

PRIOR RESTRAINT IS NEARER THAN READERS REALIZE

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Minnesota Rag: Corruption, Yellow Journalism, and the Case That Saved Freedom of the Press. By Fred W. Friendly. University of Minnesota Press, 2003. 264 pages. \$16.95.

Minnesota has sent its share of First Amendment cases to the U.S. Supreme Court,¹ but none has been more of a landmark than *Near v. Minnesota*.² In 1931, the *Near* Court ruled 5-4 that states cannot shut down “nuisance” newspapers based on what they have published in the past.³ Generations of law school students have read *Near* and its line of cases to learn that government power to restrain speech is reserved for the most compelling of circumstances. In media law, the *Near* prohibition on “prior restraint” has been applied broadly and frequently,⁴

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1. See, e.g., *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (striking down Minnesota rule prohibiting judicial candidates from announcing views on legal or political issues); *Alexander v. United States*, 509 U.S. 544 (1993) (authorizing seizure of assets from pornography retailer Ferris Alexander); *R.A.V. v. City of Saint Paul*, 505 U.S. 377 (1992) (striking down a Saint Paul hate-speech ordinance as a content-based restriction); *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (ruling that First Amendment does not bar promissory estoppel action against newspapers); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (holding that Minnesota Human Rights Act requirement that Jaycees admit women does not violate First Amendment freedom of association); *Minneapolis Star & Trib. Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575 (1983) (striking down Minnesota tax on newspaper ink and paper); *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (upholding rule restricting distribution of religious materials at Minnesota State Fair).

2. *Near v. Minn. ex rel. Olson*, 283 U.S. 697 (1931).

3. *Id.*

4. See, e.g., *Fla. Star v. B.J.F.*, 491 U.S. 524 (1989) (striking down law prohibiting publication of rape victims’ names); *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 556-57

most notably in the Pentagon Papers case in 1971 when the Supreme Court removed an injunction ordering newspapers not to publish classified details of the Vietnam War.⁵

Near's significance has been underscored yet again with the recent republication of *Minnesota Rag*, a 1981 book by former journalism professor and CBS News President Fred W. Friendly that provides the spicy and often surprising context of how *Near* came to be. Friendly reconstructs a rough-and-tumble age of corrupt Minnesota government and chronicles the methods and motivations of muckrakers who sought to expose it all.

However, while *Minnesota Rag* does great service to Minnesota history, it squanders an opportunity to highlight why the case remains vitally important and how it had a key role in one of the most important legal developments of the twentieth century. Truth is, *Near* did much more than help newspapers assert their rights. It also cemented the applicability of the First Amendment to the states through the Fourteenth Amendment.⁶ In addition, the core of *Near*—debate over prior restraint—is as much an issue today as it was in 1931.

The good news about *Minnesota Rag* is that it offers Minnesotans a surprising, albeit sordid, glimpse at their state and the officials who ran it seven decades ago. A read through *Near v. Minnesota* reveals that the case had its origins in Minneapolis. However, *Minnesota Rag* teaches that the story actually begins in northern Minnesota, where muckraker John L. Morrison published the *Duluth Rip-saw* to rid the region of corruption following the Gold Rush-like activity on the state's Iron Range. Motivated by religious ideals, Morrison took on crooked officials, including the Duluth police chief, judges, senators, and state representatives. "There ought to be a law," the legislators reasoned.⁷ The Public Nuisance Bill of 1925 was the result, drafted specifically to

(1976) (striking down judge's restraints on media in high-profile murder trial); *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 101-02 (1979) (striking down state law restricting publication of juveniles' names charged in juvenile court); *Minneapolis Star & Trib. Co. v. Schmidt*, 360 N.W.2d 433, 435 (Minn. Ct. App. 1975) (striking Minnesota juvenile court judge's order that the news media not report identity of child).

5. *New York Times Co. v. U.S.*, 403 U.S. 713 (1971). "The Pentagon Papers prompted the first attempt ever made by the Federal Government to impose a prior restraint on the press in the name of national security." R.W. Apple, *Lessons from the Pentagon Papers*, N.Y. TIMES, June 23, 1996, at D5.

6. *Near*, 283 U.S. at 722-23.

7. FRED W. FRIENDLY, *MINNESOTA RAG: CORRUPTION, YELLOW JOURNALISM, AND THE CASE THAT SAVED FREEDOM OF THE PRESS* 20 (Univ. Minn. Press 2003) (1981) [hereinafter *MINNESOTA RAG*].

silence Morrison and with help from Minnesota publishers eager “to protect the rights of responsible newspapers.”⁸

Morrison died before he could challenge a judge’s order that the *Rip-saw* stop publishing.⁹ As Friendly tells the story, the Public Nuisance Law would go untested for a couple more years until Jay M. Near riled the Twin Cities-area power brokers with his *Saturday Press* scandal sheet. While Morrison was motivated by God and sought to rid Minnesota of corruption, Near was motivated by greed and sought to capitalize on scandal for economic gain. With a scathing, anti-Semitic tone, Near and publishing partner Howard A. Guilford linked Minneapolis police to gambling syndicates and declared that “Jew Gangsters” ran the city and committed election fraud.¹⁰ None other than Floyd B. Olson—revered Minnesota governor from 1931 to 1936—was the man who, as Hennepin County Attorney, brandished the Public Nuisance Law of 1925 amid a vow “to wage war on the yellow press and ‘put out of business forever the *Saturday Press* and other sensational weeklies.’”¹¹

Olson’s crusade worked, and an injunction ordering the *Saturday Press* to shut down was issued.¹² A unanimous Minnesota Supreme Court eventually endorsed the newspaper nuisance law, likening the *Saturday Press* to “houses of prostitution or noxious weeds.”¹³

Near, like so many U.S. Supreme Court appellants, had no interest in setting a constitutional milestone; he merely wanted to make money.¹⁴ *Minnesota Rag* does an excellent job explaining how the case went forward despite Near’s disinterest in a constitutional fight. Credit is given to lawyer and *Chicago Tribune* publisher Colonel Robert McCormick for paying the legal bills and hiring former law partner Weymouth Kirkland to handle the appeal.¹⁵ In 1928, Kirkland offered

8. *Id.* at 21.

9. *Id.* at 24-27.

10. *Id.* at 39, 46.

11. *Id.* at 50.

12. *Id.* at 52-53. However, the judge did certify the case to the Minnesota Supreme Court in light of the Minnesota Constitution’s declaration that “[t]he liberty of the press shall forever remain inviolate.” *Id.* at 53; *see also* MINN. CONST. art. 1, § 3.

13. MINNESOTA RAG, *supra* note 7, at 61; *see also* State *ex rel.* Olson v. Guilford, 174 Minn. 457, 459, 219 N.W. 770, 771 (1928).

14. MINNESOTA RAG, *supra* note 7, at 77. “For Near, the only question was, ‘When can I get my paper back on the streets?’” *Id.*

15. *Id.* at 78. In 1908, McCormick formed a law partnership that would become the huge Chicago law firm of Kirkland & Ellis, which today carries Weymouth Kirkland’s name. *See* Kirkland & Ellis, History, at <http://www.kirkland.com/firm/history.asp> (last visited Nov. 28, 2003).

the Minnesota Supreme Court a novel argument: The Public Nuisance Law was unconstitutional because the First Amendment, coupled with the Fourteenth Amendment, applied to the states.¹⁶ It was an assertion that had become plausible only three years earlier in *Gitlow v. New York*, when the U.S. Supreme Court for the first time held states subject to the First Amendment.¹⁷

In *Gitlow*, however, the speaker lost. Speech advocating government overthrow was at issue, and as Justice Edward T. Sanford reasoned: “A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration.”¹⁸ The question of when a state must *not* silence speech in light of the First and Fourteenth Amendments was “undeveloped territory” when *Near* was argued before the Supreme Court on January 30, 1931.¹⁹

Minnesota Rag effectively explains why *Near*’s victory was anything but certain. Chief Justice William Howard Taft and Justice Sanford had died a year earlier.²⁰ Both justices seemed likely to rule against *Near*, along with Justices Pierce Butler, Willis Van Devanter, James C. McReynolds, and George Sutherland.²¹ Had Sanford and Taft lived, Minnesota’s prior restraint law seemed destined to survive, too. Two justices—Louis Brandeis and Oliver Wendell Holmes—were believed likely to rule in *Near*’s favor, but *Minnesota Rag* explains that much was in doubt given Holmes’ frail condition and Brandeis’s co-authorship of a highly influential *Harvard Law Review* article that effectively invented the right to privacy in light of the press’ tendency to overstep “obvious bounds of propriety and of decency.”²² New Chief Justice Charles Evans Hughes as well as new Justices Harlan Fiske Stone and Owen J. Roberts represented “votes that could not be counted at

16. MINNESOTA RAG, *supra* note 7, at 80.

17. *Gitlow v. New York*, 268 U.S. 625, 666 (1925).

For present purposes we may and do assume 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.

Id.

18. *Id.* at 631.

19. MINNESOTA RAG, *supra* note 7, at 97, 120.

20. *Id.* at 92, 93.

21. *Id.* at 94.

22. *Id.* See also Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

all.”²³ *Minnesota Rag* shows how the future of press freedom was very much in doubt, and broad extension of the First Amendment to the states was anything but certain.

Perhaps the most fascinating part of *Minnesota Rag* is the tale of Justice Butler, a St. Paul lawyer whose Court tenure is routinely overshadowed by fellow St. Paulites Warren Burger and Harry Blackmun. Butler’s family, who prospered on Minnesota’s Iron Range, had been personally affected by muckraker Morrison’s writings, and Friendly writes that “the impact of the *Rip-saw* stayed with him for a lifetime.”²⁴ It was no surprise, then, that Butler penned the *Near* dissent, joined by Justices Van Devanter, McReynolds, and Sutherland. Butler deemed Minnesota and other states powerless to control “malicious, scandalous and defamatory periodicals that in due course of judicial procedure has been adjudged to be a public nuisance.”²⁵

In spite of Butler, a five-justice majority struck down the Minnesota newspaper law. In the majority opinion, Chief Justice Hughes stressed that the law’s goal was to unconstitutionally suppress speech, not to punish it.²⁶ Libel laws “remain available and unaffected,” Hughes wrote, and forcing a publisher to prove the truth of his assertions before publication was deemed to be a dangerous step toward government censorship.²⁷

If such a statute . . . is constitutionally valid, it would be equally permissible for the Legislature to provide that at any time the publisher of any newspaper could be brought before a court, or even an administrative officer . . . , and required to produce proof of the truth of his publication, or of what he intended to publish and of his motives, or stand enjoined And it would be but a step to a complete system of censorship.²⁸

Friendly does a fine job eschewing legalese to chronicle how *Near* became a watershed for press freedom. However, *Minnesota Rag* fails to stress the holding’s broader application and therefore risks short-changing readers who support the First Amendment in general but have grown tired of cries for press freedom. For while *Gitlow* initiated the

23. MINNESOTA RAG, *supra* note 7, at 115.

24. *Id.* at 12.

25. *Near v. Minn. ex rel. Olson*, 283 U.S. 697, 723 (1931) (Butler, J., dissenting).

26. *Id.* at 711.

27. *Id.* at 709, 721.

28. *Id.* at 721.

link between the First and Fourteenth Amendments, *Near* cemented it.²⁹ *Gitlow* was groundbreaking in theory, but *Near* was revolutionary in application.³⁰ *Gitlow* lost, but *Near* won, and a new age of First Amendment application to the states had begun, all because of an appeal from Minnesota. Regrettably, Friendly misses an opportunity to explain this in a way that lawyers as well as non-lawyers might appreciate.

Perhaps Friendly must be forgiven, since his book does so well at debunking “Minnesota nice” stereotypes and unearthing juicy facts not included in your typical constitutional law casebook. And, because Friendly died in 1998, he was unable to personally revise and augment his work before the University of Minnesota Press republished it this year. However, someone at the University Press should have strived to update *Minnesota Rag*. Friendly offered an Epilogue explaining how *Near* was vitally important to the Court’s Pentagon Papers decision,³¹ why not add an Epilogue to the Epilogue to highlight recent government efforts to prevent speech?

Prior restraint is alive and well today, both in debate and in practice. The U.S. military’s successful efforts to control news during the Persian Gulf War in the early 1990s are well-documented,³² and debate over prior restraint has intensified recently amid the “war on terrorism” and the latest Iraq war.³³ This year, two federal judges—both citing *Near*—endorsed prior restraints on publications that allegedly encourage

29. It may be more appropriate to credit *Near*, not *Gitlow*, with first subjecting states to the First Amendment. See Nadine Strossen, *Frontiers of Legal Thought II, The New First Amendment: Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 565 n.411 (1990) (characterizing the *Gitlow* language regarding the First and Fourteenth Amendments as dicta).

30. “*Near* has no unambiguous textual support *Near* must invoke the fiction of incorporation to connect the First Amendment to limits upon the authority of the states.” Christopher L. Eisgruber, *The Fourteenth Amendment’s Constitution*, 69 S. CAL. L. REV. 47, 75 (1995).

31. MINNESOTA RAG, *supra* note 7, at 172-79.

32. “In the Persian Gulf War, journalists routinely submitted material to military censors, acknowledging the precise power of restraint that was resisted at great risk 20 years ago [during the Pentagon Papers dispute].” Thomas Oliphant, *From Pentagon Papers to Gulf, the Quest for Press Control*, BOSTON GLOBE, Apr. 10, 1991, at A19. See also Neil A. Lewis, *Pentagon Issues Press Rules Authorizing Military Censors*, N.Y. TIMES, Jan. 8, 1991, at A10 (describing military’s restriction of journalists to officially designated “pools” under military escort).

33. “Two thirds of the public believes the government should have the right to stop the media from disclosing military secrets” Howard Kurtz, *Most Back Wartime Media Restrictions; Poll Finds Support for Military Secrecy*, WASH. POST, Jan. 17, 2003, at A16.

submission of false tax returns.³⁴

Among other prior restraint cases this year: A newspaper publisher in Bemidji, Minnesota, continued his latest round in a multiyear tussle with city officials seeking to regulate dissemination of his political publication.³⁵ The Fourth Circuit used *Near* to reverse summary judgment in favor of sheriff's deputies who bought out the election-day stock of a weekly newspaper containing articles critical of the sheriff and a favored state's attorney candidate.³⁶ And a Michigan federal judge cited *Near* to reject an injunction barring distribution of leaflets that described two customers' allegedly racist treatment at a gas station.³⁷

As republished, *Minnesota Rag* remains a nice and often surprising read for history buffs eager for a glimpse at Minnesota immediately before the Great Depression. However, without the benefit of updated content and context, readers risk dismissing the *Near v. Minnesota* story as a historical blip irrelevant to today's world and incapable of being repeated in a state and nation where we blindly assume that when it comes to free speech, we are more tolerant and enlightened than those who came before us.

34. *United States v. Bell*, 238 F. Supp. 2d 696, 703 (M.D. Pa. 2003); *United States v. Schiff*, 269 F. Supp. 2d 1262, 1272 (D. Nev. 2003).

35. *Steele v. City of Bemidji*, 257 F.3d 902, 906-08 (8th Cir. 2001), *cert. denied*, 535 U.S. 1056 (2002) (characterizing city ordinance that required publisher to obtain permit to distribute newspaper as an unconstitutional prior restraint); *Steele v. City of Bemidji*, 242 F. Supp.2d 624, 628-29 (D. Minn. 2003) (ruling that city manager and city police officers were immune from suit but that city attorney was not).

36. *Rossignol v. Voorhaar*, 316 F.3d 516, 522 (4th Cir. 2003) (“[T]heir conduct met the classic definition of a prior restraint.” (citing *Near v. Minnesota*)).

37. *Karhani v. Meijer*, 270 F. Supp.2d 926 (E.D. Mich. 2003). “Under *Near v. Minnesota*, . . . the injunction, . . . so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights.” *Id.* at 932 (quoting *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 418-19 (1971)).