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

Eric B Easton

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“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, 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. Minnesota3 when it reached its conclusion in the United States 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 (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’ interests.

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1 Letter from Weymouth Kirkland [hereinafter Kirkland], Partner, Kirkland, Fleming, Green & Martin, Chicago, to Col. Robert R. McCormick [hereinafter McCormick], Publisher, The Chicago Tribune (Sept. 14, 1928) (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).
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business interests: antitrust regulation, copyright protection, postal rates, taxes, and similar matters. 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. 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 Chicago 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 discusses the aftermath of Near v. Minnesota and the mobilization of the institutional press.

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Part 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

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.
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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.” 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.

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. 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; Near and Guilford were ready targets down in

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 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.

1925 Minn. Laws 358 (quoted in 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. 161-62 (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, THE CASE AND TRIAL OF JOHN PETER ZENGER (Belknap Press 1963) (1736).
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Minneapolis. 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 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 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).

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

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13 FRIENDLY, supra note 6, at 31.
14 Id. at 32.
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, Near, 283 U.S. at 704; but McCormick characterizes it as an “information,” the kind of charging document used in the Zenger case to which McCormick had referred earlier. See supra note 10.
17 FRIENDLY, supra note 6, at 50-51.
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 26 months, but dates the permanent injunction at three months after an Oct. 10, 1928, hearing. That would make the duration of the TRO only 14 months. McCormick dates the permanent injunction on Oct. 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.
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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 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 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

\(^{20}\) Friendly, supra note 6, at 51.
\(^{21}\) Id. at 51-52.
\(^{22}\) Id. at 53.
\(^{23}\) State ex rel. Olson v. Guilford (I), 219 N.W. 770, 774 (Minn. 1928). Elsie Latimer is also listed as counsel for Near.
\(^{24}\) Id. at 773.
\(^{25}\) See supra note 19.
\(^{26}\) 1925 Minn. Laws 358 § 1, supra note 8.
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Americans, who were still guided by a vigorous Victorian-Progressive morality and decorum.” 27 Indeed, the 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, 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.

Part 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

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

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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 62.  
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 antisemitism. McCormick, supra note 6, at 45-52.  
31 268 U.S. 652.  
32 U.S. Const. amend. I.
of liberty, shall be inviolable.\textsuperscript{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.\textsuperscript{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 government.”\textsuperscript{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.\textsuperscript{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.” 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.\textsuperscript{37} But when \textit{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

\textsuperscript{33} \textsc{Paul Starr}, \textit{The Creation of the Media: Political Origins of Modern Communications} 74 (2004).
\textsuperscript{34} \textit{Id.} at 75.
\textsuperscript{35} \textit{Id.} Had the amendment passed, it would have been the fourteenth amendment in the original House resolution.
\textsuperscript{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.
\textsuperscript{37} \textit{Barron v. Baltimore}, 32 U.S. 243 (1832).
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 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. 38

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. 39

Finally, Marshall turned to constitutional history. It was “universally understood,” he said, that the constitution was not ratified without “immense opposition.” 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

38 Id. at 247.
39 Id. at 249.
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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. 40

Although some constitutional thinkers, particularly among 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. 41 Barron v. Baltimore was never seriously challenged. 42

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 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. 43 The extent to which the Republican reaction against those laws influenced the adoption of the Fourteenth Amendment after the war is a matter of some 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

40 Id. at 250.
42 Stanley Morrison, Does the Fourteenth Amendment Incorporate the Bill of Rights? A Judicial Interpretation, 2 Stan. L. Rev. 141, 141 (1949-50).
43 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 n. 41, at 293. See also AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 371-72 (2005).
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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? 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.

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

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44 This was the view of Rep. John A. Bingham (R-Ohio), principal drafter of the Fourteenth Amendment. CURTIS, supra note 41, at 360.
46 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. *U.S. v. Hall*, 26 F. Cas. 79, 81 (C.C.S.D. Ala 1871).
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 abolitionists…. 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.47

On the other side of the issue, writing two years after Black’s *Adamson* dissent, Stanley Morrison called Black’s position “fatally weak” and based on flawed historical research.48 “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.”49 Morrison’s position is supported by his Stanford colleague Charles Fairman in a companion article laying out a detailed legislative history of the Amendment.50

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.”51

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48 Morrison, supra note 42, at 171.
49 Id. at 173.
50 Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 Stan. L. Rev. 5 (1949-50).
51 Morrison, supra note 42, at 140.
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said, “The life of the law has not been logic: it has been experience.”52 And it would be
more than 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.53 The “first intimation from any justice that
the Fourteenth Amendment might be considered to incorporate the Bill of Rights”54 came
in Justice Harlan’s dissenting opinion in O’Neil v. Vermont,55 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.56

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. Chicago57 a substantive due process case, rather than an incorporation
case.58 The incorporation argument was rejected again in 190059 and 1908.60

52 OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Little, Brown & Co. 1881).
53 Walker v. Sauvinet, 92 U.S. 90 (1876)( civil jury trial); U.S. v. Cruikshank, 92 U.S. 542 (1876)(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).
54 Morrison, supra note 42, at 151.
55 144 U.S. 323.
56 Id. at 370.
57 166 U.S. 226 (1897).
58 Morrison, supra note 42, at 152.
59 Maxwell v. Dow, 178 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
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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. 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.

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.

during this case, challenging Black’s assertion that the legislative history had never been considered. *Supra*, text accompanying note 24.

60 *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 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).

61 DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 125 (Cambridge Univ. Press 1997).

62 *Id.* (quoting *A Plain Statement of the San Diego ‘Free Speech’ Fuss*, S.D. EVE. TRIB. 4 (March 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.
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“[I]t is not positively known at present just what protection is given to certain personal
dlhe44078620 rights by certain clauses of the U.S. Constitution, especially the 14th amendment.” 63

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,” 64 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. 65
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. 66 Henry Schofield maintained the view that First
Amendment freedoms should apply to the states through the privileges or immunities
clause. 67

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 an 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

63 RABBAN, supra n. 61, at 125 (quoting B.F. Moore, Constitutionally Protected Personal Liberties 17
(General Records of the Dept. of Labor, Feb. 1915).
64 MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM 8
65 Id.
66 Id.
67 RABBAN, supra n. 61, at 209.
wartime cases dealt with violations of the new federal Espionage and Sedition Acts\(^68\) and thus raised no challenge to state law.

In the first case that arguably raised the issue, *Gilbert v. Minnesota*,\(^69\) the Court upheld a conviction under a state law against discouraging enlistments without “deciding or considering” it.\(^70\) In his dissenting opinion in *Gilbert*, Brandeis also saw “no occasion to consider whether [the Minnesota law] violated 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 enjoy property.”\(^71\) Two years later, though, 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’…”\(^72\)

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.\(^73\) 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.”\(^74\) The Court brushed off its 1922


\(^{69}\) 254 U.S. 325 (1920).

\(^{70}\) *Id.* at 332.

\(^{71}\) *Id.* at 343 (Brandeis, J., dissenting).

\(^{72}\) Prudential Ins. Co. v. Cheek, 259 U.S. 530, 543 (1922).


dictum in *Prudential*, and cryptically cited several authorities, only some of which tended to support its proposition.\textsuperscript{75}

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 Holmes and Brandeis, who also acknowledged the application of the Fourteenth Amendment.\textsuperscript{76} It may be that the Court made its assumption solely in order to acquire jurisdiction over the case and uphold the New York statute,\textsuperscript{77} but the Court never looked back on that question again. Two years later, in *Whitney v. California*,\textsuperscript{78} the Court upheld a similar statute that had been challenged on the same ground. In his concurring opinion, Brandeis wrote:

\begin{quote}
[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.\textsuperscript{79}
\end{quote}

And in *Fiske v. Kansas*,\textsuperscript{80} also in 1927, the Court reversed a conviction under a similar Kansas statute for insufficient evidence, holding the particular application of the statute unconstitutional.

\textsuperscript{75} Id. Of all the cited cases, only *Meyer*, supra note 32, actually struck down a state statute on due process grounds. In another, *Patterson v. Colorado*, 205 U.S. 454, 462 (1907), the issue was explicitly left undecided.

\textsuperscript{76} Id. 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.”)


\textsuperscript{78} 274 U.S. 357 (1927).

\textsuperscript{79} Id. at 373 (Brandeis, J., concurring).

\textsuperscript{80} 274 U.S. 380 (1927).
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 *Fisk* for the proposition “that the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech.”

Incorporation was complete, creating the indispensable condition for *Near v. Minnesota* later that same term.

**Part 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 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.”

Kirkland noted that the ACLU planned to carry the case up to the United States 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...

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81 283 U.S. 359, 368 (1931).
82 Letter from Kirkland to McCormick (Sept. 14, 1928)(Tribune Archives).
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touch with the people appealing to see that their briefs are properly prepared,” he mused.  

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. 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.

Weymouth Kirkland defended the Ford case; Philip Kinsley, who later wrote Liberty and the Press hailing the Tribune’s role, 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. 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.

By December 1920, the animosity between McCormick and Thompson had reached the breaking point, and Thompson sued the Tribune (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. The suit was ultimately

83 Id.
84 FRIENDLY, supra note 6, at 73.
85 SMITH, supra note 6, at 175.
86 See KINSLEY, supra note 6.
87 FRIENDLY, supra note 6, at 70-73.
88 Id. at 72.
89 SMITH, supra note 6, at 241-244.
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dismissed in October 1921, “with 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.”

McCormick had been named chairman of the ANPA Committee on Freedom of
the Press shortly after the association’s 1928 annual meeting in April by ANPA
President Edward H. Butler of the *Buffalo Evening News*. 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. “I have written to the editors of several of the largest
newspapers in the state of Minnesota and asked their opinion on [the case],” McCormick
wrote, “and 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.”

Thomason readily agreed that 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

90 Id. at 243.
92 Letter from Lincoln B. Palmer [hereinafter Palmer], ANPA General Manager, to McCormick (May 4, 1928), and reply (May 7, 1928)(Tribune Archives).
93 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 1928 or early 1929, in the Tribune Archives.
94 Letter from McCormick to Samuel Emory Thomason [hereinafter Thomason](Sept. 15, 1928)(Tribune Archive).
committee on the Freedom of the Press, that this step be taken, and then I’ll follow it through." McCormick did write the directors on Sept. 21, warning that “there is but little chance of there being a reversal of the case unless the ANPA or some other similar public-spirited association takes over the litigation.” According to Friendly, however, their response was minimal.

Nevertheless, when Judge Baldwin reconvened the trial court on Oct. 10, Tribune lawyers William Symes and Charles Rathbun had joined Latimer at Near’s table. 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. Three months later, Baldwin signed the order for a permanent injunction: “Let said nuisance be abated.”

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 Feb. 27, 1929, the Tribune reported that State Representative R.R. Davis had introduced a bill in the House to repeal the law. 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 Union has entered the fight and has taken the case of the Saturday Review to the United States Supreme Court in an effort to prove the law unconstitutional.”

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95 Letter from Thomason to McCormick (Sept. 17, 1928)(Tribune Archive).
96 FRIENDLY, supra note 6, at 79.
97 Id. at 80.
98 Id. at 81.
99 Id.
100 Move to Repeal Minnesota Law Muzzling Press, CHI. TRIB., Feb. 27, 1929, at 14.
101 Id.
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 (emphasis added).”\textsuperscript{102} 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.\textsuperscript{103}

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 court from this decision is being undertaken by the publisher of The Chicago Tribune. The American Civil Liberties league also has interested itself in repeal of the law.”\textsuperscript{104} 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.”\textsuperscript{105} 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.’”\textsuperscript{106}

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.\textsuperscript{107} In the editorial, the Tribune formally announced that it “will challenge the

\textsuperscript{102} Id.
\textsuperscript{103} Solon Attacks Press Gag Law of Minnesota, CHI TRIB., Mar. 5, 1929, at 23.
\textsuperscript{104} Hearing Today on Newspaper Gag Law Repeal Bill, CHI TRIB., Mar. 18, 1929, at 24.
\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{107} Editorial, A Monkey State Candidate, CHI TRIB., Mar. 19, 1929, at 14.
law in behalf of the *Saturday Press* before the United States Supreme Court.*108 That editorial, and others, were quoted extensively by Rep. Davis when the hearings continued on March 25.109 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.110

It was all to no avail, however, as the committee voted 12-3 to recommend postponing action on the repeal bill indefinitely and the House adopted the committee report, 86-30.111 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.112 “If you repeal this bill,” Peterson said, “there is an army of persons waiting to begin publication of scandal sheets.”113 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.*

*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…*114
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. 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 intrenched 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.

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, 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 counsel (sic) in the case with

115 History of 2,300 Years Cited in “Gag” Law Brief, CHI. TRIB., March 29, 1929, at 9.
116 Id., quoting Petitioner’s Brief in State ex rel. Olson v. Guilford, 228 N.W. 326 (Minn. 1929).
117 Letter from Palmer to McCormick (Mar. 6, 1929).
instructions to present, if possible, the illegality of the statute under the
Fourteenth Amendment to the Federal Constitution. 118

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 will be made to obtain a review by the
Supreme Court of the United States.” 119 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. 120

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. 121 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

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118 Howard Ellis, Resume of the Case of State versus Guildford, transmitted to the Committee on Freedom
119 Id.
120 Id. at 6.
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“authorize[s] capital punishment of a newspaper by the fiat of a single judge.” 122 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.” A few days later, the Herald-Tribune editorial was reprinted in full in McCormick’s Tribune as its “Editorial of the Day.” 123

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. 124

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. 125

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.” 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. 126 Notwithstanding Harrison’s call, there is no indication that ASNE ever contributed any money to the litigation campaign. 127

124 Press-Gag Statute Assailed by Editor, WASH. POST, Apr. 19, 1929, at 5.
125 Id.
126 PRATTE, supra note 4, at 28.
127 Id. Pratte says the committee provided “mostly rhetoric in the fight for freedom and against censorship.”
Oral arguments before the Minnesota Supreme Court were scheduled for May 23, but postponed until Oct. 1, at Kirkland’s request, then postponed again until Dec. 2. When the court finally heard the case, Friendly writes, the event “more resembled a procedural ceremony than a legitimate clash of arguments.” Having found the gag law constitutional once, there was little chance the court would change its mind. And nothing the Tribune’s “dream team” seemed to have any contrary influence. Near’s frustration boiled over, and on Dec. 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.”

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.

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 judgment herein is affirmed.” 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.

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128 FRIENDLY, supra note 6, at 83-84.
130 State ex rel. Olson v. Guilford, 228 N.W. 326, 326 (Minn. 1929).
131 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 Court, as opponents of the law content it is a violation of the right of freedom of speech.” Court Upholds Newspaper Gag Statute Again, CHI. TRIB. Dec. 21, 1929, at 7.
A draft letter from McCormick to Harry Chandler, president of the Los Angeles Times, dated Dec. 23, 1929, served as the model. 132 “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.”

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.

Finally, McCormick makes 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 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? ¹³³

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. ¹³⁴ McCormick changed the letter the same day and sent it off via teletype to Chandler. The paragraph now read (punctuation added): “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?” ¹³⁵

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.” But he warned that waiting to see if other states might enact similar legislation could have a negative influence on the High Court. ¹³⁶

McCormick added Kirkland’s observations to the committee letter and, on Dec. 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. ¹³⁷ The letters went out on Dec. 27. ¹³⁸

Butler wrote back on Dec. 30, 1929, agreeing with McCormick’s proposal to take the matter to the United States Supreme Court “along the grounds outlined in your

¹³³ Id.
¹³⁴ Letter from Kirkland to McCormick (Dec. 24, 1929).
¹³⁵ 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.
¹³⁶ Letter from Kirkland to McCormick, supra note 134.
¹³⁷ Telegram from McCormick to G.L. Burke (Dec. 26, 1929).
¹³⁸ Id. (pencil annotation on the telegram).
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letter.” But Butler said he did not think he had authority, as ANPA president, to
“direct this action without the consent of the Board.” 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.”

Dewart also wrote back on Dec. 30, recommending the case be taken up on state
constitutional grounds. 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.”

Chandler’s response was dated Jan. 1, 1930, and he counseled “wait[ing] a little
before proceeding… and see 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

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140 *Id.*
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.”
142 Letter from Thomason to McCormick (Jan. 2, 1930).
143 Letter from Chandler to McCormick (Jan. 1, 1930).
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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. 144

There is a pencil annotation on Thomason’s letter, “send copy of each to each,” and a follow-up letter to each member dated Jan. 16, 1929, confirms that the Dewart, Thomason, and Chandler letters were sent to each of them. 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. 145

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. 146

On Jan. 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

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144 Id.
146 Letter from McCormick to Dewart, Thomason and Chandler, supra note 145.
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entire membership by mail ballot. “In this way,” McCormick wrote, “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.”

James Kerney finally responded on Jan. 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.”

McCormick then turned his attention to Near’s frustration. He sent some of Near’s correspondence to Kirkland on Jan. 23, including a letter asking for money to expand and promote a new *Saturday Press*. “I take it that this Johnny is trying to shake us down,” McCormick told Kirkland. “I think you draw the right conclusion,” replied Kirkland. “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.”

Kirkland asked to see McCormick as soon as possible – McCormick was wintering in Florida – “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

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147 Letter from James Kerney [hereinafter Kerney] to McCormick (Jan. 21, 1930).
148 FRIENDLY, supra note 6, at 86-87.
149 Letter from McCormick to Kirkland (Jan. 23, 1930).
150 Letter from Kirkland to McCormick (Jan 27, 1930).
151 Id.
152 FRIENDLY, supra note 6, at 86.
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very poorly briefed.” Later, Kirkland condemned the Minnesota gag law in a speech to the Legal Club.

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. The ANPA board met on Feb. 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.” In a letter to Thomason, however, Palmer pointed out that the association had been “under unusually heavy expense during the past year.

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.

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.”

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153 Letter from Kirkland to McCormick, supra note 150.
155 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.”
156 Letter from Palmer to Thomason (Feb. 11, 1930).
157 Id.
158 Letter from Thomason to McCormick (Feb. 14, 1930).
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 favored the appeal.\footnote{Letter from McCormick to Burke (Feb. 17, 1930).} 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.”\footnote{Telegram from McCormick to Thomason (Feb. 17, 1930).} 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.\footnote{Telegram from Thomason to McCormick (Feb. 17, 1930).}

The next day, McCormick wrote Thomason that he had instructed Kirkland to “perfect the appeal to the Supreme Court of the United States.”\footnote{Letter from McCormick to Thomason (Feb. 18, 1930).} 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. I 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.\footnote{Id.}
Thomason wrote back to tell McCormick that he had written to Butler to ask for an immediate poll, but 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.”

Having received assurances from Kirkland that there was time to conduct the referendum before the right of appeal expired, 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” 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.” McCormick found the letter “entirely satisfactory.”

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. 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]

164 Letter from Thomason to McCormick (Feb. 1930)(date obscured).
165 Telegram from Palmer to McCormick (Feb. 20, 1930), with reply telegram from Kirkland to Palmer (Feb. 22, 1930).
166 Letter from Palmer to McCormick (Feb. 25, 1930).
167 Telegram from McCormick to Palmer (Feb. 28, 1930).
brought to their attention.”169 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.170 At the time, the vote was 275-5 in favor of the appeal.171

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.172 “Of course we will have a meeting…,” McCormick replied. “As far as I am concerned, I will put it ahead of any other meeting.”173 McCormick also asked Palmer for 15 minutes “to put my views before the convention. I don’t care when.”174 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.175 He also told McCormick that the poll stood at 331-6 in favor of intervention.

That eagerness, however, did not extend to preparing a committee report. Palmer had asked for a report by April 10 so it could be published in the pre-convention Bulletin. He told McCormick the report would be of “outstanding interest to our Convention.”176 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.”

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170 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) and McCormick to Palmer (Mar. 19, 1930).
172 Letter from Palmer to McCormick (Mar. 18, 1930).
173 Letter from McCormick to Palmer (Mar. 20, 1930).
174 Letter from McCormick to Palmer (Mar. 21, 1930).
176 Letter from Palmer to McCormick (Mar. 20, 1930).
suggested Palmer “might phrase a report of the situation to date” and he would “be glad to sign it.”

Before receiving McCormick’s response, Palmer again asks for the report in another letter. 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 The Tribune compile a comprehensive report on the subject for the following meeting.”

Palmer sent a draft report to McCormick’s secretary on April 11, suggesting that she forward one copy to Kirkland. 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.” One of those attempts involved an Ohio court that sentenced two editors to 30 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. The convictions were overturned on appeal to the Ohio Appeals Court, and Palmer quoted from the opinion of Judge Willis Vickery:

We live in an age of pitiless publicity, an age when freedom of speech and a free press are a paramount issue. People should be allowed to say what they please, and newspapers to print what they please, always

177 Letter from McCormick to Palmer (Mar. 22, 1930).
179 Letter from McCormick to Palmer (Mar. 24, 1930).
180 Letter from Palmer to Burke (Apr. 11, 1930), including draft Report of Committee on the Freedom of the Press.
182 1930 Ohio Misc. LEXIS 1116.
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making themselves liable under the laws of slander or the laws of libel….

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

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

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.

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

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.

Kerney added that the quotation from Judge Vickery “should be pasted in the hat of every editor and every judge in America.” Dewart wrote the same day: “It suits me.”

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

183 Id. at 20.
184 Id. at 24.
185 Id.
188 Id.
189 Id.
190 Letter from Dewart to McCormick (Apr. 16, 1930).
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. 191

The 1930 ANPA convention saw Harry Chandler replace Edward Butler as president and also, apparently, a change of heart regarding the financing. Chandler had written to McCormick back in March suggesting the membership “share expenses pro rata with The Chicago Tribune.” 192 On April 19, the ANPA directors actually voted to “meet the cost incurred in connection with taking an appeal.” 193 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. 194

McCormick asked Kirkland to “kindly supply the important and interesting information” that Chandler had requested. 195 Kirkland estimated the total cost, including

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191 Telegram from Ellis to McCormick (Apr. 18, 1930).
192 Letter from Chandler to McCormick (Mar. 20, 1930).
193 Letter from Chandler to McCormick (May 21, 1930) (quoting a letter from Palmer to Chandler without noting its date).
194 Letter from Chandler to McCormick (May 21, 1930).
195 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.
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oral argument, at $25,000. McCormick forwarded the information to Chandler, adding, “Any sum that the A.N.P.A. sees fit to pay will be satisfactory to me.” In the end, ANPA contributed $5,000 to the appeal.

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…. ” 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.” That advice came in a cover letter for a document McCormick entitled “Comments on the Minnesota Brief,” which contained 16 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? ….

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.

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196 Letter from Kirkland to McCormick (June 20, 1930).
197 Letter from McCormick to Chandler (June 25, 1930).
198 SMITH, supra note 6, at 282.
199 Letter from McCormick to Kirkland (May 12, 1930).
200 Letter from McCormick to Kirkland (May 26, 1930).
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. 201

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. 202 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.” 203

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. 204 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 Chicago Tribune Building in Chicago. 205

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201 Robert R. McCormick, Comments on the Minnesota Brief, May 27, 1930.
202 Letter from McCormick to Kirkland (May 28, 1930).
203 Letter from Kirkland to McCormick (May 29, 1930).
204 Letter from McCormick to Kirkland (June 5, 1930 and June 11, 1930).
205 “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
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-to-close relationship with the Capone gang. Still, McCormick and the *Tribune* remained active in the *Near* case and other press freedom issues. Among the more interesting issues to surface that summer was the 15% 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.* 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. 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.”

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. 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

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207 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).

208 297 U.S. 233 (1936).


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

constitutionality, he now believed “that the possibilities for abuse make it an unwise law,” a position he could not take as prosecutor. The Tribune’s editorial in support of repeal fell far short of embracing Olson, claiming credit instead for having initiated the court challenge. The St. Louis Post-Dispatch was more charitable toward Olson, and the Tribune duly carried its editorial the following day.

Bills to repeal the gag law were introduced in both the Minnesota House and Senate on Jan. 16 and approved by the House on Feb. 4 by a vote of 68-58 after two days of intense debate. Perhaps anticipating the demise of the gag law one way or the other, one Minnesota state senator began drafting a draconian new criminal libel law that provided prison terms of one to three years. But prospects for the legislation’s clearing the Senate had begun to dim, 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. 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.

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

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Court. Near’s jurisdictional statement had reached the Court on May 17, 1930,222 and the Court had noted probable jurisdiction on Oct. 20.223 Kirkland filed Near’s brief on Dec. 12,224 and Minnesota Atty. Gen. Henry N. Benson filed the state’s reply brief on Jan. 19, 1931.225 Oral arguments were scheduled for Jan. 30.

Part IV – Before the Supreme Court

After describing the statute as interpreted and applied by the Minnesota courts, Kirkland’s 70-page brief defined “freedom of the press” as broader than Supreme Court “precedents passing upon that right under the First Amendment.” Rather, Kirkland asserted that precedents defining the right under state constitutions and the common law are also apposite.226 Averring that all such authorities, from Blackstone to the present, agree with the proposition that freedom of the press prohibits prior restraints,227 Kirkland proceeded to offer the court a veritable library of precedents supporting that position. 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.228

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

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222 Supreme Court Gets “Gag” Law Plea from Near, CHI. TRIB., May 18, 1930, at 7.
226 Id. at 22.
227 Id. at 45-46.
privileges and immunities clauses of the Fourteenth Amendment. For the former proposition, Kirkland pointed to *Gitlow v. New York* and subsequent cases; by 1930, that issue had been all but conclusively decided, 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* had gutted the privileges and immunities clause, and Kirkland could not resurrect it here. 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.”

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). But that freedom, the brief asserted, “does not include the free and unrestricted right to publish obscene, scandalous or defamatory matter.” 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.

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229 *Id.* at 46.
231 *See supra* Part II.
232 83 U.S. 36 (1872).
233 *See supra* notes 46-47 and accompanying text.
234 Brief of Appellant, 1930 WL 28681 at 67.
235 Brief of Appellee, 1931 WL 30640 at 8.
236 *Id.*
237 *Id.*
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There is no transcript of the oral argument, but Friendly reconstructs it from newspaper accounts.\(^{238}\) “The words were delivered by counsel,” Friendly says, “but the rhetoric was vintage McCormick.”\(^{239}\) Kirkland spoke for 54 minutes, interrupted by Justice Pierce Butler’s reminders that “the Saturday Press was a hate sheet which regularly published defamatory articles.”\(^{240}\) 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.”\(^{241}\) 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….\(^{242}\)

Deputy Atty. Gen. 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.’”\(^{243}\) 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.” He also defended the statute as “beneficial to newspapers because it would ‘have the effect of purifying the press.’”\(^{244}\)

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\(^{238}\) Friendly, *supra* note 6, at 125-133 and accompanying note at 202.
\(^{239}\) *Id.* at 126.
\(^{240}\) *Id.* at 128.
\(^{241}\) *Id.*
\(^{242}\) *Id.*
\(^{243}\) *Id.* at 129.
\(^{244}\) *Id.*
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 Oct. 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. 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. 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.

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. Some segments of the press had supported the law and Minneapolis Journal editors had even helped draft it. Brandeis also collected clips from the Washington Post and the newspaper Labor on efforts to repeal the gag law.

At oral argument, Brandeis told Markham 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.” He led Markham like an experienced cross-examiner to admitting 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

246 Note from Brandeis to HTA (Oct. 16, 1930).
248 FRIENDLY, supra note 6, at 21.
249 Editorial, Minnesota’s Press Gag, WASH. POST, Jan. 12, 1931; Expect Repeal of Newspaper ‘Gag’ Act in Minnesota, LABOR, Jan. 27, 1931.
250 Brandeis Hints Minnesota’s Gag Law is Invalid, CHI. TRIB., Jan. 31, 1931, at 7.
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citizen.”’ When Markham replied, “‘Assuming it to be true,’” Brandeis “snapped back: ‘No. A newspaper cannot always wait until it gets the judgment of a court.’”251

According to Friendly, Markham looked to Justice Oliver Wendell Holmes, Jr., to rescue him from Brandeis’s embrace, noting Holmes’s majority opinion in Paterson v. Colorado,252 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.’”253

Near, at least, reacted favorably to the oral arguments. On Feb. 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.254 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.255 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.”256 McCormick apparently ignored him.

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:

251 FRIENDLY, supra note 6, at 130-131.
252 205 U.S. 454 (1907).
253 FRIENDLY, supra note 6, at 132.
254 Letter from Near to McCormick (Feb. 4, 1931).
256 Letter from Near to McCormick (Feb. 4, 1931).
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Willis Van Devanter, James McReynolds, and George Sutherland – who came to be known as the “four horsemen.” 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 5 hours of each other. Had they not left the Court when they did, *Near v. Minnesota* might well have gone the other way. 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.

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. 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 FDR’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. Hughes accepted and served as associate justice until 1916, when he accepted the Republican nomination for the presidency. While on the bench, Hughes earned a reputation as a great liberal, supporting (usually in dissent) use of

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257 FRIENDLY, supra note 6, at 105.
258 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.
259 FRIENDLY, supra note 6, at 94.
260 MERLO PUSEY, 1 CHARLES EVANS HUGHES 268 (1951).
261 Id. at 329.
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. 262

Hughes lost the election of 1916 to Woodrow Wilson263 and practiced law – including waging a campaign in support of five Socialists who had been expelled from the New York State Assembly264 – 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. 265 When Taft retired as Chief Justice because of ill health, President Hoover immediately nominated Hughes to succeed him. 266 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. 267 Hughes assumed the office of Chief Justice on Feb. 24, 1930, and retained the position until his retirement in 1941. 268

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

263 PUSEY, supra note 260, at 361.
264 HENDEL, supra note 262, at 72-73; PUSEY, supra note 260, at 391-393.
265 Id. at 68-77.
266 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.
268 HENDEL, supra note 262, at 91.
Part 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.270 Hughes quoted directly from the first section of the act, which provides for the abatement of “obscene, lewd and lascivious” or “malicious, scandalous and defamatory” publications and establishes the defense of “truth… published with good motives and for justifiable ends.” 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.

Hughes next began a chronology of the case against Near with a description of the complaint and its principal allegations.271 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

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269 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.

270 283 U.S. at 701-703.

271 Id. at 703-707.
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 is 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. 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.” 272

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. 273 Accordingly, he launched into a four-part description of purpose and effect that reads more like an indictment.

272 Id. at 708.
273 Id. at 708-709.
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First, Hughes wrote, the statute does not redress private wrongs, but aims to protect public welfare. Second, the statute targets not merely private libels, but also publication of “charges against public officers of corruption, malfeasance in office and serious neglect of duty.” Third, the object of the statute is not punishment, but suppression. And fourth, the statute operates not only to suppress the offending newspaper, but “to put the publisher under effective censorship.” The words of the statute evoke, not “the historic conception of liberty of the press,” Hughes wrote, but the very conditions that liberty was supposed to ameliorate.

“If we cut through mere details of procedure,” 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.”

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.” 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.

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274 Id. at 709.  
275 Id. at 710.  
276 Id. at 711.  
277 Id. at 712-713.  
278 Id. at 713.  
279 Id. at 714.
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.”

Other critics, Hughes noted, believe the prohibition on previous restraints has been stated too broadly. Hughes agreed, excluding certain wartime speech, obscenity, incitement, and speech-acts from its purview. “But these limitations are not applicable here,” Hughes continued. To the contrary, “the 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.”

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. 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 one hundred and fifty years. Even where honorable officers are recklessly assaulted, subsequent punishment is the “appropriate remedy, consistent with constitutional privilege.”

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

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280 Id. at 714-715.
281 Id. at 715-716.
282 Id. at 716-720.
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.” Nor is that immunity lost, he continued, when the alleged official malfeasance would be punishable as crimes.283

Hughes found the defense of truth, “published with good motives and for justifiable ends,” inadequate to justify the Minnesota statute. Finding such a law constitutionally valid would be to recognize “the authority of the censor against which the constitutional barrier was erected.” 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. “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.284

For all of these reasons, Hughes concluded, the Minnesota statute infringed the liberty of the press guaranteed by the Fourteenth Amendment.285

Writing for the four dissenting justices, Associate Justice Pierce Butler accused the majority of giving press freedom “a meaning and scope not heretofore recognized.”286

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.287

283 Id. at 720-721.
284 Id. at 721-722.
285 Id. at 722-723.
286 Id. at 723 (Butler, J., dissenting).
287 Id. at 723-724.
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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, slanderous and defamatory” articles.288 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.289

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 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.290 States must be free to “employ all just and appropriate measures” to prevent such abuses, Butler insisted.291

Butler quoted Justice Joseph Story’s famous treatise on the Constitution for the proposition that the First Amendment is not absolute. Such a supposition, Story had said, is “too wild to be indulged by any rational man.”292 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 officer,” not a judge acting pursuant to duly enacted legislation as the Minnesota statute provides.293

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

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288 Id. at 725.  
289 Id. at 724 n. 1.  
290 Id. at 731.  
291 Id. at 732.  
292 Id.  
293 Id. at 733-734.
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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.”

Part 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.

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. The
story included the full text of the opinion and dissent, the full text of ANPA’s resolution,

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294 Id. at 737-738.
295 Statement of Col. Robert R. McCormick (June 1, 1931).
296 Minnesota Act Quashed by U.S. Supreme Court, CHI. TRIB., June 2, 1931, at 1.
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and an individual photograph of every U.S. Supreme Court justice.\textsuperscript{297} Favorable reaction was reported from Minnesota Gov. Floyd B. Olson\textsuperscript{298} and the National Editorial Association, meeting in convention in Atlanta.\textsuperscript{299} And, of course, McCormick’s statement was run in full, although modestly positioned between the Olson and NEA reaction stories.\textsuperscript{300}

Coverage continued on June 3 with the favorable reaction of various members of Congress,\textsuperscript{301} an analysis of the recent “liberalization” of the Supreme Court by Washington correspondent Arthur Sears Henning,\textsuperscript{302} 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….\textsuperscript{303}” More editorials followed.\textsuperscript{304}

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.”\textsuperscript{305} 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.”\textsuperscript{306}

\begin{itemize}
\item \textsuperscript{297} Id.
\item \textsuperscript{298} Governor Pleased by Decision Killing Minnesota Gag Law, CHI. TRIB., June 2, 1931, at 7.
\item \textsuperscript{299} Editors Hail Gag Ruling as Press Victory, CHI. TRIB., June 2, 1931, at 7.
\item \textsuperscript{300} Decision a Triumph for Free Thought, M’Cormick Says, CHI. TRIB., June 2, 1931, at 7.
\item \textsuperscript{301} Arthur Sears Henning, Supreme Court ‘Liberalized’ in Recent Months, CHI. TRIB., June 3, 1931, at 4.
\item \textsuperscript{302} Press Gag Decision Praised by Washington Officialdom, CHI. TRIB., June 3, 1931, at 4.
\item \textsuperscript{303} Editorial, The Background of the Gag Law, CHI. TRIB., June 3, 1931, at 14.
\item \textsuperscript{304} Editorial of the Day, Another Liberal Victory [St. Louis Star], CHI. TRIB., June 4, 1931, at 14; Editorial, Freedom of the Press, CHI. TRIB., June 14, 1931, at 14.
\item \textsuperscript{305} Telegram from Dewart to McCormick (June 2, 1931).
\item \textsuperscript{306} Letter from McCormick to C.B. Blethen (June 1931)(date obscured).
\end{itemize}
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Perhaps the most important message came from the 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.” 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.” 307

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.

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. 308

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

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. 309

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308 Letter from Baldwin to McCormick (June 4, 1931).
309 Letter from McCormick to Baldwin (June 6, 1931).
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.