minnesota* cont.

the publication of newspapers and periodicals. The general principle that the constitutional guaranty of the liberty of the press gives immunity from previous restraints has been approved in many decisions under the provision of state constitutions. . . .For these reasons we hold the statute. . . .to be an infringement of the liberty of the press guaranteed by the Fourteenth Amendment.”

In October 1932, under the caption “The Newspaper That Refused to Stay Gagged,” the *Saturday Press* reappeared, with Jay Near at its helm. The character of the paper hadn’t changed much. Mr Near died on April 17, 1936 of natural causes. Although the Minneapolis *Tribune* ran only a brief obituary, making no reference to the landmark First Amendment case, the Chicago *Tribune* ran a story under the headline “Editor J. Near Dies in Minnesota; Foe of Governor Olson and Crime.”

BACKGROUND Source: *Minnesota Rag*, Fred Friendly

Student Handout: *NEAR v. MINNESOTA*

PROBLEM 1

When people talk of the Freedom of Writing, Speaking or Thinking I cannot choose but laugh. No such thing ever existed. No such thing now exists: but I hope it will exist. But it must be hundreds of years after you and I shall write and speak no more.

John Adams to Thomas Jefferson, July 15, 1817

?? Questions to consider ??

1. Where are the protections of freedom of writing (press) and speaking listed?
2. Why did the country's founders think that these freedoms were important?
3. How have the freedoms of press and speech been expanded since 1791?

Student Handout: *NEAR v. MINNESOTA* cont.

PROBLEM 2

Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the states, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits.

James Madison

?? Questions to consider ??

1. What is Mr. Madison referring to when he says “noxious branches” and “those yielding the proper fruits.”
2. It is sometimes said that punishing abuses of the press will have a “chilling effect” on the appropriate action of the press. How might this happen? Do you agree or disagree?

Student Handout: *NEAR v. MINNESOTA* cont.

PROBLEM 3

The administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities.

Chief Justice Charles Evans Hughes, Opinion of the Court
Near v. Minnesota

?? Questions to consider ??

1. What role does the press play, especially in the situations described above?

2. Has society changed since 1931 when Justice Hughes wrote this statement? Has the function of the media changed? If so, in what ways?

Student Handout: *NEAR v. MINNESOTA* cont.

PROBLEM 4

The protection even as to previous restraint is not absolutely unlimited. . . . “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 rights” No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government.

Chief Justice Charles Evans Hughes, Opinion of the Court
Near v. Minnesota

?? Questions to consider ??

1. What three areas can be regulated, according to the above statement?
2. What problems do these areas create?
3. Can you think of recent situations concerning these limitations?

Student Handout: *NEAR v. MINNESOTA* cont.

PROBLEM 5

If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter-in particular that the matter consists of charges against public officers of official dereliction-and unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is the essence of censorship.

Chief Justice Charles Evans Hughes, Opinion of the Court
Near v. Minnesota

?? Questions to consider ??

1. How would a newspaper try to prove that its charges are true and are published with good motives and for justifiable ends? What would constitute justifiable ends?
2. Who would decide if the materials was true and published with good motives and for justifiable ends?
3. Is there a potential conflict of interest when a public official (a judge) is deciding about the motives and justifiable ends of a newspaper's criticism of another public official?

Student Handout: *NEAR v. MINNESOTA* cont.

PROBLEM 6

It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people.

Justice Felix Frankfurter
United States v. Rabinowitz (1950)

?? Questions to consider ??

1. Can you think of examples?
2. Should these people receive fewer safeguards?

Student Handout: *NEAR v. MINNESOTA* cont.

PROBLEM 7

That this amendment [First Amendment] was intended to secure to every citizen an absolute right to speak, or write, or print whatever he might please, without any responsibility, public or private, therefore, is a supposition too wild to be indulged by any rational man. This would be to allow to every citizen a right to destroy at his pleasure the reputation, the peace, the property, and even the personal safety of every other citizen. . . . Civil society could not go on under such circumstances. Men would then be obliged to resort to private vengeance to make up for the deficiencies of the law; and assassinations and savage cruelties would be perpetrated with all the frequency belonging to barbarous and brutal communities. It is plain, then, that the language of this amendment imports no more than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so always that he does not injure any other person in his rights, person, property, or reputation; and so always that he does not thereby disturb the public peace, or attempt to subvert the government. . . .

Justice Pierce Butler, Dissenting Opinion, quoting Justice Story
Near v. Minnesota

?? Questions to consider ??

1. If freedom of speech and press are absolute, what does Justice Butler and Justice Story claim will happen?
2. Does the statement that limits free speech and press so that it does not attempt to subvert the government contradict the reason for free speech and press? Should a person be able to call for the overthrow of the government?

ANSWER KEY : *Near v. Minnesota*

?? Questions to consider ??

PROBLEM 1

1. Where are the protections of freedom of writing (press) and speaking listed?

ANSWER: State declarations of rights, U.S. Bill of Rights.

2. Why did the country's founders think that these freedoms were important?

ANSWER: They believed that any government would attempt to abuse its powers and that one of the only ways in which to hold government officials accountable to the people was for the people to feel that they could discuss the issues freely.

3. How have the freedoms of press and speech been expanded since 1791?

ANSWER: Free press now includes other methods of communication including television and radio (although treated a bit differently). Free speech includes symbolic speech (expression). Within these areas, the U.S. Supreme Court has handed down many decisions that clarify First Amendment freedoms. (For example, in *Time v. Sullivan*, the Supreme Court held that public officials attempting to prove libel must show that the publishers acted with malice or with reckless disregard for the truth. Also, in *Tinker v. Des Moines*, the court decided that wearing a black armband to school to protest the Vietnam war was protected under symbolic speech.)

PROBLEM 2

1. What is Mr. Madison referring to when he says "noxious branches" and "those yielding the proper fruits."

ANSWER: "Noxious branches" is referring to newspapers that publish stories that one would view as harmful to society. "Those yielding the proper fruits" refers to newspapers that print appropriate stories.

2. It is sometimes said that punishing abuses of the press will have a "chilling effect" on the appropriate action of the press. How might this happen? Do you agree or disagree?

ANSWER: If newspaper publishers are afraid of the consequences of publishing a story that is critical of government, they may choose instead to refrain from discussing issues that are of controversy and importance to the public.

ANSWER KEY: *Near v. Minnesota cont.*

PROBLEM 3

1. What role does the press play, especially in the situations described above?

ANSWER: The media is viewed as the watchdog on the operations of government. Some call it the fourth branch of government, referring to its role of checking on the other three branches of government to make certain that government officials are doing their jobs according to the law.

2. Has society changed since 1931 when Justice Hughes wrote this statement? Has the function of the media changed? If so, in what ways?

ANSWER: Although we may view today's society as lawless, Minnesota in the 1920s was filled with corruption. However, many of the problems facing Minnesotans in the 1920s continue to plague us today. Crime has increased and government is even more complex. The news media continues to take its role seriously, often times forming its own investigative units to look into questionable behavior.

PROBLEM 4

1. What three areas can be regulated, according to the above statement?

ANSWER: National secrets during times of war, obscenity, and "fighting words."

2. What problems do these areas create?

ANSWER: It is hard to determine what secrets deserve protection versus the information that the public has a right to know, hard to define obscenity, and hard to select the words that are "fighting words."

3. Can you think of recent situations concerning these limitations?

ANSWER: The press coverage of the Persian Gulf War was both criticized for publicizing government war efforts and criticized for not providing enough information about the actual damage being done in Iraq. Recent songs have been labeled "obscene," and record sellers have been charged with crimes (Two Live Crew). Also, organizations are attempting to regulate hate language calling it "fighting words."

ANSWER KEY: *Near v. Minnesota* cont.

PROBLEM 5

1. How would a newspaper try to prove that its charges are true and are published with good motives and for justifiable ends? What would constitute justifiable ends?

ANSWER: Proving the truth would not be as difficult as proving good motives and justifiable ends. It is very likely that what one would consider to be justifiable ends would not be so to another.

2. Who would decide if the materials was true and published with good motives and for justifiable ends?

ANSWER: The judge, a servant of the government.

3. Is there a potential conflict of interest when a public official (a judge) is deciding about the motives and justifiable ends of a newspaper's criticism of another public official?

ANSWER: Yes. If the judge simply does not like the content of the article (because it reflects badly on colleagues, friends, etc.), he or she could find that good motives and justifiable ends were lacking.

PROBLEM 6

1. Can you think of examples?

ANSWER: Pornographers frequently challenge obscenity laws. Persons accused of crimes (often felons convicted of previous offenses) challenge illegal searches by police officers.

2. Should these people receive fewer safeguards?

ANSWER: No, the principle of innocent until proven guilty requires that everyone receive all protections regardless of past criminal conduct.

ANSWER KEY: *Near v. Minnesota cont.*

PROBLEM 7

1. If freedom of speech and press are absolute, what does Justice Butler and Justice Story claim will happen?

ANSWER: Citizens will be injured in a way that will incite them to violence. If their government does not have the power to limit these rights, the citizens will be forced to take action themselves through assassinations and savage cruelties.

2. Does the statement that limits free speech and press so that it does not attempt to subvert the government contradict the reason for free speech and press? Should a person be able to call for the overthrow of the government?

ANSWER: In the Declaration of Independence, Thomas Jefferson stated that when government has a long pattern of abuse of our unalienable rights of life, liberty, and pursuit of happiness, the citizens have the right, even the duty to “throw off such government,” to abolish it and institute a new government. However, if advocating overthrow is done in a context where the communication of ideas threatens to trigger serious damage through imminent lawless action, the communication can be regulated to protect the public.

Student Handout: FACTS NOT THEORIES

The following articles appear in the last edition published, dated November 19, 1927:

“FACTS NOT THEORIES.

“‘I am a bosom friend of Mr. Olson,’ snorted a gentleman of Yiddish blood, ‘and I want to protest against your article,’ and blah, blah, ad infinitum, ad nauseam.

“I am not taking orders from men of Barnett faith, at least right now. There have been too many men in this city and especially those in official life, who HAVE been taking orders and suggestions from JEW GANGSTERS, therefore we HAVE Jew Gangsters, practically ruling Minneapolis.

“It was buzzards of the Barnett stripe who shot down my buddy. It was Barnett gunmen who staged the assault on Samuel Shapiro. It is Jew thugs who have ‘pulled’ practically every robbery in this city. It was a member of the Barnett gang who shot down George Rubenstein (Ruby) while he stood in the shelter of Mose Barnett’s ham-cavern on Hennepin avenue. It was Mose Barnett himself who shot down Roy Rogers on Hennepin avenue. It was at Mose Barnett’s place of ‘business’ that the ‘13 dollar Jew’ found a refuge while the police of New York were combing the country for him. It was gang of Jew gunmen who boasted that for five hundred dollars they would kill any man in the city. It was Mose Barnett, a Jew, who boasted that he held the chief of police of Minneapolis in his hand-had bought and paid for him.

“It is Jewish men and women-pliant tools of the Jew gangster, Mose Barnett, who stand charged with having falsified the election records and returns in the Third ward. And it is Mose Barnett himself, who, indicted for his part in the Shapiro assault, is a fugitive from justice today.

“Practically every vendor of vile hooch, every owner of a moonshine still, every snake-faced gangster and embryonic yegg in the Twin Cities is s JEW.

“Having these examples before me, I feel that I am justified in my refusal to take orders from a Jew who boasts that he is a ‘bosom friend’ of Mr. Olson.

“I find in the mail at least twice per week, letters from gentlemen of Jewish faith who advise me against ‘launching an attack on the Jewish people.’ These gentlemen have the cart before the horse. I am launching, nor is Mr. Guilford, no attack against any race, BUT:

“When I find men of a certain race banding themselves together for the purpose of preying upon Gentile or Jew; gunmen, KILLERS, roaming our streets shooting down men against whom they have no personal grudge (or happen to have); defying OUR laws; corrupting OUR officials; assaulting business men; beating up unarmed citizens; spreading a reign of terror through every walk of life, then I say to you in all sincerity, that I refuse to back up a single step from that ‘issue’- if they choose to make it so.

“If the people of Jewish faith in Minneapolis wish to avoid criticism of these vermin whom I rightfully call ‘Jews’ they can easily do so BY THEMSELVES CLEANING HOUSE.

“I’m not out to cleanse Israel of the filth that clings to Israel’s skirts. I’m out to ‘hew to the

Student Handout: FACTS NOT THEORIES cont.

line, let the chips fly where they may.’

“I simply state a fact when I say that ninety per cent. of the crimes committed against society in this city are committed by Jew gangsters.

“It was a Jew who employed JEWS to shoot down Mr. Guilford. It was a Jew who employed a Jew to intimidate Mr. Shapiro and a Jew who employed JEWS to assault that gentleman when he refused to yield to their threats. It was a JEW who wheedled or employed Jews to manipulate the election records and returns in the Third ward in flagrant violation of law. It was a Jew who left two hundred dollars with another Jew to pay to our chief of police just before the last municipal election, and:

“It is Jew, Jew, Jew, as long as one cares to comb over the records.

“I am launching no attack against the Jewish people AS A RACE. I am merely calling attention to a FACT. And if the people of that race and faith wish to rid themselves of the odium and stigma THE RODENTS OF THEIR OWN RACE HAVE BROUGHT UPON THEM, they need only to step to the front and help the decent citizens of Minneapolis rid the city of these criminal Jews.

“Either Mr. Guilford or myself stand ready to do battle for a MAN, regardless of his race, color or creed, but neither of us will step one inch out of our chosen path to avoid a fight IF the Jews want to battle.

“Both of us have some mighty loyal friends among the Jewish people but not one of them comes whining to ask that we ‘lay off’ criticism of Jewish gangsters and none of them comes carping to us of their ‘bosom friendship’ for any public official now under our journalistic guns.”