Chapter ---
[Civil Liberties and Civil Rights]

In early April 1937 the Supreme Court struck down black Communist Angelo Herndon’s conviction for attempting to incite insurrection. The next day Felix Frankfurter wrote his protégé Charles Wyzanski, then serving in the Solicitor General’s office, “I should like to bet you 10 to 1 that for the rest of the term the Court will sustain everything that should be sustained and invalidate, as in the Herndon case, everything that will vindicate the Court as the unflagging guardian of our liberties!” Frankfurter was hardly prescient about the Court’s likely approach to economic cases; the Court had already upheld the National Labor Relations Act two weeks earlier. His implicit linkage of Herndon and the economic cases did signal the beginning of the new Court’s confrontation with the two issues. In the course of that confrontation the modern law of civil rights and civil liberties was born. Frankfurter’s cynical observation about Herndon signaled the difficulties the Court’s new members, including within a few years Frankfurter himself, would face.

The Progressive jurisprudence that Frankfurter shared and to which he had contributed gave Roosevelt’s justices few resources to use in cases involving civil liberties and civil rights. In its broad sweep that jurisprudence emphasized that constitutional analysis must take seriously the importance of social values asserted by democratic legislatures; in its application of judicial review it cautioned strongly against judicial displacement of social value choices in the name of what justices said were enduring values but that were likely to be simply the values the justices personally ranked most highly. In contrast the Court’s conservatives had a jurisprudence that supported some rights-based claims, beyond the property rights on which Progressives focused their fire. Conservative jurisprudence of the Progressive era had two components – a vague and inconsistent tendency toward libertarianism and a skeptical view of the reach of the state’s regulatory powers – that provided some basis for occasionally protecting some civil rights and civil liberties.

Liberals and conservatives alike found themselves in awkward positions. The conservatives’ jurisprudence led them to see some merit in the positions taken by groups they viscerally disliked – labor unions and political radicals. Roosevelt’s appointees were liberals on economic matters and were sympathetic to political dissidents, labor unions, and African Americans. Yet their best developed thoughts about constitutional law were deeply skeptical about judicial decisions displacing the considered decisions of democratically elected legislatures. From 1937 to 1941 they thrashed around searching for some general account of judicial review and the United States Constitution that would allow them to find unconstitutional the statutes they believed disfavored those the Constitution, as they saw it, placed in their charge. The justices of the reconstructed Court began to articulate several sometimes inconsistent theories, but they had not settled on a satisfactory account by the time Hughes retired.

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1 Felix Frankfurter to Charles Wyzanski, April 27, 1937, Charles Wyzanski Papers, Harvard Law School, Box F-12.
James M. Beck, former Solicitor General and member of the House of Representatives, was perhaps the leading conservative constitutional theorist of the 1920s and 1930s. In 1922, while serving as Solicitor General, Beck delivered a series of lectures at Gray’s Inn, the home of some of London’s leading lawyers. Beck identified six fundamental principles animating the U.S. Constitution. Most dealt with the government’s structure: representative government rather than direct democracy, federalism, judicial independence. Beck came close to disparaging the “many mechanical details of government” in the Constitution, “which naturally must be adapted from time to time by usage, practical administration or judicial interpretation to the changed conditions of life in the Twentieth Century.” What then made Beck a conservative? His additional view, not given a prominent place in his exposition, that the Constitution “contains certain fundamental verities of liberty … based upon considerations of eternal morality.” Earlier he had called the basic principle “individualism,” a belief in the “worth and dignity of the human soul, the free competition of man and man, the nobility of labour, the right to work, free from the tyranny of state or class.” And even the “verities” were qualified: “the full interpretation of many does not rest upon the letter of the Constitution but upon the enlightened conscience of mankind.” Those words were written in 1927, but the New Deal experience did little to change Beck’s fundamental views. The basic principles were the same structural ones. The “guaranty of individual liberty” received barely more than a page of exposition. The Supreme Court was the Constitution’s “balance wheel,” and “compels the living generation, too often swept by selfish interests and frenzied passions, to respect the immutable principles of liberty and justice,” although “no law should be declared invalid unless its incompatibility with the Constitution was clear beyond reasonable doubt.”

None of this was precise enough to serve as the foundation for a conservative constitutional jurisprudence. Beck’s conservatism was more a matter of attitude and sensibility. His concluding chapters offered a pessimistic view of the “enlightened conscience” of the American people. Many of the Constitution’s “essential principles have been … insidiously subverted, and many others are today threatened by direct attack.” Property rights “have been impaired by many socialistic measures,” which the courts were unable to thwart because they were unable to apply “the principles of constitutional law … to complex facts.” The final chapters of his book dealt with “the

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3 Beck, Unchanging Constitution, supra note ---, at 22-23.
4 Beck, Constitution of the United States, supra note ---, at 213.
5 Beck, Unchanging Constitution, supra note ---, at 21.
decay of leadership” in anodyne terms, and contained a screed against the sensationalism of modern journalism and radio.\(^7\)

Supreme Court justices had to translate this sensibility into constitutional doctrine. The jurisprudence of the *Lochner* era sought to do so in several ways.\(^8\) The vaguely libertarian sensibility began by suspecting government efforts to regulate individual choice while acknowledging the people sometimes faced restricted choices, which government regulation could expand, and sometimes made decisions that were effectively coerced, which regulation could supplant with decisions that a person would more likely freely choose. Conservatives were suspicious of claims that decisions resulted from coercion or constraint, though, and conservative judges pressed government attorneys to demonstrate that coercion and constraint really characterized the settings in which government sought to regulate. Conservatives also agreed that government could regulate even freely chosen contracts pursuant to its “police” power to protect public health and safety – what today’s scholars describe as the externalities of private contracts – and to protect public morality. Here too libertarian attitudes pushed judicial conservatives to ask for evidence of real risks to public health or safety.\(^9\) And the category of public morality had to be confined lest any new regulation be justified as reflecting some new moral concern. For examples, progressives saw laws requiring that employers pay minimum wages and laws limiting the hours employers could require their employees to work as reflecting a modern morality about fairness in the economic domain. Justice Rufus Peckham in *Lochner* quickly dispatched that argument, writing that a maximum hour law could not be defended against constitutional challenge “as a labor law, pure and simple.”\(^10\)

One sentence later Justice Peckham identified another theme in the conservative judicial sensibility. “There is no contention,” he wrote, “that bakers as a class are not equal in intelligence or capacity to men in other trades or manual occupations.”\(^11\) Here Justice Peckham evoked a concern about what had come to be called “class legislation” – not legislation on behalf of the working class, but rather legislation that sought to advance the interests of one specific group within the larger public, without protecting the public as a whole.\(^12\) Judicial conservatives were suspicious of what we now think of as

\(^7\) *Id.* at 271-72.

\(^8\) For a more detailed discussion, see Chapter --- *supra*.

\(^9\) Differences over the amount of evidence required to demonstrate such risks divided the majority in *Lochner* from Justice John Marshall Harlan, who dissented on the ground that the government had provided sufficient evidence of the risks to health and safety from agreements to work long hours.


\(^11\) *Ibid*.

special interest laws. Here too, though, the suspicions could not run too deep, because too much legislation was patently designed to serve special interests, with only a fig leaf of concern for the public interest at large. Conservative justices who were Republicans had a special concern about one type of class legislation, statutes that aimed at African Americans. They carried the legacy of Abraham Lincoln and Reconstruction with them, though its force weakened as the years passed.

Conservatives also developed a method of constitutional analysis that gave a bit more shape to their attitudes. For them, constitutional law consisted of a series of well-defined categories with sharp boundaries dividing one from another. Power to regulate was lodged either with the national government or with state governments, for example, and the Court’s job was to ensure that the boundaries were not crossed. Similarly, a regulation could be justified if the legislature really was exercising its power to protect the public health or safety, but not otherwise. A minor regulation that did not address a problem affecting the public as a whole was unconstitutional even if it dealt with a large problem for some special interest group. …

Meyer v. Nebraska, decided in 1923, was probably the most robustly libertarian decision in the conservatives’ tool-kit. Responding to the United States’ entry into the war against Germany, in 1919 Nebraska’s legislature adopted a statute prohibiting teaching any subject in any language other than English, and limited foreign language instruction to high schools. Justice McReynolds wrote the Court’s opinion striking the statute down. After providing an expansive list of the “liberty” protected by the Fourteenth Amendment – “it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men” – Justice McReynolds observed that “this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect.”

He then turned to the state’s purposes – “to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals.” Justice McReynolds conceded that “the state may do much, go very far, indeed, to improve the quality of its citizens, physically, mentally and morally.” “The desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate,” and the state certainly had the power to “compel attendance at some school” and to regulate the curriculum. But Nebraska went too far. Two years later Justice McReynolds provided a stronger justification for that

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13 262 U.S. 390 (1923).

14 Justice Holmes, joined by Justice Sutherland, dissented in a companion case, Bartels v. Iowa, 292 U.S. 412 (1923). For him, the state could “experiment” with ways of ensuring that everyone spoke a common language. Where children heard languages other than
conclusion: “The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”

Buchanan and Meyer shared a libertarian attitude, but neither case explained rather than asserted why the statutes were not justified by the states’ police powers. They resembled Beck’s generalities, and captured the conservative sensibility on issues of civil rights and civil liberties: Attitudes and inclinations, suspicion and a sensibility, set within a doctrinal framework that offered some loose guidance, opened up the possibility that conservatives would rule in favor of constitutional rights beyond the property rights that defined constitutional conservatism. That possibility sometimes ran up against an uncomfortable reality: Conservatives disliked many of those – especially political radicals and ordinary criminal defendants – who claimed that their constitutional rights had been violated. Whether the possibility or the discomfort prevailed depended on the cases the Court chose to consider.

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By the end of the decade some justices offered new doctrines that held out real promise, but none had been fully fleshed out, none had swept the field of competitors, and, crucially, none had persuaded all of Roosevelt’s appointees that their prior criticisms of conservative constitutional jurisprudence were mistaken.

Herbert Croly was the political theorist of the Progressive movement, John Dewey its philosopher. Focusing their attention on the need for an active government serving democratic purposes in contrast to the “hands off” state they believed too prevalent in U.S. political theory and practice, they understandably did not pay much attention to developing an account of rights citizens would have against state action. Indeed, such rights were, in their view, precisely what had obstructed the development of the active state they thought modern conditions – and, for Dewey, the human condition generally – required. …

Croly’s book “Progressive Democracy” contained a chapter on popular sovereignty that fleshed out his vision of civil liberties. The chapter began by criticizing “conservatives” for the view that “the exercise of sovereign power, except under specific constitutional restrictions,” was “necessarily inimical to individual liberty and public order.” The conservative vision, though, was “a mere political bogie, born of the hallucinations of men who confuse the haunted castle of feudalism and monarchism for the well-lighted mansion of the American democracy.” Americans were devoted to law

English at home, he thought, the legislature could reasonably promote learning English by requiring that only English be spoken in school.

15 Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925). The case struck down an Oregon statute that prohibited the operation of private schools; the statute, passed under the influence of the Ku Klux Klan, was aimed at schools affiliated with the Catholic Church.
“in the sense of orderly procedure,” but preserving order required “the reign of social justice” as well. To Croly, constitutional protections could do no more than impose procedural requirements on democracy, and even those requirements could not be strong ones: “Any particular method of securing order, such as that prescribed by the Constitution, must not be exalted from a method or an instrument into a Higher Law.”

Still, Croly criticized the Supreme Court from two seemingly inconsistent directions. Noting the Progressive criticism of _Lochner_-ism, Croly criticized the Court’s “resistance” to Progressive legislation. A recent article by legal scholar Charles Warren, “The Progressiveness of the Supreme Court,” had patiently gone through the Court’s decisions since _Lochner_, demonstrating that the Court had upheld the vast majority of the social legislation it considered, and Croly echoed its conclusion. “The judicial veto is being exercised … only in the cases of manifest excesses and flagrant abuses of legislative authority.” The Court had “throw[n] the burden of political decisions on legislative bodies,” which were using the police power “to shelter an increasing array of interferences with individual liberties” and were “incapable of saving themselves from the enervating and disintegrating effect of excessive indulgence in special legislation.” The solution was “to bring into existence a genuine democratic community, … the outcome of a far deeper sense of common responsibilities and policies, of the interdependence of individuals and local groups, of the necessity and fruitfulness of cooperation, and of the intimate relation between democracy and nationality.” That, in turn, required that “a dominant popular purpose can be expressed without unnecessary delay and without excessive effort.” Croly concluded his chapter by asking, “[I]s there any better way of making majorities considerate and purposeful than by placing the immediate responsibility for the public welfare in their hands? And if a majority is inconsiderate and frivolous in its policy, how long will such a majority remain a majority?” This was a program for political reform without obvious implications for individual rights, except in its foundational commitment to the social. As Croly put it, “the amount of liberty which can be left to the individual without endangering the social interest will vary at different times.”

The Progressive emphasis on the social and the commitment to balancing interests appeared in Progressive jurisprudence as well. Law school professor and, later, Harvard Law School dean Roscoe Pound invented the term “sociological jurisprudence” to describe what Progressives believed about law. From him, sociological jurisprudence required a careful balancing of competing social interests. Rather than “assum[ing] first principles,” it would adapt “principle and doctrines to the human conditions they are to govern.” Pound’s summary of sociological jurisprudence gave as one of its axioms that

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18 Croly, _Progressive Democracy_, at pp. 234, 235, 236, 238, 244, 239.

“legal precepts are to be regarded more as guides to results which are socially just and less as inflexible molds,” an axiom not easily applied to ideas about rights, particularly natural rights.\textsuperscript{20}

In 1915 Pound published two articles in the \textit{Harvard Law Review} on the legal protection of “interests in personality.” Near the end of the second article he discussed the “individual interest” in “belief and opinion.” That interest was “closely connected with an interest in the physical person,” but it was “also closely connected with a social interest … as guarantees of political efficiency and instruments of social progress,” which Pound suggested was “the more significant.” He acknowledged that bills of rights treated individual free speech “as an individual natural right,” but again Pound moved toward identifying a social interest in observing that “[t]he individual will fight for his beliefs,” creating a social interest “in general security.” And, turning to the overarching issue, Pound insisted that “the individual interest in free belief and opinion must always be balanced with the social interest in the security of social institutions and the interest of the state in its personality.”\textsuperscript{21} As Dewey put it a few years later, the minority “must obey the majority … because such obedience is indispensable to the practical security and order of the society.”\textsuperscript{22}

Citing “recent examples” including “the federal law as to alien anarchists,” and a state ban on flying a red flag, Pound observed with seeming equanimity that “[t]hese interests may or may seem to require repression of forms of belief which threaten to overturn vital social institutions or to weaken the power of the state.” He did note that some “state persecution” resulted from “an over-insistence” on these social interests, but his general approach did not provide powerful tools for distinguishing between proper and improper enforcement of them.

Under some circumstances the interests of the state in its personality may have to be weighed against the individual interest in free political belief and free expression thereof…. Where men live in congested large cities, especially where there are great numbers subjected to severe economic pressure who are more or less ignorant of the local political institutions and more or less ignorant of the language in which the law is expressed, the danger of mobs, which are controlled by suggestion, may require confining free expression of political opinions on certain subjects to times and places where such things may be discussed without grave danger of violence and disorder.\textsuperscript{23}


\textsuperscript{22} John Dewey, Lectures in China, 1919-1920 on Logic, Ethics, Education and Democracy (translated from the Chinese and edited by Robert W. Clapton & Tsuin-Chen Ou, Taiwan, China Academy, 1985), p. 222.

\textsuperscript{23} Pound, Interests in Personality, at pp. 454, 455.
The Progressive reform agenda is implicit in this formulation: Eliminate ignorance, spread knowledge, and thereby create conditions for protecting free expression. But Pound did not provide any defense of free expression as such, against the assertion of generic “social interests.” As Mark Graber observes, “Pound did not give any examples of actual circumstances where the social interest in expression outweighed other social interests,” and the Progressive critique of *Lochner* would have made it difficult from him to do so. The interest-balancing that characterized the Progressive approach to rights generally could not readily support robust constitutional protection of civil liberties.

The Progressive lack of interest in free expression culminated in Dewey’s tortured treatment of free speech during World War I. As David Rabban puts it, for Dewey “individual rights should be recognized only to the extent that they contribute to social interests,” no less for civil liberties than for the right to contract. Dewey was not insensitive to intrusions on civil liberties; he defended teachers when they were dismissed for antiwar speech, for example. But, unsurprisingly, his positions were regularly cast in pragmatic terms. Wartime required social unity, he argued, and that would be impaired by efforts to suppress dissenting speech by force of law. “What [would] the effect [be] upon the pupil in the public schools … in seeing their teachers held up to suspicion[?]” Perhaps cynicism when they heard the teachers “speak seriously on the subject of loyalty and patriotism, ‘Oh, they have to say those things, or lose their jobs if they don’t.’” The remedy for attacks on civil liberties lay in education and politics, not in the courts.

Dewey wrote several essays on World War I for *The New Republic*. … His essay on “Conscription of Thought” was his most extensive discussion of free expression. He began by agreeing on “the importance of social solidarity, of union of action, in wartimes.” And social solidarity was “best attained … with intellectual and emotional unity. Without a certain sweep of undivided beliefs and sentiments of unity outer action is likely to be mechanical and simulated.” Dewey was unconcerned that attempts to suppress speech would damage society in the long run, finding “something rather funny in the spectacle of ultra-socialists rallying to the old banner of … the sanctity of individual rights and constitutional guarantees.” His concern was “the historically demonstrated inefficacy of the conscription of mind as a means of promoting social solidarity, and the gratuitous stupidity of measures that defeat their own ends.” For him, “hasty ill considered attempts to repress discussion of unpopular ideas and criticisms of governmental action foster general intellectual inertness.”

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27 John Dewey, “Conscription of Thought,” in id. at pp. 276, 277, 278-79.
Progressives understood that the democracy they sought to advance required a public discourse that allowed a diverse range of viewpoints about public policy to be expressed. Often, though, that understanding was expressed in passing or in conclusory terms, and not integrated into their theorizing. So, for example, Dewey followed his observation that the minority had to obey the majority to ensure security and order with this – “I refer also to the right of the minority to state and argue for its position, and to become a majority when it can gain enough converts to its point of view” – and nothing more.\(^{28}\) In Rabban’s words, “Dewey never explicitly opposed free speech or even specified limitations on its exercise,” but “his social thought … revealed substantial hostility to behavior that did not ultimately contribute to a harmonious community.” For Progressives, free speech and other civil liberties might well be good policies for a democracy to adopt, but civil liberties were not, for them, robust constitutional rights.\(^{29}\)

Dewey’s pragmatic defense of free speech was tepid enough. More, Dewey failed to note the tension between his pragmatic approach and the Progressive critique of *Lochner*. For Progressives who focused on *Lochner*, the solution for the courts’ failure to appreciate the pragmatic judgments legislatures made in enacting social legislation lay in deference to those judgments. When applied to civil liberties, the critique of *Lochner* meant that courts should uphold legislatures’ reasonable efforts to promote national unity, even through what some might think were misguided efforts to suppress dissent. Dewey’s words, that some legislation was so pragmatically unwise as to amount to “gratuitous stupidity,” might have formed the basis for defending civil liberties while accepting the critique of *Lochner*. Dewey was not a lawyer, of course, and his philosophizing created an atmosphere in which Progressives could vaguely sympathize with dissenters without simultaneously developing a legal theory of civil liberties and their judicial enforcement.

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Experience with prosecutions of domestic radicals during and after World War I led some Progressives to rethink their positions on freedom of speech, though with relatively little impact on their jurisprudence of rights more generally. Harvard law professor Zechariah Chafee published a major article on “Freedom of Speech in Wartime” and other essays, becoming the emerging position’s most articulate defender. He began from the Progressive premise that rights involved a balancing of social interests, and restated Pound’s observation that the right of free expression and its regulation required recognition of all the social interests implicated in any controversy – in wartime, not merely the social interest in the successful conduct of the war, but also the “social interest in the attainment of truth.” Judges too often ignored or at least placed too little weight on that interest, thereby failing to provide adequate protection for free expression. They should decide cases according to the “true meaning of freedom of speech”: “One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through unlimited discussion, for, … once force is thrown into the argument, it becomes

\(^{28}\) Dewey, Lectures in China, p. 222.

\(^{29}\) Rabban, Free Speech, p. 228.
a matter of chance whether it is thrown on the false side or the true….” Of course “[u]nlimited discussion sometimes interferes “with the government’s valid purposes, “which must then be balanced against freedom of speech, but freedom of speech ought to weight very heavily in the scale.” The nation had “to run risks for the sake of open discussion, believing that truth will prevail over falsehood if both are given a fair field, and that argument and counter-argument are the best method which man has devised for ascertaining the right course of action for individuals or a nation.”

Justice Oliver Wendell Holmes’s opinion for the Supreme Court in one wartime case articulated a legal standard – the “clear-and-present danger” test – that, properly administered by judges and juries, would offer sufficient protection for free expression. But experience showed that the “human machinery” of law administration, those same judges and juries, could not be counted on. “It is only in times of popular panic and indignation that freedom of speech becomes important as an institution, and it is precisely in those times that the protection of the jury proves illusory.” Nor were judges much better. Chafee compiled quotations showing judges failing to “keep their minds free from economic prejudices,” and observed that judges should have withdrawn far more cases from juries, involving “remote language,” than they did. As the prominent trial court judge Learned Hand wrote Chafee, “I am not wholly in love with Holmesey’s test…. [O]nce you admit that the matter is one of degree, you obviously make it a matter of administration, i.e., you give to Tomdickandharry, D.J., so much latitude that the jig is at once up.”

What was needed, Chafee argued, was a free-expression test that could keep the human machinery working properly. An objective test focusing on “the nature of the words used” rather than on circumstances or tendencies or intent, would do the job. Chafee found such a test in a Hand decision, later reversed, requiring that speech could be suppressed only if it consisted of words expressly “counsel[ing] or advis[ing] others to violate the law.” Chafee’s defense of an objective approach to radical political speech was not entirely satisfactory. Objectivity mattered because it would place some limits on what juries and judges under the influence of wartime passions could find criminal. Yet, Chafee agreed that “Mark Antony’s funeral oration … counseled violence while it expressly disconvenanced it.” He also commented on a Supreme Court opinion in which this – “Workers of the World! Awake! Rise! Put down your enemy and mine! Yes, friends, there is only one enemy of the workers of the world and that is Capitalism” – was described as “clearly … an appeal to the workers of this country to arise and put down by force the Government of the United States.” Chafee commented, “If Justice Clarke is wrong, lesser judges may err.” Chafee had no obvious solution to what came to be called the problem of the “clever inciter,” and the same judges who did so badly in applying the


clear-and-present danger test with the stringency that Chafee thought it deserved might just as easily find a great deal of clever inciting going on were they required to apply Hand’s “words of incitement” test. What Chafee offered, and what Progressives came gradually to accept, was a sensibility far more favorable to expression than they had articulated in the wartime cases.32

[Discussion of criminal justice system omitted]

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The [Wickersham Commission’s] report on third-degree practices illustrated them with extended discussions of two cases. Wan v. United States was a Supreme Court decision invoking the common law to throw out a confession extracted from Ziang Sun Wan, a native of China suspected of murder, and Fisher v. State was a decision by the Mississippi Supreme Court excluding a confession of murder by an African American that had been obtained after police gave him “the water cure, a species of torture well known to the bench and bar of the country.”33 The report noted that third-degree practices were “especially used against the poor and uninfluential.” Among those groups, of course, were African Americans. The report mentioned race occasionally in its description of particular incidents, quoted statistics from New York showing that 101 of 289 cases of third degree practices involved African Americans, but without special emphasis, and asserted that “[s]everal informants in different parts of the country state that there is no color discrimination in the application of the third degree, but a few tell us that in their districts these practices are particularly used against Negroes.”34

The delicacy with which the report addressed issues of race – and the fact that it did so – suggests the difficulties those issues posed for Progressives in the 1920s. They were committed to democracy as they understood it, but historians have demonstrated that the Progressives had a “notorious blind spot” with respect to race.35 In part that was because Progressives had little use for the concept of rights at all. In part it was because Progressive thinkers were more than tinged by racism. Ray Stannard Baker, a Progressive journalist, wrote that African Americans were “far inferior in education, intelligence, and efficiency to the white people as a class [in the South].” Progressive reforms sought to promote an active and educated citizenry, but, Baker wrote, African Americans “must

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32 Chafee, supra note ---, at pp. 49 (quoting Masses Publishing Co. v. Patten, 244 F 535 (S.D. N.Y.), rev’d 246 F. 24 (2nd Cir. 1917)), 55, 215-16 (quoting Abrams v. United States, 250 U.S. 616, 620 (1919)).


34 Id. at pp. 159, 55, 65, 70, 101, 158.

first prove themselves in these simple lines of work before they can expect larger opportunities.”

And, finally, in part Progressives were uninterested in civil rights because the political subordination of African Americans meant that there was little to gain, and a fair amount to lose in the South, by embracing the cause of civil rights.

During the 1930s that started to change. Roosevelt’s programs provided some significant relief to African Americans, though they were not designed specifically to do so and often incorporated features aimed at assuaging concerns of Roosevelt’s Southern supporters that the programs would do too much to benefit blacks. African Americans responded by beginning to abandon the “party of Lincoln” for the Democratic party and minor parties even farther to the left. The movement was halting, more substantial in the urban North to which many African Americans migrated. The issue of civil rights was complicated as well by the politics of the union movement, where historically the craft unions at the heart of the American Federation of Labor defended racial segregation in employment, and the more radical and younger Congress of Industrial Organizations sought to gain ground within the movement by championing equal treatment within industrial unions.

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Through the 1930s, then, the Court’s conservatives and liberals resembled each other at the deepest level: Both had attitudes and predispositions, but no well-developed account of constitutional rights they could apply systematically. For much of the 1930s the conservatives and liberals occasionally and almost accidentally converged in supporting particular claims in civil liberties and civil rights cases. After the liberals took control on the Court, they made some progress in working out such an account, but they remained burdened by the legacy of their criticisms of the *Lochner* Court and were unable to develop an approach to constitutional rights around which they all could rally.

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[The Hughes Court and Radical Dissent]

Scattered Supreme Court decisions in the early twentieth century dealt with the Constitution’s protection of freedom of speech. Radical dissent over United States participation in World War I and the nation’s intervention against the Bolshevik revolution in Russia led the Court to its first sustained engagement with free speech cases. By the time Chief Justice Hughes took the center chair, the national government largely had abandoned its pursuit of radical dissenters, some of whom played large roles

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37 [citation]


in the labor organizing that provided political support for the Roosevelt administration and, from 1935 to 1939, in the Communist Party’s “Popular Front” that aligned the Party and its members and sympathizers with the administration. The Depression gave capitalism’s critics more opportunities to organize, and state governments occasionally went through local “red scares,” prosecuting such critics – particularly members of the then newly organized Communist Party – who then raised free speech defenses. [discussion of free speech cases of the 1920s omitted]…. The First Amendment as it had been interpreted in the federal cases arising out of World War I and as it had been assumed to apply in the state cases of the 1920s framed the Hughes Court’s treatment of radical dissent. A theory that offered robust protection for radical dissent had been eloquently stated, but only in dissent. The Hughes Court’s decisions ended up protecting many dissenters, but not by directly invoking the First Amendment. They were due process decisions influenced by the First Amendment.

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Like many teenagers, Yetta Stromberg worked during the summer as a camp counselor. The camp Stromberg worked at in the foothills of the San Bernardino Mountains, though, was unusual: it was for “workers’ children” between the ages of ten and fifteen, and Stromberg managed it as part of her activities as a dedicated Communist organizer. She taught a class every day, which some of the campers described as “puzzling,” instructing the campers in Marxism, Russian history, and the like. One camper testified that they were told “workers [were] slaves.” The camp’s library had many Communist books and pamphlets, some of which taught “the indispensability of a desperate, bloody, destructive war as the immediate task” for those who read the books.” Every day, as well, Stromberg supervised the raising of a red flag, said by another counselor to be “symbolic of universal brotherhood,” to a call-and-response of “Are you ready?” and “We are always ready.” The campers pledged allegiance “to the workers’ red flag, and to the cause for which it stands, one aim throughout our lives, freedom for the working class.”

Stromberg and seven others associated with the camp were arrested in August, 1929, and charged with violating a California statute prohibiting the display of red flags. The statute had been enacted in 1919, at the same time that California adopted the criminal syndicalism law upheld in Whitney. Stromberg’s prosecution was the first ever under the anti-red-flag law, which was representative of several enacted during the 1919-20 Red Scare. After a one-week trial, Stromberg and five of her co-defendants were convicted. Stromberg was sentenced to six months to five years for displaying the flag. While she was on bail pending appeal, Stromberg was arrested when she and other Communists tried to hold a demonstration near a Los Angeles High School, which turned into a raucous brawl when the police tried to stop them. Sentencing Stromberg to ninety

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days in jail, the judge said, “Our public schools must be protected from these people who strive to teach the children atheism, Communism and like doctrines.”

Obviously, people could raise red flags for undeniably good reasons, for example as warning of danger. California’s red-flag statute did not outlaw all uses of red flags. Rather, it focused on the purposes for which the flag was displayed: “Any person who displays a red flag … as a sign … of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character is guilty of a felony.” The jury was instructed that Stromberg could be convicted if it found that she had raised the red flag for any one of the three purposes -- “opposition to organized government,” “stimulus to anarchistic action,” and “aid to [seditious] propaganda” -- listed in the statute.

John Beardsley argued Stromberg’s case in the Supreme Court. An active member of the American Civil Liberties Union, Beardsley “wasn’t a radical, but would go to the defense of a radical on the question of constitutional rights.” Beardsley contended that each clause violated the First Amendment. Chief Justice Hughes’s opinion for the Court, joined by six of his colleagues, focused on the first clause, because the jury might have rested its conviction simply on its determination that Stromberg had

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42 283 U.S. 359, 360, 363-64 (1931).

43 “Jurist Dies in His Sleep,” Los Angeles Times, June 11, 1946, p. A1. After serving as a city attorney from 1935 to 1939, Beardsley was appointed to the trial court in Los Angeles by Governor Floyd Olson. His tenure as a judge was controversial, and when he sought reelection in 1946, the city bar association opposed him and the Los Angeles Times, which had endorsed him in 1946, endorsed William M. Byrne, who opposed Beardsley in the primary election. Beardsley narrowly defeated Byrne, but died, at age 70, days after the election. “Los Angeles Bar Backs Houser and Judge Byrne,” Los Angeles Times, April 24, 1946, p. 2; Editorial, “Recommending the Election of an Impartial Judge,” Los Angeles Times, May 10, 1946, p. A4.
raised the flag as a symbol of opposition to organized government, without concluding that she did so to stimulate anarchistic action or to aid seditious propaganda. The state court had upheld Stromberg’s conviction by disregarding the first clause, but the Court was “unable to agree with this disposition of the case.” The difficulty was that the jury had reached a general verdict – it had convicted Stromberg without spelling out which of the three clauses it found she had violated. So, if any of the clauses allowed the jury to convict someone for engaging in constitutionally protected speech, the verdict had to be overturned.44

Referring to Gitlow and Whitney, Hughes agreed that the second and third clauses, aimed at incitement to anarchism and seditious propaganda, were constitutional “on their face,” although he reserved judgment on whether they were constitutional as applied to Stromberg’s activities. The first clause, though, was too “vague and indefinite.” It might “permit the punishment of the fair use” of “the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means.” It was therefore unconstitutional “upon its face.”45

Notably, the state court that upheld Stromberg’s conviction observed that the “opposition to organized government” clause was of “questionable” constitutionality, because the phrase “might be construed to include the peaceful and orderly opposition to a government as organized and controlled by one political party by those of another political party equally high minded and patriotic.” Sounding a bit like Justice Brandeis in Whitney, the state court judges observed, “Progress depends on new thought and the development of original ideas. All change is, to a certain extent, achieved by the opposition of the new to the old,” and “peaceful opposition is guaranteed … as a means of political evolution, but not of revolution.” Even Justice Pierce Butler, who dissented on largely technical grounds, seemed to agree with some of the majority’s premises. The jury instructions, as he read them, told the jurors that Stromberg “had the right without limit to advocate peaceable changes in our government, that under our constitution … an organization peaceably advocating changes in out government, no matter to what extent or upon what theories or principles, may adopt a flag signifying [its] purposes, … and that it is impossible to make that unlawful.” The protection he would have given radicals was clearly less than the protection that Gitlow and Whitney dissents would have, but it was not nothing. The majorities in Schenck, Gitlow and Whitney acknowledged the importance of free expression in a democracy, but the decisions focused far more on the abuses of that freedom and the state’s power to limit it, rather than its affirmative value.

44 283 U.S. at 367. Justices McReynolds and Butler dissented, both arguing that Stromberg’s trial lawyer had failed to object “separately” to the first clause on its own, and Butler arguing in addition that the record clearly showed that Stromberg had not been convicted for raising the red flag simply as a symbol of opposition to organized government. 283 U.S. at 371 (McReynolds, J., dissenting), 372-76 (Butler, J., dissenting).

45 283 U.S. at 369-70.
In *Stromberg* the Court began to speak of the First Amendment in ways that recognized its central place in supporting peaceful political change.\(^{46}\)

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Two weeks after handing down *Stromberg*, the Court even more vigorously defended the First Amendment’s affirmative value. The case involved a different kind of radical dissent – a virulently anti-Semitic local scandal sheet published in Minneapolis, brought to the Court with the support of Robert McCormick, the conservative publisher of the Chicago *Tribune*. Self-interest and libertarian ideology converged for “Colonel” McCormick, a war hero who got his title from his position in the Army Reserve Officers Corps. In 1919 Henry Ford “won” a libel suit against McCormick’s paper, which had called Ford an “ignorant idealist and unpatriotic American” for opposing Woodrow Wilson’s expedition against Mexico. Ford’s victory consisted of a judgment for six cents damages and six cents in costs. Chicago’s mayor “Big Bill” Thompson unsuccessfully sued the *Tribune* for libelous stories and editorials charging Thompson with corruption. Ford’s “victory” and Thompson’s losses cost McCormick a great deal of money. McCormick became a devotee of freedom of the press, heading the American Newspaper Publishers Association’s committee on press freedom, but more than self-interest was at work. McCormick’s conservatism consisted in a general suspicion of government power – in the economy, for example, as he became a fierce opponent of the New Deal, and with respect to control of expression.\(^{47}\)

In mid-1928 McCormick learned that the Minnesota Supreme Court had upheld an injunction against a newspaper’s continuing publication. The decision roused his pro-press, anti-regulatory instincts. Looking into the decision, McCormick spoke with Weymouth Kirkland, the *Tribune*’s general counsel and formerly McCormick’s law partner and with Frederick Siebert, a young scholar of journalism and the law at the University of Illinois, who eventually prepared a memorandum on the history of censorship in Great Britain and the United States. Armed with their advice, McCormick decided to take over the appeal from the Minnesota Supreme Court’s decision.\(^{48}\)

The Minnesota decision involved a Minneapolis “scandal sheet,” but it originated with a newspaper in Duluth, the *Rip-Saw*, which began publication in 1917. As journalist Fred Friendly put it, “The *Rip-saw* was relentless” in its attacks on those who opposed alcohol prohibition, which, in the paper’s view, included much of the

\(^{46}\) 283 U.S. at 366 (quoting the state court opinion), 373 (Butler, J., dissenting).

\(^{47}\) Citation to McCormick biography

\(^{48}\) Fred W. Friendly, Minnesota Rag: The Dramatic Story of the Landmark Supreme Court Case that Gave New Meaning to Freedom of the Press (New York: Vintage Books, 1981), pp. 75-77. Kirkland joined McCormick’s law firm in 1915 and became the *Tribune*’s general counsel when McCormick left the firm to become the newspaper’s publisher in 1920. Another lawyer who joined the firm in 1915, Howard Ellis, eventually became the second name partner in one of Chicago’s major law firms, Kirkland & Ellis. For the firm’s account of its history, see “Firm History,” available at http://www.kirkland.com/sitecontent.cfm?contentID=264.
Duluth power structure and government. In October 1924 the Rip-saw went after three local politicians, accusing Victor Power, formerly mayor of Hibbing, of corruption and leading a dissolute life, state senator Michael Boylan of making threats to the newspaper’s publisher, and probate judge Bert Jamison of having become impotent because of syphilis and of taking out his anger by treating the young women who were wards of the court as a result of unplanned pregnancies with gross unfairness. Jamison took out advertisements denying the newspaper’s charges. He also persuaded a local prosecutor to charge John Morrison, the newspaper’s publisher, with criminal libel. Morrison was convicted and paid a $100 fine. Then Power filed another criminal libel action, claiming that Morrison’s false attacks had led to Power’s defeat in his campaign for a seat in Congress. Again Morrison was convicted, but the charges were erased when Power agreed to accept a public apology.49

As a state senator Boylan was in a position to do something more permanent about the problem, as he saw it, of scandalous newspaper. He pushed the Public Nuisance Bill of 1925 through the state legislature, supported by the major newspapers in Minneapolis, who believed that scandal sheets like the Rip-saw were outside the domain of respectable and responsible journalism. Boylan’s bill relied on traditional notions that allowed courts to issue injunctions against “public” nuisances, those that had wide adverse effects. The bill gave the courts the power to enjoin the continuing publication of “malicious, scandalous and defamatory newspaper[s],” allowing a defense that “the truth was published with good motives and for justifiable ends.” Notably, the bill authorized injunctions against truthful statements if they were made without justification, a significant departure from the tradition in civil libel cases, where truth was a complete defense. The Rip-saw continued its attacks on local officials, and in May 1925 faced the first public nuisance action under the new statute. The judge presiding over the case issued a temporary restraining order, but before the hearing on entering a permanent injunction occurred Morrison died of a stroke, and the case fizzled out.50

The Rip-saw put itself forward as a crusading newspaper. The Minneapolis Twin City Reporter did so as well, but with less justification. Its publishers Howard Guilford and Jay Near were shady operators – a “professional blackmailer and a shyster lawyer,” in the words of the Minneapolis Morning Tribune – who apparently used the threat of “exposure” in their paper to extort money from their targets, some of whom were in fact corrupt public officials. Guilford and Near abandoned their newspaper in the early 1920s, but decided to start a new one, the Saturday Press, in 1927. Reviving their associations with the Minneapolis underworld, they found themselves the target of violence organized, they believed, by Mose Barnett, one of the city’s crime bosses. Barnett’s first name was significant; he was Jewish, and Guilford claimed that he had been shot while driving his car by “three Jews in a Chevrolet.”51

49 Friendly, supra note ---, at pp. 8, 14-20. Friendly’s book gives a detailed account of Near’s background.
50 Id. at pp. 23-27.
51 Id. at pp. 32-39 (the Morning Tribune is quoted on p. 33, Guilford on p. 38).
Barnett’s activities included extortion on behalf of the local dry-cleaning syndicate. In August 1927 Barnett and his associates threatened, then attacked a small dry-cleaning operation that refused to knuckle under to the demand that it go out of business. They sprayed the clothes at the store with acid, and pistol-whipped Sam Shapiro, the owner. Jay Near and the Saturday Press took up Shapiro’s causes notwithstanding Near’s anti-Semitism, calling the city’s mayor and police chief allies of “gangsters” like Barnett. The city’s major newspapers did not escape Near’s eye: They were “afraid to mention” Barnett’s name. On November 19, 1927, the Saturday Press published an issue that triggered an action under the Public Nuisance Law.52

The centerpiece of the issue, and of the lawsuit, was an editorial, “Facts Not Theories.”53 It began with a purported quotation from “a gentleman of Yiddish blood,” who “‘want[ed] to protest against your article,’ and blah, blah, blah, ad infinitum, ad nauseam.” The editorial continued:

I am not taking orders from men of Barnett faith, at least right now. There have been too many men in this city and especially those in official life, who HAVE been taking orders and suggestions from JEW GANGSTERS, therefore we HAVE Jew Gangsters, practically ruling Minneapolis.

It was buzzards of the Barnett strip who shot down my buddy [Guilford]. It was Barnett gunmen who staged the assault on Samuel Shapiro. It is Jew thugs who have “pulled” practically every robbery in this city….

It is Jewish men and women – pliant tools of the Jew gangster, Mose Barnett, who stand charged with having falsified the election records and returns in the Third ward….

Practically every vendor of vile hooch, every owner of a moonshine still, every snake-faced gangster and embryonic yegg in the Twin Cities is a JEW….

When I find men of a certain race banding themselves together for the purpose of preying upon Gentile or Jew, gunmen, KILLERS, roaming our streets, shooting down men against whom they have no personal grudge (or happen to have … then I say to you in all sincerity, that I refuse to back up a single step from that “issue” – if they choose to make it so.

If the people of the Jewish faith in Minneapolis wish to avoid criticism of these vermin whom I rightfully call “Jews” they can easily do so by themselves cleaning house….

I simply state a fact when I say that ninety per cent of the crimes committed against society in this city are committed by Jew gangsters.

It was a Jew who employed JEWS to shoot down Mr. Guilford. It was a Jew who employed Jews to intimidate Mr. Shapiro and a Jew who employed JEWS to assault that gentleman when he refused to yield to their threats….

52 Id. at pp. 40-4 (“afraid to mention” is quoted on p. 43).
It is Jew, Jew, Jew, as long as one cares to comb over the records.

I am launching no attack against the Jewish people as a race. I am merely calling attention to a FACT. And if the people of that race and faith wish to rid themselves of the odium and stigma THE RODENTS of their own race have brought upon them, they need only to step to the front and help the decent citizens of Minneapolis rig the city of these criminal Jews.

The issue appeared on Saturday. On Monday district attorney Floyd Olson, a young man making a name for himself among liberals, and who tolerated minor morals offenses as long as they did not intrude too openly on public order, filed a public nuisance action against Near and the Saturday Press. Within a week Near and Guilford responded with a demurrer prepared by Thomas Latimer, a local lawyer interested in issues of civil liberties. The demurrer which had the effect of admitting that they had indeed published “scandalous” material while contending that the Public Nuisance Law violated their constitutional rights. The following Monday, ten days after the initial publication, Judge Mathias Baldwin held a hearing at which Latimer analogized the Minnesota statute to laws in fascist Italy and Soviet Russia. Judge Baldwin issued a permanent injunction two weeks later, and certified the case for appeal to the Minnesota Supreme Court.

The supreme court heard the case on an expedited schedule, but the injunction remained in effect, keeping the Saturday Press from publishing. By the time the court heard oral argument on April 16, 1928, the paper had been closed down for five months, and would remain closed because Chief Justice Samuel Wilson, joined by all of his colleagues, upheld the statute’s constitutionality. The opinion relied on the state’s police power, which it said includes all regulations designed to promote … an orderly state of society…." The legislature had a great deal of leeway in determining what measures would do that. Treating a newspaper that published scandalous material as a public nuisance was not arbitrary, according to the court. “The distribution of scandalous matter is detrimental to public morals and to the general welfare. It tends to disturb the peace of the community. Being defamatory and malicious, it tends to provoke assaults and the commission of crime. It has no concern with the publication of the truth, with good motives and for justifiable ends.” Indeed, the chief justice said, “There is no constitutional right to publish a fact merely because it is true.” A state could hope that criminal libel actions would be enough to stop the publication of malicious libels, but the opinion observed that it was a “matter of common knowledge” that they failed to do so because the “victims of such assaults seldom resort to the courts.” The opinion’s treatment of press freedom was assertive and repetitious. The chief justice mentioned the traditional view that freedom of the press implied a ban on prior restraints. But, according to the court, a court-issued injunction against a public nuisance was not a prior

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54 George H. Mayer, The Political Career of Floyd B. Olson (Minneapolis: University of Minnesota Press, 1951), at p. 15, describes Olson’s position on vice crimes.

55 Latimer was mayor of Minneapolis from 1935 to 1937, dying shortly after he was defeated for reelection. On his election, see Time, ---, June 24, 1935, p.-.-.-.

56 Friendly, supra note ---, at pp. 50-53.
restraint: “In Minnesota no agency can hush the sincere and honest voice of the press; but our constitution was never intended to protect malice, scandal and defamation when untrue or published with bad motives or without justifiable ends.” In short, “In making the publisher responsible for the abuse of the press the legislature is authorized to make laws to bridle the appetites of those who thrive upon scandal and rejoice in its consequences.”

Near decided that the American Civil Liberties Union might help him with an appeal to the U.S. Supreme Court, and got a modest expression of support – and a pledge of $150. The ACLU described the Public Nuisance Law “a menace to the whole principle of the freedom of the press.” Perhaps knowing more than the ACLU about the Minnesota’s background, the Minneapolis Evening Tribune attacked the ACLU for defending the “blackmailer and the scandal monger,” and said that “legitimate newspaper will be rather bored than excited” about the case. The Tribune underestimated Colonel McCormick. By the fall of 1928 McCormick had decided to intervene, pressed by Weymouth Kirkland, who told McCormick that “the mere statement of the case makes by blood boil.” … If this decision is sustained in the Supreme Court, how easy it would be for a ‘small’ administration, through control of the legislature, to pass a like statute in Illinois or some other state.” McCormick ended up contacting Near and offering Kirkland’s services. Near agreed, and Kirkland took over the appeal.

Kirkland sent two lawyers from Chicago to Minneapolis for the final hearing in the case, when Judge Baldwin entered a final injunction, the appeal from which allowed Near to appeal to the U.S. Supreme Court. Like many litigants, Near got impatient at the pace of litigation – not unusually slow, but every day the injunction was in place was a day that Near could not make a living by publishing his newspaper. He complained to McCormick in terms that McCormick interpreted, perhaps correctly in light of Near’s history, as an attempt “to shake us down.” McCormick lined up support from the American Newspaper Publishers Association. He had to overcome two kinds of concerns – a reluctance by “responsible” newspapers to support irresponsible ones, and some concern that losing the case in the Supreme Court would make things worse for newspapers around the country, as legislatures would be free to adopt statute’s like Minnesota’s.

With the ANPA’s support in hand, McCormick and Kirkland prepared the arguments they would make on Near’s behalf. Kirkland began his brief with some quite strained interpretations of the Minnesota statute, but his argument against the statute’s constitutionality did not turn in any important way on the statute’s specific provisions. Then, however, he turned to the real theme, which he stated repeatedly: “in exercising its police powers in cases involving expression, “the State must proceed by punishment after publication, not by prior restraints.” What mattered was that the statute authorized an injunction against publication once a judge found that the publisher had previously

57 State ex rel Olson v. Guilford, 174 Minn. 457, 460-63, 219 N.W. 770 (1928).
58 Friendly, supra note ---, at pp. 62-65 (the ACLU’s statement is quoted on pp. 63-64, the Tribune’s editorial on pp. 64-65), p. 78 (quoting Kirkland).
59 Id. at pp. 80-81, 85-87, 88-89 (McCormick is quoted on p. 87).
published scandalous or malicious material without a good reason for doing so – nothing more. Kirkland observed that constitutional scholars and state courts uniformly agreed that “the substantive right of freedom of the press prohibits restraints upon publication prior to such publication.” Indeed, to Kirkland the fact that he could not identify any effort “before the present case” in which any legislature had tried to enact a law like Minnesota’s showed how “universally recognized and admitted” the principle against previous restraints was. The very novelty of the Minnesota statute was an “exceedingly strong argument[]” against it. Kirkland disagreed with the argument that “the constitution was never intended to be a shield for malice, scandal, and defamation.” He asserted forthrightly that “every person does have a constitutional right to publish malicious, scandalous, and defamatory matter though untrue, and with bad motives, and for unjustifiable ends, in the first instance, though he is subject to responsibility therefore afterwards.” No one needed protection for “harmless and colorless statements,” which “[n]o sane government will ever suppress.” There was, though “great need … to protect the other class.” Kirkland then offered a functional justification for the difference between previous restraint and subsequent punishment: Punishment was administered through trials by “the people represented by the jury,” whereas injunctions were issued by individual judges. Then Kirkland showed how state court after state court had rejected injunctions against publication, in a range of circumstances. Kirkland concluded his discussion of free expression with some observations about the relation between defamation and political reform: “Reform comes only when the evils and corruption existing in a state have been pointed out and brought to the attention of the people. No publication can point out corruption in the body politic without being defamatory, …” True enough in some sense, but cogent only to the extent that courts could not readily distinguish between “mere” defamation and scandalous and malicious defamations, and it is unclear that they could not.60

Having written a powerful brief on free expression, Kirkland then made a rhetorical mistake. Conservative legal theory divided the constitutional world into two domains. In one the state exercised its police power, which was plenary and unrestricted. In the other, individuals held constitutional rights. Having established that Near had a right to publish without prior restraint, Kirkland had necessarily shown that the Minnesota statute was not a constitutionally permissible exercise of the state’s police power. But, perhaps out of an abundance of caution, perhaps because he did not fully understand the conceptual structure of constitutional analysis, Kirkland added a section attempting to show that the statute was “an unreasonable exercise of the police power.” According to Kirkland, the injunction “deprives appellant of the right to follow his lawful occupation.” The injunction shut the Saturday Press down, and if Near tried to publish another newspaper he ran the risk that it too would be found scandalous and that he would thereupon be held in contempt of court for violating the initial injunction. “It would be far wiser to give up journalism and enter some other field,” and “this … is what in effect the Statute compels him to do…” Kirkland here drew on well-established precedents indicating that a state’s police power did not extend to making it impossible for a person to engage in an otherwise lawful occupation, but the argument was

60 Brief of Appellant, Near v. United States, No. 91, October Term 1930, pp. 43, 22, 24, 29, 30, 44-45.
unnecessary given the free-expression principles he had already developed, and was strained as well.\(^{61}\)

The brief filed by the state’s attorneys was more than a little confused. Its style was that of an era about to pass into history: conclusory statements, mere citations of relevant authorities, extended quotations from precedents said to be relevant with little explanation of how they bore on the case at hand. The lawyers clearly had not fully assimilated the fact that the Court had become fully committed, albeit quite recently, to the view that the Constitution required state governments to comply with principles of free expression. They included a footnote citing the “criticism” leveled against *Gitlow*’s assumption to that effect, written by law professor Charles Warren, who, the brief said, contended that the assumption was “unwarranted [and] at variance with prior decisions of this court and with the intention of the framers…” Once one took their skeptical stance, the brief’s core arguments fell into line. Challenging Kirkland’s claim that the injunction effectively barred Near from pursuing his profession as a journalist, the brief nonetheless agreed that the problem should be thought of as one involving business regulation. Citing numerous cases upholding regulation of businesses as public nuisances, the brief pointed out that the Court has “sustained” statutes “forbid[ding] an innocent calling upon the ground that certain evils incident to the calling existed.” The law of nuisance had regularly been extended to “new conditions,” and that was all Minnesota’s legislature had done.\(^{62}\) The state’s approach was ingenious, and held out some prospect for success. The Court’s conservatives might see the statute as a use of the state’s police powers to promote morals by prohibiting scandalous publications, and the Court’s liberals might see it as an ordinary business regulation of a sort they routinely voted to uphold.

It was not to be. The Court’s liberals saw the case in light of their developing account of constitutional limitations on the government’s power to deal with radical dissent. In *Near*, the majority treated the case as involving dissent with respect to local government, and radicalism in its scurrilousness: If the national government and state governments had to put up with Communists, surely Minneapolis’s political leaders could be required to put up with Near’s anti-Semitism.

At the oral argument on January 30, 1931, Kirkland basically summarized his brief, although he appeared to concede, as the brief did not, that injunctions against publication might be permitted if “the evil sought to be remedied was of such paramount importance as to threaten the destruction of the state politically, morally, industrially or economically.” Near the end of Kirkland’s argument, Justice Pierce Butler suggested that private actions for defamation after publication might be inadequate because defendants like Near would rarely have the money to pay a judgment. Kirkland shifted attention from private damage actions to criminal prosecutions: An impecunious publisher who would not worry about being told to pay money would worry about going to jail.\(^{63}\)

\(^{61}\) *Id.*, pp. 51 (section heading, capitalization altered).

\(^{62}\) Brief of Appellee, *Near v. Minnesota*, No. 91, October Term 1930, pp. 8 n.*, 13,

James E. Markham, one of the deputies to Minnesota’s Attorney General, ran into more difficulty in his argument. Chief Justice Hughes interrupted when Markham repeated the state’s skepticism about the proposition that the national Constitution required states to comply with its principles of free expression: “Prior decisions of the court so held it,” the Chief Justice said. Markham then tried to argue that the injunction was not in fact a prior restraint, because it was issued only after Near had published defamatory and scandalous material; the injunction was actually a form of punishment for those earlier publications. Justice Brandeis read from the record, finding in it allegations of “combinations between criminals and public officials.” Was not Near’s “effort to expose such a combination … a privileged communication if there ever was one?” Repeating a point Kirkland had made, Brandeis observed, “Of course, there was defamation; you cannot disclose evil without naming the doers of evil.” But, he said, it was “difficult to see how one can have a free press and the protection it affords in the democratic community without the privilege this act seems to limit. You are dealing here not with a sort of a scandal too often appearing in the press, and which ought not to appear to the interest of anyone, but with a matter of prime interest to every American citizen. What sort of matter could be more privileged?” To Brandeis, Near and Guilford had “acted with great courage,” risking criminal punishment if what they said turned out to be false. Markham struggled to respond, but really had nothing to say. The best he could do was to allude to the police power argument: “Newspapers would do better to sustain laws such as this, for they have the effect of purifying the press.”

When the votes were counted, Chief Justice Hughes assigned himself the majority opinion striking down the Minnesota statute. He began his substantive discussion by observing that the statute was “unusual, if not unique,” and by emphasizing the “grave importance” of the questions, which “transcend[ed] the local interests” in Minneapolis. Citing Gitlow and the very recent Stromberg decision, Hughes made it clear that it was “no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action.” That, though, only began the inquiry, for the state’s general “authority … to enact laws to promote the health, safety, morals and general welfare of its people” – its police power – “is necessarily admitted.” So, the states could “punish [the] abuse” of the liberty of the press.

In elaborating, Hughes cited several economic due process cases. When Justice Brandeis, to whom those cases were anathema, objected, Hughes responded that he included the citations “to expose the inconsistency of the dissenters.” This was diplomatic, but not entirely accurate: The conservative dissenters never denied that states retained their police powers up to the point where the exercise of those powers violated a protected right, and their disagreement with the majority in Near was over whether

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Friendly states that his “account has been pieced together from [newspaper and magazine stories and] … interviews with law clerks and other observers.” *Id.*, pp. 202-3.


Minnesota actually was exercising its police power to protect local morals, not over whether the due process clause protected freedom of the press, a position that they had accepted since *Gitlow*.

Hughes then offered four numbered paragraphs to describe “precisely the purpose and effect of the statute” as the state supreme court had construed it. First, the statute was “not aimed at the redress of individual or private wrongs,” which the state’s ordinary libel law could deal with. And the state was more restrictive than ordinary libel law: “The statute permits the defense not of the truth alone, but only that the truth was published with good motives and for justifiable ends.” Second, echoing the point Kirkland and Brandeis had made, the statute “is directed … at the continued publication … of charges against public officers…. Such charges, by their very nature, create a public scandal.” Hughes returned to this theme late in his opinion, after he had laid out the case against prior restraints: “Charges of reprehensible conduct … unquestionably create a public scandal, but the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication.” Third, rejecting one of Markham’s points, “[t]he object of the statute is not punishment, in the ordinary sense but suppression” of the newspaper. Finally, the statute “put[s] the publisher under an effective censorship,” because the publisher faced nearly automatic contempt sanctions if he publishes anything later found to be scandalous: “Whether he would be permitted again to publish matter deemed to be derogatory … would depend upon the court’s ruling.”

Whether Hughes found Kirkland’s advocacy particularly effective, or arrived at his conclusions independently, the parallel between what Kirkland said and what Hughes wrote is striking.

Having “cut through mere details of procedure,” Hughes then described “the operation and effect of the statute.” It was, for Hughes, “of the essence of censorship.” The Chief Justice then asked whether such censorship was “consistent with the conception of the liberty of the press as historically conceived.” Acknowledging that the general view that “the chief purpose of the guaranty [was] to prevent previous restraints upon publication” was not universally accepted, Hughes detailed his version of the relevant history, which, he argued, supported the prevailing view; most of the criticism of that position treated it as offering a too-limited conception of freedom of the press, not an inaccurate one. Hughes agreed that “the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases.” In a passage that governments would regularly cite in the future, Hughes wrote, “No one would question but that a government might prevent … the publication of the sailing dates of transports or the number and location of troops.”

The novelty of Minnesota’s statute mattered: “The fact that, for approximately one hundred and fifty years, there has been almost an entire absence of attempts to

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66 Hughes to Brandeis, May 13, 1931, Brandeis Papers, ---. Hughes’s opinion dismissed the argument that the statute should be treated as an ordinary business regulation. 293 U.S. at 720.

67 283 U.S. at 709-13, 722.

68 Id. at 713, 715, 716.
impose previous restraints upon publications relation to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right.” Nor had the “importance of this immunity … lessened” under modern conditions. Published of public officials were no “greater,” and might even be fewer, “than that which characterized the period in which our institutions took shape.” Because “the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions,” the “primary need of a vigilant and courageous press, especially in great cities,” was perhaps even larger.69

Hughes’s opinion had some of the hallmarks of Progressive jurisprudence, and suggested how it might be adapted from defending government power to limiting it. Rights were not absolute, but had to be balanced against social interests – but the social interests had to be “exceptional.” Changed social conditions affected constitutional analysis – but here the changes showed why the freedom of the press was more important than ever.

Justice Butler wrote the dissent, which his three conservative colleagues joined. A Minnesotan whose family had been attacked in the Duluth Rip-Saw, Butler was dismayed that the Chief Justice’s opinion deprived Minnesota of the ability to respond to scandal sheets by enjoining their distribution. He emphasized that in “every edition” of the Saturday Press, “scandalous and defamatory matter predominates to the practical exclusion of all else.” Many of the stories were so “improbable” that they almost certainly were false, and Butler placed the full text of the “Jew, Jew, Jew” article and others in a footnote to show that “[t]he articles themselves show malice.” For Butler, the statute was well within the state’s police power as a “just and appropriate measure[] to prevent abuses of the liberty of the press.” That such abuses could occur, and that the states could address them, was established by the authority of Joseph Story and by the majority’s concession that the states could penalize the publication of libelous material through civil and criminal actions after publication. As scholars then and since have noted, the distinction between “previous” restraints – a term that alternated with the term “prior” restraints in the litigation – and subsequent punishment is thin in substance: “[I]nsofar as the criminal law is preventive, the difference between previous restraints and subsequent punishment is illusory” because a well-calibrated punishment system will deter precisely those publications that courts would enjoin.70

Criminal punishment and injunctions are different procedurally, though. Butler agreed that the First Amendment was designed to eliminate “previous” restraints, but he used that agreement to make his most effective point. The First Amendment’s framers were responding to a tradition in which prior restraints took the form of censorship by “an administrative officer” – a censorship board – who had to approve works before they could be published. But, Butler pointed out, a judicial injunction was different because judges were different from censors. As the First Amendment scholar Thomas Emerson

69 Id. at 718,

70 283 U.S. at 724, 732 (Butler, J., dissenting); “Previous Restraints Upon Freedom of Speech,” 31 Columbia Law Review 1148, 1155 (1931).
pointed out decades later, the problem with censorship boards is that the job of censors is to censor: If they do not find some things worth suppressing, people will wonder why they have a job.\textsuperscript{71} Judges, in contrast, have many things other than censorship on their minds. And, Butler continued, judges use fair procedures, allowing publishers to try to show that what they published was true, or if false was published with good motives. Butler read the majority opinion as conceding that the state could enjoin future distribution of publications found to be obscene, and he could see no difference in principle between obscenity and scandalous material: Even for the majority both could be punished after publication, and both should be subject to injunctions against publication. States could use their police power to enjoin scandalous publications as public nuisances just as they could enjoin the operation of houses of prostitution as public nuisances.

Justice Butler did not mention another argument supporting Minnesota’s law – the very fact that it was “very unusual, if not unique,” as the Chief Justice put it. Butler might have treated Minnesota’s approach to scandal sheets as one of the experiments that states in a federal system could try. After all, Butler himself noted that it was “well known … that existing libel laws are inadequate to suppress evils” associated with scandal sheets.\textsuperscript{72} Yet, the argument from experimentation was a Progressive one, ordinarily used to explain why states should be allowed to adopt novel forms of economic regulation. The Court’s conservatives valued federalism as a protection against the incursion of the national legislature on liberties protected by the states. They did not see the exercise of national judicial power in the same light. Further, to the Court’s conservatives the police power operate din a binary fashion – it was either on or off. And, as Justice Butler’s rhetoric suggested, conservatives sometimes found it difficult to distinguish between wise exercises of the police power and merely permissible ones, perhaps because of their binary understanding.

Jay Near complained to the ACLU that Colonel McCormick had failed to deliver the financial support he thought he had been promised, and “whine[d]” about having to defend a “scandal sheet.” He struggled to revive the \textit{Saturday Press} after the injunction was lifted. The paper appeared with the slogan “The Paper That Refused to Stay Gagged,” but Near could not make a living from it. Within a year Near “severed” his association with the \textit{Saturday Press}. He died in 1936.\textsuperscript{73}

Outside Minnesota the press hailed the Chief Justice’s opinion. The New York \textit{Times} called it “weighty and conclusive,” but warned that the press itself had to develop a “conscience,” and the New York \textit{Herald Tribune} called the opinion “a buttress of steel,”

\textsuperscript{71} \textit{Citation}. A student writing in 1931 suggested that “the conscience of the chancellor” might not be different from “the fiat of the censor,” especially when “local authorities … will employ favorably disposed equity judges as censors.” “Previous Restraints,” \textit{supra} note ---, p. 1151.

\textsuperscript{72} 283 U.S. at 737 (Butler, J., dissenting).

showing that the Constitution protected the press even in a case where the facts showed the press “in the least favorable light.” The New Orleans Times-Picayune, concerned that Governor Huey Long might go after the press, was relieved that the Louisiana legislature had resisted “the temptation to imitate Minnesota” and hoped that “the drive to muzzle the press” would “be dropped even by those who welcomed it so avidly.” Colonel McCormick wrote the Chief Justice a letter in which he said that “your decision in the Gag Law case will forever remain one of the buttresses of free government,” and had Hughes’s sentence referring to “the primary need of a vigilant and courageous press” inscribed on a plaque in the Tribune’s lobby. More familiar with Near and his scandal sheet, Minnesota’s newspapers’ enthusiasm was more restrained. The day after the decision was announced, the Minneapolis Tribune observed that the state was “fertile in the production of blackmailing and scandal sheets.” It seemed to lament the fact that such publications would “be back with us.” It observed that “[n]ewspapers … are so sensitively jealous of their freedom of speech that they oppose to the utmost the slightest curtailment,” and conceded that even it “was not at all anxious to see even the beginnings of a press censorship.” Its “satisfaction over the vindication” of press freedom was “diluted by the knowledge that the scandal sheets will quickly revive in Minnesota.” Later the Tribune joined other local papers in urging legislators to seek ways to suppress scandal sheets, perhaps by requiring that newspapers register and post bonds to guarantee that they would be able to pay the libel judgments that were now the only recourse against scandalous publications.

Lawyers quickly began to speculate about Near’s implications. Louis Caldwell, a prominent practitioner who had served as the first general counsel to the Federal Radio Commission, wondered how Near’s anti-censorship principle could be reconciled with the pervasive limitations the government placed on those holding radio licenses: “A broadcasting station can be put out of existence … for the oral dissemination of language which, if printed in a newspaper, is protected … against exactly the same sort of repression.” Labor’s supporters had railed against “government by injunction” – employers’ use of injunctions to break strikes. Injunctions might still be available against the actual withholding of labor, but Near opened up the possibility, realized at the

74 Id. pp. 161, 162 (quoting newspaper editorials), 161 (quoting letter), photo preceding 117 (showing the inscription); Cortner, supra note ---, p. 57.

75 Friendly, supra note ---, pp. 158 (quoting editorial), 159.

76 Louis Caldwell, “Freedom of Speech and Radio Broadcasting,” 177 Annals of the American Academy of Political and Social Science 179, 203 (Jan. 1935). Kirkland’s brief had anticipated this concern by distinguishing between the kind of general regulation involved in Near and the imposition of conditions on benefits conferred by the government, such as radio licenses. See Brief of Appellant, Near v. Minnesota, No. 91, October Term 1930, pp. 45-46.

end of the decade, that the labor picketing that accompanied many strikes would be treated as a form of free expression protection against injunctions by Near.

The Nazi takeover of the German government in 1933 led to heightened concern for anti-Semitism as a political phenomenon in the United States. What had been described as a scandal sheet took on more ominous overtones. Writing in 1942, a young legal scholar suggested that democratic governments should seek ways to suppress what he called group libel, over which Near’s anti-Semitism was a good example. David Riesman, who had served as a law clerk to Justice Brandeis during the 1935 Term, contended that “liberal pre-conceptions,” rooted in the American heritage of middle-class individualistic liberalism … impeded our creation of a vigorous public policy for the handling of group libels.” A detailed examination of the use of the criminal law to control such libels led Riesman to conclude that the criminal law provided only “clumsy weapons,” but civil actions were more promising. He repeated the criticism that Near was “unrealistic” in seeing a sharp difference between an injunction and heavy post-publication punishment, but conceded that it was “unlikely that the courts can be persuaded to enter this controversial area.” Legislation was a more promising route. What, though, of Near, which did involve a statute? Riesman argued that it did not raise a “bar” to carefully drawn legislation. Perhaps a statute authorizing private actions rather than a public nuisance suit would be permissible. When Near was argued, Justice Brandeis observed that Near’s campaign against corrupt politicians had to be “conducted … by persistence and continued iteration.” And Chief Justice Hughes’s opinion discounted the fact that the “danger of violent reactions becomes greater with effective organization of defiant groups,” because worrying about such groups would “reduce[]” the constitutional right “to a mere form of words.” For Riesman, Brandeis’s point was true enough, but Hughes’s was naïve. By 1942 similar forms of “persistent” attacks pointed to a different conclusion. Near, he wrote, “was handed down in 1931 … before systematic political defamation had made much headway in the United States.” Near had “indulged in virulent attacks on Jews,” but “his concern seemed to be with the local Minnesota situation and was not part of a national strategy of counter-revolution and division.”

Riesman criticized liberals “who are hostile to the use of libel law as a control upon opinion are still under the influence of attitudes which historically were shaped by experiences and fact-situations of the pre-nineteenth century period.” Then the “menace came from the absolutist state,” but in the 1940s “it is no longer tenable to continue a negative policy of protection from the state; such a policy, in concrete situations, plays directly into the hands of the groups whom supporters of democracy need most to fear.” Riesman used the language of legal realism to offer a pragmatic critique of a liberalism that had hardened into an ideology.

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79 Riesman, supra note ---, pp. 779-80.
Five years passed before the Hughes Court revisited questions about government suppression of radical political dissent. Radicals in the United States were critical supporters of the New Deal in two senses: They played an important role in generating political support for the New Deal, especially as labor organizers, but many of them argued that the New Deal did not go nearly far enough, and saw it as much a defense of capitalism as the beginning of a socialist transformation. It was at least symbolically appropriate for the Court to take up its next criminal syndicalism case in 1936, as it was confronting the Roosevelt administration on the constitutionality of the New Deal.

Longshoremen in Portland, Oregon, were on strike in July 1934. The strike occasioned violence, and four of the strikers were shot by police officers. Dirk De Jonge, a Communist and longshoreman, organized a meeting to protest the police action. Somewhere between 150 and 200 people attended the meeting, which was sponsored by the Communist Party, although only a few dozen of those attending were Communists. De Jonge was the second speaker on the program. He criticized conditions at the local jail, and described the police actions against the strikers as “attacks upon the working class” to break the strike. He asked his listeners to buy Communist Party literature and to help increase the Party’s membership. Police officers raided the meeting, arresting De Jonge and other speakers. He was charged with violating Oregon’s criminal syndicalism law by “conducting” the meeting, at which speakers “taught and advocated the doctrines of criminal syndicalism and sabotage.” According to Harry Gross, one of De Jonge’s lawyers, the prosecution had been arranged with the assistance of the local “Citizen’s Emergency League,” which the lawyer described as “a local vigilante group organized by the Chamber of Commerce during the strike.” The state appointed a special prosecutor to try the case, again according to Gross “at the request of … a group of commanders of the local posts” of veterans’ organizations such as the American Legion and the Veterans of Foreign Wars. In addition to showing what had happened at the meeting, the prosecutor introduced excerpts from Communist literature into the record.  

Gross was joined in defending De Jonge by three other lawyers from the International Labor Defense. The ILD was created in 1925. Supported by the Soviet Union and taking the “international” in its name seriously, the ILD’s goals were “to defend all persecuted for their activity in the labor movement, to defend the struggles of the national minorities, and to support the families of victims of ruling class terror.” It responded to a dilemma faced by political radicals of a Marxist bent. They were in an awkward position when they defended their actions by invoking their constitutional rights. Their theory of law and society implied that law, even constitutional law, was a reflection of basic power relations, a tool of the ruling class to suppress the working class. As the ILD’s head noted, the organization’s purpose was “to destroy the illusions of a democracy and justice above classes, and to expose their class character.” How could radicals expect judges, who were among the elites in the ruling class, to interpret the law to immunize political radicals from persecution and prosecution? As The New Republic put it in commenting on a long sentence imposed by a Georgia court on a

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Communist organizer, “Even a paper as conservative as the new York Herald has protested the outrageous injustice of this sentence, which goes far to prove what the Communists have long charged about capitalist-ruled courts, in the Deep South and elsewhere.”

To a large extent they did not harbor great expectations of judges. Their main defense of invoking the Constitution when they were prosecuted lay not in hopes of vindication in court but in what they called “labor defense.” Labor defense treated prosecutions as occasions for organizing support for radicals. Prosecutions demonstrated that capitalist “rule of law” was a sham, discarded as soon as the ruling class felt threatened by radical dissent. Labor defense exposed that sham through publicity and demonstrations. The Industrial Workers of the World organized “free speech fights” from 1909 to 1913, but these fights were disruptive demonstrations in the streets, not invocations of the law in courtrooms.

The best vehicles for labor defense were prosecutions that could be described as frame-ups of innocent defendants – at least, defendants who were innocent of the crimes with which they were charged. Campaigns against the continued imprisonment of Tom Mooney, convicted for setting a bomb that killed ten and injured forty at a “Preparedness Day” celebration in San Francisco in 1916, and of the execution of Joe Hill, for murdering a Salt Lake City butcher and his son in 1914, and of Nicola Sacco and Bartolomeo Vanzetti, convicted in 192- of a robbery and murder in South Braintree, Massachusetts, foreshadowed the development of labor defense as a weapon for using prosecutions as an organizing device.

Labor defense worked best when its organizers could credibly claim that the victims were being framed, as they could in the cases prominent during the 1920s. Lawyers who accepted the theory could ask juries to acquit, even in the face of evidence, and thereby to demonstrate how working people could stand up to the ruling class. After conviction, the theory of labor defense had to confront the difficulty that the lawyers were attempting to persuade members of the ruling class to let political radicals go free in the face of a jury’s decision that they had violated the law. This was made even more awkward when the defendants were convicted of political offenses rather than ordinary crimes. Radicals were proud of their political positions, and were uncomfortable at best in claiming that they had not made the speeches or published the pamphlets that were at


83 Citation [Rabban?]

the basis of the charges against them. Mooney, Hill, and Sacco and Vanzetti might have been framed for murder, but political radicals were not being framed when they were charged with offenses that were defined by their radical views.

The advocates of labor defense never fully worked out how appeals to higher courts fit into radical political theory. Trumpeting one victory, Communist leader Earl Browder declared, “The higher court was forced by the pressure of aroused mass opinion and protest to set aside the verdict…. ” Similarly, ILD leader William Patterson asserted, “Not legal pressure alone, but mass pressure, into which the legal defense is merged, has forced the capitalist courts … to grant a new trial.” Yet, exactly how mass pressure could force capitalist courts to do anything was obscure. One promising path lay in describing political prosecutions as “legal lynchings.” Doing so allowed the lawyers to seek relief from one segment of the ruling class – the judges of the national courts, especially the Supreme Court – against decisions made by a more parochial segment of the ruling class, particularly judges in Southern courts. The idea was that sophisticated political elites would understand that legal lynchings undermined the credibility of the general claim that the capitalist rule of law was fundamentally fair, and generally involved defendants who posed no real threat to the capitalist economic, social, and political order. The contrast The New Republic drew between the conservative New York newspaper and the Georgia courts suggests this line of argument.

The lawyers defending political radicals also appealed to liberals who had civil libertarian inclinations, and in several important cases prominent liberal lawyers played important roles in the appeals to the higher courts. Felix Frankfurter, for example, was prominently associated with the campaign to free Sacco and Vanzetti, in 1927 publishing a book, based on a long magazine article he had written, offering a “critical analysis” of the case. Rebecca Hill suggests that anarchists and liberals “bonded over … a belief in the importance of individual ideas – and individualism…. ” The combination of labor defense with civil libertarianism was more awkward. Labor defense treated appeals to the Constitution as purely instrumental, likely to succeed only under special conditions, while civil libertarians had a principled commitment to the constitutional claims being made. Judges considering appeals in cases where a strenuous labor defense had been mounted might well have been suspicious of the sincerity with which the defendants’ lawyers were invoking the Constitution. Still, suspicious or not, they had to deal with the legal arguments as such.

As the 1930s proceeded, political radicals developed another way of explaining their reliance on the Constitution in their defense. Captured best in the Communist Party slogan adopted during the Popular Front period after 1935, “Communism is twentieth century Americanism,” radicals located themselves within the American constitutional

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87 Hill, supra note ---, p. 189.
88 Citation needed
tradition rather than outside or against it. Claude Bowers, a journalist and historian, wrote of the conflict between Thomas Jefferson and Alexander Hamilton as a preview of modern battles against large corporations, a “clear-cut fight between democracy and aristocracy,” as he put it in his preface, and the “spirits of Jefferson and Hamilton still stalk the ways of man – still fighting,” as he put it on the last page of the volume. 89 For Bowers, Jefferson’s opposition to the Alien and Sedition Acts was the true American tradition of liberty. The Alien and Sedition Acts inaugurated what Bowers called a “reign of terror” throughout the country. 90 The phrase’s resonance with the terminology of a “Red Scare” used a few years earlier could not have been clearer. In this view political radicals who took a “Jeffersonian” position against those who Bowers called “terrorists” who suppressed speech were continuing America’s best tradition.

De Jonge’s defense was a modest example of labor defense in action. During the three weeks the trial consumed, De Jonge’s supporters filled the courtroom, wearing red badges. At trial the I LD lawyers repeatedly challenged the special prosecutor’s references to De Jonge “as ‘a rat,’ a dangerous radical, and a liar.” The lawyers were told that the jury was initially divided evenly on whether to convict De Jonge, then eight-to-four for conviction. The judge re-read the instructions to the jury, and a few hours later two jurors agreed to vote for conviction if the jury also recommended a lenient sentence. Because in Oregon only ten votes were needed to convict, that was what happened: a conviction by a ten-to-two vote, with a recommendation for leniency. The judge, not bound by the recommendation, sentenced De Jonge to seven years in prison rather than the maximum possible sentence of ten years. De Jonge’s trial exemplified labor defense in its almost-successful appeal to jurors directly, and in his lawyers’ characterization of the case as involving vigilante justice. 91

Osmond K. Fraenkel, a New York lawyer affiliated with the New York Liberties Committee, not then a branch of the American Civil Liberties Union, took over the case when it reached the Supreme Court. With a “political bias to the left,” Fraenkel was a committed civil libertarian who believed that “people should do whatever they wanted as long as they didn’t hurt anybody else.” 92

89 Claude Bowers, Jefferson and Hamilton: The Struggle for Democracy in America (Boston: Houghton Mifflin Co., 1926), pp. vii, 511. Roosevelt appointed Bowers ambassador to Spain, where he served from 1933, and then to Chile, where he served until his resignation and retirement after Dwight Eisenhower’s election, in 1953.

90 Id. p. 386 (chapter title).

91 Gross, supra note ---; Cathy Howard, “The Case of Dirk De Jonge,” Portland Oregonian, Northwest Magazine, March 28, 1976, p. 9. (I thank Seneca Gray and Tung Yin for locating a copy of this article.) Two judges of the Oregon Supreme Court would have reversed De Jonge’s conviction because of the admission of hearsay evidence, the testimony about bank robberies, and the special prosecutor’s improper appeals to passion. They also criticized the length of De Jonge’s sentence. State v. De Jonge, 152 Or. 315, 51 P.2d 674 (1935).

The precise charge against De Jonge turned out to be crucial. He violated the criminal syndicalism statute, it said, by “presid[ing] at … [and] conducting an assemblage of persons, …the Communist party, which … was … teaching and advocating … the doctrine of criminal syndicalism and sabotage.” A police undercover agent testified at De Jonge’s trial about incidents in which Communists suggested that members rob banks to get money for a trip to Russia, but no evidence showed that De Jonge had made similar statements. Fraenkel’s brief repeatedly sounded one theme: The charge allowed a conviction simply for helping to organize a meeting sponsored by the Communist Party, and that was all the evidence showed De Jonge had done. No evidence showed that anyone had advocated criminal syndicalism or sabotage at the meeting, nor did it show that the meeting was one of the Communist Party; it showed only that the Communist Party generally – in its overall teaching – advocated criminal syndicalism. As Fraenkel put it, the statute as construed by the state courts did not punish “assistance to an organization ‘to advocate’” criminal syndicalism, but rather “mere assistance to an organization ‘which advocates’” that doctrine. So, Fraenkel wrote, the question for the Court was “whether a statute is constitutional which punishes a person for participation in a lawful meeting, called for a lawful purpose, merely because the meeting was called by an organization which, it is charged, advocated prohibited doctrines.” Under the state court’s decision, “any person could be convicted who participated in a symposium called by the Communist Party for the discussion of the campaign issues of the current year, were such a person a Democrat, a Republican, or a member of any other political party.” After distinguishing Whitney on the ground that Oregon’s legislature had never determined that activities like De Jonge’s were dangerous, Fraenkel returned to the “guilt by association” theme: “If the conviction in this case can be sustained, then anyone who speaks at a meeting called by the Communist Party for any purpose whatsoever might likewise be convicted.”

The Supreme Court returned from its December break on January 4, 1937, just a month after it had heard the arguments in De Jonge. Hughes delivered the opinion for a unanimous Court. Written with what the New York Times called his “characteristic … tight-lipped reasoning and … a restrained emotion which often rises to real eloquence,”


93 Brief for Appellant, DeJonge v. Oregon, No. 123, October Term 1936, pp. 12, 7, 8.

Hughes’s opinion continued along the path of developing an affirmative theory of the First Amendment. As Hughes understood the case, De Jonge was convicted simply because “he had assisted in the conduct of a public meeting, albeit otherwise lawful, which was held under the auspices of the Communist Party.” That De Jonge was in fact a Communist was irrelevant to the charge. “A like fate might have attended any speaker…. However innocuous the object of the meeting, however lawful the subjects and tenor of the addresses, however reasonable and timely the discussion, all those assisting in the conduct of the meeting would be subject to imprisonment as felons if the meeting were held by the Communist Party.” Discussions of tariffs, foreign policy, taxation, relief – all might lead to criminal liability for participants, were the discussion sponsored by the Communist Party. Legislatures could address abuses of constitutional rights, but “[t]he rights themselves must not be curtailed.”

Hughes then offered a statement of First Amendment theory focusing on the role speech and assembly had in democratic government:

The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

The First Amendment protected the ability of the American people to change the policies their government pursued, and even the form of their government, by peaceful means. De Jonge and others were “entitled to discuss the public issues of the day and thus in a lawful manner, without incitement to violence or crime, to seek redress of alleged grievances.” Hughes stated a broad rule: “[P]eaceable assembly for lawful discussion cannot be made a crime.” Criminal syndicalists might be prosecuted for whatever crimes they committed “elsewhere.” But the government could not “seize[] upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.”

Editorial reactions to the De Jonge decision showed how protecting free expression could appeal to liberals and conservatives. The Portland Oregonian wrote that the decision rejected “the red-baiting witch hunts which have characterized some of our officialdom and part of our press here in Oregon,” and a columnist said that it showed “that we are making headway against the fascist drift in this country.” To the New York Times, the decision showed that judges “who have so often been described as narrow-minded reactionaries” could “let the breath of life and liberty” into Oregon, “one of the most progressive and liberal-minded states.” To the Chicago Daily Tribune the decision “ought to strengthen the restraints upon hasty impulse in lawmaking” at a time when the

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96 Id. at 366, 365.
“mood” and the “most powerful leadership” of the American people “show little regard for the dangers of legislative haste under pressure of public excitement.” All constitutional limitations, not merely the First Amendment, were designed to protect the nation from “impulsive lawmaking” enacted during moments of “public excitement,” when the people “disregard permanent considerations in the pursuit of an immediate object.” “A wise people,” the Tribune said, “will wish to protect themselves from their own moments of passionate impulse and hasty decision, … or what seems to be our will at the moment may be and often has been the defeat of our real will, obscured for the moment by passion, but expression in the enduring principles our reason cherishes.” The implicit reference was of course to Roosevelt and the New Deal, in the aftermath of the Democrats’ electoral victory in 1936 and on the eve of Roosevelt’s challenge to the Court.

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Starting in March 1930 Atlanta’s police, directed by prosecutor John Hudson, conducted a series of raids on meetings organized by members of the Communist party, dispatch to the region to help organize workers and relief recipients. Eventually Joseph Carr, an eighteen-year-old Communist, and five others were indicted for attempting to incite insurrection, under a statute dating from the pre-Civil War years. The Communists saw Atlanta as fertile ground because, facing severe shortfalls in income, the city had cut its expenditures on relief – as well as salaries for public officials. On June 30, 1932, about one thousand marchers organized by Communists under Angelo Herndon’s leadership demonstrated at the doors of the city council in the local courthouse building. Herndon was arrested eleven days later, for violating the anti-insurrection statute.

Herndon, born in southern Ohio in 1913, wandered through the South after his father’s death in 1922, working at coal mines in Kentucky and Alabama. In 1930 he chanced upon a meeting of the Communist-sponsored Unemployed Council in Birmingham and immediately found in Communism an explanation for the poverty he experienced and a program for eliminating its cause, capitalism. He attended national meetings of the Unemployed Councils, and in the fall of 1930 he was arrested along with Carr for attempting to organize coal miners in Birmingham. Later the party sent him to New Orleans and then, in 1932, to Atlanta, where, paid ten dollars a week, he continued his organizing efforts.

Herndon’s presence in Atlanta resulted from strategic choices made by the Communist Party in the late 1920s. African Americans had played an important role in the Communist Party almost from its founding, and increasingly so in the 1920s. By the

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end of that decade the Party was divided over whether to take organizing African Americans in the South as an important goal. The debates entwined esoteric disputes over Marxist theory with power struggles in the Soviet Union, with Joseph Stalin using Marxist theory as his excuse for eliminating his opponents. The argument against organizing in the South was that revolution was not imminent in the United States, and that the best way to bring the revolution on, inevitably a long-term project, was to organize in industrial North rather than the rural South. The argument for organizing in the South was that the Depression showed that capitalism was on its last legs, that revolution was just around the corner, and that African Americans in the South, oppressed by both racism and capitalism, would be important foot-soldiers in the revolution. The Party in the United States took the side of organizing, or more precisely Stalin took the side of those favoring organizing in the South because the advocates of the longer-term strategy were allied with his opponents in the Soviet Union. The Party adopted a program advocating African American self-determination in the Black Belt, with the goal of establishing a separate state for African Americans, assuming that that was what African Americans would choose if given the chance. In January 1929 the American Communist Party formally adopted a program to send organizers southward.\textsuperscript{100}

Herndon’s arrest in 1932 galvanized the International Labor Defense, which sent its national secretary William L. Patterson to Atlanta to locate lawyers who could both defend Herndon and help in a labor defense campaign. Patterson first hired a prominent white lawyer, with whom he quickly fell out. Then Patterson met Benjamin Davis, a young black lawyer recently graduated from Harvard Law School. He had the ILD retain Davis and his partner John Geer to defend Herndon. Davis and Geer agreed to the labor defense approach, “legal efforts at justice within the court system and political efforts outside it aimed at undermining the socioeconomic forces which had originally inspired the prosecution.”\textsuperscript{101}

In court Davis and Geer mounted constitutional challenges to the indictment, to the exclusion of African Americans from the jury, and, eventually, to the inadequate questioning of potential jurors to determine whether they were prejudiced against Herndon. Their first victory was to get Herndon’s bond reduced so that he could be released from the jail in which he had been held from July to December. A frail young man, Herndon had continually complained about the physical conditions at the jail, and his release allowed him to go on a speaking tour as part of the labor defense campaign.\textsuperscript{102}

Herndon’s trial was contentious, to the point where, as historian Glenda Gilmore put it, Davis “walked into the packed courtroom a nominal Republican and strode out a card-carrying Communist.” Prosecution and defense quarreled over the questions jurors were asked and the evidence the prosecution sought to introduce to show that

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\textsuperscript{100} For a discussion of African Americans and the Communist Party in the 1920s, see Gilmore, \textit{supra} note ---, pp. 36-42, 51-57, 70. Gilmore discusses the disputes over organizing African Americans pp. 59-61, and the adoption of the self-determination program pp. 62-64.

\textsuperscript{101} Martin, \textit{supra} note ---, pp. 10-11, 12.

\textsuperscript{102} \textit{Id.} pp. 12, 34-35.
Communists advocated insurrection, even though they did not try to show that Herndon himself had distributed or even read the literature they put before the jury. Quarrelsomeness was part of the labor defense strategy too, as Davis and Geer tried to show jurors that, as the Communist newspaper the *Daily Worker* put it, the changes were a “frame-up,” not in the sense that Herndon had not organized for the Party but in the sense that jurors ought to find nothing wrong with what he had done. The jurors were unswayed, and accompanied their guilty verdict with a recommendation that Herndon be sentenced to eighteen-to-twenty years in prison.  

Labor defense then moved into its next phases – an appeal to the state supreme court and, more important to the ILD, a local and nationwide publicity campaign. A local defense group formed to publicize the case in Atlanta, which continued to go through a local Red Scare with new police raids and arrests. Nationally, William Patterson wrote, “only mass pressure can bring about the release of a class war prisoner,” though that pressure had to be “supplemented by legal defense” conducted on the highest level, presumably because judges had to be given some legal hook on which to hang their response to mass pressure. Herndon spoke in Washington, Baltimore, Philadelphia, Newark, and New York, and then in the Midwest where he was joined by the mother of one of the Scottsboro defendants. In New York, Herndon told his audience, “the Southern ruling class thought that they had just another ‘nigger’ case … but they discovered they had to take notice of millions of protests that came in from the masses all over the world.”

Much of the Georgia Supreme Court’s decision was devoted to trial-related issues such as the selection of jurors and the admissibility of testimony. At the end the court turned to evaluating the evidence to determine whether it was enough to support the conviction. Herndon came to Atlanta “as an organizer for the Communist Party,” and the jury could “find that his chief objective was to press the cause of the Communist Party.” So, the jury could consider the Party’s “program[,] and statutes” in assessing whether he was attempting to incite insurrection. The court then provided an fairly extensive summary of a booklet, “The Communist Position on the Negro Question,” describing the Party’s interest in self-determination in the Black Belt, and concluding with the sentence, “[Negro Communists’] constant call to the Negro masses must be: REVOLUTIONARY STRUGGLE AGAINST THE RULING WHITE BOURGEOISIE, THROUGH A FIGHTING ALLIANCE WITH THE REVOLUTIONARY WHITE PROLETARIAT.” It quoted Herndon’s testimony at trial -- “We know the system we are living under is on the verge of collapse; no matter what system we are living under, it has developed to its highest point and comes back--for instance, you can take a balloon and get so much air in it, and when you get too much it bursts; so with the system we are living under--of course, I don’t know whether that is insurrection or not, but the question, it has developed to its highest point” – and asked, “Did this statement not indicate a belief that the

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conditions were opportune for a revolution or insurrection and that now or soon would be
a seasonable time to strike?” The Party, and Herndon, could not reasonably believe that
the Black Belt’s self-determination could occur “by peaceful … and lawful processes.”
The jury, the court said, could “infer that violence was intended.” The opinion concluded
with a long quotation from Gitlow, and the statement that the “evidence authorized the
verdict.”

In some ways the state supreme court’s decision rested on the same perception
that animated the Communist Party’s Southern efforts: The Black Belt was ripe for
revolution, secession through self-determination was a realistic possibility, and it could
happen only violently. Northern liberals saw the decision as a large threat to civil
liberties. An editorial in The New Republic, for example, said that the state court’s
decision illustrated “the danger of legislation directed against radical activities.” Because
the decision appeared to “establish the principle that the ownership of any book … that
advocates social change is proof of one’s determination to overthrow the government,” if
the decision stood, it would “block every avenue by which we may hope to reach a better
and fuller life, and reduce our status as free and independent Americans to a point
somewhere near absolute zero.”

Herndon’s lawyers were surprised by the Georgia Supreme Court’s decision.
Their entire free-speech argument had been that the evidence presented at trial did not
show that Herndon had actually violated the anti-insurrection statute under the standard,
derived from Schenck, that the jury had been told to apply. The state supreme court,
though, upheld the conviction by interpreting the statute to require less evidence, and
finding that under the new interpretation there was indeed enough evidence to support
Herndon’s conviction. As the lawyers saw it, this injected a new issue into the case:
Was the anti-insurrection statute, as now construed, consistent with free speech
principles?

Labor defense was well and good as an organizing tool, but Herndon, who had
complained about conditions at the jail in Atlanta, still faced twenty years in a Georgia
prison, where the conditions were likely to be worse. His lawyers of course wanted to
overturn his conviction. Drawing on their connections within the Communist party, they
contacted Carol Weiss King, a radical New York lawyer whose network of professional
friends included Communists and liberals. Through her contacts at Columbia Law
School, King recruited Walter Gellhorn, a rising star of the faculty. Gellhorn went to
Atlanta and got another young lawyer just making his mark in Atlanta legal circles, W.A.
Sutherland, to prepare a petition for rehearing in the Georgia Supreme Court, arguing that
the court had mistakenly applied the Gitlow standard to uphold a conviction for
attempting to incite insurrection, a Schenck-type charge. Returning to New York,
Gellhorn in turn recruited Whitney North Seymour, a Wall Street lawyer who had served
in the Solicitor General’s office during the Hoover administration, who would give the
Communist organizer’s case a respectable face. Seymour and Gellhorn then persuaded
another Columbia law professor, Herbert Wechsler, to join them in preparing Herndon’s

appeal. The final member of the appellate team was Elbert Tuttle, Sutherland’s partner.¹⁰⁷

With an eye on an appeal to the Supreme Court, Geer and Seymour filed the petition for rehearing in the state supreme court, arguing that the statute as it had been construed was unconstitutional and that Herndon was entitled to raise the question then even though he had not raised it earlier because his lawyers could not reasonably have anticipated the new interpretation. The state supreme court denied the petition. It modified its earlier interpretation of the statute by saying, “Force must have been contemplated,” but it would be enough “that it should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce.” Were that interpretation to be unconstitutional, the court continued, Herndon’s lawyers had to have raised their constitutional argument earlier.¹⁰⁸ The court did not explain how they could have anticipated the interpretation at any time before the court itself rendered its decision. … [discussion of Herndon v. Georgia omitted]

Herndon’s lawyers’ next invoked Georgia’s habeas corpus procedure, which allowed those whose convictions had been upheld on direct appeal to file a habeas corpus petition for post-conviction relief. Relief could be granted if the original conviction violated their fundamental rights. The case was assigned to judge Hugh M. Dorsey. Dorsey had become notorious in liberal circles as the prosecutor of Leo Frank, convicted of murdering a young woman and then lynched when the state’s governor commuted his death penalty into a life sentence. Dorsey had capitalized on his role in the Frank case to run successfully for governor, where he pursued moderate policies, including some moderation on issues of race. Elbert Tuttle, who had worked briefly as a subordinate to Dorsey, assured Seymour that Dorsey was fair-minded.¹⁰⁹

Tuttle’s judgment was vindicated when Judge Dorsey held the anti-insurrection statute unconstitutionally vague.¹¹⁰ To the Daily Worker, “The United Front freed Herndon! Onward with the United Front!” The success was short-lived, though. The Georgia Supreme Court quickly reversed Judge Dorsey’s decision, in a short opinion that merely referred to its early decision upholding Herndon’s conviction. But, having


¹⁰⁸ Herndon v. Georgia, 179 Ga. 597, 600 (1934).

¹⁰⁹ Martin, supra note ---, p. 162.

¹¹⁰ Dorsey’s decision became an issue when he sought re-election in 1936. He won a close race against John Hudson, who had led Herndon’s prosecution. Id. pp. 172-73.
addressed the merits, the state supreme court opened up its decision to review by the U.S. Supreme Court.\footnote{Id. pp.164, 165 (quoting Daily Worker); Lowry v. Herndon, 182 Ga. 582 (1936).}

The briefs in the appeal of the habeas corpus decision added nothing new to what had been argued in the first go-round. Seymour argued that the anti-insurrection statute was unconstitutional as construed by the state supreme court because it allowed the jury to convict Herndon without finding the kind of close connection Schenck required between what he said and the possibility that insurrection would actually occur. True, the jury had been instructed properly, but the Georgia Supreme Court evaluated Herndon’s conviction by using a looser standard. Were the proper standard to be applied, Seymour argued, the conviction was not supported by sufficient evidence. The state’s brief suggested that the Court abandon the “clear and present danger” test for the older “bad tendency” test that Schenck had rejected.\footnote{Brief for Appellee, Herndon v. Lowry, Nos. 474 and 475, October Term 1936, pp. 53-55.}

A five-justice majority of the Supreme Court rejected Georgia’s innovative suggestion, and applied Schenck, or at least purported to do so. Saying that the state’s power “to abridge freedom of speech … is the exception, rather than the rule,” Justice Owen Roberts’s largely pedestrian opinion drew the appropriate distinction between Schenck-type cases and Gitlow-type ones and cited Stromberg and De Jonge to show that state laws had to have an “appropriate relation to the safety of the state.” Reading the state court’s decisions, Roberts concluded that the state court had necessarily construed its statute to mean that “one who seeks members for … a party which has the purposes and objects disclosed by the evidence may be found guilty of an attempt to incite insurrection.”\footnote{Herndon v. Lowry, 301 U.S. 242, 258, 255 (1937).}

That construction led Roberts to examine the evidence against Herndon closely. Roberts noted Georgia’s “especial[]” reliance on the booklet on “The Communist Position on the Negro Question,” which he described in detail. Did Herndon incite insurrection by inducing people to join the Communist Party, “by reason of the fact that they agreed to abide by the tenets of the party, some of them lawful, others, as may be assumed, unlawful, in the absence of proof that he brought the unlawful aims to their notice … or that the fantastic program they envisaged was conceived of by any one as more than an ultimate ideal”? As construed, the statute did not allow the judge and jury to “appraise the circumstances and character of the defendant’s utterances or activities as begetting a clear and present danger of forcible obstruction of a particular state function.…” Rather, the jury could convict if it concluded that “any act or utterance” Herndon made “in opposition to the established order … might, in the distant future, eventuate in a combination to offer forcible resistance to the state.” He did not have to “advocate resort to force,” and indeed, Justice Roberts wrote, had Herndon merely “forecast that, as a result of a chain of causation, following his proposed action a group may at some future date … resort to force,” he could be found guilty. The scope of potential liability, as Roberts described it, was enormous: “Every person who attacks
existing conditions, who agitates for a change in the form of government, must take
the risk that, if a jury should be of opinion he ought to have foreseen that his utterances might
contribute in any measure to some future forcible resistance to the existing government,”
he could be convicted. Terms such as “reasonably foretell” and “some time in the
indefinite future” were the hallmarks of a statute that restricted freedom of speech far too
much. Georgia’s statute. “as construed and applied, amounts merely to a dragnet which
may enmesh any one who agitates for a change of government if a jury can be persuaded
that he ought to have foreseen his words would have some effect in the future conduct of
others.”

Justice Roberts and his colleagues in the majority said that they were only
following through on the logic of Schenck and its concern that juries might be enflamed
by local and national passions against radical dissenters who posed no serious threat to
the government’s stability. The Four Horsemen, led by Justice Willis Van Devanter,
disagreed. Their concurrence in De Jonge showed that they had no quarrel with the
principles Justice Roberts articulated. They did think, though, that the evidence showed a
greater threat than the majority acknowledged. They found the program for the Black
Belt, as elaborated in the booklet from which Van Devanter quoted extensively, far more
dangerous than the majority had it. Van Devanter pointed out that the booklet “was
particularly adapted to appeal to negroes” in the South, “for it pictured their condition as
an unhappy one….” As had the Georgia Supreme Court, Justice Van Devanter’s analysis
unconsciously echoed the Communist Party’s understanding: Proposing to create an
independent state in the Black Belt “was nothing short of advising a resort to force and
violence, for all know that such measure could not be effected otherwise.” Given this
threat, the state was entitled to convict Herndon if the jury found that illegal action might
take place “at any time within which [Herndon] might reasonably expect his influence to
continue to be directly operative….”

This might well have been a reasonable interpretation of what “clear and present
danger” meant in the context of the World War I cases, which had, after all, upheld the
convictions in Abrams under circumstances where the likelihood of anyone doing
anything serious was far smaller than the threat in the South during the Depression. The
nation, though, was more than a decade beyond the World War I prosecutions and the
Red Scare of the early 1920s, and “clear and present danger” had come to mean
something more stringent than it had in the early 1920s. Justice Roberts’s opinion
applied the test as it had come to be understood by 1937.

Echoing Frankfurter’s judgment of 1937, historian Glenda Gilmore connects
Herndon v. Lowry to the “switch in time.” Editorial reactions to Herndon v. Lowry

114 Id. at 250, 260-61, 262.
115 Id. at 275, 276, 277 (Van Devanter, J., dissenting).
116 Herndon remained a Communist into the 1940s, and co-edited a Communist-
sponsored cultural magazine, The Negro Quarterly, with Ralph Ellison for a few years.
He then drifted away from the Party, eventually moving from New York to the Midwest
to work in sales. Martin, supra note ---, pp. 212-13.
117 Gilmore, supra note ---, p. 195.
similarly read it against the background of Roosevelt’s Court-packing plan. To the New York Times, the decision showed that the Court’s critics overlooked the fact that the Court stood in the way of “injustice, hysteria and tyranny,” and was “the guardian of civil rights belonging to even the humblest citizen.” The St. Louis Post-Dispatch said that the decision showed that the Court “again stands out in bold relief as an indispensable bulwark of human rights against invasion by unwarranted governmental authority.” For liberal columnist Heywood Broun five-to-four decisions favoring civil liberties were fine, but “they are not good enough to stand as fundamental settlements of pressing problems, since it is not beyond the bounds of experience for a Justice of the Supreme Court to change his mind.”

Unlike the claims about Justice Roberts’s change in position in West Coast Hotel v. Parrish, this one is at least unembarrassed by a question of timing. Roosevelt announced the Court-packing plan on Friday, February 5, 1937; Herndon v. Lowry was argued three days later, on Monday, February 8. And, Justice Roberts’s evaluation of the evidence against Herndon was quite searching and skeptical.

Yet, the association of Herndon v. Lowry with the switch-in-time seems strained. Roosevelt had made it clear that the Court-packing plan was aimed at getting the Court out of the horse-and-buggy age so that it would uphold New Deal initiatives. Whatever Roberts might have thought about the threat Court-packing posed to the Court, he could not reasonably have believed that Roosevelt or anyone else likely to go after the Court’s power cared in the slightest about how the Court dealt with domestic radicals. Herndon v. Lowry is better understood as another step in the Court’s gradual distancing itself from its decisions in the aftermath of the Red Scare of the 1920s. In Schenck Holmes had written, “When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right.” This was simultaneously a suggestion that the constitutional rule should be applied differently in peacetime than in wartime and a prediction about what courts would do. De Jonge and Herndon v. Lowry confirmed both the doctrinal differences between war and peace, and Holmes’s prediction. Perhaps enough justices came to think that they had overreacted in approving too much of what had been done in the 1920s that they chose to employ the framework of those decisions to reach results in Stromberg, De Jonge, and Herndon v. Lowry more tolerant of radical dissent. They may have been encouraged to do so by the fact that, unlike what had happened in the 1920s, the federal government abstained from serious attacks on domestic radicalism in the 1930s. De Jonge and Herndon v. Lowry are undoubtedly different in tone from Gitlow and Whitney, though not on their face different in doctrine. But, the differences did not arise from the dramatic events of early 1937. They had deeper roots.

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118 For a compilation of editorial reactions, see Martin, supra note ---, pp. 185-88 (quoting New York Times p. 188, St. Louis Post-Dispatch p. 189, and Broun p. 187

119 For an extended discussion of the switch in time, see Chapter --- supra.

120 249 U.S. at 52.
By the mid-1930s fascist Italy and Nazi Germany had become metonyms for both liberals and conservatives of the dangers of populist politics uncontrolled by constitutional limitations. The briefs challenging the New Deal compared Roosevelt’s programs disparagingly with those in Soviet Russia, but also with Mussolini’s Italy and Hitler’s Germany. 

Because his ailing wife found the waters at the German spa at Weisbaden helpful, Willis Van Devanter spent two summers there, befriending the aristocratic German Ilsa von Richthofen, sister of the celebrated war ace. Von Richthofen found the rising tide of Nazism distasteful, as did Van Devanter, who warned conservative correspondents to temper their enthusiasm for the Nazis. Liberals saw domestic analogues to Mussolini’s Black Shirts and Hitler’s Brown Shirts in paramilitary groups encouraged, they believed, by conservative businessmen. They worried that Sinclair Lewis’s 1935 novel It Can’t Happen Here could actually be a prediction as well as the warning Lewis intended. Lewis portrayed a populist politician elected to the presidency with promises of economic prosperity, supported during the election campaign and after by the Minute Men, a private military force who, Lewis artfully described as not wearing black or brown or red shirts; the president capitalizes on his popular support to establish martial law, imprison his enemies, and change the Constitution.121

Lewis’s foreign models were Mussolini and Hitler, but his domestic one was Louisiana’s Huey Long, who once said, “Down in Louisiana we have no dictatorship, but what I call a closer response to the will of the people.” Elected governor in 1928 at age thirty-four, Long built a powerful political machine by promising to provide free school books, build roads and bridges, and lower the cost of natural gas to consumers—and delivering, albeit with more than a little corruption, election fraud, and intimidation of his opposition. Long was elected to the U.S. Senate in 1930, but did not take his seat until 1932 so that he could maintain his control over local politics, and even after he left for Washington he dominated Louisiana politics through his distinctly second-in-command, Governor O.K. Allen. Long created a “Share the Wealth Society” to promote a reasonably detailed program of wealth redistribution through ceilings on incomes and wealth, a guaranteed income and much more. For Long Share the Wealth was the vehicle he could ride to the presidency. Franklin Roosevelt thwarted Long’s national ambitions by supporting Long’s opponents in Louisiana, and Long’s career ended with his assassination in 1935.122


Much of Long’s program consisted of rewarding his friends and punishing his enemies, standard practices in American politics, and the statutes the Louisiana legislature enacted under his direction rarely raised serious constitutional problems. ... Long’s friends and enemies could be found throughout the state, and in many businesses. When he applied ordinary politics to the press, Long ran into difficulty. The state’s largest newspapers unanimously opposed Long’s machine; its smaller ones were divided, some providing editorial support for Long and his allies. Long reciprocated with intensely personal attacks on leading newspaper publishers, one of which became a charge in unsuccessful impeachment proceedings against him in 1929. Long’s speeches, and stories in his own newspaper the Louisiana Progress, regularly called the state’s newspaper “liars” owned by “plutocra[ts]” with a “rule-or-ruin” outlook. The newspaper attacks increased when Long presented a program of tax increases to fund public projects. Calling the proposal “my own stuff,” in 1934 Long, by then a Senator, tried to punish his enemies in the press by including in the larger tax package a 2% tax on newspaper advertising revenues – applicable only to papers with circulations greater than 20,000. As Long said, “There was only one newspaper in the State that had not joined up with the gang opposing me and that was ‘The Lake Charles American-Press.’ Well, 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.” “Lying newspapers,” Long said, should have to pay for their lying,” a sentiment echoed in a memorandum legislators signed by Long and his successor Oscar Allen referring to the “lying newspapers” and describing the tax as “a tax on lying 2 [cents] a lie.” Opponents described the tax as a “warning to the smaller weeklies that if they do not get in line, they will be clubbed out of existence.”

Having described the tax as a “step ... toward the destruction of freedom of the press” and punishment of newspapers “for their failure to ‘get right’ with the state administration,” it was no surprise when the state’s large newspapers went to court, challenging the tax as a violation of their rights. They filed suit in federal court, largely because they were properly skeptical that they would obtain a fair hearing in Louisiana courts dominated by Long appointees. The newspapers’ position had two components:


123 Cortner, supra note ---, pp. 25-32 (describing the personal hostility Long expressed toward some publishers, and his impeachment), 48-49 (quoting Long’s speeches and stories in the Progress), 87 (quoting an opponent on “clubbing”); “Long Pushes Bill for Tax on Press,” New York Times, July 4, 1934, p. 10; Long speech and memorandum quoted in Appellees’ Brief, Grosjean v. American Press Co., No 303, October Term 1935. The 1934 legislation was a sequel to an effort by Long in 1930 to impose a 15% on the revenues newspapers received from advertising. The legislation failed after a substantial campaign by local and national newspapers against it. See Cortner, supra, pp. 1-5.

124 Cortner, supra note ---, pp. 90-91 (quoting newspaper editorials). Formally, the lawsuit was against Alice Lee Grosjean, Louisiana’s Supervisor of Public Accounts, with
Any tax on newspapers as such violated the free press guarantee, and imposing a tax on large newspapers but not small ones violated the Equal Protection Clause. Uncertain about the strength of the pure free press argument, in the lower court the newspapers’ lawyers emphasized the equal protection claim. Charles Rivet, a close legal adviser to Long, was appointed special assistant attorney general to defend the newspaper tax. Rivet compiled affidavits from small-town publishers who described their difficulties in obtaining sufficient advertising to survive, which, Rivet contended, would justify a tax on large newspapers whose effect would be to improve the competitive position of smaller ones. The federal court hearing the case was composed of Wayne G. Borah, a Republican appointed to the New Orleans district court in 1928, Ben Dawkins, a Democrat appointed by Calvin Coolidge in 1924, and circuit court judge Rufus Foster, a long-serving trial judge who had been promoted to the court of appeals in 1925. The three-judge court first issued a temporary injunction against collecting the tax, and then permanently enjoined its collection with an opinion that stated in quite conclusory terms that the tax was “arbitrary” and could not be justified by “difference[s] between the urban and metropolitan press.” Both types of newspapers were “doing precisely the same business.”

Louisiana appealed to the Supreme Court. It responded to the newspapers’ arguments with a number of technical objections, but focused on several central claims. It defended the legislation as an effort to preserve what it called the “country” newspapers, the small newspapers that were being driven under by the larger ones, again relying on the affidavits to show that the country papers needed to improve their competitive position. And, on the constitutional claim, the state argued that the First Amendment did not apply to the states; even if it did, corporations could not claim rights under the First Amendment; and even if they could, the First Amendment barred nothing more than prior restraints on publication enforced by censorship boards or, as in Near, by injunctions against publication.

The lower court had enjoined the enforcement of the tax because it discriminated between large and smaller newspapers, and initially Justice George Sutherland prepared an opinion agreeing that the discrimination was unconstitutional. Justice Cardozo saw in this analysis the kinds of flaws that infected the Court’s approach to economic regulation, and drafted a concurrence that recast the equal protection claim in First Amendment terms: A “tax discriminating against newspapers in favor of others, and discriminating against some newspapers in favor of others, is an unconstitutional abridgment of the responsibility for revenue collection (and widely rumored to be Long’s mistress). See Cortner, supra, pp. 33-34.

125 Cortner, supra note ---, pp. 122-24 (described Rivet), 126-27 (describing one of the affidavits); American Press Co. v. Grosjean, 10 F.Supp. 161 (D.C. La. 1935). Cortner, supra note ---, pp. 100-4, finds the origins of the newspapers’ strategy in a memorandum written before litigation was begun by Eberhard Deutsch, general counsel to the New Orleans Item. On the litigation strategy, see id., pp. 105-7.

126 The Supreme Court heard argument in the case in January, 1936, several months after Long’s assassination.
freedom of the press.” Incorporating into his draft much of the historical analysis developed by Eberhard Deutsch in his brief for the newspapers, Cardozo described how newspaper taxes had historically been used to suppress disagreement with those holding the power to tax. Noting the newspapers’ allegations that the tax had been adopted precisely to punish Long’s opponents, Cardozo abjured an inquiry into legislative motive, but used the courts’ “incapacity” to examine that motive as the foundation for a broad rule: “[T]hought freely communicated is the indispensable condition of intelligent experimentation, the one test of its validity. The duty of the courts to ward off encroachments upon the freedom of the press is thus proportionate to the danger and its insidious approaches.”

Cardozo’s opinion led Sutherland to rewrite his opinion. After disposing of the technical arguments, Justice George Sutherland used the case as an opportunity for a forceful and convincing essay on constitutional history, adopting the core of Cardozo’s analysis. Justice Sutherland began by describing the newspapers’ First Amendment claim as “present[ing] a question of the utmost gravity and importance,” because it “goes to the heart of a natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interests.” Reviewing the Court’s cases, Justice Sutherland cited the Powell case, one of the Scottsboro cases, to show that the Court treated “certain fundamental rights, safeguarded by the first eight amendments against federal action, … [as] safeguarded against state action” by the Fourteenth Amendment. “That freedom of speech and of the press of [this] fundamental character … has likewise been settled,” Justice Sutherland wrote, citing Gitlow and Near.

Justice Sutherland dealt with the state’s argument that corporations could not claim constitutional rights under the Fourteenth Amendment by calling it “only partly true,” citing precedents that corporations could not indeed claim rights under the Amendment’s Privileges and Immunities Clause but could do so under the Due Process and Equal Protection Clauses. Then he launched into his historical examination. “The history is a long one,” Sutherland wrote, “but, for present purposes, it may be greatly abbreviated.” The Constitution’s framers knew that their adversaries in Great Britain had “persistent[ly] sought to “abridge the free expression of any opinion which seemed to criticize or exhibit in an unfavorable light, however truly, the agencies and operations of the government.” The first manifestation of opposition to these efforts was the rule against prior restraints, but “mere exemption from previous censorship was soon recognized as too narrow a view of the liberty of the press.” Beginning in 1712 the British government sought to tax newspapers, and British and American friends of liberty persistently resisted such taxes. As Justice Sutherland put it, the American Revolution “really began when, in 1765, [the British] government sent stamps for newspaper duties to the American colonies.” These taxes were condemned “as ‘taxes on knowledge,’” which showed that opposition to such taxes aimed “to establish and preserve the right of the English people to full information in respect of the doings or misdoings of their


And, when the Massachusetts state legislature imposed taxes on newspapers in 1785 and 1786, resistance forced almost immediate repeal. The Constitution’s framers knew all this, Justice Sutherland wrote. In light of this history, Justice Sutherland found it “impossible to concede that … the framers of [the First Amendment] intended to adopt merely the narrow view” that freedom of the press “consisted only in immunity from previous censorship.” Taxes on newspapers were as reviled as censorship was.

The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity, and, since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the 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. To allow it to be fettered is to fetter ourselves.

As this peroration suggests, the newspapers’ claim had to be carefully limited. Newspapers could not be “immune from any of the ordinary forms of taxation,” but Long’s tax was “not an ordinary form of tax, but one single in kind, with a long history of hostile misuse. …” Justice Sutherland observed that no state other than Louisiana had ever tried to impose a tax on newspapers as such. The Long regime provided a subtext to much of what Justice Sutherland wrote. The subtext almost surfaced when Justice Sutherland final substantive paragraph called the “form” of the tax “suspicious” because it was not measured by the volume of the advertisements placed but by the newspapers’ circulation, “with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers.”

Justice Sutherland’s revised opinion induced Justice Cardozo to withdraw his proposed concurrence. Notably, none of his colleagues appears to have objected to Justice Sutherland’s passing reference to natural rights. Grenville Clark, a prominent

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129 Id. pp. 245-46, 247.
130 Id. p. 250.
131 Id. pp. 250, 251. Long had other weapons to discipline his opponents in the press; the most important was the state’s power to choose which newspapers to favor with its contracts for publishing public records and court notices. See Magliocca, supra note --, at p. 19 (quoting newspaper editor Hodding Carter: Publishing such records “meant the difference between survival and failure.”).
liberal businessman and frequent commentator on constitutional law, linked *Grosjean* with the libertarian *Pierce v. Society of Sisters*, recharacterizing the latter as a case involving religious liberty. Clark also cautioned that, despite its “strong legal position,” the press could not “rely solely on legal and constitutional rights.” It had to “depend on the support of public opinion, and consequently the press must earn and justify that support by keeping itself independent, clean and responsible.”132 The linkage of *Grosjean* with *Meyer* shows how conservative constitutional theory might sometimes converge with a Progressive constitutional theory founded on fundamentally different premises. The insistence on press responsibility through self-discipline drew on the ideals of professionalism that Progressives promoted in journalism as in every other profession.

The shift from an equal protection theory of the case to a First Amendment one raised questions about the reach of the principle announced in *Grosjean*. That the case arose in Huey Long’s Louisiana meant that the principle might apply to taxes – and perhaps regulations – that were intentionally aimed at political enemies, or perhaps a bit more broadly intentionally aimed at newspapers as such. The case might have been limited to taxes that were “discriminatory or excessive.”133 It might have stood for an even broader principle, that taxes – and perhaps regulations – that increased the cost of operating newspapers substantially were constitutionally questionable.134

Broad readings, though, ran up against the realities of the modern administrative state, in which newspapers as businesses were subject to a wide range of taxes and regulations. *Time* magazine celebrated the role Deutsch played in the litigation, but there was another player on the scene. The American Newspaper Publishers’ Association had supported the challenge to the Louisiana tax, and was a stanch opponent of the National Industrial Recovery Act and then the National Labor Relations Act. *The New Republic* was “left with more than a little feeling of nausea” when speakers at the ANPA’s annual meeting in 1936 “pointed with pride” to the *Grosjean* decision while “acting, not as journalists but as wealthy business men” in their vociferous opposition to the New Deal. “[T]he publishers talk nobly about the ideals of their profession,” the editorial concluded, “but they never expel anybody for degrading those ideals.”135


133 For this suggestion, see Case Note, Constitutional Law – Legislative Powers, 49 Harvard Law Review 998 (1936).

134 For a suggestion along these lines, see Eberhard P. Deutsch, “Freedom of the Press and Mails,” 36 Michigan Law Review 703 (1938) (citing *Grosjean* to support the argument that denying second-class mailing privileges to the press – that is, charging them the same rate as ordinary mail – might be an abridgement of press freedom).

Within a year the constitutional revolution of 1937 resolved the question. [discussion omitted] …

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The wartime cases showed that the justices understood political radicalism even when it took the form of an objection to wars in which the United States was engaged. The clear-and-present-danger test was offered as a way of accommodating such objections without undermining the war effort, and as World War I receded the Court’s liberals, and eventually the entire Court, were willing to look on discussions of revolution and violence with some care. In two important cases radical pacifism rooted in religion rather than politics gave the Hughes Court more pause.

The Great War brought home the enormous human and material costs of modern warfare. The public and its leaders responded with two kinds of policy, seemingly in tension but perhaps mutually supporting. In 1928 national foreign offices negotiated the Kellogg-Briand Pact, which renounced war as an instrument of national policy except in self-defense. The Pact was widely regarded as toothless, but it did state an ideal and an aspiration. Deterrence in the form of military preparedness and collective security was the alternative. By building up armed forces, the world’s nations might produce a world without war, if preparedness and deterrence worked as planned. Billy Mitchell advocated preparedness by a large expansion of the U.S. air force, a controversial position within the U.S. military. The War Department promoted preparedness by supporting the expansion of the program for training officers in peacetime, the Reserve Officers Training Corps (ROTC), which had been created in 1916 to consolidate and expand existing programs for training officers in civilian colleges and universities.136

Historic peace churches such as the Quakers and Mennonites were well-established in post-War America. Affiliated with an invigorated international peace movement, the American peace movement made inroads in more mainline churches in the 1920s and 1930s, developing a “Churches’ Plea Against War and the War System,” endorsed by more than 150 well-known ministers.137 Traditionally the historic peace churches’ members had been exempted from programs of compulsory military service. Peace activists in the 1920s sought to expand the exemption system to make it clear that all who had religiously based objections to military service were exempt as well. A slogan seen in 1921 captured the objection to ROTC: “The only way to abolish War is to abolish preparations for War.”138

The peace movement was particularly active on college campuses, because many maintained ROTC programs. The Morrill Act of 1862 the Morrill Act of 1862 gave states money for “land-grant” universities “where the leading object shall be, without

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136 citations
137 For an overview of the peace movement in the United States during this period, see Charles Chatfield, For Peace and Justice: Pacifism in America, 1914-1941 (Knoxville: University of Tennessee Press, 1971), parts two and three. The “Churches’ Plea” is discussed in id., pp. 125-26.
138 Id., p. 143 (quoting a slogan used in a disarmament parade in New York, 1921).
excluding other scientific studies and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts.” In 1923 Wisconsin became the first state to make participation in ROTC at its university voluntary rather than compulsory. A national organization, the Committee on Militarism in Education, began a program of public education in 1926, and immediately added agitation for removal of ROTC from colleges and universities. Faculties at several universities adopted resolutions urging that ROTC programs be made voluntary.

Because it at least nominally gave the imprimatur of national policy to the renunciation of war, the Kellogg-Briand Pact spurred further activism. For example, in 1931 the Southern California Conference of the Methodist Episcopal Church by an “overwhelming” vote cited the Pact in petitioning Congress to exempt from military service members of that Church who “conscientiously believe that participation in war is a denial of their supreme allegiance to Jesus Christ.” At its meeting the next year, the Church’s governing body formally modified its teachings to include a statement that it was the churches’ “duty … to give moral support to those individuals who hold conscientious scruples against participation in military training or military service,” specifically mentioning its desire for exemption from military training at “all educational institutions.” The Southern California Conference focused specifically on ROTC programs in a 1933 resolution in “pledg[ing its] moral and official backing” for all church members who sought exemption from participation in ROTC programs at the state universities in California and Arizona.

The peace movement did not go unanswered. The Long Beach branch of the American Legion “flay[ed]” the Southern California Conference’s resolution, with its head saying that the decision “was the result of Communist activities among the young people.” The peace movement’s opponents regularly sought to link the movement and specific activists to Communism and political radicalism. When some members of Congress introduced bills that would have eliminated compulsory ROTC courses, David Kinley, the president of the University of Illinois, mobilized the opposition. He thwarted efforts to bring pacifist speakers to campus and chastised ministers affiliated with religious organizations on campus for failing to ask him before they signed on to the program of the Committee on Militarism in Education. Responding to the “war on military training,” in 1929 Sveinbjorn Johnson, general counsel to Kinley’s university, wrote a detailed defense of compulsory military training. Johnson immigrated to the United States with his parents from Iceland, settled in North Dakota and eventually became a justice on that state’s supreme court, where he served for just short of four


years before resigning to become general counsel and a law professor at the University of Illinois. Johnson emphasized the importance of preparedness: “Good sense suggests that the other party to the controversy, knowing the excellent state of our preparedness, will somehow find it easier to treat with us in the spirit of compromise and accommodation.” The “ladies and gentlemen” who were “agitat[ng]” for the elimination of compulsory ROTC courses, Johnson wrote, should “pause and give heed to the rather elementary idea” that Congress had required land-grant universities to make ROTC compulsory. At Kinley’s insistence, Johnson asked Attorney General William Mitchell for an opinion on whether the Morrill Act required that ROTC training be compulsory. Unfortunately for Kinley, Mitchell said that it did not.142

The Court’s difficulties with the cases involving radical religious views were compounded because, though the religious pacifists attracted a fair amount of sympathetic attention in the press and even some on the Court, the cases arose in doctrinal settings quite unfavorable to the religious pacifists. One involved congressional regulation of naturalization, where the Court had said since the outset that Congress had plenary power unrestricted by substantive constitutional provisions such as the Free Exercise Clause. The other involved state efforts, encouraged by Congress, to provide personnel for the armed forces by imposing conditions on attendance at public universities. The states’ general police powers intersected with their power to subsidize education on the terms they chose. And, finally, in contrast to free speech doctrine, doctrine and theorizing about the Free Exercise Clause was rudimentary in the 1930s. The Court’s liberals were mildly sympathetic to the pacifists’ claims, but ended up dissenting in one case, concurring in the other.

Constitutional doctrine about free exercise derived – perhaps was confined to – cases arising from Congress’s efforts to suppress the practice of polygamy by Mormons in the territory of Utah. The government prosecuted George Reynolds, a Mormon leader who was Brigham Young’s secretary, for violating a federal statute banning polygamy. Representing Reynolds in the Supreme Court, George W. Biddle, a prominent Philadelphia lawyer, argued that the anti-bigamy statute was unconstitutional as applied to those who, like Reynolds, had a religion-inspired duty to engage in polygamy. A unanimous Court rejected the argument in an opinion by Chief Justice Morrison Waite. The analysis was cursory but definitive: “Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order. … Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and, in effect, to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.”143


Nothing in constitutional doctrine had changed since that 1878 decision. When the Supreme Court upheld the World War I military draft, which exempted religious objectors from the duty to serve in the military “in a strict sense” but authorized the president to require that they perform “service of a non-combatant character,” a unanimous Court dismissed an objection to the alternative service requirement with the back of its hand: “[W]e pass without anything but statement the proposition that … an interference with the free exercise … resulted from the exemption clauses of the act …, because we think its unsoundness is too apparent to require us to do more.”

The relevant law on naturalization was more recent, though it had old roots. The Constitution gave Congress the power to enact rules on naturalization. The Court characterized that power as one inherent in sovereignty, which in the Court’s eyes gave it some special status. The Naturalization Act of 1906 required those seeking naturalization to swear an oath to “support and defend the Constitution and laws of the United States against all enemies.” The Department of Labor was charged with developing the rules for administering the oath. It produced a questionnaire that asked applicants for naturalization for information about themselves – date and location of birth, for example. Probing whether the applicant’s assertion that he or she would support and defend the Constitution, the questionnaire asked applicants if they were “willing to take up arms in defense of this country.”

In 1929 the Supreme Court decided the case of Rosika Schwimmer, a world-renowned feminist and pacifist who settled in the United States in 1921 after leaving her native Hungary for London and then Chicago. Forty-nine years old when she applied for naturalization, Schwimmer was hardly likely to be asked to serve in the armed forces, but the lower courts, charged with determining whether an applicant fulfilled the Naturalization Act’s requirements, found that her principled unwillingness to take up arms disqualified her from naturalization. Upholding that decision, Justice Pierce Butler described “the duty of citizens by force of arms to defend our government” as “a fundamental principle of the Constitution” – although the closest the Constitution comes to stating that principle is the presidential oath to “preserve, protect, and defend the Constitution,” obviously not a requirement for all citizens and indeed an oath that naturalized citizens are barred by the Constitution from swearing. Pacifists, even those like Schwimmer who would never serve in the armed forces, could “influence others” to become pacifists and thereby “lessen [their] willingness to discharge their duty to bear arms in the country’s defense…” Schwimmer’s statements about how strong her pacifist beliefs were did not, according to Justice Butler, dispel the risk that her speeches would lead some people to resist military service, which was enough to show that she had failed to demonstrate that “her opinions and beliefs would not prevent or impair the true faith and allegiance required” by the Naturalization Act. In form the decision merely interpreted the Naturalization Act, but it plainly had constitutional overtones, as the implicit reference to Schenck suggested.

Justice Holmes, dissenting, noted that the Court’s analysis seemed linked to its position in Schenck, but, he wrote, the case was different because Schwimmer’s “position and motives are wholly different from those of Schenck.” In a sentence that entered the canon of free speech law— but not the law of free exercise— Holmes wrote, “if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought— not free thought for those who agree with us but freedom for the thought that we hate.” That principle, he believed, should apply to admission to citizenship as well as to “life within this country.” Sardonically, Justice Holmes “suggest[ed] that the Quakers have done their share to make the country what it is, …and that I had not supposed hitherto that we regretted our inability to expel them because they believed more than some of us do in the teachings of the Sermon on the Mount.”

Douglas Macintosh and Marie Brand almost certainly did believe more than Justice Holmes did in the Sermon on the Mount. Born in Canada in 1977, Macintosh came to the United States permanently in 1909, served in the Canadian and U.S. armies as a chaplain, and became the Dwight Professor of Theology at the Yale Divinity School, holding the chair that had been created in 1822 when the Divinity School became a separate part of Yale University. He was a Baptist theologian, author of works titled The Problem of Knowledge and Theology as an Empirical Science, and a pamphlet published in 1918, “God in a World at War.” Macintosh applied for naturalization in 1925. Macintosh parsed the question, “If necessary, are you willing to take up arms in defense of this country?,” carefully. “Yes,” he wrote, “but I should want to be free to judge as to the necessity.” In speeches he elaborated that he would not “support military force in a war which he might believe to be morally wrong,” such as one in violation of the Kellogg-Briand Pact. He thought “it would be positively immoral to give a blanket promise beforehand to support any and every future war in which one’s country might engage.” Bland was also a Canadian, who had served as a nurse for U.S. soldiers during the World War. Bland wrote into the oath that she would bear arms “as far as my conscience as a Christian allows.”

The Court of Appeals for the Second Circuit rejected the view that the Schwimmer decision required the rejection of Macintosh’s and Bland’s applications. The panel was a distinguished one, with Learned Hand and Charles Swan on it, along with Martin Manton, as yet untainted by the charges that ultimately led to his conviction for taking bribes. Judge Manton wrote the Court’s opinions in both cases, with the Macintosh case providing the more extensive analysis. He relied heavily on the fact that the World War I draft allowed conscientious objectors to perform alternative service, such as Macintosh’s work as an army chaplain, to show that “a person does not lack

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146 Id. at 654-55 (Holmes, J., dissenting). Justice Brandeis joined this dissent; Justice Edward Sanford dissented as well, simply noting his agreement with the lower court’s analysis.

147 Macintosh v. United States, 42 F.2d 845, 846 (2nd Cir. 1930); Brief for Respondent, United States v. Macintosh, No. 504, October Term 1930, p. 4 n. 1; “Declares Patriot May Renounce War,” New York Times, July 1, 1929, p. 23; Bland v. United States, 42 F.2d 842 (2nd Cir. 1930).
nationalism or affection for his government if, by reason of a conscientious religious scruple, he requests being excused from bearing arms.” Macintosh’s willingness to bear arms in what he regarded as justified wars and to perform alternative service in other wars showed that his views would not lead to obstruction of any war efforts, which distinguished his case from Schwimmer’s. Judge Manton observed that Schwimmer was “an absolute atheist,” and did not ground her objection to war on religious belief. Macintosh’s insistence that he would not bear arms in an “unjustified war” was, for Judge Manton, “akin to … having conscientious scruples against all wars.”

Noting “the large alien population” living in the Second Circuit and relying heavily on Schwimmer, Solicitor General Thomas Thacher asked the Supreme Court to review the Macintosh case. Commensurate with his social position, Macintosh had a distinguished set of lawyers. Charles Clark, the dean of the Law School at Yale, was on the team, which was led by John W. Davis, the Democratic candidate for the presidency in 1924 who as Solicitor General in 1917 had argued the selective service cases for the government – but, Davis later said, there was no inconsistency between the views he had presented in 1917 and the position he took on Macintosh’s behalf. Davis’s brief opposing review was unsurprisingly devoted to showing that Schwimmer was different. It noted that there the government had expressly observed that “refusal to perform military service on account of religious scruples is not involved in this case.” Schwimmer was an absolute pacifist, Macintosh was willing to take up arms in a justified war. Davis called Macintosh’s “attitude … that of every intelligent Christian man or woman.” Davis denied that Congress had required “that an alien must be willing as a condition of naturalization to promise in advance to bear arms in any and all future wars even against his conscientious religious scruples,” pointing out that the question was inserted into the questionnaire by the Department of Labor and was not part of the Naturalization Act itself.

In addition to relying heavily on Schwimmer, from which Macintosh’s case differed only “superficial[ly],” the government’s brief on the merits focused on two points. Macintosh was not in fact opposed to war as such, and so could not qualify as a conscientious objector under the exemption Congress had provided in the Selective Service Act. Rather, he reserved the right to decide for himself whether a specific war was justified. But, if other applicants for naturalization did the same, “the constitutional power of Congress to declare war and raise and support armies would become impotent.” That consequence required the Court to read the Naturalization Act’s requirement that applicants for naturalization “support and defend the Constitution” to authorize the question about bearing arms and to allow lower courts to infer from answers like

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148 Macintosh v. United States, 42 F.2d. at 847, 848.

Macintosh’s that the applicant could not satisfy the statutory requirement – that, as the government put it, Macintosh was trying to take the oath with “mental reservations.”

With four appendices totally more than twenty pages detailing the long tradition of exempting those with religious objections from various forms of military service, Davis’s brief argued that only an express decision by Congress, not some interpolation by the Department of Labor, could authorize denial of naturalization to people like Macintosh. It rejected the government’s assertion that Macintosh was trying to take the oath with mental reservations; all he was doing, the brief said, was taking the oath as he understood it, as requiring only that he be willing to bear arms in wars that he regarded as justified. Nor could anyone properly infer from Macintosh’s conscientious objection to certain wars that he was not attached to the principles of the Constitution. “The very exaggeration” of the statement that Macintosh’s position would render the government impotent “robs it of all force,” Davis wrote. The brief also contained a long section asserting that the Constitution did not require those with conscientious objections to bear arms, a proposition that Davis appears to have believed supported the proposition that Macintosh could take an oath to uphold the Constitution even if he had conscientious objections to military service.

The section’s conclusion took a sharp turn, though, in saying that “the constitutional protection of religious freedom does embrace conscientious scruples against bearing arms in war,” a conclusion that implied that the statutory provision for alternative service was in fact constitutionally required. The argument was not entirely clear and was buried in some overheated rhetoric – “We hesitate to believe that the Government seriously contends that all Christian citizens should be reduced to conscienceless serfs” – but seems to have been that because citizens had a constitutional right to exemption from bearing arms on grounds of religious conscience, applicants for citizenship could not be denied the opportunity to become citizens merely because they held views that the government would have to accommodate were they citizens. This version of the argument became a bit clearer, though not much, in a section contending that “[a] promise to forego a privilege enjoyed by a native born citizen under the Constitution … cannot be exacted of an alien as a condition of his naturalization.” Surely it would be impermissible, Davis argued, to make it a condition of naturalization that the application agree in advance to waive his “right of free speech or … the right to be secure against unreasonable searches,” and waiving the right to conscientious objection was indistinguishable in principle. After distinguishing Schwimmer on the ground that her objection to bearing arms was not rooted in religious belief and that Macintosh unlike Schwimmer was willing to perform – indeed, had performed – alternative service, the brief concluded, “Induction into American citizenship is a serious business, not a mere ceremony…. If the courts are to be guided solely by questionnaires [sic] devised in the

150 Brief for the United States, United States v. Macintosh, No. 504, October Term 1930, pp. 20, 11, 15.

151 Brief for Respondent, United States v. Macintosh, No. 504, October Term 1930, p. 19.
Department of Labor, the whole process is at once degraded from a judicial inquiry to the base level of a bureaucratic ritual.”

As Justice Holmes had suggested, Quakers were “keenly interested” in Macintosh’s case, and the American Friends Service Committee, for in 1917 to represent Quakers during the World War, filed a brief supporting Macintosh. The brief’s authors were Charles Howland and Richard Hale, elite lawyers from New York and Boston who were deeply interested in public affairs. Their rambling and discursive brief contrasted the Prussian “concept” of “the rigorous sovereignty of the State,” with “English and American ideas of liberty and the practices of democratic governments.” The statement that “the willingness to bear arms must be ‘unqualified’” was made by “the voice” of the lawyer who argued the government’s case, “but the hand us the Iron Hand of Prussian history.” According to Howland and Hale, “The ultimate source of law-abidingness is the respect of citizens for the law, and respect for law … depends in large extent on the respect which law itself exhibits towards the foundations of that respect – the convictions of the citizens.” The brief included seven pages of example after example of domestic criticisms of specific wars, showing how wrong it was to think that those who offered such criticism were “unfit material for the citizenship of a self-governing Commonwealth.” History showed that the Naturalization Act should be construed as not authorizing the question that trapped Macintosh. The brief concluded, “The Court should not declare the oath or affirmation to mean ‘I promise to render unto Caesar the things that are God’s.’”

Describing naturalization as a privilege, Justice Sutherland wrote that the case was “ruled in principle” by Schwimmer. Reverting to the kind of rhetoric he had used as a Senator and in his extrajudicial writing, Sutherland declaimed, “There are few finer or more exalted sentiments than that which finds expression in opposition to war. Peace is a sweet and holy thing, and was is a hateful and an abominable thing, to be avoided by any sacrifice or concession that a free people can make.” But, he continued, “thus far, mankind has been unable to devise any method of indefinitely prolonging the one or of entirely abolishing the other…. This seeming irrelevancy was followed by another seemingly irrelevant essay on the breadth of the war power under the Constitution: As the Court’s cases showed, Congress could limit free speech in wartime to ensure that “the morale of the people and the spirit of the army may not be broken,” could authorize the execution of spies and deserters by military trials, could regulate food prices and take over railroads. From the breadth of this power, it “necessarily” followed that exemption from military service depended on congressional choice. Davis’s claim on Macintosh’s behalf that the statutory exemption for conscientious objectors was constitutionally

\[152\] Id. pp. 34, 36, 39, 42, 51.

required was, to Justice Sutherland and his colleagues, “astonishing.” The exemption “comes not from the Constitution, but from acts of Congress.”

With this background, Justice Sutherland turned to Macintosh’s case. True, “We are a Christian people,” but “also, we are a nation with the duty to survive, a nation whose Constitution contemplates war as well as peace.” Such a nation’s “government must go forward upon the assumption … that unqualified allegiance to the nation and submission and obedience to the laws of the land … are not inconsistent with the will of God.” But, Sutherland continued, Macintosh was “unwilling to rely, as every native-born citizen is obliged to do, upon the probable continuance by Congress” of the practice of exempting conscientious objectors from military service.” Justice Sutherland raised the prospect of applicants for naturalization picking and choosing among the nation’s laws and agreeing to obey them only if they concluded that the laws were morally justified. In effect, Justice Sutherland concluded, Macintosh wanted to rewrite rather than take the oath of allegiance, and “[i]t is not within the province of the courts to make bargains with those who seek naturalization.”

Chief Justice Hughes wrote an impassioned dissent, in which he was joined by Justices Holmes, Brandeis, and Stone. The Chief Justice’s personal religious commitments may have given him a personal appreciation of how religious objections to war fit into Macintosh’s outlook on the world. Paring away the nationalist rhetoric in Justice Sutherland’s opinion, Hughes made it clear that the only issue in the case was whether in insisting that applicants for naturalization take an oath to uphold the Constitution, Congress had actually insisted that conscientious objectors – who it exempted from military service – swear unequivocally to bear arms. No such requirement was “express,” and the Chief Justice thought that none should be implied, “because such a construction is directly opposed to the spirit of our institutions and to the historic practice of the Congress.” The opinion pointed out that Congress had in fact made it a condition of naturalization that applicants not hold some beliefs – anarchism, for example – but had not included objection to war on the list. It also made the quite effective point that the oath Macintosh would have to swear – to uphold the Constitution and defend the United States against all enemies – was the same as the oath Congress required all civil officers to swear, and no one contended that conscientious objectors were disqualified from public office because they could not take that oath. All this was supported by the consistent practice of exempting conscientious objectors from military service, a practice that showed that general language, and indeed the nation’s ability to defend itself, had never been understood to require that those with religious objections to war take up arms to defend the country. The courts should not let the “departmental zeal” of the Department of Labor “outrun the authority conferred by statute. If such a promise is to

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154 United States v. Macintosh, 283 U.S. 695, 620, 621, 623-24 (1931). Bland’s petition for rehearing relied on traditionalist accounts of women’s inherent characters in asserting that women who were conscientious objectors were “relieved from combatant military service not by a Congressional act of grace but by virtue of the virile spirit of the manhood of the nation…. ” “Miss Bland Asks for a Rehearing,” New York Times, June 20, 1931, p. 4 (quoting petition for rehearing).

155 Id. at 625-26.
be demanded, contrary to principles which have been respected as fundamental, the Congress should exact it in unequivocal terms....” As Hughes read the statute in light of historic practices, Congress had not done so.\textsuperscript{156}

Defending the Court’s decision, retired Harvard law professor Eugene Wambaugh observed that Macintosh “has had much sympathy,” although he thought the naturalization statute was properly read in Macintosh as in Schwimmer “to deny the thorough attachment of a person whose willingness to participate is merely conditional.” But, many prominent “preachers assail[ed]” the Court’s decision. In his Sunday sermon at Riverside Church, the prominent New York minister Harry Emerson Fosdick “denounced” the decision “as a violation of Christian principles.” The majority’s decision “announces in a particularly obnoxious form the doctrine of the nation’s right to conscript conscience,” Fosdick told his audience. Perhaps unconsciously adverting to Justice Holmes’s observation about the Sermon on the Mount, another minister said that “[i]f Jesus were here today and applied for American citizenship, he would be politely informed that he was not eligible.” Yet another sounded a nativist tone in criticizing the Court: “In the past we have opened our doors to a good deal of the riffraff from Europe.... But a man who follows his conscience, a man who is considered worthy to train young men for the ministry, a woman who risked her life helping our own wounded soldiers in France, these are undesirable citizens.” The Reverend Sloan Coffin, head of the Union Theological Seminary in New York, called the decision “infamous.” Later in 1931 forty-nine religious leaders signed a manifesto agreeing with Macintosh’s position that each person had a right to “weigh issues before fighting.” Theologians also promoted a “Declaration” to be made by citizens who did not have to take a naturalization oath, that they would not “accept an act of Congress as the final interpretation of the will of God.” Congress considered legislation aimed at overturning the Macintosh decision, but it did not. The Supreme Court overruled Schwimmer, Macintosh, and Bland in 1946.\textsuperscript{157} ... [discussion of Hamilton v. Board of Regents omitted]

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At the end of the 1930 Term journalist R.L. Duffus offered an evaluation of Chief Justice Hughes’s first sixteen months on the bench. Framing his discussion by referring to the criticisms Progressives like Senators Robert La Follette and George Norris had made of Hughes during the confirmation process, Duffus took some satisfaction in pointing out that there had really be “no reason why ‘liberal’ opinions should not have been expected of him,” and offered the Stromberg case as an example of Hughes’s liberalism. In Hughes’s dissent in Macintosh “[o]ne easily recognizes the voice of the

\textsuperscript{156} Id. at 630, 627-28 (Hughes, C.J., dissenting).

clergyman’s son with an ingrained conviction of the rights of private conscience.” Hughes was “vitally interested in preserving the old constitutional guarantees and in applying them to the conditions of a changing society.” This “naturally” aligned him with Justices Holmes, Brandeis, and Stone.

Two young men who would soon become major legal scholars offered more suggestive assessments. Malcolm Sharp indicated that “a ‘liberal’ tendency might be expected in the work of the Court,” but observed that “[a] rather ‘liberal’ decision on red flag legislation was balanced by two rather ‘conservative’ naturalization decisions.” Harry Shulman juxtaposed *Near* to *O’Gorman & Young, Inc. v. Hartford Insurance Co.*, two cases with identical divisions among the justices. *O’Gorman & Young* upheld a New Jersey statute requiring insurance companies to pay a uniform commission rate to each of its agents, no matter what the contract between the company and an individual agent said. There the majority “took seriously what had hitherto come to be meaningless bromides” about deferring to legislative judgments.” *Near*, in contrast, gave no deference whatever to the Minnesota legislature’s judgment. “Every member of the Court changed his attitude, shifting from one rule of presumption in the one case to an opposite rule of presumption in the other.” These shifts did “more than illustrate the opportunistic use of precedents and logic.” For Shulman, the decisions were “a hopeful sign pointing in the direction of an ideal of freedom.” That ideal would distinguish between “[p]ersonal liberties” such as freedom of speech, and economic liberty. Shulman followed Holmes in endorsing the idea that “‘Freedom to think as you will and to speak as you think’ is the vehicle to more general liberty,” but “freedom to contract as you will and impose whatever conditions you can may be a sure means of oppression.” For Shulman, “[a] larger capacity for liberty to contract … may well need governmental control over the power to exert economic compulsion. But a larger capacity for the liberty of speech needs primarily absence of governmental restraint on speech.”158

Shulman saw hints that the Court was distinguishing between “personal liberties” and economic freedom in the early 1930s, but it took the Court’s transformation later in the decade for the Court even to begin to conceptualize the Constitution with that distinction in hand. Until then the Court’s liberals and conservatives managed to agree on many aspects of “personal liberty” even as they disagreed about economic freedom. There was more to what the Court did in the 1930s than could be captured by the terms liberal or conservative, as Duffus, Sharp, and Shulman acknowledged. The Court before its transformation by Franklin Roosevelt issued more than a few decisions upholding the rights of radical dissenters, though without developing anything like a full account of the ways in which the Constitution accommodated such dissent. The Court’s Progressives could glimpse in Justice Brandeis’s *Whitney* dissent a theory of free expression, and in Hughes’s *McIntosh* dissent a theory of the autonomy of religious choice from government regulation. They could apply less contentious doctrines – of fair notice, for

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example – with those glimpses in mind. The Court’s conservatives similarly could draw on their libertarian inclinations when radical dissenters invoked such doctrines, although they appeared to be somewhat reluctant to do so, sometimes seeking technical reasons for avoiding ruling for radical dissenters. The conservatives’ judgments, tempered by their inclinations, converged often enough with the Progressives’ inclinations, tempered by their concerns about judicial review, converged often enough to give dissenters more victories than they might have expected.