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Near v. Minnesota in the Context of Historical Developments

Paul L. Murphy*

I deplore . . . the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of those who write for them These ordures are rapidly depraving the public taste. . . .

It is however an evil for which there is no remedy. Our liberty depends on the freedom of the press, and that cannot be limited without being lost.¹

I. INTRODUCTION

In their brief to the Minnesota Supreme Court attacking that body's earlier validation² of the state's newspaper "Gag Law"³ and the use of an injunction to silence a publication, the

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1. Letters from Thomas Jefferson to Dr. W. Jones (Jan. 2, 1814) and Dr. J. Currie (Jan. 28, 1786), reprinted in T. JEFFERSON, *DEMOCRACY* 150-51 (S. Pado-ver ed. 1939).

2. *State ex rel. Olson v. Guilford*, 174 Minn. 457, 219 N.W. 770 (1928). The Hennepin County attorney brought an action under the act to enjoin and abate as a nuisance *The Saturday Press*. Defendants demurred to the complaint on the grounds that it did not state facts sufficient to constitute a cause of action and that the statute was unconstitutional. The district court overruled the demurrer and certified the question to the Minnesota Supreme Court, which affirmed the order overruling the demurrer and held the statute to be a valid police regulation. *Id.* The district court then addressed the merits and found the newspaper to be a public nuisance. Defendant again appealed unsuccessfully. *State ex rel. Olson v. Guilford*, 179 Minn. 40, 228 N.W. 326 (1929), *rev'd sub nom.* *Near v. Minnesota*, 283 U.S. 697 (1931).

3. Act of Apr. 20, 1925, ch. 285, 1925 MINN. LAWS 358 (held unconstitutional in *Near v. Minnesota*, 283 U.S. 697 (1931)). The law provided in relevant part:

Any person . . . engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away

- (a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or
- (b) a malicious, scandalous and defamatory newspaper, magazine or other periodical,

is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided.

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

attorneys for the *Chicago Daily Tribune*⁴ set forth an extensive historical exposition of freedom of the press.⁵ The brief contended that from the death of Socrates through the fall of the Roman Empire until after the Renaissance, authorities prohibited discussion and proscribed scientific works. During this period, the Inquisition flourished, and censorship was in the hands of church and state. The brief pointed out that the Tudor and Stuart dynasties censored the English press, and that during the Commonwealth, until the latter years of the 17th century, the government frequently used the hated licensing technique against the press. Western civilization, it contended, then came to see the error of suppressing ideas. If governments, particularly corrupt ones, could silence written opposition to their actions, they could speedily crush all attempts to reform existing evils.⁶ Characterizing the Minnesota law as "despotic",⁷ the brief argued that "such laws give birth to violence and revolution; when the people are forbidden to speak and write, they begin to act." "Surely," its authors argued, "it is better to permit the free publication of defamation with responsibility therefor afterwards. 'No abuse of a free press can be so great as the evils of its suppression.'"⁸ The brief ended with the plea, "[w]e therefore ask this Court to vindicate the freedom of the press and to protect a right for which so much blood has been shed down through the centuries."⁹

The Minnesota Supreme Court, which considered the case two years earlier,¹⁰ remained unimpressed. It rejected both the pleas based on history and the strong arguments regarding the limits of state governmental authority¹¹ and followed its earlier

4. Following the Minnesota Supreme Court ruling in *State ex rel. Olson v. Guilford*, 179 Minn. 40, 228 N.W. 326 (1929), *rev'd sub nom. Near v. Minnesota*, 283 U.S. 697 (1931). Colonel Robert R. McCormick, owner of the *Chicago Daily Tribune*, and chairman of the Free Press Committee of the American Newspaper Publishers' Association, retained counsel to assist those engaged by *The Saturday Press*, the Minneapolis newspaper which sparked the controversy, in overturning the "tyrannical" statute. Foster, *The 1931 Personal Liberties Cases*, 9 N.Y.U.L.Q. REV. 64, 68 & n.16 (1931).

5. Brief for Appellant at 40-58, *State ex rel. Olson v. Guilford*, 179 Minn. 40, 228 N.W. 326 (1929).

6. *Id.* at 45-57, 94-98.

7. *Id.* at 376.

8. *Id.*

9. *Id.* at 376-77.

10. See note 2 *supra*.

11. Brief for Appellant at 217-23, *State ex rel. Olson v. Guilford*, 179 Minn. 40, 228 N.W. 326 (1929).

decision.¹² In that opinion, Chief Justice Samuel B. Wilson noted the deference accorded to the legislature in promoting the public welfare.¹³ More specifically, the Chief Justice found that a court may enjoin a newspaper as a public nuisance when existing libel laws did not adequately protect the public.¹⁴

The case of *Near v. Minnesota*¹⁵ resulted from the defendant's appeal to the United States Supreme Court from the Minnesota Supreme Court's decision. Contemporaries saw *Near* as a landmark,¹⁶ with one legal commentator on freedom of the press characterizing the case as "the most important decision rendered since the adoption of the first amendment."¹⁷ Subsequent authorities continue to view it in a similar light.¹⁸ The opinion represents an important development in American public law; it had important impacts upon a wide range of historical developments. These include the relationship between government and the broad dispersal of public information; the general history of public regulation in the United States; the use of law in America to criminalize certain forms of behavior, and the subsequent forms of social control which emerged from that process; the development of the fourteenth amendment as an instrument for the proper definition of state authority and state responsibility within the federal system; and the changed role of law vis-a-vis the media as the United States underwent the modernization process, including all of the implications which that process produced for the operation of democratic institutions within a mass, impersonal society.

This article will examine the historical importance of *Near v. Minnesota* and its place in this broad range of historical trends. While not attempting counter-factual analysis, it will speculate briefly upon what might have happened if one of the Justices had joined the minority¹⁹ to reinforce the series of his-

12. *State ex rel. Olson v. Guilford*, 179 Minn. 40, 42, 228 N.W. 326, 326 (1929), *rev'd sub nom. Near v. Minnesota*, 283 U.S. 697 (1931).

13. *State ex rel. Olson v. Guilford*, 174 Minn. 457, 460, 219 N.W. 770, 771 (1928).

14. *Id.* at 461-62, 219 N.W. at 772.

15. 283 U.S. 697 (1931).

16. Several law reviews commented on *Near*. See, e.g., 31 COLUM. L. REV. 1148 (1931); 30 MICH. L. REV. 279 (1931); 16 MINN. L. REV. 97 (1931); 80 U. PA. L. REV. 130 (1931); 41 YALE L.J. 262 (1931).

17. Deutsch, *Freedom of the Press and of the Mails*, 36 MICH. L. REV. 703, 749 (1938).

18. See, e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556-57 (1976); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *United States v. Progressive, Inc.*, 467 F. Supp. 990, 992 (W.D. Wis. 1979).

19. Chief Justice Hughes wrote the opinion for the majority, in which Jus-

torical developments which *Near* so dramatically interrupted. It contends that *Near* was a desirable break with a number of past trends and, as such, generally deserves the landmark designation it has gained.

II. THE HISTORIC RELATIONSHIP BETWEEN GOVERNMENT AND THE PRESS

The proper relationship between government and the press began to develop during the period of the English Civil War in the early 17th century. The invention of the printing press in the 15th century and its rapid development in the 16th and 17th centuries opened vast possibilities for the communication of ideas in all fields. Prevailing doctrines of spiritual and temporal sovereignty made it inevitable that control over the new medium of expression would be gathered firmly in the hands of the ruling authorities.²⁰ In England, printing first developed under royal sponsorship and soon became a monopoly granted by the crown. The crown retained, however, the right to restrain in advance the printing of material considered threatening or unwarranted. The government initially used its authority against certain religious works "with divers heresies and erroneous opinions."²¹ But once the crown began the process of censorship by curtailing one segment of the press, the whole field became open to official suppression. In 1566 the Star Chamber²² issued a decree limiting printers to publication of only the most innocuous sort of material, a role it enforced with increasing severity under the early Stuart rulers of the 17th century.²³ To this the authorities added over the years further royal proclamations, Star Chamber decrees,²⁴ and parlia-

tices Holmes, Brandeis, Stone, and Roberts joined. Butler dissented and was joined by Van DeVanter, McReynolds, and Sutherland.

20. Pope Alexander VI proclaimed in a 1501 bull that unlicensed printing should be prohibited so that publicity would not be given to evil. O. FERRARA, *THE BORGIA POPE: ALEXANDER THE SIXTH* 310 (1940).

21. *SOURCES OF ENGLISH CONSTITUTIONAL HISTORY* 387 (C. Stephenson & F. Marcham eds. 1937). See also F. SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND* 48 (1965).

22. The Star Chamber was the judicial body that heard most of the cases involving the press. It was under the authority of the Privy Council, which assisted the King in administering the laws. F. SIEBERT, *supra* note 21, at 28-29.

23. C. SCOFIELD, *A STUDY OF THE COURT OF STAR CHAMBER* 32 (1900). The decree prohibited the printing of books advocating positions contrary to any ordinance in effect. For the text of the decree see J. TANNER, *TUDOR CONSTITUTIONAL DOCUMENTS* 245-47 (1930).

24. The most famous of these was the decree of 1586. See F. SIEBERT, *supra* note 21, at 61-62. The decree limited the number of printers, gave vast powers of search and seizure to the government backed printing monopoly, and

mentary enactments, constantly increasing in complexity and further shackling the art and the business of publication.

Liberal opposition to the crown arose early. Although opponents of these practices did not question the propriety of punishing seditious libels, they did object to "prior punishment." The licensing power allowed authorities to place a prior restraint on a publication's issuance; anything published without a license was criminal. These views continued into the civil war period. When Parliament assumed control over printing and some Puritan leaders demanded that the process be strictly regulated along prior lines, strong objection arose. Other Parliamentary leaders, convinced that there was a "definite, discernable, and discoverable truth in religious doctrine, the presentation of which could not fail to convince the unbeliever,"²⁵ began talking in limited "marketplace" vocabulary. As the poet John Milton wrote at the time:

And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licencing and prohibiting to misdoubt her strength. Let her and Falshood grapple; who ever knew Truth put to the wors, in a free and open encounter?²⁶

Milton was also a pragmatist when it came to the process of licensing. Stunned by threats against his unlicensed pamphlet discussing the desirability of divorce, Milton pointed out that the licensing system depended upon the skill and commitment of the official charged with its enforcement. If the censor

be of such worth as behoovs him, there cannot be a more tedious and unpleasing journey-work, a greater losse of time levied upon his head, then to be made the perpetuall reader of unchosen books and pamphlets [W]e may easily foresee what kind of licencers we are to expect hereafter, either ignorant, imperious, and remisse, or basely pecuniary.²⁷

At the same time his friend Samuel Hartlib offered the alternative scenario: "the art of Printing will so spread knowledge that the common people, knowing their own rights and liberties will not be governed by way of oppression" ²⁸ Thus, the importance of the press's effect on the relationship between the government and the people was recognized early.

required the licensing of all books. The text is set out in J. TANNER, *supra* note 23, at 279-84.

25. F. SIEBERT, *supra* note 21, at 191. See generally W. HALLER, TRACTS ON LIBERTY IN THE PURITAN REVOLUTION (1934).

26. J. MILTON, AREOPAGITICA, in 4 J. MILTON, THE WORKS OF JOHN MILTON 347 (F. Patterson ed. 1931) (hereinafter cited as J. MILTON).

27. *Id.* at 322-23.

28. Hartlib, *A Description of the Famous Kingdom of Macaria* (October 25, 1641), quoted in F. SIEBERT, *supra* note 21, at 192.

But Puritans, including Milton, quickly saw that "truth" is not always victorious even where given a free field,²⁹ and that "wrong" opinion must be suppressed when the press is properly controlled. Hence, although Milton's *Areopagitica* stands as a literary classic, a monument to intellectual freedom, and an invaluable contribution to political thinking on the subject of liberty, it left much to be desired as a statement on the principles of freedom of the press. "Milton wanted freedom of discussion for serious-minded men who held honest, although differing, opinions. He was not willing to extend this same freedom to men of lesser standing with less serious purposes."³⁰ Hence, it is not surprising to see him later becoming a censor and, while continuing to advocate a system of unlicensed printing, endorsing the sanctions of the criminal law for any abuse or licentiousness by the press. "Those [unlicensed words], if they be found mischievous and libellous, the fire and executioner will be the timeliest and the most effectually remedy, that mans [*sic*] prevention can use."³¹

Many of Milton's contemporaries, thought of today as liberals, shared his views. Roger Williams, although an eloquent pleader for toleration, carefully added, "I speak not of scandals against the civil state, which the civil magistrate ought to punish."³² John Locke argued that "no opinions contrary to human society, or to those moral rules which are necessary to the preservation of civil society, are to be tolerated by the magistrate."³³ He proposed the punishment of persons who "will not own and teach the duty of tolerating all men in matters of mere religion."³⁴ Sedition was to be punished, and the intolerant

29. F. SIEBERT, *supra* note 21, at 191.

30. *Id.* at 197. See W. CLYDE, *THE STRUGGLE FOR THE FREEDOM OF THE PRESS* 172-73, 261 (1934).

31. J. MILTON, *supra* note 26, at 353.

32. Williams, *The Bloody Tenant* (1644), reprinted in 3 *THE WRITINGS OF ROGER WILLIAMS* 136 (S. Caldwell ed. 1866).

33. Locke, *A Letter Concerning Toleration* (1689), reprinted in 35 *GREAT BOOKS OF THE WESTERN WORLD* 1, 17 (R. Hutchins ed. 1952).

34. *Id.* at 18. Locke's philosophy of when toleration should be extended to the intolerant took concrete form particularly in the McCarthy era. Proponents of such toleration argued that democratic rights should not be denied to groups repudiating democratic principles. See Z. CHAFFEE, *FREE SPEECH IN THE UNITED STATES* 431-35 (1941); W. DOUGLAS, *THE RIGHT OF THE PEOPLE* 91-94 (1958); A. MEIKLEJOHN, *POLITICAL FREEDOM* 42-43, 57, 76-77 (1960); Riesman, *Civil Liberties in a Period of Transition*, 3 *PUB. POLICY* 52-58 (1942). See also *American Communications Ass'n v. Douds*, 339 U.S. 382, 429, 439 (1950) (Jackson, J., concurring in part and dissenting in part). The minority view is clearly stated in Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 *U. CHI. L. REV.* 173 (1956). See generally W. BERNS, *FREEDOM, VIRTUE AND THE FIRST AMENDMENT* (1957); G. Catlin, *On Free-*

opinions of athiests and the exclusivist political implications of Catholic doctrine were among the most seditious expression.

For Locke, however, the proper form of punishment was not prior government censorship.³⁵ By then the prior restraint system was cumbersome and unpopular. When the English licensing laws expired in 1695, they were not extended.³⁶ Thereafter, freedom of the press from licensing came to be recognized in England as a common law or natural right. That law was summarized by Blackstone, in a now famous passage:

The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraint upon publication, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity.³⁷

Thus the governmental method for controlling the press evolved from the prior censorship of Milton's day to the subsequent punishment of Blackstone's.

Eighteenth century liberals, less secular and more political, viewed freedom of the press in far more modern terms. As Clinton Rossiter argued, "*Cato's Letters* rather than Locke's *Civil Government* was the most popular, quotable, esteemed source of political ideas in the colonial period."³⁸ And clearly the most famous of the *Letters* were those on freedom of speech and his *Reflections upon Libelling*,³⁹ one of three essays on libel law and freedom of the press. It was Cato from whom the founding fathers derived certain of their first amendment ideas, and it was Cato who redefined the proper relationship

dom, reprinted in ASPECTS OF LIBERTY 49 (M. Kovitz & C. Rossiter eds. 1958); B. LIPPINCOTT, DEMOCRACY'S DILEMMA: THE TOTALITARIAN PARTY IN A FREE SOCIETY (1965); K. POPPER, THE OPEN SOCIETY AND ITS ENEMIES (1950).

35. Locke objected to the system because it injured the printing trade, was administratively cumbersome, and was unnecessary because the common law gave adequate protection against licentiousness. In 1694, he drafted for the House of Commons a statement of eighteen reasons for terminating government censorship. See P. KING, THE LIFE AND LETTERS OF JOHN LOCKE 202-09 (1858).

36. See F. SIEBERT, *supra* note 21, at 260-3.

37. 4 W. BLACKSTONE, COMMENTARIES *151-52 (emphasis in original).

38. C. ROSSITER, SEEDTIME OF THE REPUBLIC 141 (1953). "Cato" was the joint pseudonym of the Whig political journalists, John Trenchard and Thomas Gordon, whose essays were first published in the London press in 1720. The essays were later collected in four volumes and sold widely in the years following 1733. For a modern collection see D. JACOBSON, THE ENGLISH LIBERTARIAN HERITAGE (1965).

39. D. JACOBSON, *supra* note 38, at 73-80 (letter of June 10, 1721).

between government and the press, thereby affording a basis for the evolution of a free press in America.

In Cato's view, freedom from illegitimate authority is vital, and freedom of expression was a primary value. These freedoms should be broad and should be limited only when their use might directly hurt or control the right of another. But central to our purposes was his description of the proper relationship between the government and free press. Here he argued that free government and free expression would prosper or die together.⁴⁰ Because government officials are agents of the people's interests, they should be subject to popular criticism and should, in fact, welcome having their activities openly examined. "Only the wicked Governors of Men dread what is said of them,"⁴¹ Cato argued, and it is only they who fear a free press. The proper method for limiting the press was to pressure that entity to correct its errors, not to punish for them when they occurred. In Cato's view, libels rarely provoked causeless discontent against the government. In a statement reminiscent of Justice Brennan's opinion in *New York Times Co. v. Sullivan*,⁴² Cato argued that libels were the inevitable result of a free press, "an Evil arising out of a much greater Good,"⁴³ bringing advantages to society that far outweigh potential harm. Cato was aware, however, of his own need for protection at a time in England when his views were decidedly premature. Thus, he was quick to point out that libels against the government should be punishable,⁴⁴ while truth about public men and public measures should be admitted as a defense against a criminal libel charge.⁴⁵

Cato's Letters, as Leonard Levy argued, "was the high water mark of libertarian theory until the close of the eighteenth century. . . . In fact, American libertarian theory, neither original nor independent, was at its best little more than an imitation of Cato."⁴⁶ Just as Cato's ideas were not em-

40. *Id.* at 38.

41. *Id.* at 39.

42. 376 U.S. 254 (1964). In *New York Times Co. v. Sullivan*, Justice Brennan stated: "[T]here is a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wideopen, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270.

43. D. JACOBSON, *supra* note 38, at 78.

44. *Id.* at 238, 239.

45. *Id.* at 74.

46. L. LEVY, *FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON* xxvi (1966).

braced in practice in the England of those years,⁴⁷ neither were they embraced in practice on this side of the ocean before the days of the infamous Alien and Sedition Laws.⁴⁸ Certain portions of his argument, such as the positive correlation between free expression and good government, however, were accepted. In fact, as the American revolutionary crisis intensified and repression grew, the need to expose and protest against that repression intensified as well. Evidence clearly shows that the press became a powerful force in rallying colonial opposition against British oppression.⁴⁹

An example of the important impacts of Cato's influence on later American history occurred during the Revolution itself. Well before the Declaration of Independence, the members of the Continental Congress addressed a statement to the inhabitants of Quebec in an attempt to persuade them to support American independence. Americans boasted of freedom of the press as one of the essential blessings of liberty, which, "in its diffusion of liberal sentiments," created conditions "whereby oppressive officers are shamed or intimidated, into more honorable and just modes of conducting affairs."⁵⁰ While such a statement clearly was motivated by American self-interest, its emphasis upon liberty's place above authority, and the importance of the people holding their governors accountable for the protection of that liberty, represented an important new assurance that the people's political power was and should be growing.

The first formal inclusion of freedom of the press in an

47. At common law truth was not a defense to a criminal libel charge. In civil actions, however, truth was a defense for either libel or slander. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* §§ 113-16, at 769-99 (4th ed. 1971).

48. Benjamin Franklin voiced the view of a number of Americans at the time regarding "excess" freedom of the press, stating: "[F]ew of us, I believe, have distinct ideas of its Nature and Extent. . . . [I]f it means the Liberty of affronting, calumniating, and defaming one another, I, for my part, own myself willing to part with my Share of it when our Legislators shall please so to alter the Law, and shall cheerfully consent to exchange my *Liberty* of Abusing others for the *Privilege* of not being abused myself." Franklin, *An Account of the Supreme Court of Judicature in Pennsylvania, viz. The Court of the Press*, *Federal Gazette*, Sept. 12, 1789, reprinted in 10 *WRITINGS OF BENJAMIN FRANKLIN* 37-38 (A. Smythe, ed. 1907) (emphasis in original).

49. See P. DAVISON, *PROPAGANDA AND THE AMERICAN REVOLUTION* 225-45 (1941); A. SCHLESINGER, *PRELUDE TO INDEPENDENCE* 45-47, 280, 284-87 (1958); essays collected in *THE PRESS AND THE AMERICAN REVOLUTION* (B. Bailyn & J. Hench eds. 1980).

50. Letter to the Inhabitants of the Province of Quebec, Oct. 1774, reprinted in 1 *JOURNALS OF THE CONTINENTAL CONGRESS* 108 (W. Ford ed. 1904). Leonard Levy, however, pointed out: "Illiberal—that is, loyalist—sentiments were simply suppressed during the Revolution." L. LEVY, *supra* note 46, at xlvi.

American document came in section 12 of the Virginia Bill of Rights of 1776, wherein the drafters acclaimed freedom of the press as "one of the great bulwarks of liberty, [which] can never be restrained but by despotic governments."⁵¹ Four years later, in a draft of the Massachusetts Declaration of Rights, John Adams also emphasized: "The liberty of the press is essential to the security of freedom in a state[;] it ought not, therefore, to be restrained in this commonwealth [*sic*]."⁵² Similar language appeared in a number of other state bills of rights.⁵³ In light of this attention to freedom of the press, the failure to define the proper relationship between government and the press in either the Articles of Confederation or the Constitution seems contradictory. In neither of these documents nor, for that matter, in any of the various state constitutions, did early Americans attempt to move beyond Blackstone to spell out more precisely the law and theory of freedom of expression.

Some early Americans took pertinent actions, however, which reflected a concern for developing a practical system to deal concretely with free expression.⁵⁴ When the State of Pennsylvania successfully prosecuted Eleazer Oswald, a Philadelphia printer, for libel, despite his plea that the action was simply an attempt by his enemies to attack him under the pretext of justice and to assault the rights of the press,⁵⁵ he did generate some minority support for his position. In fact, some of his supporters in the legislature pushed his attempt to impeach justices of the state supreme court who convicted him.⁵⁶ Although the legislators were unsuccessful, their actions produced considerable public debate regarding the permissible limits of a free press and the precise meaning of the free press

51. 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3814 (F. Thorpe ed. 1909). The Virginia Bill of Rights, the model for other states and the Federal Bill of Rights, did condemn general warrants previously issued for the seizure of seditious publications; thus, it "greatly strengthened the freedom of the press." SOURCES OF OUR LIBERTIES 306 (R. Perry & J. Cooper eds. 1952) (hereinafter cited as PERRY & COOPER).

52. PERRY & COOPER, *supra* note 51, at 376.

53. *Id.* at 330, 340, 350, 356, 385. See also W. ADAMS, THE FIRST AMERICAN CONSTITUTIONS 156-58 (1980).

54. Advanced libertarians sought to move toward the acceptance of the rule from the 1735 *Zenger* case, whereby truth was a defense in a criminal prosecution for libel, with criminality to be determined by a jury of one's peers, rather than a judge. But American acquiescence in the common law definition of a free press was so widespread that the *Zenger* principles had remote chance for acceptance. L. LEVY, *supra* note 46, at li.

55. *Republica v. Oswald*, 1 U.S. (1 Dall.) 319, 319-20 (Pa. 1788).

56. *Id.* at 329 n.b.

clause in Pennsylvania's Bill of Rights. The *Oswald* ruling made other state courts sensitive to violations of civil rights and led to a number of positive rulings underwriting them.⁵⁷ On the other hand, when Thomas Jefferson proposed a new constitution for Virginia in 1783, he wanted the press exempted from prior restraints, but liable to punishment for false publications.⁵⁸ Other state legislatures passed libel and sedition laws which, while acknowledging the principle of no prior restraint, clearly indicated the nature of expression that legitimately could result in subsequent punishment.

When the Constitutional Convention met in May of 1787, the free press issue obviously was low on the agenda. It was not until August 20, near the end of that famous meeting, that Charles Pinckney submitted a proposal for a bill of rights. The press provision was among its thirteen propositions and simply stated: "The liberty of the Press shall be inviolably preserved."⁵⁹ Even this language had little appeal to the other founding fathers, many of whom did not want a bill of rights, because "[t]hey believed that provisions to safeguard individual liberties were originally created to protect the subject from rulers claiming absolute powers and that such provisions had no place in a constitution founded on the will of the people themselves."⁶⁰ Other similar attempts to obtain at least certain basic principles of liberty, such as liberty of the press and trial by jury failed to win in a vote.⁶¹

57. See *Bayard v. Singleton*, 1 N.C. (Mart.) 42 (1787); *McMullen v. City Council of Charleston*, 1 S.C.L. (1 Bay) 46 (1787); *Porter v. Dunn*, 1 S.C.L. (1 Bay) 53 (1787); *Frisbie v. Butler*, 1 Kirby 213-15 (Conn. 1787); *Gilbert v. Marcy*, 1 Kirby 401-02 (Conn. 1787).

58. 6 THE PAPERS OF THOMAS JEFFERSON 304 (J. Boyd ed. 1950).

59. 2 RECORDS OF THE FEDERAL CONVENTION 340-42 (M. Farrand ed. 1937) (hereinafter cited as RECORDS).

60. PERRY & COOPER, *supra* note 51, at 404.

61. *Id.* at 405. George Mason, who opposed ratification, prepared a detailed criticism of the final document. His primary objection was that "no declaration of any kind, preserving the liberty of the press" was included. RECORDS, *supra* note 59, at 640. Richard Henry Lee developed a set of proposals which he sought to add to the document before Congress transmitted it to the state conventions. These included freedom of religion, freedom of the press, and the right to trial by jury in both criminal and civil cases. 3 THE LETTERS OF RICHARD HENRY LEE 424 (J. Ballagh ed. 1911); 8 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 648-49 (E. Burnett ed. 1930). A German analyst of American constitutions, Willi Paul Adams, observes in his recent book that "[t]he use of a bill of rights to curtail the power of the sovereign majority was a new step in the development of Western constitutionalism." W. ADAMS, *supra* note 53, at 145. Noting that bills of rights always imposed limits on rulers, Adams points out that "with independence the enemy disappeared, and the question arose whether there still was any need for this kind of safeguard against arbitrary power." *Id.*

When the Constitution was submitted to the states for ratification, citizens voiced protests of varying degrees about the absence of a bill of rights. The Constitution's advocates thus were prompted to respond. Alexander Hamilton in the *Federalist* papers expressed a practical view. He argued that there was no way to secure a concept such as freedom of the press by words. "[W]hatever fine declarations may be inserted in any constitution respecting it," he insisted, the protection of free speech and a free press, like all our rights, "must altogether depend on public opinion, and on the general spirit of the people and of the government."⁶² James Madison followed a similar path. He agreed that those rights which were solely dependent upon majority public opinion could be snuffed out whenever that opinion changed.⁶³ He went on to argue,

In Virginia, I have seen the bill of rights violated in every instance where it has been opposed to a popular current. . . . Wherever the real power in a Government lies, there is the danger of oppression. In our Governments, the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended not from acts of Government, contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents.⁶⁴

This was not, however, cause for inaction. In fact, Madison believed that when it came to the rights and liberties of individual dissenters, a democratic majority could be as repressive as a king. Thus, the majority must have its power over certain rights clearly limited.⁶⁵ This view was widely shared, and the Virginia representatives insisted when they ratified the Constitution that the "liberty of conscience and of the press cannot be cancelled, abridged, restrained, or modified, by any authority of the United States."⁶⁶ The implication of the statement was clear—the Constitution should forbid not only Congress, but the executive and the judiciary as well, from limiting any of the guarantees of the later first amendment.

Madison wanted even more. Possibly anticipating a situation such as *Near* and clearly responding to the repressive behavior of some states during the Confederation period, he advocated an amendment, which he considered the most valua-

62. THE FEDERALIST No. 84, at 580 (A. Hamilton) (J. Cooke ed. 1961).

63. Letter from James Madison to Thomas Jefferson (October 17, 1788), reprinted in THE COMPLETE MADISON 254 (S. Padover ed. 1953).

64. *Id.*

65. *Id.* at 254-55.

66. THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 653 (2d ed. J. Elliot 1941) (hereinafter cited as DEBATES). See also R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 162-74 (1955).

ble in the whole list, stating that "no State shall violate the equal right of conscience, [or of the] freedom of the press . . . because it is proper that every Government should be disarmed of powers which trench upon those particular rights."⁶⁷ "I cannot see any reason," he stated, "against obtaining even a double security on those points [I]t must be admitted, on all hands, that the State Governments are as liable to attack these invaluable privileges as the General Government is, and therefore ought to be as cautiously guarded against."⁶⁸ Neither of these proposals was adopted, leaving freedom of the press susceptible to state encroachment and to limitation by the courts and the executive branch.⁶⁹ Nonetheless, when the first amendment was finally added to the Constitution, it initially appeared strong enough to support Madison's general view that in this new American democracy, the power of censorship should be exercised by the people over the Government, and not by the Government over the people.

The question remained regarding the first amendment's legal and theoretical meaning. There seemed little question what it meant to certain leaders. Madison generally agreed with Jefferson's view regarding exemption from prior restraints,⁷⁰ but Madison advocated liability for false publication. He also favored exemption of the press from liability for "true facts." Despite such qualifications, however, he proposed an amendment which declared only that "Congress shall make no law abridging freedom of speech or of the press."⁷¹ What this meant was

67. 1 ANNALS OF CONG. 440-41 (Gales & Seaton eds. 1789).

68. *Id.* at 441.

69. Possibly this omission stemmed from Madison's growing belief that the courts should not be restrained for fear their strong obligation to protect the Bill of Rights might somehow be regrettably qualified. As he stated on June 8, 1789 when advocating a Bill of Rights in the first Congress,

If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.

Id. at 439.

70. See note 58 *supra* and accompanying text.

71. 2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1160 (1971). The conference committee, of which Madison was a member, wrote the language after the Senate eliminated Madison's proposal prohibiting the states from infringing on freedom of conscience, speech, and press. *Id.* at 1145-46, 1159. Freedom of speech and press were guaranteed separately in two explicit clauses. This raised questions about their similarity or differences and produced a controversy that erupted into a modern debate both on and off the bench. In a 1974 speech to the Yale Law School, Justice Potter Stewart con-

clear. What it did not mean was not. Evidence from all sides indicates agreement that this phraseology clarified Congress's powerlessness to authorize restraints in advance of publication, whether by means of a licensing act, a tax act, a sedition act, or any other form of legislative restriction. On the other hand, nothing in the amendment's wording denied that the federal courts could exercise jurisdiction over common law crimes against the United States. During the next half-dozen years, the federal courts tried a variety of these crimes, including indictments of editors for seditious libel.⁷² Further, the elimination from the final draft of the provision restricting the states from violating freedom of the press implied that the amendment clearly reserved legislative authority in the field of speech and press to the states. This situation continued unchanged until the enactment of the infamous Sedition Act of 1798⁷³ by the highly partisan Federalist leadership in Congress.

III. GOVERNMENT AND THE FIRST AMENDMENT IN OPERATION

Although "[t]here was little discussion of freedom of

tended that the free press guarantee of the Constitution deliberately extended special protection to the publishing business, "the only organized private business that is given explicit constitutional protection." Address by Justice Stewart, Yale Law School Sesquicentennial Convocation (Nov. 2, 1974), *reprinted in* Stewart, *Or of the Press*, 26 HASTINGS L. J. 631, 633 (1975). The press, he argued, was specially designated in the Constitution to be autonomous of the government, so that it might provide "organized, expert scrutiny of government." *Id.* at 634. As such, it required special protections to preserve its independence. *Id.* Chief Justice Burger, whose affection for the press is minimal, subsequently used a Massachusetts case, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), to denounce the Stewart view, arguing that no special protection exists for the press and that there was no historical basis for such a conclusion. *Id.* at 798 (Burger, C.J., concurring). Beyond that, he contended that the very process of defining who might be entitled to any special protections is perilous and "is reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country." *Id.* at 801. On this controversy see Lange, *The Speech and Press Clauses*, 23 U.C.L.A. L. REV. 77 (1975); Nimmer, *Is Freedom of the Press a Redundance: What Does It Add to Freedom of Speech?*, 26 HASTINGS L. J. 639 (1975); Abrams, *Two Theories of Press Freedom are Parallel, Yet Bound to Meet*, N.Y. Times, May 7, 1978, at 11, col. 1.

72. In a letter to John Adams in February, 1789, Chief Justice John Cushing of Massachusetts expressed clearly the limited liberalism present after the adoption of the Constitution, pointing out that while prior restraint was unacceptable, subsequent punishment was certainly in line, since falsehood and scandals against the government should be punished "with becoming rigour." Grinnell, *Hitherto Unpublished Correspondence Between Chief Justice Cushing and John Adams in 1789*, MASS. L. Q., Oct. 1942, at 12-16.

73. Act of July 14, 1798, ch. 73, 1 Stat. 596.

speech and of the press when Congress was considering amendments to the Constitution,"⁷⁴ Congressional passage and federal enforcement of the Alien and Sedition Acts of 1798 sparked a crisis that elicited a massive public debate on the subject. In this debate, the Federalists defended these repressive laws on the grounds that they constituted an important and constructive reform; they went well beyond the English common law to embrace the principle of truth as a defense in a libel action as well as endorsing the use, as in the 1735 *Zenger* case, of this plea to the juries.⁷⁵ Anti-Federalist opponents relied on the earlier position of Cato as they developed an elaborate body of new libertarian principles denouncing the new governmental restriction on speech and freedom of the press. Jefferson's and Madison's famed Kentucky and Virginia Resolutions denounced Federalist strictures and the logic supporting them, setting forth a theory of states' rights which became the cornerstone for those who opposed restrictive or punitive federal policies. When he spelled out the position ultimately approved by the Virginia legislature in January, 1800, Madison summarized aspects of this new libertarian position well, arguing at one point:

In the United States, the great and essential rights of the people are secured against legislative, as well as against executive ambition. They are secured not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires, that it should be exempt, not only from previous restraint by the executive, as in Great Britain, but from legislative restraint also; and this exemption, to be effectual, must be an exemption not only from the previous inspection of licenser, but from the subsequent penalty of laws. The state of the press, therefore, under the common law, cannot, in this point of view, be the standard of its freedom in the United States.⁷⁶

These public positions, plus the vigorous writing of leading contemporary legal scholars such as George Hay, John Thomson, and Tunis Wortman,⁷⁷ the strong statements on the floor of

74. PERRY & COOPER, *supra* note 51, at 425.

75. 5 ANNALS OF CONG. 2985-93 (1799).

76. THE VIRGINIA REPORT OF 1799-1800, at 220 (1850). "It would be mockery," he pointed out elsewhere in the *Report*, "to say that no laws shall be passed preventing publications from being made, but that laws might be passed for punishing them in case they should be made." *Id.*

77. Wortman went so far as to contend that there was no such thing as a law of seditious libel. That crime, he concluded, could "never be reconciled to the genius and constitution of a Representative Commonwealth." T. WORTMAN, A TREATISE CONCERNING POLITICAL ENQUIRY 262 (1800). One "distributor" of such views was St. George Tucker, a Virginia judge and law professor, whose American version of Blackstone was standard legal fare in the period and the textbook of several generations of law students. Tucker flatly rejected Black-

Congress by men like Albert Gallatin, John Nicholas, Nathaniel Macon, and Edward Livingston, and the legal arguments of defense counsel such as George Blake in Sedition Act prosecutions, moved the free press argument toward a rejection of the strait-jacket doctrines of Blackstone, the common law, and the Federalist concept of a federal common law of crimes.⁷⁸ The free press proponents scorned the no-prior-restraint definition as inadequate protection for a truly free press and insisted that the press be free from subsequent restraints as much as from prior restraints.

This activity moved the country toward a new theory and law of freedom of the press. The press was now far more secure than it had been under the ambiguous protection in the first amendment. The new, more expansive interpretation of the first amendment led to a constitutional presumption that the press is free not only from prior restraint but from certain aspects of subsequent punishment. This became the rule for the federal and state courts, freeing the press from frivolous restrictions imposed by momentary majorities.⁷⁹ Ironically, Alexander Hamilton placed a cap upon this early liberalizing process. As an attorney in *People v. Croswell*,⁸⁰ which involved an alleged seditious libel of President Jefferson, he defended his journalist client on the grounds that freedom of the press "consists in the right to publish, with impugnty, truth, with good motives, for justifiable ends, though reflecting on government, magistracy, or individuals."⁸¹ Subsequently truth, if published with good motives and for justifiable ends, gradually became a defense in American law and a test which the Minnesota gag law had to pass if it was not to be ruled an unjustifiable restriction on free press.⁸²

stone's concept of no prior restraint, suggesting in virtually an "absolutist fashion" that the press should be equally free from subsequent punishment. See L. LEVY, *supra* note 46, at 717-26.

78. This concept of a federal common law of crimes against the United States produced considerable litigation in the 1790s. These cases, heard in federal courts, even included common law indictments for the crime of seditious libel. See J. SMITH, *FREEDOM'S FETTERS* 95, 183-84, 188-200 (1956). The issue was eventually settled by the Supreme Court in *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812).

79. First amendment absolutism, while suggested, was not adopted in this period. It was enunciated strongly, however, by George Hay, who contended that a free government cannot be criminally attacked by the opinion of its citizens. For Hay, freedom of the press, like chastity, was either "absolute" or did not exist. G. HAY, *AN ESSAY ON THE LIBERTY OF THE PRESS* 23-24 (1799).

80. *People v. Croswell*, 3 Johns. Cas. 337 (N.Y. 1804).

81. *Id.* at 337.

82. While Hamilton lost his case, the New York legislature quickly re-

In the years after the *Croswell* case until the adoption of the fourteenth amendment in 1868, the press in practice, while almost totally exempt from federal restraint, was subject to certain forms of state restriction. During that period, state restraint of the press produced little punishment for written statements other than criminal libel,⁸³ and state prosecution for defamation of any citizen existed alongside the civil suit by the damaged party. But evidence indicates there was broad freedom to accuse, charge, question motives, and comment openly. Only an occasional civil or criminal libel action was filed to undermine such practice. States imposed little restraint on criticism of public officials.

One case, however, does stand out as an exception. James H. Peck, a federal judge in Missouri, attempted to use the contempt power to strike at an attorney's criticism of one of his opinions.⁸⁴ The attorney, Luke Lawless, wrote a newspaper article pointing out errors in the judge's decision. After the judge cited Lawless for contempt of court, found him guilty, and suspended him from practice for eighteen months, the attorney persistently petitioned Congress to impeach the judge. After four years, his efforts succeeded when the House of Representatives voted to present articles of impeachment to the Senate. The long and exhaustive impeachment proceedings focused on the central issue of whether courts could punish only contempt committed in the presence of the judge that immediately disrupted proceedings, or whether they could also punish "constructive contempt" committed outside the courtroom. In the final analysis, the Senate exonerated the judge, but made it clear that it wanted no more convictions for "constructive contempt."⁸⁵ Shortly thereafter Congress passed a statute limiting punishment to disturbances that "[p]alpably disrupt the ad-

sponded in 1805 with an Act Concerning Libels, ch. 90, 4 N.Y. Laws 232, making "truth—at least when published with good motives and for justifiable ends . . . a defense for the accused . . . and giving the jury the right to find the law in criminal prosecutions for libel." H. NELSON, *FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT* 40-41 (1967). Other states were slow to follow. Massachusetts failed to adopt a statute providing for truth as a defense in a libel action until 1855. Act of May 19, 1855, ch. 396, 1855 Mass. Acts 782-83.

83. Both the federal government and the states attempted to keep "incendiary" material out of the mails. During the Civil War, Postmaster General Montgomery Blair assumed the authority to remove from the mails, or forbid delivery of, anti-union writing and of material he considered obscene. H. NELSON, *supra* note 82, at xxii, xxv.

84. See A. STANSBURY, *REPORT OF THE TRIAL OF JAMES H. PECK* 3 (1833).

85. Nelles & King, *Contempt by Publication in the United States*, 28 COLUM. L. REV. 401, 423-30 (1928).

ministration of justice."⁸⁶ The case reflected the values of the period, with freedom most often the rule and restraint the exception.⁸⁷

The Civil War period was an exception to this aura of freedom. War news was managed by the federal government, and states took certain actions along similar lines, generally in the name of national security. Thus, the issue of federal policy regarding freedom and the state's relationship thereto did not attract public interest until the Reconstruction period. At that time, the move for the fourteenth amendment was preeminent. And old and modern authorities strongly disagree about the implications of that most central section of the modern Constitution.

IV. THE BILL OF RIGHTS AND THE FOURTEENTH AMENDMENT

The *Near* case is part of the important historical development of the fourteenth amendment as an integral part of the Constitution after 1868. Once again, the historical background is essential to a full understanding of both the importance of the amendment itself, in the general area of the relationship of government to free expression, and in understanding how *Near* interrupted a long body of interpretation to change the course of constitutional law.

The fourteenth amendment brought about a new constitutional relationship between the government and its citizens. Federal citizenship was constitutionally defined for the first time, as the amendment set forth the rights that citizenship guaranteed: federal protection against state abrogation of the privileges and immunities of federal citizens, the right to equal protection of the laws, and the right to due process of law. Precisely what those legal phrases meant, however, and what explicit actions of the states should be restrained by federal authority was unclear. In fact, the question of the intent of the framers of the fourteenth amendment, particularly as it applied to the Bill of Rights, has remained an ongoing controversy from that day to the present.⁸⁸ Justice Hugo Black turned the ques-

86. Act of Mar. 2, 1831, ch. 98, 4 Stat. 487.

87. This policy was altered only by the slavery issue and the increasingly nervous desire on the part of southern leaders to restrain inflammatory literature which would stir up slave revolts or arouse sufficient interest in the slavery question to produce public disturbances.

88. Since *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), the Supreme Court's rule was that the Bill of Rights applied only to the federal

tion into a public policy issue in the late 1940s, insisting that the modern Bill of Rights should be totally incorporated into the fourteenth amendment because that was the initial intent of the amendment's framers.⁸⁹ Although scholars challenged Black in subsequent years,⁹⁰ the confrontation ultimately produced far more heat than historical illumination, raising both erroneous and, in the final analysis, unanswerable questions. One answerable query is how the courts interpreted the fourteenth amendment's relation to the press in the years from 1868 to 1931, and what impact those interpretations had upon the dispersal of public information in that period.

The meaning of the term "liberty" in section 1 of the amendment is central to a description of the way the fourteenth amendment readjusted the relationship of the federal government to the states, and the relationship of both levels of government to freedom of the press.⁹¹ Did that term obligate the federal government to step in when the states threatened the exercise of personal freedoms such as speech, press, and

government and did not limit the states. The legislators who had primary responsibility for the fourteenth amendment, John Bingham in the House of Representatives and Jacob Howard in the Senate, both intended an expansive meaning for section 1 of the fourteenth amendment, making clear in their Congressional floor statements that the amendment's purpose was to overrule *Barron*. Thaddeus Stevens expressed a similar view in the House on May 8, 1866, stating that "[t]he Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all." CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (emphasis in original). Raoul Berger in *Government By Judiciary* (1977) challenges this point of view, but Berger's contentions are thoroughly invalidated by the far more exhaustive and impressive research of Robert Kaczorowski. See R. Kaczorowski, *The Nationalization of Civil Rights: Constitutional Theory and Practice in a Racist Society, 1866-1883* (1971) (unpublished Ph.D. dissertation in University of Minnesota Library). See also Kaczorowski, *Searching for the Intent of the Framers of the Fourteenth Amendment*, 5 CONN. L. REV. 396 (1973).

89. *Adamson v. California*, 332 U.S. 46, 71 (1948).

90. See Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 139 (1949); Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 STAN. L. REV. 140, 171-73 (1949); Mendelson, *Mr. Justice Black's Fourteenth Amendment*, 53 MINN. L. REV. 711, 714-16, 721-22 (1969).

91. Section 1 reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.

assembly? If this were the case, which of the three federal branches had that obligation, and what other forms of state activity were clearly eligible for proscription? The answers required a comprehension of federalism as it existed at the time of the ratification of the fourteenth amendment and its development in later years.

From the late 1820s, courts generally conceded that the states could employ their inherent "police power" for the preservation and proper functioning of local institutions.⁹² Such authority included the ability to enact a wide variety of regulations designed to promote public convenience, general welfare, prosperity, and an orderly state of society.⁹³ Further, the police power extended to all public needs including, but not limited to, the health, morals, or safety of the community. The legislature had the authority to determine not only what the public interest required, but also the measures necessary to protect that public interest. Further, courts did not see the police power as a threat to individual liberty even when certain state-imposed restrictions seemed potentially coercive.

Certainly, a minority of Americans in 1866 and 1867 viewed the new fourteenth amendment as an instrument for undermining the type of social control they believed was essential to local stability and maintenance of peace. In fact, the majority of northerners viewed the fourteenth amendment as an instrument for protecting the freed Black from the excesses of southern legislatures who were determined to reinstitute a state of subservience through legislation like the Black Codes of late 1865 and 1866.⁹⁴ The full import of the fourteenth amendment, however, had yet to be hammered out through case law.

The first attempt to bring the right of free expression under the protection of the fourteenth amendment was made in 1871, only three years after the amendment's ratification. In *United*

92. Even the Republican Party, the political heir to the nationalist sentiments of the Federalists and the Whigs, acknowledged on the eve of the Civil War the obligation to "preserve the rights of the states . . . inviolate, . . . and especially the right of each state to order and control its own domestic institutions . . .[,] 'rights' essential to that balance of power on which the perfection and endurance of our political fabric depends." The phrasing comes from resolutions two and four of the Republican Party Platform of 1860. K. PORTER & D. JOHNSON, NATIONAL PARTY PLATFORMS 32 (1956). See also W. BENNETT, AMERICAN THEORIES OF FEDERALISM 168-69 (1964).

93. See *State ex rel. Olson v. Guilford*, 174 Minn. 457, 460, 219 N.W. 770, 771 (1928).

94. The temporary southern legislatures of the first year of Andrew Johnson's presidency were responsible for the Black Codes.

States v. Hall,⁹⁵ two Alabama Ku Klux Klansmen were indicted for violating section 6 of the Congressional Enforcement Act of 1870.⁹⁶ The law made it a federal crime to conspire with the intent to oppress and to intimidate United States citizens, and to prevent and to hinder their free exercise and enjoyment of the right of free speech and assembly, both being "right[s] and privilege[s] granted and secured to them by the Constitution of the United States."⁹⁷ A demurrer to this indictment was overruled by Circuit Court Judge Woods, who found that the original Constitution and the Bill of Rights did not grant courts the power to protect people from state infringement of their first amendment rights. He asserted, however, that since the adoption of the fourteenth amendment, these privileges, which were denominated fundamental, belonged "of right to the citizens of all free states."⁹⁸ They were, he contended, privileges and immunities of citizens of the United States secured by the Constitution, which Congress has the power to protect by appropriate legislation.

The ruling appears to sustain, on its face, that "liberty" in section 1 of the fourteenth amendment could and did incorporate first amendment rights. Supreme Court decisions soon, however, overshadowed *Hall*. In 1875, the Justices ruled in *United States v. Cruikshank*⁹⁹ that the fourteenth amendment added nothing to the fundamental rights of citizens under the Constitution. When the plaintiff argued that Louisiana infringed his rights of federal citizenship, the Court responded that the rights he demanded were not rights enjoyed by reason of federal citizenship, nor were they secured by any section of the Federal Constitution. Eight years later in the famous *Civil Rights Cases*,¹⁰⁰ the Supreme Court struck down as unconstitutional the Civil Rights Act of 1875,¹⁰¹ a law passed to enforce the fourteenth amendment. Ignoring Judge Woods's opinion in *Hall* that Congress had the authority to protect certain basic rights, the Court ruled that the Act was unconstitutional, reasoning that the fourteenth amendment did not invest Congress with the power to legislate upon subjects within the domain of state jurisdiction.¹⁰² Woods, by this time a member of the

95. 26 F. Cas. 79 (C.C.S.D. Ala. 1871).

96. Act of May 31, 1870, ch. 114, 16 Stat. 140.

97. *United States v. Hall*, 26 F. Cas. 79, 79 (C.C.S.D. Ala. 1871).

98. *Id.* at 81.

99. 92 U.S. 542, 554 (1876).

100. 109 U.S. 3 (1883).

101. Act of March 1, 1875, ch. 114, 18 Stat. 335.

102. 109 U.S. 3, 25 (1883).

United States Supreme Court, concurred in the ruling. Only Justice John Marshall Harlan dissented, arguing vehemently that the purpose of the 1875 Civil Rights Act was to protect not only the political, but also the social rights of United States citizens from state infringements. The term "liberty" in section 1 of the fourteenth amendment, Harlan contended, clearly covered those political and social rights.¹⁰³

For the next thirty years, litigants attempted to overturn certain state measures by bringing various fundamental, civil, and personal rights under the protection of the fourteenth amendment.¹⁰⁴ The due process and equal protection clauses were the ultimate vehicles in these attempts, because the Court, beginning in 1873, repeatedly ruled against any attempt to nationalize these rights under the privileges and immunities clause.¹⁰⁵ By and large such efforts failed, since they flew in the face of the climate of the period and its general value structure.

In many ways, the search for the traditional meaning of liberty and first amendment guarantees was lost in the dynamism of social and institutional change occurring during the last quarter of the nineteenth century. This change affected both American values and public law and influenced in important ways the relationship of the state to the citizen. At the time when a small group of liberal attorneys and public statesmen sought some answer to the relationship of first amendment rights to the new fourteenth amendment, the vast majority of American statesmen and the conservative members of the bar sought to convert that amendment into a new bastion of protection for an emerging entrepreneurial class. This class was already in the process of converting the nation from an agrarian, decentralized, and informal society, into an industrial, urban, and centralized modern state.¹⁰⁶ The conservatives won. Per-

103. *Id.* at 46-49 (Harlan, J., dissenting).

104. See Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 436 (1926). Warren points out that in at least 20 cases between 1877 and 1907 the Supreme Court had been urged to define "liberty" in personal rights terms.

105. See, e.g., *The Slaughterhouse Cases*, 8 U.S. (16 Wall.) 36 (1873).

106. Abraham Lincoln probably anticipated this shift, commenting at one point:

The world has never had a good definition of the word liberty, and the American people, just now, are much in want of one. We all declare for liberty; but in using the same word we do not all mean the same thing. With some the word liberty may mean for each man to do as he pleases with himself, and the product of his labor; while with others the same word may mean for some men to do as they please with other men, and

sons in positions of power in the economic, political, and legal worlds set out early to define "liberty" in the fourteenth amendment in ways useful to themselves. This process inevitably meant an eclipse of public interest in clarifying the fourteenth amendment's relation to freedom of the press. It also meant a rethinking of the meaning of state police power, a term previously understood as a virtually uninhibited prerogative of the local community.

The rethinking process began publicly in 1873 when the Supreme Court, in *The Slaughterhouse Cases*¹⁰⁷ upheld a Louisiana law, seeking to clean up a health hazard granting a monopoly over the slaughtering of livestock to one firm to enable the state to better monitor and regulate the butchering business. Justice Stephen Field, a conservative Californian closely tied to powerful business interests, argued in his dissenting opinion that "liberty" was not a value rooted principally in spiritual and humane considerations, freeing the citizen from individual restraints; instead, it protected the opportunity to acquire and use wealth. Liberty, Field argued, entailed the right of citizens to pursue the ordinary avocations of life, to acquire property, and to pursue happiness.¹⁰⁸ When the state interferes with this process, it opposes the whole theory of free government. "It requires no aid from any bill of rights to render [such state action] void."¹⁰⁹

Field clearly attempted to bring a substantive protection for economic liberty into the Constitution, in this instance, by way of the fourteenth amendment's privileges and immunities clause. The Justice failed to persuade a majority of the Court, but this failure only steeled his determination to prevail. Four years later, in *Munn v. Illinois*,¹¹⁰ a case testing the regulatory provisions of the Illinois Granger Laws, he maintained that the fourteenth amendment relieved property from any public obligation except those recognized by the law of nuisance. "I deny," he said categorically, "the power of any legislature under our government to fix the price which one shall receive

the product of other men's labor. Here are two, not only different, but incompatible things, called by the same name, liberty. And it follows that each of the things is, by the respective parties, called by two different and incompatible names—liberty and tyranny.

Quoted in E. GERHART, *AMERICAN LIBERTY AND "NATURAL LAW"* vi (1953).

107. 83 U.S. (16 Wall.) 36 (1873).

108. *Id.* at 101-02 (Field, J., dissenting).

109. *Id.* at 111 (Field, J., dissenting).

110. 94 U.S. 113 (1877).

for his property of any kind."¹¹¹ The term "property" in the due process clause, he went on to contend, should be given the most liberal construction possible. It includes not only the physical possession of and the title to property, but the use and income of property as well.¹¹² The police power cannot justify rate-fixing, because the question of price is unrelated to the objectives of the police power.¹¹³ Thus, the owner of property should be free to do as he wills, subject only to "the general and rational principle that every person ought so to use his property as not to injure his neighbors."¹¹⁴

Although Justice Field's statements were, as in *The Slaughterhouse Cases*, again issued in dissent, time and economic power were with him. Within the next two decades, his views not only prevailed, but the term "liberty" in the fourteenth amendment also came to be interpreted in terms of "liberty of contract." Any state action deemed to impose unreasonable restraints on how a person conducted his business became a denial of his liberty "without due process of law."¹¹⁵

The impact of this major redefinition of legal terms upon other non-economic forms of liberty was intriguing. Although Field became irate over the plight of Louisiana butchers deprived of their employment by a state health law, he was totally unmoved by contemporaneous efforts to enforce the fourteenth amendment's equal protection clause on behalf of the civil rights of Blacks,¹¹⁶ or its due process clause to insure a fair trial to the convicted Haymarket anarchists.¹¹⁷ Broadly stated, this shift meant that liberty was so infused with property considerations, in the traditional Lockean sense, that to charge successfully that liberty had been impaired, one needed to demonstrate that the state restraint had adverse effects upon property. If a plaintiff could demonstrate that tie, certain personal freedoms might be validated. If, however, state con-

111. *Id.* at 152 (Field, J., dissenting).

112. *Id.* at 141-43 (Field, J., dissenting).

113. *Id.* at 148-53 (Field, J., dissenting).

114. *Id.* at 136-54 (Field, J., dissenting).

115. The Supreme Court first openly embraced the "liberty of contract" concept derived from Adam Smith in *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897); courts used it in the next three decades principally to invalidate state laws regulating conditions of labor.

116. See Justice Field's dissenting opinions in *Ex parte Virginia*, 100 U.S. 339, 349 (1879); *Virginia v. Rives*, 100 U.S. 313, 324 (1879); *Strauder v. West Virginia*, 100 U.S. 303, 312 (1879).

117. See *Spies v. Illinois*, 123 U.S. 131 (1887); text accompanying note 132 *infra*.

straints did not unwarrantedly infringe upon a person's property rights, courts normally sanctioned their use as an acceptable exercise of traditional state police power.¹¹⁸

Judicial rulings from this period offer consistent examples of the economic dominance of the meaning of "liberty." The Salvation Army was heavily committed to advancing its cause through street-corner speaking, literature distribution, and parades. Local municipalities frequently attempted to impose certain restrictions on this organization by requiring it to secure permission prior to conducting its activities. Few persons considered the Salvation Army's activities a threat to property rights. Indeed, a number of civic leaders saw the organization as instrumental in alleviating some of the suffering which produced worker discontent and general alienation. Thus, in a number of states in the 1880s and 1890s, authorities recognized the Salvation Army's right to raise money and to distribute largesse to the needy through street speeches and parades. As the Michigan Supreme Court ruled in an 1886 case, "it is only when political, religious, social, or other demonstrations create public disturbances, or operate as nuisances, or create or manifestly threaten some tangible public or private mischief, that the law interferes."¹¹⁹

In contrast, when William Davis, a controversial figure, attempted to preach without a permit on the Boston Common in contravention of a Boston municipal ordinance, the potential threat he posed to the public peace was sufficient to produce his prosecution. Judge Oliver Wendell Holmes saw no free speech issue involved in the case.¹²⁰ When Davis appealed to the Supreme Court, Justice White also failed to recognize a free speech issue, premising his decision to sustain the state on

118. See R. McCLOSKEY, *AMERICAN CONSERVATISM IN THE AGE OF ENTERPRISE* 107-23 (1951). This period saw another operational qualifier afford an excuse for denying personal rights: only the successful were deserving and, thereby, capable of handling rights responsibly. This clearly excluded Blacks, American Indians, recent immigrants, women, and the destitute. See P. MURPHY, *WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES* 43-45 (1979).

119. *In re Frazee*, 63 Mich. 396, 405, 30 N.W. 72, 75 (1886). See also *Anderson v. City of Wellington*, 40 Kan. 173, 179, 19 P. 719, 722 (1888); *State ex rel. Garabod v. Dering*, 84 Wis. 585, 595, 54 N.W. 1104, 1107 (1893).

120. *Commonwealth v. Davis*, 162 Mass. 510, 39 N.E. 113 (1895), *aff'd*, 167 U.S. 43 (1897). Commenting on Justice Holmes's opinion, Max Lerner wrote: "It is possible that the reason why Holmes took the narrower view in the present case was that he was writing in a relatively less turbulent social context, when no concrete issues of freedom of speech had arisen, and he was loath to launch on the broad sea of social philosophy." M. LERNER, *THE MIND AND FAITH OF JUSTICE HOLMES* 106 (1943).

Davis's lack of property interest in the Commons. He quoted Holmes's opinion: "For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."¹²¹ Further, the Justices flatly refused to incorporate the protections of the first amendment into the fourteenth amendment. There were, therefore, no constitutional grounds for usurping the state police power; the mayor and city council that regulated expression to promote the general enjoyment of public land did not infringe upon first amendment freedom. The opinion met with general approval. One contemporary argued, "the rule of common-sense and of the public interest [is] not to allow public property set aside for one purpose to be used, at the whim of a few individuals, for another purpose."¹²² Thus, if personal liberty forbade absolute prohibition of speech, public order demanded its reasonable regulation.¹²³ Similarly, when a socialist, Abe Sugarman, set out to test a Minneapolis city anti-loitering ordinance designed to preserve the public order, the Minnesota Supreme Court sustained his conviction, maintaining that the ordinance was a perfectly reasonable regulation.¹²⁴ Thus, as Alexis Anderson cogently pointed out, if the courts did not wish to honor a first amendment claim,

one of the trilogy of police power concerns (safety, health, or morals) was inevitably cited. These regulatory principles had been a traditional subject of nineteenth century jurisprudence; First Amendment doctrines were only now being hammered out. Thus the novelty of the constitutional claims, coupled with the era's understandable fear of mass violence, goes far in explaining the deference paid local officials.¹²⁵

The uninhibited use of private property in relationship to the right of free expression also became a public policy question. Here federal protection of free speech and free press was

121. *Davis v. Massachusetts*, 167 U.S. 43, 47 (1897).

122. Reynolds, *Reasonable Restrictions Upon Freedom of Speech*, 9 AM. SOC. SC'Y 46, 56 (1914).

123. The patterns were national. In New York, left-wing street speakers were arrested for violating the public's right to free access of the streets, and the judges summarily rejected first amendment claims. *People v. Wallace*, 85 A.D. 170, 172, 83 N.Y.S. 130, 132 (1903); *People v. Pierce*, 85 A.D. 125, 125, 83 N.Y.S. 79, 79 (1903). In Georgia, even though a South Carolina professor distributed circulars in advance of his speech, asking that people not block the sidewalks or streets, he was arrested and his free speech claims were denied. *Fitts v. Atlanta*, 121 Ga. 567, 572, 49 S.E. 793, 795 (1905).

124. *State v. Sugarman*, 126 Minn. 477, 148 N.W. 466 (1914).

125. Anderson, *The Formative Period of First Amendment Theory, 1870-1915*, 24 AM. J. LEGAL HIST. 56, 74 (1980).

also essential, especially since private suppression was often carried out with the covert approval of state authorities. But from the time of the adoption of the fourteenth amendment a serious question remained concerning whether the fourteenth amendment reached private speech. The courts gave little encouragement. The Supreme Court in the *Civil Rights Cases* clearly stated that the fourteenth amendment's section 1 provisions were confined to actions by the states. "Individual invasion of individual rights is not the subject matter of the amendment," wrote Justice Bradley for the Court.¹²⁶ "[C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority . . ." ¹²⁷ If the meaning of this statement was not clear from the majority opinion, Justice Harlan clarified it in his ringing dissent. He argued that the federal government had an obligation to protect citizens in their rights not only against formal state deprivation, but against assaults upon those rights by private individuals.¹²⁸ Harlan, however, persuaded none of his brethren. The majority opinion instead sent a message to the federal courts: only if the case involved state action and only if that state action threatened property rights, would the federal courts intervene to protect the constitutional rights of federal citizens.

In summary, the federal courts would protect property rights against state action. Resolution of other questions regarding the relationship of the state to the individual and his rights would generally be left to the state. Thus, in the landmark *Hurtado v. California*¹²⁹ case in 1884, involving a California citizen who contended that California courts denied him due process by convicting him of a felony without a grand jury indictment, Justice Matthews argued that it would not be wise for the states to be bound by any fixed set of procedures in criminal cases.¹³⁰ Thus state courts could very largely operate as they wished, and unless gross departures from basic procedures occurred, their operation was beyond federal supervision, despite the due process clause of the fourteenth amendment. In *Spies v. Illinois*,¹³¹ a case resulting from the famous Haymarket riot in Chicago in the mid-1880s, Spies and

126. *The Civil Rights Cases*, 109 U.S. 3, 11 (1883).

127. *Id.* at 17.

128. *Id.* at 43, 59 (Harlan, J., dissenting).

129. 110 U.S. 516 (1884).

130. *Id.* at 529.

131. 123 U.S. 131 (1887).

others were charged with responsibility for the Haymarket bombing, on the theory that his speeches and writings constituted a conspiracy to induce the resulting violence. Spies's attorneys contended that although the Bill of Rights had not limited the states, so far as they secured and recognized fundamental rights, they were privileges and immunities of citizens of the United States and were now protected against state abridgment by the fourteenth amendment.¹³² The Court ultimately decided the case on other grounds,¹³³ but in a series of subsequent cases it confronted this argument and rejected it. Again, the dissenting Justice Harlan would argue that the fourteenth amendment in effect incorporated the Bill of Rights and made them effective restraints on state civil liberties violations.

The railroading of Spies and three other alleged anarchist conspirators to the gallows riled growing working-class discontent and disaffection. In fact, the Haymarket martyrs became symbols for working class protest and for capitalist injustice for the next two decades. The *Spies* case stimulated strikes, picketing, boycotts, and labor organizing activities. When workers refused to move the trains during the famed Pullman strike of the mid-1890s, the nation's railroad system was brought virtually to its knees.¹³⁴

This situation led to two peripheral developments, both legacies of the Court's earlier interpretations of the fourteenth amendment. Both ultimately related to the *Near* case. One involved the growing use of private power by corporations to contain their critics and their rebellious workers. This took the form of private detectives, strikebreaking by private militia, the use of scabs, economic coercion, and cleverly induced community sanctions—pressures, in other words, which undermined individual rights, but which did not constitute state action.

The other development involved the growing use of legal devices, such as restraining orders and injunctions, which did not directly restrict free speech, press, and assembly, but could be used to do so. Supporters of their use argued that they effectively maintained law and order and the general peaceful

132. *Id.* at 151-52. Contemporaries frankly admitted that the anarchists were hung not for murder, but for their utterances. Henry Adams wrote at the time: "Free discussion does not contemplate such license to press and speech as will endanger the peace and tranquillity of the community." Adams, *Shall We Muzzle the Anarchists*, 1 FORUM 445, 449 (1886).

133. The Supreme Court refused to accept jurisdiction on the grounds that no fourteenth amendment issue was present. 123 U.S. at 181.

134. See generally A. LINDSEY, *THE PULLMAN STRIKE* (1942).

stability of the community. In practice they provided the police a green light in suppressing threats to the public peace and led to breaking up picket lines, sometimes with help from the state militia.¹³⁵ If this form of legalized coercion was unsuccessful, authorities could normally obtain injunctions from a local judge, demanding that certain action such as picketing, boycotting, or striking generally be stopped. The defiance of an injunction normally meant a jail sentence. Breaking the Pullman Strike through such injunctive relief did much to dramatize this as a device for suppressing labor, and it soon became a standard company weapon.

In some ways, however, the most effective manner of dealing with malcontents was through the "creative" enforcement of a variety of local statutes and ordinances.¹³⁶ Unpopular speakers and militant demonstrators could be arrested under ordinances prohibiting trespass, obstruction of traffic, vagrancy, or general disturbing of the peace. Finally, as the Haymarket case demonstrated, arrests could be made under conspiracy laws, which provided a successful way of jailing critics against whom no other plausible charge could be leveled.

Prosecutions against the press, appearing to reject libertarian views and principles supposedly nailed down one hundred years earlier, frequently resulted in successful convictions for obscenity, blasphemy, libel, contempt of court, and licensing schemes. Whenever the Supreme Court addressed the issue, the majority seemed more concerned with emphasizing the limits of freedom of expression than extending its meaning.¹³⁷ Thus, classic concepts of word crimes justifying restraint of freedom of speech and press were revitalized in these years as ways of maintaining control over those who might disrupt the normal peace and general welfare of the community.

In sum, all of these informal, but nonetheless legal, devices were well known as successful vehicles for dealing with troublesome citizens for some time before the *Near* controversy. Those who used them were well aware that technically they did not raise embarrassing or troublesome fourteenth amendment questions, and were thus safe from federal intervention.

In a numbers of ways, the Progressive movement intensified many of these attitudes and many of these practices.

135. See P. MURPHY, *supra* note 118, at 48-49. See also P. MURPHY, *THE MEANING OF FREEDOM OF SPEECH* 116-18 (1972).

136. Anderson, *supra* note 125, at 64-65.

137. Nelson, *Prior Restraint Outlawed*, *The Michigan Journalist*, October 21, 1968, at 10.

While reflecting no consistent ideology, the general thrust of progressive leadership in the years from 1901 to the outbreak of World War I emphasized new forms of social engineering through law to better the community. Accompanying this view was a general perspective that individual rights should be sublimated to the welfare of the whole; achieving a new sense of national uplift and governmental efficiency were now the ultimate objectives.¹³⁸ In such an atmosphere, state police power gained further respect and adherents; the general feeling was that public regulation geared to upgrading the health, safety, morals, and welfare of the community should be given the benefit of the doubt, even if it meant that legitimate businesses could operate only under certain conditions.¹³⁹ Generally, the courts of these years sustained the progressive legislation because it did not sufficiently violate the liberty of employers.¹⁴⁰ These laws covered maximum hours, factory inspection, employer liability, and worker's compensation, as well as censorship measures and forms of local prohibition. One Massachusetts statute even required compulsory smallpox vaccination of all citizens.¹⁴¹ The Supreme Court, speaking through Justice John Marshall Harlan, made it clear that it would not strike down a law imposing substantial limitations upon personal liberty when the Justices approved of the social purpose of the legislation in question. Responding to the defendant's contentions that the state invaded his liberty when the court sentenced him to fine or imprisonment for neglecting or refusing to submit to vaccination, and that the law should recognize the inherent right of every free person to care for himself as he pleases, Harlan stated:

[L]iberty secured by the Constitution of the United States to every

138. See generally P. MURPHY, *supra* note 118, at 36.

139. A federal police power also began to emerge in this particular period. It was more clearly geared, however, to restricting certain activities considered detrimental to the public good: prostitution, impure foods, mislabeled drugs, narcotics, and unhealthy products, from improperly preserved meats to phosphorous matches. Federal authority also attacked the abuses of child labor, as state ineffectiveness became clear. See A. KELLY & W. HARBISON, *THE AMERICAN CONSTITUTION* 584 (5th ed. 1955). See generally S. WOOD, *CONSTITUTIONAL POLITICS IN THE PROGRESSIVE ERA* (1968).

140. The principal exception was *Lochner v. New York*, 198 U.S. 45 (1905), in which the Court struck down a New York maximum hour law for bakers and confectionary workers. Holmes's eloquent and famous dissent as well as Brandeis's famous brief, providing sociological data to vindicate state social welfare legislation, went far toward influencing the Court to support future social welfare laws. See 2 J. SMITH & P. MURPHY, *LIBERTY AND JUSTICE* 330-31 (1968).

141. 1902 Mass. Acts, ch. 190, § 1, (current version at MASS. ANN. LAWS ch. 111, § 181 (Michie/Law. Co-op 1975)).

person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. . . . Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.¹⁴²

At the turn of the twentieth century, the fourteenth amendment remained an ineffective check on state abrogation of civil liberties.

V. FREEDOM OF THE PRESS AND THE FOURTEENTH AMENDMENT

It was in this progressive climate and with these specific precedents at hand that a court first attempted to bring the right of freedom of the press under the fourteenth amendment. The case was *Patterson v. Colorado*,¹⁴³ a precedent the *Near* Court came to terms with in 1931. Thomas M. Patterson was a crusading editor of Denver's *Rocky Mountain News*. A former Democratic congressman and senator, and a progressive, intent on cleaning up political corruption, Patterson saw the basis for much of Denver's problem rooted in the conservative and allegedly business-controlled state supreme court. The Republican governor at the time, James H. Peabody, was widely accused of permitting certain powerful corporations to select state supreme court appointees. In June 1905, the *News* began a campaign of exposure, printing page-one editorials and cartoons accusing the supreme court of corruption in personnel and judicial decisions.

The justices were baldly proclaimed to be tools of the utility and railroad corporations and the Republican bosses. The Court, said the *News*, was the "Great Judicial Slaughter-House and Mausoleum," and a cartoon depicted the Chief Justice as the "Lord High Executioner" beheading virtuous Democrats. It was no sniping attack.¹⁴⁴

Patterson was out front with his charges and defiantly dared the court to pursue reprisals.¹⁴⁵ The supreme court picked up

142. *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905). Harlan went on to partially qualify his ruling, stating that "[w]hile this court should guard with firmness every right appertaining to life, liberty or property as secured to the individual by the Supreme Law of the Land, it is of the last importance that it should not invade the domain of local authority except when it is plainly necessary to do so in order to enforce that law." *Id.* at 38.

143. 205 U.S. 454 (1907).

144. R. PERKIN, *THE FIRST HUNDRED YEARS 410-11* (1959).

145. As he wrote at the time, "I am responsible for every one of [the edito-

the challenge and cited Patterson for contempt, charging that his libelous assault tended to reflect on the judges' motives and conduct, and hence, interfered with the administration of justice in pending cases. Patterson maintained that the statements in the articles were true, that he would prove them, and that under the first amendment to the Constitution truth was a defense for an alleged libel. But the supporting brief and the intricate and lengthy arguments bolstering it proved unavailing and were unaided by Patterson's final verbal statement:

[This] is the most stupendous indictment that can be framed against this whole doctrine of constructive contempt. . . .

[N]o matter what penalty the court may inflict, from this time forward I will devote myself—by constitutional amendment if necessary, . . . to deprive every man and every body of men of such tyrannical power, of such unjust and dangerous prerogative, of the ability to say to publishers of newspapers: 'While about everybody else you may speak the truth, no matter what our offenses may be, you speak the truth with the open door of the jail staring you in the face, or the depletion of what you may possess of this world's goods, and probably of both.'¹⁴⁶

The Colorado bar was appalled. No one had ever called the supreme court justices tyrants to their face, and despite informal censure Patterson was unrepentant. Furthermore, Patterson was confident that on appeal to the United States Supreme Court his indictment would be reversed and he would be vindicated. He was naturally disappointed when that body sustained the Colorado court's verdict, maintaining his assaults represented "contempt" of public officials.¹⁴⁷

Justice Oliver Wendell Holmes wrote the Supreme Court's opinion, stating that the "propriety and necessity of preventing interference with the course of justice by premature statement, argument, or intimidation hardly can be denied."¹⁴⁸ Generally, Holmes pointed out, the Constitution of the United States did not give the United States Supreme Court appellate jurisdiction over state court libel decisions. The only possible avenue in the Constitution by which the Supreme Court could review a

rial attacks] and either wrote or approved them. I believe they are fair and just criticism, and are fully warranted by what has transpired I consider the proceedings against me as direct assault upon the freedom of the press, and I shall defend that ancient and important prerogative of free people with all my power." *Rocky Mountain News*, June 30, 1905, quoted in R. PERKIN, *supra* note 144, at 411.

146. *People v. News-Times Publishing Co.*, 35 Colo. 253, 397, 399, 84 P. 912, 957-58 (1905) *error dismissed sub nom.* *Patterson v. Colorado ex rel. Attorney Gen.*, 205 U.S. 454 (1907). See R. PERKIN, *supra* note 144, at 412.

147. 205 U.S. at 462-63.

148. *Id.* at 463.

state libel decision was through an incorporation of the first amendment into the fourteenth. Yet Holmes was hesitant to start down that road. In the Colorado situation, Holmes reasoned, the main purpose of the first amendment was to prevent prior restraint of publication by the government. But once printed, statements "deemed contrary to the public welfare" might be punished whether true or false.¹⁴⁹ Speaking to the incorporation issue, Holmes simply indicated that the Court left "undecided the question whether there is found in the Fourteenth Amendment a prohibition similar to that in the First."¹⁵⁰ Furthermore, he contended that even the assumption that freedom of speech and press are protected from abridgment by the states does not preclude subsequent punishment for statements deemed to be contrary to the public welfare.¹⁵¹

Thus, the Court sanctioned libel restraints as well as the power of courts to hold newspapers in contempt.¹⁵² These were not restraints prior to publication and, as a result, were not considered regulations that impaired freedom of the press. Each state, was now free to determine the extent to which libel against officials was confined by the American public's privilege to freely discuss those officials, with a clear implication that the public welfare had a higher value than individual freedom. The *Patterson* case, in many ways, accurately reflected progressivism.

Four years after *Patterson*, the Supreme Court decided another case which reflected the values of the period. The case involved the head of the American Federation of Labor (AFL), Samuel Gompers.¹⁵³ Gompers, although no firebrand, was prepared to fight certain employer tactics with cautious retaliation. When he received a plea for assistance against the tactics of

149. *Id.* at 462.

150. *Id.*

151. *Id.*

152. In a strong dissent, Justice Harlan said that the *Civil Rights Cases* held that the thirteenth amendment decreed "universal civil and political freedom through the United States." He went on to contend that freedom of speech and press were privileges and immunities of citizens of the United States which "neither Congress nor any State since the adoption of the Fourteenth Amendment can, by legislative enactments or by judicial action, impair or abridge. . . ." 205 U.S. at 464-65. This view was again underscored by the Supreme Court in the case of *Prudential Ins. Co. v. Cheek*, 259 U.S. 530 (1922). While this suit concerned privacy, not libel, the decision again promoted state independence in determining controls on speech and press. In this case, the Court said that "neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restriction about 'freedom of speech . . .'" *Id.* at 543.

153. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911).

the Bucks Stove Company from the Iron Molder's local in St. Louis, Gompers responded by putting the company on the AFL's "We Don't Patronize" list published in the organization's monthly magazine, *The American Federationist*. The Bucks Stove Company, supported by the American Anti-Boycott Association, a financier of earlier legal action against union boycott tactics, asked a federal judge for an injunction terminating the boycott. The judge promptly enjoined the AFL from combining to injure the company's business and, in particular, from publishing any printed matter listing Bucks Stove on an "Unfair" or "We Don't Patronize" list. The AFL promptly appealed.

Further trouble, however, quickly developed. The injunction was not to go into effect for five days. During that period, Gompers hastily rushed another issue of *The American Federationist* into print, featuring the Bucks Stove Company. This brought another law suit for contempt of court; Bucks Stove charged that the magazine, as well as several public speeches by Gompers, violated the injunction. A lower court judge agreed, sentencing Gompers to one year in jail; Frank Morrison, editor of *The American Federationist*, to nine months; and John Mitchell, President of the United Mine Workers, who cooperated with Gompers, to six months.¹⁵⁴ This decision, too, was appealed, and the complex legal actions which reached the Supreme Court¹⁵⁵ raised difficult questions regarding the labor injunction as a device to restrain free speech and press. In the final opinion, Gompers was freed, but he won no points for the right to free speech. Justice Oliver Wendell Holmes, speaking for the Court, did not address the argument that the injunction was an unconstitutional limitation on freedom of speech and a prior restraint of the press. The result was a precedent hindering trade unionists from saying or publishing anything derogatory about a non-union firm. Again the free press, when it threatened property owners or their prerogatives, clearly ranked well below economic considerations and the "liberty" of employers to be free from damaging public pressure.¹⁵⁶

In a subsequent case the Court sustained a criminal contempt charge against a Toledo newspaper that criticized a judge's use of an injunction to stop what the paper believed was legitimate action. The Court upheld the power of the fed-

154. *Re Gompers*, 40 App. D.C. 293 (1913).

155. *Gompers v. United States*, 233 U.S. 604 (1914).

156. For a description of the litigation, see E. LIEBERMAN, *UNIONS BEFORE THE BAR* 71-83 (1960).

eral judge to punish printed criticism, despite the words of the post-Peck, 1831 statute,¹⁵⁷ which seemed to limit the power to punish misbehavior to the near environs of the Court.¹⁵⁸ In the pre-World War I years, rulings such as this indicated the availability of last-resort options to management, while giving a green light to more informal restraints on free expression. These restraints were carried out effectively, particularly against aggressive and militant union bodies such as the International Workers of the World (IWW) and radical organizations such as the Socialist Party and the Non-Partisan League.

VI. SPEECH, PRESS, AND THE CRIMINAL LAW

World War I injected another element into the picture—the formal “criminalization” of “excessive” speech and press.¹⁵⁹ Statutory limitations on free expression were minimal in the years prior to World War I. Following the assassination of President William McKinley, the state of New York in 1902 passed a criminal anarchy law aimed at securing convictions of radical agitators who, as American citizens, were ineligible for deportation.¹⁶⁰ But with the exception of a 1904 case in which a man who accused another of being an anarchist was charged with slander,¹⁶¹ the measure went unenforced. In addition, prior to 1917, many state and local authorities preferred to deal with troublesome expression through the use of informal sanctions rather than run the risk of openly preferring formal charges. They feared that formal restraint might elicit charges of free speech and free press violations and, thereby, cast them in an unfavorable light.

American entry into the war in 1917 radically altered this climate. The public welfare now became the public safety and the nation’s security, and the federal government for the first time since the late 1790s enacted legislation restricting speech and press under the rationale that it was essential to victory. Attacked by leaders of the nation’s press as excessive and dan-

157. Act of March 2, 1831, ch. 99, § 1, 4 Stat. 487 (current version at 18 U.S.C. § 401 (1976)).

158. *Toledo Newspaper Co. v. United States*, 247 U.S. 402 (1918). Holmes and Brandeis dissented, contending there was no showing that the publication actually interfered with fair court procedures. The decision was ultimately overruled in *Nye v. United States*, 313 U.S. 33 (1941).

159. See P. MURPHY, *supra* note 118, at 71-132.

160. For the statute’s history, see J. JAFFE, *CRUSADE AGAINST RADICALISM* 198 (1975).

161. *Von Gerichten v. Seitz*, 94 A.D. 130, 87 N.Y.S. 968 (1904).

gerous,¹⁶² the espionage and sedition legislation nevertheless was passed and enforced.¹⁶³ Authorities brought more than two thousand federal prosecutions and courts imposed criminal sanctions for a wide variety of forms of expression, belief, and association.¹⁶⁴

This federal action inevitably inspired the states to follow suit. A number did so by enacting statutes, which added a more precise set of criminal remedies to the normal devices for restricting unpopular expression. The motivations behind these laws were mixed. Aware of the value of identifying publicly with patriotism and loyalty in a period of national hysteria, many legislatures and state officials rushed to take action to project a public image of coping quickly and squarely with the menace of wartime disloyalty. Others saw the climate of wartime urgency as creating a golden opportunity to act openly against trouble makers, such as anarchists, socialists, IWW members, and agrarian radicals in the Non-Partisan League, previously a difficult task.

The form of this legislation varied. Eleven states passed sedition statutes providing, in one way or another, for punishment of overt expression.¹⁶⁵ By 1918, five states—Idaho, Minnesota, Montana, Arizona and South Dakota—where hysteria about the IWW was particularly rampant, passed criminal syndicalism laws.¹⁶⁶ In addition to these laws, which made it a

162. See P. MURPHY, *supra* note 118, at 78-79.

163. Sedition Act of 1918, ch. 75, § 3, 40 Stat. 553 (repealed 1921). Technically, this legislation was not libel law in the sense that punishment was provided for defamatory criticism of those who ran the government. The measure undoubtedly curtailed expression, and in defying the first amendment was probably unconstitutional. Its avowed purpose, however, was to punish expression that tended to incite insubordination and disloyalty during World War I.

164. See Z. CHAFEE, *FREEDOM OF SPEECH* 56-57 (1920). This included a major assault on the left wing and foreign language press through applications of postal laws and regulations to deny use of the mails under certain conditions. This was itself an effective form of prior restraint, because it killed most of the publications so banned. See D. FOWLER, *UNMAILABLE: CONGRESS AND THE POST OFFICE* 113-15 (1977).

165. These sedition measures did not follow a single model like the Criminal Syndicalism and Criminal Anarchy Acts. Connecticut punished public advocacy of "any measure, doctrine, proposal or propaganda intended to injuriously affect the government;" New Jersey punished incitement to insurrection or sedition or attempts to do so and banned any book encouraging hostility to the government of the United States or the state; Rhode Island punished language intended to incite "a . . . disregard of the Constitution or laws." Chafee, *Sedition*, 13 *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 638 (1935).

166. See E. DOWELL, *A HISTORY OF CRIMINAL SYNDICALISM LEGISLATION IN THE UNITED STATES* 147 (1939). By the end of 1920, twenty-one states and two territories enacted similar laws. Cf. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (Ohio criminal syndicalism statute violates first and fourteenth amendments).

crime to use language criticizing the government and opposing various aspects of the war effort, municipal bodies passed a vast hodgepodge of local ordinances to criminalize actions or speech calculated to interfere with the war effort. These ordinances normally left considerable discretion to the district attorney to choose which cases to prosecute.

Such laws drew vigorous wartime enforcement. For example, the Non-Partisan League was virtually destroyed when its key leaders were prosecuted under Minnesota's criminal syndicalism law.¹⁶⁷ Yet, many state leaders believed they were not enough. With the war's end in November, 1918 and the expiration of the federal espionage and sedition legislation,¹⁶⁸ state legislators in the supercharged post-war atmosphere of strikes, radicalism, and fear of Bolshevism passed peacetime sedition and criminal syndicalism statutes, seeking to insure nervous citizens that the state governments would continue to attack disloyalty despite the federal government's retreat from the area.¹⁶⁹ This state legislation again took a variety of forms. Ultimately, thirty-five states passed some type of "police power" legislation—sedition, criminal syndicalism, or red flag laws—geared to protecting the welfare of the local community from agitators and dangerous seditionists.¹⁷⁰ In the early 1920s, this legislation was widely enforced.¹⁷¹

Several groups expressed opposition to this particular form of criminalization. Some of the more militant labor unionists of the period viewed it as ill-disguised class legislation, designed

167. See P. MURPHY, *supra* note 118, at 237, 268.

168. This legislation became useless with the end of the war, because it was unenforceable in peacetime. The Sedition Act Amendment of 1918 was revoked by Congress in March, 1921.

169. There had been efforts almost immediately after the war ended to enact federal sedition legislation to replace the wartime laws. These efforts, however, drew hostile criticism from a variety of sources, including not only the liberal community and press, but also the conservative press. Hence, this legislation was eventually defeated, and Congress did not attempt to pass it again until the Smith Act in 1940. See P. MURPHY, *supra* note 135, at 40, 64, 84-86.

170. Such legislation enabled a rapid crackdown on speech and written expression that might produce unlawful actions stimulating improper political or economic change. For a detailed history of this legislation and a careful state-by-state record of its framing, see Dowell, *A History of the Enactment of Criminal Syndicalism Legislation in the United States* (1936) (2 vols. Ph.D. dissertation, Johns Hopkins University).

171. The Supreme Court's decision in *Gilbert v. Minnesota*, 254 U.S. 325 (1920), gave a green light to the enforcement of such legislation. The majority held that the right of free expression, as secured by the first amendment, was not absolute; the limitation imposed by the Minnesota statute was thus lawful. In *State v. Holm*, 139 Minn. 267, 166 N.W. 181 (1918), the Minnesota Supreme Court took an earlier step in that direction.

to provide state support for employers' suppression of the union movement. Others objected to it because it constituted an informal type of preventive or prohibitory legislation devised not actually as punishment for wrongful conduct, but to prevent future evils through a series of restrictions and qualifications that seriously jeopardized freedom of expression. These critics pointed out that there was no legal need or justification for such laws, that the criminal codes of the states adequately covered conspiracy and libel. Still others saw it as an unholy alliance among business, general property interests, and the state, in which legislators passed intimidating laws which freed business from the necessity of confronting the threats to its ongoing success. Such legislation in operation, the opposition argued, left to the discretion of administrative officials the authority to restrict troublesome citizens through the development of standards to fit immediate and local needs.¹⁷² As the decade progressed, the injunction was also upgraded and used as a complementary precautionary weapon. Critics raised similar objections to its use, and civil libertarians launched a nationwide, anti-injunction campaign in the latter years of the decade.¹⁷³

This history of the 1920s, however, is not the history of ongoing state repression of radical thought and expression. Certainly during the first three or four years following the Armistice, public opposition to those espousing radical causes was great, and the demands for further government censorship indeed constituted an obstacle to restoring full peacetime freedom of expression. This situation was agitated by certain government officials, particularly Attorney General A. Mitchell Palmer,¹⁷⁴ who saw an opportunity to cash in on these appre-

172. Some state legislators expressed their fears concerning such laws in legislative debates. A Washington state Republican legislator argued:

[S]o long as we exalt property rights above human rights—so long as we tolerate a condition of society in which some heap up wealth they cannot use while others live in want—so long as the fires beneath our social structure are fed with the flames of greed and corruption and special privilege—we must not court disaster by weighing down the safety valve by the enactment of such a bill as this.

P. MURPHY, *supra* note 135, at 45.

173. A leading case was *Truax v. Corrigan*, 257 U.S. 312 (1921), in which the Supreme Court used both the due process and equal protection clauses of the fourteenth amendment to overthrow an Arizona anti-injunction law designed to undermine the use of the injunction against labor. Holmes and Brandeis strongly dissented. Brandeis particularly expressed his view that "the law of property was not appropriate for dealing with the forces beneath social unrest." *Id.* at 368.

174. See E. DOWELL, *supra* note 166, at 77.

hensions. He sought to continue using wartime authority and suppression as a way of courting public favor and building post-war political careers. But by 1923, the post-war red scare was almost totally forgotten, in part because the laissez faire attitude of the decade subtly contributed to popular aversion to further radical hunting and disloyalty probing by the state.¹⁷⁵ Conversely, some states continued to use the police power against publications. Here the modernizing developments in the decade raised new levels of public concern.

VII. STATE POLICE POWER AND A YELLOWING PRESS

The first nine years of the 1920s were the era of the supreme triumph of the businessman. As President Calvin Coolidge once stated, "the business of America is business,"¹⁷⁶ and this spirit infused almost every aspect of American life. Combined with this new spirit was business consolidation and growth, the rapid development of huge metropolitan centers, and a massive movement of people from the country to the city, all of which produced an increasingly depersonalized urban culture characterized by the automobile, the radio, and the motion picture. These homogenizing tendencies broke down the uniqueness of small-town culture and created a greater national synthesis. Anomie increased among many urban dwellers, and the comfort, convenience, and gossip of the small town was no longer accessible. Urban newspaper owners and a growing group of magazine entrepreneurs quickly saw great potential in this market for a type of journalism which would reach this audience. Other businesses viewed the newspaper as a means to induce customers to buy their products. Thus, during the decade the press shifted its emphasis to meet the needs of a new mass market; as a result, its content and orientation tended to change in several clear ways. As big business operations, newspapers became increasingly dependent upon advertising for support and, consequently, dependent upon burgeoning circulation figures. This attempt to appeal to a popular audience required increased sublimation of serious news and thoughtful editorial content to what Silas Bent, in a devas-

175. When Harlan Fiske Stone was appointed Attorney General by Calvin Coolidge, one of his first acts was to take the Bureau of Investigation out of politics and to terminate its hunting license for radicals, thus ending one of its central early activities. See P. MURPHY, *THE CONSTITUTION IN CRISIS TIMES, 1918-1969*, at 78-79 (1972).

176. Speech by Calvin Coolidge to the Society of American Newspaper Editors (Jan. 17, 1925).

tating exposé of the industry in the 1920s, called "the art of Ballyhoo."¹⁷⁷ This yellowing journalism frequently tended to be irresponsible, based upon half-truths, and often employed the exposé as a sure-fire method of selling newspapers. Pages were filled with details of crime, sex and sexual perversion, not too subtle attacks on minority religious and racial groups, grossly exaggerated accounts of the questionable morality of public officials, and scandals surrounding the private lives of prominent citizens.

One casualty of this development was the decline of older style, editorially-oriented, political journalism tailored to inform people accurately about public issues. That journalism also considered the complex administration of government and the need to bring certain kinds of pressure to force it to deal with corrupt politicians, malfeasance in office, and suspected liaisons between organized crime and politicians. Hence, particularly with the rise of the tabloid, 1920s' journalism offended many older, more serious Americans, who were still guided by a vigorous Victorian-Progressive morality and decorum. They objected to everything about the tabloid—its dishonest, fraudulent, and harmful advertising, its gross misrepresentation of facts, its deliberate invention of tales calculated to excite the public, and its wanton recklessness in the use of headlines. Also offensive to many was the graphic detail of the tabloid's portrayals of scandals and divorces of rich or prominent people, its pictures of vicious criminals, prize fighters, and bathing beauties, its "sob stuff," and its xenophobic jingoing and ill-will toward other nations. As Felix Frankfurter wrote at the time: "A low tone, emotionalism, off-emphasis, irrelevance, and neglect are, we submit, the outstanding sources of newspaper shortcomings. These qualities of news matter fashion the mind of the public. The public, in its turn, is stimulated to want this kind of news."¹⁷⁸

Parallel to the development of tabloids was the emergence of a new type of periodical literature again designed to appeal strongly to the prurient interest of the decade. Sexually-oriented magazines, confession magazines, naughty *Vie Parisienne* art magazines,¹⁷⁹ and celebrity magazines featuring the

177. S. BENT, *BALLYHOO: THE VOICE OF THE PRESS* (1927).

178. L. BEMAN, *CENSORSHIP OF SPEECH AND THE PRESS* 150-51 (1930) (quoting *THE CLEVELAND FOUNDATION, CRIMINAL JUSTICE IN CLEVELAND* 524 (1922)).

179. Mandeville, *Gutter Literature*, 45 *NEW REPUBLIC* 350 (1926). One nationally popular publication was *Captain Billy's Whiz Bang*, a "behind the barn" rag published by Captain Billy Fawcett, a good friend and political sup-

intimate lives of movie stars, sports heroes, and entertainment figures filled the shelves. One critic in the *New Republic* referred to these as "a malady of our civilization."¹⁸⁰

Both of these developments led to arguments in the 1920s that the deteriorating conditions in public morality in the decade were "produced in considerable measure by the newspapers and magazines."¹⁸¹ Critics argued that the newspapers' glamorization of crime increased disrespect for the law and made the United States the most criminal of all civilized nations. As criminologist George W. Kirschwey argued in the *Survey* magazine in 1926:

With the automatic gun to paralyze the victim and wayfarers and the automobile at the curb to ensure a quick get-away, is there any wonder that the young dare-devils of the criminal profession are attracted to the game? With the newspapers reporting and dramatizing every detail of every hold-up of this character, the wonder is that more of them don't go in for it. It is certainly made to look like easy money with a minimum of risk.¹⁸²

The *Christian Science Monitor* stated in an editorial:

Expert surveys add further corroboration to the evidence that crime news engenders crime. The persistent glorification of criminals in the press, the publication of their portraits, the use of laudatory or at least striking nicknames, and the growing practice of feature writers of spreading the views and exploits of criminals all over the Sunday papers, stimulate, encourage, and increase crime.¹⁸³

There was, however, another dimension to these developments. The 1920s also saw 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. Many, however, while their tone was deplorable, actually filled an information gap. In many cities

porter of Floyd B. Olson, the principle prosecutor in the *Near* case, who later became Minnesota's Attorney General and Governor. G. MAYER, *THE POLITICAL CAREER OF FLOYD B. OLSON* 6 (1951).

180. Mandeville, *supra* note 179, at 351.

181. Similar blame was not placed on motion pictures or radio, probably because the movies were not thought of at the time as a corrupted public information source. The Supreme Court ruled in 1915 that movies were strictly a business. *Mutual Film Corp. v. Industrial Comm'n of Ohio*, 236 U.S. 230 (1915), *overruled*, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952). Moreover, the industry, through its Hays office, began self-censorship early in the decade. Radio, then in its infancy, was subject to certain regulations at the outset and in 1927 was placed under federal control through the Radio Act of 1927, a statute giving the government licensing and policing power over the industry. Act of Feb. 23, 1927, Pub. L. No. 632, ch. 169, 44 Stat. 1162. See Note, *Previous Restraints Upon Freedom of Speech*, 31 COLUM. L. REV. 1148, 1153 (1931).

182. Kirchwey, *Crime Waves and Crime Remedies*, 55 SURVEY 593, 595 (1926).

183. See generally L. BEMAN, *supra* note 178, at 160-61.

the politicians were in collusion with the business world, which was closely tied to big newspapers and more interested in circulation based upon scandal and gossip than in performing honest public information functions. As with the newspapers and the magazines, the response of a fair segment of the "respectable" public to the scandal sheets was hostile. In the public mind these three rather disparate forms of journalistic endeavor tended to blur together and become synonymous. Moreover, the respectable public felt victimized and powerless to retaliate against them all, particularly when suggestions of regulation or curtailment inevitably met the argument that the first amendment protected these journalistic activities.¹⁸⁴

It was undoubtedly public exasperation which led to widespread demands for censorship and which led one progressive state, Minnesota, to enact a statute in 1925 to protect the community against the evils of these forms of business.¹⁸⁵ This law was subsequently dubbed the "Minnesota Gag Law."¹⁸⁶

The new law was defined in its preamble as "an act declaring a nuisance, the business . . . of regularly or customarily producing, publishing, or circulating an obscene, lewd, and lascivious newspaper, magazine, or other periodical, or a malicious, scandalous, and defamatory newspaper, magazine, or other periodical and providing for injunction and other proceedings."¹⁸⁷ It provided specifically that the county attorney or, in his absence, the attorney general or any citizen acting in behalf of the county attorney, might petition the district court for a temporary restraining order against any periodical which allegedly violated the provisions of the act.¹⁸⁸ After a trial on the merits, the district court judge could grant a permanent injunction, by which, in the language of the law, "such a nuisance may be wholly abated."¹⁸⁹ Thus, the law allowed the enjoining of any publication which, in the opinion of a single judge, was contrary to public morals. It was, as a popular commentator

184. Even contemporaries, however, considered this posture unpersuasive. Silas Bent wrote in 1926 that no newspaper reader will "become an active champion [of press freedom] until newspapers mend their ways . . . , shovel less smut and print more news." S. BENT, *supra* note 177, at 377-78.

185. See note 3 *supra*.

186. The legislative history of the measure is described in Hartmann, *The Minnesota Gag Law and the Fourteenth Amendment*, 37 MINN. HIST. 161-62 (1960).

187. Act of Apr. 20, 1925, ch. 285, 1925 Minn. Laws 358 (held unconstitutional in *Near v. Minnesota*, 283 Minn. 697 (1931)).

188. *Id.* at § 2.

189. *Id.* at § 3.

wrote later, "a shining example of . . . that kind of police power which makes for governmental tyranny."¹⁹⁰ If the law was effective, political corruption and business fraud could flourish without fear of exposure. Failure to comply with the order of the court would be contempt, punishable by a fine of a thousand dollars or a year in the county jail.

Minnesota's experiment quickly drew warm national approval as a "wise and desirable remedy" for these evils.¹⁹¹ The arguments supporting the law ran as follows: the complications of ordinary censorship, or prior restraint, make it impractical; it would be impossible to have government censors read every magazine and delete every falsehood, exaggeration, indecency, or obscenity. Censorship would require an enormous staff of well-paid and highly trained censors and would, therefore, be expensive and unworkable. Legal actions against undesirable publications also failed completely. Prosecutions under the criminal libel statutes failed to result in effective repression or suppression of such literature. Further, civil actions for damages could not prevent the harm or a repetition of the offense. The publicity given to the trial sometimes did more harm than good. In addition, the expense of the trials and appeals put this remedy out of the reach of all except the wealthy. Supporters argued that the Minnesota law could be applied promptly, and could stop obscenity, indecency, falsehood, and defamation, as well as end the publication of scandal sheets completely. It could, in other words, make the journalistic profession responsible again, scare the criminal element among writers and publishers, and encourage reputable newspapers and magazines. Freedom of the press would not be impaired. Freedom of the press, it was argued, never meant a license to publish scandalous, malicious, obscene, or indecent matter. Finally, Gag Law advocates contended that the first amendment did not limit the power of the state governments; it merely limited Congress. Each state could properly regulate its own newspapers, magazines, and news agencies under its police power.¹⁹²

Clearly the law created positive regulatory overtones. It sought to protect the property rights of certain individuals against blackmailers and scandal mongers who might damage

190. Pollard, *Our Supreme Court Goes Liberal*, 86 FORUM 193, 198 (1931).

191. See L. BEMAN, *supra* note 178, at 163. The national student debate topic for 1930 was: Resolved: That the Minnesota Nuisance Law should be adopted by every state in the Union. *Id.* at 145.

192. These arguments are summarized in L. BEMAN, *supra* note 178, at 146-48.

their reputation and standing in the community, injuring them financially. The purpose of the law placed the public welfare above any first amendment rights that people might claim. To the extent that it protected "liberty," the law saw liberty as the citizen's freedom from the evil impacts of this new journalistic development; certainly it was not liberty of members of the "fourth estate" to publish freely what they wished.

But there were other trends in the 1920s, particularly in first amendment constitutional law, running counter to those trends which produced the Minnesota Gag Law. Their roots were in World War I and their culmination, as it turned out, was in the Supreme Court's ruling in *Near v. Minnesota*.

VIII. THE FIRST AMENDMENT AND THE MARKETPLACE OF IDEAS

As the federal government and the states moved during and after World War I to criminalize certain forms of freedom of expression, certain citizens concerned with civil liberties expressed strong apprehension about this development and its long range implications. In an early wartime case, the *Masses Publishing Company* sued in Judge Learned Hand's federal court in the Southern District of New York to enjoin the New York postmaster from not delivering the August, 1917 issue of *The Masses*, a monthly revolutionary journal containing several articles, poems, and cartoons attacking the war.¹⁹³ Hand set out to clarify the boundary line between punishable and non-punishable expression under the new Espionage Act. Adopting the position of constitutional expert Thomas M. Cooley, Hand granted the injunction, pointing out that one could not limit free speech and press to polite criticism. He contended that the greater the grievance, the more likely people are to get excited about it, and the more urgent the need of hearing what the discontented have to say.¹⁹⁴ The test for the suppression of expression in a democratic government, Hand stated, is neither the justice of its substance nor the decency and propriety of its temper, but the strong danger that it will directly incite injurious acts. In the *Masses* case Hand believed that this connection was not persuasively established.

193. *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y.), 245 F. 102 (2d Cir.), *stay continued, rev'd*, 246 F. 24 (2d Cir. 1917).

194. 246 F. at 539-40.

Although Hand was reversed by a higher court,¹⁹⁵ his position ultimately precipitated a wartime debate over the permissible limits of freedom of speech and press, a debate in which he drew strong support from Zechariah Chafee, Jr., of the Harvard Law School.¹⁹⁶ Chafee, like Hand, was persuaded that freedom of the press was not adequately protected by the Blackstonian principle of no prior restraint. Clearly this was too narrow a rule. Both men agreed that a proper consideration of the social interests involved, namely the beneficial interests in society in the ascertainment of the truth,¹⁹⁷ not merely protection for the public welfare and safety, demanded that states be limited in their power to hold publishers responsible for what they print. Thus, both men attempted through their public statements and private actions to change the Court's thinking about first amendment freedoms. At approximately the same time, a group of angry citizens, distressed with the excesses of wartime repression, organized the National Civil Liberties Bureau, the antecedent of the American Civil Liberties Union. They intended to transform the question of the restriction of civil liberties into a public policy issue and to secure more favorable protection for individual rights.¹⁹⁸

The success of these individuals during the war period was notably limited. But as first amendment test cases began to reach the courts in the post-war period, both groups hoped courts would recognize that the only grounds for suppressing an expression existed when it did not add truth to the marketplace or it was a demonstrable threat to the public safety or national security. At the time such a view was alien to the legal community and to the majority of Americans. They still viewed

195. *Masses Publishing Co. v. Patten*, 246 F. 24 (2d Cir.) *rev'g*, *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917).

196. Regarding Chafee, see Auerbach, *The Patrician as Libertarian: Zechariah Chafee, Jr. and Freedom of Speech*, 42 *NEW ENGLAND Q.* 51 (1969); Ragan, *Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919*, 58 *J. AM. HIST.* 24 (1971).

197. Benjamin Cardozo expressed similar views:

There is no freedom without choice, and there is no choice without knowledge,—or none that is not illusory. Implicit, therefore, in the very notion of liberty is the liberty of the mind to absorb and to beget . . . The mind is in chains when it is without the opportunity to choose. One may argue, if one please, that opportunity to choose is more an evil than a good. One is guilty of a contradiction if one says that the opportunity can be denied, and liberty subsist. At the root of all liberty is the liberty to know.

B. CARDOZO, *Pardoxes of Legal Science*, in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 317 (M. Hall ed. 1947).

198. P. MURPHY, *supra* note 118, at 244.

liberty as tied closely with property and believed the test for the permissible limits of free expression turned directly on whether such expression constituted potential danger to property interests. Thus, when the Supreme Court in the first of the post-war test cases upheld a conviction under the Espionage Act of 1917 on the grounds that the writings constituted a "clear and present danger" to the nation, free speech advocates were disappointed.¹⁹⁹ Justice Oliver Wendell Holmes, while proposing a new test in the first amendment area, hardly departed from his earlier view in the *Davis*²⁰⁰ and *Patterson*²⁰¹ cases. His opinion lacked the conception that speech might serve broader social interests, interests which would be disadvantaged if denied the ideas which such speech contained.²⁰²

Holmes was rebuked publicly by several legal liberals for authorizing the needless punishment of future utterances. One authority, Ernest Freund of the University of Chicago Law School, deplored the decision and the later Supreme Court action upholding the sentencing of Socialist leader, Eugene V. Debs. He called for tolerance for adverse opinions and implied that Holmes's ruling fostered intolerance.²⁰³ Chafee condemned Holmes's limited free expression concept in print. He also obtained an "audience" with the Justice, now smarting from growing charges of his insensitivity in the civil liberties area. Holmes emerged from their ensuing discussion convinced that the first amendment established a national policy favoring a search for truth, while balancing social interests and individual interests.²⁰⁴ Shortly thereafter he enunciated this position in his strong dissent in *Abrams v. United States*, urging toleration in an eloquent and, as it turned out, frequently

199. *Schenck v. United States*, 249 U.S. 47 (1919).

200. *Commonwealth v. Davis*, 162 Mass. 510, 39 N.E. 113 (1895), *aff'd*, 167 U.S. 43 (1897). See text accompanying notes 120-21 *supra*.

201. *Patterson v. Colorado ex rel. Attorney Gen.*, 205 U.S. 454, 454 (1907). See notes 143-51 *supra* and accompanying text.

202. Holmes at the time wrote to Learned Hand:

[F]ree speech stands no differently from freedom from vaccination. The occasion would be rarer when you cared enough to stop it, but if for any reason you did care enough you wouldn't care a damn for the suggestion that you were acting on a provisional hypothesis and might be wrong. That is the condition of every act.

Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine*, 27 STAN. L. REV. 719, 757 (1975).

203. Freund, *The Debs Case and Freedom of Speech*, 19 NEW REPUBLIC 13 (1919).

204. Ragan, *supra* note 196, at 43.

quoted statement.²⁰⁵

If first amendment freedoms were to take on a new meaning, however, it was ultimately the states, and not the federal government, whose role the Court had to clarify. At this point Justice Louis Brandeis entered the fray and returned to the long standing legal question regarding the proper meaning of the term "liberty" in the fourteenth amendment. Brandeis's public opportunity came in a case in which a leader of the Non-Partisan League, Joseph Gilbert, was arrested under Minnesota's criminal syndicalism law for certain statements opposing aspects of the government's war effort.²⁰⁶ In his argument for striking down the law, Brandeis made clear his position: "I cannot believe that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and enjoy property."²⁰⁷ Brandeis subsequently joined the majority in one case considering a statute forbidding teaching in the German language²⁰⁸ and addressing a statute requiring all parents to send their children to public schools.²⁰⁹ Justice McReynolds, writing the majority opinions for both cases, struck down the laws as violative of property rights. In the first case, he implied children were the property of their parents and he deplored the violation of the parents' right to bring up their children according to the dictates of their conscience. In the other, he viewed the state's action as depriving private schools of business and, thus, property without due process of law, in violation of the liberty guaranteed by the fourteenth amendment. The majority position in both cases implied that "liberty" in the fourteenth amendment protected personal liberty from state control or regulation only if it was in some way linked with freedom of property.

During these years, developments occurred regarding use of the injunction against free speech and press. This demonstrated the sharp dichotomy between those committed to free expression for its own sake and those who continued to view it only in relationship to property rights. In 1922, the Harding administration, through its Attorney General Harry M. Daugh-

205. [T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

206. *Gilbert v. Minnesota*, 254 U.S. 325 (1920) (Brandeis, J., dissenting).

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

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

209. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

erty, sought a massive injunction to break a railway workers' strike²¹⁰ that tied up the nation's rail system. When the federal judge granted the injunction, conservatives applauded, but liberals cried out against it. The injunction forbade union officials from aiding the strike "by letters, telegrams, telephones, word of mouth, or otherwise."²¹¹ Picketing was prohibited, and union officials were even restrained from issuing any strike directions, or saying or writing anything which might keep any strikebreaker from working. The liberal *New York World* called for the impeachment of both Daugherty and Judge Wilkerson, the man who issued the injunction.²¹² Other journalists were quick to spot the implications of the action.²¹³ "If the spokesmen for the strikers can be enjoined from writing about the strike or from talking about it for publication," wrote the *Brooklyn Eagle*, "newspapers can also be enjoined from publishing interviews and statements which have any color favorable to the strikers or adverse to the railroads."²¹⁴ The influential trade journal, *Editor and Publisher*, was more categorical: "The constitutional guarantees of a free press and free citizenship . . . were taken away last Saturday when the First Amendment of the Constitution was abridged by Federal Injunction."²¹⁵

In contrast, Daugherty insisted that the injunction was salutary to free speech and press. It guarded the honest American worker from criminal action and, thereby, preserved the worker's freedom and individuality. The only question was one of maintaining public security under the Constitution. With the forces of evil frustrated, Daugherty told a Canton, Ohio audience, "God reigns and the government at Washington still lives."²¹⁶

The Daugherty episode produced one revealing incident having national implications. William Allen White, the famous Kansas editor, was arrested during the period by state authorities for supporting the strikers. The pro-strike placards he

210. For a full statement of the injunction order see Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in "Interior" Federal Courts*, 37 HARV. L. REV. 1010, 1101-13 (1924).

211. *Id.* at 1107.

212. *Impeachable Offenses*, N.Y. World, September 7, 1922, at 10, col. 2.

213. See, e.g., *Smothering a Strike by Injunction*, LITERARY DIG., Sept. 16, 1922, at 7.

214. Quoted in *id.* at 8.

215. *Trifling With Freedom*, EDITOR AND PUBLISHER, Sept. 9, 1922, at 26.

216. Address by Harry M. Daugherty, Attorney General of the United States, at Canton, Ohio (Oct. 21, 1922).

placed in the windows of his newspaper office were promptly declared to be a "form of picketing."²¹⁷ But White refused to remove them. Instead he wrote a Pulitzer Prize winning editorial on the need for freedom of expression in periods of national crisis.²¹⁸ White was eventually freed and ultimately the strike was broken. The message these events conveyed appeared clear. Free speech and press advocacy, while eloquent, was not persuasive to those in power. Rather, it was the potential of injunctive relief which was intriguing, particularly due to its utility for the protection of property interests.

The message was clearly read. The following year in California a state judge, Charles O. Busick, issued an injunction, subsequently upheld by the state supreme court, against the various acts prohibited by the state's criminal syndicalism law.²¹⁹ Members of the IWW and the Worker's Party were thus prohibited from circulating pamphlets and books, advocating their doctrines, or organizing any group to do so. The Busick injunction consequently removed offenders from the control of juries and gave the judge the direct power to sentence them for contempt of court for their actions. As a result, equity proceedings tended to replace direct prosecutions under the act, thus eliminating the growing embarrassment of using dubious witnesses, a standard practice in the trials of radicals, and the need to rely upon juries. Again, opponents promptly protested against the use of this legal device to prohibit free speech and press. But again, the successful use of this legal avenue suggested to various conservative leaders the possibilities of adding injunctive relief to state police power as a method for making that power quick, easily applicable, and effective with a minimum of legal complications. Since the legislative record does not indicate the motives of the sponsors of the Minnesota statute, it is not possible to establish a direct connection between this legislation and the Minnesota Gag Law of 1925; however, certain similarities in the two laws are sufficiently clear to suggest that the sponsors of the Minnesota legislation knew about it.²²⁰

217. W. JOHNSON, *WILLIAM ALLEN WHITE'S AMERICA* 364 (1947).

218. H. MAHIN, *THE EDITOR AND HIS PEOPLE: EDITORIALS BY WILLIAM ALLEN WHITE* 346 (1924).

219. For the text of the injunction see *In re Wood*, 194 Cal. 49, 227 P. 908 (1924).

220. The continuing use of the injunction to stop what many considered to be legitimate activities eventually led to a national anti-injunction campaign by the American Civil Liberties Union, and to several proposed congressional measures, ultimately succeeding with the Norris-LaGuardia Act in 1932 (ch. 90,

These developments again underlined the low priority which courts in the 1920s placed upon the protection of freedom of expression for its own sake. The point was brought out clearly *Gitlow v. New York*²²¹—the first celebrated state press case to reach the Supreme Court since *Gilbert v. Minnesota*.²²² New York authorities arrested Benjamin Gitlow during the “red scare” of 1920 for publishing the *Left Wing Manifesto*, a pamphlet denouncing capitalism and advocating the establishment of a socialist state. The case went through two appeals²²³ during which lower court judges raised serious questions about the punishment of mere expression and the failure to establish a clear relationship between that expression and some illegal act. When the New York Court of Appeals upheld the conviction, Judge Cuthbert Pound, influenced by the views of Learned Hand and Zechariah Chafee, questioned whether the court adequately considered the utility of speech. In a dissenting opinion joined by Judge Benjamin N. Cardozo, he argued that “the rights of the best men are secure only if the rights of the vilest and most abhorrent are protected.”²²⁴ Gitlow, an official of the Communist Party, retained as counsel Walter H. Pollak, the distinguished New York attorney, who over the next ten years would emerge as one of the most effective civil liberties lawyers to argue before the Supreme Court.²²⁵ Influenced by Brandeis’s dissent in the *Gilbert* case, Pollak attempted to persuade the Supreme Court on appeal that the law should strike down local controls over individual liberties when they became excessively arbitrary. Liberty of expression, he argued, is a right which the due process clause protects against state

47 Stat. 70). P. MURPHY, *supra* note 135, at 238. George Norris, a progressive Senator from Nebraska, was active in every stage of the process. As his biographer points out,

Norris understood that in issuing an injunction, a judge not only made law as expressed in the terms of the document, but also had responsibility for its enforcement, thereby assuming both legislative and executive authority in addition to rendering judgment upon his own acts. Injunction-made laws could send men to prison without jury trials. Violators would be tried before the man who had made the law they were charged with disobeying.

R. LOWITT & G. NORRIS, *THE PERSISTENCE OF A PROGRESSIVE, 1913-1933*, at 438 (1971).

221. 268 U.S. 652 (1925).

222. 254 U.S. 325 (1919). See notes 206-07 *supra* and accompanying text.

223. *People v. Gitlow*, 111 Misc. 641, 183 N.Y.S. 846 (1920), *aff'd*, 195 App. Div. 773, 187 N.Y.S. 783 *aff'd*, 234 N.Y. 132, 136 N.E. 317 (1922), *aff'd*, 268 U.S. 652 (1925).

224. 234 N.Y. at 158.

225. Regarding Pollak, see Z. Chafee, *Walter Heilprin Pollak*, 22 *DICTIONARY OF AMERICAN BIOGRAPHY* 534, 534-35 (1958).

action. This is established by the Court's authoritative determination of the meaning of "liberty" as used in the fourteenth amendment, by the assumptions it uses in dealing with the precise question, and by its explicit declarations with respect to the related right of free assemblage.²²⁶ Pollak convinced the Court on at least this point. The majority, speaking through Justice Sanford, made it clear that "we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment 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."²²⁷ Thus, as one commentator indicated, Sanford "opened the door upon what was to become a new era in the constitutional law of civil liberty."²²⁸ On the other hand, the Court refused to use such a device in this case, sustaining Gitlow's conviction and refusing to strike down New York's criminal anarchy law which secured the conviction.

Sanford also refused to accept the clear and present danger test as a way of dealing with speech and press issues at the state level. That rule, he argued, was intended to apply only to cases where the statute "merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself."²²⁹ He held that the test did not apply to a statute expressly directed against words of incitement. Words could be punished for their bad nature, he insisted, by an interpretation of their meaning regardless of the effectiveness of their impact. If legislative findings resulted in statutes aimed clearly at curtailing the dissemination of sentiments destructive to the ends of society, that was sufficient regardless of the Court's opinion that there was no danger of bad acts. It is not surprising that Holmes wrote a scorching dissent. Happily agreeing that the term "liberty" in the fourteenth amendment included speech and press, he deplored the majority's reluctance to apply the clear and present danger doctrine to Gitlow's pamphlet and their suggestion that words could be punished for their possible tendency to incite violence. He argued:

Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the

226. Brief for Plaintiff-in-Error at 11, *Gitlow v. New York*, 268 U.S. 652 (1925). On Pollak's strategy see Z. CHAFEE, *THE BLESSINGS OF LIBERTY* 73 (1954).

227. 268 U.S. at 666.

228. A. KELLY & W. HARBISON, *supra* note 139, at 664.

229. *Gitlow v. New York*, 268 U.S. 652, 670 (1925).

expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration.²³⁰

Brandeis also was pleased with the acceptance of the "incorporation" doctrine and joined Holmes in his dissent. He was determined, however, to push both the incorporation principle and the marketplace concept into full majority acceptance. In a concurring opinion in *Whitney v. California*,²³¹ he proposed an explicit way of determining when state curtailment of expression might be warranted. He wrote:

No danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, and not enforced silence.²³²

Thus, even in affording more precise ways to limit freedom of speech, Brandeis was at pains to make clear that state restrictions were warranted only when general social needs were threatened by a type of expression that might lead directly to serious damage to society.

Brandeis's concern, however, was not merely that of finding a salutary method for delineating the boundary of state regulatory authority. With Holmes, he criticized the unfortunate impact on the law of a double standard in constitutionally protected freedoms. In legislation regulating labor contracts, freedom was the rule and regulation the exception. Brandeis asked why the same principle did not apply to limitations on speech and press. The state was assuming responsibility for curtailing the freedom of individuals, expressing themselves either orally or in print, to challenge actions potentially dangerous to property and, hence, to society. Why should the state be curtailed in its power to regulate a variety of anti-social activities in the economic area, which in the long run robbed people of their individualism and created the conditions which initially fostered dissent and protest? These persuasive convictions, wrapped as

230. *Id.* at 673.

231. 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

232. *Id.* at 377. Although the Court upheld the conviction of Ms. Whitney, the Governor of California shortly thereafter pardoned her. In the interim the Court took another California criminal syndicalism case, *Burns v. United States*, 274 U.S. 328 (1927). In *Burns*, Justice Pierce Butler upheld the conviction of an IWW organizer, despite an eloquent brief by Walter Pollak and a sharp dissent by Justice Brandeis. Both argued that the law's only concern was to protect property, with no sensitivity to any other personal interests or rights.

they were with a strong element of social responsibility and a serious concern for the needs of society, advanced the libertarian position on free speech and press in the latter years of the 1920s. The liberal community embraced this position more and more, especially as the nation began to feel the effects of the 1929 depression. In early 1931 under the new Chief Justice, Charles Evans Hughes,²³³ who was far more sensitive to civil liberties than his predecessors, the Court moved to pull away from the traditional property-oriented definition of liberty in the economic area, and to sanction state police power as a legitimate device for protecting the public against business exploitation, even in cases where the Constitution would normally have denied its use as an unwarranted interference with liberty of contract.²³⁴ The ruling in *O'Gorman v. Hartford Fire Insurance Co.*, a five to four decision issued only a few months before the *Near* case, made the outcome of *Near* important to first amendment doctrine. It was important not only for first amendment freedoms and their new protection from the states, but also for state economic regulatory laws, possibly subject to new judicial sanction if liberty lost its previously property-oriented meaning.

In addition to the Court, other elements in the 1920s were deeply concerned over free press issues and involved themselves actively to achieve their favorable resolution. For example, the American Newspaper Publishers Association (ANPA), founded in 1887 as a daily newspaper trade association, worked to free the press. By the 1920s, the ANPA represented the great majority of American newspapers, serving principally as

233. Hughes spoke out strongly during the "red scare" days of 1920 against refusal of the New York legislature to seat duly elected Socialist representatives and headed a delegation of lawyers to Albany that decried such a prostitution of the democratic process. M. PUSEY, CHARLES EVANS HUGHES 391 (1951).

234. *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257-58 (1931). Harry Shulman quickly noticed the implications of the shift which was occurring:

Freedom to think as you will and to speak as you think, is the vehicle to more general liberty; its complete exercise by some does not infringe upon the like liberty of others, whatever other evils it may abuse. But freedom to contract as you will and impose whatever conditions you can may be a sure means of oppression; its complete exercise by some often results in the curtailment of the like freedom of others. A larger capacity for liberty to contract in our economic organization may well need governmental control of the power to exert economic compulsion. But a larger capacity for the liberty of speech needs primarily absence of governmental restraint on speech.

Shulman, *The Supreme Court's Attitude toward Liberty of Contract and Freedom of Speech*, 41 YALE L. J. 262, 271 (1931).

an instrument for advancing the business interests of daily newspapers and as a negotiator of adjustments and conflicts with advertisers, labor, communications competitors, newsprint makers, and the government. In the immediate post World War I period, the organization expressed strong concern over continuing government interference with the media and took the position that the nation no longer needed the wartime rules, regulations, and frequent coercion, and that deregulation and decriminalization were required. In 1923, the body set up a committee on federal laws, which it directed to "exercise its utmost effort to maintain the freedom of the press whenever and wherever it may be threatened."²³⁵

The ANPA based part of its concern on a fear that if sizable portions of the American public came to regard the press as solely a business enterprise, it would be open to economic regulation under the authority of state police power. On the other hand, it feared the press would lose public sympathy for its freedom as an information source protected by the first amendment. Thus, the ANPA, sensitive to rising public criticism of the press's behavior and to the press's sins not only of commission, but also of omission, particularly in its highly partisan treatment of many political issues, found itself more on the defensive than usual.²³⁶

One of the movers and shakers in the ANPA was Colonel Robert R. McCormick, the colorful, autocratic owner and publisher of the *Chicago Tribune*. McCormick, long concerned with keeping the politicians off the back of the media, in fact opened the decade defending a long and colorful libel action against the city of Chicago. The city sued the *Tribune* for the sum of ten million dollars for alleged libel, because the newspaper criticized the fiscal administration of the city and, thereby, injured its credit.²³⁷ The *Tribune* rested its defense on the argument that the state and federal constitutional guarantees of freedom of the press precluded a government's suit for libel.

235. E. EMERY, HISTORY OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION 221 (1950).

236. Questions were raised regarding why the ANPA did not do a better job of policing its own members in the 1920s. The ANPA's response was that as a trade association with voluntary membership, it had no real authority to police any newspaper's content, orientation, or management. E. EMERY, *supra* note 235, at 221-22. Some contemporaries, however, remained unpersuaded, believing that if the ANPA were to claim full press freedom, it had an obligation to do a better job of policing itself. See generally S. BENT, *supra* note 177, at 268.

237. *City of Chicago v. Tribune Co.*, 307 Ill. 595, 596-98, 139 N.E. 86, 86-87 (1923).

McCormick won. The Chief Justice of Illinois handed down a unanimous decision, vigorously asserting the right of the media to inform the public regarding the performance of its officials: "When the people became sovereign, as they did when our government was established under our constitution and the ministers became the servants of the people, the right to discuss government followed as a natural sequence."²³⁸ McCormick's efforts soon realized even greater rewards.

IX. THE *NEAR* LITIGATION DRAWS NATIONAL ATTENTION

In 1928, partly in response to the first prosecution under the Minnesota Gag Law earlier that year, McCormick accepted the chairmanship of a new ANPA Committee on Freedom of the Press.²³⁹ Not surprisingly, as the first Gag Law case under the Minnesota statute began to work its way through the Minnesota courts, the ANPA and McCormick quickly lent support to the defendant Minneapolis publishers, by furnishing financial assistance and legal counsel. McCormick saw the law as authority for a repeat performance, this time through an injunction proceeding, of the political assault he had overcome in Chicago five years earlier. At the 1929 ANPA meeting, he submitted a committee report decrying the statute as "tyrannical, despotic, un-American and oppressive," as resuscitating "obsolete libels on the government" and "permitting suppression of publications exposing corruption in government."²⁴⁰ The report asserted that courts of equity should not be permitted to censor the press and suppress writings in advance of publication, and that "this statute was the first attempt of a legislature since the foundation of the Union to gag the press in so drastic a manner."²⁴¹ At its 1930 meeting, the ANPA adopted another resolution condemning the Minnesota act as "a violation of the First and Fourteenth Amendments of the Constitution of the United States, a peril to the right of property and a menace to republican institutions . . . and as a dangerous and vicious in-

238. *Id.* at 601, 139 N.E. at 88.

239. At the time the Committee was appointed, it adopted a resolution stating that "The action of the Minnesota Legislature and Courts, if permitted to stand, will render all guarantees of free speech valueless in Minnesota, and such choking of thought and expression can be extended further if not checked." The resolution is printed in P. KINSLEY, *LIBERTY AND THE PRESS* 35-36 (1944).

240. Quoted in Foster, *The 1931 Personal Liberty Cases*, 9 N.Y.U.L.Q. REV. 64, 68 n.16 (1931).

241. *Id.*

vasion of personal liberties."²⁴²

ANPA members were particularly troubled by the Minnesota Supreme Court ruling in the initial Gag Law case sustaining the use of the Gag Law. The court reasoned that the current tendency in American law was to extend, rather than to restrict, the police power; accordingly, the legislature could legitimately place certain conditions on the way a person conducts a business. Since the newspaper business was no different than any other business, and the distribution of scandalous material disturbed the public peace, provoked assaults and the commission of crimes, and was therefore detrimental to public morals and to the general welfare, the law was valid. The case, the court noted, was not unlike a number of other recent precedents in which the states legitimately restrained the press. Moreover, the due process clause of the fourteenth amendment was never intended to limit the subjects on which the police power of the states might be lawfully exerted.²⁴³ If this position were to be sustained on appeal, the free press, which the body was pledged to defend, would clearly be endangered.²⁴⁴ Editorials and general expression of pained protest from the national press underlined this concern.²⁴⁵

242. N.Y. Times, Apr. 26, 1930, at 4, col. 2.

243. State *ex rel.* Olson v. Guilford, 174 Minn. 457, 465, 219 N.W. 770, 773 (1928).

244. In the initial Minnesota case, *State ex rel. Olson v. Guilford*, attorneys for the *Saturday Press* argued that closing down the publication violated the state constitution's free press provisions, and that the use of an equity proceeding denying jury trial violated constitutional rights. Chief Justice Wilson rejected these charges. "[T]he police power," he contended, "includes all regulations designed to promote public convenience, happiness, general welfare and prosperity, an orderly state of society, the comfort of the people, and peace, and . . . it extends to all great public needs as well as to regulations designed to promote public health, morals or safety." He equated the *Saturday Press*, as a nuisance, to lotteries, noxious weeds, houses of prostitution, dogs, itinerant carnivals, saloons, and malicious fences. 174 Minn. at 459, 219 N.W. at 771. In the appeal from this ruling, attorneys for the paper added a property charge, contending the injunctive action deprived Near of his right to earn a living, and thereby sought to capitalize upon the court's presumed concern with property and the individual's economic rights. Again the supreme court rejected their argument, insisting that to run a business one must operate it in harmony with the public welfare, something Near deliberately refused to do. 179 Minn. 40, 41, 228 N.W. 326, 326 (1929).

245. The *Cleveland Plain Dealer* stated after the initial ruling: "The case is one of vast importance. It far overshadows the specific wrong committed against an obscure and unimportant weekly publication in Minnesota. It concerns the fundamental rights of free speech and free press." December 8, 1928, at 7. The *New York Times*, after the unsuccessful Minnesota appeal, wrote that the Gag Law was a "vicious law." N.Y. Times, Apr. 26, 1929, at 24, col. 3. Meanwhile, the *Chicago Tribune* charged that Minnesota may justly claim to be the more ridiculous of the "Monkey States."

The Supreme Court heard arguments in the case of *Near v. Minnesota* on January 30, 1931, handing down its ruling on June 1 of that year. Between those two dates it heard a case²⁴⁶ challenging the use of a California Red Flag law to silence the leaders of a left-wing summer camp, and ruled large portions of that law a deprivation of liberty without due process, contrary to the fourteenth amendment.²⁴⁷

Attorneys for *Near* argued the civil libertarian position espoused by Hand, Chafee, Holmes, and Brandeis, insisting that the Minnesota statutory restraints, exercisable prior to publication, were incompatible with freedom of the press.²⁴⁸ To suppress a newspaper as a nuisance or otherwise was a form of prior restraint. Moving to more practical considerations, the appellant's brief argued that state punishment of utterances, not as criminal libels on individuals, but as general injuries to the public welfare, abridged freedom of the press, unless the statements advocated the violent overthrow of the government or a breach of the law. Freedom of the press, it contended, was protected by the fourteenth amendment, and the Gag Law deprived the appellant of this liberty without due process of law. Apparently seeking further bolstering, the brief argued that the Gag Law abridgment of freedom of the press also violated the privileges and immunities clause of the fourteenth amendment. Clearly the attorneys again sought to use a more traditional argument by insisting that the right to publish was a "common occupation of life," both a property right and a liberty within the protection of the fourteenth amendment.²⁴⁹

Attorneys for the State of Minnesota, with much more restrictive precedents to rely upon, submitted a six-part argument. Admitting that "liberty" in the fourteenth amendment included freedom of the press, they contended that the term did not allow an unrestricted right to publish everything. Harking back to the *Bucks Stove*²⁵⁰ case, they asserted that the

After all it is less than one hundred years since intelligent men discarded the traditional biological notions found in the Bible. It is nearly three hundred years since John Milton stated the argument for free speech and free press, . . . [and] Milton was by no means the first champion of enlightenment in this field.

Chicago Daily Tribune, Mar. 28, 1929, at 14, col. 2.

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

247. See P. MURPHY, *supra* note 135, at 245-46. This constituted the first case in which the Court actually ruled portions of a state law unconstitutional as a violation of the first amendment applied through the fourteenth.

248. Brief for Appellant at 22-23, *Near v. Minnesota*, 283 U.S. 697 (1931).

249. *Id.* at 52-54.

250. *Buck Stove & Range Co. v. Vickers*, 226 U.S. 205 (1912).

courts have power to restrain by injunction the publication of defamatory matters; the Minnesota statute did not adversely affect property rights, since its application was not intended to prevent anyone from engaging in a lawful calling. Further, they argued that the power of a state legislature to forbid an innocent occupation because certain evils existed incident to the occupation was often sustained against attack under the taking of property language in the due process clause, that newspapers publishing scandalous material were in some states declared to be criminal publications, and that the evil which the Act sought to suppress was a nuisance in fact.²⁵¹

Chief Justice Hughes, joined by Holmes, Brandeis, Stone, and Roberts, clearly embraced the liberal position. He stated early on that "in the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment."²⁵² The subject was the "no prior restraint" doctrine and its protection of the publication of material which could well be the subject of subsequent punishment under criminal libel or other laws. Hughes's argument concerning prior restraint was far more historical than analytical. As Thomas Emerson pointed out, "the Court never undertook to explain the functional basis of the prior restraint doctrine."²⁵³ It preferred to find in the "general conception" of liberty of the press, as adopted by the Federal Constitution, the essential attribute of freedom from prior restraint, which the Court was convinced the statute violated. On the other hand, possibly reflecting the emerging legal realism of the day, Hughes did not care to be drawn into the abstract question of whether the Minnesota law authorized prior restraint. Rather, he believed the test was whether in operation the law worked that way—whether in its administration and techniques of enforcement, it served to preclude in advance the dispersal of certain ideas and informa-

251. Brief for Appellee at 10, 16, 25, *Near v. Minnesota*, 283 U.S. 697 (1931). During the oral argument, James E. Markham, the Assistant Attorney General of Minnesota, contended that the statute was not a restraint prior to publication, quoting Holmes's dictum in *Patterson v. Colorado ex rel. Attorney Gen.*, 205 U.S. 454 (1907) that prior restraints were alone within the prohibition of the free press concept. Holmes smilingly interrupted him and said: "I was much younger when I wrote that opinion than I am now. If I did make such a holding, I now have a different view." Quoted in R. McCORMICK, *THE FREEDOM OF THE PRESS* 51 (1936). Brandeis at one point stated to counsel, "It is difficult to see how one can have a free press, and the protection it affords a democratic community, without the privilege this act seeks to limit." *N.Y. Times*, Jan. 31, 1931, at 6, col. 7.

252. *Near v. Minnesota*, 283 U.S. at 715.

253. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 506 (1970).

tion.²⁵⁴ Proceeding from these assumptions, Hughes ruled that the Minnesota law was an unconstitutional infringement of the freedom of the press safeguarded by the due process clause of the fourteenth amendment. In the process, he asserted finally, after 150 years, the principle that restraint before publication is, with few exceptions, unconstitutional. In finally reducing the broad prohibition against prior restraint to a working principle of constitutional law, he recognized that minor exceptions existed.²⁵⁵ Contemporary commentators, however, viewed the exceptions as insignificant and hypothetical. The broader implications of the majority, speaking through the Chief Justice, gave the decision its historical significance as a turning point in American law and public policy.

The ruling brought to a significant new stage Brandeis's long crusade for redefining the term "liberty" in human rights rather than in property rights terms.²⁵⁶ By actually using that concept to strike down a state law, the decision also logically extended the incorporation theory as it related to freedom of the press, a theory which Justice Sanford launched in his *Gitlow* opinion.²⁵⁷ Considered with the *O'Gorman* decision of the previous January 5, which downgraded the property rights objection to states' use of police power, *Near* seemed to shift presumptions regarding the constitutionality of state laws. Laws restricting personal liberties now demanded new and vigorous justification, while laws restricting property rights were to be given the judicial benefit of the doubt.²⁵⁸ Thus, the ruling

254. 283 U.S. at 708. Actually, there was much to be said for the minority position that the situation was not formally a prior restraint situation, but a system of subsequent punishment by contempt procedures. Thus, Hughes's concern with testing the statute by its operation and effect was clear.

255. The four suggested exceptions were: publication of critical war information; obscenity; publication inciting acts of violence against the community or violent overthrow of the government; and publications invading private rights. *Id.* at 716.

256. See Hamilton, *The Jurist's Art*, in MR. JUSTICE BRANDEIS 182-83 (F. Frankfurter ed. 1932).

257. See text accompanying notes 226-28 *supra*.

258. *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251 (1931). Contemporary observers were well aware, however, of the limits of protection the judiciary could actually give such rights. One commentator pointed out:

Review by the Supreme Court, even if the members were of one mind, is a weak safeguard of personal liberty. It can review only a very small fraction of the cases litigated. For the most part, this liberty is at the mercy of executive and administrative officers and trial courts. But while personal liberty must thus look for protection to our generally becoming 'more civilized,' the Supreme Court can set a brilliant example.

Shulman, *supra* note 234, at 270.

culminated more than 60 years of struggle over the proper relationship among the federal government, the states, and the citizen regarding first amendment issues. The press now joined speech in being protected not only from formal federal government restraint, but from state restraint and more subtle forms of local restraint such as those authorized by the Minnesota law.²⁵⁹

In the first amendment area, the ruling was a clear triumph for Learned Hand and Zechariah Chafee; Hughes even cited Chafee's influential book *Freedom of Speech* in his opinion.²⁶⁰ The ruling was clearly "market-place" in its orientation. It strongly stressed the importance in a democratic society of the press being free to carry out its proper function of informing the electorate, particularly about the behavior of the people's public officials. The behavior of the editors of the *Saturday Press* obviously troubled the Chief Justice—the form of exposé, writing they engaged in clearly was styled to arouse passion rather than to disperse knowledge and information. The opinion, however, in some ways blurred this distinction, focusing instead upon the importance of editors to be able to criticize public officials, consequently downplaying any illicit motives, defamation, racial and religious bigotry, and general irresponsibility. Hughes focused upon what was defensible about Near's operation, rather than what was indefensible.

In this regard, the opinion came directly to terms with the changing and modernizing conditions that produced much of the new journalism. Arguing, with good historical justification, that journalistic abuse of American institutions and the people who ran them characterized the early period in which our institutions took shape, Hughes pointed out that:

[T]he administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct.²⁶¹

In a different context, the ruling represented an important development in the area of deregulation and decriminalization,

259. See note 3 *supra*.

260. *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

261. *Id.* at 719-720.

an issue of considerable concern at this time. The World War I and immediate postwar federal and state legislation attaching criminal penalties to certain forms of expression, belief, and association was a form of public regulation. Not unlike the prohibition amendment, its critics increasingly viewed it as unwarranted interference with personal rights and personal choices, which many people believed did not deserve to be classified with criminal behavior.²⁶² The *Near* decision, along with the *Stromberg* ruling two weeks earlier, was actually a form of decontrol striking at the use of state police power to curtail freedom of expression. Decontrol was not only popular at the time, but indicated the general public's distaste for the heavy handed enforcement of sedition, criminal syndicalism, and red flag laws, as well as for state and local censorship of various forms of publication.²⁶³ In this regard, the majority opinion was in sharp contrast to that of both Minnesota Supreme Court rulings and of the minority dissent, all of which supported and encouraged a greater use of state police power to deal with virtually every unseemly aspect of society and human behavior.

The majority opinion also questioned and rejected some of the assumptions and overtones of the earlier word crime laws. Suspicion emerged regarding whether they were really precautionary laws designed not as punishment for actual wrong conduct, but as a means to prevent future evils by a series of restrictions and qualifications which local officials could use to control conduct which the majority found somehow unacceptable.²⁶⁴ The Supreme Court in *Near* deplored the action of Minnesota's Attorney General, Floyd B. Olson, in using the discretion which the Gag Law afforded him as a way of suppressing critics of corrupt politicians. The majority Justices

262. See generally D. KYVIG, REPEALING NATIONAL PROHIBITION 116-18 (1979).

263. The opinion does make an exception for obscenity, but does not define it: "[T]he primary requirements of decency may be enforced against obscene publications." 283 U.S. at 716. But the Court did begin moving toward more precise definitions shortly thereafter, with Judge Woolsey in the 1933 case of *United States v. One Book Called "Ulysses"* 5 F. Supp. 182 (D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934), attacking the older *Comstock* rule and thereby undermining sharply the discretionary authority of customs officials to exclude works they found offensive. This constituted a further form of decriminalization as well as a modification of a form of prior restraint.

264. Congress apparently was not sufficiently influenced to respond accordingly and in 1932 passed an extortion law, making it a crime to use the mails to injure innocent parties. Act of July 8, 1932, ch. 464, 47 Stat. 649 (current version at 18 U.S.C. § 876, 877, 3239 (1976)). For a discussion of the passage of the measure, see Fowler, *supra* note 164; at 132-33.

said that Olson's action was typical of the way preventive or precautionary legislation was used, and they deplored the license it gave to enforcement officials.²⁶⁵ Nine months after the *Near* decision, Congress enacted the Norris-LaGuardia Act,²⁶⁶ which legally restricted the use of the labor injunction as a device for limiting freedom of speech, press, and assembly. The *Near* ruling complimented and possibly played a role in precipitating this further attack upon the use of certain types of controls that were designed to afford local officials authorization to use a type of power which otherwise would have been legally beyond their reach.

Finally, the *Near* case, along with *Stromberg v. California*,²⁶⁷ was an attempt to move away, and move the country away, from the use of informal local controls to limit freedom of expression. Just as the majority condemned the ongoing use of the police power to restrict civil liberties, so it condemned a situation which made it possible for local officials, often acting at the behest of private local power, to selectively use their discretion in the law enforcement process to curtail expression that was distasteful or threatening to the local power establishment. While the Civil Rights movement of the 1950s and 1960s quickly demonstrated that such controls could be swiftly revived and reinvigorated, the realistic recognition of their potential as devices to inhibit free expression by the *Near* court marked an

265. As Thomas I. Emerson pointed out, such a proscription was not permanent. Much of the McCarthy era's legislation was of the same kind, constituting "a tremendous and ominous expansion of preventive law in the area of civil liberties." Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648, 649 (1955).

266. Ch. 90, 47 Stat. 70 (1932) (current version at 29 U.S.C. § 104 (1976)). The key section of the Act read:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute from doing . . . any of the following acts:

. . . .

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, or patrolling, or any other method not accompanied by force or violence;

(f) Assembling peaceably . . . in promotion of their interest in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified.

Id. at § 4.

267. 283 U.S. 359 (1931).

important judicial acknowledgement of a process long overlooked by legal literalists.

Justice Pierce Butler, a Minnesotan, wrote a strong dissenting opinion joined by Justices McReynolds, Sutherland, and Van Devanter. Butler began his dissent with the annoyed acknowledgement that "[t]he decision of the Court in this case declares Minnesota and every other State powerless to restrain by injunction the business of publishing and circulating among the people malicious, scandalous and defamatory periodicals that in due course of judicial procedure has been adjudged to be a public nuisance."²⁶⁸ Butler stated that such a ruling "gives to freedom of the press a meaning and a scope not heretofore recognized and construes 'liberty' in the due process clause of the Fourteenth Amendment to put upon the States a federal restriction that is without precedent."²⁶⁹ Clearly interested in protecting Minnesota's respectable citizens from the possibility of abuse, he based most of his dissent upon the facts of the particular case, pointing out that Near did precisely what the law was intended to prevent, and that Near was, by his own admission, tainted with blackmail. He also quoted at length from the alleged malicious articles appearing in the *Saturday Press*.²⁷⁰

A considerable portion of his analysis questioned whether the Minnesota law actually constituted prior restraint in the historical sense of that term. He denied sharply that it did, quoting the petitioner: "'every person had a constitutional right to publish malicious, scandalous and defamatory material though untrue and with bad motives and for unjustifiable ends *in the first instance*, though he is subject to responsibility therefore *afterwards*.'"²⁷¹ The latter, once it was established by reading the published writing, was perfectly susceptible to control through the exertion of the state's police power, a power which the Justice viewed as being broad authority to prohibit a full range of questionable activities. The use of this type of police power was essential for practical reasons. Subsequent punishment, he argued, was inadequate to protect against the sort of evil confronted here, since legislative libel laws were "inadequate effectively to suppress evils resulting from the kind of business and publications that are shown in this case."²⁷² Thus, Butler, whose previous position had generally

268. *Near v. Minnesota*, 283 U.S. 697, 723 (1931) (Butler, J., dissenting).

269. *Id.*

270. *Id.* at 724-27 (Butler, J., dissenting).

271. *Id.* at 730 (Butler, J., dissenting).

272. *Id.* at 737 (Butler, J., dissenting).

been that "a state may not, under the guise of protecting the public, arbitrarily interfere with private business, or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them",²⁷³ now took the position that protection of legitimate businesses from this kind of illegitimate behavior justified new levels of control. Although *Near's* business had not been regulated, but closed down totally, Butler did not see this as any threat to property rights, despite the argument of *Near's* attorneys to the contrary. Since he was threatening the morals, peace, and good order of the state, *Near's* behavior was a nuisance. Any way that such a nuisance could be legally suppressed appeared to be condonable in the Justice's eyes.²⁷⁴ Butler also seemed totally insensitive to the "liberty" issue which the case raised. As J. Edward Gerald pointed out, Butler and those who joined him

seemed oblivious of the unconstitutional nature of prior restraint and assumed that a state court operating by summary procedure was freed of the obligations of due process of law. Moreover, the dissenting justices would have left the states free of the compulsions of the First Amendment, as if the amendment had been intended less to assure a minimum standard of freedom to the people than to provide an exclusive operations franchise for state legislatures bent on some degree of suppression of freedom.²⁷⁵

It seems reasonable to suppose that if Butler and the three other dissenters had prevailed, *Near* would not have taken its rather sharp departure from *stare decisis*. One may also speculate that an adverse *Near* precedent would have further strengthened state police power and encouraged its extension into other areas.²⁷⁶ In time the Gag Law might have been

273. *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 513 (1924).

274. Generally, until this time in order for the state police power regulation to be upheld by the courts, it had to bear close relation to the evils it was intended to apprehend. The burden of the legislation had to fall equally on all who were similarly situated, although this did not mean that the class to be regulated could not be small and narrowly defined. Also, the language of the law had to be clear and concise and plainly state the nature of the conduct subjecting the citizen to penalty or punishment. All of these conditions were met by the *Near* legislation, or seemed to be, so that a Justice like Butler could not see any reason why this was not perfectly good law. See generally D. Belgum, *The Anatomy of State Police Power, 1900-1933* (Dec. 1972) (Ph. D. dissertation, University of Minnesota).

275. J. GERALD, *THE PRESS AND THE CONSTITUTION, 1931-1947*, at 129 (1948) (footnote omitted).

276. Zechariah Chafee later pointed out that unlike the rapid spread of criminal syndicalism and sedition acts, there initially had been no imitation of the Gag Law in other states, but since "authorities are constantly subject to the temptation of imposing some kind of rigid control on objectionable criticism. . . .[,] probably it would soon have been copied elsewhere except for this decision." Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 381 (1941).

widely copied in other states and used to enjoin speech in other areas of communication such as broadcasting, motion pictures, radio, and possibly television.

An adverse *Near* precedent could also have been used not only to suppress the scandal sheet business, but also to condemn a variety of other businesses as nuisances, all without a trial, a jury, and due process. This might have turned police power into a tool which authorities could have used for partisan political purposes, particularly when the media became too ambitious and candid in revealing the seamy underside of much of modern political behavior.

The contemporaneous popular and scholarly reaction to the *Near* ruling reflected many of these concerns and additionally demonstrated a remarkable perceptiveness about the Court's ruling and its implications. In summarizing broad journalistic reaction to the decision shortly after it was issued, the *Literary Digest* quoted a newspaper account which commented that the shift of a majority of the Court to the "liberal" side was

'[j]ust about the biggest Washington news of the decade The cleavage between liberal and conservative and the dominance of the former appear particularly in two areas of decisions. One, speaking broadly, emphasizes human rights and constitutional guarantees to the individual, such as freedom of speech. These human rights the liberals of the Court tend to protect or enlarge.

The other group of decisions . . . tends to restrain private property rights and to enlarge the powers of State government in dealing with private property.'²⁷⁷

The *Minneapolis Tribune*, on the other hand, was unimpressed. In its editorial, the writer stated:

The jubilation over the decision of the supreme court will be much more enthusiastic outside of Minnesota. For some unexplained reason this state seems to have been particularly fertile in the production of blackmailing and scandal sheets. The suppression law put an end to them, but no doubt they will be back with us, now that the law has been declared unconstitutional.²⁷⁸

Joseph P. Pollard, writing in the popular journal, *The Forum*, was particularly astute in his observation that

[t]he collapse of our economic structure and the present widespread depression show that business enterprise free from governmental control will not work, and the new judges know it. Nor will suppression of free thought achieve anything worthwhile in an enlightened era. This too the judges have realized . . . and . . . [they] have acted broadly, tolerantly, and humanely. Much has been accomplished in the single

²⁷⁷ *The Supreme Court's Shift to Liberalism*, LITERARY DIG., June 13, 1931, at 8. See D. Wolf, *Supreme Court in a New Phase*, 34 CURRENT HIST., 590, 592-93 (1931).

²⁷⁸ *Minneapolis Tribune*, June 2, 1931, at 10, col. 1.

year in which they have been together on the bench. Much more will be accomplished in the years to come, and the Supreme Court will play a part of ever-increasing prominence in the progressive development of the country.²⁷⁹

To the extent that the *Near* ruling marked one of the first faltering ventures down this new road, its historical significance is assured.

279. Pollard, *supra* note 190, at 199.