

# **SCHNEIDER V. NEW JERSEY: WEAPONS IN THE DEFENSE OF LIBERTY**

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## INTRODUCTION

*Schneider v. New Jersey*<sup>1</sup> has been cited by state and federal courts over 1,200 times, including 157 times by the U.S. Supreme Court.<sup>2</sup> It is a workhorse for the First Amendment. It is not famous as a decision creating new law, like *Schenck v. United States*<sup>3</sup> or *Brandenburg v. Ohio*,<sup>4</sup> but *Schneider* held that the federal Constitution does not allow a municipality to infringe on speech and press rights simply by invoking the state police power.<sup>5</sup> If that seems like a simple proposition of constitutional law, why did the four cases consolidated in *Schneider* have to be decided by the U.S. Supreme Court, after the courts below sanctioned the arrests of these defendants for passing out pieces of paper?<sup>6</sup>

The three women and two men who were the defendants in the cases consolidated on appeal in *Schneider* were not famous or infamous, were not convicted of serious offenses, and left little mark in the historical record—apart from their roles as frontline soldiers for the causes in which they believed with sufficient conviction to face public hostility and arrest by the police.<sup>7</sup> In an era before electronic social media, these defendants distributed printed pamphlets; Clara Schneider went door-to-door in a residential

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<sup>1</sup> 308 U.S. 147 (1939).

<sup>2</sup> *Schneider v. State* [sic], 308 U.S. 147: Citing Decisions, LEXISNEXIS, <https://www.lexisnexis.com/en-us/product-sign-in.page> (select applicable LEXIS product; then sign in to account; then search “308 U.S. 147”; then select “Citing Decisions” tab) [Perma.cc link unavailable] (last visited Jan. 3, 2022).

<sup>3</sup> 249 U.S. 47, 52 (1919) (creating the “clear and present danger” standard in the era of World War I protests).

<sup>4</sup> 395 U.S. 444, 447 (1969) (creating the “imminent lawless action” standard in the era of Vietnam war protests).

<sup>5</sup> See *Schneider*, 308 U.S. at 160.

<sup>6</sup> See *id.* at 154-59.

<sup>7</sup> See *id.* Schneider and Snyder petitioned the Court for writs of certiorari under Rule 38, while Young and Nichols (and Thompson) submitted “jurisdictional statements” under Rule 12(1) of the Supreme Court Rules effective Feb. 27, 1939. See *id.* at 154 n.1. See also SUP. CT. R. 12(1), 38, 306 U.S. 694, 716 (1939) (repealed 1954). Seizing the Court via a jurisdictional statement migrated to Rule 15 in 1954, see SUP. CT. R. 15, 346 U.S. 960 (1954) (repealed 1989), and was abolished effective Jan. 1, 1990. See SUP. CT. R. (1989). For this reason, Schneider and Snyder were “petitioners,” and Young and Nichols (and Thompson) were “appellants,” as their pleadings reflect. *Schneider*, 308 U.S. at 154-59. Here, I collect them all in their original role as “defendants.”

neighborhood, handing out religious pamphlets, and the others distributed political handbills on sidewalks.<sup>8</sup> All were arrested for violations of local ordinances.<sup>9</sup>

The opinion in their consolidated case is also modest.<sup>10</sup> Beneath its surface, however, are roiling political controversies in a volatile time of domestic and international crises. In 1938, unemployment in the United States was around twenty percent;<sup>11</sup> Japan was slaughtering the population of Nanjing as part of its brutal war in Manchuria, China;<sup>12</sup> Nazi-led Germany was “annexing” the Sudetenland and Austria;<sup>13</sup> Soviet dictator Joseph Stalin was conducting show trials of “enemies of the people” in Moscow;<sup>14</sup> and fascist and communist forces were clashing in a vicious proxy war in Spain.<sup>15</sup> As the controversies discussed in this Article will illustrate, Americans were bitterly divided on how to address the Great Depression at home and the many crises abroad.

After a review of the Supreme Court decision’s brief recital of the facts,<sup>16</sup> we will look outside the court reporter for more information about each case. First, we consider Ms. Schneider’s arrest for distributing Jehovah’s Witness pamphlets in Irvington,

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<sup>8</sup> *Id.* at 154-56, 158.

<sup>9</sup> *Id.* at 154-58.

<sup>10</sup> See discussion *infra* Part I.

<sup>11</sup> Patricia Waiwood, *Recession of 1937-38*, FED. RSRV. HIST. (Nov. 22, 2013), <https://www.federalreservehistory.org/essays/recession-of-1937-38> [<https://perma.cc/Q78Y-HCW9>].

<sup>12</sup> The Editors of Encyclopaedia Britannica, *Nanjing Massacre*, BRITANNICA, <https://www.britannica.com/event/Nanjing-Massacre> [<https://perma.cc/ZN7X-ADUG>] (May 6, 2021).

<sup>13</sup> The Editors of Encyclopaedia Britannica, *Munich Agreement*, BRITANNICA, <https://www.britannica.com/event/Munich-Agreement> [<https://perma.cc/WVV4-R2KU>] (Sept. 23, 2021).

<sup>14</sup> The Editors of Encyclopaedia Britannica, *Great Purge*, BRITANNICA, <https://www.britannica.com/event/Great-Purge> [<https://perma.cc/NV3E-2Z35>] (Mar. 6, 2022). See also Robert Zich & Kathryn D. Ellis, *Revelations from the Russian Archives: Internal Workings of the Soviet Union*, LIBR. CONG., <https://www.loc.gov/exhibits/archives/intn.html> [<https://perma.cc/3QAT-DDGG>] (Apr. 1996).

<sup>15</sup> The Editors of Encyclopaedia Britannica, *Spanish Civil War*, BRITANNICA, <https://www.britannica.com/event/Spanish-Civil-War> [<https://perma.cc/85TK-VNVX>] (July 10, 2021).

<sup>16</sup> See *infra* Part I.

New Jersey.<sup>17</sup> Then, we look at the case of Kim Young, a student in Los Angeles, who passed out handbills to advertise a meeting in support of the American volunteers fighting against the fascists in the Spanish Civil War.<sup>18</sup> To explain why such a meeting was politically controversial, we identify the proposed speakers, who included radical playwright Lillian Hellman, a war correspondent named Jay Allen, and a communist veteran of the Spanish war whose brother was a sitting Member of Congress.<sup>19</sup>

The Article then describes the two labor activist cases. First, we investigate the labor issues at the textile mills in Worcester, Massachusetts, where Elmira Nichols and Pauline Thompson were arrested for distributing handbills for a labor rally.<sup>20</sup> Then, we examine why Harold Snyder was arrested for handing out boycott leaflets in front of a Milwaukee, Wisconsin meat market,<sup>21</sup> one of a regional chain of markets accused of running a sham “company union” to avoid the new laws on collective bargaining.<sup>22</sup>

The convictions of these defendants would all be upheld by state courts and had to be appealed to the U.S. Supreme Court by free speech activist attorneys.<sup>23</sup> The Supreme Court ruled in favor of free speech,<sup>24</sup> meaning here, the opportunity to distribute inflammatory materials at a time of worldwide economic hardship and political unrest. In that era, “communist,” “socialist,” and “fascist” were not always exaggerated terms of abuse. Who were these Americans taking sides in the war in Spain—an ideological conflict between left and right and a war in which the United States was officially neutral?<sup>25</sup> Why was organized labor picketing this Midwestern meat market? Why was Massachusetts unemployment insurance the subject of a protest meeting? More importantly, why

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<sup>17</sup> See Transcript of Record at 7-8, *Schneider v. New Jersey*, 308 U.S. 147 (1939) (No. 11) [hereinafter Transcript of Record for *Schneider*].

<sup>18</sup> See Transcript of Record at 1-4, *Schneider*, 308 U.S. 147 (No. 13) [hereinafter Transcript of Record for Young].

<sup>19</sup> See *infra* Section II.B.

<sup>20</sup> See Transcript of Record at 6-8, *Schneider*, 308 U.S. 147 (No. 29) [hereinafter Transcript of Record for Nichols and Thompson].

<sup>21</sup> See Transcript of Record at 1-2, 18-19, *Schneider*, 308 U.S. 147 (No. 18) [hereinafter Transcript of Record for Snyder].

<sup>22</sup> See *infra* Section III.B.

<sup>23</sup> See *infra* Part IV.

<sup>24</sup> See *Schneider*, 308 U.S. at 165.

<sup>25</sup> See *infra* notes 85-87 and accompanying text.

did these citizens have to reach the U.S. Supreme Court to vindicate their rights?

### I. THE *SCHNEIDER* DECISION

Justice Owen Roberts’s opinion contains no internal headings, but is a model of tidiness.<sup>26</sup> First, he describes the facts of each case in three or four paragraphs, concluding with *Schneider*, whose three fact paragraphs are notably longer than the others.<sup>27</sup> Each factual summary begins with the relevant local ordinance.<sup>28</sup> Then, in six paragraphs, Justice Roberts states some broad principles of applicable law.<sup>29</sup> Finally, four paragraphs apply the law to the three defendants who had distributed pamphlets on the street,<sup>30</sup> and four paragraphs apply the law to Clara Schneider’s door-to-door solicitation.<sup>31</sup> The decretal paragraph reverses and remands each case.<sup>32</sup>

The factual summaries are succinct. Kim Young violated a Los Angeles ordinance that prohibited distributing handbills to any pedestrian or passenger in a “street, sidewalk[,] or park.”<sup>33</sup> Young had distributed handbills to pedestrians on a sidewalk, and had in his possession another three hundred of the handbills, containing “a notice of a meeting to be held under the auspices of ‘Friends Lincoln Brigade’ at which speakers would discuss the war in Spain.”<sup>34</sup> The courts below had upheld his conviction on the grounds that the ordinance only banned distribution of handbills in certain areas, not everywhere in the city.<sup>35</sup>

Harold F. Snyder, in his turn, had been arrested for violating a Milwaukee ordinance that prohibited distribution of handbills and similar printed matter on the street or sidewalk.<sup>36</sup> He had been

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<sup>26</sup> *See Schneider*, 308 U.S. 147.

<sup>27</sup> *See id.* at 154-59.

<sup>28</sup> *See id.* at 154-57.

<sup>29</sup> *See id.* at 160-62.

<sup>30</sup> *See id.* at 162-63.

<sup>31</sup> *See id.* at 163-65.

<sup>32</sup> *See id.* at 165.

<sup>33</sup> *Id.* at 154.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 154-55.

<sup>36</sup> *Id.* at 155.

picketing at a meat market, and his handbills “set forth the position of organized labor with respect to the market, and asked citizens to refrain from patronizing it.”<sup>37</sup> Some handbill recipients had thrown them in the street or gutter, but in accordance with “a policy of the police department[,] . . . he who passed out the bills was arrested rather than those who received them and afterwards threw them away.”<sup>38</sup> The courts below upheld Snyder’s conviction in light of this policy, which supposedly showed Snyder had been arrested only because his conduct caused “unsightly” littering.<sup>39</sup>

Elmira Nichols and Pauline Thompson violated a similar ordinance in Worcester, Massachusetts, where they “distributed in a street leaflets announcing a protest meeting in connection with the administration of state unemployment insurance.”<sup>40</sup> Like Snyder, they had not themselves committed littering, but some recipients had, “with the result that some thirty were lying about.”<sup>41</sup> The Massachusetts courts reasoned that free speech was available in locations other than public streets and sidewalks.<sup>42</sup>

Clara Schneider violated an ordinance in Irvington, New Jersey, that was more elaborate than these anti-littering ordinances. The ordinance addressed door-to-door soliciting and required a permit issued by the police.<sup>43</sup> The ordinance included, *inter alia*, that:

[T]he canvasser must make an application giving his name, address, age, height, weight, place of birth, whether or not previously arrested or convicted of crime, by whom employed, address of employer, clothing worn, and description of project for which he is canvassing; that each applicant shall be fingerprinted and photographed; that the Chief of Police shall refuse a permit in all cases where the application, or further investigation made at the officer’s discretion, shows that the

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 155-56.

<sup>39</sup> *Id.* at 156.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 156-57.

<sup>42</sup> *Id.* at 157.

<sup>43</sup> *Id.*

canvasser is not of good character or is canvassing for a project not free from fraud . . . .<sup>44</sup>

Schneider, an ordained minister of the Watch Tower Bible and Tract Society, did not obtain a permit before calling door-to-door to distribute cards and booklets.<sup>45</sup> The courts below held the ordinance valid as a measure to protect citizens from annoyance and fraud.<sup>46</sup>

These sketches convey nearly all the facts contained in the Supreme Court decision. The reporter's syllabus added little, mostly supplying the arguments of government counsel that the ordinances infringed only incidentally on free speech.<sup>47</sup> Although admirably succinct, and perhaps deliberately discreet, Justice Roberts's factual summaries imply the deep political, even truly ideological, conflicts in Depression-era America, which this Article will explore.

Justice McReynolds dissented without writing a separate opinion.<sup>48</sup> He was the last member of the Court's "Four Horsemen"<sup>49</sup> who had, sometimes with the vote of Chief Justice Hughes and Justice Owen Roberts, blocked many of President Franklin Roosevelt's New Deal programs in 1935-36.<sup>50</sup> In 1937, however, Chief Justice Hughes and Justice Roberts joined the "liberal" wing of the Court to uphold a state minimum wage law in *West Coast Hotel Co. v. Parrish*.<sup>51</sup> Because President Roosevelt had floated the idea of "packing" the Court with more justices, wiseacres called this

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<sup>44</sup> *Id.* at 157-58.

<sup>45</sup> *Id.* at 158-59.

<sup>46</sup> *Id.* at 159.

<sup>47</sup> *See id.* at 149-53. Another symmetry within Justice Roberts's opinion is that each factual summary notes how the respective state courts had purported to distinguish *Lovell v. City of Griffin*, a case *very* similar in its facts to those of Clara Schneider. *See id.* at 155-59. *See also* *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

<sup>48</sup> *See id.*

<sup>49</sup> *See generally* William E. Leuchtenburg, *When Franklin Roosevelt Clashed with the Supreme Court—and Lost*, SMITHSONIAN MAG. (May 2005), <https://www.smithsonianmag.com/history/when-franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994/> [<https://perma.cc/Z22E-EUSB>].

<sup>50</sup> *See, e.g.*, *United States v. Butler*, 297 U.S. 1 (1936); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

<sup>51</sup> 300 U.S. 379 (1937).

decision “[t]he switch in time that saved nine,” playing with an old clothes-mending adage that “[a] stitch in time saves nine.”<sup>52</sup>

Between *West Coast Hotel* and *Schneider*, two of the Horsemen (Justices Willis Van Devanter and George Sutherland) had retired,<sup>53</sup> and Justice Pierce Butler died in the early morning hours of November 16, 1939,<sup>54</sup> after *Schneider* had been argued, but before the decision was announced.<sup>55</sup> Now a lone rider, Justice McReynolds dissented without comment, making the *Schneider* decision seven to one.<sup>56</sup>

The country had changed, the Court had changed, and the decision in *Schneider* seems intended to protect political expression without unduly upsetting defenders of the traditional order. This article will suggest that in each of these consolidated cases, circumstantial evidence strongly suggests that local ordinances had been used selectively to silence challengers of the status quo. Learning more about these cases shows why there was much more at stake than unsightly litter.

#### A. *Schneider’s Arrest and Trial*

Clara Schneider was a naturalized American citizen born in Austria in 1905.<sup>57</sup> Unmarried, she lived with her elderly parents in Newark, New Jersey.<sup>58</sup> She had completed the eighth grade and

<sup>52</sup> A *Stitch in Time Saves Nine*, ENG. 344, [http://mason.gmu.edu/~dcurrie/English\\_344/Photo\\_Remix.html](http://mason.gmu.edu/~dcurrie/English_344/Photo_Remix.html) [<https://perma.cc/3RQV-4GQ8>] (last visited Oct. 22, 2021).

<sup>53</sup> See *National Affairs: By Retirement*, TIME (Jan. 17, 1938), <http://content.time.com/time/subscriber/article/0,33009,758853,00.html> [<https://perma.cc/6W46-M83W>].

<sup>54</sup> *Pierce Butler, 1923-1939*, SUP. CT. HIST. SOC’Y, <https://supremecourthistory.org/history-of-the-court-timeline-of-the-justices-pierce-butler-1923-1939/> [<https://perma.cc/N3SK-XN5X>] (last visited Oct. 22, 2021).

<sup>55</sup> See *Schneider v. State of New Jersey*, OYEZ, <https://www.oyez.org/cases/1900-1940/308us147> [<https://perma.cc/DA6Y-7ESG>] (last visited Oct. 22, 2021).

<sup>56</sup> See *Schneider v. New Jersey*, 308 U.S. 147, 165 (1939).

<sup>57</sup> See U.S. Census Bureau, *Sixteenth Census of the United States: 1940 – Population Schedule, New Jersey, E.D. No. 25-395, Sheet No. 4B*, NAT’L ARCHIVES: 1940 CENSUS (Apr. 9, 1940), <https://1940census.archives.gov/> (select “Census Search” tab; then select “Enumeration Districts” under “Search by.”; then select “New Jersey” from “State” dropdown menu; then type “25-395” in “ED” search bar; then click “View It”; then click “View ED 25-395”; then type “8” in “Jump to.” search bar; then click “Go”) [Perma.cc link unavailable].

<sup>58</sup> *Id.*

was employed as a factory inspector.<sup>59</sup> She was also a minister in the Jehovah's Witnesses,<sup>60</sup> a nontrinitarian Christian denomination founded in the late nineteenth century by Charles Taze Russell as "Zion's Watch Tower Tract Society."<sup>61</sup> "In 1884[,] the embryonic organization was incorporated with the stated purpose of "the dissemination of Bible truths in various languages by means of the publication of tracts, pamphlets, papers and other religious documents, and by the use of all other lawful means.""<sup>62</sup> Their characteristic proselytizing was not without effect—from fewer than 1,000 adherents in the United States in 1918, the denomination had grown to around 25,000 adherents in the United States in 1938.<sup>63</sup>

On the afternoon of Saturday, December 7, 1935, Clara Schneider went calling "house to house" in the town of Irvington, New Jersey, offering residents copies of cards and booklets explaining the religious tenets of the Jehovah's Witnesses.<sup>64</sup> She was arrested for violating a town ordinance that prohibited such conduct without a written permit signed by the town's chief of police or the officer in charge at the police station.<sup>65</sup> On December 17, 1935, the Irvington police court convicted her, sentenced her to pay a fine of \$100 or spend thirty days in jail, and released her on a \$200 bond.<sup>66</sup> Four days later, she appealed this summary conviction for a trial *de novo* in the Essex County Court of Common Pleas.<sup>67</sup>

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<sup>59</sup> *Id.*

<sup>60</sup> *Schneider*, 308 U.S. at 158.

<sup>61</sup> William Shepard McAninch, *A Catalyst for the Evolution of Constitutional Law: Jehovah's Witnesses in the Supreme Court*, 55 U. CIN. L. REV. 997, 1004, 1055 (1987).

<sup>62</sup> *Id.* at 1005.

<sup>63</sup> *Id.* at 999 n.18.

<sup>64</sup> Transcript of Record for *Schneider*, *supra* note 17, at 7-8. Irvington is five miles west of Newark Liberty International Airport, which opened on October 1, 1928. *Newark Liberty International Airport (EWR)*, BARUCH COLL., [https://www.baruch.cuny.edu/nycdata/infrastructure/airport\\_newark.html](https://www.baruch.cuny.edu/nycdata/infrastructure/airport_newark.html) [<https://perma.cc/GQ6H-RJJD>] (last visited Jan. 5, 2022). The street on which she solicited, Ball Street, is now adjacent to the Garden State Parkway. *See* Transcript of Record for *Schneider*, *supra* note 17, at 8. "The record in this case is confusing and indeed incomplete in certain respects." *Town of Irvington v. Schneider*, 200 A. 799, 799 (N.J. 1938). Nothing in the record, for example, explains why *Schneider's* December 21, 1935 appeal to the Essex County Court of Common Pleas was not decided until May 13, 1937. *See* Transcript of Record for *Schneider*, *supra* note 17, at 4, 10.

<sup>65</sup> Transcript of Record for *Schneider*, *supra* note 17, at 7-8.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 4-5.

Schneider's attorney in the Essex County Court of Common Pleas was Jacob Karkus,<sup>68</sup> state counsel for the Watch Tower Bible and Tract Society.<sup>69</sup> Karkus had, in 1934, won decisions on the constitutionality of ordinances in Westfield and Nutley, New Jersey, barring solicitation by non-residents without leave of the local police.<sup>70</sup> He had less success in Essex County (which included Irvington), losing two challenges to an ordinance along the lines of the Irvington ordinance.<sup>71</sup> In 1935, Karkus had successfully collaborated with Olin Moyle, national counsel for the Watch Tower Bible and Tract Society, and lawyers from the ACLU on a case in Union County, New Jersey, to challenge a state hate speech law.<sup>72</sup>

Karkus opted for a bench trial, and the parties stipulated that Schneider's case should be decided based on a stipulation in another case involving solicitation by Jehovah's Witnesses in Irvington.<sup>73</sup> On May 13, 1937, the court affirmed the summary police court conviction.<sup>74</sup>

#### *B. A Question Already Decided in Lovell v. City of Griffin?*

On March 28, 1938, the Supreme Court decided a case wherein the defendant, a Jehovah's Witness, was represented by Olin Moyle.<sup>75</sup> On April 20, 1936, Alma Lovell had gone door-to-door in Griffin, Georgia, distributing periodicals, without having first obtained a license from the city manager, as required by a city ordinance.<sup>76</sup> The Georgia Court of Appeals opined that the

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<sup>68</sup> *Id.* at 5.

<sup>69</sup> *Jehovah Group to Test Anti-Nazi Law*, PATERSON EVENING NEWS, Nov. 14, 1935, at 40.

<sup>70</sup> *See* *Town of Westfield v. Stein*, 172 A. 522 (N.J. 1934); *Town of Nutley v. Brandt*, 174 A. 244 (N.J. 1934).

<sup>71</sup> *See* *Maplewood Twp. v. Albright*, 176 A. 194 (N.J. Ct. Com. Pl. 1934); *Dziatkiewicz v. Twp. of Maplewood*, 178 A. 205 (N.J. 1935).

<sup>72</sup> *See* *Jehovah Group to Test Anti-Nazi Law*, *supra* note 69, at 40.

<sup>73</sup> *See* Transcript of Record for Schneider, *supra* note 17, at 5-7. Adding to the confusion, the defendant in the other case was Clara Schuster, and the record combined documents from the two cases. *See id.* at 5-7, 11-15.

<sup>74</sup> *Id.* at 10-11.

<sup>75</sup> *See* *Lovell v. City of Griffin*, 303 U.S. 444, 444, 448 (1938).

<sup>76</sup> Transcript of Record at 6-7, *Lovell*, 303 U.S. 444 (No. 391).

ordinance was constitutional, and the state supreme court denied certiorari.<sup>77</sup>

Moyle argued to the Supreme Court that the Griffin city ordinance violated, firstly, Lovell's freedom of religion, and also her rights of speech and of the press.<sup>78</sup> In an amicus curiae brief for the ACLU, Osmond Fraenkel argued the case as a matter of speech and press freedom, not free exercise.<sup>79</sup>

Chief Justice Hughes wrote for a unanimous court of eight (Justice Cardozo was unwell) that the city ordinance violated freedom of the press.<sup>80</sup> In legal analysis not mentioning free exercise, he declared that "liberty of the press is not confined to newspapers and periodicals," and recalled the circulars of John Milton and Thomas Paine.<sup>81</sup> A reader wishing to construe *Lovell* narrowly could note that it addressed an ordinance requiring a license to distribute printed materials: "The struggle for the freedom of the press was primarily directed against the power of the licensor."<sup>82</sup> A proleptic reader would note the focus on distribution<sup>83</sup> and its stirring defense of pamphlets and leaflets as "historic weapons in the defense of liberty."<sup>84</sup>

## II. FASCISM, SOCIALISM, AND COMMUNISM AT HOME AND ABROAD

Justice Roberts's succinct recitation of facts of each case cannot convey to a twenty-first century American reader all that was involved in these cases. To understand why littering cases and door-to-door solicitation had to go to the Supreme Court, we must know more about the people involved, including many not named in the opinion.

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<sup>77</sup> *Lovell v. City of Griffin*, 191 S.E. 152, 152-53 (Ga. Ct. App. 1937); Transcript of Record, *supra* note 76, at 16-18.

<sup>78</sup> See Appellant's Brief at 10-11, *Lovell*, 303 U.S. 444 (No. 391), 1937 WL 41018, at \*10-11.

<sup>79</sup> See Brief and Motion on Behalf of American Civil Liberties Union as Amicus Curiae, *Lovell*, 303 U.S. 444 (No. 391).

<sup>80</sup> *Lovell*, 303 U.S. at 447, 452-53.

<sup>81</sup> *Id.* at 450-52.

<sup>82</sup> *Id.* at 451.

<sup>83</sup> *Id.* at 452 ("The ordinance cannot be saved because it relates to distribution and not to publication.").

<sup>84</sup> *Id.*

For example, an informed American in the 1930s would have known that the ongoing Spanish Civil War pitted an insurgent Nationalist force led by Francisco Franco and backed by Nazi Germany and Fascist Italy against left-leaning Republican forces backed by Soviet Russia and socialist and communist parties worldwide, including the American socialist and communist parties.<sup>85</sup> “The rebelling Nationalist forces were supported via military supplies and combat participation from the Italian and German governments. The Republicans received aid primarily from multinational brigades of genuine foreign volunteers as well as weapons and combat participation from the Soviet Union.”<sup>86</sup> U.S. policy was to avoid entanglement in foreign wars, and in 1937, a joint resolution extended the 1935 Neutrality Act to ban arms trade in civil conflicts, such as the war in Spain.<sup>87</sup>

#### A. *Kim Young, a Student Activist in Los Angeles*

On Thursday, March 17, 1938, First Lady Eleanor Roosevelt gave a lecture at the Shrine Auditorium, adjacent to the University of Southern California in Los Angeles,<sup>88</sup> addressing the topic: “Problems of Youth.”<sup>89</sup> Young activists took the opportunity to hand out leaflets “dealing with the Spanish war, the Austrian situation and youths’ problems.”<sup>90</sup> Six activists were arrested for passing out handbills in violation of a city anti-littering ordinance.<sup>91</sup> One of those arrested was a nineteen-year-old Korean student named Kim Young, who distributed handbills advertising an event to be held

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<sup>85</sup> AUSTIN CARSON, SECRET WARS: COVERT CONFLICT IN INTERNATIONAL POLITICS 99, 103 (Fred Appel & Thalia Leaf eds., 2018).

<sup>86</sup> *Id.* at 103.

<sup>87</sup> See S.J. Res. 51, 75th Cong., 50 Stat. 121 (1937).

<sup>88</sup> *General Info*, SHRINE AUDITORIUM & EXPO HALL, <https://www.shrineauditorium.com/general-info> [<https://perma.cc/Y4GQ-69ME>] (last visited Oct. 22, 2021).

<sup>89</sup> *Six Youths Jailed for Passing Bills at Roosevelt Talk*, VENTURA CNTY. STAR-FREE PRESS, Mar. 18, 1938, at 2.

<sup>90</sup> *Judges and City Officials Called: Handbills Case Defense Wants Them as Witnesses*, L.A. TIMES, Mar. 26, 1938 (pt. II), at 8 [hereinafter *Judges and City Officials Called*]. Nazi Germany “annexed” Austria on March 12, 1938. History.com Editors, *Germany Annexes Austria*, HISTORY, <https://www.history.com/this-day-in-history/germany-annexes-austria> [<https://perma.cc/49LZ-XYR9>] (Mar. 9, 2021).

<sup>91</sup> *Judges and City Officials Called*, *supra* note 90, at 8.

four days later at Trinity Auditorium, a couple miles north of Shrine Auditorium.<sup>92</sup>

The day after the arrests, the prosecution filed a complaint in Los Angeles Municipal Court, and Young was released on \$25 cash bail.<sup>93</sup> Trial was set for March 25, 1938, and Young appeared in court with his attorney, Leo Gallagher, who also represented a medical office employee named Melda Strand.<sup>94</sup> Gallagher, a graduate of the Catholic University of America and Yale Law School, had the honor of being declared an “undesirable alien” by Nazi Germany in 1934 for his work in defense of Georgi Dimitrov in the Reichstag Fire prosecution.<sup>95</sup> In his defense of Young and Strand, Gallagher subpoenaed the Los Angeles mayor, city attorney, and chief of police, as well as thirty-five Municipal and Superior Court judges, on the expectation that their testimony would show that their political campaigns had been allowed to distribute handbills without incurring arrests.<sup>96</sup>

The judge continued the case to March 30, 1938, and on that day ruled that “because of a recent United States Supreme Court

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<sup>92</sup> See *L.A. Handbill Ordinance Is Held Invalid*, SANTA CRUZ NEWS, Mar. 30, 1938, at 2; Transcript of Record for Young, *supra* note 18, at 4. Another handbill being distributed was headed with “Problems of Youth” and read in part, “Youth has no future under the profit system of capitalism which Mrs. Roosevelt represents.” *Six Youths Jailed for Passing Bills at Roosevelt Talk*, *supra* note 89, at 2 (attributing this handbill to the Young People’s Socialist League; the sources do not make clear whether Kim Young was a member of that organization).

<sup>93</sup> Transcript of Record for Young, *supra* note 18, at 17-18. When the Municipal Court dismissed the charge against Kim Young, his bail was returned to Alexander Riskin, *id.* at 19, a doctor who, with his wife, was active in the nonprofit Community Medical Foundation in Los Angeles. See *Medical Center Seeks Funds for Expansion*, L.A. TIMES, Apr. 23, 1950 (pt. II), at 7; *Medical Unit Elects Staff*, L.A. TIMES, May 14, 1950 (pt. III), at 14. They later moved to San Francisco, where they were the victims of a home invasion in 1965 after attracting opportunistic criminal attention in the society pages. See *People v. Thompson*, 60 Cal. Rptr. 203, 206-07 (Ct. App. 1967). In 1952, Dr. Riskin was accused of having been a member of “the medical branch” of the Communist Party in 1939-40. *13 L.A. Doctors Identified as Communists in 1939-40*, OAKLAND TRIB., Jan. 21, 1952, at E2.

<sup>94</sup> Transcript of Record for Young, *supra* note 18, at 18; *Judges and City Officials Called*, *supra* note 90, at 8; *More Officials Called in Handbill Case*, HOLLYWOOD CITIZEN-NEWS, Mar. 29, 1938, at 3.

<sup>95</sup> S. Cal. Libr. for Soc. Stud. & Rsch., *Register of the Leo Gallagher Papers, 1922-1963*, ONLINE ARCHIVE CAL. (2000), [https://oac.cdlib.org/findaid/ark:/13030/tf0779n48d/entire\\_text/](https://oac.cdlib.org/findaid/ark:/13030/tf0779n48d/entire_text/) [<https://perma.cc/V5LX-S6MF>].

<sup>96</sup> *Judges and City Officials Called*, *supra* note 90, at 8.

decision,” the case was dismissed.<sup>97</sup> The state appealed the decision, however, and the Los Angeles County Superior Court remitted the Municipal Court decision and remanded the case for a new trial.<sup>98</sup> The decision remanding the case for trial commented that “judges are not framers of the laws” and “[l]egislative bodies are charged with the responsibility of determining what policies shall be enacted into ordinances.”<sup>99</sup>

In a one-day trial on September 7, 1938, the prosecution called one police officer, and the parties stipulated that another officer would testify to the same effect.<sup>100</sup> Leo Gallagher called fifteen witnesses, including Kim Young himself and Los Angeles Police Chief James E. Davis.<sup>101</sup> Presumably, the trial judge would not allow Mr. Gallagher to subpoena the broad swath of Los Angeles officials he had originally requested,<sup>102</sup> and calling Chief Davis may have been Mr. Gallagher’s consolation. Chief James “Two Guns Davis” was colorful, reactionary, and ruthless.<sup>103</sup> Having held the office from 1926 to 1930, Mr. Davis returned as chief of police in 1933<sup>104</sup> and continued to use the Los Angeles Police Department (“LAPD”) “Red Squad” to investigate and control “radical” activities, strikes, and riots.<sup>105</sup> A similarly-minded police

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<sup>97</sup> Transcript of Record for Young, *supra* note 18, at 18-19.

<sup>98</sup> *Id.* at 19. The Superior Court decision is noted in the Young Transcript of Record as having been “returned and filed” on August 10, 1938; however, it is not in the Transcript of Record and does not appear to be available online. *Id.*

<sup>99</sup> *City’s Handbill Curb Upheld: Decision Reversed in Case of Distributor of Spain War Literature*, L.A. TIMES, Aug. 1, 1938 (pt. II), at 5.

<sup>100</sup> Transcript of Record for Young, *supra* note 18, at 19-20.

<sup>101</sup> *Id.* at 20.

<sup>102</sup> See *Judges and City Officials Called*, *supra* note 90, at 8.

<sup>103</sup> Scott Harrison, *From the Archives: L.A. Police Chief James Davis Displays Confiscated Guns*, L.A. TIMES (Sept. 6, 2018, 1:00 AM), <https://www.latimes.com/visuals/photography/la-e-fw-archives-la-police-chief-james-davis-displays-confiscated-guns-20180807-htlmstory.html> [https://perma.cc/8BTN-Z9MM].

<sup>104</sup> *J.E. Davis, Retired Police Chief, Dies*, L.A. TIMES, June 21, 1949 (pt. II), at 1.

<sup>105</sup> See KATHRYN S. OLMSTED, RIGHT OUT OF CALIFORNIA: THE 1930S AND THE BIG BUSINESS ROOTS OF MODERN CONSERVATISM 35 (2015) (“To maintain their control, antiunion employers relied on the Los Angeles Police Department’s Red Squad, which gassed, beat, chased, and arrested left-wing protesters and picketers.”). See also L.A. “Red Squad” Breaks Up Jobless Parade for Relief, SALINAS INDEX-J., Oct. 3, 1932, at 1; “Red” Squad Head Defends Police Procedure, Saying Violence NOT Preferred, ILLUSTRATED DAILY NEWS (L.A.), Feb. 17, 1933, at 8; *Worker Groups Ask ‘Red’ Squad*

commissioner in 1932 opined of radicals, “[t]he more the police beat them up and wreck their headquarters, the better” because “Communists have no constitutional rights,” and he would not “listen to anyone who defend[ed] them.”<sup>106</sup>

In April 1938, Chief Davis had testified—or more accurately, he had stonewalled—in the sensational trial of the head of the LAPD Intelligence Unit, Police Captain Earle E. Kynette, and two of his subordinates who were charged with the January 1938 attempted murder of Harry J. Raymond, a former San Diego Chief of Police who was working as a private investigator unearthing evidence of corruption in the LAPD.<sup>107</sup> Chief Davis had declared Captain Kynette and his squad innocent after his own “personally conducted” twenty-four hour investigation in January.<sup>108</sup> The LAPD intelligence unit members, who were facing charges for illegally tapping Mr. Raymond’s telephone at the time *someone* placed a bomb under the hood of his car, refused to answer questions (even from the prosecution) about their surveillance of Mr. Raymond, and the unit had to be disbanded in June 1938.<sup>109</sup> Also in June 1938, a neighbor who had been a witness in the

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*Abolition*, ILLUSTRATED DAILY NEWS (L.A.), Apr. 20, 1934, at 3; *Red Squad Leader Made Sergeant by Davis*, ILLUSTRATED DAILY NEWS (L.A.), July 23, 1935, at 12.

<sup>106</sup> SCOTT KURASHIGE, *THE SHIFTING GROUNDS OF RACE: BLACK AND JAPANESE AMERICANS IN THE MAKING OF MULTIETHNIC LOS ANGELES* 82 (2008) (quoting another source).

<sup>107</sup> *Davis Denies Spy House Knowledge*, SAN PEDRO NEWS-PILOT, Apr. 26, 1938, at 1; *Judge Criticizes Los Angeles Police Chief as Bomb Trial Given Jury: Jurist Finds Many Faults in Testimony*, SAN BERNARDINO DAILY SUN, June 16, 1938, at 2 (“‘Chief Davis was on the witness stand for a day and a half,’ Judge Ambrose told the jury. ‘Yet, we had trouble getting him to answer the simplest of questions.’”); *Police Chiefs of San Diego*, SAN DIEGO, <https://www.sandiego.gov/police/about/chiefs> [<https://perma.cc/52BM-DW6V>] (last visited Jan. 11, 2022). The left suspected Captain Kynette of complicity in two other bomb attacks and threats against those opposing Chief Davis’s policy of using the LAPD to disrupt the migration of “Okies” from the Dust Bowl. *A.C.L.U. Attorney Charges Kynette with Intimidation*, AM. C.L. UNION-NEWS, Feb. 1938, at 2; Cecilia Rasmussen, *LAPD Blocked Dust Bowl Migrants at State Borders*, L.A. TIMES (Mar. 9, 2003, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2003-mar-09-me-then9-story.html> [<https://perma.cc/M3VN-JBRU>].

<sup>108</sup> *Davis Clears Kynette and Squad in Harry Raymond Bombing: Police Predict New Arrests in Blast Plot*, L.A. TIMES, Jan. 24, 1938 (pt. I), at 1.

<sup>109</sup> *Id.* at 1; *L.A. Police Spy Squad Disbanded*, SAN PEDRO NEWS-PILOT, June 23, 1938, at 11.

attempt on Mr. Raymond's life was physically assaulted by an area police officer for the second time.<sup>110</sup>

Chief Davis was intensely concerned with the red menace facing America.<sup>111</sup> In June 1938, he commissioned sixty-five "auxiliary" police captains and lieutenants to protect the harbor and industrial area from "subversive movements."<sup>112</sup> With this officer structure in place, the LAPD then issued further badges, and around the time of Mr. Young's trial late in 1938, Chief Davis had issued a total of 7,843 badges in his effort to create "an auxiliary force subject to call in time of emergency."<sup>113</sup>

The record does not convey whether Gallagher succeeded rhetorically in his examination of Chief Davis,<sup>114</sup> and there appears to have been no coverage by the press. The jury took about two hours to convict.<sup>115</sup> Gallagher immediately moved for a new trial.<sup>116</sup> On September 13, 1938, that motion was denied, and although Young was sentenced to pay a fine of \$25, the court suspended the sentence.<sup>117</sup>

On December 9, 1938, the Appellate Department of the Los Angeles County Superior Court affirmed Kim Young's conviction.<sup>118</sup> Young was represented by Gallagher's law partner, A.L. Wirin, a son of Jewish immigrants who had fled pogroms in Russia,<sup>119</sup> who argued that *Lovell* required dismissal of the charge.<sup>120</sup> The court disagreed on the grounds that "[t]he ordinance under consideration there differs from ours in [the] vital particular" that the Griffin

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<sup>110</sup> *Sakalis Names Assailant: Charges Beating to Deputy*, SAN PEDRO NEWS-PILOT, June 27, 1938, at 1.

<sup>111</sup> See *supra* note 105 and accompanying text.

<sup>112</sup> *Chief Davis Commissions 65 Auxiliary Police Officers*, SAN PEDRO NEWS-PILOT, June 30, 1938, at 8.

<sup>113</sup> *Davis Explains Badges Issuance*, SAN PEDRO NEWS-PILOT, Oct. 27, 1938, at 7.

<sup>114</sup> See Transcript of Record for Young, *supra* note 18, at 20.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 21.

<sup>118</sup> *People v. Young*, 85 P.2d 231, 231, 235 (Cal. App. Dep't Super. Ct. 1938).

<sup>119</sup> S. Cal. Libr. for Soc. Stud. & Rsch., *supra* note 95; Paul Weeks, *On A.L. Wirin - One of Our Legends: Lawyer Fought for Rights of All*, ACLU SAN DIEGO & IMPERIAL CNTYS. (Jan. 27, 2012, 8:25 PM), <https://www.aclusandiego.org/en/news/al-wirin-one-of-our-legends-lawyer-fought-rights-all-paul-weeks> [<https://perma.cc/KTT4-XXPK>]. In his professional life, he used only his initials "A.L.," which stood for Abraham Lincoln. *Id.*

<sup>120</sup> *Young*, 85 P.2d at 232, 234.

ordinance “prohibited the distribution of handbills and cards anywhere in the city,” not “in a very limited number of places.”<sup>121</sup>

*B. The Advertised Speakers on the War in Spain*

To better understand the controversies at issue, we turn now to the offending handbill:

BACK FROM . . .  
WAR-TORN SPAIN

Captain  
HANS AMLIE  
Commander Lincoln Battalion  
Brother of Congressman Amlie

JAY ALLEN  
War Correspondent Expelled From Rebel Spain

PEPI JUNEDA  
Famous Spanish Dancer

PILAR ARCOS  
Spanish Actress and Singer

Chairman, LILLIAN HELLMAN  
Screen writer and playwright

TRINITY AUDITORIUM  
847 So. Grand Ave.

March 21, —:— 8:00 P.M.  
Admission 25¢ and 50¢

AUSPICES: FRIENDS LINCOLN BRIGADE  
333 W. 2nd St. —:— Mi. 7926<sup>122</sup>

This Section discusses some of the marquee names scheduled to appear.

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<sup>121</sup> *Id.* at 234.

<sup>122</sup> Transcript of Record for Young, *supra* note 18, at 4.

### 1. Lies, Damned Lies, and Lillian Hellman

By 1938, Lillian Hellman had written successful, but controversial screenplays, including one based on her own stage play script.<sup>123</sup> Her screenplay for *These Three*, a movie made in 1936, was based on her own stage play about a girls' boarding school destroyed by a troubled student's accusation of sexual scandal.<sup>124</sup> Not afraid of controversy, "Hellman threw herself into the tough political battles of her time, actively supporting the Spanish Loyalists, joining the Communist Party (although she was evasive about her membership) and standing up to McCarthyism."<sup>125</sup>

However admirable Hellman's independence may have been, she was not an agreeable person, and her feuds and controversies were legion.<sup>126</sup> Her dissemblance about Communist Party membership aside, she seems also to have improved the autobiographical truth when she thought it would make a better story, leading conservative author Paul Johnson to title a book chapter about her "Lies, Damned Lies[,] and Lillian Hellman."<sup>127</sup>

### 2. The War Correspondent

Jay Allen (more precisely, Jay Cooke Allen Jr.) was born in Seattle in 1900 and became friends with Ernest Hemingway in Paris in 1924, taking over for Hemingway as correspondent for the *Chicago Daily Tribune*.<sup>128</sup> He covered western continental Europe for his paper and moved to Madrid in 1930.<sup>129</sup> In 1934, he was fired by the *Tribune* over office politics, but stayed in Madrid working on

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<sup>123</sup> See *These Three*, IMDB, <https://www.imdb.com/title/tt0028356/> [<https://perma.cc/3JXW-R5ME>] (last visited Oct. 22, 2021).

<sup>124</sup> *Id.*

<sup>125</sup> Maureen Corrigan, *Lillian Hellman: A 'Difficult,' Vilified Woman*, NPR (Apr. 26, 2012, 10:41 AM), <https://www.npr.org/2012/04/26/150727939/lillian-hellman-a-difficult-vilified-woman> [<https://perma.cc/29LY-EB8B>] (reviewing ALICE KESSLER-HARRIS, *A DIFFICULT WOMAN: THE CHALLENGING LIFE AND TIMES OF LILLIAN HELLMAN* (2012)).

<sup>126</sup> See, e.g., Dick Cavett, *Lillian, Mary, and Me*, NEW YORKER (Dec. 9, 2002), <https://www.newyorker.com/magazine/2002/12/16/lillian-mary-and-me> [<https://perma.cc/9VB2-3JQC>] (recalling Hellman's libel suit against author Mary McCarthy and talk show host Dick Cavett).

<sup>127</sup> PAUL JOHNSON, *INTELLECTUALS: FROM MARX AND TOLSTOY TO SARTRE AND CHOMSKY* 288 (Harper Perennial 2007) (1988).

<sup>128</sup> PAUL PRESTON, *WE SAW SPAIN DIE: FOREIGN CORRESPONDENTS IN THE SPANISH CIVIL WAR 1936-39* (2008).

<sup>129</sup> *Id.* at 292.

a book about Spanish politics.<sup>130</sup> As stability crumbled, Allen stayed on, scoring the first interview of Franco by a foreign correspondent in July 1936.<sup>131</sup>

In the interview, General Franco described his plan to take Madrid, pacify the country, and save it from Marxism “at whatever cost.”<sup>132</sup> When Allen replied that he would have to shoot half the people in the country, General Franco reiterated, “I said whatever the cost.”<sup>133</sup>

Despite this apparent candor, the *Generalissimo* did not appreciate his candor being reported: “After the interview appeared, one of Franco’s staff told the American consul in Tangier that, if he were ever captured, Jay Allen would be shot.”<sup>134</sup>

Between 1936 and 1938, Allen launched a political periodical with Ernest Hemingway and shuttled around Europe and America lobbying for the Loyalist cause, including many meetings with Eleanor Roosevelt.<sup>135</sup> On the one occasion when the First Lady secured him an opportunity make his pitch to President Roosevelt, the President listened impassively and then replied by feigning that he had not been able to hear him: “Mr. Allen, I can hear the Roman Catholic Church and all their allies very well. They speak very loudly. Could you and your friends speak a little louder, please?”<sup>136</sup>

In the winter of 1937-38, Allen was back in Spain, reporting from the front alongside Hemingway and annoying his more participatory colleague by refusing to help him reposition an artillery piece on the grounds that he was a journalist and not a combatant.<sup>137</sup> In March 1938, we know he was in Los Angeles, “back from war-torn Spain.”<sup>138</sup>

### 3. The Radical Congressman’s More Radical Brother

Thomas R. Amlie was first elected to Congress as a Republican in 1931 to fill a vacancy caused by the death of the incumbent, but

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<sup>130</sup> *Id.* at 295.

<sup>131</sup> *Id.* at 299.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 300.

<sup>135</sup> *Id.* at 313-15.

<sup>136</sup> *Id.* at 315-16.

<sup>137</sup> *Id.* at 316.

<sup>138</sup> *See* Transcript of Record for Young, *supra* note 18, at 4.

he was not re-nominated by his party in 1932.<sup>139</sup> In 1934 and 1936, he won election as the candidate of the Wisconsin Progressive Party.<sup>140</sup> In 1938, he was a sitting member of the House and his party's nominee for the Senate, but he lost in the general election.<sup>141</sup> In 1939, President Roosevelt nominated him to the Interstate Commerce Commission, but withdrew the nomination "in the face of heated opposition."<sup>142</sup>

If Congressman Amlie was controversially radical, his younger brother Hans Amlie put him in the shade. According to the FBI, Hans Amlie joined the Communist Party in 1936.<sup>143</sup> Young's handbill identified Amlie as commander of the Lincoln Battalion in the Spanish Loyalist forces.<sup>144</sup> The Abraham Lincoln Battalion was an American volunteer unit organized in 1936, which had a sister unit, the George Washington Battalion, until heavy casualties in mid-1937 required merger of the units.<sup>145</sup> Of the 2,800 Americans who fought for the Loyalist cause in Spain, "about 900 were killed in action."<sup>146</sup>

In January 1938, Hans Amlie and his wife Milly Bennett (a radical who lived in Russia as a journalist from 1931 until 1936, when she moved to Spain)<sup>147</sup> returned to the United States and appeared onstage with Lillian Hellman in New York on February 13, 1938, for an anniversary celebration of the Abraham Lincoln Brigade.<sup>148</sup> Mr. Amlie then "undertook a national fund- and consciousness-raising tour on behalf of the Americans in Spain"

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<sup>139</sup> Amlie, *Thomas Ryum (1897-1973)*, BIOGRAPHICAL DIRECTORY U.S. CONG., <https://bioguideretro.congress.gov/Home/MemberDetails?memIndex=A000176> [<https://perma.cc/FZD2-XXX9>] (last visited Oct. 22, 2021).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> Theodore Rosenof, *The Political Education of an American Radical: Thomas R. Amlie in the 1930's*, WIS. MAG. HIST., Autumn 1974, at 19, 20.

<sup>143</sup> LISA A. KIRSCHENBAUM, INTERNATIONAL COMMUNISM AND THE SPANISH CIVIL WAR: SOLIDARITY AND SUSPICION 192-93 (2015).

<sup>144</sup> See Transcript of Record for Young, *supra* note 18, at 4.

<sup>145</sup> The Editors of Encyclopaedia Britannica, *Abraham Lincoln Battalion*, BRITANNICA, <https://www.britannica.com/topic/Abraham-Lincoln-Battalion> [<https://perma.cc/NTL6-6HZM>] (Dec. 27, 2017).

<sup>146</sup> *Id.*

<sup>147</sup> Hoover Inst. Libr. & Archives, *Register of the Milly Bennett Papers*, ONLINE ARCHIVE CAL. (2017), [https://oac.cdlib.org/findaid/ark:/13030/tf6n39n837/entire\\_text/](https://oac.cdlib.org/findaid/ark:/13030/tf6n39n837/entire_text/) [<https://perma.cc/5Y3U-853U>].

<sup>148</sup> KIRSCHENBAUM, *supra* note 143, at 187.

under the auspices, as it were, of the Friends of the Lincoln Brigade, which billed itself as a veterans' relief organization.<sup>149</sup> "Starting on the West Coast at the end of March," Mr. Amlie made public appearances across the Midwest en route to Washington, D.C. and then north to New York and New England.<sup>150</sup> In May 1938, as Representative Thomas Amlie was running for the Senate, Hans Amlie appeared before an audience of over 22,000 people at a Communist Party convention in New York City.<sup>151</sup>

In late 1938, as Young's case was on appeal,<sup>152</sup> a House subcommittee continued its investigation of "Un-American Propaganda Activities in the United States."<sup>153</sup> On November 22, 1938, the committee heard testimony from a Socialist Party member about the conflicts between the Socialist Party and the Communist Party in America.<sup>154</sup> The witness complained the Communists were claiming all credit for fighting fascism in Spain, while disparaging the Socialist Party's contributions.<sup>155</sup> He cited an open letter that Hans Amlie had published in the *Daily Worker* to criticize the Socialist Party, and he provided the committee with a statement from the Socialist Party answering Amlie's accusations: "Here, in the official organ of the Socialist Party, is an answer to one Hans Amlie, a brother of the Wisconsin Congressman, in which the national executive committee takes it upon itself to answer the

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<sup>149</sup> *Id.*; *Denies Communist Link: Paris Representative Speaks for Friends of Lincoln Battalion*, N.Y. TIMES, Oct. 18, 1938, at 9 ("The Friends of the Abraham Lincoln Battalion was founded one year after the Spanish civil war started to return the wounded and materially to assist 'buddies' still in Spain . . ."). *See also 323 More Return from Spanish War: Members of Lincoln Brigade Are Welcomed at Pier by Relatives and Friends*, N.Y. TIMES, Dec. 21, 1938, at 10 ("A young veteran had a warm reception when he landed on the pier. His indignant mother snatched his blue beret, which bore the insignia of the brigade, and threw it down and danced on it.").

<sup>150</sup> KIRSCHENBAUM, *supra* note 143, at 187-88. Kirschenbaum's book does not include an itinerary, but her wording suggests that Mr. Amlie did not make appearances in the southern United States. *See id.*

<sup>151</sup> *Id.*

<sup>152</sup> *See* Transcript of Record for Young, *supra* note 18, at 21.

<sup>153</sup> *Investigation of Un-American Propaganda Activities in the United States: Hearings on H.R. Res. 282 Before a H.R. Spec. Comm. on Un-Am. Activities*, 75th Cong. 2427 (1939), <https://archive.org/details/investigationofu193804unit/mode/2up> [Perma.cc link unavailable].

<sup>154</sup> *See id.* at 2427, 2522-24 (statement of Sam Baron).

<sup>155</sup> *See id.* at 2525-48.

libelous charges of Hans Amlie, who fought in Spain . . .”<sup>156</sup> It must have been awkward when a congressman’s brother was cited in this dispute between the socialists and the communists—on the communist side—over the war in Spain.

Although Kim Young was not famous, his case and his cause involved celebrities and people in high places. Justice Roberts’s sketch of the facts in the *Schneider* decision noted the political nature of Mr. Young’s handbill,<sup>157</sup> but today’s reader might fail to appreciate the extent to which the war in Spain was a matter of bitter contention in this country.

### III. LABOR CONFLICTS IN DEPRESSION-ERA AMERICA

Strikes in 1805 by the Federal Society of Journeymen Cordwainers in Philadelphia led to convictions on charges of criminal conspiracy.<sup>158</sup> “Cordwainers” (shoemakers) also featured in *Commonwealth v. Hunt*, the landmark 1842 Massachusetts decision that labor organization was not per se a criminal conspiracy.<sup>159</sup> By the 1930s, organized labor in America had coalesced around two umbrella organizations with different philosophies.<sup>160</sup> The American Federation of Labor (“AFL”) was pragmatic and explicitly pro-capitalist, while the recently formed Congress of Industrial Organizations (“CIO”) “enlisted a large number of socialists as union organizers and projected a more militant image in collective bargaining . . .”<sup>161</sup>

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<sup>156</sup> *Id.* at 2551-53 (“The Socialist Party of the United States, as all decent sections of the world labor movement, has been a vigorous critic of the Communist Party in Spain because of its vicious and brutal persecution of revolutionary workers who do not agree with the line of the Communist International.”).

<sup>157</sup> See *Schneider v. New Jersey*, 308 U.S. 147, 154 (1939).

<sup>158</sup> HARRY C. KATZ ET AL., AN INTRODUCTION TO U.S. COLLECTIVE BARGAINING AND LABOR RELATIONS 24-25 (5th ed. 2017).

<sup>159</sup> *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111, 127-32 (1842).

<sup>160</sup> See KATZ ET AL., *supra* note 158, at 35, 38-40.

<sup>161</sup> *Id.* at 35, 40. The AFL and CIO merged in 1955 after decades of turf wars. *Id.* at 46. In the 1930s, an instance of cooperation between the two organizations in Worcester was newsworthy. See *C.I.O., A.F.L. Now Picketing Brockelman’s*, FITCHBURG SENTINEL, Apr. 27, 1938, at 1 (“This is the first time that the A.F. of L. and C.I.O. pickets have been seen doing duty together in this city.”).

*A. Elmira Nichols and Pauline Thompson, Labor Activists in Worcester*

In the spring of 1938, a CIO affiliate in Massachusetts, called the State Industrial Union Council, launched a campaign against the state's Unemployment Compensation Commission in an open letter to the governor alleging "incompetence" and "mismanagement."<sup>162</sup> The CIO coalition included unionized textile mill workers in New England belonging to the Textile Workers Organizing Committee ("TWOC").<sup>163</sup>

At that time, over a thousand TWOC members in South Worcester were employed at the mills of the Whittall Anglo-Persian Carpet Company, founded in 1880 by Matthew J. Whittall at a bend in the Middle River, just west of the campus of the College of the Holy Cross.<sup>164</sup> The enormous mill complex, partly destroyed by construction of Interstate 290, now houses Rotmans furniture store and several small businesses.<sup>165</sup>

### 1. Arrest and Trial

In April 1938, the Worcester Industrial Union Council organized a protest meeting to be held on Worcester Common on Saturday, April 16, to talk about jobs, wages, and unemployment insurance.<sup>166</sup> To publicize the event, Elmira Nichols and Pauline Thompson distributed handbills on Thursday, April 14, in Wheaton Square, a small park between Worcester's Massachusetts National Guard Armory and the Worcester Vocational High School.<sup>167</sup>

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<sup>162</sup> *Declares State Jobless Body Is "Incompetent,"* N. ADAMS TRANSCRIPT, Mar. 16, 1938, at 1.

<sup>163</sup> *Textile Mass Meetings Will Be Called*, BERKSHIRE EVENING EAGLE, Apr. 30, 1938, at 1-2; *CIO to Meet at Worcester: Will Try to Restore Textile Wage*, BERKSHIRE EVENING EAGLE, Aug. 1, 1938, at 6.

<sup>164</sup> *Intend to Reopen Worcester Plant*, N. ADAMS TRANSCRIPT, Dec. 17, 1938, at 9; Dan Ricciardi et al., *South Worcester: A British Enclave in the Heart of the Commonwealth*, <https://college.holycross.edu/projects/worcester/neighbors/southworcester.htm> [<https://perma.cc/E7XW-4NL2>] (last visited Oct. 22, 2021).

<sup>165</sup> Telephone Interview with Thomas Murray, Son of Labor Leader Daniel Murray (Sept. 22, 2020) (on file with author).

<sup>166</sup> See Transcript of Record for Nichols and Thompson, *supra* note 20, at 8.

<sup>167</sup> *Id.* at 8-9, 12-13. The decommissioned armory now houses a nonprofit organization called Veterans Inc., and the vocational school has been converted into apartments called Voke Lofts. Melissa McKeon, *Wheaton Square, Grove and Salisbury Streets, Worcester*, TELEGRAM & GAZETTE, <https://www.telegram.com/story/news/2018/10/08/then-now->

Although I have found no direct evidence that Nichols and Thompson were textile workers, the shoe fits; forty percent of textile workers in the 1930s were women, and hundreds of thousands of textile workers had joined new unions organized by the CIO.<sup>168</sup>

Nichols and Thompson were arrested for violation of a city ordinance and taken before the Worcester Central District Court, where they asserted the unconstitutionality of the ordinance, but they were found guilty and sentenced to a fine of \$5.<sup>169</sup> They appealed the decision, posting \$50 to secure their return in May for trial de novo at the Worcester County Superior Court.<sup>170</sup>

In May 1938, Nichols and Thompson returned to court, represented by Sidney Grant and his partner S.E. Angoff, authors of a 1930 law review article titled “Massachusetts and Censorship.”<sup>171</sup> On May 23, 1938, Grant filed motions to dismiss the complaints on the grounds that the ordinance was “void and unconstitutional on its face” in light of *Lovell*.<sup>172</sup> The same day, the Superior Court judge denied the motions, accepted the defendants’ waivers of a jury trial, found them both guilty, and imposed fines of \$5.<sup>173</sup>

Grant handled Nichols and Thompson’s appeal to the Supreme Judicial Court of Massachusetts, arguing on September 26, 1938, that *Lovell* dictated dismissal of the charges.<sup>174</sup> The court

wheaton-square-grove-and-salisbury-streets-worcester/9605442007/  
[https://perma.cc/ZV7B-XR4W] (Oct. 9, 2018, 10:56 AM); Nick Kotsopoulos, *Voke Lofts Housing OK’d in Downtown*, TELEGRAM & GAZETTE, <https://www.telegram.com/story/news/state/2012/10/25/voke-lofts-housing-ok-d/49326607007/> [https://perma.cc/3QFS-CVBJ] (Oct. 25, 2012, 12:37 PM).

<sup>168</sup> CAROL HYMOWITZ & MICHAEL WEISSMAN, A HISTORY OF WOMEN IN AMERICA 309 (1978). If I am reading the complaints correctly, Ms. Nichols and Ms. Thompson had the same address in Holden, Massachusetts, about eight miles north of the Whittall carpet mills. See Transcript of Record for Nichols and Thompson, *supra* note 20, at 8-9, 12-13.

<sup>169</sup> Transcript of Record for Nichols and Thompson, *supra* note 20, at 6-7.

<sup>170</sup> *Id.* at 10.

<sup>171</sup> See *id.* at 10-11, 14-15; Sidney S. Grant & S.E. Angoff, *Massachusetts and Censorship*, 10 B.U. L. REV. 36 (1930). Grant was a labor lawyer who had been counsel for the CIO. See *Strikers Riot at Auburn, ME*, BOS. DAILY GLOBE, Apr. 21, 1937, at 1, 7. A champion of free speech rights in the scholarship mentioned above, he later took recourse to libel law when *Reader’s Digest* insinuated that he was a Communist. See *Grant v. Reader’s Dig. Ass’n*, 151 F.2d 733, 734 (2d Cir. 1945).

<sup>172</sup> Transcript of Record for Nichols and Thompson, *supra* note 20, at 10-11, 14-15.

<sup>173</sup> *Id.* at 17-19.

<sup>174</sup> See *Commonwealth v. Nichols*, 18 N.E.2d 166, 166-67 (Mass. 1938).

disagreed, holding on December 22, 1938, that unlike the licensing requirement of the ordinance in *Lovell*, the Worcester ordinance was “a reasonable regulation of the use of the streets affecting only incidentally one method of distributing printed matter.”<sup>175</sup>

Our best hope for better understanding what motivated Nichols and Thompson is to unpack the issues and public speakers for whom they advertised.

## 2. The Labor Issues and Speakers

The handbill distributed by Nichols and Thompson appears in the record:

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<sup>175</sup> *Id.* at 166, 168-69.

Protest Meeting  
Saturday, Apr. 16—2 P.M.  
Worcester Common

Speakers:

A. Frank Reel  
well known Boston Labor Lawyer

Daniel Murray  
President Worcester Industrial Union Council

Ernest B. Sykes  
President Whittall Group of Local 15 TWOC

Unemployment Insurance. Are you getting your check on time? We paid the money when we worked. We demand it when we need it. Make Gov. Hurley remove his incompetent friends from the Insurance Commission and put qualified Civil Service Servents [sic] in their place.

Welfare and Relief. What are we going to do when our unemployment insurance runs out? It is the duty of Government to provide jobs or relief. There must be No Starvation in Worcester. Increase the WPA.

Wage Cuts. Worcester employers are cutting wages and trying to blame the Depression on Roosevelt. Low Wages mean less purchasing power, means a worse depression. Stop Wage Cuts in Worcester.

Worcester Industrial Union Council,  
26 Trumbull Street.<sup>176</sup>

In April 1938, the month when Nichols and Thompson were arrested, a national Progressive Party was re-founded in Wisconsin, the Amlies' home state.<sup>177</sup> In Boston, Milwaukee-born labor lawyer A. Frank Reel immediately declared his allegiance:

“Those of us who are Democrats have felt for some time that there is no true Democratic party in this state, in the sense that

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<sup>176</sup> Transcript of Record for Nichols and Thompson, *supra* note 20, at 8.

<sup>177</sup> *See Reis Sees History Made as New Party Is Born in Logical Birthplace*, CAP. TIMES (Madison, Wis.), Apr. 29, 1938, at 4.

our elected state officials have not given any substantial support to Franklin Roosevelt's domestic policies. In particular we have been dissatisfied with the antilabor, anti-New Deal attitude of the present Governor, who undoubtedly owes his election to the fact that he wears the same party label as President Roosevelt.[?]"<sup>178</sup>

Earlier that year, Reel had appeared before a legislative committee on the judiciary in favor of a bill that "would nullify city and town ordinances prohibiting picketing, carrying placards or distributing literature."<sup>179</sup> Had a state law preempted the Worcester ordinance, of course, Nichols and Thompson would never have been arrested.

The "Gov. Hurley" named in the defendants' handbill, and referred to here by Reel, was Charles F. Hurley, a one-term Democratic governor from 1937-1939,<sup>180</sup> not to be confused with his immediate predecessor James Michael *Curley*, a one-term Democratic governor from 1935-1937.<sup>181</sup> In 1938, Curley defeated Hurley in the Democratic primary, but then lost to Leverett Saltonstall, a liberal Republican WASP.<sup>182</sup> Notably, the Worcester labor organizers were challenging a Democratic governor's "incompetent friends" on an unemployment commission being investigated by the opposition Republicans in the state

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<sup>178</sup> *Watt May Run for Governor: Possible Candidate on Progressive Ticket*, BOS. EVENING GLOBE, Apr. 29, 1938, at 6 (quoting Reel). Reel would go on to serve as a legal officer in the Pacific Theater in World War II and be remembered as a (disaffected) military commissions defense attorney. Wolfgang Saxon, *A. Frank Reel, 92, Defended Japanese General in '45 Trial*, N.Y. TIMES, Apr. 10, 2000, at B7 ("Mr. Reel, and an ABC documentary in 1974, asserted that General MacArthur had scripted the trial, including the verdict.").

<sup>179</sup> *Labor Backs Picketing Bill*, BOS. DAILY GLOBE, Feb. 25, 1938, at 5.

<sup>180</sup> *Charles F. Hurley, Former Governor*, N.Y. TIMES, Mar. 25, 1946, at 25.

<sup>181</sup> *James M. Curley Dies in Boston; Colorful Democratic Boss Was 83*, N.Y. TIMES, Nov. 13, 1958, at 1, 33. Biographer Jack Beatty called Curley's incumbency "a disaster mitigated only by moments of farce." JACK BEATTY, *THE RASCAL KING: THE LIFE AND TIMES OF JAMES MICHAEL CURLEY (1874-1958)* 9 (1992).

<sup>182</sup> *Astounding Curley Comeback Most Notable of His Career*, BOS. EVENING GLOBE, Sept. 21, 1938, at 19; *Gov.-Elect Saltonstall and Wife Given Informal Reception at Flower Show*, BOS. DAILY GLOBE, Nov. 12, 1938, at 2. Mr. Curley's political career continued to be colorful and complicated. On January 19, 1946, he was convicted of mail fraud in a Washington D.C. federal district court, while holding office simultaneously as a member of Congress and as the mayor of Boston. John G. Harris, *Curley Back Tonight—Will Continue as Mayor*, BOS. EVENING GLOBE, Jan. 19, 1946, at 1.

legislature.<sup>183</sup> Within organized labor, those associated with the AFL sided with Hurley while those in the CIO opposed him,<sup>184</sup> and the loss of labor's support must have contributed to Hurley's loss of the governorship.

The Worcester labor unions were not alone in their dissatisfaction with the Massachusetts unemployment insurance rules. In March 1938, the chief counsel of the State Unemployment Compensation Commission appeared before the state legislature's committee on labor and industry to ask for changes.<sup>185</sup> To receive benefits, a person had to have been unemployed (meaning \$3 or less a week in pay) for a period of three consecutive weeks.<sup>186</sup> The Commission asked the legislature to amend the rules to allow a person to receive up to \$5 a week in pay and to have been unemployed for only two weeks to qualify.<sup>187</sup>

The handbill also promised two Worcester labor leaders as speakers.<sup>188</sup> Ernest B. Sykes, we know from the handbill, was the president of the Whittall mills employee group of TWOC.<sup>189</sup> The other speaker was the president of the Worcester Industrial Union Council, the event's organizer, Daniel F. Murray Jr.<sup>190</sup> A former textile worker from the nearby Blackstone Valley, Murray had helped unionize hundreds of textile workers in the Worcester region.<sup>191</sup> His father had been a mechanic and foreman for the Worcester trolley company and had been killed by an industrial accident in 1916 when the future union leader was eight years old.<sup>192</sup> The elder Murray's death compelled his suffragist wife to

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<sup>183</sup> Transcript of Record for Nichols and Thompson, *supra* note 20, at 8; *Jobless Board Inquiry Voted*, BOS. DAILY GLOBE, Mar. 23, 1938, at 1.

<sup>184</sup> *See Hurley Blasted by C.I.O. in State: Seen as Further Evidence of Breach Between Lewis Followers and A.F. of L.*, N. ADAMS TRANSCRIPT, July 22, 1938, at 2.

<sup>185</sup> *Urge Change in Security Law: Would Cut Wait Before Payment*, BOS. EVENING GLOBE, Mar. 24, 1938, at 2.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *See* Transcript of Record for Nichols and Thompson, *supra* note 20, at 8.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> Telephone Interview with Thomas Murray, *supra* note 165.

<sup>192</sup> Telephone Interview with Timothy Murray, President and CEO of the Worcester Regional Chamber of Commerce, Former Lieutenant Governor of Massachusetts, Grandson of Labor Leader Daniel Murray (Sept. 19, 2020) (on file with author); Tim Murray, *A Reflection over Labor Day Weekend: Labor Law*, ONE COMMONWEALTH BLOG

take a job in the textile mills, which the family blamed for her death at an early age from respiratory problems.<sup>193</sup> Murray's frontline involvement in labor disputes on the part of the textile workers (and other Worcester unions) led many times to his own arrest.<sup>194</sup>

The "WPA" that the union activists wanted to be increased was the Works Progress Administration, a federal "New Deal" jobs program.<sup>195</sup> The WPA employed as many as two million people a month in temporary jobs, building "thousands of schools, libraries, parks, sidewalks, and hospitals," as well as artistic projects.<sup>196</sup> In May 1938, the WPA employed approximately 107,000 workers in Massachusetts.<sup>197</sup>

With so many people unemployed and businesses struggling to stay afloat, some unions were compelled to accept wage cuts.<sup>198</sup> Labor leaders feared that if manufacturers began to cut wages, others in the industry would be compelled to follow suit.<sup>199</sup> Labor unions argued that "[t]he vicious cycle of wage cuts so stupidly started already has . . . reduced purchasing power of the people" and would destabilize the textile industry.<sup>200</sup> Indeed, the Whittall carpet mills went into receivership in June 1938 and were almost sold away from the Whittall family before the Worcester Chamber of Commerce brokered a new arrangement in December 1938.<sup>201</sup>

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(Sept. 12, 2017), <https://www.timurray.org/2017/09/reflection-over-labor-day-weekend-labor-law/> [<https://perma.cc/PX8K-83YN>].

<sup>193</sup> Murray, *supra* note 192.

<sup>194</sup> Telephone Interview with Timothy Murray, *supra* note 193.

<sup>195</sup> See The Editors of Encyclopaedia Britannica, *Works Progress Administration*, BRITANNICA, <https://www.britannica.com/topic/Works-Progress-Administration> [<https://perma.cc/PT75-HX5V>] (July 7, 2020).

<sup>196</sup> DORIS KEARNS GOODWIN, *NO ORDINARY TIME* 87 (1994). By 1943, its usefulness had been eclipsed by wartime employment. *See id.* at 482.

<sup>197</sup> *Attacks Local W.P.A. Control*, BOS. EVENING GLOBE, May 4, 1938, at 1, 10. November 1938 was the peak of WPA employment nationally, reaching 3,334,594 people. NICK TAYLOR, *AMERICAN-MADE: THE ENDURING LEGACY OF THE WPA* 547 (2008).

<sup>198</sup> *See Says Wage Cuts Hinder Recovery*, N. ADAMS TRANSCRIPT, Apr. 27, 1938, at 1.

<sup>199</sup> *See id.* ("The [TWOC], affiliate of the [CIO], today announced it had asked President Roosevelt to call a conference of manufacturers and the union to halt wage cutting and establish a basis for stabilizing the textile industry.")

<sup>200</sup> *Textile Wage Cuts Hurt New England*, CIO SAYS, BERKSHIRE EVENING EAGLE, May 19, 1938, at 6.

<sup>201</sup> *See Whittalls Plan to Reopen Carpet Mills*, BOS. EVENING GLOBE, Dec. 17, 1938, at 4.

*B. Harold F. Snyder, Labor Activist in Milwaukee*

On February 28, 1938, the Supreme Court announced two decisions related to the prohibition against “company unions,” sham unions controlled by the employer to create an illusion of collective bargaining.<sup>202</sup> This practice violated the 1935 National Labor Relations Act<sup>203</sup> and earlier federal and state laws.<sup>204</sup> *NLRB v. Pennsylvania Greyhound Lines, Inc.* upheld the NLRB’s power to compel an employer to withdraw recognition of a company-supported union as a collective bargaining unit.<sup>205</sup> The legislative purpose protected by the judicial decision was the theory that “the maintenance of a ‘company union,’ dominated by the employer, may be a ready and effective means of obstructing self-organization of employees and their choice of their own representatives for the purpose of collective bargaining.”<sup>206</sup>

In the other Supreme Court decision announced that day, a Milwaukee labor attorney won a case in which the local butchers’ union had been picketing an employer with a company union.<sup>207</sup> Arthur W. Richter, representing the Amalgamated Meat Cutters and Butcher Workmen (an AFL affiliate), convinced the Court that the union had a legally valid “labor dispute” with E.G. Shinner & Co., a Delaware corporation operating meat markets in the Midwest, five of which were in Milwaukee.<sup>208</sup> Because the courts below had held that the union campaign against Shinner was not a valid “labor dispute” under state and federal law, the courts had enjoined the union from picketing the company’s meat markets.<sup>209</sup> The decision in *Lauf v. E.G. Shinner & Co.*, written by Justice Roberts, reversed the lower courts’ holdings that there was not a

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<sup>202</sup> See *NLRB v. Pa. Greyhound Lines, Inc.*, 303 U.S. 261, 266 (1938); *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323 (1938).

<sup>203</sup> See 29 U.S.C. § 151.

<sup>204</sup> See *Pa. Greyhound Lines*, 303 U.S. at 265-67.

<sup>205</sup> *Id.* at 268.

<sup>206</sup> *Id.* at 266.

<sup>207</sup> See *Lauf*, 303 U.S. at 325-26; *Argue Right to Picket at Plant Which Has No Strike*, SHEBOYGAN PRESS, Jan. 13, 1938, at 9.

<sup>208</sup> *Lauf*, 303 U.S. at 325, 327-28; *Meat Shops Nonunion; Employer Is Picketed*, OSHKOSH NW., Mar. 2, 1938, at 4.

<sup>209</sup> *Lauf v. E.G. Shinner & Co.*, 82 F.2d 68, 69-70 (7th Cir. 1936).

valid labor dispute and remanded the case to the district court for further proceedings.<sup>210</sup>

The picketing of the Shinner meat markets was part of a broader campaign of labor unions in Wisconsin to unionize workers in the meat industry,<sup>211</sup> with the AFL and the CIO competing to establish their affiliates in “closed shops,” where labor union membership was a condition of employment.<sup>212</sup> After the union victory at the Supreme Court on February 28, 1938, picketing at the Shinner meat markets resumed on March 2, 1938, for just a short time because the parties later agreed that the Supreme Court’s holding did not actually lift the picketing injunction.<sup>213</sup>

### 1. Arrest and Trial

Around noon on Wednesday, April 27, 1938, Harold Snyder and one other member of the butchers’ union were picketing the Shinner meat market on Vliet Street when a police patrol drove up.<sup>214</sup> The police watched for twenty minutes as Snyder handed out dozens of handbills to passersby, and when the police got out of the patrol car, they picked up four of the thirty or forty handbills in the gutter across the street from the storefront.<sup>215</sup> When the police arrested Snyder, “he said he didn’t know he was violating the law.”<sup>216</sup>

Like Young in Los Angeles,<sup>217</sup> Snyder’s case was dismissed by the court of first appearance (the Milwaukee County District Court)

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<sup>210</sup> See *Lauf*, 303 U.S. at 325, 327-31.

<sup>211</sup> See, e.g., *Six More Meat Markets Enter Butcher Union*, SHEBOYGAN PRESS, Mar. 17, 1938, at 11; *Meat Market Operators Under Union Contracts*, WAUSAU DAILY RECORD-HERALD, Mar. 9, 1938, at 3.

<sup>212</sup> See, e.g., *Plankinton Co. Union Election Is Scheduled*, GREEN BAY PRESS-GAZETTE, Mar. 7, 1938, at 3 (“Employees [sic] of the Plankinton [sic] Packing company, Milwaukee, will choose a collective bargaining agent in an election to be held within 15 days, the national labor relations board announced today. The vote will determine whether the workers desire representation through the United Packing House Workers’ Local No. 681, [CIO] affiliate, or the Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 248, [AFL] affiliate.”).

<sup>213</sup> *Picketing Is Resumed at Shinner Co. Stores*, MARSHFIELD NEWS-HERALD, Mar. 2, 1938, at 1; *E.G. Shinner & Co. v. Lauf*, 36 F. Supp. 709, 710-11 (E.D. Wis. 1941).

<sup>214</sup> Transcript of Record for Snyder, *supra* note 21, at 8-9.

<sup>215</sup> *Id.* at 9-10.

<sup>216</sup> *Id.* at 11.

<sup>217</sup> See *supra* note 97 and accompanying text.

on grounds that the ordinance was unconstitutional, and it was the prosecution who appealed for a trial de novo in the Milwaukee County Circuit Court.<sup>218</sup>

The attorneys at trial in May 1938 were the same attorneys who would argue the case at the U.S. Supreme Court in October 1939.<sup>219</sup> The city was represented by Assistant City Attorney Carl F. Zeidler,<sup>220</sup> who in 1940 would unseat Daniel Webster Hoan as Milwaukee mayor after Hoan's twenty-four years in office as a Socialist.<sup>221</sup> Snyder's attorney was Arthur W. Richter,<sup>222</sup> the AFL labor attorney who had represented this same union's efforts in *Lauf v. E.G. Shinner & Co.*<sup>223</sup> and who also tried criminal cases.<sup>224</sup> Earlier in his career, Richter held a teaching and administrative position at Marquette University Law School, beginning in 1911.<sup>225</sup> He also, however, had been disbarred in 1925.<sup>226</sup> Among other offensive conduct, Richter defended a claim against him by arguing that his own conduct had been illegal, so enforcement of the debt would be against public policy.<sup>227</sup> He engaged in real estate dealings<sup>228</sup> until his law license was reinstated in January 1935.<sup>229</sup> On a more positive note, he was president of the Milwaukee Citizens' Anti-Nazi Committee, something that had to exist in 1938.<sup>230</sup>

In Snyder's bench trial, Richter argued that the Milwaukee anti-littering ordinance was being used to target speech because the police did not arrest the litterer, but instead arrested the

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<sup>218</sup> Transcript of Record for Snyder, *supra* note 21, at 1-2.

<sup>219</sup> See *Schneider v. New Jersey*, 308 U.S. 147, 152 (1939).

<sup>220</sup> Transcript of Record for Snyder, *supra* note 21, at 15.

<sup>221</sup> Michael E. Stevens, "Give'em Hell, Dan!": How Daniel Webster Hoan Changed Wisconsin Politics, WIS. MAG. HIST., Autumn 2014, at 16, 19, 25.

<sup>222</sup> Transcript of Record for Snyder, *supra* note 21, at 15.

<sup>223</sup> See *supra* notes 207-210 and accompanying text.

<sup>224</sup> See, e.g., *Salen Freed, Nine Others Given Terms*, OSHKOSH NW., July 20, 1938, at 1.

<sup>225</sup> William D. Miller, *Marquette Law School: The First Twenty Years*, 74 MARQ. L. REV. 377, 382 (1991).

<sup>226</sup> See *In re Richter*, 204 N.W. 492, 497 (Wis. 1925).

<sup>227</sup> See *id.* at 493.

<sup>228</sup> See *Goodsitt v. Richter*, 257 N.W. 23, 23-24 (Wis. 1934) (in which Mr. Richter appeared pro se).

<sup>229</sup> See *Richter Reinstated for Law Practice*, CHIPPEWA HERALD-TELEGRAM, Jan. 8, 1935, at 3.

<sup>230</sup> *Auditorium Halls to Be Rented Volksbund*, OSHKOSH NW., Feb. 21, 1938, at 16.

pamphleteer who had not, in fact, littered.<sup>231</sup> The prosecution countered that pamphleteers were “the cause” of the littering and therefore were arrested as a matter of policy.<sup>232</sup> On cross-examination of a police officer, Richter elicited that the patrol car had been sent to the picketing site by police headquarters, but the judge sustained an objection shutting down further inquiry into police policy as irrelevant to whether the defendant had violated the ordinance.<sup>233</sup> Later, the judge reconsidered this ruling and allowed further inquiry.<sup>234</sup> Accordingly, Richter questioned a deputy police inspector on why a police patrol car had been sent to the site on the first day that picketing resumed.<sup>235</sup> The inspector replied, “[I]f the complaint is not serious, we would not use a squad car, but if somebody says there is a serious littering of streets there, yes, a squad car would be dispatched.”<sup>236</sup> On May 24, 1938, Snyder was found guilty and ordered to pay a fine of \$1 and unspecified court costs.<sup>237</sup>

Richter also represented Snyder in his appeal to the Wisconsin Supreme Court, where he argued that *Lovell* required reversal.<sup>238</sup> The state supreme court disagreed, holding that “[t]he ordinances involved in the two cases are so widely different that we perceive no conflict between the decisions.”<sup>239</sup>

## 2. The “Company Union” Controversy

Unlike the handbills in the *Young* and *Nichols* cases,<sup>240</sup> Snyder’s handbill was in the form of a letter, not a brief advertisement.<sup>241</sup> The most interesting portions of the letter follow:

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<sup>231</sup> See Transcript of Record for Snyder, *supra* note 21, at 6.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 11.

<sup>234</sup> See *id.* at 11-12.

<sup>235</sup> See *id.* at 16, 18.

<sup>236</sup> *Id.* at 18.

<sup>237</sup> See *id.* at 8.

<sup>238</sup> See *City of Milwaukee v. Snyder*, 283 N.W. 301, 302-03 (Wis. 1939).

<sup>239</sup> *Id.* at 303.

<sup>240</sup> See *supra* text accompanying notes 122, 176.

<sup>241</sup> See Transcript of Record for Snyder, *supra* note 21, at 18-19.

To the Citizens of Milwaukee:

Since 1934 we have endeavored to organize the Shinner markets owned by E.G. Shinner Company of Delaware into union shops. The Shinner company fought us in all the courts and finally the Supreme Court of the United States decided that we had a bona fide labor dispute with the company, and had a right to picket their places of business. . . .

. . . It is unpatriotic to work for an employer such as Shinner's is, and it is unpatriotic for you as citizens to purchase from such an employer. If you want to help the workingmen of the United States, and aid the regulation of industries towards a speedy recovery, you will not deal with Shinner's.

. . . The union which they claim to have is a company union created by Shinner's, and not by its employees . . . .

. . . .

Remember that every chain store in Milwaukee employs union butchers with the sole exception of Shinner Meat Markets.

We ask you, as good American citizens, to refrain from trading with Shinner's.

Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 73, of the American Federation of Labor.<sup>242</sup>

Indeed, in August 1938, a few months after Snyder's picketing and distribution of this pamphlet, the Wisconsin Labor Relations Board, investigating charges brought by the Amalgamated Meat Cutters and Butcher Workmen, held that the Shinner employee association was a "company union" and had been since its inception in 1934.<sup>243</sup>

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<sup>242</sup> *Id.*

<sup>243</sup> *Shinner Employe [sic] Group Is Branded a Company Union*, OSHKOSH NW., Aug. 29, 1938, at 13. *But see* E.G. Shinner & Co. v. Wrabetz, 292 N.W. 902, 908 (Wis. 1940) (vacating the Board's findings of fact, conclusions of law, and accompanying order on the grounds that there was "no evidence" in the record to support the findings). Query the

#### IV. CONVERGENCE AND CONSOLIDATION AT THE U.S. SUPREME COURT

In 1925, the U.S. Supreme Court incorporated the First Amendment protection of speech and the press as applying to the states via the Fourteenth Amendment in *Gitlow v. New York*, a case concerning a Socialist author convicted of “criminal anarchy.”<sup>244</sup> Yet when Jehovah’s Witnesses pamphleteer Alma Lovell was convicted in 1936 of violating a city ordinance that required a license to solicit,<sup>245</sup> her appeal focused on her free exercise rights, only mentioning freedom of speech and of the press as an alternative issue.<sup>246</sup> The High Court, however, decided the case on the basis that “on its face,” the licensing procedure violated freedom of the press.<sup>247</sup> The ordinances analyzed in *Lovell* and *Schneider* being so similar,<sup>248</sup> the need for any action in *Schneider* beyond a summary reversal is not self-evident. Recall that the courts of first appearance in *Young* and *Snyder* had dismissed the charges in light of *Lovell*.<sup>249</sup> Evidently, the Court did not use *Schneider* to announce incorporation of free exercise under the Fourteenth Amendment, but it did just a few months later in another Jehovah’s Witness case—*Cantwell v. Connecticut*—another decision written by Justice Owen Roberts.<sup>250</sup> The choice to decide *Schneider* as a speech and press case may be yet another indication that the Court wished to decide the political speech cases (*Young*, *Nichols*, and *Snyder*) in a way that reduced the focus on the political cases and their details.

##### A. Reaching the U.S. Supreme Court

Only Clara Schneider had been convicted before the Supreme Court’s *Lovell* decision.<sup>251</sup> Her case had, however, been affirmed by

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credibility of the court’s ruling that there was “no evidence” despite the administrative agency’s findings.

<sup>244</sup> *Gitlow v. New York*, 268 U.S. 652, 654-55, 666 (1925).

<sup>245</sup> See Transcript of Record, *supra* note 76, at 6-7.

<sup>246</sup> See Appellant’s Brief, *supra* note 78, at 15-42 (making a freedom of religion argument from pages 15 to 36 of the brief and a freedom of speech and of the press argument from pages 36 to 42).

<sup>247</sup> *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938).

<sup>248</sup> See *id.* at 447-48; *Schneider v. New Jersey*, 308 U.S. 147, 157-58 (1939).

<sup>249</sup> See *supra* notes 97, 218 and accompanying text.

<sup>250</sup> See *Cantwell v. Connecticut*, 310 U.S. 296, 300, 303-04 (1940).

<sup>251</sup> See Transcript of Record for *Schneider*, *supra* note 17, at 4; *Lovell*, 303 U.S. at 444.

two state appellate courts during the time since we last saw her in the Essex County Court of Common Pleas in May 1937.<sup>252</sup> Under the style *Town of Irvington v. Schneider*, the New Jersey Supreme Court heard her appeal, and it was argued by her trial attorney, Jacob S. Karkus, in January, 1938.<sup>253</sup> Olin Moyle, national counsel for the Watch Tower Bible and Tract Society, joined Karkus in this effort.<sup>254</sup> The court rejected her arguments based in freedom of speech and of the press, finding on July 20, 1938, that door-to-door solicitation threatened “the peace and quiet of citizens” and that the Irvington ordinance “was a reasonable police regulation having for its purpose a safeguard designed for the public welfare.”<sup>255</sup>

At that time, the highest New Jersey court was the Court of Errors and Appeals, to which Karkus and Moyle next took Schneider’s case, arguing that *Lovell* was “dispositive of the present case.”<sup>256</sup> On January 13, 1939, that court affirmed the conviction, finding that the ordinance at issue in *Lovell* required a license for any distribution of printed matter while the Irvington ordinance required a license only for bothersome door-to-door solicitation.<sup>257</sup> “The difference between the ordinance in [*Lovell*] and the one in the present case is thus quite marked.”<sup>258</sup>

Schneider petitioned for certiorari on February 27, 1939.<sup>259</sup> Young filed a jurisdictional statement on March 1, 1939,<sup>260</sup> and Snyder petitioned for certiorari on March 15, 1939.<sup>261</sup> Schneider’s petition was granted on April 3, 1939,<sup>262</sup> three days before Nichols and Thompson filed their jurisdictional statement on April 6,

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<sup>252</sup> See *supra* notes 73-74 and accompanying text.

<sup>253</sup> *Town of Irvington v. Schneider*, 200 A. 799, 799 (N.J. Sup. Ct. 1938).

<sup>254</sup> See *id.*

<sup>255</sup> *Id.* at 799-800.

<sup>256</sup> *Town of Irvington v. Schneider*, 3 A.2d 609, 609 (N.J. 1939).

<sup>257</sup> See *id.* at 609-10.

<sup>258</sup> *Id.* at 610.

<sup>259</sup> See *Petition for Writ of Certiorari, Schneider v. New Jersey*, 308 U.S. 147 (1939) (No. 11).

<sup>260</sup> See *Statement as to Jurisdiction, Schneider v. New Jersey*, 308 U.S. 147 (1939) (No. 13).

<sup>261</sup> See *Petition for Writ of Certiorari, Schneider v. New Jersey*, 308 U.S. 147 (1939) (No. 18).

<sup>262</sup> *Schneider v. New Jersey*, 306 U.S. 628 (1939).

1939.<sup>263</sup> Snyder's petition was granted on April 17, 1939.<sup>264</sup> Under Rule 20(8) of the Court's rules of that time, "Two or more cases, involving the same question, may, by order of the court, be heard together, and argued as one case or on such terms as may be prescribed."<sup>265</sup> Further evidence about the decision to consolidate eludes me. Justice Owen Roberts, after retirement, burned his professional papers.<sup>266</sup> The extant papers of Chief Justice Charles Evans Hughes in the Library of Congress, as far as can be ascertained from the available finding aid, contain no reference to the *Schneider* cases.<sup>267</sup> The decision itself states its explanation in the opening sentence, "Four cases are here, each of which presents the question whether regulations embodied in a municipal ordinance abridge the freedom of speech and of the press secured against state invasion by the Fourteenth Amendment of the Constitution."<sup>268</sup>

### *B. Argument and Decision*

At the Supreme Court, Kim Young's trial attorney Leo Gallagher and his law partner A.L. Wirin were joined by Osmond Fraenkel,<sup>269</sup> who had filed the ACLU's amicus curiae brief in *Lovell*.<sup>270</sup> Snyder's Wisconsin attorney A.W. Richter was also joined at this stage by Fraenkel.<sup>271</sup> Nichols and Thompson's Massachusetts attorney Sidney Grant was joined by, of course, Fraenkel,<sup>272</sup> whose representation was another link between the three political speech cases.

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<sup>263</sup> See Statement as to Jurisdiction, *Schneider v. New Jersey*, 308 U.S. 147 (1939) (No. 29).

<sup>264</sup> *Snyder v. City of Milwaukee*, 306 U.S. 629 (1939).

<sup>265</sup> SUP. CT. R. 20(8), 306 U.S. 704 (1939) (repealed 1954).

<sup>266</sup> Edward L. Carter & Edward E. Adams, *Justice Owen J. Roberts on 1937*, 15 GREEN BAG 2D 375, 380 (2012).

<sup>267</sup> Email from Bruce Kirby, Reference Libr., Libr. of Cong. to author (Oct. 9, 2020) (on file with author and the Mississippi Law Journal) ("The Hughes papers are shelved in the Library's James Madison Memorial Building, and have not been digitized. Because of the pandemic, all Library of Congress buildings are closed to researchers and non-essential staff until further notice.").

<sup>268</sup> *Schneider v. New Jersey*, 308 U.S. 147, 153-54 (1939).

<sup>269</sup> See Statement as to Jurisdiction, *supra* note 260, at 14.

<sup>270</sup> See *supra* note 79 and accompanying text.

<sup>271</sup> See Petition for Writ of Certiorari, *supra* note 261, at 5.

<sup>272</sup> See Statement as to Jurisdiction, *supra* note 263, at 8.

Clara Schneider had the rare distinction of being represented before the Supreme Court by the head of her church.<sup>273</sup> Joseph F. Rutherford was a lawyer and state court judge before converting to the denomination in 1906, and he became its legal counsel before succeeding Russell as leader in 1917.<sup>274</sup> Because of the denomination's campaign against participation in war, Rutherford and seven other denomination leaders were convicted in 1918 of violating the Espionage Act,<sup>275</sup> sentenced ten to twenty years' confinement, and were briefly imprisoned until their convictions were overturned in 1919 and not further pursued.<sup>276</sup> Rutherford submitted Schneider's brief and argued on her behalf,<sup>277</sup> replacing Moyle because the victor of *Lovell* had resigned from the organization on July 21, 1939.<sup>278</sup>

Despite consolidation, arguments in the *Schneider*, *Young*, and *Snyder* cases were heard on Friday, October 13, 1939,<sup>279</sup> while the argument for Nichols and Thompson was heard on Monday, October 16th.<sup>280</sup> Chief Justice Hughes announced from the bench that the Court had received a letter from the counsel for Los Angeles "implying that the city would not defend the ordinance" in Young's case.<sup>281</sup> Milwaukee's politically ambitious Carl Zeidler appeared for his city in the case of Harold Snyder, who was represented by Richter.<sup>282</sup> Osmond Fraenkel made a "combined argument" in the three political speech cases on behalf of the ACLU, and Rutherford argued on behalf of Schneider "that the issue was one of religious liberty, as his client was 'worshipping God' when

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<sup>273</sup> See *Schneider*, 308 U.S. at 149.

<sup>274</sup> WATCH TOWER BIBLE & TRACT SOC'Y OF PA., JEHOVAH'S WITNESSES: PROCLAIMERS OF GOD'S KINGDOM 65-67 (1993). See also *Succeeds Pastor Russell*, N.Y. TIMES, Jan. 7, 1917, at 9.

<sup>275</sup> Espionage Act of 1917, ch. 30, 40 Stat. 217 (codified as amended at 18 U.S.C. §§ 792-99).

<sup>276</sup> McAninch, *supra* note 61, at 1010-11. See also *Rutherford v. United States*, 258 F. 855 (2d Cir. 1919).

<sup>277</sup> See *Schneider*, 308 U.S. at 149.

<sup>278</sup> See *Olin Moyle Letter to Rutherford*, DOC BOB (Dec. 26, 2004), <http://www.docbob.org/wordpress/olin-moyle-letter> [<https://perma.cc/J6WT-F7ZH>].

<sup>279</sup> *United States Supreme Court*, N.Y. TIMES, Oct. 14, 1939, at 34; *Civil Rights Cases Before High Court*, N.Y. TIMES, Oct. 14, 1939, at 6.

<sup>280</sup> *United States Supreme Court*, N.Y. TIMES, Oct. 17, 1939, at 50. The Nichols argument on Oct. 16, 1939, was not covered substantively. See *id.*

<sup>281</sup> *Civil Rights Cases Before High Court*, *supra* note 279, at 6.

<sup>282</sup> *Id.*

she distributed the literature.”<sup>283</sup> Moreover, Rutherford invoked the fascist menace: “The spirit of totalitarianism has swept over Europe and is encroaching upon this country[,] . . . especially in the neighborhood of Jersey City.”<sup>284</sup> The *New York Times* noted, “In all the cases, . . . the Supreme Court is asked to invalidate the ordinances, largely on the precedent of [*Lovell*] . . . .”<sup>285</sup>

That is what the Court did. “As said in *Lovell v. City of Griffin*, pamphlets have proved most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people.”<sup>286</sup> Justice Roberts’s opinion recalled the rationale of *Lovell* and repeated its rhetorical flourish defending “pamphlets, which had become historical weapons in the defense of liberty.”<sup>287</sup>

#### CONCLUSION

A law professor writing on Jehovah’s Witness cases noted that *Schneider* was decided as a speech and press case, but its rationale was akin to the least restrictive alternative standard that would later be used in free exercise cases.<sup>288</sup>

*Schneider* is as significant for its reasoning as for its conclusions. Prevention of litter in the streets and fraud in solicitation are legitimate police power concerns, but when the exercise of police power infringes upon the fundamental personal liberties of speech and press, the Court must “appraise the substantiality of the reasons advanced in support of the regulation.”<sup>289</sup>

Justice Roberts’s opinion downplayed the contentiousness of the speech in the cases it consolidated. Even controversial or tiresome speech is entitled to legal protection, so there was no need for minute detail. The downside, however, is that later generations

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<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Schneider v. New Jersey*, 308 U.S. 147, 164 (1939) (citation omitted).

<sup>287</sup> *Id.* at 162. *See also Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938).

<sup>288</sup> McAninch, *supra* note 61, at 1029.

<sup>289</sup> *Id.* (quoting *Schneider*, 308 U.S. at 161).

may not appreciate that the decision was not a foregone conclusion. The same pressures of the moment that led to the arrests of these defendants could have swayed members of the Court to side with peace, quiet, and the status quo over free expression. In the context of the time, that approach had its merits, or the cases would not have reached the Supreme Court. Knowing more about the issues in these cases and seeing them in the context of the 1930s allows us to appreciate what the decision really meant and how First Amendment protections should apply to the heated economic and ideological controversies of our own time.

This Article has tried to read between the lines of the *Schneider* decision and to look deeper into the facts of the four cases. Beyond the recital of facts in the opinion, there is more we can find with certainty in the historical record, and then, we can employ an informed imagination in looking at the decisions made by the police and the courts at each level.

Am I wrong to infer that Clara Schneider annoyed her neighbors by coming to the door with religious tracts? Did Kim Young's trial attorney not show the real motivation for Young's arrest when his parade of witnesses proved everyone holding elective office in Los Angeles had also distributed handbills during their election campaigns? Did a patrol car come to arrest Snyder because of his "serious littering" or because of his picketing? Readers can form their own opinion on these questions. They can also consider my pet theory that the artful brevity of Justice Roberts' opinion implied a desire not to say more than necessary about labor unrest or the Congressman's Communist brother.

This insinuation about the Supreme Court's tactical brevity is meant to commend, not to criticize. I see, in this decision, a Supreme Court that stayed above the political fray and instructed the courts below to accord the protection of law even to people who ring the doorbell when you're busy, support the Communists in Spain, or demand higher wages using bothersome tactics. In 2022, the other Americans who annoy us are more likely to use an electronic device than a pamphlet, but the principle remains the same. We still do not all agree on what religion to follow, what foreign policy to pursue, or how much the minimum wage should be, but we are still united under a Constitution that allows everyone to express an opinion on such questions.