

# William & Mary Bill of Rights Journal

---

Volume 10 (2001-2002)  
Issue 2

Article 1

---

February 2002

## Table of Contents (v. 10, no. 2)

Follow this and additional works at: <https://scholarship.law.wm.edu/wmborj>

---

### Repository Citation

*Table of Contents (v. 10, no. 2)*, 10 Wm. & Mary Bill Rts. J. (2002),  
<https://scholarship.law.wm.edu/wmborj/vol10/iss2/1>

Copyright c 2002 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.  
<https://scholarship.law.wm.edu/wmborj>

# THE BUSINESS OF EXPRESSION: ECONOMIC LIBERTY, POLITICAL FACTIONS AND THE FORGOTTEN FIRST AMENDMENT LEGACY OF JUSTICE GEORGE SUTHERLAND

Samuel R. Olken\*

*In The Business of Expression: Economic Liberty, Political Factions And The Forgotten First Amendment Legacy of Justice George Sutherland, Samuel Olken traces the dichotomy that emerged in constitutional law in the aftermath of the Lochner era between economic liberty and freedom of expression. During the 1930s, while a deeply divided United States Supreme Court adopted a laissez faire approach to economic regulation, it viewed with great suspicion laws that restricted the manner and content of expression. During this period, Justice George Sutherland often clashed with the majority consistently insisting that state regulation of private economic rights bear a close and substantial relationship to public health, safety, morals, or welfare.*

*Bringing Sutherland's beliefs to the present, the author feels that constitutional issues raised by the recent must-carry controversy reflect many of the ambiguities raised by the Court in their handling of differential taxation of the press disputes during the 1980s and into the 1990s. The author believes similar questions about the relationship between economic liberty and freedom of expression are likely to recur in other contexts as the Court struggles to adapt traditional First Amendment analytical models to emerging forms of communications technology. From this perspective, the author argues that Sutherland's recognition during the 1930s of the convergence of economic liberty, political factions, and expressive activity is highly relevant to modern constitutional inquiry. In the spirit of Sutherland's views, the author proposes a new form of heightened scrutiny in cases involving differential treatment of the press that more precisely considers the economic and expressive interests at stake. Specifically, Olken argues that the Court should employ a nuanced version of heightened scrutiny that considers more explicitly the respective economic and expressive interests of the affected parties when the government regulates private entities engaged in the business of expression.*

In the aftermath of the *Lochner* era,<sup>1</sup> a dichotomy emerged in constitutional law

---

\* A.B. Harvard, 1982; J.D. Emory, 1985. Professor of Law, The John Marshall Law School, Chicago, Illinois. I gratefully acknowledge the intellectual support of my colleagues, Alberto Bernabe-Riefkohl and Barnabas Collins, and would like to thank my wife, Pamela Lambos, whose abiding faith in this project and sense of humor helped put the research and writing in perspective.

<sup>1</sup> This term refers to the height of economic substantive due process during the period spanning from the late nineteenth century into the 1930s. The seminal case of this period was *Lochner v. New York*, 198 U.S. 45 (1905). For an excellent overview of this era, see HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993).

between economic liberty and freedom of expression. During the 1930s, as a sharply divided United States Supreme Court adopted a more deferential stance toward economic regulation,<sup>2</sup> it maintained a vigorous skepticism of laws that restricted the manner and content of expression.<sup>3</sup> Over the course of the last several decades, most claims based on substantive due process or equal protection notions of economic liberty<sup>4</sup> have received minimal judicial scrutiny,<sup>5</sup> whereas many of those derived from the First Amendment Free Speech and Press Clauses<sup>6</sup> have often evoked a much higher level of judicial review.<sup>7</sup>

While in theory the dichotomy between freedom of expression and economic liberty may seem logical, at times it has fostered dubious distinctions emanating from misconceptions of history and the distortion of precedent. Even where the Supreme Court has ostensibly used some form of heightened scrutiny, such as the

---

<sup>2</sup> See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (sustaining a minimum wage law for women); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (upholding a mortgage moratorium law); *Nebbia v. New York*, 291 U.S. 502 (1934) (sustaining a milk price regulation).

<sup>3</sup> See, e.g., *Schneider v. New Jersey*, 308 U.S. 147 (1939) (invalidating an ordinance that prohibited the distribution of leaflets in public as an overly broad regulation of speech); *Near v. Minnesota*, 283 U.S. 697 (1931) (invalidating a law that functioned as a prior restraint).

<sup>4</sup> The term economic liberty, as used in this article, refers to the autonomy of natural persons and businesses in their private economic affairs. The Constitution protects private economic rights from arbitrary and unreasonable governmental authority most notably in the following: the Due Process Clauses of the Fifth and Fourteenth Amendments; the Equal Protection Clause of the Fourteenth Amendment; the Privileges and Immunities Clauses of art. IV § 2, cl. 1, and the Fourteenth Amendment; and the Contract Clause.

<sup>5</sup> See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), *reh'g denied* 349 U.S. 925 (1955) (upholding Oklahoma optometry restrictions).

<sup>6</sup> In relevant part, the First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. Communication that is obscene (*Miller v. California*, 413 U.S. 15 (1973)), pornographic (*Grayned v. City of Rockford*, 408 U.S. 104 (1972)), constitutes fighting words (*Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)), or manifests an intent to incite imminent unlawful action (*Brandenburg v. Ohio*, 395 U.S. 444 (1969)) receives little, if any, protection under the First Amendment, which does, however, offer more protection to certain forms of commercial speech (*Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980)). In contrast, the First Amendment places a premium value on the unfettered exchange of ideas about politics and other subjects that do not fall within the aforementioned categories. See, e.g., *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (noting that freedom of speech is a "means indispensable to the discovery and spread of political truth"); see also ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948) (linking freedom of expression to participatory democracy).

<sup>7</sup> See, e.g., *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (holding a "right of reply" law unconstitutional). As used in this article, the term freedom of expression refers to both freedom of speech and freedom of the press.

content-neutral *O'Brien* test,<sup>8</sup> in cases involving both economic liberty and freedom of expression, its primary concern has been with preserving First Amendment interests instead of private economic rights.<sup>9</sup> Indeed, in recent decisions that upheld must-carry rules as a constitutional means of promoting the flow of information through the medium of cable television, the Court placed more emphasis upon the importance of public access to broadcast television programs than it did on the manner in which mandatory carriage of such programming might impair the business interests of private cable system operators.<sup>10</sup> Yet, when viewed in historical context, the Court's apparent willingness in these cases, as well as in others, to embrace the myth that economic liberty merits less protection than freedom of expression reveals a flawed constitutional jurisprudence in which the justices, to some extent or another, exalt form over function.

---

<sup>8</sup> In *United States v. O'Brien*, 391 U.S. 367 (1968), *reh'g denied* 393 U.S. 900 (1968), the Supreme Court articulated a four-part test for incidental regulations of speech. Under *O'Brien*, a law will be constitutional if: (1) "it is within the constitutional power of the government;" (2) "if it furthers an important or substantial governmental interest;" (3) "if the governmental interest is unrelated to the suppression of free expression;" and (4) "if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377. Somewhat analogous to this test is the classic standard used to assess time, place, and manner regulations whereby the Court will sustain a content-neutral regulation justified by a significant or substantial governmental interest that leaves open alternative means of communication. *See, e.g.,* *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981) (upholding a Minnesota ordinance that restricted the distribution and sale of literature and solicitations for money to licensed booths on state fairgrounds). By the end of the 1980s, the Supreme Court had, in effect, merged the *O'Brien* test with the one for time, place, and manner regulations and devised a new standard comprised of elements from both *O'Brien* and its time, place, and manner counterpart. *See, e.g.,* *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (noting the similarity between the constitutional tests used by the Court to assess incidental and time, place and manner regulations). In present constitutional discourse, the term "*O'Brien* test" thus often refers to the hybrid standard. *See generally* David S. Day, *The Hybridization of the Content-Neutral Standards for the Free Speech Clause*, 19 ARIZ. ST. L.J. 195, 208-09 (1987) [hereinafter Day, *Hybridization*] (criticizing the application of the *O'Brien* incidental restriction test to time, place, and manner regulations). Pursuant to this application of *O'Brien* to both incidental and time, place, and manner restrictions, the government, in order to prevail, must demonstrate the regulation is: (1) content-neutral; (2) "unrelated to the suppression of expression" (*see O'Brien*, 391 U.S. at 377); (3) "narrowly tailored to serve a significant governmental interest;" and (4) "leave[s] open ample alternative channels for communication of the information." (quoting *Ward*, 491 U.S. at 791).

<sup>9</sup> *See, e.g.,* *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457 (1997), *reh'g denied* 521 U.S. 1145 (1997) (sustaining mandatory assessments for advertising pursuant to the Agricultural Marketing Act as constitutional economic regulation rationally related to legitimate governmental objectives).

<sup>10</sup> *See* *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) *reh'g denied* 512 U.S. 1278 (1994). For further discussion of these cases, *see* Part IV and accompanying notes.

One of the neglected aspects of the Supreme Court's constitutional jurisprudence of the 1930s is that, while the more heralded "liberal" wing of the Court differentiated between the standard of review in economic liberty and freedom of expression cases,<sup>11</sup> its "conservative" justices did not.<sup>12</sup> The intellectual leader of this quartet was George Sutherland, whose trenchant dissents in *Home Building & Loan Ass'n v. Blaisdell*<sup>13</sup> and *West Coast Hotel Co. v. Parrish*<sup>14</sup> both criticized the Court's shifting emphasis in economic substantive due process and,

---

<sup>11</sup> Compare *Near v. Minnesota*, 283 U.S. 697 (1931) (Hughes, C.J.) (closely scrutinizing a Minnesota law restricting freedom of the press), with *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (Hughes, C.J.) (balancing the reasonable exercise of state police powers and the obligation of contracts). Compare also *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936) (unpublished draft of concurring opinion of Justice Benjamin N. Cardozo) (regarding freedom of the press as a fundamental constitutional right warranting close judicial scrutiny of a Louisiana license tax on the gross receipts of newspaper advertising) (transcript available in the Kaufman Cardozo Collection of the Harvard Law School Library), with *Liggett Co. v. Lee*, 288 U.S. 517, 580-86 (1933) (Brandeis, J. and Cardozo, J., dissenting) (expressing considerable deference toward state tax and police powers).

<sup>12</sup> After the retirements of Chief Justice Taft in 1930 and Associate Justice Oliver Wendell Holmes in 1932, the nine justices who sat on the Court during the rest of the decade often voted in blocs. Justices Louis D. Brandeis, Benjamin N. Cardozo, and Harlan F. Stone (and in the 1920s, Holmes) comprised the wing of the Court most deferential to the exercise of state police powers in the context of economic regulation and more outspoken about the importance of the First Amendment in a constitutional democracy. See, e.g., *Nebbia v. New York*, 291 U.S. 502, 523-24 (1934) (upholding a regulation of milk prices); *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring) (linking freedom of expression and deliberative democracy). On several occasions, the more moderate Chief Justice Charles Evans Hughes and Associate Justice Owen J. Roberts joined the trio of Brandeis, Cardozo, and Stone to form the majority in a series of seminal cases that marked the Court's increasing reluctance to overturn economic regulation. See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding a minimum wage law for women as a reasonable exercise of local police powers). In contrast, Justices George Sutherland, Pierce Butler, Willis Van Devanter, and James C. McReynolds often formed a more conservative bloc that sought to preserve a more traditional jurisprudence of police powers. See, e.g., *id.* at 400-14 (Sutherland, J., dissenting) (maintaining that economic regulation must bear a close and substantial relationship to the public welfare and thus be more than merely reasonable). The terms "liberal" and "conservative," as used in this article, do not refer either to the political beliefs or judicial motivations of the justices, but instead function as shorthand labels to describe the tendency of these jurists to either depart from or adhere to certain jurisprudential premises prevalent throughout the latter half of the nineteenth century and into the early decades of the twentieth century. For an excellent overview of the transformation of constitutional jurisprudence during the first half of the twentieth century, see G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000); see also BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998).

<sup>13</sup> 290 U.S. 398, 449-83 (1934) (Sutherland, J., dissenting).

<sup>14</sup> 300 U.S. 379, 404-14 (1937) (Sutherland, J., dissenting).

like his majority opinions in other cases,<sup>15</sup> asserted the transcendent importance of constitutional limitations as a means of protecting private economic rights from the ephemeral whims of democratic majorities.<sup>16</sup>

For Sutherland, the emerging Court majority of the 1930s incorrectly presumed the legitimacy of local police powers when it cast aside rigorous judicial review of economic regulations in favor of a more flexible, pragmatic approach that balanced the public welfare and private interests.<sup>17</sup> Despite mounting criticism from both within and outside the Court, Sutherland steadfastly insisted that state regulation of private economic rights bear a close and substantial relationship to public health, safety, morals, or welfare.<sup>18</sup> This was a stringent standard of judicial scrutiny that emphasized the primacy of individual rights in a democratic republic in general and, in particular, reflected a traditional presumption against government intervention in private economic affairs born from a longstanding fear of political factions that predated the formation of the Constitution.<sup>19</sup>

Although the nature of Sutherland's economic liberty jurisprudence has been the subject of recent scholarship,<sup>20</sup> the manner in which his views of economic liberty influenced his understanding of the First Amendment has drawn relatively little attention. In part, this may be because during his years on the Court, Sutherland authored only two significant opinions concerning freedom of expression. In 1936, he wrote for a unanimous Court in *Grosjean v. American*

---

<sup>15</sup> See, e.g., *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923), *overruled in part* by 300 U.S. 379 (1937) (invalidating a minimum wage law for women); *Tyson and Bros., Co. v. Banton*, 273 U.S. 418 (1927), *overruled in part* by 313 U.S. 236 (1941) (invalidating a New York regulation of ticket brokers); *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (invalidating an Oklahoma law restricting the manufacture, sale, and distribution of ice).

<sup>16</sup> See, e.g., *Blaisdell*, 290 U.S. at 449, 451-52, 465, 472-73, 482-83 (Sutherland, J., dissenting) (strictly construing the Contract Clause as a prohibition of all laws that impair the obligation of contracts).

<sup>17</sup> See, e.g., *West Coast Hotel*, 300 U.S. at 401-04 (Sutherland, J., dissenting) (discussing judicial review and constitutional interpretation); *Blaisdell*, 290 U.S. at 448-53, 473, 482-83 (Sutherland, J. dissenting) (invoking the unchanged meaning of constitutional limitations).

<sup>18</sup> See, e.g., *West Coast Hotel*, 300 U.S. at 411-13 (Sutherland, J., dissenting) (strictly interpreting the concept of public welfare); *Adkins*, 261 U.S. at 549, 554-61 (construing a minimum wage law for women as illegitimate class legislation). For criticism of Sutherland's police powers jurisprudence, see *id.* at 568-71 (Holmes, J., dissenting) (asserting the need for judicial deference toward legislative classifications made pursuant to the reasonable exercise of local police powers).

<sup>19</sup> See Samuel R. Olken, *Justice George Sutherland and Economic Liberty: Constitutional Conservatism and the Problem of Factions*, 6 WM. & MARY BILL RTS. J. 1, 9-35, 57-88 (1997) [hereinafter Olken, *Justice George Sutherland*].

<sup>20</sup> See generally HADLEY ARKES, *THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS* (1994) (attributing Sutherland's views to natural rights). For criticism of Arkes's approach and an alternative analysis of Sutherland's notions of economic liberty, see generally Olken, *Justice George Sutherland*, *supra* note 19 (emphasizing Sutherland's aversion toward political factions).

*Press Co.*,<sup>21</sup> which invalidated a Louisiana licensing tax imposed on large newspapers. The following year Sutherland penned a dissent in *Associated Press v. NLRB*.<sup>22</sup> because he believed that the application of the National Labor Relations Act to the editorial operations of a news gathering association violated the First Amendment. Both cases, moreover, signaled an emerging distinction in the minds of some of the justices between economic regulations and regulations affecting First Amendment rights,<sup>23</sup> a difference Sutherland himself was reluctant to recognize.

Understandably, on the basis of his opinions in these cases, scholars have often attributed to Sutherland a strong penchant for protecting freedom of expression.<sup>24</sup> In large part, this is because he used the type of rhetoric one would normally associate with a passionate defense of this constitutional freedom. However, Sutherland may actually have been less a champion of freedom of expression than one might otherwise think, especially because in the vast majority of First Amendment cases that came before the Court during his tenure from 1922 to 1938, he often voted *against* the First Amendment claimants.<sup>25</sup>

Indeed, a more accurate way of understanding Sutherland's opinions in *Grosjean* and *Associated Press* is from the perspective of his economic liberty jurisprudence. Indeed, his deep-set aversion toward political factions heightened his sensitivity about the vulnerability of individual rights in a democratic republic. As such, Sutherland recognized in the constitutional protection of private economic interests a paradigm for the preservation of other civil rights, such as freedom of expression, from the incursion of transient democratic majorities.<sup>26</sup> Both *Grosjean*

---

<sup>21</sup> 297 U.S. 233 (1936).

<sup>22</sup> 301 U.S. 103, 133-41 (1937) (Sutherland, J., dissenting).

<sup>23</sup> See, e.g., *id.* at 128-33 (Roberts, J.) (upholding the application of the National Labor Relations Act to the editorial department of the Associated Press as a reasonable Commerce Clause regulation of incidental effect upon the news agency's First Amendment rights); see also *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (unpublished draft of Cardozo concurring opinion at 10) (refusing to invalidate the Louisiana license tax on equal protection grounds but arguing that it violated freedom of the press).

<sup>24</sup> See, e.g., ARKES, *supra* note 20, at 250-63; JOEL FRANCIS PASCHAL, MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE 205-07, 216-17 (1951).

<sup>25</sup> See, e.g., *Herndon v. Lowry*, 301 U.S. 242, 274-75 (1937) (Van Devanter, J., and Sutherland, J., dissenting) (asserting that the majority should have upheld the criminal syndicalism conviction of a man for the possession of Communist literature with the intent to distribute it and incite an insurrection); *Near v. Minnesota*, 283 U.S. 697, 723-38 (1931) (Butler, J., and Sutherland, J., dissenting) (Sutherland joining in a dissent that would have upheld a Minnesota law authorizing injunctive relief to prevent the publication of periodicals regarded as nuisances); *United States v. Macintosh*, 283 U.S. 605 (1931) (Sutherland, J.), *overruled by* *Girouard v. United States*, 328 U.S. 61 (1946) (asserting the primacy of national security over freedom of conscience); *Whitney v. California*, 274 U.S. 357 (1927) (sustaining a criminal syndicalism statute); *Gitlow v. New York*, 268 U.S. 652 (1925) (upholding a conviction for seditious speech). Sutherland was part of both the *Whitney* and *Gitlow* majorities.

<sup>26</sup> See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280 (1932). See also Olken,

and *Associated Press* raised closely related issues of economic liberty and freedom of expression in ways that most other First Amendment disputes during Sutherland's era did not.<sup>27</sup> Each case arose when political factions exerted enormous pressure upon the legislature to enact measures that actually benefitted some economic groups at the expense of others in ways that affected the manner, or business, of expression.<sup>28</sup> Sutherland implicitly perceived this connection between the rights of business (essentially ones of property) and those of expression, and so he imbued his analysis of the First Amendment with his understanding of economic substantive due process and equal protection. Accordingly, he may have been more receptive to the First Amendment arguments in this context than in others where he did not necessarily sense that the government regulation arbitrarily singled out a particular business that happened to be involved in the business of expression.<sup>29</sup>

Much of this article links Sutherland's economic liberty jurisprudence with his First Amendment views. To this extent, it offers a new way of understanding both *Grosjean* and *Associated Press*. In turn, reappraisal of these cases may provide additional insight into some flaws with the modern Court's approach toward

---

*Justice George Sutherland, supra* note 19, at 71-72.

<sup>27</sup> Whereas *Grosjean* and *Associated Press* involved economic regulations of some effect upon expressive interests, the other First Amendment cases Sutherland encountered, for the most part, implicated primarily only issues of free speech, freedom of the press, or freedom of association. See, e.g., *Herndon*, 301 U.S. at 245 (invoking freedom of association and freedom of speech); *Gitlow*, 268 U.S. at 652 (upholding a seditious speech conviction).

<sup>28</sup> In *Grosjean*, a Louisiana license tax on two percent of the gross advertising receipts applied to only those newspapers whose weekly circulation exceeded 20,000 copies. As such, only thirteen of the state's 163 papers were subject to this seemingly neutral tax with differential effects. See *Grosjean v. American Press Co.*, 297 U.S. 233, 240-41 (1936). In *Associated Press*, the NLRB ordered the Associated Press to reinstate an editorial employee discharged, in large part, because of his leadership in the union that represented the news agency's editorial staff. See *Associated Press v. NLRB*, 301 U.S. 103, 123-25 (1937). The adversely affected newspapers in *Grosjean* claimed the Louisiana license tax abridged both their property and First Amendment rights. The Associated Press challenged the application of the National Labor Relations Act to its editorial operations, in part, as an infringement of both substantive due process and the First Amendment.

<sup>29</sup> For example, in *Near*, Sutherland joined in Justice Butler's dissenting opinion, which argued that the state could abate as a public nuisance the publication of a defamatory article in a newspaper. 283 U.S. at 723-38 (Butler, J., dissenting). While the dissenters implicitly recognized that the Minnesota law operated to curtail the economic liberty of publishers, they understood the Minnesota law as a reasonable exercise of state police powers for the benefit of the public as a whole. *Id.* at 735-37. Had the dissenters viewed the state law as one that operated for the benefit of one group at the expense of another — the *sine qua non* of political factionalism — they would have joined the majority in invalidating the law as a form of prior restraint. However, for Sutherland and the others in the *Near* dissent, the law in question did not operate unequally, and thus the state could restrict the offensive publication pursuant to common law concepts of nuisance. *Id.* at 735.



differential treatment of the press in general, and must-carry rules in particular. In many respects, each of these types of cases shares related characteristics with those of the 1930s in which Sutherland articulated, in inchoate judicial form, the nexus between economic liberty and freedom of expression. Essentially, the Court's present analysis of differential treatment of the press and must-carry rules lacks precision because many of the justices fail to perceive the close connection between economic liberty and freedom of expression, a relationship perhaps best characterized by the term "the business of expression."

As used in this article, the term "business of expression" refers to situations in which the legislature, at the behest of factions, has enacted a law that ostensibly regulates not only the manner of communication or expression within an industry, but also benefits certain businesses at the expense of their competitors. Distilled from the intersection of the First Amendment, economic substantive due process, and equal protection of the laws, the concept "business of expression" describes a relatively narrow set of circumstances in which under the guise of a seemingly neutral law, the legislature, through the influence of political factions, has created economic distinctions within a particular type of business or industry whose core activity is the dissemination of speech. "Business of expression" cases differ from those involving commercial speech<sup>30</sup> or limits on campaign spending<sup>31</sup> where First Amendment rights clearly overshadow incidental, or secondary, economic behavior, and the restrictions in question are laws of general application that do not promote one class of businesses to the detriment of others.<sup>32</sup>

In contrast, *Grosjean* and *Associated Press*, as well as their modern counterparts such as *Minneapolis Star* and *Turner*, exemplify how differential treatment of the press often arises through the existence of partial laws that affect both the First Amendment and economic interests of private parties. As a hybrid constitutional doctrine, the business of expression recognizes that the expressive and business functions of those affected by the governmental regulations may become so intertwined that, as a practical matter, it is impossible to consider the

---

<sup>30</sup> See, e.g., *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980) (invalidating an administrative order that proscribed utility companies from using advertising to encourage the consumption of electricity).

<sup>31</sup> See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1969) (sustaining limits on campaign contributions but holding unconstitutional restrictions on campaign expenditures).

<sup>32</sup> For example, a law prohibiting the advertisement of cigarettes on billboards affects all cigarette makers and their advertisers the same way. Conversely, a law that distinguishes between types of cigarette manufacturers, for example, on the basis of sales revenue, and thus permits smaller companies to advertise cigarettes on billboards but restricts larger companies from so doing would illustrate a partial law that benefits one group of businesses to the detriment of others. See, e.g., *Grosjean*, 297 U.S. 233 (1936) (involving a differential license tax on newspaper advertising). As such, this scenario might present a business of expression claim, whereas the first example would only involve commercial speech.

free expression issues in the absence of economic liberty.<sup>33</sup> Yet modern constitutional jurisprudence, with its ready distinction between economic and First Amendment rights, often sanctions partial economic laws as incidental restrictions of expression.<sup>34</sup> In so doing, it neglects the interplay between economic liberty and freedom of expression that forms the essence of business of expression cases.

In the gloaming of the *Lochner* era, Sutherland, through his insistence upon applying the same exacting standards of judicial review to economic and expressive regulations alike and his aversion toward political factions, intuitively formulated the business of expression concept. His legacy, however, remains forgotten as the Supreme Court has adhered to a traditional dichotomy between economic liberty and the First Amendment that, in a special set of cases, often ignores the extent to which regulations of expression may actually exemplify partial laws that really seek to benefit one group economically at the expense of other similarly situated businesses. In such cases, the Court should employ a nuance version of heightened scrutiny that considers more explicitly the respective economic *and* expressive interests of the affected parties when the government regulates private entities engaged in the business of expression.

The constitutional issues raised recently by the must-carry controversy reflect ambiguities in the Court's handling of differential taxation of the press disputes during the 1980s and into the 1990s. Accordingly, similar questions about the relationship between economic liberty and freedom of expression may very well reassert themselves in other contexts as the Court struggles to adapt traditional First Amendment analytical models to emerging forms of communications technology.<sup>35</sup> From this perspective, Sutherland's fundamental recognition during the 1930s of the convergence of economic liberty, political factions, and expressive activity is highly relevant to modern constitutional inquiry.

The first part of this article examines Sutherland's commitment to individualism and explains how it, together with his aversion toward political factions, influenced his economic liberty jurisprudence. Part two places Sutherland's thought in historical perspective. The third and fourth parts discuss in depth both the context of *Grosjean* and *Associated Press* and the manner in which Sutherland's analysis

---

<sup>33</sup> See, e.g., John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 54-57, 63, 91, 93, 97, 99, 110-15 (discussing the tendency of essentially bifurcated First Amendment judicial review to neglect the nexus between property rights and the First Amendment).

<sup>34</sup> See *infra* Part IV text and accompanying notes.

<sup>35</sup> See, e.g., Donald E. Lively, *The Information Superhighway: A First Amendment Roadmap*, 35 B.C. L. REV. 1067, 1067-69, 1076-91, 1091 (1994) (criticizing the use of different First Amendment standards for different forms of media notwithstanding the increasing convergence of media); Matthew D. Segal, Note, *The First Amendment and Cable Television: Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445 (1994), 18 HARV. J.L. & PUB. POL'Y 916, 928 (1995) (noting the competition posed by direct broadcast satellite television and telephone companies).

of the First Amendment in these cases reflected his conception of economic liberty. The fifth segment assesses the modern Court's analysis of differential treatment of the press and contends the Court has essentially ignored the connection between economic liberty and freedom of expression Sutherland implicitly set forth during the 1930s. The article ends with some thoughts about how the justices have compounded this problem in the context of their attempt to determine the constitutional status of must-carry rules. In conclusion, this article proposes a new form of heightened scrutiny in cases involving differential treatment of the press that more precisely considers the economic and expressive interests at stake.

## I. JUSTICE GEORGE SUTHERLAND, ECONOMIC LIBERTY AND CONCERNS ABOUT POLITICAL FACTIONS

While in-depth analysis of Justice Sutherland's jurisprudence of economic liberty is beyond the scope of this article, an overview of its main tenets provides an essential perspective from which to assess his Supreme Court opinions in *Grosjean* and *Associated Press*. Sutherland's implicit recognition of the nexus between economic and expressive rights emanated from his notions of individual liberty, political factions, and the role of government in a constitutional democracy. These ideas shaped his judicial thinking and reflected Sutherland's respect for legal tradition and historical custom.

### A. *Individualism, Democracy and Government*

#### 1. The Paramount Importance of Individual Liberty

Sutherland's profound concern for the individual influenced his views of law and government. Largely a self-made man and a product of the hard scrabble Utah frontier of the late nineteenth century, Sutherland, from an early age, appreciated the personal qualities of hard work, diligence, and initiative.<sup>36</sup> As a public figure before his years on the Supreme Court, and even in the twilight of his life after he left the bench, Sutherland often praised self-reliance and "sturdy individualism,"<sup>37</sup> which he considered important components of a thriving democracy. For example, in a commencement address at his alma mater, Brigham Young University, the

---

<sup>36</sup> Born in England in 1862, Sutherland thereafter emigrated with his family to the Utah territory. For an account of the financial hardships endured by the Sutherlands and a brief chronicle of young Sutherland's varied work experience, see PASCHAL, *supra* note 24, at 3-5.

<sup>37</sup> George Sutherland, Private Rights and Government Control, American Bar Association Annual Address (Sept. 4, 1917) (transcript available in the Sutherland Papers at the Library of Congress), reprinted in A.B.A., REPORT OF THE 40TH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION ABA 202 (1917) [hereinafter Private Rights].

elderly jurist exhorted the young graduates to "be independent. Do your own thinking. Act upon your own judgment and responsibility. Cultivate self[-]reliance."<sup>38</sup> He also warned that "nothing so soon and so effectually destroys the moral fibre as the habit of constantly referring doubts and difficulties to others. Solve them for yourselves. Look the world in the face as an individual unit and not merely as a part of the general mass."<sup>39</sup>

From Sutherland's perspective, robust individualism contributed to a vibrant democracy in which people learned to overcome personal hardship through earnest struggle and embraced responsibility for the course of their lives. To this extent, he thought that personal freedom was necessary to better oneself in both a material and moral sense, and that individual liberty strengthened the social fabric of democratic society.<sup>40</sup> The democracy he cherished was one marked by a dynamic culture that fostered productive activity and personal growth.

Accordingly, Sutherland was critical of governmental programs that he considered detrimental to the democratic values of individual initiative and self-reliance.<sup>41</sup> In particular, he worried that too much public interference in private economic affairs might "encourage . . . indolen[ce]"<sup>42</sup> and create a system of perverse incentives in which lethargic dependence upon others would eclipse the characteristics of personal independence imperative to long-term public welfare.<sup>43</sup> Writing to labor leader Samuel Gompers in 1916 during the height of Progressive era agitation for widespread economic and industrial reform, Sutherland, then a United States senator from Utah, confided that "[w]e must be careful not to overdo

---

<sup>38</sup> George Sutherland, Commencement Address at Brigham Young University 9 (n.d.) (transcript available in the Sutherland Papers at the Library of Congress) [hereinafter Brigham Young Commencement Address].

<sup>39</sup> *Id.*

<sup>40</sup> "[I]ndividual initiative [and] self-reliance . . . were necessary to develop a real democracy." Letter from George Sutherland, to Henry M. Bates, Dean, University of Michigan Law School (Apr. 21, 1937) (transcript available in the Sutherland Papers at the Library of Congress) [hereinafter Letter to Henry M. Bates].

<sup>41</sup> *Id.*

<sup>42</sup> George Sutherland, The Economic Value and Social Justice of a Compulsory and Exclusive Workmen's Compensation Law, Address before the Third Annual Convention of the International Association of Casualty and Surety Underwriters 11 (July 14, 1913) (Quebec, Canada) (transcript available in the Sutherland Papers at the Library of Congress), reprinted in S. Doc. No. 131 (1913) [hereinafter Economic Value and Social Justice].

<sup>43</sup>

One objection to governmental interference with the personal habits, or even the vices of the individual, is that it tends to weaken the effect of the self-convincing moral standards and to put in their place fallible and changing conventions as the test of right conduct, with the consequent loss of the strengthening value to the individual of the free exercise of his rational choice of good rather than evil.

our legislation and take from the individual the strengthening effect which comes from the struggle to help himself."<sup>44</sup>

As a legislator, he admonished both colleagues and constituents alike to "never lose sight of the vital distinction between helplessness, which is a misfortune, and laziness, which is a vice."<sup>45</sup> Wary of popular panaceas that offered imperfect and partial solutions to important problems, Sutherland steadfastly maintained that such irresponsible legislation "will not only fail to bring about the good results intended to be produced, but will gravely threaten the stability and further development of that sturdy individualism, to which is due more than any other thing our present advanced civilization."<sup>46</sup>

Throughout his public career Sutherland emphasized the primacy of individual liberty in a democratic republic. Personal autonomy, he insisted, meant freedom from governmental interference "except where necessary to protect the liberties or rights of other individuals or to safeguard society."<sup>47</sup> Insofar as he recognized the inherent tension between private rights and public order, Sutherland reasoned that the ultimate strength of society derived from its individuals. Government, therefore, was most effective when it did not impede the initiative of independent persons engaged in productive and moral activities but instead enhanced "the release of individual creative energy"<sup>48</sup> and maintained the security of personal rights through the equal operation of its laws. As Sutherland observed, "[i]ndividual liberty and the common good are not incompatible, but are entirely consistent with one another."<sup>49</sup>

Sutherland, however, was not an ardent Social Darwinist intent on minimizing the role of government in order to preserve a process of natural selection by which only the most fit citizens would survive in a ruthless competition for finite natural resources.<sup>50</sup> He appreciated how government could "stimulat[e] . . . personal

---

<sup>44</sup> Letter from George Sutherland to Samuel Gompers 3 (Jan. 15, 1916) (transcript available in the Sutherland Papers at the Library of Congress) [hereinafter Letter to Samuel Gompers]. Sutherland, for example, questioned the wisdom of proposals to enact minimum wage regulations that interfered with the private contractual relationship between an employer and his employee.

<sup>45</sup> Economic Value and Social Justice, *supra* note 42, at 12.

<sup>46</sup> Private Rights, *supra* note 37, at 202.

<sup>47</sup> *Id.*

<sup>48</sup> JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES 7 (1967). The eminent legal historian J. Willard Hurst used this phrase to describe the early nineteenth century transformation of American culture. Sutherland, who came of age during the latter half of the nineteenth century, embraced the Jacksonian ideals of equal opportunity and rugged individualism that Hurst's apt phrase described. See generally Olken, *Justice George Sutherland*, *supra* note 19 (placing Sutherland's jurisprudence of economic liberty in historical context).

<sup>49</sup> Private Rights, *supra* note 37, at 213.

<sup>50</sup> The leading proponents of late nineteenth century Social Darwinism were Herbert Spencer of Great Britain and William Graham Sumner, a professor at Yale. Essentially, a

effort”<sup>51</sup> through programs intended “to prevent or minimize the evils which give rise to the necessity for assisting the helpless.”<sup>52</sup> Indeed, Sutherland’s advocacy of worker’s compensation and support for legislation to improve labor conditions demonstrated his awareness that material progress was not without its harmful personal consequences.<sup>53</sup> Explaining the need for a fixed compensation system to redress the inequities under common law negligence often sustained by laborers in industrial accidents, Sutherland remarked with a mixture of compassion and gritty realism that:

There is a growing feeling that the individualistic theory has been pushed with too much stress upon the dry logic of its doctrines and too little regard for their practical operation from the humanitarian point of view . . . we can not always regulate our economic and social relations by scientific formulae, because a good many people perversely insist upon being fed and clothed and comforted by the practical rule of thumb rather than by the exact rules of logic.<sup>54</sup>

Government aid pursuant to a uniform scheme of compensation would, therefore, provide to injured workers and their families some economic independence they

---

theory of political economy which drew upon Malthusian economics and Darwinian notions of evolution, Social Darwinism posited that societal perfection could only arise through a process of natural selection by which those who developed the best adaptive attributes would become the most fit to survive. With its emphasis upon ruthless individual competition, Social Darwinism relegated government to a minimal role as peacemaker in social relations. Relatively few Americans subscribed to its orthodox tenets, which opposed public education, bi-metallism, protective tariffs, and labor regulations; policies which, to one extent or another, the vast majority of Americans supported. *See Olken, Justice George Sutherland, supra* note 19, at 31-33, 38.

<sup>51</sup> Economic Value and Social Justice, *supra* note 42, at 12.

<sup>52</sup> *Id.*

<sup>53</sup> In favor of worker’s compensation for railroad laborers, Sutherland remarked “we must take care that these people do not become wrecks, human driftwood in society . . . The law of negligence is hard; it is unjust, it is cruel in its operation. The law of compensation proceeds upon broad humanitarian principles.” 48 CONG. REC. 4846, 4853 (1912) (statement of Sen. Sutherland). In addition, Sutherland supported a compulsory eight-hour day for industrial workers because the inherent disparity between an employer and employee in most industries was not often alleviated by private contract, a problem he thought affected the public as a whole and not just a particular set of workers. *See* 48 CONG. REC. 6796, 6797 (1912) (statement of Sen. Sutherland). He also recognized the right of labor to organize unions and to strike for higher wages and improved working conditions. *See* Letter to Samuel Gompers, *supra* note 44. *See also* 51 CONG. REC. 11802, 11803 (1914) (statement of Sen. Sutherland). As a Utah politician, Sutherland had introduced legislation to regulate working conditions and hours in dangerous industries such as mining and smelting. *See PASCHAL, supra* note 24, at 36.

<sup>54</sup> Economic Value and Social Justice, *supra* note 42, at 11.

might not otherwise enjoy.<sup>55</sup>

## 2. Inherent Distrust of Democratic Majorities

For Sutherland, the ultimate objective of government was to preserve individual rights through the impartial restraint of the law.<sup>56</sup> Insofar as he cherished personal liberty, he remained throughout his life acutely aware of human foibles and their effects upon democracy. Consequently, he perceived that ignorance, intolerance, and selfishness were characteristics easily assumed by unrestrained democratic majorities. Sutherland worried about the "individual fallibility of the average man"<sup>57</sup> who, affected by caprice and the tide of popular sentiment, might accede to policies detrimental to long-term public welfare. "There can be no greater delusion than to suppose that by putting a ballot into the hands of a voter you thereby put wisdom into his head [...],"<sup>58</sup> Sutherland archly observed. Popular sovereignty was essential, but he also knew that "the will of the people as expressed from time to time through the decrees of the changing majority may be often unwise and sometimes unjust."<sup>59</sup>

He distinguished between a "pure democracy"<sup>60</sup> without limits marked by "the spasmodic and . . . despotic rule of the fluctuating majority"<sup>61</sup> and a democratic republic in which elected representatives engaged in the deliberate process of lawmaking pursuant to constitutional restrictions designed to curb popular tyranny.<sup>62</sup> Only a constitutional democracy, he thought, could preserve individual rights and liberties from the whims of majoritarian sentiment. Inherently distrustful of democratic majorities, he at times expressed open disdain for their abuse of power and refused to accept that popularity will alone render a cause of action wise or prudent.<sup>63</sup>

---

<sup>55</sup> *Id.* at 11-12; *see also* 48 CONG. REC. 4846, 4853 (1912) (statement of Sen. Sutherland) (commenting that in the absence of a compulsory compensation system, "the injured man or the family that is left . . . not compensated by the industry directly . . . [may] . . . become a charge upon society").

<sup>56</sup> *See* Private Rights, *supra* note 37, at 204.

<sup>57</sup> 47 CONG. REC. 2793, 2795 (1911) (statement of Sen. Sutherland).

<sup>58</sup> George Sutherland, The Courts and the Constitution, Address Before the American Bar Association (Aug. 28, 1912), *reprinted in* A.B.A., REPORT OF THE 35TH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 383 [hereinafter *The Courts and the Constitution*].

<sup>59</sup> *Id.* at 381; *see also* Sutherland, *What Shall We Do With the Constitution?*, at 3 (Utah Independent 1912) [hereinafter *Sutherland, What Shall We Do With the Constitution?*].

<sup>60</sup> The Courts and the Constitution, *supra* note 58, at 372 [emphasis in original]; *see also* Sutherland, *What Shall We Do With the Constitution?*, *supra* note 59, at 2.

<sup>61</sup> Sutherland, *What Shall We Do With the Constitution?*, *supra* note 59, at 2.

<sup>62</sup> *Id.*

<sup>63</sup> *See* The Courts and the Constitution, *supra* note 58, at 373, 383. A constitutional democracy with a representative form of government enabled "the sober and deliberate will

An incident from early in Sutherland's career illustrates this point. In 1906, the Senate Committee on Privileges and Elections recommended that the full Senate remove Utah's senior senator, Reed Smoot, from its membership because of allegations from Utah Protestants that Smoot, an apostle in the Mormon Church, endorsed polygamy and impermissibly allowed other Church leaders to influence his political judgment. Though not a Mormon, Sutherland knew that the charges against Smoot, elected to the Senate in 1903, were untrue and the product of vicious political machinations by enemies of both Smoot and the Mormon Church.<sup>64</sup>

In a speech noteworthy for its appeal to reason and logic, Sutherland urged his colleagues to not "permit themselves to be swayed in the slightest degree from a just determination of this case upon the merits by petitions, however numerous or by whomever signed."<sup>65</sup> Sutherland emphasized that removal on the basis of unsubstantiated hearsay evidence would punish Smoot because of misconceptions about his personal religious beliefs.<sup>66</sup> "[T]his is a case where the *right* of an individual is more sacred than the mere *demand* of *all* the people,"<sup>67</sup> Sutherland exclaimed, as he admonished the Senate to refrain from yielding to political expediency. Ultimately, Sutherland's view prevailed, and Reed Smoot retained his Senate seat.

Sutherland's skepticism about the wisdom of democratic majorities also prompted his opposition to the initiative, referendum and recall provisions of the constitution Arizona submitted for congressional approval in 1911 as a prerequisite to statehood.<sup>68</sup> Critical of the initiative and referendum because it encouraged direct of the people . . . [to] . . . be effectuated without . . . becoming the mere mechanical and helpless register of the passing whims and caprices and fleeting emotions of the constantly changing numerical majority." *Id.* at 373; *see also* 47 CONG. REC. 2793, 2796-98 (1911) (statement of Sen. Sutherland) (suggesting that the referendum in the proposed Arizona constitution would substitute the transient will of popular majorities for careful lawmaking characterized by thorough consideration of the facts and compromise in the public interest).

<sup>64</sup> Smoot was neither a polygamist nor did he endorse this practice. Instead he, like other Church leaders, adopted an attitude of benign neglect, thinking the rumors would die out naturally. In its manifesto of 1890, the Mormon Church officially disavowed polygamy, but it also realized the difficulty of retroactively prohibiting polygamous relationships. *See* 41 CONG. REC. 1486-97 (1907) (statement of Sen. Sutherland) (attributing the charges against Smoot to public hysteria and popular misconceptions about the Mormon Church and its influence in political affairs).

<sup>65</sup> *Id.* at 1486.

<sup>66</sup> *Id.* at 1497; *see also* 40 CONG. REC. 8218, 8226-28 (1906) (statement of Sen. Forager in dissent of Committee on Privileges and Elections recommendation to unseat Reed Smoot and suggesting adverse action against Smoot might violate his Free Exercise rights).

<sup>67</sup> 41 CONG. REC. 1486-87 (1907) (statement of Sen. Sutherland).

<sup>68</sup> The initiative and referendum bypassed the normal legislative process by allowing citizens to enact legislation or to veto it based on the wishes of a majority of voters. Similarly, recall permitted citizens to remove an elected official, or in some instances a judicial decision, at any time by a majority of votes. *See* GEORGE E. MOWERY, *THE ERA OF THEODORE ROOSEVELT AND THE BIRTH OF MODERN AMERICA* 1900-1912 81-82 (Harper



participation of the people in the framing, execution, and interpretation of laws, Sutherland regarded these reform measures as harmful because of their emphasis upon immediate satisfaction of the whims of popular majorities.<sup>69</sup> “[C]areless ignorance of the facts”<sup>70</sup> and impatience would supplant the deliberate process of lawmaking. Laws “would be framed, not by those who see the situation from different angles, but by those who all occupy the same point of view.”<sup>71</sup> Accordingly, Sutherland believed the initiative and referendum impeded social progress because of the enormous pressure it placed on elected representatives to put the interests of particular factions before those of the whole nation. He also worried that recall of elected officials and unpopular court decisions would make public servants more vulnerable to the fickle emotions of ephemeral majorities and thus compromise their judgment.<sup>72</sup>

### 3. Factional Aversion

Much of Sutherland’s apprehension emanated from his aversion toward political factions.<sup>73</sup> He thought the transient nature of democratic majorities rendered them inept at protecting individuals in the minority. Their myopic behavior, he reasoned, undermined the legitimacy of government as those in dominance often promoted their interests at the expense of others.<sup>74</sup> As a realist, he recognized that the natural turbulence within democracy enabled factions to control popular majorities and thus distort the democratic process for their selfish ends.<sup>75</sup>

In particular, Sutherland associated the illegitimate exercise of governmental authority with the pernicious influence of factions, whose emphasis on expediency often resulted in ill-conceived laws that benefitted a favored segment of the

---

Torchbooks 1962). Arizona and its sister territory, New Mexico, submitted model constitutions to Congress for approval in 1911 pursuant to the Enabling Act of 1910.

<sup>69</sup> See 47 CONG. REC. 2793, 2797-98, 2800, 2802 (1911) (statement of Sen. Sutherland).

<sup>70</sup> *Id.* at 2800; see also *id.* at 2897-98, 2800, 2802 (discussing the need for deliberation in lawmaking). Sutherland discounted the fleeting desires of the populace as a reliable criterion for governmental action. See *The Courts and the Constitution*, *supra* note 58, at 383. However, he did trust “the wisdom and justice of the persistent majority,” whose will emerged gradually and expressed itself best through the deliberative compromise of the legislative process. 47 CONG. REC. 2800 (1911) (statement of Sen. Sutherland).

<sup>71</sup> 47 CONG. REC. 2798 (1911) (statement of Sen. Sutherland).

<sup>72</sup> *Id.* at 2800.

<sup>73</sup> Olken, *Justice George Sutherland*, *supra* note 19, at 46.

<sup>74</sup> See *id.* at 45-46. He feared the tendency of factions “to subvert the liberties of the individuals, who, . . . may constitute the majority today and the minority tomorrow.” *The Courts and the Constitution*, *supra* note 58, at 381.

<sup>75</sup> See George Sutherland, *The Law and the People*, Address Before The Pennsylvania Society 6 (Dec. 13, 1913) (transcript available in the Sutherland Papers at the Library of Congress) [hereinafter *The Law and the People*].

populace and rarely bore a substantial relationship to the public welfare.<sup>76</sup> Laws that distinguished between groups on the basis of factional imperative, Sutherland derided as impermissible class legislation, or partial laws, because of their unequal effects: "[A]ny law which arbitrarily separates men into classes to be punished or rewarded, not according to what they do but according to the class to which they are assigned, is . . . despotic, no matter how large a majority may have approved it."<sup>77</sup> Moreover, class legislation was the "most odious form of legislative abuse,"<sup>78</sup> in contravention of the fundamental premise that the "law . . . shall operate generally."<sup>79</sup>

Sutherland's criticism of partial laws reflected longstanding concerns about the problem of factions. Indeed, his emphasis upon public welfare was reminiscent of English political reformers from centuries earlier for whom the legitimate exercise of power in a commonwealth derived from the neutrality of governmental action and the impartial restraint of the law.<sup>80</sup> In America, a plethora of post-revolutionary class legislation for the benefit of debtors that impaired the contract rights of creditors and undermined the security of private property fomented much anti-factional sentiment and led to the formation of the Constitution, with its limitations upon democratic majorities and restrictions upon arbitrary governmental power.<sup>81</sup> Yet James Madison, the Constitution's principal draftsman, knew that the inherent inequality of people's ability to acquire property created social divisions from which factions emerged "whether amounting to a majority or a minority of the whole . . . united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."<sup>82</sup> Consequently, Madison emphasized the importance of impartial laws in neutralizing political factions.<sup>83</sup>

---

<sup>76</sup> See George Sutherland, *Principle or Expedient?*, Address to the New York State Bar Ass'n 19 (Jan. 21, 1921), [hereinafter *Principle or Expedient?*]. Sutherland feared that class legislation "may constitute the first link in a chain of precedents which, beginning in necessity, passes from one gradation to another until, at length, it rests in mere favor." *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Private Rights*, *supra* note 37, at 212.

<sup>79</sup> *The Courts and the Constitution*, *supra* note 58, at 384.

<sup>80</sup> See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* 54-55 (1972); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 L. & HIST. REV. 293, 314-17 (1985).

<sup>81</sup> See WOOD, *supra* note 80, at 53-65; Benedict, *supra* note 80, at 316-17.

<sup>82</sup> THE FEDERALIST NO. 10, at 55 (James Madison) (The Heritage Press ed. 1945); see also *id.* at 56-67 (discussing inevitability of factions and their cause). See generally THE FEDERALIST NO. 57 (James Madison) (expressing disapproval of class legislation).

<sup>83</sup> See THE FEDERALIST NO. 10 (James Madison), *supra* note 82, at 58-61 (explaining that factions should neutralize each other in a large democratic republic); THE FEDERALIST NO. 51 (James Madison) (noting the attributes of separation of powers as a limitation upon governmental authority and a means for preserving individual rights from political factions); see also JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN*

Subsequent generations of American statesmen and jurists shared these convictions; perhaps the most noteworthy of whom was Thomas Cooley, one of Sutherland's law professors, author of an influential constitutional law treatise, and a member of the Michigan Supreme Court during the latter half of the nineteenth century. Cooley distinguished between partial laws that inured to the benefit of select groups and those of general application that advanced the interests of society as a whole.<sup>84</sup> A proponent of Jacksonian democracy, he approved of government action intended to promote equal opportunity and was critical of measures whose tenuous relationship to public welfare arbitrarily infringed upon individual liberty — especially the pursuit of property, which he regarded as essential to the enjoyment of other civil rights.<sup>85</sup>

Sutherland embraced this historical tradition and opposed "statutes . . . which select for privilege one class of great voting strength or set apart for special burdens another class of small numerical power at the polls."<sup>86</sup> Accordingly, he regarded the initiative, referendum, and recall with suspicion, convinced that if implemented they would release the unbridled passions and fleeting emotions of popular democratic majorities and facilitate factions.<sup>87</sup> Similarly, he opposed the Underwood Tariff Bill of 1913 because its reduced rates favored Southern cotton and sugar growers while leaving Western wool producers at a competitive disadvantage.<sup>88</sup>

Throughout his public career, Sutherland decried "the artificial inequalities of special privilege."<sup>89</sup> He perceived that class legislation delegitimized the principal components of a healthy democracy: individual initiative, self-reliance, and merit. A year before he joined the Supreme Court Sutherland explained:

[F]or if the hand of power shall ever be permitted to take from "A" and

---

CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 43-45, 177-80, 207 (1990).

<sup>84</sup> See THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 355, 389-94 (Da Capo Press 1972) (1868) [hereinafter COOLEY, CONSTITUTIONAL LIMITATIONS]; see also *People v. Salem*, 20 Mich. 452, 486-87 (1870) (Cooley, J.) (invalidating a law that conferred special economic benefits on a railroad as illegitimate class legislation).

<sup>85</sup> See, e.g., Alan Jones, *Thomas M. Cooley, and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 J. AM. HIST. 751, 752, 755-58, 760, 762-63 (1967) (attributing Cooley's anti-factionalism to Jacksonian Democracy).

<sup>86</sup> Private Rights, *supra* note 37, at 212.

<sup>87</sup> See 47 CONG. REC. 2793, 2797-98, 2800 (1911) (statement of Sen. Sutherland); see also *The Law and the People*, *supra* note 75, at 6 (characterizing the recall of judicial decisions as partial laws); Olken, *Justice George Sutherland*, *supra* note 19, at 45-47.

<sup>88</sup> See 50 CONG. REC. 4297 (1913) (statement of Sen. Sutherland) (explaining the necessity for a protective tariff that exemplified "a definite and defensible policy of general application").

<sup>89</sup> *Id.*

give to "B" merely because "A" has much and "B" has little, we shall have taken the first step upon that unhappy path which leads from a republic where every man may rise in proportion to his energy and ability, to a commune where energy and sloth, ability and ignorance, occupy in common the same dead level of individual despair.<sup>90</sup>

Consequently, Sutherland was aghast at the proliferation of partial laws intended to indulge the ephemeral desires of popular majorities and the factions which controlled them.<sup>91</sup>

#### 4. The Equal Operation of the Laws as a Democratic Ideal

Like Cooley, Sutherland realized that the legitimacy of governmental authority derived from the equal operation of its laws. Otherwise, chaos would ensue and in place of a government of laws would be one based upon fickle emotion.<sup>92</sup> Through the impartial restraint of its laws, government could neutralize political factions and protect individual rights from the unreliable tides of democracy. Laws that arbitrarily distinguished between groups or citizens were presumptively illegitimate and impaired true social progress.

Sutherland demonstrated his commitment to equality through the legislation he sponsored. For example, he enthusiastically supported universal suffrage because it afforded women voting rights equal to those of men and removed the artificial barrier of gender as an impediment to the exercise of a vital citizenship right.<sup>93</sup> Moreover, Sutherland advocated worker's compensation because its uniform allocation of benefits replaced the uncertain amount of damages available to injured

---

<sup>90</sup> Principle or Expedient?, *supra* note 76, at 18-19.

<sup>91</sup> See Private Rights, *supra* note 37, at 203-05. "[T]oo many laws are being passed in haste. Too many that simply reflect a temporary prejudice, a passing fad, a fleeting whim, a superficial view or an exaggerated estimate of the extent, or a mistaken impression of the quality of an evil." Principle or Expedient?, *supra* note 76, at 20; see also Private Rights, *supra* note 36, at 199.

<sup>92</sup> See Principle or Expedient?, *supra* note 76, at 8-9.

<sup>93</sup> See 51 CONG. REC. 3598, 3600-01 (1914) (statement of Sen. Sutherland). Sutherland explained that:

To deprive . . . [women] of the right to participate in government is to make an arbitrary division of the citizenship of the country upon the sole ground that one class is made up of men, and should therefore rule, and the other class is made up of women, who should therefore be ruled.

George Sutherland, Speech at Women's Suffrage Meeting, Belasco Theatre 3-4 (Dec. 12, 1915) (transcript available in the Sutherland Papers at the Library of Congress). Sutherland also introduced a joint resolution recommending a constitutional amendment giving women the franchise. See 53 CONG. REC. 75 (1915) (statement of Sen. Sutherland).

laborers under the common law and equitably spread the risk of loss within an industry.<sup>94</sup> These measures were consistent with his creed that “[t]he course of safety for society, as well as liberty for the individual, is to make and enforce laws which will keep free the gates of equal opportunity.”<sup>95</sup> Equality before the law was the *sine qua non* of Sutherland’s political philosophy and would become the touchstone of his jurisprudence.

## 5. Constitutional Limitations and an Independent Judiciary

Sutherland understood that without a written constitution, a government of laws would be an illusion. He knew from practical experience that democratic majorities could not always implement the actual will of the people because of their vulnerability to political factions.<sup>96</sup> Though relatively pessimistic about the wisdom of democratic majorities, he realized that the legitimacy of the Constitution derived from the will of the populace.<sup>97</sup> Yet he insisted that for the Constitution to function as the fundamental law of the land, it must curb the excesses of democracy.<sup>98</sup> Only then could individual rights be secure and the enduring will of the people remain paramount to political expediency and factional self-interest. Long before he joined the Court, Sutherland remarked:

Constitutions are made not only for the purpose of confining the representative agents of the people within definite boundaries, but also for the purpose of preventing hasty, ill-considered, and unjust action on the part of the majority of the people themselves. The written constitution is the shelter and the bulwark of what might otherwise be a helpless minority.<sup>99</sup>

Sutherland further explained that the Constitution was “the shield of the weak against the powerful and of the few against the many. The majority can always take care of itself, but without the checks of the Constitution the minority would live under the constant menace of the dangers which flow from sudden popular emotion or prejudice.”<sup>100</sup> Unchanged in the meaning of its limitations since its ratification

---

<sup>94</sup> See *Economic Value and Social Justice*, *supra* note 42, at 5-11. “[T]he compensation law substitutes the communistic idea of the benefit for the whole class in place of the individualistic theory which permits a minority of the class to recover much and the majority little or nothing.” *Id.* at 9.

<sup>95</sup> Principle or Expedient?, *supra* note 76, at 19.

<sup>96</sup> *Id.* at 18-19.

<sup>97</sup> See *The Courts and the Constitution*, *supra* note 37, at 375.

<sup>98</sup> *Id.* at 381-83.

<sup>99</sup> 47 CONG. REC. 2793, 2800 (1911) (statement of Sen. Sutherland).

<sup>100</sup> George Sutherland, Undated/Untitled Speech 2 (transcript available in the Sutherland Papers at the Library of Congress).

and subject to alteration only through the lengthy and deliberate process of amendment, the Constitution therefore made possible the impartial restraint of the law within a democratic republic.<sup>101</sup>

Insofar as Sutherland considered the Constitution a safeguard from the tyranny of democratic majorities, he thought an independent judiciary could best interpret the meaning of its provisions and thus preserve the primacy of law in a society based upon popular sovereignty. Sutherland attributed this special role of judges to their training in the common law and the respect for historical custom characteristic of *stare decisis*.<sup>102</sup> Unlike legislators expected to heed the popular demand for making laws, judges, whether appointed or elected, must "simply ... declare and apply the law of the Constitution."<sup>103</sup> Accordingly, he criticized the recall of unpopular judicial decisions and other attempts to restrict judicial review.<sup>104</sup> That which threatened an independent judiciary, he felt, impaired the ability of judges to protect individual rights through the careful scrutiny of laws to ensure their equal operation.

## II. JUSTICE SUTHERLAND, THE CONSERVATIVE JUDICIAL TRADITION AND HIS CONSTITUTIONAL JURISPRUDENCE OF ECONOMIC LIBERTY

### A. *The Conservative Judicial Tradition*

Once on the Supreme Court, Sutherland closely adhered to a conservative judicial tradition in which jurists, influenced by factional aversion, often invalidated partial laws that benefitted some groups at the expense of others and upheld measures of equal operation that clearly promoted the public interest in health,

---

<sup>101</sup> See Sutherland, *What Shall We Do With the Constitution?*, *supra* note 59, at 1-4. "The great purpose of the Constitution is to . . . preserve the rights of the citizen by the definite and unchanging law of the land, instead of leaving him at the mercy of the transitory opinions of a constantly changing majority." *Id.* at 4.

<sup>102</sup> See Olken, *Justice George Sutherland*, *supra* note 19, at 54-56.

<sup>103</sup> George Sutherland, Undated Speech on Utah Judiciary 4, 18 (transcript available in the Sutherland papers at the Library of Congress). Moreover, Sutherland noted that, whereas legislators might enact some laws because of political expediency, a judge has no constituents and therefore need not base a decision upon the apparent popularity of a law. See *The Law and the People*, *supra* note 75, at 5. An independent judiciary, therefore, would likely eschew political expediency and maintain the equal operation of the law. "The law must apply to all alike. The making of law is an exercise of the *will* of the state; the interpretation and application of the law is an exercise of the *reason* of the judge." *Private Rights and Government Control*, *supra* note 37, at 204-05.

<sup>104</sup> See *The Courts and the Constitution*, *supra* note 58, at 384. Sutherland believed that recall "advocate[s] a method by which the *rights* of the minority shall be subordinate to the *will* of those who for the time being predominate in numbers." Sutherland, *What Shall We Do With the Constitution?*, *supra* note 59, at 3.

safety, morals, or welfare.<sup>105</sup> A student of history with a strong sense of the common law, Sutherland implicitly understood that class legislation and the political factions responsible for its creation threatened the security of personal rights in a democratic society.

### 1. Judicial Skepticism of Political Factions in Historical Perspective

From the outset, the constitutional Framers realized that those with relatively little property would comprise the majority of citizens, from whom factions would likely arise to facilitate the passage of laws favorable to their self-interest but harmful to those in the minority with large amounts of property. Alexander Hamilton, among others, foresaw judicial review as a mechanism for preserving private property from the fleeting emotions of popular democratic majorities,<sup>106</sup> and under the leadership of Chief Justice John Marshall the Supreme Court invoked the Contract Clause to protect private economic rights from the redistributive effects of partial laws. Ostensibly distinguishing between law and politics, the Marshall Court applied the concept of vested rights to prevent political factions from impairing the obligation of contracts and infringing upon the security of private property through retroactive legislation.<sup>107</sup> As Marshall explained in *Fletcher v. Peck*,<sup>108</sup> wherein the Court invalidated Georgia's revocation of a prior legislative land grant through which hundreds of bona fide third party purchasers claimed title to millions of acres, the Contract Clause was meant "to shield . . . property from the effects of those sudden and strong passions to which men are exposed."<sup>109</sup>

Over time, the Marshall Court's solicitude for vested rights yielded to a more instrumental conception of public welfare critical of government intervention that conferred exclusive monopolies and other special economic privileges. Influenced by Jacksonian democracy, which promoted individualism and equality before the law, judges began to regard the impartial restraint of the law as integral to economic

---

<sup>105</sup> See generally GILLMAN, *supra* note 1 (discussing the pattern of *Lochner* era police powers jurisprudence); see also Olken, *Justice George Sutherland*, *supra* note 19, at 9-36 (describing the conservative judicial tradition).

<sup>106</sup> See THE FEDERALIST NO. 78, at 525 (Alexander Hamilton) (The Heritage Press ed. 1945).

<sup>107</sup> See, e.g., *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (holding the Contract Clause prohibited New Hampshire from divesting the pre-existing charter rights of a private college); *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819) (invalidating a New York insolvency statute that retroactively discharged a debtor from an antecedent contract obligation). But see *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827) (upholding a prospective New York insolvency law). Marshall, however, thought that *both* retroactive and prospective insolvency laws violated the Contract Clause. See *id.* at 354-57 (Marshall, C.J., dissenting) (attributing these acts to factional impulses comparable to those responsible for post-revolutionary debtor relief laws).

<sup>108</sup> 10 U.S. (6 Cranch.) 87 (1810).

<sup>109</sup> *Id.* at 138.

liberty and equal opportunity.<sup>110</sup> They construed "law of the land" provisions within state constitutions to mandate the neutrality of government in private economic affairs and equated laws of general application with the public good.<sup>111</sup> Consequently, they differentiated the right to acquire property through the equal operation of the law from the creation of artificial privilege with which they associated vested rights.

Thus, in *Charles River Bridge v. Warren Bridge*,<sup>112</sup> the Supreme Court rejected the contention of a toll bridge company that Massachusetts's subsequent charter of a competitor impaired its exclusive franchise rights in violation of the Contract Clause.<sup>113</sup> Chief Justice Taney's narrow reading of the initial corporate charter eschewed any implication of monopoly, and he instead sustained the authority of the commonwealth to foster competition in the public interest.<sup>114</sup> In other instances, courts upheld legislation that advanced public health, safety, morals, or welfare, but invalidated partial laws that arbitrarily distinguished between groups or persons by singling them out for either preferential or discriminatory treatment.<sup>115</sup>

During the latter half of the nineteenth century, judges began to use substantive due process to assess the legitimacy of state police powers. Long part of the common law tradition, due process initially functioned as a procedural restriction upon government when it sought to infringe upon a person's life, liberty, or property without a judicial proceeding.<sup>116</sup> Yet as local governments increasingly used their police powers to regulate private economic affairs, the Due Process Clause of the Fourteenth Amendment, and comparable provisions within state constitutions, emerged as substantive limitations. Concerned with preserving both the value and use of property,<sup>117</sup> judges examined not only the form of legislation

---

<sup>110</sup> See Olken, *Justice George Sutherland*, *supra* note 19, at 17-20.

<sup>111</sup> See, e.g., *Vanzant v. Waddel*, 8 Tenn. (2 Yer.) 230, 239-40 (1829) (defining "law of the land" as a law of general application and upholding legislation that provided additional remedies to bank creditors).

<sup>112</sup> 36 U.S. (11 Pet.) 420 (1837).

<sup>113</sup> *Id.* at 548-52.

<sup>114</sup> Taney said: "[I]n grants by the public, nothing passes by implication." *Id.* at 546. See also *id.* at 552-53 (claiming an implied monopoly would impede progress and promote economic waste in the use of an important river); see generally STANLEY I. KUTLER, *PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE* (1971) (suggesting Taney's literal construction of the charter reflected his preference for local economic development over stagnant vested rights).

<sup>115</sup> See, e.g., *Bronson v. Kinzie*, 42 U.S. (1 How.) 311 (1843) (invalidating, under the Contract Clause, an Illinois law that extended the period for redeeming foreclosed real property).

<sup>116</sup> See Paul Kens, *The Source of a Myth: Police Powers of the States and Laissez Faire Constitutionalism, 1900-1937*, 35 J. AM. LEG. HIST. 70, 75 (1991).

<sup>117</sup> Justices Stephen J. Field and Joseph P. Bradley, in particular, understood that both tangible and intangible property rights inhered within liberty of contract. See, e.g., *Munn v. Illinois*, 94 U.S. 113, 141 (1877) (Field, J., dissenting) ("All that is beneficial in property



enacted pursuant to local police powers, but also its substance in order to distinguish between illegitimate partial laws and those that bore a substantial relationship to the public interest.<sup>118</sup> Consequently, laws that did not fit within the narrowly prescribed police power categories of public health, safety, morals, or welfare rarely withstood close scrutiny by judges committed to preserving economic liberty from the whims and passions of transient democratic majorities.<sup>119</sup>

Within this context, judges increasingly relied upon the doctrine of liberty of contract to determine whether the spate of reform measures enacted to improve industrial conditions interfered with "the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others."<sup>120</sup> Based upon the premise that a person has a property interest in his labor, freedom of contract evolved into both a property right and a liberty interest protected by the Constitution from the partial laws of political factions.<sup>121</sup> Insofar as judicial

---

arises from its use, and the fruits of that use; and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession."); *see also* *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 757 (1884) (Field, J., and Bradley, J., concurring); *id.* at 762 (both characterizing freedom of contract as an inalienable right integral to the pursuit of personal happiness); *The Slaughterhouse Cases*, 83 U.S. 36, 122 (1873) (Bradley, J., dissenting) (invoking liberty of contract). Eventually, a majority of the Court adopted Field's and Bradley's view. *See, e.g.,* *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating maximum hours legislation as an unconstitutional abridgement of liberty of contract).

<sup>118</sup> *See, e.g.,* *Mugler v. Kansas*, 123 U.S. 623, 661 (1887) (asserting that "courts are not bound by mere forms . . . [but] are at liberty- indeed, are under a solemn duty — to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority"). In *Mugler*, the Court upheld Kansas' proscription of the manufacture or sale of alcohol as a legitimate exercise of its police powers.

<sup>119</sup> As Justice Stephen Field explained:

If the courts could not . . . examine . . . the real character of the act, but must accept the declaration of the legislature as conclusive, the most valued rights of the citizen would be subject to the arbitrary control of a temporary majority . . . , instead of being protected by the guarantees of the Constitution.

*Powell v. Pennsylvania*, 127 U.S. 678, 696-97 (1888) (Field, J., dissenting).

<sup>120</sup> *See Butchers' Union Co.*, 111 U.S. at 757. (Field, J., concurring).

<sup>121</sup> *See, e.g.,* *The Slaughterhouse Cases*, 83 U.S. at 83-111 (Field, J., dissenting); *id.* at 111-24 (Bradley, J., dissenting) (both asserting that a slaughterhouse monopoly infringed on the property and liberty rights of independent butchers to pursue a lawful trade). As Bradley explained, the New Orleans ordinance interfered with the butchers' freedom of contract when it "deprive[d] them of liberty as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property." *Id.* at 122. Insofar as Justices Field and Bradley acknowledged the city of New Orleans could regulate the location of animal slaughter pursuant to its police powers, they doubted whether the creation of a butchers' monopoly actually promoted the public interest in public health or safety. *Id.* at 87 (Field, J. dissenting). Bradley said the monopoly "is not a police

adoption of liberty of contract reflected traditional skepticism about class legislation, it also showed how judges assumed, sometimes naively and incorrectly, that employers and employees could bargain on equal terms with each other about conditions of employment.

Consequently, the application of liberty of contract to labor regulations could be quite inflexible where, as in *Lochner v. New York*,<sup>122</sup> a divided Court invalidated part of a state law that prescribed maximum hours for bakers because of the perception that it did not bear a close relationship to public wealth, safety, morals, or welfare. Justice Holmes, in a caustic dissent, criticized the *Lochner* majority for its narrow view of state police powers and suggested that economic substantive due process merely disguised the personal prejudices of judges who imbued constitutional analysis with principles of laissez faire economics and Social Darwinism.<sup>123</sup>

Yet in the vast majority of cases, courts sustained legislative attempts to regulate private economic affairs,<sup>124</sup> belying Holmes's view that the predominantly conservative characteristics of economic substantive due process reflected a conscious effort by judges to maintain the industrial status quo and preserve the property rights of an economic elite. Indeed, the principal concern of *Lochner* era jurists was with ephemeral popular majorities and the political factions that controlled them. Relying primarily upon historical custom and common law methodology, rather than on principles of laissez faire economics, natural law, or Social Darwinism, courts sought to protect economic liberty from popular democratic majorities and political factions.<sup>125</sup> In essence, liberty of contract signified a broad conception of individual freedom,<sup>126</sup> and the close scrutiny of

---

regulation . . . it is one of those arbitrary and unjust laws made in the interests of a few scheming individuals." *Id.* at 120 (Bradley, J., dissenting). The United States Supreme Court formally endorsed the concept of liberty of contract in *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

<sup>122</sup> 198 U.S. 45, 57-64 (1905).

<sup>123</sup> *Id.* at 75 (Holmes, J., dissenting) (criticizing the majority for a decision based "upon an economic theory which a large part of the country does not entertain" and proclaiming that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics"). Holmes also remarked that "a constitution is not intended to embody a particular economic theory", and accused the Court of using substantive due process to "prevent the natural outcome of a dominant opinion." *Id.* at 75-76.

<sup>124</sup> See Olken, *Justice George Sutherland*, *supra* note 19, at 7, 31.

<sup>125</sup> *Id.* at 33-35.

<sup>126</sup> Implicit within the Court's late nineteenth and early twentieth century recognition of economic substantive due process was an expansive definition of liberty. Both Justices Bradley and Field initially articulated this notion in their dissenting opinions in *The Slaughterhouse Cases*, when they suggested that the Fourteenth Amendment Due Process Clause protected the freedom of individuals to pursue lawful occupations and that such freedom emanated from the pursuit of personal happiness at the heart of constitutional liberty. See *The Slaughterhouse Cases*, 83 U.S. 36, 87-89, 93, 101-11 (1873) (Field, J.,

economic regulations conducted by *Lochner* era judges, presaged modern judicial recognition of non-economic interests involving the First Amendment and the right to privacy.<sup>127</sup> George Sutherland would draw upon these jurisprudential premises

dissenting); *id.* at 116-122 (Bradley J., dissenting). In *Butchers' Union Co. v. Crescent City Co.*, they reasserted that liberty meant more than freedom from physical constraint — it also signified "[t]he right to follow any of the common occupations." 111 U.S. 746, 762 (1884) (Bradley, J. concurring). See also *Powell v. Pennsylvania*, 127 U.S. 678 (1888) (implicitly acknowledging the constitutional importance of liberty of contract while upholding a Pennsylvania oleomargarine law as a legitimate police power regulation). In *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), the Supreme Court formally recognized liberty of contract as part of the liberty protected by the Due Process Clause of the Fourteenth Amendment. Thereafter, liberty of contract enjoyed preeminent constitutional status until the 1930s. See, e.g., *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923); *Coppage v. Kansas*, 236 U.S. 1 (1915); *Lochner v. New York*, 198 U.S. 45 (1905). As a constitutional doctrine, liberty of contract accommodated both tangible and intangible property rights. Indeed, its emphasis upon preserving the pursuit of property through a lawful occupation — in and of itself an intangible property right — ultimately made possible the Court's eventual recognition that the Liberty Clause of the Fourteenth Amendment also protected individuals' other intangible rights such as freedom of expression from incursion by the states. See Charles Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 446-58 (1926).

<sup>127</sup> In 1925, the Supreme Court expressly ruled for the first time that the Due Process Clause of the Fourteenth Amendment incorporates the First Amendment's Free Speech and Free Press Clauses. See *Gitlow v. New York*, 268 U.S. 652 (1925). In *Gitlow*, Justice Sanford, writing for the majority, stated that "we . . . 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 Fourteenth Amendment from impairment by the States." *Id.* at 666. *Gitlow's* acknowledgment that freedom of expression is part of the liberty protected by the Due Process Clause of the Fourteenth Amendment emanated, in large part, from a growing recognition by several members of the Court that liberty encompassed a broad spectrum of personal rights aside from the freedom of contract. See, e.g., *Pierce v. Soc. of Sisters*, 268 U.S. 510 (1925) (decided one week before *Gitlow*) (finding that Fourteenth Amendment liberty includes parental/guardian autonomy concerning their children's education); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (ruling that the acquisition of useful knowledge is within the liberty protected by the Fourteenth Amendment); *Gilbert v. Minnesota*, 254 U.S. 325, 343 (1920) (Brandeis, J., dissenting) (suggesting that if freedom of contract is within the ambit of liberty protected by the Fourteenth Amendment Due Process Clause, so should the liberty to teach others and communicate about pacifism); *Twining v. New Jersey*, 211 U.S. 78 (1908) (suggesting in dicta that the liberty protected by the Due Process Clause of the Fourteenth Amendment from state encroachment included some of the rights guaranteed in the first eight amendments). *Twining*, therefore, anticipated both the expansive concept of Fourteenth Amendment liberty characteristic of subsequent twentieth century constitutional jurisprudence and the process of selective incorporation by which the Court would identify which portions of the Bill of Rights would be made applicable to the states through the Due Process Clause of the Fourteenth Amendment. See also *Berea College v. Kentucky*, 211 U.S. 45, 67 (1908) (Harlan, J., dissenting) (suggesting that the right to teach is not only a property right akin to freedom of contract but also a fundamental liberty protected from state incursion by the Due Process Clause of the Fourteenth Amendment); *Patterson v. Colorado*,

when, in his opinions in *Grosjean* and *Associated Press*, he set forth the close connection between economic liberty and freedom of expression.

## 2. Justice George Sutherland and Economic Liberty

George Sutherland was an associate justice of the United States Supreme Court from 1922 to 1938. His jurisprudence of economic liberty, with its emphasis upon the preservation of private economic rights through the equal operation of the law, bore the influence of longstanding constitutional values shaped by historical custom and the common law. Factional aversion underscored this tradition, which guided Sutherland throughout his public career. Like conservative jurists before him, Sutherland sought to protect individual rights and liberties from the whims of democratic majorities manipulated by political factions eager to promote their selfish needs at the expense of the public good. From this perspective, Sutherland differentiated between partial laws, enacted on behalf of special interest groups that did not substantially advance public health, safety, morals, or welfare, and laws of equal operation for the benefit of the community as a whole. During his sixteen years on the Court, he persisted in carefully scrutinizing economic regulations even as the realities of the Depression rendered obsolete many of the *Lochner* era's assumptions about the government's role in private economic affairs. Insofar as Sutherland may have erred in his assessment of local police powers during his last years on the Court, his commitment to equality, intuition about political factions, and recognition of property rights as a constitutional paradigm for other individual liberties ultimately enabled him to perceive a nexus between economic liberty and freedom of expression he may not have otherwise appreciated.

Sutherland's aversion toward political factions was the linchpin of his jurisprudence, and liberty of contract the prism through which he determined the constitutional limits of governmental intervention into private economic affairs. While he acknowledged that freedom of contract was not absolute,<sup>128</sup> he nevertheless considered it an element of personal liberty as well as a property right, and throughout his tenure on the Court he remained skeptical of legislative schemes that threatened the autonomy of businesses to establish wages,<sup>129</sup> the prices they

---

205 U.S. 454, 465 (1907) (Harlan, J., dissenting) (asserting "that the privileges of free speech and of a free press . . . constitute an essential part . . . of everyman's liberty, and are protected against violation by that clause of the Fourteenth Amendment forbidding a State to deprive any person of his liberty without due process of law"). *But see* *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 538, 543 (1922) (stating that the Fourteenth Amendment does not make the First Amendment applicable to the states). *Gitlow* disavowed this observation from *Prudential Ins. Co.* See *Gitlow*, 268 U.S. at 666. For an excellent discussion of these cases, see Warren, *supra* note 126, at 432, 451-58.

<sup>128</sup> See *Adkins*, 261 U.S. at 546.

<sup>129</sup> See, e.g., *id.*; *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 401-14 (1937) (Sutherland, J., dissenting). He also joined in the majority opinion in *Morehead v. New York*

charged,<sup>130</sup> or restricted their access to local markets.<sup>131</sup> Though much maligned for his often inflexible application of late nineteenth century economic substantive due process concepts to the industrial problems spawned by the Depression, Sutherland's jurisprudence of economic liberty reflected his relatively progressive views as a senator and influenced his inchoate recognition in *Grosjean* and *Associated Press* of the business of expression.

a. *Class Legislation and Private Economic Affairs*

Sutherland's analysis of minimum wage regulations is a prime example of how anti-factional bias pervaded his constitutional interpretation and molded his conception of judicial review. In *Adkins v. Children's Hospital*,<sup>132</sup> Sutherland wrote the majority opinion for a divided Court that invalidated a District of Columbia minimum wage law applicable only to women. Unpersuaded that this measure actually promoted the health or moral welfare of its intended beneficiaries, Sutherland regarded the minimum wage provision as a capricious interference with contractual liberty that disrupted the inherent equality he presumed existed between employers and employees to bargain over the actual value of labor.<sup>133</sup> In part, he thought the law unreasonable because it imposed a minimum wage requirement in disregard of either the worth of the services provided by female workers or the ability of employers to make such payments.<sup>134</sup> Moreover, he considered this type of industrial regulation unnecessarily paternalistic because it assumed that women

---

*ex rel. Tipaldo*, 298 U.S. 587 (1936), that invalidated New York's minimum wage law.

<sup>130</sup> See, e.g., *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929) (Sutherland, J.) (invalidating a Tennessee law setting price of gas); *Ribnik v. McBride*, 277 U.S. 350 (1928) (Sutherland, J.) (invalidating a New Jersey regulation of fees charged by employment agencies), *overruled by Olsen v. Nebraska*, 313 U.S. 236, 244 (1941); *Tyson and Brother v. Banton*, 273 U.S. 418 (1927) (Sutherland, J.) (invalidating a New York law regulating the resale prices for entertainment tickets).

<sup>131</sup> See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (Sutherland, J.) (invalidating an Oklahoma law restricting the manufacture, distribution, and sale of ice); *Frost v. Corp. Comm'n*, 278 U.S. 515 (1929) (Sutherland, J.) (invalidating an Oklahoma statute exempting agricultural and horticultural cooperatives from cotton gin licensing requirements).

<sup>132</sup> 261 U.S. 525 (1923).

<sup>133</sup> *Id.* at 545 (asserting that "the parties have an equal right to obtain from each other the best terms they can as the result of private bargaining"); see also *id.* at 555-62.

<sup>134</sup> *Id.* at 555-58. Sutherland explained:

The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employee is capable of earning it, but irrespective of the ability of his business to sustain the burden.

*Id.* at 557.

could not bargain as effectively for a living wage as their male counterparts, a premise he believed untenable in light of advances in women's suffrage and their increased political power.<sup>135</sup>

After *Adkins*, Sutherland continued to view laws that prescribed a minimum wage as illegitimate class legislation whose unequal operation created arbitrary distinctions unrelated to the public interest in health, safety, morals, or welfare.<sup>136</sup> He also dissented in *West Coast Hotel Co. v. Parrish*,<sup>137</sup> which sustained a Washington state minimum wage regulation for women as a reasonable exercise of local police powers and thus overruled *Adkins*. Appalled at the deference the majority accorded this law, Sutherland explained that to prohibit women from voluntarily working at substandard rates ironically encouraged employers to instead hire men for whom there was no such minimum wage requirement and thus impeded the economic opportunity of women.<sup>138</sup>

Primarily concerned with preserving individual economic rights and liberties from the artifice of political factions, Sutherland considered minimum wage legislation particularly inimical to the public welfare because it allowed the whims of transient democratic majorities to interfere with the sanctity of private contracts, a pervasive theme in his jurisprudence. Three years earlier, for example, in *Home Building & Loan Ass'n v. Blaisdell*,<sup>139</sup> Sutherland had argued, in dissent, that a Minnesota statute violated the Contract Clause when it retroactively extended the period for mortgagors to redeem foreclosed property in contravention of the express terms of a mortgage contract.<sup>140</sup> A bare majority of the Court had sustained the law, enacted on behalf of anxious mortgagors, as a reasonable exercise of local police powers intended to provide temporary relief during an economic emergency.<sup>141</sup> In contrast, Sutherland believed it impermissibly impaired the contract rights of the mortgagee and decried "the attempt . . . to shift the misfortune of the debtor to the

---

<sup>135</sup> *Id.* at 553 (discussing the 1920 ratification of the Nineteenth Amendment). Sutherland commented: "No distinction can be made between women . . . and men, for certainly, if women require a minimum wage to preserve their morals men require it to preserve their honesty." *Id.* at 556.

<sup>136</sup> Prior to 1937, Sutherland joined in three Court decisions that struck down minimum wage legislation for women. *See, e.g.,* *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936); *Donham v. West-Nelson Mfg. Co.*, 273 U.S. 657 (1927) (*per curiam*); *Murphy v. Sardell*, 269 U.S. 530 (1925) (*per curiam*).

<sup>137</sup> 300 U.S. 379 (1937).

<sup>138</sup> *Id.* at 409-13 (Sutherland, J., dissenting). In *Adkins*, Sutherland noted that one of the plaintiffs, Willie Lyons, lost her job as a hotel operator for which she would have voluntarily continued to work at a wage below that prescribed by the D.C. labor board, when her employer fired her to avoid criminal sanctions for violating the minimum wage standard. *See Adkins*, 261 U.S. at 542-43 (1923).

<sup>139</sup> 290 U.S. 398 (1934).

<sup>140</sup> *See id.* at 448-83 (Sutherland, J., dissenting).

<sup>141</sup> *Id.* at 435, 437-39, 442-47 (Hughes, C.J.).

shoulders of the creditor . . . ” as illegitimate class legislation.<sup>142</sup>

Like *Blaisdell*, *West Coast Hotel* required the justices to reassess constitutional limits on police powers in the context of an unprecedented depression which shook to the core fundamental assumptions about the appropriate role of government in private economic affairs. In both cases, the same five justices<sup>143</sup> sought to replace the relatively narrow, categorical conception of local police powers upon which *Adkins* and *Lochner* rested with a more pragmatic, deferential standard that essentially balanced private rights with the public interest.<sup>144</sup> Sutherland, however, vigorously resisted this jurisprudential shift; his fear of factions and strong sense of judicial duty compelled him to observe that “the meaning of the Constitution does not change with the ebb and flow of economic events.”<sup>145</sup> Though no longer part of the Court majority in many economic regulation cases by the late 1930s, Sutherland never wavered from his conviction that “the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members.”<sup>146</sup> Constitutional limitations such as the Contract Clause or economic substantive due process, therefore, existed to restrain the tyranny of popular democratic majorities under all circumstances.<sup>147</sup>

Sutherland, like conservative jurists before him, considered economic regulations invalid unless they bore a close and substantial relationship to some aspect of the public welfare.<sup>148</sup> Thus, he differentiated minimum wage laws, which he thought remotely advanced the needs of society, from worker’s compensation<sup>149</sup> and maximum hour regulations<sup>150</sup> intended to improve the health, safety, and moral

---

<sup>142</sup> *Id.* at 472 (Sutherland, J., dissenting).

<sup>143</sup> Chief Justice Hughes and Associate Justices Cardozo, Brandeis, Stone, and Roberts comprised the majority. Associate Justices Sutherland, Butler, McReynolds, and Van Devanter were the dissenters.

<sup>144</sup> *See, e.g.*, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391, 398-400 (1937) (Chief Justice Hughes explaining the need for governmental intervention in the workplace to prevent the self-interest of some employers from subverting the public welfare); *Blaisdell*, 290 U.S. at 442 (Chief Justice Hughes noting “a growing appreciation of public needs and of the necessity for finding a rational compromise between individual rights and the public welfare”).

<sup>145</sup> *West Coast Hotel*, 300 U.S. at 402 (Sutherland, J., dissenting); *see also Blaisdell*, 290 U.S. at 450-51 (Sutherland, J., dissenting).

<sup>146</sup> *Adkins v. Children’s Hosp.*, 261 U.S. 525, 561 (1923).

<sup>147</sup> *See, e.g.*, *West Coast Hotel*, 300 U.S. at 401-04; *Blaisdell*, 290 U.S. at 448-53, 465, 482-83.

<sup>148</sup> *See, e.g.*, *Liggett Co. v. Baldridge*, 278 U.S. 105, 111-12 (1928) (invalidating a Pennsylvania restriction on ownership of pharmacies). In *New State Ice Co. v. Liebmann*, 285 U.S. 262, 279 (1932), Sutherland explained that to be reasonable police powers must be “applied with appropriate impartiality.” *Id.* at 279.

<sup>149</sup> *See, e.g.*, *Bountiful Brick Co. v. Giles*, 276 U.S. 154 (1928) (Sutherland, J.) (sustaining worker’s compensation laws); *Cudahy Packing Co. v. Parramore*, 263 U.S. 418 (1923) (Sutherland, J.) (same).

<sup>150</sup> *See, e.g.*, *Radice v. New York*, 264 U.S. 292 (1924) (sustaining maximum hours

welfare of many citizens. He also worried that some legislative attempts to fix the prices of commodities and services merely represented illegitimate forms of class legislation enacted for the benefit of some groups at the expense of others in derogation of the principle that the government should not interfere in private economic affairs unless it does so pursuant to a compelling public purpose in an impartial manner calculated to benefit the community in its entirety.<sup>151</sup> In *Tyson and Brother v. Banton*,<sup>152</sup> for example, Sutherland rejected the notion that New York could prescribe the resale price of theater tickets charged by private companies pursuant to merely the general objective of protecting consumers from exorbitant fees and fraud. He reasoned that this type of commercial activity did not comprise at common law a business sufficiently affected with the public interest to warrant so intrusive an interference with the freedom of ticket brokers to peddle their items.<sup>153</sup>

b. *Economic Liberty as a Constitutional Paradigm*

Skeptical of partial laws that restricted private enterprise through the guise of local police powers, Sutherland applied substantive due process in part to preserve economic opportunity. In *New State Ice Co. v. Liebmann*,<sup>154</sup> he criticized an Oklahoma law that authorized a state commission to issue licenses for the manufacture, sale, and distribution of ice only to those applicants who could prove a public need existed for these services in their intended geographical markets. Sutherland, who wrote the majority opinion for a divided court, believed this limitation arbitrarily reduced competition within the ice industry for the benefit of

---

regulation for women). Whereas in *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) and *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), Sutherland did not think physiological differences between men and women were relevant in minimum wage legislation, and he considered them a legitimate basis for distinction in the state's attempt to protect women's health and welfare. See *id.* at 295 (distinguishing *Adkins*).

<sup>151</sup> See, e.g., *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929) (Sutherland, J.) (invalidating a Tennessee gas price fixing law); *Ribnik v. McBride*, 277 U.S. 350 (1928) (Sutherland, J.) (invalidating a New Jersey price regulation of employment agency fees), *overruled by Olsen v. Nebraska*, 313 U.S. 236, 244 (1941).

<sup>152</sup> 273 U.S. 418 (1927). In fact, Sutherland found no connection between the asserted state interest and the resale of tickets in excess of the fifty-cent charge permitted by law. *Id.* at 445.

<sup>153</sup> See *id.* at 430-31 (asserting that the state could only regulate the prices of a business affected with a public interest). At common law, a business became affected with a public interest when it: (a) was created by a public grant or charter; (b) provided an essential public service; or (c) was a monopoly. Sutherland found all three criteria lacking in this case, though he conceded that the state could regulate the conduct of a business, as opposed to its prices, even if the business was entirely private. *Id.* at 439-42.

<sup>154</sup> 285 U.S. 262 (1932).



established businesses<sup>155</sup> and infringed upon the contractual freedom of others to pursue an otherwise lawful endeavor.<sup>156</sup> While he recognized the importance of ice to Oklahomans, he doubted that commerce in it was a public matter that justified the imposition of a novel, yet discriminatory, licensing requirement.<sup>157</sup>

Sutherland ended his opinion in *New State Ice Co.* with the suggestion that "[t]he opportunity to apply one's skill and labor in an ordinary occupation" deserved as much constitutional protection as rights guaranteed by the First Amendment.<sup>158</sup> Though intended as a rhetorical flourish in an analysis of economic substantive due process, this statement nevertheless indicates that Sutherland perceived economic liberty as a constitutional paradigm. In essence, he viewed the sanctity of contracts and private property in the broader context of personal liberty and understood that their vulnerability to the whims of ephemeral popular majorities could affect the stability of other individual rights in a democratic republic.

A decade before he joined the Court, Sutherland explained:

There is no such thing as rights of property apart from the rights of man . . . . The thing protected by the Constitution is not the right of property, but the right of a person to property, and this right to property is of the same character as the right to life and liberty.<sup>159</sup>

He also noted in this same speech that "[p]roperty *per se*, has no rights; but the individual . . . has three great rights, equally sacred from arbitrary interference: the right to his life, the right to his liberty, the right to his property."<sup>160</sup> Accordingly, Sutherland regarded the right to property as an element of individual liberty, and indeed his emphasis upon the equal operation of the law reflected an overriding concern with personal freedom.

---

<sup>155</sup> *Id.* at 278-79. As Sutherland explained: "The control here . . . does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it." *Id.* at 279.

<sup>156</sup> *Id.* at 277-80. "Here we are dealing with an ordinary business . . . as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the shoemaker . . . ." *Id.* at 277.

<sup>157</sup> *Id.* at 277-80. In contrast, Justice Brandeis, who was generally far more deferential towards local economic regulations, in dissent, proclaimed the authority of the state "to remould, through experimentation, . . . economic practices and institutions to meet changing social and economic needs." *See id.* at 311 (Brandeis, J., dissenting). *See also* *Frost v. Corp. Comm'n*, 278 U.S. 515, 520-25 (1929) (Sutherland, J.) (invalidating an Oklahoma gin licensing scheme that granted preferential exemptions to agricultural/horticultural businesses as an arbitrary law unrelated to the public welfare). *But see* *Packard v. Banton*, 264 U.S. 140, 143-45 (1924) (Sutherland, J.) (sustaining a New York law that required hired motor vehicles to carry liability insurance or post a bond as a legitimate public safety measure).

<sup>158</sup> *New State Ice Co.*, 285 U.S. at 280.

<sup>159</sup> The Courts and the Constitution, *supra* note 58, at 390.

<sup>160</sup> *Id.*

In part, Sutherland's broad view of economic liberty derived from seventeenth century Whig theory, which considered freedom of speech and property rights as complementary components "of an indivisible concept of liberty."<sup>161</sup> Influenced by this tradition, James Madison, the most notable of the Constitution's Framers, perceived freedom of expression as an inherent individual property right.<sup>162</sup> In a 1792 newspaper article, Madison, the author of the First Amendment, explained that "a man has a property right in his opinions and the free communication of them."<sup>163</sup> He then went on to remark that: "Government is instituted to protect property of every sort; as well as that which lies in the various rights of individuals. . . . This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*."<sup>164</sup> Thus, Madison may have expressed, in inchoate form, what ultimately became a guiding principle for Sutherland in his interpretation of the business of expression.

As a Supreme Court justice, Sutherland invoked the limitations of the Constitution to preserve private economic affairs from partial laws that bore the influence of political factions and the tyranny of democratic majorities. Factional aversion and a fervent belief in the impartial restraint of the law shaped the contours of his jurisprudence, rather than principles of laissez faire economics or Social Darwinism. For Sutherland and other conservative jurists of the *Lochner* era, economic regulations that drew arbitrary distinctions unrelated to the long-term public welfare threatened personal liberty and thus required close judicial scrutiny. From this premise, Sutherland, like Madison before him, eventually forged a link between economic rights and freedom of expression.

### III. JUSTICE SUTHERLAND'S RECOGNITION OF THE BUSINESS OF EXPRESSION

During the last two years of Sutherland's tenure, the Supreme Court confronted for the first time economic regulations that affected freedom of the press. In *Grosjean v. American Press Co.*,<sup>165</sup> a unanimous Court invalidated on First Amendment grounds a Louisiana licensing tax levied only on the gross advertising receipts of large newspapers. The following year, in *Associated Press v. National Labor Relations Board*,<sup>166</sup> a closely divided Court upheld the reinstatement of an

---

<sup>161</sup> McGinnis, *supra* note 33, at 63. See also Roger Pilon, *A Modest Proposal on "Must-Carry," the 1992 Cable Act and Regulation Generally: Go Back to Basics*, 17 HASTINGS COMM. & ENT. L. J. 47, 63 (1994) (suggesting that the constitutional Framers' concern for property rights was at the root of the First Amendment).

<sup>162</sup> See McGinnis, *supra* note 33, at 64-65, 67.

<sup>163</sup> *Id.* at 65 (quoting James Madison, *Property*, (National Gazette (March 27, 1792)), reprinted in Robert A. Rutland et al., eds., 14 *The Papers of James Madison* 266 (Virginia 1983)).

<sup>164</sup> *Id.* at 65-66 (emphasis in original).

<sup>165</sup> 297 U.S. 233 (1936).

<sup>166</sup> 301 U.S. 103 (1937).

editorial employee, active in union affairs, who was discharged by a private newsgathering and distribution agency. Though challenged in part as an impermissible infringement upon the editorial discretion of the Associated Press, a majority of the justices sustained the application of the National Labor Relations Act to its editorial operations as a reasonable economic measure notwithstanding the First Amendment claim of the news service.<sup>167</sup>

Decided against the backdrop of the Supreme Court's gradual transformation of its police powers jurisprudence during the 1930s, when a bare majority of the justices adopted a more deferential attitude toward economic legislation,<sup>168</sup> *Grosjean* and *Associated Press* reflected a deep schism within the Court over the appropriate constitutional limits of government intervention into private economic affairs. Modern scholars often view *Grosjean* and *Associated Press* through the perspective of this jurisprudential shift and attribute their different outcomes to the contemporaneous dichotomy that emerged between economic liberty and freedom of expression.<sup>169</sup> In so doing, they obscure the context of these cases and somewhat distort their meaning.

Justice George Sutherland, who wrote the majority opinion in *Grosjean* and the dissent in *Associated Press*, found the distinction between economic and expressive rights assumed by the Court majority in *Associated Press* largely untenable. In both cases he invoked the First Amendment while steadfastly clinging to the fundamental tenets of *Lochner* era police powers jurisprudence. Sutherland's aversion to political factions and concomitant emphasis upon the equal operation of the law enabled him to meld the seemingly disparate concepts of economic liberty and

---

<sup>167</sup> *Id.* at 130-33.

<sup>168</sup> See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-41 (1937) (upholding application of the National Labor Relations Act to intrastate manufacture of steel); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (sustaining minimum wage legislation for women); *Nebbia v. New York*, 291 U.S. 502 (1934) (upholding a regulation of milk prices); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (sustaining a Minnesota mortgage moratorium). See generally CUSHMAN, *supra* note 12; WHITE, *supra* note 12 (both providing an excellent overview of the changes that occurred in the Supreme Court's constitutional jurisprudence during the early decades of the twentieth century).

<sup>169</sup> See, e.g., DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 1888-1986* 260 (1990) (discussing *Grosjean* only as a First Amendment case); ANDREW L. KAUFMAN, *CARDOZO* 546-47 (1998) (attributing the majority opinion in *Associated Press* to the emerging deference among several of the justices toward economic regulation). Kaufman, however, does address briefly the First Amendment aspects of the case. *Id.* at 546-47. Moreover, Kaufman regards *Grosjean* primarily as a First Amendment case, asserting that Justice Cardozo's unpublished draft concurring opinion ultimately changed the basis of the Court's decision from equal protection grounds to those involving freedom of expression, and that Sutherland's published opinion for the Court incorporated most of Cardozo's points about the First Amendment. *Id.* at 539-41 ("*Grosjean* was a landmark result in the history of the First Amendment . . . [for which] . . . Cardozo deserves a large share of the credit." *Id.* at 541.).

freedom of the press. Indeed, for *Sutherland*, *Grosjean* and *Associated Press* involved *both* economic and expressive rights. From his implicit recognition of the relationship between the two, he articulated, albeit in inchoate form, the importance of protecting the business of expression from the partial laws of political factions.

Conventional analysis of *Grosjean* and *Associated Press* often ignores the interplay between economic liberty and freedom of the press that actually shaped the issues before the Court in each case and, in particular, informed Sutherland's use of the First Amendment.<sup>170</sup> Careful examination of Sutherland's opinions, however, reveals that his adherence to traditional notions of economic liberty — from which a majority of the Court had begun to depart by 1937 — influenced his views about some forms of expression. Reconsideration of *Grosjean* and *Associated Press* from this perspective also suggests that more than simply discrete restrictions upon economic rights, or freedom of the press were in issue. Instead, class legislation, economic rights, and freedom of expression converged, giving rise to a hybrid constitutional concept called the business of expression. Sutherland's fledgling perception of this link between the seemingly disparate claims of economic liberty and freedom of the press is his forgotten First Amendment legacy and thus bears close scrutiny as the modern Court struggles to devise a coherent and consistent jurisprudence in this area.

#### A. *Differential Taxation of the Press and the Context of the Grosjean Decision*

In *Grosjean*, Louisiana attempted to restrict freedom of the press through the guise of a seemingly neutral economic regulation.<sup>171</sup> In 1934, the Louisiana legislature imposed a two percent tax on the gross receipts of advertising sold by and published in periodicals with a weekly circulation of 20,000 or more copies throughout the state.<sup>172</sup> Unequal in its operation, the law differentiated between

---

<sup>170</sup> Indeed, most commentators regard *Grosjean* solely as a First Amendment decision and omit discussion of its economic liberty aspects. See, e.g. CURRIE, *supra* note 169, at 260; LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 773, 817, 998, 1004, 1040 (2d ed. 1988) (discussing various First Amendment issues and *Grosjean*). In addition, most scholars primarily consider *Associated Press* as an economic regulation case, in large part because it was one of five cases decided on April 12, 1937, in which the Supreme Court upheld the application of the National Labor Relations Act to various industrial activities. See, e.g., *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-41 (applying federal labor law to manufacturing activities); see also CUSHMAN, *supra* note 12, at 133-35 (discussing context of *Associated Press*).

<sup>171</sup> 297 U.S. 233, 240-41 (1936).

<sup>172</sup> In relevant part, Louisiana Act No. 23 (July 12, 1934) provided:

Every person, firm, association, or corporation, domestic or foreign, engaged in the business of selling, or making any charge for, advertising or for advertisements, whether printed or published . . . in any newspaper, magazine, periodical or publication . . . having a circulation of more than 20,000 copies per

segments of the written press on the basis of circulation volume. Though nominally a device to raise revenue, it actually functioned as a discriminatory licensing mechanism that applied only to the thirteen largest daily urban newspapers within the state, all but one of which openly criticized the political regime of Huey P. Long.<sup>173</sup> However, the Act exempted from taxation one hundred and fifty of Louisiana's other periodicals, most of which were small weekly papers from rural areas whose publishers either supported Long's controversial socio-economic policies or remained neutral in the disputes they spawned.<sup>174</sup> Included within this favored group were four relatively large daily papers whose circulation fell slightly below the statutory threshold and thus insulated their advertising revenue from the scope of the license tax.<sup>175</sup> In essence a regulation that affected both the business of the press and its communicative function, Louisiana Act No. 23 raised issues that concerned both economic liberty and freedom of expression.

1. "A Tax on Lying, 2 cents a lie"<sup>176</sup>

---

week . . . in . . . Louisiana, shall . . . pay a license tax for the privilege of engaging in such business in this State of two per cent. (2%) of the gross receipts of such business.

1934 La. Acts 23.

<sup>173</sup> See Appellees' Brief at 5, 8, 26, 36-37, *Grosjean*, 297 U.S. at 233. The lone paper not especially critical of the Long political faction that came within the purview of the license tax because of its large circulation was *The Lake Charles American-Press*. *Id.* at 8.

<sup>174</sup> See *id.* at 5, 26. Of the state's 120 weekly papers, none reached the statutory circulation level of twenty thousand, further reinforcing the differential effect of the license tax. See *id.* at 6. See also RICHARD C. CORTNER, *THE KINGFISH AND THE CONSTITUTION: HUEY LONG, THE FIRST AMENDMENT, AND THE EMERGENCE OF MODERN PRESS FREEDOM IN AMERICA* 3, 19-20 (1996). As originally proposed in the Louisiana House of Representatives, the license tax would have applied to only Long's most vociferous critics in the press, six daily newspapers of relatively large circulation in New Orleans and Shreveport. *Id.* at 83. This bill passed the Louisiana House by a margin of 56-38, but Long, worried about potential constitutional challenges, subsequently had it amended so that the two-percent license tax would apply to all newspapers published within the state whose weekly circulation was at least twenty thousand. *Id.* at 83-85. Huey Long's main political supporters and the legislative proponents of Louisiana Act No. 23 (the license tax) came from rural parishes within the northern and southern regions of the state. *Id.* at 88.

<sup>175</sup> See Appellees' Brief, *supra* note 173, at 6, 25, 37. These four newspapers, *The Ruston Leader* (Ruston, La.), *The Hammond Courier* (Hammond, La.), *The Crowley Signal* (Crowley, La.), and *The Morning Advocate* (Baton Rouge, La.), were not particularly critical of the Long political faction but competed with those of the appellees for circulation and advertising. *Id.* at 6.

<sup>176</sup> *Id.* at 9 (quoting circular issued by U.S. Senator Huey P. Long and Louisiana Governor Oscar K. Allen) (1934). See also Record at 43, *Grosjean*, 10 F. Supp. 161 (E.D.La. 1935) (No. 303) (quoting Affidavit of Marshall Ballard and J. Walker Ross (Nov. 23, 1934)) [hereinafter Record].

Enacted at the behest of a powerful political faction led by Democratic United States Senator Huey P. Long and his first lieutenant, Governor Oscar K. Allen, the Louisiana license tax marked the culmination of Long's attempt throughout the 1930s to tax newspaper advertising and thus "control the dissemination of news in the state."<sup>177</sup> An irrepressible demagogue and fiery agrarian populist, Huey Long throughout his political career decried special economic privileges and sought to enhance the welfare of common citizens. Prior to entering the Senate, as governor of Louisiana Long advocated an ambitious public works program that featured, among other things, improved roads and educational facilities.<sup>178</sup> He expected the state to fund these internal improvements through bonds and a comprehensive taxation scheme that would generate revenue from most forms of commercial enterprise, yet encountered considerable opposition from large urban daily newspapers who accused him of using the machinery of the state to accumulate his own personal slush fund and doubted the sincerity of his convictions.<sup>179</sup> In particular, newspapers in New Orleans and Shreveport criticized proposed taxes on oil companies and the cotton exchange and questioned the motives of a politician whose modest background and crude manners they ridiculed, often characterizing him as a backwoods rogue and tyrant. Moreover, their editorials usually supported Long's political rivals and had even endorsed an unsuccessful effort to impeach him as governor in 1929.<sup>180</sup>

The relatively thin-skinned Long attributed much of the criticism he absorbed in the urban dailies to the pernicious influence of vested corporate interests, such as those in the businesses of oil and cotton, whom he thought compromised the editorial judgment of the press through advertisements they placed in major papers that subsidized, in large part, the production costs of print journalism and facilitated widespread circulation of published news stories hostile to his policies.<sup>181</sup> Angry at his treatment by the press and convinced that many of its stories actually harmed

---

<sup>177</sup> CORTNER, *supra* note 174, at 96 (discussing the newspaper license tax in conjunction with the Long political faction's creation of a board of censors with jurisdiction over movies and newsreels). In 1935, this faction also sponsored the formation of a state printing board that would authorize certain newspapers to print official government notices and thus provide an essential source of revenue for those papers friendly to the Long political machine. *Id.*

<sup>178</sup> T. HARRY WILLIAMS, HUEY LONG 455, 546-47 (1969).

<sup>179</sup> *Id.* at 546-47 (1969); CORTNER, *supra* note 174, at 3-4, 32.

<sup>180</sup> See CORTNER, *supra* note 174, at 29-30, 32. For an overview of the unsuccessful 1929 attempt to impeach Huey Long when he was governor of Louisiana and the manner in which his political faction thwarted the impeachment process, see WILLIAMS, *supra* note 178, at 347-419.

<sup>181</sup> CORTNER, *supra* note 174, at 70-71, 73. In 1933, *American Progress* (the new name of Long's paper) complained that many of Louisiana's larger daily newspapers "existed 'for the purpose of publishing advertisements and for spreading lies that may assist in the propaganda against the welfare of the common man.'" *Id.* at 70 (quoting *American Progress* at 6 (Oct. 19, 1933)).

the public welfare, Long set out to counter its influence. In 1930, Long launched his own paper that not only promoted the virtues of his socioeconomic vision but also attacked with some frequency the veracity of journalists who lambasted the mercurial politician and his platform.<sup>182</sup> At the same time he unsuccessfully urged the Louisiana legislature to tax newspaper advertising at the rate of fifteen percent in order to make the press fiscally accountable for exercising its journalistic privileges.<sup>183</sup> A comparable attempt to bridle the independence of newspapers through a prior restraint law also failed in the legislature.<sup>184</sup>

Three years later, however, Long renewed his crusade to tax the press, frustrated, in particular, by the incessant opposition of the large urban dailies to his proposal for increased taxes on personal income and commercial activity and their unflagging support for the very businesses Long sought to weaken. In November 1933, Long explained his motivation for lobbying the legislature to impose a tax upon the advertising revenue of some segments of the press: "We are going to sock a tax on those damned rascals. Let them scoundrels pay for the privilege of lying. . . . Newspapers get paid for lying. The freedom of the press lets those newspapers print any kind of lies."<sup>185</sup> Several months later, in a circular he and Oscar K. Allen distributed to the state legislature, Long articulated the salient purpose of the two percent newspaper license tax of 1934: "It is a system that these big Louisiana papers tell a lie every time they make a dollar. This should be called a tax on lying, 2 [cents] a lie."<sup>186</sup>

However, throughout the litigation that ensued from the passage of this license tax, the state expressly disavowed any punitive motive, asserting instead that the license tax was a legitimate means of obtaining revenue from an industry whose members had derived considerable benefit from the public largesse through the use of mail subsidies, tax-free newsprint, and the indirect advantages accruing from

---

<sup>182</sup> *Id.* at 34, 43-44, 49; WILLIAMS, *supra* note 178, at 455-60 (discussing how Long's suspicion of the segments of the press critical of his policies influenced his formation of a newspaper dedicated to the dissemination of his political and social views, which he called *The Louisiana Progress*).

<sup>183</sup> See CORTNER, *supra* note 174, at 2, 4-5.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 73 (quoting Speech of Huey Long (Nov. 1933)). Long also said: "I believe in freedom of speech, but it's got to be truthful speech, and lying newspapers should have to pay for their lying. I'm going to help these newspapers by hitting them in their pocketbooks; maybe then they'll try to clean up." *Id.* at 79 (quoting *New Orleans Times-Picayune*, July 3, 1934 at 10).

<sup>186</sup> Appellees' Brief, *supra* note 173, at 9 (quoting from a 1934 circular issued by U.S. Senator Huey P. Long and Louisiana Governor Oscar K. Allen). After the introduction of a bill in the Louisiana legislature to tax newspaper advertising, Long and Allen distributed this circular throughout the state and to members of its legislature to make sure that the bill became law. *Id.* See also Record, *supra* note 176, at 43 (quoting Affidavit of Marshall Ballard and J. Walker Ross (Nov. 23, 1934)).

improvements in Louisiana's transportation facilities.<sup>187</sup> It also claimed that a tax based on the volume of circulation represented the most reliable method of ascertaining gross income within the industry.<sup>188</sup>

Nevertheless, for the handful of large newspapers required to remit to the state a percentage of their gross advertising receipts, the license tax threatened to disrupt their business operations and imperil their economic viability.<sup>189</sup> Highly dependent upon advertising revenue to defray production costs and subsidize circulation, these newspapers would face significant commercial losses if forced to comply with the Louisiana Act because subscription fees and individual sales comprised but a fraction of the income necessary to produce and distribute a daily paper.<sup>190</sup> As such, a tax upon advertising could adversely affect how a newspaper conducted its business and ultimately interfere with its dissemination of news. Carl Ackerman, Dean of the Columbia University School of Journalism, referred to this symbiotic relationship between economic liberty and freedom of expression in a 1934 affidavit

---

<sup>187</sup> See Appellant's Brief at 25, 46, *Grosjean*, 297 U.S. at 233 (No. 303); CORTNER, *supra* note 174, at 78-79. Long, in part, justified the license tax as a means of treating the press like other businesses within the state subject to license taxes and noted that the press received many benefits from a tax-free tariff on newsprint and public improvements within Louisiana. *Id.*

<sup>188</sup> See CORTNER, *supra* note 174, at 78-79. Proponents of the two percent tax believed that a tax levied on the net income of newspapers or on the net profits from advertising would be less reliable as a revenue measure because newspapers could manipulate their account books and thus reduce their tax liability. *Id.*

<sup>189</sup> Appellees' Brief, *supra* note 173, at 6-7, 29-31 ("Newspapers are dependent, in large measure, for the conduct of their business on the revenue from the advertising published therein.") *Id.* at 6. The appellees further explained that because:

Circulation revenue meets only a portion of the . . . [cost of production] . . . it is necessary to depend on advertising revenues to meet the major cost of production. Any factor which affects advertising revenue . . . directly affects the ability of newspapers to serve their readers and to perform their duties and functions to the public.

*Id.* at 6-7.

In their December 1935 brief to the United States Supreme Court, the appellees reiterated many points they asserted before the federal district court in their legal action for declaratory and injunctive relief. For the purpose of clarity, references to both the appellees' and appellant's arguments throughout the litigation come from the Supreme Court briefs, transcript record, or summary of the January 1936 oral arguments before the Court.

<sup>190</sup> Appellees' Brief, *supra* note, 173, at 6-7, 23-24. Appellees noted that some daily newspapers with relatively small circulation actually had advertising rates comparable to those of papers with larger circulation. In this regard, they considered the license tax flawed as a revenue measure. *Id.* at 7-8, 25. Appellees contended that "[c]irculation has no fixed relation to volume of advertising or advertising revenue, and a classification based thereon is inherently arbitrary." *Id.* at 23-24. Moreover, "[t]he volume of a newspaper's circulation . . . has but a remote bearing on its revenues from advertising, if any at all." *Id.* at 33.



he submitted in federal court on behalf of the *Grosjean* plaintiffs. Ackerman observed in a statement that pithily described the seminal importance of advertising revenue to the editorial and business functions of newspapers: "The business of a newspaper publisher is the gathering and dissemination of information in the form of news, editorial comment and advertising . . . ."<sup>191</sup>

Concerned that the license tax applied only to the state's thirteen largest papers, and in effect exempted the smaller periodicals with whom they competed for advertising and subscribers,<sup>192</sup> the publishers of the targeted dailies regarded the law as a thinly veiled attempt to curtail their circulation in violation of freedom of the press.<sup>193</sup> James Thompson, of the *New Orleans Item & Tribune*, a daily paper whose weekly circulation exceeded the statutory threshold of 20,000, wrote that the act marked "'a deliberate attempt to punish, muzzle and destroy newspapers . . . they can be taxed entirely out of business. They can be ruined or confiscated at pleasure by any political group temporarily dominating a legislature.'"<sup>194</sup> Cognizant of Long's hostility towards segments of the press that had criticized him, the large newspapers believed that the license tax was a partial law calculated to restrict both their property rights and expressive liberty. Accordingly, they perceived it as "an attempted reprisal or punishment by the dominant political faction of the state . . . against the daily press of the state for its past opposition, and a threat of future reprisals in the event of further or future oppositions"<sup>195</sup>

Worried that such legislation augured their subjugation to the whims of a tyrannical democratic majority, the nine companies who owned and operated the thirteen newspapers singled out by the Act filed suit in 1935 in federal district court to enjoin Alice Grosjean, Long's purported mistress and the Supervisor of Public Accounts, from collecting the proceeds of the two percent license tax. The district court issued an injunction, ruling that the tax arbitrarily discriminated against the

---

<sup>191</sup> Record, *supra* note 176 at 56 (Affidavit of Carl W. Ackerman, Nov. 20, 1934). Ackerman also commented that "advertising and news . . . [were] . . . absolutely interdependent," and that the increase in advertising "made it possible for the press to provide public information, indispensable in a democracy." *Id.*

<sup>192</sup> Appellees' Brief, *supra* note 173, at 5-6, 24-26, 34-35. From the Appellees' perspective, "one of the purposes of this tax . . . was to divert business from newspapers having a circulation of more than 20,000 per week to newspapers with a circulation of less than 20,000 per week." *Id.* at 30. The license tax, therefore, manifested "an intent by the legislature to interfere with the business of a particular group of newspapers and to regulate that business through the device of taxation." *Id.* at 30-31. Given the close nexus between the business, editorial, and distributive functions of newspapers, a "tax on the advertising portion only of the business of the press . . . [was] . . . in effect . . . a tax upon the press itself" and was in contravention of the First Amendment. *Id.* at 26. *See also id.* at 31-33, 35 (characterizing the license tax as a form of unconstitutional prior restraint).

<sup>193</sup> *Id.* at 24-26, 34-35.

<sup>194</sup> CORTNER, *supra* note 174, at 80 (quoting *New Orleans Item* at 1, July 4, 1934).

<sup>195</sup> Record, *supra* note 176, at 6. *See also* Appellees' Brief, *supra* note 173, at 8-9, 26-27, 36-37.

state's largest daily papers in contravention of the Equal Protection Clause of the Fourteenth Amendment and the provision of the Louisiana constitution that required uniform application of license taxes.<sup>196</sup>

Grosjean appealed, and the case came before the United States Supreme Court, where the parties elaborated upon their original contentions. The arguments presented before the Court provide an essential perspective from which to understand how the dispute reflected the confluence of economic liberty and freedom of press. They also lend credence to the notion that, although Sutherland ostensibly based his opinion for a unanimous Court upon the First Amendment, he also applied principles of economic substantive due process and equal protection to protect the business of expression from the artifice of a political faction.

## 2. Economic Liberty, Political Factions, and the License Tax as Differential Treatment of the Press

In their arguments before the Supreme Court, American Press Company and Alice Grosjean addressed whether the Louisiana newspaper license tax violated the Equal Protection Clause of the Fourteenth Amendment, the uniform license tax provision of the Louisiana Constitution and the Free Press Clause of the First Amendment. In so doing they discussed the extent to which local government could impose economic regulations upon the press. Whereas American Press Company, et al., the appellees, emphasized the interaction between economic liberty and freedom of expression, Grosjean, the appellant, differentiated between the two and sought to limit the scope of the First Amendment in this context.

In essence, Grosjean distinguished the business of advertising from publishing in her appeal to the Supreme Court. Her counsel characterized the law as a permissible revenue measure that merely imposed a tax on the highly profitable commercial enterprise of selling advertising space in newspapers;<sup>197</sup> it was not, therefore, a tax on newspaper publishing, nor, as argued by the appellees, "a tax upon the press itself."<sup>198</sup> Thus, the legislative distinction between small and large papers reflected a reasonable belief that substantial differences existed between these types of periodicals in terms of circulation and advertising to warrant a tax applicable to all but one-tenth of the state's publications.<sup>199</sup>

---

<sup>196</sup> *Am. Press Co. v. Grosjean*, 10 F. Supp. 161, 163 (E.D. La. 1935), *aff'd*, 297 U.S. 233 (1936).

<sup>197</sup> See Appellant's Brief, *supra* note 187, at 10, 48-56 (claiming that the license tax reflected reasonable differences between large and small volume newspapers based upon their gross advertising revenue and that the tax affected "all similarly situated" newspapers alike).

<sup>198</sup> Appellees' Brief, *supra* note 173, at 26. See Appellant's Brief, *supra* note 187, at 25, 46 (asserting that the license tax was merely a revenue measure based on the gross advertising receipts of newspapers and not a law that abridged freedom of the press).

<sup>199</sup> Appellant's Brief, *supra* note 187, at 10, 48, 52, 54-56. In essence, the state argued

Grosjean also denied that the license tax restricted freedom of the press. Doubtful that the First Amendment even applied to the states in this context,<sup>200</sup> Grosjean narrowly construed its scope and claimed that because the tax only concerned "the business 'of selling . . . advertisements'"<sup>201</sup> it did not function as an unconstitutional prior restraint upon the dissemination of information.<sup>202</sup> Careful to point out that Act No. 23 did not prohibit newspapers from publishing stories, Grosjean explained the tax did "not censure or restrict the free expression of opinions. It merely require[d] of those who engage in the profitable business of making others pay for the expression of their views, or for advertising their business, a small contribution for the support of government."<sup>203</sup>

In contrast, American Press Company, on behalf of the state's large daily newspapers, assailed the two percent license tax as a discriminatory measure intended to curb freedom of the press through means calculated to impair the business interests of certain newspapers. For this reason the appellees challenged the legitimacy of a direct tax whose selective application threatened their continued existence. In essence, their argument rested on the premise that the economic rights and expressive functions of the affected newspapers were so intertwined that the tax facilitated censorship. Once in effect, it would restrict both the economic liberty of the state's large metropolitan papers and infringe upon their freedom of the press. The appellees first claimed that Louisiana Act No. 23 violated the Equal Protection Clause of the Fourteenth Amendment and the state's constitutional mandate that all license taxes be uniform.<sup>204</sup> From their perspective, the license tax operated unequally because it was a partial law that imposed a distinct economic burden upon large, urban daily papers for the benefit of small, rural newspapers with which

---

that it was permissible to treat large and small papers as distinct businesses for the purpose of taxation. As such, the license tax was not unequal because it applied in the same way to all papers whose weekly circulation exceeded 20,000. *Id.* at 49.

<sup>200</sup> *Grosjean*, 297 U.S. at 235 (argument of Charles J. Rivet, counsel for Appellant); Appellant's Brief, *supra* note 187, at 12, 41.

<sup>201</sup> *Grosjean*, 297 U.S. at 237 (argument of Charles J. Rivet, counsel for Appellant).

<sup>202</sup> *Id.* at 236; see Appellant's Brief, *supra* note 187, at 25, 46. Before the federal district court, counsel for Grosjean had argued the First Amendment only prohibited prior restraint by the government and did not apply to punishment subsequent to expression. See CORTNER, *supra* note 174, at 141. Nor did the First Amendment prohibit the application of a general tax to the business of newspapers. *Id.* See also Appellant's Brief, *supra* note 187, at 12, 45-46.

<sup>203</sup> *Grosjean*, 297 U.S. at 237 (argument of Charles J. Rivet, counsel for Appellant); Appellant's Brief, *supra* note 187, at 46.

<sup>204</sup> Appellees' Brief, *supra* note 173, at 3, 10 (quoting art X, § 8 of the 1921 Louisiana Constitution, which prescribed the uniform levy of occupational license taxes). In essence, the appellees argued that this provision of the Louisiana Constitution prohibited partial legislation that taxed only some types of newspapers. See Appellees' Brief, *supra* note 173, at 21-22.

they competed for subscribers and advertising revenue.<sup>205</sup> Though the appellees conceded the state had the authority to enact a tax of general application, they argued that the license tax was arbitrary because it unreasonably differentiated between newspapers engaged in essentially similar business and expressive functions.<sup>206</sup> In particular, the appellees challenged the legislative presumption that a direct correlation existed between the volume of a newspaper's circulation and its advertising revenue when in fact some of the state's smaller papers had higher advertising rates than their larger competitors.<sup>207</sup> That the number of readers "ha[d] but a remote bearing on its [a newspaper's] revenue from advertising . . . ,"<sup>208</sup> therefore, undermined the legitimacy of the license tax and rendered it impermissible class legislation.

Accordingly, the large papers asserted that one purpose of the act "was to discourage advertisers from using newspapers having a circulation in excess of 20,000 per week and to encourage them in the use of smaller newspapers."<sup>209</sup> Of particular relevance was the tax exemption enjoyed by four dailies whose circulation was comparable to those of the thirteen largest papers required to pay the license tax but fell just short of the taxable level prescribed by the law. The appellees thought that this discrepancy, together with the fact that less than ten percent of the periodicals within the state were subject to the tax, created an inference that the legislature intended "to interfere with the business of a particular group of newspapers and to regulate that business through the device of taxation."<sup>210</sup>

In addition, the appellees asserted that the Louisiana Act violated their rights under the Free Press Clause of the First Amendment because it "punish[ed] those newspapers opposed to the dominant political faction in the State."<sup>211</sup> The size of the tax mattered little to the appellees, who perceived in its discriminatory nature a punitive objective.<sup>212</sup> The First Amendment, they argued, prohibited government

---

<sup>205</sup> The appellees maintained that a main purpose of Act No. 23 "was to divert business from newspapers having a circulation of more than 20,000 per week to newspapers with less than 20,000 per week." *Id.* at 30; *id.* at 6, 25; Record, *supra* note 176, at 18 (Affidavit of Frank A. Smith, Oct. 23, 1934); *id.* at 21 (Affidavit of Charles P. Manship, Oct. 19, 1934); *see also id.* at 23 (Affidavit of James M. Thompson, Oct. 24, 1934).

<sup>206</sup> Appellees' Brief, *supra* note 173, at 24-25. The appellees argued that "the mere size of a business affords no basis for taxing less than ten percent of the concerns engaged therein and exempting all others. The newspapers published by plaintiffs are engaged in identically the same business as are those newspapers which are exempted from the operation of the statute." *Id.* at 24.

<sup>207</sup> *Id.* at 7-8.

<sup>208</sup> *Grosjean*, 297 U.S. at 240 (argument of Esmond Phelps and Elisha Hanson, counsel for appellees). *See also* Appellees' Brief, *supra* note 173, at 29-30, 33.

<sup>209</sup> Appellees' Brief, *supra* note 173, at 34-35.

<sup>210</sup> *Id.* at 30-31.

<sup>211</sup> *Id.* at 36. *See also Grosjean*, 297 U.S. at 238 (argument of Esmond Phelps and Elisha Hansen for Appellees).

<sup>212</sup> *See* Appellees' Brief, *supra* note 173, at 26, 36-37. Characterizing the license tax as

restriction of the press through differential, or partial, taxation devised to license or censor the press.<sup>213</sup> To this extent, they cited the legislative history of the license tax, which manifested the repeated attempts of Huey Long to quell newspaper opposition to his policies and his intent that the press pay for the privilege of publishing lies through a license tax.<sup>214</sup> Moreover, there was evidence to suggest that in its original form, the license tax only applied to papers in New Orleans and Shreveport, home to Long's most vociferous critics and influential political opponents, and that the proponents of the tax had originally sought to exclude from its scope the only newspaper whose weekly circulation exceeded twenty thousand copies that remained neutral toward Huey Long.<sup>215</sup> Ironically, American Press Company, the lead appellee, published this paper, *The Lake Charles American-Press*, which in common with the state's other large dailies, regarded the license tax as a potential detriment to the independence of all publications within the state because of its unequal operation and suspicious motives.<sup>216</sup>

*B. The Supreme Court's Internal Division Over the Limits of State Taxation and How It Affected the Basis of the Grosjean Decision*

On February 10, 1936, the United States Supreme Court invalidated the Louisiana license tax as an unconstitutional restriction upon freedom of the press.<sup>217</sup> All of its members joined in the opinion of Justice Sutherland, which, although it affirmed the decree of the district court, invoked the First Amendment and not, as "a direct tax upon the newspaper publishing business," *id.* at 31, the appellees argued that "[a] tax on the principal source of revenue of a newspaper is a tax upon its subsistence," and in violation of freedom of the press. *Id.* at 32-33.

<sup>213</sup> *Id.* at 26-28, 31-33. See also *id.* at 48-70 (Appendix B) (discussing the historical antecedents of freedom of the press in England and the United States).

<sup>214</sup> *Id.* at 8-9, 26, 36-37.

<sup>215</sup> See CORTNER, *supra* note 174, at 85. Thereafter, the legislature altered the tax so that on its surface it applied equally to a similar class of newspapers, based on the volume of their circulation, regardless of their geographical location, including *The Lake Charles American-Press*, the one large paper that refrained from much criticism of the Long political faction and the socioeconomic policies of its colorful leader. *Id.* With respect to *The Lake Charles American-Press*, Long himself commented: "'There was only one newspaper in the State that had not joined up with the gang opposing me . . . we tried to find a way to exempt 'The Lake Charles American-Press' from the advertising tax, but did not think we could do it, but we would have done it if we could.'" Appellees' Brief, *supra* note 173, at 9 (quoting Speech of Huey P. Long, Sulphur, La., Sept. 24, 1934).

<sup>216</sup> Indeed, the appellees raised the possibility that once the legislature began to tax the press at all, it eventually could tax certain segments of it out of business altogether. See Appellees' Brief, *supra* note 173, at 30. Moreover, tax exempt status based upon the content of a publication compromised journalistic independence as publishers fearful of losing their exemption might withhold criticism of the local government. See CORTNER, *supra* note 174, at 102, 114, 138.

<sup>217</sup> See *Grosjean v. Am. Press Co.*, 297 U.S. at 233 (1936).

that tribunal had, the Equal Protection Clause of the Fourteenth Amendment as the principal basis of its decision. Despite the apparent unanimity of the Court, internal disagreement existed over how to characterize the case. Initially, Justice Sutherland, and perhaps as many as five others, considered the dispute one over economic liberty and thus were prepared to strike down the Act solely on equal protection grounds.<sup>218</sup> However, Justices Cardozo and Stone, and probably Brandeis, thought the law only infringed upon the First Amendment rights of Louisiana newspapers. Upon reading Sutherland's draft opinion, Cardozo prepared a concurrence so as to avoid the appearance of tacitly endorsing a narrow conception of state regulatory authority that limited the discretion of local governments to promote economic welfare through imperfect and sometimes experimental means. Finding no equal protection violation, he instead argued that the license tax constituted an impermissible form of censorship that abridged freedom of the press.<sup>219</sup>

### 1. Justice Cardozo's Deference Towards State Taxation

Cardozo's reluctance to join Sutherland's initial opinion reflected an ideological schism within the Court over the appropriate constitutional limits of public regulation of private economic affairs. One facet of this problem concerned the extent to which states could tax local businesses. In many respects, the differences that emerged among the justices about the problems of local taxation emanated from fundamental conflicts about the nature of judicial review and the permissible scope of state police powers. By 1936, several members of the Court had adopted, to some degree, a more deferential approach toward local economic regulation that substituted a pragmatic balance of public and private interests for the more rigid categorical police powers jurisprudence of the early *Lochner* era to which Sutherland, Butler, McReynolds, and Van Devanter stubbornly clung.<sup>220</sup> Cardozo, an articulate and forceful proponent of this jurisprudential shift, therefore

---

<sup>218</sup> See CORTNER, *supra* note 174, at 165; KAUFMAN, CARDOZO, *supra* note 169, at 539-41.

<sup>219</sup> See KAUFMAN, CARDOZO, *supra* note 169, at 539-41. See also Benjamin Cardozo, Draft of *Grosjean* Concurring Opinion (1936) (transcription available in Cardozo Papers in the Special Kaufman Cardozo Collection of Harvard Law School Library). Cardozo noted in this unpublished concurring opinion that a tax of general applicability to newspapers as a business would be permissible under the Equal Protection Clause, and that in general, states could impose graduated taxes on some businesses and not others if the distinctions reflected reasonable differences and the taxes were levied pursuant to legitimate police power objectives. See *id.* at 5. Many thanks to Professor Andrew Kaufman of Harvard Law School, who graciously made available a copy of his transcription of this unpublished draft.

<sup>220</sup> See, e.g., *Nebbia v. New York*, 291 U.S. 502 (1934) (upholding a regulation of milk prices); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (sustaining a Minnesota mortgage moratorium).

refused to invalidate the Louisiana law on equal protection grounds for the same reasons he found constitutional most state taxation schemes that came before the Court throughout the 1930s.

Together with Justices Brandeis and Stone, Cardozo advocated a relaxed standard of judicial review in such cases. Recognizing the broad authority of states to redistribute economic resources and the public interest in private business, the Court's more progressive wing upheld the discretion of local governments to regulate commercial activities through various forms of taxation designed to either encourage or discourage certain types of enterprise.<sup>221</sup> Much of this deference came from the notion that the conduct of business was a privilege which states, pursuant to their police powers, could abridge altogether or otherwise subject to reasonable restrictions.<sup>222</sup> From this premise Cardozo, and other proponents of judicial restraint in matters of local economic regulation, accorded the states considerable latitude in formulating legislative distinctions that sometimes produced unequal tax burdens. Narrowly construing the scope of the Equal Protection Clause, these justices refused to apply the traditional exacting standards of economic substantive due process to problems of differential taxation borne by corporate entities.<sup>223</sup> Consequently, they interpreted the concept of equal protection in relative, rather than absolute, terms that presumed the legitimacy of tax laws that used reasonable, though not necessarily the most precise, criteria as the basis for distinguishing between businesses.<sup>224</sup>

---

<sup>221</sup> See, e.g., *Great Atl. & Pac. Tea Co. v. Grosjean*, 301 U.S. 412 (1937) (upholding a Louisiana graduated tax that imposed more significant burdens on regional and national chain stores); *Fox v. Standard Oil Co.*, 294 U.S. 87, 100 (1935) (suggesting states could use discriminatory taxes to discourage the proliferation of chain stores and encourage independent stores); *State Bd. of Tax Comm'n v. Jackson*, 283 U.S. 527 (1931) (upholding an Indiana tax on chain stores). Cardozo had articulated the growing public concern in private contracts in a 1934 unpublished draft concurring opinion he asked Chief Justice Hughes to consider in *Blaisdell*. See Samuel L. Olken, *Charles Evans Hughes and the Blaisdell Decision: A Historical Study of the Contract Clause Jurisprudence*, OR. L. REV. 513, 590 (1993).

<sup>222</sup> See, e.g., *Great Atl. & Pac. Tea Co.*, 301 U.S. at 424-26; *Fox*, 294 U.S. at 100-01; *Liggett Co. v. Lee*, 288 U.S. 517, 544-45, 547, 569-70, 576-77 (1933) (Brandeis, J., dissenting); *id.* at 584-86 (Cardozo, J., dissenting) (both expressing reluctance as jurists to interfere with the reasonable exercise of state police and tax powers); *Jackson*, 283 U.S. at 537.

<sup>223</sup> See, e.g., *Fox*, 294 U.S. at 102 (Cardozo noting that "[t]he operation of a general rule will seldom be the same for every one"); see also *Liggett*, 288 U.S. at 547, 570-72, 575 (Brandeis, J., dissenting) (explaining that under the Fourteenth Amendment's Equal Protection Clause a state may create differential tax classifications).

<sup>224</sup> See *Liggett*, 288 U.S. at 547, 570-72, 574-75 (Brandeis, J., dissenting), *id.* at 581-86 (Cardozo, J., dissenting). Justice Cardozo articulated the deferential standard when, in an opinion for the Court sustaining a West Virginia chain tax on gas stations, he reasoned the tax "has a rational relation to the subject matter." *Fox*, 294 U.S. at 101. See also Carmichael v. S. Coal & Coke Co., 301 U.S. 495, 512 (1937) (noting that the Fourteenth Amendment

In particular, the chain tax cases illustrate the differences between the justices that formed the backdrop of *Grosjean*. Throughout the 1930s, the Court sustained the constitutionality of several state license taxes whose graduated rates imposed higher taxes upon chain stores than on independent merchants.<sup>225</sup> Enacted to promote competition in retail markets, these progressive chain store taxes exemplified government intervention into private business to improve the public welfare by fostering widespread economic opportunity.<sup>226</sup> Justices Cardozo, Stone, and Brandeis were the most consistent advocates of judicial deference in this area, reluctant to disturb legislative findings that the economic advantages enjoyed by chain stores justified graduated license taxes.<sup>227</sup> "Differences in the size of business present . . . an adequate basis for different rates of taxation,"<sup>228</sup> Justice Brandeis asserted. Similarly, Justice Cardozo thought it appropriate for the "state to discriminate between integrated and voluntary chains, though the difference of organization is slender and the inequality of economic benefit uncertain and disputed."<sup>229</sup> Along with Chief Justice Hughes and the sometimes unpredictable Owen J. Roberts, they comprised a majority in several of the cases that sustained a variety of progressive, or graduated, chain store taxes.<sup>230</sup> Unconcerned that many allowed states "to select a particular class as a subject for taxation" if the differential classification promotes the public welfare). In this case, Stone, writing for the Court, ruled that Alabama could require only large employers to subsidize the state's unemployment compensation system. *Id.* at 509-12. Any one of several permissible criteria constituted a reasonable legislative basis for making tax classifications. *See, e.g., Great Atl. & Pac. Tea Co.*, 301 U.S. at 423-26 (competitive economic advantages enjoyed by chain stores); *Fox*, 294 U.S. at 101 (comparative scale of the business); *Jackson*, 283 U.S. at 535-36, 541-42 (business distinctions between chain stores and independent retailers).

<sup>225</sup> *See, e.g., Great Atl. & Pac. Tea Co.*, 301 U.S. 412 (sustaining Louisiana's graduated tax that imposed a greater burden on regional and national chains with at least one store within the state than on intra-state retail chain stores and independent merchants); *Fox*, 294 U.S. 87 (upholding application of a progressive tax on chains of gasoline stations); *Jackson*, 283 U.S. 527 (sustaining an Indiana chain store tax). Many graduated tax schemes bore the descriptive term "progressive" because of their graduated tax rates.

<sup>226</sup> *See, e.g., Great Atl. & Pac. Tea Co.*, 301 U.S. at 426; *Liggett*, 288 U.S. at 568-70 (Brandeis, J., dissenting) (both opinions explaining the rationale for applying progressive license taxes to chain stores).

<sup>227</sup> *See, e.g., Fox*, 294 U.S. at 101 (explaining that a West Virginia progressive chain tax borne most heavily by large gas stations was neither arbitrary nor unreasonable because they could afford to pay more taxes than smaller gas station chains or independent gas dealers); *Jackson*, 283 U.S. at 535 (noting the comparative managerial efficiency of chain stores). *See also Great Atl. & Pac. Tea Co.*, 301 U.S. at 419-20, 423, 425 (discussing retail business advantages of chain stores).

<sup>228</sup> *Liggett*, 288 U.S. at 572 (Brandeis, J., dissenting).

<sup>229</sup> *Id.* at 584-85 (Cardozo, J., dissenting). Independent stores who voluntarily cooperated with each other, sharing marketing strategies, pricing information, and in some cases, inventory, were exempt under most chain tax schemes whereas chain stores part of a formal integrated network were not. *See also Fox*, 294 U.S. at 100-01.

<sup>230</sup> Roberts, in fact, wrote the majority opinions upholding chain store taxes in *Great*



of these tax laws discriminated between retail businesses on the basis of their size or their organizational structure, this segment of the Court often upheld the authority of states to impose differential tax burdens on chain stores that benefitted smaller merchants and increased their social utility.<sup>231</sup>

## 2. Conservative Opposition to Progressive State License Taxes

In contrast, Justice Sutherland and the more conservative members of the Supreme Court often voted to invalidate progressive license taxes on chain stores and other forms of business enterprise on equal protection grounds. They insisted, as in other areas of economic regulation, that there be a close and substantial relationship between legislative means and ends, and thus read into the Equal Protection Clause a requirement of significant precision in all forms of legislative classification.<sup>232</sup> In essence, this quartet of justices combined traditional notions of economic substantive due process with equal protection to fashion a jurisprudence of economic liberty that emphasized the equal operation of the law as the linchpin of individual rights enjoyed alike by both natural persons and corporate entities. Sutherland, who was the principal spokesman for this group, emphasized repeatedly that the Fourteenth Amendment prohibited unequal taxation of similarly situated persons, and, unlike Cardozo, Brandeis, and Stone, he included private businesses within the ambit of constitutional protection from discriminatory taxes.<sup>233</sup>

---

*Atlantic & Pacific Tea Co. and Jackson. But see Stewart Dry Goods Co.*, 294 U.S. 550 (1935); *Liggett*, 288 U.S. 517 (invalidating state graduated taxes). Brandeis, Cardozo, and Stone, however, remained consistent, asserting in these cases, as in those in which the Court sustained progressive license taxes, the authority of states to impose differential taxes in order to preserve economic competition and promote social utility. *See, e.g., Liggett*, 288 U.S. at 568-70, 572 (Brandeis, J., dissenting).

<sup>231</sup> *See, e.g., Great Atl. & Pac. Tea Co.*, 301 U.S. at 425-26 (sustaining a Louisiana chain store tax); *Fox*, 294 U.S. 87 (upholding the application of a West Virginia progressive license tax on a chain of gasoline stations); *Jackson*, 283 U.S. 527 (sustaining an Indiana graduated tax on chain stores); *see also Stewart Dry Goods Co.*, 294 U.S. at 569 (Cardozo, J., dissenting) (arguing that "the flat rate is . . . less efficient than the graded one as an instrument of social justice"). In *Stewart Dry Goods Co.*, the Court invalidated a Kentucky progressive gross sales tax under the Equal Protection Clause, finding no reasonable correlation between commercial sales volume and graduated tax rates. *See also Liggett*, 288 U.S. at 585-86 (Cardozo, J., dissenting). *Liggett* and *Stewart Dry Goods Co.* were aberrations from the Court's general trend of upholding graduated license taxes.

<sup>232</sup> *See, e.g., Colgate v. Harvey*, 296 U.S. 404, 422 (1935) (asserting that the Fourteenth Amendment does not permit gross inequality in taxes). "The classification . . . must be founded upon pertinent and real differences, as distinguished from artificial ones." *Id.* at 423. *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37 (1928) (invalidating Kentucky mortgage recording tax only applicable to mortgages over five years).

<sup>233</sup> *See, e.g., Carmichael v. S. Coal & Coke Co.*, 301 U.S. 492, 527, 531 (1937) (Sutherland, J., dissenting); *Great Atl. & Pac. Tea Co.*, 301 U.S. at 432 (Sutherland, J., dissenting); *Jackson*, 283 U.S. at 544, 548 (Sutherland, J., dissenting).

Sutherland was especially critical of differential tax classifications based on the size of a business or its organizational structure. From his perspective, both chain and non-chain stores that sold similar items engaged in the same retail business regardless of their corporate form or volume of sales.<sup>234</sup> Differences between the two were slight and rarely justified the imposition of heavier taxes on those who were part of an integrated network while independent merchants enjoyed preferential tax treatment.<sup>235</sup> Dissenting from the Court's decision upholding an Indiana law that imposed higher taxes on retail chain stores than on independent merchants, Sutherland noted that it was "wholly irrelevant . . . that the business of one is carried on under many roofs, and that of the other under one only."<sup>236</sup> Consequently, the license tax operated unequally because of its application to "different persons following identical occupations."<sup>237</sup> Thus, he considered progressive taxes that discriminated between large and small commercial entities arbitrary and unreasonable incursions upon economic liberty harmful to the long-term interests of the community. However, he did not object to taxes that reflected substantial differences between competitors within an industry and actually promoted the public welfare.<sup>238</sup>

Inherently skeptical of political factions, Sutherland carefully scrutinized local tax laws in order to protect private economic rights from the tyranny of ephemeral democratic majorities. Accordingly, he and some other members of the Court viewed graduated taxes that imposed heavier burdens on large retail stores as illegitimate class legislation. For example, in *Jackson*, Sutherland's dissent

---

<sup>234</sup> See, e.g., *Great Atl. & Pac. Tea Co.*, 301 U.S. at 430-34 (Sutherland, J., dissenting); *Fox*, 294 U.S. at 103 (Sutherland, J.) (indicating that he would have affirmed the lower court decision that the West Virginia gas station chain tax violated the Equal Protection Clause); *Jackson*, 283 U.S. at 543-48 (Sutherland, J., dissenting). See also *Stewart Dry Goods Co.*, 294 U.S. 550 (invalidating Kentucky gross retail graduated sales tax); *Liggett*, 288 U.S. 517 (1935) (invalidating Florida chain store tax that imposed higher taxes on stores that were part of chains with franchises in multiple counties than on independent stores and chains that operated wholly within a single county). In each case, Sutherland and the other Four Horsemen comprised part of the Court majority even though they disagreed with Justice Roberts' dicta in these decisions that generally supported the concept of graduated taxes.

<sup>235</sup> See, e.g., *Great Atl. & Pac. Tea Co.*, 301 U.S. at 430-34 (Sutherland, J., dissenting); *Jackson*, 283 U.S. at 544-45 (Sutherland, J., dissenting).

<sup>236</sup> *Jackson*, 283 U.S. at 548 (Sutherland, J. dissenting); see also *Great Atl. & Pac. Tea Co.*, 301 U.S. at 431 (Sutherland, J., dissenting).

<sup>237</sup> *Jackson*, 283 U.S. at 546 (Sutherland, J., dissenting); see also *Great Atl. & Pac. Tea Co.*, 301 U.S. at 431, 433 (Sutherland, J., dissenting).

<sup>238</sup> See, e.g., *Magnano Co. v. Hamilton*, 292 U.S. 40, 43 (1934) (sustaining a fifteen-cent Washington tax on butter substitutes as a legitimate exercise of state police powers); *Great N. Ry. Co. v. Minnesota*, 278 U.S. 503 (1929) (sustaining a Minnesota tax levied on the gross receipts of intrastate business of an interstate railroad); *Raley & Bros. v. Richardson*, 264 U.S. 157 (1924) (upholding a Georgia tax on the intrastate business of interstate brokers).

characterized the progressive license tax borne by chain stores as "a mere subterfuge by which the members of one group of taxpayers are unequally burdened for the benefit of the members of other groups similarly circumstanced."<sup>239</sup> Consequently, he regarded most graduated tax schemes with considerable suspicion, aware that under the guise of local police powers transient popular majorities could, under the pretext of manufactured reasons unrelated to the public welfare, enact differential taxes to benefit one set of businesses at the expense of another. Thus, when confronted in *Grosjean* with what was, in essence, a discriminatory license tax based on the volume of gross advertising, Sutherland understandably regarded the Louisiana Act as an unconstitutional restriction upon the economic liberty of large daily newspapers and initially sought to invalidate it under the Equal Protection Clause.

### 3. Cardozo's Draft Concurrence in *Grosjean*

Justice Cardozo, together with Brandeis and Stone, fundamentally disagreed with this analysis. In his draft concurrence, Cardozo explained that:

If the statute were subject to no objection except the one considered in the opinion of the court, I should be unable to pronounce it void. A distinction between a large business and a small one, between newspapers with a weekly circulation of more than 20,000 copies and newspapers with less, does not exceed the bounds of legitimate classification, unless it results in an abridgement of the freedom of the press.<sup>240</sup>

For Cardozo, the differential tax imposed on the state's large newspapers was unconstitutional only because it abridged freedom of the press. Relying extensively upon the brief of the American Press Company, he compared the Louisiana Act to the controversial taxes upon knowledge, license requirements, and other forms of censorship used in England between the seventeenth and mid-nineteenth centuries, and briefly in post-revolutionary Massachusetts, to control criticism of the government and limit the independence of the press.<sup>241</sup>

---

<sup>239</sup> *Jackson*, 283 U.S. at 548 (Sutherland, J., dissenting). "The test to be applied . . . is . . . does the statute arbitrarily and without genuine reason impose a burden upon one group of taxpayers from which it exempts another group, both of them occupying substantially the same relation toward the subject matter of the legislation?" *Colgate v. Harvey*, 296 U.S. 404, 423 (1935).

<sup>240</sup> *Grosjean v. Am. Press Co.*, 297 U.S. at 233 (1936). Cardozo, Draft of *Grosjean* Concurring Opinion at 8; see also *id.* at 5 (asserting that the Equal Protection Clause permits differential tax classifications that do not concern the press); *id.* at 8-10.

<sup>241</sup> *Id.* at 1-4. Between the seventeenth and mid-nineteenth centuries, there were several attempts by the British government to restrict the press. One such restriction was a licensing scheme enacted in the seventeenth century pursuant to which the British government

Deeply committed to an informed democracy, Cardozo believed that by singling out certain newspapers, the Louisiana Act threatened the experimental impulse essential for democratic reform.<sup>242</sup> However, despite his fervent insistence that the case turned on the First Amendment, Cardozo nevertheless perceived that "[f]reedom of expression in the conduct of a newspaper is the very lifeblood of the business, and a tax upon that freedom puts the business in jeopardy . . . ."<sup>243</sup> Notwithstanding this observation, Cardozo sought to isolate the First Amendment issue because he believed the state otherwise had the power to create unequal tax burdens.<sup>244</sup> He therefore considered the newspaper license tax unreasonable because its selective application impaired the overriding public interest in having a responsible and independent press.<sup>245</sup>

Cardozo withdrew his concurring opinion when Sutherland thereafter substantially rewrote his opinion for the Court so that it adopted Cardozo's First Amendment rationale in place of its original equal protection premise.<sup>246</sup> That Sutherland made this substantive change should obscure neither the fact that *Grosjean* involved both economic liberty and freedom of expression nor Sutherland's implicit recognition of the link between these seemingly disparate concepts. Moreover, it would be incorrect to assume that, simply because Sutherland incorporated Cardozo's points in the published opinion, he forsook altogether his initial economic liberty analysis of the Louisiana act.

### C. Sutherland's *Grosjean* Opinion: Viewing the First Amendment Through the

---

censored stories published about it. In 1712, Parliament devised newspaper stamp and advertising taxes, referred to as knowledge taxes, designed to limit the circulation of the less expensive newspapers favored by common citizens. Essentially, the knowledge taxes functioned as a means of restricting information about public affairs so as to thwart popular criticism of the British monarchy and Parliament. Eventually, by the middle of the nineteenth century, Parliament repealed these types of restrictions upon the press. In 1786, Massachusetts briefly imposed a stamp tax on periodicals and an advertising tax, only to repeal them soon thereafter in the wake of much popular criticism. For an overview of the history of knowledge taxes, see Appellees' Brief, *supra* note 173, at 48-70 (appendix B). See generally LEONARD W. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION (Harper Torchbook 1963) (discussing knowledge taxes and other forms of prior restraint in the centuries preceding the First Amendment).

<sup>242</sup> Cardozo, Draft of *Grosjean* Concurring Opinion, at 6.

<sup>243</sup> *Id.* at 8.

<sup>244</sup> *Id.* at 5, 8-10. "[I]n callings not connected with freedom of the press, exemptions from taxation, unless wholly arbitrary or personal, are well within the scope of legislative power . . . ." *Id.* at 8-9. See also *Liggett Co. v. Lee*, 288 U.S. 517, 585-86 (1933) (Cardozo, J., dissenting).

<sup>245</sup> See Cardozo, Draft of *Grosjean* Concurring Opinion, at 5-6. "Once admit the possibility of imposing upon the press a special system of taxation, and its freedom is a myth, except indeed by dint of governmental grace." *Id.* at 5.

<sup>246</sup> CORTNER, *supra* note 174, at 165; KAUFMAN, CARDOZO, *supra* note 169, at 540-41.

*Lens of Economic Liberty and Factional Aversion*

Although much of Sutherland's published opinion in *Grosjean* seemingly relied upon the First Amendment, it also contained several oblique references to economic liberty, which the author probably muted in order to appease Cardozo and maintain what was otherwise a fragile consensus. Indeed, Sutherland's concluding remark that it was unnecessary to address the equal protection issue<sup>247</sup> masked the initial conflict within the Court over how to decide the case. Only twelve pages in length, the opinion reasoned that the Louisiana newspaper license tax abridged the independence of the press through its imposition of a two percent tax on the gross advertising receipts of the state's thirteen largest daily papers.<sup>248</sup> Yet, for all of its emphasis upon freedom of expression, the opinion also evoked Sutherland's aversion toward political factions and concern for protecting private economic rights from the tyranny of popular democratic majorities. While somewhat constrained by his compromise with the Cardozo bloc, Sutherland nevertheless imbued his analysis of the First Amendment with principles of economic liberty and thus set forth in inchoate form the concept of the business of expression.

### 1. The Nexus Between Economic Liberty and Freedom of Expression

From the outset, Sutherland articulated a broad notion of liberty that encompassed freedom of expression and economic rights. A proponent of selective incorporation, he considered freedom of the press a fundamental constitutional right "safeguarded against state action by the due process of law clause of the Fourteenth Amendment."<sup>249</sup> Accordingly, he ruled that the constitutional limitations of the First Amendment applied directly to the state of Louisiana through the Due Process Clause of the Fourteenth Amendment — a conclusion based, in part, upon an awareness that both economic rights and expressive behavior were components of individual liberty protected by the Due Process Clause against arbitrary governmental authority. Significantly, Sutherland cited the juxtaposed precedent of two freedom of expression decisions and one about contractual autonomy in support of his finding that the Due Process Clause of the Fourteenth Amendment incorporated the First Amendment.<sup>250</sup> Moreover, as in the chain store tax cases, he

---

<sup>247</sup> *Grosjean*, 297 U.S. at 251.

<sup>248</sup> *Id.* at 250.

<sup>249</sup> *Id.* at 243-44.

<sup>250</sup> *Id.* at 244 (citing *Near v. Minnesota*, 283 U.S. at 697 (1931) (prior restraint); *Gitlow v. New York*, 268 U.S. at 652 (1925) (free speech); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (liberty of contract)). In particular, Sutherland's position in three 1920s cases illustrates how his understanding of substantive due process reflected a broad conception of personal liberty in which economic and non-economic rights at times converged. For example, in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), Sutherland was part of a unanimous Court that struck down an Oregon law that compelled young children to attend

rejected the assertion of the state that the corporate status of the appellees limited the scope of their constitutional protection. For Sutherland there was no difference between the newspaper publishers as commercial entities and natural persons in terms of either freedom of press, due process, or equal protection.<sup>251</sup>

In essence, Sutherland perceived that the Louisiana newspaper license tax affected both the business and expressive functions of the state's largest newspapers. From this perspective, he said of the act: "It thus operates as a restraint in a double sense. First, its effect is to curtail the amount of revenue realized from advertising, and, second its direct tendency is to restrict circulation . . . it well might result in destroying both advertising and circulation."<sup>252</sup> That Sutherland described the law in this manner perhaps reflected his colloquy at oral argument with Elisha Hanson, counsel for the appellees, who in response to Sutherland's question whether the Act "would tend to curtail circulation," responded: "Yes . . . [i]t would also turn the business of one newspaper group over to another."<sup>253</sup> Hanson's reference to the unequal operation of the license tax and its partial characteristics resonated, in particular, with Justice Sutherland, whose aversion to political factions pervaded his constitutional jurisprudence and heightened his sensitivity to the possible interplay between freedom of expression and economic liberty.

Prior to joining the Court, Sutherland discussed the importance of judicial review in preserving individual rights from the whims of transient democratic majorities and the political factions that controlled them. Of particular relevance was a speech he made before the New York State Bar Association in which he asserted:

---

the state's public schools. The Court found that the statute not only unduly interfered with the implicit First Amendment autonomy of parents and guardians to make educational choices for their children, but also infringed upon the economic liberty of non-public schools. *Id.* at 534-36. However, two years earlier, in the companion cases of *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Bartels v. Iowa*, 262 U.S. 404 (1923), Sutherland joined Justice Holmes in dissenting from the Court's ruling that states could not prohibit foreign language instruction in either private (including parochial) or public schools. *See Meyer*, 262 U.S. at 401-03; *Bartels*, 262 U.S. at 411. Sutherland tacitly agreed with Holmes' assertion that this requirement did not constitute "an undue restriction of the liberty either of teacher or scholar." *Bartels*, 262 U.S. at 412 (Holmes, J., dissenting). Though his stance in these three cases might seem inconsistent, when viewed from the perspective of his aversion to class legislation and political factions, Sutherland's voting pattern becomes more comprehensible. For Sutherland, a law that required children to attend public schools in the absence of a substantial state interest was illegitimate class legislation. In contrast, a flat ban on foreign language instruction intended to encourage fluency in English was a legitimate exercise of local police powers pursuant to a law of equal operation.

<sup>251</sup> *See Grosjean*, 297 U.S. at 244.

<sup>252</sup> *Id.* at 244-45.

<sup>253</sup> CORTNER, *supra* note 174, at 163 (quoting *New Orleans Times-Picayune*, Jan. 14, 1936, at 28).

The guaranties for safe-guarding life, liberty and property, freedom of speech, of the press and of religious worship, and all the other guaranties of the Constitution, would be of little value if their interpretation and enforcement depended upon arbitrary, shifting, temporary official edicts instead of the calm, judgment of the judiciary under the general law of the land.<sup>254</sup>

Confronted in *Grosjean* with the issue of whether Louisiana abridged freedom of the press through the guise of a seemingly neutral revenue measure, Sutherland adhered to his conviction that partial laws enacted for the benefit of some groups at the expense of others de-legitimized the exercise of governmental power and undermined the pursuit of liberty in a constitutional democracy.

Sutherland thought the license tax violated the First Amendment because it represented an impermissible attempt by the state to interfere with the dissemination of news. He considered "an untrammelled press . . . a vital source of public information" and "informed public opinion . . . the most potent of all restraints upon misgovernment."<sup>255</sup> Consequently, Sutherland regarded with suspicion a law whose unequal operation threatened the independence of large newspapers through the selective imposition of a tax upon their principal source of revenue-advertising.<sup>256</sup>

Comparing the Louisiana Act to the taxes on knowledge and other discredited methods used throughout Anglo-American history to restrict the circulation of newspapers and stifle criticism of government, Sutherland believed the Louisiana Act was an unconstitutional form of censorship.<sup>257</sup> Cognizant of its origins, he

<sup>254</sup> Principle or Expedient?, *supra* note 76, at 11.

<sup>255</sup> *Grosjean*, 297 U.S. at 250.

<sup>256</sup> *Id.* at 244-45. In particular, Sutherland appears to have accepted the appellees' argument that the license tax imposed economic burdens on them for the benefit of their competitors. *Id.* at 241 (describing the differential effects of the tax).

<sup>257</sup> *Id.* at 245-50. In essence, Sutherland thought the license tax functioned as a form of prior restraint because it impeded the business of the press. *Id.* at 249-51. In so doing, he broadly construed the concept of unconstitutional prior restraint to encompass restrictions upon circulation after publication. *Id.* at 249. In contrast, the preeminent common law jurist William Blackstone had noted: "[L]iberty of the press . . . consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published." CORTNER, *supra* note 174, at 7 (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, (J.B. Lippincott 1890 (1859))). In fact, Sutherland went so far as to suggest that the framers of the First Amendment intended for freedom of the press to mean more than simply freedom from prior restraint. See *Grosjean*, 297 U.S. at 248. It also signified protection against any form of censorship. *Id.* at 248-50. For the notion that the First Amendment was not necessarily meant to depart significantly from the Blackstonian concept of freedom of the press, see LEVY, *supra* note 241, at 176-248 (noting that the post-revolutionary generation distinguished between prior restraint and post-publication censorship in the form of anti-sedition laws). See also *Near v. Minnesota*, 283 U.S. 691, 735-37 (1931) (Butler, J., dissenting) (suggesting that a Minnesota law authorizing law suits to prevent future publication of periodicals considered of nuisance

concluded that the license tax sought to curb freedom of expression and quell criticism of the dominant political faction within the state. Its discriminatory treatment of large, metropolitan daily newspapers critical of the Huey Long political faction threatened to compromise the autonomy of these publications and impair the public interest in learning about government and business affairs.<sup>258</sup>

In essence, Sutherland regarded the license tax as illegitimate class legislation, and this enabled him to appreciate how the issue of freedom of expression, in effect, merged with the economic liberty aspect of the case. Sutherland's emphasis upon the value of an unfettered press as the conduit of news reflected his paramount concern with preserving equal opportunity and individual choice in a democratic society.<sup>259</sup> Yet a law that exempted certain segments of the press from paying a tax required of their competitors indicated partisan government intervention in the marketplace of ideas inconsistent with the democratic ideals of an informed citizenry and the impartial restraint of the law.<sup>260</sup>

---

value neither constituted an unconstitutional prior restraint nor exceeded the permissible exercise of legitimate police powers). Sutherland joined in Butler's *Near* dissent. Sutherland's incorporation of Cardozo's First Amendment arguments may explain his apparent reversal of course after *Near*, though it is possible to reconcile Sutherland's seemingly contradictory views about prior restraint if one takes into consideration his pervasive aversion toward political factions. See text *infra* and accompanying notes. See LEVY, *supra* note 241, at 176-248 (presenting a view of the First Amendment in contrast to Sutherland's). Contemporaneous commentary in several law review articles published in the aftermath of *Grosjean* thought Sutherland's *Grosjean* opinion went considerably beyond Blackstone's concept of freedom of the press. See, e.g., Note, 49 Harv. L. Rev. 998, 998 (1936); Note, 20 Minn. L. Rev. 671, 672 (1936) (both suggesting that Sutherland seemed to interpret freedom of the press to include circulation and dissemination of published ideas).

<sup>258</sup> See *Grosjean*, 297 U.S. at 244-45, 250-51.

<sup>259</sup> *Id.* at 247, 249-50. In an undated commencement address at Brigham Young University, Sutherland remarked: "To be wholly free consists in something more than the absence of physical restraint; it is the ability to look your fellow in the face with the consciousness of intellectual independence as well." Sutherland, Brigham Young Commencement Address, *supra* note 38, at 9.

<sup>260</sup> To this extent, Sutherland quoted from Thomas Cooley, his constitutional law professor at Michigan over fifty years earlier:

The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.

*Grosjean*, 297 U.S. at 249-50 (quoting 2 THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 886 (8<sup>th</sup> ed.)). Cooley, a Michigan jurist, was one of the leading constitutional theorists of the nineteenth century whose profound concern for equal operation of the law reflected an abiding aversion toward political factions and a penchant for Jacksonian democracy. See Olken, *Justice George Sutherland*, *supra* note 19, at 22-24 (discussing the main tenets of Cooley's constitutional philosophy and his influence upon Sutherland).



Insofar as he acknowledged the authority of the state to subject the press to generally applicable economic regulations, he remained skeptical of partial laws intended to skew access to information about matters of public interest and discourage criticism of government. To this extent, Sutherland remarked:

The tax here involved is not bad because it takes money from the . . . appellees . . . . It is bad because, in light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. A free press stands as one of the great interpreters between the government and the people.<sup>261</sup>

Though Sutherland ostensibly focused on the First Amendment, he also recognized that the license tax encumbered the economic liberty of the state's thirteen largest newspapers. The reference above to the "present setting" of the tax and its characterization as "a deliberate and calculated device . . . to limit . . . circulation . . . ." indicate Sutherland's acute sense of factional influence in the passage of the law and its effects upon both the business and expressive interests of the newspapers within the state. Sutherland realized that the legislature not only sought to insulate the Long political regime from criticism, but that its differential tax created distinct economic burdens for the large metropolitan dailies from which their competitors for advertising and subscription revenue, predominantly small rural papers, were exempt. Circulation, therefore, signified to Sutherland not only freedom of expression, but also an activity with business implications. Accordingly, he understood that, as a practical matter, it was very difficult to distinguish between the business of publishing and the free press concerns of the adversely affected newspapers. Thus, he considered the Louisiana license tax an infringement of the business of expression in that it impaired free press rights and economic liberty of a select group of newspapers.

Consequently, the form of the tax assumed considerable importance in Sutherland's analysis, and his attention to it underscores the nexus he perceived between the equal protection and First Amendment claims of the newspapers. In this regard, he commented:

The form in which the tax is imposed is in itself suspicious. It is not measured or limited by the volume of advertisements. It is measured alone by the extent of the circulation of the publication in which the advertisements are carried, with the plain purpose of penalizing the publishers and curtailing the selection of a selected group of

---

<sup>261</sup> *Grosjean*, 297 U.S. at 250. That Louisiana was the only state with such a discriminatory license tax also demonstrated to Sutherland its factional basis. *Id.* at 250-51.

newspapers.<sup>262</sup>

Sutherland's reference to the "form" of the license tax evoked its factional context in which it operated as a partial law that impaired both the expressive and business interests of the urban press targeted by Long's political cadre. As in other economic liberty cases, Sutherland insisted that there be a close and substantial relationship between the basis of the legislative classification and the state's regulatory objective. From this perspective, he questioned the legitimacy of a tax that distinguished between newspapers on the basis of their circulation volume instead of the more relevant criterion of advertising revenue. To Sutherland, then, the Louisiana Act was no less arbitrary and unreasonable than chain store taxes based upon merely the size or corporate structure of a particular type of business or, for that matter, other types of economic regulations whose tenuous assumptions reflected the influence of political factions.<sup>263</sup>

Moreover, a fundamental tenet of Sutherland's economic liberty jurisprudence prescribed close judicial scrutiny of laws to ascertain whether they in fact promoted the long-term public welfare or instead merely advanced the self-interest of political factions able to manipulate the ephemeral whims of popular democratic majorities.<sup>264</sup> Sutherland followed this approach in *Grosjean* when he carefully examined a seemingly neutral economic regulation of the press and found that it

---

<sup>262</sup> *Id.* at 251. Justice Stone advised Sutherland not to place undue emphasis upon legislative motive in assessing the legitimacy of the license tax, especially the infamous July 1934 circular Huey Long distributed to the Louisiana legislature to convince it about the imperative of taxing the "lying" press. In a memorandum to Sutherland, he wrote: "While reading between the lines we may conclude that this expressed the real motives of the legislation, . . . it would be extremely unfortunate to commit ourselves to the proposition that could impugn the motives to the members of the legislature . . ." Memorandum from Associate Justice Horace F. Stone to Associate Justice George Sutherland, at 1 (Feb. 5, 1936) (on file as part of the Horace F. Stone Papers at the Library of Congress). Stone also said:

There is no need to rely on such dubious support. The tax, on its face, is a plainly discriminatory tax . . . a burden on the exercise of the powers of the press . . . It would be wiser for use to rest the case on that unimpeachable ground than to attribute bad motives to the legislators on the basis of what someone else said to them.

*Id.*

<sup>263</sup> See *Grosjean*, 297 U.S. at 250-51; see also *Great Atl. & Pac. Tea Co.*, 301 U.S. at 433-34 (Sutherland, J., dissenting) (finding a Louisiana chain store tax unconstitutional); *Adkins v. Children's Hosp.*, 261 U.S. 525, 549-62 (1923) (Sutherland, J.) (suggesting that a minimum wage regulation for women violated due process because it bore a tenuous relationship to public health, safety, morals, or welfare).

<sup>264</sup> See Olken, *Justice George Sutherland*, *supra* note 19, at 57-88 (discussing Sutherland's economic liberty jurisprudence).

was a partial law detrimental to the freedom of expression and economic liberty of nearly a tenth of the state's newspapers.<sup>265</sup>

## 2. *Grosjean* and Sutherland's Previous First Amendment Record

Perhaps the most revealing indication that Sutherland construed the First Amendment issue in *Grosjean* from the perspective of economic liberty emanates from his overall record in freedom of expression cases during his sixteen years on the Court. In the vast majority of such cases, Sutherland often voted to sustain the convictions of individuals under criminal syndicalism statutes enacted by the government to suppress seditious speech.<sup>266</sup>

Though he believed the paramount interest of national security generally outweighed freedom of expression,<sup>267</sup> Sutherland departed from his usual deference when convinced that only a tenuous link existed between the expressive activities of the defendant and the criminal syndicalism prohibited by law.<sup>268</sup> Insofar as he sanctioned the restriction of seditious speech, he nevertheless insisted that such

---

<sup>265</sup> *Grosjean*, 297 U.S. at 244-45, 250-51. The American Newspaper Publisher's Association, for which the appellees' lead attorney, Elisha Hanson, was the general counsel, also regarded the case as one involving the attempt of a political faction to interfere with freedom of the press through the guise of a seemingly neutral economic regulation. In this regard, it emphasized "the principle that the freedom of the press includes the freedom from unjust and discriminatory taxation by which hostile political factions may seek to stifle criticism through attempting the economic destruction of their critics." CORTNER, *supra* note 174, at 171 (quoting *Editor & Publisher*, Feb. 15, 1936, at 41).

<sup>266</sup> See, e.g., *Herndon v. Lowry*, 301 U.S. 242, 274-75 (1937) (Van Devanter, J., dissenting) (Sutherland joined the dissent that would have upheld the criminal syndicalism conviction of a man for the possession of Communist literature with the intent to distribute it and incite an insurrection); *Whitney v. California*, 274 U.S. 357 (1927) (sustaining a criminal syndicalism statute); *Gitlow v. New York*, 268 U.S. 652 (1925) (upholding a conviction for seditious speech). Sutherland was part of both the *Whitney* and *Gitlow* Court majorities.

<sup>267</sup> See, e.g., *United States v. Macintosh*, 283 U.S. 605 (1931) (Sutherland, J.), *overruled* by *Girouard v. United States*, 328 U.S. 61 (1946). In *Macintosh*, the Court held the United States government could deny citizenship to an alien who refused to take an unqualified oath to bear arms in defense of the country during a war. See also *Meyer v. Nebraska*, 262 U.S. 390 (1923) (Holmes, J., dissenting) (invoking a national security rationale in support of state law that prohibited foreign language instruction in public schools). Sutherland, the only other dissenter, joined in Holmes' dissent.

<sup>268</sup> See, e.g., *DeJonge v. Oregon*, 299 U.S. 353 (1937) (ruling that mere participation in a meeting that discussed revolutionary policies was not tantamount to illegal advocacy of overthrowing the government); *Stromberg v. California*, 283 U.S. 359 (1931) (finding part of the California criminal syndicalism statute that applied to the mere demonstration of a red flag unconstitutionally vague); *Fiske v. Kansas*, 274 U.S. 380 (1927) (reversing the criminal syndicalism conviction because of insufficient evidence). Sutherland joined in the majority opinions of these cases.

regulation occur pursuant to laws equally applicable to all citizens and administered in an impartial manner for the benefit of the public welfare.<sup>269</sup>

For similar reasons, five years before *Grosjean*, Sutherland was one of four members of the Court who dissented in *Near v. Minnesota*,<sup>270</sup> a case involving the constitutionality of a statute that authorized local officials to enjoin the publication of articles in newspapers and other periodicals previously found to have contained similar stories that constituted a nuisance.<sup>271</sup> Chief Justice Hughes, writing for a divided Court, ruled the "Minnesota gag law" contravened the First Amendment as an impermissible prior restraint.<sup>272</sup> However, to Justice Butler and the others who joined in his dissent, the statute marked the reasonable exercise of state police powers to curb a public nuisance.<sup>273</sup> Narrowly construing the concept of prior restraint,<sup>274</sup> this quartet of justices, who often demonstrated a particular solicitude for the economic liberty of private businesses, thought that the gag law operated equally in that it applied to all publishers. As such, it was not a partial measure intended to benefit some at the expense of others, but rather a legitimate means of preserving community order.<sup>275</sup>

Sutherland's implicit endorsement of Butler's analysis suggests that in *Near*, as in the seditious speech cases, he was less interested in freedom of expression for its own sake than in protecting individual liberty from the tyranny of political factions. Yet undue attention to the First Amendment rhetoric within his opinions in *Grosjean*, and a year later in *Associated Press*, obscures this point. Moreover, it is possible to reconcile Sutherland's apparent contradictory positions in *Near* and *Grosjean* about the scope of prior restraint if one considers that Sutherland actually incorporated many of Cardozo's points about the First Amendment when he redrafted his *Grosjean* opinion. Much less a proponent of free speech in a

---

<sup>269</sup> Sutherland also demonstrated his aversion to political factions in other kinds of individual liberty cases. See, e.g., *Berger v. United States*, 295 U.S. 78 (1935) (finding a prosecutor's misleading closing statement unconstitutionally impaired a defendant's right to a fair trial because such deceptive tactics undermined the impartial restraint of the law); *Powell v. Alabama*, 287 U.S. 45 (1932) (invoking the right to defense counsel when confronted with prosecution for the commission of a capital crime where the absence of a defense attorney would subvert a fair hearing).

<sup>270</sup> 283 U.S. 697 (1931).

<sup>271</sup> The Minnesota law provided that a person or company "engaged in 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, is guilty of a nuisance, and . . . may be enjoined . . ." Ch. 285 Session Laws of Minn. 10123-1 *et seq.* § 1 (1925) (Mason's Minn. Stats. 1927).

<sup>272</sup> *Near*, 283 U.S. at 713, 723.

<sup>273</sup> *Id.* at 731-38 (Butler, J., dissenting).

<sup>274</sup> *Id.* at 735 (explaining the Minnesota law merely authorized an equitable remedy for the proscription of a nuisance).

<sup>275</sup> *Id.* at 735, 737-38.

democratic republic than either Cardozo, or for that matter Brandeis, Sutherland was most receptive to the concept of an untrammelled press when confronted with cases wherein a close nexus existed between economic liberty and freedom of expression. Fundamentally, this was how he perceived the Louisiana license tax controversy and a year later interpreted the attempt of the National Labor Relations Board to interfere with the firing of an editor in the New York office of the Associated Press.

#### IV. EDITORIAL DISCRETION, INDUSTRIAL REGULATION AND THE BUSINESS OF EXPRESSION REFINED DURING THE TWILIGHT OF *LOCHNER*

In *Associated Press v. NLRB*,<sup>276</sup> Sutherland elaborated upon his views about the business of expression when he dissented from the Court's decision upholding the application of the National Labor Relations Act to the editorial operations of a private news agency. One of five cases decided on April 12, 1937 that upheld the National Labor Relations Act as a regulation of interstate commerce,<sup>277</sup> *Associated Press*, like *Grosjean*, presented issues of both economic liberty and freedom of expression before the Supreme Court. Yet unlike *Grosjean*, in which all of the justices reached a consensus, in *Associated Press* the ideological rift that beset the Court throughout the 1930s once again emerged as five of its members, reluctant to interfere with the industrial policies of the federal government, sustained the National Labor Relations Act as a legitimate economic regulation of interstate commerce that only incidentally affected freedom of the press.<sup>278</sup> Indeed, the contrast between Roberts' majority opinion and Sutherland's dissent underscores the dichotomy between economic liberty and freedom of expression to which the modern Court has adhered since the demise of the *Lochner* era.

Roberts expressed considerable deference toward the law as an economic measure and thus regarded the First Amendment claim of the Associated Press in an ancillary light. Sutherland, however, interpreted freedom of expression through the prism of economic liberty and, therefore, perceived the nexus between the expressive rights of the Associated Press and its private business interests. Though

---

<sup>276</sup> 301 U.S. 103 (1937).

<sup>277</sup> See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding application of the NLRA to the steel industry); *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49 (1937) (upholding application of the NLRA to the trailer manufacturing industry); *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937) (upholding application of the NLRA to the clothing manufacturing industry); *Washington, Va. & Md. Coach Co. v. NLRB*, 301 U.S. 142 (1937) (upholding application of the NLRA to an interstate transportation company). Justices Butler, McReynolds, Sutherland, and Van Devanter dissented from the other Commerce Clause case decided that day, *Associated Press v. NLRB*, 301 U.S. 103 (1937), in addition to dissenting from each of the other cases except for *Washington, Va. & Md. Coach Co.*

<sup>278</sup> *Associated Press*, 301 U.S. at 125-30, 133.

his constitutional analysis ostensibly focused primarily on the First Amendment, as in *Grosjean*, his frequent references to political factions and conclusion that the National Labor Relations Act was an illegitimate partial law evoked his pervasive concern with economic liberty.

Ironically, Sutherland's insistence that the Court erred in its casual assessment of the First Amendment has, in part, engendered the perception that freedom of expression warrants a higher standard of review than economic liberty. Yet nowhere in his dissent did Sutherland actually endorse this approach. Unlike a majority of the Court, he refused to abandon, in the area of economic regulation, the strict scrutiny characteristic of *Lochner* era police powers jurisprudence. Cognizant that the NRLA affected both the business and expressive interests of the Associated Press, Sutherland construed the law with *Lochner* in mind because he did not necessarily differentiate between First Amendment and economic rights, which he regarded as complementary aspects of personal liberty vulnerable to the ephemeral whims of transient democratic majorities. Analysis of the issues before the Court provides an essential context from which to understand Sutherland's nuance dissent.

#### A. *Interstate Commerce and Economic Liberty*

The case arose when the Associated Press terminated from its New York office Morris Watson, an editor and prominent leader in the American Newspaper Guild active in the process of collective bargaining by which the union sought to reduce the working hours of the Associated Press' editorial employees.<sup>279</sup> A private news organization that collected, reformulated, and distributed stories to its member newspapers throughout the country, the Associated Press claimed that it fired Watson for poor performance as a news editor,<sup>280</sup> though in all probability his discharge emanated from his union activities and perceived bias in covering labor matters within the news.<sup>281</sup> The National Labor Relations Board intervened on behalf of Watson, found his dismissal discriminatory, and concluded that the Associated Press committed several unfair labor practices.<sup>282</sup> It ordered the news

---

<sup>279</sup> See Brief for the National Labor Relations Board at 13, *Associated Press v. NLRB*, 301 U.S. 103 (1937) (No. 365) [hereinafter *Brief for the NLRB*]. The Guild was the exclusive collective bargaining representative of the Associated Press's editorial employees.

<sup>280</sup> See Brief on Behalf of Petitioner the Associated Press at 5, *Associated Press v. NLRB*, 301 U.S. 103 (1937) (No. 365) [hereinafter *Brief of the Associated Press*].

<sup>281</sup> See *Brief for the NLRB* at 9, *Associated Press* (No. 365) (attributing the dismissal to Watson's union leadership).

<sup>282</sup> *Id.* at 5, 9-15. The NLRB argued that Morris Watson's termination from his editorial position at the Associated Press in apparent retaliation for his union activities as head of the American Newspaper Guild unit of the Associated Press violated the right of employees to organize and participate in unions and the process of collective bargaining pursuant to § 7 of the National Labor Relations Act. Moreover, the dismissal of a union leader signified illegal interference by an employer with the union and collective bargaining rights

organization to reinstate Watson as an editor with back pay and to cease and desist from refusing to recognize the collective bargaining rights of its employees, a decision affirmed by the United States Court of Appeals for the Second Circuit.<sup>283</sup> The Associated Press then appealed to the United States Supreme Court.

### 1. Private Economic Affairs and Editorial Discretion

The Associated Press contended that the actions of the National Labor Relations Board infringed upon its business of expression. First, it argued that the administrative agency lacked jurisdiction to intervene in Watson's dismissal because neither the news service in general nor its editorial employees in particular were engaged in interstate commerce.<sup>284</sup> To this extent, it relied upon Supreme Court precedent which distinguished between manufacturing and commerce.<sup>285</sup> The Associated Press emphasized that, although its editors rewrote news stories supplied from sources throughout the country, their activities were analogous to those of workers in a manufacturing plant whose production of items indirectly affected the flow of interstate commerce.<sup>286</sup> From this perspective, the Associated Press differentiated between the process of editing, which it characterized as a creative task distinct from interstate commerce, and the transmission of news across state

---

guaranteed by § 7 of the Act and an impermissible attempt to discourage membership in the American Newspaper Guild. Accordingly, the labor board contended the Associated Press also violated subsections (1) and (3) of § 8 of the Act.

<sup>283</sup> See *Brief for the NLRB* at 15-16, *Associated Press* (No. 365); *NLRB v. Associated Press*, 85 F.2d 56 (1936).

<sup>284</sup> See *Brief of the Associated Press*, *supra* note 280, at 10-12, 40, 43-45. The Associated Press viewed itself as "an exchange of news system and nothing more." *Id.* at 43 (quoting Transcript Record at 88, *Associated Press v. NLRB*, 301 U.S. 103 (1936) (No. 365)). It characterized this exchange of information as private and therefore "not interstate commerce." *Id.* at 44. Arguing that in its "collection, compilation, formulation and distribution of . . . news" to member newspapers throughout the country, the Associated Press was "not a mere conduit of news," *id.* at 9, the news agency distinguished itself from railroads and other instrumentalities of interstate commerce. *Id.* at 16. Moreover, since editorial employees merely produced news stories and did not transmit them through the channels of interstate commerce, their editorial activities did not constitute interstate commerce. *Id.* at 11, 45.

<sup>285</sup> See, e.g., *Carter v. Carter Coal Co.*, 238 U.S. 238 (1936) (ruling that industrial working conditions and labor relations were not matters of interstate commerce); *E.C. Knight Co.*, 156 U.S. 1 (1895) (noting that manufacturing precedes commerce).

<sup>286</sup> See *Brief of the Associated Press*, *supra* note 280, at 45, *Associated Press* (No. 365). At oral argument, John W. Davis, on behalf of the Associated Press declared: "These employees are engaged . . . in the manufacture of news . . . they are engaged in the production of news, in its obtainment, in its formulation, in its preparation . . ." *Associated Press v. NLRB*, 301 U.S. 103, 731 (argument of John W. Davis, counsel for the Associated Press).

lines conducted by its non-editorial employees.<sup>287</sup> Narrowly construing the scope of the Commerce Clause, the Associated Press contended that its labor relations with editorial employees such as the discharged Watson constituted a local matter remotely connected to interstate commerce. Accordingly, the National Labor Relations Board lacked constitutional authority under both the Tenth Amendment and the Commerce Clause to issue its cease-and-desist order upon the Associated Press.<sup>288</sup>

In addition, the Associated Press asserted that the National Labor Relations Act violated the Due Process Clause of the Fifth Amendment.<sup>289</sup> Emphasizing its primary function as a private distributor of news, the company fundamentally objected to the compulsory system of collective bargaining imposed upon it by the federal government.<sup>290</sup> Indeed, it invoked the hoary, though by then somewhat discredited, presumption that an inherent equality existed in the bargaining positions of prospective employees and their potential employers.<sup>291</sup> From this premise, the news service criticized the unilateral requirement that it negotiate with the American Newspaper Guild irrespective of whether the union represented the

---

<sup>287</sup> See *Brief of the Associated Press*, *supra* note 280, at 11, 45, *Associated Press* (No. 365).

<sup>288</sup> *Id.* at 18, 24-26, 29 (asserting that labor relations comprise local activities with no bearing on interstate commerce).

<sup>289</sup> *Id.* at 17, 64, 68, 70, 75. The news agency contended the compulsory process of collective bargaining abridged liberty of contract by forcing both employers and employees to relinquish their private contract rights to collective action. *Id.* at 68, 70, 75. Moreover, application of the federal labor act to a private business was "an intolerable interference with the right of employers to manage the internal affairs of their private enterprises." *Id.* at 92. The Associated Press also claimed the Act abridged the news agency's right to a jury trial under the Seventh Amendment. *Id.* at 17.

<sup>290</sup> *Id.* at 70, 75, 85-88. In part, the Associated Press considered the Act arbitrary because it ignored the common law distinction between public and private businesses when it included within its broad scope virtually all types of businesses, regardless of their size and the precise relationship between employers and employees. Believing that a vague government interest in the promotion of industrial collective bargaining did not, in and of itself, transform an otherwise private enterprise into a public endeavor, the news service assailed the federal government's attempt to abridge liberty of contract. *Id.* at 68, 70, 75, 92. At oral argument, its counsel remarked that the federal labor act was "a direct violation of the Fifth Amendment . . . because it . . . [was] . . . an invasion of freedom of contract between an employer and an employee . . . engaged in a wholly private occupation . . ." *Associated Press*, 301 U.S. at 728 (argument of John W. Davis, counsel for the Associated Press).

<sup>291</sup> See *Brief of the Associated Press*, *supra* note 280, at 68, 70-71, *Associated Press* (No. 365) (referring to *Adair v. United States*, 208 U.S. 161, 174-75 (1908)) (asserting that a federal labor law arbitrarily interfered with contractual liberty because it disrupted the equal rights of labor and management to bargain over terms of employment).



actual will of the vast majority of its constituents.<sup>292</sup> Doubtful that mandatory collective bargaining under such circumstances bore a substantial relationship to the public welfare, the company considered the Act an unreasonable and arbitrary incursion upon the contractual freedom of management and workers alike.<sup>293</sup> Accordingly, the Associated Press decried the National Labor Relations Act as an illegitimate attempt to alter the balance of power within the industrial marketplace through the means of a partial regulation intended to benefit some groups of employees to the economic disadvantage of their employers.<sup>294</sup> Frustrated that the National Labor Relations Board prohibited Watson's discharge, the company assailed a federal law that impeded its economic liberty to hire and fire employees.<sup>295</sup>

---

<sup>292</sup> *Id.* at 85, 87-88; *Associated Press*, 301 U.S. at 111-14 (excerpt from argument of John W. Davis, counsel for the Associated Press) (claiming the federal labor act "fosters the closed union shop"). *Id.* at 111.

<sup>293</sup> See *Brief of the Associated Press*, *supra* note 280, at 70, 75, 92, *Associated Press* (No. 365); *Associated Press*, 301 U.S. at 728-30 (argument of John W. Davis, counsel for the Associated Press); *Associated Press*, 301 U.S. at 111 (excerpt from argument of John W. Davis, counsel for the Associated Press) (characterizing the federal labor act as "an arbitrary encroachment upon the constitutional rights of the unwilling employer and his non-consenting employees").

<sup>294</sup> The Associated Press argued that the National Labor Relations Act conferred on its employees more choice in negotiating than it allowed the news agency as an employer, because the Act forced the Associated Press to recognize a collective bargaining unit sanctioned by the NLRB. Insofar as the employees presumably had some initial choice as to the selection of their labor representative (or perhaps could decline union representation altogether), the Associated Press had no other choice but to deal with the union. See *Associated Press*, 301 U.S. at 729 (argument of John W. Davis, counsel for the Associated Press). Moreover, because the Act required the Associated Press to bargain only with the union elected by a majority of the employees, it "den[ie]d minority the right to deal with the employer . . . [and] . . . the employer the right to deal with the minority" in contravention of freedom of contract implicit within the concept of substantive due process. *Id.* at 730. The news agency also raised the possibility that a faction of workers might manipulate the union election process to the detriment of the vast majority of their peers and thus actually "subject the majority employees to the will of the minority." *Brief of the Associated Press* at 85, *Associated Press* (No. 365). Additionally, while the Act restricted the economic liberty of the employer through its provisions for compulsory bargaining and arbitration of labor disputes, it did not impose similar limitations upon members of the union. *Id.* at 87-88.

<sup>295</sup> To this extent, it commented derisively that:

[T]he AP [sic] must employ a person whom it *does* not want . . . . Neither the subject matter, the terms, nor the duration of the contract are of its own choosing. The AP [sic] must refrain from employing other persons more to its liking in order to leave room for Watson, or may even be compelled to discharge some non-union editorial employee in order to make room for Watson.

Of particular concern to the Associated Press was the application of the National Labor Relations Act to the editorial operations of a private news entity. It considered its core business, the production of news stories and their subsequent dissemination to member newspapers, distinct from ordinary forms of commercial enterprise that did not necessarily involve freedom of expression.<sup>296</sup> In essence, the Associated Press perceived that the cease-and-desist order of the National Labor Relations Board interfered with both its economic liberty and the exercise of its editorial discretion pursuant to the First Amendment. As the private news agency explained:

To name the men who shall choose and write the news for publication is no different either in principle or in result from naming what shall be [either] written or published. Here the author and the product are one and inseparable. If one is to be free, so must the other.<sup>297</sup>

Consequently, it considered its business and expressive interests indivisible and sought to persuade the Court that a restriction upon its freedom of contract undermined the integrity of its expressive endeavor. With this in mind, the company asked: "How can a newspaper remain the master of its business if the right to select those who compose its editorial page . . . those who shall compose its news columns is no longer within its choice?"<sup>298</sup>

At oral argument, John W. Davis, counsel for the Associated Press, described Watson as "the writer, the reporter, the rewriter, the composer of headlines" and noted that he wrote the opening paragraphs of stories carried by the news agency's client newspapers.<sup>299</sup> Drawing an analogy between the editor and manufacturer of a product — in this case, a news story — Davis reiterated that: "The author and the product are one and inseparable. No law, no sophistry can divide them; and if you restrict the right to choose the one you have inevitably restricted the right to

<sup>296</sup>

[I]nterference with the internal management of any private concern is inconsistent with due process of law. Where, however, the private concern is not dealing in ordinary commercial commodities but is engaged exclusively in the formulation and dissemination of news for the press, such interference is still more intolerable in that it constitutes *an encroachment upon the management and policy of the press itself*.

*Id.* at 99. Accordingly, the Associated Press criticized the actions of the NLRB as being "in disregard of the First Amendment, [since it] treated as ordinary articles of commerce . . . news and intelligence . . ." *Associated Press*, 301 U.S. at 116 (excerpt from oral argument of John W. Davis, counsel for the Associated Press).

<sup>297</sup> See *Brief of the Associated Press*, *supra* note 280, at 102, *Associated Press* (No. 365).

<sup>298</sup> *Associated Press*, 301 U.S. at 734 (argument of John W. Davis, counsel for the Associated Press).

<sup>299</sup> *Id.* at 731.

choose the other."<sup>300</sup> Appalled that the federal government had intervened in what the company considered its prerogative to keep the news it published free from bias, the Associated Press, therefore, invoked the First Amendment to preserve its right to terminate certain editors whose union sympathies might undermine this objective. "How can accuracy, independence and impartiality survive a deliberate attempt by the Government to impose upon The [sic] Associated Press a requirement that its news editors be union men?"<sup>301</sup> the news service wondered with dismay as it decried the use of a partial labor regulation to skew public discourse about industrial relations.

Though initially the company claimed it dismissed Watson because of his unsatisfactory performance, when the case came before the Supreme Court it suggested, perhaps unwittingly, an ulterior motive for his discharge. For in asserting a First Amendment right to ensure that its stories remained free of bias, especially in the area of labor relations, a topic often in the news during the 1930s, the Associated Press imputed to Watson, in the absence of tangible evidence to the contrary, an inability to edit the news devoid of his union sympathies.<sup>302</sup> Moreover, it feared that Watson's compulsory reinstatement subsequent to his discharge would further compromise the news agency's efforts at producing impartial stories about labor and business affairs.<sup>303</sup> Notwithstanding the possibility that either of these may have been straw arguments, the Associated Press, in effect, contended that its core business was sufficiently intertwined with the First Amendment that the unequal operation of the National Labor Relations Act infringed upon both its economic liberty and freedom of expression.

From this perspective, it concluded a regulation that encroached upon the autonomy of the news service to manage its editorial personnel threatened the existence of an independent press because it subjected the process of journalism to

---

<sup>300</sup> *Id.* at 734.

<sup>301</sup> *Brief of the Associated Press*, *supra* note 280, at 99, *Associated Press* (No. 365).

<sup>302</sup> From this perspective, the news agency invoked not only liberty of contract but also freedom of the press when it contested the NLRB order that it reinstate Morris Watson as an editor. As noted at oral argument by John W. Davis, counsel for the Associated Press, "[t]his is ordered irrespective of his present capacity or qualification or his acceptability by his employer and irrespective of whatever bias he may have acquired by reason of his discharge." *Associated Press*, 301 U.S. at 116 (excerpt of oral argument of John W. Davis, counsel for the Associated Press). Davis also remarked that:

[I]t is not that he may be more biased, not that he may be less biased, but it is that those who publish and print the news must have the right to choose the people by whom the news is to be written before it is printed. You cannot divorce . . . the author from his product . . . .

*Associated Press*, 301 U.S. at 733 (argument of John W. Davis, counsel for the Associated Press).

<sup>303</sup> See *Brief of the Associated Press*, *supra* note 280, at 99, *Associated Press* (No. 365).

government edict and the whims of political factions.<sup>304</sup> Accordingly, the Associated Press construed the application of the National Labor Relations Act to its editorial process as "a direct, palpable, undisguised attack upon the freedom of the press."<sup>305</sup>

## 2. A Regulation of Interstate Commerce of Incidental Effect Upon the Press

In contrast, the National Labor Relations Board de-emphasized the relationship between economic liberty and freedom of expression. It argued that the Associated Press participated in interstate commerce through its transmission of news items notwithstanding their revision by a group of editors in the New York office, who themselves only rewrote the stories from raw information supplied by satellite outposts and did not physically send them across state lines.<sup>306</sup> Nevertheless, because these editors crafted articles for nationwide distribution, their local activities comprised an integral part of the stream of interstate commerce.

In particular, the government agency contended that potential labor strife between the management of the Associated Press and its editorial employees threatened to disrupt the interstate commerce in news.<sup>307</sup> Thus, the Board had authority under the Commerce Clause to intervene in Watson's dismissal. Moreover, it argued that the collective bargaining requirement of the National Labor Relations Act was a legitimate industrial regulation consistent with due process in that it sought to redress inherent inequality in the relationship between management and employees in a business whose distribution of news implicated a significant public interest in both the news itself and those who formulated it through the editorial process.<sup>308</sup>

The federal government perceived the use of the National Labor Relations Act

---

<sup>304</sup> *Id.* at 98-100; *Associated Press*, 301 U.S. at 733-34 (argument of John W. Davis, counsel for the Associated Press).

<sup>305</sup> *Associated Press*, 301 U.S. at 731 (argument of John W. Davis, counsel for the Associated Press).

<sup>306</sup> See *Brief for the NLRB*, *supra* note 279, at 38-39, 69-71, *Associated Press* (No. 365). In this regard, the NLRB emphasized the continuity in the manner in which the Associated Press received raw items of news, transferred the information to its editors who rewrote or reformulated news stories and thereafter forwarded the stories to another department of the news agency, which then distributed the finished product to members' newspapers throughout the country. *Id.* at 38-39. Accordingly, the editorial employees worked "at the very hub of the petitioner's system of interstate . . . commerce . . ." *Id.* at 71.

<sup>307</sup> *Id.* at 16-19, 71; *Associated Press*, 301 U.S. at 136 (argument of Charles E. Wyzanski, Jr., on behalf of NLRB) (asserting that if the editorial employees of the Associated Press went on strike "there would be a dam to the flow of . . . news").

<sup>308</sup> See *Brief for the NLRB*, *supra* note 279, at 86, 96-100, *Associated Press* (No. 365). In fact, the government thought that the Associated Press invoked liberty of contract in this case as a pretext for interfering with the collective bargaining and other legally protected union activities of its editorial employees. *Id.* at 100.

in this context as a seemingly neutral industrial regulation that only incidentally affected freedom of the press.<sup>309</sup> Absent direct proof that compliance with the federal requirements forced the Associated Press to compromise its journalistic integrity,<sup>310</sup> the Act as applied merely recognized the rights of workers to engage in certain protected forms of union activity. Thus, its primary purpose was to promote interstate commerce through the safeguard of a mechanism calculated to promote fairness in labor negotiations in an industry whose product — news — affected the public at large.<sup>311</sup>

With its emphasis upon the validity of the federal labor law as an economic regulation, the National Labor Relations Board, in essence, rejected the premise that its imposition of collective bargaining directly curtailed the First Amendment rights of the Associated Press. Doubtful that the compulsory reinstatement of Watson infringed upon the news agency's editorial discretion, the labor board differentiated between economic liberty and freedom of expression.<sup>312</sup> It considered the dispute between the parties an industrial one and, therefore, urged the Court to apply an appropriately deferential standard of review in light of recent Commerce Clause, Contract Clause,<sup>313</sup> and substantive due process cases<sup>314</sup> wherein the Court retreated from precedent it considered largely inflexible and inappropriate in addressing socioeconomic problems of the Depression.

#### *B. Justice Roberts' Opinion and the Dichotomy Between Economic Liberty and Freedom of Expression*

---

<sup>309</sup> *Id.* at 104-05. To this extent, the NLRB asserted that "[a] newspaper publisher does not have a special immunity from the application of general legislation nor a special privilege to destroy the recognized rights and liberties of others." *Id.* at 104. It also explained that the editorial operations of the Associated Press came within the purview of federal labor law "because it engages in interstate commerce and not because the commodity with which it deals happens to be news." *Id.* at 105.

<sup>310</sup> The NLRB disputed the notion, presented for the first time by the Associated Press, that the National Labor Relations Act's application to its editorial operations saddled it with a biased editor. *Id.* at 106-08. Moreover, the NLRB asserted that notwithstanding the Act, the Associated Press could still discharge editorial employees for bias or other reasons having nothing to do with union activity. *Id.* at 86, 96-98, 106-08.

<sup>311</sup> *Id.* at 96-98, 104-08.

<sup>312</sup> *Id.* at 104-08. In fact, most of the labor board's legal argument concerned Commerce Clause and substantive due process issues, which indicates that from its perspective the case primarily involved the permissible scope of economic regulation of a private business engaged in interstate commerce.

<sup>313</sup> See, e.g., *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (upholding a Minnesota mortgage moratorium as a reasonable exercise of state police powers).

<sup>314</sup> See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (sustaining a District of Columbia minimum wage for women while overruling *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923)); *Nebbia v. New York*, 291 U.S. 502 (1934) (upholding milk price regulation in the general public interest).

By the margin of a single vote, the United States Supreme Court sustained the application of the National Labor Relations Act to the editorial operations of the Associated Press. Insofar as the 5–4 vote reflected the division within the Court over the constitutional limits of public regulation of private economic activity, it also revealed the nascent dichotomy for some of the justices between economic liberty and freedom of expression. For when the Court upheld the National Labor Relations Board's cease-and-desist order as well as its mandate that the Associated Press reinstate Morris Watson as an editor, this meant that, from the perspective of five of its members, the case essentially involved an economic or labor dispute that warranted a deferential standard of review. However, from the vantage point of Sutherland and the three other justices who joined his dissent, the federal labor law infringed upon both the expressive and economic rights of a private news agency.

### 1. The National Labor Relations Act as a Legitimate Economic Regulation of Interstate Commerce

Justice Owen J. Roberts wrote the majority opinion, which drew upon the Court's rationale in four other cases, also decided on April 12, 1937, that sustained Congress' power under the Commerce Clause to regulate private, local business activities that substantially affected interstate commerce. In each of these Commerce Clause decisions, the Court upheld cease-and-desist orders from the National Labor Relations Board issued to private employers to prevent them from engaging in unfair labor practices that threatened to disrupt commerce among the states.<sup>315</sup> Pursuant to the National Labor Relations Act, the labor board also ordered the companies to reinstate employees discharged for membership in unions and participation in collective bargaining activities. These, too, were upheld as permissible Commerce Clause regulations.<sup>316</sup>

The most significant of these cases was *NLRB v. Jones & Laughlin Steel Corp.*,<sup>317</sup> wherein the Court ruled the National Labor Relations Act prohibited the nation's fourth largest steel manufacturer from interfering with the rights of its

---

<sup>315</sup> See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding application of the NLRA to the steel industry); *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49 (1937) (upholding the application of the NLRA to the trailer manufacturing industry); *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937) (upholding application of the NLRA to the clothing manufacturing industry); *Washington, Va. & Md. Coach Co. v. NLRB*, 301 U.S. 142 (1937) (upholding application of the NLRA to an interstate transportation company). Justices Butler, McReynolds, Sutherland, and Van Devanter, who dissented in *Associated Press v. NLRB*, also dissented from each of the other cases except for *Washington, Va. & Md. Coach Co.*

<sup>316</sup> See, e.g., *Washington, Va. & Md. Coach Co.*, 301 U.S. at 147 (upholding NLRB order that a common motor carrier reinstate drivers and mechanics terminated because of their union affiliation).

<sup>317</sup> 301 U.S. 1 (1937).

industrial workers to join a union and engage in collective bargaining. In so holding, the Court expressly found that the company, whose Pennsylvania plants produced steel and iron from mineral ore extracted from deposits in other states before shipping the finished products throughout the country, was "a completely integrated enterprise" engaged in interstate commerce.<sup>318</sup>

Cognizant that the company's animus toward unions might precipitate a strike that would obstruct the flow of interstate commerce, five members of the Court rejected Jones & Laughlin's contention that labor relations within its Pennsylvania plants bore but a remote and indirect relation to interstate commerce. Indeed, in sustaining the labor board's actions, this slim majority of the Court substituted a more flexible Commerce Clause approach — one that emphasized the substantial effects of local activity upon the stream of interstate commerce — for the more restrictive test urged by the steel company.<sup>319</sup>

Rather than apply the traditional requirement that there be a direct nexus between the regulated activity and interstate commerce, a rigid criterion the Court had even used the year before in striking down a federal law that regulated wages of intra-state coal miners,<sup>320</sup> these justices departed from this narrow conception of Commerce Clause powers that often distinguished between manufacturing and commerce.

In its place, they adopted a revised notion of Commerce Clause powers that focused on whether the aggregate effects of intrastate activities had a close and substantial relationship to interstate commerce.<sup>321</sup> As Chief Justice Hughes explained, "[i]t is the effect upon commerce, not the source of the injury, which is

---

<sup>318</sup> *Id.* at 26, 35.

<sup>319</sup> To this extent, the Court noted that the plenary powers of the Commerce Clause "may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.'" *Id.* at 37 (quoting *Second Employers' Liability Cases*, 223 U.S. 1, 51 (1912)).

<sup>320</sup> *Id.* at 34-41 (rejecting the steel company's analogy between manufacturing and labor relations and criticizing the traditional indirect/direct test). In cursory fashion, the Court simply noted that *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) was "not controlling." *Id.* at 41. In *Carter*, the Court ruled the Bituminous Coal Conservation Act of 1935 violated the Commerce Clause because it attempted to regulate labor conditions in mines when the production of coal merely preceded commerce. *See Carter*, 298 U.S. at 297, 303-04. Labor relations of this kind, therefore, only indirectly affected interstate commerce. *Id.* at 307-09. Justice Sutherland, who wrote the Court's opinion in *Carter*, explained that "[t]he distinction between a direct and an indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about." *Id.* at 308.

<sup>321</sup> "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." *Jones & Laughlin Steel Corp.*, 301 U.S. at 37.

the criterion . . . .<sup>322</sup> The question is necessarily one of degree."<sup>323</sup>

In effect, by viewing commerce as a continuum that encompassed both production and distribution, the majority collapsed the distinction between manufacturing and commerce critical to the assumption that labor relations bore little direct relevance to interstate commerce. Aware that industrial strife could disrupt the passage of steel products across state lines, the divided Court acknowledged that intrastate labor relations had a close and substantial effect upon interstate commerce.<sup>324</sup> Accordingly, it used the stream of commerce theory in all but one of the "Labor Board" cases to uphold federal interdiction of private labor discrimination that threatened to impede the flow of interstate commerce.<sup>325</sup>

Within this context, Justice Roberts construed the application of the National Labor Relations Act to the editorial operations of the Associated Press. He reasoned that the Associated Press "engaged in interstate commerce"<sup>326</sup> by virtue of its widespread activities in the collection, reformulation, and dissemination of news stories throughout the country. In particular, he and the other members of the majority found persuasive the existence of a vast network of affiliates which enabled Associated Press to "ac[t] as an exchange or clearing house of news as between the respective members and as a supplier to members of news gathered through its own domestic and foreign activities."<sup>327</sup>

They considered the private news agency an instrumentality of interstate commerce and assumed that the news items it produced from raw stories and ultimately distributed to its far-flung press affiliates were themselves articles of interstate commerce.<sup>328</sup> From this perspective, Roberts, on behalf of the majority, concluded that the editorial duties of those employed in the New York office substantially affected interstate commerce.

Rather than determine whether local industrial strife directly harmed commerce among the states, Roberts accepted that labor relations within the New York editorial office of the Associated Press had a close and substantial effect upon interstate commerce. Thus, he perceived that the company's intransigence towards the collective bargaining activities of its editorial employees would probably cause

---

<sup>322</sup> *Id.* at 32.

<sup>323</sup> *Id.* at 37. In fact, Hughes was quite critical of the direct/indirect test used in *Carter*, believing that its reliance upon semantical distinctions made it impractical for assessing the actual limits of Congress' Commerce Clause powers. *Id.* at 41-42.

<sup>324</sup> *Id.* at 37, 42-43.

<sup>325</sup> In *Washington, Va. & Md. Coach Co. v. NLRB*, 301 U.S. 142 (1937), a unanimous Court sustained the application of the National Labor Relations Act to an interstate carrier under the instrumentality of commerce theory alone and *not* in conjunction with the substantial effects doctrine.

<sup>326</sup> *Associated Press v. NLRB*, 301 U.S. 103, 128 (1937).

<sup>327</sup> *Id.*

<sup>328</sup> *Id.* at 125-29.



a work stoppage likely to obstruct the flow of news across state lines.<sup>329</sup> Consequently, the Court sustained the jurisdiction of the labor board to intervene in a dispute between the Associated Press and one of its editors.

Though he did not expressly address whether the National Labor Relations Act encroached upon the news agency's freedom of contract, Roberts noted that *Jones & Laughlin Steel Corp.* found the law did "not interfere with the normal exercise of the right of the employer to select its employees or to discharge them."<sup>330</sup> Largely deferential to congressional authority to redress labor problems, Roberts' majority opinion also reflected the paradigmatic shift that was occurring in the Court's substantive due process jurisprudence. Indeed, not only the Labor Board cases of April 12, 1937, but also other recent decisions involving economic regulations marked an increased willingness by several of the justices to balance the public interest with private rights and a growing awareness of the importance of public regulation in maintaining the security of private economic rights.<sup>331</sup> As a result, during the 1930s there emerged, to one extent or another, a tendency among those members of the Court who comprised the *Associated Press* majority to employ pragmatism in resolving constitutional issues arising from governmental regulation of private economic affairs.<sup>332</sup>

Close judicial examination of the connection between legislative means and ends, therefore, began to yield to a more relaxed standard of review in such cases. For example, in *Jones & Laughlin Steel Corp.*, Chief Justice Hughes noted the importance of interpreting the Commerce Clause in practical terms rather than "in an intellectual vacuum."<sup>333</sup> In *Associated Press*, Roberts adopted this approach, characterizing the federal law as an economic regulation that warranted minimal judicial scrutiny.<sup>334</sup> With the broad latitude he accorded the federal labor board, Roberts separated the business interests of the Associated Press from its editorial

---

<sup>329</sup> *Id.* at 129-30.

<sup>330</sup> *Id.* at 133. Roberts applied this rationale in dispatching with the claim that application of the National Labor Relations Act to the editorial operations of the Associated Press interfered with the news agency's First Amendment rights. *Id.*

<sup>331</sup> See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391-92 (1937) (sustaining a District of Columbia minimum wage regulation for women); *Home Bldg & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 434-35, 438-39, 443-44 (1934) (sustaining a Minnesota mortgage moratorium as a reasonable exercise of local police powers).

<sup>332</sup> See Olken, *Charles Evans Hughes*, *supra* note 221, at 580-82, 586-95 (discussing constitutional pragmatism in the context of 1930s Contract Clause jurisprudence).

<sup>333</sup> *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41 (1937); see also *id.* at 41-42 (stating that "interstate commerce itself is a practical conception").

<sup>334</sup> In this regard, Roberts explained that: "Congress may facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation. In shaping its legislation to this end, Congress was entitled to take cognizance of actual conditions and to address itself to practicable measures." *Associated Press*, 301 U.S. at 130 (quoting *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 209 (1921)).

discretion under the First Amendment.

## 2. Freedom of Expression in Eclipse

Insofar as the Court upheld the application of the National Labor Relations Act to the editorial department of the Associated Press, it considered the law one of general application that only incidentally affected the private news service's First Amendment rights. Noting that the Associated Press claimed at the initial labor board hearing that it discharged Watson for unsatisfactory work, Justice Roberts regarded with much skepticism the news agency's assertion upon appeal that reinstatement of its former editor would impair its free press rights to produce impartial news stories about industrial relations.<sup>335</sup> Consequently, he believed that the Associated Press merely invoked the First Amendment as a pretext for interfering with the collective bargaining rights of its union editors.<sup>336</sup> Watson's original discharge emanated, therefore, from illegal actions by his employer in retaliation for his leadership in the American Newspaper Guild and collective bargaining activities, and not because his work had demonstrated any pro-union bias.

In this regard, Roberts rejected the Associated Press's claim of an unqualified First Amendment privilege to discharge its editorial personnel. Careful to note that the National Labor Relations Act did not preclude the news agency from firing an editor who was unable to formulate impartial stories or was incompetent, Roberts insisted that the law prohibited employers from terminating editors because of their participation in union affairs and collective bargaining.<sup>337</sup> Notwithstanding Watson's union activities, the Associated Press had not presented concrete evidence of either his past incompetence as an editor or that, once reinstated, he would imbue the news items he wrote with a pro-labor bias.<sup>338</sup> Under these circumstances, the labor board intervened pursuant to a general business law that "ha[d] no relation whatever to the impartial distribution of news."<sup>339</sup> Accordingly, Roberts viewed the case primarily as one involving economic regulation rather than editorial autonomy and refused to use a more exacting standard of review.

### C. Sutherland's Dissent: *The Business of Expression Refined*

For Justice Sutherland and the others in dissent, the case was much more complex because they perceived that the involuntary reinstatement of Morris Watson encroached upon both the editorial autonomy of the Associated Press and

---

<sup>335</sup> *Associated Press*, 301 U.S. at 131-32.

<sup>336</sup> *Id.*

<sup>337</sup> *Id.* at 132-33.

<sup>338</sup> *Id.* at 131-32.

<sup>339</sup> *Id.* at 132-33.

the manner in which it conducted its business. Confronted with a decision that not only contradicted their narrow view of the Commerce Clause, but also seemed to presume the legitimacy of economic regulation, the quartet of dissenting justices, whose aversion to class legislation often compelled them to scrutinize closely both the content and operative effects of economic regulation, invoked the First Amendment as a means of staving off what they regarded as the Court's unfortunate retreat from principled judicial review.<sup>340</sup> Sutherland, who had the misfortune of witnessing firsthand the Court's rejection of Commerce Clause and substantive due process precedent he personally authored,<sup>341</sup> wrote the dissent in *Associated Press*. While he emphasized the First Amendment, Sutherland nevertheless applied it to the facts of this case through the prism of economic liberty.

### 1. Editorial Discretion and Economic Liberty

This is true despite the assertion, at the outset of his dissent, that First Amendment rights are subject to fewer restrictions than economic ones protected

---

<sup>340</sup> Sutherland expressed his dismay through metaphor, suggesting "[a] little water, trickling here and there through a dam, is a small matter in itself; but it may be a sinister menace to the security of the dam, which those living in the valley below will do well to heed." *Id.* at 136 (Sutherland, J., dissenting). This passage evokes Sutherland's much earlier reference to the Constitution as an edifice intended to preserve fundamental principles of law, but whose strength would diminish if its provisions were interpreted so that they "may change with every shifting breath of popular emotion." 47 CONG. REC. 2793, 2794 (1911) (statement of Sen. Sutherland); see also *id.* at 2800 (calling the Constitution "the shelter and bulwark of what might otherwise be a helpless minority"); George Sutherland, Address Before the Utah State Bar Association (1924), in STATE BAR ASS'N OF UTAH, 1924 PROCEEDINGS OF THE TWENTIETH ANNUAL SESSION OF THE STATE BAR ASS'N OF UTAH 67 (likening the Constitution to a "most superb edifice" and noting that constitutional government "requires labor and skill and infinite patience").

<sup>341</sup> In its explicit ruling that intrastate labor relations substantially affected interstate commerce in news, the *Associated Press* majority departed significantly from Sutherland's analysis of the Commerce Clause in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), wherein he reasoned that a federal labor regulation of local miners was unconstitutional, in part, because labor relations bore a remote and indirect affect upon interstate commerce. *Carter*, 298 U.S. at 308-09. Critical to Sutherland's conclusion was his acceptance of the analogy between coal mining and manufacturing, both of which he thought preceded commerce. *Id.* at 303-04. In the Labor Board cases, the Court rejected this approach toward the Commerce Clause. See, e.g., *Jones & Laughlin Steel Corp. v. NLRB*, 301 U.S. 1, 32, 37, 40-43 (1937) (finding that threatened industrial strife within the manufacturing component of an interstate business bore a close and substantial effect upon interstate commerce). On March 29, 1937, in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the same five justices in the *Associated Press* majority voted to uphold a District of Columbia law that proscribed a minimum wage for women. In so ruling, they displaced the rigorous economic substantive due process jurisprudence Sutherland and the dissenters endorsed with a more deferential standard of review and overruled *Adkins v. Children's Hosp.*, 261 U.S. 525 (1921). Sutherland wrote the majority opinion in *Adkins*.

by substantive due process.<sup>342</sup> Though he appeared to differentiate between the two types of constitutional liberties, Sutherland expressed this point to remind the Court, in rather stark terms, that through the guise of a seemingly neutral economic regulation, the federal government had infringed upon the Associated Press's freedom of expression. From his perspective, the National Labor Relations Board's orders not only interfered with the news agency's discretion to hire and fire editors, they also compromised its editorial autonomy.<sup>343</sup> Unable to dissuade the Court from its deference to public regulation of private economic affairs, Sutherland felt compelled to emphasize the First Amendment aspects of the case.

While he recognized the primacy of First Amendment rights within a constitutional democracy, Sutherland did not regard them as absolute. Indeed, his judicial record prior to 1936 suggests quite the opposite, as he often voted to sustain seditious speech convictions<sup>344</sup> and supported the use of prior restraint to prevent the publication of defamatory articles.<sup>345</sup> For Sutherland, freedom of expression and economic liberty comprised complimentary facets of personal liberty, each vulnerable to the ephemeral whims of transient democratic majorities.<sup>346</sup> As such,

<sup>342</sup> *Associated Press*, 301 U.S. at 135 (Sutherland, J., dissenting).

<sup>343</sup> *Id.* at 137-40. "Due regard for the constitutional guaranty requires that the publisher or agency of the publisher of news shall be free from restraint in respect of employment in the editorial force." *Id.* at 140.

<sup>344</sup> See, e.g., *Herndon v. Lowry*, 301 U.S. 242, 274-75 (1937) (Van Devanter, J., dissenting) (Sutherland joining in a dissent that would have upheld the criminal syndicalism conviction of a man for the possession of Communist literature with the intent to distribute it and incite an insurrection); *Whitney v. California*, 274 U.S. 357 (1927) (sustaining a criminal syndicalism statute); *Gitlow v. New York*, 268 U.S. 652 (1925) (upholding a conviction for seditious speech). Sutherland was part of both the *Whitney* and *Gitlow* Court majorities.

<sup>345</sup> See *Near v. Minnesota*, 283 U.S. 697, 735-38 (1931) (Butler, J., dissenting). Sutherland joined in Butler's dissent.

<sup>346</sup> See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280 (1932) (suggesting the Constitution protected both liberty of contract and freedom of expression from the illegitimate exercise of state police powers). In a 1921 address before the New York State Bar Association, Sutherland explained:

The guarantees for safeguarding life, liberty and property, freedom of speech, of the press and of religious worship . . . would be of little value if their interpretation and enforcement depended upon arbitrary, shifting, temporary official edicts instead of the calm, judgment of the judiciary under the general law of the land.

Principle or Expedient?, *supra* note 76, at 11. Nearly two decades after Sutherland left the Court, Justice Felix Frankfurter, a particularly astute student of constitutional history, noted in relation to the rise and fall of economic substantive due process that:

[P]rotection of property interests may . . . quite fairly be deemed, in appropriate circumstances, an aspect of liberty. . . .

their protection warranted close judicial scrutiny of all forms of regulation. Rather than consider economic liberty and freedom of expression in dichotomous terms, Sutherland understood that, at times, they could converge and thus form an essentially indivisible right. Partial laws that restricted the business interests of those engaged in expressive activity, therefore, jeopardized the First Amendment. Appalled that the Court neglected to consider the link between economic liberty and freedom of expression, Sutherland believed that the National Labor Relations Act abridged both the economic and expressive constitutional rights of the Associated Press.<sup>347</sup>

## 2. Class Legislation and Political Factions

Acutely aware that political factions could suborn the public welfare through class legislation, Sutherland regarded with suspicion a federal regulation that unilaterally restricted the contractual freedom of private companies.<sup>348</sup> In this regard, his fundamental aversion to political factions enabled him to appreciate how the application of the National Labor Relations Act to the editorial department of the Associated Press implicated the business of expression. Interspersed throughout his dissent are several references to factions that underscore the extent to which Sutherland melded his analysis of the First Amendment with the tenets of his economic liberty jurisprudence.<sup>349</sup> Concerned that the labor measure was a partial

....

Yesterday the active area in this field was concerned with 'property'. Today it is 'civil liberties.' Tomorrow it may again be 'property.' Who can say that in a society with a mixed economy, like ours, these two areas are sharply separated, and that certain freedoms in relation to property may not again be deemed, as they were in the past, aspects of individual freedom?

Felix Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 230 (1955), quoted in Andrew Kaufman, *Benjamin Cardozo*, in 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 1150 (Leon Friedman and Fred L. Israel eds. 1997).

<sup>347</sup> With this sentiment in mind, Sutherland exhorted his brethren "to withstand all beginnings of encroachment." *Associated Press*, 301 U.S. at 141 (Sutherland, J., dissenting). Aghast at the Court's insouciance toward the First Amendment claims of the Associated Press, he remarked that "the saddest epitaph which can be carved in the memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time." *Id.* For more contemporary criticism of the majority's approach, see CARDOZO, *supra* note 169, at 547 (noting, in retrospect, that Roberts neglected to consider the adverse effects of the federal labor policy upon freedom of the press).

<sup>348</sup> See *Associated Press*, 301 U.S. at 136 (Sutherland, J., dissenting) ("Congress has no power to regulate the relations of private employer and employee as an end in itself . . .").

<sup>349</sup> *Id.* at 136-37 (discussing how the application of the NLRA to the editorial department of the Associated Press could benefit editorial workers at the expense of management); *id.*

law, he admonished the Court "to be most on . . . guard to protect liberty when the government's purposes are beneficent."<sup>350</sup>

In particular, Sutherland perceived that the unequal operation of the Act curtailed the editorial autonomy of a private news agency whose core business consisted of the formation and distribution of news.<sup>351</sup> In contrast to Justice Roberts, Sutherland found persuasive the notion that Morris Watson's union background might affect his ability to formulate impartial stories about industrial and labor affairs prevalent in the news of the 1930s.<sup>352</sup> Critical of the federal labor board's partisan intervention into what he considered a matter of business discretion (the hiring and firing of editorial staff) Sutherland emphasized the correlation between the economic and expressive interests of the Associated Press.<sup>353</sup> Assessing the actions of the labor agency through the vantage point of factional aversion, Sutherland explained:

[T]he judgment of an administrative censor – cannot, under the Constitution, be substituted for that of the press management in respect of the employment or discharge of employees engaged in editorial work. The good which might come to interstate commerce or the benefit which might result to a special group, however large, must give way to that higher good of all the people so plainly contemplated by the imperative requirement that

---

at 138 (averring that the news agency's involuntary compliance with the NLRB orders could distort news about labor affairs to the advantage of union members); *id.* at 140 (suggesting that government intervention in editorial personnel decisions could lead to impermissible partial regulation of the press to the detriment of the public welfare).

<sup>350</sup> *Id.* at 136. Sutherland often invoked the duty of the judiciary to uphold constitutional limitations on the exercise of state police powers that he believed represented illegitimate class legislation. *See, e.g.,* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 401-04, 409, 411, 413 (1937) (Sutherland, J., dissenting) (suggesting a minimum wage law for women abridged contractual liberty); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 448-51, 483 (Sutherland, J., dissenting) (literally interpreting the Contract Clause as an absolute prohibition of a mortgage moratorium law); *New State Ice Co. v. Liebmann*, 285 U.S. 263, 279-80 (1932) (asserting the primacy of substantive due process over the experimental use of state police powers); *Adkins v. Children's Hosp.*, 261 U.S. 525, 544-45, 553-561 (1923) (asserting the judicial prerogative to declare unconstitutional a minimum wage law for women he viewed as partial legislation remotely connected to the public welfare).

<sup>351</sup> *Associated Press*, 301 U.S. at 137-40 (Sutherland, J., dissenting).

<sup>352</sup> *Id.* at 138-41.

<sup>353</sup> *Id.* at 138, 140; *see also* ARKES, *supra* note 20, at 260-62 (suggesting that the NLRA really interfered with the associative freedom between the Associated Press management and its editors inherent in liberty of contract). Though Arkes construes freedom of association from a natural rights perspective that Sutherland may not have had, this point nevertheless supports the notion that Sutherland interpreted the First Amendment in this case with economic liberty in mind. *See* Olken, *Justice George Sutherland*, *supra* note 19, at 57, 85 (explaining that Sutherland did *not* follow a natural rights approach in his jurisprudence of economic liberty).

"Congress shall make *no* law . . . abridging the freedom . . . of the press."<sup>354</sup>

Consequently, Sutherland broadly construed the concept of freedom of the press to incorporate economic activity intended to facilitate expression. Control over who edited news stories, therefore, involved a cluster of constitutional rights. From this perspective, he refused to differentiate, as had the majority, between the business and First Amendment interests of the Associated Press. Indeed, Sutherland observed that "[w]hen applied to the press, the term freedom . . . means more than publication and circulation. . . . [It also includes] the liberty to exercise an uncensored judgment in respect of the employment and discharge of the agents through whom the policy is to be effectuated."<sup>355</sup> Restricted in its ability to choose editorial employees because of the labor board's orders, the Associated Press could no longer maintain complete control over the production of its news stories. For Sutherland, this signified an intolerable incursion upon the First Amendment rights of the news agency as well as a breach of substantive due process.

### 3. The Business of Expression

In essence, Sutherland worried that through the means of a partial economic regulation the federal government was indirectly distorting the news. This, in large part, explains why he believed the Court erred in the deference it accorded the labor law as an industrial measure. For in relaxing the standard of review, Sutherland felt that the majority had ignored the interplay between economic liberty and freedom of expression that rendered the Act unconstitutional. Cognizant of Watson's role as a union leader, Sutherland accepted the premise of the Associated Press that his reinstatement would compromise journalistic integrity and hinder the news agency's efforts to distribute impartial new stories.<sup>356</sup>

While he conceded the right of news editors to engage in union activities, Sutherland recognized the company's countervailing interest in retaining discretion over pertinent editorial matters.<sup>357</sup> Rather than question the motivation behind Watson's termination, Sutherland assumed the First Amendment permitted the Associated Press to determine the fitness of those entrusted to formulate and rewrite articles. Noting the frequency of labor disputes in the news, Sutherland thought it "reasonable prudence for an association engaged in part in supplying the public with fair and accurate factual information with respect to the contests between labor and capital, to see that [its editors] are free from either extreme sympathy or

---

<sup>354</sup> *Associated Press*, 301 U.S. at 137 (Sutherland, J., dissenting) (quoting, in part, the First Amendment).

<sup>355</sup> *Id.*

<sup>356</sup> *Id.* at 137-40.

<sup>357</sup> *Id.* at 139.

extreme prejudice one way or the other."<sup>358</sup> Otherwise, it incurred the risk of distributing stories marred by bias.

From Sutherland's anti-factional perspective, forcing the company to retain an editor whose objectivity it doubted in preparing news reports rife with stories about labor disputes signified a form of compelled speech in contravention of freedom of the press.<sup>359</sup> Moreover, this dual restriction of economic and expressive liberty was detrimental to the public welfare because it distorted the marketplace of ideas. Once again, Sutherland evoked the specter of illegitimate class legislation when he explained that "an unbiased version of [labor relations news] is of the utmost public concern. To give a group of employers on the one hand, or a labor organization on the other, power of control over such a service is obviously to endanger the fairness and accuracy of the service."<sup>360</sup> This, Sutherland believed, would undermine the role of an independent press in a democratic society.<sup>361</sup> Consequently, he concluded that application of the National Labor Relations Act to the editorial department of the Associated Press violated the First Amendment.

Sutherland's *Associated Press* dissent, with its emphasis upon preserving the discretion of a private news agency to hire and fire its editors, bears the unmistakable mark of his deep-set aversion to political factions. Indeed, his conclusion that the federal labor measure was a partial economic regulation that infringed upon the editorial freedom of the Associated Press emanated from his observation that the Act was a law of unequal operation.<sup>362</sup> Accordingly, Sutherland imbued his analysis of the First Amendment with principles culled from his economic liberty jurisprudence. In tandem with his *Grosjean* opinion, the *Associated Press* dissent demonstrates the extent to which Sutherland conflated economic liberty and freedom of expression.

## V. THE FORGOTTEN FIRST AMENDMENT LEGACY OF JUSTICE SUTHERLAND

In the modern era, the Court has continued to differentiate between economic liberty and freedom of expression. It has consistently upheld, with considerable deference, the authority of the government to impose generally applicable economic

---

<sup>358</sup> *Id.* at 138.

<sup>359</sup> *Id.* at 138-41 (implying the National Labor Relations Act was a "form of legislative coercion.") *Id.* at 139. Sutherland noted that "the hope of benefit to a cherished cause which may bias the editorial employee is a contingency the risk of which the press in the exercise of its unchallengeable freedom under the Constitution may take or decline to take, without being subject to any form of legislative coercion." *Id.* at 138-39.

<sup>360</sup> *Id.* at 138.

<sup>361</sup> Sutherland considered "a free press . . . one of the most dependable avenues through which information of public and governmental activities may be transmitted to the people . . . ." *Id.* at 136.

<sup>362</sup> *Id.*



regulations on the press in many instances,<sup>363</sup> while in others it has sought to protect the content of expression through some form of heightened scrutiny.<sup>364</sup> Indeed, the Court's persistent adherence to the distinction between content-neutral<sup>365</sup> and content-based<sup>366</sup> restrictions of speech assumes, in large part, a dichotomy between economic regulation and freedom of expression. Under this conventional approach, an economic regulation that restricts the business of one engaged in expressive activity as either a speaker or conduit of speech often receives much less judicial scrutiny than a measure intended to somehow limit the content or viewpoint of communication.<sup>367</sup> At times, in their preoccupation with applying the purported

---

<sup>363</sup> See, e.g., *Associated Press v. United States*, 326 U.S. 1 (1945) (upholding the application of the Sherman Anti-Trust Act to a private news agency).

<sup>364</sup> See, e.g., *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (using strict scrutiny to invalidate a "right of reply" law requiring newspapers to publish the responses of political candidates to published criticism).

<sup>365</sup> A content-neutral law "restrict[s] communication without regard to the message conveyed." Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 81 (1979). [hereinafter Stone, *Subject-Matter Restrictions*]. Some content-neutral restrictions regulate the physical form of speech, as opposed to its substantive content. See, e.g., *United States v. O'Brien*, 391 U.S. 367 (1968) (upholding the application of a federal law proscribing the knowing destruction of military draft cards to symbolic conduct as a narrowly tailored incidental restriction of speech). Other content-neutral restrictions regulate the time, place, or manner of communication. See, e.g., *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (sustaining a municipal ordinance prohibiting the posting of signs on public property). Despite technical distinctions between these two types of content-neutral limitations, the Supreme Court, since the 1980s, has in effect regarded both incidental restrictions and regulations upon the time, place, or manner of speech as comparable content-neutral restrictions subject to a uniform test. See, e.g., *City of Renton v. Playtime Theatres*, 475 U.S. 41, 50 (1986). For criticism of this merger, see generally Day, *Hybridization*, *supra* note 8, 208-209 (noting that fusion of the incidental restriction test with the standard to assess time, place and manner regulations blurs the distinction between unintentional and intentional limitations on speech in ways harmful to First Amendment interests); Keith Werhan, *The O'Briening of Free Speech Methodology*, 19 ARIZ. ST. L.J. 635 (1988) (asserting that application of the *O'Brien* incidental restriction test to time, place, and manner regulations signifies too much judicial deference to governmental regulation of expression).

<sup>366</sup> A content-based law restricts expression on the basis of its content or the communication of a particular viewpoint expressed therein. See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 190 (1983) [hereinafter Stone, *Content Regulation*]. Unless a content-based restriction represents the least restrictive means of attaining a compelling state interest, it will violate the First Amendment. See, e.g., *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (invalidating a municipal ordinance prohibiting drive-in movie theaters from showing movies containing human nudity).

<sup>367</sup> See, e.g., *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457 (1997) (upholding, as a reasonable economic regulation rationally related to a legitimate governmental objective, federal marketing orders enacted under the Agricultural Marketing Agreement Act by the secretary of agriculture that required California growers, handlers and fruit processors to pay

distinction between content-neutral and content-based regulations of speech, the justices have ignored, for the most part, the correlation between economic liberty and some forms of expression.<sup>368</sup> Thus, they have often failed to consider the extent to which seemingly neutral, or even incidental, regulations of speech can reflect the artifice of political factions. Through the guise of a law that regulates the form of speech, factions may actually intend to benefit one group of speakers/publishers economically at the expense of others. This implicates the business of expression wherein the economic and expressive interests of a media actor coalesce into an essentially indivisible right especially vulnerable to incursion by partial laws or illegitimate class legislation. Yet constitutional analysis that assumes the primacy of the First Amendment, on one hand, and presumes the legitimacy of economic regulation on the other, may not necessarily detect all of the problems created by partial economic legislation that adversely affects the business interests of those engaged in expression.<sup>369</sup> Indeed, this flaw is most likely to occur when a court confronts a seemingly neutral economic regulation that incidentally affects the press. However, such ancillary effects may actually belie a more significant threat to the business interests that facilitate expression through either indirect or direct means.

---

generic advertising fees).

<sup>368</sup> See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (sustaining must-carry rules imposed upon cable television system operators and programmers as a content-neutral regulation that primarily affected their business decisions rather than their First Amendment rights as "speakers").

<sup>369</sup> Under traditional First Amendment analysis, a law that regulates the form of speech, regardless of its content, will likely pass constitutional muster so long as it functions as a content-neutral, time, place, or manner restriction. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (sustaining noise ordinance). Yet under this test, if the government's principal objective is to regulate the business of the media actor, a court will sustain such regulation if it only incidentally affects the content or viewpoint expressed. See, e.g., *Glickman*, 521 U.S. at 566 (upholding a federal agricultural marketing order that required California fruit growers, handlers, and processors to pay advertising fees as an incidental restriction of their speech); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (upholding Oklahoma optometry restrictions as legitimate economic regulation under the rational basis test). Given the considerable deference accorded to economic regulation by the modern Court, close examination of whether the law itself is a partial measure designed to benefit one group at the expense of another may not occur if this disparity appears on the surface to only create an incidental affect upon freedom of expression. See, e.g., *Turner*, 520 U.S. 180 (sustaining must-carry rules as a narrowly tailored means of furthering a substantial governmental interest in preserving the economic viability of broadcast television as a video transmission source). This approach, however, may not account for situations where the nexus between the expressive and economic interests of a media actor is so close that, as a practical matter, it is nearly impossible to distinguish between the two. In this relatively small group of cases, neither traditional content-neutral or content-based First Amendment analysis adequately considers the extent to which a partial economic regulation may hinder the business of expression.

Implicit in George Sutherland's analysis of the First Amendment over sixty years ago was his recognition of the nexus between economic liberty and freedom of expression. From this perspective, he considered it the duty of the judiciary to examine carefully the factional context of legislation that affects both expressive and economic interests. Unfortunately, modern Supreme Court justices have often neglected this nuance approach when confronted with economic regulations of speech and the press. Recent Court decisions in two areas (differential taxation of the press and the constitutional status of must-carry rules imposed upon cable television system operators and programmers) illustrate this disregard of the interplay between economic liberty and freedom of expression. Though an in-depth analysis of this problem is beyond the scope of this article, discussion of some aspects of the modern Court's jurisprudence underscores Sutherland's forgotten First Amendment legacy.

*A. The Modern Supreme Court Approach Toward Differential Taxation of the Press and the Distortion of Grosjean*

Nearly half a century after *Grosjean*, the Supreme Court addressed more subtle forms of differential taxation of the press. In a trilogy of cases, a few years apart, the Court set forth a series of principles to determine the appropriate standard of review. Pursuant to this analysis, differential taxation of the press is presumptively unconstitutional where it is apparent that the state legislature has either imposed special burdens on the press inapplicable to other businesses or singled out a segment of the press for adverse disparate treatment.<sup>370</sup> In either of these scenarios, the Court has endorsed the use of strict scrutiny in order to protect freedom of expression from the potential of government abuse.<sup>371</sup> Moreover, the Court has considered strict scrutiny appropriate where the differential tax imposed on a portion of the press reflects a content-based distinction.<sup>372</sup> However, if a tax scheme differentiates between different types of media, the Court has suggested that such distinction may still be permissible because it is less likely to pose a threat of censorship than more pernicious forms of differential taxation that either single out the press or a subset therein for more burdensome treatment than other businesses, or where the tax distinction actually reflects the judgment of government officials about the content of certain publications.<sup>373</sup> Thus, a tax that evenhandedly

---

<sup>370</sup> See, e.g., *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (invalidating a Minnesota use tax on ink and paper that exempted small publishers). This concern with differential treatment of the press also encompasses favorable treatment afforded the press because such treatment might compromise an independent press by making it beholden to local government. *Id.* at 588.

<sup>371</sup> *Id.* at 585, 588.

<sup>372</sup> See, e.g., *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229-32 (1987) (invalidating an Arkansas sales tax applied only to general interest magazines).

<sup>373</sup> See, e.g., *Leathers v. Medlock*, 499 U.S. 439, 447-49, 451-53 (1991) (upholding an

differentiates between types of media by treating similar classes therein the same way will most likely receive more deferential judicial treatment.<sup>374</sup> Nevertheless, in its multi-tiered approach to problems of differential taxation of the press, the Court has largely ignored the confluence of economic and expressive rights, often falling into the trap of analyzing one to the near exclusion of the other. A brief analysis of the leading opinions illustrates this point.

### 1. Differential Taxation and the Business of Expression

In the first of these cases, *Minneapolis Star and Tribune Co.*, the Court invalidated a Minnesota use tax on the ink and paper consumed in the production of periodicals.<sup>375</sup> The legislature exempted the first hundred thousand dollars worth of ink and paper used from taxation, and thus the use tax in effect only applied to a small segment of the press comprised of the largest periodical publishers within the state. The Court concluded that, because other businesses were not subject to this use tax, the tax itself signified differential treatment of the press.<sup>376</sup> Moreover, the Court found that because the exemption only applied to small volume publishers, the use tax scheme constituted another form of differential taxation within the media.<sup>377</sup>

Though the Court refused to speculate about the motive behind the use tax structure, it presumed that its differential characteristics threatened freedom of the press in general and, in particular, infringed upon the First Amendment rights of those few publishers who disproportionately bore the burden of the use tax because their annual production volume exceeded the limits of the exemption.<sup>378</sup> To this extent, a majority of the justices regarded the use tax and its exemption as comparable to impermissible content-based restrictions of the expressive rights of the state's largest publishers.<sup>379</sup> Applying strict scrutiny, the Court rejected the notion that the use tax represented the least restrictive means of raising revenue from profitable publishers given the threat to editorial freedom posed by the structure of the tax and the selective application of its exemption.<sup>380</sup> In essence, the Court worried that differential treatment of the press in any form, regardless of whether the distinction inures to the benefit of some members of the press, could

---

Arkansas gross receipts tax that exempted certain newspapers and magazines, but applied to cable television as a tax of general applicability not intended to "single out the press").

<sup>374</sup> *Id.* at 450-53 (applying deferential review to what the Court considered a generally applicable economic regulation).

<sup>375</sup> 460 U.S. 575, 590-92 (1983).

<sup>376</sup> *Id.* at 581.

<sup>377</sup> *Id.* at 591.

<sup>378</sup> *Id.* at 581, 585, 591-92.

<sup>379</sup> *Id.* at 585 (suggesting the differential treatment of the press in this case was "not unrelated to suppression of expression").

<sup>380</sup> *Id.* at 585-86, 588.

subject publishers to potential legislative abuse and compromise their autonomy. Underlying the Court's analysis was the presumption that differential taxation of the press violates the First Amendment.<sup>381</sup>

In dissent, Justice Rehnquist noted that the use tax actually benefitted the large newspapers within the state who, though subject to taxation on the amount of ink and paper consumed, nevertheless paid far less in use taxes than they would have had the state instead imposed the same four percent sales tax on the press that it exacted from other businesses.<sup>382</sup> From this perspective, he considered the use tax scheme a rational economic regulation of the state that did not burden the First Amendment rights of the largest periodicals.<sup>383</sup> In so doing, he merely perpetuated the dichotomy between economic liberty and freedom of expression characteristic of the Court's constitutional jurisprudence since the late 1930s.

Despite their differences, neither Justice O'Connor, who wrote the majority opinion, nor Justice Rehnquist seemed to recognize that the case actually involved both economic and expressive rights. Indeed, the unequal application of the Minnesota use tax and its exemption imposed certain economic burdens on the state's largest publishers that may have actually benefitted their media competitors in television, radio, and among the smaller volume periodicals — none of whom was subject to the use tax on ink and paper. The strict scrutiny adopted by a majority of the Court only focused upon the expressive interests at stake and did not consider the manner in which a seemingly neutral economic regulation could actually impair the business interests of larger publishers. Moreover, because it was not entirely clear that the tax scheme discriminated against the largest newspapers on the basis of their viewpoints, the Court may have used the wrong standard of review.<sup>384</sup>

---

<sup>381</sup> *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585, 588 (1983).

<sup>382</sup> *Id.* at 597-98 (Rehnquist, J., dissenting).

<sup>383</sup> *Id.* at 599-604.

<sup>384</sup> The Court usually assesses viewpoint-neutral restrictions under the more forgiving standard of heightened scrutiny, whereby it will sustain a narrowly tailored regulation that advances a substantial government interest unrelated to the suppression of speech. *See, e.g., City Council v. Taxpayers For Vincent*, 466 U.S. 789 (1984) (upholding a Los Angeles ordinance prohibiting the posting of signs on public utility poles). Much of the judicial deference accorded viewpoint-neutral restrictions emanates from the perception that they reflect neither ill motive on the part of the government nor the intent to distort communication of ideas. As such, they function as content-neutral restrictions. *See, e.g., Stone, Content Regulation, supra* note 366, at 193-201 (suggesting that the differences between viewpoint-neutral and viewpoint-based restrictions reflect pervasive distinctions between content-neutral and content-based regulations). In *Minneapolis Star*, the tax scheme was not the apparent byproduct of the government's attempt to quell the content of communication, and so it differed from the one in *Grosjean*, in which it was abundantly clear that the legislature used a seemingly neutral means of accomplishing its motive to punish those newspapers most critical of Huey Long's political regime. *See Minneapolis*

Likewise, Justice Rehnquist erred in his assumption that because the tax functioned as an economic regulation, it withstood minimal scrutiny as a legitimate means of implementing the state's rational objective of raising revenue. Inherently deferential in its application, the rational basis test urged by Justice Rehnquist would have neither required close examination of the factional context of the Minnesota tax scheme nor considered the connection between the business interests of the adversely affected newspapers and their communicative rights.<sup>385</sup> Accordingly, it would have eschewed judicial inquiry as to whether the use tax and its exemption impaired the economic ability of the state's largest newspapers to engage in some form of protected expression.

## 2. The Presumptive Dichotomy Between Expressive and Economic Rights

In *Arkansas Writers' Project, Inc. v. Ragland*,<sup>386</sup> the Court continued to differentiate between economic liberty and freedom of expression. Once again, a majority of the justices used strict scrutiny, this time to strike down an Arkansas law that imposed a sales tax on general interest periodicals but exempted newspapers and special interest publications from taxation on the basis of their content.<sup>387</sup> Though the tax operated unequally because it applied only to three

---

*Star & Tribune Co.*, 460 U.S. at 580 (differentiating, in part, *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936)). Nevertheless, the *Minneapolis Star* Court found that the differential effects of the Minnesota use tax upon the state's largest newspapers warranted strict scrutiny. See *Minneapolis Star & Tribune Co.*, 460 U.S. at 585-86 (implying that Minnesota's interest in collecting revenue through the method of a differential use tax was neither compelling, nor did it constitute the least restrictive means available of attaining the state's objective).

<sup>385</sup> The rational basis test, with its deference toward economic regulation, merely provides that there be some rational connection between legislative means and ends. See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-91 (1955) (upholding an Oklahoma law prescribing optometry requirements). Under this minimal standard of review, the government will prevail so long as it demonstrates the economic regulation at issue constitutes a reasonable method of furthering a legitimate objective. *Id.* Concerns about class legislation, the unequal operation of the economic regulation, or its factional basis become peripheral in this deferential analysis that often presumes the legitimacy of public regulation of economic activity.

<sup>386</sup> 481 U.S. 221 (1987).

<sup>387</sup> The *Arkansas Times*, a general interest magazine published by the appellant, was subject to the four percent sales tax. At oral argument, counsel for the state commissioner of revenue asserted that two other periodicals paid this tax, a fact disputed by the appellant. *Id.* at 229 n.4. Noting that the tax applied to only a small number of periodicals, the Court questioned its exemption for newspapers, many of which contained general interest stories similar to those published by the appellant. *Id.* at 230-31. Nevertheless, the Court did not analyze whether the disparate tax scheme promoted the business interests of those who received exemptions at the expense of their competitors. Instead, it focused on the First Amendment issue raised by the content-based regulation. Concluding that the selective

periodicals published within the state, seven of the justices decided the case on First Amendment grounds<sup>388</sup> and found that the law, which authorized a public official to determine the tax status of a publication in terms of its content, effectuated impermissible viewpoint discrimination.<sup>389</sup> In so holding, the Court reasoned that neither the state's putative interests in raising revenue nor encouraging the proliferation of smaller specialty journals through tax exemptions justified a selective tax upon a portion of the press.<sup>390</sup> Preoccupied with the threat of censorship inherent in such differential treatment, the Court focused exclusively upon the expressive harms borne by the plaintiffs and thus did not necessarily consider whether the law itself was a partial economic regulation. In part, this is understandable given the law's overt content-based restriction. Yet this approach failed to refute the notion, expressed in dissent by Justices Scalia and Rehnquist, that the tax was a reasonable economic regulation whose exemptions the state implemented to subsidize small publishers.<sup>391</sup> Consequently, the majority and dissenting opinions exemplify the willingness of the modern Court to differentiate between economic liberty and freedom of expression.

Perhaps the most problematic case in this area is *Leathers v. Medlock*,<sup>392</sup> in which the Court reversed course when it used the rational basis standard of review to uphold a differential regulation of the press. In *Leathers*, the Court sustained an Arkansas tax imposed only on cable television services that exempted broadcast television, radio, the print media and, until the state amended the tax, satellite television transmission.<sup>393</sup> Because the tax affected nearly one hundred cable service providers, a majority of the justices viewed it as a generally applicable economic regulation.<sup>394</sup> As a result of this deference, they never considered that the tax may have impaired the ability of cable television system operators to compete

---

application of the tax on the basis of periodical content amounted to impermissible viewpoint discrimination, *id.* at 229-31, 234, the Court found it unnecessary to determine whether the tax also violated the First Amendment because it distinguished between magazines and newspapers. *Id.* at 233.

<sup>388</sup> Justice Marshall, writing for the Court, explained that although the plaintiffs also raised an equal protection issue under the Fourteenth Amendment, "Arkansas' sales tax system directly implicates freedom of the press." *Id.* at 228 n.3.

<sup>389</sup> *Id.* at 229-30.

<sup>390</sup> *Id.* at 231-34.

<sup>391</sup> *Id.* at 235-37 (Scalia, J., dissenting).

<sup>392</sup> 499 U.S. 439 (1991).

<sup>393</sup> *Id.* at 453. Once amended, the law no longer exempted satellite television transmission. *Id.* at 443. Noting the absence of evidence indicating the state intended to censor cable speech, Justice O'Connor, writing for the Court, characterized the regulation as a "broad-based, content-neutral sales tax . . . [un]likely to stifle the free exchange of ideas." *Id.* at 453. Notwithstanding its differential effect upon cable television, the tax functioned as a "generally applicable sales tax." *Id.* Nor did the Court address the original disparate treatment between cable and satellite transmission.

<sup>394</sup> *Id.* at 447, 450-53.

in the information market place with the other, more favored segments of the media that received tax exemptions. Though the Court recognized that the cable industry plaintiffs engaged in a form of protected speech,<sup>395</sup> it found the tax was content-neutral because it affected a large and heterogeneous group in a non-discriminatory manner.<sup>396</sup> In essence, the Court employed an ad hoc approach that presumed the economic legitimacy of the tax<sup>397</sup> and dispensed with analysis of whether the law was a partial regulation that indirectly curtailed the freedom of the press.

Justice Marshall, however, recognized that because Arkansas' differential tax placed a disproportionate economic burden on cable system operators, it restricted their First Amendment rights. In dissent, he asserted that the tax created a content-based distinction borne solely by those in the cable industry, whose programming provided entertainment and news unavailable in some parts of the state from segments of the media favored with exemptions.<sup>398</sup> Highly critical of the notion that the standard of review depended upon the size of the adversely affected group,<sup>399</sup> he insisted that the tax lacked a compelling justification.<sup>400</sup> Insufficiently narrowly tailored, its unequal operation hindered the First Amendment interests of the cable television industry.<sup>401</sup>

### 3. The Distortion of Sutherland's Legacy

While Marshall implicitly understood that the tax scheme skewed business competition within the media,<sup>402</sup> his primary concern was protecting the free press

---

<sup>395</sup> *Id.* at 444.

<sup>396</sup> *Id.* at 448-50.

<sup>397</sup> *Id.* at 451-52. Indeed, the majority explained that "[i]nherent in the power to tax is the power to discriminate in taxation." *Id.* at 451. From this perspective, it did not think that a tax that imposed different burdens upon segments of the press necessarily implicated the First Amendment. *Id.* at 451-52. For criticism of judicial deference toward structural regulation of the media because of its tendency to neglect the factional basis of seemingly neutral economic regulations and their differential effects upon some segments of the media, see McGinnis, *supra* note 33, at 114-15 (criticizing the Court's use of fairly deferential heightened scrutiny to assess the constitutionality of must-carry laws).

<sup>398</sup> *Leathers v. Medlock*, 499 U.S. 439, 461-62 (Marshall, J., dissenting). Marshall explained that some of the cable systems that provided unique special language, cultural, and news programs unavailable in other forms of media were the only cable systems within some regions of the state. *Id.* "[I]n any given locale, Arkansas' discriminatory tax may disadvantage a *single* actor, a 'small' number even under the majority's calculus." *Id.* at 462. Consequently, this belied the majority's assertion that the tax affected a large intra-media group and created the potential for censorship reflective of government biases that would impede the flow of information. *Id.*

<sup>399</sup> *Id.* at 454, 460-62.

<sup>400</sup> *Id.* at 459, 464-65.

<sup>401</sup> *Id.* at 458-65.

<sup>402</sup> See *id.* at 456-59, 462, 465. He noted that cable television system operators had to pay a tax on their subscription fees while their media competitors were exempt from taxation of



rights of cable television system operators from potential government abuse.<sup>403</sup> To this extent, he worried that through the structure of an economic regulation, the legislature could impair expressive rights.<sup>404</sup> In this regard, of the two opinions, his was the more consistent with Sutherland's legacy. However, unlike Sutherland, who construed differential taxation of the press through the prism of economic liberty, Marshall adhered to the post-1930s notion that differentiates between economic liberty and the First Amendment. Accordingly, his analysis never really focused on how the Arkansas tax curtailed the business of expression as a partial economic regulation. Insofar as Marshall realized that government could impede the flow of information through economic measures, he cared less about protecting the business interests of the cable system operators than about preserving their communicative autonomy.<sup>405</sup> Though he shrewdly understood that, through the guise of a sales tax, the state infringed upon the First Amendment rights of certain media actors, Marshall, like most modern jurists, placed more emphasis upon the First Amendment than on economic liberty. For this reason, he thought strict scrutiny was the most appropriate means of protecting the cable system operators' freedom of expression.

Yet Marshall's characterization of the Arkansas tax as a content-based form of media discrimination would not necessarily have forced the Court to determine whether the law was a partial regulation enacted to benefit the business of a few favored members of the media to the economic detriment of others.<sup>406</sup> The type of strict scrutiny Marshall advocated would have, in effect, shunted the issue of economic liberty to the side and focused exclusively on whether the tax achieved a compelling objective through means least restrictive of the First Amendment interests of the cable system operators. This approach, therefore, would have

---

their advertising revenue. *Id.* at 456. In this regard, Marshall suggested that the Arkansas legislature may have enacted the differential tax at the behest of television broadcasters who feared competition from their cable counterparts. *Id.* at 463. Rather than construe this as a problem of partial economic regulation, he focused on the First Amendment censorship implications of the differential tax. *Id.*

<sup>403</sup> *Id.* at 458, 462-63.

<sup>404</sup> *Leathers v. Medlock*, 499 U.S. 439, 458, 462-64 (1991).

<sup>405</sup> *Id.* at 458-59, 462-63 (explaining how differential taxation of the media "distorts the marketplace of ideas").

<sup>406</sup> First, it was not altogether clear that the Arkansas tax really discriminated against the cable medium to suppress the expression of cable speech. As Justice O'Connor noted in her majority opinion, the differential tax did not refer to the content of cable expression, and this content, with its "mixture of news, information, and entertainment," did not really differ from the content present in other forms of media. *Id.* at 449. Moreover, strict scrutiny as a standard of review may not consider all forms of indirect abridgement of speech, such as structural, or seemingly neutral, economic regulations of speech. *See, e.g., McGinnis, supra* note 33, at 114 (strict scrutiny "does not screen for all the manipulations of speech . . . . Special rules targeted at the operations or structure of the communication media inevitably affect content, even if they do not expressly refer to it.").

merely fostered the divergence between economic liberty and freedom of expression that Sutherland himself rejected in both *Grosjean* and *Associated Press*.

Indeed, conventional First Amendment analysis, using either strict or heightened scrutiny, presupposes a dichotomy between economic liberty and freedom of expression ill-suited for careful judicial assessment of laws that may restrict the business of expression.<sup>407</sup> With their emphasis upon protecting expressive liberty, neither type of heightened review really considers the extent to which regulations about the form of communication may reflect the biases of political factions who capture the legislative process in order to create economic benefits for some segments of the media at the expense of others. Though economic regulations of unequal operation can distort the market place of ideas, traditional First Amendment tests rarely examine how partial legislation can disrupt the

---

<sup>407</sup> See, e.g., Ashutosh Bhagwat, *Of Markets And Media: The First Amendment, The New Mass Media, and the Political Components of Culture*, 74 N.C. L. REV. 141, 142, 176 (1995) (implying that because "most mass media regulation necessarily takes into account, to some degree, the content of the regulated speech," a judiciary preoccupied with distinguishing between content-based and content-neutral restrictions might not detect some ways in which modern mass media rules limit expression); McGinnis, *supra* note 33, at 54-57, 91, 93, 97, 99, 110-15 (discussing the tendency of bifurcated First Amendment judicial review to neglect the connection between property rights and freedom of expression); Laurence H. Winer, *The Red Lion of Cable, and Beyond?* — *Turner Broadcasting System v. FCC*, 15 CARDOZO ARTS & ENT. L.J. 1, 5 (1997) (noting the conjunction of content and structural regulation of media). Winer also criticized the *Turner I* Court for its failure to perceive that the must-carry rules functioned as both an impermissible content-based restriction upon the editorial discretion of cable operators and programmers, *see id.* at 29-34, 36-45, and partial economic legislation that impeded the business interests of the cable industry for the benefit of broadcast television. *Id.* at 42, 45. In essence, then, Winer, like McGinnis and, to a lesser extent, Bhagwat, all implicitly suggest that traditional First Amendment standards of review may not adequately assess laws that affect the interrelated expressive and economic interests of media actors.

symbiotic relationship between the business and expressive interests of a media actor.<sup>408</sup> Where these interests converge to the extent that they essentially form an

---

<sup>408</sup> Consider the following example. Suppose a state law authorizes a flat tax only on all wrestling magazines sold within the jurisdiction that promote the sport's virtues. Periodicals that criticize the sport are not subject to the tax. Further assume that many citizens purchase the magazines that tout wrestling's benefits. Because the tax, in effect, singles out magazines favorable to wrestling, it is probably a content-based restriction that most likely results in impermissible viewpoint discrimination under the First Amendment. *See, e.g., Police Dep't. v. Mosley*, 408 U.S. 92 (1972) (invalidating a content-based restriction on certain kinds of labor picketing). Using strict scrutiny, a court will invalidate the tax unless the state demonstrates that the tax is the least restrictive means available of attaining a compelling state interest other than restricting freedom of expression. This, in turn, suggests that strict scrutiny would probably permit a significant incursion upon the economic liberty of the publishers so long as the legislative means are so precisely tailored that they leave undisturbed the viewpoints of the affected wrestling magazines. However, in all probability, a court would find this tax violates the First Amendment because its highly selective application to a group of magazines characterized by their content raises serious questions about legislative censorship of certain viewpoints. *See, e.g., id.* at 95-96 (asserting that under the First Amendment "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"). Therefore, a court might find that the state could raise revenue (assuming that is its stated purpose), promote more wholesome sports or encourage the business of other types of magazine publishers through less restrictive, content-neutral means. At this point, it is necessary to consider an alternative scenario.

In this second example, a content-neutral, progressive tax based on the sales volume of all sports magazines might prevail under virtually any form of heightened scrutiny because it would not intrude nearly so much upon the First Amendment interests of certain wrestling magazine publishers. In other words, it would be tantamount to a viewpoint-neutral, subject matter restriction. *See, e.g., Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (upholding a flat ban on all advertising about political and public issues on public transportation vehicles as a viewpoint-neutral, subject matter restriction). *But see Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936) (invalidating a progressive tax upon advertising receipts that exempted small publishers). In essence, this content-neutral, progressive tax would function as a generally applicable economic regulation of incidental effect upon freedom of the press. *See, e.g., Associated Press v. United States*, 326 U.S. 1 (1945) (upholding application of federal anti-trust legislation to a news gathering agency). Given the current presumption accorded to most economic regulations, a court would, therefore, only examine carefully the First Amendment effects. However, because a court might not consider whether a seemingly neutral economic regulation is in and of itself a partial law intended to affect business competition within the media, it is quite possible that a court would overlook the effects of a partial economic regulation upon the ability of some media actors to engage in the very business of expression. *See McGinnis, supra* note 33, at 112-15 (criticizing the *Turner I* Court's use of heightened scrutiny in its constitutional analysis of must-carry rules). In this second scenario, a content-neutral progressive tax on sports magazines may only incidentally effect the viewpoints expressed in some wrestling magazines. However, its progressive structure might indicate that the real purpose of the tax was to neutralize economic competition between certain highly profitable wrestling periodicals and less popular general sports magazines. This, in turn, might interfere with the

indivisible right, judicial subordination of economic liberty to freedom of expression ignores subtle forms of discrimination that may undermine the very business of the press and thus indirectly subvert its expressive function. It also distorts the meaning of Sutherland's opinions in both *Grosjean* and *Associated Press*.<sup>409</sup>

### B. *Must-Carry and the Business of Expression*

The Supreme Court has also neglected the business of expression in its constitutional analysis of the most recent must-carry rules. In 1992, after several previous attempts to regulate cable television, Congress enacted the Cable Television Consumer Protection and Competition Act ("Cable Act").<sup>410</sup> Pursuant to this law, most cable television systems must carry broadcast television programs on at least one-third of their channels.<sup>411</sup> Convinced that without mandatory carriage, broadcast television would confront economic peril because of increased anti-competitive behavior by the cable industry,<sup>412</sup> Congress devised the must-carry requirements to protect the viability of the broadcast medium, to promote fair competition within the video market, and to preserve the broad transmission of news and entertainment from a diverse spectrum of sources.<sup>413</sup> In a tandem of cases three years apart, the Court upheld the must-carry provisions of the Cable Act as a narrowly tailored content-neutral regulation of only incidental effect upon the First Amendment interests of cable television system operators and programmers.<sup>414</sup>

underlying business interests of those wrestling magazines. Thus, the modern Court, with its overt emphasis upon the First Amendment, might neglect the more subtle interplay between economic liberty and freedom of expression that Sutherland perceived in *Grosjean* and *Associated Press*.

<sup>409</sup> In this regard, Sutherland's dissent in *Associated Press* is especially relevant, because there he looked beyond the surface of a seemingly neutral economic regulation and found a partial measure whose unequal operation hindered the business of a private new service and compromised its editorial autonomy. See *Associated Press v. NLRB*, 301 U.S. 103, 133-41 (1937) (Sutherland, J., dissenting).

<sup>410</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended in 1994 in various sections of 47 U.S.C.) [hereinafter 1992 Cable Act].

<sup>411</sup> *Id.* at § 4, 106 Stat. 1460, 1471, 47 U.S.C. § 534. Section 5 of the 1992 Cable Act prescribes mandatory carriage by cable television systems of public broadcast stations. *Id.* at § 5, 106 Stat. 1460, 1471, 47 U.S.C. § 535.

<sup>412</sup> *Id.* at § 2(a)(5)(13-19), 106 Stat. 1460, 1463, 47 U.S.C. § 521 (a)(5), (13-19) (setting forth Congressional findings about how increased vertical integration of the cable television industry and anti-competitive cable programming practices threatened the economic viability of broadcast television).

<sup>413</sup> *Id.* at § 2(a)(6-12), 106 Stat. 1460, 1463, 47 U.S.C. § 521 (a)(6-12); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) [hereinafter *Turner I*].

<sup>414</sup> See *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) [hereinafter *Turner II*] (ruling that in the absence of mandatory carriage, cable television systems would continue

In essence, the must-carry rules reflected a congressional belief that, in the absence of mandatory carriage of its stations by cable systems, broadcast television would falter economically and no longer remain a viable and relatively inexpensive source of information for nearly forty percent of the American households who did not subscribe to cable television.<sup>415</sup> Though the must-carry provisions implicated both economic liberty and freedom of expression, the justices in both the majority and dissent in each case largely ignored the confluence of these rights. As a result, the Court's most recent must-carry decisions contain significant flaws that perpetuate the dichotomy between economic liberty and freedom of expression and distort Sutherland's First Amendment legacy.

### 1. The *Turner* Cases: An Overview

Concerned that mandatory carriage of broadcast television programs interfered with their editorial autonomy under the First Amendment, cable television operators and programmers sued the Federal Communications Commission ("FCC"), characterizing the must-carry requirement as an impermissible content-based restriction whose imposition amounted to a form of compelled speech.<sup>416</sup> In response, the FCC argued that must-carry was a legitimate economic regulation intended to alleviate impediments to the flow of information created by the increasingly anti-competitive behavior of cable television systems, who throughout the previous decade had increased their stranglehold control of home video transmission through monopolistic practices that often resulted in the dropping of broadcast television programs from cable systems or repositioning of them to obscure channels in favor of cable fare.<sup>417</sup> The lower district court granted the government's motion for summary judgment, as two of the three judges ruled that the must-carry provisions were content-neutral because they distinguished between media on technological grounds designed to facilitate public access to broadcast television.<sup>418</sup>

On appeal, a divided Supreme Court agreed in principle with the constitutional analysis of the lower court, but vacated its order on the grounds that insufficient

---

anti-competitive behavior likely to create economic peril for large segments of the broadcast television industry and thus undermine the government's substantial interest in promoting diversity of video information transmission); *Turner I*, 512 U.S. 622 (1994) (upholding must-carry as a content-neutral restriction of incidental effect upon the First Amendment rights of cable operators and programmers).

<sup>415</sup> See § 2(a)(5),(13-19) of 1992 Cable Act, 106 Stat. 1460, 1463, 47 U.S.C. § 521 (a)(5),(13-19); *Turner I*, 512 U.S. at 626,632-34.

<sup>416</sup> *Turner I*, 512 U.S. at 645-46, 652, 656-58.

<sup>417</sup> *Id.* at 632-33, 638-41 (both references summarizing Congress' rationale).

<sup>418</sup> See *Turner Broad. Sys., Inc. v. FCC*, 819 F. Supp. 32, 40, 43-45, 51 (D.D.C. 1993). In dissent, Judge Williams argued the must-carry rules were impermissible content-based restrictions on cable speech. *Id.* at 57-67 (Williams, J., dissenting).

evidence existed to dismiss the cable plaintiffs' claims. In his plurality opinion for the Court, Justice Kennedy explained that the differential burden imposed upon the cable industry by the must-carry regime reflected technological distinctions between cable and broadcast media unrelated to the specific content or viewpoints of cable television programs.<sup>419</sup> Thus, the must-carry provisions functioned as a content-neutral restriction.<sup>420</sup> While Kennedy and the four justices who joined in his plurality opinion acknowledged the First Amendment protected the editorial discretion of cable operators and programmers,<sup>421</sup> they noted that the must-carry rules only sought to alleviate the cable industry's bottleneck control over video transmission in subscribers' homes.<sup>422</sup> Moreover, they characterized as substantial the federal government's asserted interests in promoting fair competition within the video market and preserving broadcast television as a viable medium.<sup>423</sup> From this perspective, five members of the Court reasoned that must-carry was a structural, economic regulation intended to redress competitive imbalance within the video transmission market in favor of diversity and not an intentional abridgement of

---

<sup>419</sup> *Turner I*, 512 U.S. at 623-25, 643-44, 657-62 (concluding that the special characteristics of the cable medium justify the differential burden imposed upon the cable industry by the must-carry rules). Thus, Justice Kennedy did not perceive in either the structure or the application of the must-carry rules impermissible governmental motive to suppress the viewpoints of cable operators or programmers. *Id.* at 660-61. Nor did he consider the possible indirect effects upon cable speech resulting from mandatory carriage of broadcast programs because he never examined whether the must-carry rules may have reflected congressional content-based judgment about the respective value of some broadcast programs. *Id.* at 678-82 (O'Connor, J., concurring in part and dissenting in part); *Turner*, 819 F. Supp. at 58 (Williams, J., dissenting). See also Jim Chen, *The Last Picture Show (On the Twilight of Federal Mass Communications Regulation)*, 80 MINN. L. REV. 1415, 1468, 1470-71 (noting that the must-carry rules exemplify structural regulation intended to promote broadcast speech at the expense of the cable industry); Winer, *supra* note 407, at 5, 7, 19, 29, 32-34, 36, 39, 45 (asserting the *Turner I* majority confused the distinction between a permissible general business regulation and an impermissible content-based restriction). But see C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 S. CT. REV. 57, 61, 62, 82, 88, 90-93, 114, 121-22, 127 (asserting that the must-carry rules exemplified permissible content-based structural regulation of the media designed to facilitate access to information).

<sup>420</sup> *Turner I*, 512 U.S. at 644-49, 654-55.

<sup>421</sup> *Id.* at 636-37. In previous cases the Court had recognized some aspects of cable programming as constituting speech under the First Amendment. See, e.g., *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) (equating cable operators with First Amendment speakers). The *Turner I* plurality opinion, however, distinguished the editorial discretion of cable programmers who create original cable programs and of cable operators who select cable programs from the conduit function of cable television. From this perspective, because the must-carry rules primarily affected the physical transmission of speech over cable systems, they did not infringe the First Amendment interests of the cable industry. See *Turner I*, 512 U.S. at 636-37, 654-59.

<sup>422</sup> *Id.* at 624-25, 656, 660-61.

<sup>423</sup> *Id.* at 623-25, 647-48, 651-52, 661-64.

speech.<sup>424</sup> Yet the Court found genuine issues of fact remained as to whether must-carry was essential to further the government's substantial interests, particularly the protection of broadcast television's economic viability, and whether application of the must-carry requirement was sufficiently narrowly tailored that it only incidentally affected cable speech.<sup>425</sup> Consequently, the Court remanded the case back to the special district court for further evidentiary review.

In *Turner II*, the Court reiterated that the content-neutral characteristics of must-carry warranted heightened scrutiny. In a plurality opinion highly deferential to congressional findings,<sup>426</sup> Justice Kennedy observed that ample, though not uncontroverted, evidence indicated that in the absence of mandatory carriage, the cable industry's anti-competitive business practices posed a significant economic threat to local broadcasters.<sup>427</sup> This conflicted with the substantial governmental interest in preserving multiple and diverse sources for the transmission of video information.<sup>428</sup> Noting that most cable systems voluntarily carried popular broadcast programs, Kennedy found the must-carry rules narrowly tailored because of their modest effects upon the editorial discretion of cable operators and

---

<sup>424</sup> *Id.* at 640-48, 651-52, 656, 661-62.

<sup>425</sup> *Id.* at 667-68.

<sup>426</sup> See *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195-96, 199-202, 209-11 (1997). As if to underscore its rational basis approach toward economic regulation, a majority of the Court deferred to congressional findings about the economic imperative for the must-carry rules notwithstanding the existence of conflicting evidence. *Id.* at 195-200, 209-13 (explaining that the Court will defer to "reasonable and . . . rational . . . legislative conclusions").

<sup>427</sup> In particular, the Court concluded that evidence of increasing horizontal and vertical integration within the cable industry threatened the economic viability of its broadcast competitors and that cable system operators were more likely to displace or relegate to obscure channels some broadcast programs in favor of those produced by cable affiliated programmers. *Id.* at 191-92, 197-207. Moreover, the Court found that there was sufficient evidence to indicate that, as the cable monopoly increased its influence within the video transmission market, cable systems had an economic incentive to drop or reposition broadcast television programs because both cable and broadcast television competed for advertising revenue. *Id.* at 206-09. But see Ronald W. Adelman, Essay, *Turner Broadcasting and the Bottleneck Analogy: Are Cable Television Operators Gatekeepers of Speech?*, 49 SMUL. REV. 1549, 1550, 1555-56 (1996) (criticizing the Court's conclusion that the must-carry rules were necessary to alleviate cable television industry's "bottleneck" control over video transmission); Winer, *supra* note 407, at 40, 47-50 (explaining that in the absence of mandatory carriage, cable television had an economic incentive to carry the most popular broadcast television programs and criticizing the Court's "bottleneck" rationale).

<sup>428</sup> See *Turner II*, 520 U.S. at 215-16, 221. Though he was not necessarily convinced that the evidence indicated that broadcast television would incur dire economic consequences in the absence of mandatory carriage, Justice Breyer concurred with the notion that the cable industry's bottleneck control over home video transmission impaired a substantial governmental interest in promoting diverse video sources and that the must-carry rules advanced this interest by narrowly tailored means. See *id.* at 226-29 (Breyer, J., concurring in part).

programmers.<sup>429</sup> Accordingly, they comprised a content-neutral restriction of incidental affect upon cable speech. As in *Turner I*, Justice Kennedy's conclusion that the must-carry rules primarily operated as economic regulation demonstrates the extent to which he separated the business and speech interests of the cable industry.

Justice O'Connor disagreed with the rationale of the *Turner* plurality opinions. Partially dissenting in the first case, she characterized compulsory carriage of broadcast television stations as a content-based restriction that reflected the government's preferences for broadcast programs about local news, education, and public affairs.<sup>430</sup> Applying strict, in addition to heightened, scrutiny to the must-carry rules, Justice O'Connor argued that neither localism nor diversity comprised compelling governmental interests, and that even if they were, the government could have attained these objectives through less restrictive means.<sup>431</sup>

In *Turner II*, Justice O'Connor remained skeptical about the government's assertions that the business practices of the cable industry jeopardized the economic health of broadcast television and required cable systems to carry local television programs to ensure viewers access to multiple sources of video information.<sup>432</sup> From this perspective, she was very critical of the Court's deference to Congress, given the conflicting evidence concerning competition within the video transmission market and the extent of television broadcasters' economic problems.<sup>433</sup> Perceiving that the must-carry rules interfered with the editorial discretion of cable operators and programmers, Justice O'Connor believed that they

---

<sup>429</sup> *Id.* at 214-18. (explaining that the government would prevail so long as mandatory carriage was not a substantially overbroad structural, economic regulation). In essence, Justice Kennedy interpreted the narrowly tailored language of *O'Brien* to mean "reasonable," and thus demonstrated great deference to the government's economic arguments. *See, e.g., McGinnis, supra* note 33, at 114-15 (noting that pursuant to *O'Brien*, the Court deferred to the government's interests as defined by the government and criticizing the Court's conclusion that cable television's bottleneck control over video transmission necessitated mandatory carriage of broadcast programs).

<sup>430</sup> *See Turner I*, 512 U.S. at 676-82 (O'Connor, J., concurring in part and dissenting in part).

<sup>431</sup> *Id.* at 680. Justice O'Connor considered governmental subsidies to broadcast television stations one less restrictive mean. *Id.* Alternatively, she applied a heightened scrutiny standard (*O'Brien*) and ruled that the governmental interest in preserving the economic viability of broadcast television did not outweigh the First Amendment interests of the cable industry. Justice O'Connor considered the economic threat to broadcast television speculative and believed that the must-carry rules were overbroad and not unrelated to the suppression of cable speech. *Id.* at 682-84.

<sup>432</sup> *See Turner II*, 520 U.S. 180, 232-34, 238-48 (O'Connor, J., dissenting).

<sup>433</sup> *Id.* at 247-54. In particular, she criticized the Court for not more carefully scrutinizing the government's putative substantial interests when much of the testimony before Congress about the need for mandatory carriage came from the broadcast television industry. *Id.* at 237-38.



constituted an overly broad restriction of cable speech.<sup>434</sup>

## 2. Criticism and Context: Judicial Failure to Recognize the Business of Expression

Notwithstanding the internal debate over the constitutional status of mandatory carriage, the Supreme Court failed to recognize the nexus between economic liberty and freedom of expression at issue in the *Turner* litigation. Indeed, both the plurality opinions, with their emphasis upon the must-carry rules as a structural or economic regulation, and the dissenters' predominant concern with the must-carry rules' effects upon cable speech, suggest that the justices as a whole never fully appreciated the parallels between the *Turner* cases and the differential treatment of the press cases previously discussed. In particular, had they followed Sutherland's approach in *Grosjean* and *Associated Press*, they may have avoided some analytical pitfalls.

One problem is that the distinction between content-neutral and content-based restrictions is not always clear.<sup>435</sup> In part, it assumes that one can clearly differentiate content of expression from its physical form, or manner, yet in practice the two often merge. Moreover, judicial definitions of content are often ambiguous.<sup>436</sup> Accordingly, some content-neutral regulations may actually have content-differential effects that, to some extent, distort the market place of ideas or

---

<sup>434</sup> See *id.* at 234-35, 243-44, 249-54. Applying strict scrutiny to the must-carry rules, Justice O'Connor concluded that neither a compelling interest justified their imposition, nor did they comprised the least restrictive means available of attaining the stated governmental objectives. *Id.* at 249-54 (arguing, in part, that leased access or subsidies were less intrusive means). Alternatively, she would have applied the *O'Brien* test more stringently than did the majority, as she questioned whether the government actually had implemented a substantial interest unrelated to the suppression of cable speech through narrowly tailored means. Under this approach, she found that the First Amendment interests of the cable industry outweighed the speculative interests of the government and thus rendered the must-carry provisions unconstitutional as well under heightened scrutiny. *Id.* at 251-58.

<sup>435</sup> See, e.g., Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 113, 116-19, 128-29, 140-42 (1981) (criticizing the distinction between content-neutral and content-based restrictions). Redish suggests that subject matter restrictions, in particular, generate much confusion. *Id.* at 117. Observing that either a content-neutral or content-based restriction ultimately "impairs the flow of free expression," *id.* at 128-29, Redish questions the utility of the content distinction in First Amendment jurisprudence, and proposes instead a unified standard of strict scrutiny for all restrictions of speech. *Id.* at 114, 129-30, 142, 150.

<sup>436</sup> See, e.g., Daniel A. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727, 747 (1980) ("Although the idea behind the term 'content' is intuitively clear, it is not easy to give a precise definition."); Redish, *supra* note 435, at 142 (asserting that "[t]he content distinction is conceptually and pragmatically untenable and should therefore be abandoned").

affect communicative impact.<sup>437</sup> Restrictions that limit the access of certain types of speakers illustrate the difficulty in differentiating content-based laws from those that do not regulate on the basis of content.<sup>438</sup> Similarly, laws that prescribe the secondary effects of some kinds of expressive activity also can be difficult to classify.<sup>439</sup>

Insofar as the content distinction differentiates between the physical form or manner of speech and its content, it reflects the jurisprudential dichotomy between economic liberty and freedom of expression that emerged over sixty years ago. Within this context, most, if not all, structural regulations of the media pose special problems. Ostensibly predicated upon specific technological or economic characteristics, this legislation in some respects resembles content-neutral regulation even though, at times, it relies upon content-based classifications for the scope of its application.<sup>440</sup> Yet where there is a close relationship between expressive and economic activity, the distinction between content-based and content-neutral restrictions dissolves, in large part, because a regulation may not necessarily only affect the time, manner, or place of expression. It can also yield

---

<sup>437</sup> See, e.g., Day, *Hybridization*, *supra* note 8, at 224 (noting some content-neutral laws are "not necessarily unrelated to expression"); Redish, *supra* note 435, at 134, 140-41 (suggesting incidental restrictions of speech may be as problematic as direct restrictions upon the content of expression); Stone, *Subject Matter Restrictions*, *supra* note 365, at 102, 107-08 (suggesting that some content-neutral restrictions, including "[s]ubject matter restrictions . . . distort the 'marketplace of ideas' in a content-differential manner"). Elsewhere, Stone suggests that some subject matter restrictions can create ambiguities pertaining to the content distinction. Stone, *Content Regulation*, *supra* note 366, at 239-42. In this regard, compare *Police Dep't. v. Mosley*, 408 U.S. 92 (1972) (finding exemption from a picketing prohibition for certain kinds of labor picketing an impermissible content-based restriction), with *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (finding restriction on political advertising on municipal public transportation vehicles viewpoint neutral).

<sup>438</sup> Compare *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978) (invalidating a Massachusetts law that prohibited only business entities from spending money on election referenda), with *Regan v. Taxation With Representation*, 461 U.S. 540 (1983) (upholding a federal law that authorized tax deductions only for contributions made to a tax-exempt veterans group). See Stone, *Content Regulation*, *supra* note 366, at 244-51 (noting that speaker access restrictions at times blur the distinction between content-based and content-neutral restrictions).

<sup>439</sup> See, e.g., Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 629-35 (1991) (criticizing Court precedent upholding the use of facially content-based laws to regulate the secondary effects of speech). In this regard, see *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (sustaining a law that restricted location of theaters that showed films with nudity).

<sup>440</sup> See, e.g., Bhagwat, *supra* note 407, at 193-94 (suggesting that much structural media regulation is content-based); McGinnis, *supra* note 33, at 114 (noting that structural regulation of media often indirectly affects content); Winer, *supra* note 407, at 5 (commenting on the difficulty of distinguishing permissible structural regulation of the media from impermissible content regulation).

indirect effects upon the content of expression, particularly if the medium and the message are inextricably intertwined. Indeed, Sutherland implied as much in his *Grosjean* and *Associated Press* opinions. The confluence of economic liberty and expression, therefore, belies the utility of the classical distinction between content-based and content-neutral laws when applied to issues arising from differential taxation of the press or must-carry rules.

Though Congress intended the must-carry rules to function as a structural regulation of the cable industry, divisions within the Court emerged over whether these provisions were content-neutral or content-based. Much of the ambiguity may have come from the similarity of must-carry rules to either speaker access restrictions or laws that regulate the secondary effects of speech,<sup>441</sup> either of which underscores the sometimes illusory and semantical distinction between content-neutral and content-based regulations.<sup>442</sup> On a more fundamental level, however, the internal rift may have reflected the inability of the justices as a whole to understand how the must-carry rules affected both the economic and First Amendment interests of the cable industry.

In the *Turner* cases, the business and expressive interests of cable operators and

---

<sup>441</sup> Arguably, the must-carry rules resembled speaker access restrictions because, in theory, they limited the access or opportunity of cable operators and programmers to carry only cable programs. Compare *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983) (upholding a collective bargaining provision that only gave the union elected as the exclusive bargaining representative access to an inter-school mail system), with *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530 (1980) (invalidating a rule that prohibited only utility companies from including certain messages with bills). Indeed, even some adherents of the content distinction in First Amendment analysis concede that speaker access restrictions at times blur the distinction between content-neutral and content-based regulations. See, e.g., Stone, *Content Regulation*, *supra* note 366, at 244-51 (explaining that some speaker restrictions may create content-differential effects). On the other hand, regulation of the cable television industry intended to redress its presumed anti-competitive behavior and preserve broadcast television as a viable source of video transmission conceivably justifies mandatory carriage as an attempt by Congress to prescribe aspects of cable television unrelated to the content of speech. Pursuant to the secondary effects doctrine, these content-neutral objectives would justify incidental restrictions of cable speech. See, e.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (upholding zoning restrictions imposed on adult theaters). The problem, however, is that neither characterizing the must-carry rules as speaker access restrictions nor laws intended to prescribe the secondary effects of the editorial discretion of cable operators and programmers necessarily considers the indirect effects of such regulation. See, e.g., Williams, *supra* note 439, at 629-35 (positing that the secondary effects doctrine has contributed to the Court's sometimes confused distinction between content-based and content-neutral restrictions). This is important because the expressive and business interests of the cable operators and programmers converge so that a seemingly viewpoint neutral law such as mandatory carriage may actually have significant indirect effects upon the ability of the cable industry to facilitate communication and avoid compelled speech.

<sup>442</sup> See, e.g., Farber, *supra* note 436 at 747; Redish, *supra* note 435, at 113, 116-19, 142.

programmers converged. Selection of programs for carriage on cable systems is not only an economic decision but also one of editorial discretion.<sup>443</sup> Therefore, as a practical matter, it is difficult to distinguish between the medium of cable television and its message.<sup>444</sup> Yet the justices, to one extent or another, persisted in differentiating between the economic and First Amendment activities of cable operators and programmers.<sup>445</sup> As a result, they placed inordinate emphasis upon proper classification of the must-carry rules and eschewed careful analysis of how those rules may have impaired the business of cable expression. Given the close nexus between the expressive and economic activities of those members of the cable industry affected by mandatory carriage, the justices erred when they applied constitutional standards of review that presuppose a formal dichotomy between economic and First Amendment rights.

Moreover, it is not altogether certain whether cable operators and programmers primarily function as speakers in terms of the First Amendment or merely as conduits of speech.<sup>446</sup> Arguably, the creation and selection of cable programming

---

<sup>443</sup> See, e.g., Winer, *supra* note 407, at 26-27, 66-67 (contending cable operators' editorial discretion warrants First Amendment protection); Josephine I. Aiello, Note, *Congressional Cable-Vision: Turner Broadcasting v. Federal Communications Commission*, HARV. J.L. & TECH. 231, 240 (1995) (stating that "[f]or purposes of First Amendment review, cable television is a hybrid media resembling broadcast to viewers, sharing editorial discretion with newspapers, and dispensing compilations of associated expressions like newsstands"); Jeff Gray, Note, *Turner Broadcasting System, Inc. v. FCC: The Need for a New Approach in First Amendment Jurisprudence of the Cable Industry*, 29 U.S.F. L. REV. 999, 1030-32, 1034-35 (characterizing the speech/conduit distinction as a fallacy because the message and the medium of cable television are interrelated).

<sup>444</sup> See Gray, *supra* note 443, at 1031-32 (explaining that because most "communication involves conduct . . . [it is difficult] . . . to separate conduct from expression"). Moreover, "because the purpose of cable is to deliver speech . . . [a] cable operator's choice of programming is necessarily both conduct and expression." *Id.* at 1031-32. See also John H. Ely, *Flag Desecration: A Case Study in the Role of Categorization and Balancing in First Amendment Analysis*, 86 HARV. L. REV. 1482, 1495 (1975) (questioning the artificial distinction between conduct that facilitates expression and conduct intertwined with expression).

<sup>445</sup> Even though Justice O'Connor sensed that the must-carry rules impaired both the economic and expressive interests of cable operators and programmers, she essentially believed the rules reflected content-based preferences for local broadcast programs, see *Turner I*, 512 U.S. at 676-85 (O'Connor, J., concurring in part and dissenting in part), and would have preferably struck down the mandatory carriage provisions under strict scrutiny, see *id.* at 679-82, a constitutional standard that implicitly emphasizes the First Amendment and might not necessarily detect partial economic regulations that indirectly infringe upon expressive activity. See McGinnis, *supra* note 33, at 114.

<sup>446</sup> For the notion that cable operators serve as mere conduits of speech with attenuated First Amendment rights, see Baker, *supra* note 419, at 63 (asserting that cable operators do not have as strong First Amendment rights as individual speakers); Daniel Brenner, *Cable Television and the Freedom of Expression*, 1998 DUKE L.J. 329, 339, 343, 370 (arguing that cable operators' selection of programs is primarily an economic activity and not necessarily

involves the exercise of editorial discretion well within the rubric of the First Amendment,<sup>447</sup> whereas the transmission of cable television programs may not.<sup>448</sup> Notwithstanding this theoretical distinction, the business of cable television combines both speech and distributive functions,<sup>449</sup> and regulation of the economic aspects of the cable industry could indirectly affect its freedom of expression.<sup>450</sup> Accordingly, this close connection between the business and expressive components of the cable medium renders an imprecise classification of the must-carry rules as either entirely content-based or content-neutral restrictions of speech.

Justice O'Connor likened cable television to traditional print media and thought the Court probably should have applied strict scrutiny to must-carry rules that explicitly sought to protect the content of the cable industry's broadcast competitors.<sup>451</sup> However, given strict scrutiny's principal emphasis upon protecting the content of expression, it is possible that partial economic regulations that

---

protected speech); Michael I. Meyerson, *Authors, Editors, and Uncommon Carriers: Identifying the "Speaker" Within the New Media*, 71 NOTRE DAME L. REV. 79, 97-99 (concluding that the must-carry rules were permissible regulation of cable operators as conduits of speech who function as common carriers); Frederick Schauer, *Cable Operators as Editors: Prerogative, Responsibility, and Liability*, 17 HASTINGS COMM. & ENT. L.J. 161, 174-76 (1994) (reasoning that because cable operators are mere conduits of speech they have attenuated First Amendment rights).

<sup>447</sup> *Turner I*, 512 U.S. at 643-45; see also Eric F. Ugland, *Cable Television, New Technologies and the First Amendment After Turner Broadcasting System, Inc. v. F.C.C.*, 60 MO. L. REV. 799, 833 (1995) (asserting that the must-carry rules amounted to compelled speech through their interfering with the editorial discretion of cable operators); Winer, *supra* note 407, at 8, 12, 16, 66-67 (emphasizing the editorial functions of cable operators).

<sup>448</sup> *Turner I*, 512 U.S. at 644-45; see also Baker, *supra* note 419, at 63 (differentiating between cable operators and individual speakers); Brenner, *supra* note 446, at 339, 343, 370 (emphasizing cable television's distribution of speech); Meyerson, *supra* note 446, at 83-84, 89-92, 98 (noting that broadcasters have less First Amendment protection than print media); Schauer, *supra* note 446, at 174-76 (asserting that cable operators' selection of programming differs from the editorial functions of traditional print media).

<sup>449</sup> See, e.g., Aiello, *supra* note 443, at 240 (calling cable television "a hybrid media" for First Amendment purposes); Gray, *supra* note 443, at 1031-32 (noting the fallacy of the speech/conduit distinction as applied to cable television because the cable medium and its message are often interrelated).

<sup>450</sup> See, e.g., Robert Corn-Revere, *New Technology and the First Amendment: Breaking the Cycle of Repression*, 17 HASTINGS COMM. & ENT. L.J. 247, 328 (1994) (implying that the must-carry rules did not necessarily create an incidental restriction upon cable speech); McGinnis, *supra* note 33, at 114-15 (suggesting the *Turner I* Court overlooked the link between the expressive and business interests of the cable industry); Ugland, *supra* note 447, at 820, 830-33 (criticizing the *Turner* Court's conclusion that the must-carry rules were content-neutral structural regulation of the cable medium); see also Winer, *supra* note 407, at 12, 16, 42, 45, 66-67 (contending that the must-carry rules directly interfered with the editorial discretion of cable operators and programmers).

<sup>451</sup> See *Turner I*, 520 U.S. at 247-49 (O'Connor, J., concurring in part and dissenting in part).

indirectly infringe upon First Amendment rights might go undetected under this approach as implemented by a Court reluctant to invalidate many economic regulatory schemes.<sup>452</sup> Indeed, because of its lenient stance towards economic regulation, the Court would probably not carefully scrutinize most laws that impose economic burdens on one set of speakers for the benefit of their competitors.<sup>453</sup>

A law that interferes with economic liberty but appears to leave alone the content of expression will therefore probably withstand strict scrutiny even though a close nexus might exist between the business and expressive activities of the affected media actor. Even though such regulation may impose distinct economic burdens on one segment of the press, this disproportionate effect would not necessarily convince the Court about the existence of less restrictive means. In the post-*Lochner* era, any form of judicial review presupposes the legitimacy of economic regulation, and so legislation that has differential economic effects might still be upheld, provided the government can demonstrate some legitimate interest. This presumption becomes problematic when the partial economic regulation indirectly abridges expression through its effects upon the business aspects of a media entity. For these reasons, the Court, had it used strict scrutiny, would probably not have considered whether the must-carry rules represented partial economic legislation detrimental to the business of expression of cable operators and programmers because such differential economic treatment would not have ordinarily attracted the Court's attention. In fact, the Court may have sanctioned this byproduct of the structural regulation of the cable industry if persuaded that it represented the least restrictive means available to preserve the content of broadcast television.

Thus, despite her assertions about the content-based characteristics of must-carry, Justice O'Connor never addressed whether the government's preference for local broadcast television reflected illegitimate class legislation intended to impose an economic burden upon one class of media for the benefit of another.<sup>454</sup> In part, this stems from the usual deference accorded economic regulation by the Court during the latter half of the twentieth century. However, constitutional inquiry limited to judicial examination of a law's effect upon the content of communication may neglect more subtle and indirect methods of infringing upon expression, especially where the economic and expressive activities of a media actor are closely

---

<sup>452</sup> See McGinnis, *supra* note 33, at 114 (suggesting that because strict scrutiny focuses on content restriction it often ignores the manner in which structural regulation indirectly affects the content of expression).

<sup>453</sup> See, e.g., *Leathers v. Medlock*, 499 U.S. 439, 447, 450-53 (1991) (upholding, as a seemingly neutral economic regulation, an Arkansas tax that exempted all forms of media but cable television).

<sup>454</sup> At best, O'Connor implied this. Though she discussed the adverse effects of must-carry upon cable speech, she did not really analyze the provision as a partial economic regulation and thus did not seem to understand how must-carry interfered with cable operators' and programmers' very business of expression.

intertwined. Indeed, one could argue that because of the Court's adherence to the traditional two-track classification system, with that system's inherent deference to economic regulation and implicit distinction between economic liberty and expression, the justices failed to consider whether the must-carry rules were partial economic legislation that created indirect, as opposed to incidental, burdens upon the expressive activities of cable operators and programmers.

### 3. Content-Neutral Analysis and the Attempt to Separate Economic Liberty from Free Expression

Alternatively, if one accepts the premise that cable operators are conduits of speech with attenuated First Amendment rights, then significant problems emerge with the Supreme Court's content-neutral analysis in the *Turner* cases. Having reached the conclusion that the must-carry rules comprised structural regulation of the cable medium, a plurality of the justices used the *O'Brien* test and upheld mandatory carriage as a narrowly tailored means of preserving broadcast television and of incidental effect upon the First Amendment rights of cable operators and programmers.<sup>455</sup> Yet because of this balancing approach, the Court did not perceive the extent to which the must-carry rules impaired the cable industry's business of expression.

Often employed by the Court to assess many different kinds of content-neutral restrictions of speech,<sup>456</sup> the *O'Brien* test assumes a dichotomy between economic

---

<sup>455</sup> See *Turner II*, 520 U.S. 180, 211-25 (1997).

<sup>456</sup> In recent years, the Court has applied the *O'Brien* test to both incidental restrictions of speech and time, place, and manner regulations on the premise that the *O'Brien* incidental regulation standard is substantially similar to that which the Court had been using to assess time, place, and manner restrictions. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (upholding a noise ordinance as a content-neutral regulation of incidental effect upon speech). In extending the purview of *O'Brien* to time, place, and manner regulations, the Court has slightly modified the test, replacing the requirement that "the incidental restriction on alleged First Amendment freedoms [be] no greater than is essential to the furtherance of . . . an important or substantial governmental interest," *United States v. O'Brien*, 391 U.S. 367, 377 (1968), with the requirement that either the incidental or time, place, and manner restriction be "narrowly tailored to serve a significant governmental interest . . . that leave[s] . . . open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). One consequence of this merger is a utilitarian standard fairly deferential to government regulation of speech that confuses the distinction between incidental and indirect restrictions of expression. See Bhagwat, *supra* note 407, at 169-70 (explaining that under the hybrid test the government can prevail with a reasonable regulation not related to the actual content of speech, which is a more forgiving standard than pre-*Ward*); Williams, *supra* note 439, at 653-54 (calling the hybrid test a diminished time, place, and manner standard); see generally Day, *Hybridization*, *supra* note 8; David S. Day, *the Incidental Regulation of Free Speech*, 42 MIAMI L. REV. 491 (1988) [hereinafter Day, *Incidental Regulation*]; Werhan, *supra* note 365 (all criticizing the hybrid test for its

liberty and freedom of expression reflected in its implicit distinction between communication and conduct. Conceptually, its balancing test provides more protection for speech itself than for conduct unrelated to communication, and regards with varying degrees of solicitude activities that facilitate expression.<sup>457</sup> Within this context, the Court generally associates many business functions of the media with non-expressive conduct and thus considers them amenable to a broader range of regulation than activities more directly related to the content of speech.<sup>458</sup> At times subjective<sup>459</sup> and lenient in its application,<sup>460</sup> the *O'Brien* test rarely scrutinizes economic regulations that indirectly affect the pursuit of expression, and therefore does not consider the ways in which political factions can enact laws that impose distinct economic burdens on some segments of the media for the benefit

---

deference to governmental regulation). *But see* Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 HAST. L.J. 921, 927-28 (1993); (supporting the extension of *O'Brien*).

<sup>457</sup> See *O'Brien*, 391 U.S. at 376 ("when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms"). Some commentators have suggested that as a practical matter it is very difficult, if not impossible, to distinguish between conduct that facilitates expression and non-facilitative conduct. See Williams, *supra* note 439, at 724. Others have noted the difficulty of distinguishing an act that facilitates expression from speech itself. See, e.g., Alexander, *supra* note 456, at 928; Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1207 (1996).

<sup>458</sup> See, e.g., *Associated Press v. United States*, 326 U.S. 1, 19-20 (1945) (ruling that application of federal anti-trust legislation to the business practices of a news agency did not violate freedom of the press); *Associated Press v. NLRB*, 301 U.S. 103, 130 (1937) (sustaining the application of the National Labor Relations Act to the editorial department of a news agency as an incidental, and thus permissible, restriction upon the press).

<sup>459</sup> See, e.g., Bhagwat, *supra* note 407, at 169-70 (criticizing the widespread application of *O'Brien* as "extremely subjective, and somewhat arbitrary and unpredictable doctrine"). Much of the problem with the *O'Brien* test lies in the inherent uncertainty of its balancing of the interests associated with governmental regulation and those concerning First Amendment expression. See Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 117 (1987) [hereinafter Stone, *Content-Neutral Restrictions*]. Writing about the perils of judicial balancing in the general context of First Amendment litigation, Stone observed that "balancing invites judges to overstate governmental interests and to defer unduly to legislative judgments. It thus tends in practice to legitimate rather than to check governmental abuse." *Id.* at 73. See also Redish, *supra* note 435, at 120, 125 (characterizing judicial balancing to assess the constitutionality of content-neutral restrictions as unreliable and ambivalent).

<sup>460</sup> See, e.g., Day, *Hybridization*, *supra* note 8, at 209; Redish, *supra* note 435, at 127; Werhan, *supra* note 365, at 642; Williams, *supra* note 439, at 747 (all noting the lax application of *O'Brien*). "Ultimately, the *O'Brien* test for content-neutral regulations requires nothing more than . . . 'no gratuitous inhibition' on speech . . ." Redish, *supra* note 435, at 127 (quoting, in part, Ely, *supra* note 444, at 1488).



of their competitors. Inherently deferential to governmental regulation,<sup>461</sup> this standard of review often sustains partial economic laws as incidental restrictions of speech notwithstanding their significant incursion upon the business of expression.<sup>462</sup>

A threshold issue under the *O'Brien* test is whether the regulation is related to the suppression of speech.<sup>463</sup> Ostensibly, this factor enables the Court to determine if the restriction functions as a pretext for impermissible content or viewpoint discrimination.<sup>464</sup> Beyond that, however, the unrelatedness prong assumes that a clear distinction exists between economic and expressive activity. Given the Court's general deference toward economic regulation, it rarely doubts the legitimacy of governmental objectives in this area.<sup>465</sup> Consequently, it often concludes that most forms of economic regulation are unrelated to the suppression of speech and therefore incidental restrictions of expression.<sup>466</sup> In the *Turner* cases, the Court erred in this assessment of the must-carry rules because of the close connection between the business and speech activities of cable operators and programmers. Yet mandatory carriage of broadcast television stations impeded their

---

<sup>461</sup> See, e.g., Bhagwat, *supra* note 407, at 169-70 (noting that pursuant to the extension of *O'Brien* to time, place, and manner restrictions, government regulations need only be reasonable and not related to the content of speech); Day, *Hybridization*, *supra* note 8, at 209-10, 219-25 (criticizing the extensive use of *O'Brien* in ways that diminish judicial review of content-neutral regulations and the presumption that government restriction of speech is unintentional); Day, *Incidental Regulation*, *supra* note 456, at 519, 523, 529 (describing the Court's diluted standard of review of content-neutral laws resulting from the merger of the *O'Brien* incidental regulation test with the one for time, place, and manner restrictions); Stone, *Content-Neutral Restrictions*, *supra* note 459, at 50-51, 78-79 (characterizing the Court's application of the *O'Brien* test to content-neutral restrictions as comparable to the rational basis test used in economic regulation cases); Werhan, *supra* note 365, at 640-42 (decrying the Court's "relaxed approach toward incidental governmental restrictions of expression").

<sup>462</sup> See, e.g., *Turner II*, 520 U.S. 180 (1997) (upholding must-carry rules as an incidental restriction of speech under the *O'Brien* test). A more salient example of judicial deference to economic regulation with possible adverse First Amendment consequences is *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997) (upholding, as reasonable economic regulation rationally related to a legitimate governmental objective, federal marketing orders enacted under the Agricultural Marketing Agreement Act by the secretary of agriculture that required California growers, handlers, and fruit processors to pay generic advertising fees notwithstanding the claims that the marketing orders compelled speech).

<sup>463</sup> See, e.g., Day, *Incidental Regulation*, *supra* note 456, at 508, 513; Farber, *supra* note 436, at 742 (both noting the importance of this issue).

<sup>464</sup> See Day, *Hybridization*, *supra* note 8, at 207; Day, *Incidental Regulation*, *supra* note 456, at 527.

<sup>465</sup> See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (expressing deference to state police powers in upholding Oklahoma optometry restrictions).

<sup>466</sup> See, e.g., *Associated Press v. NLRB*, 301 U.S. 103, at 132-33 (1937) (concluding that the application of federal labor legislation to the personnel practices of a news agency were unrelated "to the impartial distribution of news").

business of expression with its restrictions upon editorial discretion and imposition of programming requirements that interfered with the economic autonomy of cable industry members.<sup>467</sup>

Additional problems arise from the notion that the must-carry rules only created incidental restrictions of cable speech. Much of the difficulty emanates from the term "incidental" as frequently used by the Court in its application of the *O'Brien* test to laws that ostensibly regulate the time, manner, or place of expression or the physical, as opposed to substantive, forms of speech. Construed by the Court to mean the unintentional, non-purposeful, or ancillary limitation of expression,<sup>468</sup> the term "incidental" functions as a conclusion made by the Court about the purpose and effect of a law with speech restrictive effects. Laws that reflect governmental motive to regulate the content of some kinds of speech presumably warrant increased scrutiny as content-based classifications,<sup>469</sup> whereas laws deemed of incidental effect invoke less stringent, though often heightened, review.<sup>470</sup>

However, the incidental standard fosters widespread judicial acceptance of indirect limits on speech. The *O'Brien* test's broad tolerance of incidental restrictions in fact permits significant, indirect incursions upon expression so long as the government regulation does not restrict more speech than necessary to accomplish a substantial interest.<sup>471</sup> However, all too often, the standard rests on the questionable premise that a bright line distinction exists between conduct that may, in some way, facilitate expression and expression itself.<sup>472</sup> Given that the

---

<sup>467</sup> See, e.g., Uglund, *supra* note 447, at 833 (arguing that the must-carry rules constituted a form of compelled speech); Winer, *supra* note 407, at 12, 66-67 (emphasizing that the must-carry rules infringed upon the editorial discretion of cable operators).

<sup>468</sup> See, e.g., Day, *Hybridization*, *supra* note 8, at 210.

<sup>469</sup> See, e.g., *Police Dep't v. Mosley*, 408 U.S. 92 (1972) (invalidating a municipal ordinance that prohibited all but labor picketing near schools); see also Stone, *Content-Neutral Restrictions*, *supra* note 459, at 55-57, 72; Stone, *Content Regulation*, *supra* note 366, at 230.

<sup>470</sup> See, e.g., *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (sustaining a municipal ordinance banning the posting of signs on public property as a content-neutral, time, place, and manner regulation of incidental effect upon speech).

<sup>471</sup> See, e.g., Day, *Incidental Regulation*, *supra* note 456, at 505 (explaining, that under the incidental restriction doctrine, the Court will often sustain a law of general application that indirectly but substantially burdens speech if convinced the regulation's primary purpose was not to abridge expression); Dorf, *supra* note 457, at 1204 & n.117 (criticizing *O'Brien*'s conclusion that the government's interest in protecting draft registration cards from mutilation was unrelated to the suppression of speech).

<sup>472</sup> See, e.g., Alexander, *supra* note 456, at 928 (asserting that speech-facilitative conduct and expression are "ultimately inseparable"); Dorf, *supra* note 457, at 1207 (discussing how conduct that facilitates speech is often intertwined with speech). Dorf contends that the incidental burden test of *O'Brien* rests on the flawed assumption that one can differentiate conduct that facilitates speech from conduct intertwined with speech. *Id.* at 1208. Even one commentator who suggests that a distinction exists "between the facilitative and communicative aspects of speech," implies that incursions upon the facilitative aspects of

selection of cable programming involves both economic liberty and First Amendment rights,<sup>473</sup> the line of demarcation becomes much less clear. From this perspective, the must-carry rules may have created more than merely an incidental burden on cable speech because the business and expressive activities of cable operators and programmers were so intertwined that regulation of one aspect of the cable enterprise would invariably affect the other.

Thus, when the Court upheld the must-carry rules as an incidental regulation of speech, it essentially ignored the nexus between economic liberty and freedom of expression. As a result of the *O'Brien* test's inherent deference to governmental regulation, the Court did not carefully scrutinize the must-carry provisions to determine if they were actually partial legislation intended to bestow economic benefits on one set of media actors at the expense of their competitors. Under this scenario, the must-carry laws may have indirectly impeded the First Amendment interests of cable operators and programmers to the advantage of the broadcast television industry.<sup>474</sup>

Judicial assumptions about the reasonableness of most forms of economic regulation may also undermine the utility of the requirement under *O'Brien* that incidental restrictions of speech be narrowly tailored. Though in theory this prong of the *O'Brien* test requires that a content-neutral law not curtail more speech than necessary to attain a substantial governmental interest, it has, over the years, evolved into a much less rigorous standard of legitimacy<sup>475</sup> that, like other facets of content-neutral analysis, presumes the validity of economic regulations and perpetuates the dichotomy between economic liberty and freedom of expression. Indeed, had the Court in the *Turner* cases more carefully examined the factional basis of the must-carry rules, it may have found that mandatory carriage actually restricted more cable speech than necessary through its regulation of economic

---

speech may at times violate the First Amendment, and posits that this might occur when time, place, and manner regulations limit the media access to certain groups. See Williams, *supra* note 439, at 660, 663. Conceivably, the must-carry rules exemplify this scenario. See Corn-Revere, *supra* note 450, at 325 (discussing the difficulty of separating speech from conduct in the context of analyzing mandatory carriage).

<sup>473</sup> See, e.g., Aiello, *supra* note 443, at 240 (characterizing cable television as "a hybrid media"); Gray, *supra* note 443, at 1031-32 (noting that cable programming is both a business and speech decision).

<sup>474</sup> See Chen, *supra* note 419, at 1470-71 ("[m]ust-carry implicitly taxes one form of speech in order to finance another"); see also Adelman, *supra* note 427, at 1553 (characterizing the must-carry rules as class legislation intended to preserve broadcast television "at the expense of a portion of the cable operators' First Amendment rights"); Winer, *supra* note 407, at 39, 42, 45 (referring to mandatory carriage as a direct incursion upon the First Amendment interests of the cable industry).

<sup>475</sup> See, e.g., Day, *Hybridization*, *supra* note 8 at 209-10, 219-25; Day, *Incidental Regulation*, *supra* note 456, at 519, 523, 529; Werhan, *supra* note 365, at 640-42 (all discussing the diminution of *O'Brien* standards).

conduct that facilitated the expression of cable operators and programmers.<sup>476</sup>

Because most of the *Turner* justices ultimately deferred to the government's arguments about the economic imperatives for mandatory carriage,<sup>477</sup> they forsook consideration of how the must-carry rules imposed a distinct set of economic burdens on the cable industry. Had they subjected the must-carry regime to closer scrutiny, they would have discovered that mandatory carriage came about, in large part, through the efforts of a powerful group of broadcast television lobbyists,<sup>478</sup> who through the expenditure of millions of dollars ultimately convinced Congress to enact class, or partial, legislation for the benefit of the broadcast industry and the economic disadvantage of their cable competitors.<sup>479</sup> More than a mere incidental restriction of cable speech,<sup>480</sup> the must-carry rules indirectly impaired the First

<sup>476</sup> See, e.g., McGinnis, *supra* note 33, at 114-15 (implying that because the *Turner* Court assessed the must-carry rules under the inherently deferential *O'Brien* test, it failed to detect the disproportionate influence exerted upon Congress by the broadcast lobby in its successful attempt to secure preferential legislation at the expense of the cable industry); Winer, *supra* note 407, at 33-34, 39, 45, 66 (decrying mandatory carriage as partial legislation that infringed upon the economic liberty and editorial discretion of cable operators and programmers).

<sup>477</sup> See *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195-209 (plurality opinion). In fact, the plurality found the conclusions Congress drew reasonable. *Id.* at 209-10. But see *id.* at 236-50 (O'Connor, J., dissenting) (criticizing plurality's deference to congressional conclusions about economic imperative for the must-carry rules).

<sup>478</sup> On the clout of the broadcast television lobby, see Romesh Ratnesar, *A Bandwidth Bonanza*, TIME, Sept. 1, 1997, at 60 (noting the seven million dollars broadcast television lobbyists expended between 1995 and 1997 on efforts to secure favorable federal legislation); Paul Taylor, *Superhighway Robbery*, THE NEW REPUBLIC, May 5, 1997, at 20 (referring to the powerful economic influence of the broadcast lobby on Capitol Hill); Leslie Wayne, *Broadcast Lobby's Formula: Airtime + Money = Influence*, N.Y. TIMES, May 5, 1997, at C1 and C9 (describing the manner in which the broadcast television industry uses money and lobbyists to extract favorable legislation from Congress). In his initial veto of the 1992 Cable Act, President Bush noted its factional basis when he attributed its passage to the fact that Congress had "'fallen prey to special interests.'" See Winer, *supra* note 407, at 17 n.55 and 19 n.65 (both quoting President George Bush, Message to the Senate Returning Without Approval the Cable Television Consumer Protection and Competition Act of 1992, 28 Weekly Comp. Pres. Doc. 1860 (Oct. 3, 1992)).

<sup>479</sup> See, e.g., Donald J. Boudreaux and Robert B. Ekelund, Jr., *The Cable Television Consumer Protection and Competition Act of 1992: The Triumph of Private over Public Interest*, 44 ALA. L. REV. 355, 356-57, 390 (1993) (analyzing mandatory carriage as rent seeking legislation intended to redistribute the profits of the cable industry for the economic self-interest of broadcast television). One commentator has gone so far as to describe the must-carry rules as a form of "publicly sanctioned private condemnation, with local broadcasters 'taking' the channels that belong to cable operators . . . [who are] . . . made to serve their broadcast competitors . . . while bearing the whole cost themselves." Pilon, *supra* note 159, at 59 n.79. Doubting the economic imperative for mandatory carriage, Pilon notes that it requires "private cable operators" to, in effect, subsidize the inefficient practices of their broadcast television competitors. *Id.* at 60.

<sup>480</sup> See Corn-Revere, *supra* note 450, at 328 (implying that the must-carry rules were not

Amendment rights of cable operators and programmers because, as regulations of their economic activities, they also interfered with their ability to facilitate expression. As such, the must-carry rules exemplified partial legislation that impeded the business of expression. Yet because the justices, to one extent or another, differentiated between the economic and expressive interests of the cable industry, they missed the close connection between the medium of cable television and its message. Consequently, they perpetuated the dichotomy between economic liberty and freedom of expression George Sutherland implicitly rejected nearly sixty years earlier in *Grosjean* and *Associated Press*.

### CONCLUSION

Indeed, the inherent flaws in the modern Court's analysis of differential treatment of the press and the constitutional status of must-carry rules reveal the extent to which present day members of the Court have distorted, if not altogether ignored, Sutherland's First Amendment legacy. Rather than struggle with the sometimes illusory distinction between content-based and content-neutral restrictions and the consequent application of some form of bifurcated judicial review that presumes the validity of economic measures even when they result in indirect interference with speech, the Court should instead recalibrate its analysis of laws that affect the business of expression.

A major problem with traditional standards of First Amendment review is that each separates economic and speech activities into distinct spheres and thus does not account for occasions when the business and expressive interests of media actors coalesce. Pursuant to these conventional standards of review, the Court may fail to perceive that through the guise of seemingly neutral structural regulations political factions might impede the freedom of expression of some segments of the media.

Accordingly, in instances where, as a practical matter, the expressive and business interests of a media entity converge, the Court should employ a more precise test that considers both the economic and expressive interests at stake. Rather than simply assume the validity of an economic regulation in this context, the justices should carefully scrutinize the law for differential effects resulting from the artifice of political factions. Through such heightened review, the Court would more likely ascertain the existence of class legislation intended to benefit some segments of the press at the expense of others whose core business is speech. Often partial laws of this kind create overbroad and indirect restrictions of expression. Heightened analysis of seemingly neutral economic regulations applied to the business of expression, therefore, would provide increased protection for both the economic and First Amendment interests of the media.

---

necessarily an incidental restriction on speech).

Over six decades ago, Justice George Sutherland recognized the confluence of economic liberty and freedom of expression. Viewed from the perspective of his jurisprudence of economic liberty, Sutherland's opinions in *Grosjean* and *Associated Press* suggest a nexus between these personal rights otherwise neglected in modern constitutional law in the aftermath of the *Lochner* era. Drawing upon traditional aversion to political factions, Sutherland insisted upon close judicial review of economic legislation to preserve the equal operation of the law and protect individual constitutional liberties from the tyranny of democratic majorities. In so doing, he limned the contours of the business of expression. This is his forgotten First Amendment legacy.