AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 8: The New Deal/Great Society Era – Democratic Rights

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Grosjean v. American Press Co. (1936)

As part of the long-running battle between the political machine of the populist Huey Long and the large newspapers in the state of Louisiana, the state legislature adopted in 1934 a statute imposing a special tax on "every person, firm, association or corporation, domestic or foreign, engaged in the business of selling . . . advertisements . . . in any newspaper, magazine, periodical or publication whatever having a circulation of more than 20,000 copies per week." In practice, the tax applied to thirteen of the 163 newspapers published in the state, almost all of which opposed Long. As the law was under consideration in the state legislature, the governor circulated a letter contending that "these big Louisiana newspapers tell a lie every time they make a dollar. This tax should be called a tax on lying." Senator Long declared in a stump speech that the drafters of the bill had tried to find a way to exempt the one large newspaper that supported his political faction but could not devise a tax that would hit only his opponents and exempt all of his supporters. They had gotten as close to that ideal as they could.

The nine corporations publishing those thirteen newspapers filed suit in federal court against the state tax collector to block the implementation of the law, arguing that the distinction between large-circulation urban papers and small-circulation rural papers was arbitrary and violated the Fourteenth Amendment of the U.S. Constitution. A special three-judge panel (consisting of three Republican appointees) in the district court agreed, concluding that the tax violated the equal protection clause. On appeal, the U.S. Supreme Court unanimously affirmed on the grounds that the tax infringed on freedom of the press as protected against the states by the due process clause of the Fourteenth Amendment.

Of particular interest is the Court's assertion that corporations were "persons" enjoying the protection of the Fourteenth Amendment against infringements of "liberty" without due process of law. The Court had concluded early on that corporations were protected from state restrictions on their property without due process of law, but there was less clarity about whether corporations also enjoyed constitutional protections of "liberty" or whether the constitutional protections of liberty could be claimed only by natural persons. With the Court's increasing attention to the liberty component of the due process clause, the question became particularly pressing. If "liberty" included protections for speech and the press, for example, did corporations publishing newspapers have federal constitutional claims against state governments that might restrict the freedom of the press – or could only individuals claim a federal right against the states to engage in free speech? Or perhaps free speech was better understood as part of the "privileges and immunities" of citizenship, in which case entities that were not citizens could not claim such constitutional protection. In the case of Long's attack on the city papers, the Court firmly established that fundamental liberties were protected against states through the due process clause and corporations benefitted from those protections just as individuals did.

Why should corporations be considered as persons for purposes of the Fourteenth Amendment at all? If they are to receive protections through the due process clause, is it more reasonable that they enjoy protections for property, or liberty, or both? Is there a basis for distinguishing between liberty and property in the Fourteenth Amendment? Are Fourteenth Amendment liberties best thought of as privileges of citizenship rather than freedoms of persons? Is the effect on corporations a reason to incorporate the Bill of Rights through the due process clause rather than the privileges and immunities clause? Is there a basis for constitutionally distinguishing between newspapers owned by corporations and newspapers owned by individuals? Why must large-circulation newspapers

be treated the same as small-circulation newspapers? Would it matter if the latter were owned by individuals and the former were owned by corporations? Is there a constitutional basis for distinguishing between newspapers owned by foreign corporations (whether out of state or outside the United States) and those owned by domestic or local corporations? Is freedom of the press different than other constitutional liberties, such as a right against unreasonable searches?

DISTRICT COURT OPINION IN AMERICAN PRESS CO. V. GROSJEAN (10 F.Supp. 161 [1935]).

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We think that [the state statute] of 1934 not only violates the Constitution of this state, but that it is also violative of the Fourteenth Amendment of the Constitution of the United States in that it does not represent a legitimate exertion of the power of classification, is purely arbitrary, and denies the legal protection of the laws to those against whom it discriminates. . . .

If the state, upon the same classification which it is seeking to uphold, had reversed the process and taxed the country journals and exempted the metropolitan newspapers, the inequality probably would be readily conceded, but the constitutional infirmity, though more strikingly apparent, would have been the same.

While recognizing the power of the state to classify for purposes of taxation, it must also be remembered that the equal protection of the laws is guaranteed, and that such equal protection is denied whereas here the act makes positive and direct discrimination between persons engaged in the same class of business. No one will presume to say that a newspaper whose circulation is 20,000 copies per week is not doing precisely the same business as one whose circulation is slightly below that figure.

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BRIEF OF THE APPELLANT TO THE U.S. SUPREME COURT.

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Complainants contend that by effect of the Fourteenth Amendment, legislatures of the states are prohibited from passing laws infringing the freedom of the press. This theory finds no support in the jurisprudence of this court. . . .

The effect of the second clause of the Fourteenth Amendment was to protect from the hostile legislation of the states, the privileges and immunities of CITIZENS OF THE UNITED STATES as distinguished from the privileges and immunities of Citizens of the states. . . .

The liberty guaranteed by the Fourteenth Amendment against deprivation without due process of law is the liberty of NATURAL not of artificial persons. See *Western Turf Association v. Greenberg* (1907). The appellees are corporations. They do not possess the privileges and immunities of citizens of the United States within the meaning of the Constitution.

A corporation cannot claim the protection of the clause of the Fourteenth Amendment which secures the privileges and immunities of citizens of the United States against abridgment or impairment by the law of a state. . . .

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A state does not deny the equal protection of the laws because it recognizes the distinction between a small country journal, appearing weekly or semi-weekly, with a circulation limited both as to area and number, and carrying local advertisements only, and the metropolitan daily with an extensive circulation and carrying about one-third news and two-thirds advertisements. . . .

The state has a right to determine when the character of the business is such as to be called upon to contribute a share to the burdens of government, and it cannot be opposed because other allied businesses are not taxed.

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BRIEF OF THE APPELLEES TO THE U.S. SUPREME COURT.

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In the District Court, appellant argued that the First and Fourteenth Amendments, considered together, were for the benefit of natural persons and that corporations (artificial persons) could not avail themselves of rights thereunder to protect themselves against hostile action by a legislature, even though their business was printing and publishing newspapers, and such action would abridge the freedom of the press.

Appellant attempts to distinguish between persons and corporations in the application of the Fourteenth Amendment to the sacred fundamental rights guaranteed under the Bill of Rights. This Court, many years ago, held "that corporations are persons within the meaning of this (the Fourteenth) Amendment." . . .

Reference to [the statute] shows that the Legislature made no attempt whatsoever in that statute to distinguish between natural and artificial persons. The Act applies to "every person, firm, association, or corporation, domestic or foreign, engaged in the business" in the State of Louisiana.

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Newspaper publishers, whether natural or artificial persons, were not given this great right [freedom of the press] as a matter of personal right to the exclusion of others. Rather, they occupy the position of trustees of a right granted to all of the people. By reason of their peculiar position, it is their solemn duty to protect the press, at all hazards, against hostile action.

This issue has been determined by this Court in *Pierce v. Society of Sisters* (1925) [allowing a corporation operating a parochial school to raise constitutional questions about the right of parents and students to direct their education]. . . .

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There can be no conclusion other than that the real purpose and effect of this law is a punishment of the press opposed to the dominant political faction in the state.

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JUSTICE SUTHERLAND delivered the opinion of the Court.

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The [constitutional claim] presents a question of the utmost gravity and importance; for, if well made, it goes to the heart of the natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interests. . . . While [the First Amendment] is not a restraint upon the powers of the states, the states are precluded from abridging the freedom of speech or of the press by force of the due process clause of the Fourteenth Amendment.

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That freedom of speech and of the press are rights of [a] fundamental character, safeguarded by the due process of law clause of the Fourteenth Amendment against abridgement by state legislation, has . . . been settled by a series of decisions of this court beginning with *Gitlow v. New York* (1925). . . . The word 'liberty' contained in that amendment embraces not only the right of a person to be free from physical restraint, but the right to be free in the enjoyment of all his faculties as well.

Appellant contends that the Fourteenth Amendment does not apply to corporations; but this is only partly true. A corporation, we have held, is not a 'citizen' within the meaning of the privileges and immunities clause. *Paul v. Virginia* (1869). But a corporation is a 'person' within the meaning of the equal protection and due process of law clauses, which are the clauses involved here. . . . *Smyth v. Ames* (1898).

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A determination of the question whether the tax is valid in respect of the point now under review requires an examination of the history and circumstances which antedated and attended the adoption of the abridgement clause of the First Amendment, since that clause expresses one of those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,' . . . and, as such, is embodied in the concept 'due process of law,' . . . and, therefore, protected against hostile state invasion by the due process clause of the Fourteenth Amendment. . . .

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Judge Cooley has laid down the test to be applied: '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.' . . .

It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press.

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Having reached the conclusion that the act imposing the tax in question is unconstitutional under the due process of law clause because it abridges the freedom of the press, we deem it unnecessary to consider the further ground assigned, that it also constitutes a denial of the equal protection of the laws.

Decree *affirmed*.