FREE SPEECH AND CONSTITUTIONAL TRANSFORMATION

Daniel Hildebrand *

"[This case] raises questions of grave importance transcending the local interests involved in the particular action." So wrote Chief Justice Charles Evans Hughes in *Near v. Minnesota*,[1] the second Supreme Court case to protect free speech under a conscious and articulated theory of the First Amendment. In an extraordinary series of opinions throughout the 1930s, Hughes and Justice Owen Roberts went on to author a First Amendment jurisprudence based upon the centrality of free speech in a democratic government. Perhaps because the Warren Court offered such admirable support for free speech during the civil rights era, perhaps because Hughes and Roberts never matched the grand rhetoric of Brandeis in *Whitney v. California*[2] or Brennan in *New York Times v. Sullivan*,[3] or perhaps because FDR's court-packing plan gave a special historical prominence to the 1930s commerce clause cases, the First Amendment decisions of the Hughes Court receive scant attention in modern scholarship. Two central lessons are obscured by this neglect: first, that a coherent First Amendment tradition honoring the centrality of rich public debate begins as early as the 1930s, and second, that the main constitutional achievements of the 1930s Court—newly legitimate national economic regulation and incipient protection of minorities under the Fourteenth Amendment—are Siamese twins, born of the First Amendment cases and linked by the triumph of national interests over "local interests" like those alluded to in *Near*.

The first lesson of the Hughes Court First Amendment cases concerns the popular sense of how long courts have understood and protected free speech. If there is a popular vision of the Court's free speech tradition, it runs something as follows: free speech issues

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1. 283 U.S. 697, 707 (1931).
2. 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).
3. 376 U.S. 254 (1964).

were either non-existent or ignored by the Court from the Bill of Rights until the 1920s. Then, the Court got off to a bad start in the Red Scare cases, upholding shockingly repressive state and federal statutes with little or no First Amendment review, while Holmes and Brandeis registered ringing dissents. The wisdom of these dissents gradually became law, but under the grip of the early "clear and present danger test," the Court was slow to articulate a sophisticated First Amendment jurisprudence with consistent results in hard cases. Not until the 1960s did the free speech of minorities and other unpopular groups enjoy full protection; not until *New York Times* did the Court express "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[4] Offered most prominently by Harry Kalven's scholarship, this view of First Amendment jurisprudence deserves revision.

Focusing on the First Amendment decisions of the Hughes Court allows those who champion free speech to draw on a judicial tradition thirty years older than the 1960s, one less vulnerable to rhetoric that attacks the liberalism of the Warren Court as dependent on an activist, overreaching federal judiciary. If Hughes Court decisions reveal the same theoretical framework and the same basic values as Warren Court decisions, then scholars or critics can speak more forcefully of a consistent, core free speech tradition that recognizes and affirms the central importance of rich public debate to American democracy. The language and logic of the Hughes Court First Amendment decisions reveal that they establish virtually all the theories and protections of *New York Times* and the "modern" 1960s cases, while avoiding the complex, often sterile formalism of more recent decisions.

The second lesson of the Hughes Court First Amendment cases probes a different professional narrative, the one which accounts for the changes the 1930s wrought in constitutional jurisprudence. The standard view of this period, as offered in first semester constitutional law courses, runs as follows: The *Lochner* era Court read the due process clause of the Fourteenth Amendment to protect liberty of contract and invalidated many congressional efforts to regulate the national economy. Pressured by the "court packing" plan of the popular Roosevelt administration, the Court finally backed down in the steel strike case.[5] In famous footnote four of *United States v. Carolene Products*,[6] a subsequent case upholding

4. Id. at 270.
5. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).
6. 304 U.S. 144, 152 (1938).

Congress's authority to regulate the milk industry, the Court suggested that it would still apply heightened scrutiny to laws that were insulated from legislative review, or laws that affected minorities who might be less protected by the political process. The traditional view of this famous shift in commerce clause jurisprudence juxtaposes judicial deference and judicial scrutiny. It focuses on issues of constitutional interpretation, as though the Court after *Carolene Products* redirected all its substantive due process energy to a more appropriate arena, and learned an important separation-of-powers lesson in judicial legitimacy.

The cases cited in *Carolene Products*'s footnote four, however, sketch a more complicated picture, revealing that the Court's shift in the 1937 commerce clause cases borrowed from a vision of nationalism first expressed in First Amendment cases like *Near*. In both the later commerce clause cases and the free speech cases, the Court was willing to recognize that local actions (economic or political) had profound national ramifications, and hence were subject to review and correction by the national government. The differing institutional settings can easily obscure this basic similarity—it is not obvious that Supreme Court protection of local fringe groups from municipal or state suppression raises the same issues as national regulation of Schechter's local poultry business. Recall that the Four Horsemen typically supported the local oppressor of the Jehovah's Witness or the Communist as well as the local business chafing under congressional regulation, however, and one's focus sharpens: the critical issue becomes the conflict of local and national imperatives, not the degree or sphere of judicial scrutiny. The first great achievement of the Hughes Court lay in asserting that local suppression of speech could corrupt the national democratic process. Six years later the Court applied essentially the same nationalist logic to uphold new regulation of local economic activity under the commerce clause.

The parallels between the Hughes Court's First Amendment cases and its later commerce clause cases are startling when viewed in this light. Like the post-1936 commerce clause opinions, the early First Amendment opinions flew in the face of recent and directly contrary precedents. They took power away from local polities—power to regulate speech in the general welfare—and transferred control and review of free speech to the Supreme Court, an arm of the national government. The First Amendment opinions, followed by the commerce clause cases, championed a new faith in the ability of the national government to monitor the democratic process and the economy in service of greater freedom and

prosperity for the entire country. In method, inspiration and result, then, the free speech cases prefigured the "switch-in-time" of the more famous commerce clause cases. Against the common picture of a decisive shift in constitutional jurisprudence around the events of 1936, the First Amendment decisions work their subtle revolution in 1931—before Roosevelt was twice elected, before he resorted to threats of court packing.

These nationalist free speech cases were paralleled by the Hughes Court's articulation of a national commitment to minimum requirements of due process in criminal proceedings. Synthesizing these developments, the Court in *Palko v. Connecticut* held that states would be bound to respect elements in the Bill of Rights that were "implicit in the concept of ordered liberty."[7] *Palko* was one of the first decisions to incorporate the Bill of Rights against the states. Comparison of the cases cited in *Palko* and *Carolene Products* reveals that both relied on free speech cases such as *Stromberg v. California*[8] and *De Jonge v. Oregon*.[9] By reflecting more deeply on the notion of a national commitment to civil rights, the free speech cases also helped inspire the incorporation of the Bill of Rights against the states.

The free speech theory of the 1930s cases directly relates to their role as a harbinger of constitutional change. If one underplays the coherence of the Hughes Court's free speech theory, one misses the recurrent emphasis that speech must be protected as central to peaceable, orderly change in the government. This emphasis in turn makes local suppression of speech an assault on the vitality of the national democratic process. Understanding the nationalism of the free speech cases thus renders famous footnote four of *Carolene Products* less dramatic. The footnote is best read as a belated acknowledgement of continuity between the recent commerce clause cases, the First Amendment decisions and the protection of fundamental liberties promised by *Palko*. Emphasis on the democratic political process permeates the text of the entire footnote; it melds perfectly with the case's support for national economic regulation by Congress. Localism is out, national democracy is in.

In sum, then, the free speech cases of the 1930s teach two exciting lessons. First, they establish the democratic importance of rich public debate while elaborating most essential modern free speech doctrines by 1940. Second, they foreshadow the great shifts in commerce clause and due process jurisprudence and identify

7. 302 U.S. 319, 325 (1937).
8. 283 U.S. 359 (1931).
9. 299 U.S. 353 (1937).

1931 as a critical watershed in the major constitutional changes of the 1930s. Part I of this paper offers a brief introduction to the free speech tradition before 1930. Part II shows that *Near* and *Stromberg* prove both the lessons outlined above: they offer a free speech theory that identifies democratic debate as the core of the First Amendment and they break radically from earlier cases that subordinated free speech to principles of federalism. Part III explores how the cases that followed *Near* developed most of the doctrines used in modern First Amendment analysis. Part IV examines the parallels between the free speech cases of 1931 and later developments in commerce clause, due process and Fourteenth Amendment jurisprudence and proposes that the free speech cases helped initiate the great constitutional changes of the 1930s.

I. THE FIRST AMENDMENT BEFORE THE HUGHES COURT

Between the Alien and Sedition Acts and the Fourteenth Amendment, courts had little occasion to review the meaning of the First Amendment. Under *Barron v. Baltimore*,[10] the First Amendment did not apply to the states, so various state efforts to restrict speech were not reviewable in the federal courts. Most notable state suppressions of First Amendment rights occurred in the South between the 1830s and the 1860s: Southern states placed severe restrictions on distribution of abolitionist literature, forbade Blacks from assembling for religious or other purposes and even criminalized teaching Blacks to read the Bible.[11] Before the civil war, basic state law on free speech remained similar to that found in the English common law and Blackstone: prior restraints were forbidden, but punishment of speech was permissible and truth was not a defense to charges of seditious libel absent good motives.[12] Aside from abuses related to support for slavery, however, few prosecutions for what today would be considered First Amendment activity occurred.

After the Civil War, the *Slaughter-House Cases* read only narrow rights such as habeas corpus and petition or assembly to bind the states under the Fourteenth Amendment,[13] so the First Amendment still did not check state suppression of speech. Between the passage of the Fourteenth Amendment and the Red Scare cases of

10. 32 U.S. (7 Pet.) 243 (1833).

11. See Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1215-17 (1992).

12. See Leonard W. Levy, *The Emergence of a Free Press* (Oxford U. Press, 1985).

13. 83 U.S. (16 Wall.) 36, 79 (1872).

the 1920s, courts were very hostile to free speech, regularly supporting state and local actions that would now be considered egregious breaches of the First Amendment.[14] A few cases serve to illustrate the flavor of First Amendment jurisprudence in this era. Revealingly, two were by Justice Holmes, belated author of pro-free speech dissents in the 1920s.

Davis v. Massachusetts[15] reviewed an ordinance that forbade speaking on the commons and public garden without a permit from the mayor, who routinely granted permits to political speakers. Nevertheless, the Supreme Court held that the ordinance was properly used to bar the speeches of a local religious critic of the mayor. *Patterson v. Colorado*[16] upheld the contempt conviction of a U.S. Senator who criticized a local court proceeding in the Colorado papers. At the time his editorials were published, the Colorado case was concluded save for motions for rehearing and publishing of the decision; there were no jury bias issues to favor punishing the editorials. Finally, *Fox v. Washington*[17] upheld the conviction of a local nudist who criticized state indecency laws. The nudist had published a diatribe in a local paper, criticizing the puritanism of those who sought to have the indecency laws enforced against a local nudist colony. A Washington state court found that his article was an incitement to violate the state indecency laws, and convicted the writer under a statute banning advocacy to break the law. In all three cases, the Supreme Court found that the convictions raised no First Amendment issues.

Fox and *Patterson* contained a hopeful note that was to prove fruitful in the future: both declined to decide whether free speech was protected by the due process clause of the Fourteenth Amendment, finding the question unnecessary to resolve the case. If a question remains open without being decided long enough, it becomes a small matter for the Court to decide the question either way—and in *Gitlow v. New York*,[18] the Court in an opinion by Justice Sanford assumed in passing that the Fourteenth Amendment's due process clause barred states from restricting free speech rights. Sanford cited *Fox*, *Patterson* and *Robertson v. Baldwin*.[19] The role of the First Amendment in fostering incorporation will be taken up in

14. See David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 Yale L.J. 514 (1981).

15. 167 U.S. 43 (1897).

16. 205 U.S. 454 (1907).

17. 236 U.S. 273 (1915).

18. 268 U.S. 652, 666 (1925).

19. 165 U.S. 275 (1897) (reviewing limits on fundamental freedoms in the Bill of Rights, including limits on free speech).

greater detail later, but this review provides a brief backdrop to the Hughes and Roberts decisions of the 1930s.

In 1919, the Supreme Court finally began to address the substantive meaning of the First Amendment. Opinions between 1919 and 1931 debated the "clear and present danger" test, with results consistently adverse to the speaker who criticized the government. The majority opinions held that legislatures (state or federal) had a right to punish speech that could lead to bad acts. All that was necessary, in essence, was a legislative finding that certain speech had a "dangerous tendency" to incite lawless action. Holmes and Brandeis argued in frequent dissent that only speech which incited imminent, serious lawless action could be banned by the government. Holmes and Brandeis developed their clear and present danger theory slowly, over the course of several decisions.[20] The Brandeis concurrence in *Whitney v. California* is probably the most eloquent judicial defense of free speech ever delivered;[21] it is also the most developed theoretical synthesis of First Amendment principles in any 1920s decision.

Dissents do not make a working jurisprudence, however. While Brandeis (with prompting and support from Holmes, Chaffee and others) expressed most of the enduring ideals that have animated First Amendment law to the present day, he did not have the opportunity to apply these ideals to diverse factual problems in majority opinions. That task fell to Hughes and Roberts, who adapted Brandeis's opinions, moved beyond the clear and present danger test, and founded a mature First Amendment jurisprudence based on a nuanced respect for the centrality of dissent and debate to American democracy.

II. *STROMBERG* AND *NEAR*

On February 24, 1930, Charles Evans Hughes was sworn in as chief justice of the United States Supreme Court. This event came late in a career of distinguished public service; Hughes had been governor of New York, the republican candidate for president in 1916 (he nearly defeated incumbent Wilson), secretary of state, a judge on the World Court, and even (1910-1916) an Associate Justice of the Supreme Court.[22] In the words of Paul Freund, clerk for

20. See David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. Chi. L. Rev. 1205 (1983); Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America* 130-166 (Harper & Row, 1988) ("*A Worthy Tradition*"). Both offer excellent treatment of the 1920s cases.

21. 274 U.S. at 375-76.

22. Henry J. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court* 168-71, 201-34 (Oxford U. Press, 3d ed. 1992).

Brandeis in 1932 and distinguished law professor at Harvard, Hughes was to become a Chief Justice of "Marshallian" stature.[23] The first two First Amendment cases to come before his court corroborate Freund's judgment, for Hughes's majority opinions established a sophisticated groundwork, self-consciously practical as well as theoretical, for future cases that could and did come before the Court. They also wrought a decisive shift in principles of federalism that heralded the Court's later commerce clause and due process cases.

Stromberg v. California,[24] decided a month before *Near v. Minnesota*[25] in May of 1931, was the more cautious of the two opinions. Stromberg was a nineteen-year-old woman who worked as a supervisor at a children's summer camp near San Bernardino. Then as now, California was at the quirky vanguard of social change, for at this summer camp the children were taught 'class consciousness, the solidarity of the workers, and the theory that the workers of the world are of one blood and brothers all.'[26] Every day the kids hoisted a Soviet flag over the camp, and for this their supervisor was prosecuted under a California penal statute which made it a felony to 'display[ ] a red flag . . . in any public place . . . [1] as a sign, symbol or emblem of opposition to organized government[,] or [2] as an invitation or stimulus to anarchistic action[,] or [3] as an aid to propaganda that is of a seditious character. . . .'[27]

Hughes's opinion begins with six pages that review the statute and the trial below and conclude that the trial judge instructed the jury to convict if the flag had been displayed for any of the three purposes listed in the statute. The remaining two pages find the statute's first purpose unconstitutional and overturn the conviction because the jury could have reached its verdict on the first clause alone. At first glance, this short, technical opinion is no ringing victory for free speech; certainly, the statute's second and third clauses are patent First Amendment violations by modern standards. Attention to *Stromberg*'s logic, however, reveals that its apparent technicality is something of a subterfuge, more crafty and subversive than it appears, and supportive of free speech in future cases. Read carefully, Hughes's opinion breaks with recent precedent, adopts a strict standard for reviewing state restrictions on speech, and justifies all this with a powerful constitutional theory.

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23. Paul Freund, *Hughes as Chief Justice*, 81 Harv. L. Rev. 4, 43 (1967).

24. 283 U.S. 359 (1931).

25. 283 U.S. 697 (1931)

26. *Stromberg*, 283 U.S. at 362.

27. Id. at 361. I have added the bracketed numbers to show the three bases for conviction offered by Hughes's interpretation of the California statute.

Hughes's first tactic is a smokescreen: he acknowledges that free speech is not an absolute right. "There is no question but that the State may thus provide for the punishment of those who indulge in utterances which incite to violence and crime and threaten the overthrow of organized government by unlawful means . . . . We have no reason to doubt the validity of the second and third clauses of the statute as construed by the state court to relate to such incitements to violence."[28] To appreciate the significance of this formulation, one needs to look back for a moment to earlier majority opinions upholding the conviction of speakers in the 1920s. As Harry Kalven correctly points out, the 1920s majority never applied a protective standard of the "clear and present danger" test in subversive advocacy cases.[29] Holmes and Brandeis usually dissented on the grounds that there was little chance that the speakers actually intended or were likely to incite acts aimed at the violent overthrow of the government. For the majority, this did not matter; it was enough that the legislature had identified speech with a dangerous tendency to provoke illegal acts at some time in the future.[30]

Although Hughes cites the majority opinion in *Gitlow*,[31] *Stromberg* appears to favor the minority test offered by Brandeis in *Whitney*.[32] Hughes's sentence structure and analysis do not support *Gitlow*'s dangerous tendency analysis. One must listen to how Hughes's use of active verbs demands a tight causal link between speech and violence: "utterances which incite to violence and crime"[33] can be read to require subsequent violence before speech is punished; "threaten the overthrow of organized government by unlawful means"[34] can be read to protect any speech which does not really threaten to topple the government by violence. There is no dangerous tendency language here, no "may incite," only tight, active language that tracks the intent of Brandeis's formulations. To reinforce this subtle shift towards a more protective "clear and present danger" test, the concluding remark "as construed by the state court to relate to such incitements to violence"[35] cabins the permissible meanings of the statute's second and third clauses.

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28. Id. at 368-69.

29. Kalven, Jr., *A Worthy Tradition* at 150-66 (cited in note 20).

30. See, e.g., *Gitlow*, 268 U.S. at 668-69.

31. Id. Hughes's other toehold in the precedents was *Fiske v. Kansas*, 274 U.S. 380 (1927), the only recent extant Supreme Court case to support a speaker. *Fiske* overturned a subversive advocacy conviction on the grounds that the utter lack of evidence violated the due process clause, but it did not update or question *Gitlow*'s dangerous tendency analysis.

32. 274 U.S. at 376-77.

33. *Stromberg*, 283 U.S. at 369.

34. Id.

35. Id.

If this were all Hughes offered, his opinion would be an incremental but significant shift toward support for free speech, a hopeful turn away from the restrictive, almost paranoid decisions of the 1920s. But there is more: after sparing the second and third elements of California's statute, Hughes pounces on the first. He quotes at length from the cautionary language of the opinion below, which warned that "opposition" could be read to include legal political activity. Then his rhetoric, punching tight and hard at the end of the opinion: "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."[36] Here, in the majority opinion of the Supreme Court's very first pro-free speech case, we see rich public debate theory, brief but unmistakable. Hughes recognizes the popular sovereignty that underlies American constitutional government, and he echoes the spirit of Brandeis's magisterial passage in *Whitney*.[37] There is biting satire here, too, in the use of the word "security"—the logical inference is that political discussion, not California's statute, serves the security of America.

In sum, Hughes's restrained majority opinion in *Stromberg* is best read as subversive of the earlier anti-free speech tradition, an about-face rather than a cautious swing to the left. Its about-face quality is more apparent if one considers that *Stromberg* raised issues identical to the dozen or so subversive advocacy decisions from the 1920s. With one narrow exception,[38] these recent cases supported repressive, hostile treatment of radical speakers by both state and federal statutes. None of these cases showed the careful attention to statutory construction offered by Hughes—indeed the opinion's very technicality is part of its strength as a departure from the earlier cases. Sensitivity to the 1920s cases shows that *Stromberg* was as dramatic a shift in First Amendment jurisprudence as *Jones & Laughlin* was in commerce clause jurisprudence—perhaps more so, since the latter could draw support from a parallel tradition of

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36. Id.

37. [The Founders] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of American government.

274 U.S. at 375 (Brandeis, J., concurring).

38. *Fiske*, 274 U.S. at 380.

cases upholding certain types of national economic regulation,[39] and from early Marshall Court pronouncements such as *Gibbons v. Ogden*.[40]

Near v. Minnesota[41] offers an equally forceful repudiation of earlier First Amendment cases. *Near* was argued four months before *Stromberg*, and the two should be read as a pair. Unlike *Stromberg*, which mirrored the facts of earlier subversive advocacy cases, the facts of *Near* were unlike any recently before the Court. Hughes seized this opportunity to write a manifesto on the merits of a vigorous and critical press that severely curtailed local power to regulate speech for the general welfare. His opinion generated a heated and elaborate dissent by all four Horsemen, unlike the two narrow dissents in *Stromberg*.

As before, Hughes begins by reviewing the state statute and the facts below. Minnesota law provided that any 'obscene, lewd and lascivious' or 'malicious, scandalous and defamatory newspaper, magazine or other periodical' could be enjoined as a public nuisance.[42] Truth alone was no defense to the statute—the offending material had to published with good motives as well. A Minneapolis paper called the Saturday Press was indicted under the statute for publishing "malicious, scandalous and defamatory" articles about the local government. Hughes relates only that "the articles charged in substance that a Jewish gangster was in control of gambling, bootlegging and racketeering in Minneapolis, and that law enforcing officers and agencies were not energetically performing their duties."[43] The bigoted, scurrilous quality of the articles is better conveyed by Butler's dissent, which quotes some representative passages[44]—but Hughes's summary is accurate, if understated. Near lost at trial and in the state supreme court, and was enjoined from further publication of scandalous newspapers under any name.[45]

Hughes begins his analysis with a critical sentence: "This statute, for the suppression as a public nuisance of a newspaper or periodical, is unusual, if not unique, and raises questions of grave importance transcending the local interests involved in the particu-

39. See, e.g., *Lottery Case*, 188 U.S. 321 (1903) (upholding regulation of lottery tickets sold across state lines); *Houston & Texas Ry. v. United States*, 234 U.S. 342 (1914) (upholding regulation of interstate railroads); *Stafford v. Wallace*, 258 U.S. 495 (1922) (upholding regulation of stockyards as a conduit of interstate commerce).

40. 22 U.S. (9 Wheat.) 1 (1824).

41. 283 U.S. 697 (1931).

42. Id. at 702.

43. Id. at 704.

44. Id. at 724-27, n.1.

45. Id. at 706.

lar action."[46] It is easy to forget that the statute was not in fact unusual, because it patently conflicts with modern free speech values. Recall, however, that numerous cases between 1870 and 1910 had allowed states to regulate speech for the public welfare, which was all Minnesota's nuisance law purported to accomplish. For Hughes's purposes, however, the law could be labeled unique because the first Supreme Court cases to discuss the First Amendment were only a decade old, and all involved criminal punishment, not civil injunctions. Earlier prior restraint cases like *Davis*,[47] which allowed a local mayor to censor his critics by denying them a permit, easily disposed of Near's due process argument—yet Hughes could ignore these cases because they were much older and outside the well-established boundaries of the recent subversive advocacy cases. Furthermore, the facts of *Near* were closer to the 1920s cases than they first appear. Although the statute allowed the state to enjoin a newspaper from publication, the injunction was nothing more than an ex-post remedy for nuisance, and the nuisance had to be proved as a factual matter before the remedy could issue. In short, enjoining a paper that has proved to be a public nuisance is little different from imprisoning a speaker who has made a seditious speech—both sanctions turn on the content and effect of the speech.

Hughes's opening line, then, is important because it portrays an ordinary restriction of speech as an unusual one, one that raises "grave" concerns which may outweigh "local interests." He announces that because "constitutional questions" are involved, the Court will review the statute as to "operation and effect," not merely search for errors by the trial court in applying the statute.[48] As in *Stromberg*, however, this heightened standard of review is entirely new. Precedents only four years old gave local statutes restricting speech only minimal scrutiny. Read alongside *Stromberg*'s treatment of the California statute, Hughes here establishes de novo review of First Amendment claims by the Supreme Court.

Hughes proceeds to analyze the "operation and effect" of Minnesota's statute. To paraphrase his lengthy analysis, Hughes interprets the statute to allow public officials to haul a publisher into court for criticizing the authorities and enjoin him from future critical publication. "This is of the essence of censorship,"[49] he concludes—and indeed it is, as he has described the statute, but his description is highly deceptive. Here, a brief return to *Stromberg*

46. Id. at 707.
47. *Davis v. Massachusetts*, 167 U.S. 43 (1897).
48. *Near*, 283 U.S. at 708-09.
49. Id. at 713.

helps to decipher what Hughes is doing. *Near*, like *Stromberg*, purports to examine a statute very closely to determine its practical effect on speech—but neither case leaves any room for official discretion to interpret the statute in a permissible way. *Stromberg* rejected the lower court's decision to assume the local jury would read the California statute's overly general first prong in light of the permissible purposes of the second and third parts. But in fact, the entire California statute easily could have been read to prohibit only speech with a dangerous tendency to provoke lawless action—a natural reading that would have rendered the statute acceptable under recent Supreme Court opinions. In *Stromberg*, Hughes insisted on pessimism, on refusing to give local officials the benefit of the doubt, and he conjured up an image of the statute being used to repress a mainstream political opposition party carrying flags. In so doing, he wrote an opinion that purported to be technical, but in fact undermined the entire California statute by supporting political opposition and reading the constitutional portions to ban only direct incitements to violence.

In his description of the Minnesota statute's "operation and effect," Hughes has pulled off the same slight of hand—he characterizes the statute in the most extreme way possible, and describes its potential operation in a way that suggests it will be used to repress mainstream critics of the government. Here, instead of a marching mainstream opposition party, there is the image of a publisher writing about corruption in the government and being dragged into court for criticizing the authorities. Hughes's portrait of the statute is laden with the words "public," "officials" and "authorities." This repeated language emphasizes that officials might immunize themselves from popular criticism, forcing the reader to worry about the democratic implications of the law.

This refocusing of concern distracts the reader from recognizing that *Near* was an easy case that should have gone the other way under contemporary doctrine. As of 1930 virtually no judge had ever acknowledged a First Amendment issue when public officials shut down some crackpot like the antisemitic publisher of the Saturday Review. The statute before Hughes had not been used to censor a mainstream newspaper editorial, and there was no reason on its face to fear that it would, for the terms "malicious," "scandalous" and "defamatory" did not demand a reading directed at responsible criticism of public officials. Even before its legal analysis begins, then, Hughes's *Near* opinion shows a both a deep mistrust for any law that could allow government officials to entrench themselves against the democratic political process, and a willingness to protect even fringe critics of the government from punishment.

Hughes's extreme description of the statute determines the outcome of his analysis, for it enables him to analyze the statute as a prior restraint law. Even English common law before the American revolution forbid prior restraints on publication, so Hughes could strike down Minnesota's statute on the conservative authority of Blackstone. Hughes cites critics of Blackstone who charged that the freedom of speech must apply to ex post punishments as well as prior restraints or mean nothing, but notes that "[i]n the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment."[50] Hughes describes the statute so as to camouflage the real issue presented by *Near*: the permissible scope of the state's power to punish harmful speech.

The remainder of the opinion celebrates the immunity of the press from prior restraint, and it is punctuated with ringing quotations that emphasize the centrality of a free press to democratic government. From the Continental Congress:

> The importance of [freedom of the press] consists . . . in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.[51]

From Madison:

> In every State, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men of every description which has not been confined to the strict limits of the common law . . . . [T]o the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression.[52]

Hughes concludes in his own words, "Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under the libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals."[53]

Near is a case that hammers the importance of the First Amendment as a mechanism for the public to monitor its agents in

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50. Id. at 715.
51. Id. at 717.
52. Id. at 718.
53. Id. at 718-19.

the government. The description of the statute, the legal analysis, the supporting authority—all emphasize again and again that in a democracy the people retain a central freedom to criticize their government. Hughes may pretend the statute is only about "prior restraints," but this is of no moment, for the logic of the rich public debate theory that rolls off page after page is much more powerful, and Hughes reserves the question of subsequent punishment, saying it must be "consistent with constitutional privilege."[54] As in *Stromberg*, the opinion's logic and unforgiving construction of the state statute serve as signposts—billboards, really—that send the reader a strong message about what subsequent punishments might be upheld by future opinions. The clear losers are state and local governments, and Hughes's talk of Blackstone and Madison cannot obscure the fact that in *Near* the states lose a long-held power to regulate speech by moderate restraints in support of the general welfare.

Hughes may fool a modern reader, but he does not fool the Horsemen. Butler and his posse thunder out of the gates with a passage that illuminates *Near* as an utter repudiation of earlier assumptions about the relation between state and federal authority:

> The decision of the Court in this case declares Minnesota and every other State powerless to restrain by injunction the business of publishing and circulating among the people malicious, scandalous and defamatory periodicals that in due course of judicial procedure has been adjudged to be a public nuisance. It gives to freedom of the press a meaning and a scope not heretofore recognized and construes "liberty" in the due process clause of the Fourteenth Amendment to put upon the States a federal restriction that is without precedent.[55]

Citing *Barron v. Baltimore*,[56] Butler acknowledges that prior to the Fourteenth Amendment, the Constitution "did not protect the right of free speech or press against state action," but he cannot resist adding that "the constitutions and laws of the States . . . operated adequately to protect it."[57] Butler exposes a number of deceptions in the majority opinion. First, he draws a concrete picture of the facts of the case at hand, offering details that Hughes omitted. Emphasizing the antisemitic nature of the Saturday Review's articles, he reads "malicious" and "scandalous" only as broadly as their ordinary meaning would allow, and finds (accurately) that the words

54. Id. at 720.
55. Id. at 723 (Butler, J., dissenting).
56. 32 U.S. (7 Pet.) 243 (1833).
57. *Near*, 283 U.S. at 723.

describe the publication before the Court. The footnoted text of the articles supports Butler's position, for they were highly offensive.[58]

Butler also challenges Hughes's exaggerated interpretation of the statute. He writes, "The defendant here has no standing to assert that the statute is invalid because it might be construed so as to violate the Constitution. His right is limited solely to the inquiry whether . . . the effect of applying the statute is to deprive him of his liberty without due process of law."[59] For Butler, the law does not deprive Near of liberty without due process: the motives of the statute aim at protecting the public's interest in repressing scandalous and malicious stories; the defendant is not suppressed without a hearing; and the statute provides adequate defenses to protect socially useful publications that print truthful accusations for public-spirited reasons. Butler reminds us that "this court is by well established rule required to assume, until the contrary is made to appear, that there exists in Minnesota a state of affairs that justifies [the statute]."[60]

This last point is more than a bland repetition of a rule of statutory construction—for with his sensitive interest in the facts, Butler finds evidence that Near's various business activities (including publishing) are properly a serious concern of the local authorities. He cites evidence that Near's paper had been used to blackmail former business associates, and that Near was linked to gambling and organized crime. In other words, Butler sees the good guys and bad guys rather differently from Hughes. To read Hughes's opinion, one would think that the government of "urban" Minneapolis was riddled with potential for crime and corruption, checked only by "courageous" publishers like Near. The reader has no reason to prefer one factual picture to the other, of course, but the discrepancy supports the theory that Hughes has a broader agenda, an agenda which champions the First Amendment as a safeguard of the people's right to monitor, instruct or recall their agents in the government.

Butler closes by attacking Hughes's effort to paint the dispute as a prior restraint case. Butler points out that Blackstone understood prior restraints as unbridled discretion in the hands of administrative officers. This was not how the statute worked, as we have seen, and Butler stresses the point:

> It is fanciful to suggest similarity between the granting or en-

58. In modern jurisdictions such as Canada that control hate speech, Near's articles might be grounds for criminal prosecution.

59. *Near*, 283 U.S. at 725-26.

60. Id. at 731.

> forcement of the decree authorized by this statute to prevent *further* publication of malicious, scandalous and defamatory articles and the *previous restraint* upon the press by licensers as referred to by Blackstone and described in the history of the times to which he alludes.[61]

Butler thus reads the statute to impose subsequent punishment, not prior restraint.

Attention to Butler's dissent, then, confirms the view of *Near* offered above: the opinion was crafted to chart a new direction in First Amendment jurisprudence. In *Near* and its companion *Stromberg*, Hughes effected a radical break with the earlier anti-free speech tradition of the 1920s, and in so doing he asserted that an intrusive federal norm unrecognized by earlier cases would henceforth limit local actions. Hughes supported this about-face with repeated language which emphasized that the First Amendment protects criticism of the government as central to democracy. This analysis reveals *Near* as an early companion to *New York Times v. Sullivan*,[62] a prototype that shows a similar concern for public debate in the democratic process. The parallel emerges more strongly if one considers the factual and institutional issues that underlay the two opinions. Both cases reviewed a common-law doctrine used by local officials to censure their critics, and both held that federal norms restricted the scope of local action. The plaintiffs in *New York Times* were more sympathetic than those in *Near*, and Brennan could draw on a richer body of free speech writings to develop his elegant opinion, but neither of these differences should obscure *Near*'s stature as the foundation of a jurisprudence devoted to the protection of rich public debate.

Taken together, the structure and logic of *Near* and *Stromberg* suggested that in future cases, the Court would closely scrutinize local actions that might compromise the integrity of the political process by restricting speech. Over the next ten years the Court was to fulfill the implicit promises of *Near* and *Stromberg* by supporting free speech against a diverse array of local challenges.

III. THE CONTOURS OF A TRADITION

Harry Kalven envisioned the Supreme Court's First Amendment cases as an organic tradition that over time perfects the rules of democratic debate.[63] While Kalven was an astute reader of opinions and a thorough student of the major Hughes Court cases, he

61. Id. at 736 (emphasis in original).
62. 376 U.S. 254 (1964).
63. Kalven, *A Worthy Tradition* at 150-166 (cited in note 20).

may not have observed that the tradition he saw elaborated over decades and culminating in *New York Times v. Sullivan* was actually intact in its essential details and insights by 1940. *Near* and *Stromberg* introduced the foundation of this nascent tradition: the theory that free critical debate was essential to the ongoing process of democratic government. Subsequent Hughes Court cases built over this foundation the essential architecture of modern First Amendment analysis: doctrines such as strict scrutiny, void for vagueness, chilling and unbridled discretion. The free speech opinions of 1931-1941 thus delineate most of the liberal First Amendment tradition commonly celebrated as a product of the 1960s.

Before reviewing the cases that built on the achievements of *Near* and *Stromberg*, it might be helpful to summarize the First Amendment doctrines the first two opinions established. By giving detailed readings of state laws and declining to presume the laws were constitutional, both applied what was later called "strict scrutiny" to statutes restricting free speech. *Near* founded prior restraint doctrine, and although it quoted Blackstone and early republican sources for a traditional common-law view of the doctrine, its strong language could be readily extended to condemn other regulatory schemes that restricted the press.

The Court's next First Amendment opinion broadened *Near*'s prior restraint analysis into a doctrine invoked to review government actions that burdened the press without raising concerns of naked censorship by injunction or administrative order. Citing *Near*, the Court in *Grosjean v. American Press Co.*[64] held that a two percent tax on the gross profits of Louisiana's largest newspapers was an unconstitutional prior restraint of free speech. After a thorough summary of *Near*'s reasoning, *Grosjean* found that *Near*'s test applied to "any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."[65] Sutherland concludes "[a] free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."[66] One is moved to wonder aloud if this can possibly be the same judge who joined Butler's angry dissent in *Near* five years earlier. Evidently the democratic importance of a free press was persuasive enough to win over some of its early detractors. Sutherland celebrates the same popular right to criticize and monitor the gov-

64. 297 U.S. 233 (1936).
65. Id. at 249-50 (citation omitted).
66. Id. at 250.

ernment that had been either novel or controversial in recent Brandeis and Hughes opinions. Some of his enthusiasm, however, may derive from the claimants' status as mainstream, established corporations who gained the benefit of important new protections under the due process clause.

In early 1937, the Court returned to subversive advocacy issues in *De Jonge v. Oregon*.[67] The case arose under Oregon's criminal syndicalism act, which outlawed speeches or writings that advocated 'crime, physical violence, sabotage or any unlawful acts or methods as a means of accomplishing or effecting industrial or political change or revolution.'[68] De Jonge was a member of the Communist Party; he attended and spoke at a public meeting in Portland sponsored by the local party chapter. Various people spoke about local jail conditions and a local strike, but there was no evidence of any advocacy of criminal syndicalism as defined by the statute, and only 10-15% of those who attended were party members. After reviewing the record below, Hughes found that De Jonge was tried, convicted and sentenced to seven years in prison solely because "he had assisted in the conduct of a public meeting, albeit otherwise lawful, which was held under the auspices of the Communist Party."[69]

De Jonge was an easy case. Even before *Near* and *Stromberg*, *Fiske v. Kansas*[70] had overturned a subversive advocacy conviction for the absence of any supporting evidence: here also there was no evidence of subversive advocacy. Hughes's *De Jonge* analysis echoes *Stromberg*. It confirms that only incitements to crime may be punished as an abuse of the right of free speech: "[L]egislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed."[71] In a passage of remarkable clarity, he argues (as he implied in *Stromberg*) that free speech is essential to state security and democratic government:

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

67. 299 U.S. 353 (1937).
68. Id. at 357.
69. Id. at 362.
70. 274 U.S. 380 (1927).
71. *De Jonge*, 299 U.S. at 364-65.

> means. Therein lies the security of the Republic, the very foundation of constitutional government.[72]

Ten years later, Hughes here establishes as law Brandeis's great assertion from *Whitney*, that repression of speech and democracy are incompatible.[73] *De Jonge* left unresolved the issue of when advocacy against the state would become an unlawful incitement to violence, and it added no new doctrines to the Court's First Amendment analysis. But it settled the essential theory of free speech jurisprudence: in a democratic government, the people command a sovereign power to criticize the government and debate its actions. As of early 1937, all four Hughes Court First Amendment opinions had extolled this principle.

In April of 1937, the Court in *Herndon v. Lowry*[74] reviewed the eighteen year sentence of a communist convicted for fomenting insurrection in Georgia. One searches the opinion in vain for his first name, but Herndon must have possessed awe-inspiring courage, for in addition to being a communist he was black, and the party sent him to Atlanta to start a local organization and distribute literature that advocated, among other things, '[e]qual rights for the Negroes and self-determination for the Black Belt.'[75] After enlisting several members and conducting three meetings, he was arrested, and if his work had barely begun, in retrospect he may have been fortunate—Georgia law punished insurrection with death, mitigated to five to twenty years only if the jury recommended mercy. In the first of several influential free speech decisions he was to author, Justice Roberts reviewed at length the statute and the findings of the courts below—a structure that mimicked the earlier Hughes opinions. He found that Herndon's conviction rested primarily on the content of the literature found when Herndon was arrested—the literature advocating self-determination for blacks in the South. There was no evidence that any literature had been distributed. Roberts also found that the state had used a "dangerous tendency" standard to determine what acts were insurrection.

Roberts's treatment of the case vindicates *Stromberg* as a repudiation of earlier 1920s subversive advocacy decisions. First, he expressly rejects dangerous tendency analysis: "[*Gitlow*] furnishes no warrant for the appellee's contention that . . . the standard of guilt may be made the 'dangerous tendency' of [ ] words."[76] As we saw

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72. Id. at 365.
73. *Whitney*, 274 U.S. at 375-76.
74. 301 U.S. 242 (1937).
75. Id. at 250.
76. Id. at 258.

above, however, *Gitlow* stood for just this standard. Roberts follows *Stromberg* by adopting the incitement standard to review subversive advocacy cases, and here he quotes the "clear and present danger" language (its first appearance in a decade) from the 1920s dissents of Holmes and Brandeis. Roberts states that the government may punish speakers only when "wilful and intentional interference with the described operations of the government might be inferred from the time, place, and circumstances of [their] act[s]."[77] For Roberts, the "clear and present danger" image expresses a requirement that some immediate threat to the operation of government must be present before officials may punish a speaker.

Roberts also establishes the important First Amendment doctrine of "void for vagueness." He writes, "[W]here a statute is so vague and uncertain as to make criminal an utterance or an act which may be innocently said or done with no intent to resort to violence . . . a conviction under such a law cannot be sustained."[78] Roberts shows that "void for vagueness" is the critical flaw of dangerous tendency analysis—statutes that punish words for their dangerous tendency hold speakers responsible for remote and unlikely events that the speaker may neither wish for nor intend. Such uncertain penalties unconstitutionally burden a speaker's power of free speech. He links this insight to the essential free speech theory of the Hughes decisions: "peaceful agitation for a change of our form of government is within the guaranteed liberty of speech . . . ."[79]

Roberts explains the application of these principles to Herndon's case in the remainder of the opinion. He writes first that the statute as applied punished Herndon for enlisting members into a political party. Herndon was not punished because he himself advocated violence against the government, but because his political party printed materials that advocated possible resort to violence against the government at some indefinite time in the future. The state made no showing that any literature threatening its security was distributed, or that insurrection was even remotely likely. Roberts therefore concludes that the statute involves a jury in "pure speculation as to future trends of thought and action." He points out that "[t]he Act does not prohibit incitement to violent interference with any given activity or operation of the state . . . . Nor is any specified conduct or utterance of the accused made an offense."[80] He closes by again stressing the burden such a law places

77. Id. at 256.
78. Id. at 259.
79. Id.
80. Id. at 261.

on the popular right to press for changes in the government:

> The statute, as construed and applied, amounts merely to a dragnet which may enmesh anyone who agitates for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some effect in the future conduct of others. No reasonably ascertainable standard of guilt is prescribed. So vague and indeterminate are the boundaries thus set to the freedom of speech and assembly that the law necessarily violates the guarantees of liberty embodied in the Fourteenth Amendment.[81]

One sees in *Herndon* isolated cases beginning to cohere as a tradition around the organizing principle of freedom to criticize the government. Upon the bare bones of this theory, first offered by *Stromberg*, *Herndon* looks to *De Jonge* for support and fleshes out some important new doctrines and standards. The cases begin to interact with one another, suggesting doctrines not yet present in any single case alone.

Herndon shows by implication that statutes held "void for vagueness" raise two independent concerns. The first is notice—under a dangerous tendency regime, speakers will not be sure when they will be liable for arguing for changes in the government. This concept finds expression in later cases as a concern for laws that "chill" the exercise of free speech rights. The second issue alluded to by these cases is the problem of "unbridled discretion" of local officials to interpret a vague law. One sees Hughes in *Stromberg* worried about the possibility that public officials can apply speech-restricting laws to silence their opponents. By the time Roberts articulates the "void for vagueness" doctrine in *Herndon*, the concern for abuse of official discretion lies just beneath the surface of his statements about the jury's freedom to speculate about the future consequences of a speech.

It is no surprise, then, that the next Supreme Court First Amendment case formally establishes that laws which vest public officials with unbridled discretion over the power of free speech are unconstitutional. *Lovell v. City of Griffin*[82] reviewed a Georgia town ordinance that required those who wished to distribute handbills or literature on the city streets to get a permit from the local officials. Lovell, a Jehovah's Witness, believed that to seek permission from the city for her proselytizing would violate her religion's commandments. When she did not apply for a permit, she was cited for handbilling. Hughes's opinion is brief, clipped and em-

81. Id. at 263-64.
82. 303 U.S. 444 (1938).

phatic. He describes the ordinance as one that "embraces literature in the widest sense." After holding the ordinance facially invalid, he writes, "Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship."[83]

Here again, the logical justification for this summary result is Hughes's concern for preserving First Amendment freedoms as a vehicle to criticize the government. There was no evidence to suggest the ordinance was being applied in a discriminatory way, for the Jehovah's Witness had not even applied for a permit. Hughes uses the words "license and censorship" to convey his sense that the ordinance offers a dangerous potential for official abuse of authority. He concludes, "The press . . . comprehends every sort of publication which affords a vehicle of information and opinion. What we have had recent occasion to say with respect to the vital importance of protecting this essential liberty from every sort of infringement need not be repeated,"[84] and he cites *Near*, *Grosjean* and *De Jonge*. The citation refers to both subversive advocacy cases and free press cases, and what "need not be repeated" is their shared mantra that a democratic people must retain the power of free speech so that they may freely and openly criticize their government.

Lovell offers two important additions to the growing free speech tradition of the Hughes Court. First, the record did not suggest that the Jehovah's Witnesses were agitating for a change in the government—as observed above, they had not even been denied a permit. Hughes was simply concerned with the structure of the ordinance and the power it placed in local officials. It mattered not that the speakers were now a religious minority with no apparent political agenda. This suggests an insight elaborated more fully in *Cantwell v. Connecticut*[85] and subsequent religious freedom cases—namely, that democratic society demands an openness for all types of opinion, even those not expressly directed at reforming government. *Cantwell*, discussed below, illuminates this theory more completely than Hughes's attenuated opinion in *Lovell*, however, so I will set aside this idea for the moment.

Second, *Lovell* invents a vital formulation that still has a contested role in First Amendment jurisprudence. While criticizing the Griffin ordinance, Hughes writes that it "prohibits the distribution of literature of any kind at any time, at any place, and in any man-

83. Id. at 451.
84. Id. at 452.
85. 310 U.S. 296 (1940).

ner without a permit from the City Manager."[86] Later opinions inverted this statement, finding that more narrow restrictions on the time, place or manner of speech were permissible. Hughes elaborated this aspect of *Lovell* four years later in *Cox v. New Hampshire*,[87] where he upheld a local ordinance requiring that groups planning a parade in the city streets first get a permit from the mayor. Here again, the plaintiffs were Jehovah's Witnesses who claimed that applying for a permit would be against their religious beliefs. Hughes passed over the free exercise aspect of their First Amendment claims. Distinguishing *Lovell*, he found that liberty depended on a certain degree of organization in society, and that the parade permit system was constitutional because it was narrowly directed at 'organized formations of persons using the highways.'[88] Since these early, functionalist and innocuous beginnings, however, "time, place, manner" analysis has grown into a vast category of exceptions to the First Amendment, allowing governments to restrict speaking opportunities in a broad variety of ways.[89]

Perhaps the most interesting and difficult First Amendment opinion from the Hughes Court era was *Hague v. C.I.O.*,[90] decided a year after *Lovell* in 1939. The case arose from the enforcement of Jersey City ordinances against the C.I.O. Under color of the ordinances, labor organizers were repeatedly denied permits to speak in the town halls, searched upon entry into the city, barred from pamphleting on the city streets, and even forcibly ejected from the city limits. Even in the matter-of-fact language of Roberts's opinion, the whole scene appears as a Hughesian nightmare, confirming the worst fears of opinions like *Stromberg* and *Lovell*—for in Jersey City, local officials showed themselves eager to use power over speech to entrench themselves against opposing views. *Hague* found in favor of the union 5-2 (two justices did not participate). The majority agreed that the Jersey City ordinances were an unconstitutional restriction of free speech. In a remarkable debate, however, they split over the question of whether the privileges and immunities clause or the due process clause of the Fourteenth Amendment compelled this result. Roberts, joined by Black and Hughes, favored the former result, Stone and Reed the later. Since both sides agreed on the importance of free debate, however, further discussion of *Hague* is unnecessary. Apart from its conflicting views of the Fourteenth Amendment, *Hague* fits squarely within the

86. *Lovell*, 303 U.S. at 451.
87. 312 U.S. 569 (1941).
88. Id. at 575.
89. See Owen M. Fiss, *Silence on the Street Corner*, 26 Suffolk U.L. Rev. 1 (1992).
90. 307 U.S. 496 (1939).

evolving tradition of cases concerned with protecting democracy by restricting the power of local majorities to curtail opposition speech.

Following his opinion in *Hague*, Roberts in the fall of 1939 delivered *Schneider v. State*,[91] another important free speech decision that added a working methodology to the perhaps doctrinaire results of earlier Hughes Court cases. *Schneider* addressed a question suggested by the facts of *Lovell*. While faced with an inability to control speech through permits, municipalities could still regulate speech with a technique known today as a "flat ban." Three of the four cases consolidated before the Court as *Schneider* involved ordinances that banned all handbilling from a city's streets because handbilling tended to cause litter. Roberts held them an invalid restraint of free speech, and his analysis offered a way to accommodate the city's interest in clean streets with the speaker's desire to communicate with passers-by. As discussed by Owen Fiss in a recent article,[92] in *Schneider* Roberts first applied the familiar "weighted balancing test" to First Amendment claims. He explained, "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."[93] Roberts asked that the regulatory aims of local statutes be weighed against the heavy importance of free speech in a democratic society. Here, since the municipality could easily control litter by punishing those who threw handbills to the ground, its interest did not outweigh the burden placed on speech by a flat ban against handbilling. In *Schneider*, then, Roberts pioneered an important new method of analysis while adhering to the central free speech theory he and Hughes had developed in previous opinions: free speech weighs heavily against other government aims because it is "vital to the maintenance of democratic institutions."[94]

In the spring of 1940, the Court decided a pair of labor picketing cases, *Carleson v. California*[95] and *Thornhill v. Alabama*,[96] where anti-loitering laws had been used to arrest union demonstrators. Justice Murphy overturned the convictions in succinct and authoritative opinions. He wrote: "[T]he group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that

91. 308 U.S. 147 (1939).
92. Fiss, 26 Suffolk U. L. Rev. at 1 (cited in note 89).
93. *Schneider*, 308 U.S. at 161.
94. Id.
95. 310 U.S. 106 (1940).
96. 310 U.S. 88 (1940).

others may thereby be persuaded to action inconsistent with its interests."[97] Murphy reaffirmed the Court's willingness to hold laws restricting free speech facially invalid. The language quoted above reduces the essential Hughes Court free speech theory to a single sentence. Free speech is not merely a right, it is a power, and the First Amendment protects the people from their agents in the government who would usurp that power.

Taken as a group, then, the Hughes Court free speech cases established doctrines of strict scrutiny, prior restraint, void for vagueness, unbridled discretion, chilling and time, place, manner exceptions. All of these were supplemented with Roberts's weighted balancing analysis, which judged First Amendment claims against the importance of countervailing state interests while recognizing that the public had a serious, continuous interest in open debate. By 1941, a tradition extolling the principle of free public debate and its supporting doctrines had developed around ten eloquent cases, and this core tradition promised support for a comprehensive and sophisticated free speech jurisprudence in the future.

Before leaving this argument, an eleventh and final Roberts case offers a beautiful summary of the free speech theory articulated over the preceding ten years. *Cantwell v. Connecticut* reviewed a local law that barred religious groups from soliciting members of other religions.[98] A Jehovah's Witness had approached two Catholics with a portable phonograph and played a recording that attacked Catholicism. The opinion held for the first time that freedom of religion was a fundamental liberty protected from state abridgement by the Fourteenth Amendment. In an analysis that mirrors the approach in *Schneider*, Roberts balanced the state interest in regulating solicitation against the freedom of religious conscience. He found that the Jehovah's Witness presented no threat of disorder, and that the state law was needlessly broad if it could be applied to arrest a peaceful solicitor. Roberts's concluding statement conjoins freedom of religion and freedom of speech as part of a common First Amendment tradition:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in

97. Id. at 104.
98. 310 U.S. 296 (1940).

> spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.[99]

Perhaps better than any other short quotation, this passage summarizes the ideal of democratic pluralism that underlies the First Amendment. More than twenty years before Brennan's *New York Times* opinion, it thoroughly foreshadows the reasoning and result of that great case, even down to its observation that as citizens exchange heated views, they may resort to falsehoods—and that if we have confidence in openness and respect for one another, we need not fear such abuse in the long run.

Cantwell provides an apt conclusion to my review of the Hughes Court's free speech tradition, for it both embraces and looks beyond the importance of a free exchange of ideas among citizens of a democracy. *Cantwell* offers a higher vision of the First Amendment, one that to this day remains unaddressed by the Supreme Court's free speech tradition. For Roberts, the core tradition protects more than democratic process; it celebrates pluralism, tolerance, and a respect for the differing views of one's fellow citizens. The opinion presents a surprisingly contemporary distillation of values and challenges that could unify American citizens in all our colorful diversity as we struggle to realize the many unfulfilled promises of our Constitution in a new century.

IV. CONSTITUTIONAL TRANSFORMATION

Near and *Stromberg* introduced two lessons the Hughes Court First Amendment cases could teach the modern student of constitutional law. As to the first lesson, the subsequent 1930s cases should speak for themselves. Hopefully, they have persuaded readers that the Hughes Court set forth a sophisticated First Amendment jurisprudence based on the central importance of rich public debate to democracy, and that the liberal free speech tradition located by the popular mind as arising out of the 1960s is in fact 30 years older. Were this all the cases established, they would rank among the most important contributions to constitutional doctrine in this century. As I suggested in Part II, however, *Near* and *Stromberg* teach a second lesson. They inaugurate the complex changes in our constitutional jurisprudence that occurred in the 1930s.

Scholars commonly identify two major changes in constitutional law in this century: national economic regulation by the modern administrative state, and incorporation of the Bill of Rights

99. Id. at 310.

against the states. Both these changes were born in the 1930s. Broad federal regulation of the national economy was first legitimated by the commerce clause cases following *NLRB v. Jones & Laughlin Steel Corp.*[100] and buttressed by separation-of-powers decisions that ratified the new delegation of power to administrative agencies. Incorporation of fundamental provisions of the Bill of Rights against the states occurred gradually over a series of cases holding that the due process clause of the Fourteenth Amendment bound the states to respect limited rights of free speech[101] and minimum standards of criminal due process.[102]

A vast literature surrounds the relationship between these two changes in constitutional law. Much of it focuses on the problem of judicial review and the famous footnote four of *United States v. Carolene Products.*[103] My purpose here is neither to challenge this literature nor engage it on any serious level. Rather, I want to refocus scholarly attention on the First Amendment's prominent role as a catalyst of constitutional transformation in the early 1930s. In my view, scholarly interest in judicial review and substantive due process should not obscure the pivotal importance of *Near*'s free speech theory as the herald of a new constitutional regime.

I begin with the strong but overlooked parallel between the Court's behavior in the first pro-free speech cases and its behavior in the first pro-national regulation cases. In both instances, the Court turned its back on a recent, firmly established tradition in prior cases to endorse a new nationalist agenda. By exploring this similarity, I stress that the Hughes Court First Amendment cases came *first*; they predated the famous commerce clause shift by five years. This matters, as it turns out, to certain established schools of constitutional interpretation, and explodes some of the mythology surrounding the famous switch in time of 1937.

The first free speech cases cleverly jumped through hoops to distinguish prior cases that demanded opposite results. *Stromberg*'s facts were nearly identical to the federal or state subversive advocacy cases of the previous decade that supported restrictions on speech. In *Near*, earlier precedents from the turn of the century provided ample support for the proposition that states or municipalities could regulate the press by prior restraints or ex post punishments in service of the general welfare. Both cases set forth a radical new program, a commitment to the ideal that local preferences could not be allowed to impede democratic decision-making

100. 301 U.S. 1 (1937).
101. *Gitlow v. New York*, 268 U.S. 652 (1925).
102. *Powell v. Alabama*, 287 U.S. 45 (1932).
103. 304 U.S. at 152.

at the national level—a commitment that had never enjoyed but one or two votes on the Court.

What does it mean to assert that the Court's new protection of democratic process was "nationalist"? First, under the logic of Hughes's opinion, California's suppression of flags flown in opposition to the government was an assault on the integrity of the national democratic process. States and towns had an interest in laws regulating advocacy against the government—a desire to keep the peace or to preserve local institutions, for example. For Hughes, however, in the very first two cases these local interests are openly trumped by the need for free public debate, "[so] that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . ."[104] Why not let local majorities determine what restrictions on speech impeded their democratic character? The answer compelled by the logic of *Near* and *Stromberg* is that local governments are prone to capture by self-interested agents, and the First Amendment protects the people's sovereign power to direct, and if necessary, replace their agents in all types of government. Since what passed for subversion in California might be part of a national movement for change, the integrity of national democracy required that the federal government bar California from interfering with the entire nation's power to alter the course or structures of its government.

Near, *Stromberg* and the ensuing free speech tradition are nationalist on a second level, however. For even if governments, both federal and local, are vulnerable to capture by self-interested agents, there is nothing on the face of the First Amendment to suggest which locus of authority—federal or state—should monitor the democratic integrity of the entire system. An important strain of American constitutional thought prior to 1930 viewed the actions of the national government as likely to be undemocratic. National government was feared as unrepresentative, and local communities were trusted as the foci of a sovereign people. Even after the First Amendment bound the states under the Fourteenth, then, it is possible to imagine a vision of democracy that gave local communities authority to regulate the boundaries of free speech, on the theory that at a local level, a sovereign people could more easily overturn rules that impeded their ability to monitor, direct or recall their agents in the government.

By 1940, however, all eleven free speech cases had restricted the power of some state or local polity to restrain free speech according to its own best judgments about the general welfare. The

104. *Stromberg*, 283 U.S. at 369.

federal government, through the national Supreme Court, became the national arbiter of the democratic process. Before 1931, local democracies had the power to monitor the representative character of both local and national government. After 1931, the federal government through the Supreme Court usurped this power. With their nationalist effect thus exposed, *Near* and *Stromberg* emerge as more than exercises in democratic, rich public debate-free speech theory. They also effect a naked shift of power, a shift from state and local governments to the national government. Hughes's democratic free speech theory alone cannot justify the shift, for it does not explain why the Supreme Court is a better monitor of democracy than local communities. As the dissent in *Near* recognizes, the case is about much more than prior restraints on the press. It is a constitutional power shift as novel and shattering as the explosion of the commerce power six years later.

The 1930s commerce clause jurisprudence follows the same pattern as the Hughes Court First Amendment cases, but since the commerce clause story is familiar I will not rehash it with extended arguments from particular cases. In early 1930s commerce clause cases, the Court blocked New Deal legislation under a well-established line of cases that had denied the federal government authority to regulate major aspects of the national economy. As Bruce Ackerman's work forcefully reminds us, FDR's economic program was endorsed by overwhelming popular and congressional support for national regulation as a means of lifting the country out of the depression.[105] In 1937, after FDR threatened to pack the Court, the Supreme Court reversed its earlier position and began to uphold FDR's programs. One need not locate a "constitutional moment" or an unwritten amendment to the Constitution in these events to recognize that they allowed the federal government to assert a new level of control over local affairs. In 1934, the federal government could not tell Schechter how to run his local poultry business,[106] but by 1941 it was imposing conditions on the sale of local wheat to local customers.[107] Both the free speech and the commerce clause cases asserted that local actions, economic and political, had profound national ramifications that the federal government was entitled to supervise or regulate. The free speech cases thus provided a model of judicial support for nationalism that was paralleled six years later in the commerce clause cases.

Scholars also study the 1930s to explore the roots of incorpora-

105. See Bruce A. Ackerman, *We the People* 47-50 (Belknap Press, 1991).

106. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

107. *Wickard v. Filburn*, 317 U.S. 111 (1942).

tion, where the Court began to apply the Bill of Rights against the states. Again, I do not wish to enter the scholarly debate over the origins or theory of incorporation. *Near*, however, reveals 1931 as a critical watershed in the Court's due process jurisprudence. Under modern incorporation cases, the due process clause became a constitutional hook for applying the Bill of Rights against the states. As most first-year law students learn, these cases have a grim and discredited elder cousin—*Lochner*.[108] The *Lochner*-era Court read the due process clause to protect expansive property and contract rights from federal *and* state infringement, usually to the advantage of corporations and to the detriment of poor workers.

Near is the fulcrum of a shift in the Court's due process emphasis—from property and contract rights to civil rights. A reader can almost see the transition on the face of the opinion; Hughes supports his free speech analysis by illustrating the due process analysis of earlier contract and property decisions.[109] Before *Near*, due process cases mostly protected property and contract rights, and ignored other individual liberties. After *Near*, the Court exercised significant judicial review in both areas for about five years, but then retreated from its long-standing supervision of property and contracts. A brief canvass of some early, proto-incorporation decisions outside the free speech area makes the shift more clear. In 1932, *Nixon v. Condon* affirmed blacks' voting rights, overruling a Texas effort to exclude blacks from primaries.[110] Over the dissent of the Four Horsemen, Cardozo dismissed arguments that a private political party, and not the state legislature, was the true promulgator of the racial barrier. Cardozo concluded, "The Fourteenth Amendment, adopted as it was with special solicitude for the equal protection of members of the Negro race, lays a duty upon the court to level by its judgment these barriers of color."[111] The same year, *Powell v. Alabama*[112] and *Sorrel's v. United States*[113] articulated new national standards of due process for criminal defendants in state proceedings. *Powell* overturned the conviction of a black defendant because the state had denied him counsel at trial. *Sorrel's* overturned a conviction because federal officers had induced the defendant to commit the crime. In 1936, *Brown v. Mississippi*[114] over-

108. *Lochner v. New York*, 198 U.S. 45 (1905).

109. *Near*, 283 U.S. at 707.

110. 286 U.S. 73 (1932). This case reaffirmed the terse holding of *Nixon v. Herndon*, 273 U.S. 536 (1927).

111. Id. at 89.

112. 287 U.S. 45 (1932).

113. 287 U.S. 435 (1932).

114. 297 U.S. 278 (1936).

turned the conviction of a black defendant who was brutally beaten over a period of several days until he confessed to a crime. All these cases held states to new federal standards of fundamental fairness before the "switch in time" of 1937.

There is a second side to the Court's shifting due process review, of course, for as the Court focused on civil and political rights it retreated from expansive protection of contract and property rights. If the retreat had been more swift, there would have been no court-packing crisis, but signs of the Court's retreat appear before 1937 in the case of *Nebbia v. New York*,[115] where Justice Roberts upheld New York's effort to stabilize the milk industry with price controls. Justice McReynolds in dissent was joined by the rest of the Horsemen, and he accurately pointed out that under the Court's precedents, freedom to set prices was a core liberty of contract. *Near* itself had affirmed this principle:

> [W]hile the liberty of contract is not an absolute right . . . the power of the State stops short of interference with what are deemed to be certain indispensable requirements of the liberty assured, notably with respect to the fixing of prices and wages.[116]

Revealingly, McReynolds cited *Near* in his catalogue of opinions establishing the contours of due process under the Fourteenth Amendment, supporting my view of *Near* as a critical transition between *Lochner* and modern due process concerns.

The due process revolution ultimately styled "incorporation" began, in the words of *Palko v. Connecticut*,[117] by forcing states to respect protections in the Bill of Rights deemed "implicit in the concept of ordered liberty." The word liberty connotes an individual's freedom from government control, and it is right to insist that the incorporation project has focused on the protection of individual liberties from government restraint. But incorporation is also about national standards. In their insistence that open and critical debate was essential to democratic government, the free speech cases demanded that the states honor national standards of democratic process. The free speech, due process and commerce clause cases all expressed a new confidence in the ability of a national democratic community to make collective decisions that bind all its constituents.

My vision of the 1930s free speech cases fragments Bruce Ackerman's vision of the New Deal as the prime mover or inaugurator

115. 291 U.S. 502 (1934).
116. *Near*, 283 U.S. 707-08.
117. 302 U.S. at 325.

of his third constitutional regime.[118] He identifies interbranch conflict followed by popular ratification as the driving process behind fundamental changes in the Constitution. In his view, the Court's resistance to Roosevelt's economic plan made the landslide victory of 1936 a vindication of that plan, forcing the Court to avoid a constitutional crisis after the popular president proposed the court-packing plan. If *Stromberg* and *Near* are as radical as I argue, if they initiate a nationalizing shift in the balance of power between federal government and the states, then the court-packing induced shift of the commerce clause cases has a precursor in 1931 of equal magnitude, and one is forced to conclude that nationalizing forces were at work in the judiciary before the crisis of 1936. *Near* and *Stromberg* argue that interbranch conflict is not the fulcrum of a single decisive shift in our constitutional regime. The great changes of 1936 began in 1931 and took a decade to flower—not just in commerce clause jurisprudence, but in First Amendment and Bill of Rights cases as well.

Ackerman's focus on 1936 also derives support from those who locate a decisive constitutional shift in footnote four of *Carolene Products*, often read to establish a new theory of judicial review and a new balance of power among the branches of the federal government.[119] Footnote four, however, cites all six extant Hughes Court free speech opinions—*Stromberg*, *Near*, *Grosjean*, *De Jonge*, *Herndon* and *Lovell*—and as I argued above, these cases along with the criminal process opinions authorized new federal power over local affairs long supervised by the states alone. Footnote four is best read to ratify the parallel nationalism of the free speech and the commerce clause decisions, not to pioneer a new theory of judicial review.

In the area of First Amendment scholarship, *Near* and *Stromberg* rebuke those who attempt to stretch the 1930s free speech canvass around an Ackerman-inspired frame. Discussing the Hughes Court free speech cases in the context of Ackerman's theories of constitutional change, David Yassky claims that the decisive shift in First Amendment jurisprudence occurred "in the late 1930s."[120] In my view, this is something like calling *Wickard* and *Darby* the decisive shift in commerce clause jurisprudence, and the conclusion does not stand up to a close reading of the two 1931 opinions.

None of this is meant to suggest that the free speech cases ex-

118. Ackerman, *We the People* at 47-50 (cited in note 105).
119. Id. at 119-30.
120. David Yassky, *Eras of the First Amendment*, 91 Colum. L. Rev. 1699, 1730 (1991).

actly match the jurisprudential shift of the later commerce clause cases. Congress retains power under "dormant commerce clause" analysis to intervene when state actions affect the national economy. This power implies a correlative freedom to cede power to the states.[121] The institutional relationships between state and federal power are somewhat different in the free speech and civil rights arenas, for Congress cannot defer to state suppression of speech or state infringement of the fundamental rights of criminal defendants. Such differences aside, however, when the free speech cases are compared in method and result to later commerce clause and due process cases, they show themselves to be a critical impetus for the major constitutional changes of the 1930s.

CONCLUSION

It is said that even without a First Amendment, the republican structure of the Constitution would demand free speech. The First Amendment, then, must be understood to extend beyond the terrain of "individual rights." Individual rights are a prominent, even noble aspect of American political theory. But focus on free speech as an individual entitlement does not capture the central importance of rich public debate in our constitutional regime. I have argued that the First Amendment burst into our modern jurisprudence driven by the theory that rich public debate was central to democracy, and by the belief that democracy at a national level was both possible and desirable. The Hughes Court free speech cases inaugurated a constitutional shift towards democratic nationalism that blossomed as the Court supported an expanded commerce power and incorporation doctrine. If this perspective on the 1930s can be reduced to a single, simple lesson, it is that free speech is best thought of as a collective power that binds Americans together as a nation. The emergence of this power in the 1930s marks the era of our history when we began to envision ourselves as a national community. The unfulfilled challenge of this power remains a vision of pluralism and tolerance difficult to achieve in a large, heterogeneous nation. But if we continue to believe, as did Justice Roberts, that enlightened opinion and right conduct are possible in an open society, then there is reason to remain optimistic about the power of free speech to unite Americans in a more just national community over the coming century.

121. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), a case upholding state economic regulations that was decided the same term as *Jones & Laughlin*.