

# From Left to Rights: Civil Liberties Lawyering Between the World Wars

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## Abstract

In the formative years of the modern First Amendment, civil liberties lawyers struggled to justify their participation in a legal system they perceived as biased and broken. For decades, they charged, the courts had fiercely protected property rights even while they tolerated broad-based suppression of the “personal rights,” such as expressive freedom, through which peaceful challenges to industrial interests might have proceeded. This article focuses on three phases in the relationship between the American Civil Liberties Union (ACLU) and the courts in the period between the world wars: first, the ACLU’s attempt to promote worker mobilization by highlighting judicial hypocrisy; second, its effort to induce incremental legal reform by mobilizing public opinion; and third, its now-familiar reliance on the judiciary to insulate minority views against state intrusion and majoritarian abuses. By reconstructing these competing approaches, the article explores the trade-offs – some anticipated and some unintended – entailed by the ACLU’s mature approach.

## Keywords

ACLU, civil liberties, First Amendment, social movements, cause lawyering, labor, courts, constitution, rights

“The decisions of the courts have nothing to do with justice.”<sup>1</sup> At the height of the New Deal, that was the pithy assessment of Morris Ernst, General Counsel to the American

1. Corrected draft of Interview between Thomas Stix and Morris Ernst, January 23, 1935, in Morris Leopold Ernst Papers, 1888–1976, Harry Ransom Humanities Research Center, University of Texas at Austin (Ernst Papers), box 487, folder 5.

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Civil Liberties Union. It was, perhaps, a surprising sentiment for a lawyer who devoted his life to court-based constitutional change – indeed, who played important and often foundational roles in the most celebrated legal advocacy organizations of the twentieth century, including the National Association for the Advancement of Colored People, Planned Parenthood, and the National Lawyers Guild, in addition to the ACLU.

That Ernst doubted judges' abstract commitment to justice did not betoken a general disaffection with law. A pioneer of cause lawyering, Ernst sought to rehabilitate the judiciary as an effective tool for social and economic progress. But the justice he pursued was mediated by popular contestation. In Ernst's view, "the point of view of the judge derive[d] from the pressure of public opinion"<sup>2</sup> – which explains why he orchestrated letter-writing campaigns to sitting judges in a number of celebrated cases.

The trouble, according to Ernst, was not that judges were capitulating to extrajudicial pressures. That was both inevitable and desirable. Rather, the problem was the failure of reform-minded Americans to comprehend and embrace the judiciary's function. Even as they grappled over constitutional meaning, the people had relinquished their claims on the courts. The first chairman of the American Bar Association (ABA)'s Committee on the Bill of Rights chastised the bar for allowing "the active defense of civil liberty . . . to drift very largely into the hands of the elements of 'the Left.'"<sup>3</sup> Ernst, conversely, indicted New Dealers for ceding the courts to the Right.

Ernst's was one of many critical approaches to lawyering before the New Deal settlement. In an era of judicial conservatism, civil liberties lawyers struggled to justify their participation in a system they perceived as biased and broken. For decades, they charged, the courts had fiercely protected property rights even while they tolerated broad-based suppression of the *personal rights*, such as expressive freedom, through which peaceful challenges to industrial interests might have proceeded. For Ernst, the appropriate corrective to *Lochner*-era legalism was not to dismantle the judicial branch, but to reclaim it as an engine of social change, subject to democratic override. Others defined their personal and professional duties in oppositional terms; the role of radical lawyers, they insisted, was to show up the hypocrisy of the courts. Many others insisted that civil liberties were best pursued through administrative, legislative, or extra-governmental means.

This article explores the competing approaches and ambitions of the ACLU's lawyers during the interwar period, with particular emphasis on their conceptions of court-centered justice. It is an underlying premise of the article that the roots of the modern civil liberties movement in America are intimately bound up with the labor movement's efforts to promote workers' rights.<sup>4</sup> Indeed, the ACLU – which was the first group to

2. Op. cit. On Ernst's uses of letter-writing and other publicity to persuade judges to overturn convictions, see Laura M. Weinrib, "The Sex Side of Civil Liberties: *United States v. Dennett* and the Changing Face of Free Speech," *Law and History Review* 30 (2012), 325–86, 360.

3. Grenville Clark, "Conservatism and Civil Liberty," *ABA Journal* 24 (1938), 640–4, 641.

4. The standard account attributes the emergence of the modern First Amendment to the repression of World War I. For example, Geoffrey R. Stone et al., *Constitutional Law*, 7th edn (New York: Aspen, 2013), pp. 1038–9 traces the Court's engagement with the First Amendment to "a series of cases concerning agitation against the war and the draft during World War I."

popularize the term *civil liberties* in the United States and helped to litigate most of the seminal speech-protective cases of the interwar period and after – was founded in 1920 for the express purpose of defending labor’s rights to organize, picket, and strike.<sup>5</sup> Given the deeply antagonist relationship between the judiciary and organized labor, exemplified by the notorious labor injunction in addition to substantive due process, it is no accident that the ACLU’s lawyers were skeptical of the courts. In its second year of operation, the new organization issued a pamphlet on “The Supreme Court vs. Civil Liberty.” As evidence of the Court’s transgressions, it featured such core labor cases as *Hitchman Coal*<sup>6</sup> and *Duplex Printing Press*<sup>7</sup> alongside the Espionage Act decisions that would eventually frame the origin story of the First Amendment.<sup>8</sup>

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See also Paul L. Murphy, *The Meaning of Freedom of Speech: First Amendment Freedoms from Wilson to FDR* (Westport, CN: Greenwood Publishing, 1972), pp. 8–9 (emphasizing the “World War I crisis in civil liberties,” as well as the subsequent Red Scare); Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (New York: W.W. Norton, 2004), p. 230 (“The government’s extensive repression of dissent during World War I and its conduct in the immediate aftermath of the war had a significant impact on American society. It was at this moment, in reaction to the country’s excesses, that the modern civil liberties movement truly began.”). Certainly the egregiousness of wartime censorship and the Espionage Act prosecutions provoked public concern. I argue elsewhere, however, that building a coalition on behalf of a court-centered First Amendment was a gradual and contested process that turned largely on labor’s right to strike. See generally Laura Weinrib, *The Taming of Free Speech: America’s Civil Liberties Compromise* (Cambridge, MA: Harvard University Press, forthcoming 2016).

5. See, for example, Walter Nelles, “Suggestions for Reorganization of the National Civil Liberties Bureau” (undated), in American Civil Liberties Union Records, The Roger Baldwin Years, 1917–1950, Seeley G. Mudd Manuscript Library, Public Policy Papers, Princeton University, Princeton, NJ (ACLU Papers), reel 16, vol. 120 (“We are frankly partisans of labor in the present struggle.”); “Civil Liberty: The Position of the American Civil Liberties Union on the Issues in the United States Today,” Undated, ACLU Papers, reel 16, vol. 120; ACLU, *The Fight for Free Speech* (New York: 1921). Scholarship exploring the relationship between labor radicalism and civil liberties in the early to mid-twentieth century includes Jerold Auerbach, *Labor and Liberty: The La Follette Committee and the New Deal* (Indianapolis, IN: Bobbs-Merrill Co., 1966); Cletus Daniel, *The ACLU and the Wagner Act: An Inquiry into the Depression-Era Crisis of American Liberalism* (Ithaca, NY: New York State School of Industrial and Labor Relations, Cornell University, 1980); Donna T. Haverty-Stacke, *Trotskyists on Trial: Free Speech and Political Persecution Since the Age of FDR* (New York: New York University Press, 2016); Jennifer Luff, *Commonsense Anti-Communism: Labor and Civil Liberties Between the World Wars* (Chapel Hill, NC: University of North Carolina Press, 2012); Murphy, *Meaning*; James Gray Pope, “The Thirteenth Amendment versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1958,” *Columbia Law Review* 102 (2002), 1–123, 99–123; David M. Rabban, *Free Speech in Its Forgotten Years, 1870–1920* (New York: Cambridge University Press, 1997); John Wertheimer, “Free Speech Fights: The Roots of Modern Free-Expression Litigation in the United States” (Ph.D. diss., Princeton University, 1992).
6. *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917).
7. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921).
8. Albert DeSilver, *The Supreme Court vs. Civil Liberty* (New York: ACLU, 1921).

Nonetheless, the ACLU consistently proved willing to use the courts when doing so suited its cause. Co-founder Roger Baldwin would have preferred to rely on grass-roots agitation and direct action, but he resigned himself to the fact that “the middle-class mind works legalistically” – that “whenever rights are violated, the first thing they want to do is get a lawyer and go to court.”<sup>9</sup> Unlike labor lawyers, many of whom spurned the judiciary, the ACLU’s attorneys sought to enlist the courts to the civil liberties cause.<sup>10</sup> Even as they helped to draft and promote the Norris-LaGuardia Act, which stripped the federal courts of injunctive power in ordinary labor disputes, ACLU lawyers urged unions to seek injunctions against intransigent employers. They criticized their labor allies for their stubborn adherence to principle, which stood in the way of concrete gains. “It is almost like saying to the employers ‘we won’t use this because you do,’” one ACLU pamphlet protested.<sup>11</sup> Employers were adept at generating public sympathy by complaining of disorder. The workers, in response, would do well to “stir up the cry of repression of civil liberty.”<sup>12</sup>

The article traces three phases in the campaign by ACLU advocates to pursue their cause in the courts. These phases, of course, overlap, and if each was dominant for a time within the organization, all were always contested. Still, in broad strokes, they capture a trajectory that both reflected and helped to shape a new confidence in the judiciary among advocates of social change. Eventually, the ACLU came to regard “the whole courts system, top to bottom, federal and state, [as] the proper and natural ally of citizen’s rights.”<sup>13</sup> Indeed, for the mature ACLU, “with its appeal to law,” the judiciary was “the essential forum.”<sup>14</sup> That unwavering faith in the judicial vindication of civil liberties was virtually unimaginable in 1920, when the ACLU was founded.

The first phase, which was modeled on the “free speech fights” by prewar radicals, sought to generate support for civil liberties by publicizing judicial defeats.<sup>15</sup> This strategy was premised on the assumption that courts were inherently antagonistic to workers’ rights and that organized labor would do better to rely on alternative channels, ranging from administrative tolerance to unadorned working class power. The second envisioned

9. Roger Baldwin to Robert Whitaker, April 6, 1934, ACLU Papers, reel 105, vol. 678.
10. ACLU, “Legal Tactics for Labor’s Rights” (New York, April 1930), pp. 8–9, in ACLU Papers, reel 90, vol. 536.
11. “Injunctions to Protect Civil Liberties” (undated), ACLU Papers, reel 72, vol. 395.
12. ACLU, “Legal Tactics for Labor’s Rights,” 4–5.
13. Roger Baldwin, “Introduction,” *American Civil Liberties Union Annual Reports*, vol. 1 (New York: Arno Press and the New York Times, 1970), p. xii.
14. Op. cit. For an alternative account of the ACLU’s shift toward the courts during its early years of operation, see Emily Zackin, “Popular Constitutionalism’s Hard when You’re Not Very Popular: Why the ACLU Turned to Courts,” *Law and Society Review* 42 (2008), 367–95. Zackin samples the meeting minutes of the organization and its antecedents between 1918 and 1928 and concludes that the ACLU turned to litigation because its efforts to pursue constitutional change outside the courts were unsuccessful.
15. On the free speech fights, see Melvyn Dubofsky, *We Shall Be All: A History of the Industrial Workers of the World* (Chicago, IL: Quadrangle Books, 1969); Philip S. Foner (ed.), *Fellow Workers and Friends: I.W.W. Free Speech Fights as Told by Participants* (Westport, CN: Greenwood Press, 1981); Philip S. Foner, *History of the Labor Movement*, vol. 9, *The T.U.E.L. to The End of the Gompers Era* (New York: International Publishers, 1991); Rabban, *Forgotten Years*; Wertheimer, “Free Speech Fights.”

incremental legal reform as a corrective to the inefficiencies and inconsistencies of interest group politics. If courts simply implemented the preferences of their social circles, as critics of the judiciary often contended, then the best means of advancing progressive interests in the face of powerful political lobbies and hostile majorities was to harness the persuasive power of sympathetic elites. That is, rather than channel judicial losses into positive publicity, the organization sought to parlay public support into judicial victories. The third and final phase is the most familiar because it ultimately prevailed. In a period in which judicial review was uniquely vulnerable to democratic attack, the ACLU recast the courts as an insulated haven for beleaguered minorities and disfavored views.

On the surface, the ACLU's approach proved wildly successful. By the late New Deal, the organization was cooperating with a broad range of government actors and private organizations, including the Department of Justice, the American Bar Association, and the U.S. Chamber of Commerce, all of which openly endorsed civil liberties. Conservative groups publicly celebrated the very ACLU-sponsored cases that they had long castigated, invoking the Supreme Court's halting defense of civil liberties as a justification for judicial review. Yet the vision that triumphed within and outside the courts was double-edged. As the levers of power shifted, so too did the beneficiaries of free speech and personal rights. The civil liberties that once had protected picket lines from hostile judges and federal troops soon shielded employer distribution of anti-union literature against regulatory intervention by the National Labor Relations Board (NLRB).

The ACLU of the late New Deal was an unusual social movement, if it can be considered one at all. As Roger Baldwin put it in 1938, the ACLU had "no 'ism' to promote except the Bill of Rights."<sup>16</sup> Although it began as an arm of the labor struggle, it had come to define itself in relation to a capacious idea – one that took no stake in the merits of political or economic debate. Perhaps that transformation limits its usefulness as a model of court-centered justice. Perhaps it functions as a cautionary tale about what becomes of a movement that hitches itself to the courts. At the very least, it serves as a powerful reminder that the prospects and possibilities of cause lawyering are inextricably bound to the cause.

The actors described in this article could not know the legacy of their choices. The development of the anti-state, constitutional, and court-centered concept of civil liberties that gained ascendancy by the onset of World War II was mired in contingency. It was the product of international events, domestic politics, organizational pressures, and personal ambitions. Nonetheless, civil liberties lawyers understood that their judicial strategy entailed risks and tradeoffs. At a moment of profound uncertainty about the future of judicial review, the decisions they made helped to define the stakes of constitutional litigation – indeed, to preserve space for the courts as a restraint on majoritarian pressure and an agent, however equivocal, for social change.

## I. The Wages of Defeat

In the 1924 presidential campaign, the platform of Progressive Party candidate Robert La Follette incorporated a longstanding progressive proposal. Pledging to abolish "the tyranny

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16. Remarks of Roger Baldwin at Journal Square Meeting, June 12, 1939, ACLU Papers, reel 177, vol. 2134.

and usurpation of the courts, including the practice of nullifying legislation in conflict with the political, social or economic theories of the judges,”<sup>17</sup> La Follette sought a constitutional amendment authorizing Congress to override Supreme Court decisions that invalidated its democratically enacted statutes. That is, La Follette sought to abolish judicial review of congressional legislation. And the newly established ACLU, which would someday call the courts its truest and most natural ally, heartily endorsed La Follette’s views.

La Follette’s proposal was not novel, let alone revolutionary. Twelve years prior, no less a national hero than Theodore Roosevelt – also running for president on the Progressive Party ticket – had advocated the “recall of judicial decisions” and considered it “absolutely necessary for the people themselves to take control of the interpretation of the constitution.”<sup>18</sup> At that time, La Follette himself had embraced the campaign for the recall of *judges* – a reform implemented in many western states – which, in theory, permitted democratic majorities to redress perceived judicial usurpation in a much wider range of cases than constitutional ones.<sup>19</sup> Indeed, the early years of the 1910s were notable for a wholesale attack on the courts (or at least, a particular style of classical legalism<sup>20</sup>) across a broad band of the political spectrum. Populists and progressives blamed

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17. “Progressive Party Platform, 1924,” in *Great Issues in American History: From Reconstruction to the Present Day, 1864–1981, vol. 3 (rev. ed.)*, Richard Hofstadter and Beatrice K. Hofstadter (eds) (New York: Vintage Books, 1982), p. 326.
  18. Theodore Roosevelt to Herbert David Croly, February 29, 1912, in Theodore Roosevelt Papers, Manuscripts Division, Library of Congress, available online in Theodore Roosevelt Digital Library, Dickinson State University, at <http://www.theodorerooseveltcenter.org/Research/Digital-Library/Record.aspx?IOP.cit.=o224709>.
  19. La Follette was somewhat more restrained with respect to the judicial recall than socialists and labor radicals. In an address at New York’s Carnegie Hall in January 1912, he explained: “I am in favor of extending the recall to the judiciary (*prolonged applause*), but I am in favor of hedging the recall of Judges about with reasonable restrictions and precautions that I would not apply to other officers ... Before recalling a Judge I would permit time enough to pass from the filing of the charges for passions to cool and mature judgment to prevail.” “News Worth Remembering,” *La Follette’s Weekly Magazine*, February 3, 1912, 9. President and future Supreme Court justice William Howard Taft was an outspoken critic of both Roosevelt’s and La Follette’s proposals. For a list of states that took up judicial recall measures, see “Report of the Committee to Oppose the Judicial Recall,” 1913, reprinted in Rome G. Brown, *Addresses, Discussions, Etc.* (Minneapolis, MN: 1917), vol. 1 (unpaginated).
  20. Progressives rejected a brand of common law legalism and constitutionalism that divorced law from politics and imagined legal actors as autonomous and equally powerful. See, for example, Morton J. Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992); Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* (Washington, DC: Beard Books, 2006); Morton White, *Social Thought in America: The Revolt Against Formalism* (New York: Viking Press, 1949); William M. Wiecek, *The Lost World of Classical Legal Thought: Law and Ideology in America, 1886–1937* (New York: Oxford University Press, 1998); Michael Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago* (New York: Cambridge University Press, 2003). For an argument challenging the progressive characterization of nineteenth century

*Lochner*-era courts for undermining the most important reform efforts of the late nineteenth and early twentieth centuries, including rate regulation, the income tax, and protective labor laws. Organized labor divided in its attitudes toward political methods but united in unequivocal disdain for the courts; whatever their differences, Samuel Gompers, Big Bill Haywood, and Eugene V. Debs all castigated judges for their casual resort to labor injunctions to crush strikes and boycotts apparently authorized by legislative majorities.<sup>21</sup> Even conservatives occasionally worried that perceptions of judicial partisanship would undermine support for rule of law.<sup>22</sup>

To combat these critiques, the American Bar Association launched a massive public relations campaign under the auspices of a Committee To Oppose the Judicial Recall. The bar's pamphlets, public addresses, and "general propaganda" emphasized the centrality of an independent judiciary to American traditions of governance and to upholding individual rights.<sup>23</sup> But the interests the committee emphasized were seldom the sort that animated either progressive reformers or future advocates of free speech. Although it occasionally invoked "personal liberty,"<sup>24</sup> its professed concern for the "mass of the people" extended almost exclusively to their property rights.<sup>25</sup> "The same law which would deny protection to the rich or confiscate the property of corporations," one committee report characteristically explained, "might take the cottage or the liberty of the humblest citizen."<sup>26</sup> Raising the specter of socialism, the ABA cautioned against democratic expropriation – a threat that was all the more salient after the 1917 Russian Revolution.<sup>27</sup> And with American entry into World War I, German autocracy made an equally compelling foil.

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legal thought as formalist, see David M. Rabban, *Law's History: American Legal Thought and the Transatlantic Turn to History* (New York: Cambridge University Press, 2013).

21. See, for example, William E. Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge, MA: Harvard University Press, 1991); Daniel R. Ernst, *Lawyers Against Labor: From Individual Rights to Corporate Liberalism* (Urbana, IL: University of Illinois Press, 1995).
22. For representative views, see Edith M. Phelps (ed.), *Selected Articles on the Recall* (New York: H.W. Wilson Co., 1913). On competing attitudes toward judicial recall and other court-curbing proposals during the 1910s, see Weinrib, *Taming*, chapter 1.
23. "Report of the Committee To Oppose the Judicial Recall," in *Report of the Thirty-Seventh Annual Meeting of the American Bar Association Held at Washington, D.C., October 20, 21, and 22, 1914* (Baltimore, MD: Lord Baltimore Press, 1914), pp. 607–21, 607.
24. *Op. cit.*, p. 611.
25. "Report of the Committee to Oppose the Judicial Recall," in *Report of the Thirty-Fifth Annual Meeting of the American Bar Association Held at Milwaukee, Wisconsin, August 27, 28, and 29, 1912* (Baltimore, MD: Lord Baltimore Press, 1912), pp. 574–89, 583.
26. *Op. cit.*
27. "Report of the Committee To Oppose Judicial Recall," *American Bar Association Journal* 3 (1917), 457 ("The judicial function of declaring invalid any statute which contravenes constitutional safeguards to individual rights of property and liberty is, so long as it continues, a barrier to the establishment of a government of Socialism."). The 1917 Bolshevik Revolution abolished almost all existing courts. Richard Pipes, *The Russian Revolution* (New York: Knopf, 1990), p. 797.

In his 1918 presidential address to the ABA's annual meeting, Walter George Smith warned that the wartime expansion of federal power would soon shade into despotism. "With a suddenness difficult to realize," he complained, "well nigh every act of the citizen is put under federal regulation."<sup>28</sup> The new menace he invoked was not the Espionage Act, with its attendant authorization of administrative censorship, but the intrusion of economic regulation on private contractual relations. To combat a threatened railroad strike, for example, the federal government had "fix[ed] hours of labor and rates of wages upon the transportation system."<sup>29</sup> Such actions and, still worse, the passage of constitutional amendments to legitimate government intrusions, threatened to "reverse the natural order."<sup>30</sup>

In light of this longer history, what was most striking about the 1924 debate over the congressional override of judicial decisions was how marginal Robert La Follette's position had become. According to Republican vice presidential candidate Charles G. Dawes, the effects of La Follette's 1924 proposal would be "disastrous." Government would be subject to the vagaries of political preference, "with demagogues in the saddle."<sup>31</sup> The mainstream movement to curb judicial excess had collapsed in the face of an equally untethered administrative state. Against a bureaucratic behemoth indifferent to state prerogatives and individual rights, incumbent president Calvin Coolidge defended the Supreme Court as "the very citadel of justice," and his Democratic opponent agreed.<sup>32</sup>

It was no surprise, then, when the ACLU issued an open letter to the Democratic and Republican candidates defending La Follette's proposal and "prov[ing] that the courts had been as flagrant violators of civil liberties as the legislative and the executive branches of government."<sup>33</sup> The origins of the ACLU – and through it, of the modern concept of civil liberties in America – are intimately tied to the labor movement's efforts to promote workers' rights.<sup>34</sup> For political, ideological, and historiographical reasons, the labor entanglements of interwar civil liberties advocacy have received insufficient scholarly scrutiny.<sup>35</sup> Although the prevalence of early anti-radical and anti-labor suppression has been amply documented, historians and First

28. Walter George Smith, "Address of the President," *American Bar Association Journal* 4 (October 1918), 551–6, 558.

29. *Op. cit.*, 560.

30. *Op. cit.*

31. "La Follette Has No Answer to Charges Made by Dawes," *St. Petersburg, Florida, Independent*, September 12, 1924.

32. "A Platform of Business Principles," *Nation's Business*, December 1924, p. 37.

33. ACLU, *Free Speech in 1924: The Work of the American Civil Liberties Union January to December 1924* (New York: 1925), p. 30.

34. Nelles, "Suggestions"; ACLU, *Fight for Free Speech*.

35. In public discourse, the civil liberties movement often downplayed its commitment to labor. Eventually, its evolving understanding of civil liberties, which increasingly rested on a claim of political neutrality, reinforced this construction of its founding impulses. Most constitutional historians have accepted the claim, consciously constructed by early advocates, that the ACLU defended labor radicals during and after World War I because they were

Amendment scholars have tended to assume that Red Scare repression galvanized support for judicial enforcement of the First Amendment. They have taken for granted that freedom of speech and assembly were always conceived in constitutional terms, and that early proponents of expressive freedom sought stronger judicial protection against state encroachment. In reality, the architects of the modern civil liberties movement regarded the courts as antagonistic to workers' organizing efforts and preferred to pursue their goals through other means, whether political mobilization or private economic power.

In short, to the early ACLU, the courts were the problem rather than the solution. Before the war, its leaders had believed (as influential member Clarence Darrow told the Commission on Industrial Relations) that legal machinery was inaccessible to the poor and responsive to the rich; paraphrasing Nobel laureate Anatole France, Darrow reflected that "the law is perfectly equal; it provides that it is a crime for anybody to sleep under a bridge, whether he is a millionaire or pauper."<sup>36</sup> A decade later, the ACLU leadership believed that courts simply reinforced existing imbalances in economic power. Felix Frankfurter, who joined the ACLU just months after it opened shop, thought the Court's "occasional services to liberalism" would only legitimate judicial legislation.<sup>37</sup>

In the face of wartime hysteria (what the ACLU called the "dictatorship of property in the name of patriotism"<sup>38</sup>), the future founders of the ACLU had looked past their long-standing aversion to judicial power in an effort to vindicate civil liberties in the courts.<sup>39</sup> Their efforts had yielded only disappointments and defeats. Conservative judges had proven unwilling to expand their concern for individual rights to encompass labor organizing or radical political advocacy. Faced with strong majoritarian support for the wartime

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the most frequent targets of state repression. There is a substantial body of work exploring the uses and understandings of free speech claims by specific labor constituencies, especially, though not exclusively, before World War I. See, for example, Dubofsky, *We Shall Be All*; Ernst, *Lawyers Against Labor*; Foner (ed.), *Fellow Workers*; Forbath, *Shaping*; Luff, *Commonsense Anticommunism*; Rabban, *Forgotten Years*; Christopher Tomlins, *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880–1960* (New York: Cambridge University Press, 1985).

36. "Testimony of Mr. Clarence S. Darrow – Recalled," *United States Commission on Industrial Relations, Final Report and Testimony Submitted to Congress by the Commission on Industrial Relations, 11 vols., 64th Cong., 1st sess.* (Washington, DC, Government Printing Office, 1916) (CIR Report and Testimony), vol. 11, p. 10799.
37. Quoted in Samuel Walker, *In Defense of American Liberties: A History of the ACLU, 2nd edn* (Carbondale, IL: Southern Illinois University Press, 1999), p. 81. See also H.N. Hirsch, *The Enigma of Felix Frankfurter* (New York: Basic Books, 1981).
38. ACLU, *Fight for Free Speech*, p. 4.
39. The National Civil Liberties Bureau, the precursor to the ACLU, was involved in several of the central constitutional challenges to the Espionage Act and other wartime legislation. On the NCLB and early ACLU, see Robert Cottrell, *Roger Nash Baldwin and the American Civil Liberties Union* (New York: Columbia University Press, 2000); Donald Johnson, *The Challenge to American Freedoms: World War I and the Rise of the American Civil Liberties Union* (Lexington, KY: University of Kentucky Press, 1963); Walker, *American Liberties*.

prosecutions, their progressive counterparts proved reluctant to buttress the counter-majoritarian exercise of judicial power.<sup>40</sup> The eventual dissents of Justices Louis Brandeis and Oliver Wendell Holmes Jr., though they signaled an emerging liberal aversion to state suppression of speech (coupled with lingering ambivalence about judicial enforcement), appeared patently unlikely to change judicial practice. After all, both justices had long dissented in the Court's liberty of contract cases, with nothing to show for their persistence. When the ACLU compiled a list of factors threatening civil liberties in the wake of the war, its first item was "the reactionary decisions of federal and state supreme courts."<sup>41</sup> The *Abrams* case, Holmes's stirring dissent notwithstanding, had left "the status of civil liberty hopeless so far as it is the concern of the courts of law."<sup>42</sup>

Still, even in its most radical years, the ACLU never entirely abandoned the courts as a forum for advancing its goals. Reasoning from first principles, the ACLU leadership preferred a world without labor injunctions and without judicial review. Given the realities of the political system in which they found themselves, however, they were not too scrupulous to use the judiciary where it suited their objectives. Like the Industrial Workers of the World before it, whose free speech fights had aimed to awaken the working class by revealing prosecutorial bias and judicial hypocrisy, the ACLU believed that judicial defeats, even more than elusive victories, could generate support for the civil liberties cause (and perhaps also for curbing the courts). Consistent with that view, the organization believed that "reporting trials," as compared with litigating them, had "much more probability of result."<sup>43</sup> It sent free speech organizers into the field to provoke arrest, and its lawyers followed up with test cases in the courts.<sup>44</sup> In the early 1920s, the ACLU hoped that publicizing its valiant struggles and inevitable losses would provide the impetus for broad-based and meaningful change.

It was in this spirit that the ACLU pursued a policy that the organization's labor allies deemed dangerous and misguided. Like many labor legal defense groups, the ACLU defended organizers and pickets against criminal prosecutions for unlawful assembly and disorderly conflict. Where the ACLU parted ways from most of its labor movement counterparts, however, was in its willingness to pursue injunctions against employers to inhibit interference with labor activity. Organized labor "regard[ed] the injunction as a weapon which should be abolished" and was hesitant to "sanction it by using it."<sup>45</sup> The ACLU dismissed such concerns as excessively principled and practically damaging. It sought instead to turn the power of the injunction against its ordinary master, and it entreated labor lawyers to do the same.

In 1930, the ACLU issued a pamphlet titled *Legal Tactics for Labor's Rights*, condensed from a book that ACLU attorney Arthur Garfield Hays helped to write. (As early

40. Within the Wilson administration, however, some officials promoted increased protection for civil liberties through the exercise of administrative power. Jeremy Kessler, 'The Administrative Origins of Modern Civil Liberties Law', *Columbia Law Review* 114 (2014), 1083–166.

41. ACLU, *Fight for Free Speech*, p. 4.

42. Nelles, "Suggestions."

43. Op. cit.

44. Op. cit.

45. ACLU, *Legal Tactics*, pp. 8–9. On labor's use of injunctions, see Forbath, *Shaping*, pp. 118–27.

as 1925, Hays had encouraged the ACLU to study the potential of “affirmative legal action” to secure “labor’s civil rights.”<sup>46</sup>) Drawing on Hays’s decade-long experience seeking pro-labor injunctions for the ACLU, it summarized the organization’s policy “for aggressive fighting in the courts to establish labor’s rights.”<sup>47</sup> It emphasized, however, that litigation was effective even, or especially, when a legal loss appeared inevitable. Judicial defeats garnered positive publicity and produced “a good moral effect,” it explained.<sup>48</sup> The authors of the pamphlet anticipated the systematic denial of pro-labor injunctions by the same judges who eagerly awarded *ex parte* injunctions against strikes and picketing to aggrieved employers. They hoped that the discrepancy would buttress labor’s claim that the courts had sacrificed labor’s “ancient legal rights of civil liberty” to the material interests of industrial concerns.<sup>49</sup> In the unlikely event that their legal campaign proved successful, so much the better. But winning, as a general matter, was beside the point. “The vital thing for labor to realize, and to make labor attorneys realize,” the pamphlet emphasized, “is that the chief object to be gained is, *not the winning of legal actions, but the bringing of them.*”<sup>50</sup> A few high-profile losses might convince open-minded Americans that unions were neither menacing nor anarchistic – that the resort to drastic methods was thrust upon them by unresponsive courts.

The ACLU conceded that lawsuits, however successful, could never adequately safeguard labor’s rights; only workers’ collective action could counter industrial power. But if legal tools could ease the process of organizing, it was foolish for labor to spurn them. As a tactical matter, there was “no conflict between pressing for strong organization and at the same time seeking relief in the courts.”<sup>51</sup> Unions could elicit popular support and energize the workers by foregrounding the judicial repression of civil liberties.<sup>52</sup>

## II. Victory as Its Own Reward

In the mid-1920s, the ACLU faced an unexpected dilemma: it began to win. At first, the small victories were curious anomalies and did little to affect the broader direction of the organization. As the judicial successes accumulated, however, the ACLU encountered a puzzling development. When ACLU lawyers made bold and brazen claims of the kind asserted in the organization’s early pamphlets – for example, that the First Amendment protected even patent advocacy of violence – they habitually lost in court. Losing, of course, was fodder for ACLU’s ongoing propaganda campaign on judicial hypocrisy. Increasingly, however, the old strategy appeared inadequate and ill advised. Popular hostility toward the judiciary was at a decades-long nadir, notwithstanding the many Taft

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46. ACLU Executive Committee Minutes, October 26, 1925, ACLU Papers, reel 40, vol. 281.

47. ACLU, *Legal Tactics*, p. 3. The book on which the pamphlet was based was Arthur Garfield Hays, Clement Wood and McAlister Coleman, *Don’t Tread on Me: A Study of Aggressive Legal Tactics for Labor* (New York: Vanguard Press, 1928).

48. ACLU, *Legal Tactics*, p. 3.

49. *Op. cit.*, p. 4.

50. *Op. cit.* (emphasis in original).

51. *Op. cit.*, p. 17.

52. *Op. cit.*

Court decisions extending substantive due process. According to the ACLU's 1925 Annual Report, "widespread prosperity" had dulled the radical spirit; neither court-curbing legislation nor the general strike remained on the horizon.<sup>53</sup> And yet, labor quiescence led police, prosecutors, and judges to suspend the worst of their Red Scare methods and exercise some restraint.<sup>54</sup> Through incremental expansion of expressive freedom, the organization could carve out space for organizing and education, with an eye toward future returns.

In practice, the new approach (which coexisted with the old) meant making arguments about the sufficiency of the evidence to support a conviction, not the defendant's First Amendment rights. It also entailed the defense of peaceful and well-respected speakers rather than labor agitators and pickets. An ACLU publicity director described the organization's mid-1920s tactics in colorful terms. First, "the police of Ameba, New Jersey, let us say, broke up a strike meeting held outdoors and beat up the speakers." Second, the ACLU (per the strikers' invitation) sent a "stinging communication" to the Ameba police; at the strikers' next meeting, speakers stuck to such venerated scripts as the Declaration of Independence, but police intruded all the same. Third, the ACLU arranged an independent test meeting, featuring "not strikers and labor organizers, but a prominent lawyer, a famous bishop, a celebrated senator, two well-known editors of respectable journals and a wealthy lady of liberal views." The socially prominent speakers emphasized expressive freedom, not the merits of the underlying labor dispute. Often, local officials capitulated to the threat of negative press. "The Ameba police listened with profound respect to these good people who were well dressed and spoke in modulated tones," and the ACLU notified the newspapers "that free speech had scored a victory in New Jersey."<sup>55</sup>

Sometimes, however, the distinguished speaker was arrested and charged. The most important such episode involved the prosecution for unlawful assembly of Roger Baldwin himself, who helped to organize a free speech protest in Paterson, New Jersey on behalf of striking silk workers.<sup>56</sup> When Baldwin was sentenced to six months in prison, the ACLU divided over the best strategy on appeal: whether to challenge the conviction on constitutional grounds, or rather, to argue the case on its sympathetic facts as a "simple, clearcut, not too important illustration of a trial court gone wrong."<sup>57</sup> Felix

53. ACLU, *Free Speech 1925–1926: The Work of the American Civil Liberties Union* (New York: 1926), p. 3.

54. Op. cit. ("no serious conflict or minority activity has aroused the latent forces of repression").

55. Joseph Freeman, *An American Testament: A Narrative of Rebels and Romantics* (New York: Farrar and Rinehart, 1936), p. 330. Whether the police maintained their tolerant attitude toward strikers once the ACLU cleared out was a subject of contentious debate.

56. On the 1924 Paterson silk strike that precipitated the arrest, see Nancy Fogelson, "They Paved the Streets with Silk: Paterson, New Jersey, Silk Workers, 1913–1924," *New Jersey History* 97 (Autumn 1979), 142–6; Martha Glaser, "Paterson 1924: The ACLU and Labor," *New Jersey History* 94 (Winter 1976), 155–72; Murphy, *Meaning*, pp. 151–3; Arthur T. Vanderbilt II, *Changing Law: A Biography of Arthur T. Vanderbilt* (New Brunswick, NJ: Rutgers University Press, 1976), pp. 48–53.

57. Felix Frankfurter to Samuel Smoleff, January 26, 1926, ACLU Papers, reel 22, vol. 159A.

Frankfurter (who served on the ACLU's National Committee beginning in its first year) captured the essence of the trade-off. The latter path, he acknowledged, might "seem to be pedestrian stuff"; one could plausibly argue that it would "help the cause of civil liberty more to have Baldwin go to jail than to have his conviction reversed."<sup>58</sup> Even so, Frankfurter had no qualms about recommending the conservative course. He had never approved of "promoting propaganda by defeats in the court." On the same grounds, he opposed the decision of ACLU attorneys Walter Pollak and Walter Nelles to take the cases of Benjamin Gitlow and Anita Whitney to the Supreme Court. "I count very low the publicity of cumulative adverse decisions by the Supreme Court," he advised Nelles regarding the cases that generated two of the most important Holmes and Brandeis opinions of the 1920s.<sup>59</sup>

Tellingly, Nelles had come to much the same conclusion. In a 1917 challenge to the constitutionality of the Conscription Act – the first case in which he participated on behalf of the National Civil Liberties Bureau (NCLB), the organizational precursor to the ACLU – Nelles had prepared his amicus brief to the Supreme Court with complete loyalty to his underlying views and "with complete indifference to effect on the court." Predictably, the approach had failed; indeed, the Supreme Court barely mentioned Nelles's argument, because it considered "its unsoundness . . . too apparent to require [it] to do more."<sup>60</sup> Rather than generate public outrage, the Court's decision impeded the NCLB's fundraising and recruitment campaign.<sup>61</sup> During the intervening years, Nelles had learned to make arguments that were legally plausible and popularly palatable. Such concessions better served the ACLU's long-term interests, as well as those of its clients, who "quite reasonably" preferred not to go to jail.<sup>62</sup>

For the remainder of the decade, the ACLU's legal cases heavily emphasized the sufficiency of the evidence rather than constitutional limitations. Wherever possible, the organization framed its arguments in terms of common law interpretation and statutory construction. It also advocated procedural protections for criminal defendants, which it considered the only surviving set of constitutional constraints that conservative judges (concerned for the real or perceived integrity of the judicial process) would bother to enforce.<sup>63</sup> Many ACLU allegiances grew out of the lawless roundups and administrative deportations that characterized the Palmer Raids; late in the decade, the organization

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58. Op. cit.

59. Felix Frankfurter to Walter Nelles, January 25, 1926, ACLU Papers, reel 22, vol. 159A; *Gitlow v. New York*, 268 U.S. 652 (1925); *Whitney v. California*, 274 U.S. 357 (1927).

60. *Arver v. United States*, 245 U.S. 366, pp. 389–90 (1918), upholding the act, was decided on January 7, 1918. The brief presented an argument based on freedom of conscience. On the ACLU's participation in the conscription act cases, see Laura Weinrib, "Freedom of Conscience in War Time: World War I and the Civil Liberties Path Not Taken," *Emory Law Journal* 65 (2016), 1051–1137.

61. For example, Lawrence Brooks to Roger Baldwin, September 21, 1917, ACLU Papers, reel 4, vol. 32 ("[F]ighting the draft and attempting to repeal it merely discredits an organization which indulges in the pastime without doing the slightest good.").

62. Walter Nelles to Roger Baldwin, January 23, 1926, ACLU Papers, reel 22, vol. 159A.

63. Walter Nelles, *Seeing Red: Civil Liberty and Law in the Period Following the War* (New York: ACLU, 1920).

would classify the “right to be free from unreasonable searches and seizures” as an integral part of its agenda and call for even greater attention to the “constitutional guarantees of defendants in criminal cases.”<sup>64</sup>

The ACLU routinely characterized the speech it defended as non-threatening, consistent with social mores, and important to public welfare. If the ACLU could present its defendants as “regular people” rather than dangerous “Reds,” it could capitalize on swelling public sentiment that efforts by local police and federal officials to root out radicals had gone too far.<sup>65</sup> It was crucial, though, to downplay the “suggestion that reversal is sought in aid of a subversive social tendency.”<sup>66</sup> It might be possible to “sustain on libertarian principles a right to assemble under circumstances alarming to men of firmness and courage,” Nelles told Baldwin, “but you can’t tell judges that’s a *constitutional* right. You’d simply be out of court.”<sup>67</sup>

Instead of the right of agitation, the ACLU increasingly invoked the time-tested justifications for free speech that lawyers and judges had long promoted. Robust public discussion, they said before Justice Brandeis did, was necessary for self-governance in a democracy (even as Roger Baldwin considered “political action under representative government [to be] the very heart of violence”<sup>68</sup>). Echoing Justice Holmes, they claimed that the airing of minority views would enable the emergence of truth in the marketplace of ideas (even as the organization argued that the corporate domination of the commercial press sharply curtailed access to unbiased information and

64. Letter to the National Committee, February 14, 1929, ACLU Papers, reel 63, vol. 360. On reactions to the Palmer raids see, for example, Christopher M. Finan, *From the Palmer Raids to the Patriot Act: A History of the Fight for Free Speech in America* (Boston, MA: Beacon Press, 2007), pp. 1–37; Robert K. Murray, *Red Scare: A Study in National Hysteria, 1919–1920* (Minneapolis, MN: University of Minnesota Press, 1955); Regin Schmidt, *Red Scare: FBI and the Origins of Anticommunism in the United States, 1919–1943* (Copenhagen: Museum Tusulanum Press, University of Copenhagen, 2000); Donald L. Smith, *Zechariah Chafee Jr., Defender of Liberty and Law* (Cambridge, MA: Harvard University Press, 1986), pp. 47–50.

65. Walter Nelles to Roger Baldwin, January 23, 1926, ACLU Papers, reel 22, vol. 159A; mounting concern about government lawlessness found expression in the “Report upon the Illegal Practices of the United States Department of Justice,” signed by twelve prominent lawyers and academics, including Felix Frankfurter, Zechariah Chafee, Ernst Freund, and Roscoe Pound. National Popular Government League, *Report upon the Illegal Practices of the United States Department of Justice* (Washington, DC: National Popular Government League, May 1920).

66. Walter Nelles to Roger Baldwin, January 23, 1926, ACLU Papers, reel 22, vol. 159A.

67. Op. cit.

68. Roger Baldwin to Zona Gale, August 23, 1920, ACLU Papers, reel 16, vol. 120. Gilbert Roe, a veteran of the Free Speech League who was influential in the NCLB and early ACLU, had emphasized in 1919 that “[i]f a people have self-government, they must have freedom of expression respecting it, or theirs will become the worst government in the world.” Gilbert E. Roe, “Repeal the Espionage Law: An Address Delivered Before the Civic Club of New York, December 3, 1918,” *Dial*, January 11, 1919, pp. 21–22.

systematically skewed debate).<sup>69</sup> Free speech would facilitate social progress, and the airing of pent-up grievances would defuse social conflict; suppression of dissent, they insisted, only increased support for revolutionary causes (the very causes the ACLU had pledged to serve).<sup>70</sup>

To be sure, the ACLU drew on these justifications for civil liberties in its First Amendment challenges on behalf of radical defendants. But as Nelles observed, reflecting on the ACLU's loss in *Gitlow*, his disquisitions on libertarian philosophy and "comparatively scholarly adduction of history" had failed to persuade the majority of the Court that speech urging overthrow of the government was protected by the Constitution.<sup>71</sup> In place of the right to strike, picket, or advocate violence, the ACLU expanded its involvement into other, less controversial domains, where constitutional claims were more conceivable. It promoted such values as academic freedom, sex education, religious liberty, and artistic expression. It defended them by recourse to progressive arguments about social progress (casting civil liberties as a prerequisite to the intelligent and effective exercise of state power) as well as conservative arguments about individual autonomy and state overreaching. In so doing, it gradually assembled these formerly disparate strands with conflicting political valences into a single civil liberties bundle.<sup>72</sup>

In part, the change in direction reflected a change in personnel. When the ACLU was founded, only three of its twenty executive committee members were lawyers.<sup>73</sup> Over the course of the decade, however, attorneys played an increasingly important role. Arthur Garfield Hays and Morris Ernst were appointed general counsels and expanded the

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69. For example, "Take Your Choice – Should We Drive Out the Fortune Tellers?" *New York American*, August 7, 1931 ("The state should not forever be our nursemaid... Fortune telling should be allowed free trade in the market place of thought. It will then live or die on its own merits."). On the corporate press, see, for example, Paul Hanna, 'Report to Roger Baldwin, April 13, 1918', ACLU Papers, reel 4, vol. 28; sample circular letter in ACLU Papers, reel 4, vol. 28.
70. The organization had always hedged on this issue. For example, Albert DeSilver, for the NCLB, to A. Mitchell Palmer, November 6, 1919, ACLU Papers, reel 7, vol. 69 ("We regard the Department's action in seeking to prevent a strike through the medium of an injunction as a grave blow at the liberties of the American workingman, probably without precedent in our history... We do not mean to imply that disaster is close at hand, but it is our belief that the attempt permanently to coerce men into acting contrary to their beliefs and aspirations leads to that eventual end and no other.").
71. Walter Nelles to Roger Baldwin, January 23, 1926, ACLU Papers, reel 22, vol. 159A.
72. For example, Roger Baldwin to James P. Cannon, May 26, 1926, ACLU Papers, reel 46, vol. 303 (explaining appeal to liberals to promote "civil liberty as a principle of progress"); Statement by the National Council on Freedom from Censorship, July 16, 1934, ACLU Papers, reel 105, vol. 678 (endorsing "personal choice"); ACLU, *The Fight for Civil Liberty: The Story of the Activities of the American Civil Liberties Union, 1928–1929* (1929), p. 3 (reporting improvement in "public opinion" due to the broadening of ACLU activity).
73. Walker, *American Liberties*, p. 69.

organization's legal work.<sup>74</sup> Despite their very real concerns about judicial abuses, both were comparatively optimistic about the potential for legal change. But they also understood the constraints of legal argument, the practical limitations imposed by legal precedent. Moreover, though they were sincerely committed to labor's right to organize, they were liberals, not radicals, and their belief in expressive freedom was deeply held, not nakedly instrumentalist, as critics alleged of some of their colleagues. In fact, Hays argued at a Ford Hall Forum in 1928 that radicalism was misguided and that "the solution of our economic problems must be accomplished by education and law, not by revolution."<sup>75</sup> Both Hays and Ernst regularly pursued speech claims outside the labor context in their private law practice; both, for example, defended publishers against obscenity charges. Both lawyers, in short, were liberal individualists, and they brought their liberal sensibilities to the ACLU.<sup>76</sup>

As successful litigators, Hays and Ernst were especially attuned to judicial psychology. During the Progressive Era, critics of the judiciary had often emphasized the infiltration of ideological commitments and political preferences into the work of judging.<sup>77</sup> Some accused judges of outright allegiance to industrial interests, either through graft or patent favoritism. Others sketched more complicated pathways. Theodore Schroeder, leader of the early twentieth-century Free Speech League and a pathbreaking advocate of expressive freedom, linked judges' predispositions to an "unconscious economic determinism, controlling the judicial intelligence."<sup>78</sup> Insiders occasionally validated such observations. The chief justice of the North Carolina Supreme Court, Walter Clark, observed that judges often began their legal career as corporate attorneys and speculated that they were "unconsciously biased in favor of views they held before they went on the bench."<sup>79</sup> There was general agreement that judges were products of their times, alert to social pressures and sensitive to the opinions of their peers.

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74. ACLU Bulletin 325, October 18, 1928, American Civil Liberties Union Records and Publications, 1917–1975, Microfilming Corporation of America (Glen Rock, NJ, 1977) (ACLU Records and Publications), reel 1; ACLU Bulletin 391, February 14, 1930, ACLU Records and Publications, reel 2. Baldwin invited Ernst to act as the organization's chief counsel in 1926, but he declined. He eventually agreed to serve as associate general counsel in 1930. Roger Baldwin to Morris Ernst, March 13, 1926, Ernst Papers, box 399, folder 3.
75. Advertisement for Ford Hall Forum, n.d., in Betsey B. Covell (ed.), *Women's Studies Manuscript Collections from the Schlesinger Library, Radcliffe College, Series 3: Sexuality, Sex Education, and Reproductive Rights, Part B: Papers of Mary Ware Dennett and the Voluntary Parenthood League* (Bethesda, MD: University Publications of America, 1994), reel 22, file 477.
76. On Hays and Ernst, see Weinrib, "Sex Side of Civil Liberties," 325.
77. Subsequent scholarship has emphasized similar processes. For example, Lawrence Baum, "Measuring Policy Change in the U.S. Supreme Court," *American Political Science Review* 82 (1988), 905–12; Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (New York: Cambridge University Press, 1993).
78. "Additional Statement of Mr. Theodore Schroeder," CIR Report and Testimony, vol. 11, p. 10896. On Schroeder, see Rabban, *Forgotten Years*, pp. 23–210.
79. For discussion of progressive critiques of the judiciary in testimony before the Commission, see Graham R. Taylor, "Labor and the Law As Viewed By Those Who Represent Each," *Survey*, May 29, 1915, 193.

The rejection of the classical legal model, premised on judges' neutral pursuit of justice through abstract principles and legal rules, led many liberals to repudiate the courts. For Hays and Ernst, by contrast, judges' susceptibility to social pressures presented opportunities. The first was the strategic value of judicial appointments. At the state level, advocates of judicial recall had assumed that judges subject to public scrutiny would be more responsive to popular pressures.<sup>80</sup> Ernst saw similar potential in judicial appointments. "Before any person is appointed to the bench in the future, there should be a very stringent cross examination by the proper committees of Congress as to the man's economic faith," he wrote to Heywood Broun. "It is about time that we got away from the idea that there is such a thing as a good lawyer or a bad lawyer. He is either a man of our prejudices or of other prejudices."<sup>81</sup>

More important, the ACLU's lawyers believed the organization could capitalize on liberal sentiment to move the law gradually in its favor. If judges were persuaded by the opinions of their social peers, as they believed, then the key to judicial success was to secure support from sympathetic elites. That is precisely the course that the ACLU adopted. It ran advertisements in newspapers and progressive journals, featuring endorsements from distinguished public figures, with the hope of swaying public opinion.<sup>82</sup> Sometimes, it targeted judges directly, soliciting letters to the court from prominent lawyers, judges, academics, and public intellectuals. Some of the ACLU's members and correspondents advised against these methods, including Learned Hand, Felix Frankfurter, and Roscoe Pound.<sup>83</sup> After extensive deliberation, the organization's lawyers persevered, reasoning that "the character of political cases, which in their very nature involve much publicity unfavorable to the defendant," rendered it "permissible and ethical even for a member of the bar, to endeavor to secure publicity for the other side of the facts."<sup>84</sup>

Within the ACLU leadership, many assumed that courts were "pretty accurate interpreters, somewhat after the fact, of the mores."<sup>85</sup> Morris Ernst went further, arguing that

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80. On the judicial recall, see Phelps (ed.), *Selected Articles*; William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890–1937* (Princeton, NJ: Princeton University Press, 1994), chapter 5. By contrast, judicial elections were introduced in the nineteenth century to insulate judges from partisan politics. See Jed Handelsman Shugerman, *The People's Courts: Pursuing Judicial Independence in America* (Cambridge, MA: Harvard University Press, 2012).
81. Morris Ernst to Heywood Broun, May 21, 1935, Ernst Papers, box 401, folder 3.
82. See Alexander Lindey to Messrs. G.P. Putnam's Sons, September 24, 1930, Ernst Papers, box 369, folder 2. Attempts to sway the judiciary by mobilizing public opinion began during the NCLB period. See, for example, revised draft of New Republic advertisement, 1918, ACLU Papers, reel 4, vol. 28.
83. See, for example, Felix Frankfurter to Albert DeSilver, February 17, 1921, ACLU Papers, reel 25, vol. 151 ("[W]e do not feel it wise or right, as members of the Bar of the Supreme Court, to support an appeal which might legitimately be interpreted as an effort on our part to influence the forthcoming action of the Supreme Court upon the application for certiorari.").
84. Albert DeSilver to Felix Frankfurter, February 19, 1921, ACLU Papers, reel 25, vol. 151.
85. Walter Nelles to Arthur Garfield Hays, January 26, 1926, reel 22, vol. 159A. The letter argued that some courts were "behindhand" and therefore willing to treat dissent in the reasonably tolerant fashion prominent before World War I.

courts – rather than presenting a counter-majoritarian difficulty or even adapting slowly to changing social norms<sup>86</sup> – were *more* open than legislatures to popular persuasion. It was an overarching theme of social criticism and academic literature in the 1920s that Congress succumbed to special interests and that legislation often foundered on the opposition of influential voting blocs.<sup>87</sup> Ernst thought that federal judges, because of judicial tenure, might resist the donors and lobbies to which legislatures were beholden. His concept of “nullification,” which turned on judicial erosion and executive non-enforcement of outmoded or undesirable laws, assumed that judges and administrators were better insulated against political distortions than the putative representatives of the people.<sup>88</sup> Unlike the political branches, he argued, courts were free to embrace democratic change.<sup>89</sup>

The defining feature of this intermediate stage in the ACLU’s evolving attitude toward the judiciary was its essentially incrementalist approach to litigation. No longer did the

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86. Much of the scholarship on popular constitutionalism and constitutionalism outside the courts explicitly or implicitly accepts the premise of the counter-majoritarian difficulty, that is, that judicial decisions diverge more sharply from public opinion than the products of the elected branches. See, for example, Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis, IN: Bobbs-Merrill, 1962), pp. 16–23; Bruce Ackerman, *We the People* (Cambridge, MA: Harvard University Press, 1991), pp. 8–16. Advocates of popular constitutionalism favor increased judicial responsiveness to public preferences. For example, Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004); Richard D. Parker, “Here, the People Rule”: *A Constitutional Populist Manifesto* (Cambridge, MA: Harvard University Press, 1994); Mark Tushnet, *Taking the Constitution Away from the Courts* (Cambridge, MA: Harvard University Press, 1999); Robin West, *Progressive Constitutionalism: Reconstructing the Fourteenth Amendment* (Durham, NC: Duke University Press, 1994). Of course, there is a well developed body of scholarship on the influence of broader political and cultural trends on judicial opinions, including Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (New York: Farrar, Straus and Giroux, 2009); Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004); Robert Post and Reva Siegel, “Roe Rage: Democratic Constitutionalism and Backlash,” *Harvard Civil Rights-Civil Liberties Law Review* 42 (2007), 373–433; Jeffrey Rosen, *The Most Democratic Branch: How the Courts Serve America* (New York: Oxford University Press, 2006).
87. See, for example, Daniel T. Rodgers, *Contested Truths: Keywords in American Politics since Independence* (Cambridge, MA: Harvard University Press, 1987), pp. 197–8. On the implications of this understanding in the domain of free speech and press freedom, see Sam Lebovic, *Free Speech and Unfree News* (Cambridge, MA: Harvard University Press, 2016).
88. Morris Ernst, “Sex Wins in America,” *Nation*, August 10, 1932, p. 123. Ernst honed the technique in the context of birth control, which he thought would never be legalized through legislation.
89. In fact, legislatures may prefer to defer contentious issues to the judiciary. Mark A. Graber, “The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary,” *Studies in American Political Development* 7 (1993), 35–72.

courts serve simply as a reactionary foil to the unmediated power of mass mobilization or concerted economic action. As its utopian vision receded into the horizon, the ACLU had come to understand the courts as a useful check on administrative excess and majoritarian intolerance in a second-best world. Indeed, in 1930 – even as its National Committee on Labor Injunctions promoted the Norris-LaGuardia Act – its National Committee for Freedom from Censorship helped secure passage of a bill transferring customs censorship power to the federal courts.<sup>90</sup> The ACLU was no judicial booster, and many of its members still preferred to pursue the civil liberties agenda through other institutions.<sup>91</sup> Still, by the early 1930s, the ACLU was no longer inclined to “fight against the courts.”<sup>92</sup>

### III. The Turn to Rights

A deep irony pervades the ACLU’s mature attitude toward the courts, which emerged during the 1930s. The founding commitment of the ACLU was a robust right of agitation – a right to challenge the existing industrial and political order through direct action by organized labor. During the New Deal, for the first and only time in American history, a substantial part of the government shared the ACLU’s early understanding of civil liberties, as well as the organization’s early desire to curb the authority of the courts. Yet at the precise moment when its project became possible, the organization moderated its conception of civil liberties as a vehicle for fundamental social change. In its place, it promoted a value-neutral vision of civil liberties based on constitutional protections, secured through the federal courts and against the state.

The election of Franklin D. Roosevelt precipitated sweeping changes with respect to the ACLU’s agenda. Those changes threatened the precarious civil liberties coalition that the organization had worked hard to assemble. Over the course of the decade, ACLU supporters would split over federal oversight of the radio, the extension of free speech to Nazi marches, and the civil liberties implications of racial discrimination.<sup>93</sup> The most important fracture in the civil liberties alliance, however, stemmed from New Deal labor

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90. Monthly Bulletin for Action, January 1931, ACLU Papers, reel 79, vol. 444.

91. See Laura Weinrib, “Civil Liberties Outside the Courts,” *Supreme Court Review* 2014 (2015), 297–362.

92. Isadore Katz, John Edelman, and David Schlick to Roger Baldwin, May 22, 1935, ACLU Papers, reel 116, vol. 780.

93. See, for example, Memorandum of Bills Proposed for Discussion, Conference on Civil Liberties under the New Deal, ACLU Papers, reel 110, vol. 719 (listing contentious issues, including radio censorship); “Shall We Defend Free Speech for Nazis in America,” ACLU Papers, reel 105, vol. 678; Roger Baldwin to Thomas Hardwick, July 14, 1931, ACLU Papers, reel 80, vol. 451 (civil liberties and race discrimination); Executive Committee to members of the National Committee, February 7, 1929, ACLU Papers, reel 63, vol. 360 (proposing extension of ACLU activities to include “[a]id to Negroes in their fight for civil rights,” among other issues); Felix Frankfurter to Roger Baldwin, February 16, 1929, ACLU Papers, reel 63, vol. 360 (rejecting ACLU involvement in “protection of negroes” as outside the organization’s purview).

policy. The core of the conflict was the various constituencies' competing attitudes toward state power and the federal courts.<sup>94</sup>

New Deal labor legislation marshaled the power of the state to secure labor's right to organize. The statutory framework previewed in the National Industrial Relations Act and, after a significant overhaul, perfected in the National Labor Relations Act (NLRA) reflected a compromise approach to government involvement in labor relations. The NLRA foreswore compulsory arbitration, and it preserved the resort to economic weapons among labor and industry alike. It nonetheless forced reluctant employers to recognize and bargain with a union when a majority of its employees elected collective representation, substantially abrogating employers' common law prerogatives in the process. More to the point, it explicitly recognized a right to strike, free from employer retaliation. And it established an administrative body, the NLRB, to police collective bargaining and ensure that both parties played by the rules.<sup>95</sup>

Established unions overwhelmingly supported the new approach, though there were holdouts. Among them were the dedicated voluntarists within the conservative craft unions, who were wary of intervention by a federal government that had generally acted to undermine their interests.<sup>96</sup> On the other end of the spectrum were the small radical and Communist unions that the ACLU had disproportionately defended, for whom the implementation of majority rule and exclusive representation portended substantial declines in power. These militant minorities argued that the state would inevitably serve the interests of capital and, by making minor concessions, erode the mounting movement for working class power.<sup>97</sup> The core ACLU leadership condemned the NLRA on much the same basis<sup>98</sup>; Baldwin called the class war the "central struggle involving civil liberties" and insisted that administrative meddling would undermine labor's strength.<sup>99</sup> On this view, labor could advance "only through its own economic power, not through dependence on legislation."<sup>100</sup>

94. For an account of the competing attitudes toward labor and civil liberties within and outside the ACLU, see Weinrib, *Civil Liberties Outside the Courts*.

95. National Labor Relations Act (NLRA), 29 USC §§ 151 (1935). See Charles J. Morris, *The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace* (Ithaca, NY: ILR Press, 2005); Peter H. Irons, *The New Deal Lawyers* (Princeton, NJ: Princeton University Press, 1982); James A. Gross, *The Making of the National Labor Relations Board: A Study in Economics, Politics, and the Law* (Albany, NY: State University of New York Press, 1974).

96. James Gray Pope, "The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1958," *Columbia Law Review* 102 (2002), 1–122, 7–17, 61–5.

97. For a discussion of labor militancy during the early New Deal, see Irving Bernstein, *Turbulent Years: A History of the American Worker, 1933–1941* (Boston, MA: Houghton Mifflin, 1969).

98. In addition to Baldwin, supporters of this view included Harry Ward, Corliss Lamont, William B. Spofford, and Robert W. Dunn.

99. Speech of Roger Baldwin, Annual Meeting of the ACLU, February 19, 1934, ACLU Papers, reel 105, vol. 678.

100. Roger Baldwin to members of the National Committee and local branches, May 8, 1935, ACLU Papers, reel 115, vol. 772.

Within the ACLU, Baldwin's vision encountered substantial resistance. Among the organization's longtime members were many labor leaders and New Dealers who lined up behind the NLRA.<sup>101</sup> When Baldwin issued a letter to Robert F. Wagner withholding support for his pending bill, some of them threatened to resign.<sup>102</sup> After all, the radical anti-statism of the ACLU's founding leadership put its adherents in odd company. As Baldwin acknowledged, the major opposition to the Wagner Act came from "employers still wedded to laissez-faire economics."<sup>103</sup> Baldwin insisted that the liberty he defended – "the freedom to agitate for social change without restraint" – was different in kind.<sup>104</sup> Still, it shared a certain similarity with *Lochner*-era understandings of economic liberty championed by "those rugged defenders of property rights," the American Liberty League.<sup>105</sup>

With the debate over the Wagner Act, the ACLU faced head on the continued viability of its founding aspirations. The right of agitation was rooted in opposition to state power. As early as World War I, the founders of the ACLU had tempered their Progressive Era confidence in administrative solutions to social problems. Their deep state skepticism was out of step with the labor movement's new preference for government intervention to counterbalance entrenched "capitalistic interests" in a "modern industrial country."<sup>106</sup> But the ACLU, too, had changed in its fifteen years of operations. In the 1920s, to enhance its clout and to improve its chances in the courts, the ACLU had expanded its base of support. The organization's progressive contingent recognized that overzealous administrators threatened free speech but hoped a meaningful commitment to civil liberties would legitimate rather than undermine the exercise of state power over

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101. See generally Daniel, *ACLU and the Wagner Act*.

102. For example, John W. Edelman, David S. Schick, and Isadore Katz to Roger Baldwin, May 3, 1935, ACLU Papers, reel 116, vol. 780; John W. Edelman to Roger Baldwin (undated), ACLU Papers, reel 116, vol. 780.

103. Speech of Roger Baldwin, Annual Meeting of the ACLU, February 19, 1934, ACLU Papers, reel 105, vol. 678.

104. Roger Baldwin, "Civil Liberties under the New Deal," October 24, 1934, ACLU Papers, reel 109, vol. 717. He added: "Practically today that means freedom for the working-class to organize and of minorities to conduct their propaganda." The following month, Baldwin again rejected the liberty espoused by groups like the American Liberty League and Americans First, explaining: "They are the dying gladiators of individualism in business of laissez faire economics. But the landslide has buried their straw man of liberty. Collectivism has come to stay." Roger Baldwin, "Coming Struggle for Freedom," November 12, 1934, ACLU Papers, reel 109, vol. 717.

105. Roger Baldwin, "Civil Liberties under the New Deal." See also Francis Biddle to Roger Baldwin, April 17, 1935, ACLU Papers, reel 116, vol. 780; Baldwin, "New Deal"; Speech of Roger Baldwin, Annual Meeting of the ACLU, February 19, 1934, ACLU Papers, reel 105, vol. 678. On the American Liberty League, see Frederick Rudolph, "The American Liberty League, 1934–1940," *American Historical Review* 56 (October 1950), 19–33; George Wolfskill, *The Revolt of the Conservatives: A History of the American Liberty League* (Boston, MA: Houghton Mifflin, 1962).

106. David J. Saposs, "The American Labor Movement Since the War," *Quarterly Journal of Economics* 49 (1935), 236–54, 239.

social and economic matters.<sup>107</sup> At the same time, the ACLU's involvement in such cases as *Pierce v. Society of Sisters* and the *Scopes* trial had buttressed the belief that a meddling state menaced more than labor.<sup>108</sup> Many of the ACLU's more recent members were only incidentally interested in the rights to picket or strike. Indeed, the organization's conservative critics alleged that the ACLU had solicited supporters on false pretenses – that it had recruited “genuine Liberal[s]” by pretending it was “primarily a defender of artistic freedom against the throttling hand of censorship.”<sup>109</sup> By the mid-1930s, what tied together the diverse membership of the ACLU was a mistrust of state intrusion into the dissemination of ideas, personal morality, and private life.

The upshot of this fragile consensus was a perceived need to separate state policing of economic activity from state censorship of speech. For lawyers like Arthur Garfield Hays and Morris Ernst, as for other New Dealers, the rights to organize, picket, and strike were mere manifestations of a general commitment to expressive freedom.<sup>110</sup> Far from interfering with those rights, the Wagner Act extended them administrative protection – and for a substantial majority of the ACLU's national membership, that was the end of the inquiry. They were sympathetic to workers' struggle for higher wages and better labor conditions, but they did not understand those ambitions as civil liberties concerns. And they were therefore willing to accept state regulation of labor relations, even if its effects were counter-revolutionary, as long as expressive freedom was preserved.<sup>111</sup> In this spirit, Judge Charles Amidon, who headed the ACLU-sponsored National Committee on Labor Injunctions, advised against carrying on “campaigns against economic wrongs” where civil liberties were only incidentally involved.<sup>112</sup> Alexander Meiklejohn likewise thought it was a mistake for the organization “to engage in industrial disputes instead of fighting for the maintaining of civil liberties in connection with them.”<sup>113</sup> When the ACLU was founded, its leadership had believed it “absurd to expect opponents of the cause of labor to join with us in the application of the general principle” of expressive freedom.<sup>114</sup> And yet, during the 1920s, the ACLU had engineered exactly that. By expanding into new realms and incorporating new constituencies, the organization had

107. Morris L. Ernst, “Who Shall Control the Air?” *Nation*, April 21, 1926, p. 443.

108. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (striking down Oregon's compulsory public education law); *Scopes v. Tennessee*, 152 Tenn. 424 (Tenn. 1925).

109. Harold Lord Varney, “The Civil Liberties Union,” *American Mercury* 39 (December 1936), 385–99, 386.

110. Morris Ernst to Roger Baldwin, April 29, 1935, ACLU Papers, reel 116, vol. 780. Ernst thought that the Wagner Act was the only effective way to counteract fascism. Morris Ernst to Roger Baldwin, May 10, 1935, ACLU Papers, reel 116, vol. 780.

111. See, for example, letter from Arthur Garfield Hays, May 7, 1935, ACLU Papers, reel 116, vol. 780 (“From the point of view of civil liberties the subject of unionism should be confined to the rights of free press, free speech, free assemblage, the right to organize, strike, picket and demonstrate, the right to be free from unfair injunctive processes and cognate matters.”).

112. Charles F. Amidon to Roger Baldwin, April 27, 1934, ACLU Papers, reel 105, vol. 678.

113. Alexander Meiklejohn to Roger Baldwin, May 20, 1935, ACLU Papers, reel 116, vol. 780.

114. Nelles, “Suggestions.”

generated wide-ranging support for a vision of civil liberties based on free speech. In the process, the ACLU had unwittingly altered its core purpose.

Shortly before passage of the NLRA, the ACLU rescinded its opposition to the bill.<sup>115</sup> Within months, the organization numbered among the statute's staunchest supporters (indeed, it soon celebrated the Wagner Act, with its strong statutory protection of labor's putatively expressive rights, as the New Deal's greatest achievement in the civil liberties field).<sup>116</sup> But if passage of the Wagner Act helped to crystallize the ACLU's convergence on the personal liberties contained within the Bill of Rights, it did nothing to settle the question of how or where the organization would seek enforcement of the rights it defended.<sup>117</sup> By the early 1930s, many members had reluctantly accepted the courts as a useful forum for raising civil liberties claims. The organization had scored some notable successes, including *Stromberg v. California*.<sup>118</sup> But the likelihood that the Supreme Court would invalidate the NLRA rekindled internal opposition to advancing civil liberties in the courts. As soon as the statute took effect, the American Liberty League launched an aggressive campaign to overturn it. With the weight of precedent on its side,

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115. In a referendum of National Committee members and local branches, a majority favored some version of the Wagner Act, and the Board voted to take no official position on the bill. Roger Baldwin to members of the National Committee and local branches, May 8, 1935, ACLU Papers, reel 115, vol. 772; ACLU Statement, May 27, 1935, ACLU Papers, reel 116, vol. 780.
116. For example, ACLU, *Let Freedom Ring! The Story of Civil Liberty 1936–1937* (New York: 1937), p. 16 (arguing that “[n]o decision in years promise[d] such far-reaching favorable effects on civil rights” as *Jones & Laughlin Steel*, the Supreme Court decision upholding the NLRA); ACLU, *Eternal Vigilance! The Story of Civil Liberty 1937–1938* (New York: 1938), p. 3 (describing the “beneficent effects of the National Labor Relations Act, in effect a civil liberties statute”). The ACLU's eventual endorsement of the NLRA as a civil liberties measure generated its own controversy within the organization, for related reasons. Most members of the ACLU opposed state and federal legislation curtailing the rights to picket and strike, as well as judicial injunctions. Many, however, felt that legislative intervention into employers' power to retaliate for labor activity was different in kind, in that it presented a problem of private rather than public power. For the early ACLU, by contrast, civil liberties could be asserted against private parties as well as government regulation. Indeed, much of the early leadership regarded employers as the greater threat, and in any case, understood industrial power as itself a creature of legal privilege sufficient to confer state action. See Weinrib, *Taming*, chapter 8.
117. ACLU, *How Goes the Bill of Rights? The Story of the Fight for Civil Liberty, 1935–1936* (New York: 1936), p. 3 (listing the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments as “the sections of the Bill of Rights of the federal constitution which constitute the basis of civil liberty”).
118. *Stromberg v. California*, 283 U.S. 359 (1931). The ACLU handled the case jointly with the International Labor Defense (ILD). At the ILD's request, ACLU attorney Walter Pollak also argued two cases involving the Alabama trial of the “Scottsboro boys,” young black defendants who were falsely accused of raping two white women. *Powell v. Alabama*, 287 U.S. 45 (1932); *Patterson v. Alabama*, 294 U.S. 600 (1935). On the Scottsboro cases, see James Goodman, *Stories of Scottsboro* (New York: Pantheon Books, 1994).

it argued that Congress' intrusion on contractual freedom and abrogation of employers' property rights, not to mention its exercise of expansive federal power, were incompatible with the United States Constitution and bound to be struck down. Many within the ACLU were determined to avoid that outcome at all costs.<sup>119</sup>

In the end, then, it was enactment of the NLRA that pushed the ACLU to clarify its position on state power and the legal fate of the statute that forced it to face squarely its relationship to the courts. Even before President Roosevelt announced his judiciary reorganization plan, the ACLU was vigorously debating the very question that it had taken for granted when it defended the 1924 Progressive Party platform against Democratic and Republican attack. Once again, longtime members were at loggerheads. Those who opposed judicial review charged their opponents with exaggerating the very civil liberties victories the ACLU had secured. Defenders of the judicial model countered that they were "mak[ing] the Court's record worse than it is."<sup>120</sup> Many applauded the Court's January 1937 decision in *De Jonge v. Oregon*, argued by ACLU attorney and Board member Osmond Fraenkel, which overturned the conviction of a Communist Party organizer under a criminal syndicalism law.<sup>121</sup> John Haynes Holmes, who would soon serve as chairman of the ACLU's Board of Directors, urged the organization to stake its position based on the Bill of Rights, not labor legislation. "[T]he United States Supreme Court, so far as civil liberties is concerned, is for us and not against us," he insisted, "and we should be for and not against the Court."<sup>122</sup>

With the hope of issuing an organization-wide statement, the ACLU solicited the views of its "eminent lawyers."<sup>123</sup> Unsurprisingly, the survey generated a broad range of responses. Some participants considered judicial enforcement of civil liberties to be unnecessary and preferred to curtail the power of the courts. Others, including Lloyd K. Garrison – who had served as the first chair of the original NLRB before assuming the deanship of the University of Wisconsin Law School – worried about "giving majorities too much say over minorities."<sup>124</sup> Still others worried about "executive arbitrariness" rather than majoritarianism and considered the Supreme Court to be a more effective safeguard against "the expansion of the executive power into dictatorship."<sup>125</sup> Socialist

119. For discussion of the legal attack on the NLRA and the NLRB's response, see Gross, *Making*, pp. 149–253; Irons, *Lawyers*, pp. 201–71.

120. Osmond Fraenkel to Louis Boudin, March 20, 1937, ACLU Papers, reel 143, vol. 978.

121. *De Jonge v. Oregon*, 299 U.S. 353 (1937). Critics of the Court thought that enthusiasm about *De Jonge* was misguided. For example, Louis Boudin to Osmond Fraenkel, March 18, 1937, ACLU Papers, reel 143, vol. 978. Fraenkel, however, believed it to be warranted. Osmond Fraenkel to Louis Boudin, March 20, 1937, ACLU Papers, reel 143, vol. 978.

122. John Haynes Holmes to Harry Ward, January 29, 1937, ACLU Papers, reel 143, vol. 978.

123. Preliminary Report of the American Civil Liberties Union Temporary Committee Concerning the Supreme Court, ACLU Papers, reel 143, vol. 978. Also polled were Charles Beard, Edwin Borchard, John Finerty, Felix Frankfurter, Lloyd Garrison, Walter Gellhorn, Max Lerner, and Whitney North Seymour. Frankfurter and Beard declined to participate.

124. *Op. cit.*

125. Edwin Borchard to Osmond Fraenkel, February 4, 1937, ACLU Papers, reel 143, vol. 978.

leader Norman Thomas would have restricted the Court's review of Congress' "economic and social" program but preserved its authority outside those domains.<sup>126</sup>

All told, a majority of respondents thought the Court should retain its power of judicial review in some form. But several would have required a supermajority to invalidate federal laws, and some favored proposals to authorize a congressional veto of constitutional decisions. Others preferred to ease the requirements for constitutional amendment. There was only one issue on which all respondents agreed: all considered it acceptable to strip the due process clause of its substantive sweep and limit it to procedural matters, as long as a carefully worded provision made the Bill of Rights binding on the states. That, of course, is essentially the result that the Supreme Court itself eventually reached, albeit as a matter of judicial interpretation rather than statute or constitutional amendment.<sup>127</sup>

As events unfolded, the ACLU's effort to reach consensus on a court-curbing proposal proved somewhat beside the point. In February 1937, President Roosevelt announced his own solution to the Supreme Court problem, his notorious "Court-packing plan," which further polarized the ACLU. Many liberals who were sympathetic to democratic curtailment of judicial review regarded the President's proposal as a dangerous exercise of unilateral executive power.<sup>128</sup> Others accepted Court-packing as an emergency measure – including La Follette's son Robert La Follette Jr., now chair of the Senate Civil Liberties Committee that the ACLU had helped to organize, who emphasized that "no kind of legal guaranty has ever been able to protect minorities from the hatreds and intolerances let loose when an economic system breaks down."<sup>129</sup> Unable to reach agreement, the ACLU board took no official position on the issue, though it did issue a report by Osmond Fraenkel, which concluded that the Court had signaled a new commitment to expressive freedom and minority rights, even if historically it had "more often failed to protect the Bill of Rights than preserve it."<sup>130</sup>

In March 1937, in its famous "switch in time," the Supreme Court upheld the Washington state minimum wage law at issue in *West Coast Hotel v. Parrish*, hastening

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126. Norman Thomas to Roger Baldwin, February 25, 1937, ACLU Papers, reel 142, vol. 969.
127. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.").
128. On the Court-packing plan and the popular hostility it generated, see generally Alan Brinkley, *The End of Reform: New Deal Liberalism in Recession and War* (New York: Knopf, 1995); Burt Solomon, *FDR v. the Constitution: The Court-Packing Fight and the Triumph of Democracy* (New York: Walker & Co., 2009); Jeff Shesol, *Supreme Power: Franklin Roosevelt vs. the Supreme Court* (New York: W.W. Norton, 2010).
129. Radio Address by Hon. Robert M. La Follette Jr., February 13, 1937, ACLU Papers, reel 143, vol. 978.
130. ACLU Press Release, May 21, 1937, ACLU Papers, reel 143, vol. 978; Osmond K. Fraenkel, *The Supreme Court and Civil Liberties: How the Court Has Protected the Bill of Rights* (New York: ACLU, 1937).

the defeat of President Roosevelt's judicial reorganization bill.<sup>131</sup> But it was the Court's decision two weeks later, in *Jones and Laughlin Steel* that effectively settled the ACLU's position on judicial review.<sup>132</sup> Notably, the ACLU considered *Jones and Laughlin Steel* to be a civil liberties victory. In upholding the Wagner Act, the Court classified "the right of employees to self-organization" as a "fundamental right."<sup>133</sup> A few months later, it assumed that "members of a union might . . . make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."<sup>134</sup> In short succession, the ACLU secured a spate of First Amendment victories involving Communists and Jehovah's Witnesses.<sup>135</sup> At the dawn of the new decade, in *Thornhill v. Alabama*, the Supreme Court would finally declare that peaceful labor picketing was a constitutionally protected exercise of free speech.<sup>136</sup>

At the end of the 1930s, the ACLU split once again over the propriety of administrative intervention into labor relations. One contingent defended the NLRB's decision to prohibit employers from distributing anti-union literature to their employees, and the other, invoking the ACLU's longstanding line between expression and physical violence, criticized the agency for curtailing free speech. The differences between them ultimately proved irreconcilable, prompting the expulsion of Communists from the ACLU board and the resignation of many of the organization's longtime members. That controversy, however, turned mostly on the limits of the First Amendment, not the appropriate arbiter of the dispute.<sup>137</sup> Members disagreed over the desirability of deference to administrative fact-finding and remedies, but few doubted that in the final analysis, it fell upon the courts to construe the Bill of Rights.

#### IV. Law, Labor, and Justice

Looking forward from 1940, the ACLU leadership was satisfied that the organization's investment in the judiciary had paid off. Internal squabbles notwithstanding, there was broad public and political approval of the ACLU's mature vision of civil liberties, that is,

131. Literature on the constitutional revolution includes Brinkley, *End of Reform*; Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1998); William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York: Oxford University Press, 1995); Richard A. Maidment, *The Judicial Response to the New Deal: The United States Supreme Court and Economic Regulation, 1934–1936* (New York: St. Martin's Press, 1991); "AHR Forum: The Debate over the Constitutional Revolution of 1937," *American Historical Review* 110 (2005), 1046–1115.

132. *NLRB v. Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937).

133. *Op. cit.* at 33.

134. *Senn v. Tile Layers Protection Union*, 301 U.S. 468, 478 (1937).

135. For example, *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Schneider v. New Jersey*, 308 U.S. 147, 151 (1939).

136. *Thornhill v. Alabama*, 310 U.S. 88 (1940).

137. See Weinrib, "Civil Liberties Outside the Courts"; Weinrib, *Taming*, chapter 8. The dispute turned on whether employer anti-union propaganda was inherently "coercive" and therefore outside the scope of First Amendment protections under the Supreme Court's anti-labor precedent.

robust judicial enforcement of the personal liberties protected by the Bill of Rights. In 1920, most Americans had decried civil liberties as a cover for subversive activity. Liberty, they insisted, did not mean license; neither public policy nor the First Amendment countenanced subversive speech. A mere two decades later, the ACLU's legal strategy was widely respected and broadly emulated, and free speech was a fundamental American value. By 1940, American liberals eager to protect free speech "[took] comfort in evidences of an enlightened judiciary."<sup>138</sup>

And yet, from the perspective of the organization's early goals, the path forward was more ambivalent. Just one year after *Thornhill v. Alabama*, the Supreme Court would retreat from its protection of picketing. Indeed, it was Felix Frankfurter – newly appointed to the Supreme Court – who would write the Court's opinion in *Milk Wagon Drivers Union v. Meadowmoor Dairies*, upholding a state court injunction against peaceful picketing where a union had previously engaged in violence.<sup>139</sup> Persuaded, perhaps, by the gravity of his new office, Frankfurter voiced a principle that the judiciary had long promoted and the ACLU had long opposed, namely, that "an utterance in a contest of violence can lose its significance as an appeal to reason and become part of an instrument of force."<sup>140</sup>

I argue elsewhere that the ACLU not only endorsed the new order, but helped to create it.<sup>141</sup> The New Deal's so-called Constitutional Revolution is ordinarily understood to contain two related parts. In 1937, in *West Coast Hotel v. Parrish* and *NLRB v. Jones and Laughlin Steel*, the Court retreated from its review of social and economic legislation.<sup>142</sup> Two years later, in its famous fourth footnote of *Carolene Products*, it signaled its intention to rigorously review state and federal intrusion on free speech and minority rights.<sup>143</sup>

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138. Rose Feld, "Down With Censors! A Crusading Chronicle of Their Constant Threat to Books, Movies and Radio," *New York Herald Tribune* 4 (1940), p. IX. On the new consensus, see John W. Wertheimer, "A 'Switch in Time' Beyond the Nine: Historical Memory and the Constitutional Revolution of the 1930s," *Studies in Law, Politics and Society* 53 (2010), 3–34.
139. *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941).
140. Op. cit., p. 293. On the rapid rise of industrial pluralism and corresponding narrowing of the right to strike, see Christopher L. Tomlins, "The New Deal, Collective Bargaining, and the Triumph of Industrial Pluralism," *Industrial Labor Relations Review* 39 (1985), 19–34; Irons, *Lawyers*, pp. 295–6; Karl E. Klare, "Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law," *Berkeley Journal of Employment & Labor Law* 4 (1981), 450–82, 454–6.
141. Weinrib, *Taming*. The rise of international totalitarianism was an important, if incomplete, catalyst for the shift. On the role of totalitarianism, see, for example, William Edward Nelson, *The Legalist Reformation: Law, Politics, and Ideology in New York, 1920–1980* (Chapel Hill, NC: University of North Carolina Press, 2001); Richard Primus, *The American Language of Rights* (New York: Cambridge University Press, 1999); Edward Purcell, *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (Lexington, KY: University of Kentucky Press, 1973).
142. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *NLRB v. Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937).
143. *Carolene Products Co.*, 304 U.S. at 152 n. 4. On *Carolene Products*, see Felix Gilman, "The Famous Footnote Four: A History of the Carolene Products Footnote," *South Texas Law Review* 46 (2004), 163–243.

Today, the two pieces are thought to form a seamless whole.<sup>144</sup> In the 1930s, however, that second step was just as unexpected as the first.

When the ACLU's New Deal allies pushed to curb the authority of the courts, they sought to reallocate responsibility for civil liberties enforcement, as well as the nation's social and economic program, to the political branches. It was in this spirit that the National Lawyers Guild republished a pamphlet by the International Juridical Association, a leftist law reform organization with which the ACLU often collaborated, which concluded that "there can be no true enforcement of the Bill of Rights in the interests of persons instead of wealth, except by the elected representatives of the people."<sup>145</sup> With the "Switch in Time," contemporaries assumed that the Supreme Court would defer to legislators and regulators across the board. Few anticipated or even desired that *Carolene Products* would follow.

The ACLU, almost alone among liberal and labor organizations, was more skeptical of the state than of the judiciary, and it helped to cultivate a new role for the courts. Between 1937 and 1939, it aggressively litigated constitutional claims. Freed from its perennial fear of legitimating *Lochner*, it asked the Supreme Court to strike down state statutes and local ordinances limiting the rights to public assembly and freedom of speech. It portrayed purportedly neutral laws as incursions on the Bill of Rights. Where before it had proceeded cautiously, emphasizing the insufficiency of the evidence or the inadequacy of the pleadings, it boldly invoked constitutional limitations on legislative and regulatory power.<sup>146</sup>

In this task, it sought assistance less from the liberal and labor groups it had long courted than from conservative groups concerned to preserve a role for the courts.<sup>147</sup> To combat the Court-packing plan, the ABA had eagerly invoked the Supreme Court's

144. On the "New Deal settlement" see Bruce Ackerman, *We the People* (Cambridge, MA: Belknap Press of Harvard University Press, 1991), pp. 105–30; Jack M. Balkin, "The Footnote," *Northwestern University Law Review* 83 (1989), 275–320; Richard A. Epstein, *How Progressives Rewrote the Constitution* (Washington, DC: Cato, 2006), pp. 7–9, 52–83; Barry Friedman, "The History of the Counter-Majoritarian Difficulty, Part Four: Law's Politics," *University of Pennsylvania Law Review* 148 (2000), 971–1064, 974; Howard Gillman, "Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence," *Political Research Quarterly* 47 (1994), 623–53; Kramer, *People Themselves*, pp. 219–22; G. Edward White, *The Constitution and the New Deal* (Cambridge, MA: 2000), pp. 128–64, 227–32.

145. International Juridical Association, "Curbing the Courts" (1937), in William Gorham Rice Papers, Wisconsin Historical Society Archives, Madison, WI, box 19, folder 7.

146. See, for example, *Hague v. CIO*, 307 U.S. 496 (1939); *Minersville School District v. Gobitis*, 108 F.2d 685 (3d Cir. 1939) (amicus brief); *Griffin* (amicus brief); *Johnson v. Zerbst*, 304 U.S. 458 (1938) (assistance in lower courts); *Breedlove v. Suttles*, 302 U.S. 277 (1937).

147. For example, Statement on Current Issues of Civil Rights by the Board of Directors, March 1937, ACLU Papers, reel 142, vol. 969 (emphasizing willingness to defend the rights of conservatives); Arthur Garfield Hays to ACLU, March 23, 1938, ACLU Papers, reel 156, vol. 1080 (courting corporate attorney Grenville Clark, who was active in the ABA's efforts to defeat the Court-packing plan by promoting judicial independence); Roger Baldwin, Memorandum on conference with Grenville Clark, October 28, 1938, ACLU Papers, reel 156, vol. 1079 (recruiting ABA participation in *Hague v. CIO*); B.W. Huebsch to Fellow Directors, April 19, 1940, ACLU Papers, box 74, folder 6 (advocating expansion in ACLU membership and contributions in light of exclusion of Communists from the board).

recent civil liberties decisions in its defense of judicial review.<sup>148</sup> Recognizing that arguments based on the preservation of property rights and opposition to redistribution no longer mobilized popular support, the ABA launched a public relations campaign depicting the Supreme Court as a champion of minority rights. Its pamphlets and radio programs promoted the very cases that the ACLU had litigated and that most members of the bar had vociferously opposed.<sup>149</sup> Rather than call the Bar to task for its hypocrisy, the ACLU embraced its new ally and pledged “full cooperation” with the ABA’s new Committee on the Bill of Rights, which was founded in 1938.<sup>150</sup> Soon, the ABA managed to convince its corporate clients that the First Amendment could substitute for *Lochner*-style substantive due process to protect their prerogatives in the Court. The ACLU actively encouraged this view.<sup>151</sup>

The ACLU leadership had not (yet) given up on labor’s substantive goals. It hoped that a judicial check on government intrusion would provide adequate space for labor to assert its own power, relying on the old mantra that workers were best served by a strong union, not a strong state.<sup>152</sup> For their part, industrial groups expected that the judiciary, given appropriate tools, would continue to defend their interests against an unshackled state. As ABA president Frank Hogan put it in his address announcing the creation of the Committee on the Bill of Rights, constitutional protections for personal rights might also be invoked “when the crushed toes were encased in patent leather footwear of the wealthy, or the rights denied or the privacy invaded were those of the business corporation.”<sup>153</sup> In short, the “Constitutional Revolution” contained within it the seeds of *Citizens United*.<sup>154</sup>

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148. Arthur Vanderbilt to Frank Grinnell, March 18, 1937, Arthur T. Vanderbilt Political, Professional, and Judicial Papers, Wesleyan University Collection on Legal Change, Middletown, CN, box 113, folder Correspondence 1937 (reporting that an ABA committee had concluded that the best means of generating popular hostility to the judiciary was to create a series of radio broadcasts featuring “famous case[s] in which personal rights have been upheld by the Supreme Court”).
  149. See, for example, George Wharton Pepper, “Plain Speaking: The President’s Case Against the Supreme Court,” *ABA Journal* 23 (1937), 247–51; Warren Olney Jr., “The President’s Proposal to Add Six New Members to the Supreme Court,” *ABA Journal* 23 (1937), 237–41; William J. Donovan, “An Independent Supreme Court and the Protection of Minority Rights,” *ABA Journal* 23 (1937), 254–60. For further discussion, see Weinrib, *Taming*, chapter 6.
  150. ACLU Board Minutes, August 8, 1938, ACLU Papers, reel 156, vol. 1079.
  151. For example, Russell L. Greenman, “New Government Hurdles for Business,” *Nation’s Business*, October 1939, 19 (noting the ACLU’s defense of the Ford Motor Company’s right to distribute anti-union literature and observing that “Henry Ford and the Civil Liberties Union make strange bedfellows”).
  152. See, for example, Roger Baldwin, Speech at ACLU Annual Meeting, February 19, 1934, ACLU papers, reel 105, vol. 678 (“The real fight is on the job, not in Washington”); Roger Baldwin to John S. Codman, July 7, 1937, ACLU papers, reel 142, vol. 969 (explaining his commitment to “keeping the public authorities neutral in ... strikes”).
  153. Frank J. Hogan, “Justice, Sure and Speedy, for All,” Address to the Annual Meeting of the ABA, 29 July 1938, Papers of Grenville Clark in the Dartmouth College Library, ML-7, Rauner Special Collections Library, Hanover, NH, box 83, folder 45.
  154. *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

History cannot tell us whether law is compatible with justice. Still, there is much to be gained by exploring how legal actors have understood the relationship between the two. Recovering past perceptions of law's possibilities can point the way to unfamiliar and unexpected approaches to legal change. It can also alert us to hidden dangers. It can challenge us to confront whether, after intoning them time and again before judge and public, we have begun to believe our own fictions.

The early architects of the modern civil liberties movement – and, more tendentially, of American constitutional liberalism – did not believe that courts were dispensers of justice. Some considered them an untapped resource: an instrument of state power, like any other, that might be steered toward desirable ends. Others thought the dangers of a strong state exceeded the dangers of an unconstrained industrial capitalism – that justice was achievable “by economic power and organized pressure alone,”<sup>155</sup> and that the judiciary (though itself, concededly, a state actor) was the institution best equipped, by structure and precedent, to insulate labor's most powerful weapons against government intervention. Before World War I, Clarence Darrow emphasized the “impossibility of the weak to use the machinery” of the law, and the “ease with which power can use it against the weak.”<sup>156</sup> By the time President Roosevelt announced his Court-packing plan, Darrow had revised his views. He continued to believe that it was “sometimes impossible” to “reconcile the law with justice and human progress.”<sup>157</sup> Still, he rose to the defense of the institution he had long condemned. “There isn't much freedom anyway,” he observed, “and we might as well hang on to what we have.”<sup>158</sup> A few years later, many within the ACLU made a still bolder claim. They came to regard the judicial protection of civil liberties as the signature contribution of American democracy, as well as the organization's foremost goal.<sup>159</sup>

The ACLU's unfolding approach to litigation during the interwar period yields several basic insights into the nature of legal advocacy. First, there are other avenues for the pursuit of constitutional change than court-centered litigation. This, of course, is a familiar notion from the literatures on popular constitutionalism and constitutionalism outside the courts, which have amply documented the limited capacity of the judiciary, in comparison with the political branches, to secure substantive equality and economic justice.<sup>160</sup> And

155. Resolutions, Conference on Civil Liberties under the New Deal, December 9, 1934, ACLU Papers, reel 110, vol. 721.

156. “Testimony of Mr. Clarence S. Darrow – Recalled,” CIR Report and Testimony, vol. 11, p. 10799.

157. “Clarence Darrow Is Dead in Chicago,” *New York Times*, March 14, 1938.

158. Op. cit.

159. ACLU, *Presenting the American Civil Liberties Union, Inc., November 1941* (New York: 1941), 3 (expressing that Supreme Court decisions “in case after case [had] firmly established the interpretations of the Bill of Rights which the Union supports”); Baldwin, “Introduction,” p. xii (“[T]he whole court system, top to bottom, federal and state, is the proper and natural ally of citizen's rights, and for the ACLU, with its appeal to law, it is the essential forum.”).

160. Scholarship stressing the limitations of the judiciary, in comparison with other institutions, in mitigating social and economic inequality include Forbath, *Shaping*; Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence*

yet, the same insights apply in areas that legislators and administrators have neglected – indeed, in the domain of “negative” rights, including expressive freedom, where state action has often been regarded as a threat instead of a solution.<sup>161</sup> Between 1920 and the late New Deal, advocates of labor’s rights pursued their agenda through legislation, administration, and economic pressure in addition to the courts. The ACLU, too, experimented with these methods, and many within the organization believed its objectives would fare best by curbing judicial power.

It is telling that the ACLU understood the constitutional enforcement of free speech as fully compatible with constraining courts’ injunctive power in the context of labor disputes. In fact, for the ACLU, the two approaches served the same goal. Just as the labor movement had sought to mark off labor relations as an arena of private power by curtailing “government by injunction,” the Supreme Court’s emerging civil liberties jurisprudence maintained state “neutrality” in the face of competing interests.<sup>162</sup> For the ACLU leadership, the two developments were variations on a theme, and the organization was almost as instrumental in securing the Norris-LaGuardia Act as it was in establishing a constitutional right to free speech.<sup>163</sup> The ACLU’s longstanding commitment to the right of agitation turned on shielding strikes and boycotts from state interference. Whether that

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(Durham, NC: Duke University Press, 1993); Frank I. Michelman, “Socioeconomic Rights in Constitutional Law: Explaining America Away,” *International Journal of Constitutional Law* 6 (2008), 663–86; Martha Nussbaum, “Foreword: Constitutions and Capabilities: ‘Perception’ Against Lofty Formalism,” *Harvard Law Review* 121 (2007), 4–97; Karen Orren, *Belated Feudalism: Labor, the Law, and Liberal Development in the United States* (New York: Cambridge University Press, 1991); Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge, MA: Harvard University Press, 1992); Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920* (New York: Cambridge University Press, 1982); Cass R. Sunstein, *The Partial Constitution* (Cambridge, MA: Harvard University Press, 1993). Cass R. Sunstein, “Why Does the American Constitution Lack Social and Economic Guarantees?,” *Syracuse Law Review* 56 (2005), 1–26.

161. See, for example, Frederick Schauer, “The Exceptional First Amendment,” in Michael Ignatieff (ed.), *American Exceptionalism and Human Rights* (Princeton, NJ: Princeton University Press, 2005), p. 46 (“The Constitution of the United States is a strongly negative constitution, and viewing a constitution as the vehicle for ensuring social rights, community rights, or positive citizen entitlements of any kind is, for better or for worse, highly disfavored ... And while the libertarian culture that such attitudes of distrust engender is hardly restricted to freedom of communication, this skepticism about the ability of any governmental institution reliably to distinguish the good from the bad, the true from the false, and the sound from the unsound finds its most comfortable home in the First Amendment”). For a defense of the negative-positive distinction in describing the “lived experiences” of constitutional activists, see Emily Zackin, *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America’s Positive Rights* (Princeton, NJ: Princeton University Press, 2013), pp. 42–7.
162. For discussion of labor’s attacks on “government by injunction,” see Forbath, *Shaping*, pp. 59–97.
163. For example, ACLU, *Sweet Land of Liberty, 1931–32* (New York: 1932), p. 16 (describing the Norris-LaGuardia Act, which the ACLU had played an “active part” in promoting, as the only recent victory for civil liberties).

end was achieved by curtailing the jurisdiction of the federal courts or by expanding the scope of the First Amendment to encompass labor activity was a matter of expediency – however inconsistent the strategies appeared vis-à-vis judicial power.

Second, adopting a court-based strategy for effecting social change does not necessarily imply an endorsement of the judicial forum. There are multiple ways of pursuing justice through the courts. In its early years, the ACLU anticipated judicial defeat. By raising consciousness of law's injustice, it hoped to instantiate justice through extra-legal means.<sup>164</sup> The early ACLU described the right of agitation as a “natural right – prior to and independent of constitutions.”<sup>165</sup> Rather than pushing law to accommodate moral claims, it sought to modify public morality through a critique of law. That is, by exposing law's failings, it hoped to move the class war to the arena of private power.

Gradually, the ACLU moderated its structural critique. In its second phase, it believed that incremental change could move the courts toward a more just result, even if the system itself was irredeemable. Its leaders still anticipated that meaningful social change was beyond law's domain, but they were willing to use the courts to preserve the channels of communication and the tools of collective action. Only in its final phase did the ACLU come to understand the courts as an implement of justice – as the sole sustainable constraint on the tendency of popular majorities to trample minority rights.

Third, and more tentatively, the ACLU's eventual embrace of constitutional liberalism gestures toward the limits of law's neutrality – a basic component of rule-of-law – as a marker of legal justice. Underlying imbalances in the allocation of power and resources made any such conclusion untenable. In Darrow's pithy formulation, “the law is equal, all right, but it catches the poor man only.”<sup>166</sup> By the same token, it was a frequent refrain of the early ACLU that groups secured their legal rights “in proportion to their power to take and hold [them].”<sup>167</sup> The ACLU's lawyers understood the allocation of rights as a zero-sum game, and they acknowledged that their goal was to upset the existing order. To cite a poignant example, some went so far as to defend the sit-down strike in civil liberties terms: neither the state nor the courts, they argued, were constitutionally empowered to defend the rights of property when the “right of agitation” was at stake. “I suppose that almost everything that Labor has done for itself on emancipation was illegal at first and was finally legalized, because men had the courage to defy the law,” one longtime member mused.<sup>168</sup> Rarely are rights claimants so forthright about the trade-offs that their assertions of rights entail.<sup>169</sup>

164. As Darrow put it, the “more you recognize the division of classes and the injustice of it, the more good it will do.” “Testimony of Mr. Clarence S. Darrow – Recalled,” CIR Final Report and Testimony, vol. 11, p. 10803.

165. ACLU, *Fight for Free Speech*, p. 5.

166. “Testimony of Mr. Clarence S. Darrow – Recalled,” CIR Final Report and Testimony, vol. 11, p. 10799.

167. ACLU, *Fight for Free Speech*, p. 5.

168. Herbert S. Bigelow to Roger Baldwin, May 15, 1937, ACLU Papers, reel 142, vol. 970.

169. Hendrik Hartog, “The Constitution of Aspiration and ‘The Rights That Belong to Us All,’” *Journal of American History* 74 (1987), 1013–34, 1019–20.

Still, the ACLU's lawyers recognized that the wholesale redistribution of rights was as unlikely in a constitutional democracy as was the wholesale redistribution of property. To be sure, they meant to dismantle one system of rights, based on property and contractual autonomy, and replace it with another. But they also assumed that the legal system was incapable of accommodating truly radical claims, and they understood the need to make concessions to existing stakeholders.

Through its cooperation with conservative lawyers, the ACLU began to reimagine the courts as a check on government's reach rather than an arm of the state. Where its New Deal allies endorsed free speech as a prerequisite for legitimate state compulsion in social and economic life, the ACLU regarded censorship as an inevitable outcrop of government authority and sought to undermine the state's monopoly on coercion. It hoped that on a level playing field, workers' private collective strength could effectively counter the power of capital. Its onetime allies reminded it, unavailingly, that background inequalities made its vision fanciful – that employer speech was “a *protected* commodity in a *monopoly* market.”<sup>170</sup>

Finally, and relatedly, tracing the ACLU's unfolding attitude toward the courts reveals the difficulty of defining justice apart from an actor's participation in the effort to achieve it. Over time, the organization refined its goals for changing circumstances and adapted its rhetoric for new allies. In a handful of 1920s cases, the ACLU's lawyers explicitly borrowed conservatives' constitutional arguments, including congressional power, substantive due process, even freedom of contract.<sup>171</sup> As they repeated those claims with increasing frequency and fervor, some came to internalize them. As they won in the courts, they moderated their skepticism. What began as an overtly instrumentalist approach became a genuine belief in law's neutrality. “We are neither anti-labor nor pro-labor,” Roger Baldwin reflected in 1940. “With us it is just a question of going wherever the Bill of Rights leads us.”<sup>172</sup>

In one sense, there can be no better case through which to study why social actors pursue constitutional strategies than a group of disabused progressive reformers whose earlier efforts to effect social change succumbed to constitutional claims by their perceived oppressors. These were no doe-eyed adherents to an inherited tradition of

170. “Civil Liberties and the NLRB,” International Juridical Association, reprinted from speech by Nathan Greene, 8 March 1940, p. 5 (emphasis in original), in Maurice Sugar Collection, Walter P. Reuther Library of Labor and Urban Affairs, Wayne State University, Detroit, MI, acc. 232, folder 54:17.

171. For example, *Scopes v. Tennessee*, 152 Tenn. 424 (Tenn. 1925); Brief to Supreme Court of Tennessee, John Thomas Scopes vs. State of Tennessee, No. 2. Rhea County Criminal Docket, September Term, 1925, 278 S.W. 57 (Tenn. 1925), pp. 64–6, ACLU Papers, reel 38, vol. 274 (arguing that legislatures were confined to “limited purposes” and that the state statute prohibiting the teaching of evolution in publicly funded schools had denied John Scopes of the “right properly to practice his profession”).

172. Alexander Crosby, “Baldwin Denies Civil Liberties Union Is Turning Against Labor,” March 7, 1940, in Gardner Jackson Papers, 1912–1965, Franklin D. Roosevelt Presidential Library, Hyde Park, NY, General Correspondence, container 3.

constitutional celebration. They were acutely aware of both the pitfalls and power of a court-based, constitutional approach. But the same strategic awareness that makes their reflections on constitutionalism so poignant may also render them outliers in the historic struggle for constitutional rights. Perhaps their self-conscious strategizing bears little resemblance to later generations of rights claimants: racial minorities, women, gay men and lesbians, and other aspiring beneficiaries of constitutional legitimacy. Perhaps by investing in judicially enforceable constitutional rights, civil libertarian cynics restored a bit of their mythical sheen.

At bottom, the ambivalence and experimentation of the interwar ACLU serve as a reminder that our legal regime is neither timeless nor inevitable. It was the product of political circumstances and practical choices: increasingly sympathetic judicial appointments, unprecedented threats to business interests, widespread skepticism toward the legitimacy of the courts. In the run-up to the Constitutional Revolution, even the most impassioned defenders of the courts were not naïve. They sought to rehabilitate the judiciary because they deemed it preferable for particular ends, channeled through particular theoretical precepts. When today we recite old mantras about the value of unfettered discussion, the dangers of state suppression, and the unique capacity of the courts to constrain majoritarian abuses, we would do well to remember how and why historical actors manufactured those commitments. If our ends are not theirs, we might ask whether other ideals and institutions are better suited to achieving them.

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