Supplementary Material

Chapter 8: The New Deal/Great Society Era—Democratic Rights/Free Speech

Associated Press v. National Labor Relations Board, 301 U.S. 103 (1937)

The Associated Press fired Morris Watson in October 1935 because of Watson's union activities on behalf of the American Newspaper Guild. At the time Watson was fired, he was an editorial employee, whose job responsibilities included rewriting new reports received from other sources to be transmitted to newspapers throughout the country. Watson claimed that his discharge was an unfair labor practice under federal law, which forbade businesses in interstate commerce from terminating employees who joined unions. The Associated Press responded that the National Labor Relations Act exceeded congressional powers under the commerce clause and violated the First Amendment. The National Labor Relations Board found for Watson and their finding was sustained by the Court of Appeals for the Second Circuit. The Associated Press appealed to the Supreme Court of the United States.

The Supreme Court by a 5-4 vote declared that Watson was illegally discharged. Justice Robert's majority opinion held that a newspaper has no immunity from labor laws. Notice the unusual line-up in this case. Justice Roberts and the more liberal members of the Hughes Court barely acknowledged the existence of a First Amendment issue. Justice Sutherland wrote and the other judicial conservatives joined a very powerful defense of First Amendment rights. As you read the other cases in this section, can you find a principled basis for this judicial divide? Were the judicial liberals correct not to think much of the Associated Press's first amendment claim? Is this an early instance of courts protected only approved political dissent?

JUSTICE ROBERTS delivered the opinion of the Court.

. . .

Does the statute, as applied to the petitioner, abridge the freedom of speech or of the press safeguarded by the First Amendment? We hold that it does not. . . . [The Associated Press claims that,] whatever may be the case with respect to employees in its mechanical departments, it must have absolute and unrestricted freedom to employ and to discharge those who, like Watson, edit the news, that there must not be the slightest opportunity for any bias or prejudice personally entertained by an editorial employee to color or to distort what he writes, and that the Associated Press cannot be free to furnish unbiased and impartial news reports unless it is equally free to determine for itself the partiality or bias of editorial employees. So it is said that any regulation protective of union activities, or the right collectively to bargain on the part of such employees, is necessarily an invalid invasion of the freedom of the press.

We think the contention not only has no relevance to the circumstances of the instant case, but is an unsound generalization. . . . The petitioner did not assert, and does not now claim, that [Watson, the fired employee] had shown bias in the past. It does not claim that, by reason of his connection with the union, he will be likely, as the petitioner honestly believes, to show bias in the future. The actual reason for his discharge . . . was his Guild activity and his agitation for collective bargaining. . . .

The act does not compel the petitioner to employ any one; it does not require that the petitioner retain in its employ an incompetent editor or one who fails faithfully to edit the news to reflect the facts without bias or prejudice. The act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees. The restoration of Watson to his former position in no sense guarantees his continuance in petitioner's employ. The petitioner is at liberty, whenever occasion

may arise, to exercise its undoubted right to sever his relationship for any cause that seems to it proper save only as a punishment for, or discouragement of, such activities as the Act declares permissible.

The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court. He is subject to the antitrust laws. Like others, he must pay equitable and nondiscriminatory taxes on his business. The regulation here in question has no relation whatever to the impartial distribution of news. The order of the Board in nowise circumscribes the full freedom and liberty of the petitioner to publish the news as it desires it published or to enforce policies of its own choosing with respect to the editing and rewriting of news for publication, and the petitioner is free at any time to discharge Watson or any editorial employee who fails to comply with the policies it may adopt.

JUSTICE SUTHERLAND, dissenting

JUSTICE VAN DEVANTER, JUSTICE McREYNOLDS, JUSTICE BUTLER, and I think the judgment below should be reversed.

. . .

The difference between the [First Amendment and due process clauses of the Fifth and Fourteenth Amendment] is an emphatic one, and readily apparent. Deprivation of a liberty not embraced by the First Amendment—as, for example, the liberty of contract—is qualified by the phrase "without due process of law;" but those liberties enumerated in the First Amendment are guaranteed without qualification, the object and effect of which is to put them in a category apart and make them incapable of abridgment by any process of law. That this is inflexibly true of the clause in respect of religion and religious liberty cannot be doubted, and it is true of the other clauses save as they may be subject in some degree to rare and extreme exigencies such as, for example, a state of war. Legislation which contravenes the liberties of the First Amendment might not contravene liberties of another kind falling only within the terms of the Fifth Amendment. Thus, we have held that the governmental power of taxation, one of the least limitable of the powers, may not be exerted so as to abridge the freedom of the press (*Grosjean v. American Press Co.* [1936]), albeit the same tax might be entirely valid if challenged under the "liberty" guaranty of the Fifth Amendment, apart from those liberties embraced by the First. . . .

. . .

Freedom is not a mere intellectual abstraction, and it is not merely a word to adorn an oration upon occasions of patriotic rejoicing. It is an intensely practical reality, capable of concrete enjoyment in a multitude of ways day by day. When applied to the press, the term freedom is not to be narrowly confined, and it obviously means more than publication and circulation. If freedom of the press does not include the right to adopt and pursue a policy without governmental restriction, it is a misnomer to call it freedom. And we may as well deny at once the right of the press freely to adopt a policy and pursue it as to concede that right and deny 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.

In a matter of such concern, the judgment of Congress—or, still less, the 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. . . .

. . .For many years, there has been contention between labor and capital. . . . The daily news with respect to labor disputes is now of vast proportions, and clearly a considerable part of petitioner's editorial service must be devoted to that subject. Such news is not only of great public interest, but an unbiased version of it 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. Strong sympathy for or strong prejudice against a given cause or the efforts made to advance it has too often led to suppression or coloration of unwelcome facts. It would seem to be an exercise of only 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 those whose activities include that service are free from either extreme sympathy or extreme prejudice one way or the other. . . . [T]he 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.

. . .

. . . Let us suppose the passage of a statute of like character with that under review, having the same objective, but to be effected by forbidding the discharge of employees on the ground not that they are, but that they are not, members of a labor association. Let us suppose further that a labor association is engaged in publishing an interstate-circulated journal devoted to furthering the interests of labor, and that members of its editorial staff, resigning their membership in the association, transfer their allegiance from the cause of the workingman to that of the employer. Can it be doubted that an order requiring the reinstatement of an editorial writer who had been discharged under these circumstances would abridge the freedom of the press guaranteed by the First Amendment?

And if that view of the amendment may be affirmed in the case of a publication issued for the purpose of advancing a particular cause, how can it be denied in the case of a press association organized to gather and edit the news fairly and without bias or distortion for the use of all causes? To hold that the press association must await a concrete instance of misinterpretation of the news before it can act is to compel it to experiment with a doubt when it regards certainty as essential.

. . .

Do the people of this land—in the providence of God, favored, as they sometimes boast, above all others in the plenitude of their liberties—desire to preserve those so carefully protected by the First Amendment: liberty of religious worship, freedom of speech and of the press, and the right as freemen peaceably to assemble and petition their government for a redress of grievances? If so, let them withstand all beginnings of encroachment. For the saddest epitaph which can be carved in 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.