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Minnesota Rag

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BOOK REVIEW

Minnesota Rag. Fred W. Friendly. New York, New York: Random House, Inc., 1981. 233 pp. \$12.95.

*Terry Clayton Paulson**

[H]istory, fate or whatever force it is that provides the unlikely champion, or the subtle, improbable turn of events that leaves its indelible stamp upon the course of human events, intervened. It was one such incident that ultimately empowered five Supreme Court Justices to infuse with life and spirit an amendment which for 150 years had existed only as a bare skeleton.¹

That "improbable turn of events," which culminated in the landmark Supreme Court decision of *Near v. Minnesota*,² is graphically recounted by Fred Friendly in his latest book, *Minnesota Rag*. A renowned journalist, Friendly has long espoused a passion for the first amendment. In *Minnesota Rag* he not only tells the tale underlying *Near*, he also charts the precedential value of the case in recent attempts to invoke prior restraint against the press.³

The initial spark that led to the *Near* decision was struck in the Minnesota Legislature in 1925 by a state senator and a state representative. Messrs. Boylan and Lommen had fallen prey to the *Rip-saw*, one of many "rags" or "scandal sheets" of the roaring twenties that made no bones about fabricating libelous facts to support their positions on questionable issues. The result of this legislative backlash was the Public Nuisance Law of 1925,⁴ commonly known as the "Gag Law," which declared those scandal sheets public nuisances and permanently enjoined their publication.

The second target of the Gag Law was the *Saturday Press*, a particularly vile, anti-semitic weekly, written and published by Jay

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1. F. FRIENDLY, MINNESOTA RAG 179 (1981).

2. 283 U.S. 697 (1931).

3. *E.g.*, *New York Times v. United States*, 403 U.S. 713 (1971) (the "Pentagon Papers" case).

4. 1925 Minn. Laws ch. 285.

M. Near and others. Near, whose bigotry and scorn for government permeated the *Saturday Press*, incurred the wrath of Minneapolis officials by printing a series of articles and editorials charging the Minneapolis police force with graft, corruption, and dereliction of duty.⁵ The paper was confiscated on the newstands, Near's partner was shot in a gangland-style assault, and, eventually, the *Saturday Press* was ordered to shut down its presses under the Gag Law.

Naturally, Jay Near fought the injunction. For him the viability of his scandal sheet was a matter of economic survival. But for Near's ally, "Colonel" Robert Rutherford McCormick, publisher of the *Chicago Tribune*, the Minnesota Public Nuisance Law was an odious attack on the liberty of the press. McCormick, variously described as a jingoist and "one of the finest minds of the fourteenth century," willingly committed his fortune and personal attention to establishing and preserving a truly free press. In his monomaniacal zeal for the *Near* case, the Colonel alienated many, including the infant American Civil Liberties Union, and enlisted the aid of more, including the American Newspaper Publishers Association whose Minnesota affiliates had initially supported the Gag Law as a means of ridding the profession of its black sheep.

Meanwhile, the Supreme Court was experiencing a crisis of its own. Chief Justice Taft had resigned in ill health, and a flurry of speculation about his successor followed. During the March 8, 1930, Saturday conference of the remaining Justices, the news was brought that Justice Edward T. Sanford had suddenly collapsed and died; five hours later Taft was pronounced dead. The carefully selected Supreme Court majority of six that Taft had designed while holding the office of President abruptly vanished, and Herbert Hoover's appointments to fill the vacancies on the Court certainly influenced the decision in *Near v. Minnesota*.

Through the Minnesota courts and to the United States Supreme Court, McCormick drove his vehicle of attack on prior restraint, while Jay Near eked out an existence. On June 1, 1931, Chief Justice Charles Evans Hughes read in open court the five-to-four decision declaring the Minnesota Public Nuisance Law unconstitutional as being a previous restraint in violation of the first and fourteenth amendments to the United States Constitution.

History records the events which transpired in the courtrooms, but Friendly records people and the flavor of an era. In a style that

5. Whether fortunate or unfortunate, the charges carried a ring of truth that ultimately helped secure the vote of United States Supreme Court Justice Louis D. Brandeis.

is neither wholly journalistic nor completely interpretive, he uses local color and draws upon the recollections of people who were somehow involved in the case to outline the total picture. The book is constructed not unlike a play, with an introduction, climax, and a denouement that relates the eventual effect of the decision on Near and his *Saturday Press*, on the Justices who solidified freedom of the press, and on then-future politicians. Although there are many "characters" and sub-themes threading through the story line, readability is unimpaired. Photographs of the major characters and newspapers add a note of realism. The thumbnail sketches of McCormick, the Justices, and Near, and vignette-like digressions into the make-up and mystique of the Taft and Hughes Courts add a depth to the book that ram home the impact of happenstance on our pivotal legal precedents.

To the student or scholar of constitutional law, the book provides more than entertainment. Friendly tapped numerous legal sources in his research, and the finished product contains a more than adequate condensation of some difficult constitutional concepts: the selective incorporation of fundamental constitutional standards, fourteenth amendment due process, and the scope of the Supreme Court's power from *Marbury v. Madison*⁶ to the present.

It is well for the members of the bar to ruminate for a moment on pure constitutional theory as new challenges to the scope of the first amendment's establishment clause come to bear in Arkansas. *Minnesota Rag* could serve as a touchstone for recalling the purposes of the founding fathers and to inspire reflection on the lessons that history teaches, to one end or another. *Minnesota Rag* exhibits a touch of *The Untouchables* and a bit of *The Brethren*. It is a worthy addition to the shelves of any lawyer's library.

6. 5 U.S. (1 Cranch) 137 (1803).