

The Colonel's Finest Campaign: Robert R. McCormick and *Near v.* *Minnesota*

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I.	<i>NEAR V. MINNESOTA: BACKGROUND</i>	195
II.	INCORPORATION: THE NECESSARY PRECONDITION	198
III.	COL. MCCORMICK TAKES CHARGE OF <i>NEAR</i>	206
IV.	BEFORE THE SUPREME COURT	226
V.	THE DECISION	231
VI.	THE AFTERMATH	236

“The mere statement of the case makes my blood boil.”

So wrote Weymouth Kirkland to his most illustrious client, Col. Robert R. McCormick of *The Chicago Tribune* (“*Tribune*”) on Sept. 14, 1928.¹ The prominent Chicago attorney was writing about a case then styled *State ex rel. Olson v. Guilford*,² but which would make history as *Near v. Minnesota*³ when it reached its conclusion in the United States

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1. Letter from Weymouth Kirkland, Partner, Kirkland, Fleming, Green & Martin, Chicago, to Col. Robert R. McCormick, Publisher, The Chicago Tribune (Sept. 14, 1928) (on file with Series I-60, Business Correspondence, 1927-1955, Tribune Archives at Cantigny, Wheaton, Ill. [hereinafter Tribune Archives]).

2. 219 N.W. 770 (Minn. 1928).

3. 283 U.S. 697 (1931).

Supreme Court nearly three years later. Both McCormick and Kirkland were to become principal players in *Near*, and together they created a role for the institutional press as “strategic litigator,” shaping the First Amendment doctrine under which journalists operate.

Today, media corporations and their professional and trade associations, along with organizations like Reporters Committee for Freedom of the Press and the American Civil Liberties Union, carefully monitor litigation that implicates First Amendment values and decide whether, when, and how to intervene. It was not always so.

To be sure, such groups as the American Newspaper Publishers Association (“ANPA”) (now the Newspaper Association of America) and, to a lesser extent, the American Society of Newspaper Editors, had routinely lobbied and litigated on behalf of their members’ business interests: antitrust regulation, copyright protection, postal rates, taxes, and similar matters.⁴ But litigation by an institutional press to avoid or create doctrinal precedent under the First Amendment really began with the appointment of Col. Robert R. McCormick to head the ANPA’s Committee on Freedom of the Press in the spring of 1928 and his involvement in *Near v. Minnesota* beginning that fall.

In my previous work on this subject, I have shown that the institutional press has been relatively successful in shaping First Amendment doctrine, at least with respect to content regulation, through litigation in the United States Supreme Court.⁵ In this Article, I demonstrate that, although incorporation of First Amendment values through the Due Process Clause of the Fourteenth Amendment made this kind of litigation possible, the press was nevertheless reluctant to become involved. Through extensive use of Col. McCormick’s correspondence and the *Tribune’s* coverage, I show that McCormick’s personal and financial commitment to press freedom in general, and the *Near* case in particular, ultimately persuaded the institutional press to pursue doctrinal litigation in their own interest.

Part I briefly outlines the background of the *Near* case, while Part II discusses the role of incorporation in making a First Amendment challenge feasible. Part III traces McCormick’s efforts to draw the institutional press into the *Near* litigation. Part IV covers the proceedings before the Supreme Court, while Part V describes the landmark opinion itself. Finally, Part VI

4. See EDWIN EMERY, HISTORY OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION (1950); PAUL ALFRED PRATTE, GODS WITHIN THE MACHINE: A HISTORY OF THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, 1923-1993 (1995).

5. Eric B. Easton, *The Press as an Interest Group: Mainstream Media in the United States Supreme Court*, 14 UCLA ENT. L. REV. 247 (2007).

discusses the aftermath of *Near v. Minnesota* and the mobilization of the institutional press.

I. *NEAR V. MINNESOTA*: BACKGROUND

The story of *Near v. Minnesota* begins, not with Jay Near and Howard Guilford, Near's partner in sleaze, but with John L. Morrison, a highly religious, crusading prude with a venomous pen who waged a one-man crusade against the purveyors of booze and prostitutes in the wild and wooly iron mining town of Duluth, Minnesota, in the mid-1920s.⁶

Morrison's muck-raking newspaper, the Duluth *Rip-saw*, also went after the politicians who protected Duluth's rather crude entertainment industry. They were not amused and took their pique to the state legislature. In 1925, the Minnesota legislature—with some drafting help by Minneapolis newspapers, no less⁷—enacted a Public Nuisance Law, or “gag” law, that provided for abatement as a public nuisance of any “malicious, scandalous and defamatory newspaper, magazine or other periodical.”⁸

6. FRED W. FRIENDLY, *MINNESOTA RAG: THE DRAMATIC STORY OF THE LANDMARK SUPREME COURT CASE THAT GAVE NEW MEANING TO FREEDOM OF THE PRESS* 3-28 (1981). Fred Friendly was always a great story teller, and his love of the Constitution and its First Amendment made him the perfect author to capture this story. McCormick's biographer calls it “the definitive history” of this episode. RICHARD NORTON SMITH, *THE COLONEL: THE LIFE AND LEGEND OF ROBERT R. MCCORMICK 1880-1955*, at 280 (1997). It is certainly more definitive than “the Colonel's” own version, which makes Near and Guilford seem like candidates for sainthood. See ROBERT R. MCCORMICK, *THE FREEDOM OF THE PRESS* 46-52 (Arno Press 1970) (1936), PHILIP KINSLEY, *LIBERTY AND THE PRESS: A HISTORY OF THE CHICAGO TRIBUNE'S FIGHT TO PRESERVE A FREE PRESS FOR THE AMERICAN PEOPLE* (The Chicago Tribune 1944).

7. FRIENDLY, *supra* note 6, at 21.

8. *Id.* at 22. Section 1 of the Act provided:

Section 1. Any person who, as an individual, or as a member or employee of a firm, or association or organization, or as an officer, director, member or employee of a corporation, 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.

Participation in such business shall constitute a commission of such nuisance and render the participant liable and subject to the proceedings, orders and judgments provided for in this Act. Ownership, in whole or in part, directly or indirectly, of any such periodical, or of any stock or interest in any corporation or organization which owns the same in whole or in part, or which publishes the same, shall constitute such participation.

In actions brought under (b) above, there shall be available the defense that the truth was published with good motives and for justifiable ends and in such actions

University of Minnesota historian Paul L. Murphy attributes enactment of the gag law to “public exasperation” with the yellow journalism of the time and the “emergence of a number of cheap, ephemeral scandal sheets, which were used for extortion, blackmailing petty crooks, or pressuring concessions from venal public officials.”⁹ Murphy points out that “Minnesota’s experiment quickly drew warm national approval” as a practical alternative to administrative censorship, which would have been too costly, or civil or criminal libel actions, which had proved ineffective.¹⁰

Although Murphy does not discuss the importance of the *Rip-saw* to its adoption, a target of that paper, then-State Sen. Michael J. Boylan, came to be known as the “father” of the gag law.¹¹ In any event, Publisher Morrison died of a blood clot in the brain before he could be prosecuted under it. Of course, there was no shortage of scandalous newspapers in that era;¹² Near and Guilford were ready targets down in Minneapolis.¹³ Near was not nearly as self-righteous (or righteous at all, for that matter) as Morrison but was a complete scoundrel and bigot: antisemitic, antiblack, antilabor,¹⁴ and unfailingly hostile to Minneapolis area officials.

In 1927, Near and Guilford launched *The Saturday Press*, a scurrilous rag that, among other things, alleged that Jewish gangsters were

the plaintiff shall not have the right to report (*sic*) to issues or editions of periodicals taking place more than three months before the commencement of the action.

Near v. Minnesota, 283 U.S. 697, 702 (1931).

9. Paul L. Murphy, *Near v. Minnesota in the Context of Historical Developments*, 66 MINN. L. REV. 95, 135-36 (1980). Murphy notes without comment that the legislative history of the act is described in John E. Hartmann, *The Minnesota Gag Law and the Fourteenth Amendment*, 37 MINN. HIST. 161, 162 (1960). Hartmann, then a graduate student, acknowledges the “claim” that the act was directed against a particular editor but finds no substance in the legislative history pointing one way or the other. Introduced by a Progressive-Republican from Minneapolis, the bill was apparently handled routinely, enacted without dissent, and signed by the governor without any fanfare with other end-of-session bills. *Id.* at 161.

10. Murphy, *supra* note 9, at 137. Of that so-called “efficiency,” McCormick writes, “The statute was cunningly devised not only to avoid the necessity of indictment by the grand jury, as had been done in the Zenger case, but to avoid a jury trial also and leave the newspaper at the mercy of a corrupt or politically controlled court.” MCCORMICK, *supra* note 6, at 46. McCormick is referring to the near-mythic case of John Peter Zenger, a colonial printer prosecuted for seditious libel and acquitted through jury nullification. See JAMES ALEXANDER, *A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER* (Belknap Press 1963) (1736).

11. *Newspaper ‘Gag’ Law is Assailed as ‘Dangerous,’* CHI. TRIB., Mar. 26, 1929, at 17.

12. Indeed, it seems they have been with us always. See, e.g., Ralph Frasca, *The Helderberg Advocate: A Public-Nuisance Prosecution a Century before Near v. Minnesota*, 26 J. SUP. CT. HIST. 215 (2001).

13. FRIENDLY, *supra* note 6, at 31.

14. *Id.* at 32.

responsible for bootlegging, gambling, and racketeering in Minneapolis (which probably didn't bother anyone), and that certain law enforcement officials—especially Hennepin County Prosecutor Floyd B. Olson—were letting the gangsters run amok (which certainly did).¹⁵

Olson undertook to put Near out of business and filed a complaint on November 21, 1927, alleging multiple instances of defamation.¹⁶ Describing the newspaper as “malicious, scandalous, and defamatory,” the “magic words” of the Public Nuisance Law, Olson sought an injunction under that act.¹⁷ A temporary restraining order was issued the same day, enjoining Near and Guilford from publishing *The Saturday Press* or anything like it.¹⁸ *The Saturday Press* never recovered, but that TRO, which lasted more than a year,¹⁹ became the predicate for the most important press freedom case in American history up to that date.

At first, Near was represented only by local counsel, Thomas Latimer, a prominent Minneapolis attorney and, in Fred Friendly's words, a “self-appointed Legal Aid Society.”²⁰ When Near finally got to court in December 1927, Latimer argued that the Public Nuisance Law was a “subterfuge” to avoid the state constitution and the requirements of its libel law.²¹ Although he compared it to laws in fascist Italy and communist Russia, his argument fell on deaf ears. Judge Mathias Baldwin, who had himself been a target of *The Saturday Press*, refused to lift the restraining order but did certify the case to the Minnesota Supreme Court.²²

On May 25, 1928, the Minnesota Supreme Court unanimously upheld the validity of the statute as an exercise of the state's police powers.²³ “A

15. *Id.* at 45-49. See also MCCORMICK, *supra* note 6, at 47. McCormick's “spin” on Olson's decision to invoke the gag law is that “he would not risk” a libel action, implying that Near was telling the truth.

16. MCCORMICK, *supra* note 6, at 47; FRIENDLY, *supra* note 6, at 50. Friendly called the filing a “complaint,” as does Hughes, but McCormick characterizes it as an “information,” the kind of charging document used in the Zenger case to which McCormick had referred earlier. *Near v. Minnesota*, 283 U.S. 697, 704 (1931).

17. FRIENDLY, *supra* note 6, at 50.

18. *Id.*

19. *Id.* at 53. *But see* MCCORMICK, *supra* note 6, at 47. The timeline here is somewhat unclear. Friendly says the TRO remained in force for twenty-six months but dates the permanent injunction at three months after an October 10, 1928, hearing. That would make the duration of the TRO only fourteen months. McCormick dates the permanent injunction on October 11, 1928, which may refer to an oral judgment that Friendly says was conveyed to the lawyers. None of the briefs or opinions provide clarification except by reference to the record extract.

20. FRIENDLY, *supra* note 6, at 51.

21. *Id.* at 51-52.

22. *Id.* at 53.

23. *State ex rel. Olson v. Guilford*, 219 N.W. 770 (Minn. 1928). Elsie Latimer is also listed as counsel for Near.

business that depends largely for its success upon malice, scandal and defamation can be of no real service to society,” wrote Chief Justice Samuel Bailey Wilson for a unanimous court. “It is not a violation of the liberty of the press or of the freedom of speech for the Legislature to provide a remedy for their abuse.”²⁴ Four and a half months later, Judge Baldwin made the temporary restraining order a permanent injunction,²⁵ prohibiting Near and Guilford from publishing until they agreed to publish only the truth, “with good motives and for justifiable ends.”²⁶

As outrageous as the Minnesota Supreme Court’s opinion might seem today, the journalism of the day may have been even more outrageous. Murphy points out that, “with the rise of the tabloid, 1920’s journalism offended many older, more serious Americans, who were still guided by a vigorous Victorian-Progressive morality and decorum.”²⁷ Indeed, “[t]he national student debate topic for 1930 was: Resolved: That the Minnesota Nuisance Law should be adopted by every state in the Union.”²⁸

By then, however, word of the case had reached New York and the American Civil Liberties Union (“ACLU”), which had been formed in 1920.²⁹ Although the ACLU announced that it would take the case to the United States Supreme Court, there were doubts about the group’s financial wherewithal, and its involvement in the case was ultimately minimal.³⁰ Word also reached Chicago and Col. McCormick, who sent the case file on to Weymouth Kirkland.

II. INCORPORATION: THE NECESSARY PRECONDITION

Before turning to Kirkland’s response, and McCormick’s decision to take charge of the case and use it to establish modern prior restraint doctrine, we must remember that less than a decade earlier, such litigation would not have been possible. Until incorporation, usually attributed to *Gitlow v. New York*³¹ in 1925, the First Amendment could not be invoked against state gag laws; only Congress was precluded from abridging freedom of the press under the federal Constitution.³²

24. *Id.* at 773.

25. *See supra* note 19 and accompanying text.

26. 1925 Minn. Laws 358 § 1, *supra* note 8.

27. Murphy, *supra* note 9, at 134.

28. *Id.* at 137 (citing LAMAR T. BEMAN, CENSORSHIP OF SPEECH AND THE PRESS 178 (1930)). *See also* SILAS BENT, BALLYHOO: THE VOICE OF THE PRESS (1927).

29. FRIENDLY, *supra* note 6, at 63.

30. *Id.* at 63-65. McCormick’s version of the tale, at least in its published version, avoids any mention of the gangsters’ religious affiliation or Near’s anti-Semitism. MCCORMICK, *supra* note 6, at 45-52.

31. 268 U.S. 652 (1925).

32. U.S. CONST. amend. I.

Madison's proposed draft of the First Amendment had not been so constrained on that point: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."³³ That language appears to have passed in the House, but the Senate changed the subject of the sentence to "Congress." Paul Starr points out, however, that without a record of the discussion, there is no way to know whether the change was meant to be substantive.³⁴

Madison had even proposed another amendment explicitly prohibiting the states from abridging freedom of speech. "[I]f there was any reason to restrain the government of the United States from infringing upon these essential rights, it was equally necessary they should be secured against the state governments."³⁵ That, too, passed the House, but not the Senate. As adopted, the First Amendment protected freedom of speech and freedom of the press from encroachment only by the new national government.³⁶

Other provisions of the Bill of Rights were not so clearly drawn; the "takings clause" of the Fifth Amendment, for example, never mentions Congress. Using the passive voice, it says only, "nor shall private property be taken for public use, without just compensation."³⁷ So when a Baltimore wharf owner sued the city for destroying the value of his property, he not unreasonably claimed just compensation under the Fifth Amendment.³⁸ But when *Barron v. Baltimore* reached the U.S. Supreme Court in 1833, Chief Justice Marshall found the question presented "of great importance, but not of much difficulty."

The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are

33. PAUL STARR, *THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS* 74 (2004).

34. *Id.* at 75.

35. *Id.* Had the amendment passed, it would have been the fourteenth amendment in the original House resolution.

36. For the time being, we can leave aside the question as to whether this "freedom" was a right or a privilege (if those are different), or neither of those, but merely an immunity from Congressional action.

37. U.S. CONST. amend. V.

38. *Barron v. Baltimore*, 32 U.S. 243 (1832).

naturally, and, we think, necessarily applicable to the government created by the instrument. . . .

If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states.³⁹

Marshall reinforced the logical argument with a reference to the prohibitions on bills of attainder and ex post facto laws imposed on Congress in Article I, Section 9 and expressly imposed on the states in Section 10.

If the original constitution, in the ninth and tenth sections of the first article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the general government, and on those of the states; if in every inhibition intended to act on state power, words are employed which directly express that intent; some strong reason must be assigned for departing from this safe and judicious course in framing the amendments, before that departure can be assumed.

We search in vain for that reason.⁴⁰

Finally, Marshall turned to constitutional history. It was “universally understood,” he said, that the constitution was not ratified without “immense opposition.”⁴¹ He noted that nearly every ratifying convention recommended amendments against abuse of power, against “encroachments of the general government—not against those of the local governments.”

In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.⁴²

Although some constitutional thinkers, particularly more radical abolitionists, would express the view that states were nevertheless required to guarantee some or all of the rights enumerated in the first eight amendments, particularly freedom of speech and of the press, they justified their arguments on grounds other than direct application of the amendments.⁴³ *Barron v. Baltimore* was never seriously challenged.⁴⁴

Thus, even had the press been ready to emerge as a strategic litigator in its own interest—which it decidedly was not—it would have had no First

39. *Id.* at 247.

40. *Id.* at 249.

41. *Id.* at 250.

42. *Id.*

43. See MICHAEL KENT CURTIS, FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE” 266-270, 366-67 (2000).

44. Stanley Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? A Judicial Interpretation*, 2 STAN. L. REV. 140, 141 (1949-50).

Amendment shield against most of the regulations to which it was susceptible. Between the expiration of the Alien and Sedition Acts of 1798 and the Civil War, the most onerous of these would have been the laws enacted by slaveholding states criminalizing the expression of abolitionist views, as well as unsuccessful attempts to enact similar statutes in the North.⁴⁵ The extent to which the Republican reaction against those laws influenced the adoption of the Fourteenth Amendment after the war is a matter of considerable debate.

With the First Amendment now securely incorporated, it is easy enough to look back on that debate as a historical curiosity with little practical relevance today. Still, no understanding of incorporation can be complete without appreciating why that constitutional “work-around” was necessary. At the very least, it may explain why the Supreme Court seems to have incorporated the First Amendment so casually, without the detailed explication one would expect to accompany such an important shift in constitutional doctrine.

Was the Fourteenth Amendment designed by its framers and understood by its ratifiers to enable the national government to enforce the rights enumerated in the first eight amendments against the states through the privileges or immunities clause?⁴⁶ The leading advocate for the affirmative position was Justice Hugo Black:

My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states. With full knowledge of the import of the *Barron* decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced. This historical purpose has never received full consideration or exposition in any opinion of this Court interpreting the Amendment.⁴⁷

In his dissenting opinion in *Adamson v. California*, Justice Black proffered a scathing indictment of the failure of the Court in the *Slaughter-*

45. Curtis quotes a North Carolina statute making it a crime to circulate “any written or printed pamphlet or paper . . . the evident tendency whereof is to cause slaves to become discontented with the bondage in which they are held . . . and free negroes to be dissatisfied with their social condition.” CURTIS, *supra* note 43, at 293. See also AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 371-72 (2005).

46. This was the view of Rep. John A. Bingham (R-Ohio), principal drafter of the Fourteenth Amendment. CURTIS, *supra* note 43, at 360.

47. *Adamson v. California*, 332 U.S. 46, 71-72 (1946) (Black, J., dissenting) (holding that the due process clause did not protect a criminal defendant's right against self-incrimination in state trials).

House cases⁴⁸ and their progeny to consider the legislative history of the Fourteenth Amendment. In *Slaughter-House*, the first cases on point to reach the Supreme Court after ratification, the Court effectively made a constitutional nullity of the privileges or immunities clause. A contemporary historian restates that view more emphatically with respect to the First Amendment.

Justice Miller [who wrote the majority opinion in *Slaughter-House*] leaves out the entire history of suppression of civil liberties of white opponents of slavery, including Republicans, in the South before the Civil War. He is silent about the suppression of free speech in the South for Republicans as well as abolitionist. . . . He fails to note that Black Codes abridged privileges including free speech The struggles for free speech about slavery before the Civil War show that Justice Miller's constricted reading of the privileges-or-immunities of citizens of the United States secured by the Fourteenth Amendment was seriously mistaken.⁴⁹

On the other side of the issue, writing two years after Justice Black's *Adamson* dissent, Stanley Morrison called Black's position "fatally weak" and based on flawed historical research.⁵⁰ "In the absence of any adequate support for the incorporation theory, the effort of the dissenting judges in *Adamson v. California* to read the Bill of Rights into the Fourteenth Amendment amounts simply to an effort to put into the Constitution what the framers failed to put there."⁵¹ Morrison's position is supported by his Stanford colleague Charles Fairman in a companion article laying out a detailed legislative history of the Amendment.⁵²

There is no need to resolve this debate here, even if that were possible, but even Morrison suggests that Black and his fellow dissenters in *Adamson* may have been logically correct with respect to the First Amendment. "Once the basic principle of substantive due process had been established, there was no reason why liberty of speech and religion should not be protected by that doctrine against arbitrary legislation, just as economic liberty was protected."⁵³ Still, as Justice Oliver Wendell Holmes, Jr., famously said, "[t]he life of the law has not been logic: it has been

48. *Slaughter-House Cases*, 83 U.S. 36 (1872). A year earlier, a federal circuit court had held that the First Amendment guarantee of free speech applied to the states through the privileges or immunities clause of the Fourteenth Amendment, but that view went nowhere. *United States v. Hall*, 26 F. Cas. 79, 81 (C.C.S.D. Ala. 1871).

49. CURTIS, *supra* note 43, at 375-76. Curtis also cites with approval Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627 (1994).

50. Morrison, *supra* note 44, at 171.

51. *Id.* at 173.

52. Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949-50).

53. Morrison, *supra* note 44, at 168.

experience.”⁵⁴ And it would be more than a half century after ratification before the Supreme Court would apply the Fourteenth Amendment to strike down a state law censoring the press.

In the relevant cases that followed *Slaughter-House*, the Court consistently rejected any contention that specific rights enumerated in the first eight amendments could be enforced against contrary state law.⁵⁵ The “first intimation from any justice of the Supreme Court that the Fourteenth Amendment might be considered to incorporate the Bill of Rights”⁵⁶ came in Justice Harlan’s dissenting opinion in *O’Neil v. Vermont*,⁵⁷ an 1892 cruel and unusual punishment case:

[S]ince the adoption of the Fourteenth Amendment, no one of the fundamental rights of life, liberty or property, recognized and guaranteed by the Constitution of the United States, can be denied or abridged by a State in respect to any person within its jurisdiction. These rights are, principally, enumerated in the earlier Amendments of the Constitution.⁵⁸

Five years later, Harlan wrote a majority opinion stating in dicta that due process required just compensation in a state takings case, although Morrison calls *Chicago, Burlington & Quincy R.R. v. Chicago*⁵⁹ a substantive due process case, rather than an incorporation case.⁶⁰ The incorporation argument was rejected again in 1900⁶¹ and 1908.⁶²

54. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 5 (1881).

55. See *Walker v. Sauvinet*, 92 U.S. 90 (1875) (civil jury trial); *United States v. Cruikshank*, 92 U.S. 542 (1875) (First and Second Amendments); *Hurtado v. California*, 110 U.S. 516 (1884) (indictment by grand jury); *Presser v. Illinois*, 116 U.S. 252 (1886) (right to bear arms); *Speis v. Illinois*, 123 U.S. 131 (1887) (right to impartial jury; resolved on other grounds); *In re Kemmler*, 136 U.S. 436 (1890) (cruel and unusual punishment); *McElvaine v. Brush*, 142 U.S. 155 (1891) (cruel and unusual punishment); *O’Neil v. Vermont*, 144 U.S. 323 (1892) (cruel and unusual punishment; resolved on other grounds).

56. Morrison, *supra* note 44, at 151.

57. *O’Neil v. Vermont*, 144 U.S. 323 (1892).

58. *Id.* at 370.

59. *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1897).

60. Morrison, *supra* note 44, at 152.

61. *Maxwell v. Dow*, 176 U.S. 581 (1900) (grand jury indictment, jury trial). Morrison points out that pro-incorporation statements made during the debates on the Fourteenth Amendment were raised by counsel during this case, challenging Black’s assertion that the legislative history had never been considered. Morrison, *supra* note 44, at 154. See also *supra*, text accompanying note 47.

62. *Twining v. New Jersey*, 211 U.S. 78 (1908) (self-incrimination). In *Twining*, Harlan dissented on the grounds that compelled self-incrimination violated both the privileges or immunities clause and the due process clause.

I am of opinion that as immunity from self-incrimination was recognized in the Fifth Amendment of the Constitution and placed beyond violation by any Federal agency, it should be deemed one of the immunities of citizens of the United States which the Fourteenth Amendment in express terms forbids any State from abridging—as much so, for instance, as the right of free speech....

It is my opinion also that the right to immunity from self-incrimination cannot

Notwithstanding the failure of the general incorporation doctrine to win Supreme Court approval, the idea that substantive due process might provide the rationale for enforcing the First Amendment guarantees against the states was beginning to capture some legal and scholarly imaginations. The radical International Workers of the World (“IWW”) or Wobblies advanced that argument during the early years of the century when their legendary “free speech fights” provoked arrest and trial.⁶³ That, in turn, evoked a backlash from the press itself. One editorial referred to “the arrogant assumption of the street orators that they were ‘exercising a constitutional privilege’ – a deliberate misinterpretation” of the First Amendment, which leaves the states the power “to abridge the right of free speech” as they see fit.⁶⁴

But one chronicler of the period, B.F. Moore, a staff member of the Commission on Industrial Relations, was not so sure. Writing in 1915, Moore noted that the Supreme Court had interpreted the due process clause of the Fourteenth Amendment as prohibiting state “infringement of property rights rather than personal rights” but indicated the possibility that the Amendment extended to guarantees of free speech and press as well. “[I]t is not positively known at present just what protection is given to certain personal rights by certain clauses of the U.S. Constitution, especially the 14th amendment.”⁶⁵

Although the notion got no traction whatsoever in the Supreme Court, prominent scholars of the pre-World War I era, whom Mark Graber has called “the conservative libertarians,”⁶⁶ continued to move the idea forward even as they began to discard the laissez-faire economics supported by substantive due process. Thomas Cooley, for example, considered both freedom of speech and freedom of contract among the fundamental rights protected by the due process clause of the Fourteenth Amendment.⁶⁷ Theodore Schroeder and Ernst Freund, on the other hand, believed that speech rights were protected by the due process clause, but that freedom of contract stood on a different (and lesser) footing.⁶⁸ Henry Schofield

be taken away by any State consistently with the clause of the Fourteenth Amendment that relates to the deprivation by the State of life or liberty without due process of law.

Id. at 124-25 (Harlan, J., dissenting).

63. DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 125 (1997).

64. *Id.* (quoting *A Plain Statement of the San Diego ‘Free Speech’ Fuss*, S.D. EVE. TRIB. 4 (Mar. 13, 1912)). Such an editorial could be taken as evidence in itself that the press was not yet ready to act as an interest group with respect to First Amendment doctrine.

65. *Id.* at 125.

66. MARK A. GRABER, *TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM* 8 (1991).

67. *Id.*

68. *See id.*

maintained the view that First Amendment freedoms should apply to the states through the privileges or immunities clause.⁶⁹

Thus, on the eve of World War I, a growing body of scholarly literature favored enforcing the First Amendment guarantees against the states. And although the Supreme Court had effectively eliminated the privileges or immunities clause as a mechanism for such enforcement, the logic of substantive due process provided a promising alternative. It would be some years, though, before the issue again reached the Court; the earliest wartime cases dealt with violations of the new federal Espionage and Sedition Acts⁷⁰ and thus raised no challenge to state law.

In the first case that arguably raised the issue, *Gilbert v. Minnesota*,⁷¹ the Court upheld a conviction under a state law against discouraging enlistments without “deciding or considering” it.⁷² In his dissenting opinion in *Gilbert*, Justice Brandeis also saw “no occasion to consider whether [the Minnesota law] violate[d] also the Fourteenth Amendment,” but, in an obvious attack on substantive due process, said he could not believe that “the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property.”⁷³ Two years later though, Justice Brandeis joined a majority opinion that asserted “neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about ‘freedom of speech’ . . .”⁷⁴

In 1923, the Court struck down a state statute prohibiting the teaching of foreign languages in school on due process grounds, citing the acquisition of useful knowledge as a protected liberty interest.⁷⁵ In 1925, the Court inched even closer to resolving the issue, assuming if not quite deciding, “that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”⁷⁶ The Court brushed off its 1922 dictum in *Prudential* and cryptically cited several authorities, only some of which tended to support its proposition.⁷⁷

69. RABBAN, *supra* note 63, at 209.

70. *See* *Schenck v. United States*, 249 U.S. 47 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Abrams v. United States*, 250 U.S. 616 (1919); *Schaefer v. United States*, 251 U.S. 466 (1920).

71. 254 U.S. 325 (1920).

72. *Id.* at 332.

73. *Id.* at 343 (Brandeis, J., dissenting).

74. *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 543 (1922).

75. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

76. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

77. *Id.* Of all the cited cases, only *Meyer* actually struck down a state statute on due

Notwithstanding its now famous assumption in *Gitlow v. New York*, the Court affirmed Gitlow's conviction under New York's criminal anarchy statute over the dissent of Justices Holmes and Brandeis, who also acknowledged the application of the Fourteenth Amendment.⁷⁸ It may be that the Court made its assumption solely in order to acquire jurisdiction over the case and uphold the New York statute,⁷⁹ but the Court never looked back on that question again. Two years later, in *Whitney v. California*,⁸⁰ the Court upheld a similar statute that had been challenged on the same ground. In his concurring opinion, Justice Brandeis wrote:

[I]t is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the federal Constitution from invasion by the states. The right of free speech, the right to teach and the right of assembly are, of course, fundamental rights.⁸¹

In *Fiske v. Kansas*,⁸² also in 1927, the Court reversed a conviction under a similar Kansas statute for insufficient evidence, holding the particular application of the statute unconstitutional.

Finally, in 1931, the Court struck down a state law prohibiting the display of an anarchist red flag. In *Stromberg v. California*, Chief Justice Hughes cited *Gitlow*, *Whitney*, and *Fiske* for the proposition "that the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech."⁸³ Incorporation was complete, creating the indispensable condition for *Near v. Minnesota* later that same term.

III. COL. MCCORMICK TAKES CHARGE OF *NEAR*

When Kirkland received the *Near* file from McCormick, his response was unequivocal:

I think the decision in this case is utterly at variance with all of our Institutions . . . and most certainly establishes a dangerous precedent to a free press. Whether the articles are true or not, for a judge, without a jury, to

process grounds. See 262 U.S. at 403. In another, *Patterson v. Colorado*, 205 U.S. 454, 462 (1907), the issue was explicitly left undecided.

78. 268 U.S. at 672 (Holmes, J., dissenting) ("The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States.").

79. ALFRED H. KELLY, WINFRED A. HARBISON & HERMAN BELZ, 2 THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 518 (7th ed. 1991).

80. 274 U.S. 357, 372 (1927).

81. *Id.* at 373 (Brandeis, J., concurring).

82. 274 U.S. 380, 386-87 (1927).

83. *Stromberg v. California*, 283 U.S. 359, 368 (1931).

suppress a newspaper by writ of injunction is unthinkable, and is just another step, along with the Volstead Injunction, to do away with jury trials. The remedies of civil action and criminal action were open to the State's Attorney and if the Jewish race or the grand jury was slandered, criminal libel could be invoked. If this decision stands, any newspaper in Minnesota which starts a crusade against gambling, vice, or other evils may be closed down, all of which without a trial by jury. Of course, newspapers which are habitually slanderous and defamatory should not be allowed to run, but they should be stopped only in accordance with law. We should not have criminals running the streets at large, but they are, nevertheless, entitled to a jury trial.⁸⁴

Kirkland noted that the American Civil Liberties Union ("ACLU") planned to carry the case up to the Supreme Court and expressed the hope that the decision would be reversed there. If not, Kirkland mused, it would be easy for a governor in Illinois or some other state to push a similar statute through the legislature. "I wonder if there is some way we could get in touch with the people appealing to see that their briefs are properly prepared," he mused.⁸⁵ McCormick seemed to have something more in mind.

McCormick was no stranger to hardball litigation. Early in his career, the *Tribune* had successfully defended a series of libel suits by Mayor William "Big Bill" Thompson in 1917 and 1918 seeking \$1.3 million for criticizing Thompson's pro-German attitude during the war.⁸⁶ The first major libel case that involved McCormick directly arose from an editorial that he did not write, but approved, in 1916, titled "Henry Ford is an Anarchist." The editorial took Ford to task for criticizing the Mexican "troubles" and threatening the jobs of any Ford worker who volunteered for service when the National Guard was called out.⁸⁷

Weymouth Kirkland defended the Ford case; Philip Kinsley, who later wrote *Liberty and the Press* hailing the *Tribune's* role,⁸⁸ covered for the *Tribune*. The trial was vicious, with Ford portraying McCormick as having a corrupt interest in the Mexican war, and McCormick making Ford out to be something close to a traitor.⁸⁹ The trial went from mid-May to mid-August, with Ford ultimately winning six cents in damages. McCormick refused to pay, and Ford never collected.⁹⁰

By December 1920, the animosity between McCormick and Thompson had reached the breaking point. Thompson sued the *Tribune*

84. Letter from Kirkland to McCormick (Sept. 14, 1928) (on file with Tribune Archives).

85. *Id.*

86. See FRIENDLY, *supra* note 6, at 73.

87. SMITH, *supra* note 6, at 175.

88. See KINSLEY, *supra* note 6, at 28-34.

89. See FRIENDLY, *supra* note 6, at 70-73.

90. *Id.* at 72.

(and the *Daily News*) for \$10 million, claiming his administration had been libeled by exposés of municipal corruption. It was the largest libel action ever filed in the U.S. at that time.⁹¹ The suit was ultimately dismissed in October 1921:

[W]ith a ringing affirmation of a free press as ‘the eyes and ears of the world. . .the advocate constantly pleading before the alter of public opinion. It holds up for review the acts of our officials and those men in high places who have it in their power to advance peace or endanger it.’⁹²

McCormick had been named chairman of the American Newspaper Publishers Association (“ANPA”) Committee on Freedom of the Press shortly after the association’s 1928 annual meeting in April⁹³ by ANPA President Edward H. Butler of the *Buffalo Evening News*.⁹⁴ So, the day after Kirkland opined on the *Near* file, McCormick wrote his old friend Samuel Emory Thomason of the *Tampa Morning Tribune* and *Chicago Journal* and *Daily Times*. Thomason was a former law partner of McCormick’s, one-time business manager of the *Tribune*, and a member of McCormick’s committee.⁹⁵ “I have written to the editors of several of the largest newspapers in the state of Minnesota and asked their opinion on [the case],” wrote McCormick who further stated:

I have referred the records in the case to my own lawyer. It may be that we should intervene in the appeal to the Supreme Court of the United States. If the freedom of the press is in jeopardy I don’t think we should leave it to any outside organization to fight our battle.⁹⁶

Thomason readily agreed that the ANPA should intervene in the Minnesota case and offered to bring the matter up at a board of directors meeting in New York. “It might be a good idea if you would write a note to the Board and suggest, as chairman of the committee on the Freedom of the Press, that this step be taken, and then I’ll follow it through.”⁹⁷ McCormick did write the directors on September 21, warning that “there is but little chance of there being a reversal of the case unless the ANPA or some other

91. SMITH, *supra* note 6, at 241-44.

92. *Id.* at 243

93. AM. NEWSPAPER PUBLISHERS ASS’N (ANPA), REPORT OF THE FORTY-SECOND ANNUAL MEETING 146 (1928) (cited in EDWIN EMERY, HISTORY OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION 222 at note 5 (1950)).

94. Letter from Lincoln B. Palmer (“Palmer”), ANPA General Manager, to McCormick (May 4, 1928), and reply (May 7, 1928).

95. The committee also included Harry Chandler of the *Los Angeles Times*, William T. Dewart of *The (Los Angeles) Sun*, and James Kerney of the *Trenton Times*, according to an undated list of members (probably from 1928 or early 1929) in the *Tribune* Archives.

96. Letter from McCormick to Samuel Emory Thomason (“Thomason”) (Sept. 15, 1928).

97. Letter from Thomason to McCormick (Sept. 17, 1928) (on file with *Tribune* Archive).

similar public-spirited association takes over the litigation.”⁹⁸ According to Friendly, however, their response was minimal.

Nevertheless, when Judge Baldwin reconvened the trial court on October 10, *Tribune* lawyers William Symes and Charles Rathbun had joined Latimer at Near’s table.⁹⁹ As it happened, the additional firepower was useless. Following a largely perfunctory hearing, Olson asked Baldwin to issue a permanent injunction, and Baldwin told him to prepare the order.¹⁰⁰ Three months later, Baldwin signed the order for a permanent injunction: “Let said nuisance be abated.”¹⁰¹

That final order set the stage for a new appeal to the Minnesota Supreme Court, but it also seemed to embarrass the Minnesota legislature, and the *Tribune*’s coverage shifted from the court battle to an effort to repeal the gag law. On February 27, 1929, the *Tribune* reported that State Representative R. R. Davis had introduced a bill in the House to repeal the law.¹⁰² The article reported that the *Tribune* had criticized the gag law since it was first enacted but made no mention of any involvement in the litigation. In fact, it incorrectly reported that the “[American] Civil Liberties [U]nion has entered the fight and has taken the case of the Saturday Review to the United States Supreme [C]ourt in an effort to prove the law unconstitutional.”¹⁰³

The role of the press generally remained tepid. “I have written to approximately ten publishers of leading newspapers and magazines in the United States,” the *Tribune* quotes Davis. “The replies, which are beginning to come back to me, are *almost* unanimous for repeal of the law.”¹⁰⁴ The *Tribune*, however, kept up the drumbeat. On March 5, it covered a speech Davis made before a House legislative committee condemning the gag law. Davis noted that, in addition to the *Tribune*, the *St. Paul Pioneer Press*, and *Editor & Publisher* had editorialized against the law.¹⁰⁵

The *Tribune* continued its thorough coverage of the Minnesota hearings throughout March, at one point partially correcting the record regarding the pending litigation. “Now an appeal to the United States Supreme [C]ourt from this decision is being undertaken by the publisher of *The Chicago Tribune*. The American Civil Liberties league also has

98. FRIENDLY, *supra* note 6, at 79.

99. *Id.* at 79-80.

100. *Id.* at 80-81.

101. *Id.* at 81.

102. *Move to Repeal Minnesota Law Muzzling Press*, CHI. TRIB., Feb. 27, 1929, at 14.

103. *Id.*

104. *Id.* (emphasis added).

105. *Solon Attacks Press Gag Law of Minnesota*, CHI. TRIB., Mar. 5, 1929, at 23.

interested itself in repeal of the law.”¹⁰⁶ The article also noted that the ANPA had taken the position that the Minnesota law “is a dangerous precedent to permit on court records in a nation which has prided itself on its freedom of press and speech.”¹⁰⁷ But most Minnesota editors, the article said, had “failed to take a serious interest in the law, contenting themselves with the idea that ‘decent newspapers will not be affected by the law.’”¹⁰⁸

The next day, the *Tribune* editorialized against the gag law under the headline “A Monkey State Candidate”—an unstated reference to the Scopes evolution trial in Tennessee.¹⁰⁹ In the editorial, the *Tribune* formally announced that it “will challenge the law in behalf of the Saturday Press before the United States Supreme [C]ourt.”¹¹⁰ That editorial, and others, were quoted extensively by Rep. Davis when the hearings continued on March 25.¹¹¹ Also testifying against the gag law then were S.M. Williams, editor of the *St. Paul Pioneer Press and Dispatch*; Sam Haislett, secretary of the Minnesota Editorial Association; and Prof. Bruce McCoy of the University of Minnesota Journalism School.¹¹²

It was all to no avail, however, as the committee voted 11-3 to recommend postponing action on the repeal bill indefinitely, and the House adopted the committee report, 86-30.¹¹³ Opposition to the bill was led by Rep. C.A. Peterson, who said supporters of repeal suffered from “hallucinations” with regard to threats to freedom of the press.¹¹⁴ “If you repeal this bill,” Peterson said, “there is an army of persons waiting to begin publication of scandal sheets.”¹¹⁵ The *Tribune*’s editorial response was scathing and classic McCormick. In “Minnesota Joins the Monkey States,” the *Tribune* declared:

The defeat of the repeal bill is a disgrace to the state of Minnesota. When the law was enacted in 1925 it had attracted relatively little attention, and its passage could be interpreted charitably as an oversight. Today the significance of the law is plain and the refusal to repeal it indicates beyond all question that the enactment of the law was a deliberate attempt to strangle criticism in a way which enlightened men have rejected as unsound politically and morally for nearly 300 years.

106. *Hearing Today on Newspaper Gag Law Repeal Bill*, CHI. TRIB., Mar. 18, 1929, at 24.

107. *Id.*

108. *Id.*

109. Editorial, *A Monkey State Candidate*, CHI. TRIB., Mar. 19, 1929, at 14.

110. *Id.*

111. *Newspaper ‘Gag’ Law is Assailed as ‘Dangerous,’* CHI. TRIB., Mar. 26, 1929, at 17.

112. *Id.*

113. *Bill to Repeal Press Gag Law is Set Aside*, CHI. TRIB., Mar. 27, 1929, at 22.

114. *Id.*

115. *Id.*

Minnesota joins hands with Tennessee, and of the two Minnesota may justly claim to be the more ridiculous. After all, it is less than a hundred years since intelligent men discarded the traditional biological notions found in the Bible.¹¹⁶

The day that editorial appeared, the *Tribune* legal team submitted a voluminous 377-page brief to the Minnesota Supreme Court surveying 2,300 years of censorship, from Socrates to the present, mentioning such exemplary “critics of government” as Christ and Savonarola, Zenger and Vallandigham.¹¹⁷ The brief was signed by Weymouth Kirkland, Louis Caldwell, Charles Rathbun, and Edward Caldwell of the Kirkland firm. The Latimers were listed as associate counsel. The brief argued that affirming the gag law

would put a precedent on the books which hereafter would be used by an entrenched minority to escape ouster from office and opprobrium.

It is unconstitutional to issue an injunction stifling a newspaper even after hearing and trial; to issue a temporary injunction before hearing and without any trial whatsoever is a despotic act which the American people always have thought could be characteristic only of a czar or the inquisition, and inconceivable in a democracy.¹¹⁸

On this trip to the Minnesota Supreme Court, Near had not only the full attention of McCormick, his *Tribune*, and its law firm, but also, at long last, the organized support of the publishers. When L.B. Palmer asked McCormick on March 6 for a report of his Freedom of the Press Committee for the ANPA annual meeting,¹¹⁹ set for April 24, in New York City, McCormick had the law firm prepare a summary of the Minnesota case. Howard Ellis sent a draft to McCormick on March 19. Ellis summarized the case through May 25, 1928, when the Minnesota Supreme Court affirmed the restraining order and remanded the case:

It was at this point that The Chicago Tribune became aware of the revolutionary effect of this decision upon the liberties of the people and of the press. By agreement with the defendants, the attorneys for the Chicago Tribune became additional council (sic) in the case with instructions to present, if possible, the illegality of the statute under the Fourteenth Amendment to the Federal Constitution.¹²⁰

Ellis went on to discuss the trial and expressed the hope that, if the Minnesota Supreme Court reaffirmed its previous holding, “the Supreme Court of the United States can review the whole matter; and a sincere effort

116. Editorial, *Minnesota Joins the Monkey States*, CHI. TRIB., Mar. 28, 1929, at 14.

117. *History of 2,300 Years Cited in “Gag” Law Brief*, CHI. TRIB., March 29, 1929, at 9.

118. *Id.*, (quoting Petitioner’s Brief in State ex rel. Olson v. Guilford, 228 N.W. 326 (Minn. 1929)).

119. Letter from Palmer to McCormick (Mar. 6, 1929).

120. Howard Ellis, *Resume of the Case of State versus Guildford* (Mar. 19, 1929) (transmitted to the Committee on Freedom of the Press of the American Newspaper Publishers Association).

will be made to obtain a review by the Supreme Court of the United States.”¹²¹ Under the heading, “Some Objections to the Statute,” Ellis outlined the substantive case in detail, then appealing to the publishers through their wallets, considered “The Effect of the Statute on Newspaper Values:”

Needless to say, if this statute is held valid, the value of newspaper properties throughout the country will be greatly diminished. If the law is valid in Minnesota it is valid in other states. There is always the possibility of similar legislation being adopted elsewhere. Newspapers can be suppressed at the will of the legislature and a single judge sitting without a jury and, if a preliminary injunction is granted, before notice to the newspaper or hearing. No legitimate business can stand up under such a load. No legitimate business has ever been subjected to such a burden

The possibility that such a law could legally be adopted and enforced would cause newspaper properties everywhere to decline in value.¹²²

The report seems to have had the desired effect. On the opening day of the ANPA convention, the publishers accepted the report that Ellis prepared for McCormick and adopted a resolution pledging a united front against the Minnesota law.¹²³ The following day, New York City’s three leading dailies lent their editorial support to the fight. The *World* said the law was “the most extreme attempt to fetter journalism made anywhere in the country since civil war days,” while the *Herald-Tribune* said the law “authorize[s] capital punishment of a newspaper by the fiat of a single judge.”¹²⁴ The *Times* praised McCormick’s “effective struggle against the statute” and said publishers who heard his committee report “were amazed that any state legislature in the Union could have passed such a law.”¹²⁵ A few days later, the *Herald-Tribune* editorial was reprinted in full in McCormick’s *Tribune* as its “Editorial of the Day.”¹²⁶

McCormick had also garnered the moral support of the American Society of Newspaper Editors (“ASNE”), which met in Washington on April 18 shortly before the ANPA convention in New York City. President Walter M. Harrison, editor of the *Daily Oklahoman* and the *Oklahoma City Times*, urged ASNE to “lend every assistance possible” to support McCormick’s campaign to overturn the Minnesota statute.¹²⁷

121. *Id.*

122. *Id.* at 6.

123. *Publishers Join in Fight on Law Muzzling Press*, CHI. TRIB., Apr. 25, 1929, at 11.

124. *Minnesota Gag Law Target of New York Press*, CHI. TRIB., Apr. 26, 1929, at 16.

125. *Id.*

126. Editorial of the Day, *Minnesota’s Gag Law*, CHI. TRIB., May 3, 1929, at 14 (reprinted from the *New York Herald-Tribune*).

127. *Press-Gag Statute Assailed by Editor*, WASH. POST, Apr. 19, 1929, at 5.

No larger club could be held over the newspaper profession by the judiciary. Under such a tyrannical statute a corrupt judge might silence any fair comment about his derelictions and kill a newspaper by a temporary writ that would ruin a going business before the editor might have an opportunity to prove his case during his day in court.¹²⁸

Harrison praised McCormick effusively as “the first to raise his voice” against what Harrison called “a medieval invasion of the freedom of the press guaranteed in our bill of rights.”¹²⁹ McCormick was a member of ASNE as well as ANPA and served on ASNE’s committee on legislation and freedom of the press, along with Edward S. Beck of his own *Chicago Tribune* and Samuel Williams and R. J. Dunlap of the *St. Paul Pioneer Press and Dispatch*.¹³⁰ Notwithstanding Harrison’s call, there is no indication that ASNE ever contributed any money to the litigation campaign.¹³¹

Oral arguments before the Minnesota Supreme Court were scheduled for May 23, but were postponed until October 1, at Kirkland’s request, then postponed again until December 2. When the court finally heard the case, Friendly writes, the event “more resembled a procedural ceremony than a legitimate clash of arguments.”¹³² Having found the gag law constitutional once, there was little chance the court would change its mind and nothing the *Tribune*’s “dream team” did seemed to have any contrary influence. Near’s frustration boiled over, and on December 14, even before the Supreme Court decision came down, he wrote a truly grotesque letter to McCormick, complaining about Ellis’s handling of the case, including delays since the spring and his attraction to “Minnesota moonshine.”¹³³

This case means everything to me. It is I who am deprived of a chance to make a living, of my property. True, I am defying court orders and inviting a jail sentence for writing for the Beacon, but I have got to live and Mr. McCormick, if I’m going to be made an ass of by Mr. Ellis and the laughing stock of the city because of his actions while here – I’m not and I don’t believe you expect me to.¹³⁴

In all likelihood, nothing Ellis could have done would have affected the outcome of the case. As expected, the Minnesota Supreme Court once again upheld the gag law in a perfunctory opinion. “The record presents the same questions upon which we have already passed. . . . Upon authority [of the earlier opinion], wherein our views have been more fully expressed, the

128. *Id.*

129. *Id.*

130. PRATTE, *supra* note 4, at 28.

131. *Id.* (Pratte says the committee “provided mostly rhetoric in the fight for freedom and against censorship.”)

132. FRIENDLY, *supra* note 6, at 83-84.

133. Letter from Jay M. Near (“Near”) to McCormick (Dec. 14, 1929).

134. *Id.*

judgment herein is affirmed.”¹³⁵ But the decision touched off a flurry of activity from McCormick and Kirkland to enlist support from the publishers to take the case to the United States Supreme Court.¹³⁶

A draft letter from McCormick to Harry Chandler, president of the *Los Angeles Times*, dated December 23, 1929, served as the model.¹³⁷ “The question now arises, – shall the case be taken to the United States Supreme Court? It may be taken on three grounds, – violation of the First Amendment to the Constitution, violation of the Fourteenth Amendment to the Constitution, and violation of the First Amendment to the Constitution of Minnesota.”¹³⁸

McCormick then reiterated the appeal Ellis had made to the publishers’ financial interests and offered the best- and worst-case scenarios:

It is obvious that if we appeal the case and win it, such cloud as has been placed upon our titles will have been removed. The chances appear to be very much in favor of our winning the case, but in the event of our failure to win the case, I imagine we might expect the legislatures of the various States to enact similar legislations, which then would be probably held up by the Supreme Courts of most, if not all, the States. Free press in this country would disappear.

The other alternative is to wait quietly and trust that the Minnesota case with the Minnesota statute will not be copied in other jurisdictions, or if it is copied in other States and upheld by the other Supreme Courts, then take the fight to Washington. I think it is obvious that the Supreme Court of the United States would be less likely to reverse two or more States (sic) Supreme Courts than to reverse one.¹³⁹

Finally, McCormick made a plea for solidarity among the publishers, presumably more for symbolic than financial purposes.

This matter is of vital interest to all of us. I do not feel that I should definitely take action which will be binding upon all the newspapers of the country. I am writing this letter to all the members of the Committee on the Freedom of the Press, soliciting their views. It may be that they will be sufficiently unanimous and positive to enable us without a further meeting to make a recommendation to the Directors. If not, I will endeavor to obtain a meeting of the Committee, as time

135. State ex rel. Olson v. Guilford, 228 N.W. 326, 326 (Minn. 1929).

136. Indeed, the *Tribune’s* coverage of the adverse decision carried the subhead, “Publishers Will Appeal to U.S. Tribunal,” although the story was rather more modest. “It is expected sponsors of the action will take the case to the United States Supreme [C]ourt, as opponents of the law contend it is a violation of the right of freedom of speech.” *Court Upholds Newspaper Gag Statute Again*, CHI. TRIB. Dec. 21, 1929, at 7.

137. Letter from McCormick to Harry Chandler (“Chandler”) (Dec. 23, 1929) (on file with author).

138. *Id.*

139. *Id.*

will not permit our awaiting the annual Convention without losing our right of appeal.

Will you think this matter over, and when you have done so, write me what you think should be done?¹⁴⁰

McCormick sent this draft to Kirkland, who suggested a change in the paragraph that involved grounds for taking the case to the United States Supreme Court.¹⁴¹ McCormick changed the letter the same day and sent it off via teletype to Chandler. The paragraph now read: "It may be taken on two grounds. Does the statute violate the Fourteenth Amendment to the United States Constitution or does it violate the Free Speech Amendment to the Constitution of Minnesota, which is virtually the same as the First Amendment to the United States Constitution?"¹⁴²

Kirkland also advised McCormick that, after a long talk with Ellis, he and Ellis were both "quite confident . . . that the Supreme Court of the United States will not uphold this statute."¹⁴³ But he warned that waiting to see if other states might enact similar legislation could have a negative influence on the High Court.¹⁴⁴

McCormick added Kirkland's observations to the committee letter and, on December 26, asked his secretary, Genevieve Burke, to remove any remarks specific to Chandler and prepare the letter for all committee members and ANPA President Butler.¹⁴⁵ The letters went out on December 27.¹⁴⁶

Butler wrote back on December 30, 1929, agreeing with McCormick's proposal to take the matter to the United States Supreme Court "along the grounds outlined in your letter."¹⁴⁷ But Butler said he did not think he had authority, as ANPA president, to "direct this action without the consent of the Board."¹⁴⁸ Butler asked McCormick to send him copies of the responses he received from the committee members, "and I, in turn, will immediately take a mail vote on the proposition from the members of the Board in order that this matter will not be delayed unduly, for, as you say, there is danger in delay."¹⁴⁹ Dewart also wrote back on

140. *Id.*

141. Letter from Kirkland to McCormick (Dec. 24, 1929) (punctuation added)

142. Letter from McCormick to Chandler (Dec. 24, 1929). It is not clear why Kirkland thought the United States Supreme Court would hear a challenge to the statute on the ground that it violated the state constitution. The state supreme court would have been the ultimate authority on that point.

143. *Id.*

144. Letter from Kirkland to McCormick, *supra* note 141.

145. Telegram from McCormick to G.L. Burke (Dec. 26, 1929).

146. *Id.* (pencil annotation on the telegram).

147. Letter from Edward Butler ("Butler") to McCormick (Dec. 30, 1929).

148. *Id.*

149. *Id.*

December 30, recommending the case be taken up on state constitutional grounds.¹⁵⁰ Thomason agreed.

Because I can not imagine that the United States Supreme Court would sustain the opinion of the Supreme Court of Minnesota, and because I think it is wise to get this matter settled while we know that the preparation of the briefs and arguments is in the hands of capable lawyers, I am for taking the case to the United States Supreme Court now.¹⁵¹

Chandler's response was dated January 1, 1930,¹⁵² and he counseled wait[ing] a little before proceeding . . . and see[ing] in the interval if any disposition manifests itself on the part of other states to enact similar legislation.

I have heard of none and I should say the chances are somewhat against any considerable movement in this direction. In many, in fact most states, I am inclined to believe that the combined influence of the newspapers would prevent such enactments, if attempted.

The policy is frankly that of letting sleeping dogs lie. If we go to the Supreme Court now and that tribunal upholds the Minnesota court, we will have stirred up the matter to a point strongly conducive to similar legislation in other states. If so formidable a movement develops as to make it necessary ultimately to go before the Supreme Court, I do not believe we will be any worse off than we are now. I note the objection of Mr. Kirkland to this delay. While I am not a lawyer, it seems to me likely that if the Supreme Court should knock out the Minnesota statute because of its faulty wording, as Mr. Kirkland suggests, this would not prevent another state from drawing a similar law but avoiding the errors made in Minnesota.

This is merely an offhand opinion. The matter is certainly worthy of the very best consideration we can give it.¹⁵³

There is a pencil annotation on Thomason's letter, "send copy of each to each," and a follow-up letter to each member dated January 16, 1929, confirms that the Dewart, Thomason, and Chandler letters were sent to each of them.¹⁵⁴ In that follow-up letter, McCormick noted that he had also received many newspaper clippings and found them to be "practically unanimous" in their strong opposition to the Minnesota decision.¹⁵⁵

150. Letter from William T. Dewart ("Dewart") to McCormick (Dec. 30, 1929). On March 7, 1930, Dewart would write McCormick to say he had read that the United States Supreme Court lacked jurisdiction to hear the case on state constitutional grounds. "I should assume from this that the fight might better be based on the Fourteenth Amendment. However, I am not a Constitutional lawyer."

151. Letter from Thomason to McCormick (Jan. 2, 1930).

152. Letter from Chandler to McCormick (Jan. 1, 1930).

153. *Id.*

154. *Id.*

155. Letters from McCormick to Dewart, Thomason and Chandler (Jan. 16, 1930). McCormick had some of these published in the *Tribune*. Under the heading "Editorial of the Day," he published editorials critical of the gag law from the *New York Herald-Tribune*, *The*

It seems to me desirable that we take the appeal at this time both because we will lose our rights if we delay and because this is the most advantageous way in which to mobilize the press of the country in defense of its rights.

Acting in unison, I strongly believe we can defend this essential principle of our form of government. Without united action I am afraid that we will be destroyed piecemeal, and with us the Republican form of government.¹⁵⁶

On January 18, McCormick wrote Butler suggesting that the ANPA Board of Directors recommend taking the case to the Supreme Court and asking for approval of the entire membership by mail ballot:

In this way, I think you will put practically every newspaper in America actively behind our movement. At the same time you will have aroused the newspapers of the country to such an extent that wherever similar legislation is proposed the newspapers of the state will be ready to organize against it.¹⁵⁷

James Kerney finally responded on January 21. "On the whole, while there is some force in Mr. Chandler's arguments, I agree with you that the considerations on the other side of the question are much more important, and that an immediate appeal should be taken to the United States Supreme Court."¹⁵⁸

McCormick then turned his attention to Near's frustration. He sent some of Near's correspondence to Kirkland on January 23, including a letter asking for money to expand and promote a new *Saturday Press*.¹⁵⁹ "I take it that this Johnny is trying to shake us down," McCormick told Kirkland.¹⁶⁰ "I think you draw the right conclusion," replied Kirkland.¹⁶¹ "You will remember that some time last fall I told you we had a request from him for money which you very properly refused to grant. Ellis transmitted this information to him and since then he has had no use for Ellis."¹⁶²

Minnesota Gag Law, CHI. TRIB., Jan. 4, 1930, at 10, and the *St. Louis Post-Dispatch*, *The Minnesota Injunction Law*, CHI. TRIB., Jan. 27, 1930, at 12. Other clips in McCormick's file included two identical AP photos of himself, with the caption, "Col. Robert McCormick, publisher of the *Chicago Tribune*, as head of a committee of American newspaper publishers is leading a fight to nullify the Minnesota newspaper 'gag' law," from the Everett (Wash.) *Herald*, Jan. 17, 1930, and the Pocatello (Id.) *Tribune*, Jan. 18, 1930. The trade journal, *Editor & Publisher*, *The Fourth Estate*, had also sent McCormick a "rough early proof" of an article for its Jan. 18, 1930, issue entitled *Will Take 'Gag' Law To Supreme Court/Col. McCormick, As A.N.P.A. Committee Head, Will Be Leader in Fight to Prove Illegality of Minnesota Law*.

156. Letter from McCormick to Dewart, Thomason and Chandler, *supra* note 155.

157. Letter from McCormick to Butler, Jan. 18, 1930.

158. Letter from James Kerney ("Kerney") to McCormick (Jan. 21, 1930).

159. FRIENDLY, *supra* note 6, at 86-87.

160. Letter from McCormick to Kirkland (Jan. 23, 1930).

161. Letter from Kirkland to McCormick (Jan. 27, 1930).

162. *Id.*

Kirkland asked to see McCormick as soon as possible—McCormick was wintering in Florida¹⁶³—“because I am under the impression that whether we take up the case or not, Near will have someone do it and with his lack of means it will probably be very poorly briefed.”¹⁶⁴ Later, Kirkland condemned the Minnesota gag law in a speech to the Legal Club.¹⁶⁵

Meanwhile, McCormick’s efforts to enlist the support of the other publishers was having mixed results, receiving praise for his efforts but no financial backing.¹⁶⁶ The ANPA board met on February 8, 1930, and, according to Lincoln Palmer, was “in full accord with Colonel McCormick’s suggestion that [taking the case to the Supreme Court] was the proper course to follow.”¹⁶⁷ In a letter to Thomason, however, Palmer pointed out that the association had been “under unusually heavy expense during the past year.”¹⁶⁸

In view of these heavy expenses already incurred the Board naturally hesitates to incur additional heavy expense, and so I have been asked to write to you to express the hope of the Board that you will discuss the matter with Colonel McCormick who is, I understand, in Florida at this time, with a view toward learning in what manner the expense of carrying this case through to a conclusion may be met.¹⁶⁹

Thomason forwarded Palmer’s letter to McCormick, along with his own summary of the Board’s position.

They did not feel that they had any right to ask you to bear the expense of the Freedom of the Press case any further, but they assigned to me the delicate task of saying to you that the Association would be glad to cooperate in every way if the Tribune would bear the legal burden.¹⁷⁰

McCormick was more interested in polling the ANPA membership than in any financial contribution, telling his secretary to inform committee members he would be glad to bear the expense if a substantial majority

163. FRIENDLY, *supra* note 6, at 86.

164. Letter from Kirkland to McCormick, *supra* note 150.

165. Arthur Evans, *Press Gag Law Called Blow at Basic Liberties*, CHI. TRIB., Feb. 4, 1930, at 5.

166. Typical was a Jan. 23, 1930, letter from M.V. Atwood, secretary of the New York State Society of Newspaper Editors, who wrote McCormick to express his organization’s appreciation for

the brave and unselfish fight you are making of the freedom of the press in the matter of the Minnesota gag law. Because of the precedent it sets, this law is a menace to every newspaper in the United States and the editors of New York are indeed grateful that it is to be carried to the highest court by so fearless and distinguished a protector of free speech and the freedom of the press as yourself.

Letter from M.V. Atwood to McCormick (Jan. 23, 1930).

167. Letter from Palmer to Thomason (Feb. 11, 1930).

168. *Id.*

169. *Id.*

170. Letter from Thomason to McCormick (Feb. 14, 1930).

avored the appeal.¹⁷¹ He wired Thomason especially to explain that the poll would “have the effect of thoroughly arousing the membership which is just as important as the appeal itself.”¹⁷² He asked Thomason whether he thought he could get the idea adopted, and Thomason wired back to say he would try and believed he could succeed.¹⁷³

The next day, McCormick wrote Thomason that he had instructed Kirkland to “perfect the appeal to the Supreme Court of the United States.”¹⁷⁴ He also provided a longer, more detailed explanation of his overall strategy.

It seems to me highly desirable that the members of the A.N.P.A. should be polled as to their favoring this procedure. In this manner we will arouse them to the peril of the situation as we cannot in any other way, and will have them prepared to resist any injunction laws proposed in other States or in Washington. Unless we do arouse the Publishers in time, I am afraid that the politicians will begin knocking them off State by State until they have shown they can get away with it and then will pass injunction laws throughout the Union.

It is to be borne in mind that the Courts were never favorable to the Freedom of the Press. The press attained its freedom by legislative action. On the other hand, our Supreme Court is more favorable to Constitutional rights than it was when Taft was Chief Justice, and may be more favorable now than it will be when some of the present Judges, notably Brandeis and Holmes, have passed on.

I hope the Board of Directors will act before the next meeting of the Association in New York.¹⁷⁵

Thomason wrote back to tell McCormick that he had written to Butler to ask for an immediate poll, but that Butler had gone south for the winter. So he wired Palmer asking for a telegraphic vote of the directors authorizing the referendum. “I think you are entirely right in your conclusion,” he told McCormick, “and I will keep after Palmer and the directors with a view to getting a referendum before the New York meetings.”¹⁷⁶

Having received assurances from Kirkland that there was time to conduct the referendum before the right of appeal expired,¹⁷⁷ Palmer sent McCormick a draft of the referendum letter. The letter hailed McCormick as an “ardent champion” of freedom of the press, “so seriously challenged”

171. Letter from McCormick to Burke (Feb. 17, 1930).

172. Telegram from McCormick to Thomason (Feb. 17, 1930).

173. Telegram from Thomason to McCormick (Feb. 17, 1930).

174. Letter from McCormick to Thomason (Feb. 18, 1930).

175. *Id.*

176. Letter from Thomason to McCormick (Feb. 1930) (date obscured).

177. Telegram from Palmer to McCormick (Feb. 20, 1930), with reply telegram from Kirkland to Palmer (Feb. 22, 1930).

by the Minnesota law. The letter said McCormick had retained counsel and perfected an appeal in the case and

is prepared to continue this fight through to a United States Supreme Court decision to the end that newspapers may be protected from suppression by injunction, provided the membership is in accord with such action. A referendum vote has been ordered by President Butler and you are requested to record your vote.¹⁷⁸

McCormick found the letter “entirely satisfactory.”¹⁷⁹

In March, McCormick stepped up the campaign to bring the publishers on board in anticipation of the ANPA annual convention the following month. He wrote to M.V. Atwood, secretary of the New York State Society of Newspaper Editors, asking him to “suggest to the members of your State Association that they vote in the affirmative” on the referendum.¹⁸⁰ He also reported the ANPA referendum in the *Tribune*, summarizing the case “[f]or the information of editors and other readers who have not had the [case] brought to their attention.”¹⁸¹ And he wired Palmer suggesting the press be given results of the referendum on a weekly basis, mailed out as “news matter,” not merely put in the ANPA *Bulletin* as Palmer had suggested.¹⁸² At the time, the vote was 275-5 in favor of the appeal.¹⁸³

McCormick was very eager for the annual convention, as well as for a meeting of his Freedom of the Press committee. Palmer wrote McCormick, noting the difficulty in scheduling a meeting the previous year and asking whether he wanted one this year.¹⁸⁴ “Of course we will have a meeting . . .,” McCormick replied. “As far as I am concerned, I will put it ahead of any other meeting.”¹⁸⁵ McCormick also asked Palmer for fifteen minutes “to put my views before the convention. I don’t care when.”¹⁸⁶ Palmer wrote back to say he had arranged for McCormick to address the convention during the first session and had scheduled a meeting of the committee.¹⁸⁷ He also told McCormick that the poll stood at 331-6 in favor of intervention.

178. Letter from Palmer to McCormick (Feb. 25, 1930).

179. Telegram from McCormick to Palmer (Feb. 28, 1930).

180. Letter from McCormick to M.V. Atwood (Mar. 10, 1930), *supra* note 155.

181. *The Minnesota Gag Law*, CHI. TRIB., Mar. 11, 1930, at 14.

182. Telegrams from McCormick to Palmer (Mar. 14, 1930); Palmer to McCormick (Mar. 15, 1930); McCormick to Palmer (Mar. 15, 1930). Letters from Palmer to McCormick (Mar. 17, 1930); McCormick to Palmer (Mar. 19, 1930).

183. Letter from Palmer to McCormick (Mar. 17, 1930).

184. Letter from Palmer to McCormick (Mar. 18, 1930).

185. Letter from McCormick to Palmer (Mar. 20, 1930).

186. Letter from McCormick to Palmer (Mar. 21, 1930).

187. Letter from Palmer to McCormick (Apr. 2, 1930).

That eagerness, however, did not extend to preparing a committee report. Palmer had asked for a report by April 10 so that it could be published in the pre-convention *Bulletin*. He told McCormick the report would be of “outstanding interest to our Convention.”¹⁸⁸ McCormick replied that he couldn’t make a report “until the vote of the members is in and until the Board of Directors has taken some action upon our recommendation.” He suggested Palmer “might phrase a report of the situation to date” and he would “be glad to sign it.”¹⁸⁹

Before receiving McCormick’s response, Palmer again asked for the report in another letter.¹⁹⁰ Noting that their correspondence was crossing, McCormick repeated his unwillingness to submit a report, this time telling Palmer that the editorial assistant he had assigned to collect material for the report had left the *Tribune*. “I believe you could write a report on this one subject, the Minnesota case, which we could submit to our committee Next year I will have somebody on [t]he *Tribune* compile a comprehensive report on the subject for the following meeting.”¹⁹¹

Palmer sent a draft report to McCormick’s secretary on April 11, suggesting that she forward one copy to Kirkland.¹⁹² The report, which was to be signed by the committee members, found “no attempts to abridge [freedom of the press] by state or federal legislation, and . . . few attempts on the part of the courts.”¹⁹³ One of those attempts involved an Ohio court that sentenced two editors to thirty days and \$500 in fines for publishing editorials criticizing a judge for sitting on a trial in a case in which the judge had an interest.¹⁹⁴ The convictions were overturned on appeal to the Ohio Appeals Court,¹⁹⁵ and Palmer quoted from the opinion of Judge Willis Vickery:

We live in an age of pitiless publicity! We live in an age when freedom of speech and freedom of press are paramount issues. People should be allowed to say what they please, and newspapers to print what they please, always making themselves liable under the laws of slander or the laws of libel¹⁹⁶

188. Letter from Palmer to McCormick (Mar. 20, 1930).

189. Letter from McCormick to Palmer (Mar. 22, 1930).

190. Letter from Palmer to McCormick (Mar. 22, 1930).

191. Letter from McCormick to Palmer (Mar. 24, 1930).

192. Letter from Palmer to Burke (Apr. 11, 1930) (including draft *Report of Committee on the Freedom of the Press*).

193. *Id.* (quoting *Report of Committee on the Freedom of the Press*).

194. *Seltzer v. State ex Read*, 1930 Ohio Misc. LEXIS 1116 (Ohio App. 8th Dist. March 6, 1930). For a description of the original contempt order, see *Press v. Bench*, *TIME*, Jul. 19, 1929.

195. 1930 Ohio Misc. LEXIS 1116.

196. *Id.* at 20.

In other words, it is better that the press be free, that speech be free . . . [and] that the right to air our views be free, than it is that they be uttered in fear and trembling

A free people must have a free press and they must have the right to speak freely their thoughts.¹⁹⁷

Palmer also reported on the Minnesota case referendum, which now stood at 375-8. "The Chicago Tribune's attorneys, therefore, are perfecting the appeal to the United States Supreme Court, and your Committee feels that there is every indication of a successful termination of the issue involved."¹⁹⁸

McCormick forwarded the draft to all of the members of the committee.¹⁹⁹ Kerney sent back a lengthy letter, thanking McCormick and congratulating him on his vigilance. "It is fine and I am proud to have my name signed to it, although I have contributed nothing. You are doing a great job."²⁰⁰

As I see it, the biggest danger to American institutions comes from the arrogance of the courts, which undertake to assume all the functions of the three departments of government. Perhaps a large part of the blame rests with the press, which has been too indulgent, or too timid, in pointing out the infringement on liberty by stupid judges.²⁰¹

Kerney added that the quotation from Judge Vickery "should be pasted in the hat of every editor and every judge in America."²⁰² Dewart wrote the same day, "It suits me."²⁰³

Meanwhile, a formal resolution had been drafted for adoption by the ANPA convention. McCormick sent a copy to Kirkland, and Ellis suggested revised language:

Be it resolved that Chapter 285, Session Laws of 1925 of the State of Minnesota, popularly known as the 'Gag Law', (sic) is a violation of the first and fourteenth amendments to the Constitution of the United States, a peril to the right of property and a menace to republican institutions;

Be it further resolved that this association condemn this statute as a dangerous and vicious invasion of personal liberties;

Be it further resolved that this association and its members cooperate to cause its annulment (sic) and to prevent the enactment of similar legislation.²⁰⁴

197. *Id.* at 24.

198. See Letter from Palmer to Burke, *supra* note 192.

199. Letters from McCormick to Dewart, Kerney, Thomason, and Chandler (Apr. 14, 1930).

200. Letter from Kerney to McCormick (Apr. 16, 1930).

201. *Id.*

202. *Id.*

203. Letter from Dewart to McCormick (Apr. 16, 1930).

204. Telegram from Ellis to McCormick (Apr. 18, 1930).

The 1930 ANPA convention saw Harry Chandler replace Edward Butler as president and also, apparently, experience a change of heart regarding the financing. Chandler had written to McCormick back in March suggesting the membership “share expenses pro rata with [t]he Chicago Tribune.”²⁰⁵ On April 19, the ANPA directors actually voted to “meet the cost incurred in connection with taking an appeal.”²⁰⁶ Chandler had told the directors immediately after the convention that he would communicate with McCormick to get some idea of the costs involved, but illness prevented Chandler from following through until late May. “If you have any approximate idea of what the appeal cost will be I should like to have it in order to make Mr. Palmer’s records as complete as possible,” Chandler wrote.²⁰⁷

McCormick asked Kirkland to “kindly supply the important and interesting information” that Chandler had requested.²⁰⁸ Kirkland estimated the total cost, including oral argument, at \$25,000.²⁰⁹ McCormick forwarded the information to Chandler, adding, “[a]ny sum that the A.N.P.A. sees fit to pay will be satisfactory to me.”²¹⁰ In the end, ANPA contributed \$5,000 to the appeal.²¹¹

Meanwhile, Kirkland’s legal team had been working on a brief for the Supreme Court. McCormick monitored the process closely and freely offered his advice. At one point, for example, he advised Kirkland that Justice Louis D. Brandeis was “a fairly orthodox Jew, and it may not be wise to greatly emphasize the crucifixion in the appeal”²¹² Later, he advised Kirkland, “I think we should point out that the Government in Washington is the outcome of a fight for free government of which freedom of the press was an integral part.”²¹³ That advice came in a cover letter for a document McCormick entitled “Comments on the Minnesota Brief,” which contained sixteen suggestions for changes in the draft:

1. I have never read JUNIUS. I understand it was very bitter and was anonymous. Can’t you argue that if anonymous publications are forced by law, they will be much more bitter and defamatory than established publications?

205. Letter from Chandler to McCormick (Mar. 20, 1930).

206. Letter from Chandler to McCormick (May 21, 1930) (quoting a letter from Palmer to Chandler without noting its date).

207. Letter from Chandler to McCormick (May 21, 1930).

208. Letter from McCormick to Kirkland (May 16, 1930). Kirkland noted the *Tribune* had already paid \$3,615.42 in the appellate process and incurred another \$949.21 still unpaid. He estimated the cost of printing the record and briefs at \$2,500. *Id.*

209. Letter from Kirkland to McCormick (June 20, 1930).

210. Letter from McCormick to Chandler (June 25, 1930).

211. SMITH, *supra* note 6, at 282.

212. Letter from McCormick to Kirkland (May 12, 1930).

213. Letter from McCormick to Kirkland (May 26, 1930).

3. Page 55: It seems as though it might be more convincing to present an instance or two of the prosecutions instituted after the expiration of licensing: were they not against political opponents rather than against scandalous, lewd, or malicious publications?

5. Page 74: It appears you might profitably continue the quotation from Madison where he shows how the executive, judiciary and legislature are curtailed by the first amendment.

6. Page 87: Might we comment that the Minnesota statute does not give the defendant even such protection as the sedition act was supposed to afford through a jury and therefore is much worse than this greatly reprobated statute?

10. Page 175: Of course the decision that the jury and not the judge should decide the libelous nature of a writing is a precedent against letting a judge make the decision through the expedient of an injunction.²¹⁴

McCormick's suggestions continued in letter after letter to Kirkland. "I wonder if the old laws against scolds are in any way relevant to the injunction case," he wrote in one.²¹⁵ Kirkland assured McCormick that "most of your ideas can and will be incorporated in the brief," but cautioned that, "while the brief in the Supreme Court of Minnesota was 377 pages in length, the brief in the Supreme Court of the United States cannot be permitted to run over 75 pages." Pointing out that the Court had "recently dismissed several briefs merely on account of the length," Kirkland told McCormick that "[s]uch of your suggestions that cannot be incorporated in the brief can undoubtedly be worked into oral argument."²¹⁶

That admonition seemed to have little or no effect on McCormick. "Would the best way to fix the court's mind upon the essential issue be – to start off with a quotation of the First amendment to the Constitution?" he asked in another letter, which he drafted at least twice.²¹⁷ In that letter, he urged Kirkland to use an extended quotation from Richard Brinsley Sheridan on the power of the press to overcome even the most corrupt government that is now carved in the entry hall of the *Tribune* building in Chicago.²¹⁸

214. Robert R. McCormick, Comments on the Minnesota Brief, May 27, 1930.

215. Letter from McCormick to Kirkland (May 28, 1930).

216. Letter from Kirkland to McCormick (May 29, 1930).

217. Letter from McCormick to Kirkland (June 5, 1930 and June 11, 1930).

218. "Give me but the liberty of the press and I will give to the minister a venal House of Peers. I will give him a corrupt and servile House of Commons. I will give him the full swing of the patronage of office. I will give him the whole host of ministerial influence. I will give him all the power that place can confer upon him to purchase up submission and overawe resistance: and yet, armed with the liberty of the press, I will go forth to meet him undismayed. I will attack the mighty fabric of that mightier engine. I will shake down from its height corruption and bury it beneath the ruins of the abuses it was meant to shelter." *Id.*

McCormick's attention during the summer of 1930 was necessarily focused on the murder of *Tribune* crime reporter Jake Lingle and revelation of Lingle's all-too-close relationship with the Capone gang.²¹⁹ Still, McCormick and the *Tribune* remained active in the *Near* case and other press freedom issues.²²⁰ Among the more interesting issues to surface that summer was the fifteen percent annual tax on newspaper advertising proposed by Louisiana Gov. Huey P. Long, which would later become the central issue in another landmark Supreme Court decision, *Grosjean v. American Press Co., Inc.*²²¹ McCormick had received a letter from Philip Schuyler of Publishers' Service Semi-Monthly in New York "wondering" what his committee was going to do about the tax.²²² McCormick said the committee had "asked all the newspapers of America to oppose the newspaper tax bill in Louisiana" and had been advised by the *Item-Tribune* in New Orleans "that the opposition is proving effective."²²³

By the fall of 1930, the *Near* case was back in the news as the gag law's initial sponsor, Minnesota State Sen. George Lommen, announced that he would support repeal in the Minnesota legislature.²²⁴ Soon thereafter, Floyd B. Olson, the former district attorney who had filed for the injunction against *Near's Saturday Press*, was elected governor of Minnesota and, in his inaugural address in January 1931, expressed support for the repeal. Olson explained that, although he remained convinced of the statute's constitutionality, he now believed "that the possibilities for abuse make it an unwise law," a position he could not take as prosecutor.²²⁵ The *Tribune's* editorial in support of repeal fell far short of embracing Olson, claiming credit instead for having initiated the court challenge.²²⁶ The *St. Louis Post-Dispatch* was more charitable toward Olson, and the *Tribune* duly carried its editorial the following day.²²⁷

219. See, e.g., SMITH, *supra* note 6, at 291-299; LLOYD WENDT, CHICAGO TRIBUNE: THE RISE OF A GREAT NEWSPAPER 529-538 (1979); JOSEPH GIES, THE COLONEL OF CHICAGO 86-100 (1979).

220. By this time, McCormick had been asked to chair the freedom of the press committees for ASNE as well as ANPA, finally receiving ANPA Board permission to do both in October 1930. Letter from McCormick to Chandler (May 22, 1930); Letter from Palmer to McCormick (June 5, 1930); Letter from McCormick to Chandler (June 10, 1930); Letter from Palmer to McCormick (Oct. 15, 1930).

221. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

222. Letter from Philip Schuyler ("Schuyler") to McCormick (June 21, 1930).

223. Letter from McCormick to Schuyler (June 25, 1930).

224. *Minnesota Starts Movement to Repeal Newspaper Gag Law*, CHI. TRIB., Oct. 11, 1930, at 7.

225. *Gov. F.B. Olson Asks Repeal of News 'Gag Law'*, CHI. TRIB., Jan. 9, 1931, at 5.

226. Editorial, *The Minnesota Gag Law*, Chi. Trib., Jan. 14, 1931, at 14.

227. Editorial of the Day, *Minnesota Has a Governor [St. Louis Post-Dispatch]*, CHI. TRIB., Jan. 15, 1931, at 14.

Bills to repeal the gag law were introduced in both the Minnesota House and Senate on January 15²²⁸ and approved by the House on February 4 by a vote of 68-58 after two days of intense debate.²²⁹ Perhaps anticipating the demise of the gag law one way or the other,²³⁰ one Minnesota state senator began drafting a draconian new criminal libel law that provided prison terms of one to three years.²³¹ But prospects for the legislation's clearing the Senate had begun to dim,²³² and, at one point, its chief sponsor, Sen. Lommen, agreed to allow the bill to lie dormant in committee pending a "speedy" decision by the United States Supreme Court.²³³ In the end, the bill died in the crush of other legislative business when sponsors failed to win a special order giving it priority consideration.²³⁴

But the machinations of the Minnesota legislature had no effect on the legal process through which *Near v. Minnesota* finally reached the United States Supreme Court. Near's jurisdictional statement had reached the Court on May 17, 1930,²³⁵ and the Court had noted probable jurisdiction on October 20.²³⁶ Kirkland filed Near's brief on December 12,²³⁷ and Minnesota Attorney General Henry N. Benson filed the state's reply brief on January 19, 1931.²³⁸ Oral arguments were scheduled for January 30.

IV. BEFORE THE SUPREME COURT

After describing the statute as interpreted and applied by the Minnesota courts, Kirkland's seventy-page brief defined "freedom of the press" as broader than Supreme Court "precedents passing upon that right under the First Amendment."²³⁹ Rather, Kirkland asserted that precedents defining the right under state constitutions and the common law are also apposite.²⁴⁰ Averring that all such authorities, from Blackstone to the

228. *Bill to Repeal Minnesota Gag Law is Offered*, CHI. TRIB., Jan. 16, 1931, at 26.

229. *Minnesota "Gag" Law Repeal is Voted in House*, CHI. TRIB., Feb. 5, 1931, at 6; *Committee May Kill Minnesota Gag Law Repeal*, CHI. TRIB., Feb. 22, 1931, at 9.

230. *See* Editorial of the Day, *Press "Gag" Law Doomed [Niagara Falls Gazette]*, CHI. TRIB., Jan. 24, 1931, at 10.

231. *Severer Libel Law Considered for Minnesota*, CHI. TRIB., Feb. 7, 1931, at 14.

232. *See Committee May Kill Minnesota Gag Law Repeal*, *supra* note 229, at 9.

233. *Bill to Repeal 'Gag' Law Will Await Decision*, CHI. TRIB., Feb. 27, 1931, at 12.

234. *Senate Blocks Minnesota Gag Law Repealer*, CHI. TRIB., Apr. 19, 1931, at 21.

235. *Supreme Court Gets "Gag" Law Plea from Near*, CHI. TRIB., May 18, 1930, at 7.

236. *See Minnesota Gag on Press Goes to High Court*, CHI. TRIB., Oct. 21, 1930, at 16.

237. *Press Gag Law is Attacked in Supreme Court*, CHI. TRIB., Dec. 13, 1930, at 6; Appellant's Brief, *Near v. Minnesota*, 283 U.S. 697 (1931).

238. *Minnesota Gag Law Defended in U.S. Court Brief*, CHI. TRIB., Jan. 20, 1931, at 6; Brief of Appellee, *Near v. Minnesota*, 283 U.S. 697 (1931).

239. Appellant's Brief at 21, *Near v. Minnesota*, 283 U.S. 697 (1931).

240. *Id.*

present, agree with the proposition that freedom of the press prohibits prior restraints,²⁴¹ Kirkland proceeded to offer the court a veritable library of precedents supporting that position.²⁴² He acknowledged a handful of cases where an injunction had been granted affecting freedom of speech or of the press but distinguished the lot as aimed at preventing unlawful conduct and having only an incidental effect on the right of free speech and press.²⁴³

Having established that the statute violated freedom of the press, Kirkland next set out to show that freedom of the press is protected by both the due process and privileges or immunities clauses of the Fourteenth Amendment.²⁴⁴ For the former proposition, Kirkland pointed to *Gilow v. New York*²⁴⁵ and subsequent cases; by 1930, that issue had been all but conclusively decided,²⁴⁶ and Kirkland's case was strong and focused. Precedents for the latter proposition were more general, with only a tenuous link to freedom of the press; the *Slaughter-House Cases*²⁴⁷ had gutted the privileges or immunities clause, and Kirkland could not resurrect it here.²⁴⁸ No matter, he concluded; freedom of the press "is probably a right of such magnitude that it would exist even in the absence of the Fourteenth Amendment."²⁴⁹

Minnesota's brief began by limiting the issue to the due process clause, which the state conceded *arguendo* might protect Near's liberty interest in freedom of the press (although not without a skeptical footnote).²⁵⁰ But that freedom, the brief asserted, "does not include the free and unrestricted right to publish obscene, scandalous or defamatory matter."²⁵¹ Minnesota relied heavily on the World War I Espionage and Sedition Act cases for the proposition that freedom of speech is not absolute, then concentrated on showing that the injunction against Near was a valid exercise of the state's police power to abate a real nuisance, not an injunction against mere libel as Kirkland had characterized it.²⁵²

There is no transcript of the oral argument, but Friendly reconstructs it from newspaper accounts.²⁵³ "The words were delivered by counsel,"

241. *Id.* at 22.

242. *Id.*

243. *Id.* at 45-46.

244. *Id.* at 46.

245. 268 U.S. 652 (1925).

246. *See supra* Part II.

247. 83 U.S. 36 (1872).

248. *See supra* notes 48-49 and accompanying text.

249. Appellant's Brief at 65, *Near v. Minnesota*, 283 U.S. 697 (1931).

250. Brief of Appellee at 8, *Near v. Minnesota*, 283 U.S. 697 (1931).

251. *Id.*

252. *Id.*

253. FRIENDLY, *supra* note 6, at 125-133 and accompanying note at 202.

Friendly says, “but the rhetoric was vintage McCormick.”²⁵⁴ Kirkland spoke for fifty-four minutes, interrupted by Justice Pierce Butler’s reminders that “the *Saturday Press* was a hate sheet which regularly published defamatory articles . . .”²⁵⁵ Butler asked “if it wasn’t ‘fanciful’ to prevent a state such as Minnesota from enforcing a decree to prevent further publication of malicious articles.”²⁵⁶ Friendly reports Kirkland responding that “the proper remedy for persons feeling themselves defamed was to seek indictments and criminal trials before juries The Minnesota gag law [was] a remedy worse than the evil it attempted to cure . . .”²⁵⁷

Deputy Attorney General James E. Markham argued for the state that the statute did not violate the federal Constitution “because it provided for due process of law as commanded by the Fourteenth Amendment.”²⁵⁸ Chief Justice Charles Evans Hughes interrupted to steer Markham away from any Fourteenth Amendment argument, citing *Gitlow* to establish conclusively that freedom of the press is a fundamental right. He then asked Markham to address the prior restraint question. Markham denied that the injunction amounted to a prior restraint, calling it a “punishment for an earlier wrong.”²⁵⁹ He also defended the statute as “beneficial to newspapers because it would ‘have the effect of purifying the press.’”²⁶⁰

Both Friendly’s account and the *Tribune*’s coverage emphasize the questioning of Justice Louis D. Brandeis. It is evident from Brandeis’s own papers that he had been preparing for this case for some time. One note to a clerk, H. Thomas Austern, dated October 14, 1930, for example, says “let me know as early as possible” whether the case has been discussed in any newspapers, trade magazines, or law reviews.²⁶¹ Two days later, Brandeis asked Austern to check the house organs and annual reports of the ANPA and ASNE for anything they might have said about the case.²⁶² Other notes showed that Austern tracked coverage of the case in *Editor & Publisher*, *Printers Ink*, the *Minneapolis Journal*, and the *Minnesota Law Review*, among others.²⁶³

254. *Id.* at 126.

255. *Id.* at 128.

256. *Id.*

257. *Id.*

258. *Id.* at 129 (internal citations omitted).

259. *Id.*

260. *Id.*

261. Note from Justice Louis D. Brandeis [hereinafter Brandeis] to HTA (presumably law clerk H. Thomas Austern) (Oct. 14, 1930) in the Brandeis papers at the Library of Congress.

262. Note from Brandeis to HTA (Oct. 16, 1930).

263. *Id.*

Brandeis's papers also contain handwritten and typed copies of a *Minneapolis Journal* editorial supporting the gag law and the Minnesota Supreme Court's second affirmation of it.²⁶⁴ Some segments of the press had supported the law, and *Minneapolis Journal* editors had even helped draft it.²⁶⁵ Brandeis also collected clips from the *Washington Post* and the newspaper *Labor* on efforts to repeal the gag law.²⁶⁶

At oral argument, Brandeis told Markham that it was "difficult to see how one is to have a free press and the protection it affords a democratic community without the privilege this act seems to limit."²⁶⁷ He led Markham like an experienced cross-examiner to admit that the kind of collusion between gangsters and public officials reported in the *Saturday Press* was "privileged" as "a matter of prime interest to every American citizen."²⁶⁸ When Markham replied, "[a]ssuming it to be true," Brandeis "snapped back: 'No. A newspaper cannot always wait until it gets the judgment of a court.'"²⁶⁹

According to Friendly, Markham looked to Justice Oliver Wendell Holmes, Jr., to rescue him from Brandeis's embrace, noting Holmes's majority opinion in *Patterson v. Colorado*,²⁷⁰ which upheld a contempt charge against a newspaper publisher. Friendly quotes Holmes as replying, "I was much younger when I wrote that opinion than I am now, Mr. Markham. If I did make such a holding, I now have a different view."²⁷¹

Near, at least, reacted favorably to the oral arguments. On February 4, 1931, he wrote to McCormick expressing the view that the case seemed to be won but also complaining that, for him, the victory would be a Pyrrhic one because he was jobless and broke.²⁷² Near had been working off and on for a paper called the *Beacon* and, in April 1930, was acquitted of criminal libel charges stemming from his reporting there.²⁷³ Now, he wanted McCormick to "underwrite the Saturday Press for a few months" and help Near turn it into a "national publication with wide influence and certain financial success."²⁷⁴ McCormick apparently ignored him.

264. Editorial, *Suppression Act Again Upheld*, MINN. J., Dec. 21, 1929, at 6.

265. FRIENDLY, *supra* note 6, at 21.

266. Editorial, *Minnesota's Press Gag*, WASH. POST, Jan. 12, 1931, at 6; *Expect Repeal of Newspaper 'Gag' Act in Minnesota*, LABOR, Jan. 27, 1931.

267. *Brandeis Hints Minnesota's Gag Law is Invalid*, CHI. TRIB., Jan. 31, 1931, §1, at 7.

268. *Id.*

269. FRIENDLY, *supra* note 6, at 130-31.

270. 205 U.S. 454 (1907).

271. FRIENDLY, *supra* note 6, at 132 (internal citations omitted).

272. Letter from Near to McCormick (Feb. 4, 1931).

273. *Libel Acquittal Adds Interest to Gag Law Case*, CHI. TRIB., May 8, 1930, at 3.

274. Letter from Near to McCormick (Feb. 4, 1931).

It is far from clear, however, why *Near* was so confident that the case would be won. From the oral arguments, he could be reasonably certain of support from Justices Brandeis and Holmes and probably Harlan Fiske Stone. He could also be sure that Justice Butler would vote the other way, and probably carry the other three conservatives: Willis Van Devanter, James McReynolds, and George Sutherland—who came to be known as the “four horsemen.”²⁷⁵ The other votes, however, were not so easily predicted.

Less than a year earlier, on March 8, 1930, then-Chief Justice (and former president) William Howard Taft (who had resigned a month earlier) and Associate Justice Edward T. Sanford died within five hours of each other. Had they not left the Court when they did, *Near v. Minnesota* might well have gone the other way.²⁷⁶ As it was, the new appointees, Chief Justice Charles Evans Hughes and Owen J. Roberts, were no sure bets, but both were more liberal than the men they replaced, and Roberts would eventually provide “the switch in time that saved nine”—putting an end to President Roosevelt’s so-called “court-packing” scheme.²⁷⁷

Taft had led a solid six-vote conservative bloc consisting of Butler, Van Devanter, McReynolds, Sutherland, and Sanford. The dissenters were typically Holmes, Brandeis, and Stone.²⁷⁸ With a few personnel changes, this was essentially the ultra-conservative Court that ruthlessly enforced sedition laws against WWI dissenters and would go on to block Roosevelt’s New Deal reforms.

Hughes had been nearing the end of his second term as governor of New York in 1910 when then-President Taft offered him a seat on the Supreme Court upon the death of Justice David J. Brewer.²⁷⁹ Hughes accepted and served as associate justice until 1916, when he accepted the Republican nomination for the presidency.²⁸⁰ While on the bench, Hughes earned a reputation as a great liberal, supporting (usually in dissent) the use of state police powers to protect the public health and welfare against the conservative juggernaut that was substantive due process and liberty of contract, and use of the Fourteenth Amendment’s equal protection clause to protect blacks and aliens insofar as the times permitted.²⁸¹

Hughes lost the election of 1916 to Woodrow Wilson²⁸² and practiced law—including waging a campaign in support of five Socialists who had

275. FRIENDLY, *supra* note 6, at 105.

276. Smith points out that McCormick himself admitted that he would have lost if Taft had still been on the bench. SMITH, *supra* note 6, at 284.

277. FRIENDLY, *supra* note 6, at 119.

278. FRIENDLY, *supra* note 6, at 94.

279. 1 MERLO J. PUSEY, CHARLES EVANS HUGHES 268 (1951).

280. *Id.* at 329.

281. SAMUEL HENDEL, CHARLES EVANS HUGHES AND THE SUPREME COURT 23-35 (1951).

282. PUSEY, *supra* note 278, at 361.

been expelled from the New York State Assembly²⁸³—until becoming Secretary of State in the new Harding administration of 1921. He resigned from the Cabinet in 1925 and returned to the practice of law, also serving on international tribunals from 1926 to 1930.²⁸⁴ When Taft retired as Chief Justice because of ill health, President Hoover immediately nominated Hughes to succeed him.²⁸⁵ Despite his liberal record on the Court, Hughes was vigorously opposed by Senate progressives and populists, but in the end, Hoover's allies prevailed 52-26.²⁸⁶ Hughes assumed the office of Chief Justice on February 24, 1930, and retained the position until his retirement in 1941.²⁸⁷

Roberts had been a successful corporate lawyer and taught at the University of Pennsylvania Law School. He had not been very active politically, although he had served the government in the Teapot Dome cases, and his views were not very well known. He was not, in fact, Hoover's first choice to succeed Sanford. But Judge John J. Parker, whose name was first submitted, was rejected by the Senate for his having voted to uphold "yellow dog" contracts while a U.S. Circuit Court judge.²⁸⁸ Roberts joined the Court in June 1930, and the *Near v. Minnesota* Court was complete.

V. THE DECISION

The decision was announced on June 1, 1931, with Hughes, Roberts, Holmes (who would retire the following year), Brandeis, and Stone in the majority, and the "four horsemen"—Butler, McReynolds, Sutherland, and Van Devanter—in dissent.

Hughes began his opinion with an unadorned description of the state nuisance statute under which *Near* was enjoined and which, by the end of the opinion, Hughes would declare unconstitutional.²⁸⁹ Hughes quoted directly from the first section of the act, which provides for the abatement of "obscene, lewd and lascivious" or "malicious, scandalous and

283. HENDEL, *supra* note 280, at 72-73; PUSEY, *supra* note 260, at 391-393.

284. HENDEL, *supra* note 281, at 68-77.

285. *Id.* at 78. As usual, Friendly tells a far more colorful story of the selection of Hughes to succeed Taft. FRIENDLY, *supra* note 6, at 101-103.

286. HENDEL, *supra* note 281, at 78-88. *See also* TREVOR PARRY-GILES, *THE CHARACTER OF JUSTICE* 50-55 (2006).

287. HENDEL, *supra* note 281, at 91.

288. *Id.* at 90-91. *See also* Trevor Parry-Giles, *Property Rights, Human Rights and American Jurisprudence: The Rejection of John J. Parker's Nomination to the Supreme Court*, 60 S. COMM. J. 57 (1994). Parry-Giles points out that Parker's rejection grew out of the tension between property rights and human rights championed by conservatives and progressives, respectively, in the Senate and "represented an ideological moment of profound importance for those struggling with the onset of the Depression." *Id.* at 60-61.

289. *Near v. Minnesota*, 283 U.S. 697, 701-03 (1931).

defamatory” publications and establishes the defense of “truth . . . published with good motives and for justifiable ends.”²⁹⁰ He paraphrased the second and third sections, which outline the act’s enforcement procedures and the penalty for violation of not more than \$1,000 or one year in the county jail.²⁹¹

Hughes next began a chronology of the case against *Near* with a description of the complaint and its principal allegations.²⁹² His recitation was remarkably dry, considering that it encompassed a number of very colorful articles, which are extensively quoted in the dissenting opinion. Drier still were the procedural details that followed, even though the route from temporary injunction to final appeal included two trips to the Minnesota Supreme Court, which twice affirmed the statute’s constitutionality. Nothing in the early paragraphs of the opinion betrayed the direction Hughes’s opinion would take, unless it was the absence of any reaction whatsoever to *Near*’s outrageous brand of journalism.

Quite the contrary, Hughes all but ignored the *Saturday Press* as he proceeded to take aim at the Minnesota nuisance act. Calling it “unusual, if not unique,” Hughes found that it raised questions of “grave importance” that transcended local concerns.²⁹³ Awkwardly, with a pair of double negatives, he reminded the reader that liberty of the press is safeguarded against infringement by state laws and that state police powers are limited. Noting that liberty of the press is also limited and that states can punish abuses, Hughes finally revealed his analytical direction: “[T]he inquiry is as to the historic conception of the liberty of the press and whether the statute under review violates the essential attributes of that liberty.”²⁹⁴

Hughes seemed to digress from his historical course to consider assertions from both parties that *Near*’s constitutional challenge was facial, that is, focused on the statute itself, not on its application to the *Saturday Press*. Hughes ignores the fact that this was a peculiar stance for an aggrieved party—though a rational strategic choice where the goal is to shape doctrine—and agreed that the Court’s proper concern went beyond any errors of the trial court to the “purpose and effect” of the statute as construed by the state’s highest court.²⁹⁵ Accordingly, he launched into a four-part description of purpose and effect that reads more like an indictment.

290. *Id.* at 709-10.

291. *Id.* at 703.

292. *Id.* at 702-07.

293. *Id.* at 706.

294. *Id.* at 708.

295. *Id.* at 708-09.

First, Hughes wrote, the statute does not redress private wrongs but aims to protect public welfare.²⁹⁶ Second, the statute targets not merely private libels but also publication of “charges against public officers of corruption, malfeasance in office, or serious neglect of duty.”²⁹⁷ Third, the object of the statute is not punishment, but suppression.²⁹⁸ And fourth, the statute operates not only to suppress the offending newspaper, but “to put the publisher under an effect of censorship.”²⁹⁹ The words of the statute evoke, not “the historic conception of the liberty of the press,” Hughes wrote, but the very conditions that liberty was supposed to ameliorate.³⁰⁰

“If we cut through mere details of procedure,”³⁰¹ Hughes concluded, public authorities may bring a publisher before a judge for exposing their own dereliction and, unless the publisher proves truth published with good motives and justifiable ends, the newspaper is suppressed and further publication is punishable as contempt. “This is the essence of censorship.”³⁰²

Then, as abruptly as he digressed, Hughes returned to the historical inquiry with Blackstone’s classic definition: “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.”³⁰³ Quoting Madison and citing an 1825 Massachusetts case, he asserted that the historical immunity from previous restraints applies to legislative as well as executive action, and to false statements as well as true.³⁰⁴

Acknowledging that Blackstone had been criticized, Hughes pointed out that the critics have not objected to the prohibition on previous restraints but on the presumption that liberty of the press stands for that and nothing more. Defending both civil and criminal libel laws, Hughes brought the analysis back to Jay Near: “For whatever wrong the appellant has committed or may commit, by his publications, the state appropriately affords both public and private redress by its libel laws.”³⁰⁵

Other critics, Hughes noted, believe the prohibition on previous restraints has been stated too broadly.³⁰⁶ Hughes agreed, excluding certain

296. *Id.* at 709.

297. *Id.* at 710.

298. *Id.* at 711.

299. *Id.* at 712.

300. *Id.* at 708.

301. *Id.* at 713.

302. *Id.* at 712-13.

303. *Id.* at 713-14.

304. *Id.* at 714.

305. *Id.* at 714-15.

306. *Id.* at 715.

wartime speech, obscenity, incitement, and speech acts from its purview.³⁰⁷ But “these limitations are not applicable here,” Hughes continued.³⁰⁸ To the contrary, “[t]he exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship.”³⁰⁹

Hughes reinforced the message with additional quotations from Madison and the Massachusetts case, this time emphasizing the value of prior restraints in stifling criticism of public officials.³¹⁰ The conviction that such restraints would violate constitutional rights, he said, is evinced by the almost complete absence of any attempts to restrain “publications relating to the malfeasance of public officers” in 150 years.³¹¹ Even where honorable officers are recklessly assaulted, subsequent punishment is the “appropriate remedy, consistent with constitutional privilege.”³¹²

Turning finally to Minnesota’s arguments, Hughes rejected the state’s assertion that the statute dealt not with publications per se but rather with the business of publishing defamation. “Characterizing the publication as a business, and the business as a nuisance,” he wrote, “does not permit an invasion of the constitutional immunity against restraint.”³¹³ Nor is that immunity lost, he continued, when the alleged official malfeasance would be punishable as crimes.³¹⁴

Hughes found the defense of truth, “published with good motives and for justifiable ends,” inadequate to justify the Minnesota statute.³¹⁵ Finding such a law constitutionally valid would be to recognize “the authority of the censor against which the constitutional barrier was erected.”³¹⁶ Equally unavailing is the state’s insistence that the statute was designed to preserve the public peace, he wrote, citing an early condemnation of what would come to be called the “heckler’s veto” by a New Jersey court.³¹⁷ “If the township may prevent the circulation of a newspaper for no reason other than that some of its inhabitants may violently disagree with it . . . there is no limit to what may be prohibited,” that court had opined.³¹⁸

307. *Id.* at 715-16.

308. *Id.* at 716.

309. *Id.* at 715-16.

310. *Id.* at 717.

311. *Id.* at 718.

312. *Id.* at 716-20.

313. *Id.* at 720.

314. *Id.* at 720-21.

315. *Id.* at 712.

316. *Id.* at 721.

317. *Id.*

318. *Id.* at 721-22 (internal quotations omitted).

For all of these reasons, Hughes concluded, the Minnesota statute infringed the liberty of the press guaranteed by the Fourteenth Amendment.³¹⁹

Writing for the four dissenting justices, Associate Justice Pierce Butler accused the majority of giving press freedom “a meaning and a scope not heretofore recognized”³²⁰ Conceding that the Court had previously interpreted the Fourteenth Amendment to protect press freedom from abridgment by the states, Butler asserted that the *Near* decision imposed an unprecedented restriction on the states.³²¹

In contrast to Hughes and both litigants, Butler insisted that the record required the Court to consider the statute, not facially, but as applied to *Near*'s “malicious, scandalous and defamatory” articles.³²² And, in contrast to Hughes's restrained description of the *Saturday Press*, Butler reprinted its virulently anti-Semitic articles verbatim, presumably to facilitate the as-applied analysis.³²³

After retracing the procedural history of the case against *Near*, Butler began his analysis with the assertion that the statute at issue was enacted as an exercise of the state's police power, that is, for the preserving of the peace and good order. “The publications themselves disclose the need and propriety of the legislation,” he wrote, relating some of the unsavory history of *Near* and Guilford and their criminal journalism.³²⁴ States must be free to “employ all just and appropriate measures” to prevent such abuses, Butler insisted.³²⁵

Butler quoted Justice Joseph Story's famous treatise on the Constitution for the proposition that the First Amendment is not absolute.³²⁶ Such a supposition, Story had said, is “too wild to be indulged by any rational man.”³²⁷ Butler rebutted Hughes's reliance on Blackstone by arguing that the previous restraints against which Blackstone railed were those that “subjected the press to the arbitrary will of an administrative

319. *Id.* at 722-23.

320. *Id.* at 723 (Butler, J., dissenting).

321. *Id.* at 723-24.

322. *Id.* at 724.

323. *See id.* at 724 n.1.

324. *Id.* at 731.

325. *Id.* at 732.

326. *Id.*

327. *Id.* (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION 635 (Melville M. Bigelow ed., 1994)).

officer,” not a judge acting pursuant to duly enacted legislation as the Minnesota statute provides.³²⁸

Asserting that the existing libel laws were “inadequate effectively to suppress evils resulting from the kind of business” in which Near engaged, Butler concluded that the doctrine against previous restraints, if imposed in cases like Near’s, would

expose the peace and good order of every community and the business and private affairs of every individual to the constant and protracted false and malicious assaults of any insolvent publisher who may have purpose and sufficient capacity to contrive and put into effect a scheme or program for oppression, blackmail or extortion.³²⁹

VI. THE AFTERMATH

By a single vote, Butler’s limited view of freedom of the press was relegated to an historical footnote, and the principle that prior restraints are anathema to the Constitution has been a bulwark of the legal system ever since. McCormick was jubilant:

The decision of Chief Justice Hughes will go down in history as one of the greatest triumphs of free thought. The Minnesota gag law was passed by a crooked legislature to protect criminals in office and supported by a state court as feeble in public spirit as it was weak in legal acumen.

We must not blind ourselves to the fact that subversive forces have gone far in this country when such a statute could be passed by any legislature and upheld by any court, and must be on guard against further encroachments.

The newspapers of America will realize the responsibilities devolving upon them under this decision and will maintain and increase the high principles which have guided them since the inception of a free press.³³⁰

The June 2 *Tribune* carried a full banner headline, DECISION ENDS GAG ON PRESS, with a full column on the front page and nearly two full pages inside.³³¹ The story included the full text of the opinion and dissent, the full text of ANPA’s resolution, and an individual photograph of every Supreme Court justice.³³² Favorable reaction was reported from Minnesota Governor Floyd B. Olson³³³ and the National Editorial Association, meeting

328. *Id.* at 733-34.

329. *Id.* at 737-38.

330. *Decision a Triumph for Free Thought, M’Cormick [sic] Says*, CHI. TRIB., June 2, 1931, § 1, at 7.

331. Arthur Sears Henning, *Minnesota Act Quashed by U.S. Supreme Court*, CHI. TRIB., June 2, 1931, § 1, at 1.

332. *Id.*

333. *Governor Pleased by Decision Killing Minnesota Gag Law*, CHI. TRIB., June 2, 1931, § 1, at 7.

in convention in Atlanta.³³⁴ And, of course, McCormick's statement was run in full, although modestly positioned between the Olson and NEA reaction stories.³³⁵

Coverage continued on June 3 with the favorable reaction of various members of Congress,³³⁶ an analysis of the recent "liberalization" of the Supreme Court by Washington correspondent Arthur Sears Henning,³³⁷ and an editorial expressing the hope that the decision would "arrest, if it does not end, the efforts to cripple the guarantee of a free press"³³⁸ More editorials followed.³³⁹

So did the congratulatory messages. Dewart wired McCormick the day after the decision came down: "Congratulations on the decision of the Supreme Court upholding your contention that the freedom of the press is not a political plaything. Since you did all the work, you deserve all the credit."³⁴⁰ To *Seattle Times* publisher Col. C.B. Blethen, who had also sent a congratulatory wire on June 2, McCormick wrote: "As a five to four decision, we just squeezed through. If Taft were still occupying Hughes' place, we would have been beaten."³⁴¹

Perhaps the most important message came from ACLU president Roger Baldwin. The ACLU had been an early supporter of the *Near* litigation and, shortly before the decision came down, circulated a pamphlet declaring: "Scandal and Defamation! The Right of Newspapers to Defame/Unique Minnesota law empowers judges to suppress papers by injunction/First such use of judicial power in American history/Chicago Tribune takes the case to the U.S. Supreme Court, where it awaits decision."³⁴² Baldwin sent the pamphlet "To the Editor" with a cover letter urging editors to comment on the case and "the larger issues of freedom of speech and of the press on which the American Civil Liberties Union bases its activity."³⁴³

334. *Editors Hail Gag Ruling as Press Victory*, CHI. TRIB., June 2, 1931, § 1 at 7.

335. *Triumph for Free Thought*, *supra* note 330, at 7.

336. *Press Gag Decision Praised by Washington Officialdom*, CHI. TRIB., June 3, 1931, § 1, at 4.

337. Arthur Sears Henning, *Supreme Court 'Liberalized' in Recent Months*, CHI. TRIB., June 3, 1931, § 1, at 4.

338. Editorial, *The Background of the Gag Law*, CHI. TRIB., June 3, 1931, § 1, at 14.

339. See Editorial of the Day, *Another Liberal Victory [St. Louis Star]*, CHI. TRIB., June 4, 1931, § 1, at 14; Editorial, *Freedom of the Press*, CHI. TRIB., June 14, 1931, § 1, at 14.

340. Telegram from Dewart to McCormick (June 2, 1931).

341. Letter from McCormick to C.B. Blethen (June 1931) (date obscured).

342. This pamphlet was in the McCormick archives.

343. Letter from Roger Baldwin [hereinafter Baldwin] "To the Editor" (April 4, 1931).

Now Baldwin reminded McCormick of ACLU's early role in the case and expressed "delight[] with the outcome in the Supreme Court, even by so narrow a margin."³⁴⁴

On behalf of our entire Board, our liveliest appreciation of the service you have rendered the cause of a 'free press' in this country by thus backing the appeal. It was a victory by a dangerously narrow margin, but, I have no doubt, a victory that is decisive against the abuse of the injunctive process.³⁴⁵

McCormick wrote back thanking Baldwin for the letter and condemning the Minnesota legislation as "merely another step in the demolition of private rights. . ."³⁴⁶

If the press had not acted when it did and with substantial unanimity, I am afraid the law would have been enacted in one State after the other and would probably have been held Constitutional first by the State Supreme Courts and afterwards when the law seemed so well established, by the United States Supreme Court.

Let us hope that the Supreme Court decision in this case marks the turning of the tide.³⁴⁷

Perhaps McCormick's worst fears were exaggerated, but *Near v. Minnesota* still stands as one of the great landmarks of First Amendment law to this day. Few people—journalists or lawyers—are aware of the vital role that Col. Robert R. McCormick played in shaping the prior restraint doctrine established by that opinion. And fewer still realize that he was instrumental in mobilizing the mainstream press to litigate, not only in their narrow commercial interests, but also in pursuit of their most fundamental rights to gather and publish the news.

344. Letter from Baldwin to McCormick (June 4, 1931).

345. *Id.*

346. Letter from McCormick to Baldwin (June 6, 1931).

347. *Id.*