

The Burger Court Opinion Writing Database

*Minneapolis Star & Tribune Co. v.
Minnesota Commissioner of Revenue*
460 U.S. 575 (1983)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

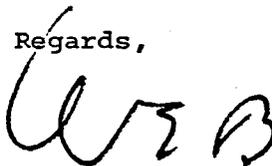
February 21, 1983

Re: 81-1839 - Minneapolis Star & Tribune Company v. Minnesota
Commissioner of Revenue

Dear Sandra:

I join.

Regards,

A handwritten signature in black ink, appearing to be 'W B', written over the typed name 'Justice O'Connor'.

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

February 16, 1983

Re: Minneapolis Star v. Minn. Comm'r, No. 81-1839

Dear Sandra:

I think you have written a fine opinion, and I expect to join. I do have on reservation, which I would like to draw to your attention.

Your paragraph on pages 13-14 seems unclear in its implications. You start by noting, correctly, that "courts as institutions are poorly equipped to evaluate the relative burdens of various methods of taxation." This suggests that, in the First Amendment context, the courts simply should not get into the business of comparing empirical burden. I agree with that position; precisely because the courts are likely to be bad at the task, I am unwilling to entrust freedom of the press to the vagaries of complex economic factual proof (even though, as you point out in footnote 9, we cannot avoid such proof in other contexts).

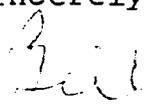
In the rest of the paragraph, however, you arguably imply the contrary. For example, you conclude:

"Without detailed data concerning the breakdown of revenues between sales of papers and sales of advertising and the breakdown of costs between ink and paper and other inputs-- data that the State has not provided--we cannot speculate as to whether Star Tribune pays more taxes on ink and paper than it would pay under the hypothetical sales tax."

This troubles me because it suggests that, if the state had provided that data, it might have been able to justify the tax. Of course, other portions of your opinion appear to rule that out. Nevertheless, I would prefer not to include a passage that could easily be misunderstood by lower courts as validating facially discriminatory taxes with lower empirical economic burdens on the press.

If you agree with me, perhaps you could change the penultimate sentence of that paragraph to something like the following: "Even were the State's proof on these points more adequate than it is, we do not think it appropriate for the courts to speculate as to whether a method of taxation that facially discriminates against newspapers is more or less burdensome, as an empirical matter, than a State's generally applied taxes." Failing that, I would prefer to see the entire paragraph deleted rather than to risk giving the wrong impression on the bottom-line holding of the Court.

Sincerely,


WJB, Jr.

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

February 18, 1983

Re: Minneapolis Star v. Minn. Comm'r, No. 81-1839

Dear Sandra:

Thank you for your quick response. Your suggested revision, I fear, does not overcome the reservations I expressed in my earlier letter; indeed, in some respects it is less preferable than your present draft. The omissions of footnote 9 and of the sentence about courts being poorly equipped to evaluate relative burden, if anything, tend to resolve the paragraph's ambiguity in the opposite way from what I was suggesting.

I feel quite strongly that we should avoid the implication that discriminatory taxation may be justified by empirical proof. I still hope that you may be able to accomodate me on this point. If not, I may well see my way clear to joining your opinion as it now stands, but even so I would probably write separately to state my own views on the subject.

Sincerely,



WJB, Jr.

Justice O'Connor

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE W. J. BRENNAN, JR.

February 22, 1983

Re: Minneapolis Star v. Minn. Comm'r, No. 81-1839

Dear Sandra:

I am delighted with the revisions you propose in your letter to John and me. I will gladly join your revised opinion when it circulates.

Sincerely,



WJB, Jr.

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

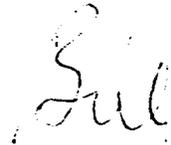
February 24, 1983

RE: No. 81-1839 Minnesota Star and Tribune Co. v. Minnesota
Commissioner of Revenue

Dear Sandra:

I agree.

Sincerely,



Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 14, 1983

9
81-1836 - Minneapolis Star and Tribune
v. Minnesota Commissioner of Revenue

Dear Sandra,

Having reconsidered this case in the light of the writing and correspondence, I shall join Part V of your opinion and concur in the judgment. Otherwise, I am in dissent and have sent to the printer a few words to this effect.

Sincerely yours,



Justice O'Connor

cc: The Conference

cpm

To: The Chief Justice
Justice Brennan
✓ Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: MAR 15 1983

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1839

MINNEAPOLIS STAR AND TRIBUNE COMPANY, AP-
PELLANT *v.* MINNESOTA COMMISSIONER OF
REVENUE

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

[March —, 1983]

JUSTICE WHITE, concurring in part and dissenting in part.

This case is not difficult. The exemption for the first \$100,000 of paper and ink limits the burden of the Minnesota tax to only a few papers. This feature alone is sufficient reason to invalidate the Minnesota tax and reverse the judgment of the Minnesota Supreme Court. The Court recognizes that Minnesota's tax violates the First Amendment for this reason, and I subscribe to Part V of the Court's opinion and concur in the judgment.

Having found fully sufficient grounds for decision, the Court need go no further. The question whether Minnesota or another state may impose a use tax on paper and ink that is not targeted on a small group of newspapers could be left for another day.

I

The court, however, undertakes the task today. The crux of the issue is whether Minnesota has justified imposing a use tax on paper and ink in lieu of applying its general sales tax to publications. The Court concludes that the State has offered no satisfactory explanation for selecting a substitute for a sales tax. *Ante* at 12. If this is so, that could be the end of the matter, and the Minnesota tax would be invalid for a second reason.

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice White

page 4 & stylistic changes

Circulated: _____
Recirculated: MAR 22 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1839

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
APPELLANT *v.* MINNESOTA COMMISSIONER
OF REVENUE

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

[March —, 1983]

JUSTICE WHITE, concurring in part and dissenting in part.

This case is not difficult. The exemption for the first \$100,000 of paper and ink limits the burden of the Minnesota tax to only a few papers. This feature alone is sufficient reason to invalidate the Minnesota tax and reverse the judgment of the Minnesota Supreme Court. The Court recognizes that Minnesota's tax violates the First Amendment for this reason, and I subscribe to Part V of the Court's opinion and concur in the judgment.

Having found fully sufficient grounds for decision, the Court need go no further. The question whether Minnesota or another state may impose a use tax on paper and ink that is not targeted on a small group of newspapers could be left for another day.

The Court, however, undertakes the task today. The crux of the issue is whether Minnesota has justified imposing a use tax on paper and ink in lieu of applying its general sales tax to publications. The Court concludes that the State has offered no satisfactory explanation for selecting a substitute for a sales tax. *Ante*, at 12. If this is so, that could be the end of the matter, and the Minnesota tax would be invalid for a second reason.

The Court nevertheless moves on to opine that the State could not impose such a tax even if "the effective burden

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 3, 1983

Re: No. 81-1839 - Minneapolis Star and Tribune
Co. v. Minnesota Commissioner of Revenue

Dear Sandra:

Please join me.

Sincerely,

J.M.

T.M.

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 24, 1983

Re: No. 81-1839 - Minneapolis Star and Tribune Co. v.
Minnesota Commissioner of Revenue

Dear Sandra:

I have been delayed in my response to your draft in this case because I was troubled by the same things that were of concern to John and to Bill Brennan. I do hope that I can join the final version of your opinion, for this case comes from my home State and the city where I lived and practiced for many years and concerns the only newspaper there. I much prefer to avoid any separate writing. I have the following comments:

1. The carry-over paragraph on pages 13-14 was difficult for me. The revision proposed in your letter of February 19 to Bill and John, however, generally eliminates my difficulty, and I go along with the revision.

2. The first paragraph of footnote 9, I feel, is correct. The second paragraph, as originally written and as proposed for revision, troubles me. Like John, I am in dissent in Washington v. United States and, indeed, shall be writing the dissent. My distinct preference is for you to eliminate that second paragraph, as John suggested on page 2 of his letter of February 18. It also will delay the issuance of your opinion, for Washington is not yet ready. If you retain the second paragraph, I shall write separately to disavow my participation in it. But if you eliminate that paragraph, I shall join your revised opinion without reservation.

Sincerely,



Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 1, 1983

Re: No. 81-1839 - Minneapolis Star and Tribune Co.
v. Minnesota Commissioner of Revenue

Dear Sandra:

For the present, and pending developments, why not record me as joining your opinion except for the second paragraph of footnote 8 thereof.

Sincerely,



Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 10, 1983

Re: No. 81-1839, Minneapolis Star v. Minnesota Comm'r

Dear Sandra:

In view of the changes made in your recirculation of March 9, will you now record me as joining your opinion except for its footnote 12.

Sincerely,

Harry

Justice O'Connor

cc: The Conference

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HAB

March 16, 1983

Re: No. 81-1839 - Minneapolis Star v. Minnesota Commissioner

Dear Sandra:

Thank you for your considerateness in writing as you did on March 15. My note of March 10 to you represents my final posture in this case and was meant to eliminate the suggestion of separate writing that appeared in my letter of February 24. My dissent in No. 81-969, Washington v. United States, is sufficient writing, for these cases now will come down on the same day.

Thus, you may record me as joining the last draft of your opinion except for footnote 12 thereof.

Sincerely,

HAB

Justice O'Connor

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 17, 1983

81-1839 Minneapolis Star v. Minnesota Commissioner

Dear Sandra:

Please join me.

Sincerely,



Justice O'Connor

lfp/ss

cc: The Conference

February 18, 1983

PERSONAL

81-1839 Minneapolis Star v. Minnesota Commissioner

Dear Sandra:

I read your opinion last night with interest and admiration. It has a great deal of history in it.

At the personal level I swallowed hard when I read the first sentence on page 9:

"Indeed, our nation owes its liberty as much to the aid of a free press as to our citizens' muskets".

A free press, of course, is essential in a democracy and particularly now that our country has become virtually a "pure" democracy. I have recognized this repeatedly in what I have written about the First Amendment.

Yet, there is a good deal of truth to the view - increasingly expressed - that our media has become the "fourth branch" of government (particularly television) - a branch not subject to the people or any of the lawful checks and balances of our system. Its interest and influence extend far and pervasively beyond preserving our liberties.

In my view the judiciary - and indeed for the most part all three branches of government - also have sought to preserve the liberties guaranteed by the Bill of Rights. Opinions such as yours today assure that the media is able to continue its important role. I would not single out either the media or the muskets.

Moreover, and here I express my own personal conviction, some of the media coverage of the Vietnam war was by no means invariably accurate or in the best interest of our country. There are responsible people who think this may have handicapped the "muskets". Of course, there were enough mistakes made both in commencing and conducting that

unfortunate war to be shared among many, and so I do not
single out the media.

Sincerely,

Justice O'Connor

lfp/ss

P.S. The enclosed article was sent me some time ago. I do
not indentify either Mr. Wattenburg or the publication, but
the view expressed is a sobering one in terms of preserving
liberties in a world threatened by totalitarian regimes.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 21, 1983

81-1839 Minneapolis Star v. Minnesota Commissioner

Dear Sandra:

The changes you suggest in your letter of February 19 to Bill Brennan and John are helpful and look fine to me.

Sincerely,



Justice O'Connor

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

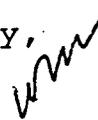
February 24, 1983

Re: No. 81-1839 Minneapolis Star & Tribune Co.
v. Minnesota Commissioner of Revenue

Dear Sandra:

In due course I will circulate a dissent in this case.

Sincerely,



Justice O'Connor

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: Justice Rehnquist

Circulated: MAR 4 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1839

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
APPELLANT *v.* MINNESOTA COMMISSIONER
OF REVENUE

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

[March —, 1983]

JUSTICE REHNQUIST, dissenting.

Today we learn from the Court that a State runs afoul of the First Amendment proscription of laws "abridging the freedom of speech, or of the press" where the State structures its taxing system to the advantage of newspapers. This seems very much akin to protecting something so overzealously that in the end it is smothered. While the Court purports to rely on the intent of the "Framers of the First Amendment," I believe it safe to assume that in 1791 "abridge" meant the same thing it means today: to diminish or curtail. Not until the Court's decision in this case, nearly two centuries after adoption of the First Amendment has it been read to prohibit activities which in no way diminish or curtail the freedoms it protects.

I agree with the Court that the First Amendment does not *per se* prevent the State of Minnesota from regulating the press even though such regulation imposes an economic burden. It is evident from the numerous cases relied on by the Court, which I need not repeat here, that this principle has been long settled. *Ante*, at 5. I further agree with the Court that application of general sales and use taxes to the press would be sanctioned under this line of cases. *Id.*, at 11-12, n. 8. Therefore, I also agree with the Court to the extent it holds that any constitutional attack on the Minne-

STYLISTIC CHANGES THROUGHOUT

Pg 237
1,1

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: Justice Rehnquist

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1839

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
APPELLANT *v.* MINNESOTA COMMISSIONER
OF REVENUE

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

[March —, 1983]

JUSTICE REHNQUIST, dissenting.

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I agree with the Court that the First Amendment does not *per se* prevent the State of Minnesota from regulating the press even though such regulation imposes an economic burden. It is evident from the numerous cases relied on by the Court, which I need not repeat here, that this principle has been long settled. *Ante*, at 5. I further agree with the Court that application of general sales and use taxes to the press would be sanctioned under this line of cases. *Id.*, at 11-12, n. 9. Therefore, I also agree with the Court to the extent it holds that any constitutional attack on the Minne-

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STYLISTIC CHANGES THROUGHOUT

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: Justice Rehnquist

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Recirculated: _____ MAR 23 1983

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1839

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
APPELLANT *v.* MINNESOTA COMMISSIONER
OF REVENUE

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

[March —, 1983]

JUSTICE REHNQUIST, dissenting.

Today we learn from the Court that a State runs afoul of the First Amendment proscription of laws "abridging the freedom of speech, or of the press" where the State structures its taxing system to the advantage of newspapers. This seems very much akin to protecting something so overzealously that in the end it is smothered. While the Court purports to rely on the intent of the "Framers of the First Amendment," I believe it safe to assume that in 1791 "abridge" meant the same thing it means today: to diminish or curtail. Not until the Court's decision in this case, nearly two centuries after adoption of the First Amendment has it been read to prohibit activities which in no way diminish or curtail the freedoms it protects.

I agree with the Court that the First Amendment does not *per se* prevent the State of Minnesota from regulating the press even though such regulation imposes an economic burden. It is evident from the numerous cases relied on by the Court, which I need not repeat here, that this principle has been long settled. *Ante*, at 5. I further agree with the Court that application of general sales and use taxes to the press would be sanctioned under this line of cases. *Id.*, at 11-12, n. 9. Therefore, I also agree with the Court to the extent it holds that any constitutional attack on the Minne-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 18, 1983

Re: 81-1839 - Minneapolis Star and Tribune
v. Minneapolis Commissioner of Revenue

Dear Sandra:

Although I find most of your opinion persuasive and expect that I will be able to join most of what you have written, I have serious problems with a couple of sections.

First, like Bill Brennan, I find the argument at pages 13-14 of your opinion unpersuasive. The Minnesota Supreme Court decided the case on the assumption that the tax was less burdensome to the press than an outright sales tax. The State has not challenged that premise in this Court. I must confess that at the jurisdictional statement stage I voted to dismiss the appeal because I then felt that this assumed fact provided a sufficient justification for the tax. I am now convinced, however, that the "singling out" features that you describe in your opinion require that the tax be invalidated even if its economic burden is correctly described by the Minnesota Supreme Court. If we fail to make this clear, the case is sure to come right back after the State demonstrates that the state court knew what it was talking about.

A brief calculation from figures in the state court's opinion (App. A-5) will show that the paper and ink tax was substantially less burdensome to the appellant than an outright sales tax would have been. In 1974 the average combined daily circulation of the morning Tribune and the evening Star was 489,345; assuming 25 cents per copy, 1974 gross sales revenue for these papers was \$38,168,910. The average Sunday circulation of the Sunday Tribune was 640,756; assuming \$1 per copy, the paper's gross sales revenue for the year was \$33,319,312. The total 1974 sales revenue would be \$71,488,222. The sales tax would be 4% of that sum, or \$2,859,528.80. These figures may be imprecise, but it is clear that in 1974 the paper and ink tax the publisher actually paid--\$608,634--was less than the sales tax it would have paid. Whether or not the state submitted

detailed data in this case, I think the conclusion is inescapable that the paper and ink tax was less burdensome. In addition, I agree with Bill Brennan that the courts should simply not undertake any inquiry into comparative empirical burdens; singling out is the real problem. We should not create the misimpression that more detailed proof would have changed our conclusion. Perhaps you would be willing to omit the discussion on pages 13-14.

Second, since I expect to be in dissent in Washington v. United States, I am troubled by your citation of that case to support the otherwise unsupported proposition that there are "some cases" in which the courts "cannot avoid evaluating the relative burdens of different taxes," p. 13 n. 9. I agree that, as you originally wrote on page 13, "courts as institutions are poorly equipped to evaluate the relative burdens of various methods of taxation." If you are willing to omit the text at pages 13-14, I hope you would not retain the second paragraph of footnote 9.

Third, although I agree that we cannot resolve this case by simple citation to Grosjean, I think that case provides more support for our holding than you draw from it. You are unquestionably correct in recognizing that the history of the Louisiana statute may well have had an impact on the members of the Court, but the actual rationale of the Court's opinion barely hints at, and certainly does not rely substantially on, the subjective motivation of the legislators. As I read the Court's opinion, three completely objective facts were of critical importance: (1) the history of English taxes on the press teaches us that a tax which singles out the press may be used to curtail the free flow of knowledge; (2) the Louisiana tax applied only to the press and was unique in over 150 years of history; and (3) the form of the tax was suspect because even though imposed on advertising, it was measured by circulation. Given these objective indicia, the Court legitimately concluded that it had "the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers." 297 U.S. at 251.

Thus in my opinion the Court in O'Brien was entirely correct in concluding that the Grosjean holding did not rest on "legislative motive." We took the same view in NAACP v. Alabama, 357 U.S. at 461-462. I recognize that the Court is

now much more willing to psychoanalyze state legislatures than I am, see, e.g., Rogers v. Lodge, last Term. Even if that is permissible in the field of race relations, I think it would be a great mistake to encourage that approach to constitutional adjudication in the First Amendment area.

If you can omit your discussion on page 13-14 and accept the state court's analysis of the economic burden of the tax for purposes of decision, and if you can recast your analysis of Grosjean, I will join your opinion in full. If this is too much to ask, I might still join parts of your opinion but in addition I might write separately to express my views.

Respectfully,



Justice O'Connor

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 23, 1983

Re: 81-1839 - Minneapolis Star v.
Minneapolis CIR

Dear Sandra:

Thank you for revising pages 13 and 14. This change takes care of my principal concern. I am, however, still a little concerned about your references to legislative motivation in the discussion of Grosjean and still have a problem with footnote 9.

With respect to legislative motivation, the Court has sometimes suggested that it is entirely irrelevant in constitutional analysis (see, e.g., O'Brien), sometimes held that improper motive is a necessary element of a constitutional violation (see, e.g., Washington v. Davis), and sometimes seemed to imply that such a motive is sufficient to establish unconstitutionality (see, e.g., Rogers v. Lodge). So far most of the Court's confusion about purpose has been limited to the equal protection area. Because my views on the subject differ from the Court's, and because I think purpose may have a different significance in First Amendment cases than in equal protection cases, I am perhaps overly sensitive to this topic. Nevertheless, two quite trivial changes in your opinion would allay my concern: First, would you simply omit your footnote 3? (I acknowledge its accuracy, but submit that it is not necessary.) Second, could you revise your parenthetical comment on Houchins at the top of page 5 to read "(suggesting that purpose was relevant in Grosjean)"?

With respect to footnote 9, I agree that it is appropriate to distinguish Washington, and I can accept your analysis as a basis for distinction. I remain troubled, however, by the suggestion that Washington is typical of a group of cases in which the Court has

concluded that it cannot avoid evaluating the relative burdens of different taxes. Two changes in the footnote would take care of my problem. First, could you simply omit the first sentence in the second paragraph and begin your discussion with: "Since M'Culloch ..."? Second, could you change the sentence toward the end of the footnote describing the "special rule" to read this way: "The special rule prohibiting direct taxation of the Federal Government but permitting the imposition of an equivalent economic burden on the Government may not only justify the State's use of different methods of taxation, but may also force us, within limits, see Washington v. United States, U.S. , at , n. 11, to compare the burdens of two different taxes."?

If you can make these changes, I will join your opinion.

Respectfully,



Justice O'Connor

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 24, 1983

Re: 81-1839 - Minneapolis Star v.
Minnesota CIR

Dear Sandra:

Please join me.

Respectfully,



Justice O'Connor

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 15, 1983

Re: No. 81-1839 Minneapolis Star and Tribune Company
v. Minnesota Commissioner of Revenue

MEMORANDUM TO THE CONFERENCE:

In the 1st draft circulated today, I have referred in footnote 9 to Washington v. United States, No. 81-969, which, of course, is only a circulating draft at present. In the event it does not command a majority, or it is not announced before this case, the footnote will have to be amended.

Sincerely,

Sandra

VP. 8, 10, 11, 12, 15

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

Circulated: FEB 15 1983

Recirculated: _____

~~SDO
Please give me
H~~

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1839

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
APPELLANT *v.* MINNESOTA COMMISSIONER
OF REVENUE

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

[February —, 1983]

JUSTICE O'CONNOR delivered the opinion of the Court.

This case presents the question of a State's power to impose a special tax on the press and, by enacting exemptions, to limit its effect to only a few newspapers.

I

Since 1967, Minnesota has imposed a sales tax on most sales of goods for a price in excess of a nominal sum.¹ Act of June 1, 1967, ch. 32, art. XIII, §2, 1967 Minn. Laws Sp. Sess. 2143, 2179, codified at Minn. Stat. §297A.02 (1982). In general, the tax applies only to retail sales. *Ibid.* An exemption for industrial and agricultural users shields from the tax sales of components to be used in the production of goods that will themselves be sold at retail. §297A.25(h). As part of this general system of taxation and in support of the sales tax, see Minn. Code of Agency Rules, Tax S & U 300 (1979), Minnesota also enacted a tax on the "privilege of using, storing or consuming in Minnesota tangible personal property" in the State. This use tax applies to any tangible personal

¹Currently, the tax applies to sales of items for more than 9¢. Minn. Stat. §297A.03(3) (1982). When first enacted, the threshold amount was 16¢. Act of June 1, 1967, ch. 32, art. XIII, §3(2), 1967 Minn. Laws Sp. Sess. 2143, 2180.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 17, 1983

No. 81-1839 Minneapolis Star v. Minn. Comm'r.

Dear Bill,

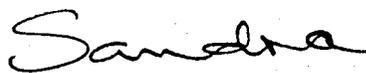
I have received some reactions to the first draft of my opinion in addition to those you sent yesterday, and I would like to attempt to accommodate them as well as yours. I wonder if you would be satisfied with the following replacement for the runover paragraph from page 13 to page 14:

In any event, the proposed rule would not apply in this case, for the State's argument does not enable us to conclude with any confidence that the burden of a hypothetical sales tax on newspapers exceeds that of a use tax on ink and paper. The State's argument rests on the assumption that the retail sales price of a product will always exceed the cost of components. Even in the case of a profitable newspaper, that assumption does not necessarily reflect reality. The commercial press derives a good deal of revenue from advertising¹¹ which, as a service, would not be covered by the sales tax, Minn. Stat. §297A.25(i) (1982). Without detailed data concerning the breakdown of revenues between sales of papers and sales of advertising and the breakdown of costs between ink and paper and other inputs--data that the State has not provided--we cannot speculate as to whether the price Star Tribune charges for its finished product exceeds the cost of components, so we cannot determine whether Star Tribune pays more taxes on ink and paper than it would pay under the hypothetical sales tax. The State

thus has offered no adequate justification for the special treatment of newspapers.

The paragraph preceding this substitute raises considerable doubt as to whether we would ever apply the proposed rule. Although I share your conviction that we probably would not, perhaps we need not decide that here. After all, the state has not made even a colorable showing that the tax here is less burdensome than a sales tax. If a state presents a more persuasive argument, we can decide then for certain whether the courts will enter the fray.

Sincerely,



Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 19, 1983

Re: Minneapolis Star & Tribune Co. v. Minnesota Commissioners
of Taxes, No. 81-1839.

Dear Bill and John:

Since you have both written to me concerning the same portion of my draft, I will try to make a different change on pages 13 and 14 to accommodate your views. The paragraph would be changed as follows:

A second reason to avoid the proposed rule is that courts as institutions are poorly equipped to evaluate the relative burdens of various methods of taxation.¹ The complexities of factual economic proof always present a certain potential for error, and courts have little familiarity with the process of evaluating the relative economic burden of taxes. In sum, the possibility of error inherent in the proposed rule poses too great a threat to concerns at the heart of the First Amendment, and we cannot tolerate that possibility. Minnesota, therefore, has offered no adequate justification for the special treatment of newspapers.

Footnote 9 will read as follows:

If a state employed the same method of taxation but applied a lower rate to the press, so that there could be no doubt that the legislature was not singling out the press to bear a burdensome tax, we would, of course,

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be in a position to evaluate the relative burdens.

In some cases, we have held that the courts cannot avoid evaluating the relative burdens of different taxes. See Washington v. United States, U.S. (1983). Since M'Culloch v. Maryland, 4 Wheat. 316 (1819), the Supremacy Clause has prohibited not only state taxation that discriminates against the Federal Government but also any direct taxation of the Federal Government. See generally United States v. New Mexico, 455 U.S. 720, 730-734 (1982). In spite of the rule against direct taxation of the Federal Government, States remain free to impose the economic incidence of a tax on the Federal Government, as long as that tax is not discriminatory. E.g., id., at 734-735 and n. 11; United States v. County of Fresno, 429 U.S. 452, 460 (1977). In that situation, then, the valid state interest in requiring federal enterprises to bear their share of the tax burden will often justify the use of differential methods of taxation. As we explained in Washington v. United States, "[Washington] has merely accomodated for the fact that it may not impose a tax directly on the United States. . . ." U.S., at The special rule prohibiting direct taxation of the Federal Government but permitting the imposition of an equivalent economic burden on the Government often will not only justify the State's use of different methods of taxation, but will force us, within limits, see Washington, supra, at, n. 11, to compare the burdens of two different taxes. Nothing, however, prevents the State from taxing the press in the same manner that it taxes other enterprises. It can achieve its interest in requiring the press to bear its share of the burden by taxing the press as it taxes others, so differential taxation is not necessary to achieve its goals.

I hope that these changes will make it possible for you to

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join. I will also make a few other changes in the next circulation which may lessen John's other concerns.

Sincerely,

Sandra

Justices Brennan and Stevens
cc: The Conference

FEB 22 1983

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 22, 1983

No. 81-1839 Minneapolis Star v. Minnesota Commissioner

Dear Lewis,

Having been engaged in more extensive correspondence with Bill Brennan and John on this case, I have neglected to thank you for your letter of February 18. I will make an adjustment to the language at the beginning of page 9 in the next draft to alleviate your understandable concern.

Sincerely,

Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 23, 1983

No. 81-1839 Minneapolis Star v. Minnesota Commr.

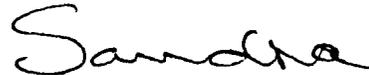
Dear John,

Thank you for your suggestions in this case. I am happy to incorporate the changes you suggest in the discussion of Grosjean and most of the changes you suggest on footnote 9. I do feel, however, that the second paragraph of footnote 9 requires some lead-in, and I propose to start with the following sentence:

"We have not always avoided evaluating the relative burdens of different methods of taxation in certain cases involving state taxation of the Federal Government and those with whom it does business. See Washington v. United States, 442 U.S. 153 (1983); United States v. County of Fresno, 429 U.S. 452 (1977)."

I hope that these changes will prove satisfactory.

Sincerely,



Justice Stevens

Copies to the Conference

Stylistic Changes Throughout

pp. 1, 2, 4, 5, 6, 8, 12, 13, 14

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

Circulated: _____

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1839

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
APPELLANT *v.* MINNESOTA COMMISSIONER
OF REVENUE

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

[February —, 1983]

JUSTICE O'CONNOR delivered the opinion of the Court.

This case presents the question of a State's power to impose a special tax on the press and, by enacting exemptions, to limit its effect to only a few newspapers.

I

Since 1967, Minnesota has imposed a sales tax on most sales of goods for a price in excess of a nominal sum.¹ Act of June 1, 1967, ch. 32, art. XIII, §2, 1967 Minn. Laws Sp. Sess. 2143, 2179, codified at Minn. Stat. §297A.02 (1982). In general, the tax applies only to retail sales. *Ibid.* An exemption for industrial and agricultural users shields from the tax sales of components to be used in the production of goods that will themselves be sold at retail. §297A.25(h). As part of this general system of taxation and in support of the sales tax, see Minn. Code of Agency Rules, Tax S & U 300 (1979), Minnesota also enacted a tax on the "privilege of using, storing or consuming in Minnesota tangible personal property" in the State. This use tax applies to any nonexempt tangible

¹ Currently, the tax applies to sales of items for more than 9¢. Minn. Stat. §297A.03(3) (1982). When first enacted, the threshold amount was 16¢. Act of June 1, 1967, ch. 32, art. XIII, §3(2), 1967 Minn. Laws Sp. Sess. 2143, 2180.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 28, 1983

No. 81-1839 Minneapolis Star v. Minnesota Comm'r.

Dear Harry,

Thank you for your reactions to the opinion in this case. I am pleased that you agree with the changes on pages 13-14.

You also expressed some concern with footnote 8, discussing Washington v. United States. As I explained in my memo to the Conference of February 15, 1983 concerning this case, if the circulating draft of Washington does not command a majority or has not been announced when this case is ready to be announced, I will of course amend the footnote. If, however, the circulating draft of Washington becomes the opinion of the Court and has been announced when this case is announced, I feel constrained to include some discussion of it. Although I do not doubt that the two cases are reconcilable, there is a tension that requires explanation.

Sincerely,



Justice Blackmun

Copies to the Conference

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Stylistic Changes Throughout

PP. 5, 6, 9, 10, 11, 12, 13, 14, 15, 16

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

Circulated: _____

Recirculated: MAR 9 1983

346
2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1839

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
APPELLANT *v.* MINNESOTA COMMISSIONER
OF REVENUE

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

[March —, 1983]

JUSTICE O'CONNOR delivered the opinion of the Court.

This case presents the question of a State's power to impose a special tax on the press and, by enacting exemptions, to limit its effect to only a few newspapers.

I

Since 1967, Minnesota has imposed a sales tax on most sales of goods for a price in excess of a nominal sum.¹ Act of June 1, 1967, ch. 32, art. XIII, §2, 1967 Minn. Laws Sp. Sess. 2143, 2179, codified at Minn. Stat. §297A.02 (1982). In general, the tax applies only to retail sales. *Ibid.* An exemption for industrial and agricultural users shields from the tax sales of components to be used in the production of goods that will themselves be sold at retail. §297A.25(h). As part of this general system of taxation and in support of the sales tax, see Minn. Code of Agency Rules, Tax S & U 300 (1979), Minnesota also enacted a tax on the "privilege of using, storing or consuming in Minnesota tangible personal property" in the State. This use tax applies to any nonex-

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 15, 1983

No. 81-1839 Minneapolis Star & Tribune Co. v.
Minnesota Comm'r. of Revenue
No. 81-969 Washington v. United States

Dear Harry,

I believe the votes are all in on both of these cases. I understand from our correspondence that you may want to write something separately in Minneapolis Star concerning the footnote reference to the Washington case.

Inasmuch as Bill Rehnquist's opinion in Washington has a Court, I feel it is necessary in Minneapolis to try to articulate a basis for distinguishing it.

Sincerely,



Justice Blackmun

Stylistic changes throughout
pp. 8, 13, 14, 15, 16

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

Circulated: _____

Recirculated: MAR 21 1983

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1839

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
APPELLANT *v.* MINNESOTA COMMISSIONER
OF REVENUE

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

[March —, 1983]

JUSTICE O'CONNOR delivered the opinion of the Court.*

This case presents the question of a State's power to impose a special tax on the press and, by enacting exemptions, to limit its effect to only a few newspapers.

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Since 1967, Minnesota has imposed a sales tax on most sales of goods for a price in excess of a nominal sum.¹ Act of June 1, 1967, ch. 32, art. XIII, §2, 1967 Minn. Laws Sp. Sess. 2143, 2179, codified at Minn. Stat. §297A.02 (1982). In general, the tax applies only to retail sales. *Ibid.* An exemption for industrial and agricultural users shields from the tax sales of components to be used in the production of goods that will themselves be sold at retail. §297A.25(h). As part of this general system of taxation and in support of the sales tax, see Minn. Code of Agency Rules, Tax S & U 300 (1979), Minnesota also enacted a tax on the "privilege of using, storing or consuming in Minnesota tangible personal property" in the State. This use tax applies to any nonex-

*JUSTICE BLACKMUN joins this opinion except footnote 12.

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Stylistic Changes Throughout

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

Circulated: _____

Recirculated: _____

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1839

**MINNEAPOLIS STAR AND TRIBUNE COMPANY,
APPELLANT v. MINNESOTA COMMISSIONER
OF REVENUE**

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

[March 29, 1983]

JUSTICE O'CONNOR delivered the opinion of the Court.*

This case presents the question of a State's power to impose a special tax on the press and, by enacting exemptions, to limit its effect to only a few newspapers.

I

Since 1967, Minnesota has imposed a sales tax on most sales of goods for a price in excess of a nominal sum.¹ Act of June 1, 1967, ch. 32, art. XIII, § 2, 1967 Minn. Laws Sp. Sess. 2143, 2179, codified at Minn. Stat. § 297A.02 (1982). In general, the tax applies only to retail sales. *Ibid.* An exemption for industrial and agricultural users shields from the tax sales of components to be used in the production of goods that will themselves be sold at retail. § 297A.25(h). As part of this general system of taxation and in support of the sales tax, see Minn. Code of Agency Rules, Tax S & U 300 (1979), Minnesota also enacted a tax on the "privilege of using, storing or consuming in Minnesota tangible personal

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