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MODERNIZING THE LAW OF OPEN-AIR SPEECH: THE HUGHES COURT AND THE BIRTH OF CONTENT-NEUTRAL BALANCING

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INTRODUCTION

On February 15, 2003, a massive crowd, perhaps as large as 400,000 people,[1] gathered in the streets of New York City to protest the impending war with Iraq.[2] Protest organizers had requested a permit for a march in front of the United Nations building, but city officials, concerned about security, refused to allow a parade.[3] A federal district court upheld the city's decision to limit the protest to a stationary rally.[4] Drawing upon Supreme Court precedents from the 1930s, the district court declared that while citizens have a right to use streets for public assembly, the

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[1] *See* Robert D. McFadden, *Threats and Responses: Overview; From New York to Melbourne, Cries for Peace*, N.Y. TIMES, Feb. 16, 2003, § 1, at 1 (noting that "[c]rowd estimates are often little more than politically tinged guesses"; police estimated the crowd to be 100,000, while organizers said 400,000 people attended), *available at* LEXIS, News Library, NY Times file. In Washington, D.C., a frequent site of large protests, "the United States Park Police stopped providing counts for rallies after bitter disputes over past estimates." Robin Toner, *Abortion Rights Marchers Vow to Fight Another Bush Term*, N.Y. TIMES, Apr. 26, 2004, at A1, *available at* LEXIS, News Library, NY Times file.

[2] Anti-war protests also occurred in many other American cities and towns on February 15, 2003. *See* Jodi Wilgoren, *Threats and Responses: Domestic Dissent; In Word, Song and Sign, Demonstrators Across the United States Say No to an Invasion of Iraq*, N.Y. TIMES, Feb. 16, 2003, § 1, at 21, *available at* LEXIS, News Library, NY Times file. During the war, street protests occurred in major cities. *See, e.g.*, Joe Garofoli, et al., *Protests: Tens of Thousands Demonstrate Peacefully in S.F., 200,000 Take to Streets in N.Y.*, S.F. CHRON., Mar. 23, 2003, at W1, *available at* 2003 WL 8245377; Ana Mendieta & Kate N. Grossman, *Local Anti-War Protests Attract Thousands*, CHI. SUN-TIMES, Mar. 21, 2003, News Special Edition, at 11, *available at* 2003 WL 6839400. On August 29, 2004, an anti-war march in New York City drew an estimated crowd of 500,000. Robert D. McFadden, *Vast Anti-Bush Rally Greets Republicans in New York*, N.Y. TIMES, Aug. 30, 2004, at A1, *available at* LEXIS, News Library, NY Times file.

[3] United for Peace & Justice v. City of New York, 243 F. Supp. 2d 19, 20–21 (S.D.N.Y.), *aff'd*, 323 F.3d 175 (2d Cir. 2003).

[4] *Id.* at 31.

government may also regulate public expression to protect safety and similar content-neutral interests.[5]

A century ago, however, there was a different constitutional order concerning open-air speech. Under *Davis v. Massachusetts*,[6] municipal officials had the authority to ban rallies on public property. Some officials also believed they had the authority to allow public property to be used only by those speakers with favored viewpoints. From the late 1800s until the late 1930s, *Davis* and "the atmosphere which it generated"[7] influenced a variety of police power ordinances sharply restricting certain forms of public expression in American cities.[8]

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[5] *Id.* at 23.

[6] 167 U.S. 43 (1897).

[7] Niemotko v. Maryland, 340 U.S. 268, 286 n.2 (1951) (Frankfurter, J., concurring). Prior to the *Davis* decision, a handful of state courts had ruled in the 1880s and 1890s that local governments had only limited power and accompanying text. But the *Davis* opinion largely halted, until the late 1930s, judicial sympathy for the idea that public property is appropriately used for expressive purposes.

Despite judicial hostility to their free speech claims, groups such as the Socialists and the Industrial Workers of the World ("Wobblies"), fought for the right to speak in public during the early decades of the twentieth century. *See* MELVYN DUBOFSKY, WE SHALL BE ALL: A HISTORY OF THE INDUSTRIAL WORKERS OF THE WORLD (Joseph A. McCartin ed., abr. ed. 2000); FELLOW WORKERS AND FRIENDS: I.W.W. FREE SPEECH FIGHTS AS TOLD BY PARTICIPANTS (Philip S. Foner ed., 1981) [hereinafter FELLOW WORKERS]; THEODORE SCHROEDER, FREE SPEECH FOR RADICALS (1916); David M. Rabban, *The IWW Free Speech Fights and Popular Conceptions of Free Expression Before World War I*, 80 VA. L. REV. 1055 (1994) (arguing that groups, such as the IWW, advanced free speech ideals largely outside of the legal system); John W. Wertheimer, Free Speech Fights: The Roots of Modern Free-Expression Litigation in the United States (1992) (unpublished Ph.D. dissertation, Princeton University) (on file with author). Although the Socialists were not successful in changing the legal doctrine concerning open-air speech, their efforts did change the way in which Americans thought about open-air speaking. In the late nineteenth century, few litigants or judges thought open-air speech restrictions raised free speech issues. *Id.* at 215. "In contrast, by the second decade of the twentieth century, largely as a result of the efforts of Socialist litigants and polemicists, the control of open-air speaking was unmistakably a free-speech issue." *Id.*

For discussions of freedom of expression during the late nineteenth and early twentieth centuries, see, for example, MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM (1991); Margaret A. Blanchard, *Filling in the Void: Speech and Press in State Courts Prior to* Gitlow, *in* THE FIRST AMENDMENT RECONSIDERED 14 (Bill F. Chamberlin & Charlene J. Brown eds., 1982); David M. Rabban, *The Free Speech League, the ACLU, and Changing Conceptions of Free Speech in American History*, 45 STAN. L. REV. 47 (1992); David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514 (1980) [hereinafter Rabban, *Forgotten Years*].

[8] *See, e.g.*, Thomas v. Casey, 1 A.2d 866, 869 (N.J. 1938) (stating that under *Davis*, liberty of speech did not include the right to speak on public property without a permit); Coughlin v. Chi. Park Dist., 4 N.E.2d 1, 9 (Ill. 1936) (same).

In the late 1930s and early 1940s, the Court turned away from *Davis* and crafted several crucial doctrines concerning open-air speech. In an earlier article, I summarized these interrelated doctrines as follows: "First, licensing standards allowing unduly discretionary judgments by government officials are unconstitutional. Second, certain public properties are appropriate places for expression. Finally, the government may protect public safety and similar interests through narrowly drawn, content-neutral regulations."[9] These doctrines remain key facets of the current Court's free expression methodology. For example, *Watchtower Bible & Tract Society, Inc. v. Village of Stratton*,[10] decided in 2002, was largely decided within the "historical and analytical backdrop" created by cases from the late 1930s and early 1940s.[11] As Justice Kennedy reminded the Court in 2000, "the whole course of our free speech jurisprudence, sustaining the idea of open public discourse which is the hallmark of the American constitutional system, rests to a significant extent on cases involving picketing and leafleting."[12]

The abandonment of *Davis* is part of a larger story concerning the Supreme Court's discovery of the First Amendment, a process that began in 1919 with the famous dissents of Justices Holmes and Brandeis,[13] gained momentum in the early 1930s with cases such as *Near v. Minnesota*[14] and *Stromberg v. California*,[15] and escalated with a series of cases articulating the preferred position doctrine in the late 1930s and early 1940s.[16] Familiar elements of that story include the renunciation

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[9] William E. Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place and Manner Regulations of Expression*, 54 GEO. WASH. L. REV. 757, 761–62 (1986) [hereinafter Lee, *Lonely Pamphleteers*] (footnotes omitted).

[10] 536 U.S. 150 (2002).

[11] *Id.* at 161.

[12] Hill v. Colorado, 530 U.S. 703, 781 (2000) (Kennedy, J., dissenting).

[13] Schaefer v. United States, 251 U.S. 466, 482 (1920) (Brandeis, J., dissenting); Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting). *See generally* David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205 (1983) [hereinafter Rabban, *Emergence*] (discussing the dissents of Justices Holmes and Brandeis in the Espionage Act cases).

[14] 283 U.S. 697 (1931) (finding a state statute restricting certain types of publishing an unconstitutional prior restraint).

[15] 283 U.S. 359 (1931) (holding that a state statute unconstitutionally punished the display of a red flag as a symbol of opposition to the government).

[16] *See, e.g.*, Martin v. City of Struthers, 319 U.S. 141, 143 (1943) ("The right of freedom of speech and press has broad scope . . . [and] may not be withdrawn even if it creates the minor nuisance for a community."); Thornhill v. Alabama, 310 U.S. 88, 95–96 (1940) (stating that "[m]ere legislative preferences" may support regulations aimed at other activities, but are insufficient to justify restrictions on free expression); Schneider v. State, 308 U.S. 147, 161 (1939) (holding the same). *See generally* David P. Currie, *The Constitution in the Supreme Court: Civil Rights and Liberties, 1930–1941*, 1987 DUKE L.J. 800; David P. Currie, *The Constitution in the Supreme Court: The Preferred-Position Debate, 1941–1946*, 37 CATH. U. L. REV. 39 (1987).

of *Lochner*-era freedom of contract, the elevation of First Amendment freedoms as preferred rights, and the development of bifurcated judicial review.[17]

The traditional accounts of the Supreme Court's discovery of the First Amendment emphasize the contributions of Justices Oliver Wendell Holmes, Jr. and Louis Brandeis, Judge Learned Hand, and Professor Zechariah Chafee, Jr.[18] These seminal figures were focused on the government's treatment of anti-government speech, a critical content regulation problem.[19] Of these individuals, only Holmes had a significant part to play in the development of content-neutral doctrine. Holmes's role, however, was negative. The doctrinal developments in the 1930s were contrary to Holmes's views about the power of local governments to restrict open-air speech. In 1895, while a member of the Massachusetts Supreme Judicial Court, Holmes wrote the following: "For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."[20] Nothing in this statement presaged Holmes's First Amendment epiphany of 1919,[21] nor his status in the 1920s and 1930s as a First Amendment

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[17] *See, e.g.*, G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299 (1996); David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699 (1991).

[18] *See* Bradley C. Bobertz, *The Brandeis Gambit: The Making of America's "First Freedom," 1909–1931*, 40 WM. & MARY L. REV. 557, 560–61 (1999) (describing the traditional literature).

[19] Chafee played a minor part in *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939). *See infra* Part II.B. As a member of the Bill of Rights Committee of the American Bar Association, Chafee collaborated with Grenville Clark on an amicus brief. DONALD L. SMITH, ZECHARIAH CHAFEE, JR.: DEFENDER OF LIBERTY AND LAW 196 (1986). However, "Chafee credited Clark with doing 'the lion's share' of the work on the brief." *Id.* The late Professor Harry Kalven, Jr. claimed the *Hague* Court was "aided, and obviously made use of a major amicus curiae brief filed by the Bill of Rights Committee of the American Bar Association." Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 14. However, the central points of the amicus brief resembled those made by the respondents.

Chafee's seminal book dealt primarily with content-based problems; public assembly and similar forms of open-air speech were addressed solely in the context of limits on radical speech. ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH (1920). Chafee's later work included a discussion of the Supreme Court's content-neutral doctrines developed during the late 1930s and early 1940s. ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 398–438 (1941) [hereinafter CHAFEE, FREE SPEECH].

[20] Commonwealth v. Davis, 162 Mass. 510, 511 (1895), *aff'd*, 167 U.S. 43 (1897). *But see* ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 151 (1904) (claiming that the power of the legislature to control the streets is not equivalent to that of a private property owner).

[21] *See, e.g.*, Rabban, *Emergence*, *supra* note 13. *But see* Sheldon M. Novick, *The Unrevised Holmes and Freedom of Expression*, 1991 SUP. CT. REV. 303 (claiming that Holmes did not change his views on the clear and present danger test in 1919); Fred D.

icon.[22] As the Hughes Court in the 1930s began building content-neutral doctrines concerning public speech, it had to bury Holmes's nineteenth century views, a rather awkward process given Holmes's stature.

One of the pivotal steps taken by the Hughes Court was to regard speech freedom and press freedom as equally important. Since the 1930s, the modern Supreme Court has frequently referred to "freedom of expression,"[23] a phrase that does not appear in the First Amendment and was unknown to the Framers.[24] The Court also began using the terms "speech" and "press" interchangeably.[25] Phrases

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Ragan, *Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919*, 58 J. AM. HIST. 24 (1971). *See generally* G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 412–54 (1993) (discussing Holmes's free speech views).

[22] As the petitioners in *Hague* stated, "the liberality" of Justice Holmes's views "cannot be questioned." Brief on Behalf of Petitioners at 34, *Hague*, 307 U.S. 496 (No. 651). Professor Chafee regarded Holmes as a free speech champion equivalent to John Milton, Thomas Erskine, and John Stuart Mill. CHAFEE, FREE SPEECH, *supra* note 19, at 509. Justice Frankfurter wrote, "[n]o Justice thought more deeply about the nature of a free society or was more zealous to safeguard its conditions by the most abundant regard for civil liberty than Mr. Justice Holmes." Pennekamp v. Florida, 328 U.S. 331, 351 (1946) (Frankfurter, J., concurring).

[23] *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (stating that "freedom of expression upon public questions is secured by the First Amendment"). The case involved defamation suits brought against the *New York Times* and a group of ministers; the "actual malice" standard developed in the case applied equally to the newspaper and the ministers. *Id.*

The phrase "freedom of expression" made its first appearance in a majority opinion in *Bridges v. California*, 314 U.S. 252 (1941). The Court noted that the clear and present danger test "has afforded practical guidance in a great variety of cases in which the scope of constitutional protections of freedom of expression was in issue." *Id.* at 262. The related phrase"liberty of expression" had appeared in earlier opinions. *See, e.g.*, Schneider v. State, 308 U.S. 147, 163 (1939) ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."); Gitlow v. New York, 268 U.S. 652, 664 (1925) ("[L]iberty of expression 'is not absolute . . . .'").

[24] *See, e.g.*, David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 488 (1983) (stating that "the notion of an interrelated complex of protections for thought, belief, and expression is a modern concept").

[25] For a contemporary example, see *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636 (1994) ("Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment."). Sometimes the Court uses the singular to describe freedom of speech and press. *See, e.g.*, Martin v. City of Struthers, 319 U.S. 141 (1943). In *Martin*, Justice Black wrote: "The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance." *Id.* at 143.

such as "freedom of expression" and the exchangeability of the terms "speech" and "press" reflect the Court's belief that street corner speakers do not have less First Amendment protection than journalists.[26]

Modern constitutional interpretation masks the distinct origins[27] and histories of press freedom and open-air speech freedom. Throughout the nineteenth century, it was commonly understood that press freedom prohibited prior restraints on publishing, while allowing subsequent punishments.[28] Open-air speakers, however,

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[26] The Supreme Court has rejected every claim that members of the press have rights greater than other citizens. *See, e.g.*, Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (holding that the press is not exempt from search warrants); Branzburg v. Hayes, 408 U.S. 665 (1972) (stating that journalists must comply with grand jury subpoenas). *But see* Potter Stewart, *"Or of the Press"*, 26 HASTINGS L.J. 631, 633 (1975) (claiming that "the Free Press Clause extends protection to an institution"). Justice Stewart's claim spawned an extensive body of literature. *See, e.g.*, Margaret A. Blanchard, *The Institutional Press and Its First Amendment Privileges*, 1978 SUP. CT. REV. 225 (arguing that the best way to protect the First Amendment rights of the press is to expand the First Amendment rights of individuals).

[27] *See, e.g.*, LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 5 (1960) (stating that freedom of speech "developed as an offshoot of freedom of the press . . . [and] freedom of religion"); Anderson, *supra* note 24, at 488 (noting that the Press Clause had its own origins, separate from the other First Amendment rights).

Justices Frankfurter and Jackson are the only members of the Court to question the relevance of press cases in open-air speech cases. Justice Jackson said that precedents from the field of press freedom "cannot reasonably be transposed to the street-meeting field [because t]he impact of publishing on public order has no similarity with that of a street meeting." Kunz v. New York, 340 U.S. 290, 307 (1951) (Jackson, J., dissenting). Justice Frankfurter claimed that press freedom cases, such as *Near v. Minnesota*, 283 U.S. 697 (1931), "are rooted in historic experience regarding prior restraints on publication. They give recognition to the role of the press in a democracy," a consideration not pertinent in open-air cases involving religious speech. Niemotko v. Maryland, 340 U.S. 268, 276 (1951) (Frankfurter, J., concurring).

[28] *See, e.g.*, THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS 526 (4th ed. 1878) (stating that the "liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse"). Joseph Story's influential nineteenth century commentary on the Constitution referred to the First Amendment as meaning "that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so always, that he does not injure any other person in his rights, person, property, or reputation." 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 667–68 (Lawbook Exch., Ltd. 2001) (1833). Story's reference to a right to speak free of prior restraint needs to be read in context. Speech had never been licensed in England or the American colonies. As Professor Levy notes, "[w]hen the press was freed from prior restraints it simply became directly amenable to the law of libel as speech had always been. Thus, freedom of speech and freedom of the press, being subject to the same restraints of subsequent punishment, were rarely distinguished." LEVY, *supra* note 27, at 174.

While modern scholars agree that the Press Clause was intended to eliminate prior

faced a different legal culture. With increased urbanization in the latter half of the nineteenth century, municipalities began requiring licenses for public speeches and assemblies; these licensing schemes were not regarded as violating constitutional speech rights.[29] And, municipal governments treated newspapers differently from other types of printed material such as leaflets and advertising circulars. The distribution of leaflets was often banned, licensed, or closely regulated, requirements generally not applied to newspapers.[30]

This Article explores the birth of content-neutral doctrines such as a First Amendment right to use public property for expressive purposes, and the accompanying power of the government to regulate open-air speech.[31] As the Hughes

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restraints, they disagree as to whether the Framers intended to abolish seditious libel prosecutions. *Compare* Anderson, *supra* note 24 (arguing that the Press Clause had a broad meaning), *with* Leonard W. Levy, *On the Origins of the Free Press Clause*, 32 UCLA L. REV. 177 (1984) (arguing that the Framers had a narrow definition of press freedom). *See also* William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91 (1984) (claiming that an intent to abolish seditious libel is found in the Constitution's structure of federalism and limited powers); David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795 (1985) (reviewing LEONARD W. LEVY, EMERGENCE OF A FREE PRESS (1985)).

[29] Wertheimer, *supra* note 7, at 131 (during the first century of the nation's existence, neither litigants nor courts considered outdoor speaking to be protected by constitutional speech clauses). Because of this legal culture, groups, such as the Salvation Army, challenging nineteenth century restrictions on public speech commonly invoked religious liberty rather than freedom of speech. The *Davis* case was the first open-air case to present freedom of speech claims. *See infra* Part I.B.

[30] *See, e.g.*, City of Philadelphia v. Brabender, 51 A. 374 (Pa. 1902) (holding that an ordinance regulating handbills and circulars as "nuisances," yet excepting newspapers, is reasonable); Wettengel v. City of Denver, 39 P. 343 (Colo. 1895) (holding that an ordinance prohibiting handbill distribution, yet allowing newspaper distribution, is a reasonable means of preventing littering). Municipal ordinances prohibiting or regulating distribution of handbills, while exempting newspapers, were also commonplace in the early part of the twentieth century. *See, e.g.*, People v. St. John, 288 P. 53 (Cal. App. Dep't Super. Ct. 1930) (noting that there is ample judicial authority supporting the enactment of reasonable regulations regulating or prohibiting the distribution of handbills and circulars).

[31] This Article focuses on doctrine developed during the latter part of Chief Justice Hughes's tenure. *Valentine v. Chrestensen*, 316 U.S. 52 (1942), decided during the first year of Chief Justice Stone's tenure, is discussed because it is a clarification of a key Hughes-era case, *Schneider v. State*, 308 U.S. 147 (1939). Six Justices voting in *Chrestensen* also voted in *Schneider*. *See infra* note 209.

This Article also emphasizes cases involving open-air speech activities occurring on public property. Nonetheless, the Court, during the early 1940s, addressed several cases involving speech on private property. *See, e.g.*, Martin v. City of Struthers, 319 U.S. 141 (1943) (finding unconstitutional a municipal ban on door-to-door solicitation of literature); Thornhill v. Alabama, 310 U.S. 88 (1940) (holding unconstitutional a state law prohibiting labor picketing). Professor Post claims that the Court's cases during the late 1930s and early

Court created the modern doctrine of open-air speech, it introduced balancing into First Amendment methodology. The Court announced it would "weigh the circumstances and . . . appraise the substantiality of the reasons advanced in support of [a] regulation of [open-air speech]."[32] Yet, to add a point of nuance, this balancing was not always weighted in favor of open-air speech. In cases involving minimal burdens on speech, the Court continued to defer to the judgment of local officials. Additionally, as the Court denounced the arbitrary licensing of religious, political, and labor speech, it allowed municipal officials to make arbitrary decisions about commercial speech.

Part I of this Article explains *Davis* and the licensing of open-air speech. Part II reveals how the Hughes Court dismantled *Davis*, at least for noncommercial speech. Finally, Part III explains the development of the concept of "ordered freedom."

I. LICENSING OPEN-AIR SPEECH

> The right of free speech, as I understand it, consists of two main branches — the freedom of the press, and the freedom of the platform or the right of assemblage. The former of these was won generations ago by our ancestors after centuries of agitation and struggle; the latter came later in time, has had to be contested step by step, and even yet, though embodied in our law, is not completely part of the bone and sinew of American democracy.
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> –Professor J.Q. Dealey, 1914 [33]

In the 1880s, the Salvation Army swept through American cities; Salvationists believed they were following God's command in aggressive street proselytizing of those who did not attend church.[34] Salvation Army parades, featuring singing and musical instruments such as tambourines and trumpets, were often the targets of

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1940s protect speech, regardless of its geographical location. *See* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1720–21 (1987).

[32] *Schneider*, 308 U.S. at 161.

[33] J.Q. Dealey, *Discussion*, 9 AM. SOC. SOC'Y 42 (1914). Justice Holmes also referred to free speech as a broad concept encompassing press freedom. *See, e.g.*, United States *ex rel.* Milwaukee Soc. Democrat Publ'g Co. v. Burleson, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting) (revocation of a newspaper's second-class mailing privileges is harmful because "the use of the mails is almost as much a part of free speech as the right to use our tongues").

[34] *See* Rachel Vorspan, *"Freedom of Assembly" and the Right to Passage in Modern English Legal History*, 34 SAN DIEGO L. REV. 921, 943–44 (1997).

newly-enacted parade licensing ordinances.[35] Salvationists, though, regarded licensing requirements for parades and assemblies as an interference with their religious liberty.[36] From 1886 to 1893, in a series of cases involving the Salvationists, the supreme courts of Michigan, Kansas, Illinois, and Wisconsin ruled that the regulation of parades must be impartial.[37] The decisions of the Michigan, Kansas, and Illinois courts relied primarily upon municipal powers analysis.[38] The notion of rights, such as the pursuit of happiness,[39] played only a very minor part in the judicial analysis of these cases.

The Wisconsin Supreme Court, however, was the first court to bring the Federal Constitution into play in a case involving the state regulation of parading. Although framed in terms of the Fourteenth Amendment's Equal Protection Clause, the Wisconsin court's decision in *In re Garrabad*[40] is a significant precursor of the First Amendment doctrine that the government "must afford all points of view an equal

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[35] *See id.* at 950–62.

[36] *See, e.g., In re* Frazee, 30 N.W. 72 (Mich. 1886).

[37] *See In re* Garrabad, 54 N.W. 1104, 1107 (Wis. 1893) (stating that an arbitrary parade-licensing ordinance is "un-American"); City of Chicago v. Trotter, 26 N.E. 359, 360 (Ill. 1891) (stating that arbitrary authority "is subversive of the liberty of the citizen"); Anderson v. City of Wellington, 19 P. 719, 723 (Kan. 1888) (stating that parade licensing ordinances must not "allow an officer to prevent those with whom he did not agree on controverted questions from calling public attention to the principles of their party"); *Frazee*, 30 N.W. at 76 (stating that arbitrary licensing "would enable a mayor or councilman to shut off processions of those whose notions did not suit their views or tastes, in politics or religion, or any other matter on which men differ").

Members of the Salvation Army were not always successful in court. *See, e.g.*, Mashburn v. City of Bloomington, 32 Ill. App. 245 (Ill. App. Ct. 1889) (declining to overturn judgment against a defendant for violating a municipal ordinance).

[38] *See* Richard T. Pfohl, Note, Hague v. CIO *and the Roots of Public Forum Doctrine: Translating Limits of Powers into Individual Rights*, 28 HARV. C.R.-C.L. L. REV. 533 (1993).

> Municipal corporation law was simply an application of limits of powers doctrine. At issue was not whether the individual had a right to speak, but rather whether local municipalities had the legitimate power — either as an explicit grant from the state or as implied power of government — to regulate the conduct involved.

Id. at 543. Municipal ordinances were also required to be "reasonable" and arbitrary power was considered to be unreasonable. *Id.* at 543, 544 n.58. *See also* FREUND, *supra* note 20, at 57–61 (discussing the principle of reasonableness).

[39] *Trotter*, 26 N.E. at 359 ("Citizens have the constitutional right 'of pursuing their own happiness,'" including peacefully gathering in parades.); *Anderson*, 19 P. at 722 (stating that the right of people to demonstrate is "too firmly established" to be questioned); *Frazee*, 30 N.W. at 75 (stating that "[i]t has been customary, from time immemorial," for people to gather together for parades).

[40] 54 N.W. 1104 (Wis. 1893).

opportunity to be heard."[41] *Garrabad*'s progressive interpretation of the Fourteenth Amendment would shape some of the key arguments presented to the United States Supreme Court in *Davis*.

A. Garrabad

By the early 1890's, the city of Portage, Wisconsin had enacted a parade ordinance directly aimed at the Salvation Army. Parades involving "shouting, singing, or beating drums or tambourines, or playing upon any other musical instrument" were prohibited unless the mayor issued a permit.[42] Specifically exempted from the ordinance were funeral processions, fire companies, the state militia, and political parties.[43] In *Garrabad*, the Wisconsin Supreme Court held that the right to parade "with music, banners, songs, and shouting, is a well-established right" that was protected by the Fourteenth Amendment's Equal Protection Clause.[44] The special treatment of political parties was especially troublesome to the Wisconsin court:

> An ordinance which expressly secures to political parties having state organizations the absolute right to street parades and processions, with all their usual accompaniments, and denies it to the societies and other like organizations already mentioned, except by permission of the mayor, who may arbitrarily refuse it, is not valid, and offends against all well-established ideas of civil and religious liberty. The people do not hold rights as important and well settled as the right to assemble and have public parades and processions with music and banners and shouting

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[41] Police Dep't of Chi. v. Mosley, 408 U.S. 92, 96 (1972). The key passage from *Mosley* is the following:

> [G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.

Id. As Professor Kenneth Karst observed, the concept of equal liberty developed in *Mosley* and similar cases "is not just a peripheral support for the freedom of expression, but rather part of the 'central meaning of the First Amendment.'" Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 21 (1975).

[42] *Garrabad*, 54 N.W. at 1105.

[43] *Id.*

[44] *Id.* at 1106.

> and songs, in support of any laudable or lawful cause, subject to the power of any public officer to interdict or prevent them.[45]

Drawing upon *Yick Wo v. Hopkins*,[46] the Wisconsin court said the parade ordinance was not "dictated by a fair and equal mind," but was an instrument of "petty tyranny, the result of prejudice, bigotry, and intolerance . . . . It is entirely un-American, and in conflict with the principles of our institutions and all modern ideas of civil liberty."[47] To be valid, such an ordinance must have an equal and uniform application and not be susceptible of "unjust and illegal discriminations."[48]

Garrabad rests upon the principle that the use of the streets for expressive purposes must not depend upon the discretion of public officials. *Davis*, however, presents an entirely different view: government officials have the "greater" authority to decide whether or not public property is available for open-air speech and the "lesser" authority to employ a licensing system.[49]

B. Davis

> Neither the Czar of Russia, nor the Sultan of Turkey, can exercise a more arbitrary and despotic power than by this ordinance is conferred on the mayor of Boston.
>
> –James F. Pickering, attorney for William F. Davis[50]

Until 1862, Bostonians could freely speak on public property, such as the Boston Common. During the Civil War, Boston officials in 1862 enacted an ordinance requiring permission from local officials for "sermon[s], lecture[s], address[es] or discourse[s] on the common or other public grounds" of the city.[51] Opponents claimed the law was adopted "at the bidding of the rumsellers of Boston" and was designed to silence those who spoke out against "the reeking abominations of the Boston liquor traffic."[52]

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[45] *Id.* at 1108.

[46] 118 U.S. 356 (1886) (holding that a laundry licensing ordinance, applied in a racially discriminatory manner, violated the Fourteenth Amendment's Equal Protection Clause).

[47] *Garrabad*, 54 N.W. at 1107.

[48] *Id.* Commenting on the principle of equality as applied to open-air speech, Professor Freund wrote that "an uncontrolled power to grant or withhold privileges which might be accorded on equal terms, is open to the greatest abuses." FREUND, *supra* note 20, at 671.

[49] *See* Davis v. Massachusetts, 167 U.S. 43 (1897).

[50] Brief of Plaintiff in Error at 8, *Davis*, 167 U.S. 43 (No. 229).

[51] Commonwealth v. Davis, 4 N.E. 577, 578 (Mass. 1886), *aff'd*, 167 U.S. 43 (1897).

[52] WILLIAM F. DAVIS, CHRISTIAN LIBERTIES IN BOSTON: A SKETCH OF RECENT ATTEMPTS TO DESTROY THEM THROUGH THE DEVICE OF A GAG-BY-LAW FOR GOSPEL PREACHERS 9–10 (1887).

In the early 1890s, the ordinance was changed in two significant ways. First, the mayor became the sole official with authority to issue permits.[53] Second, in addition to public addresses, the ordinance required permits for the discharge of cannons or firearms, the sale of "goods, wares, or merchandise," and the erection of booths or tents for purposes of public amusement.[54] The ordinance did not specify the standards for licensing decisions.

"Brother" William F. Davis, a tenacious street preacher and litigant, was frequently fined in the 1880s for violating the Boston permit ordinance.[55] Davis believed his right to preach was a gift "of nature and of God, which Government did not give and cannot take away."[56] His challenge to an 1885 conviction for violating the ordinance raised technical arguments as well as protection under the freedom of religion clause of the Massachusetts Constitution.[57] The Massachusetts Supreme Judicial Court in 1886 tersely rebuffed the technical claims.[58] Although the Massachusetts Constitution had long been interpreted as protecting the press from licensing,[59] the Supreme Judicial Court overlooked Davis's religious freedom claim altogether.[60]

Davis continued to violate the Boston ordinance; even time in jail did not deter him.[61] On Sunday, June 10, 1894, Davis preached to a crowd on the Boston

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[53] *Davis*, 167 U.S. at 44.

[54] *Id.*

[55] *See generally* Wertheimer, *supra* note 7, at 161–75. Davis used the title "Brother" because "it best expressed his feelings toward all whom he met." SILAS P. COOK, ONE WHO SERVED 27 (1918). Cook, a Harvard classmate of Davis, described Davis's motto as "*go preach.*" *Id.* at 26.

[56] Plaintiff's Brief at 4, *Davis*, 167 U.S. 43 (No. 229).

[57] The briefs in the case are reprinted in DAVIS, *supra* note 52, at app. 12–58.

[58] Commonwealth v. Davis, 4 N.E. 577 (Mass. 1886).

[59] *See, e.g.*, Commonwealth v. Blanding, 20 Mass. 304 (1825):

> Besides, it is well understood, and received as a commentary on this provision for the liberty of the press, that it was intended to prevent all such *previous restraints* upon publications as had been practised by other governments, and in early times here, to stifle the efforts of patriots towards enlightening their fellow subjects upon their rights and the duties of rulers.

Id. at 313–14.

[60] This decision prompted Davis to write, "[i]f Christian citizens hereafter have any respect for this State Attorney and these Supreme Court judges, it will assuredly be in spite of their deliverances in this case, and not because of them." DAVIS, *supra* note 52, at 71.

[61] While in jail in 1887, Davis wrote an attack on the Boston "gag" law. DAVIS, *supra* note 52. He offered a series of reasons explaining why he did not apply for a license, such as the following: "Because Mayor O'Brien is not my God; and is in no wise competent to authorize any man to do the work of a Christian Evangelist. The assumption that Mayor O'Brien *has* any such authority as this ordinance implies, is profane as to the verge of blasphemy." *Id.* at 13.

Common. While "there was no disorder or disturbance," police arrested Davis for speaking without a license.[62] He appealed his conviction to the Massachusetts Supreme Judicial Court.[63] In this challenge, Davis claimed the Massachusetts Bill of Rights protected free speech, assembly, and religious freedom.[64] And, most significantly, drawing upon *Yick Wo* and *Garrabad*, he argued the mayor's discretion violated the Fourteenth Amendment of the Federal Constitution.[65]

Holmes, who had participated in the Massachusetts court's curt 1886 decision finding an earlier version of the ordinance to be constitutional, bluntly wrote that the constitutionality of the ordinance was "implied" by the earlier decision.[66] Although Davis had expanded his claims to include freedom of speech, Holmes readily dismissed this argument; the law was not directed at free speech.[67] Rather, it was "directed towards the modes in which Boston Common may be used."[68] Holmes then explained the state's power over public property:

> As a representative of the public, [the Legislature] may and does exercise control over the use to which the public may make of such places, and it may and does delegate more or less of such control to the city or town immediately concerned. For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house. When no proprietary rights interfere, the Legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the less step of limiting the public use to certain purposes.[69]

In short, because Boston could ban public entry into the Common, the "lesser step" of controlling certain uses through licensing was also permissible. This resembled

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[62] Transcript of Record at 6, *Davis*, 167 U.S. 43 (No. 229). John W. Little, the arresting officer, testified that the grass in the area where Davis was speaking had been entirely worn away because of its frequent use "by sundry persons who had been in the habit of preaching at this place under a permit from the mayor." *Id.*

[63] *See Davis*, 39 N.E. 113.

[64] Transcript of Record at 8, *Davis*, 167 U.S. 43 (No. 229).

[65] *Id.*

[66] *Davis*, 39 N.E. at 113.

[67] *Id.*

[68] *Id.*

[69] *Id.* For criticism of Holmes's treatment of nineteenth-century municipal corporation law, see Pfohl, *supra* note 38, at 548 n.75.

Holmes's 1892 opinion in *McAuliffe v. Mayor of New Bedford*,[70] where he reasoned that since citizens have no right to government employment, the state could restrict the speech of its employees.[71]

Davis also argued the absence of standards in the Boston ordinance enabled the mayor to censor preachers.[72] Holmes readily dismissed this claim, writing "we have no reason to believe, and do not believe, that this ordinance was passed for any other than its ostensible purpose, namely, as a proper regulation of the use of public grounds."[73]

James F. Pickering, the attorney for Davis, expanded his arguments in a sixty-seven-page brief submitted to the United States Supreme Court.[74] First, "Free preaching" of the Gospel was a natural right that preceded creation of the state; the Massachusetts Constitution and the Fourteenth Amendment protected Davis from being robbed of "his highest civil rights."[75] Second, "free preaching" was customary on the Boston Common until the ordinance of 1862.[76] The city, as trustee, was obligated to hold open the Common for its customary uses.[77] Third, appealing to that era's preference for property and economic liberties, Pickering claimed that Davis's rights were no less important than "the rights of business men, and the owners of property."[78] Similarly, drawing upon *Yick Wo*, Pickering wrote, "a preacher of the gospel, in Boston, is not less entitled to immunity from arbitrary encroachments on his rights, than an unnaturalized Chinese laundryman in San Francisco."[79] Finally, the danger of censorship, noted in cases such as *Garrabad*, was especially apparent in the Boston ordinance where the mayor had "wholly

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[70] 29 N.E. 517 (Mass. 1892).

[71] *Id.* at 517 ("The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."). Professor Van Alstyne's comment about Holmes's *Davis* opinion is apt: Davis "may have a constitutional right to talk religion, but he has no constitutional right to use the Boston Common." William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1440 (1968). *See also* Commonwealth v. Plaisted, 19 N.E. 224, 226 (Mass. 1889) (noting that rules governing street musicians "do not restrict any one in the ordinary use of his own property, but merely affect the use which may be made of the streets and public places of the city").

[72] *Davis*, 39 N.E. at 113.

[73] *Id.*

[74] Brief of Plaintiff in Error, *Davis*, 167 U.S. 43 (No. 229).

[75] *Id.* at 67; *see also id.* at 4, 20. It is important to note that while Pickering drew extensively upon the Massachusetts Bill of Rights and the Fourteenth Amendment, he scarcely mentioned the First Amendment. *See id.* at 3–4; Transcript of Record at 8, *Davis*, 167 U.S. 43 (No. 229) (Defendant's Motion to Quash Complaint).

[76] Plaintiff's Brief at 35, *Davis*, 167 U.S. 43 (No. 229).

[77] *Id.* at 30. Crowds as large as 20,000 people had gathered to hear open-air preaching on the Common in the 1700s. *Id.* at 32.

[78] *Id.* at 10.

[79] *Id.* at 50.

personal, arbitrary and autocratic" authority.[80] While others had given speeches on the Common without a license, only preachers had been prosecuted for doing so.[81]

To the Commonwealth, freedom of speech was "freedom as to substance, rather than as to place," and Boston had not prevented Davis from preaching elsewhere.[82] Nothing in the record showed the ordinance was unjustly administered;[83] in fact, Davis had not been denied a permit.[84] Just as Boston had the police power to license peddlers, junk dealers, and pawnbrokers, it could also license preaching on the Common.[85] Finally, the Fourteenth Amendment's Equal Protection Clause merely meant that all citizens were subject to the same regulations.[86] "Nothing [was] denied to the plaintiff in error by the ordinance in question that is not denied to every citizen of the United States."[87]

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[80] *Id.* at 2. For a discussion of *Garrabad*, see *id.* at 59–60. *See also id.* at 55–58 (discussing other Salvation Army cases).

[81] *Id.* at 17.

[82] Brief of Defendant in Error at 10, *Davis*, 167 U.S. 43 (No. 229). Similarly, freedom of religion did not mean that one could occupy Boston Common for religious purposes. *Id.* at 11.

[83] *Id.* at 13.

[84] *Id.* at 11. In 1884, though, Davis had been denied a license. DAVIS, *supra* note 52, at 35. Other open-air preachers had also been denied licenses. H. L. Hastings reported that Boston officials frequently refused to issue licenses or delayed the issuance of licenses in the 1880s. He wrote:

> After having been arrested and fined for speaking without a permit, and having been told by the judge on the bench that it was a very simple thing to get a permit, I made a written application for a permit. My application was treated with silent contempt. I afterwards applied again, and through the kindness of his Honor the Mayor I received a permit, but not until *fourteen months had elapsed* since my first application, during which time I had been fined and imprisoned for preaching and reading the Bible. Nor am I at all certain that I should have received the permit even at that date, had not a large and influential body of ministers, by special vote, sent a request to the mayor to grant me that permit. If it were so difficult for *me* to obtain a permit, after preaching in this and other countries for nearly forty years, during more than a score of which I have also edited a paper in Boston, what would be the probability that an ordinary plain man would get a permit to speak in public places? The fact is, the city government of Boston has *determined to suppress outdoor preaching*.

H.L. Hastings, *A Few Cold Facts Concerning Preaching on Boston Common*, MONTHLY MESSAGE, Apr. 1888, at 8. Apparently, licenses were commonly granted in the 1890s. *See supra* note 62.

[85] Defendant's Brief at 12, *Davis*, 167 U.S. 43 (No. 229).

[86] *Id.* at 14.

[87] *Id.*

The Court was unwilling to extend the Fourteenth Amendment to open-air preaching.[88] Writing for a unanimous Court, Justice White observed that the Fourteenth Amendment did not destroy the police power of states, nor did it create a right of citizens to use public property "in defiance of the constitution and laws of the State."[89] Also, closely following Holmes's opinion for the Massachusetts Supreme Judicial Court, inasmuch as Boston had the power to exclude public speakers from the Common, it also had the "lesser" power to employ a permit system.[90]

From a modern perspective, the *Davis* Court's lack of attention to the free speech issues seems strange.[91] But the case needs to be read in context. *Davis* was decided in the era when the Court routinely held that ordinances conferring discretionary power to municipal licensing boards, not just those regulating speech, were permissible under the Fourteenth Amendment.[92] These cases rested on a presumption that the licensing power would be exercised in a proper manner.[93] In theory, if there were proof of arbitrary enforcement, courts could intervene.[94]

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[88] *Davis*, 167 U.S. 43.

[89] *Id.* at 48.

[90] *Id.*

[91] Rabban, *Forgotten Years*, *supra* note 7, at 529 (citing *Davis* as an example of a case in which "the Supreme Court did not even discuss free speech issues that the modern judge would clearly identify"). Wertheimer notes that *Davis* "was among the first appellate cases in American legal history in which judges were asked to decide whether or not an open-air ordinance" interfered with freedom of speech. Wertheimer, *supra* note 7, at 175. "The 'free speech issues' that the Gilded Age judges did not discuss, in other words, might be almost as 'modern' as the 'modern judges' who would 'clearly identify' them today." *Id.*

[92] *See, e.g.*, New York *ex rel.* Lieberman v. Van de Carr, 199 U.S. 552, 562 (1905) (upholding an ordinance licensing the sale of milk even though the ordinance contains no standards to guide licensing officials); *see also* Fischer v. City of St. Louis, 194 U.S. 361, 372 (1904) (noting that there are cases such as *In re Frazee*, 30 N.W. 72 (Mich. 1886), and *City of Chicago v. Trotter*, 26 N.E. 359 (Ill. 1891), holding that discretionary licensing authority is "contrary to the spirit of American institutions," but the "great weight of authority" authorizes delegation of power to licensing boards).

[93] *Van de Carr*, 199 U.S. at 562; *see also* Hall v. Geiger-Jones Co., 242 U.S. 539, 554 (1917) (according the commissioner a presumption that licensing authority will be executed in the public interest, not "wantonly or arbitrarily"); *Fischer*, 194 U.S. at 37 (stating that the Court is "bound to assume" that licensing decisions are made in the interest of the public).

[94] *See, e.g.*, Fitts v. City of Atlanta, 49 S.E. 793, 797 (Ga. 1905) (stating that "[w]hen a case of capricious, malicious, or arbitrary action arises, the courts will deal with it as the law requires"). As *Fitts* reveals, courts in the post-*Davis* era were reluctant to find that local officials had acted in an arbitrary manner. In this case, the Georgia Supreme Court sustained the conviction of "Prof." J.L. Fitts, a Socialist, for violating an Atlanta ordinance requiring a permit for street speeches. *Id.* Fitts delivered two or three speeches under a permit and when his permit was withdrawn, he defied the ordinance. *Id.* at 794; *see infra* notes 242–45 and accompanying text. The crowd that gathered to hear Fitts's unlicensed speech was orderly until the police sought to silence Fitts. *Fitts*, 49 S.E. at 794. The ensuing disorder was cited by the state supreme court as evidence that the denial of a permit was not capricious. *Id.* at 797.

Moreover, the idea that the Fourteenth Amendment encompassed freedom of speech was extraordinarily radical in 1897. The Court, at that time, was a decade away from its first dissenting opinion arguing for this view of the Fourteenth Amendment,[95] and twenty-eight years away from the first majority opinion to accept this interpretation.[96] In 1897, there was nothing special about open-air preaching that justified protection under the Fourteenth Amendment; the states had autonomy to grant or restrict opportunities for public speech largely as they pleased, without interference from federal courts.

Although other states were free to depart from the Massachusetts model and offer significant protection to open-air speech,[97] *Davis* largely halted the "flow of a stream of precedents" such as *Garrabad* "that had the earmark of giving a reasonable easement of assemblage in public places."[98] By devaluing open-air speech and stressing the proprietary powers of the government, *Davis* set the tone for a generation of opinions that were plainly hostile to the idea that streets were appropriate to use for expressive activities.[99] Moreover, despite the oft-cited

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[95] Patterson v. Colorado, 205 U.S. 454, 464–65 (1907) (Harlan, J., dissenting).

[96] Gitlow v. New York, 268 U.S. 652, 666 (1925) ("[F]reedom of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment . . . ."). Professor Curtis claims the Fourteenth Amendment was intended to protect First Amendment rights against restrictions by states; he is critical of nineteenth century cases, such as *United States v. Cruikshank*, 92 U.S. 542 (1876), which rely on the "pre-Civil War paradigm of the semi-sovereign state, free to deprive all its citizens of fundamental rights set out in the Bill of Rights." MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE" 380 (2000).

[97] In *State v. Coleman*, 113 A. 385 (Conn. 1921), the Connecticut Supreme Court of Errors found that an ordinance requiring a license for open-air speeches was permissible under the Fourteenth Amendment. However, the ordinance was a violation of the state constitution: "There can be no reasonable presumption that an unlimited discretion will not be exercised when the ordinance itself reposes an unlimited discretion." *Id.* at 387. See also *Anderson v. Tedford*, 85 So. 673 (Fla. 1920), in which the Florida Supreme Court found a licensing ordinance to be unreasonable.

[98] Comm. for Indus. Org. v. Hague, 25 F. Supp. 127, 151 (D.N.J. 1938), *aff'd*, 101 F.2d 774 (3d Cir.), *aff'd*, 307 U.S. 496 (1939).

[99] The Georgia Supreme Court stated in upholding the conviction of a Socialist speaker who claimed he had a right to speak on public streets without a license:

> If Prof. Fitts' idea of constitutional law were correct, I see no reason why every citizen should not claim a right to use the public streets for the exercise of his trade, calling, or profession, which may be much more essential to his welfare and that of the public than speechmaking by the plaintiff in certiorari, however eloquent . . . .

Fitts, 49 S.E. at 795; *see also* Coughlin v. Chi. Park Dist., 4 N.E.2d 1, 9 (Ill. 1936) (stating that under *Davis* and its progeny, "no citizen has a right to use at his pleasure, or on his own terms, public property . . . without a permit").

In addition to courts, police officials in the early 1900s were often hostile towards open-air speakers. In 1915, the United States Commission on Industrial Relations wrote the

doctrine that courts could intervene to prevent discrimination, courts in the post-*Davis* era deferred to the judgment of local officials and ignored discrimination against unpopular speakers, such as Socialists.[100]

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following:

> One of the greatest sources of social unrest and bitterness has been the attitude of the police toward public speaking. On numerous occasions in every part of the country, the police of cities and towns have either arbitrarily or under the cloak of a traffic ordinance, interfered with or prohibited public speaking, both in the open and in halls, by persons connected with organizations of which the police or those from whom they received their orders did not approve. In many instances such interference has been carried out with a degree of brutality which would be incredible if it were not vouched for by reliable witnesses.

COMM'N ON INDUS. REL., FINAL REP. 150–51 (1915). The Commission recommended that "every reasonable opportunity should be afforded for the expression of ideas and the public criticism of social institutions." *Id.* at 151. Overall, it approved the policies of Arthur Woods, police commissioner of New York City. *Id.* Woods believed the right of "free assemblage in this country is inalienable; it is a constitutional right." Arthur Woods, *Reasonable Restrictions upon Freedom of Assemblage*, 9 AM. SOC. SOC'Y 31 (1914). Consequently, Woods instructed police officers that it was their duty to "protect people in the enjoyment of free speech and assemblage." *Id.* A public meeting "was not merely to be allowed, therefore, but protected so long as it did not interfere with the rights of others; did not obstruct the free use of the streets or sidewalks, and did not incite to violence." *Id.* Woods's policies reduced the "unpleasantness" that previously characterized relations between speakers and New York City police. 11 COMM'N ON INDUS. REL., INDUSTRIAL RELATIONS: FINAL REPORT AND TESTIMONY, S. DOC. NO. 415, at 10550–51 (1st Sess. 1916) (testimony of Arthur Woods).

[100] For example, the mayor of Mt. Vernon, New York refused to issue a permit for a Socialist street meeting. People *ex rel.* Doyle v. Atwell, 133 N.E. 364 (N.Y. 1921), *writ of error dismissed*, 261 U.S. 590 (1923). The mayor even stated that as long as he was in office, no permits would be issued for Socialist meetings. *Id.* at 366. Nonetheless, on November 2, 1920, the Socialists held a street meeting without a permit. *Id.* at 365. The speakers were arrested and, before trial, obtained writs of habeas corpus; the speakers were then discharged on the grounds that the ordinance was unconstitutional. *Id.* The Appellate Division of the New York Supreme Court dismissed the writs. *Id.* This action was sustained by the New York Court of Appeals. *Id.* at 366. Drawing upon cases such as *Davis*, the court of appeals held that liberty of speech did not include holding street meetings without a permit. *Id.*

The Socialists' claim that the mayor had arbitrarily applied the ordinance was inappropriate in a habeas corpus proceeding. *Id.* See also *City of Duquesne v. Fincke*, 112 A. 130 (Pa. 1920), in which the Pennsylvania Supreme Court held that there was no right to hold a street meeting without a permit. Consequently, the remedy to arbitrary licensing decisions "was not by violating the ordinance, but by mandamus to compel a proper obedience to it." *Id.* at 134. *But see* State v. Coleman, 113 A. 385 (Conn. 1921) (holding that the exercise of discretion cannot be controlled by mandamus, and that ordinances conferring unlimited discretion should be declared void).

II. DISMANTLING *DAVIS*

When Charles Evans Hughes returned to the Court as Chief Justice in 1930, the state of First Amendment doctrine was nearly as dismal as when he left the Court in 1916. Despite the 1925 ruling that the First Amendment was applicable to the states through the Fourteenth Amendment,[101] as of 1930 the Court had not yet ruled in favor of a First Amendment claim. Two 1931 rulings, *Near v. Minnesota*[102] and *Stromberg v. California*,[103] were critical turning points in the history of the First Amendment. *Near* restated the historic antipathy toward prior restraint of the press.[104] *Stromberg* maintained that tolerance of dissent was essential to the "security of the Republic"[105] and was the first step in the abandonment of the bad-tendency test. *Near* and *Stromberg* were followed by a series of decisions limiting state power to restrict the content of speech.[106] Building upon the principle that government officials lack the power to silence their critics, the Hughes Court also repudiated *Davis* and established a First Amendment right to use public property for open-air speech, free of arbitrary licensing.[107] By reading the Fourteenth Amendment as making the First Amendment applicable to the states, the Hughes Court replaced the autonomy of states with national norms.

The *Davis* Court's presumption that officials would properly act when licensing open-air speech stands in marked contrast to a central rationale of the doctrine protecting the press from licensing: government officials, often the subject of press criticism, cannot be trusted to license the press. As Chief Justice Hughes wrote in *Near*, "[c]harges of reprehensible conduct, and in particular of official malfeasance, 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

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[101] *Gitlow*, 268 U.S. at 666.

[102] 283 U.S. 697 (1931).

[103] 283 U.S. 359 (1931). Prior to *Stromberg*, the Court overturned a conviction under a criminal syndicalism statute on due process grounds. Fiske v. Kansas, 274 U.S. 380 (1927). The *Fiske* Court found there was a lack of evidence to support the charge that the speaker advocated unlawful acts. *Id.* at 386. *Stromberg* invalidated a conviction for displaying a flag as a symbol of opposition to organized government. *Stromberg*, 283 U.S. at 359. The *Stromberg* Court rested on free speech grounds; it was concerned that the vague statute could be used to punish peaceful opposition to government. *Id.* at 369.

[104] *Near*, 283 U.S. at 713–15.

[105] *Stromberg*, 283 U.S. at 369 (Chief Justice Hughes wrote that the "maintenance 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, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.").

[106] *See, e.g.*, Herndon v. Lowry, 301 U.S. 242 (1937) (reversing a conviction for violation of an insurrection statute).

[107] *See infra* Part II.B.

publication."[108] One of the Court's critical steps in dismantling *Davis* was a shift to a presumption that licensing of open-air speech — unless tightly confined to content-neutral criteria — posed unacceptable risks of content discrimination by licensing officials. The presumption against government officials, which begins with *Lovell v. City of Griffin*,[109] enabled facial challenges to licensing ordinances by litigants who had not applied for licenses and consequently could not show discrimination.

A. Lovell

> I did not ask for a permit, because I am sent by Jehovah to do His work. His law is supreme and above every human law. To apply for a permit to do His work would be an act of disobedience to His commandment. It would be an insult to the Most High which would in time result in my eternal destruction.
>
> –Alma Lovell[110]

Alma Lovell, like other Jehovah's Witnesses,[111] distributed religious pamphlets door-to-door without a license. When she did this in Griffin, Georgia, in 1936, she violated a municipal ordinance prohibiting the distribution of "circulars, handbooks, advertising, or literature of any kind" without a permit from the city manager.[112] Lovell was convicted and sentenced to fifty days in jail.[113]

Lovell appealed her conviction to the Court.[114] Unlike Davis, Lovell had the benefit of the Court's post-1925 interpretation of the Fourteenth Amendment as protecting First Amendment freedoms.[115] Moreover, as a distributor of literature, she was able to claim that her activities were protected under the First Amendment's Press Clause; the ordinance was a violation of the general rule that prior restraints

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[108] *Near*, 283 U.S. at 722; *see also infra* note 184. For a more recent statement of this presumption, see *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755–58 (1988).

[109] 303 U.S. 444 (1938).

[110] Transcript of Record at 12, *Lovell* (No. 391).

[111] *See generally* William Shepard McAninch, *A Catalyst for the Evolution of Constitutional Law: Jehovah's Witnesses in the Supreme Court*, 55 U. CIN. L. REV. 997 (1987).

[112] *Lovell*, 303 U.S. at 447. This type of ordinance was commonplace in America during the 1930s. James K. Lindsay, *Council and Court: The Handbill Ordinances, 1889–1939*, 39 MICH. L. REV. 561, 564–65 (1941).

[113] *Lovell*, 303 U.S. at 447.

[114] *Id.*

[115] In addition to freedom of the press, Lovell claimed her activities were also protected by the First Amendment's Religion and Speech Clauses, made applicable to states by the Fourteenth Amendment. Appellant's Brief at 9, *Lovell* (No. 391).

against the press are not permitted.[116] Lovell was supported by the American Civil Liberties Union and the Workers' Defense League who declared in amicus briefs that leaflets were especially important to minorities[117] and that licensing ordinances were used to "oppress humble people when their views and policies offend municipal administrations."[118]

The City defended the ordinance by claiming that Lovell was "not a member of the press."[119] Besides, the City did not license publishing but merely regulated "the physical handling of printed matter."[120] Because of the presumption that the licensing authority would act properly, Lovell, who had not applied for a license, was not entitled to a contrary presumption.[121]

Writing for a unanimous Court, Chief Justice Hughes said the ordinance was a facially invalid abridgment of press freedom.[122] Consequently, Lovell could contest the ordinance's validity without seeking a permit.[123] The character of the law, rather than its application, was critical; the ordinance "strikes at the very foundation of the freedom of the press by subjecting it to license and censorship."[124] To Hughes, the historic "struggle for the freedom of the press was primarily directed at the power of the licensor" and "the ordinance in question would restore . . . censorship in its baldest form."[125]

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[116] *Id.* at 38.

[117] Brief and Motion on Behalf of American Civil Liberties Union as Amicus Curiae at 5–6, *Lovell* (No. 391).

[118] Motion and Brief on Behalf of Workers' Defense League as *Amicus Curiae* at 12, *Lovell* (No. 391).

[119] Brief of Appellee at 4, *Lovell* (No. 391).

[120] *Id.* at 14. The City also claimed that Lovell's conviction had not been based on the content of her expression. *Id.* at 4.

[121] *See supra* note 93.

[122] *Lovell*, 303 U.S. at 451.

[123] *Id.* at 452–53. As support, Chief Justice Hughes cited his opinion in *Smith v. Cahoon*, 283 U.S. 553, 562 (1931). *Lovell*, 303 U.S. at 453. Smith involved the proprietor of a transport company who did not apply for a license. *Smith*, 283 U.S. at 556. Transporters of certain products, such as dairy and farm products, were exempt from the licensing requirement and the Court found that the distinctions within the law were arbitrary and unrelated to public safety. *Id.* at 567. In *Smith*, Chief Justice Hughes wrote that when a licensing statute is facially valid, those who fail to apply for a license are unable to complain of an anticipated improper licensing decision. *Id.* at 562; *see also* Hall v. Geiger-Jones Co., 242 U.S. 539, 554 (1917) (according the commissioner a presumption that licensing authority will be executed in the public interest, "not wantonly or arbitrarily"). Chief Justice Hughes added, "[t]his principle, however, is not applicable where a statute is invalid upon its face and an attempt is made to enforce its penalties in violation of [a] constitutional right." *Smith*, 283 U.S. at 562.

[124] *Lovell*, 303 U.S. at 451.

[125] *Id.* at 451–52; *see also Near*, 283 U.S. at 713–14 (claiming that the chief purpose of the Press Clause was to prevent prior restraints). The *Lovell* opinion was joined by Justices

The distrust of government licensing officials in *Lovell* stands in stark contrast to the *Davis* Court's presumption in favor of government officials. Chief Justice Hughes did not even mention *Davis* in *Lovell*. In effect, *Davis* was irrelevant; by characterizing *Lovell* as a press freedom case, Hughes was able to draw upon a longstanding view of the dangers of licensing publications.[126] Had Hughes characterized Lovell's activities as falling within the ambit of *Davis*, Lovell would have been unable to prove that government officials had discriminated against her.

Hughes placed Lovell's activities within the context of press freedom by broadly defining the term press:

> The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.[127]

Moreover, the scope of press freedom was defined to include distribution as well as publication.[128] "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value."[129]

Butler and McReynolds who had dissented in *Near*. In Justice Butler's discussion of prior restraint doctrine in *Near*, he claimed that the arbitrary licensing power of an administrative officer was distinct from judicial decrees against further publication of malicious material. *Id.* at 736 (Butler, J., dissenting).

As *Lovell* shows, the generalization that the Four Horsemen — Van Devanter, McReynolds, Sutherland, and Butler — were more protective of economic liberties than freedom of expression is not completely true. While the Four Horsemen dissented in *Near* and *Herndon v. Lowry*, 301 U.S. 242 (1937) (overturning a conviction for insurrection), they joined the Court in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (invalidating a tax on newspapers), and in *De Jonge v. Oregon*, 299 U.S. 353 (1937) (invalidating a state criminal syndicalism law as applied to lawful public meetings). *See also* Stromberg v. California, 283 U.S. 359 (1931) (invalidating a law prohibiting display of a red flag, with Van Devanter and Sutherland joining the opinion). Moreover, the Four Horsemen did not consistently vote in favor of economic rights. *See* Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 246 n.255 (1994) (listing cases and showing their voting records).

The member of the Hughes Court most likely to vote against First Amendment claims was Justice McReynolds. He dissented in *Near*, *Stromberg*, *Herndon*, *Hague*, *Schneider*, and *Thornhill*.

[126] *Lovell*, 303 U.S. at 451–52.

[127] *Id.* at 452.

[128] *Id.*

[129] *Id.* (quoting *Ex parte* Jackson, 96 U.S. 727, 733 (1877)). After noting that recent cases such as *Near* emphasized the importance of protecting press freedom from "every sort of

Although *Lovell* did not overrule *Davis*, the case raised provocative questions about *Davis*'s continuing validity. Did *Lovell*'s presumption against licensing of press activities also apply to other forms of expression such as open-air speaking? Was speaking in public places still a privilege, exercised at the discretion of local officials, or was it classified as a right? Stated differently, was the protection of the First Amendment's Speech Clause identical to that provided by the Press Clause? To what extent did the First Amendment protect a citizen's access to public property for expressive purposes? The Court confronted these questions in several cases decided shortly after *Lovell*.

B. Hague

> We hear about constitutional rights, free speech and the free press. Every time I hear those words I say to myself, "That man is a Red, that man is a Communist." You never heard a real American talk in that manner.
>
> –Mayor Frank Hague, 1938[130]

Frank Hague and his political machine ruthlessly controlled Jersey City, New Jersey from 1917 to 1947.[131] Industry was safe in Jersey City, Hague boasted,

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infringement," *id.* at 452, the Court added a "see also" footnote citation to seven cases, *id.* at n.2. Read together, these cases emphasize the importance of protecting the distribution of printed materials. However, these cases involved content-based prohibitions, *see, e.g.*, *Ex parte* Campbell, 221 P. 952 (Cal. Dist. Ct. App. 1923) (holding that a ban on printing or distributing material espousing the precepts of the Industrial Workers of the World violated the state constitution), or judicially-created exemptions for preferred types of speech, such as political commentary, *see, e.g.*, Coughlin v. Sullivan, 126 A. 177, 177 (N.J. 1924) (holding that political pamphlets were exempt from an ordinance restricting "circulars, pamphlets, and other advertising matter"). Only one of the cases cited by the *Lovell* Court involved a power similar to the Griffin, Georgia licensing ordinance. In *Dearborn Publishing Co. v. Fitzgerald*, 271 F. 479 (N.D. Ohio 1921), the mayor of Cleveland sought to sanction a newspaper, the *Dearborn Independent*, for publishing anti-Semitic articles he regarded as a breach of peace. *Id.* at 480–81. The mayor instructed police to arrest anyone distributing the paper on the streets if additional anti-Semitic articles were published. *Id.* The paper obtained an injunction. *Id.* at 486. Federal district Judge Westenhaver wrote in terms that would be reflected in later opinions such as *Lovell*:

> If defendants' action were sustained, the constitutional liberty of every citizen freely to speak, write, and publish his sentiments on all subjects, being responsible only for the abuse of that right, would be placed at the mercy of every public official who for the moment was clothed with authority to preserve the public peace, and the right to a free press would likewise be destroyed.

Id. at 485.

[130] THE COLUMBIA DICTIONARY OF QUOTATIONS 154 (Robert Andrews ed., 1993).

[131] *See* DAYTON DAVID MCKEAN, THE BOSS: THE HAGUE MACHINE IN ACTION (1940).

because he would not allow "Un-American" labor groups like the Committee for Industrial Organization (CIO) to meet, picket, or pass out literature in the city.[132] Hague firmly believed that *Davis* authorized his policies, a view supported by the New Jersey courts.[133] Nonetheless, when federal courts heard challenges to Hague's policies, those courts found ways to bypass *Davis*.

In November 1937, New Jersey CIO leaders announced it was time for a showdown between the CIO and "I-Am-The-Law-Hague."[134] The CIO planned a massive drive to organize workers in Jersey City; if necessary, the CIO announced that it would test the validity of Jersey City laws prohibiting distribution of leaflets and requiring licenses for public assemblies.[135] Hague's machine responded viciously. On November 29, 1937, CIO organizers and sympathizers were illegally searched, leaflets were confiscated, and although few CIO organizers were arrested, most were *deported* from Jersey City.[136]

The CIO and the American Civil Liberties Union applied for permits to hold outdoor meetings in December 1937, and a variety of Jersey City veteran's groups, inspired by Hague's machine, opposed the granting of permits for "thoroughly Un-American" speakers.[137] Based on this opposition, the Jersey City director of public safety refused the permits because the meetings "would lead to riots, disturbances,

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[132] As Judge Clark wrote,

> [The] deliberate policy of Jersey City is this. Certain individuals and groups of individuals . . . are alleged to be the kind of persons and to hold the kinds of opinions to which the people of Jersey City or a majority of them are, to use a current and expressive medical term — allergic.

Comm. for Indus. Org. v. Hague, 25 F. Supp. 127, 130 (D.N.J. 1938), *aff'd*, 101 F.2d 774 (3d Cir.), *aff'd*, 307 U.S. 469 (1939).

[133] In 1922, the state's highest court held that the mayor and fire chief of Rahway were justified in using a stream of water from a fire hose to sweep a Socialist speaker off of a platform, "wetting those in the immediate neighborhood thereof," and dispersing a public meeting. Harwood v. Trembley, 116 A. 430, 431 (N.J. 1922). The Socialists had been denied a permit to hold the meeting and the court added, à la *Davis*, that "liberty of speech no more authorizes a citizen to appropriate to his own use the public property of a community for the purpose of exercising that guaranty than it permits him to occupy *in invitum* the private property of a fellow citizen for the same purpose." *Id.* In 1938, the state supreme court reaffirmed its view that *Davis* was still the law of the land; liberty of speech did not include the right to speak on public property without a permit. Thomas v. Casey, 1 A.2d 866, 869 (N.J. 1938).

[134] Hague v. Comm. for Indus. Org., 101 F.2d 774, 778 (3d Cir.), *aff'd*, 307 U.S. 496 (1939).

[135] *Id.*

[136] *Id.* As Professor Chafee wrote, "Mayor Frank Hague fought the closed shop by establishing the closed city." CHAFEE, FREE SPEECH, *supra* note 19, at 410.

[137] *See Hague*, 101 F.2d at 803–04.

and disorderly assemblage."[138] Rather than violate the public assembly ordinance, the CIO sought an injunction from the federal district court.[139]

After a lengthy trial in 1938, Judge William Clark issued a decree prohibiting Hague and his associates from excluding CIO representatives from Jersey City, restraining their movement within the city, interfering with the distribution of leaflets or the display of signs, and "placing any previous restraint" upon public meetings.[140] The city's ban on leafleting was facially unconstitutional under *Lovell*, decided earlier in 1938.[141]

As for public meetings, Judge Clark found that there was an "easement of assemblage" in municipal parks.[142] How could this "easement of assemblage" be reconciled with *Davis*? Judge Clark claimed that Hughes's comments about the municipal power to forbid public speaking in public places was dictum; consequently, the language in the United States Supreme Court opinion affirming the Massachusetts court was "double dictum."[143]

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[138] *Id.* at 806 (Davis, J., dissenting) (quoting a letter from Daniel Casey, Jersey City director of public safety). As the Court of Appeals stated, the "cries of impending riot raised by the appellants are not candid. In other words, Mayor Hague and his associates, reversing the usual procedure, troubled the waters in order to fish in them." *Id.* at 784.

[139] CHAFEE, FREE SPEECH, *supra* note 19, at 412.

[140] The district court's findings of fact and decree are reprinted as an appendix to the appellate court's opinion. *Hague*, 101 F.2d at 791–96.

Judge Clark's views on prior restraint were not completely consistent. He believed that the doctrine of cases such as *Near* and *Lovell* was not fully applicable to public meetings. *Hague*, 25 F. Supp. at 146. In commenting on procedures that he believed to be constitutional, he noted that licensing authorities could deny a license if there were proof that the applicants "have spoken in the past in such fashion that audiences similar to those to be reasonably expected in Jersey City have indulged in breaches of the peace." *Id.* Moreover, if there were proof of previous breaches of peace,

> we think that either a copy of the speech to be currently delivered could be required and censored in the light of the reasonable apprehension of disorder of 'firm and courageous' city officials or else the speakers could be bound over to keep the peace and be of good behaviour.

Id. He admitted this was a system of censorship and public speeches might "suffer in spontaneity but . . . the listening public would welcome the compensating gain in thoughtfulness." *Id.* at 148.

The day after issuing his opinion, Judge Clark wrote to Professor Chafee, stating "I am sure you have been discouraged in the past with the curious tendency on the part of a certain school of liberals to overlook the countervailing considerations of public order. In my opinion I have tried to give them some reasonable scope." SMITH, *supra* note 19, at 196 (quoting Letter from William Clark to Zechariah Chafee, Jr. (Oct. 28, 1938)).

[141] *Hague*, 25 F. Supp. at 144.

[142] *Id.* at 145.

[143] *Id.* at 151.

The Third Circuit affirmed the injunction[144] and provided an expansive discussion of the First Amendment's application to public assemblies. Drawing heavily upon *Near*, the appellate court concluded, "[t]here is strong analogy between the right freely to publish the written or printed word and the right here in issue freely to speak in a public assembly."[145] The licensing scheme was repugnant to free speech because it allowed government officials to destroy their opponents. Under Hague's application of the assembly ordinance, "political speakers might not stump a city in an election if their opponents objected to what they had to say and threatened disorder. The strict application of such a rule would result eventually in the existence of but one political party as is now the case under totalitarian governments."[146]

The appellate court regarded *Davis* as both irrelevant and passé. First, *Davis* was distinguished from this case on technical grounds because Davis never applied for a permit; in this case, the appellees sought permits.[147] Second, and more significant, the Third Circuit regarded *Davis* as overruled by the "modern doctrine of protection of liberty of speech and assembly" pronounced in cases such as *Near* and *Lovell*.[148] There was "but small discussion" of civil liberties in *Davis* and its view of the powers of municipal authorities was outdated.[149] The appellate court, in language mirroring William F. Davis's unsuccessful claims more than forty years earlier, added:

> [W]e think it cannot now be doubted that a city owns and its officials administer its streets and parks, not as private proprietors, but as trustees for the people. While streets and parks are to be administered primarily for the use of the people for travel and recreation it is equally certain that, consistent with such uses, the public places of a city must be open for the use of the people in order that they may exercise their rights of free speech and assembly. If this were not so it is obvious that these

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[144] *Hague*, 101 F.2d at 791. The decree permitted Jersey City to adopt a policy of forbidding all meetings of any kind upon the streets or public places of Jersey City, other than parks. *Id.* at 796. The court of appeals struck this provision from the decree. *Id.* at 787.

[145] *Id.* at 784.

[146] *Id.* The appellate court added that even if the ordinance were valid, it had been applied in a discriminatory manner in violation of the Equal Protection Clause of the Fourteenth Amendment. "The criterion imposed by the authorities of Jersey City upon the right to speak therein is simply whether or not the individual who is to speak is a right thinking person in the view of those who constitute the city authorities. No other test is applied." *Id.* at 786.

[147] *Id.* at 785. Judge Davis thought the majority was relying on a "distinction without a difference." *Id.* at 800 (Davis, J., dissenting).

[148] *Id.* at 785. Judge Davis said there is not a "line, word or even a hint" in cases such as *Near* and *Lovell* expressly overruling or modifying *Davis*. *Id.* at 801 (Davis, J., dissenting).

[149] *Id.* at 785.

> rights would be but empty forms for those unable to obtain suitable private places in which to exercise them.[150]

In their briefs submitted to the Supreme Court, the parties offered starkly differing views of *Davis*'s validity. Hague claimed that cases such as *Lovell* did not create a right of "free expression" that protected open-air speech to the same extent as freedom of the press.[151] The respondents countered that *Davis* was no longer good law; speech in public places was an essential part of American democracy and the trend of the Court's decisions in the 1930s was to provide substantial protection to speech.[152]

The Supreme Court sustained the lower court, but no opinion commanded a majority.[153] Remarkably, Justice Roberts's plurality opinion found the Jersey City ordinances void, but sidestepped the question of *Davis*'s continuing validity.[154] His attempt to distinguish the two cases was hyper-technical. The Boston ordinance was not solely aimed at free expression, but also included within its scope other activities such as discharging firearms and selling goods.[155] The Jersey City ordinance, in contrast, only dealt with public assembly and was "not a general measure to promote the public convenience in the use of the streets or parks."[156] Then, while claiming that *Davis* was not being overruled, Justice Roberts offered language that plainly undercut *Davis*:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United

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[150] *Id.*

[151] Brief on Behalf of Petitioners at 40–41, Hague v. Comm. for Indus. Org., 307 U.S. 496 (1939) (No. 651). The petitioners added, "[t]here is not and never has been any general right of 'free expression' recognized by any court. The use of such a catch-all, cover-all phrase is attended by the gravest risks of confused ideology, as is the use of any other lump-concept." *Id.* at 41.

[152] Respondents' Brief at 54, 63–64, *Hague*, 307 U.S. 496 (No. 651); *see also* Brief of the Committee on the Bill of Rights, of the American Bar Association, As Friends of the Court at 7–11, *Hague*, 307 U.S. 496 (No. 651) (arguing that "[f]reedom of assembly is an essential element of the American democratic system").

[153] *Hague*, 307 U.S. 496.

[154] *See id.*

[155] *See id.* at 515.

[156] *Id.*

> States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.[157]

Roberts cited no authorities or sources to support his assertion that streets and parks had been used "time out of mind" for expressive purposes.[158] By claiming that the Court was protecting a longstanding tradition, Justice Roberts masked the break from *Davis* "and the way things had been time *in* mind."[159]

Hague signaled that the proprietary authority recognized in *Davis* had been brushed aside.[160] Although Justice Roberts's plurality opinion relied on the Privileges and Immunities Clause of the Fourteenth Amendment, this was promptly forgotten.[161] His plurality opinion in *Hague* soon came to stand for a First Amendment right of all speakers, regardless of citizenship, to use public streets and parks to discuss political and religious matters.[162]

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[157] *Id.* at 515–16. None of the other members of the Court finding the permit ordinance invalid acknowledged the break from *Davis*. Justice Stone's separate opinion emphasized that First Amendment rights were protected by the Fourteenth Amendment's Due Process Clause. *Id.* at 519. This, of course, is in stark contrast with the *Davis* Court's position on the Fourteenth Amendment, a matter Stone did not mention. Justice Butler was the only member of the Court to comment on Roberts's effort to distinguish the Jersey City ordinance from the Boston ordinance. Both ordinances were identical in principle, thus he believed that *Davis* prevailed. *Id.* at 533 (Butler, J., dissenting). Justice McReynolds dissented because "management of such intimate local affairs . . . is beyond the competency of federal courts." *Id.* at 532 (McReynolds, J., dissenting).

[158] *See id.* at 515–16.

[159] Wertheimer, *supra* note 7, at 236.

[160] As an immediate consequence, a public celebration of the *Hague* decision was held without a permit in Jersey City on June 12, 1939. *Hague Safeguards Rally of His Foes*, N.Y. TIMES, June 13, 1939, at 1. State courts soon regarded *Hague* as overruling *Davis*. M. GLENN ABERNATHY, THE RIGHT OF ASSEMBLY AND ASSOCIATION 125–128 (2d ed. rev. 1981).

[161] Justice Roberts's preference for the Privileges and Immunities Clause was short-lived. In subsequent cases he relied upon the Due Process Clause. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("[T]he fundamental concept of liberty embodied in [the Fourteenth Amendment's Due Process Clause] embraces the liberties guaranteed by the First Amendment.").

[162] *See, e.g.*, Kunz v. New York, 340 U.S. 290, 293 (1951) (citing *Hague* as the beginning point for an analysis of municipal power to control the use of public streets for the expression of religious views). In *Kunz*, the Court found a New York City ordinance requiring permits for public worship meetings on streets unconstitutional. *Id.* at 294–95. Prior to *Hague*, the Court treated the same ordinance as not presenting a substantial federal question. *See* Smith v. New York, 292 U.S. 606 (1934). In his dissenting opinion in *Kunz*, Justice Jackson noted

Despite *Hague*'s sweeping repudiation of the idea that open-air speech occurs "at the sufferance of the state,"[163] Justice Roberts's plurality opinion is very preliminary. The detailed rules established in the district court's decree were set aside;[164] Justice Roberts believed that courts should not rewrite facially invalid ordinances.[165] Thus, the *Hague* plurality opinion provided only very broad answers to the questions regarding municipal regulation of open-air expression. Roberts recognized that local governments had the duty to "maintain order" and regulate the streets for all citizens.[166] And, the "uncontrolled" official discretion exercised under the Jersey City meetings ordinance was unconstitutional because it served as an "instrument of arbitrary suppression of free expression."[167] A major step toward filling in the details would occur in *Schneider v. State*,[168] decided a few months after *Hague*.

C. Schneider

> This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used.
>
> –Justice Owen Roberts, 1939[169]

The Court consolidated four cases involving municipal control of leafleting in *Schneider*.[170] One of the ordinances required a license to engage in door-to-door canvassing, solicitation, and leaflet distribution and presented questions relating to

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that municipal ordinances requiring permits for public assemblies "[u]ntil recently" had been widely regarded as constitutional. *Kunz*, 340 U.S. at 306 (Jackson, J., dissenting). The reason for the different results in *Smith* and *Kunz* "must be found in the Court, not in the ordinance." *Id.* at 308.

[163] Kalven, *supra* note 19, at 13.

[164] *See, e.g.*, *Hague*, 101 F.2d at 795 (asserting that permits for park meetings could only be denied if the time or place of the applicant's proposed use was in conflict with other park uses).

[165] *Hague*, 307 U.S. at 518.

[166] *Id.* at 516.

[167] *Id.*

[168] 308 U.S. 147 (1939).

[169] *Id.* at 161 (footnote omitted). The key Hughes-era First Amendment opinions discussed in this Article were written by either Chief Justice Hughes or Justice Roberts, both Hoover appointees. For a discussion of their roles in other types of cases, see Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891, 1935–74 (1994).

[170] *Schneider*, 308 U.S. at 147 n.*.

content discrimination.[171] The other ordinances prohibited leafleting in the streets and raised a different set of content-neutral questions.[172]

1. Licensing

The Irvington, New Jersey licensing ordinance was violated by Clara Schneider, a Jehovah's Witness who regarded applying for a license to be an act of disobedience to Jehovah.[173] Schneider's conviction was sustained by New Jersey's highest court, which distinguished *Lovell* because that case did not involve canvassing or soliciting.[174] The state court ruled that protecting citizens from fraudulent solicitation was a legitimate exercise of police power.[175] Schneider's appeal to the Court drew heavily upon *Lovell*, arguing that the licensing ordinance was an invalid prior restraint.[176]

Justice Roberts, writing for all members of the Court except Justice McReynolds, found that the licensing ordinance was not narrowly drawn to prevent fraud or trespass.[177] Rather, it gave the police censorial power "to say some ideas may, while others may not, be carried to the homes of citizens; some persons may, while others may not, disseminate information from house to house."[178] Drawing upon the historic struggle against press licensing, Justice Roberts wrote that "a censorship through license . . . strikes at the very heart of the constitutional guarantees."[179]

Significantly, Justice Roberts did not describe the activities of the Jehovah's Witnesses as falling within the First Amendment's Free Exercise of Religion Clause; this was "speech and press"[180] and the scope of the ordinance reached anyone "who wishes to present his views on political, social or economic questions."[181] One year

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[171] *Id.* at 157–58, 163.

[172] *Id.* at 154–56.

[173] Town of Irvington v. Schneider, 3 A.2d 609, 609 (N.J. 1939).

[174] *Id.* at 610.

[175] *Id.*; *see also* Dziatkiewicz v. Township of Maplewood, 178 A. 205 (N.J. 1935) (sustaining an ordinance similar to the one in *Schneider* as a valid police power regulation).

[176] Petitioner's Brief at 21, *Schneider* 308 U.S. 147 (No. 11). Although Schneider claimed her activities came within *Lovell*'s definition of press freedom, *id.* at 12, she also claimed her activities were protected under the First Amendment as freedom of religion and speech, *id.* at 8–9. *See also id.* at 31 ("[F]reedom of worship and religious liberty are inherent rights of equal value with freedom of speech, press and assembly.").

[177] *Schneider*, 308 U.S. at 164.

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id.* at 163; *cf.* Thomas v. Collins, 323 U.S. 516, 540 (1945) (invalidating a licensing requirement for labor speakers; if such a requirement were valid, it could apply to anyone "who seeks to rally support for any social, business, religious or political cause").

after *Schneider*, though, in *Cantwell v. Connecticut*,[182] Justice Roberts wrote that Jehovah's Witnesses were protected from arbitrary licensing schemes by the Free Exercise Clause.[183] Read together, *Lovell*, *Hague*, *Schneider*, and *Cantwell* show the Court's hostility toward censorial power cut across the Religion, Press, Speech, and Assembly Clauses. By 1940, the break from the past was clear; discretionary licensing schemes affecting open-air speech were no longer presumed to be constitutional.[184]

2. Content-Neutral Restrictions

Municipalities began prohibiting or regulating the distribution of leaflets in the 1880s as a means of preventing littering, street obstruction, and similar problems in rapidly urbanizing communities. These ordinances were commonly accepted by the judiciary.[185] In *Schneider*, the Court addressed three leafleting ordinances that had been upheld by lower courts; municipal power to prohibit leafleting was deeply

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[182] 310 U.S. 296 (1940). At issue was a statute prohibiting solicitation for any "religious, charitable, or philanthropic cause" unless a government official determined that the cause was religious or a bona fide charity or philanthropy. *Id.* at 301–02. Justice Roberts observed that the state official had boundless discretion in making these judgments:

> If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment . . . .

Id. at 305.

[183] After *Cantwell*, the Court referred to the expressive activities of Jehovah's Witnesses as combining elements of freedom of religion and freedom of expression, Murdock v. Pennsylvania, 319 U.S. 105, 109 (1943) (noting that the distribution of religious literature is "more than preaching; it is more than distribution of religious literature"), or placed these activities under the protection of the Religion, Press, and Speech Clauses, Largent v. Texas, 318 U.S. 418, 422 (1943) (holding that a licensing statute "abridges the freedom of religion, of the press and of speech"). The current Court regards the Jehovah's Witnesses cases of the 1930s and early 1940s as protecting religious and nonreligious speech. *See generally* Watchtower Bible & Tract Soc., Inc. v. Vill. of Stratton, 536 U.S. 150 (2002) (finding unconstitutional a licensing ordinance for door-to-door canvassing and literature distribution).

[184] In *Cantwell*, the State claimed that the judiciary could correct arbitrary action by the licensing official, but Justice Roberts considered that remedy to be inadequate: "a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint which, in the field of free speech and press, we have held inadmissible." *Cantwell*, 310 U.S. at 306.

[185] *See, e.g.*, Anderson v. State, 96 N.W. 149 (Neb. 1903); Wettengel v. City of Denver, 39 P. 343 (Colo. 1895).

entrenched and the lower courts found ways to distinguish and limit *Lovell*.[186] For example, the Massachusetts Supreme Judicial Court upheld an ordinance prohibiting street distribution of leaflets in Worcester.[187] Drawing upon its previous decisions,[188] as well as those of other courts,[189] the Massachusetts court found the ordinance to be a reasonable regulation of the use of streets; the law did not preclude the sale of newspapers, nor did it prevent free distribution of leaflets in other places.[190] As an anti-litter measure, the Worcester ordinance was "not in any sense directed toward the suppression of ideas, theories or opinions."[191] *Lovell* was distinguished because the Worcester ordinance did not allow discretionary licensing.[192]

Only Justice McReynolds, whose tenure on the Court began in 1914, voted to uphold the handbill ordinances.[193] Justice Roberts, writing for the Court, echoed *Hague* and reinforced the idea that streets were a uniquely important forum for speech.[194] Justice Roberts wrote, "the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[195] By this powerful statement, the Court discarded several decades of municipal law in which restrictions on open-air speech were justified by the availability of other outlets.

Schneider introduced balancing into the Court's First Amendment methodology.[196] Justice Roberts observed that the interest in keeping streets clean was

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[186] *See* City of Milwaukee v. Snyder, 283 N.W. 301 (Wis.) (involving an ordinance aimed at preventing littering), *rev'd sub nom.*, *Schneider*, 308 U.S. 147 (1939); People v. Young, 85 P.2d 231 (Cal. App. Dep't Super. Ct. 1938) (addressing a Los Angeles ordinance that prohibits the distribution of handbills only in limited places), *rev'd sub nom.*, *Schneider*, 308 U.S. 147 (1939); Commonwealth v. Nichols, 18 N.E.2d 166 (Mass. 1938) (holding that the ordinance reasonably regulates the use of streets in order to prevent littering), *rev'd sub nom.*, *Schneider*, 308 U.S. 147 (1939). However, some state courts invalidated handbill ordinances as a result of *Lovell*. *See, e.g.*, Dearborn v. Ansell, 287 N.W. 551 (Mich. 1939).

[187] Commonwealth v. Kimball, 13 N.E.2d 18, 22 (Mass. 1938).

[188] *See, e.g.*, *id.* at 21 ("The distribution of handbills or similar papers in streets tends to annoy travelers and abutters, obstruct to the streets, and to litter them with paper.").

[189] *See, e.g.*, Anderson v. State, 96 N.W. 149, 150 (Neb. 1903) (holding that a reasonable police regulation is not invalid because it may incidentally affect the exercise of a constitutional right); *see also Young*, 85 P.2d at 234 (stating that the conclusion that handbills may be prohibited "finds support in the authorities").

[190] *Kimball*, 13 N.E.2d at 21–22.

[191] *Nichols*, 18 N.E. 2d at 168.

[192] *Id.* at 168–69.

[193] *See* Schneider v. State, 308 U.S. 147, 165 (1939) (McReynolds, J., dissenting).

[194] *Id.* at 163.

[195] *Id.*

[196] *See generally* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987). Professor Aleinikoff observed that this development was not explained by the Court. "No Justice explained why such a methodology was a proper form

insufficient to justify a prohibition on leafleting.[197] And, if there were indirect consequences, such as litter, from the distribution of literature, municipalities would have to employ means protective of free expression.[198] Stated differently, judicial deference to municipal authorities was old-fashioned;[199] even rather mundane laws designed to promote content-neutral interests would receive heightened judicial scrutiny. Although Justice Roberts did not cite footnote four of *Carolene Products*,[200] the "modern" theory of judicial review articulated in *Carolene Products* was central to *Schneider*. Justice Roberts wrote that freedom of speech and press were critical to "free government by free men."[201] Consequently,

> where legislative abridgement of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.[202]

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of constitutional construction, nor did any purport to be doing anything novel or controversial. Yet balancing was a major break with the past . . . ." *Id.* at 948–49.

[197] *Schneider*, 308 U.S. at 162.

[198] *Id.* at 162, 164.

[199] For an example of the judicial deference commonplace prior to *Schneider*, see *Nichols*, 18 N.E. 2d at 169 ("Whether the legitimate objects of the section could be substantially accomplished by less sweeping provisions is a matter for the consideration of the city's legislative body and not for us.").

[200] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). Professor Peter Linzer erroneously claims that the first use of *Carolene Products*'s footnote four was in *Thornhill v. Alabama*, 310 U.S. 88 (1940). Peter Linzer, *The* Carolene Products *Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely vs. Harlan Fiske Stone*, 12 CONST. COMMENT. 277, 293 (1995). Justice Murphy's *Thornhill* opinion paraphrases and quotes *Schneider*'s language regarding the importance of judicial protection of First Amendment rights. *Thornhill*, 310 U.S. at 95–96. There is no substantive difference between *Thornhill* and *Schneider*; the difference is purely cosmetic as *Thornhill* cites *Carolene Products* while *Schneider* does not. Therefore, *Schneider* should be recognized as the first application of footnote four.

[201] *Schneider*, 308 U.S. at 161.

[202] *Id.*

Did this special judicial posture apply to all speech, regardless of subject matter? One of the ordinances addressed in *Schneider* prohibited distribution of both commercial and noncommercial materials on the sidewalks of Los Angeles.[203] A leaflet announcing a meeting concerning the Spanish Civil War included the words"Admission 25¢ and 50¢."[204] The Superior Court of Los Angeles County regarded the leaflet as "commercial advertising rather than the expression of one's views."[205] Hence, the State claimed before the Supreme Court that freedom of the press was not affected by application of the ordinance to a commercial advertisement.[206]

In that portion of *Schneider* dealing with the ordinances prohibiting handbill distribution, Justice Roberts did not refer to a distinction between commercial and noncommercial messages.[207] However, in discussing the Irvington, New Jersey licensing ordinance, Justice Roberts indicated that commercial soliciting could be subject to a licensing requirement.[208] If commercial solicitation could be treated differently than religious or political solicitation, could municipalities also distinguish between commercial and noncommercial leaflets? The answer came three years later in *Valentine v. Chrestensen*.[209]

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[203] *Id.* at 154–55.

[204] People v. Young, 85 P.2d 231, 235 (Cal. App. 1938), *rev'd sub nom.*, *Schneider*, 308 U.S. 147 (1939).

[205] *Id.* The California court considered the law's impact on the right to express one's views (freedom of expression) and the right to engage in business (property rights). Classifying the handbill in question as a commercial advertisement brought property rights into play. The court stated,

> We do not find the constitutional prohibition against deprivation of property without due process to be superior to that which protects one from being deprived of his liberty without due process; the latter is not, any more than the former, an absolute right; each may be abridged by a reasonable exercise of the police power for the public benefit.

Id.

[206] Appellee's Brief at 20, *Young*, 308 U.S. 147(No. 715); *see also* Fifth Ave. Coach Co. v. City of New York, 221 U.S. 467 (1911) (upholding a ban on the display of advertising on motor vehicles as a reasonable exercise of police power, without addressing any First Amendment issues).

[207] *See Schneider*, 308 U.S. 147.

[208] *Id.* at 165.

[209] 316 U.S. 52 (1942). Six members of the *Schneider* Court, Justices Stone, Roberts, Black, Reed, Frankfurter, and Douglas, also participated in *Chrestensen*. The new members of the Court hearing *Chrestensen* were Justices Murphy, Byrnes, and Jackson.

D. Valentine

> Such men as Thomas Paine, John Milton and Thomas Jefferson were not fighting for the right to peddle commercial advertising.
>
> –Judge Jerome Frank[210]

In 1940, "Captain" F.J. Chrestensen, owner of a former U.S. Navy submarine, sought to exhibit his submarine at the New York City-owned docks in Battery Park.[211] He was refused permission to do so; nonetheless, he obtained permission to dock at a state-owned pier in the East River.[212] Chrestensen prepared handbills inviting the public to take guided tours to "SEE how men live in a Hell Diver."[213] Police officials informed Chrestensen that distribution of commercial handbills violated a municipal ordinance, but noncommercial handbills were permissible.[214] Chrestensen then revised his handbill, deleting references to prices, competent guides, and the colorful phrases such as "Hell Diver."[215] On the other side of the handbill, under the headline "Submarine Refused Permission To Dock At Any City Owned Pier By Commissioner of Docks McKenzie," Chrestensen protested the "dictatorial manner" of the docks commissioner.[216]

After the police prevented distribution of Chrestensen's revised handbill, he obtained an injunction from the United States District Court for the Southern District of New York; the district court read *Schneider* as protecting distribution of both commercial and noncommercial handbills.[217] The Second Circuit agreed with the lower court's interpretation of *Schneider* and affirmed the injunction.[218] Counsel for New York City sought to save the ordinance by claiming it would only apply to

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[210] Chrestensen v. Valentine, 122 F.2d 511, 524 (2d Cir. 1941) (Frank, J., dissenting), *rev'd*, 316 U.S. 52 (1942).

[211] *Id.* at 512.

[212] *Id.*

[213] Transcript of Record at 18C, *Chrestensen*, 316 U.S. 52 (No. 707).

[214] *Chrestensen*, 122 F.2d at 512. In 1921, a New York court ruled that "[i]t would be a dangerous and un-American thing" to restrict noncommercial leaflets and limited the ordinance to commercial expression. People v. Johnson, 191 N.Y.S. 750, 751 (1921). The ordinance was formally amended in 1938 to include language stating that the ordinance restricted only "commercial or business advertising matter." *Chrestensen*, 122 F.2d at 512.

[215] Brief for Respondent at 2, *Chrestensen*, 316 U.S. 52 (No. 707). For the revised version of the handbill, see Transcript of Record at 18A, *Chrestensen*, 316 U.S. 52 (No. 707).

[216] Transcript of Record at 18B, *Chrestensen*, 316 U.S. 52 (No. 707).

[217] *Chrestensen*, 34 F. Supp. 596, 599 (S.D.N.Y. 1940).

[218] *Chrestensen*, 122 F.2d at 514.

primarily commercial handbills, but the appellate court found this to be an elusive distinction, one which vested arbitrary authority in police officials.[219]

Before the Supreme Court, New York City argued that *Schneider* did not overrule precedents such as *Packer Corp. v. Utah*,[220] in which the Court regarded commercial advertising restrictions as within the police power. Commercial advertising did not aid the process of self-government, nor did it fit within the scope of the First Amendment's protection.[221] Additionally, the decisions of the lower courts enabled business owners to "flood the streets of our cities with commercial advertising under the guise of exercising the right of freedom of the press."[222]

In an opinion issued two weeks after the oral argument, the Court unanimously reversed the lower courts in a "casual, almost offhand" manner.[223] To the Court, the New York City ordinance was a business regulation, not a "speech" restriction.[224] The special role of courts in protecting freedom of expression, advanced in *Schneider*, was inapplicable because "purely commercial advertising" was outside the protection of the First Amendment.[225] That is, because commercial speakers did not have a right to use the City's property, the New York City ordinance did not trigger judicial scrutiny of the state's interests and the methods employed to serve those interests. "Whether, and to what extent, one may promote or pursue a gainful occupation in the streets," Justice Roberts wrote, "are matters for legislative judgment."[226]

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[219] *Id.* at 515. The court of appeals asked, "How much is 'primarily?' '*Primarily* commercial' presumably signifies a test quantitative in amount; a limited dross of commercialism does not vitiate, though a more substantial amount may, and presumably will." *Id.* Motive would also be a factor, requiring police officials to

> weigh motives or intent to determine the noncommercial nature of an enterprise . . . . In net result the police officers administering the regulation are to be arbiters — just as they undertook to be here — of the quantum of advertising as against protest and of the *purpose* of the citizen in speaking and writing.

Id.

[220] 285 U.S. 105 (1932).

[221] Brief for Petitioner at 15–17, *Chrestensen*, 316 U.S. 52 (No. 707).

[222] *Id.* at 36.

[223] Cammarano v. United States, 358 U.S. 498, 514 (1959) (Douglas, J., concurring). Alex Kozinski and Stuart Banner report that the papers of Chief Justice Stone and Justices Douglas and Jackson, available in the Library of Congress, do not contain case files for *Chrestensen*, nor did these Justices refer to the case in their correspondence. "All this suggests that in 1942, the Justices considered the question whether the First Amendment has any application to advertising to be one that was easily resolved and not very important." Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 758 (1993).

[224] *Chrestensen*, 316 U.S. at 53 n.1.

[225] *Id.* at 54.

[226] *Id.*

Given that New York City had to absorb the consequences of noncommercial leafleting, such as cleaning and caring for the streets, what additional burden did commercial leafleting create? Stated differently, are people less likely to discard a noncommercial handbill than a commercial handbill?[227] The appellate court doubted that commercial handbills would cause more litter than noncommercial handbills,[228] and questioned whether the ordinance "accomplishes enough to be worth saving."[229] The Supreme Court, however, was completely uninterested in this line of inquiry.

Nor was the Court interested in the problem of arbitrary enforcement of a law distinguishing between commercial and noncommercial handbills. Rather than fearing that municipal officials would restrict noncommercial speech, the Court feared that commercial speakers would engage in ruses.[230] Justice Roberts claimed Chrestensen attached his protest to the commercial message merely to evade the commercial ban.[231] "If that evasion were successful, every merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve immunity from the law's command."[232]

Assuming commercial speech poses problems, such as fraud or deception, which justify distinct status from noncommercial speech, does this necessarily mean that a litter law may also distinguish between commercial and noncommercial expression? Fifty-one years after *Chrestensen*, the Court held in *City of Cincinnati v. Discovery Network, Inc.*[233] that public safety and aesthetic problems caused by distribution of commercial and noncommercial materials could not be addressed by a restriction solely aimed at commercial speech. The *Discovery Network* Court found that a municipal ordinance banning news racks containing commercial speech, while allowing newsracks containing newspapers, "place[d] too much importance on the distinction between commercial and noncommercial speech [and] . . . the distinction bears no relationship *whatsoever* to the particular interests that the city has asserted."[234] Of course, *Discovery Network* acknowledged

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[227] *Compare* Coughlin v. Sullivan, 126 A. 177 (N.J. 1924) (finding that "[i]t is a matter of common knowledge" that advertising handbills are likely to result in litter; political materials are likely to be retained by recipients), *with* City of Milwaukee v. Kassen, 234 N.W. 352 (Wis. 1931) (finding that it is untrue that commercial handbills are more likely to be thrown in the street than political handbills).

[228] *Chrestensen*, 122 F.2d at 513 n.1 (1941).

[229] *Id.* at 513.

[230] *See Chrestensen*, 316 U.S. at 55.

[231] *Id.*

[232] *Id.* The Court of Appeals did not view Chrestensen's combination of messages as a subterfuge. *Chrestensen*, 122 F.2d at 516. Judge Frank, in a dissenting opinion, thought Chrestensen's commercial motivation was plain. *Id.* at 518–20 (Frank, J., dissenting).

[233] 507 U.S. 410 (1993).

[234] *Id.* at 424.

that commercial speech is entitled to limited First Amendment protection, a view contrary to *Chrestensen*.[235]

Why was the *Chrestensen* Court unwilling to confer some protection on commercial speech? The answer comes by contrasting *Chrestensen* with cases involving Jehovah's Witnesses who distributed leaflets announcing religious meetings on one side and invitations to purchase books on the other side. One year after *Chrestensen*, the Court declared that the activities of Jehovah's Witnesses were "clearly religious" and not subject to commercial leaflet ordinances[236] or licensing taxes applicable to commercial "hucksters."[237] The advertising and sale of literature did not "transform evangelism into a commercial enterprise."[238] To the Court, the sale of literature by Jehovah's Witnesses was simply incidental to the main object of preaching the tenets of their faith, a highly protected form of expression. Captain Chrestensen's speech, in contrast, was merely ancillary to his business. That is, whatever value Chrestensen's protest might have had as political discourse, it was tainted by its attachment to a commercial message motivated by business interests. Moreover, his tours were akin to motion pictures, which, at that time, were denied First Amendment protection because movie exhibition was a "spectacle[]," a business conducted for profit.[239] Under the *Carolene Products* view of the Constitution, regulation of economic activities — including control of speech promoting those activities — was not subject to heightened judicial scrutiny.[240] To confer First Amendment protection to commercial speech in 1942 would have gone against that era's new constitutional order.

Chrestensen bears a striking resemblance to *Davis*. In both cases, there is no right to use public property for expressive purposes. Accordingly, whether and under what circumstances speakers are allowed to use public property are matters for legislative judgment. Justice Roberts's opinions in *Hague* and *Schneider* undercut *Davis* without directly acknowledging their attacks. Similarly in *Chrestensen*, he preserved *Davis* in the context of commercial expression without acknowledging *Chrestensen*'s debt to *Davis*. Despite Justice Roberts's insistence that the Court

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[235] *See Chrestensen*, 316 U.S. at 54–55.

[236] Jamison v. Texas, 318 U.S. 413, 417 (1943).

[237] Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).

[238] *Id.* at 111; see also *Largent v. Texas*, 318 U.S. 418, 420 (1943), stating that the Jehovah's Witnesses "look upon their work as Christian and charitable. To them it is not selling books or papers but accepting contributions to further the work in which they are engaged."

[239] Mutual Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230, 243–44 (1915). Obviously, the rationale of *Mutual Film* posed a threat to other media industries and the Court ruled in 1952 that motion pictures, like books, newspapers, and magazines, are entitled to First Amendment protection even though they are produced by profit-seeking firms. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501–02 (1952).

[240] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

had "unequivocally held that the streets are proper places" for distributing information,[241] *Chrestensen* shows that support to be equivocal.

III. ORDERED FREEDOM

On August 17, 1904, "Prof." J.L. Fitts, a Socialist, defied an Atlanta, Georgia public meeting ordinance by delivering a speech on the streets of downtown Atlanta without a permit.[242] Handbills announcing the meeting included the following:

> Prof. Fitts has been refused a permit. He will speak under the right guaranteed by the 1st Amendment to the United States Constitution, which was proposed by Jefferson and approved by Washington. If interrupted, the case will be carried to the United States Supreme Court. Shall we, who built the streets, be deprived of their use for lawfully assembling to discuss our condition and needs? Come and see. Be early and get a good place. *Don't Block Sidewalks or Streets.*[243]

After briefly speaking, Fitts was arrested and his conviction was upheld by the Georgia Supreme Court.[244] His case raised an interesting question: Could public safety be protected through measures less invasive than a permit scheme? Because the state supreme court disagreed with Fitts's constitutional claim of a right to use the streets,[245] it did not consider the appropriateness of less restrictive methods.

Other courts finding permit schemes to be invalid, however, had considered such matters. For example, in 1888, the Kansas Supreme Court found that municipalities could regulate, but not prohibit, parades and public demonstrations.[246] The Kansas court outlined permissible forms of regulation:

> [C]ertain restrictions may be necessary to preserve the public from harm. It might be proper, on account of the peculiar

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[241] *Chrestensen*, 316 U.S. at 54.

[242] Fitts v. City of Atlanta, 49 S.E. 793, 793–94 (Ga. 1905).

[243] *Id.* at 794 (emphasis added). The tactic of violating municipal permit ordinances was commonly used by Socialist speakers during the late nineteenth and early twentieth centuries. Wertheimer, *supra* note 7, at 175–215. Wobblies also violated permit ordinances, often stating that the only permit they had was the First Amendment. FELLOW WORKERS, *supra* note 7, at 174.

[244] *Fitts*, 49 S.E. at 798.

[245] *Id.* at 795 (writing that neither the federal nor state constitutions "confers any constitutional right to gather crowds and make public orations in the streets of a city regardless of the municipal control over them"). The Georgia Supreme Court also held that the ordinance was not facially discriminatory, nor was it applied in an arbitrary manner. *Id.* at 797–98.

[246] Anderson v. City of Wellington, 19 P. 719 (Kan. 1888).

> conditions of affairs in a city, that street parades should be confined to certain streets, or should be conducted within certain hours of the day, or should be forbidden in the night-time, or that the police department should have some previous notice, or that there should be other reasonable regulations respecting them, justified by such a condition that it would be apparent that regulation, and not prohibition, was the object of the ordinance.[247]

Articulating principles that would later animate content-neutral doctrine, the Kansas court said that regulations must not be "oppressive," but must operate uniformly and must not allow a government official "to prevent those with whom he [does] not agree on controverted questions" from publicly communicating.[248]

As the Court in the 1930s began developing a First Amendment right to use the streets, it was careful to acknowledge municipal authority to protect public order. For example, in *Lovell*, Chief Justice Hughes wrote that the Griffin, Georgia ordinance was flawed because it was not confined to matters such as the time, place, or manner of leaflet distribution.[249] "The ordinance prohibits distribution of literature of any kind at any time, at any place, and in any manner without a permit from the City Manager."[250] Implicit in *Lovell* is the notion that municipal power to protect interests such as "public order" must be balanced against freedom of expression. As Justice Roberts wrote in *Hague*, freedom of expression "is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."[251] It was clear after *Lovell*, *Hague*, *Schneider* and *Cantwell* that arbitrary licensing was an abridgment, but could a system of licensing be permissible if it were limited to content-neutral factors? Was the heightened scrutiny called for in *Schneider* appropriate in instances where cities regulated, but did not prohibit a form of speech? The Court confronted these questions in *Cox v. New Hampshire*.[252]

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[247] *Id.* at 723.

[248] *Id.* See also *In re Frazee*, 30 N.W. 72, 76 (Mich. 1886), in which the Michigan Supreme Court found a parade ordinance invalid because "it suppresse[d] what is in general perfectly lawful, and because it leaves the power of permitting or restraining processions, and their courses, to an unregulated official discretion, when the whole matter, if regulated at all, must be by permanent, legal provisions, operating generally and impartially."

[249] *See, e.g.*, Lovell v. City of Griffin, 303 U.S. 444, 451 (1937).

[250] *Id.*

[251] Hague v. Comm. for Indus. Org., 307 U.S. 496, 515–16 (1939); *see also* Schneider v. State, 308 U.S. 147, 161 (1939) (stating that courts' task is "to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of [free expression]").

[252] 312 U.S. 569 (1941).

A. Cox

On the evening of June 8, 1939, eighty-eight Jehovah's Witnesses, divided into groups of fifteen to twenty members, marched through the business district of Manchester, New Hampshire without a permit as required by state law.[253] Each small group went to a different part of the business district and walked in single-file formation on the sidewalks.[254] Participants carried small signs declaring "Religion is a Snare and a Racket," and on the reverse side, "Serve God and Christ the King."[255] While marching, the Jehovah's Witnesses also passed out leaflets announcing a meeting where a talk entitled "Fascism or Freedom" would be delivered.[256] The participants were instructed to walk on the sidewalks at least twenty feet apart so "they would be ordinary pedestrians, causing no more interference with others than any orderly pedestrian."[257]

Local police, however, claimed the Jehovah's Witnesses walked as close together as possible and interfered with "normal" sidewalk travel.[258] There was no breach of peace or disorderly conduct such as blocking sidewalks, streets, or crosswalks.[259] Nonetheless, five of the Jehovah's Witnesses were convicted of violating the state parade licensing statute.[260] The convictions were sustained by the New Hampshire Supreme Court.[261]

Although the statute contained no standards to guide the licensing authority, the state court — with its eye on cases such as *Lovell*, *Hague*, and *Schneider* — narrowly construed the statute.[262] The licensing authority was confined to content-neutral matters; "if the public convenience is not subjected to undue disturbance,

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[253] The statute required licenses for theatrical presentations, parades, and open-air public meetings. *Id.* at 571. The statute is still in effect. N.H. REV. STAT. ANN. § 286:2 (1999).

[254] *Cox*, 312 U.S. at 572.

[255] *Id.*

[256] *Id.*

[257] Appellants' Statement as to Jurisdiction at 22, *Cox*, 312 U.S. 569 (No. 502).

[258] State v. Cox, 16 A.2d 508, 511 (N.H. 1940). The Jehovah's Witnesses claimed unsuccessfully that the statute did not define interference. "The result is that the officers have uncontrolled discretion in determining whether or not a given joint or common movement upon the streets of two of more persons falls within the limits" of the law. Appellants' Brief at 25, *Cox*, 312 U.S. 569 (No. 502). The state supreme court readily disposed of this argument: "This was a parade or procession .... It is immaterial that its tactics were few and simple. It is enough that it proceeded in ordered and close file as a collective body of persons on the city streets." *Cox*, 16 A.2d at 511. Chief Justice Hughes accepted the conclusion of the state court. *Cox*, 312 U.S. at 575.

[259] *Cox*, 16 A.2d at 511.

[260] *Cox*, 312 U.S. at 570–71.

[261] *Cox*, 16 A.2d at 517.

[262] *Id.* at 515.

the license must issue."[263] The statute did not authorize censorship because the discretion "vested in the authority is limited in its exercise by the bounds of reason, in uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination."[264]

As a content-neutral regulation designed to accommodate free expression and social order, the law promoted "ordered freedom."[265] The state court elaborated:

> Application for a permit gives the public authorities notice in advance of any parade or procession for which license may be granted, thus giving opportunity for its proper policing. And the license, in fixing the time and place of a parade or procession, serves to prevent confusion by overlapping parades or processions, to secure convenient use of the streets by other travelers, and to minimize the risk of disorder.[266]

The state supreme court concluded the law had minimal impact on expression, leaving the display of placards and signs and the distribution of literature unrestricted.[267]

In an opinion authored by Chief Justice Hughes, the Supreme Court unanimously affirmed, stating that civil liberties "imply the existence of an organized society maintaining public order without which liberty itself would be lost

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[263] *Id.*

[264] *Id.* at 513.

[265] *Id.* at 515.

[266] *Id.* at 514.

[267] *Id.* Despite its claims about the importance of content neutrality, the state court apparently disliked the message conveyed on signs carried by the marchers. The court wrote,

> If short of blasphemy, the motto or slogan that religion is a snare and a racket was an offence to compelled readers, whose willingness to read was not consulted. Freedom of speech is not understood to go so far as to require any hearers to listen, or of writing as to force it to be read by those confronted with it. The right to worship is not a right to disturb others in their worship, and the right to free speech and writing is not one to force speech or writing on an unwilling audience or readers. It is not unreasonable to say that the sentiment displayed had a provocative tendency to a disturbance of the peace in view of the manner, place and time of its publication.

Id. There was, however, no evidence of adverse public reaction to the Jehovah's Witnesses in *Cox*. This contrasts with *State v. Chaplinsky*, 18 A.2d 754 (N.H. 1941), *aff'd*, 315 U.S. 568 (1942), where Walter Chaplinsky, a Jehovah's Witness, angered a crowd by distributing Jehovah's Witnesses literature; the police intervened and removed Chaplinsky, "apparently more for his protection than for arrest." *Id.* at 758. While being escorted by police, Chaplinsky called one of them "a damned Fascist," leading to his arrest and conviction for violating the state's "fighting words" statute. *Id.* at 757, 762.

in the excesses of unrestrained abuses."[268] Because the record in this case displayed no evidence that the statute had been administered in a discriminatory manner, and given the state supreme court's limited construction of the statute, Chief Justice Hughes regarded this case as different than cases such as *Hague* where licensing was "an instrument of arbitrary suppression of opinions on public questions."[269]

Hughes described the municipal regulation of parades as "traditional,"[270] without acknowledging the origin of parade licensing as a way to limit the speech of disfavored religious groups such as the Salvation Army, or the post-*Davis* manner in which courts ignored discriminatory licensing decisions.[271] As long as municipalities licensed parades "with regard only to considerations of time, place and manner" such action was an appropriate method of protecting the public convenience.[272]

Cox has a strikingly sterile quality; even Justice McReynolds joined the opinion. Unlike other cases of that era that are replete with rhetoric about the value of free expression,[273] or the importance of particular modes of expression,[274] the dominant theme of *Cox* is the need for an "organized society."[275] The New Hampshire Supreme Court essentially dismissed the communicative value of parades, stating that it believed the Jehovah's Witnesses' leaflets would have had as large a circulation without the parade, and signs would have been as conspicuous

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[268] *Cox*, 312 U.S. at 574.

[269] *Id.* at 577–78. The Court also sustained a fee requirement; the amount of the fee varied according to the cost of maintaining public order. *Id.* at 577. As the Court later explained, such fees cannot be based on content-related factors, such as hostile reactions from audience members. *See* Forsyth County v. Nationalist Movement, 505 U.S. 123, 136–37 (1992).

[270] *Cox*, 312 U.S. at 574.

[271] *See, e.g.*, Sullivan v. Shaw, 6 F. Supp. 112 (S.D. Cal. 1934) (stating that the court would defer to the judgment of municipal officials that the proposed parade "would be provocative of disorder and riot," even though permits for parades of similar size had been granted).

[272] *Cox*, 312 U.S. at 575. As Justice Frankfurter later described the Court's doctrine in this area, "A licensing standard which gives an official authority to censor the content of a speech differs *toto coelo* from one limited by its terms, or by nondiscriminatory practice, to considerations of public safety and the like." Niemotko v. Maryland, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring).

[273] *See* Thornhill v. Alabama, 310 U.S. 88, 102 (1940) ("Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.").

[274] *See, e.g.*, Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) (writing that pamphlets "have been historic weapons in the defense of liberty").

[275] *Cox*, 312 U.S. at 574. Interestingly, Justice Frankfurter did not include *Cox* in his discussion of the preferred position doctrine. *See* Kovacs v. Cooper, 336 U.S. 77, 90–95 (1949) (Frankfurter, J., concurring).

if carried by people who were not in marching formation.[276] Chief Justice Hughes's opinion did not question these conclusions.

Recall that *Schneider* asked courts to "weigh the circumstances," that is, to balance the state's interest against the impact of the regulation on freedom of expression.[277] Chief Justice Hughes accepted, without question, the lower court's conclusions about licensing as a means of minimizing public disorder.[278] Yet, other forms of open-air expression, such as political or religious leafleting, disturb the "normal" flow of pedestrian traffic; after *Lovell*, governments were required to respond to the disruptions created by these modes of speech through measures other than licensing. If the small groups of Jehovah's Witnesses had distributed leaflets on the streets of downtown Manchester while standing still, surely no license would have been required. Why did the combination of movement and literature distribution justify licensing?[279] Chief Justice Hughes was uninterested in this line of inquiry, referring instead to the generic problems of parades.[280] In short, the judicial scrutiny called for in *Schneider* was inappropriate in this type of case.

Nor was Chief Justice Hughes interested in tailoring issues. *Cox* treats all "processions," regardless of size, as presenting similar policing problems.[281] This contrasts with *Thornhill v. Alabama*,[282] in which the Court invalidated a ban on picketing that was not properly tailored to protect public safety. The *Thornhill* Court rejected the assumption that a breach of peace was inherent in picketing, no matter how small the number of participants.[283] A narrowly drawn statute was necessary to target "picketing *en masse*" or behavior by picketers that threatened the peace.[284] The Court concluded the statute did not specifically aim at *serious* threats to public order "and d[id] not evidence any such care in balancing these interests

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[276] *Cox*, 16 A.2d at 514.

[277] Schneider v. State, 308 U.S. 147, 161 (1939).

[278] *Cox*, 312 U.S. at 575–76.

[279] Testimony in *Cox* indicated that on Saturday evenings, 26,000 people per hour passed by one of the intersections where one of the groups of Jehovah's Witnesses marched. *Cox*, 16 A.2d at 511. Given the large number of pedestrians on the sidewalks of downtown Manchester on Saturday nights, why were only those engaged in expressive activities required to seek a permit? As Professor Baker commented, "[t]he Jehovah's Witnesses asked for no special rights. On the contrary, New Hampshire placed special restrictions on them because they assembled, because they engaged in activity protected by the first amendment. This law, unanimously upheld by the United States Supreme Court, stands constitutional commands on their heads." C. Edwin Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 NW. U. L. REV. 937, 992 (1983).

[280] *Cox*, 312 U.S. at 576.

[281] *Id.*

[282] 310 U.S. 88 (1940).

[283] *Id.* at 105.

[284] *Id.*

against the interest of the community and that of the individual in freedom of discussion on matters of public concern."[285] Of course, the statute at issue in *Thornhill* totally banned picketing, whereas the New Hampshire statute was interpreted as generally requiring the issuance of a license. Read side-by-side, *Thornhill* and *Cox* show that the Hughes Court regarded content-neutral restrictions that did not seriously restrict a means of communication to be presumptively constitutional; *serious* burdens were subjected to a higher level of judicial scrutiny. Stated differently, as long as states provided access to certain types of public property on content-neutral terms, the Court would not second-guess local decisions accommodating competing uses of that property.

The idea that citizens have a right to use public property for expression differentiates *Cox* from *Davis*. But in one aspect *Cox* resembles *Davis*; both cases treat certain forms of open-air speech as threats to public order, regardless of the number or demeanor of the participants. Additionally, both cases accept licensing as the method of preserving public order, even though more narrowly tailored methods are available.

Several important doctrines emanate from *Cox* that explain the Court's approval of the parade permit scheme. Implicit in *Cox* is the idea that parades involve behavior that can be regulated without regulating "speech." Chief Justice Hughes accepted the lower court's conclusion that the permit requirement did not interfere with activities such as the distribution of pamphlets or the display of signs.[286] In effect, the law was aimed at the nonmessage aspects of "processions." Shortly after *Cox*, the Court began using the term "speech plus" to refer to forms of communication with collateral consequences apart from the communicative impact of messages.[287] The distinction between "pure speech" and "speech plus," however, is completely arbitrary. As Harry Kalven wrote, "all speech is necessarily 'speech plus.' If it is oral, it is noise and may interrupt someone else; if it is written, it may be litter."[288]

Related to the "speech plus" distinction is the idea that the First Amendment's protection depends upon the medium. That is, the problems posed by different media justify distinct modes of regulation. As Justice Jackson wrote in 1949, "The moving picture screen, the radio, the newspaper, the handbill, the sound truck and

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[285] *Id.* With the exception of Justice McReynolds, all of the members of the Court voting to strike down the picketing law in *Thornhill* also voted to sustain the parade licensing law in *Cox*. Justice McReynolds dissented in *Thornhill*, but joined the *Cox* opinion.

[286] *Cox*, 312 U.S. at 575.

[287] *See, e.g.*, Thomas v. Collins, 323 U.S. 516, 540 (1945) (asserting that the solicitation of funds involves "free speech plus conduct"). For criticism of the "speech plus" distinction, see William E. Lee, *Speaking Without Words: The First Amendment Doctrine of Symbolic Speech and the Supreme Court*, 15 COLUM.-VLA J.L. & ARTS 495, 514–18 (1991) [hereinafter Lee, *Speaking Without Words*].

[288] Kalven, *supra* note 19, at 23.

the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself."[289] Consequently, permits are permissible with parades, but impermissible with other forms of expression.[290] And, the balancing employed by the Court in assessing content-neutral regulations is affected by the Court's perception of the importance of the means of expression.[291]

CONCLUSION

> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty.
>
> –Justice Louis Brandeis, 1927[292]

Justice Brandeis's eloquent rhetoric, written in the context of the clear and present danger test, presaged decisions by the Hughes Court, such as *Stromberg v. California*[293] and *De Jonge v. Oregon*,[294] limiting the government's power to control the content of open-air speech. To Justice Brandeis and Chief Justice Hughes, tolerance of dissent was "a fundamental principle of our constitutional system."[295] Cases such as *Lovell* and *Hague*, involving discriminatory licensing schemes, are a continuation of the idea that government officials lack the power to silence their critics. The right to use public property for open-air speech, first articulated in *Hague* and *Schneider*, was largely based on the role of speech in the democratic

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[289] Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J., concurring); *see also* Cox v. Louisiana, 379 U.S. 536, 555 (1965) (finding that marching and picketing are entitled to less First Amendment protection than "pure speech"); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952) ("Each method [of communication] tends to present its own peculiar problems.").

[290] This set of preferences remains in effect. In 2002, the Court unanimously sustained a content-neutral permit requirement for large-scale events in public parks. Thomas v. Chi. Park Dist., 534 U.S. 316 (2002). The permit requirement was ministerial, not a system of censorship, and was acceptable as a means of "safeguarding the good order." *Id.* at 323 (quoting *Cox*, 312 U.S. at 574). In the same term, the Court found unconstitutional a licensing ordinance for door-to-door canvassing and literature distribution. Watchtower Bible & Tract Soc'y v. Vill. of Stratton, 536 U.S. 150 (2002). Assuming the licensing to be "ministerial," the Court held it was nonetheless offensive "to the very notion of a free society" that a permit was necessary before one could speak in this manner. *Id.* at 166.

[291] *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 406 (1989) (The "government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word.").

[292] Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

[293] 283 U.S. 359 (1931).

[294] 299 U.S. 353 (1937).

[295] *Stromberg*, 283 U.S. at 369.

process. The First Amendment cases of the Hughes Court mark a critical turning point in the history of open-air speech.

The record of the Hughes Court, though, is blemished. *Cox* assumes that disorder is inherent in certain forms of open-air speech, an assumption exalting order at the cost of liberty. In other articles, I have shown the Court's application of content-neutral methodology to be generally unprotective of poorly-funded speakers who rely upon low-cost forms of open-air speech.[296] The Court has not been attuned to the discriminatory effects of facially-neutral laws, nor has it been sensitive to the symbolic or communicative importance of certain modes of open-air speech. The roots of these insensitivities are found in *Cox*.

Irrespective of my criticisms of the Court's content-neutral methodology, the fact that citizens have a First Amendment "easement of assemblage,"[297] free of discretionary licensing, is a significant step away from *Davis*. The broad principle that citizens have a right to use streets and parks for open-air speech, subject only to content-neutral regulation, has endured for more than sixty-five years as one of the cornerstones of modern First Amendment doctrine.

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[296] *See* Lee, *Lonely Pamphleteers*, *supra* note 9; Lee, *Speaking Without Words*, *supra* note 287; William E. Lee, *The Unwilling Listener:* Hill v. Colorado*'s Chilling Effect on Unorthodox Speech*, 35 U.C. DAVIS L. REV. 387 (2002).

[297] Comm. for Indus. Org. v. Hague, 25 F. Supp. 127, 145 (D.N.J. 1938), *aff'd*, 307 U.S. 496 (1939).