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The Liberal Compromise: Civil Liberties, Labor, and the Limits of State Power, 1917-1940

Laura M. Weinrib

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THE LIBERAL COMPROMISE
CIVIL LIBERTIES, LABOR, AND THE LIMITS OF STATE POWER, 1917–1940

Laura M. Weinrib

A DISSERTATION
PRESENTED TO THE FACULTY
OF PRINCETON UNIVERSITY
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ABSTRACT

This dissertation traces the emergence between World War I and World War II of a state-skeptical, court-centered, and content-neutral model of civil liberties in America. It argues that the new understanding drew from competing traditions of progressive reformism and conservative legalism. The American Civil Liberties Union reformulated those competing traditions, primarily through efforts to resist the cooptation and coercion of the working class by the capitalist state. More broadly, the dissertation suggests that the interwar civil liberties movement was an important architect of the post-New Deal constitutional order, which paired congressional regulation of the economy with judicial enforcement of state neutrality in the democratic decision-making process.

The ACLU’s initial theory of civil liberties derived from the principles of labor voluntarism. Its central commitment was to a “right of agitation,” bound up with the rights to picket, organize, and strike. In the early 1920s, however, economic prosperity and the resulting decline in industrial conflict opened space for the organization to venture into new fields and form new partnerships without reassessing its underlying commitment to radical laborite ideals. Although ACLU lawyers were initially skeptical of rights-based litigation, which they associated with the substantive due process decisions of the *Lochner* era, their successes in such areas as academic freedom and sex education attracted conservative proponents of individual rights and helped to rehabilitate the judiciary as a forum for progressive reform.

Over the course of the 1930s, a broad range of actors sought to define and mobilize civil liberties claims, including the La Follette Civil Liberties Committee, the American Bar Association’s Committee on the Bill of Rights, and the Civil Liberties Unit within the
Department of Justice. The ACLU clashed with its labor and administration allies over New Deal labor legislation, the judiciary reorganization plan, and “employer free speech.” Conservatives, in turn, adopted the ACLU’s civil liberties rhetoric in support of their own agenda. By the late 1930s, the ACLU had traded in its open endorsement of radical social change for a politically neutral commitment to the Bill of Rights, embraced by the legal establishment and enforced by the federal courts.
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INTRODUCTION

In 1945, the American Civil Liberties Union issued a statement defining the category of rights to which the organization was dedicated.¹ Civil liberties, it explained, were “guarantees to citizens” pertaining primarily, though not exclusively, to their relationship with government. They were essential to “democratic procedures” and flowed from the precepts of “a political democracy in which ultimate power rests in the people, and in which minority rights are as essential as majority rule.” They derived from the federal Bill of Rights and its state counterparts, and they encompassed the “freedom from governmental interference with citizens’ liberties, of protection of those liberties where necessary by government itself, and of the equality of all citizens in the exercise of rights.” According to the ACLU, the state had a role to play in providing and protecting a forum for public debate, but it was never justified in curtailing disfavored views, “however radical or reactionary.”²

The ACLU’s postwar vision of civil liberties was colored by international events, organizational politics, and a quarter-century of steady gains in the courts and in public opinion. More than anything, however, it was shaped by federal labor policy. When the ACLU was founded in the aftermath of the First World War, it declared itself an adjunct of the radical labor movement. Its defense of free speech was motivated by a deep-seated distrust of state power,

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¹ It is often difficult to distinguish the institutional voice of the ACLU from that of its various constituents. Where possible, I designate the particular speaker or group of speakers.
² Civil Liberty: A Statement Defining the Position of the American Civil Liberties Union (New York: ACLU, 1945).
stemming from decades of hostile government policy.\(^3\) That concern persisted until the early New Deal. As ACLU co-founder Roger Baldwin recalled decades later, the organization’s leaders were concerned that the administration of President Franklin D. Roosevelt would bleed into a “centralized Fascist state,” but the National Labor Relations Board convinced them otherwise. They had feared that the NLRB would decline to protect the rights of labor, but in practice “it served as one of the most impressive landmark agencies in civil liberties and industrial peace.”\(^4\)

The ACLU’s acceptance of central state authority went hand in hand with a new and lasting deference to the federal courts. During the 1920s, faced with the federal judiciary’s eagerness to protect property rights against encroachment by state and federal legislation, the ACLU had been reluctant to invite judicial intervention on behalf of individual rights. By the 1940s, the organization’s “battleground [was] chiefly in the courts.”\(^5\) Its volunteer attorneys had carried “scores of civil liberties issues” to the United States Supreme Court, “where decisions in case after case [had] firmly established the interpretations of the Bill of Rights which the Union supports.”\(^6\) Over the following decades, the ACLU would continue to pursue such non-judicial methods as lobbying, grass-roots organizing, and cooperation with administrative agencies. At

\(^3\) “Free speech” and “civil liberties” are not synonymous. Rather, free speech is a subset or component of a broader category captured by the latter term. Although both ideas were in flux during this period, free speech was more stable and entailed, at the minimum, a commitment to public discussion of lawful political decisions.


\(^6\) American Civil Liberties Union, *Presenting the American Civil Liberties Union, April 1947* (New York: American Civil Liberties Union, 1947), 5.
times, when the courts seemed unusually unfriendly to civil liberties claims, it would emphasize legislation or education. Still, the organization’s mature view was unmistakable: “the whole courts 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.”

The ACLU’s twin commitments to a robust federal government and to strong federal courts reflected a distinctly modern approach to civil liberties. The ACLU, like the liberalism of which its “card-carrying members” were emblematic, had come to accept as necessary and desirable the New Deal expansion of central state authority over vast swaths of social and economic relations. The rights it championed—expressive freedom, but also sexual autonomy, personal privacy, and procedural protections for criminal defendants—were articulated not in opposition to state power, but as its natural complements. In the ACLU’s conception, these protections were crucial because they ensured that democratic government would reflect the diversity of human viewpoints and experiences, making the legitimate exercise of federal power possible.

By conventional accounts, the new arrangement—judicial deference to state economic policy coupled with strong safeguards against government interference as that policy was formulated and enacted—was heralded by the Supreme Court’s fourth footnote of Carolene Products. This dissertation suggests that the theory of government embedded in footnote four was not a spontaneous solution by federal judges struggling to balance political will against minority rights. Nor was it, as some have suggested, primarily a response to fears stemming

7 Baldwin, “Introduction,” xii.
from the rise of totalitarianism in Europe.\(^8\) Rather, it was the articulation of two decades of negotiations between state-centered progressive reformism (with its attendant distrust of the Constitution and the courts) on the one hand, and conservative legalism (friendly to both industry and individual autonomy) on the other. Crucially, the compromise approach was brokered by the ACLU in its effort to resist the cooptation and coercion of the working class by the capitalistic state.

In short, the dissertation argues that the ACLU—guided by the lessons and ambitions, if not always the tenets, of the radical labor movement—was an unsung architect of the post-New Deal constitutional order.\(^9\) Its early theory of civil liberties derived from the principles of labor voluntarism, and during the 1920s, its rejection of state intervention in the context of labor disputes paradoxically allied it to conservative proponents of individual rights.\(^10\) For the most part, representatives of the early ACLU defended labor radicals and political dissenters by reference to constitutional rights because rights-based litigation proved effective. They believed in “agitation,” not individual liberty. Over time, however, many (though not all) internalized their commitment to free speech as an abstract value; their insistence in public communications


\(^9\) While legal histories, as well as constitutional law casebooks, have largely ignored the ACLU’s role in these developments, the ACLU’s public literature and institutional history has claimed a foundational role for the organization in the rise of modern American governance, albeit in a celebratory mode. See, e.g., American Civil Liberties Union, “ACLU History,” Web. 1 February 2011 <http://www.aclu.org/aclu-history> (“The advancement of civil liberties over the past century represents one of the most significant developments in American history, and the ACLU has been integral to this process.”).

\(^10\) On the conservative civil libertarian tradition, see Kenneth I. Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* (New York: Cambridge University Press, 2004); David Bernstein, *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform* (Chicago: University of Chicago Press, in press). Although conservative jurists occasionally upheld the contractual rights of minorities, they rarely if ever defended the rights of workers to organize or picket or the rights of radicals to promote their ideas.
that their defense of radicals’ right to speak did not imply agreement with their underlying views rang increasingly true. As early as October 1928, Arthur Garfield Hays, general counsel for the ACLU and a committed civil libertarian, argued that radicalism was ill-advised and that “the solution of our economic problems must be accomplished by education and law, not by revolution.”\textsuperscript{11} Though for a time they remained fellow travelers, the leadership of the ACLU clashed with their radical allies. Over the course of the 1930s, they unhooked their leftist ambition for substantive equality from the freedom to espouse it. By the late New Deal, the ACLU had traded in its open endorsement of radical social change for a politically neutral commitment to the Bill of Rights.

The narrative that unfolds in these pages is not the one that I expected to find. Today, the ACLU’s Web page recounts that “the ACLU was founded to defend and secure [constitutional] rights and to extend them to people who have been excluded from their protection—Native Americans and other people of color; lesbians, gay men, bisexuals and transgender people; women; mental patients; prisoners; people with disabilities; and the poor.”\textsuperscript{12} When I came to the project, I was searching for the voices of women, of immigrants, of African Americans, of the disenfranchised. All were there. But in their conversations with and on behalf of the ACLU, they did not advocate for their rights as individuals, or even (at first) of minorities. A year after the ACLU was founded, its statement on lynching neatly summed up the organization’s approach: “We publish the pamphlet in the belief that only by frankly recognizing the economic


basis of lynching can we even begin to solve the problem. . . . Its solution is obviously bound up with the cause of exploited labor—white and black alike. And that solution will become possible only as the black and white workers of the South both achieve the right to meet, speak freely, organize and strike.”

During the 1920s and 1930s, the ACLU fought the deportation of aliens and the suppression of religious fringe groups. It defended the advocacy of birth control and of racially integrated public school. But its primary goal was always to secure labor’s rights.

The American Civil Liberties Union is at the heart of this story. But this project is not a history of the ACLU; it is a history through the ACLU. Between World War I and World War II, no organization or individual was as instrumental in shaping contemporary understandings of civil liberties. The ACLU was deeply connected to the foundational social movements of the interwar period, and it was involved in virtually every important free speech case in the federal courts between its founding in 1920 and the Second World War. According to Roger Baldwin, the ACLU was the first American organization to incorporate the phrase “civil liberties” into its title, thereby bringing it “into a wider public vocabulary.” Indeed, when conservative lawyers sought to reclaim civil liberties as an “American value” in the late 1930s, they acknowledged

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15 Baldwin, “Introduction,” iii. According to Baldwin, the incorporation of “civil liberties” into the title of the AUAM’s Civil Liberties Bureau in 1917 was borrowed from “a British war-time Council for Civil Liberties whose leaders we knew.” Ibid., viii. After the war, that organization was disbanded. A new National Council for Civil Liberties was organized in 1934. On the British civil liberties movement during and between the world wars, see K. D. Ewing and C. A. Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914–1945* (New York: Oxford University Press, 2000).
their own absence from the field for the previous decades, and they attributed it to the dominant influence of the ACLU.16

Almost all of the significant figures in the interwar effort to define and promote civil liberties were affiliated, in some capacity, with the ACLU. Between 1920 and 1940, the ACLU’s governing bodies—its National Committee and, after incorporation, its National and Executive Boards—resembled a who’s who list of influential public figures.17 They included representatives of the radical and mainstream labor movements (for example, James H. Maurer, Powers Hapgood, Andrew Furuseth, and Rose Schneiderman), the NAACP (James Weldon Johnson, Charles Hamilton Houston, and future Supreme Court Justice Thurgood Marshall), and major religious denominations (John Haynes Holmes, Rev. John A. Ryan, Rabbi Abba Hillel Silver). They attracted distinguished activists and reformers (Jane Addams, Hellen Keller, and Amos Pinchot), well known lawyers (Clarence Darrow and Dorothy Kenyon), and prominent publishers, writers, and intellectuals (B. W. Huebsch, Pearl Buck, Heywood Broun, John Dos Passos, and Upton Sinclair). They boasted high-level government officials (Frank P. Walsh and Lloyd K. Garrison), as well as eminent former and future federal judges (Charles F. Amidon, George W. Anderson, and Felix Frankfurter). Politically, they brought together leading Socialists (including Morris Hillquit, Norman Thomas, and Eugene V. Debs), Communists

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16 Grenville Clark, “Conservatism and Civil Liberty,” Address at Annual Meeting of the Nassau County Bar Association, 11 June 1938, in Arthur T. Vanderbilt Political, Professional, and Judicial Papers, Wesleyan University Collection on Legal Change, Middletown, Conn. (hereafter Vanderbilt Papers), box 127, folder Civil Liberties; “Freedom of Speech: Whose Concern?” New Northwest (Portland, Oregon), 14 March 1919, ACLU Papers, reel 5, vol. 41 (“The defense of free speech has become in this country almost a monopoly of the radicals. The conservative classes, with a few honorable exceptions in congress and in the press, have put away the ancient American faith in freedom. . . . The conservative leaders of the American bar, men like Root and Hughes and Parker, have discreetly remained out of sight.”).

(William Z. Foster), liberal Republicans (Jeanette Rankin), and even, for a time, a segregationist Southern Democrat (Thomas W. Hardwick). Many others who never joined the organization turned to it for legal representation or closely allied with it in pursuit of common goals.

In addition, the vast majority of the important theorists—legal, social, and political—who thought and wrote about free speech and its relationship to American democracy were connected with the organization. Ernst Freund and Harold Laski were founding members of the National Committee, and John Dewey and Alexander Meiklejohn both subsequently joined. Charles Beard participated in ACLU-sponsored special projects. Zechariah Chafee declined to sit on the National Committee because he believed it would compromise his perceived scholarly objectivity, but he made donations, worked closely with the ACLU leadership, and guided the activities of the Civil Liberties Union of Massachusetts.18

The ACLU’s allies and constituents during the interwar years had more disagreements than commonalities, and they arrived at civil liberties advocacy from widely divergent paths. Most, however, took up the cause during or immediately after World War I.19 In the late nineteenth and early twentieth centuries, the threat to democratic progress had taken the form of “individual rights”; invoking them, courts repeatedly (albeit infrequently, relative to their dockets) undermined government efforts to temper economic injustice. During the war, conversely, “the state” was aligned with the majority in suppressing unpopular views. This new lineup encouraged a new way of thinking about rights. Prior critics of monopoly capitalism had

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19 The ACLU’s own publications consistently cited World War I as the impetus for the leadership’s interest in civil liberties. E.g., Osmond K. Fraenkel, The Supreme Court and Civil Liberties (New York: American Civil Liberties Union, 1949), 20 (“The most important issues in modern civil liberties grew out of the First World War. Then for the first time the Court was called upon to consider the meaning of freedom of speech and of the press.”).
framed American politics as a pitched battle between corporations and constitutional conservatism on the one hand and the will of the people on the other. Wartime reformers, faced with the failings of democratic majorities and government officials, were forced to reassess their political understandings. Some turned more radical, emphasizing false consciousness, the insidious influence of the industrial lobby, and administrative capture. Others clung to their confidence in progressive governance but called upon legislators and administrators to provide space for dissent. Still others adopted a liberal ideal remarkably similar to that of the *Lochner* Court, albeit toward different ends, reimagining the Constitution as a guarantor of individual rights as against the authoritarian excesses of the state.\(^{20}\) All were disillusioned by the government’s failure to uphold democratic values. The mobilization of state actors and offices in the service of domestic repression taught them just how fickle and oppressive administrative governance can be.

The most familiar strain of interwar civil libertarianism was the progressive version espoused by civil liberties theoreticians (including Zechariah Chafee, Felix Frankfurter, John Dewey, and Alexander Meilkejohn) and by a few sympathetic jurists (most famously Judge Learned Hand and Justices Louis Brandeis and Oliver Wendell Holmes). To varying degrees, these figures emphasized the capacity of free speech to inform democratic decision-making or to flush out political truth. Although they harbored serious reservations about the underlying beliefs of the wartime dissenters, they regarded civil liberties as fundamental to the rule of law. During the 1920s, they appreciated the dangers of excessive emphasis on the public interest, 

\(^{20}\) Early civil libertarians imagined rights against popular pressures (for example, mob violence) and private actors (most notably employers) as well as state power. On the importance of mob violence to the World War I civil liberties movement, see Christopher Capozzola, *Uncle Sam Wants You: World War I and the Making of the Modern American Citizen* (New York: Oxford University Press, 2008).
majority will, and administrative consensus. Moreover, they knew that social science solutions were only ever as good as the research and theory on which they relied, and they understood that accepted methods were always evolving and incomplete. They acknowledged the coercive power of the state—even, or particularly, a popularly elected one—to reinforce dominant narratives.

Most, however, accepted the administrative state as an abiding feature of modernity. Some fretted about “bigness” in government as an analog to the industrial consolidation of wealth, but they never made a concerted effort to turn the tide of central state growth. Instead, they sought to introduce protections for inadequately represented groups into the exercise of federal power (though not, primarily, through the courts). The prewar progressives had celebrated bureaucrats for their insulation from political will, but it had since become evident that neutrality was illusory—industrial interests had consistently managed to assert their influence—and ill-advised. Their interwar counterparts instead called for accountability to a broad range of public voices. They sought to ensure that the state, despite and because of its

21 ACLU attorney Morris Ernst’s 1940 book Too Big was planned in conversation with Louis Brandeis and was intended as an update to the well-known volume of the latter’s assembled works, The Curse of Bigness (1934), which was edited by another influential ACLU lawyer, Osmond Fraenkel. Morris Ernst, Too Big (Boston: Little, Brown and Co., 1940); Louis Brandeis, The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis, edited by Osmond K. Fraenkel (New York: Viking Press, 1934). Ernst’s friends and colleagues within the New Deal administration were skeptical of his critique of bigness, including, most notably, Jerome Frank, who took him to task for undervaluing New Deal efficiency and for celebrating states’ rights, among other positions. Jerome Frank to Morris Ernst, 25 September 1939, in Morris Leopold Ernst Papers, 1888–1976, Harry Ransom Humanities Research Center, University of Texas at Austin (hereafter Ernst Papers), box 10, folder 4. On the other hand, Ernst’s distrust of the new, vast bureaucracy was shared by many former Progressives, including John Dewey and Zechariah Chafee—and, of course, by Brandeis. See Mark A. Graber, Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism (Berkeley: University of California Press, 1991), 81, 135.

22 For example, Zechariah Chafee sought to persuade Congress and the people that free speech served the public interest but, like many of his Progressive colleagues, questioned the authority of the courts to override explicit legislative policy prohibiting speech. In his later years, however, Chafee came to doubt whether Congress was as capable as the courts were of safeguarding individual liberties. Jonathan Prude, “Portrait of a Civil Libertarian: The Faith and Fear of Zechariah Chafee, Jr.,” Journal of American History 60 (1973): 652–54.
unprecedented reach, would be responsive to new ideas and interests: accessible, mutable, and open to democratic change.

Like their prewar precursors, the progressive civil libertarians imagined a theory of rights that facilitated tolerance and diversity not because of the inherent autonomy and dignity of individuals, but because entrenched government interests stifle difference and progress. Zechariah Chafee explained in his seminal work on civil liberties that “the rights and powers of the Constitution . . . are largely means of protecting important individual and social interests.”

The crucial part, he explained, was finding the balance between the two.23 The solution to the growth of central state authority was not to reverse it, as conservatives and anarchists both claimed. On the contrary, it was the necessity and permanence of the wartime expansion of administrative authority that made a broader commitment to civil liberties important.24 As British civil libertarian Norman Angell observed, “The need of individuality in thought increases in direct ratio to the increasing complexity of our social arrangements. The very fact that we do need more and more unity of ACTION—regimentation, regulation—in order to make a large population with many needs possible at all, is the reason mainly which makes it so important to preserve variety and freedom of individual thought.”25

24 Reuel Schiller describes a similar process but locates the transformation in the postwar period, after “the prescriptive beliefs of prewar reformers [had been] destroyed during the Second World War.” Reuel Schiller, “Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment,” University of Virginia Law Review 86 (2000): 3–4. By contrast, I argue that civil libertarians’ distrust of the administrative regulation of expression was, by the mid-1940s, already well established. Indeed, it was their interwar interrogation of administrative authority that laid the foundation for a broader postwar indictment of the New Deal regulatory state.
over the minutiae of daily life made the open and ongoing discussion of social priorities imperative.

The ACLU made liberal use of such arguments, whose most prominent proponents collaborated actively with the organization in authoring pamphlets and drafting legal briefs.\(^\text{26}\) In fact, an ACLU-commissioned treatise on civil liberties reflected in 1928 that the courts of the United States had only recently abandoned their outmoded reliance on “natural rights” for the “modern idea that grants liberty to men . . . for the sake of the state.”\(^\text{27}\) For the ACLU’s core leadership, however, the most important lesson of the government’s wartime policy was not about pluralism or public welfare. In the wake of the Bolshevik revolution, Roger Baldwin, Norman Thomas, Albert DeSilver, Walter Nelles, and the other members of the ACLU inner circle believed that the downfall of the American economic system was imminent, and desirable, in America. Although they too began as progressive reformers, they sympathized with the radicals imprisoned under the 1917 Espionage Act and had come to share the views of the dissenters. For them, the relevant civil liberty was the “right of agitation,” which encompassed the rights to picket, boycott, and strike. In their new vision, which grew out of the radical labor movement, the state was a tool of capital and inherently inimical to the public good.

The project for the interwar ACLU was to link the right of agitation to the American constitutional tradition, both normatively and doctrinally. And in that venture, the ACLU parted company from progressives and turned, ironically, to the counter-majoritarian tradition its

\(^{26}\) For example, Zechariah Chafee was the stated author of a pamphlet actually authored by Roger Baldwin, which argued against censorship in typical progressive terms. Zechariah Chafee, *The Censorship in Boston* (Boston: The Civil Liberties Committee of Massachusetts, 1929); on authorship, see Samuel Walker, *In Defense of American Liberties: A History of the ACLU*, 2d ed. (Carbondale: Southern Illinois University Press, 1999), 83.

founders had most despised. The organization took up such quintessentially progressive ventures as academic freedom, but it sought to infuse them with the authority of anti-state individualism. In the process, it reached out to conservatives, particularly lawyers, for whom individual rights were the umbrella category from which *Lochner*-era autonomy derived. And while few conservatives articulated civil libertarian arguments explicitly during this period, ACLU lawyers were borrowing their language and learning their tactics. In so doing, they achieved remarkable success where the progressives had long failed, in the most inhospitable of forums: the federal courts.

As the New Deal unfolded, however, the broad-based civil liberties coalition began to break down. During the 1920s, when there was no realistic possibility of state protection for labor’s rights, anti-state radicals, moderate socialists, progressive reformers and conservative lawyers could all sit comfortably in the same tent. In the 1930s, the prospect of state-centered reform forced civil liberties advocates within and outside the ACLU to take sides. Progressive reformers and organized labor went one way; conservative legalists the other. The ACLU’s core leadership—still hostile to the capitalist system but still fearful of state power—was reluctant to choose. Progressives dismissed what John Dewey derisively called “the individualist and laissez-faire conception of civil liberties,” but the ACLU’s leftists were not so sure. Although

29 Voicing the standard progressive line, John Dewey concluded in 1936 (with credit to Justices Holmes and Brandeis) that “the only hope for liberalism is to surrender, in theory and practice, the doctrine that liberty is a full-fledged ready-made possession of individuals independent of social institutions and arrangements, and to realize that social control, especially of economic forces, is necessary in order to render secure the liberties of the individual, including civil liberties.” John Dewey, “Liberalism and Civil Liberties,” *The Social Frontier* (February 1936), 137. See also ibid. (“Holmes and Brandeis are notable not only for their sturdy defense of civil liberties but even more for the fact that they based their defense on the indispensable value of free inquiry and free discussion to the normal development of public welfare, not upon anything inherent in the individual as such.”).
they rejected the “right to contract,” their insistence that civil liberties were pre-political checks on a coercive state was not so different from the Right’s—a kinship that their critics within the New Deal and the organized labor movement were quick to point out. In fact, the ACLU board initially opposed New Deal labor legislation, including the National Labor Relations Act. Eventually, the organization accepted and even celebrated state control in the economic sphere. It also accepted a role for government in promoting public debate and in ensuring that the channels of communication would remain open. But when it came to the content of speech, it steadfastly opposed government intervention—even when muting privileged voices or amplifying those of the disenfranchised promised to serve the interests of organized labor.

For their part, conservative groups proved just as adaptive as the early ACLU. Over the course of two decades, the ACLU had helped to move the courts from the defense of property to the defense of “personal rights.” Its lawyers cast free speech as a right against excessive administrative intrusion into private behavior and choices—a framing that was compatible with conservative reliance on individual rights. They also rehabilitated the federal courts as a vehicle for securing individual justice and minority rights against the improper exercise of state power. In the face of Franklin D. Roosevelt’s judiciary reorganization plan, conservative groups, including the American Bar Association and even the American Liberty League, touted the ACLU-sponsored civil liberties victories of the early 1930s as evidence of the necessity for judicial review. With the “constitutional revolution,” the transition was complete. Corporate lawyers exchanged the discredited rhetoric of *Lochner*-era due process for the very language that

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30 For example, Rev. John A. Ryan, a member of the ACLU’s National Committee, thought the purpose of the ACLU was “the preservation of the constitutional rights of the individual against arbitrary exercise of officials.” John A. Ryan to Roger Baldwin, 15 December 1931, ACLU Papers, reel 80, vol. 451.
the ACLU had supplied. Henceforth, the dominant conservative tactic would be to influence legislation rather than ask courts to overturn it. The ACLU had succeeded in making civil liberties a neutral commitment, not an adjunct of economic rights. In the process, it had made free speech a powerful tool for the Right.

Looking backward from 1940, Constance L. Todd, a radical journalist who was married for two decades to the ACLU’s early representative and press correspondent in Washington, D.C., reflected nostalgically on the organization’s origins: “Twenty years ago,” she wrote to Baldwin, “you . . . showed such diabolical ingenuity in devising an organization which would compel (and I use the word advisedly) the comfortable intelligent to work for socialism in the name of Consistency and the Bill of Rights.” According to Todd, the genius of the ACLU was its eclecticism, its ability to entertain competing theories while committing to none. “You obviously enjoyed practicing and demonstrating your skill as a tight-rope walker, balancing on two ropes and drawing together strange bedfellows,” she recalled. “In actuality it worked for us, and against them; though before 1914, the Bill of Rights had worked for them and against us.”

And yet, in Todd’s view, the ACLU’s success was also its downfall. The machinery of the New Deal state had sought to preserve labor’s rights at the expense of employers’ liberties. “For the first time,” presented with that trade-off, Baldwin had been forced to “choose between two sets of colleagues.” With Baldwin still at the helm, the ACLU had attained respectability, and it had disavowed its radical past. To Todd, who had once counted Baldwin as a close friend as well as a political ally, the new direction was a betrayal of the organization’s underlying ideals. Baldwin’s response was characteristically cryptic: “I am not aware of any change

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31 Constance L. Todd to Roger Baldwin, 7 May 1940, ACLU Papers, box 75, folder 11.
32 Ibid.
whenever,” he told Todd. “Your arguments are not a bit impressive, for they are all based upon the assumption that somehow or other I have changed my ‘spots’.”

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This dissertation endeavors to contribute to historical scholarship on civil liberties, the labor movement, and court-based constitutionalism, as well as theoretical discussion of the meaning and purpose of free speech. First, it addresses the origins of the distinctively legal conception of civil liberties in America. Despite a longstanding assumption that the early civil liberties movement was antagonistic to the courts, no historian has explained the interwar turn to the judicial forum. By examining how and why civil liberties advocates settled upon their litigation strategy, the dissertation demonstrates that protecting civil liberties need not have become a constitutional project. In the years after World War I, most proponents of free speech were hostile to Lochner-era legalism and preferred to pursue free speech through other channels; when they did bring their cases to court, they made common law and statutory claims. By the mid-1930s, the free speech fight was squarely on judicial terrain, and civil liberties were thoroughly constitutionalized.

Understanding this transformation casts light on the broader embrace of legalism in mid-twentieth century political culture. During World War I, efforts to preserve civil liberties through litigation were resoundingly unsuccessful. Over the course of the 1920s, however, a

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33 Roger Baldwin to Constance L. Todd, 15 May 1940, ACLU Papers, box 75, folder 11.
combination of labor quiescence, popular indifference, and judicial successes made reliance on judicially enforceable rights, especially constitutional ones, increasingly appealing. Civil liberties lawyers—ACLU attorneys, but also firm lawyers on behalf of corporate clients, as well as the ABA—were instrumental in this transition. Whereas many free speech advocates remained deeply skeptical of constitutional litigation and its language of rights, the lawyers forcefully, if sometimes reluctantly, adopted a court-based and constitutional approach that would shortly become the signature of the civil liberties movement. They selected test cases carefully, working in areas where public opinion was favorable, such as academic freedom and sex education. In contrast to their initial defense of anarchists and communists, these cases pushed courts toward a more libertarian stance without triggering public outrage.

Second, the dissertation highlights the historical specificity of the content-neutral conception of free speech. Even the most nuanced histories have assumed that “civil liberties” inevitably entailed the freedom to voice unpopular views, and they have measured the successes of advocacy groups, including the ACLU, by their adherence to that vision. Civil liberties, however, is a dynamic concept. It was during the 1920s and 1930s, decades largely neglected by historians of free speech, that the modern understanding of civil liberties took shape. In 1917,  

35 The lawyer reformers who reached maturity around the turn of the twentieth century faced a particularly unyielding dilemma. Like their colleagues, they had viewed judicial overreaching as the central impediment to the progressive reform agenda. And yet, as classically trained lawyers, they were best equipped to achieve social change through judicial channels.  

36 E.g., Jerold S. Auerbach, Labor and Liberty: The La Follette Committee and the New Deal (Indianapolis: Bobbs-Merrill Co., 1966); Kutulas, Modern Liberalism.  

37 Paul L. Murphy, The Meaning of Freedom of Speech: First Amendment Freedoms from Wilson to FDR (Westport, Conn.: Greenwood Pub. Co., 1972) is the principal resource on the civil liberties movement during the 1920s. Murphy’s history captures the competing advocates and theories of free speech during the 1920s but fails to explain why some were ultimately successful. Ibid., 92 (“In a general way, the rapid public reversal on the free-speech issue was due to a reevaluation of national trends by many people who came to the conclusion that liberty was in jeopardy. This was of necessity a very personal process, and the cumulative reaction was the sum of individual shocks at the realization that each man’s livelihood and life style might well be threatened unless events were
few Americans would have agreed upon the meaning of the term, much less endorsed free speech for dissenters. By 1940, most Americans believed that individuals were entitled to engage in any expression that did not jeopardize the immediate health or safety of others. The popularization of civil liberties over the course of the 1920s and 1930s—their transformation in just two decades into a defining feature of American democracy—was a remarkable achievement. But it was not a revolution plotted out in advance by libertarian theorists. In fact, it was a function of tactics and institutional maneuvering as much as politics and ideology.

Beginning with World War I, civil libertarians slowly divorced the free speech rights they advocated from the underlying political views of the speakers they defended. They also began to articulate a distinction between “civil liberties” and other social causes they deemed worthy, like “civil rights” and “labor rights.” In formulating their theory of free speech, they reacted to government accusations of radicalism and Soviet collaboration; the success of rights-based litigation and the corresponding failure of both direct action and of legislative and regulatory efforts; the professionalization of civil liberties advocacy; and the rise of totalitarianism abroad and administrative governance at home, among other factors. The state-skeptical, content-neutral concept of civil liberties (and, by extension, a distinctively American devotion to free speech absolutism) developed piecemeal, and as late as 1940 important government actors retained a very different understanding of the term. By teasing out the many early approaches,

quickly reversed.”). A number of studies consider civil liberties during or beginning with the New Deal. E.g., Cletus E. Daniel, The ACLU and the Wagner Act: An Inquiry into the Depression-Era Crisis of American Liberalism (Ithaca: New York State School of Industrial and Labor Relations, 1980); Kutulas, Modern Liberalism; Auerbach, Labor and Liberty.

the dissertation emphasizes the accidents, inconsistencies, and idiosyncrasies through which the contending meanings of civil liberties were winnowed down.

Finally, and most important, the dissertation introduces labor radicalism as a determinative factor in the formulation of popular and judicial understandings of civil liberties during the first half of the twentieth century. Labor historians have acknowledged the use of civil liberties rhetoric as a tool, particularly in the context of the IWW’s prewar free speech fights,39 the 1910s and 1920s boycott and picket cases,40 and the 1930s Senate Civil Liberties Committee.41 They have assumed, however, that “free speech” was a pre-existing category and that labor leaders simply used it as they found it.

Meanwhile, historians of civil liberties have largely accepted the ACLU’s explanation of its disproportionate involvement in the defense of radicals, proffered since the organization’s founding: repression primarily affected anarchists, socialists, and Communists, and so those were the constituencies whom the ACLU was most likely to serve.42 Accounts of the prewar free

42 Some of the ACLU’s important allies, including Zechariah Chafee, expressly disclaimed radical goals. E.g., Chafee, *Freedom of Speech*, 2. Even Paul Murphy, who painstakingly documented the ACLU’s involvement with labor cases in his history of civil liberties between 1918 and 1933, underestimated the organization’s radical motivations and ideology. Curiously, although he acknowledged the importance of labor in his early work, he wrote in a subsequent book that Baldwin “was in many ways a classic nineteenth-century liberal embracing many of the values which shaped Chafee’s position” and that Walter Nelles “shared many of Chafee’s views.” Murphy,
speech movement have richly documented the relationship between radicals and civil liberties
during the early twentieth century, but they have not connected the “radical libertarian” tradition
to the modern civil liberties movement.43 Histories of the ACLU have acknowledged the
founders’ radicalism but have dismissed it as youthful flirtation—an impetus for involvement in
civil liberties work, perhaps, but extraneous to the process through which civil liberties were
defined.44 Conservative legal and political theorists have emphasized the ACLU’s leftist roots to
discredit its “neutrality” even while they have accepted the organization’s mature concept of
civil liberties as the appropriate and inevitable understanding.45 On the whole, historians have
not examined the role of class conflict in the ACLU’s selection of test-cases, choice of allies, and
ideological commitments.

The records of the interwar civil liberties movement suggest that organized labor was
more than a client or beneficiary of its services. During the 1920s and 1930s, the ACLU
leadership regarded civil liberties as an instrument of working class power, indeed, as a gateway

Meaning; Paul Murphy, *World War I and the Origin of Civil Liberties in the United States* (New York: Norton,
1979), 262–63.
43David M. Rabban, *Free Speech in Its Forgotten Years, 1870-1920* (New York: Cambridge University Press,
1997). In his dissertation on the pre-World War I history of free speech, John Wertheimer identifies socialists’ free
speech fights as the source of later commitments to open-air speaking. John Wertheimer, “Free Speech Fights: The
44E.g., Donald Johnson, *The Challenge to American Freedoms: World War I and the Rise of the American Civil
Liberties Union* (Lexington: University of Kentucky Press, 1963). Robert Cottrell focuses on Baldwin’s radicalism
but views it as aberrant within the broader civil liberties movement and a pitfall for the popularization of the ACLU.
Robert C. Cottrell, in *Roger Nash Baldwin and the American Civil Liberties Union* (New York: Columbia
University Press, 2000). Peggy Lamson similarly regards Baldwin’s commitments as competing rather than
mutually reinforcing. Peggy Lamson, *Roger Baldwin, Founder of the American Civil Liberties Union: A Portrait*
wartime radicalism and reports his self-description as a “philosophical anarchist” but concludes that his “approach to
civil liberties was more a matter of temperament than ideology, a gut-level passion for justice, and a bottomless
‘capacity for indignation.’” Walker, *American Liberties*, 53. Still, Walker is attentive to the influence of Baldwin’s
radicalism on the ACLU’s changing relationship to state power. See Samuel Walker, review of *The Politics of the
45E.g., William A. Donohue, *Politics of the American Civil Liberties Union* (New Brunswick: Transaction Books,
1985) (suggesting that the ACLU did not adhere to its “nonpartisan” commitments).
to the general strike. It brought that understanding to the seminal civil liberties cases of the
1920s (not only such obvious candidates as *Gitlow v. New York* and *Whitney v. California*, but
also controversies over compulsory public schooling and evolution, including *Pierce v. Society
of Sisters* and *Scopes v. Tennessee*). Labor radicalism guided the organization’s approach to
litigation and its connection with the progressive and legal establishments through which the
values of civil liberties were promoted and institutionalized. During the 1930s, even as civil
liberties advocacy moved from the fringes to the mainstream, the principal actors within the
ACLU retained a state-skeptical relationship to state power, indelibly stamped with the
experiences and disappointments of the previous half-century. Persuaded by two decades of civil
liberties advocacy on behalf of silenced workers, the Roosevelt administration introduced
protections for labor’s rights and sought to correct power imbalances in the marketplace of ideas.
In the end, however, it was the ACLU’s vision of state neutrality that prevailed.

Bringing labor back into the history of civil liberties in America helps explain an
apparent discrepancy between free speech theory and its implementation in the courts. The
progressive theory of civil liberties, whether premised on truth seeking or on the integrity of
democratic processes, was the one expressed in the foundational free speech dissents of the
1920s. Since that time, it has been the leading model in law schools and political science
departments, where scholars have long advocated public regulation designed to increase the
quality and range of public debate. And yet, while judges have dutifully echoed the progressive
rationales, they have consistently refused to restrict hateful and abusive speech, even where it
degrades the quality of conversation and discourages broad participation. They have also

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46 *Gitlow v. New York*, 268 U.S. 652 (1925); *Whitney v. California*, 274 U.S. 357 (1927); *Pierce v. Society of
declined to curb dominating or repetitious speech, despite its tendency to drown out the “competition.” They have studiously disregarded the tendency of state neutrality to perpetuate existing power disparities and forestall social change.47

Revisiting the interwar period from the perspective of civil liberties advocacy reveals that the progressive understanding—though it found adherents within the New Deal administration as well as the ACLU—remained a marginal view among free speech practitioners, radical and conservative. At the same time, the vision of free speech espoused in 1940 by both the ACLU leadership and the ABA was a substantial departure from the atomistic individualism of substantive due process. Both groups came to believe that government should secure a forum for public debate—that it should actively promote speech, not merely tolerate it. They urged the state to prosecute hecklers and to open up street corners, meeting halls, and radio bandwidth for political discussion. In the end, their goal was not to preserve individual autonomy; they imagined a state that was nonpartisan as opposed to laissez-faire. But they were determined to ensure government neutrality in the contest between workers and industry over public opinion and public policy. That contest, in 1940, both labor and capital believed that they could win.

Exploring the tensions among the various actors agitating for free speech in this early period reveals the hidden costs of the state-skeptical, content-neutral notion of civil liberties that

47 See Robert Post, “Reconciling Theory and Doctrine in First Amendment Jurisprudence,” California Law Review 88 (Dec. 2000): 2369–70 ("American courts have consistently opted to protect individual autonomy against regulations of public discourse designed to maintain the integrity of collective thinking processes. In the area of campaign finance reform, for example, the Supreme Court has forcefully asserted that ‘the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others’ should be repudiated as ‘wholly foreign to the First Amendment.’ In contexts ranging from restrictions on pornography and hate speech to ‘right-of-reply’ statutes applicable to newspapers, contemporary advocates of the Meiklejohnian position have sharply and continuously complained of the tendency of courts to extend constitutional protection to individual rights even when the exercise of such rights ‘distorts’ public discussion by perpetuating imbalances of social and economic power. This commitment to individual rights is one of the hallmarks of our distinctively American free-speech jurisprudence.”). See also Graber, Transforming Free Speech.
remains dominant today. The reformers-turned-radicals who ran the interwar movement imagined civil liberties as a backdoor approach to a just society. They reluctantly defended the speech of racists and reactionaries, but they regarded substantive equality as part and parcel of the civil liberties agenda. Moreover, they feared oppression by corporations and private citizens just as much as government censorship. For a variety of reasons—some institutional and strategic, others political and theoretical—the leaders of the civil liberties movement disclaimed these early ambitions by the eve of World War II. The champions of neutrality were not heedless of the consequences. They understood that unrestrained expression could undermine such competing ideals as civil, political, and economic rights, and they urged careful consideration in difficult cases. In the end, however, they trusted that in the absence of state coercion, the principles of justice would prevail. Whatever its benefits, the new approach supplanted an open commitment to economic security and social equality, within and outside the civil liberties movement.  

The dissertation is divided into six chapters. The first two focus on World War I and the Red Scare and introduce the characters and concepts that drive the larger story. Chapter 1 reviews the various prewar efforts to defend free speech and describes the dominant political and intellectual climate at the outbreak of war, including the progressive ambivalence toward civil liberties claims. It also reconstructs the central engagements of the ACLU leadership during the

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48 The same trade-off is at the heart of such seemingly intractable contemporary dilemmas as the regulation of hate speech, media consolidation, and campaign finance reform.
two years prior to the organization’s founding, when it operated as the National Civil Liberties Bureau (first as an arm of the American Union Against Militarism, and beginning in 1918 as an independent body). The founders of the ACLU were concerned not only with government repression, but also with the suppression of speech by non-state entities and individuals, including employers. In some cases, they sought to use government affirmatively to restrain private interference with expression. Limited successes coupled with concerns about majoritarian abuses and unchecked bureaucratic authority shook their confidence in state solutions. At the same time, however, judicial hostility to labor, manifest in anti-labor convictions under the Espionage Act as well as older methods like labor injunctions, made the courts an unlikely venue for social change.

Chapter 2 explores the origins of what the ACLU called a “right of agitation” against entrenched industrial interests, bound up with the rights to picket, organize, and strike. The impetus for the new approach was the NCLB’s involvement with the wartime prosecution and conviction of the IWW leadership. By the end of the IWW trial, the NCLB leadership was thoroughly disillusioned with progressive reform and had come to share the IWW’s belief that the state inevitably served the interests of capital. When the ACLU was founded in 1920, it declared itself to be a frank advocate of the labor cause, and it adopted direct action as its principal mechanism for protecting civil liberties.

Chapter 3 traces the development of the ACLU’s agenda during a period when industrial conflict and direct government involvement in labor relations were at an ebb. In the early 1920s, economic prosperity and the resulting decline in industrial conflict opened space for the organization to venture into new fields and form new partnerships without reassessing its
underlying commitment to radical ideals. The ACLU’s first new project was academic freedom. Although its initial focus was the defense of radical teachers and educational institutions (in particular, the Rand School of Social Science), progressive support for academic freedom pushed the ACLU toward a more general program. By subsequently expanding its agenda to include “non-political” speech—first sex education, followed by artistic freedom and birth control—the ACLU shed much of its radical stigma and attracted significant popular support for civil liberties. In such cases as the Scopes trial, Pierce v. Society of Sisters, and United States v. Dennett, the ACLU invoked anti-state claims of individual rights on behalf of, and sometimes even in contravention of, progressive ends. In the process, it began to rehabilitate the judiciary as a tool for protecting non-economic rights. This program helped the organization to build a broad alliance in favor of civil liberties, although fundamental tensions among the various contingents remained unresolved.

The last three chapters take up the New Deal. Chapter 4 examines the ACLU’s attitude toward seminal New Deal labor policy, including the National Labor Relations Act, and its enforcement in the federal courts. The ACLU divided over the Wagner Act because its radical leadership considered it a dangerous extension of federal authority (many voiced standard Communist arguments about the path to fascism; some would have countenanced state authority in a proletarian state). Within a year of its passage, the left within the ACLU, as outside it, had rallied behind the NLRB. Nonetheless, doubts about administrative authority, fueled by the ACLU’s extension into nonpolitical fields as well as a decade of hostile labor policy, persisted. Meanwhile, the Senate’s Civil Liberties Committee, organized by Robert La Follette, envisioned civil liberties as substantive labor rights, now secured by (not against) the state and codified as
federal law. President Roosevelt’s judiciary reorganization plan was also divisive. This time, however, the left and labor lined up behind Roosevelt, while the liberals worried about the effect of a weakened judiciary on recent civil liberties gains. Many within the ACLU felt that an independent court was necessary to protect minority rights from majority power, and the ACLU Board ultimately chose not to take a position on the issue. At the same time, conservative groups ranging from the American Bar Association to the American Liberty League seized upon the Supreme Court’s new civil liberties decisions as a justification for judicial review.

Chapter 5 describes an episode that served as a testing ground for the competing understandings of civil liberties on the eve of the Second World War. In the late 1930s, Mayor Frank Hague’s tyrannical suppression of CIO meetings in Jersey City prompted civil liberties advocates from across the political spectrum to act on their convictions and, in the process, to build their constituencies. In 1938, the ACLU and CIO sued in federal court to enjoin Hague’s repressive practices. For the ACLU, Mayor Hague’s policies were equally menacing whether they targeted Nazi sympathizers or the CIO. For the CIO, by contrast, the relevant right was labor’s right to organize. In 1938, the ABA formed a Committee on the Bill of Rights and, working with the ACLU, filed amicus briefs on behalf of free speech in the Court of Appeals and the Supreme Court. A few months later, citing circumstances in Jersey City, Frank Murphy organized a Civil Liberties Division within the Department of Justice to facilitate the active prosecution of civil liberties violations by local officials. The Supreme Court’s speech-protective decision in *Hague v. CIO* enjoyed near universal support.

The final chapter describes the collapse of the short-lived consensus in *Hague*. In the run-up to the 1940 purge of communists from its board, the ACLU split over an NLRB order
prohibiting the Ford Motor Company from distributing literature hostile to organized labor. In the end, the advocates of “employer free speech” won out. Although the board squarely condemned Ford’s unlawful labor practices, it joined the ABA and industry in advocating the unrestricted right of employers to disseminate their anti-union views. When the ACLU’s former labor allies charged that it had turned against them, Roger Baldwin insisted that the best protection for workers was a strong union, not the state. Publicly, the leaders of the ACLU denied concern for labor’s substantive goals, repudiating two decades of explicit statements to the contrary. Although they privately hoped that labor would prevail in the marketplace of ideas, they championed a value-neutral Bill of Rights.
CHAPTER 1: PRECEDENTS IN THE FREE SPEECH FIGHT

When the Civil Liberties Bureau of the American Union Against Militarism opened shop in 1917, it was venturing onto a lonely field. As factories retooled for war production and troops readied for combat overseas, free speech had few outspoken advocates. Many progressives dismissed dissent as self-indulgent; whatever their individual views concerning militarism, they insisted, citizens were duty-bound to conform to the outcome of majoritarian consensus. Rule-of-law conservatives who might have been moved by appeals to fundamental American liberties were consumed with patriotic fervor. As the Department of Justice would conclude over the course of the following year, the abstract defense of free speech, while not strictly treasonous, was a backhanded assault on the state.

Historians have generally regarded the First World War as the central impetus for the modern civil liberties movement.¹ Before it, there was no general commitment to civil liberties under federal constitutional law. Although free speech was regularly touted as a central feature of American democracy, it was subject to significant limitations in the courtroom and in popular understandings.² State constitutions often protected personal liberties, but enforcement was a matter of local discretion, and there was little tolerance for expression that threatened polite society, let alone the security of the state. For most Americans, the right to speak freely was conditioned on the speaker’s civilized conduct and compliance with social norms.

¹ Murphy, Origin of Civil Liberties, 18–21, contains a useful review of the literature prior to 1980. More recent accounts include Capozzola, Uncle Sam Wants You; Kutulas, Modern Liberalism; Graber, Transforming Free Speech; Rabban, Forgotten Years; John Fabian Witt, Patriots and Cosmopolitans: Hidden Histories of American Law (Cambridge: Harvard University Press, 2007).
In the conventional understanding, World War I generated a new and potentially powerful alliance between progressives and liberal lawyers on behalf of expressive freedom. Although their defense of free speech produced few concrete gains during the war, it laid the groundwork for the emergence of a true civil liberties commitment after the armistice. Disillusioned by the failure of the war to make the world safe for democracy and distressed by the unprecedented extent of the postwar repression, they reinvented free speech as a means of advancing the public interest and defusing social conflict. For the first time, the argument goes, scholars, judges, and public officials imagined a marketplace of ideas, where theories and thinkers would battle it out and the best one would be the last to remain standing.

This conventional story is only partly true. It is certainly the case that legal claims to free speech premised on the First Amendment rarely succeeded in the federal courts in the nineteenth and early twentieth centuries. During that period, some lawyers defended radical expression in a language that mobilized the Constitution and that resembled, anachronistically, the understanding of civil liberties that emerged after World War I, but these efforts made little headway in the courts.³ It is also undeniable that the war and the ensuing Red Scare prompted reevaluation of the importance of free speech. Organization and advocacy on behalf of civil liberties were in shambles at the close of the war, but as the wartime exigencies dissipated and repression continued, many Americans within and outside the political and legal establishments began to espouse greater tolerance for dissent and stronger adherence to the rule of law.

What most of these figures demanded in the realm of free speech was, however, little more than a return to normalcy. The proponents of free speech during and immediately after the war were borrowing from tropes and tactics developed by progressives over the previous two

³ See generally Rabban, Forgotten Years; Wertheimer, “Free Speech Fights.”
decades. To be sure, they readjusted the rank of expressive freedom in the hierarchy of progressive values; the specter of mob violence and mass hysteria had emphasized the high toll of enforced uniformity on public wellbeing. Moreover, a substantial number of the interwar civil liberties advocates—including some very important ones, like Oliver Wendell Holmes—came to recognize free speech as indispensible to democratic progress only after the war. Finally, many were motivated by new concerns, including the rapid expansion of the administrative state. Nonetheless, the dominant theories of civil liberties in 1920 were not new in any significant way.

The ACLU’s vision of civil liberties was an exception. During World War I, its precursor, the National Civil Liberties Bureau (NCLB), actively defended radical dissenters. For approximately six months, between the summer of 1917 and the following January, the leadership of that organization tested the full panoply of prewar civil libertarian arguments in defense of dissenting speech. Under the conditions of war, the individualist rhetoric of anarchists and free-lovers, the classical liberal language of individual rights, and the progressive commitment to robust public discussion of social problems were all inadequate to disrupt the forces of repression. In the progressive calculus, free speech was valuable only insofar as it served the broader public welfare—and during wartime, immediate national interests seemed to outweigh theoretical considerations. Government officials were unreceptive to outmoded notions of natural rights and too preoccupied with wartime economic production to risk its disruption by radical labor. The federal courts, though ostensibly committed to individual autonomy, were too protective of private property and too deferential to military necessity to countenance agitation. And the emerging civil liberties advocates were themselves uneasy about their path. As veteran progressive reformers, they resented the judiciary’s intervention with the products of democratic consensus; as advocates of radical labor, they confronted the majoritarian
distaste for the unpredictable and the unknown. At the end of the war, the NCLB was still formally intact, but its co-founder was in prison and its wartime policies had proven almost entirely ineffectual.

When they founded the ACLU in 1920, the veterans of the NCLB would seek out new solutions for protecting unpopular minorities, consistent with their underlying objective of fundamental social change. They would formulate a theory of civil liberties that melded progressive confidence in deliberative democracy with labor radicals’ skepticism toward the machinery of the state. Ultimately, their efforts would render free speech a fundamental American value, respected by government actors and upheld in the courts. In 1917, however, all that was in the future. The wartime agenda of the NCLB was not the beginning of a new era in civil liberties advocacy. It was the end of the old.

*The AUAM*

In the fall of 1914, as Europe reverberated with the clamor of artillery fire, a group of self-described progressives in New York City gathered informally to discuss strategies for keeping America out of war. Although they came to few definite conclusions, they sensed a need for an organization uniting the various forces opposed to American military intervention abroad. Known initially as the Henry Street Group, the new body went by a variety of names over the coming years, but its best known, the American Union Against Militarism, reflected its underlying objective: to “guard against militarism” and to “build toward world federation.”

In 1915, despite early assurances that he would avoid military engagement, President Woodrow Wilson embraced the mounting demand for preparedness. In December, as Wilson’s

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proposal for a federal militia was debated in Congress, the Henry Street Group convened a national conference. Out of that meeting, the “Anti-Preparedness Committee” was born. In the spring of 1916, the APC became the AUAM. And within a year, it was a sprawling organization with branch offices throughout the United States and fifteen hundred active members.\(^5\)

The makeup of the group was uncontroversial. Its principal constituency was social workers, but it also included academics, clergy members, writers, and newspaper editors. Notable members included Lillian Wald, director of New York’s Henry Street Settlement House; Paul Kellogg, editor of a social work periodical called the *Survey*; Jane Addams, founder of Hull House in Chicago; Rabbi Stephen Wise; Unitarian minister John Haynes Holmes; Oswald Garrison Villard, publisher of the *New York Evening Post* and *The Nation*; and Crystal Eastman, a leader of the Woman’s Peace Party and future co-founder of the NCLB. The organization’s message, while by no means universally endorsed, was a respectable one, and it attracted considerable support within and outside government.\(^6\)

For the next year, the AUAM generated popular enthusiasm for the anti-preparedness cause. Mass meetings throughout the country drew huge crowds. Organizers lambasted preparedness but were careful not to criticize the President.\(^7\) Moreover, the AUAM exercised considerable influence with both the Administration and Congress. Jane Addams (officially on behalf of the Woman’s Peace Party) was invited to address the House Committee on Military Affairs, and Wilson received an AUAM delegation and assured it that preparedness would keep the country out of war. In June, Wilson signed the National Defense Act. Although it provided for a significant expansion of the National Guard, it was limited in scope, and the AUAM was

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\(^5\) Johnson, *Challenge to American Freedoms*, 5.
\(^6\) Its supporters included William Jennings Bryan, Wilson’s Secretary of State until June 1915, and former President William Howard Taft. Ibid., 5.
\(^7\) Ibid., 7.
gratified that it did not authorize conscription. Meanwhile, diplomatic developments were promising. In May 1916, Germany pledged to provide adequate warning before attacking merchant and passenger vessels. By the summer of 1916, the AUAM was satisfied with its successes and considered its work largely accomplished.8

All that changed with Germany’s decision in February 1917 to reinstate its policy of unrestricted submarine warfare on vessels carrying supplies to its enemy, Britain. Within a matter of days, the AUAM’s earlier gains were all but irrelevant. The nation was marching swiftly toward war, and the AUAM was powerless to stop it. Indeed, many within the AUAM had no interest in doing so.

Over the ensuing weeks, the members of the AUAM scrambled desperately and divisively to redefine their position. Some, like Rabbi Stephen Wise and Oswald Garrison Villard, thought the change of circumstances warranted reconsideration of the desirability of war. Others, though horrified at the new German policy, were resolutely against a military solution.

Norman Thomas, the Presbyterian minister who would go on to lead the Socialist Party, proposed a possible strategy. Falling back on a time-worn progressive tactic, he urged the AUAM to organize a campaign for a “war referendum” in order to persuade government officials that ordinary Americans continued to oppose intervention. As with the suffrage and Prohibition movements, the “combination of agitation with direction” would arouse the people to action.9 The AUAM adopted the suggestion, apparently unconcerned that popular support might be mobilized in favor of nationalist militancy. Later that month, the executive committee discussed the agenda for its upcoming meeting with President Wilson. In addition to soliciting his support for a national referendum, the AUAM delegation would fight another losing battle: they would

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8 In fall 1916, the Board considered disbanding. Ibid., 8.
9 Norman Thomas to the Executive Committee of the AUAM, AUAM Minutes, 10 February 1917, AUAM Papers, reel 10-1.
seek to persuade him that conscription was a threat to the national interest. These efforts were fruitless. War was declared on April 6, 1917, and conscription was established six weeks later.

One month before the impending declaration of war, the AUAM board recruited a new member. Roger Baldwin, at that time a prominent St. Louis reformer, quickly assumed a leading role in framing the organization’s wartime policy. By June, the AUAM was ready to announce its “war time program.” Its second objective, “a just and lasting peace,” was the organization’s standard fare. It involved working toward a clear statement of America’s peace terms, demand for publication of international agreements, and laying the foundation for “world federation” at the end of the war. Baldwin, however, had a different and more immediate program in mind. His project, developed in cooperation with Crystal Eastman, fell under the heading “work against militarism.” It entailed opposition to the permanent establishment of conscription, legal advice to conscientious objectors, and, most important, the maintenance of “civil liberty in war time.”

Liberty in the Progressive Era

The decision to reorganize as a civil liberties bureau was not an obvious one for the AUAM. The problem lay not so much in conservative opposition, though government hawks and self-styled patriotic groups did indeed regard the strategy as a cover for subversive activity. Rather, the central obstacle was an internal one. At the outset of World War I, the defense of dissenters had few progressive champions. Even progressive lawyers subjected civil liberties to a demanding balancing test. Roscoe Pound, the architect of sociological jurisprudence, declared

10 AUAM Minutes, 27 February 1917, AUAM Papers, reel 10-1.
11 “Past Programs of the American Union Against Militarism (for reference),” AUAM Papers, reel 10-1.
that “in jurisprudence . . . the whole doctrine of natural rights has been definitively abandoned”\textsuperscript{13}; free speech warranted protection only to the extent that it promoted the public welfare.\textsuperscript{14} To a coalition of progressive reformers, endorsing a right to wartime dissent risked a costly miscalculation of public benefits and harms.

Between the turn of the century and the outbreak of World War I, Americans who regarded themselves as progressives were an odd assortment. Their agenda encompassed such far-ranging projects as tenement housing laws, food and water safety, municipal ownership of public utilities, the income tax, women’s suffrage, eugenics, and prohibition. And the differences among them on these and many other issues were sufficiently fundamental to render the label “progressive” confusing, if not meaningless.\textsuperscript{15} Despite their many disagreements, however, the progressives shared a distinct lack of enthusiasm for federal courts and for constitutional rights-based claims, which together had operated to defeat many of the most important progressive initiatives. Indeed, the rejection of the autonomous individual was one of the few threads unifying progressive thought.\textsuperscript{16}

\textsuperscript{13} Quoted in David Wigdor, Roscoe Pound: Philosophy of Law (Westport, Conn.: Greenwood Press), 276. Pound believed that the crucial task of legal doctrine was to “free individual capacities in such a way as to make them available for the development of the general happiness or common good.” Roscoe Pound, “Interests of Personality,” Harvard Law Review 28 (1915): 347.

\textsuperscript{14} Pound wrote: “[W]e have been accustomed to treat the matter [of free speech] from the standpoint of the individual interest. Undoubtedly there is such an interest, and there is the same social interest in securing it as in securing other individual interests of personality. . . . But this feeling may have an important social interest behind it. For the individual interest in free belief and opinion must always be balanced with the social interest in the security of social institutions and the interest of the state in its personality. These interests may or may seem to require repression of forms of belief which threaten to overturn vital social institutions or to weaken the power of the state.” According to Pound, if individual expression would trigger a disturbance in public peace or shock to “the moral feelings of the community,” the social interest could be judged to outweigh the individual interest. Moreover, “the danger of mobs, which are controlled by suggestion, may require confining of free expression of political opinions on certain subjects to times and places where such things may be discussed without grave danger of violence and disorder.” Roscoe Pound, “Interests of Personality [Concluded],” Harvard Law Review 28 (1915): 445–456.


\textsuperscript{16} Rodgers, “Progressivism.”
In its place, the progressives championed the common good. Under peacetime conditions, most progressives favored robust public discussion. After all, the progressive era had witnessed a rapid transformation of social, scientific, and cultural values. Many widely accepted theories in the 1910s had been marginal, if not repressed, a few decades earlier. Social progress was fundamentally dependent on the formulation and expression of new ideas. Leon Whipple, in a 1927 history of civil liberties commissioned by the ACLU, identified a new interest in free speech during the progressive period, arising “partly out of a new realization of its essential value in our complex industrial age; partly out of the common experiences of the social reformers; partly because of the increased number of cases in which liberty was sacrificed to the interests of powerful conservative groups.”

When war was declared, however, their broad commitment to social welfare and their corresponding support for President Wilson led many progressives to condemn dissent—or at least to support the authority of a majoritarian government to quash it. Joseph Byers, the General Secretary of the American Prison Association, was typical: “It would be a good thing for all of us if we emphasized a little more our duties as citizens and were less concerned about insisting upon our ‘rights,’” he wrote to Baldwin. “Personally, I am perfectly willing to have the Government suspend whatever may be necessary of my own civil rights during the period of the

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17 Leon Whipple, *The Story of Civil Liberty in the United States* (New York: Vanguard Press, 1927), 327. Signs of increased interest in civil liberties, according to Whipple, included the incorporation of new guarantees into state constitutions, the organization of the American Association of University Professors, the formation of various groups for the protection of free speech, the focus of an annual meeting of the American Sociological Society on “Freedom of Discussion,” and the attention devoted to free speech and assemblage by the Commission on Industrial Relations. Notably, Whipple rejected John Stuart Mill’s “harm principle” as inconsistent with modern social understandings. According to Whipple, Mill’s notion that interference with the liberty of others could be justified only for “self protection” was incompatible with “the revelations of science and psychology,” which had “proved how few acts there are that do not work at the expense of some one else, even if the someone is anonymous.” Whipple, *Ancient Liberties*, 10. For Whipple, there was no such thing as an atomistic individual; all rights were relational.

18 Not all progressives were majoritarian. In fact, many advocated the expansion of the regulatory state precisely because the efficiency and autonomy of administrative agencies were shielded from popular influence. For them, the postwar turn to civil liberties meant shifting their confidence from agencies—which, they discovered, were more prone to political influence than they had believed—to the courts.
war, if it will help win the war, and I have no fear whatever but that when Germany and her Allies have been licked to a frazzle that I shall be restored to the full enjoyment of all the civil rights I am capable of appreciating.”

For the AUAM leadership and many other progressives, aversion to rights-based individualism was fundamentally bound up with the struggle between labor and capital. Classical legal thinkers and, more to the point, judges, had defended private property by reference to natural rights. This abstraction had led modern society astray. In reality, the progressives argued, the allocation of wealth was founded on shared social norms; property was private only because the community had seen fit to make it that way. The notion that property owners enjoyed a negative right to use their wealth without regard to the public welfare was repugnant to progressive ideology. On the contrary, defensible economic rights, like a living wage, facilitated greater participation in democratic society. In support of labor unions, Herbert Croly characteristically argued that the social web of industrial organization would turn individual workers into “enlightened, competent, and loyal citizens of an industrial commonwealth.”

The widespread desire to moderate the class struggle and promote social harmony was a central motivation for progressive reform. By 1900, the free labor ideology that had dominated American political thought for much of the nineteenth century was broken. In an era of industrialization, the notion that workers could parlay their surplus wages into independent capitalist ventures was hopelessly anachronistic. Nor were political movements like populism a credible alternative; the establishment was too powerful and the middle class too numerous to

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21 Ibid., 193.
permit displacement of the dominant institutions and parties. Class antagonism was an
inescapable reality, however, and the labor vote was a force to be taken seriously. The solution
embraced by the legislative and executive branches at the end of the tumultuous 1890s was
incremental adjustments to the existing capitalist system. The Industrial Commission, created in
1898 and comprising congressional and executive appointees, issued a report in 1902 that largely
set the agenda for labor reform in the Progressive Era: the enactment of state laws dictating
tolerable labor conditions, the curtailment of labor injunctions, the elimination of yellow-dog
contracts, and the federal regulation of railroad work.24

With respect to the first item on the agenda, progressivism was a substantial success. The
years before the First World War were witness to a remarkable explosion of protective labor
legislation at the state and, in some cases, federal level. Fueled by workplace tragedies like the
Monongah Mining disaster and the Triangle Shirtwaist fire, progressive coalitions pushed
through workplace safety laws affecting factories, railroads, mines, and other industries;
minimum wage and maximum hour laws; employers’ liability and workers compensation
reforms; elimination or regulation of convict labor; public ownership of utilities; restrictions on
child labor; and laws regulating company stores and private employment agencies.

Progress was more equivocal when it came to collective bargaining—which, to the
members of the AUAM and other labor sympathizers, was the only tenable foundation for
industrial peace. The Anthracite Coal Strike Commission, convened by Theodore Roosevelt to
mediate a strike orchestrated by the United Mine Workers, made modest concessions to labor in
the form of increased wages and shorter hours, as well as a mechanism for arbitrating worker
grievances. But it did not require employers to recognize unions, much less the closed shop. And

24 Melvyn Dubofsky, The State and Labor in Modern America (Chapel Hill: University of North Carolina Press,
1994), 35.
Roosevelt’s cooperation was conditioned on the unions’ good behavior. Only peaceful picketers who respected private property were deemed deserving of federal help. In short, Roosevelt acknowledged that the prevailing labor conditions were unsustainable even as he inveighed against class-consciousness. When he mobilized the state to mitigate the worst abuses, his goal was to preserve the sanctity of private property and, in large measure, the existing allocation of wealth.25

Under Wilson, however, the tables began to turn. In the run-up to war, administrative support for labor was stronger than it had ever been. Wilson opposed interference with the issuance of labor injunctions, and the 1914 Clayton Act, which he signed, was more symbolic than substantive.26 Still, his many pro-labor appointees ensured union representation in policymaking and in the resolution of particular labor disputes. Most notably, the majority report of the United States Commission on Industrial Relations, issued in the summer of 1915, wholeheartedly endorsed labor’s position on controversial issues. The Commission, initiated under Taft but executed under Wilson, included representatives of capital and the public in addition to labor. Its overall composition, however, skewed left; it was chaired by the pro-labor attorney Frank P. Walsh, and its two years of hearings were far friendlier to labor than industry. Each camp issued its own findings, but the majority report was strongly pro-labor and called for “drastic” changes in the allocation of wealth and federal protection of unions’ right to collective bargaining as well as federal provisions for social insurance. Walsh boasted that it was “more

25 His concessions satisfied moderate labor leaders like John Mitchell, president of the United Mine Workers of America, who came to regard the state as an essential tool of labor reform. Marc Karson, American Labor Unions and Politics (Carbondale, Southern Illinois University Press, 1958), 90. Labor radicals, the subject of the next chapter, were not so easily appeased.

radical than any report upon industrial subjects ever made by any government agency.”\(^2^7\) Among those who provided testimony were ACLU co-founder Crystal Eastman, who appeared in her capacity as an executive board member of the Congressional Union for Woman’s Suffrage.\(^2^8\) She considered the vote to be an essential tool in the labor struggle, but she told the Commission that women “must raise their wages as men have raised their wages, by organization.”\(^2^9\)

The modest improvements for labor enacted by state legislatures and negotiated at the federal level by the Wilson Administration ameliorated the conditions of American workers. Even some unions were persuaded that federal intervention on behalf of labor was worth pursuing. Although the American Federation of Labor publicly championed “voluntarism”—the notion that labor activity should and did take place outside the realm of state power\(^3^0\)—labor historians have demonstrated that Samuel Gompers and his cohort used government adeptly when it suited their agenda.\(^3^1\) Despite fears that protective labor laws and state intervention in


\(^2^8\) Wilson’s endorsement of the Adamson Act, which mandated an eight-hour day for interstate railroad workers, ensured even closer ties between labor and the Democratic establishment. The act was one component of Wilson’s response to a 1916 dispute between the railroad brotherhoods and the railroads. Another, significantly, was his request for authorization in cases of military necessity of presidential seizure of the railroads. Although the latter never passed, it was a measure of Wilson’s growing support for administrative intervention on behalf of labor. Organized labor rewarded Wilson’s new cooperative attitude with enthusiastic support for his 1916 reelection campaign.


\(^3^1\) Nick Salvatore, introduction to *Seventy Years of Life and Labor: An Autobiography*, by Samuel Gompers (Ithaca: ILR Press, 1984). Notably, Salvatore argues that Gompers’s endorsement of Wilson’s pro-war policies was not mere politicking but rather reflected Gompers’s heartfelt philosophy.
labor disputes would undermine union power, the AFL cultivated deep ties with President Wilson and the Democratic Party.

One branch of government, however, consistently stood in the way of reform: again and again, labor’s most significant gains were undercut by the judiciary. And the justification for judicial action was a theory of individual rights based on the sanctity of private property. The most notorious example, and a powerful progressive rallying cry, was the Supreme Court’s decision in *Lochner v. New York*, which invalidated a New York maximum-hours law because it interfered with an implicit constitutional “right to free contract.” Pet progressive projects like the minimum wage, the eight-hour day, and workers compensation all died at judicial hands.

But the invalidation of state legislative protections was neither the most pervasive judicial device nor the most damaging to the labor cause. In the decades before World War I, employers (and organizations of employers, such as the National Association of Manufacturers) justified their open shop policies by reference to individual rights; closed shops, they argued, abridged workers’ freedom by conditioning employment on their obligation to join the union. Moreover, they argued that yellow-dog contracts prohibiting workers from joining unions protected

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34 *Lochner v. New York*, 198 U.S. 45 (1905). Notwithstanding revisionist claims about popular reaction to *Lochner* in the immediate aftermath of the case, see, e.g., David E. Bernstein, *Rehabilitating Lochner*, it is clear that by the 1910s progressive antipathy toward the case had crystallized.
35 The Commission on Industrial Relations assembled a long list of statutes invalidated by courts on constitutional grounds. Representative examples include statutes requiring statement of cause of discharge, prohibiting blacklisting, protecting members of labor unions, restricting the power of courts to grant injunctions, setting wages in public works, fixing time for payment of wages, and prohibiting or regulating company stores. “Report of Basil M. Manly,” in Final Report of the Commission on Industrial Relations (hereafter, Manly Report), 44.
individual rights by linking workers’ duties to those which they had voluntarily assumed. Courts agreed on both fronts.

By the early 1890s, the federal courts had decisively established their willingness and authority to suppress “coercive” labor practices—particularly the right of workers to conduct boycotts or to dissuade strike-breakers—through use of the labor injunction. During the first decades of the twentieth century, the pursuit of labor injunctions became the first line of defense for beleaguered employers.36 Although some judges exercised restraint, even expressed union sympathies, most were quick to comply with employers’ requests, often issuing ex parte restraining orders unsupported by evidence of illegal behavior. Meanwhile, in *Gompers v. Buck’s Stove*,37 the United States Supreme Court held the boycott to be an enjoinable offense under the Sherman Act. This ruling came just three years after the Court struck down the Erdman Act’s prohibition on yellow-dog contracts as a constitutional infringement on workers’ freedom of contract under the Fifth Amendment,38 a holding that it applied to state anti-yellow-dog laws in 1915.39

President Taft’s judicial appointments, including five to the Supreme Court, ensured that the judiciary would not be swayed by rising public antipathy. Indeed, in the spring of 1917, the Supreme Court extended its anti-labor reasoning. In *Hitchman Coal v. Mitchell*, a six-justice majority upheld an injunction against the UMW for attempting to recruit non-union workers.40

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37 Gompers v. Buck’s Stove, 221 U.S. 418 (1911).
38 Adair v. United States, 208 U.S. 161 (1908). The Commission on Industrial relations noted the “inconsistency between the decisions in the *Debs* case, wherein it is held that the control of Congress over interstate commerce is so complete that it may regulate the conduct of the employees engaged therein to the extent of enjoining them from going on a sympathetic strike, and the decision in the *Adair* case, where it is held that Congress has so little power over the conduct of those engaged in interstate commerce that it can not constitutionally forbid employers engaged therein discharging their employees merely because of membership in a labor union.” Manly Report, 45.
Those workers had signed yellow-dog contracts consistently with “the constitutional right of personal liberty and private property,” and any effort to organize them was consequently unlawful. For labor, this judicial invocation of workers’ autonomy in support of the yellow-dog contract was infuriating. As labor lawyer (and future ACLU member) Clarence Darrow told the Commission on Industrial Relations: “They talk about the inalienable right of a man to work; he has no such right; no one has a right to work, and the man who stands for the open shop does not care for anybody’s rights to work, except the nonunion man, and they only care for him because they can use him. If a man has a constitutional right to work he ought to have some legal way of getting work.”

The Supreme Court’s obstinacy on these issues, and its broader hostility to public regulation, threatened to undermine the progressive reform agenda—and so progressives railed against the judicial construction of the autonomous individual. The freedom of a single worker to bargain for the conditions of his (or, increasingly, her) labor was an obvious fiction in the context of modern labor conditions. Collective bargaining restored a measure of reality, as well as social consciousness, to the field of labor relations. By resting on merely formal rights, by contrast, classical legalism exacerbated social tensions. The problem with the Lochner-era judiciary was its tendency to “exaggerate private right at the expense of public interest,”

41 CIR Final Report, vol. 11, 10806.
42 The phenomenon was not limited to cases affecting labor disputes and labor protections. Indeed, the judiciary in the United States “was notorious as a graveyard for social-political initiatives.” Daniel T. Rodgers, Atlantic Crossings: Social Politics in a Progressive Age (Cambridge: Harvard University Press, 1998), 58.
43 The Supreme Court declined to extend that right to women in Muller v. Oregon, 208 U.S. 412 (1908), in which it upheld a maximum hour law applicable to women. In Adkins v. Children’s Hospital, 261 U.S. 525 (1923), however, the Court struck down federal minimum wage legislation for women as an unconstitutional infringement on liberty of contract.
44 In their influential Ethics, John Dewey and James Hayden Tufts explained: “It is the possession by the more favored individuals in society of an effectual freedom to do and to enjoy things with respect to which the masses have only a formal and legal freedom, that arouses a sense of inequity.” John Dewey and James H. Tufts, Ethics (New York: H. Holt and company, 1908), 439.
without taking social circumstances into account. The progressives believed that “the strong social interest in the moral and social life of the individual” outweighed the cost to autonomy of an aggressively interventionist judicial system.46

These developments were a central presence in the lives and careers of the members of the AUAM. Most were actively involved in some aspect of improving workers’ lives. Jane Addams, of course, worked tirelessly to relieve class injustice through legislation, social work, and occasionally union activity. Lillian Wald (along with Addams) helped to found the Women’s Trade Union League, which sought to increase women’s participation in organized labor. Florence Kelley founded the anti-sweatshop National Consumers’ League and assisted in drafting the influential “Brandeis Brief” in Muller v. Oregon, one of the few Supreme Court decisions to uphold a protective labor law (setting maximum hours for women workers). The list went on and on. All were attentive to the advantages of state cooperation and the pitfalls of judicial intervention. Probably, all were skeptical of individual rights.

The experiences of Crystal Eastman, the organization’s executive secretary, are illustrative. A reformist by upbringing, Eastman was trained as a lawyer but unable, as a woman, to find work as a practicing attorney. Instead, she devoted her early career to sociological research. She had studied political economy at Columbia before switching to law, and between 1908 and 1910 she applied both sets of skills in her evaluation of industrial accidents in New York.47 Her analysis as secretary of the Wainwright Commission, which was created by the New York legislature to study the law of workplace accidents, guided that state’s legislative effort to replace outmoded tort rules of employers’ liability with a new no-fault compensatory system. As she feared, however, the high court of New York struck down the workers’

47 Witt, Patriots and Cosmopolitans, 170.
compensation law she helped craft, calling it a violation of employers’ property rights.  

Although the decision was countered by a state constitutional amendment, the legal defeat was a powerful lesson.

For Eastman and her colleagues, the decision to resist militarism by invoking judicial review of regulatory power was a strange turn of events—one that warrants considerably more attention than the historical scholarship has afforded it. The majority of the organization regarded the state as an ally in the struggle to achieve industrial harmony, and prior to America’s entry into the war, they extended their optimism to their fight against militarism as well. Within a matter of months, however, the civil liberties bureau was the most visible face of the AUAM. Who were the actors responsible for its creation? How did they conceive the idea, and what did they intend would fall within its sweep? The story, predictably, is one of conflict and confusion. And it begins long before the war.

_Free Speech before the War_

Whatever the framers of the First Amendment intended to accomplish when they forbade Congress from “abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble,” judicial interpretation of those words prior to World War I was consistently tepid. The contrast with the expansive protection for liberty of contract and the sanctity of private property, allegedly enshrined within the due process clauses of the Fifth and Fourteenth Amendments, was particularly stark. When the Supreme Court deemed boycotts unlawful under the Sherman Act in _Gompers v. Buck’s Stove_, it rejected the AFL’s argument that

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its list of unfriendly employers was protected by the Constitution, reasoning that it was speech in
furtherance of an illegal purpose and therefore outside the First Amendment’s purview.\textsuperscript{50}

Labor, however, was not the only casualty of the Supreme Court’s First Amendment jurisprudence. Beginning with the infamous 1798 Alien and Sedition Acts, which punished language that was “false, scandalous, or malicious,” the federal courts had more or less steered clear of controversies over free speech.\textsuperscript{51} Over the following decades, many southern states prohibited speech likely to incite slaves to insurrection, and the mounting national crisis only exacerbated repressive tendencies. Abraham Lincoln declined to advocate a sedition act during the Civil War, but he was complicit in the arrest of political dissidents. One such arrest nearly cost him reelection and prompted him to issue a public statement on the matter. Wartime speech is permissible, he explained, if it is merely critical of the government; but a speaker may be arrested for “laboring . . . to prevent the raising of troops; to encourage desertions from the army; and to leave the Rebellion without an adequate military force to suppress it.”\textsuperscript{52}

While the worst repression almost invariably came at times of war,\textsuperscript{53} the regulation of expression was a routine affair in nineteenth century America. Although many state constitutions protected free speech, state law and city ordinances made frequent interventions.\textsuperscript{54}

\textsuperscript{50} In 1914, Samuel Gompers laid out the AFL’s position on civil liberties: “The American Federation of Labor looks askance upon any effort to curb the inherent, as well as the constitutional rights of free press and free speech and free assemblage, and holds that, though these rights may be perverted . . . the right of expression through speech or press must be untrammeled if we are going to have a republican form of government with freedom.” “Mr. Gompers and Civil Rights,” New York Call, 19 March 1919. During World War I, however, the AFL largely accepted the government’s speech-repressive measures.

\textsuperscript{51} The Sedition Act prosecutions were popularly denounced and are regarded as a critical factor in the Republican electoral gains in the 1800 elections, including Jefferson’s presidential victory.

\textsuperscript{52} Abraham Lincoln to Erastus Corning and Others, 12 June 1863, in Abraham Lincoln, Complete Works, vol. 2, ed. John G. Nicolay and John Hay (New York: The Century Company, 1894), 349. As during World War I, repression found popular as well as political channels. During the Civil War, mobs routinely attacked print shops that published literature inconsistent with local sentiments.


\textsuperscript{54} On pervasive state regulation during the nineteenth century, see William Novak, The People’s Welfare: Law and Regulation in Nineteenth-Century America (Chapel Hill: University of North Carolina Press, 1996); on pornography.
Few prewar cases examined free speech issues in detail, but courts periodically considered whether crimes and torts violated the First Amendment or its state constitutional analogs. On all but a few occasions they rejected such claims out of hand.

Restrictions existed on the federal level as well. The Comstock Act of 1873 prohibited distribution of obscene materials—broadly defined to include not only pornography, but also medical, scientific, and social literature pertaining to birth control, free love, and sexually transmitted diseases—through the interstate mail.\(^55\) An 1876 statute precluded financial contributions by federal employees to political campaigns, and the Alien Immigration Act of 1903 provided for the exclusion of political radicals. In addition, legislation intended for relatively narrow purposes often took on broader meaning in the hands of the Department of Justice. For instance, the Roosevelt Administration used obscenity laws to exclude anti-American literature from the mail.

Meanwhile, before the 1910s, consideration of civil liberties within the legal academy was sparse. Thomas Cooley\(^56\) and Ernst Freund\(^57\) touched upon the topic, but neither engaged in sustained discussion.\(^58\) For the most part, prewar scholarship focused on Blackstone’s account of the common law, noting that restraints on expression helped precipitate the American Revolution and debating whether the First Amendment had therefore extended protections for free speech.

Although groups occasionally organized to defend free speech against governmental incursions—sometimes to protect business interests and occasionally on ideological grounds—

\(^55\) See Chapter 4.
none made much headway in the courts. One, however, attracted considerable attention. The Free Speech League, founded in 1902 and nurtured for twenty years by Theodore Schroeder, never won a significant judicial victory. But it generated significant support for free speech at the level of local policy, and it made many progressives question whether a trump on legislative enactments—in the form of the First Amendment—might, under certain circumstances, be made to serve desirable ends.

The Free Speech League came together in reaction to the suppression of dissent in the colonies acquired during the Spanish-American War, along with the increased targeting of anarchist speech in the wake of President William McKinley’s assassination in 1901. The founders of the League and its principal beneficiaries were radicals, but the organization garnered mainstream approval as well. What was distinctive about the Free Speech League was its commitment to defending all speech, regardless of viewpoint or subject matter. “By freedom of speech,” Schroeder explained, “I do not mean the right to agree with the majority, but the right to say with impunity anything and everything which any one chooses to say, and to speak it with impunity so long as no actual material injury results to any one, and when it results then to punish only for the contribution to that material injury and not for the mere speech as such.” Although much of its work took place in the courts, the League used every strategy at

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60 The articles of incorporation of the Free Speech League articulated the organization’s objectives as follows: “By all lawful means to promote such judicial construction of the Constitution of the United States, and of the several states, and of the statutes passed in conformity therewith, as will secure to every person the greatest liberty consistent with the equal liberty of all others, and especially to preclude the punishment of any mere psychological offense; and, to that end, by all lawful means to oppose every form of governmental censorship over any method for the expression, communication or transmission of ideas, whether by use of previous inhibition or subsequent punishment; and to promote such legislative enactments and constitutional amendments, state and national, as will secure these ends.” Theodore Schroeder, Constitutional Free Speech Defined and Defended (New York: Free Speech League, 1919), iv.

61 Ibid., 20. Schroeder retreated from this radical stance later in his career.
its disposal, including publicity for legal and other disputes, academic and professional
advocacy, mass meetings and demonstrations, and correspondence with government officials. 62

Inspired by the individualist rhetoric of philosophical anarchism, freethought, radical
abolitionism, and the women’s movement, the Free Speech League celebrated individual
autonomy and regarded it as the appropriate foundation for civil liberties claims. 63 Like the
National Defense Association before it, 64 the Free Speech League devoted considerable
resources to the defense of “obscene” literature. The League’s commitment to personal freedom
was a perfect complement to the bohemian culture of early-twentieth century Manhattan. Its
frequent and noteworthy clients included Emma Goldman and Margaret Sanger, for whom free
speech was not just a platform for legal reform and social change, but a way of life. 65 Free love,
birth control, and radical politics were all part of the same civil liberties package.

Much of the League’s energy, however, was consumed by defending the Industrial
Workers of the World (IWW)—which, in the first two decades of the twentieth century, was
engaged in a series of highly publicized “free speech fights.” The IWW sought to organize
unskilled workers who were neglected by mainstream labor organizations, like the AFL, which
organized workers by craft. The organization’s goal was framed by syndicalist ideology. The
preamble to the IWW Constitution proclaimed a commitment to “abolition of the wage system”;
between the working class and the employing class, it announced, “a struggle must go on until
the workers of the world organize as a class, take possession of the earth and the machinery of

62 Rabban, Forgotten Years, 47.
63 Ibid., 23. Cf. Murphy, Meaning, 20 (“Schroeder and his cohorts were remnants of nineteenth-century liberal
thought. Optimistic individualists themselves, they believed that man’s basic problem was unwarranted restraint.”).
64 The National Defense Association (NDA) was created in 1878 to oppose the Comstock Act and assist defendants
prosecuted under it. It was active for several decades.
65 See Christine Stansell, American Moderns: Bohemian New York and the Creation of a New Century (New York:
Henry Holt, 2000), 74 (“Free speech was self-conscious, flashy, daring, ostentatiously honest and sexual. Shot
through with a bohemian fondness for self-dramatizing, it flitted from poetry to birth control to the situation of the
garment workers.”).
production, and abolish the wage system.”\textsuperscript{66} The free speech fights grew out of efforts to attract members to the “One Big Union” through public speaking and literature distribution. Municipal efforts to shut the IWW out led to widespread arrests and prosecutions, and the “Wobblies” defended their recruitment campaigns on First Amendment grounds. The Free Speech League was an indispensible ally in formulating a strategy for challenging IWW prosecutions in the courtroom and for promoting tolerance at the level of official enforcement and public opinion.

The League’s services were not universally popular within the IWW. Despite their patriotic rhetoric, most Wobblies regarded the courts as unalloyed tools of capital and scoffed at the notion of constitutional protection for disempowered minorities.\textsuperscript{67} Still, soapbox recruitment in urban centers was a crucial tool for the IWW. They saw the city employment agencies, or “sharks,” as the central obstacle to organizing migratory workers. By connecting workers to short-term jobs, these agencies ensured a steady supply of transient labor; if the IWW could succeed in breaking them, they could force employers to solicit labor through IWW hiring halls instead. The architects of the free speech fights hoped that their rare courtroom successes would open space for soliciting members on street corners, outside of the watchful gaze of employers. Failing that, the partiality of local government and judges would expose American constitutional liberties as fraudulent, generating sympathy and attracting adherents indirectly to their cause.\textsuperscript{68}

In practice, the free speech fights met with mixed success. In Spokane, the first target, IWW organizing efforts prompted the city council to enact an ordinance that prohibited street speaking by the IWW and other “revolutionists.” The Wobblies resolved to continue speaking in

\textsuperscript{66} CIR Final Report, vol. 11, 10599.
\textsuperscript{67} See, e.g., “Why Free Speech is Denied the IWW,” Industrial Worker, 17 November 1909, 4, quoted in Rabban, Forgotten Years, 86 (claiming that courts were “but the mirrors reflecting the prevailing mode of ownership in the means of production.”). Some Wobblies claimed that free speech had been meaningfully enforced during the early republic and only subsequently curtailed by the capitalists (and the judges who implemented their will). Rabban, Forgotten Years, 84. Few, however, genuinely believed that robust First Amendment protection was either possible or altogether advisable.
\textsuperscript{68} Dubofsky, We Shall Be All, 174.
a peaceable and orderly fashion (despite violent harassment from local spectators as well as the police), unless the ordinance was made applicable to all organizations on a non-discriminatory basis. Often they read aloud from the Declaration of Independence or the Constitution. What followed was a wave of arrests that flooded the city’s jails, consuming substantial time and resources on the part of law enforcement, the courts, and the correctional system. Reinforcements—most notably, founding ACLU board member Elizabeth Gurley Flynn—flooded in from around the country. Eventually, when the struggle had all but exhausted everyone involved, negotiations with the city produced a significant IWW victory. The organization was given access to indoor meeting places and the freedom to sell its newspaper, the *Industrial Worker*, on the city streets. It also achieved its substantive goal, reform of the employment agency system, in Spokane and much of the Northwest.69 Perhaps most important, the idealism, perseverance, and resolute non-violence of the Wobbly speakers generated sympathy for the IWW cause.

The outcomes of subsequent fights were, however, more equivocal. In Fresno, after months of passively withstanding torture from mobs on the street and from prison guards, the IWW secured release of all its jailed members and authorization of its right to speak on the city streets.70 Increasingly, however, these formal victories seemed inadequate to the task of organizing the workers. The notorious San Diego fight of 1912, which initially garnered support from a range of organizations, led to horrific police and vigilante violence against IWW participants, with little concrete gain. Public opinion, on the whole, was stacked against the IWW. The Free Speech League was heavily involved in the San Diego fight and provided financial and organizational support. Gilbert Roe and Emma Goldman visited the site of

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69 Ibid., 183.
70 Ibid., 188.
conflict, and Schroeder corresponded with local attorneys and coordinated efforts to establish a local branch of the league. These interventions may have tempered popular hostility to the IWW, but their influence was limited. Many commentators celebrated the fundamental American values enshrined in the Bill of Rights but carved out radical agitation from the intended scope of the First Amendment.71

The IWW leadership was never content with its modest achievements in the realm of free speech. Rather, it interpreted its successful battles as an indication of what true struggle could achieve. As the IWW organ *Solidarity* proclaimed with respect to the Spokane fight: “By use of its weakest weapon—passive resistance—labor forced civic authorities to recognize a power equal to the state.” Given that success, the organization ought to consider what would happen “when an industrially organized working class stands forth prepared to seize, operate, and control the machinery of production and distribution.”72 The free speech fights were an exercise in direct action, and a prelude to the true struggle for industrial democracy. Over time, many Wobblies rejected the fights as even an interim strategy.73 Indeed, many eschewed the use of the courts altogether. As one syndicalist publication put it at mid-decade: “The law strike is crude, uncouth, and primitive. As a means to an end for stiffening the ranks of militant labor it has about run its course. What is the law strike? A law strike is a defense of labor in a capitalist court, a case wherein Labor has hired counsel to defend prisoners accused of labor ‘crimes.’ . . . When Labor shall have strongly organized on an industrial basis, free from parliamentary law,

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72 Quoted in Dubofsky, *We Shall Be All*, 105.
73 The legacy of the free speech fights with respect to the IWW’s wartime strategy is the subject of the next chapter.
legal claptrap, judicial fakery, and capitalistic confidence methods there will be no need of hiring lawyers.”

Whatever their effect on the labor struggle, the free speech fights were instrumental in generating broader interest in civil liberties. Efforts on behalf of the IWW by the Free Speech League resonated with progressive intellectuals. Although courts upheld the constitutionality of restrictive ordinances, they sometimes reversed convictions as discriminatory in their application, unsupported by the evidence, or inconsistent with statutory intent. In consultation with the League, New York City Police Commissioner Arthur Woods openly defended free speech rights in public places; he instructed police officers to protect speakers from unruly crowds and to prohibit only incitement of immediate violence. Similarly, Attorney General George Wickersham resisted encouragement from local law enforcement and President Taft to prosecute the IWW under federal law. Socialists generally supported the IWW’s free speech claims, though they increasingly condemned the organization’s tactics. And progressive officials, activists, and academics began to mobilize for free speech. The free speech fights prompted Edward Ross, president of the American Sociological Society, to organize the Society’s 1914 annual meeting on the subject of “Freedom of Communication.” Ross situated free speech within the progressive commitment to public welfare, lamenting that the suppression

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74 Additional Statement of Theodore Schroeder, in CIR Final Report, vol. 11, 10896 (quoting recent article in syndicalist newspaper).
75 Rabban, Forgotten Years, 90–94.
76 Rabban 115–20. On one occasion, a police court judge in Spokane declared an ordinance unconstitutional because it permitted street speaking by some groups and not others (he did not object to a blanket restriction). Ibid., 116. This decision was, however, anomalous.
77 Ibid., 101–02.
78 At the request of the San Diego superintendent of police, Attorney General George Wickersham entertained an investigation by United States Attorney John McCormick, who sought an indictment of the IWW for criminal conspiracy to “overthrow the government and take possession of all things.” Dubofsky, We Shall Be All, 195. Wickersham, despite pressure from President Taft, was unimpressed by the evidence and ordered the charges dropped. Federal indictment of the IWW would wait another half-decade.
79 Rabban, Forgotten Years, 88, 93. See Wertheimer, “Free Speech Fights,” on free speech fights by Socialists.
of labor advocacy “depriv[ed] the weak of the chief weapon by which they may achieve common economic action.”

Significantly, the free speech fights figured prominently in the proceedings of the Commission on Industrial Relations. Woods told the Commission that his efforts to protect free speech for IWW organizers in New York City had drastically reduced conflict there. Darrow (who had argued a Supreme Court case on behalf of the Free Speech League in 1903), Schroeder, and many others testified about the importance of free speech to the broader success of the labor movement. All of these free speech advocates insisted that the courts were stacked against labor. All questioned whether constitutional interpretation was the best means of protecting civil liberties. Gilbert Roe thought the Supreme Court had gotten the basic constitutional balance wrong, and he advocated “changes in personnel.” He was skeptical that courts ought to be “passing upon the validity of statutes at all,” but he reasoned that “if they are going to declare statutes unconstitutional that relate to property when they are in conflict with the Constitution, it would seem that they ought to apply the same principle to statutes which invade personal rights,” by which he meant those constitutional rights protecting privacy, bodily

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81 Woods testified to the Commission that labor unions and employers were both responsible for violence in industrial disputes but that strikers, not employers, resorted to hiring gunmen. Testimony of Arthur Woods, 12 May 1915, in CIR Final Report, vol. 11, 10896.

82 Testimony of Theodore Schroeder, 27 May 1915, in CIR Final Report, vol. 11. Schroeder told the commission that he was “working at law problems all the time” but did not accept pay and did not practice in court. Ibid., 10841. Schroeder’s testimony laid out two basic propositions: “first, the absolute incapacity of any judge in the United States to understand what free speech means in light of the historical controversy which resulted in the adoption of our free-speech clauses of the Constitution,” and second, the “utter incapacity on the part of the courts, except when dealing with problems of property, to understand what law and the due process of law clause of the Federal and State Constitutions mean.” His conclusion, after careful study, was that “we have less conceded and protected freedom of speech and of the press in the United States than in any country in the world at any time in the history of the world.” Ibid.

integrity, and expressive freedom. Even Schroeder advocated the “recall of all judges, and the recall of all judicial decisions on constitutional questions.” He worried, however, that legislation invariably served the interests of property. He offered no concrete mechanism for achieving social justice but believed the first step was “freedom of speech, for [Bill] Haywood and the rest, to defend their dreams.”

The Commission was persuaded that civil liberties warranted further protection. Its members did not condone the IWW’s tactics, of course. Harris Weinstock, one of the Commission’s employer representatives, was appointed to investigate the Free Speech Fights. He concluded that the Wobbly initiative was deceptive and dangerous, aimed at overwhelming the machinery of justice and only incidentally concerned with First Amendment rights. A staff investigator noted that IWW organizers (like their Communist counterparts of the next decade) were inconsistent in their defense of free speech and broke up meetings of religious groups with whom they disagreed. Nonetheless, the Commission was univocal in denouncing vigilantism, particularly in contrast to the passive and nonviolent resistance exercised by the IWW. Moreover, the Commission’s staff was greatly troubled by the brutality of state and local law enforcement in suppressing strikers as well as soapbox speakers. Accordingly, it advised against

84 Ibid., 10474.
85 Testimony of Theodore Schroeder, 27 May 1915, in CIR Final Report, vol. 11, 10845. He continued, “If the people are credited with the right to make constitutions they should be allowed to say what they mean after being framed.” Ibid. Asked what was responsible for the “two distinct mental attitudes of the judges, with reference to property right and free speech,” Schroeder fell back on judges’ unconscious psychology. Most judges, he explained, have an aversion “to the criticism that comes from them that are down and out.” At the same time, they are predisposed to promote the interests of the rich, with whom they identify. They interpret the constitution in accordance with their emotional sympathies. Interestingly, Schroeder felt this tendency would only be exacerbated in the case of Progressive judges, who were themselves subject to suspicion and would therefore worry that deciding a case in favor of a radical defendant would cast aspersion on their own motivations and beliefs. Ibid., 10851.
86 Ibid., 10850. Bill Haywood was head of the IWW.
87 Rabban, Forgotten Years, 106–07.
police discretion in enforcing free speech and called for greater protection of First Amendment rights.  

Integrating these various concerns, the Commission’s final report devoted a section to free speech. The suppression of public speaking, it declared, was “one of the greatest sources of social unrest.” Police interference with such important “personal rights,” even when exercised in good faith, “strikes at the very foundation of Government.” The Commission’s reasoning succinctly laid out the progressive case for free speech: “[I]t is the lesson of history that attempts to suppress ideas result[] only in their more rapid propagation. Not only should every barrier to the freedom of speech be removed, as long as it is kept within the bounds of decency and as long as the penalties for libel can be invoked, but every reasonable opportunity should be afforded for the expression of ideas and the public criticism of social institutions.” The report then recommended measures, modeled in large part on Woods’s experiences in New York City, to discourage violence and promote police impartiality. Characteristically, most were designed to encourage good governance. Whereas the Commission sought to cabin the detrimental exercise of administrative discretion, most of the mechanisms it specified were advisory and regulatory— for example, congressional legislation prohibiting the transportation of armed gunmen and non-personal weapons across state lines, the regulation of private detective agencies, and enactment by the states of a uniform code governing the militia, limiting military detainment, and ensuring that a proclamation by a Governor of martial law would have no effect on constitutional

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88 Ibid., 108. Much of the criticism stemmed from the conflict in Paterson, New Jersey, though it was not formally a free speech fight. In his report on behalf of a California commission to investigate the San Diego events, Weinstock concluded that the police should not be permitted to curtail free speech on the grounds of anticipated abuse. Ibid., 107.
89 Manly Report, 98.
90 Ibid., 99.
91 Ibid.
guarantees. In response to concerns about the effects of street speaking on congestion and commerce, the Commission urged states and municipalities to open up the schools and other public buildings for lectures and public meetings.

The bolder suggestions fell under the heading “Causes of Industrial Unrest.” In that section, the commissioners stated their deep conviction, based on the evidence submitted to them, that that workers had been “denied justice in the enactment, adjudication, and administration of law.” Not only had the courts proven far more sympathetic to employers than to labor in the resolution of particular disputes, but they had construed the sections of the Constitution designed to protect “human rights” and “perverted [them] to protect property rights only,” often in contravention of state statutes specifically drafted to protect workers.

Meanwhile, they had interpreted the Fourteenth Amendment to incorporate only property rights, not personal rights, and had thereby rendered workers helpless against encroachment by the states. To eradicate the “evils” of the situation and to introduce “justice and liberty” in their place—and, in the process, to avert the “grave danger that, if the workers assert their collective power and secure the control of government by the massing of their numbers, the scales may swing equally far in the other direction”—the Commission recommended decisive action.

“Personal rights must be recognized as supreme and of unalterable ascendency over property rights,” the report concluded. The proposed solution? “That Congress forthwith initiate an amendment to the Constitution providing in specific terms for the protection of the personal rights of every person in the United States from encroachment by the Federal and State

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92 While the latter provision sought to preserve civil jurisdiction and to discourage courts martial and military detention, it was framed as a state statute presumably enforceable through state rather than federal courts.
93 Ibid., 100.
94 Ibid., 38.
95 Ibid., 47.
96 Ibid., 59.
Governments and by private individuals, associations, and corporations.”97 Presumably, this constitutional right would have been protected outside the courts, as the Commission urged Congress by statute or constitutional amendment to withdraw the judicial power to declare legislative acts unconstitutional.

The Commission’s report reflected a sincere commitment to free speech within the left of the progressive establishment. Perhaps, if the First World War had not intruded, the new indulgence of unpopular viewpoints might have picked up momentum. As it happened, the perceived need for patriotic uniformity quelled the prewar awakening of pluralistic tolerance. Still, the free speech fights brought civil liberties into the purview of some progressives’ consciousness. At the outbreak of war, when dissenters were faced with aggressive state and private repression, they had a vocabulary to draw on.

If the IWW supplied a rallying point for free speech, it was the Free Speech League that provided the model for civil liberties advocacy. League lawyers were the first to espouse a generalized defense of free speech based on First Amendment values.98 Schroeder was careful to maintain a theoretical and organizational distance between the League and the groups it represented, in order to prevent it from becoming “the tail of the kite of some other propagandist.” He explained, “Every time that it creates in the public mind the impression of being subordinate to the interests of the IWW’s or of anti-Catholic agitators; of Free Thinkers; or of Socialists, then, it is impairing its efficiency in subsequent activities.”99 Its abstract embrace of individual freedom gave the League credibility when it defended unpopular causes like labor

97 Ibid., 61. The report continued, “The principal rights which should be thus specifically protected by the power of the Federal Government are the privilege of the writ of habeas corpus, the right to jury trial, to free speech, to peaceable assemblage, to keep and bear arms, to be free from unreasonable searches and seizures, to speedy public trial, and to freedom from excessive bail and from cruel and unusual punishment.”
98 In Patterson v. Colorado, 205 U.S. 454 (1907), they sought unsuccessfully to undermine the common law “bad tendency” test.
99 Quoted in Rabban, Forgotten Years, 63.
radicalism—which, at the time, was less reputable than free love. Schroeder denounced those New York bohemians who supported the League’s position on obscenity but countenanced the censorship of Anarchist literature. “Herein they are more reactionary than the conservatives who framed our charters of liberty and those of us who still rely upon constitutions,” he explained, “because these documents recognize no such exception to our guaranteed freedom of speech and press.” By the beginning of the war, the Free Speech League, as an organization, was on the decline. Schroeder had always been the glue that held it together, and he was increasingly drawn to other interests. Nonetheless, many of the League’s most prominent members and allies, including Gilbert Roe, Harry Weinberger, and Schroeder, supplied the fledgling NCLB with crucial materials and assistance.

Roger Baldwin would later recall that the IWW wrote a crucial “chapter in the history of American liberties.” Between 1908 and 1918, he reflected, “the little minority of the working class represented in the IWW blazed the trail . . . for free speech which the entire American working class must in some fashion follow.” In 1917, as Baldwin and the AUAM leadership were casting about for a solution to the wartime repression of radical dissenters, the free speech fights were at the forefront of their minds.

The Bureau for the Protection of Conscientious Objectors

When Roger Nash Baldwin arrived in New York City in March 1917, Crystal Eastman was taking a hiatus from the AUAM. She was convalescing after a difficult pregnancy that led

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100 There were, however, marked boundaries of respectability. Christine Stansell notes that progressive free speech sympathizers were alienated by the bohemian slippage from free speech to free love. Stansell, American Moderns, 79–80.
102 Rabban, Forgotten Years, 309.
103 Quoted in Dubofsky, We Shall Be All, 173.
to chronic kidney disease, and she was unable to keep up with her organizational duties.

Baldwin seemed an ideal substitute. Like Eastman’s, his early career involved domestic policy; he had run a settlement house and worked to reform the St. Louis criminal courts, and he had advocated a social science approach to legal problems.

Baldwin was born in 1884 to an affluent family of New England reformers. After an uneventful and rather indulgent childhood in Wellesley, Massachusetts, he matriculated at Harvard, where he excelled socially if not academically. After graduation, he met with his father’s attorney to solicit some career advice. The future Supreme Court justice and prominent progressive, Louis Brandeis, encouraged the young Baldwin to pursue public service. He also urged him to start his career where Brandeis had started his own: in St. Louis, Missouri.

Baldwin heeded Brandeis’s recommendation. For the next ten years he devoted himself to progressive reform in St. Louis. He was invited to establish a department of sociology at Washington University, despite never having taken a course in the new discipline (he did enroll in a summer course after graduating and before moving to St. Louis), and he built a strong foundation before resigning from that position in the summer of 1909. At the same time, he headed a settlement house founded by the St. Louis Ethical Society. He quickly became active in municipal reforms, and he helped establish the St. Louis Committee for Social Service Among Colored People, the city’s first interracial organization. In 1907, he became the first chief probation officer for the juvenile court of St. Louis, and he was a founder and secretary of the National Probation Officers Association. He soon became an authority on juvenile justice and authored a famous textbook on the subject. Within a few years, he was heavily involved in

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105 Despite their antipathy to *Lochner*-era constitutionalism, Pound and the Progressives never altogether eschewed the judicial form. As Michael Willrich and Jonathan Simon have argued, the juvenile court movement was a thoroughly Progressive program that grew directly out of sociological jurisprudence. Michael Willrich, *City of
the Council of Social Agencies and the Civic League, which he would later head. He helped write Missouri’s first civil service regulations, became legal guardian of two orphan boys, and beginning in 1910 served as president of the State Conference for Social Welfare. He became friendly with the prominent national social workers who would attract him to the AUAM, like Jane Addams, Paul Kellogg, and Lillian Wald. He was, in short, the consummate progressive: committed to the existing political and economic systems but determined to help them run as fairly and smoothly as possible.

During his time in St. Louis, two matters stand out as a prelude to Baldwin’s future career. In 1909, Baldwin began a lifetime correspondence with Emma Goldman, who had met Baldwin during speaking engagements in St. Louis. Baldwin declined Goldman’s first request of him—to secure the Ethical Society’s Self-Cultural Hall for a public address—because he thought it would alienate donors. The following year, however, he assisted in finding a venue for her after Washington University denied her access to campus. Baldwin was dismissive of socialists and labor leaders, but anarchism piqued his interest. Years later, he explained that he was sympathetic to “their goal of a society with a minimum of compulsion, a maximum of individual freedom and of voluntary association, and the abolition of exploitation and poverty.”

Equally important, Baldwin’s involvement in a campaign to revise St. Louis’s city charter taught him the pitfalls of progressive reform. The new charter, passed in 1914 due largely to

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Baldwin’s activities for the Civic League, instituted the initiative, referendum and recall, as well as municipal ownership of public utilities and a smaller city council. Soon after it was enacted, voters introduced an initiative to mandate segregated housing. Despite Baldwin’s best efforts, working in conjunction with the NAACP, the measure passed by overwhelming margins.

For the first time, Baldwin was wrestling with the basic tension between majoritarian democracy and minority rights that would dominate the rest of his professional life. On behalf of the Civic League, he participated in a federal test case challenging the constitutionality of the ordinance. The district court granted a temporary injunction and made it permanent after the Supreme Court’s decision in *Buchanan v. Warley*, which invalidated a Louisville, Kentucky ordinance on constitutional grounds. Ironically, the basis for the decision was the very provision that progressive reformers so despised—the ordinance, held the unanimous Court (including the newly appointed Justice Brandeis), was a violation of the seller’s Fourteenth Amendment right to dispose of his private property in a manner of his choosing. Baldwin was clearly troubled by this turn of events, and he assured local citizens that “in the long run the control of legislation by the whole people is best for all of us, white and colored.” He confidently concluded that “a vote of the people” would produce the right result “on almost any other question but one involving race prejudice.”

By mid-decade, Baldwin had begun to flirt with a more radical approach to social ills. He was reading the *Masses*, and he was sufficiently impressed by interactions with visiting

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Wobblies to spearhead a new project to open municipal lodging and a soup kitchen in St. Louis. When the Report of the Commission on Industrial Relations came out in 1915, Baldwin wrote to Frank Walsh, whom he had befriended through his work on juvenile justice. He told Walsh that the report would “do more to educate public opinion to the truth of existing conditions than any other one document in existence.” He was especially impressed by the testimony of Theodore Schroeder with respect to the suppression of workers’ speech.

His new awareness of industrial conflict predisposed Baldwin to the anti-militarism of the AUAM. Like many of its members, he was persuaded that economic interests were largely responsible for the war. Without the profit motive, American industry would be far less invested in militarism. Significantly, one of the AUAM’s first initiatives was a call for public ownership of munitions factories. The government, it reasoned, would be less prone to economic incentives than the capitalists.

As the death toll in Europe steadily rose, the cost of capitalistic greed seemed to Baldwin increasingly unjustifiable. The leaders of the AUAM first approached Baldwin in 1915, when they invited him to become the organization’s secretary. Although he rejected the offer, he did take charge of the local St. Louis branch. As war loomed closer, however, Baldwin rightly sensed that local reform work would surrender the stage to national activity. When he received a telegram in March 1917 asking him to take over Eastman’s duties, he packed his bags and left for New York.

Baldwin arrived at the AUAM when the organization’s mission was most in flux. When it became clear that a draft was inevitable, he organized efforts to persuade President Wilson to

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110 Ibid., 44–45.
111 Quoted in ibid., 45.
112 AUAM Pamphlet, AUAM Papers, reel 10-1.
113 Cottrell, Roger Nash Baldwin, 48–49.
include a provision for conscientious objectors in the Selective Service Act. Norman Thomas wrote an article, which was representative of the AUAM’s position, explaining that objectors ought to be classified according to their attitudes toward service—that is, whether a given objector was willing to provide non-combatant service or no service at all—rather than by motivation, be it religious, economic, or anything else. Thomas met with Newton D. Baker, Wilson’s secretary of war, who courteously requested a memorandum explaining the AUAM’s position. Baldwin followed up with a defense of those objectors, like Socialists and German Americans, who were not unequivocally opposed to violence but were unwilling to serve in the present war.

In the end, at Baker’s urging, the Selective Service Act included an exemption from combatant service for clergy and for members of well-recognized religious sects, like the Mennonites, opposed to participation in war. When it came to so-called “political objectors,” Baker would not budge, though he promised the AUAM administrative moderation. Congress overwhelmingly rejected amendments proposed by Wisconsin Senator Robert LaFollette and Colorado Representative Edward Keating to broaden the class of objectors. While the bills were in conference, Baldwin tried again, citing British legislation that made the distinction he

115 Johnson, Challenge to American Freedoms, 16.
116 Ibid., 17–18. Baldwin sent a telegram to Jane Addams advising her, the “amendment providing for conscientious objectors will be defeated unless Baker specifically requests its inclusion.” Telegram from Roger Baldwin to Jane Addams, 27 April 1917, ACLU Papers, reel 3, vol. 16. At Baldwin’s request, Addams sent Baker a telegram urging him to act. Baker told Addams that a legislative exemption was unlikely, though he promised to express her view to the Conference Committee. The alternative he proposed was administrative moderation of the law. Jane Addams to Roger Baldwin, 5 May 1917, ACLU Papers, reel 3, vol. 16, p. 254.
recommended. His efforts, however, were unsuccessful, and on May 18 Congress easily passed the Wilson administration’s proposed bill.\textsuperscript{117}

The next day, Baldwin convened a conference of pacifists to present his proposal for a “Bureau for Conscientious Objectors.” With their wholehearted support, he organized the new Bureau within the AUAM and agreed to serve as its director. Its board attracted radical pacifists like Quaker activist L. Hollingsworth Wood, Norman Thomas, socialist union organizer Joseph D. Cannon, and Scott Nearing, a radical economist and activist who would shortly join the Socialist Party and found the People’s Council of America for Democracy and Peace. Baldwin also recruited Quaker attorney Edmund Evans, social worker Alice Lewisohn, and Oswald Garrison Villard. The new bureau resolved to do whatever possible to assist inductees whose anti-war commitments prevented them from registering for the draft.

Although there was significant enthusiasm for the new bureau, some of the most established AUAM members, including Lillian Wald and Paul Kellogg, objected to the extension of the organization’s activity. Lewisohn supported the endeavor but thought it better to establish an independent body, formally distinct from the AUAM. The social workers’ concerns about the organization’s good will and respectability were well founded. Within a few days, one AUAM member announced that the organization’s popularity had “hit bedrock.”\textsuperscript{118} On June 4 a majority of the directing committee voted to endorse Baldwin’s Bureau. The vote, however, did not settle the matter, and Wald and Kellogg were considering whether to resign from the organization they had founded.

\textsuperscript{117} Selective Service Act of 1917, 40 Stat. 76 (1917). The act provided for three kinds of exemptions: absolute exemption for certain government officials, ministers, divinity students, and persons already in the military; non-combatant for members of well-recognized religious sects forbidding participation in war; and a large class who could be exempted by the president or assigned to “partial military service.” The law set up local and district boards to hear claims and appeals.

\textsuperscript{118} C. T. Hale to the Members of the Executive Committee, 6 May 1917, ACLU Papers, reel 3, vol. 16, p. 284.
The loss of Wald and Kellogg was bound to be a significant blow to the AUAM, and Eastman was determined to prevent it. In a letter to the board, she recounted the concerns Wald and Kellogg had conveyed to her and did her best to address them. Wald felt that the Bureau’s new ventures “must inevitably lead to a radical change in the policy of the Union” and would jeopardize the AUAM’s friendly relationship with the administration. In fact, she thought it consigned the AUAM to “drift into being a party of opposition to the government.”

Eastman responded that the bureau’s position was liberal, not “extreme radical,” and that the President’s appointments to the War Department betokened a commitment to prudent enforcement of the Conscription Act. Her own progressive confidence convinced her that administrative insulation and bureaucratic expertise would lead to the just execution of the law; she believed that the bureau could in fact serve to help the President execute his plan of lenience and deference to individual conscience.

Meanwhile, Kellogg worried that “an aggressive policy against prosecution of the war” was incompatible with “an aggressive policy for settling it through negotiation and organizing the world for democracy.” Eastman acknowledged that a campaign against all recruitment would undermine the Union’s influence but denied that assistance to conscientious objectors was inconsistent with support for the administration’s goals. Indeed, she countered that Republican opposition to the administration was more obstructionist than the AUAM’s own policy. The Bureau’s ambition, she concluded, was the same as Kellogg’s: “to enlist the rank and file of the people, who make for progressivism the country

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119 Crystal Eastman to the Executive Committee, 14 June 1917, AUAM Papers, reel 10-1 (quoting Lillian Wald).
120 In particular, Eastman mentioned Newton Baker, Frederick Keppel, and Walter Lippmann. Ibid.
121 Eastman acknowledged her feeling that if it became clear that Wilson’s underlying intentions were militaristic, “the American Union Against Militarism must become, deliberately and obviously, the focus for the opposition,” a turn of events that might precipitate a break-up of the union. “But,” she asked, “why cross the bridge till we come to it? At present, taking the President at his word and counting his War Department appointments as in some degree significant, our plans for defending liberty of conscience, as well as our plans for maintaining free speech, free press, and free assembly, should logically command the support of those liberal democrats whose avowed leader the President until recently has been.” Ibid.
122 Crystal Eastman to the Executive Committee, 14 June 1917, AUAM Papers, reel 10-1 (quoting Paul Kellogg).
over, in a movement for a civil solution of this world-wide conflict and fire them with a vision of the beginnings of the U.S. of the World.”\textsuperscript{123}

Despite her strong support for the defense of conscientious objectors, Eastman acknowledged that if public identification of that work with the AUAM were too complete, the Union might lose its efficacy as an organization “to lead the liberal sentiment for peace.” She therefore proposed a structural reorganization, “making one legal bureau for the maintenance of fundamental rights in war time—free press, free speech, freedom of assembly, and liberty of conscience.”\textsuperscript{124} Eastman’s plan entailed a change in nomenclature. Rather than a Conscientious Objectors’ Bureau, which suggested opposition to the administration’s war policy, she suggested a “Bureau for the Maintenance of Civil Liberties.” The reorganization also involved a shift in the bureau’s emphasis: the new bureau would protect conscientious objectors, but it would situate that project within a broader and more established commitment to civil liberties. This move temporarily appeased the dissenters, and the new bureau was formally announced on July 2, 1917.

It is worth pausing to consider why Wald and Kellogg objected to the organization’s defense of conscientious objectors. At first blush, the new policy would appear to flow directly from the AUAM’s opposition to war. For committed progressives, however, the purported right to withhold service to one’s country at wartime was dubious. In defending objectors, the AUAM embraced a concept of “liberty of conscience”—and conscience, they insisted, “is nothing if it is not individual”—as an “Anglo-Saxon tradition for which our ancestors fought and died.”\textsuperscript{125} For the progressives, however, democratic citizenship was a collective endeavor, and society could

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\textsuperscript{123} Ibid.
\textsuperscript{124} Ibid.
\textsuperscript{125} American Union Against Militarism, \textit{Conscription and the Conscientious Objector to War}, May 1917, AUAM Papers, reel 10-2.
\end{flushright}
not afford to countenance the selfish exercise of individual rights. As theologian Samuel Zane Batten explained matters, “True liberty means the voluntary sacrifice of self for the common life.” This outlook made conscientious objection to war a difficult proposition to defend. The best the AUAM could do was to counsel compliance with the law. Over the opposition of several members, it advised objectors to register and to specify their grounds for requesting exemption. “Obedience to law, to the utmost limit of conscience,” it concluded somewhat equivocally, “is the basis of good citizenship.” The bureau also claimed that “liberty of conscience” was a means toward “social progress,” but it never had much luck in explaining how.

Although the AUAM’s efforts on behalf of conscientious objectors were a core element of the organization’s activity throughout the war, their feasibility was limited from the outset. At first, Baldwin hoped to convince the War Department to construe the conscientious objector clause to include political objectors, and he had reason to believe that War Department officials might be receptive to his advice. Baldwin told Frederick Keppel—a past dean of Columbia College, unofficial adviser to the Secretary of War, and friend of L. Hollingsworth Wood’s—that the Conscientious Objectors’ Bureau would consult with the Department on all matters. Keppel, for his part, assured Baldwin that the Department appreciated the AUAM’s “spirit of cooperation.” And Baker himself acknowledged Baldwin’s “thoughtful consideration” and

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126 Quoted in Eisanach, *Lost Promise of Progressivism*, 189.
127 AUAM Statement, 23 May 1917, AUAM Papers, reel 10-1.
128 Norman Thomas and Roger Baldwin to the Conference Committee on the Army Bill, 1 May 1917, ACLU Papers, reel 3, vol. 16, p. 263.
129 He was subsequently named Third Assistant Secretary of War. In congratulating him on his appointment, Baldwin thanked him for his “unfailing tolerance and understanding.” Roger Baldwin to Frederick Keppel, 8 April 1918, ACLU Papers, reel 2, vol. 15.
130 Frederick Keppel to Roger Baldwin, 24 May 1917, ACLU Papers, reel 6, vol. 47.
promised to give weight to his suggestions when formulating the Department’s policy.\textsuperscript{131} By fall, however, it seemed clear that no official accommodation would be made.\textsuperscript{132} Although Baker’s September instructions to camp commanders did not explicitly distinguish between religious and nonreligious objectors—for the time being, all were to be segregated and put to work—Baker was adamant that recognition of so-called political objectors would be unlawful and unwise.

What was left for the AUAM was to see that individual cantonments treated objectors humanely. Baker’s policy left immense discretion to the camp commanders, some of whom were torturing objectors and allowing other inductees to beat them. Baldwin positioned the Bureau as a watchdog group that would communicate with objectors and report abusive treatment to the War Department. In this endeavor too he was eventually stymied. Still, despite early assurances to the contrary, Baldwin proved markedly unwilling to challenge the War Department head on.

A September letter to Felix Frankfurter, then special assistant to the Secretary of War, captures Baldwin’s basic strategy.\textsuperscript{133} Baldwin emphasized the enthusiasm for cooperation on the part of the Civil Liberties Bureau and his own fear that “the rumors that are coming from the cantonments [would] give rise to an unfortunate propaganda from several points in the country.” In other words, the NCLB would not itself generate publicity on behalf of the objectors, nor

\textsuperscript{131} Newton Baker to Roger Baldwin, 7 July 1917, ACLU Papers, reel 2, vol. 15. Baldwin’s proposed solution was to confine objectors who refused all service to detention for the duration of the war; those men willing to accept non-combatant service should be assigned to such service without courtmartial. Roger Baldwin to Newton Baker, 15 July 1917, ACLU Papers, reel 2, vol. 15. It was crucial to Baldwin’s approach that the War Department publicize whatever policy it adopted in order to “promote a more orderly solution of the problem.”


\textsuperscript{133} Roger Baldwin to Felix Frankfurter, 29 September 1917, ACLU Papers, reel 2, vol. 15.
would it openly criticize the camps for known abuses. Baldwin raised the specter of damaging propaganda as an incentive to temper abuses and formulate a more generous policy. The War Department, in turn, agreed to monitor enforcement of the policy and ensure its liberal execution. Baldwin believed his approach would yield results. “We are getting much more liberal treatment from the War Department,” he wrote, “than we could possibly expect by throwing the issue into the public press, and into the hands of the patriotic organizations who are anxious to shoot or export all the objectors.”

This plan was not uniformly popular with Baldwin’s allies. In fact, the threat of imminent agitation was real, and Baldwin was constantly holding his more radical correspondents at bay. In the same September letter, he told Frankfurter: “I have been putting off all inquirers with my confident assertion that the War Department had the matter well in hand, and would doubtless arrive at some conclusion in a few days. We cannot hold out against that pressure very much longer.” Impending loss of control became a permanent state of affairs. Baldwin knew that cruel punishments, including manacling and solitary confinement, were rampant in the cantonments. Matters worsened when reports emerged that the army was court-martialing

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134 See, e.g., Roger Baldwin to Gilson Gardner, 1 November 1917, ACLU Papers, reel 2, vol. 18 (“Secretary Baker has made a special request of us not to give publicity to the matter of the conscientious objector now, for the sake of an orderly solution of the whole matter. The War Department is handling the problem so liberally and sympathetically, even though there are some cases of brutality, that we are of course complying with that request. Therefore, I will have to hold up the story I had hoped to send you last week.”).
135 E.g., Secretary of War to Roger Baldwin, October 1917, ACLU Papers, reel 6, vol. 47.
136 Roger Baldwin to John Codman, 19 November 1917, ACLU Papers, reel 3, vol. 25.
137 Roger Baldwin to Felix Frankfurter, 29 September 1917, ACLU Papers, reel 2, vol. 15.
138 Gradually, Baldwin began to lose patience. Roger Baldwin to Newton Baker, 8 November 1917, ACLU Papers, reel 2, vol. 15 (“It is perfectly obvious from the reports we are getting that there continues to be a serious misunderstanding of your orders in regard to conscientious objectors.”). Roger Baldwin to Newton Baker, 22 November 1917, ACLU Papers, reel 2, vol. 15 (“The reports which we have been getting about the treatment of conscientious objectors at various cantonments show an alarming increase in the number of cases of brutality and injustice.”).
political objectors and meting out excessive sentences. Baker did not condone the practice but continued to dodge Baldwin’s requests for investigation and clarification.

By March 1918, with no evident resolution in sight, Baldwin’s decision to tolerate the situation quietly seemed naïve, if not hypocritical. Lenetta Cooper of the American Liberty Defense League, based in Chicago, had complied with Baldwin’s earlier requests to refrain from publicity. Now she accused his organization of failure and, worse, of abandoning its constituency. After ten months of work, the conscientious objector was “still considered a slacker by practically every one.” She reminded Baldwin that her own group had wanted “to appeal to the people to demand a liberal solution of the problem”; he had begged them not to act, claiming that publicity would precipitate a broad-based attack on pacifists by the press and would undercut their aims. Cooper acknowledged that popular mobilization would have been slow and open criticism of Baker futile, but she felt that behind-the-scenes negotiations stood no chance of success without broad popular support. Even then, Baldwin stood his ground: “I have felt right along that in the uncertainty of a definite policy by the government, the best thing we could do was just to bide our time, and make the whole issue clear when the government’s policy is announced. That I understand from advices received today will be in the very near future.”

Sure enough, less than two weeks later President Wilson issued an executive order permitting objectors to elect non-combatant service. For a moment, Baldwin felt vindicated.

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139 Johnson, *Challenge to American Freedoms*, 33. One objector was sentenced to death, but his sentence was subsequently commuted.
140 Johnson reports that a confidential War Department order, unknown to Baldwin, instructed commanders to treat those with “personal scruples against war . . . in the same manner as other ‘conscientious objectors.’” Ibid., 33.
141 Lenetta Cooper (American Liberty Defense League) to Roger Baldwin, 12 March 1918, reel 4, vol. 16.
143 Roger Baldwin to Lenetta Cooper, 14 March 1918, ACLU Papers, reel 3, vol. 16.
144 John Codman to Roger Baldwin, 27 March 1918, ACLU Papers, reel 3, vol. 25, p. 22 (“If this is the result of your negotiations with the War Department, it certainly shows the wisdom of the policy which you have adopted of trusting to the Administration’s liberality rather than trying to force anything through publicity.”). In April 1918, the Adjutant General, on behalf of the Secretary of War, issued an order to all commanding officers that “no punitive
The new policy, however, proved subject to widespread abuse, and Baldwin’s initial enthusiasm quickly soured.\textsuperscript{145} Despite a series of clarifying orders from Baker, objectors who refused non-combatant service out of absolutist convictions were worse off than before.\textsuperscript{146} A Board of Inquiry appointed by Baker to examine the sincerity of objectors, though initially promising, consistently declared political objectors “insincere.”\textsuperscript{147} Meanwhile, in the spring of 1918, official dealings with Baldwin and his organization (by then known as the National Civil Liberties Bureau) became a liability for the War Department.\textsuperscript{148} Military officials were critical of the NCLB’s attitude toward conscientious objectors, and the office of military intelligence launched an investigation. Although the NCLB’s activity was eventually deemed lawful, War Department officials severed their ties with the group.\textsuperscript{149}

Even then, Baldwin sought desperately to salvage the relationship. In correspondence with Keppel, he emphasized that the NCLB was “acting wholly within the letter of the law and within the spirit of the Secretary’s policy.”\textsuperscript{150} He professed the organization’s willingness “to discontinue any practices” that the War Department deemed objectionable.\textsuperscript{151} Shut out of the inner circles of the War Department, Baldwin grew increasingly frustrated. To the last, he

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\item[145] In fact, Baldwin asked Keppel to suspend the order in lieu of its implementation. Telegram from Roger Baldwin to Frederick Keppel, 11 June 11 1918, ACLU Papers, reel 2, vol. 15.
\item[146] Johnson, \textit{Challenge to American Freedoms}, 35.
\item[147] Ibid., 39. The AUAM was understandably optimistic about the selections. The three board members were Major Walter G. Kellogg for the army, Judge Julian M. Mack (an AUAM supporter before the war), and Columbia dean Harlan F. Stone.
\item[148] Frederick Keppel to Roger Baldwin, 26 February 1918, ACLU Papers, reel 2, vol. 15 (“We are getting into an embarrassing situation through the belief of many of the Secretary’s military associates that the activities of the National Civil Liberties Bureau are of a character which will shortly bring that organization into direct conflict with the Government.”).
\item[149] Frederick Keppel to Roger Baldwin, 19 May 1918, ACLU Papers, reel 2, vol. 15.
\item[150] Roger Baldwin to Nicholas Biddle, 8 March 1918, ACLU Papers, reel 2, vol. 15, p 316–17.
\item[151] Roger Baldwin to Nicholas Biddle, 8 March 1918, ACLU Papers, reel 2, vol. 15; Roger Baldwin to Frederick Keppel, 13 March 1918, ACLU papers, reel 2, vol. 15; Roger Baldwin to Frederick Keppel, 1 March 1918, ACLU Papers, reel 2, vol. 15.
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assured the War Department that he stood ready “now, as at any time, to discontinue efforts which the Secretary of War may not think to be helpful”—lest the breakdown in communication “throw the whole matter into the field of public controversy and . . . undo much of the quiet and effective work toward a satisfactory solution.”

In the end, however, the NCLB’s demands with respect to conscientious objectors deviated too fundamentally from the government’s position. Baker was committed to the fair and humane treatment of prisoners in the military and elsewhere, and he was genuinely concerned by reports of discrepancies and injustices in the execution of War Department policies by individual commanders. The NCLB quickly picked up on these cues, and the repressive potential of administrative discretion would become a central theme of the civil liberties campaign. More than anything else, though, the organization’s leadership objected to the War Department’s failure to recognize those objectors who might “take part in some wars, as for example social revolutions.” Conscience, they explained in a September 1918 letter, is a purely individual matter. Whether the political objectors were correct was irrelevant; the important point was that they were sincere. Recognition of “the value of the individual” was what differentiated American democracy from the “Prussian doctrine of the total subordination of the individual to the state.” Keppel, answering for the War Department, was dismissive. “To admit such an exemption as that for which you contend,” he argued, “would be to admit the right of every man to set himself up as judge of the wisdom of our Government in engaging in

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152 Roger Baldwin to Col. R. VanDeman, Military Intelligence Branch, War Department, 17 August 1918, ACLU Papers, reel 2, vol. 15.
154 L. Hollingsworth Wood, Norman Thomas, John Haynes Holmes, and John Lovejoy Elliott to Newton Baker, 14 September 1918, ACLU Papers, reel 6, vol. 47. The letter also touted the importance of “heretics” and other minorities to “sound social progress,” and it noted that the “minority of today may be the majority of tomorrow.” This argument was not spelled out, however, and was clearly a secondary point.
the present war; it would be to acknowledge that the Selective Service Law is binding upon the drafted man only so far as he sees fit to object it.” Such a theory was incompatible with progressive values. “What your proposal comes to,” Keppel concluded, “is the negation of law, of authority, of government when the individual is prepared to assert that these collide with his conscience.”\textsuperscript{155} Any concession to such arguments, Keppel insisted, would jeopardize the “safety of the State.”\textsuperscript{156}

The Bureau’s particular concern for political objectors bears emphasis. Given the Bureau’s origins in the AUAM, the existing scholarship on civil liberties has assumed that its primary motivation was pacifist. That is true in a sense. The goal of the Conscientious Objectors’ Bureau was to provide support for individuals who were deeply opposed to war. But religious objectors, who were expressly exempted under the Conscription Act, were of secondary concern. From the outset, the Bureau’s constituency was a radical one: those objectors who were motivated by class sentiments to resist a capitalist war. Labor radicalism was not an accident or byproduct of the wartime experience. It was the underlying purpose of the Union’s wartime activity.

\textit{The Civil Liberties Bureau}

The Civil Liberties Bureau was more than a continuation of the Conscientious Objectors’ Bureau. It was a change in tack. In defending the rights of conscientious objectors, the AUAM had celebrated individual conscience, a negative right against state coercion. Its reasoning

\textsuperscript{155} Frederick Keppel to L. Hollingsworth Wood, Norman Thomas, John Haynes Holmes, and John Lovejoy Elliott, 2 October 1918, ACLU Papers, reel 6, vol. 47.
\textsuperscript{156} Ibid. Although the letter was not actually written by Keppel, it evidently captured his attitude. Frederick Keppel to L. Hollingsworth Wood, 9 October 1918, ACLU Papers, reel 6, vol. 47. See also Newton Baker to L. Hollingsworth Wood, 15 July 1918, ACLU Papers, reel 6, vol. 47 (“I make a sharp distinction in my mind between the men whose fundamental difficulty is the taking of human life, and the man who stands merely in political opposition to the program which our government is now carrying out.”).
sounded more like that of the Free Speech League than of the early ACLU. In fact, it would be decades before the ACLU so directly took up the banner of personal freedom. Free speech, as the AUAM would discover over the wartime years, was more easily reconcilable than conscientious objection to the progressive tropes of public welfare and social responsibility.

Although there was no national clamoring for free speech in July 1917, moderates within the AUAM were right to regard the new body as more palatable than the Bureau for Conscientious Objectors that preceded it. As the free speech fights and the Commission on Industrial Relations had proven, there was a space for progressive discussion about the desirable parameters of free speech. Baldwin sought to recruit pro-war attorneys and supporters who would buttress the Bureau’s credibility.\textsuperscript{157} One AUAM member thought it would be treasonous to maintain opposition to war once the majority, through its representatives in Congress, had spoken. “As units of democracy we are bound by the national decision,” he explained to Baldwin in the dominant progressive fashion.\textsuperscript{158} Baldwin responded that the best engine of peace was the “tremendous growth of the liberal and radical movement among the peoples of all the country.”\textsuperscript{159} And to facilitate this new flowering of radical sentiment, “it is necessary that public discussion should be unfettered.” In an August letter to the \textit{New York Tribune}, the Bureau assured readers that “in a war for democracy there is no more patriotic duty than to keep democracy alive at home.”\textsuperscript{160} The best way to promote the public interest was to foster open discussion even for those with whom one disagreed.\textsuperscript{161}

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\item[\textsuperscript{157}] E.g., Roger Baldwin to Austin Lewis, July 1917, ACLU Papers, reel 5, vol. 39; Roger Baldwin to William Woerner, 6 November 1917, ACLU Papers, reel 5, vol. 39.
\item[\textsuperscript{158}] Philip Willett to Roger Baldwin, 21 August 1917, ACLU Papers, reel 5, vol. 35.
\item[\textsuperscript{159}] Roger Baldwin to Philip Willett, 22 August 1917, ACLU Papers, reel 5, vol. 35.
\item[\textsuperscript{160}] Civil Liberties Bureau to the Editor of the \textit{New York Tribune}, 28 August 1917, ACLU Papers, reel 3, vol. 18.
\item[\textsuperscript{161}] Charles Eldwood, Professor of Sociology at the University of Missouri, was typical of this constituency. He agreed to endorse a meeting on behalf of civil liberties if its goal was “to secure free and adequate public discussion of every public policy before a decision is reached on that policy, so that the decision shall represent the untrammeled expression of rational public opinion.” Charles Ellwood to Roger Baldwin, 8 January 1918, ACLU Papers, reel 5, vol. 39.
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No doubt part of the impetus for the AUAM’s approach was the congressional and public debate over the Espionage Act, passed on June 15. Adopted at Wilson’s prompting, the statute made it unlawful to interfere with the recruitment of troops or to disclose information damaging to the military effort. Violations of the Act were punishable by twenty years’ imprisonment and a fine of ten thousand dollars. A broad interpretation of the statute’s prohibitions led to two thousand prosecutions, over a thousand convictions, and the banning of one hundred publications from the mails.162

The vast majority of prosecutions arose under title 1, section 3—a section, ironically, that garnered little attention during debate over the bill because its repressive applications were not readily apparent.163 In assessing whether targeted speech violated the Espionage Act, judges applied the common law “bad tendency” test, according to which speech was punishable if it tended to produce unlawful consequences, such as draft evasion. Because actors intend the natural and usual consequences of their acts, reasoned the courts, speech is punishable if it tends to incite illegal action. Nearly all anti-government speech was thus prone to prosecution, regardless of whether the speaker advocated illegal conduct, on the theory that an inductee was more likely to evade the draft if he believed the war to be unjust. Meanwhile, in the hysteria of World War I the jury system was no help to defendants. The only way for jurors to prove their loyalty was to convict.164 Defendants were sentenced to prison for an immense range of offenses, from expressing sympathy for the Kaiser to stray remarks about the inadequacies of the

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Papers, reel 1, vol. 3. See also Angell, Why Freedom Matters (“By suppressing the free dissemination of unpopular ideas, we render ourselves incapable of governing ourselves to our own advantage and we shall perpetuate that condition of helplessness and slavery for the mass which all our history so far has shown.”).

162 Murphy, Origin of Civil Liberties, 80.

163 Cf. Walter Nelles, Seeing Red: Civil Liberty and Law in the Period Following the War (New York: American Civil Liberties Union, 1920) (“There was never any serious question of the constitutional validity of the Espionage Law as originally enacted.”).

164 Murphy, Origin of Civil Liberties.
war effort. Most of the notable wartime defendants—including Charles Schenck, Jacob Abrams, and Eugene V. Debs—were indicted under this section.

It was the postal provision of the Espionage Act, however, that first provoked progressive criticism. That section declared nonmailable any communication that violated the Act or advocated resistance to any law of the United States. The post office was given unilateral authority to determine which materials qualified, and Postmaster General Albert Burleson, along with the department’s solicitor, William H. Lamar, proved willing and enthusiastic censors. Their determinations forced many leftist and antiwar publications to shut down.

More than any other wartime law, the postal censorship provision of the Espionage Act—supplemented in October by the Trading with the Enemy Act, which gave the President and the postmaster even more censorship power—raised the specter of administrative discretion as a threat to democratic values. When Baldwin asked Gilbert Roe whether the statute was likely to have a “direct bearing” upon the rights of free speech, press, and assembly, Roe replied that the nonmailability provision “established a censorship of the worst kind.” So much power in the hands of unaccountable bureaucrats, he feared, would be disastrous for American freedoms. This view was shared by many figures with closer ties to the administration. Frank

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169 The Trading with the Enemy Act gave the president authority over international communications; foreign language newspapers were required to submit literal translations of news articles to the president, who delegated to Burleson his authority to monitor and approve them. The NCLB sent a telegram to President Wilson to protest the press censorship provision of the Trading with the Enemy Act, which it claimed would make “possible the practicable wiping out of a free press in the United States and completely set[] aside established constitutional rights.” Telegram from NCLB to Woodrow Wilson, 26 September 1917, ACLU Papers, reel 3, vol. 26.
171 Gilbert Roe to Roger Baldwin, 30 June 1917, ACLU Papers, reel 3, vol. 26, p. 91. Foreshadowing the ACLU’s sponsorship of Senator Cutting’s customs censorship provision a decade later, Roe told Baldwin “the law should be amended so as to provide that there must be first a judicial determination of the nonmailable character of the matter, before the matter is excluded from the mails.” Ibid.
Walsh, no stranger to administrative power, decried the postmaster’s “ultra-bureaucratic method” for restricting the circulation of adverse views. Postal censorship was not the only development to push the limits of progressive confidence in bureaucratic expertise. World War I precipitated an unprecedented expansion of national power, and the dark side of state-building would be the leitmotif of the NCLB’s wartime civil liberties program. Most progressives accepted that the intricacies of modern life made administrative expansion necessary, even desirable—but the NCLB could plausibly argue that new growth required new accountability.

In the months after passage of the Espionage act, the Department of Justice and the federal courts would adopt an expansive interpretation of its scope. While the bill was under consideration, however, some members of Congress expressed considerable awareness of the bill’s implications for free speech. The limits they suggested, on the whole, were policy-oriented rather than constitutional, but they evinced discomfort with the dangers of censorship and administration discretion. When the Act was passed without addressing those concerns, an organization committed to ensuring maximum freedom within the scope of the law may have seemed both essential and popularly defensible.

More concretely, the organization of the CLB was almost certainly influenced by discussions between Baldwin and Harry Weinberger, an attorney who worked closely with the Free Speech League and would soon represent the defendant in Abrams v. United States. Weinberger was a single-taxer as well as a radical individualist who opposed all state interference with personal liberties. He had fought against compulsory vaccination in the early

172 Quoted in Johnson, Challenge to American Freedoms, 59.
173 Congress defeated or amended several particularly pernicious provisions—including a section that would have given the president tremendous powers of censorship—despite Wilson’s pleas.
1910s, and he considered the Supreme Court’s decision upholding the practice to be on a par with *Dred Scott*. He was a stalwart opponent of the draft on grounds of individual conscience. When Emma Goldman and Alexander Berkman were indicted under the Selective Service Act in June, he agreed to defend them. He argued unsuccessfully that conscription constituted involuntary servitude under the 13th Amendment and that the provision for religious exemption was an unconstitutional infringement on religious liberty.

At the outbreak of the war, Weinberger had sensed a need for a new organization to protect civil liberties. In April 1917, he shared with Roger Baldwin his idea for an American Legal Defense League that would “fight all cases in the United States where free speech, free press or the right peaceably to assemble or to petition the government is invaded.” Baldwin had already expressed interest in civil liberties. On April 14, less than two weeks after the declaration of war, he had begun soliciting prominent signatories to a request for an official statement of Wilson’s “views on free speech, free press and assemblage during the war.” But he had no concrete program for vindicating those freedoms. Weinberger suggested that the AUAM could assist him with his plan for a civil liberties organization by referring cases to him through its local branches, and he proposed a constitutional test case of the Conscription Act in the event of its passage. He also offered his opinions on the constitutional status of dissenting speech for inclusion in an AUAM pamphlet. Weinberger advised Baldwin that open disagreement with government and military practices, including the publication and distribution of pamphlets on the war, was protected by the First Amendment, and he was adamant that “any

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176 Ibid., 78.
177 Harry Weinberger to Roger Baldwin, 28 April 1917, ACLU Papers, reel 5, vol. 35.
Espionage Bill Congress may pass cannot repeal the United States Constitution.”179 By May, he was outraged at the Administration’s efforts to quash public opposition to military bills and concluded “that we must re-educate the people, that they have the right to discuss and the right to oppose conscription and ask for its repeal.”180 Advocacy of a change in law, he insisted, could not qualify as treasonable or seditious.181

At first, Baldwin was supportive of Weinberger’s organizational ambitions. A pamphlet issued in May by the Bureau’s short-lived Committee on Constitutional Rights did precisely what Weinberger advised. It declared that “constitutional rights are being seriously invaded throughout the United States under pressure of war,” blaming the abuse on “petty officials who would compel conformity.”182 And it referred victims of this unconstitutional abuse to the American Legal Defense League.183 In a move he would repeat often during his ACLU career, however, Baldwin subsequently maneuvered to protect and expand his own organization’s turf. At a May 11 meeting, Weinberger agreed that all cases involving conscientious objectors would be left to the Conscientious Objectors’ Bureau—a course that seemed advisable since much of Weinberger’s advisory committee was interested only in the rights of speech, press, and assembly. But Baldwin also secured a commitment that the American Legal Defense League

179 Harry Weinberger to Roger Baldwin, 29 April 1917, ACLU Papers, reel 5, vol. 35, p. 188. Baldwin was more cautious. He told Weinberger, “We will include your statement about the spy bill in relation to constitutional rights, but I am sure our friends will want a more explicit statement of the practical effects of this legislation later. Most of them don’t want to go to jail or to suffer an expensive trial and they want advice as to how far they can go without getting into trouble with the Federal authorities.” Roger Baldwin to Harry Weinberger, 3 May 1918, ACLU Papers, reel 5, vol. 35, p. 190.

180 Harry Weinberger to Joy Young (AUAM), 2 May 1917, ACLU Papers, reel 5, vol. 35, p. 189.


182 American Union Against Militarism, Constitutional Rights in War Time (New York: American Union Against Militarism, May 1917), available in ACLU Papers, reel 5, vol. 43. The committee members were Amos Pinchot, Max Eastman, Agnes Leach, Stephen Wise, Herbert Bigelow, Scott Nearing, and William Cochran. With respect to the pending Espionage Act, the committee advised that “much will depend on how such war-time legislation is administered. The administration at Washington professes a desire to be liberal, and it is to be hoped that the federal authorities who will enforce the provisions of this act, will not undertake seriously to interfere with established rights.”

183 Ibid.
would leave any legal test of the Conscription or Espionage Act to the AUAM. In June, he went further. He acknowledged in a letter that Weinberger “must have felt in the uncertainty of the past few weeks, that the American Union was very poorly standing by you and the American Legal Defense League.” Blaming the AUAM’s internal debate for the change in policy and circumstances, he reneged on an earlier promise of financial assistance. More important, he told Weinberger: “We have decided now to take hold of the work of organizing legal defense throughout the country under a bureau of the Union, and including conscientious objectors.” The new Civil Liberties Bureau swallowed the American Legal Defense League’s entire program. Its goal, according to the press release announcing its formation, was to unite the various groups and individuals committed to maintaining “constitutional liberties” in wartime against government interference. In a second edition of the pamphlet on constitutional rights, published in July, all references to the American Legal Defense League were gone.

To be sure, the Civil Liberties Bureau did not entirely abandon the AUAM’s standard tactics. When the CLB was first announced, Baldwin emphasized that the board expected to cooperate closely with federal officials in preserving constitutional freedom. Throughout the war, it would cultivate relationships with public officials and lean heavily on well-connected members—most notably John Nevin Sayre, the brother of President Wilson’s son-in-law. The

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185 Letter to Harry Weinberger, 18 June 1917, ACLU Papers, reel 5, vol. 35.
186 Ibid.
187 AUAM Press Release, 2 July 1917, AUAM Papers, reel 10-2. The organization had already specified the sorts of violations it had in mind: prosecution for peaceful criticism of the government, interference with meetings and refusal of meeting halls, and confiscation of pamphlets and literature. Peaceful opposition to law, the Bureau insisted, was an inviolate constitutional right, and it deserved protection even when the nation was at war. AUAM, Constitutional Rights in War Time.
189 Baldwin hoped that Sayre’s presence would “make things look a little more interesting to those public and private super-patriots who would tar us with the ‘stick of pro-Germanism.’” Roger Baldwin to John Codman, 7 May 1918, ACLU Papers, reel 3, vol. 25.
CLB’s first major initiative was characteristic of this approach. In mid-July, the CLB organized an emergency conference to address the Post Office’s suppression of seventeen radical publications.\(^{190}\) Once the attendees had reached consensus that immediate action against the Espionage Act was necessary, it was an easy matter to settle on a plan of action. The participants voted unanimously to send a delegation of lawyers, including Clarence Darrow and Frank Walsh, to discuss the matter with the President, the Postmaster General, and the Department of Justice. Burleson, however, rebuffed their overtures; indeed, he refused even to issue guidelines or explanations of his censorship criteria. If the publishers disagreed with his decisions, he said, they could take up the matter in court.\(^{191}\)

That, of course, is precisely what the CLB resolved to do. Over the coming months, the new bureau would try its hand at lobbying, propaganda, and grass-roots organizing in addition to negotiation. Its initial focus, however, would be constitutional litigation, just as Weinberger had proposed. In this endeavor, the CLB drew heavily on the experiences of the Free Speech League. Weinberger’s plans for an independent wartime civil liberties body were themselves modeled on the older organization. In addition, Theodore Schroeder sent background materials on free speech to the Bureau’s Lawyers Advisory Council early on.\(^{192}\) He also provided Baldwin with a complete set of the League’s published pamphlets.\(^{193}\) Gilbert Roe was actively involved in the new organization and provided frequent legal advice. Drawing on these resources, Baldwin formulated a plan of action. The new bureau would operate nationally as a

\(^{190}\) Crystal Eastman to American Union Members, Local Committees and Affiliated Organizations, 13 July 1917, AUAM Papers, reel 10-2. Targeted publications included The Masses, the International Socialist Review, the American Socialist, and the Milwaukee Leader. “If we accept this Prussian mandate on the part of the postal authorities peacefully,” Eastman said, “it will be fastened upon us as a permanent war policy.” Immediate protest, by contrast, presented a possibility for “real freedom of the press in America, war or no war.” Crystal Eastman to American Union Members, Local Committees and Affiliated Organizations, 13 July 1917, AUAM Papers, reel 10-2.

\(^{191}\) Johnson, Challenge to American Freedoms, 58–59. The delegation also included Morris Hillquit and Seymour Stedman.

\(^{192}\) NCLB Minutes, 20 July 1917, cited in Rabban, Forgotten Years, 307.

\(^{193}\) Cited in Rabban, Forgotten Years, 308.
clearinghouse for information and legal aid, providing assistance and legal representation to
those individuals whose constitutional rights were violated. Indeed, when the Civil Liberties
Bureau took its name, it was invoking a tradition of legal aid bureaus, including the Bureau of
Legal Defense with which it worked closely during the war. Baldwin envisioned the CLB as a
means of helping dissenters to “get their legal rights before the courts.”

The choice to operate through the courts may seem a curious one for an organization
steeped in a legal culture dominated by labor injunctions and *Lochner*-era constitutionalism. In
later years, the ACLU would achieve real successes in the courts, and despite its continuing
distrust of judicial power, it would embrace legalism as a strategy. In fact, in the late 1920s and
early 1930s, the ACLU coached labor lawyers to ignore ideological reservations and secure anti-
employer injunctions whenever possible. During World War I, however, the CLB’s relationship
to the courts was murky. There is no evidence that Baldwin or anyone else within the CLB
struggled philosophically with the question at this stage. Baldwin knew through his experience
with the St. Louis housing ordinance that courts would occasionally act against repressive
legislation. Moreover, the Free Speech League had unabashedly pursued constitutional litigation
as a check on repressive state action. Although it had rarely won its cases, the wartime
prosecutions were better candidates; picketing and boycotts could be dismissed as conduct rather
than expression, but state and federal statutes during World War I clearly abridged public
discussion of controversial issues. The decision of the CLB leadership to try its hand in the
courts, it seems, was a simple matter of strategy.

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194 Roger Baldwin to John Codman, 11 October 1917, ACLU Papers, reel 3, vol. 25. The NCLB would assist in four
types of situation: first, and most important, constitutional test cases; second, unjust prosecutions in which
defendants were unable to secure competent counsel; third, when publicity was necessary either in advance of trial
or, afterwards, to call attention to miscarriage of justice; and fourth, assistance to underfunded local defense
A few successful court challenges in the summer of 1917 encouraged pursuit of the legal program, and by September, Baldwin was urging local correspondents to challenge offensive ordinances through litigation.\textsuperscript{195} By November, the organization reported that its 120 cooperating attorneys were assisting in an average 125 cases per week throughout the United States.\textsuperscript{196} At that time, a number of important prosecutions under the Espionage and Trading with the Enemy Acts were coming to the organization’s attention as a result of the “activity of government agents,” and its staff was helping to facilitate “test cases under the new legislation which must be carried to the higher courts for final decision on constitutional points.”\textsuperscript{197} Cases were proliferating at every level, from local to federal, and under local ordinances and state laws in addition to federal legislation. The bureau was supplying legal and financial aid to needy defendants, as well as to local defense committees incapable of funding the “local fight for constitutional liberties.” Attorneys provided legal references and assisted in drafting briefs. Finally, the group was handling trial publicity to “show up miscarriage of justice.”\textsuperscript{198} Although the CLB operated primarily to redress repression after the fact, its long-term hope was to discourage unlawful interference in the first place by reminding officials that their actions were being scrutinized by a national body.\textsuperscript{199} The overarching purpose of the Civil Liberties Bureau was to “make sure that bureaucratic officials and mob-minded judges shall not, out of sheer war

\footnotesize{\textsuperscript{195} Roger Baldwin to Mrs. Leo Simmons, 21 September 1917, ACLU Papers, reel 5, vol. 36 (“In regard to the ordinance passed by your city council, the obvious thing to do is to get one of your folks to violate it so that you may take it into the courts as a test case. It is to my mind clearly unconstitutional. A similar ordinance in Indianapolis was passed last April, and tested in the courts at once. It was of course declared void.”).}
\footnotesize{\textsuperscript{196} National Civil Liberties Bureau, “Statement to Members of the AUAM,” 1 November 1917, AUAM Papers, reel 10-1 (stating that the organization was “in touch with practically all cases reported in the press, where the rights of citizens or organizations representing the movements for peace, the conscientious objector, against war and for the cause of labor are violated at the hands of officials acting under war hysteria”).}
\footnotesize{\textsuperscript{197} National Civil Liberties Bureau, “The Need of a National Defense Fund,” 15 November 1917, ACLU Papers, reel 3, vol. 26; “Bureau Gives Aid to Conscientious Objectors to War,” Milwaukee Leader, 22 November 1917.}
\footnotesize{\textsuperscript{198} Ibid.}
\footnotesize{\textsuperscript{199} National Civil Liberties Bureau, statement to members of the AUAM, 1 November 1917, AUAM Papers, reel 10-1.}
passion, trample upon the rights of free speech, free press and public assembly during war-time.\textsuperscript{200}

\textit{The National Civil Liberties Bureau}

Whatever its early achievements in the courts, the new bureau failed to accomplish its original purpose: smoothing over differences within the organization. Although its program was meant to be respectable, announcement of the Civil Liberties Bureau triggered immediate public condemnation. A July 4 editorial in the \textit{New York Times} declared that a line must be drawn between “liberty” and “license,” and “just where it shall be drawn is and must be determined, in countries properly called free, by public sentiment as formally expressed by majorities through their voluntarily chosen representatives.” It lambasted the “little group of malcontents who for present purposes have chosen to call themselves ‘The National Civil Liberties Bureau,’” whose task, it claimed, was to gain “for themselves immunity from the application of laws to which good citizens willingly submit as essential to the national existence and welfare.”\textsuperscript{201}

To make matters worse, the majority of the NCLB leadership openly supported radical causes. In August, the board voted to send delegates to a conference organized by the People’s Council, a radical anti-war group to which many AUAM board members belonged. The People’s Council was regarded as dangerous by President Wilson. Even the liberals within the administration, like Frank Walsh, thought it threatened national interests.\textsuperscript{202} Lilian Wald worried that the decision to participate in the conference would destroy the AUAM’s reputation and undermine its broader program. The AUAM had “stood before the public as a group of

\textsuperscript{202} Johnson, \textit{Challenge to American Freedoms}, 22.
reflective liberals,” she said. In cooperating with the People’s Council, it was embracing “impulsive radicalism.” Nonetheless, the board voted to hold its course.

Wald was not the only AUAM board member recommending a more conservative approach. Oswald Garrison Villard felt that the Administration’s conscription policy had accommodated the Union’s legitimate requests, and he wanted the organization to withdraw all objectionable materials from the mail, disband its Publicity Department and Washington office, and retreat from public view. H. R. Mussey thought the current radical policy unwise and unlikely to hasten international peace, and he intended to leave the AUAM if the Civil Liberties Bureau continued to dominate its program.

By late summer, Wald was determined to resign. Although she professed a strong desire to hold the organization together, she thought the “cleavage” in the board insurmountable. In a desperate bid to keep her, Eastman recommended severing the Civil Liberties Bureau from the larger AUAM. The radicals, she urged, should “leave the more conservative minority to continue the work of the organization.” And after a long and painful debate, the Board voted to implement her proposal. Formal separation was recorded in the AUAM’s minutes on September 28.

Wald left anyway, and after the split, the AUAM was more or less a shell

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203 Lillian Wald to Crystal Eastman, 26 August 1917, AUAM Papers, reel 10-1.
204 AUAM Minutes, 30 August 1917, AUAM Papers, reel 10-1. Evidently, Wald and Mussey concurred in the vote with “deep regret.” As it turned out, Wood and Thomas were unable to attend. AUAM Minutes, 13 September 1917, reel 10-1. The People’s Council did not meet in Minnesota as planned; the AFL-sponsored American Alliance for Labor and Democracy rented all available halls in Minneapolis, the Minnesota governor forbade any meeting of the council in the state, and the meeting was ultimately held in Chicago instead. Murphy, Origin of Civil Liberties, 145–46.
205 AUAM Minutes, 13 September 1917, AUAM Papers, reel 10-1.
206 H. R. Mussey to Crystal Eastman, 27 September 1917, AUAM Papers, reel 10-1.
207 Lillian Wald to Committee, 13 September 1917, AUAM Papers, reel 10-1.
208 The recommendation was a reversal of her earlier position. In August, she told Wald that despite her immense value to the organization, “if keeping you as chairman meant a radical change of policy such as dropping the Civil Liberties Bureau, I should be against it.” Crystal Eastman to Lillian Wald, 24 August 1917, AUAM Papers, reel 10-1.
209 AUAM Minutes, 13 September 1917, AUAM Papers, reel 10-1.
210 AUAM Minutes, 28 September 1917, AUAM Papers, reel 10-1.
organization. In October, it changed its name to the American Union for a Democratic Peace. Shortly thereafter, it suspended operations.\(^{211}\)

For the newly independent Civil Liberties Bureau, on the other hand, the path forward was clear. Thomas told Eastman that the sort of liberal organization advocated by Villard and Wald would “have to originate, if at all, with those who have not been so deeply tarred with uncompromising pacifism as all our present members.”\(^{212}\) The new group would serve the public best by continuing to focus on civil liberties, a specialization that distinguished it from the People’s Council. He believed that the preservation of civil liberties was essential to “reasonable social progress” and argued that there was no other organization poised to take over the fight.\(^{213}\) The rest of the board agreed, and on October 17 the National Civil Liberties Bureau was announced. Publicly, the board attributed the split to the rapid expansion of civil liberties work and the need for an independent supervisory committee.\(^{214}\) A statement to AUAM members insisted that the work of the new organization would be “exactly the same.”\(^{215}\) The NCLB was committed to the “maintenance in war time of the rights of free press, free speech, peaceful assembly, liberty of conscience, and freedom from unlawful search and seizure.”\(^{216}\) Despite reports that the organization was under federal investigation, and notwithstanding the pending

\(^{211}\) AUAM Minutes, 29 October 1917, AUAM Papers, reel 10-1.
\(^{212}\) Norman Thomas to Crystal Eastman, 27 September 1917, AUAM Papers, reel 10-1.
\(^{213}\) Ibid.
\(^{215}\) National Civil Liberties Bureau, Statement to Members of the AUAM, 1 November 1917, ACLU Papers, reel 5, vol. 43. While the NCLB’s statement to the press was much like a draft considered by the board, there were a few notable discrepancies. Missing from the final version was a general indictment of the war: “We were not won over by the arguments of those liberals—in other opinions so much like us—who believed that this war was the great exception, the one last necessary war which should bring about world federation, disarmament and lasting peace. Nor have we been won over to that view since April 3rd, despite the terrific pressure of a nation’s wartime psychology.” In the same vein, the draft statement rightly reported that most Americans supported free speech only for those with whom they agreed—a sentiment that would long serve as the ACLU’s justification for its viewpoint-blind defense of expression. What followed, however, was not a plea for neutrality. “It is essential for leadership in the fight of civil liberty in war time to come from the heart of the minority itself,” the draft statement boldly proclaimed. “With rare exception the minority must depend upon itself and its own unaided efforts to maintain its right to exist.” “Proposed Announcement for Press,” AUAM Papers, reel 10-1 (italics in original).
\(^{216}\) NCLB letterhead, ACLU Papers, reel 1, vol. 3.
investigation of Civil Liberties Bureau pamphlets held up in the mail, the NCLB would work to preserve constitutional rights through government channels. “The War Department [was] evidently doing its best under the present law,” and the new organization, like the Civil Liberties Bureau before it, would publicly support the administration.  

Still, the description of the NCLB’s activity hinted at its future direction. Unencumbered by its conservative constituents, the organization was finally free to focus on the issue to which its board was most strongly committed: the “cause of labor.” Since the summer, supporters of the Civil Liberties Bureau had alerted the board to the suppression of the labor movement in the name of patriotism. Socialist lawyer Arthur LeSueur, who agreed to serve as a cooperating attorney for the Bureau, noted the “apparently concerted attack” against labor organizations in the west. “Wherever there is any protest or rebellion on the part of wage workers,” he explained, “the organization is immediately attacked on the ground that it is in conspiracy with the German Government in some traitorous enterprise, or is in league with German spies.” Austin Lewis, also a socialist lawyer and labor activist, told Baldwin he supported the war but opposed the “use of the war for class purposes,” to “put down labor organizations and to endeavor to destroy the right of peaceable economic agitation.” These were the sorts of concerns that the NCLB board, drawing on personal experience with the Commission on Industrial Relations and other prewar gains, thought the administration might be persuaded to address.

Baldwin was a savvy organizer, and he was careful to differentiate the NCLB from more frankly radical groups. In October, he wrote Scott Nearing to propose a division of responsibilities between the NCLB and the People’s Council. Baldwin’s organization would

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217 NCLB to citizens registered with the Civil Liberties Bureau, 1 November 1917, ACLU Papers, reel 5, vol. 43.
218 Ibid.
220 Austin Lewis to Roger Baldwin, 9 July 1917, ACLU Papers, reel 5, vol. 39.
leave mass meetings and demonstration to the latter group. Instead, it would work “through legal bureaus for the handling of individual cases, through personal work with government departments, through special test cases, and through such quiet pressure as it can exert from time to time through its scattered membership.” The People’s Council, in turn, would refer all appropriate cases to the NCLB. Steering clear of propaganda would insulate the NCLB. Other agencies were responsible for mobilizing the masses; the NCLB would protect their right to do so. “Our main job,” he insisted, “is to help keep people’s mouths open, and their printing presses free.”

The NCLB’s role as a legal bureau gave it cover. As Baldwin emphasized in a recruitment letter to John S. Codman, an attorney and prominent Boston businessman who supported Wilson’s war policies, lawyers well understood the tendency in the public imagination to conflate the defense of unpopular litigants with approval of their illegal conduct. The NCLB’s advocacy of the right to dissent, he insisted, did not imply agreement with the messages voiced by the speakers whom it defended. Indeed, Baldwin was anxious to attract members who supported the war effort to make the group’s claim to neutrality more credible. When Adolph Germer, executive secretary of the Socialist Party, wrote Baldwin in December to solicit

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222 Roger Baldwin to George Edwards, 10 November 1917, ACLU Papers, reel 5, vol. 36.
223 Roger Baldwin to John Codman, 26 October 1917, ACLU Papers, reel 3, vol. 25; Roger Baldwin to John Codman, 8 November 1917, ACLU Papers, reel 3, vol. 25 (“Perhaps some of us who are not for the war may not keep just the balance that is intended in a Bureau of this sort.”).
224 Baldwin assured John Codman that the organization was not engaging in anti-war propaganda but was defending those who chose to do so. Roger Baldwin to John Codman, 11 October 1917, ACLU Papers, reel 3, vol. 25.
225 Codman advised Baldwin that he was “heartily behind the Administration in the prosecution of the war and in the diplomatic policy adopted.” John Codman to Roger Baldwin, 25 October 1917, ACLU Papers, reel 3, vol. 25. Baldwin responded that Codman’s support for the war “rather adds than weakens our committee, which happens to be composed of a majority of persons who were originally against the war, and who still want to see peace concluded as rapidly as possible.” He told Codman that he hoped “to get a few other new members on the committee who hold just your point of view.” Roger Baldwin to John Codman, 26 October 1917, ACLU Papers, reel 3, vol. 25. Baldwin also received criticism from prospective supporters for the disproportionate representation on the committee of radicals and people of “foreign extraction.” E.g., Lawrence Brooks to Roger Baldwin, 21 September 1918, ACLU Papers, reel 4, vol. 32 (noting that the large number of “Socialist, Ultra-Pacifist and German names” would raise the specter of Pro-Germanism).
financial assistance in employing a Washington representative to monitor federal legislation in advance of the coming congressional election, Baldwin declined. To begin with, the NCLB’s existing representative, Laurence Todd, was “a very capable man, a radical, and correspondent for a large number of liberal and radical papers, particularly those of the Non-Partisan League.” More important, Baldwin told Germer that while “the committee [was] in entire sympathy” with the lobbying program of the Socialist Party, the NCLB was a legal defense organization and did not engage in active propaganda. The sole purpose of the organization, Baldwin insisted, was to “maintain[] established constitutional rights.”

In reality, however, the NCLB’s leaders were heavily invested in labor agitation as a substantive good, not merely as an abstract right. As Baldwin explained to a potential donor, the organization had not “taken over the work of the National Labor Defense Council by any means,” but attacks on labor constituted the bulk of its work. The “underlying purpose” of the drive to maintain constitutional rights was to preserve a voice for minorities in the “processes of progress,” in which “labor of course must in the future play the biggest part.”

In that effort, however, the NCLB was soon right back where it started. For all its early enthusiasm about constitutional litigation, the bureau had little success in the courts. One of its first major initiatives was a constitutional challenge to the Draft Act. In October, Baldwin invited Walter Nelles, the law partner of a former Harvard classmate, to become the organization’s counsel. Nelles had read about the Civil Liberties Bureau the day it was reported

226 Adolph Germer to Roger Baldwin, 8 December 1917, ACLU Papers, reel 1, vol. 3; Roger Baldwin to Adolph Germer, 10 December 1917, reel 1, vol. 3.
227 Roger Baldwin to John Codman, 11 October 1917, ACLU Papers, reel 3, vol. 25 (“We propose printing on our letterhead and literature a statement to the effect that our interest in these cases is solely on the issue of maintaining established constitutional rights, and that we have no particular interest in the theories or political beliefs of the defendants involved.”).
228 Roger Baldwin to Fay Lewis, 30 January 1918, ACLU Papers, reel 5, vol. 39.
229 Ibid.
in the *New York Times*, and he immediately wrote to offer his services.\(^{230}\) He took charge of the Draft Act challenge, and he was adamant that the NCLB center its objection on liberty of conscience, not on the less controversial argument that Congress lacked power to raise a draft and compel service abroad.\(^{231}\) When the case came before the Supreme Court, Nelles filed an *amicus* brief arguing that the First Amendment’s protection of religious freedom encompassed all conscientious objectors, regardless of whether they were members of religious sects or organizations opposed to the war. He criticized the prevailing assumption, espoused by Elihu Root, that constitutional protections were subordinate to claims of necessity during times of national crisis.\(^{232}\) Nelles’s work proved to be a liability for recruitment as well as a failure in the Supreme Court\(^{233}\)—which, despite its frequent invocation of individual rights in past cases, stressed the broad scope of federal government power.\(^{234}\)

The Draft Act challenge, like the NCLB’s broader defense of conscientious objectors, rested on a claim to individual conscience that many potential supporters considered spurious and antisocial. By contrast, postal censorship troubled mainstream liberals, lawyers, and

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\(^{230}\) Walter Nelles to National Civil Liberties Bureau, 3 July 1917, ACLU Papers, reel 3, vol. 25. Baldwin told Nelles, “I feel we have only begun on a work of real usefulness, and I hope eventually of some political significance in our national life.” Roger Baldwin to Walter Nelles, 24 October 1918, ACLU Papers, reel 3, vol. 25.

\(^{231}\) American Union against Militarism (Civil Liberties Bureau), *Some Aspects for the Constitutional Questions Involved in the Draft Act* (New York: American Union against Militarism, 1917), in ACLU Papers, reel 5, vol. 34 (noting that the Judge Advocate General and Attorney General had issued opinions during the previous decades indicating that while service in the militia could be compelled, service abroad could not).

\(^{232}\) Nelles wrote, “It lies deep in the foundations of everyone who has been an American schoolboy that the cardinal excellence of our government is that it assures to all men at all times freedom to believe as individual conscience and judgment may direct, and, within certain limits of public morals, to govern conduct accordingly. “To Hell with the Constitution, Says Elihu Root,” *New Age*, 5 January 1917 (1918).

\(^{233}\) E.g., Lawrence Brooks to Roger Baldwin, 21 September 1918, ACLU Papers, reel 4, vol. 32 (“Fighting the draft and attempting to repeal it merely discredits an organization which indulges in the pastime without doing the slightest good.”); John Codman to Roger Baldwin, 25 October 1917, ACLU Papers, reel 3, vol. 25 (“I have no doubt that I agree with your attitude as to the conscientious objector and the question would, therefore, come on the draft. What I shall want to known sooner or later is to what extent your Committee intends to push the question of the constitutionality because I doubt the expediency of doing this and would not want to be connected with it.”).

\(^{234}\) *Arver v. United States*, 245 U.S. 366 (1918), upholding the act, was decided on January 7, 1918. It flatly rejected Nelles’s religious freedom argument: “[W]e pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred because we think its unsoundness is too apparent to require us to do more.” Ibid., 389–90.
politicians, including even President Wilson\textsuperscript{235}—and while the administration proved unwilling to abdicate its censorship authority, there was a reasonable chance that the courts would constrain the worst abuses. In the end, however, the NCLB’s participation in the Espionage Act cases was also unavailing. Perhaps its best known effort in this regard was its defense of \textit{The Masses}, a leftist political magazine edited by Max Eastman, Crystal Eastman’s brother. The suppression of \textit{The Masses} had helped guide the AUAM’s leaders toward civil liberties work when the Espionage Act was first passed, and they were heavily invested in the litigation. The CLB organized a defense fund, and Gilbert Roe agreed to represent the publication and its staff. Civil liberties advocates were elated in late July when Judge Learned Hand famously decided, as a matter of statutory interpretation, that the suppression of \textit{The Masses} based on its antiwar editorials and political cartoons exceeded the authority of the Espionage Act. But on November 2, the Second Circuit reversed Hand’s decision. Throughout the country, other courts followed suit.\textsuperscript{236} \textit{The Masses}, deprived of its second-class mailing privileges, had no choice but to close its doors.\textsuperscript{237}

\textsuperscript{235}See Murphy, \textit{Origin of Civil Liberties}; Laurence Todd to Roger Baldwin, 25 October 1917, ACLU Papers, Reel 3, Vol. 25 (reporting “‘inside’ information that the President had been induced to order Burleson to soft-pedal the press control scheme” and that socialist and other papers would be “permitted to publish criticisms of all administration policies, so long as they do not impede the enlistments, destroy morale in the army, or otherwise interfere with the conduct of the war”).

\textsuperscript{236}Some federal judges resisted the dominant trend, including George M. Borquin in the District of Montana and Charles Fremont Amidon in the Eight Circuit Court of Appeals (who would later head the ACLU’s committee on anti-injunction laws). On the whole, however, judges capitulated to popular pressures. See Murphy, \textit{Origin of Civil Liberties}, 179–247; Geoffrey Stone, “Bad Tendency Test.”

\textsuperscript{237}Hand emphasized that he was not deciding whether Congress was constitutionally empowered to prohibit “any matter which tends to discourage the successful prosecution of the war” if it chose to do so; rather, at issue was “solely the question of how far Congress after much discussion has up to the present time seen fit to exercise a power which may extend to measures not yet even considered.” Masses Publishing Company v. Patten, 244 F. 535, 538 (S.D.N.Y. 1917), reversed, 246 F. 24 (2d Cir. 1917). Nonetheless, Hand’s reasoning was later incorporated into the Supreme Court’s constitutional analysis. On the \textit{Masses} case, see generally Gerald Gunther, “Learned Hand and the Origins of the Modern First Amendment Doctrine: Some Fragments of History,” \textit{Stanford Law Review} 27 (Feb. 1975): 719–73; Gerald Gunther, \textit{Learned Hand: The Man and the Judge} (New York: Knopf, 1994). Burleson’s censorship practices were upheld by the Supreme Court in \textit{Milwaukee Publishing Company v. Burleson}, 255 U.S. 407 (1921).
With the radical press largely out of business and many radical leaders in jail, the futility of constitutional litigation was unmistakable. NCLB attorneys and affiliates would continue to intervene in appropriate cases throughout and after the war, but it was clear that radical and anti-war defendants would rarely prevail in court. Nor was the Department of Justice likely to alter its course, despite persistent NCLB pressure. Increasingly, the broad-based prosecution and conviction of left-wing leaders and organizers threatened the future of the radical and anti-war movements—which, to Crystal Eastman and others within the NCLB, were one and the same.238

The most plausible remaining strategy was the mobilization of public opinion. Vivid NCLB accounts of lawless brutality and vigilante justice—often committed with official encouragement—were troubling to many progressives. In October, a vicious attack on the AUAM’s own Herbert S. Bigelow, a pacifist minister and outspoken opponent of “big business,”239 attracted outraged moderates to the organization.240 Capitalizing on this condemnation as well as lingering concerns about Postmaster Burleson, the organization decided to convene a “mass meeting” in defense of “American Liberties in War Time.”241 Its central purpose was to demonstrate why public protest had become necessary. To manifest a broad consensus on the issue, the organizers wanted to assemble a sponsoring committee whose members would be split evenly among pacifists, militarists, and people who regarded the war as necessary but deplorable. To that end, they solicited participation from a wide range of groups

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238 Eastman explained that a liberal anti-war effort was not possible in light of anti-war hysteria and suppression. “The only great movement against war,” she told Oswald Garrison Villard, “must be the radical movement.” Crystal Eastman to Oswald G. Villard, 16 November 1917, AUAM Papers, reel 10-1.
240 E.g., John Codman to Roger Baldwin, 7 December 1917, ACLU Papers, reel 3, vol. 25 (“I have now decided to go with you and I think the attack on Bigelow has brought me to that decision. I hope some effort will be made to bring his assailants to justice.”). See also Murphy, Origin of Civil Liberty, 165.
241 Circular, ACLU Papers, reel 1, vol. 3.
and individuals, but aside from the radicals, most declined. A few accepted at first, expressing concern about mobs and vigilantism, and then backed out for lack of a critical mass. Many invoked the prominent progressive sentiment that “the world will not be safe for free speech until it is safe for democracy.”

In the end, as moderate invitees had feared, the meeting was attended and its agenda dominated by pacifists and radicals. Denied the use of Carnegie Hall, Baldwin opted instead, appropriately enough, to hold the conference at the Liberty Theatre. The theater was filled to capacity. Speakers included Herbert Bigelow, muckraker and revolutionary enthusiast Lincoln Steffens, leftist minister Harry Ward, and Socialists James Maurer and Norman Thomas. Much of the discussion focused on the capitalist underpinnings of the war. The central theme was the unjustified attack on radicalism and the labor movement under the pretext of disloyalty.

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242 The NAACP declined as an organization to take part in the January conference because it was “so radically divided on the question of war.” Mary White Ovington to Roger Baldwin, 19 November 1918, ACLU Papers, reel 1, vol. 3. Baldwin clarified that the gathering was not to be “in any sense a pacifist or anti-war meeting.” Rather, “It is to talk about the rights of minorities. Certainly the colored people have a grievance which ought to be discussed in connection with the grievance of labor, socialist and other radical movements.” Despite his plea, the NAACP board chose not to take part. Mary White Ovington to Roger Baldwin, 11 December 1917, ACLU Papers, reel 1, vol. 3.

243 Many of the moderate speakers were friends and acquaintances of Mary Wary Dennett, NCLB secretary, from her past suffrage work. Anna Howard Shaw, in declining an invitation to speak, told Dennett that “Capital has the country by the throat with one hand and Labor with the other, and between the two we women are getting the small end of it all.” More pointedly, she told Dennett that had it not been for Herbert Bigelow and others like him, “We would have had the suffrage in Ohio long ago.” Anna Howard Shaw to Mary Ware Dennett, 19 December 1917, ACLU Papers, reel 1, vol. 3. Beatrice Hale rescinded her acceptance due to the high number of pacifists and radicals who would be speaking. She explained that the meeting would be futile under the circumstances, and the damage to her reputation was therefore unjustifiable. She closed: “You know how we used to feel in Suffrage—until you can have an effective affair, don’t have one at all!” Beatrice Hale to Mary Ware Dennett, 9 January 1918, ACLU Papers, reel 1, vol. 3.


245 C. C. Smith to Mary Ware Dennett, 20 December 1917, ACLU Papers, reel 1, vol. 3.

246 Steffens and Bigelow supported the war once it was declared.

247 The assumption that attacks on labor were proceeding “under the cloak of patriotism” was central to the NCLB’s rhetoric throughout the war. Roger Baldwin to Fay Lewis, 30 January 1918, ACLU Papers, reel 5, vol. 39. In a telegram to President Wilson opposing the Trading with the Enemy bill, the NCLB had reported that the “war power [was] already being used by authorities to stifle legitimate agitation by labor for better conditions” and cautioned that postal censorship would result in the “total abolition during war of [the] entire radical and most of the labor press.” Telegram from NCLB to Woodrow Wilson, 26 September 1917, ACLU Papers, reel 3, vol. 26.
The NCLB was not invested in presenting the repression of labor as a novel departure or in suggesting that its own efforts were innovative or unprecedented.\(^\text{248}\) On the contrary, for the NCLB, the suppression of speech in wartime was simply a new manifestation of a well-established pattern. Industry was using all the tools at its disposal to quash the radical labor movement, and the government, whether wittingly or not, was playing into its hands. Thus one announcement for the meeting stressed the “charge that business interests are disloyally using patriotism to intimidate labor and radical movements.”\(^\text{249}\) Many of the NCLB’s supporters in this endeavor had been promoting the same message for years. Indeed several, including Clarence Darrow and Gilbert Roe, had testified publicly to that effect before the Commission on Industrial Relations. Wartime abuses of personal liberties were worse in degree than their prewar analogs. Such methods of repression as postal censorship were more centralized and consequently more threatening. But the basic objectives of the repressors remained the same: to shield the status quo from the insidious effects of radical organizing and expression. The Conference on Liberties in Wartime, in exposing this secret agenda, was an extension of prewar efforts to protect labor’s rights and to preserve American democracy. Tellingly, the proposed remedy for the mounting violations of civil liberties was to bring them to the attention of Congress.

The resolution adopted by the committee and submitted to Congress for consideration charged that violations of constitutional liberty were hindering rather than promoting the war effort and “menace[d] the whole future of democratic institutions and individual liberties after the war.” Mob violence had received the sanction of many public leaders. The espionage act was

\(^{248}\) In the wake of the war Zechariah Chafee would famously portray the wartime hysteria and the failure of the courts to uphold expressive freedom as an aberration in American history, a departure from a longstanding commitment to the First Amendment and to the broader tolerance of minority views. That Chafee had not yet written his seminal article was evident from the meeting’s agenda: “Summarize the outrages showing that this suppression of liberty is no new affair in American life. Refer to the negro, radical movements and labor in the past.” Circular, ACLU Papers, reel 1, vol. 3.

\(^{249}\) Mary Ware Dennett to Friends, 5 January 1918, ACLU Papers, reel 1, vol. 3.
being manipulated, “in the face of the declared intent of Congress,” to quash dissent and to “check radical and labor movements.” Post office censorship was destroying the free press. And “exploiting business interests” were deliberately crushing labor “while robbing the consumer and piling up huge war profits.” These abuses, according to the resolution, were a matter of common knowledge. But it remained unclear precisely which interests were propelling them, and toward what end. “The war has only brought to a sharp focus tendencies hostile to our democratic institutions which have long been evident in the case of such minority groups as the Negro and other races in our national life, as well as many radical and labor movements,” it concluded. In order better to understand that broader repressive trend, the conference committee requested that “an immediate Congressional inquiry be made into the actual facts of these violations of constitutional right, mob violence and censorship, and particularly the efforts to use the war as a means to crush labor.”

There was, of course, no realistic prospect of congressional action on this resolution during the war. The press dismissed it as a radical attempt to undermine the war effort. But the conference served a more important function for the NCLB: it marked the organization’s reentry into the realm of popular agitation and propaganda. As Lenetta Cooper advised Baldwin with respect to his correspondence with the War Department over its treatment of conscientious objectors, government negotiations worked best when buttressed by popular support.

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250 Resolution, ACLU Papers, reel 1, vol. 3.
251 See also Roger Baldwin to Scott Nearing, 30 January 1918, ACLU Papers, reel 5, vol. 35 (“It is our experience with the Department of Justice unless you press them pretty hard and go after them through the newspapers at the same time, you won’t get action.”). In this vein, Baldwin wrote to Colonel Edward M. House, a close advisor of President Wilson’s who was sympathetic to civil liberties, and warned him that “the suppression of liberal opinion by some of the federal departments” threatened to undermine liberal and radical support for the President’s war aims. Roger Baldwin to Col. Edward M. House, 22 Jan. 1918, ACLU Papers, reel 3, vol. 26. House agreed to relay an NCLB memorandum to President Wilson, and the NCLB was optimistic about a “big swing leftward” within the administration as a result of House’s views. Laurence Todd to Roger Baldwin, 2 February 1918, ACLU Papers, reel...
March, Baldwin was “thoroughly disgusted with the folks at Washington who have given us such hearty assurances.” Those assurances, he complained, did not translate into tolerant policy, and “the indictments go on merrily.”252 Baldwin thought it time to take a more public stand.

In the weeks after the conference, Baldwin exchanged letters with Arnold Peterson, National Secretary of the Socialist Labor Party of America. Peterson told Baldwin that although his party approved the “spirit” of the resolution, it did not believe “that the sending of resolutions protesting against outrages committed by the authorities” was worthwhile. Instead, it was committed to reaching out to the working class in an endeavor “to get that class industrially and politically organized.” The only way to protect working class rights was to effectuate working class power.253 In later years, Baldwin would often make the same claim. As he told Peterson, he agreed “about the main line of approach into the solution of the problem of liberty,” and his primary goal was “working class and radical organization.” Nonetheless, there would need to be “a lot of fighting along the way,” and in the course of the struggle, he would use “any existing agency or means” to accomplish the larger objective.254 He hoped that other groups—to which, in some cases, he contributed and belonged—would continue to fight the crucial battles. The NCLB would endeavor to protect their right to continue their work, unmolested by the state and without incurring public condemnation. “The United States Congress isn’t a bad tool for purposes of agitation and publicity which is necessary to keep the iron hot.”255 Nor, for that matter, were the courts.

3, vol. 25; Memorandum for Colonel House, 24 January 1918, ACLU Papers, reel 3, vol. 26. In the end, however, the President proved unreceptive to this argument. Johnson, Challenge to American Freedoms, 68–71.  
252 Roger Baldwin to Edmund Evans, 16 March 1918, ACLU Papers, reel 3, vol. 25.  
253 Arnold Peterson to Roger Baldwin, 31 January 1918, ACLU Papers, reel 5, vol. 35. Meanwhile, pacifists worried that narrow exceptions for conscientious objectors would serve to “ameliorat[e] the horrors of war, making war less unpleasant, more possible and consequently promoting and prolonging” it. James Warbasse to Roger Baldwin, 9 November 1917, ACLU Papers, reel 3, vol. 25.  
254 Roger Baldwin to Arnold Peterson, 2 February 1918, ACLU Papers, reel 5, vol. 35.  
255 Ibid.
Baldwin’s distinguishing characteristic as an administrator was his willingness to adopt whatever means he thought most likely to accomplish his overarching program. Between World War I and the New Deal, that program was the preservation of labor’s right to organize, en route to a general redistribution of economic resources and political power. Perhaps more than anything it was Baldwin’s flexibility that made the NCLB, and later the ACLU, so much more successful than the organizations whose rights it defended. Baldwin was always keenly aware of the prevailing political climate, and he was willing and able to adapt to changing times. Moreover, he learned from his failures and capitalized on his successes. For the duration of the war, Baldwin would be honing his skills—building his credibility in radical circles while studying the limits of liberal tolerance. By early 1918, it was clear what constituency the new organization would primarily serve. The urgent and unresolved question for the NCLB board was a strategic one: how best to protect that constituency from persecution and prosecution in a time of national crisis.
At two o’clock central time on the afternoon of September 5, 1917, hundreds of United States marshals and their deputies, together with agents of the Department of Justice, descended simultaneously on forty-seven IWW halls and offices and the residences of IWW leaders throughout the country. Federal officers seized five tons of documents—including literature, mailing lists, and financial records—as well as artwork, furniture, and even wastebaskets.

The materials and documents confiscated in the September raid served as the basis for the federal conspiracy prosecution of the IWW leadership. The Department of Justice secured indictments in areas of significant IWW activity, including Sacramento, Kansas City, and the organization’s headquarters in Chicago. The Chicago conspiracy trial, whose defendants included IWW head “Big Bill” Haywood, was the first and most celebrated. It lasted nearly nine months from indictment to verdict. Its 166 defendants—a number that declined steadily due to dozens of dismissals for insufficient evidence—were marched each day from the Cook County jail to the federal courthouse, enduring verbal abuse and physical violence along the way.\(^1\) The record, purported at the time to be the largest ever filed, contained 33,000 typewritten pages and 10 million words.\(^2\) The proceedings were billed by the prosecution and defendants alike as the most expansive and most important labor trial in United States history.

The government’s theory in the Chicago trial was that the IWW, by counseling its members not to serve in the military and by organizing strikes in crucial war industries, had conspired to undermine America’s war effort. For the defendants, however, these supposed efforts to obstruct recruitment and war production were beside the point. Flush with the

\(^2\) “Pauper’s Petition To Be Filed in Haywood Case,”* New York Tribune*, 21 May 1919.
optimism of labor’s newfound wartime strength, they embraced the opportunity to state their case publicly, once and for all. In their testimony and in their defense bulletins, the beleaguered Wobblies described the suffering of transient and migratory workers. They recounted the living conditions in the mines and the lumber camps: the inadequate food and water, the lack of access to bathing facilities, the hard straw-covered bunks on which they were expected to sleep. They explained the mechanisms used to suppress labor organization, from the rustling card system to lynching. The stated goal of the IWW’s defense was to put the industrial system on trial.

The IWW trial might seem an unusual episode through which to tell the history of civil liberties during wartime. It was not, after all, a case about “free speech” as we would recognize the term today. The liberties at issue—the rights of workers to petition, protest, and strike—were cast in terms of equality rather than autonomy. And the NCLB, though deeply involved in publicity for the case, did not so much as file a brief in court. The lawyer for the IWW, himself a member of the organization, did raise a First Amendment argument. But neither the district court nor the Court of Appeals entertained it seriously. The IWW trial produced no noteworthy doctrinal precedent on which to base future free speech claims; indeed, the Supreme Court denied the defendants’ petition for certiorari, and the appellate court considered itself bound by more notable wartime decisions.

What the IWW case did do was to precipitate a major reconsideration of strategy by the labor sympathizers who would lead the modern free speech movement. The IWW case was important because it led to the ACLU’s definitive break with the Wilson administration and its loss of confidence in its ability to work within, rather than against, the existing machinery of the state.³ When it first arose, the NCLB treated the case as a new permutation of the great free

³ Johnson, Challenge to American Freedoms, contains a helpful account of the NCLB’s involvement with the IWW litigation. Johnson regards the case as one of the NCLB’s major wartime endeavors, but he does not situate it in the
speech fights the IWW had pioneered a decade earlier. It cast the Wobblies as patriotic citizens and called on the government to observe rule of law and uphold fundamental American principles. In past labor struggles, when local law enforcement rushed to the assistance of beleaguered employers, the federal government had shown restraint. Wilson’s wartime administration included many officials who had endorsed the findings of the Commission on Industrial Relations, with its robust support for labor’s free speech. Now, the capitalists had introduced a new twist: they had accused the IWW of fighting for the Kaiser in exchange for German gold. And so the NCLB leadership set out to prove that the IWW was a labor organization, pure and simple—that its enemy was capitalist exploitation, not the United States. They believed that once they made their case, they could persuade administration officials to stay out. In historical memory, the hysteria of the First World War bleeds into the Red Scare of 1919 and 1920. It is difficult to fathom that the prosecution of radicals might have triggered concern among the same progressives who accepted the suppression of anti-war propaganda as a social necessity. But such was the situation in 1917, when the NCLB was born.4

This time, however, it was the federal government that had initiated charges. The radical labor movement was deemed a threat to war production as well as national unity, and its sacrifice was justified in the public interest. In a climate of jingoistic war frenzy marked by public hostility, mob violence, and police brutality against dissenters, the NCLB was naïve to expect a continuation of the reasonably sympathetic public reception that labor’s prewar confrontations with the law had engendered. As events unfolded, support for the IWW brought down the wrath context of the broader agenda or future program of the ACLU, nor does he emphasize the influence of the IWW’s activities and beliefs on the NCLB’s evolving theory of free speech. His discussion of the trial itself, including the legal arguments raised, is minimal. One of the defendants published an account of the trial shortly after the verdict was returned. Harrison George, *The IWW Trial: Story of the Greatest Trial in Labor’s History by One of the Defendants* (Chicago: Industrial Workers of the World, 1918).

4 See, e.g., McCartin, *Labor’s Great War*, 3 (“Perhaps at no time in American history did radical ideas penetrate the mainstream consciousness more deeply than in this era.”).
of the war department and led to spying on the NCLB by the Department of Justice and by United States Military Intelligence. The conviction of the IWW defendants emphasized the limits of progressivism as a basis for free speech. It also strengthened existing connections between the radical labor movement and the NCLB leadership. Eventually, it generated a new and radical model of civil liberties—a “right of agitation”—premised neither on individual autonomy nor on the discursive production of truth, but on the frank mobilization of working-class power.

The IWW and the War

Of the many government abridgments of labor’s right to organize over the course of the First World War, the most troubling to the NCLB was the Chicago IWW trial. Many labor leaders, including Eugene V. Debs, were prosecuted and convicted under the Espionage Act for purported anti-war activity. The IWW indictments, however, were particularly egregious. Citing evidence of the usual radical antagonism toward capitalist war, the government was threatening to send the entire organizational leadership to jail.

By the time the IWW indictments were pending, the Free Speech League had disbanded, and the IWW was more interested in using the trial as a forum for educating the masses than in expanding constitutional liberties. Still, the defense committee reached out broadly to socialists and liberals sympathetic to its cause, and the NCLB proved particularly receptive. It was clear to the NCLB that the goal of the prosecution was to destroy the IWW. The colossal trial was widely followed, and the eventual convictions of Big Bill Haywood and many of the organization’s other leaders precipitated the decline of the IWW as a major force in the American labor

5 Walker, American Liberties, 25.
movement. In January 1918, the NCLB could declare without undue hyperbole that “the government’s indictments against the Industrial Workers of the World constitute what is probably the most important labor case in history.”

The government had its reasons for targeting the IWW. The wartime economy produced a temporary shift in the balance of power between workers and employers. Increased domestic production in the face of a sharp reduction in immigration from Europe meant that unemployment plummeted. And yet, though workers were in short supply, their wages did not rise in step with their employers’ profit margins. Samuel Gompers and other labor leaders pledged that their unions would not strike while the United States was at war, but they were unable to enforce their promises on the ground. On the contrary, the early months of the war witnessed a steep rise in union organizing and a wave of strikes across all industries. Employers, in turn, brutally shut down organizing efforts by unions determined to reap their share of wartime economic profits.

It was during this moment that the IWW formulated its own wartime labor policy. Unlike its more conservative counterparts, the IWW leadership explicitly called for an escalation of the class war while the Great War waged abroad. IWW recruitment skyrocketed during the spring and summer of 1917. Strikes in war industries like logging and copper mining were responsible for precipitous drops in production and seemingly threatened the prosecution of the war.

Industry was incensed at the IWW’s successes, and local United States Attorneys, who were hostile to organized labor in general and to the IWW in particular, relayed to their superiors the demands of industrial leaders for a federal crackdown. Some went so far as to advocate

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6 NCLB circular announcing conference on the IWW case, 3 January 1918, ACLU Papers, Reel 4, Vol. 27.
7 Dubofsky, *We Shall Be All*, 376–97.
military detention of recalcitrant agitators. At first, Attorney General Thomas Gregory considered the strikes legal and had no plan to file charges. Unlike the career employees in the Department of Justice, Gregory showed a measure of restraint in filing Espionage Act cases; he felt that many U.S. Attorneys had unduly succumbed to local pressures, and he instituted a policy requiring all cases under the act to be cleared in Washington before filing. By late summer, however, the situation had worsened in western states, largely as a result of violent resistance to IWW strikes by western mine owners—and increasingly, some form of federal intervention appeared advisable. State and local police launched their own investigations in an effort to uncover evidence of espionage and disloyalty. Some states enacted criminal syndicalism laws, which made IWW ideology illegal on its own terms. But state law enforcement was unable to break the strikes, and state militias were federalized in the summer of 1917. Meanwhile, vigilante violence was rampant, and IWW pleas for federal protection were curtly dismissed. Loyalty leagues and similar groups comprising off-duty soldiers and angry citizens stormed IWW headquarters, and mobs beat, tarred and feathered, and deported unwanted Wobblies.

The best known example of the last phenomenon was the July deportation of twelve hundred miners from Bisbee, Arizona. In Bisbee, the county sheriff’s department, the mayor, the city council, the local mine operator, and executives of other area businesses formulated a plan for ridding the town of its IWW problem. The sheriff deputized two thousand townspeople, who rounded up twelve hundred alleged Wobblies (supposedly Mexicans, German agents, and subversives), packed them into cattle cars supplied by the El Paso and Southwestern Railroad,
and shipped them out of state. Many had families who were stranded in Bisbee without support. A significant portion had never belonged to the IWW, and some were members of the AFL—though the ordeal increased the IWW’s share. The deportees were housed in an army camp in New Mexico, where they received minimal rations. Requests for federal assistance—including an offer to return to work if the federal government assumed operation of the mines—were consistently rejected. Most of the deportees eventually gave up their efforts to return to Bisbee, though A.S. Embree, who would serve as secretary of the defense committee, returned home to his wife and children only to be imprisoned by the local authorities.12

The Bisbee affair was sufficiently flagrant to generate concern among moderate groups. Labor Department mediators and the AFL demanded federal action against the ringleaders, and the Justice Department reluctantly filed charges on the theory that deportation of men legally registered for the draft violated the Conscription Act. The district court, predictably, dismissed the indictments. In a decision eventually affirmed by the Supreme Court, it held that the Draft Act did not require registrants to remain within their state of residence, and the deportation of the victims across state lines was otherwise insufficient to implicate federally cognizable rights; the unlawful behavior of the vigilantes fell within the jurisdiction of state law (which, as a matter of politics, meant there was no case at all).13 It would be two decades before the federal

kindness of the land that has welcomed them to its shores by pouring the insidious poison of IWW doctrine into the ears and minds of these poor, ignorant people that come to this country and locate in these various centers.” Quoted in Appellants’ Brief, Seventh Circuit, 8–9.

12 Dubofsky, We Shall Be All, 385–88.

government, at the strong urging of the ACLU, would seek to remedy this federalism loophole, which served so often to immunize employers and their collaborators from prosecution.14

Employers’ associations and state governments were more successful than the IWW in soliciting federal assistance. In July, western governors appealed directly to the President’s Council on National Defense, which was responsible for regulating the national wartime economy.15 Federal troops were dispatched to IWW strongholds like Washington, Oregon, and Arizona to ward off disturbances in wartime production; despite orders to remain neutral in local conflicts, they generally served employers’ interests. They did so, notably, with substantial support from the AFL leadership, which believed (wrongly, it turned out) that restraint of the IWW would facilitate competing efforts by the AFL to organize the same workers.16 Gompers’s vocal call for the suppression of the IWW and other labor radicals helped to spur the ensuing witch hunt. Federal prosecution emerged as a more moderate solution to the IWW problem than active military suppression.

In July 1917, the Department of Justice distributed a circular to all of its attorneys in which it laid the groundwork for legal action against the IWW. The circular urged its recipients to collect evidence against the IWW, including its income stream, its publications, and descriptions of its leaders. At roughly the same time, on the orders of President Wilson, a federal judge initiated an investigation designed to assemble evidence to support an indictment. Justice agents monitored every IWW move, scouring all of its published circulars and trailing Haywood and other office holders in their daily business. In early September, the department launched raids in every city where the IWW had an office.17 They constituted, according to the New York Times, a...
The government went on to indict 166 labor leaders, some of whom were not actually members of the IWW, on over one thousand counts. According to the indictment, the IWW defendants had conspired to violate the Espionage Act, the Conscription Act, and other federal laws. The organizational leadership, inexplicably confident that a jury trial would vindicate them, counseled the defendants to turn themselves in.

When the IWW prosecution was first announced, it was justified by rumors that the organization was fighting for the enemy in exchange for “German gold.” In August 1917, Arizona Senator Henry Ashurst announced on the Senate floor that IWW stood for “Imperial Wilhelm’s Warriors.” Incredibly, despite the organization’s outspoken opposition to war, administration officials seem to have believed the allegations that the IWW was working for the Germans. It quickly became evident, however, that the charges of espionage and treason were baseless. Nor had the IWW officially counseled resistance of the draft once the Conscription Act was passed. Certainly, it had been staunchly opposed to intervention in the prewar years. As late as March 24, 1917, it explicitly contrasted its own declaration against war with the AFL’s pledge to serve the country with patriotic fervor in case of American entry into the conflict. Even after April, IWW publications implicitly criticized conscription, and some of the organization’s most militant organizers went further, advising members to claim exemption on their registration cards based on opposition to war (the same procedure that the NCLB recommended to political objectors). But the organization itself walked a careful line, leaving

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20 Quoted in Dubofsky, *We Shall be All*, 376.
the decision to individual members. Ninety-five percent of Wobblies who were eligible for the draft chose to register.²¹

Caution on this score by the IWW leadership did not, however, insulate the organization from public hostility, nor from prosecution under the Espionage Act. The NCLB, which immediately offered its assistance in the IWW defense, was quick to explain why. “The government is attacking primarily not the war-time activities of the organization, but the organization per se,” it explained.²² The Department of Justice seemingly agreed. Within days of the raid, one United States attorney conveyed to Gregory his understanding that the purpose of the department’s operation was “very largely to put the IWW out of business.”²³

The IWW indictments, in this respect, were much like the other Espionage Act prosecutions challenged by the NCLB during the war. The IWW threatened the interests of the industrialists on whom the federal government relied for successful prosecution of the war. The administration was hesitant to quash the radical labor movement outright. But on the pretext of military necessity, the Department of Justice was threatening to prosecute it out of existence. In its November call for contributions, the NCLB articulated the concern at the core of the IWW case and of its own broader agenda during the war years and afterwards. “In this prosecution,” it declared, “is involved the whole question of the right of agitation by a radical labor body.”²⁴

²¹ See ibid., 354–58. Most of those who registered served when called, though some declined because of allegiance to their countries of heritage (primarily Finns and Scandinavians), and some apparently hoped to bring their anti-militarist message to the armed forces.
²³ Quoted in Dubofsky, We Shall Be All, 407. The NCLB later noted that the persecution of the Farmers’ Non-Partisan League, a radical but pro-war organization, proved that the prosecution “was not due to anti-war activities” but rather a function of “the favorable opportunity offered to business interests by the war to crush their greatest foes at home.” NCLB, Memorandum Regarding the Persecution of the Radical Labor Movement in the United States (undated), ACLU Papers, reel 7, vol. 69.
The NCLB never defined this so-called right of agitation precisely, but the ACLU espoused it regularly until the Second World War. It was clearly much broader than the conventional understanding among progressives of free speech or free press, which was premised on ensuring robust public conversation as a prerequisite for democratic deliberation and decisionmaking. Later proponents of free speech, like the Communist Party, claimed a right to advocate revolutionary violence. For the IWW, however, speech was not a means of promoting its program; it was its program. In a nutshell, the right of agitation was a right to improve the situation of labor by any available non-violent means.25 Organizing workers, protesting employer abuses, and dissuading strike-breakers were fundamental weapons in the labor struggle. In the words of Elizabeth Gurley Flynn, the prosecution of the IWW for participation in the labor struggle ‘involved the right to strike, organize, and publish the labor press.’ Like the NCLB, Flynn regarded the IWW prosecutions as a labor case rather than a war case and emphasized that the ‘war atmosphere [was] being exploited by large capital and the press to create bitter prejudice against radical and militant labor unions.’ She continued, ‘It is a fundamental and epoch-making trial of labor, its struggles and aspirations.’26

After the war, Roger Baldwin would frankly declare the right of agitation to be a natural right, “prior to and independent of constitutions.”27 Like his allies in the radical labor

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25 In this respect, the NCLB’s view clashed head on with that of the legal establishment. The position of Archibald Stevenson, then chair of the National Civic Federation’s Committee on Free Speech, was typical. It was permissible, according to Stevenson, for a citizen to advocate the lawful amendment of the United States Constitution to establish in America a soviet form of government. By contrast, the advocacy of a change in government through such means as violence or the general strike, far from deserving constitutional protection, would ‘constitute[] the highest crime against the principles of civil liberty and democratic governance.’ Archibald E. Stevenson, Chairman of the Committee on Free Speech, National Civic Federation, circular responding to an editorial on the Gitlow case appearing in The Independent, 20 June 1925.
26 Elizabeth Gurley Flynn, A. Giovannitti, and Carlo Tresca to Roger Baldwin, undated, ACLU Papers, reel 4, vol. 27.
27 American Civil Liberties Union, The Fight for Free Speech (New York: American Civil Liberties Union, 1921), 5. By contrast, “the demand for ‘rights’ [was] couched usually in an appeal to free speech traditions and constitutional guarantees.”
movement, he would come to believe that “causes get that natural right in proportion to their power to take and hold it.” In other words, he would understand power as a prerequisite for freedom, rather than the other way around. For the time being, however, the NCLB was more cautious in its rhetoric, if not in its underlying beliefs. Even while it invoked the right of agitation, the NCLB emphasized to its contributors that the IWW deserved a fair trial. It requested assistance in bringing the IWW’s case to the public as a matter of “law and public policy, and of course as protagonists only of American constitutional rights.”

In short, Baldwin and the NCLB were speaking in two voices. To their radical labor allies, they promised the substantive rights crucial to organizing marginalized workers, that is, rights against interference with organizing, picketing, and boycotting. To the progressives in power, they spoke in conventional reformist terms. Free speech was just the sort of incremental adjustment in the system that would quell widespread social conflict.

As with the conscientious objectors, the first recourse of the NCLB leadership was to connections within the administration. By contrast with early optimism about judicial vindication of freedom of press in the postal censorship cases, the likelihood of success in the courts for the IWW was markedly dim, and the NCLB hoped that trial could be avoided. Its goal was a “dismissal outright of the IWW cases, so that the whole matter might be turned over to the Department of Labor as an administrative problem.” This may seem an ironic ambition for a civil liberties group organized to combat the abuses of administrative discretion through recourse to the courts, but Baldwin agreed with the attorney for the IWW that “the problems presented by

28 Ibid.
30 Roger Baldwin to Laurence Todd, 26 February 1918, ACLU Papers, reel 3, vol. 25.
this situation [were] diplomatic and administrative rather than judicial.” He asked sympathetic insiders to correct common misapprehensions about the IWW and to discourage prosecution. He argued that conviction would only exacerbate labor unrest in the United States by arousing greater enmity toward government and employers.

This position met with mixed success in the administration. Many of Wilson’s advisors—including Secretary of Labor William B. Wilson, a former Secretary-Treasurer of the UMW—were generally supportive of organized labor. But pro-unionism did not necessarily translate into sympathy for labor radicalism, and other members of the administration, such as Postmaster General Burleson, were openly hostile. President Wilson was reluctant to take a strong stand. In August 1917, largely in response to the Bisbee deportations, he had appointed a Mediation Commission to evaluate the wartime labor situation and to formulate recommendations when particular disputes jeopardized the war effort. The Commission was chaired by William B. Wilson and included two labor representatives, both AFL, and two moderate employers. Its secretary, Felix Frankfurter, was initially skeptical of the AFL’s dominance. In the course of his investigations, however, he came to agree with Gompers that the best path to industrial peace was to mandate employer negotiation with AFL unions while officially repudiating radical alternatives like the IWW. Although the Commission’s report on the Arizona copper strike absolved the strikers of intent to undermine the war effort and instead traced labor unrest to poor working conditions and low wages, its broader condemnation of

31 George Vanderveer to Roger Baldwin, 6 February 1918, ACLU Papers, reel 4, vol. 27.
32 Baldwin to Carlton Parker, University of Washington, 8 February 1918, ACLU Papers, reel 4, vol. 27.
33 Roger Baldwin to E. M. House, Memorandum on the IWW Prosecutions, 9 February 1918, ACLU Papers, reel 4, vol. 27; George Vanderveer to Woodrow Wilson, 1 February 1918, ACLU Papers, reel 4, vol. 27; Roger Baldwin to E. M. House, 9 February 1918, ACLU Papers, reel 4, vol. 27 (“We are considerably concerned over the industrial effect of the pending prosecution of the IWW. The results from the point of view of labor unrest are likely to be exceedingly serious.”).
radical tactics undercut the organization’s standing in negotiations over the indictment.\textsuperscript{35} Baker, Secretary Wilson, George Creel, and Colonel House were all disposed to dismiss the prosecution, but none was willing to take a firm stand.\textsuperscript{36} In late February, Baldwin appealed directly to President Wilson, stressing again the propriety of an administrative resolution of labor conflict.\textsuperscript{37} Wilson, however, had concluded that the IWW was “worthy of being suppressed.”\textsuperscript{38}

As late as March 1918, Baldwin sensed a “disposition of the Department of Justice not to try this case,” and Vanderveer expected the charges to be dismissed.\textsuperscript{39} If there was hesitation, however, it was not at the level of administration policy. In fact, the government was turning ever more surely away from the NCLB’s proposed course. In May, President Wilson endorsed the “Sedition Act” amendments to the Espionage Act, which explicitly authorized the censorship that had been sanctioned under the existing act as a matter of statutory interpretation. The measure, pushed by western senators, was based on a Montana statute targeting the IWW.\textsuperscript{40} The NCLB cautioned against the increased censorship authority that the bill conferred on the Postmaster General, explaining that “[s]uch arbitrary power in the hands of a single appointed officer has never before existed in the history of this republic, nor of any other nation under a

\textsuperscript{35} Baldwin was nonetheless confident that the Mediation Commission, if asked, would counsel dismissal and resolution of the issue by the Department of Labor instead. Johnson, \textit{Challenge to American Freedoms}, 93.
\textsuperscript{36} Ibid.; George Vanderveer to Roger Baldwin, 6 February 1918, ACLU Papers, reel 4, vol. 27 (reporting that Baker supported dismissal and had suggested conferring with William B. Wilson); Roger Baldwin to Carlton Parker, 8 February 1918, reel 4, vol. 27. In late February, Laurence Todd told Baldwin that the new Labor Board, which was controlled on the labor end by the “anti-Gompers element,” would demonstrate that “a new regime is coming to the front in the labor movement—a sort of coalition government by the heads of big unions, and this coalition will stand for civil liberty to a far higher degree than has the old regime.” Laurence Todd to Roger Baldwin, 27 February 1918, ACLU Papers, reel 3, vol. 25. Baldwin considered Todd’s assessment “exceedingly significant” and hoped it would lead to favorable resolution of the IWW case. Roger Baldwin to Laurence Todd, 26 February 1918, ACLU Papers, reel 3, vol. 25.
\textsuperscript{37} Roger Baldwin to Woodrow Wilson, 27 February 1918, ACLU Papers, reel 4, vol. 27.
\textsuperscript{38} Quoted in Johnson, \textit{Challenge to American Freedoms}, 93.
\textsuperscript{39} Roger Baldwin to John Graham Brooks, 14 March 1918, ACLU Papers, reel 4, vol. 27; George Vanderveer to Roger Baldwin, 20 March 1918, ACLU Papers, reel 4, vol. 27 (predicting that the case would be dismissed as a result of the government’s fear of losing the case “and thereby rehabilitat[e] the IWW in the public mind”).
\textsuperscript{40} Murphy, \textit{Meaning}, 22.
democratic constitution.” A handful of senators voiced concerns about suppression of speech in general and bureaucratic censorship in particular, though none actually advocated or desired free speech for radicals. Republicans saw the act as a potential vulnerability for the Wilson administration, and Theodore Roosevelt openly attacked the administration for its silencing of opposition views. In the Senate, Joseph France proposed amending the measure to protect the right of individuals to “publish or speak what is true, with good motives, and for justifiable ends.” Although the France amendment received considerable congressional support, Attorney General Gregory opposed it, and it was overwhelmingly voted down. The original bill passed handily in both houses of Congress, and on May 16, President Wilson signed it into law. The implications of the act for the future of IWW organizing were clear. It forbade all “disloyal, profane, scurrilous, or abusive language about the form of government of the United States,” the Constitution, the armed forces, and the American flag. More pointedly, it expressly prohibited advocacy of “any curtailment of production in this country” of anything “necessary . . . to the prosecution of the war.” The act also approved the post office’s practice of refusing

41 “Gives Power to Stop Mail Delivery,” New York Evening Post, 30 April 1918.
42 E.g., “Senators Flay Gag Bill as Hit at U.S. Liberties,” clipping, 5 April 1918, ACLU Papers, reel 6, vol. 53; “Johnson and Free Speech,” New York Evening Call, 26 April 1918, ACLU Papers, reel 6, vol. 54 (“Many Republican politicians and a few Democratic ones have suddenly awakened to the fact that freedom of speech has gone glimmering and that there is danger in the future that they themselves may be punished for exercising the rights given in the constitution to every citizen.”); “Colonel’s Attitude Toward Spy Bills,” clipping, 6 April 1918, ACLU Papers, reel 6, vol. 53. The bill was purportedly altered to “aid honest critics” and meet “gag law charges.” “Sedition Bill Altered to Aid Honest Critics,” Washington Tribune, 9 April 1918. But the New York Call dismissed the modifications (the introduction into the text of “willful” before “disloyal, profane, scurrilous, or abusive language”) as superfluous. “Senate Makes Slight Change in Gagging Bill,” New York Call, 9 April 1918.
44 “Spy Act Change Draws Protest,” New York Call, 1 June 1918 (noting that the Department of Justice maintained that the amendment would introduce a requirement of proof of motive and decrease the value of the Espionage Act). The NCLB urged senators to support the France amendment and to give the postmaster general discretionary power to block the mail. E.g., Telegram from NCLB to Senator Warren G. Harding, 29 April 1918, ACLU Papers, reel 3, vol. 26.
45 Lenetta Cooper expressed concern that the new law would be enforced against civil liberties groups and considered disbanding the American Liberty Defense League. Lenetta Cooper to NCLB, 13 May 1918, ACLU Papers, reel 3, vol. 26. L. Hollingsworth Wood responded for the NCLB: “Being satisfied that our work is entirely
to deliver mail to and from the IWW, a policy that made it virtually impossible for the defense team to raise funds and generate public support. In fact, Senator William King of Utah specifically justified the provision as a measure to prevent Haywood and the IWW from receiving contributions by mail.

In June, Montana Senator Thomas Walsh introduced a bill that would have explicitly prohibited the brand of labor radicalism espoused by the IWW and was expressly designed to “outlaw the entire organization.” Haywood wired Baldwin for assistance in defeating the measure. He believed that even if the IWW leadership was lucky enough to escape conviction under the existing war statutes, there was no way the organization could withstand the proposed bill, which even criminalized speech advocating threats of injury to property as a means of bringing about economic change. Baldwin recognized that the bill’s language would sweep in labor activity far less radical than the IWW’s, and he fought desperately for its defeat. The NCLB’s Washington correspondent, Laurence Todd, told Baldwin that the bill likely would pass without a roll call. There was no sign of opposition “from any quarter,” and the Department of Labor was keeping quiet. Even Senator Borah, who often had spoken out for civil liberties, had voiced support for the measure. He invoked it as justification for his opposition to the press

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46 Sedition Act of 1918, 40 Stat. 553 (1918). Section 4 of the Act provided: “When the United States is at war, the Postmaster General may, upon evidence satisfactory to him that any person or concern is using the mails in violation of any of the provisions of this Act, instruct the postmaster at any post office at which mail is received addressed to such person or concern to return to the postmaster at the office at which they were originally mailed all letters or other matter so addressed.”

47 Open Letter from the NCLB to President Wilson, 27 September 1918, ACLU Papers, reel 5, vol. 43. Because its passage came so late in the war, it did not produce many prosecutions.

48 Quoted in Johnson, Challenge to American Freedoms, 98. The bill defined as unlawful any association, “one of whose purposes or professed purposes is to bring about any Governmental, social, industrial, or economic change within the United States, by the use, without authority of law, of force, violence, or physical injury to person or property, or by threats of such injury, or which [advocates such activity] to accomplish such change.” Members of such associations, or individuals advocating their doctrine or circulating their literature, would have been subject to ten years imprisonment and a fine. “Drafts Bill to Curb IWW,” New York Times, 30 April 1918.

49 Laurence Todd to Roger Baldwin, 3 May 1918, ACLU Papers, reel 3, vol. 25.
censorship provision of the Sedition Act, explaining that if the Walsh bill were passed, “there will not be any IWW organization left to send mail.” The measure passed the Senate but encountered more difficulty in the House due to opposition from a single representative, Meyer London of New York. By the end of July, the bill had stalled due to the Wilson administration’s lack of support. The administration had decided to leave the question of the IWW’s survival to the courts.

**Legal Strategy and Publicity Campaign**

While the NCLB’s Washington insiders were endeavoring to persuade administration officials to drop the indictments, the IWW was working on its backup plan. In the early fall, Chicago headquarters organized a general defense committee, which began preparations for the defense. In November, the general executive board ceased publication of *Solidarity* and introduced in its place the *Defense News Bulletin*, which reported on developments in the case.

IWW counsel George Vanderveer, who had defended the organization in earlier high-profile cases, agreed to handle the case. Vanderveer was not a universally popular choice. In December, Lenetta Cooper of the Chicago-based American Liberty Defense League wrote to Baldwin that many at IWW headquarters were “much dissatisfied with Vanderveer” and wanted to recruit Clarence Darrow and Frank P. Walsh in his place. In January, the NCLB convened a conference to discuss the pending case. It invited Felix Frankfurter to attend as a “representative of the Administration, officially present to hear what is said,” since the situation was too critical.

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50 Ibid.
52 Dubofsky, *We Shall Be All*, 428–29.
53 Lenetta Cooper to Roger Baldwin, 28 December 1918, ACLU Papers, reel 4, vol. 27.
“not to have all of the cooperation possible to prevent blunders which might be embarrassing.”\textsuperscript{54}

The meeting, however, was a disappointment. Darrow and Walsh, around whose participation it was organized, failed to show up. Baldwin felt that it would be impossible to proceed without them and adjourned the deliberations. As he explained to Walsh, “We all felt that it is imperative that this greatest labor case in our history should be handled by you two gentlemen. There are no other lawyers in the country who can make the fight effectively. You can put the whole industrial system on trial.”\textsuperscript{55}

Baldwin’s ambitions on this front were thwarted, however. Darrow was preoccupied with other legal matters and unable to travel to Washington. For his part, Walsh was sympathetic to the IWW and opposed the prosecutions, but he was serving an important moderating influence within the administration and was unwilling to jeopardize that role by public participation in the case.\textsuperscript{56} The IWW’s Jack Law told Baldwin in mid-January that Walsh had offered his “unqualified support and endorsement” but that it was “utterly impossible for Frank P. to get in the case.”\textsuperscript{57} Walsh vouched for Vanderveer, however, which was enough to satisfy the dissenters.

With the composition of the defense team settled, the IWW and NCLB both turned to legal strategy. Much of the early debate centered on the blanket indictment of the IWW defendants. Elizabeth Gurley Flynn was indicted for her translation of Emile Pouget’s classic tract on sabotage, and she solicited the NCLB’s assistance in contesting the government’s theory that an author could be held accountable for a pamphlet written before the illegal conduct alleged

\textsuperscript{54} Roger Baldwin to Felix Frankfurter, 5 January 1918, ACLU Papers, reel 4, vol. 27.
\textsuperscript{55} Roger Baldwin to Frank Walsh, 10 January 1918, ACLU Papers, reel 4, vol. 27.
\textsuperscript{56} Walsh’s prudence was rewarded. In April, he was appointed co-chair of the National War Labor Board.
\textsuperscript{57} Jack Law to Roger Baldwin, 15 January 1918, ACLU Papers, reel 4, vol. 27.
had taken place.\(^5^8\) Along with Carlo Tresca, Arturo Giovannitti, and Joseph Ettor, who were indicted on similar charges, she moved for severance of her case, and she urged the other defendants to demand their own separate trials. In a conspiracy case, the prosecution was obligated to connect each defendant with the conspiracy charged.\(^5^9\) In Flynn’s view, the government would be unable to maintain a case against each of the individual defendants on each count and would be forced to drop many of the charges.\(^6^0\) She also believed that the government would drop all of the indictments if the defendants would renounce their militancy for the duration of the war.\(^6^1\) By contrast, a mass trial would all but guarantee conviction.\(^6^2\)

Unlike most of her co-defendants, Flynn was willing to disavow continued support for the IWW or its ideology to avoid prosecution. Flynn was still actively involved in the IWW as late as August, when she wrote to Solidarity that she remained a member and had “never stated otherwise anywhere.”\(^6^3\) After the September 28 indictments, however, she severed her ties with the organization and pledged her patriotic loyalty in a letter to President Wilson. Even then, the Department of Justice did not officially dismiss the indictment against her until March, assuring that she would not publicly criticize the department’s proceedings against the other defendants.

\(^5^8\) Flynn was denied access to the IWW defense fund and was therefore forced to solicit independent assistance. Roger Baldwin to H. L. Rotzel, 18 February 1918, ACLU Papers, reel 4, vol. 27.

\(^5^9\) Open letter from Elizabeth Gurley Flynn, Carlo Tresca and Joseph Ettor to Friends and Sympathizers, ACLU Papers, reel 4, vol. 27. The letter added defensively, “Our decision is not dictated by any lack of consideration for the other defendants. In fact, we are not asking for group severance, but for individual trials. We believe that they too should follow the same course, as the best legal procedure to protect their interests.”

\(^6^0\) Elizabeth Gurley Flynn, A. Giovannitti, and Carlo Tresca to Roger Baldwin, undated, ACLU Papers, reel 4, vol. 27.

\(^6^1\) Flynn’s account was published forty years after the trial, in her autobiography. Based on his reading of the Department of Justice records in the IWW case, Melvyn Dubofsky concluded that Flynn’s optimism about the prospects for dismissal was misguided, if not disingenuous; Attorney General Gregory probably dismissed charges against Flynn and her co-petitioners in order to create a public appearance of fairness and to avoid negative publicity that acquittal in their cases might create. Dubofsky, We Shall Be All, 427.

\(^6^2\) Open letter from Elizabeth Gurley Flynn, Carlo Tresca and Joseph Ettor to Friends and Sympathizers, ACLU Papers, reel 4, vol. 27.

\(^6^3\) She continued, “I would not have my friends believe me a quitter in a crisis. We have enough ‘slackers’ in the class war already.” Quoted in Dubofsky, We Shall Be All, 426.
Under the circumstances, it is unsurprising that the IWW leadership was unwilling to heed Flynn’s advice, despite the NCLB’s endorsement of its legal premise.64

The IWW defense committee was working toward a more sweeping vindication of the organization. The indictment against the IWW contained five counts. The first alleged a conspiracy to hinder the production and transportation of war supplies by means of violent strikes, and the second a conspiracy to impede the constitutional and statutory right to execute various contracts.65 The third and forth counts charged specific interference with the Selective Service Act and the Espionage Act, respectively. And the fifth count alleged that the defendants had conspired to use the mails to cheat and defraud employers, by encouraging employees to provide their employers with inefficient service. During the arraignment proceedings in December 1917, Vanderveer argued unsuccessfully that the evidence on which the government’s case was premised had been seized unlawfully, in violation of the First and Fourth Amendments to the United States Constitution.66 He subsequently filed and lost a motion to quash the indictments, in which he argued that acts cited by the government as evidence of conspiracy were the ordinary engagements of a labor organization and were directed at profiteering employers, not the government.67

While the legal team waited for the government to process evidence and assemble its case, IWW headquarters focused on raising defense funds and generating publicity. In that respect, they relied heavily on the assistance of the NCLB. Although the IWW continued to

64 Roger Baldwin to John Lord O’Brien, Department of Justice, 13 December 1917, ACLU Papers, reel 4, vol. 27.
65 More precisely, the first count alleged a conspiracy under Section 6 of the criminal code to interfere by force with the execution of eleven statutes and presidential orders pertaining to the Government’s war program and with ten additional sections of the criminal code. The second alleged a conspiracy under Section 19 of the criminal code.
66 Vanderveer subsequently withdrew the pleadings made by his clients upon arraignment and substituted motions for bills of particulars in sixty-seven cases, based on the omnibus nature of the indictments, which failed to specify dates and offenses. He entered a demurrer for 83 of the defendants and pleas of abatement for 23. Seattle Daily Call, 5 January 1918, clipping, ACLU Papers, reel 5, vol. 42.
67 New York Evening Call, 13 March 1918, clipping, ACLU Papers, reel 5, vol. 42.
solicit its own contributions, its defense bulletins, requests for donations, and even checks were routinely held for months by the post office. Moreover, IWW publications were closely monitored, and the organization’s offices were subject to periodic raids, during which materials, stamps, and mailing lists were routinely seized.

The NCLB was in a better position to organize defense efforts, because its own communications, though not immune to postal meddling, were less subject to interference. It housed a member of the IWW’s General Defense Committee in the New York office, and in response to IWW requests, it raised funds for bail and other defense costs, such as the transportation of witnesses. The NCLB was well equipped to enlist the support of respectable liberals. The fundraising committee that it organized was chaired by John A. Fitch, an editor of the Survey who taught labor relations at the New York School of Social Work. Baldwin also secured the assistance of John Graham Brooks, a Unitarian minister and labor scholar who had written extensively about the IWW. In March, the general defense committee complained that financial support from the New York area, a mere ten percent of total funds raised, had been insufficient in view of the region’s great wealth. According to E.S. Rose, “the necessity for these things has never been brought concretely and forcibly to the true liberal mediums of the population in this region. It has reached them through mediums that have been colored by other interests, or that have been too feeble to express the extremity, not only of our own situation, but

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68 Cottrell, Roger Nash Baldwin, 73.
69 E.g., Roger Baldwin to Amos Pinchot, 6 February 1918, ACLU Papers, reel 4, vol. 27 (describing need to raise Haywood’s bail and noting that “the government has been raiding the defense committees and otherwise embarrassing them in their efforts to get a fair trial”).
70 E.g., John Graham Brooks, American Syndicalism: the IWW (New York: Macmillan, 1913). Brooks set up a meeting between Baldwin and government officials to discuss the Chicago case. In attendance were David F. Houston, who had served as chancellor of Washington University during Baldwin’s tenure there, before leaving to become Secretary of Agriculture; Francis G. Caffey, the Federal District Attorney for New York, and a future federal judge; and an Assistant United States Attorney. Baldwin’s efforts to convince the group to push for a dismissal or postponement of the case were, however, unsuccessful. Cottrell, Roger Nash Baldwin, 74.
71 E.S. Rose to Roger Baldwin, 11 March 1918, ACLU Papers, reel 4, vol. 27; E.S. Rose to Roger Baldwin, 16 March 1918, ACLU Papers, reel 4, vol. 26 (the amount cited for New York was 37,000 dollars).
of the principles of human rights and liberty.” The NCLB had proven adept at arousing public sentiment, but less effective in its financial appeals. Rose asked Baldwin to arrange a meeting with influential liberals at a private reception, and he requested letters of introduction to potential donors. Baldwin dutifully complied with both requests.

In the spring, the NCLB arranged for a call for funds to be printed in *The New Republic*. The advertisement opened with a general appeal to procedural fairness, a technique that would serve the organization well in the interwar years. “Never mind what you think about the IWW,” it proclaimed, “they are at least entitled to a fair trial and an open-minded hearing.” An early draft would have accused the government of foul play in its prosecution of the case; it reported that the Department of Justice had twice raided defense committee offices and had interfered with their fundraising efforts. But reaction to this more contentious claim was decidedly negative. J. G. Phelps Stokes, on the brink of leaving his wife as well as the Socialist Party, thought that references to official misconduct would convey to the public “the impression that it was drawn in a spirit distinctly hostile to the war policy of our Government.” Roscoe Pound, though agreeing that the IWW leadership was entitled to a fair trial, considered it unseemly to raise such issues as a means of pressuring judicial tribunals. *The New Republic* voiced a similar reaction, and it agreed to take the advertisement only if the passage about “interference by officials” was deleted. The NCLB complied, and the revised version instead emphasized the need for “liberal financial support” from those Americans who believed in the “right of a fair

72 Ibid.
73 Roger Baldwin to Friends of Liberty in Wartime, 19 March 1918, ACLU Papers, reel 4, vol. 27. Baldwin actively solicited funds from contacts in New York, Boston, and elsewhere. He also called upon his connections to make solicitations of their own. See, e.g., Roger Baldwin to John Graham Brooks, 29 June 1918, ACLU Papers, reel 4, vol. 27.
74 Draft of *New Republic* advertisement, ACLU Papers, reel 4, vol. 28.
75 J. G. Phelps Stokes to Roger Baldwin, 19 April 1918, ACLU Papers, reel 4, vol. 28.
76 Roscoe Pound to George West, 24 May 1918, ACLU Papers, reel 4, vol. 28.
77 J. E. Dumars to Roger Baldwin, 9 May 1918, ACLU Papers, reel 4, vol. 28.
trial” for all parties, even the IWW. In its amended form, the advertisement bore the signatures of John Dewey, Thorsten Veblen, Charles Beard, and Helen Keller, among other prominent individuals. Even then, the Department of Justice threatened to revoke The New Republic’s second-class mailing privileges if the advertisement were reprinted.

In addition to its fundraising efforts, the NCLB coordinated publicity during the trial. That was not a task for which the organization had volunteered, but Haywood had failed to make his own publicity arrangements. Baldwin anticipated that the commercial press would issue distorted reports of the trial, and he considered it imperative to communicate a “fair interpretation of the facts.” He saw the publicity campaign as an opportunity “to get across the American public the real issues of our present labor struggle and to put the burden of guilt where it belongs, on the shoulders of private capital exploiting the workers.” To that end, he agreed to assemble a committee of reporters in New York and Washington who would produce balanced accounts of the proceedings. Baldwin advised Haywood that the NCLB lacked the funds to hire a fulltime publicist for the trial, but that he would personally arrange to send a reporter to Chicago to set up a system for distribution of “truthful and accurate” accounts of the trial and to coordinate publicity from afar. He selected Paul Hanna for the job, a reporter who came highly

78 Revised draft of New Republic advertisement, ACLU Papers, reel 4, vol. 28.
79 Keller sent a check for one hundred dollars and voiced strong support for the NCLB’s efforts. She explained to Baldwin her view that “[u]nless all who truly love democracy hold fast to the essential rights guaranteed to all the people by the Constitution, there is danger that those rights may be swept away in the torrent of war.” Hellen Keller to Roger Baldwin, 13 June 1918, ACLU Papers, reel 4, vol. 28.
81 Roger Baldwin to Bill Haywood, 27 March 1918, ACLU Papers, reel 4, vol. 27.
82 Ibid.
83 Roger Baldwin to Paul Hanna, 1 April 1918, ACLU Papers, reel 4, vol. 28.
84 Baldwin explained, “I am working on that not on behalf of the Civil Liberties Bureau, but independently on behalf of those interested in seeing the issues fairly and squarely put.” Roger Baldwin to Bill Haywood, 27 March 1918, ACLU Papers, reel 4, vol. 27.
85 Roger Baldwin to Paul Hanna, 1 April 1918, ACLU Papers, reel 4, vol. 28.
recommended by Socialist journalist Robert Bruere, who was assisting Baldwin with the publicity effort.

When Hanna arrived in Chicago in early April, he discovered precisely the situation that Baldwin had expected. Newspaper reports of the trial, which was then in the jury selection phase, were “generally frivolous, largely malicious, totally ignorant and usually inaccurate.” More important, they evinced no understanding of the “vital social and economic issues involved.”86 All in all, there was no hope for balanced coverage from the commercial press. Reliance on the IWW’s daily report to labor papers would be equally misguided, as those reports were reaching only sympathetic audiences and were in any case liable to be intercepted in the mail. Hanna, however, offered an alternative avenue for broad publicity: he advised Baldwin to encourage supporters throughout the country to submit individual letters to the editor. Hanna recognized that this sort of letter-writing campaign was an untested technique, but he thought it had tremendous potential for mobilization of local communities.87 A reporter based in Chicago would produce a brief correction of every significant misrepresentation of the trial that appeared in print and send it to correspondents in towns throughout the country with instructions to forward it, over their own signatures, to their newspapers. Readers would rethink their preconceptions, and newspaper editors would learn to review news agencies’ accounts more critically before reprinting them. “The front door to fair publicity on the IWW trials is shut and locked,” Hanna advised Baldwin, “but the side door stands wide open.” Hanna considered his plan to be “a sure means of entry by this side door,” and Baldwin, with Haywood’s approval and

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86 Paul Hanna, Report to Roger Baldwin, 13 April 1918, ACLU Papers, reel 4, vol. 28.
87 So far as he knew, it had only been employed by the Christian Scientists. For them it had been “enormously successful,” and he recommended “a very simple adaptation of their tactics for the advancement of civil liberty.” Ibid.
the resources of the NCLB, adopted it in toto.\(^88\) Judging by press reaction to the defendants’ eventual conviction, however, its actual effect was minimal.\(^89\)

In its fundraising and publicity efforts, the NCLB was honing techniques it had developed during its AUAM days and used to good effect in earlier Espionage Act cases. What was distinctive about the NCLB’s involvement in the IWW case was a project at the heart of its service to the IWW: its preparation of a pamphlet, \textit{The Truth about the IWW}, intended to dispel misconceptions about the organization’s goals. The NCLB’s objective was to demonstrate that allegations of anti-war activity by the IWW were “part of an organized campaign by war-profiteers and employing interests to use the war to crush this labor organization.”\(^90\) Much of the pamphlet consisted of corrective quotations by academics and government officials addressing “widespread misrepresentations” of the organization in the commercial press. Its contributors included John Graham Brooks, Robert W. Bruere, George P. West, John A. Fitch, and Professor Carlton H. Parker, who was a labor economist as well as a labor representative for the Department of War.\(^91\)

\(^{88}\) Ibid; Telegram from Bill Haywood to Roger Baldwin, 1 May 1918, ACLU Papers, reel 4, vol. 28. Laurence Todd also endorsed Hanna’s plan. He wrote to Baldwin that “War conditions make it virtually impossible to get into the press with news stories, but the letters he mentions would at least bear fruit in many places now sterile.” Laurence Todd to Roger Baldwin, 18 April 1918, ACLU Papers, reel 3, vol. 25. See sample circular letter in ACLU Papers, reel 4, vol. 28.

\(^{89}\) Baldwin had difficulty finding someone to produce the letters. The first person assigned the task, Charles Stern, left when called to the draft. Lenetta Cooper to Roger Baldwin, 13 May 1918, ACLU Papers, reel 4, vol. 28. Haywood enlisted Harrison George to take over, but Baldwin told him he had chosen his own replacement, Samuel Kaplan, the Chicago correspondent for the \textit{New York Call}. Bill Haywood to Roger Baldwin, 21 May 1918, ACLU Papers, reel 4, vol. 28; Roger Baldwin to Bill Haywood, 27 May 1918, ACLU Papers, reel 4, vol. 28. Kaplan in turn was forced to abdicate for medical reasons. Samuel Kaplan to Roger Baldwin, undated, ACLU Papers, reel 4, vol. 28. Baldwin finally reached an arrangement with Kaplan’s successor from the \textit{Call}, David Karsner. David Karsner to Roger Baldwin, 5 June 1918, ACLU Papers, reel 4, vol. 28.

\(^{90}\) National Civil Liberties Bureau, \textit{The Truth about the IWW} (New York: National Civil Liberties Bureau, April 1918), 10.

\(^{91}\) Ibid., 8. In his closing argument at trial, the prosecutor would dismiss this brand of academic endorsement as naïve. He said: “I think, sometimes, that a college professor is the most gullible man in the world. He would go up here and these men would look him the face, just as they do when they are on the witness stand, and they would make him believe that black is white, because a college professor ordinarily has not had the teaching with human nature outside of the classroom, that qualifies him to see through a fraud and a sham.” Prosecution Closing Argument, 17 August 1918, in Industrial Workers of the World Collection, Series V: Legal Problems, Trials and
Citing sociological evidence, the NCLB sought to establish that the radicalism of the IWW was a response to the brutalities of industrial capitalism. Carlton Parker explained that migratory laborers had “lost the conventional relationship to women and child life, lost its voting franchise, lost its habit of common comfort or dignity, and gradually become consciously a social class with fewer legal or social rights than are conventionally ascribed to Americans.”\(^92\)

Moreover, the NCLB argued that IWW organizing tactics were no different from those of the AFL. The only thing that differentiated the IWW from other labor unions was its revolutionary rhetoric—its determination to claim for labor the power to dictate the terms of production.\(^93\)

And the NCLB’s justification of the organization’s revolutionary beliefs came sufficiently close to an endorsement to prompt a judge to condemn it for “teach[ing] the doctrine of sabotage and industrial terrorism.”\(^94\) In fact, when the NCLB issued its pamphlet in May, the government moved almost immediately to suppress it. The Post Office declared it nonmailable, and the Department of Justice advised express companies not to deliver it.\(^95\)

Divorcing support for a speaker’s right to espouse radical doctrine from the underlying content of the protected expression would become the hallmark of the ACLU’s free speech program. Certainly in its advertisement for *The New Republic* and in other communications to liberals and progressives, the NCLB emphasized that one could oppose prosecutorial abuses without endorsing the program or conduct of the defendants. During World War I, however, the NCLB had not yet wholly embraced this distinction. In *The Truth about the IWW*, the NCLB did not argue that the IWW was entitled to express its anti-war views, no matter how noxious;

\(^{92}\) NCLB, *Truth about the IWW*, 11.
\(^{93}\) Ibid., 31.
\(^{94}\) C. H. Libby to Walter Nelles, 19 July 1918, ACLU Papers, reel 5, vol. 36 (reporting that his clients had been convicted for distributing the pamphlet).
\(^{95}\) Johnson, *Challenge to American Freedoms*, 95.
indeed, without distinguishing between speech and conduct, it accepted the “full propriety of the
government in suppressing ruthlessly any interference by the IWW with the war preparation.”
Nor did it even suggest that the government was running afoul of the First Amendment by
targeting the IWW’s advocacy of revolution. The NCLB was arguing that in prosecuting the
IWW for opposition to the war effort, the government was wrong.96 On the contrary, if there
was a constitutional guarantee at stake in the government’s treatment of the IWW, it was not the
liberty to speak, but rather “equality before the law.”97 In short, what the NCLB opposed in the
IWW case was not the suppression of disfavored *speech*, but the suppression “of the normal
economic protest-activities of the IWW.” The government’s position was objectionable because
it sought to attack the “symptom” of industrial oppression rather than the disease.98

In the spring of 1918, just as relations were souring between Baldwin and the War
Department on the matter of conscientious objectors, the NCLB staked its reputation on a robust,
substantive defense of an organization that was almost universally reviled. By late March, the
NCLB had agreed to raise bail for Bill Haywood. It had convened half a dozen conferences to
generate support and publicity for the IWW’s cause. It had pushed for a dismissal in
negotiations with administration officials. And it had provided legal assistance in preparing the
defense. Finally, it was circulating *The Truth about the IWW* to every individual, group, and
public official conceivably interested in the case.99 As Baldwin told a potential donor, “I doubt

96 NCLB, *Truth about the IWW*, 35 (“The public mind, and that of its agents in office, should open to an unbiased
examination of the claim of the IWW that it is far from being an organization dominated by purposes that are
subversive of this country’s purposes in the war, and that all its members want in return for their co-operation is a
‘square deal.’”).
97 Robert Bruere, quoted in ibid., 46.
98 Ibid., 12.
99 Memorandum on IWW Cases, 14 February 1918, ACLU Papers, reel 4, vol. 27 (noting that the pamphlet would
be circulated, in addition to the usual NCLB mailing list, to the editors of all U.S. daily and weekly newspapers; to
all labor and radical papers; to national magazines; to government officials throughout the country, including federal
district attorneys, federal judges, state governors, and state attorneys general; to labor officials, including the AFL
and the socialist parties; to university economics and sociology departments and to the national professional
whether anything more can be done to aid the IWW from the outside than has been done by this committee. We have risked the whole organization on it, for we realize that our motives and our work are both open to the most serious misinterpretation.”\footnote{Roger Baldwin to Jessie Ashley, 20 March 1918, ACLU Papers, reel 4, vol. 27.} In doing all this, the NCLB spoke the language of constitutional liberties. But its true goal was more ambitious. As Baldwin freely admitted, “a fair trial for these men [was] of the greatest public necessity to the industrial future of America.”\footnote{Ibid.} Baldwin’s commitment was not limited to the Chicago trial. By late spring, the IWW was under assault on multiple fronts. With little left to lose, he told Vanderveer that the NCLB would provide general support in any case “where the issues of the right of agitation are involved.”\footnote{Roger Baldwin to George Vanderveer, 26 March 1918, ACLU Papers, reel 4, vol. 27.}

The IWW Trial

The twelve jurors who were responsible for “decid[ing] the fate” of the defendants and with it “the future of American Labor organizations” were sworn in on May 1, 1918.\footnote{Of the twelve men finally selected from a venire of 410, six were wage workers. The others were professionals and farmers.} That the trial began on “International Labor Day” was not lost on the defendants, who considered it an auspicious sign.\footnote{IWW Defense News Service, 2 May 1918, ACLU Papers, reel 4, vol. 28.} Indeed, when the proceedings finally began, the defendants were cautiously optimistic. After sitting in their jail cells for months of quiet anticipation, they were excited at the opportunity to state their case publicly at last. The trial, in their view, was the “most monumental” in the history of the international labor movement, and it involved not only the organizations of economists, sociologists, historians and political scientists; to the foreign mailing list of the International Socialist Party; to Christian socialist clergy; and to all public libraries in larger cities).
rights of the IWW, but the general “right of workingmen to organize and strike.” They hoped that their performance in the courtroom would “work great changes, not only in public opinion, but the general understanding of Labor Unionism and the great issues at stake.” And they were confident that “the more the workers of this nation find out about us the more they will like the One Big Union and the things it stands for.”

The presiding judge, Kenesaw Mountain Landis, was a known conservative, but he had established a reputation for fairness after a grueling and contentious month of jury selection. Over the government’s vociferous objections, Landis had allowed Vanderveer to question prospective jurors about their economic views, including their opinions on social revolution. He had conceded a theoretical right to change the existing system through direct industrial action, “if you can get enough people together to put it over,” and he had dismissed for cause those panel members who admitted that bias against the IWW in news accounts predisposed them toward conviction. During the course of the trial, Landis regularly overruled the government’s objections to evidence about industrial unrest, blocked attempts to call witnesses without adequate notice to the defense, chastised reporters for their misrepresentations of witnesses’ testimony, and rebuked the prosecution for attempting to

105 IWW Daily Bulletin No. 7, 9 April 1918, IWW papers, box 123, folder 18.
107 Landis would soon leave the federal bench to become first commissioner of baseball, but not before presiding over the Espionage Act conviction of Victor Berger in December 1918.
108 During that time, the prosecution and defense had wrangled over the class prejudices of potential jurors, and Landis had dismissed one venire of 200 based on charges that Socialist volunteers had been directly contacting the members of the venire. “200 Veniremen at IWW Trial Are Dismissed,” New York Tribune, 7 April 1918. These allegations were later established to be false. “No Effort to Bribe IWW Jury,” New York Call, 9 April 1918. The Socialist party had, however, agreed to distribute the Defense News Bulletin and IWW leaflets throughout the city. “Socialists of Chicago Aiding IWW Defense,” New York Evening Call, 15 March 1918.
111 A Chicago Tribune reporter printed a story containing horrific descriptions of violence by members of the IWW. The account was given to him by witnesses outside of the courtroom, but his article implied that they had testified to
filter evidence. Most important, he openly conceded his belief that industry was guilty of “hoggish and unconscionable profiteering.”

The legal team for the government was dominated by special prosecutors. The United States attorney for the Northern District of Illinois, Charles Clyne, handled the early voir dire. He was outmatched by Vanderveer, however, and he soon ceded his role to Frank Nebeker, a former district attorney turned corporate lawyer who was a member of the Democratic National Committee. Paul Hanna considered him a “cool and resourceful fighter, seemingly fearless,” and “much superior” to Clyne. Baldwin thought he was an “honest lawyer,” but “narrow in the extreme, utterly without social vision, and with a thoroughly capitalistic” point of view. The department also enlisted the help of Claude Porter, a skilled government lawyer for the District of Iowa, and William C. Fitts, Assistant Attorney General of the United States and former Attorney General of the State of Alabama. For the defense, Vanderveer was assisted by W. B. Cleary, an Arizona attorney who had been deported along with Bisbee strikers; Otto Christensen, a Chicago Socialist; and Caroline Lowe, a Socialist organizer and veteran of the events he described. Landis publicly rebuked him for his misleading reporting. IWW Bulletin No. 2, ACLU Papers, reel 4, vol. 27.

112 For example, Landis criticized the prosecution for reading the condemnatory portion of a letter to the jury while omitting the exculpatory parts. Trial Bulletin 27, 15 May 1918, IWW Papers, Box 123, Folder 37; “Malicious IWW Yarn is Scored by Court,” New York Evening Call, 17 May 1918. He was also attentive to the physical needs of the prisoners; he ensured that their food was sufficient and their hygiene adequate, and he went so far as to order the provision of cuspidors in the courtroom in deference to the defendants’ “right to chew tobacco.” IWW Daily Bulletin 3, 4 April 1918, ACLU Papers, Reel 5, Vol. 42; “I.W.W Like Judge Landis,” New York Tribune, 5 April 1918, ACLU Papers, Reel 5, Vol. 42. On the other hand, he scolded the IWW (outside the presence of the jury) for an article in the Industrial Worker that implicitly threatened the judge, jurors, and prosecutors with reprisal should a guilty verdict be returned. “IWW Threat Draws Warning From Judge at Chicago Trial,” New York Tribune, 8 May 1918.

113 IWW Trial Bulletin, 4 July 1918, ACLU Papers, reel 4, vol. 28. The quotation referred to the lumber industry.

114 Paul Hanna to Roger Baldwin, 4 April 1918, ACLU Papers, reel 4, vol. 28. Oliver E. Pagah, a government indictment expert, was also involved. “Dramatic Trial of 125 IWW Begins,” New York Evening Call, 1 April 1918.

115 Roger Baldwin to Mildred B. Wertheimer, 10 July 1918, ACLU Papers, reel 4, vol. 27.

116 Porter told David Karsner that he was running for the governorship of Iowa and felt that remaining in Chicago and working on the IWW case better served his candidacy than return to Iowa to campaign. “IWW Hunt on Before Draft Act Passed,” New York Evening Call, 14 June 1918, ACLU Papers, reel 5, vol. 42.

IWW’s free speech fights, who enrolled in law school at the age of forty and had recently been admitted to the bar.

The case for the prosecution unfolded through the testimony of 150 witnesses over the course of seven weeks.\(^{118}\) It focused on the IWW’s allegedly unlawful methods, particularly sabotage, and its opposition to government policies, including conscription. The government had spent months combing through the mass of evidence seized in the raids. Despite its best efforts, it had been unable to substantiate the popular allegations that Germany had been financing the IWW. On the contrary, the government accountant who had inspected the IWW’s financial records testified on cross-examination that he had been unable to trace any funds to anyone other than usual IWW donors.\(^{119}\) Moreover, only one defendant eligible for the draft had failed to register.\(^{120}\) Furloughed soldiers testified that they had maintained their IWW memberships until and even after they were drafted and had never been criticized by the organization for their military service.\(^{121}\) If the IWW leadership had wanted to halt production in crucial industries, Haywood and other witnesses claimed, it could easily have done so. That the war effort was proceeding smoothly was evidence that interference had never been the organization’s aim.\(^{122}\)

On the other hand, the government’s review of the evidence had uncovered letters, bulletins, and official publications expressing dissatisfaction with government policies and counseling conduct disruptive of the war effort. The government introduced evidence that the IWW had urged men to “fight for their jobs and class,” that they had organized strikes in war

\(^{118}\) The stenographic record of the government’s case came to 13,000 pages. “End of IWW Trial Far Off,” *New York Evening Post*, 24 June 1918.

\(^{119}\) Cross-examination of F. M. Bailey, IWW Papers, box 11, folder 103, 618.

\(^{120}\) NCLB, *Truth about the IWW*, 55.

\(^{121}\) “Chicago Trial Enters Last Month,” *Labor Defender*, 20 July 1980, ACLU Papers, reel 5, vol. 42.

\(^{122}\) David Karsner, Bulletin 6, 19 August 1918, ACLU Papers, reel 4, vol. 28.
industries, and that they had advocated general strikes and revolution. Although the organization had been careful in its official communications, many of its leaders and members had expressed strong opposition to capitalist war, and some had even proposed sabotage within the armed forces.\(^{123}\) IWW strikers in Butte, Montana had carried a banner reading, “Down with War.”\(^{124}\) Haywood himself admitted that the IWW had always been “opposed to war,” and that he “would have the war stopped today, if it were in [his] power to do it.”\(^{125}\) When pressed, he affirmed his belief that “industrial unionism is anti-military propaganda.”\(^{126}\) He seemingly conceded that although the IWW had not issued a direct statement urging its members to resist the draft, the logical result of proper industrial education would be a stance against participation. Finally, as David Karsner put it in his draft letter for the NCLB, it was hard to dispute that “the IWW [had] taken an advantage of the war situation” to improve its bargaining situation—though as Karsner noted, the Federal Trade Commission had proven that “the packers, the copper kings, and the lumber barons” had not hesitated to “reap their profits while the world wallows in blood.”\(^{127}\)

The prosecution also devoted considerable attention to the IWW’s use of sabotage, ostensibly to hamper preparation for the war. According to the government, it was accepted IWW practice to drive spikes into logs, blow up threshing machines, place bombs on haystacks, remove machine parts, cut belts, steal freight cars, and destroy food in mills and warehouses.\(^{128}\) But there was no evidence to substantiate these charges in the criminal records of individual members, and the department was unable to locate witnesses who could testify to actual destructive acts. In the end, the government relied primarily on “the seditious and disloyal

\(^{123}\) Prosecution Opening Statement, b24h–25h.
\(^{125}\) Testimony, 10 August 1918, IWW Papers, box 117, Folder 2, c35c. According to Haywood, headquarters had ceased to circulate explicitly anti-war material after the declaration of war. He conceded, however, that such materials were difficult to suppress immediately. Ibid., c25c–c28c.
\(^{126}\) Ibid., e26c.
\(^{127}\) David Karsner, “The IWW Case—An Idea on Trial” (draft), ACLU Papers, reel 4, vol. 28.
character and teachings of the organization.” It quoted extensively in the courtroom from IWW poetry and songs, which, according to Vanderveer, merely reflected the organization’s utopian spirit.

According to the defense, the IWW practiced only non-violent sabotage. Expert witnesses testified that fires in threshing machines were the result of electrical shorts, not foul play. Government forest supervisors confirmed that the IWW had not started the rash of forest fires that had recently ravaged the West, but rather had been the most effective force in fighting them, despite long hours and low pay. A prosecution witness admitted on cross-examination that in his two months as a Montana sheriff during the IWW lumber strikes, he had witnessed no violence or destruction of property whatsoever. One IWW organizer explained that sabotage, in practice, simply meant holding back on the job; an employer could not expect ten dollars worth of work for two dollars pay. Ralph Chaplin, the editor of Solidarity, agreed. Sabotage, he insisted, meant “good pay or bum work.”

For Vanderveer, non-violent sabotage was simply one facet of the IWW’s larger strategy for shifting the balance of power in labor relations. Vanderveer’s theory of the defense was precisely the same as the one espoused by the NCLB in its pamphlet. The IWW’s strikes and organizing campaigns in the summer of 1917 were not intended to thwart the war effort, he

129 The quotation is from a summary of the IWW’s criminal record compiled by William Fitts, quoted in Dubofsky, We Shall Be All, 433.
130 “Jurors Hear IWW Songs as Evidence,” New York Evening Call, 10 May 1918, ACLU Papers, reel 5, vol. 42.
131 The NCLB similarly assumed that “sabotage is intended to embarrass the employer, and is not directed toward violence and only occasionally the destruction of property.” NCLB, Truth about the IWW, 9. Haywood claimed employers and manufacturers were the true saboteurs, because they adulterated food and produced intentionally inferior goods. David Karsner, Bulletin 6, 19 August 1918, ACLU Papers, reel 4, vol. 28.
134 Trial Bulletin No. 35, 10 June 1918, IWW Papers, box 123, folder 45. He was called by the prosecution to identify literature that he had seized from an IWW defendant.
135 Clipping, New York Evening Call, 12 July 1918, ACLU Papers, reel 5, vol. 42 (quoting testimony of James Rowan).
argued. They were legitimate responses to workers’ grievances against oppressive employers, and they were crucial weapons in a class struggle that was both inevitable and desirable. As Vanderveer told Baldwin in April, “the economic defense” would have great “propaganda value” and, in addition, was “peculiarly effective in court.”

According to the defense it was the brutal suppression of the IWW, not hostility toward America’s war aims, that had jumpstarted recruitment in the early months of the war. To prove that claim, the defense introduced evidence of the violent anti-IWW episodes of the previous summer, over the government’s objections. Witnesses recounted the horrific story of the Speculator Mine fire that cost 178 lives and precipitated the IWW’s strike in Butte, Montana, which the government alleged was an effort to cripple the wartime production of copper. One defendant had visited the morgue in the wake of the fire; he recounted “that the fingers of some of the corpses were worn to the second joint, with the bone protruding, as the result of the men clawing at the bulkheads.” More than a thousand of the striking miners had been deported, including members of the AFL. Witnesses and perpetrators described the Bisbee deportations, the mounted machine guns trained on the men—many of whom owned Liberty Bonds, and hundreds of whom were registered for the draft—who were forced into automobiles and loaded into cattle cars covered in inches of manure. The testimony of one defendant, Big Jim Thompson, was a rendition of his stump speech in lumber camps and on street corners. It

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137 George Vanderveer to Roger Baldwin, 1 April 1918, ACLU Papers, reel 4, vol. 27.
139 IWW Trial Bulletin No. 2, ACLU Papers, reel 4, vol. 27.
140 Dubofsky, We Shall Be All, 435.
“moved the witness to tears, as well as Vanderveer, several jurors, numerous defendants and several spectators.”

In late July, the government finally halted the flood of heart-wrenching testimony in the only way it could. It admitted that “evil social and economic conditions” had obtained in the northwestern lumber camps, in Butte, and in Arizona. As for the persecution of the IWW, Nebeker argued it was a consequence rather than a cause of the organization’s militancy. He asked the jury to ponder what kind of conduct could be so “exasperating” that “in practically every state in this union, these fellows get into trouble.” Notably, Nebeker cited the IWW’s free speech fights as an example of this phenomenon. By overwhelming the municipal court systems and forcing their release, Nebeker argued, the IWW were asking for extralegal justice—though he was quick to note that he was “simply speaking from human nature” and that vigilantes had no “right” to act as they did.

In the end, Judge Landis allowed the defense to present a robust picture of the abuses that the IWW had suffered at the hands of employers. One evidentiary dispute, however, stood out as particularly contentious and especially important. Vanderveer’s broad ambition, as he and Baldwin had been proclaiming for months, was to put the entire industrial system on trial. In furtherance of that goal, he sought to introduce into evidence the report of the Commission on Industrial Relations. The report documented the terrible injustices of the existing industrial system, and Vanderveer claimed that it amounted to government affirmation of the IWW’s

142 It also admitted that there were few purported episodes of sabotage relative to the number of lumber mills in the northwest; that IWW members fought forest fires on government preserves; and that farmers in the Dakotas were pleased with IWW labor. “U.S. Admits 6 Vital Points in IWW Trial,” New York Call, 24 July 1918.
143 Prosecution Closing Argument, c9h.
144 Ibid., c11h.
145 Initially, the government was successful in excluding The New Freedom. “Landis Bars Wilson’s New Freedom in IWW Trial,” New Age (Buffalo), 28 June 1918, ACLU Papers, reel 5, vol. 42. Later, however, a witness was permitted to read much of it into evidence. “Wilson’s Book Read into Big IWW Trial,” New York Call, 3 August 1918.
complaints. It was a banner of respectability in the effort to secure labor’s rights, and it was among the organization’s most successful recruitment and organizing tools. In short, it was the “Bible of the IWW.”146 After a lengthy and heated argument, Judge Landis decided that the report was irrelevant, and he refused to admit it into evidence.147 Later, however, he qualified his ruling. The IWW had published a compendium of the report in pamphlet form, to distribute to its members and supporters. In its abbreviated version, Landis agreed to let it in.148

In his opening statement, Vanderveer recited the report’s most salient findings. Seventy-nine percent of working families were unable to support themselves, he said. The working people, sixty-five percent of America’s population, owned less than five percent of the nation’s wealth. The wealthiest two percent owned two-thirds of the country’s real and personal property.149 Large corporations were earning monopoly profits. Industry was trampling on workers’ health as well as public safety. These conditions were unjust, but they were not irremediable. The goal of the IWW was to counter the concentration of industrial strength through organization of the workers.150 The capitalists understood the danger that a powerful workers’ movement posed, and it was doing everything possible to shut it down.

Nebeker denounced the report as blatantly partisan, a “forum for cranks and fanatics,” and he was desperate to keep it out of the trial. According to Nebeker, “general industrial conditions in this country [were] not involved in this case at all.” The appropriate venues for redressing unjust conditions, he insisted, were the legislatures and the courts. Workers had no business taking matters into their own hands, particularly in a time of national emergency.151

146 Defense Opening Statement, 24 June 1918, IWW Papers, box 108, folder 7, a5h–6h.
149 Defense Opening Statement, a5h–6h.
151 Defense Opening Statement, a8h.
Nebeker’s view (albeit one he backed away from in his closing argument), even a “folded arm strike” was unlawful during wartime.\textsuperscript{152}

To Vanderveer, Nebeker’s objection was symptomatic of a deeper misapprehension of syndicalist ideology and of the IWW’s goals.\textsuperscript{153} The organization was not “aimed at the government,” he explained, but rather at exploitation.\textsuperscript{154} Existing wages and working conditions were determined by “the organized efforts of employers against the organized or unorganized employees.”\textsuperscript{155} Although Vanderveer understood that the legal system structured and regulated economic exchange, he emphasized that there was no law setting wages at any particular level. On the contrary, such a law would be struck down as unconstitutional.\textsuperscript{156} After all, the courts’ view was precisely the one that Nebeker had stressed in his own opening statement: that the “wage system” was a matter of negotiation between contending parties, a product of that “fundamental right,” both natural and constitutional, “of all men to contract with each other.”\textsuperscript{157} Employers appropriated the profits that belonged to the workers because they had the economic power to do so.

Nebeker believed the IWW wanted to “do away with” that system, but the reality was quite the opposite. Just as there was “no law which gives the right to exploit,” there was “no law

\textsuperscript{152} Ibid., F1c–F2c. In his closing argument, Nebeker said that the legality of an ordinary strike during wartime was not at issue in the case. Prosecution Closing Argument, 17 August 1918, IWW Papers, box 118, folder 2, c2c.
\textsuperscript{153} Vanderveer explained: “Counsel says he cannot . . . understand what I mean when I say we are not attacking political conditions; his mind runs in political groves, mine runs in a social groove. Nothing was ever further from the purpose of this organization than to interfere with any established political condition or any established legal condition.” Defense Opening Statement, d4h.
\textsuperscript{154} Ibid., A9h.
\textsuperscript{155} Ibid.
\textsuperscript{156} Ibid.
\textsuperscript{157} Vanderveer summarized the matter: “The Supreme Court of the United States has said you cannot fix hours of labor by law, except in the ten hours women’s case in Oregon, which Justice Brandeis took up; those things are not only not required to be settled by law, but cannot be, within the provisions of our constitution. Then how are you going to do it? Your honor tried it by twenty-nine million dollar fines. I have not heard that any of it was ever paid. It has been tried by trust-busting. It has been tried by this method and the other method. It is all right to try them—no harm, but this method by which the system itself was established can by employed against it with just as much law and just as much right as it was originally employed to establish it.” Ibid., d5h–6h.
which stays a man in his effort to prevent it.” The IWW hoped to counter exploitation by the only means possible: industrial organization. Workers and capitalists were locked in simple power struggle, and there was no middle ground. If the workers through organization cut employers’ profits low enough, the profit system would fall. On the other hand, if employers “cut our wages low enough, then our morals and our civilization will topple and fall.”

In this conflict, labor’s most effective tool was “direct action,” the IWW’s signature method. For example, workers might “bring the strike to the job” by laying down their tools after eight hours of labor. They might refuse to carry too heavy a load. They would use precisely the techniques that the government denounced as unlawful sabotage. The IWW was not opposed to democratic processes, Vanderveer clarified. In fact, it “believe[ed] so completely and absolutely in our form of government, that it want[ed] to extend it to industry.” But there was no reason to resort to political action to accomplish something non-political.

There is, of course, no way of knowing what the jury made of Vanderveer’s arguments about the injustices of American capitalism—whether they considered and rejected them, or disregarded them altogether. In his closing argument, Nebeker flatly declared that “the industrial system of this country is not on trial.” He condemned war profiteering, and he acknowledged that there were people in the United States who were “living on less than they need for...
wholesome lives.” These circumstances, however, were “no legal justification” for the attitude of the IWW. The IWW had practiced sabotage, and its militancy ran afoul of the law.\textsuperscript{165} Nebeker insisted that the government had no desire to criticize any “honest” and “patriotic” labor organization (implicitly, the AFL).\textsuperscript{166} He conceded that many members of the IWW were sincere and hard-working, including the soldiers who had testified on the organization’s behalf. But these rank-and-file members did not understand the true purposes of the organization. The defendants, with their “soft hands and hard faces,”\textsuperscript{167} were of a different breed. In concluding, Nebeker explained that during the past twenty-five years a “remarkable change has taken place along the lines of progressive legislation for the purposes of equalizing these unequal conditions.”\textsuperscript{168} Refusing to acknowledge the capacity of American political institutions to solve inequalities of wealth was in Nebeker’s estimation a declaration that American institutions were a “failure”—a charge that he trusted the jury would not make.

Judge Landis’s instructions to the jury were accepted by both parties as essentially fair. Landis clarified that the defendants were not on trial for having committed sabotage, except insofar as its practices were part of a conspiracy to undermine the war effort.\textsuperscript{169} On the other hand, he echoed Nebeker’s insistence that neither “lawful organized labor” nor “our industrial society” were on trial. Landis accepted Vanderveer’s argument that workers were entitled to aggregate their power as a means of improving bargaining position in their negotiations with employers. He even agreed that the rights of workers to organize were “as broad and as complete in time of war as they are in time of peace.”\textsuperscript{170} If the sole objective of the IWW had

\textsuperscript{165} Ibid., c4h.  
\textsuperscript{166} Ibid., c2e.  
\textsuperscript{167} Ibid., c4h.  
\textsuperscript{168} Ibid., c6h.  
\textsuperscript{169} Jury Instructions, IWW Papers, box 118, 24h–25h.  
\textsuperscript{170} Ibid., 34h–35h.
been to secure better labor conditions and higher wages, then they were not guilty of the crimes charged—subject to the qualification that individuals are responsible for the natural and necessary consequences of their acts. Landis concluded that there was insufficient evidence to support the government’s fifth count, conspiracy to violate the postal laws, and he removed it from the jury’s consideration.\textsuperscript{171} The rest he submitted to the jury with “no expression of opinion as to the ultimate question of guilt[].”\textsuperscript{172}

Inexplicably, Vanderveer declined to make a closing argument.\textsuperscript{173} Reporters, observers, and historians have debated whether he was overconfident, defeatist, or simply convinced that the evidence would speak for itself. Certainly, many of the defendants expected to be acquitted. Throughout the summer, the radical press had reported that the IWW had the stronger case, and courtroom spectators agreed.\textsuperscript{174} If Vanderveer found the principles of IWW ideology so convincing that he believed a wartime jury could be persuaded to embrace them, the swift and unanimous verdict taught him otherwise.

On August 17, 1918, the jury in the Chicago trial returned a verdict of guilty on all counts and as to all defendants, after half an hour of deliberation. As Vanderveer noted in his unsuccessful motion for a new trial, that amounted to five seconds of consideration per verdict.\textsuperscript{175} To the defendants, the jury’s decision was “a shock, a thunderbolt from a clear sky.”\textsuperscript{176} Haywood tried to dismiss the judgment as a conviction of individuals rather than the IWW as a whole, but it was clear that much more was at stake.\textsuperscript{177} Baldwin told Haywood that the verdict was a “surprise to every one of us, though in war time we may expect to have just

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\textsuperscript{171} Ibid., a2h.
\textsuperscript{172} Ibid., 16h.
\textsuperscript{173} Prosecution Closing Argument, c21h.
\textsuperscript{174} E.g., Mildred S. Wertheimer to Roger Baldwin, 26 July 1918, ACLU Papers, reel 4, vol. 27 (reporting that she had heard “the trial is going to the decided advantage of the IWW”).
\textsuperscript{175} Argument on Defendants’ Motion for a New Trial, 27 August 1918, IWW Papers, box 118, folder 4, 12348-9.
\textsuperscript{176} Undated bulletin, ACLU Papers, reel 4, vol. 28.
\textsuperscript{177} “The Closing Chapter,” New Haven Register, 31 August 1918.

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such results.” Juries in earlier Espionage Act cases had convicted defendants far less reviled on evidence far less damming.

Despite their disappointment, the defendants pronounced the trial fair. Judge Landis, they admitted, had “proved himself to be impartial in all respects.” Haywood thought that he had been “absolutely square throughout the whole trial.” Nonetheless, he considered the verdict a great mistake, “one of the greatest blunders ever committed in a court of justice.” The IWW had acted lawfully and morally, he insisted, and on his release, he would continue to advocate and uphold the “principles, aims and purposes of the Industrial Workers of the World.”

For all of Landis’s fairness during trial, the sentences he handed down were harsh. Haywood received the legal maximum of twenty years in prison, as did fourteen others in the organization’s highest leadership. Thirty-three received ten-year terms. All told, ninety-three of the defendants were bound for Leavenworth, in what constituted the largest single arrival of prisoners in its history. In his remarks at the sentencing hearing, Landis expressed his belief that the jury’s judgment was correct. He cited internal documents and IWW publications as well as letters by Haywood and other IWW leaders professing opposition to the conscription laws. He noted that two local branches had gone so far as to advocate a general strike to undermine enforcement of the draft. Notwithstanding the IWW’s stated justifications for its strikes, the jury had been justified in inferring that they were “directly and necessarily calculated” to

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178 Roger Baldwin to Bill Haywood, 26 August 1918, ACLU Papers, reel 4, vol. 27.
180 Undated bulletin, ACLU Papers, reel 4, vol. 28.
181 Ibid.
182 Sentencing, 29 August 1918, IWW Papers, box 118, folder 6, b3m.
183 Clipping, Weekly People (Chicago), 21 September 1918, ACLU Papers, reel 5, vol. 42. The prisoners were transferred to Leavenworth quickly because of a bomb explosion in Chicago, which Haywood considered inopportune because it interfered with efforts to obtain bail. Clipping, (Springfield) Republican, 8 September 1918, ACLU Papers, reel 5, vol. 42.
184 Sentencing, 29 August 1918, IWW Papers, box 118, folder 6, a27h–a28h.
obstruct both the production of war equipment and registration for the draft. In fact, “the jury
could not have done anything else on this evidence but find a verdict of guilty.”\(^{185}\)

Nebeker, of course, celebrated the government’s successful resolution of “America’s
greatest criminal case.”\(^{186}\) In the wake of the trial, he advised the Department of Labor to devote
more attention to the problem of migratory and foreign workers—to treat them in a “sympathetic
way, to the end that they will feel no need for such an organization as the IWW.” Once that task
was accomplished, he said, state and national governments “should pass such laws as are
necessary to prohibit revolutionary movements of all kinds.” The wartime legislation had
enabled the government to secure a conviction, but existing laws were “wholly insufficient as a
means of dealing with such an organization as the IWW during times of peace.”\(^{187}\) The
overwhelmingly positive public reaction to the verdict suggests that many Americans agreed.\(^{188}\)
Not one AFL affiliate publicly denounced the convictions.\(^{189}\)

On appeal to the Seventh Circuit, Vanderveer made many of the same arguments that he
had made throughout the proceedings and in his motion for a new trial.\(^{190}\) First, he claimed that
the evidence failed to bear out the charge that the members of the IWW had conspired to obstruct
the war effort or the draft. Many of the defendants were never connected to the conspiracy

\(^{185}\) Ibid., a35h-36h. He did not think, however, that the IWW was working to further German war aims.
\(^{186}\) “The Closing Chapter,” New Haven Register, 31 August 1918.
\(^{187}\) Clipping, ACLU Papers, reel 5, vol. 42.
News (New Britain, Conn.), 19 August 1918; Clipping, Norwich Record (Conn.), 21 August 1918, ACLU Papers,
reel 5, vol. 42.
\(^{189}\) Dubofsky, We Shall Be All, 437. Haywood blamed Gompers’s anti-IWW propaganda since 1916 for the
prosecution and conviction. “$374,000 needed to Release Haywood and His Companions in Leavenworth,” New
York Call, 3 April 1919.
\(^{190}\) Upon conclusion of the Government’s case, all of the defendants moved for a directed verdict of acquittal on
count four. Some made a similar request with respect to count three. These motions were denied, as were
Vanderveer’s motions on behalf of all defendants, at the close of the trial, for a directed verdict of not guilty on all
counts. The defendants then moved for arrest of judgment on the first and second counts and a new trial on all four
counts, citing insufficiency of the evidence and failure to deliberate upon the evidence; these motions were likewise
denied. Appellants’ Seventh Circuit Brief, IWW Papers, Box 122, 14–15.
except by unsupported allegations of membership in the organization. Some of the defendants were opposed to war in general, and the war in Germany, along with conscription, in particular. But many had never mentioned the war or conscription in any of their correspondence. And the organization’s own position was, at worst, ambivalent. Some of its leaders believed that opposition was justified, but others disagreed, and the official correspondence tended to leave the decision to individual conscience.

Vanderveer also argued that the convictions were constitutionally flawed. Among other theories, he suggested that the government’s confiscation of IWW belongings during the raids and the subsequent introduction of the confiscated documents into evidence violated the Fourth and Fifth Amendments to the United States Constitution. According to Vanderveer, the warrants issued before the September 1917 raids were invalid—indeed, he wrote, their invalidity would “scarce be disputed by the Government”—because they failed to recite facts establishing probable cause for a search and did not describe the articles to be seized. In its brief, the government chastised the defendants for attempting “to escape the legal consequences of criminal activities because some of the evidence which admittedly showed their guilt was obtained by means which they resent.” Vanderveer thought those were “strange words by which to characterize the conduct of men seeking the preservation of their most fundamental

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191 Ibid., 14.
192 The defendants (with a handful of exceptions) had moved separately to quash the indictment because the evidence upon which it was based had been seized from them illegally. Their motions were denied. On February 1, they filed a motion for the return of the papers. While that motion was pending, the Government filed petitions requesting that the documents, which were the primary evidentiary basis for the prosecution, be impounded for use at trial. Judge Landis denied the defendants’ motions and granted the government’s requests. More than fifteen thousand of the seized documents were entered into the record over the defendants’ objections on Fourth and Fifth Amendment grounds. Appellants’ Seventh Circuit Brief, 403.
193 Ibid., 2–3.
194 Appellees’ Supplemental Reply Brief, 67, Seventh Circuit, IWW Papers, box 122.
constititutional liberties,” but when the IWW’s appeal was decided in 1920, they aptly reflected the legal and political landscape. The court accepted Vanderveer’s assessment of the warrants but concluded that each defendant was seeking the return of property that had never been in his individual possession and to which, consequently, he had no right. It rejected Vanderveer’s theory that an unlawful invasion of the privacy of one of the defendants was a constitutional breach available to all, finding that the IWW was not a partnership, but a voluntary association, and that the defendants had been indicted as individuals, not as members of the organization. In 1923, the American Law Reports would cite the Haywood case for the rule that “an unlawful search and seizure of property of a voluntary association does not make the evidence found inadmissible against individual members of the association.”

Vanderveer raised a final argument during trial and on appeal, but it received no serious consideration from the courts. He argued that the defendants’ conviction was unconstitutional because the only basis for a finding of illegal activity was the speeches, literature, and private correspondence articulating the IWW’s position on militarism and conscription. Put simply, if the defendants had a right to express disapproval of the war, then their speech and writing could not be counted as illegal activity in support of the indictment. On that theory, Vanderveer had requested an instruction to the jury on “the right of free speech as defined in the First

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195 He continued, “Such has been the plea of every tyrant from time immemorial; and by this plea one can justify the worst form of tyranny that ever existed. But neither the plea of counsel nor the autocratic abuses he seeks to excuse, can find favor with any court where constitutional rights and personal liberties are held in proper esteem.” Appellants’ Supplemental Reply Brief, 21, IWW Papers, box 122.
196 Osmond Fraenkel, later a prominent ACLU attorney, thought that the court’s rulings on this issue were substantially correct, as a matter of existing law. Osmond Fraenkel to Albert DeSilver, 11 November 1920, ACLU Papers, reel 19, vol. 136.
197 Admissibility of Evidence Obtained by Illegal Search and Seizure, 24 A.L.R. 1408 (1923).
198 Appellants’ Seventh Circuit Reply Brief, 60, IWW Papers, box 122.
Amendment." 199 According to Vanderveer, what the government alleged in the third and fourth counts of the indictment was “a conspiracy to abuse the rights of free speech, free press and free assemblage,” and there was no way for the jury to determine whether the communications ascribed to the defendants exceeded those rights unless they were instructed on the nature of the First Amendment. 200 Judge Landis, however, submitted no instruction regarding free speech at all. In his view, free speech was not an issue in the case. “When the country is at peace it is a legal right of free speech to oppose going to war and to oppose even preparation for war,” Landis explained, “but when once war is declared, this right ceases.” Similarly, after the declaration of war and before passage of the Conscription Act, “it was the legal right of free speech to oppose the adaption of the compulsory military service law.” Once the law was passed, however, free speech was an illegitimate basis for continuing to resist it. 201

In its decision, the Seventh Circuit did not mention the First Amendment or free speech. The closest it came was to consider and reject Vanderveer’s claim that the conviction was improperly based on literature produced before American entry into the war. Some of the correspondence and publications, the court explained, evinced a purpose to oppose the war and the draft even in the event that legislation was passed, and they were therefore admissible as evidence of criminal intent. Moreover, the defendants had continued to circulate some of the unlawful materials once war was declared. That the expressions of opinion contained in the

199 During jury selection, one of Vanderveer’s questions to potential jurors was, “Do you believe in free speech—that the more important a thing is the more necessary it is to have it well thought over and discussed?” IWW Daily Bulletin 20, 26 April 1918, IWW Papers, box 123, folder 30.
200 Petition for Rehearing, Seventh Circuit, IWW Papers, box 123, folder 2.
201 Sentencing, 29 August 1918, IWW Papers, box 118, folder 6, A36h–38h.
documents might have been protected under the First Amendment evidently fell in the category of claims “of trivial consequence,” not sufficiently plausible to warrant express consideration.\textsuperscript{202} The court did reverse the defendants’ convictions under the first and second counts, but its ruling was based on the redundancy of the charges and the inapplicability of the peacetime federal criminal code, not the sufficiency of the evidence or the constitutional grounds that Vanderveer had proposed.\textsuperscript{203} Still, that the court affirmed only the convictions under the wartime legislation was significant. The court specifically rejected the theory that the IWW, by organizing strikes against producers with whom the government expected to contract, violated sections of the penal code prohibiting conspiracies to hinder the execution of United States laws or to interfere with the exercise of rights or privileges guaranteed to citizens. Such an interpretation might have rendered all peacetime strikes illegal under federal law, even during peacetime, a position that the court was unwilling to endorse. The court explained: “Defendants’

\textsuperscript{202} Haywood v. United States, 268 F. 795, 807 (7th Cir. 1920). Vanderveer quoted the Supreme Court’s approval in \textit{Debs v. United States}, 249 U.S. 211 (1919), of the court’s instruction to the jury that it should not find the defendant guilty unless the “natural effect” of his words was to obstruct recruitment and “the defendant had the specific intent to do so in his mind.” Appellants’ Seventh Circuit Reply Brief, 58. In its brief, the government considered the \textit{Abrams} case to be dispositive of the intent issue. Appellees’ Supplemental Reply Brief, 107. In \textit{Abrams v. United States}, 250 U.S. 616, 621 (1919), the Supreme Court had rejected the defendants’ claim that their intent was to prevent American interference in the Russian revolution, not to hamper the war effort in Germany, holding that “men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce.” \textsuperscript{203} With respect to the first count, it held that the penal provisions of the Espionage Act and Selective Service Acts “constitute[d] the specific directions of Congress for the punishment of all obstructions, forcible or otherwise, of the recruiting and enlistment service.” Haywood, 268 F. at 799. Because Congress would not have intended to impose punishment twice for the same offense, those statutes trumped the general provisions of Section 6 of the criminal code. As for interference with the operations of suppliers of provisions and munitions to the Government, while Congress could have protected and eventually did protect these producers, to some extent, by express legislation, Section 6 was not a specific war provision and would continue to apply during peacetime to all entities transacting business with the Government. Given that practically any good might be used in the production of materials purchased by the government, the prosecution’s broad construction of Section 6 would have subjected all striking workers to punishment. The court explained that “producers, who have contracts to furnish the Government with supplies, are not thereby made officials of the Government.” Ibid., 800. The prima facie meaning of Section 6, the court concluded, “condemns force only when a conspiracy exists to use it against some person who has authority to execute and who is immediately engaged in executing a law of the United States.” Ibid. The court disposed similarly of the second count, based on Section 19 of the Penal Code, applicable in cases of conspiracy to injure citizens of the United States in the exercise of any “right or privilege secured to [them] by the Constitution and laws of the United States.” The government alleged that the IWW had run afoul of this provision by preventing producers from fulfilling their contracts with the Government for war munitions and supplies. The court stated decisively that “to produce, to sell, to contract to sell to any buyer, are not rights or privileges conferred by the Constitution and laws of the United States.” Ibid., 801.
force was exerted only against producers in various localities. Defendants thereby may have
violated local laws. With that we have nothing to do. Federal crimes exist only by virtue of
federal statutes; and the lawmakers owe the duty to citizens and subjects of making unmistakably
clear those acts for the commission of which the citizen or subject may lose his life or liberty.”204
Notwithstanding this concession, the defense team regarded the appeal as a defeat. The
defendants would remain in prison. The IWW, with the help of the NCLB, would have to pursue
non-judicial channels in their attempt to get them out.

Over the coming years, the NCLB would work to ameliorate the situation of the IWW
defendants in whatever way it could. Its efforts began in September 1918, with an open letter to
the president.205 By the fall, it was clear that direct appeals to the merits of labor radicalism
would not persuade the administration or the American public that the IWW prisoners were
worthy of executive clemency. The NCLB therefore stressed irregularities in the investigation
and prosecution of the case, with particular emphasis on administrative abuses. This was not a
new strategy. In a July 1918 Bulletin, the IWW accused the government of “deliberately
conniving to prevent men from having a fair and impartial trial” by shutting down the
organization’s newsletters, seizing IWW mail, and preventing fundraising and organizing
events.206 The NCLB’s involvement, however, brought a measure of authority to these charges.
Of course, the civil liberties group had been emphasizing the American commitment to judicial
fairness ever since the indictments were filed in September 1917. But its previous statements
were careful not to antagonize the NCLB’s would be allies in the administration. In The New
Republic advertisement, for example, cautious supporters had convinced Baldwin to omit

204 Ibid., 800.
205 Open Letter from the NCLB to President Wilson, 27 September 1918, ACLU Papers, reel 5, vol. 43.
206 Bulletin, 26 July 1918, ACLU Papers, reel 4, vol. 27.
allegations of government misconduct. The revised approach, by contrast, was to accuse the Department of Justice of deliberate and lawless interference with the IWW’s defense.

The letter to Wilson emphasized that federal agents had continued to raid the national and local offices of the IWW long after the initial warrant had expired. They had seized typewriters, stationery, cash, and other implements that were obviously irrelevant to the indictments—and were never introduced at trial—but were clearly necessary to the defense. They had arrested but failed to prosecute members of IWW defense committees throughout the country. On government orders, defense news literature was returned undelivered by express companies to committee headquarters. First-class mail from the general defense committee was almost always held at Chicago, and registered letters, many containing checks, were held, opened, officially re-sealed and delivered only months later. Judge Landis had censured justice agents for intimidating defense witnesses. Even outside attempts to aid the defense were targeted. The Department of Justice had warned *The New Republic* that re-running the NCLB’s advertisement would subject the publication to criminal investigation, and it had forbidden circulation of the NCLB’s pamphlet without ever declaring it non-mailable. These methods were “unparalleled in modern criminal prosecutions” and were “obviously open to the suspicions of being conducted not so much to obtain evidence as to embarrass the defense.”

The Wilson administration did not acknowledge the NCLB’s letter. In fact, the government’s campaign against the IWW only intensified after the Chicago conviction, even while the Department of Justice chose not to pursue other cases under the Espionage Act. In Sacramento, twenty members of the IWW arrested in the September raids, along with a second

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207 Haywood testified that defense literature mailed by the American Express Company was returned with a message: “These packages were not delivered on account of orders issued by the government.” Testimony of William Haywood, 10 August 1918, IWW Papers, box 117, folder 2, c10c.

208 Open Letter from the NCLB to President Wilson, 27 September 1918, ACLU Papers, reel 5, vol. 43.

contingent arrested at the urging of local enforcement,\textsuperscript{210} were forced to wait in jail while the Department of Justice focused on the Chicago trial. The defendants spent over a year in prison, during which time several died of the flu. Despite the utter paucity of evidence against them, they were indicted in February 1918 on the same charges filed in Chicago. Unlike their Chicago counterparts, they fully expected a conviction, and all but three chose to underscore the injustice of the American legal system by making no defense in court. All were convicted by a jury in under an hour.\textsuperscript{211} Another trial took place in Wichita, Kansas, where twenty-seven Wobblies arrested in a federal raid had languished in jail for more than two years while indictments were periodically filed and then quashed on technicalities. During this time, the NCLB fought publicly against the horrendous conditions at the Wichita jail. After persistent urging, the Department of Justice agreed to inspect the jail and eventually ordered the prisoners transferred. The defendants finally went to trial in December 1919, and twenty-six were convicted.\textsuperscript{212} Like the Chicago case, the Sacramento and Wichita verdicts were unsuccessfully appealed.\textsuperscript{213} Certiorari to the U.S. Supreme Court was denied in all cases. The estimated cost of litigating the

\textsuperscript{210} The second group was arrested in the wake of an explosion at the California executive mansion in December 1917. State authorities pressured Washington to investigate IWW involvement in the case, and though a federal agent found no evidence implicating the IWW—years later, federal officials would determine that the episode was a reelection ploy by a district attorney—the justice department made more Wobbly arrests. Dubofsky, \textit{We Shall Be All}, 440.

\textsuperscript{211} One of the defendants, a well-connected easterner with little relationship to the rest of the group, rejected the “silent defense” strategy and opted to hire a lawyer, which she did with the support and assistance of the NCLB. Although she too was convicted, she received no prison term. Dubofsky, \textit{We Shall Be All}, 438–41; Johnson, \textit{Challenge to American Freedoms}, 101–04.

\textsuperscript{212} Johnson, \textit{Challenge to American Freedoms}, 105–09.

three federal conspiracy cases to conclusion was $225,000, “a larger sum than ha[d] ever been spent by a labor organization in defending itself in a criminal trial.” To the end, the NCLB assisted in raising funds.215

While these trials were pending, the NCLB pursued its final strategy for helping the beleaguered IWW: it mounted a national amnesty campaign on behalf not only of the IWW prisoners, but of all prisoners convicted under the Espionage and Sedition Acts. At first, the organization was optimistic about the prospects for amnesty at the end of the war. It emphasized that the Department of Justice had targeted only radical labor groups, and that there was no evidence of any actual spy convicted under the wartime laws. Several respected liberals were urging better treatment for “political prisoners,” and a proposal for amnesty for court-martialed prisoners attracted broad-based support. The NCLB hoped to translate this sentiment into a movement for the Espionage Act prisoners’ release. But there was little public enthusiasm for the NCLB’s position. The NCLB’s efforts to create amnesty committees in local communities were denounced as unpatriotic, and its attempted mass meetings were sparsely attended.219

215 Advertisement for the Nation (signed by John Graham Brooks, Ernst Freund, Percy Stickney Grant, Florence Kelley, Henry Mussey, Thorstein Veblen, and Harry Ward), ACLU Papers, reel 25, vol. 181 (raising funds for a challenge in the Supreme Court, focusing on the illegality of the search warrants); ACLU Press Release, 8 March 1921, reel 25, vol. 181 (announcing a drive for funds to appeal “the greatest free speech trial of the war”).
216 Citing Thomas Jefferson’s general amnesty for those convicted under the sedition law of 1798, “a statute far less drastic than the Espionage Act,” the NCLB anticipated favorable public response to a postwar amnesty. “Liberties Bureau Takes Issue with Gregory” (clipping), ACLU Papers, reel 5, vol. 43.
217 E.g., Upton Sinclair to Newton Baker, October 1918, ACLU Papers, reel 6, vol. 50 (asking for “enlightened humanity” in treatment of those prisoners who were in jail for “carrying on propaganda against the draft or against our participation in the war” and whose opposition was “openly and honestly expressed, . . . based upon religious or humanitarian grounds”).
218 Senator Borah and other progressive senators urged general amnesty for those convicted during the war by court-martial, based on arbitrariness in sentencing. Clipping, New York Call, 28 January 1919, ACLU Papers, reel 5, vol. 41.
219 Johnson, Challenge to American Freedoms, 109–18.
President Wilson was favorably disposed toward a partial amnesty but consistently deferred to his advisors, who were staunchly opposed.\textsuperscript{220} Attorney General Thomas Gregory insisted that none of the prisoners had been convicted for merely expressing their opinions.\textsuperscript{221} To Gregory, the Espionage Act defendants were not political prisoners, but criminals and traitors who deserved to be in jail. When the NCLB issued a pamphlet, “Why Should There Be an Amnesty,” he dismissed its arguments as “entirely fallacious.”\textsuperscript{222} A. Mitchell Palmer, who replaced Gregory as Attorney General in March 1919, held similar views. Both men were willing to consider leniency in particular cases, and each recommended about fifty commutations, but both counseled against further action. The advent of the Red Scare only exacerbated matters. In the summer of 1919, Wilson communicated his intention to pardon “all American citizens in prison or under arrest on account of anything they have said in speech or in print concerning their personal opinions.” Palmer was adamant that no such cases existed. He told the press that “no men were in prison because of their expression of views on social, economic or political questions, including the war,” and he persuaded Wilson to resist mounting pressure for the release of Eugene V. Debs, among other prisoners.\textsuperscript{223} Within the Department of Justice, amnesty for convicted socialists—though not the IWW—was gaining support. Palmer, however, would not capitulate even on the most obviously political of prisoners. In fact, he was

\textsuperscript{220} The NCLB did not endorse the partial amnesty proposals. It considered a general amnesty to be the “only possible solution,” explaining that “any attempt at mere commutation of sentences and pardon in occasional cases would only serve to increase the bitterness of the many friends and sympathizers of those who remain in prison, and will give color to the charge which will inevitably be made that justice in America is a matter of favor and influence.” “Liberties Bureau Takes Issue with Gregory” (clipping), ACLU Papers, reel 5, vol. 43.
\textsuperscript{221} Ibid.
\textsuperscript{222} Quoted in Johnson, \textit{Challenge to American Freedoms}, 112.
initiating new Espionage Act prosecutions for, among other things, the distribution of amnesty literature, and he was publicly advocating a peacetime sedition law.\textsuperscript{224}

All told, the amnesty campaign would drag on for fifteen years. In 1921, President Warren G. Harding met with an ACLU delegation and commuted the sentences of Debs and twenty-four others, including six members of the IWW.\textsuperscript{225} But in the face of threats of vigilantism by the American Legion and so-called patriotic societies,\textsuperscript{226} exacerbated by mounting industrial unrest, Harding refused to do more. Internal disagreement among the IWW prisoners, many of whom refused to file individual petitions, made action on their behalf even more difficult.\textsuperscript{227} So did the decisions of several of the defendants, including Bill Haywood, to jump bail when the Supreme Court declined their request for certiorari—an action that Baldwin condemned, to the disappointment of his more radical allies.\textsuperscript{228} For the rest of the decade, ACLU

\textsuperscript{224} The new cases included the prosecution of Jacob Isaacson for an editorial opposing Liberty Loans in the April 1919 issue of \textit{Freedom} magazine; of the editors of the \textit{Seattle Union Record} for a wartime article; of three men who distributed handbills that urged amnesty and criticized federal prison conditions; and of the editor of the \textit{Oakland World} for criticizing abuses of civil liberties.

\textsuperscript{225} American Civil Liberties Union, \textit{A Year’s Fight for Free Speech: The Work of the American Civil Liberties Union from Sept. 1921 to Jan. 1923} (New York: American Civil Liberties Union, 1923). The same year, the ACLU submitted a petition to the President signed by recipients of the Congressional Medal of Honor, along with other veterans.

\textsuperscript{226} The \textit{New York Times} reported: “Promising a fight to a finish if Eugene V. Debs and other war prisoners are pardoned at this time, John G. Emery, National Commander of the American Legion, today wired President Harding that such action would be interpreted as a license to disregard law and order.” “Legion Warns Harding Against Freeing Debs,” \textit{New York Times}, 29 July 1921. Notably, by the end of the war, the activity of private patriotic groups—many of which were initially encouraged and even deputized by law enforcement—had prompted rebuke from public leaders and government officials. See generally Capozzola, \textit{Uncle Sam Wants You}. On February 1, 1919, the American Protective League (which was organized during the war under the supervision of the Bureau of Investigation) was disbanded at the request of Attorney General Gregory. A. Mitchell Palmer announced in March 1919 that the government would have no official or semi-official relationships with the private patriotic organizations established during the war to monitor private behavior. He declared that “espionage conducted by private individuals or organizations is entirely at variance with our theories of government and its operation in any community constitutes a grave menace to that feeling of public choice which is the efficient force making for the maintenance of good order.” “Espionage Work in Peace Time by Private Persons Held as Menace,” Clipping, 31 March 1919, ACLU Papers, reel 6, vol. 53.

\textsuperscript{227} Elizabeth Gurley Flynn (for Workers Defense Union), general letter, 30 July 1921, ACLU Papers, reel 25, vol. 181.

\textsuperscript{228} News Release (undated), ACLU Papers, reel 25, vol. 181. The release emphasized that “the Civil Liberties Union has no connection with the IWW and is interested in the cases solely because they involve the issues of free speech and free press.” When Baldwin organized a trip to the Midwest in 1921, Carl Haessler of the \textit{Milwaukee Leader}
representatives, along with the Joint Amnesty Committee that the organization helped create, exerted quiet pressure on Washington, securing the release of a few prisoners at a time.\(^{229}\) Only in 1933, when Franklin D. Roosevelt issued a blanket Christmas amnesty, were the wartime prisoners finally vindicated and their citizenship and voting rights restored.

_Beyond Free Speech_

In February 1918, an IWW publicity agent wrote to Roger Baldwin that “every right that is supposedly guaranteed by the American Constitution to even the humblest citizen or sojourner in the land has been completely taken away in instance after instance either by the Federal officials themselves or by the various local official and unofficial thugs with the tacit or open connivance and encouragement of those Federal officials.”\(^{230}\) By the end of the Chicago IWW trial, those complaints appeared to be well founded. In Chicago, as in other wartime trials under the Espionage Act, conviction was all but inevitable. The great lessons of the IWW trial were, first, that “civil rights hardly exist for the IWW,” and second, that the perceived deprivation of justice in the courtroom was a powerful mobilizing force.\(^{231}\)

Baldwin decried the verdict, but he was adamant that the end of the trial did not mean the “end [of] the radical labor movement in America.” The IWW, he said, would only grow stronger “as the forces making for a new world after the war gather for ultimate economic freedom.”\(^{232}\) The outrage generated by the perceived injustice of the American legal system would unify an

\(^{229}\) Baldwin favored direct confrontation and withdrew support from the Amnesty Committee when it insisted on a quieter approach. Walker, _American Liberties_, 56.
\(^{230}\) Frederick Esmond to Roger Baldwin, 21 February 1918, ACLU Papers, reel 4, vol. 30.
\(^{231}\) American Civil Liberties Union, _The Persecution of the I.W.W._ (New York: American Civil Liberties Union, 1921).
\(^{232}\) Roger Baldwin to Bill Haywood, 26 August 1918, ACLU Papers, reel 4, vol. 27.
otherwise divided and disorganized constituency. As Amos Pinchot commented in the wake of
Debs v. United States, the Supreme Court’s decisions upholding the conviction of labor
leaders only confirmed the judicial tendency to “protect the old order.” Its contortion of the First
Amendment, he claimed, was an effort by the Court “to show that in war times and class-war
times it can do its bit.” The solution for the persecution of the radical labor movement was
“not to be found in written constitutions,” but in the will of the people and in just economic
relations free from the machinery of the state.

For leftist critics of the Espionage Act prosecutions, the judiciary was no more
responsible for suppressing radical agitation than the Wilson administration was. The First
World War represented a significant expansion of federal power that affected the daily life of
average citizens in unprecedented ways, but the NCLB’s labor allies were already familiar with
the coercive potential of federal power. As witness after witness recounted in the IWW trial,
unions had regularly experienced the crushing power of the state in the form of compulsory
arbitration, military intervention, and labor injunctions. That these forces were aligned against
them contributed to the perceived equivalence of all forms of federal authority. For the

233 Debs’s view was much like that of his erstwhile comrades in the IWW. He too was imprisoned for denouncing
the war as a creature of capitalist imperialism in violation of the Espionage Act. On the eve of his defeat in the 1920
presidential election, he announced from prison: “They know where I belong under their criminal and corrupt
system. It is the only compliment they could pay me.” Quoted in Ernest Freeberg, Democracy’s Prisoner: Eugene V.
Debs, the Great War, and the Right to Dissent (Cambridge: Harvard University Press, 2008), 2. Like Debs, the
IWW sought to put “American institutions . . . on trial before a court of American citizens.” Ibid. But while Debs, a
socialist, garnered widespread support, the IWW did not. Socialism, after all, had much more in common with
mainstream progressivism than its anti-state, anarchist counterpart did. Dubofsky, We Shall Be All, 15. The IWW
unavailingly criticized the distinction made between Socialist prisoners and the IWW. Otto Christensen, Statement
Submitted to the Attorney General of the United States Concerning the Present Legal Status of the IWW Cases, 23,
IWW Papers, box 131, folder 2.

234 Amos Pinchot, “Protecting the Old Order,” New York Call, 12 March 1919. Critics noted that the Debs decision
closely followed the Supreme Court’s decision in Hammer v. Dagenhart, 247 U.S. 251 (1918), striking down as
unconstitutional the Keating-Owen Act of 1916, which banned the interstate circulation of the products of child
labor, as exceeding Congress’s power under the Commerce Clause. A second child labor bill passed in December
1918, which sought to regulate child labor through Congress’s tax power, was found unconstitutional in Bailey v.

progressives, “the state” and “the courts” were vastly different creatures. For the radical labor movement, they were faces of the same beast.236 Moderate labor unions affiliated with the AFL benefited from state policy during the war, and for the time being, the IWW was in the minority in its wholesale condemnation of the state.

It had a staunch ally, however, in the NCLB. At the Chicago trial, Vanderveer’s exchange with Nebeker over direct versus political action (and the corresponding relevance of the Report of the Commission of Industrial Relations) exerted a strong influence on the NCLB leadership. In fact, the organization was so convinced of the inadequacy of political channels that it published the entire exchange in pamphlet form.237 For Baldwin, the most appealing of the IWW’s methods was the free speech fight. As he reflected years after the war: “Far more effective is this direct action of open conflict than all the legal maneuvers in the courts to get rights that no government willingly grants. Power wins rights—the power of determination, backed by willingness to suffer jail or violence to get them.”238

Tellingly, the IWW trial coincided with the termination of the War Department’s cooperative posture toward the NCLB on the issue of conscientious objectors. Colonel R. H. Van Deman, chief of the Intelligence Section of the War College in Washington, D.C., had initiated an investigation of Baldwin in December 1917, and by the spring, the NCLB was being closely monitored.239 Keppel told Baldwin in late February that many of Newton Baker’s “military associates” believed that the NCLB’s activities were verging on “direct conflict with the

236 Testimony of William Haywood, 10 August 1918, IWW Papers, box 117, folder 3, a14h (noting that “all of the work that courts do is political”). It is telling that as conservative unions like the AFL began to receive assistance from the state, they also minimized the importance of civil liberties. On the other hand, when the NLRB favored the CIO during the New Deal, the AFL emphasized the importance of free speech and individual rights.
government.” In response, Baldwin wrote to Major Nicholas Biddle, an intelligence officer, and—attaching all of the organization’s printed materials, as well as its mailing list—requested that an inquiry be made into the NCLB’s activity to clear the organization’s name. Baldwin insisted that the NCLB was not doing anything to embarrass the government’s recruitment effort, and he wrote Van Deman directly with a promise to cease all potentially objectionable activities. Van Deman, however, was unimpressed; he recommended that Baldwin be prosecuted under the Sedition Act, and Keppel was sufficiently concerned to sever ties with the NCLB, despite his personal connections to members of the executive board.

Other government departments were also gathering information on the NCLB and its leadership. Over the summer, the Post Office declared fourteen NCLB pamphlets non-mailable, despite admitting to the Department of Justice that they did not explicitly violate the Espionage Act. On August 13, after unsuccessful talks with post office officials, Walter Nelles sued in federal district court for an injunction directing the New York postmaster to mail them. The Department of Justice considered the NCLB literature legal, but Solicitor General Lamar was determined to litigate the matter. A few weeks later, after the counsel for the government stated in court that it did not oppose the NCLB’s application, Judge Augustus Hand ordered the post office to deliver the pamphlets.

240 Frederick Keppel to Roger Baldwin, 26 February 1918, ACLU Papers, reel 2, vol. 15. Baldwin assumed that the principal objection was to the conscientious objector work, since the organization’s legal defense work was “directly communicated to the Department of Justice.” Roger Baldwin to Frederick Keppel, 1 March 1918, ACLU Papers, reel 2, vol. 15.
241 Roger Baldwin to Maj. Nicholas Biddle, 8 March 1918, ACLU Papers, reel 2, vol. 15.
242 Colonel Ralph H. Van Deman to Frederick Keppel, 9 March 1918, ACLU Papers, reel 2, vol. 15.
243 Cottrell, Roger Nash Baldwin, 75. L. Hollingsworth Wood, a personal friend of Keppel’s, met with him for an hour and commented that Keppel “seemed a good deal wrought up over the situation.” Memorandum of Conference with Third Asst. Secretary of War Keppel, 14 August 1918, AUAM Papers, reel 10-1.
244 Johnson, Challenge to American Freedoms, 74–75.
245 NCLB Press Release, 17 October 1918, Records of American Civil Liberties Union, Swarthmore College Peace Collection, Swarthmore, Penn., box 1, folder 1918.
Meanwhile, in late August, government agents began a series of interviews with Baldwin concerning his opinion of the IWW and the funding of the NCLB’s publicity work in the case. A few days later, Nicholas Biddle, now a lieutenant colonel in the Office of Military Intelligence, sent six agents to the NCLB offices to collect evidence for an Espionage Act prosecution. In the days after the raid, Walter Nelles wrote to the organization’s close associates. He attributed the operation to complaints from local patriotic societies (whose representatives accompanied the federal agents during the raid) and from intelligence officers concerned with the organization’s work on behalf of conscientious objectors, though he felt that “the investigation doubtless has some relation in point of time to the IWW conviction.”

Although there was significant government support for an indictment, the NCLB’s connections, including John Nevin Sayre, helped dissuade the Department of Justice from prosecuting.

One member of the NCLB leadership, however, was soon to stand trial, albeit on different charges. By August 1918, Roger Baldwin was disillusioned. He had been confident in the ability of his new organization to moderate government policies toward pacifists and radicals. When a year of cooperation with various government agencies definitively failed to yield results, he was ready to adopt more radical methods. He had, moreover, discovered the potential of courtroom spectacle as a platform for radical propaganda—even, or particularly, when conviction seemed certain.

In the summer of 1918, the draft age was raised to forty-five, making Baldwin eligible for conscription. Baldwin announced his intention to resign as director of the NCLB when the new

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246 L. Hollingsworth Wood to Friends of the Bureau, 17 September 1918, AUAM Papers, reel 10-1. Wood stated that “no change whatever in the operation of the Bureau is contemplated, regardless of the results of the examination of our papers.”

247 Cottrell, Roger Nash Baldwin, 82; Johnson, Challenge to American Freedoms, 76–77; John Nevin Sayre to Albert DeSilver, 18 October 1918, ACLU Papers, reel 6, vol. 47 (noting that he had telephoned his brother, President Wilson’s son-in-law, who had agreed to write to Newton Baker to “put in a good word”).
Selective Service Act became effective, so that he would be free to take a “personal stand” against the draft.248 He initially intended to refuse to register, but the raid on the NCLB offices prompted him to delay action until the “critical period” had passed. In mid-September, when he felt that matters were sufficiently settled with respect to the investigation to permit his departure, he declined to appear for his physical examination and declared in a written statement that he would not “perform any service under compulsion regardless of its character.”249 In October, he informed the District Attorney and an agent of the Department of Justice that he was refusing to appear before his local draft board for an examination, and at Baldwin’s request, a government agent was sent to his apartment to arrest him.

Baldwin was indicted for violation of the Draft Act, albeit only after a judge and several Assistant United States Attorneys tried earnestly to persuade him to take a more moderate course. On October 30, 1918, he was tried before Judge Julius Mayer in the Southern District of New York. In the interim, he had refused bail on ideological grounds, though he had spent his days at the Department of Justice offices helping them to arrange the NCLB files.250

In his statement to the court, Baldwin articulated a strong commitment to “individual freedom,” distinct from arguments about pluralism, democratic decision-making, and the public interest.251 Baldwin emphasized that his resistance rested on the precepts of individual conscience. He asserted a right to abide by his internal beliefs, unconstrained by state power. He would resist any law, he explained, that attempted to control his “choice of service and ideals.”

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248 Roger Baldwin to the Directing Committee, 10 August 1918, ACLU Papers, reel 3, vol. 25.
249 Quoted in Cottrell, Roger Nash Baldwin, 81.
251 Baldwin continued to justify his resistance on those terms after the war. See, e.g., Letter from Baldwin, undated, ACLU Papers, reel 5, vol. 43 (“We draft act prisoners stood firmly on [the] ancient principle of individual liberty.”).
But he was particularly opposed to military conscription because it served the purpose of war, to which he was unequivocally opposed.\textsuperscript{252}

Baldwin’s autobiographical narrative, which he prepared in advance and read aloud in the courtroom, neatly captured the transformation in his thinking. Baldwin began by describing his upbringing, his education, and his early career as a social worker and progressive reformer in St. Louis. He claimed to have come to New York to work for the AUAM because he had grown discouraged by the ineffectiveness of incremental change at the local level and had awakened to the cause of labor radicalism. For six years, he recounted, “I have felt myself heart and soul with the world-wide radical movements for industrial and political freedom—wherever and however expressed—and more and more impatient with reform.”\textsuperscript{253} Echoing the claims of the radical libertarians and anarchists of the prior decade and, more prominently, of John Stuart Mill, he called for a “social order without any external restraints upon the individual, save through public opinion and the opinion of friends and neighbors.” Although he was espousing a minority position, he believed himself to be part of a “great revolt surging up from the people—the struggle of the masses against the rule of the world.” In short, he declared, he was engaged in a fight against the “political state itself.”\textsuperscript{254}

Judge Mayer was impressed by Baldwin’s sincerity of belief, but he believed that his conduct was misguided. He admonished Baldwin that the republican liberties to which he was so committed rested on obedience to law. Channeling the prevailing progressive understanding, he told Baldwin that “the freest discussion” should be permitted and encouraged “in the processes that lead up to the enactment of a statute” and, once a statute was passed, “as to the methods of [its] administration.” The democratic process, however, could not countenance

\textsuperscript{252} ACLU, \textit{Individual and the State}, 6. Baldwin did not except class war from his statement.
\textsuperscript{253} Ibid., 8.
\textsuperscript{254} Ibid., 10.
disregard for duly enacted laws. Acknowledging that Baldwin’s position might someday be vindicated as the better course, he insisted that “with those possible idealistic and academic speculations a Court has nothing to do.” Accordingly, he pronounced his sentence: one year in prison, the maximum provided by law.

Baldwin listened to the Judge with a “friendly smile,” and, when the proceedings were over, his friends and supporters streamed past him, one by one, shaking his hand and congratulating him: Scott Nearing, Norman Thomas, Rose Pastor Stokes, Rabbi Judah L. Magnes, L. Hollingsworth Wood, Albert De Silver, Walter Nelles, William Simpson. In short, many of the most notable figures of the American left celebrated Baldwin’s position. Over the coming months, they initiated efforts to secure Baldwin an executive pardon, but Baldwin insisted that he would leave jail only under a general amnesty. He reiterated his opposition to state authority and affirmed his commitment to a “social principle more precious . . . than personal freedom,” namely, the right to follow the dictates of one’s God and conscience. “I would decline to leave prison as the recipient of a favor obtained by politically influential friends,” he told Albert DeSilver, “while hundreds of other men drag out long, lifeless days behind bars for precisely the same convictions that brought me here.”

Notwithstanding his somewhat grandiose declaration of his willingness to suffer for his beliefs, Baldwin did very little suffering over the coming months. After a brief stay in “the Tombs,” a lower Manhattan jail, Baldwin was transferred to the Essex County Jail in Newark. He was permitted to retain his books and personal belongings, and he spent most of his time

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255 Ibid., 13.
256 “Baldwin Gets Year for Draft Act Defiance,” New York Call, 31 October 1918, ACLU Papers, reel 6, vol. 46. Baldwin later recalled that a wide range of groups commended him for his stand, including the American Association for Organized Charities, the National Municipal League, the Society for Prevention of Cruelty to Animals, the Liberal Club of Harvard, and the League for Democratic Control. Lamson, Roger Baldwin, 111.
257 NCLB Press Release, 7 March 1919, ACLU Papers, reel 5, vol. 43.
258 Roger Baldwin to Albert DeSilver, undated, ACLU Papers, reel 5, vol. 423.
reading, writing, conversing with the other inmates, and meeting with his frequent visitors. The food was palatable, and he purchased supplementary meals. He also paid to have his cell cleaned and his laundry washed. Baldwin befriended the guards, who left his cell door open at night. He served meals and assisted in the kitchen; given the opportunity to room in the dormitories with the kitchen staff, he opted to remain in his cell because of its privacy and authenticity. Most striking, he secured the warden’s permission to organize a Prisoners’ Welfare League, which held classes and discussion sessions, procured books from the local library, arranged support for inmates’ indigent families, and hired an attorney to represent prisoners in appropriate cases.\textsuperscript{259} Baldwin’s initiatives angered the Essex County Sherriff, and in May, he was transferred to the county prison in Caldwell, New Jersey, a work farm designed for short-term prisoners. Rules were lax, and Baldwin again quickly made friends among the staff and inmates. While Baldwin was in residence, the warden attended the annual meeting of the National Conference of Social Work, where Florence Kelley nominated Baldwin to a committee. Given the circumstances, he lost by a margin of 262 to 216, but he won the warden’s vote.\textsuperscript{260}

Baldwin was released from Caldwell on July 19, 1919—almost three months early, as a result of a clerical error. In an interview for the \textit{New York Herald-Tribune}, he explained that his time in jail had been “profitable” and that he was “leaving more of a radical than [he] went in.”\textsuperscript{261} He planned to cease all civic participation, including jury duty and the vote. He explained his intention to join the “revolutionary labor movement,” since the world had “passed so-called political democracy” by.

\textsuperscript{259} See Cottrell, \textit{Roger Nash Baldwin}, 94–97. Baldwin referred to the group as the “Essex County Jail Soviet.” After Baldwin’s transfer, it disbanded.

\textsuperscript{260} Ibid., 99–100.

Over the course of the Chicago proceedings Baldwin had made several trips to Chicago and developed close relationships with Bill Haywood and other IWW leaders. He admired their philosophy and determination, and he resolved in jail to join the organization himself. Scott Nearing, Elizabeth Gurley Flynn, and Bill Haywood all tried to dissuade him; they thought that his time and energies could be spent more profitably in convincing liberals and radicals to support the defense committee. Baldwin, however, was determined to experience the life of an itinerant worker, and Haywood obligingly sponsored him for membership. He traveled the country by hopping railroad trains, and he tried his hand at manual labor. After a few months, satisfied with his new credentials but convinced that he would never rise to prominence in an organization for unskilled workers, he returned to New York.

The ACLU

When restrictive measures like the Espionage and Sedition Acts were debated in Congress, their advocates and apologists insisted that patriotic consensus was essential to the country’s military efforts; the end of the war, they promised, would bring with it a complete restoration of civil liberties. But as the NCLB and other leftist critics had predicted, the cessation of hostilities abroad failed to stem the nationalist hysteria.

The end of the war ushered in a climate of heightened social tensions. The wartime support for AFL unions, driven largely by labor shortages, had empowered labor to make

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262 Cottrell, Roger Nash Baldwin, 73.
263 Ibid., 108–10.
264 “Danger Ahead,” Nation, 8 February 1919 (“Thoughtful critics pointed out that the weapon of suppression which officials had learned to use against dis-sentiments would almost certainly be employed later by the holders of political and economic power against the socialists and other thoroughgoing critics of the existing order. Exactly thus has it fallen out. . . . The persecution of the Socialists did not even await the ending of the war. Our jails are full of their leaders, and the rank and file believe that they are there because of their protest against economic injustice.”).
unprecedented demands. The National War Labor Board, chaired by Frank Walsh and William Howard Taft, did more than any other wartime institution to advance the cause of labor, over the objections of the five employer representatives on the board (the other five were selected by the AFL).\(^\text{265}\) The NWLB introduced eight-hour days in a variety of industries, as well as wage increases, protection of union activities, and other advances. Although the recommendations of the NWLB were ostensibly advisory, President Wilson gave them teeth by seizing or threatening to seize the operations of uncooperative employers and to administer them through the government. With official sanction, union membership swelled to unprecedented levels (growing almost 70 percent, to over 5 million, between 1917 and 1920).\(^\text{266}\) By 1919, Samuel Gompers was “demand[ing] a voice,” at President Wilson’s First Industrial Conference, in the determination of the conditions under which we will give service . . . not only as supplicants but by right.”\(^\text{267}\) For the first time, industrial democracy of the kind that progressive-era labor organizers had demanded emerged as a realistic possibility.

The new optimism was, however, short-lived. The labor market expanded rapidly with the return of soldiers to the civilian workforce and the resumption of immigration. Immigrants, popularly denounced as the source of radical agitation, were summarily deported. At the same time, a shortage of civilian goods during the reconversion process led to high inflation and increased cost of living, fueling both support for and fear of labor radicalism. The taste of power had emboldened labor, precipitating industrial conflict on a scale previously unimaginable in the United States. In the face of race riots and thousands of strikes involving four million workers, it

\(^\text{265}\) Walsh was predictably pro-labor in his approach—he was more sympathetic to radical tactics than the five labor representatives, though he maintained a respectable public face—but Taft’s cooperation, in light of his fondness for labor injunctions during his tenure as a federal judge, was surprising to labor and employers alike (and would later temper labor’s opposition to his appointment by President Warren G. Harding to the Supreme Court). Dubofsky, \textit{State and Labor}, 72; Montgomery, \textit{Fall of the House of Labor}, 442–46.

\(^\text{266}\) Dubofsky, \textit{State and Labor}, 74.

seemed that the labor struggle was on the brink of tearing the country apart. In the spring of 1919, revolutionary anarchists mailed bombs to prominent politicians and government officials. One of the bombs was meant for A. Mitchell Palmer; another, for Frank Nebeker.268

The result was the “wholesale denial of civil rights.”269 The NCLB leadership considered the coal and steel strikes of 1919 “the greatest demonstrations of working-class power in the history of the country.”270 Wilson, however, deployed federal troops to break the steel strike in September 1919.271 Even worse, the administration obtained a federal injunction against striking coal miners in November—a move that the NCLB denounced as a “grave blow at the liberties of the American workingman, probably without precedent in our history.”272 In fact, ever since Republicans had gained control of Congress in 1918, the President had made increasing concessions to industry. He continued to endorse responsible unionism and demanded a comprehensive federal reform agenda, but he openly criticized labor radicalism as well as strikes by public employees. From the vantage point of the civil liberties movement, industry had mobilized its vast resources and connections to quash labor unrest through a combination of legislation, administrative action, vigilante lawlessness, injunctions, labor practices and boycotts, and “judge-made law.”

In addition to suppressing strikes, the Wilson administration did its part to silence those advocating and organizing the workers. In 1919 and early 1920, Congress debated and almost passed a peacetime sedition bill. While awaiting express legislative authority for moving against

269 ACLU, Fight for Free Speech, 6
270 Ibid.
272 Albert DeSilver to A. Mitchell Palmer, 6 November 1919, ACLU Papers, reel 7, vol. 69. Meanwhile, the labor lobby lost much of its influence in Congress, and despite their best efforts, unions were unable to defeat the Transportation Act of 1920, which—over their protests—restored the railroads to private ownership and control. See Austin K. Kerr, American Railroad Politics, 1914–1920: Rates, Wages, and Efficiency (Pittsburgh: University of Pittsburgh Press, 1968), 204–27.
perceived radical threats, the Department of Justice acted unilaterally. Between November 1919 and January 1920, the federal government arrested several thousand suspected radicals and deported hundreds of foreign nationals, including Emma Goldman and Alexander Berkman, in the so-called Palmer Raids. In the mainstream press, reaction to the raids was generally favorable. According to the Washington Post, there was “no time to waste on hairsplitting over infringement of liberty when the enemy [was] using liberty’s weapons for the assassination of liberty.” 273 Invoking their new mantra, “liberty is not license,” a broad coalition of politicians and public figures affirmed their commitment to the American tradition of free speech while calling for strict government regulation of radical expression—which, they claimed, threatened to undermine the very system that made civil liberties possible. 274

These peacetime incursions were sufficiently troublesome to prompt a sizeable minority of progressives and liberal intellectuals to reevaluate their deference to the state regulation of speech. Respectable outlets such as The Nation warned that the continued repression was “turning the thoughtful working people of the country into dangerous radicals and extreme direct actionists”—echoing arguments often invoked during the free speech fights, but largely forgotten during the war. 275 Indeed, while reminding readers of The Nation’s longstanding opposition to socialism, an editorial espoused the right of every person “to present for public consideration his ideas, no matter how erroneous they may appear.” That right, it claimed, was the basis of democracy; and it was the forces denying it, rather than the Socialists or the IWW, who were the

273 “The Red Assassins,” Washington Post, 4 January 1920, 26. President Wilson voiced a similar sentiment, claiming that those who were disloyal to the United States “had sacrificed their right to civil liberties.” Quoted in Murphy, Origin of Civil Liberties, 53.
274 See Murphy, Meaning, 26–28; “Peace-Time Sedition Law,” Cincinnati Tribune, 18 August 1919 (“Everybody says they are in favor of free speech, but not everyone agrees as to how free ‘free speech’ should be.”).
275 “Danger Ahead,” Nation, 8 February 1919.
“most dangerous enemies of the social order today.”276 Other former supporters of the President’s war policy agreed. Even President Wilson, in a 1919 address to the French Society of Political Science, proclaimed that he had always been “among those who believe that the greatest freedom of speech was the greatest safety.”277 In March 1919, the socialist New York Call ran an article title, “The Liberals Wake Up,” in which it welcomed the news that American liberals were finally “organizing to aid in the struggle to restore political democracy in the United States.”278

Moderate labor groups, whose own activity was significantly threatened for the first time in a decade, also awakened to the dangers of suppression. In January 1918, Baldwin had complained that the NCLB’s efforts to attract labor union support were stymied by Gompers’s refusal to “recognize the attacks that are being made upon personal and minority liberties.”279 By the following summer, AFL leaders were attacking state sedition laws and pronouncing free speech to be the “answer to the Steel Trust,”280 and at their annual convention, they “insist[ed] that all restrictions of freedom of speech, press, public assembly, association and travel be completely removed.”281 In August 1919, the NCLB published a leaflet with reprints of free

276 Ibid.
277 Echoing the sentiments of his prewar book The New Freedom, he continued: “The American university teachers too often speak of the state as a thing which could ignore the individual. . . . Now, as an utter democrat, I have never been able to accept that view of the state.” Woodrow Wilson, The Triumph of Ideals: Speeches, Messages and Addresses Made by the President Between February 24, 1919, and July 8, 1919, Covering the Active Period of the Peace Conference at Paris (New York: Harper & Brothers, 1919), 78; Woodrow Wilson, The New Freedom (Chicago: Doubleday, 1913).
281 Resolution Adopted by the Annual Convention of the American Federation of Labor, Atlantic City, June 1919, ACLU Papers, reel 7, vol. 69. Cf. Resolution Adopted by the Seventh Biennial Convention of the National
speech resolutions by dominant labor bodies. The next month, labor activists and sympathizers from around the country assembled in Chicago for an “American Freedom Convention” to discuss the maintenance of American civil and political rights. Although the conference was dominated by socialists and radical unionists, a number of more moderate labor organizations were represented as well. The group condemned the convictions of Debs, Victor Berger, and the IWW, among many other radical leaders. It demanded amnesty for political prisoners, the repeal of anti-sedition legislation, and broad support for free speech and free press. For the first time, a significant portion of the American labor movement was actively militating for civil liberties. As the NCLB had cautioned in The Truth about the IWW, “Equality before the law is, of all our American Constitutional guarantees, the one that the common man holds most precious, and nothing will so surely solidify otherwise discordant groups of wage workers as the infringement of this guarantee by the constitutional authorities.”

Roger Baldwin and Albert DeSilver both spoke at the American Freedom Convention, and Baldwin was asked to put together a national amnesty group. The NCLB leadership, however, sensed a need for the continuation of a New York-based group that could capitalize on the connections that it had cultivated during the war. A memorandum on the “proposed reorganization of the work for civil liberty” articulated the motivating impetus for the NCLB’s

Woman’s Trade Union League, Philadelphia, June 1919, ACLU Papers, reel 7, vol. 69 (urging that “all restraints be removed at once so that the rights of the American people to free speech, free press and free assemblage, be restored to them”).

NCLB Press Release, 1 August 1919, ACLU Papers, reel 5, vol. 43.

Freeberg, Democracy’s Prisoner, 196–99.


ACLU, Truth about the IWW, 46 (quoting Robert Bruere).

“Amnesty Meet Forming New Liberty League,” New York Call, 28 September 1919. The American Freedom League, which grew out of the conference, proclaimed its intention to arouse those forces “not dominated by the private owners of industry” to the “manner in which American freedom [had] been destroyed.” Ibid. Walter Nelles later proposed that the ACLU take over its work.
successor: “The industrial struggle is clearly the essential challenge to the cause of civil liberty today. No association is organized to deal broadly and generally with these issues in the struggle of labor. Each labor group makes its own unaided fight, without relation to the common problems they face together. The situation calls for a dramatic campaign of service to labor in the areas of conflict, by those who see the vital need of freedom of expression for orderly progress.”

Like the IWW, the NCLB had come to claim that rights could be secured only by “ceaseless agitation and sacrifice,” and that they could be maintained only through “organized power.” Every measure to suppress free speech was at its heart an attempt to suppress the “revolt of labor.” The targets of such initiatives were not just radicals, but established trade unions as well. In the struggle for industrial democracy, “the issues of free speech, free press, lawful assemblage, and peaceful picketing are everywhere involved.”

The architects of the new endeavor no longer believed that quiet negotiations and political pressure could accomplish significant change. Also absent from the agenda was the protection of civil liberties by constitutional adjudication. The wartime cases had led to disillusionment with the legal strategy, driving even Walter Nelles to abandon his commitment to the courts.

The Supreme Court’s wartime speech and labor cases stamped out any hope of securing new protections for constitutional rights in the short term; juries continued to return convictions, and “the power of injunctions, backed by a propagandized public opinion increasingly hostile to all new ideas, assail[ed] civil rights at every point.”

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288 Proposed Reorganization of the Work for Civil Liberty, ACLU Papers, reel 5, vol. 43.
289 Ibid.
290 E.g., Walter Nelles, Suggestions for Reorganization of the National Civil Liberties Bureau (undated), ACLU Papers, reel 16, vol. 120 (“The Abrams case leaves the status of civil liberty hopeless so far as it is the concern of the courts of law; I cannot see anything more substantial to be accomplished by me as counsel in sedition cases than the making of records whose excellence will never come to light. The job of reporting trials has much more probability of result.”).
291 Albert DeSilver and Roger Baldwin, on behalf of the ACLU, to ACLU members, September 1921, ACLU Papers, reel 7, vol. 69. When the political liability of the Palmer raids discouraged further prosecutions under the
productive potential of litigation was its ability to generate attention for the civil liberties cause. To that end, the new organization would orchestrate nationwide publicity of noteworthy struggles and events. More important, the memorandum called for “free speech organizers” to hold meetings and demonstrations at centers of industrial conflict. These speakers would provoke arrest under local regulations that conflicted with constitutional principles. There was to be no detachment between the advocates of civil liberties and the “struggle in the field.”

In this, of course, the veteran NCLB leadership was borrowing directly from the IWW and its free speech fights.

To implement the proposed agenda, the national committee would need “new personnel to meet the issues of the industrial struggle,” split evenly among union leaders, activists on behalf of labor, and liberals interested in both civil liberties and the industrial struggle. Half of the funding for the organization would be raised from liberal and radical donors; the other half, given the close identification between the organization and the “struggle of labor,” would come from labor groups “directly served by the work.” Walter Nelles put the group’s overarching objective succinctly: “we are frankly partisans of the labor in the present struggle,” he said, and “our place is in the fight.”

In January 1920, the NCLB leadership adopted the proposed program in its entirety. The name of the new organization, the American Civil Liberties Union, was meant to capture its

Espionage Act, industry and its government allies resorted to the direct suppression of labor through injunctions. Nelles thought this trend promised a “transfer of the real conflict outside the arena of litigation.” ACLU National Committee Meeting Minutes, 6 December 1920, in American Civil Liberties Union, Minutes of the Meeting of the Executive Committee (New York: American Civil Liberties Union, n.d.).

Ibid.

292 Walter Nelles, Suggestions for Reorganization of the National Civil Liberties Bureau (undated), ACLU Papers, reel 16, vol. 120.

294 A conference on the reorganization was held at the Civic Club in New York on January 12, 1920. Roger Baldwin to James Duncap, ACLU Papers, reel 16, vol. 120.
transition from “a bureau of legal defense work to a propaganda organization.” As planned, the ACLU national committee attracted a mix of labor leaders, advocates, and respectable liberals. Harry Ward chaired the organization and would continue to do so for almost twenty years. Duncan McDonald, President of the Illinois State Federation of Labor, agreed to serve as a Vice-chair, along with the anti-war activist and former member of Congress Jeannette Rankin. Baldwin and DeSilver were co-directors. William Foster wrote that the struggle for civil liberties was so important that he would make an exception to his general policy of belonging only to trade union organizations. Arthur LeSeuer also joined, predicting that “the service rendered will be a notable and tremendous one, both to the labor movement and the people of the United States.” Much of the original leadership of the AUAM remained involved, including Jane Addams, Florence Kelley, Hebert Bigelow, Crystal Eastman, and Norman Thomas. Even Lillian Wald approved of the reorganization, though she did not join. Other notable members of the inaugural committee included Harold Laski, Ernst Freund, Clarence Darrow, John Dewey, Henry Linville, Helen Keller, and Upton Sinclair.

Although Baldwin expressed a willingness to include conservatives in pursuit of a “well balanced committee,” he did not think it likely that they would join. He did, however,

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296 Roger Baldwin to Duncan McDonald, 21 January 1920, ACLU Papers, reel 16, vol. 120.
297 William Foster to Roger Baldwin, 18 February 1920, ACLU Papers, reel 16, vol. 120.
298 Arthur LeSeuer to Roger Baldwin, 5 January 1930, ACLU Papers, reel 16, vol. 120.
299 Jane Addams to L. Hollingsworth Wood, 8 January 1920, reel 16, vol. 120;
300 Roscoe Pound to L. Hollingsworth Wood, 18 February 1920, ACLU Papers, reel 16, vol. 120; Frank P. Walsh to L. Hollingsworth Wood, 29 January 1920, ACLU Papers, reel 16, vol. 120. Zechariah Chafee also declined to join—reportedly due to the strong connection to the labor movement (years later, he turned down a repeat invitation on the basis that it would compromise his perceived objectivity). Letter from John Codman, 30 November 1920, ACLU Papers, reel 16, vol. 120.
301 Roger Baldwin to John A. Fitch, 15 January 1920, ACLU Papers, reel 16, vol. 120; Roger Baldwin to Felix Frankfurter, 13 February 1920, ACLU Papers, reel 16, vol. 120 (“The necessity of bringing together a quite diverse
acknowledge the need to tone down the ACLU’s partisan rhetoric, at least in its official communications. In the first year of the ACLU’s existence, the more moderate members urged the leadership to restore the neutral posture cultivated by the NCLB. They noted that radical rhetoric would alienate many potential supporters “who might have been willing to go along part way.” Even Scott Nearing felt that the ACLU should maintain neutrality, explaining that “the moment it takes sides it becomes a propaganda movement and thereby loses the one claim to support it now has.” In response to these criticisms, various modifications were made to the ACLU’s publications. In June 1920, the statement of principles was amended to “stat[e] the social value of the principle of civil liberty at all times, not only when a class is struggling for expression.”

An illuminating debate arose over the ACLU’s defense of speech advocating violence. Although the majority of the organization believed that revolutionary rhetoric should not be curtailed even if it endorsed the use of force under some circumstances, there was substantial disagreement over the details. Baldwin and other absolutists drew a sharp distinction between speech and conduct and believed that only violence itself could be punished. Norman Thomas thought a “direct incitement to violence” might justifiably be regulated, but he was adamant about protecting a speaker who “said that revolutionary objects could not be attained without
violent means.”305 Zona Gale, on the other hand, was concerned with “extra-constitutional” and “extra-legal” considerations, and she believed there was no “moral right . . . to violent and obnoxious speech.” Even if the ACLU were to insist on legal protection for all speech—on the theory, for example, that the authorities would construe all radical doctrine as implicitly countenancing force—she wanted the ACLU to condemn the outright espousal of violence, whether revolutionary or not.306 Invoking Mahatma Gandhi, she considered the disavowal of violence to be an appropriate sacrifice of “personal liberty” in the interest of social welfare, no different in kind from the abridgment of personal freedom effected by Prohibition.307 Baldwin disagreed. To him, “political action under representative government . . . [was] the very heart of violence.”308 Although he did not say it explicitly, he implied his own active desire for revolution, violent or not. Gale resigned over the issue, and in the end, the exchange of views precipitated a considerable modification of the ACLU’s stated position.309

What emerged from the discussion was the closest the ACLU would come to a theoretical defense of the right of agitation, loosely modeled on a proposal made by Walter Nelles the previous year. According to Nelles, modern workers were alienated in their jobs, and “the fervor and extent of consequent discontent” ultimately would be channeled into productive change. “When agitation is outlawed,” he reasoned, “the unrest which it might have made a force for constructive betterment is diverted in bitterness toward retaliation. Sound political changes can be neither formulated nor effected except in freedom.”310 The ACLU’s first official report on its objectives and activities laid out the organization’s “social philosophy” in similar terms. It

305 Norman Thomas to Zona Gale, 10 September 1920, ACLU Papers, reel 16, vol. 120.
306 Zona Gale to Roger Baldwin, 25 August 1920, ACLU Papers, reel 16, vol. 120.
307 Ibid.; Zona Gale to Roger Baldwin, 7 September 1920, ACLU Papers, reel 16, vol. 120.
308 Roger Baldwin to Zona Gale, 23 August 1920, ACLU Papers, reel 16, vol. 120.
309 Roger Baldwin to Zona Gale, 5 November 1920, ACLU Papers, reel 16, vol. 120.
310 Walter Nelles to Roger Baldwin, 11 December 1919, ACLU Papers, reel 16, vol. 120. Nelles considered this his attempt to “express the twentieth-century application of the principle of civil liberty.”
portrayed the 1919 strikes as the high-water mark of working-class agitation. Efforts to combat industrial power through the farmer-labor campaigns of the 1920 election cycle had “emphasiz[ed] everywhere the issues of civil liberty,” but they were “buried under the Republican landslide.” Scattered pockets of resistance persisted, but effective opposition had become virtually impossible. As a result, industrial conflict of epic proportions loomed on the horizon. A growing contingent of workers had come to believe in the “the ultimate necessity of armed resistance.”

Against this backdrop, the two major goals of the ACLU were, first, “the reorganization of our economic and political life,” and second, “the demand for the ‘rights’ of those minorities and individuals attacked by the forces of reaction.” Legal rights securing the right to agitation would be freely exercised only “when no class conflict threatens the existing order.” By protecting the rights of the disenfranchised, “the organized effort for civil liberty” sought to moderate the inevitable violence ahead. Although many activists on the left believed that the “reactionary forces in power” would yield only to superior force, concerted advocacy on behalf of civil liberties would have the effect of “softening the conflict” by weakening the “resistance to progress.”

“We realize,” the pamphlet concluded, “that these standards of civil liberty cannot be attained as abstract principles or as constitutional guarantees. Economic or political power is necessary to assert and maintain all ‘rights.’ In the midst of any conflict they are not granted by the side holding the economic and political power, except as they may be forced by the strength

312 Ibid., 7. The report cited continuing armed resistance in some struggles, as well as the “secret organization of the Communist Party” and increasing solidarity in trade unions.
313 Ibid.
314 Ibid., 5. According to the pamphlet, those who understood and were working to ameliorate the condition of industrial tyranny in America were the radicals and a few liberals. “Among other classes more or less conscious of the condition but incapable of outspoken resistance are the Negroes, many foreign-born groups and the tenant farmers of the west and south.” Ibid.
315 Ibid.
of the opposition. However, the mere public assertion of the principle of freedom of opinion in the words or deeds of individuals, or weak minorities, helps win it recognition, and in the long run makes for tolerance and against resort to violence."  

The resolution of class struggle was inevitable; nothing—including free speech rights—had the power to disrupt it. The protection of civil liberties, however, could ensure that the rights of labor were secured with minimal bloodshed. Peaceful agitation might secure economic security for the working class by peaceful means. The only alternative was violent revolution. The civil liberties championed by the early ACLU were not legal rights conferred by the state to secure the expression of individual conscience, nor did they reflect a policy commitment to rational discussion of optimal social conditions in the marketplace of ideas. Rather, civil liberties were a byproduct of group struggle, rooted in power and only incidentally inscribed in law.

Conclusion

Out of the NCLB’s central engagements in 1917 and 1918 emerged several crucial features of the ACLU’s developing relationship to rights, constitutionalism, and legal advocacy. Most obviously, the early leadership was fundamentally devoted to economic redistribution of a kind more radical than it admitted to liberal members and correspondents. The primary right advocated by the leaders of the ACLU was a capacious and malleable right to agitation. Although they invoked the rhetoric of constitutional rights from the outset, their early correspondence indicates significant ambivalence on this issue. Baldwin, for one, was far from the committed civil libertarian that he would later become. He stated his attitude in a leaked

316 Ibid., 18.
letter often quoted by conservative critics: “We want to also look like patriots in everything we do. We want to get a lot of good flags, talk a good deal about the Constitution, etc.”

Baldwin was willing to deploy any personal connection or political theory that might prove effective in advancing his goals. His early advocacy of free speech was largely instrumentalist. But it was not merely instrumentalist. World War I produced in Baldwin a true and lasting aversion to state power that lent itself to a new breed of civil libertarian thought. Historians of the ACLU often have dismissed Baldwin’s theoretical ruminations as ill-formed, inconsistent, and secondary to his true skills as an organizer and administrator. Baldwin’s radicalism was not, however, a mere youthful flirtation; it was fundamental to the subsequent course of civil liberties advocacy in the United States.

The NCLB’s efforts to work through state channels—its stubborn pursuit of administrative intervention, despite its attendant dangers—produced substantial tension within the organization. Again and again, NCLB supporters sought to convince government officials to act quietly for their cause, either through opposition to legislative repression or, more commonly, through liberal interpretation of repressive statutes. They corresponded with low-level bureaucrats, friends and acquaintances in the President’s cabinet, even Wilson himself. This tendency flowed directly from the progressive origins of the organization’s leaders. Before the war, the same actors had habitually relied on regulation to contain and channel the public will. They had supported progressive legislation, but they believed that administrative agencies would craft optimal solutions to social problems.

318 For example, in 1918 Roger Baldwin expressed in a letter, “Our view is that public opinion now would be absolutely unresponsive to any presentation of our side of the case.” Roger Baldwin to Lenetta Cooper, 6 April 1918, ACLU Papers, reel 3, vol. 17.
319 To borrow from James Henretta’s description of Charles Evans Hughes, their “ideal was not government by the people but for the people.” James A. Henretta, “Charles Evans Hughes and the Strange Death of Liberal America,”
All too often, in these early years and after, the NCLB was disappointed. Even when correspondence remained friendly, government officials rarely acted on NCLB recommendations, and their assurances were beset with delays and equivocations. By April 1918, Baldwin had come to question whether anything “practical” could be accomplished by “working on legislation or administrative orders affecting civil and religious liberties.”

Although it might help sway public opinion in particular cases, the combination of an intolerant majority and a government solicitous of its sympathies would almost ensure defeat for radical causes, and condemnation or worse for radical actors. The situation at Washington is not one which lends itself at all to any influences from the outside,” he observed. “The President is in complete control, wherever he wants to take control. Congress is willing to pass any legislation demanded by the Executive. Nothing can be expected from it in the way of protecting our liberties.”

Moreover, the Espionage Act convinced the NCLB leadership that administrative insulation was itself a substantial threat to civil liberties. Although there remained a liberal contingent within the government, the Department of Justice and the Post Office Department were all too eager to exercise their discretion in the service of repression. And postal censorship proved far more damaging than threat of prosecution had ever been. Burleson’s suppression of the radical and pacifist press shut down a number of radical organizations and made effective dissent, as well as effective defense work, impossible. This sort of censorship

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_Law and History Review_ 24 (Spring 2006): 131. Similarly, Daniel Rodgers has suggested that the Progressive appeal to “the People” succeeded in part because it “allowed those who sincerely believed in a government serving the needs of ‘the people’ to camouflage from voters the acute distrust many of those same persons harbored of political egalitarianism.” Rodgers, “Progressivism,” 122.

320 Roger Baldwin to Harold Evans, 13 April 1918, ACLU Papers, reel 3, vol. 25 (answering an inquiry as to whether Evans’s Friends organization should extend its work to civil liberties).

321 Ibid. (“If the authorities don’t do it, a mob will, and the authorities will act with or without law.”).

322 Ibid.

323 Ibid. He observed, “the Administration is at war within itself. The liberals at Washington are as disheartened as any of us at the course pursued by the Postmaster General and the Attorney General.”
was unpredictable and nearly impossible to counteract. “We are not dealing now with law,” Baldwin lamented shortly after passage of the Espionage Act. “We are dealing with the shifting policies of autocratic and arbitrary officials.”

The most important influences on the early ACLU, however, were the very labor organizations that they mobilized to protect. Between World War I and the late New Deal, the ACLU’s skepticism toward state power, driven by its close alliance to the radical labor movement, would differentiate it from the progressive advocates of civil liberties with whom it cooperated. Most of its leadership shared the progressive commitment to the public interest as against the insidious effects of private interests and private “rights,” but the vision of civil liberties that it espoused was modeled on labor voluntarism, not individual autonomy. It was positioned against the state, as a right outside the realm of state interference. But it was also asserted collectively, through group power, in the public interest.

In other words, the ACLU of the interwar period promoted a radical theory of rights that resisted the very state machinery that its leadership had helped to create and refine. The ACLU was always adamant that its theory of civil liberties was distinct from the conservative celebration of individual rights at the heart of *Lochner*-era jurisprudence. Its state-skepticism did not evoke concern for private property. Rather, it recognized that groups maintained rights “only by insisting upon them.” Where the NCLB borrowed methods and arguments from the Free Speech League, the early ACLU looked to the direct action of the IWW. The ACLU was acutely aware that the mere absence of state suppression would not ensure equality of opportunity for dissenters. In organizing publicity on behalf of the IWW, Baldwin and his correspondents were distressed by the trivial and distorted coverage of the trial by the mainstream press, which was

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324 Baldwin to I. C. Herendeen, 10 September 1917, ACLU Papers, reel 5, vol. 36.
printing sensationalist accounts of the proceedings. These same reports, they emphasized, were fomenting public enthusiasm for future prosecutions and coloring the views of jurors in subsequent trials. ACLU literature stressed that major industrial interests were distributing broad-based propaganda and backing the mainstream press; the left, they understood, lacked the resources to compete. The solution they proposed was the assertion of working-class power. For the late NCLB and early ACLU, non-state repression was undoubtedly a violation of civil liberties—but its remedy, like its cause, was nongovernmental. Over time, as the ACLU increasingly adopted a litigation strategy for protecting free speech, this component of the ACLU’s program would dwindle in importance. In the early 1920s, however, it was the core of its civil liberties agenda.

By contrast, the progressives recognized the dangers of unmitigated state power, but they imagined the First Amendment as a guideline for promoting open discussion, not just a check on state suppression. Indeed, they sought to mobilize state power on behalf of dissenters. As Professor Zechariah Chafee of Harvard Law School would later observe, “the argument of Milton and Mill that unrestricted discussion is the best way to ascertain and disseminate truth loses much of its force if the discussion, even though unhampered by law, will not be thorough. It may be necessary for the community not to rest content with a negative attitude of hands off but to adopt in addition positive measures to ensure that argument and counter argument on vital issues will have full play.” The ACLU would consistently split over progressive measures designed to increase overall speech. For example, in the 1920s, some members called for the mandatory allocation of radio airtime to dissenters, while others demanded that the state stay out

326 Paul Hanna, Report to Baldwin, 13 April 1918, ACLU Papers, reel 4, vol. 28.
327 Zechariah Chafee, introduction to Civil Liberty, ed. Edith M. Phelps (New York: H. W. Wilson Co., 1927), 49. Cf. Bertrand Russell, who believed that “equality of opportunity among opinions can only be secured by elaborate laws directed to that end, which there is no reason to expect to see enacted.” Bertrand Russell, Free Thought and Official Propaganda (New York: B. W. Huebsch, 1922), 41.
of broadcasting altogether. More pointedly, when Roger Baldwin and the executive board of the ACLU expressed opposition to New Deal legislation protecting the rights of labor through the machinery of the state, the membership and national committee pressured them to reconsider. The ACLU included many committed progressives within its ranks, and one of its major accomplishments during the 1920s was to build an alliance with the progressive establishment, with whom it shared many substantive goals. But in its justification of First Amendment freedoms, the ACLU would cast state power as more oppositional than facilitative.

In fact, on these issues the ACLU’s core leadership often found itself aligned with the American Bar Association against progressive reformers, a fact that caused Baldwin significant consternation. As Leon Whipple, the ACLU’s official theoretician, would comment in 1927: “Libertarians on principle have been few and far between, and have generally belonged to three queerly mated groups: the Quakers, the Anarchists, and the lawyers.”\textsuperscript{328} The first two groups, of course, were the ACLU’s primary constituencies during World War I. Finding common ground with the third would be the organization’s central project during the 1920s. In significant ways, the resonances between its anti-state radicalism and the conservative tradition of state-skeptical constitutionalism were responsible for the ACLU’s eventual success where progressives continued to fail, namely, in the courts.

\textsuperscript{328} Whipple, \textit{Ancient Liberties}, 137. He explained: “The Quaker gives obedience to God through his conscience and hence has always demanded freedom from his interference by the state. The Anarchist oddly enough holds about the same faith, though he replaces God with some sort of Will-in-Nature, and wants to do away with both state and law. The legalist has evinced a certain professional interest in the principles of liberty, for intellectual pride has demanded that he try to erect his rule into principles.” Ibid.
CHAPTER 3: THE SEX SIDE OF CIVIL LIBERTIES

When the ACLU announced its successful appeal in United States v. Dennett in March 1930, many Americans welcomed the news as a victory for justice. Though few knew it, it was justice of an uncommonly poetic sort. The case was the ACLU’s first important attack on postal obscenity censorship, and the Second Circuit’s seminal decision was a significant achievement for the organization and its client. Newspaper accounts heralded Mary Ware Dennett as the protagonist. But Dennett’s role in the struggle was quite different from what she and her civil liberties allies might have predicted. For years, the pioneering birth control activist, a former secretary of the National Civil Liberties Bureau, had lobbied unsuccessfully for revision of the postal censorship laws. In the end, it took a criminal prosecution—of Dennett herself—to mobilize public opinion and effect legal change.

The object of the legal dispute was Dennett’s sex education pamphlet, The Sex Side of Life: an Explanation for Young People, which was widely regarded as the best available tract on the subject. Postal authorities declared the pamphlet obscene despite effusive praise by medical practitioners, religious groups, and government agencies for its frank and objective style. When

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1 Newspaper accounts of the Dennett decision were virtually unanimous in their support for Dennett, and the few critics lamented that public opinion was squarely on Dennett’s side (see note 204). For a discussion of Dennett’s opponents, see Leigh Ann Wheeler, “Rescuing Sex from Prudery and Prurience: American Women’s Use of Sex Education as an Antidote to Obscenity, 1925–1932,” Journal of Women’s History 12 (Autumn 2000): 173–96 (describing opposition by Reverend William Sheafe Chase).

2 No historian of free speech has provided an account of how and why the organization branched out into this new realm. Meanwhile, obscenity scholars have related changing public mores during the 1920s and 1930s to a relaxation of obscenity regulation, but they have not connected the liberalizing trends to legal developments in the broader context of civil liberties. For example, Jay Gertzman, Bookleggers and Smuthounds: The Trade in Erotica, 1920–1940 (Philadelphia: University of Pennsylvania Press, 1999), examines the ACLU’s National Committee for Freedom from Censorship and its effect on obscenity regulation, but it does not address concurrent developments in the regulation of political speech, nor does it discuss the architects of the free speech movement, like Zechariah Chafee and Roger Baldwin. Leigh Ann Wheeler discusses the regulation of sex education literature as well as commercial sexually explicit materials, but she is principally concerned with the relationship between the anti-obscenity movement and women’s political power, identity, and sexuality. Leigh Ann Wheeler, Against Obscenity: Reform and the Politics of Womanhood in America, 1873–1935 (Baltimore: Johns Hopkins University Press, 2004).
Dennett continued to circulate it by mail in defiance of the postal ban, she was prosecuted for obscenity. The ACLU came to her defense.

At the time, however, the organization’s leadership was unconcerned with Dennett’s broader goals. According to a 1928 bulletin, it was ACLU policy to contest obscenity regulations only when they were “relied upon to punish persons for their political views.” For most of the executive board, “political views” encompassed the struggle for control of the means of production, but not of the body or the mind. The early ACLU was not interested in defending cultural expression.

By the late 1920s the organization had moved beyond its initially narrow commitment to the “right of agitation.” It had defended religious and academic freedom, which it regarded as strategically and theoretically linked to the protection of political and economic speech. Nonetheless, most members of the ACLU thought obscenity laws were acceptable, and many in fact welcomed state regulation in the realm of morality. ACLU board members agreed to sponsor Dennett’s case because, in their view, *The Sex Side of Life* was not obscene; it instructed the youth on an issue of social importance, thereby advancing the public interest in a direct and familiar way. No one suggested that Dennett should be permitted to publish her pamphlet if it were shoddily written, much less actually lewd. No one anticipated that *United States v. Dennett* would usher in a new era for the ACLU.

Unexpectedly, however, the *Dennett* litigation unleashed a far more sweeping anti-censorship initiative. The heavily publicized conviction, overturned by the Second Circuit on appeal, generated popular hostility toward the censorship laws and convinced ACLU attorneys

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4 Rabban, *Forgotten Years*, 310; Walker, *American Liberties*, 68. Cf. Graber, *Transforming Free Speech*, 144 (noting Zechariah Chafee’s belief that obscenity did not warrant First Amendment protection because it implicated only individual, as opposed to social, interests).
that speech should be protected regardless of its social worth. United States v. Dennett is often overlooked in histories of free speech—perhaps because it never reached the Supreme Court, or because it was not decided on First Amendment grounds, or because its implications for the broader civil liberties movement were not immediately apparent.\(^5\) And yet, Dennett fundamentally redefined the way that lawyers, judges, and activists understood the category of civil liberties.\(^6\) It introduced the possibility of a free speech agenda premised on personal autonomy, a cause that resonated strongly with mainstream Americans, rather than economic equality, which polarized them.

By the early 1930s, the ACLU was the undisputed leader of the anti-censorship campaign and an aggressive advocate of artistic freedom and birth control. Indeed, many of its supporters were reluctant to defend Communists but eager to endorse artistic freedom. With that shift, the ACLU inched closer toward a new model of civil liberties: one that celebrated individual expressive freedom over substantive social reform. Thus transformed, the civil liberties movement finally attracted widespread public support, paving the way for a pluralistic turn in politics as well as personal morality. The payoff was swift and spectacular. When Dennett was decided, the ACLU was a fringe group and the civil liberties it defended were often maligned as


\(^6\) Two published works deal with Dennett at length: a 1995 article by John Craig and a biography of Dennett by Constance Chen. John M. Craig, “‘The Sex Side of Life’: The Obscenity Trials of Mary Ware Dennett,” Frontiers 15 (1995): 145–66; Constance M. Chen, The Sex Side of Life: The Story of Mary Ware Dennett (New York: New Press, 1996). Chen focuses on Dennett’s life and legacy, with particular attention to her birth control activities. Craig points to many of Dennett’s important themes but is more interested in its effects on the birth control movement and obscenity law than its broader implications for civil liberties advocacy and the meaning of free speech. Leigh Ann Wheeler’s illuminating account of the complicated relationships between Mary Ware Dennett, the social hygiene movement, and anti-obscenity activity is sensitive to the concerns and rationales of Dennett’s adversaries, but it discusses her court battle only in passing and does not explore the origins of the ACLU’s emerging liberalism. Wheeler, “Rescuing Sex”; Wheeler, Against Obscenity.
un-American. A mere decade later, President Roosevelt would stand before the nation and declare that the first of the fundamental human freedoms was the freedom of speech.7 United States v. Dennett,8 in the words of ACLU co-counsel and emerging free speech leader Morris Ernst, was a “test-case of vital importance.”9

The New Battleground

The strident radicalism of the ACLU’s early rhetoric, like the revolutionary moment that produced it, was short-lived. During 1920 and 1921, the ACLU’s preferred technique was to “dramatiz[e] the issues of civil liberty by demonstrations in areas of conflict.”10 The resulting “free speech fights” were reminiscent of the techniques employed by the IWW in prior decades. For two years, the ACLU was on the front lines of the labor struggle, marching, picketing, and organizing, outside the factory gates and in the Alabama and West Virginia coal fields.

But the looming labor revolution dissipated just as quickly as it had taken shape, and it was soon evident that social change through “agitation” was a long-term program at best. The Republicans who came to office in the 1920 election were forthright about their opposition to the labor policy of their Democratic predecessors, and they were eager to reverse any remaining

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8 United States v. Dennett, 39 F.2d 564 (2nd Cir. 1930).
9 Appellant’s Second Circuit Brief, 59, Dennett Papers, reel 23, file 490. This chronology turns on its head the conventional wisdom that acceptance of free speech in America began with political speech and steadily expanded toward more personal liberties. See, e.g., Ken I. Kersch, “How Conduct Became Speech and Speech Became Conduct: A Political Development Case Study in Labor Law and the Freedom of Speech,” University of Pennsylvania Journal of Constitutional Law 8 (March 2006): 266 (summarizing dominant narrative: “[W]hereas free speech protections were largely focused on core political speech in the early twentieth century, they were expanded to protect other forms of speech, such as (anti) religious (blasphemy), sexual (indecency), artistic, commercial, and other forms of speech.”). Civil liberties advocacy groups, including the ACLU, did indeed follow that trajectory. But the public did not. Rather, it was civil libertarians’ successful defense of popular, non-political causes like the dissemination of scientific and sexual knowledge that paved the way for popular tolerance of political dissent.
10 ACLU, Fight for Free Speech, 8–9.
wartime advances. Meanwhile, the postwar depression undermined labor’s demands for higher wages and put unions on the defensive. By 1921, union membership had declined by 1.5 million and the open shop was the rule. The next year, the Harding administration was faced with two major strikes, and in both cases it threw its support squarely to employers, with devastating consequences for labor.11

On the judicial front, the situation was even bleaker. The Supreme Court, under its newly appointed Chief Justice William Howard Taft, swiftly undercut many of labor’s legislative and administrative gains.12 Its 1921 decision in *Duplex v. Deering* declared secondary boycotts unlawful under the Clayton Act and authorized the use of injunctions to block them.13 In *Truax v. Corrigan*, it went further, striking down a state anti-injunction law as an unconstitutional violation of equal protection and due process.14 Other decisions effectively outlawed picketing (*American Steel Foundries v. Tri-Cities Central Trade Council*15) and made unions subject to high damages for restraint of interstate commerce (*United Mine Workers v. Coronado Coal*16).

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11 When miners throughout the struggling coal industry organized a national strike, Harding proposed and the UMW rejected a plan that called for compulsory arbitration; Harding’s subsequent threats of military intervention were disregarded by labor, and the strike resolved after three months without significant federal assistance. The second strike was organized by nonoperating railroad workers and was fueled in part by opposition to the industry’s refusal to implement the few pro-labor recommendations issued by the National Railroad Board. In July 1922, the shopcraft unions of the AFL’s Railway Employee Department, whose members lacked the protection of the more respectable railroad brotherhoods and were thus repeatedly targeted for wage cuts, delivered on their threat to strike unless the RLB reversed its recently announced wage cuts and forced the railroads to reinstate its former work rules. The administration condemned it as criminal and sanctioned strike-breaking. Federal Judge James Wilkerson dealt a further blow to the already doomed strike with a sweeping injunction, which essentially claimed authority to enjoin any strike involving interstate transportation. Dubofsky, *State and Labor*, 95. Notably, criticism of Wilkerson’s decision was swiftly forthcoming in parallel decisions by Judge Charles Amidon and Judge George M. Borquin—the same judges who were most sympathetic to Espionage Act defendants—that relied on the Clayton Act to refuse injunctions against the striking railroad workers. Great Northern Railway Company v. Local Great Falls Lodge of International Association of Machinists, 283 F. 557 (1922); Great Northern Railway Company v. Brosseau, 286 F. 414 (D. Mont. 1922). Amidon would become a member of the ACLU in 1929.


Such decisions gave license to the most anti-labor of federal courts to issue sweeping injunctions against labor activity.

Unions, of course, were not wholly without power during the 1920s. Congressional Democrats, together with a few influential liberal Republicans, exerted pressure on labor’s behalf. Although the radical unions fared poorly under a decade of Republican leadership, their more conservative counterparts like the railroad brotherhoods and the UMW retained considerable strength. Their strategy—to appease employers in exchange for a share in the decade’s general economic abundance—seemed the best that labor could muster. The Republican Party offered up such concessions as high tariffs, immigration restrictions, and a few modest labor bills, including the Railway Labor Act of 1926, which officially recognized railroad workers’ right to bargain collectively but not the right to strike.17 By the mid-1920s, however, both true government support for labor (for example, of the kind envisioned by the Non-Partisan League) and mass mobilization through direct action had come to appear hopeless.

From the perspective of the ACLU, the changing labor landscape called for a revised set of civil liberties commitments. As strikes declined in frequency, so too did the opportunities for ACLU assistance in the field. The “right of agitation” had been premised on the assumption that pickets, boycotts, and organizing drives would pave the way to peaceful revolution. By the mid-1920s, however, the general strike was a distant specter. Intolerance was “so entrenched” that it was unnecessary to “lock[] people up to control their heresies.”18 Ample employment and reasonable wages had seduced the workers into complacency; they needed reminding that fleeting material comforts were no substitute for control of the means of production. “Enough of

17 See generally Robert H. Zieger, Republicans and Labor, 1919–1929 (Lexington: University of Kentucky Press, 1969). At the level of individual disputes, however, the Republican presidents proved unwilling to intervene and counseled unions to pursue their grievances in court.

our workers can buy second hand cars to ward off class-consciousness,” Baldwin lamented at mid-decade. “All they need for contentment is the price of gasoline.”

The ACLU’s 1925 Annual Report laid out the organization’s new understanding. Despite a perception of improvement in the civil liberties situation, “intolerance and repression” remained significant. The decrease in violence of the 1920 variety simply indicated that “no serious conflict or minority activity has aroused the latent forces of repression.” In other words, flagrantly oppressive tactics were no longer necessary to quash worker militancy; “widespread prosperity and the consequent absence of industrial strife” had already accomplished that task. “The efforts to impose majority dogma by law and intimidation have shifted from the industrial arena to the field of education,” the report concluded. Education was “the new battle ground.”

The ACLU continued to promote the right of agitation, but in place of the picket, its priorities were to safeguard radical education and to undermine the countervailing attempts by the state to institutionalize conservative views. The change was an adjustment in emphasis rather than a wholesale reformulation of the organization’s agenda. Even as strikes raged across America, the ACLU’s principal activity was publicity—“for ours,” an early report explained, “is a work of propaganda—getting facts across from our point-of-view.” The ACLU sought to “educate” Americans through news releases and statements, pamphlets, an information service distributed to a national network of cooperating speakers and writers, and publicity agents. Still, over the early-to-mid 1920s, disputes over education played an increasingly central role in the ACLU’s work. The organization continued to defend the few anarchists and Communists prosecuted under state criminal syndicalism laws. It contested ideologically grounded

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21 ACLU, Fight for Free Speech, 8. On the ACLU’s activity in connection with early 1920s strike, see Murphy, Meaning, 138–50.
immigration laws, and it opposed alien registration and deportation bills. It also engaged with racial discrimination, especially lynchings. But during the labor lull of the 1920s, it made primary and secondary education its most visible focus. It was clear to the ACLU’s leadership that the long-term success of the radical movement entailed protecting not only the tools of labor radicalism, but also advocacy of and instruction in their use and goals.

Naturally, the ACLU’s first and most consistent target was the suppression of radical teachings and radical teachers. In fact, freedom for radical teachers had been part of the ACLU’s agenda since the NCLB days. Leon Whipple was discharged from the University of Virginia after espousing pacifism and celebrating Russia in a speech at a neighboring women’s college.22 Even closer to home, Scott Nearing was dismissed first from the University of Pennsylvania and then the University of Toledo before assisting in the creation of the NCLB. Nearing was also intimately involved with the Rand School of Social Science, a Socialist institution for the education of workers, whose lecturers included Franklin H. Giddings, John Spargo, James T. Shotwell, and Charles A. Beard (who had resigned his own position at Columbia University after the expulsion of two professors for their purported dissemination of disloyal doctrines).23 The Rand School was targeted for state suppression early in the war, and during the postwar Red

22 Leon Whipple, “Free Speech and Jefferson’s University,” ACLU Papers, reel 5, vol. 37. The NCLB approached him to offer its assistance; the ensuing correspondence led to an arrangement for funding his scholarship on the history and theory of civil liberties. Roger Baldwin to Leon Whipple, 27 November 1917, ACLU Papers, reel 5, vol. 37.
Scare, it was the center of the NCLB’s battle against the Joint Legislative Committee to Investigate Seditious Activities, or Lusk Committee.  

The Lusk Committee launched a campaign against the Rand School in June 1919, at the urging of its counsel, Archibald Stevenson—the same Red hunter who had sought to convince the Department of Justice to prosecute the NCLB the previous year. Fifty men, most of whom had been members of the American Protective League, ransacked the school’s facilities in pursuit of papers and materials; two days later, they returned to search the safe for its financial records. Although the raids produced minimal evidence (the most sinister finding reported in the New York Times was “that persons identified with the Rand School had interested themselves in the defense of William Haywood and other I.W.W. leaders convicted in Chicago”), the Attorney General of New York compliantly initiated charges to cancel the school’s charter, cheered on by the press.

According to the NCLB, the episode posed a “challenge to all liberal Americans.” In August, three months before Justice Holmes’s dissent in Abrams v. United States, the organization prepared a statement by prominent non-Socialists urging the state to cease its attack on the Rand School. “If its teachings are unsound the surest way to demonstrate that fact is to

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27 National Civil Liberties Bureau, “Bolshevism and Cool Heads” (draft), 5 July 1919, ACLU Papers, reel 22, vol. 159A. See also NCLB Press Release, 18 July 1919, ACLU Papers, reel 22, vol. 159A (noting that the statement “calls attention to the danger that coercion of minority opinion inevitably will drive criticism underground and will
permit them to be heard and observed,” it argued. “The people of New York are capable of making up their own minds about them.” Such reasoning fit neatly into the progressive model of free speech that had receded during the War but was re-emerging among liberal lawyers and academics. In communications with government officials and potential contributors, the NCLB emphasized the value of political expression as a means both of buttressing democratic legitimacy and of facilitating “social progress.” It attracted mainstream support by celebrating (along with Justice Holmes) a marketplace of ideas, or (before Justice Brandeis) the centrality of open discussion to democratic decision-making. In the NCLB’s assessment, the state had


28 In the years after World War I, a new pluralism (verging at times on relativism) crept into legal and political theory. To borrow from Morton Horwitz’s influential account of legal realism, the war disrupted the “self-assurance about values that Progressives were able regularly to muster.” Horwitz, Crisis of Legal Orthodoxy, 191. Some interwar libertarians lauded free speech for its potential to flush out the political vision most compatible with the “public good,” but others wondered whether any such ideal existed in the first place. Vincent Blasi notes that Justice Oliver Wendell Holmes was a pluralist, skeptical of absolute truth and yet committed to the articulation of steadfast political beliefs. In this pragmatist model, he suggests, dissenting speech represents a crucial challenge to established power structures and the means through which false conceptions are periodically replaced. Vincent Blasi, “Holmes and the Marketplace of Ideas,” Supreme Court Review (2004): 14, 29–30, 45–46. See also Graber, Transforming Free Speech; Post, “Reconciling Theory and Doctrine.” Cf. Daniel T. Rodgers, Contested Truths: Keywords in American Politics since Independence (Cambridge: Harvard University Press, 1987), 197–98 (describing move from public interest to propaganda among political scientists during the 1920s).

29 The concept of the “marketplace of ideas” is generally attributed to Justice Holmes’s dissent in Abrams v. United States, though he did not explicitly use the phrase. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”). The ACLU often invoked the analogy. E.g., American Civil Liberties Union, Are you Free to See, Hear, Read? (New York: American Civil Liberties Union, June 1947) (“The American Civil Liberties Union philosophy is grounded in the belief that truth wins out in the open market-place.”). The invocation of the market was easily adapted to a libertarian ideal of moral autonomy. Indeed, Morris Ernst put it to rhetorical use in an argument against the regulation of fortune telling: “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. Do not let us encourage palmeasies and bootleggers of astrology. Suppression never succeeds.” “Take Your Choice—Should We Drive Out the Fortune Tellers?” New York American, 7 August 1931, Ernst Papers, box 2, folder 3.

30 In his famous concurrence in Whitney v. California, 274 U.S. 357, 375 (1927), Brandeis wrote: “ Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is
little to fear from the Rand School’s propagation of potentially erroneous views. Rather, the “real
danger” was “the immeasurable harm which such coercion of minority opinion does to the
processes of orderly discussion of public affairs.”31

Although the NCLB issued its statement while the legal proceedings were pending, it was
a general pronouncement on the government’s policy, not the merits of the legal case. By the
same token, when the case eventually collapsed, the Lusk Committee continued to lambast the
Rand School just as vigorously.32 In fact, the Rand School’s attorney claimed that “it was
apparent from the day the action was begun that the Attorney General never intended to try it.”33
The Lusk Committee was concerned with public opinion, not law, and it was not deterred by
legal setbacks.

In 1920, the Committee proposed legislation to shut down the Rand School by
prohibiting the state from licensing any private school “where it appears that the instruction
proposed to be given includes the teachings of the doctrine that organized government shall be
overthrown by force, violence or unlawful means.”34 Had the bill stopped there, it might have
avoided significant controversy. But the so-called Lusk Laws went much further. They also
required public school teachers to demonstrate through external assessment that they were “loyal
and obedient to the government of [New York State] and of the United States.” Any teacher who

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159A.
32 Justice John V. McAvoy ordered that the case against the Rand School be brought by July 28 so as not to interfere
1919. When the Deputy Attorney General announced on July 30 that he was not ready to proceed with the case,
July 1919.
33 Samuel Untermeyer, the attorney who represented the Rand School (and later defended Roger Baldwin in the
New Jersey State courts), disclaimed any sympathy with the socialist program. “Court Dismisses Rand School Case,”
34 “Ask Legislature To End Rand School,” New York Times, 18 March 1920; “Pass Bill to Kill Rand School Here,”
had ever advocated change (whether peaceful or violent) in the form of the state or federal
government was to be denied a certificate of fitness. The bill passed, but Governor Al Smith
vetoed it, explaining that it targeted teachers for their thinking, not their teaching, and that its
effect “would be to make the Commissioner of Education the sole and arbitrary dictator of the
personnel of the teaching force of the State in its public schools.”35

Despite Smith’s denunciation, the legislature passed the bill again in 1921, and Governor
Nathan L. Miller signed it.36 That fall, an oath was administered to public school teachers
throughout the state, and principals were required to report on the “morality and loyalty” of their
teachers.37 Often, the assessments were based on opinions by undisclosed informants. Teachers
suspected of disloyalty were not told why. In the spring of 1922, the Commissioner of Education
appointed a five-member Advisory Council, led by Archibald Stevenson, to decide contested
cases in secret meetings.

The anonymous evaluations and closed proceedings proved too much for many New
Yorkers to bear. Newspapers denounced the law and, even more fervently, its administration.
The Buffalo Times declared the law “a reversal of all civilization,” worse than “the barbarism of
darkest Africa.”38 The Buffalo Evening News decried the “star chamber procedure.”39 The New
York Evening Post called for repeal of the law, which interfered “with the fundamental rights of

resounding endorsement of free speech: “This country has lived and thrived from its inception until today, when it is
recognized as the leading world power, upon the fundamental principles set forth in the Declaration of
Independence, one of which was the declaration that all men are created equal. No matter to what extent we may
disagree with our neighbor he is entitled to his own opinion, and until the time arrives when he seeks by violation of
law to urge his opinion upon his neighbors he must be left free, not only to have it, but to express it. In a State, just
as in a legislative body, the majority needs no protection, for they can protect themselves. Law, in a democracy,
means the protection of the rights and liberties of the minority.” As for the Rand School provision, Smith believed
that “the bill strikes at the very foundation of one of the most cardinal institutions of our nation: the fundamental
right of the people to enjoy liberty in the domain of idea and speech.”
38 Ibid. (quoting Buffalo Times, 7 December 1921).
freedom of thought and speech.”

Most tellingly, *The Nation* acknowledged the public’s “callous indifference to the civil liberties of workers” but hoped that an attack on education might attract popular outrage; in an atmosphere of fear, hypocrisy, and servility, it explained, “you cannot make good citizens, to say nothing of honest men and women.”

In May 1923, at the urging of newly re-elected governor Al Smith, the public school law was repealed. So was the private school licensing law, despite a split decision by New York’s intermediate court upholding its constitutionality against a due process challenge—in a case argued for the Rand School by Socialist leader and labor lawyer Morris Hillquit, a member of the ACLU’s National Committee.

The fight over the Lusk Laws taught the ACLU that academic freedom, unlike the rights of anarchist immigrants or radical workers, commanded mainstream support. The lesson was

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41 “The Degradation of Teaching,” *Nation*, 7 December 1921.
43 Zechariah Chafee observed that “after the [Rand] school’s foot was pinched by state regulation, its teachers may have understood better the irritation which other kinds of business feel under government regulation.” The Rand School argued that the excessive restrictions on education embodied in the Lusk Committee restrictions on radical education were a deprivation of liberty and property under the due process clause. Zechariah Chafee, “The Rand School Case,” *New Republic*, 27 September 1922, 118 (“In the past much social legislation restricting private enterprise had been held unconstitutional under [the Fourteenth Amendment], to the indignation of Socialists, labor leaders, and even such a staunch individualist as Theodore Roosevelt. The class rooms of the Rand School must have frequently echoed to denunciations of *Ives v. Railway Co.*, invalidating the first New York Workmen’s Compensation Act, *Re Jacobs*, denying the state power to forbid the manufacture of cigars in crowded tenements, and *Lochner v. New York*, upsetting the ten-hour day in bakeshops. It was amusing, therefore, to find the Rand School, a Socialist institution, striving on the authority of these very cases to limit governmental control over a private activity.”).
44 The Rand School declined to apply for a license and initiated a test of its constitutionality in the state courts. When he announced the school’s intention to challenge the law, Algernon Lee predicted that Senator Lusk would not intervene by locking its doors. He pointed to “the development since the excitement of war of a saner disposition on the part of those in authority to thrash matters of this kind out in an orderly legal manner.” “Rand School To Defy Lusk Loyalty Law,” *New York Times*, 25 September 1921. The state was, in fact, cooperative in arranging to test the law. “Rand School Safe Till Law Is Tested,” *New York Times*, 28 September 1921; “Debs Bust Cheered by Crowd of 10,000,” *New York Times*, 1 January 1922. In a 2 to 1 decision, the Appellate Division upheld the law. People v. American Socialist Society, 202 A.D. 640 (N.Y.A.D. 1922). Morris Hillquit speculated that the court’s decision was “the first adjudication by an authoritative American tribunal which sanctions the institution of preliminary censorship” and declared that the decision “sweeps away all constitutional safeguards which have been thrown around the freedom of press and speech, and opens the door to oppressive class despotism.” “Rand School Loses Fight on Lusk Law,” *New York Times*, 15 July 1922. The Appellate Division permitted the school to stay open pending decision by the Court of Appeals. “Rand School to Stay Open,” *New York Times*, 7 October 1922.
reinforced by controversy over a second restrictive education law, which was then working its way up through the federal courts. That law effectively abolished private education in the state of Oregon, and the surrounding litigation culminated in the Supreme Court’s oft-cited decision in *Pierce v. Society of Sisters*, which recognized parents’ authority over their children’s education and disclaimed the “power of the State to standardize its children by forcing them to accept intrusion from public teachers only.” For the ACLU, the Oregon public school law was a curious initiation into the field of academic freedom. The law was backed by the Ku Klux Klan, and its purpose was to abolish the Catholic Schools, which were widely regarded as an impediment to the assimilation of immigrant children. As a rule, neither the Klan nor anti-immigrant sentiment was popular within the ACLU. Still, most of the ACLU leadership personally opposed parochial education as superstitious and conservative. Moreover, the Oregon law garnered substantial progressive support, even within the ACLU.

William S. U’Ren, an ACLU National Committee member, was among Oregon’s most notable progressive reformers and had played a critical role in introducing the initiative, recall, and referendum to his state’s legislative process. On the issue of the public school law, he advised the ACLU’s executive committee to “pay no attention,” because it raised no issue of “civil or religious liberty.” On the contrary, U’Ren approved of the measure because it would raise the quality of the public school system and mitigate class difference in education. “If every normal child must go to the district public school through the first eight grades, then every

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47 William S. U’Ren to Roger Baldwin, 27 December 1922, ACLU Papers, reel 34, vol. 245. As for Governor Pierce, who was endorsed by the KKK, U’Ren thought he had “respect for the constitutional rights of citizens.” William S. U’Ren to Roger Baldwin, 6 December 1922, ACLU Papers, reel 34, vol. 245. He explained that he had known Pierce since the 1890s and that although he was a “politician,” he had supported every measure that U’Ren had ever advocated, except the single tax. He told Baldwin: “I may be wrong, but it is my judgment that a man who has that kind of a record is fairly liberal and progressive. I think he will make an excellent governor.”
parent, whether rich or poor, Jew or Gentile, Catholic or Protestant, saint or sinner, will have the highest possible selfish parental interest in making the best possible school because there is no other for his or her children,” he explained. The executive committee, however, uniformly rejected U’Ren’s reasoning, and it pledged its support to opponents of the school law. The fourteen members to whom Baldwin read U’Ren’s letter “all felt distinctly that an issue of both civil and religious liberty [was] involved and that the right to worship according to the dictates of one’s conscience is certainly involved in the right to send children to schools of your own choosing, public or private.”

Baldwin’s rhetoric notwithstanding, the ACLU did not understand the law’s menace primarily in terms of the free exercise of religion, or even (as later Supreme Court decisions would cast it) of individual liberty or family autonomy. As Baldwin told U’Ren: “All the rest of us here seem perfectly clear on the other side. Perhaps it is because we’ve got a number of experimental private schools in and near New York which are infinitely more valuable to the future of education than anything the public schools are doing. Under such a law as you have in Oregon, they would be wiped out.” When it discussed Pierce v. Society of Sisters publicly, the ACLU invoked religious freedom and parental rights. In so doing, it made new allies among conservatives and helped to secure a unanimous decision in the Supreme Court. At bottom, however, the members of the ACLU’s executive committee opposed compulsory public schooling because it threatened the future of the Rand School and projects like it. They believed that control of the curriculum was a more insidious version of the violently repressive machinery of World War I.

48 Roger Baldwin to William S. U’Ren, 4 January 1923, ACLU Papers, reel 34, vol. 245.
49 Roger Baldwin to William S. U’Ren, 17 January 1923, ACLU Papers, reel 34, vol. 245.
prohibiting private alternatives—all to ensure that the public school system would inculcate children with the values of the dominant capitalist culture. By contrast, radical education, if it were only sheltered from state suppression, had the potential to awaken the masses.

It is no wonder, then, that the ACLU’s first committee, formed in the fall of 1924 and chaired by Tufts Professor Clarence R. Skinner, was its Committee on Academic Freedom. When the organization first addressed the issue of academic freedom as a potential area of activity in June 1924, it openly acknowledged its concern—namely, “propagandists’ efforts to distort education in the interest of a particular conception of political and economic thinking,” of which the Lusk Committee’s effort to shut down the Rand School was the most prominent example. Such laws, the ACLU insisted, were “special interest” measures to promote industrialist propaganda and thereby undermine the broader public interest.51

Over the following summer, the ACLU explored potential avenues of involvement in academic freedom work. The possibility of a new alliance with the American Association of University Professors—which had first occupied the field in 1915 with its thoroughly progressive Declaration of Principles on Academic Freedom and Academic Tenure—was appealing. Despite the AAUP’s general capitulation to popular hysteria during World War I,52 progressive academics had formulated a robust defense of freedom in the classroom under ordinary circumstances. The premise of the AAUP’s Declaration was that academic knowledge was capable of objective assessment and was properly evaluated by peers within a scholar’s

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51 The pamphlet declared that “the public mind is poisoned at its source when special interests take hold of educational institutions for promoting their own propaganda.” American Civil Liberties Union, Freedom of Speech in Schools and Colleges (New York: American Civil Liberties Union, June 1924), in ACLU Papers, reel 34, vol. 245.

52 E.g., “Academic Freedom in Wartime: American Association of University Professors Takes Stand for Freedom of Word and Action on the Part of Teachers,” New York Post, 1 May 1918 (noting the AAUP policy that instructors convicted of disobedience could be deprived of academic office and that faculty should “be required by their institutions to refrain from propaganda designed, or unmistakably tending, to cause others to resist or evade the Compulsory Service law or the regulations of the military authorities”).
discipline rather than by lay trustees, who were motivated by politics and ideology.\textsuperscript{53} “The claim to freedom of teaching is made in the interest of the integrity and of the progress of scientific inquiry,” the Declaration explained, and it was therefore available only to “those who carry on their work in the temper of the scientific inquirer.” The AAUP was primarily concerned with ideas expressed in scholarship and in the classroom, not with political activities outside of academic institutions.\textsuperscript{54}

For a combination of ideological and institutional reasons,\textsuperscript{55} the ACLU was most interested in precisely those issues that the AAUP discounted. “In cases involving freedom of opinion outside the classroom the public interest is peculiarly involved,” an ACLU statement explained. “In such cases we offer the aid of our legal and publicity services to teachers or students whose views subject them to attack.”\textsuperscript{56} An outside organization like the ACLU could not properly defend a teacher who used the classroom to disseminate propaganda; “the extent to which a teacher may legitimately lay before a class his own opinions on controversial questions is a matter for those engaged in teaching to determine through their own organization.” Conversely, it was patently the ACLU’s concern to ensure that educational institutions did not attempt to impede teachers in their exercise of “the common rights of citizens, including the right


\textsuperscript{55} Many potential members of the ACLU’s committee were concerned that it would duplicate the work of the AAUP. The ACLU assured these candidates that the two organizations had different objectives and that the AAUP was fully aware and supportive of the ACLU’s proposed work. \textit{E.g.}, Roger Baldwin to Allyn A. Young, 29 August 1924, ACLU Papers, reel 35, vol. 248; Allyn A. Young to Roger Baldwin, 21 October 1924, ACLU Papers, reel 35, vol. 248 (“I understand you are not concerned so much with ‘professional freedom’ as with other things—student repression of liberal opinion, obstacles put in the way of ‘radical’ lectures, and the like. I should say that your committee could do no harm and \textit{might} do some good.”); H. W. Tyler, AAUP, to Roger Baldwin, 25 October 1924, ACLU Papers, reel 35, vol. 248 (“I believe you can render a real service in this field. We certainly have our hands more than full with the problems brought to us.”).

\textsuperscript{56} ACLU, “Schools and Colleges.”
of expressing their views on political and economic issues, in speech or in print.” The ACLU was also concerned (inspired, presumably, by the energy of the student movement in Europe) with the right of college students to hear radical speakers and organize radical activities on campus. In fact, Roger Baldwin told Ernst Freund that he hoped the committee would “prevent[] further inroads upon the agitation of radical and labor issues in the colleges.” An October press release reiterated that commitment. The new committee would resist “college and school rules restricting liberal and radical activities,” in addition to preserving teachers’ and students’ “freedom of opinion” outside the classroom. It would also oppose laws limiting teachers’ autonomy in the classroom, such as those prohibiting teaching of pacifism, of “certain concepts of history,” and of evolution.

Although the last issue was something of an after-thought in the ACLU’s platform on academic freedom, it soon took center stage. During July 1925, national attention was riveted on Dayton, Tennessee, where Clarence Darrow and William Jennings Bryan clashed in the courtroom over the scientific plausibility of creationism. For the ACLU, however, the Scopes trial, which it sponsored, was a case about academic freedom rather than evolution. Indeed, the ACLU leadership was distressed by Clarence Darrow’s flagrantly anti-religious approach during the trial and would have preferred a more moderate and publicly palatable strategy. Much of

57 Ibid.  
58 Roger Baldwin to Ernst Freund, 27 August 1924, ACLU Papers, reel 35, vol. 248.  
59 ACLU Press Release, 22 October 1924, ACLU Papers, reel 35, vol. 248 (noting that the ACLU’s new committee would investigate “interference with the activities of liberal or radical students and instructors in any college or school in the country”).  
61 The principal exception was Darrow’s law partner, ACLU counsel Arthur Garfield Hays, who vehemently defended his approach. Unsigned letter to Felix Frankfurter, 10 November 1926, ACLU Papers, reel 44, vol. 299 (describing the positions of various members of the ACLU leadership).
the executive committee disapproved of his confrontational tone and wanted him replaced with a
more respectable attorney, ideally future Chief Justice Charles Evans Hughes, on appeal.\footnote{Roger Baldwin to John T. Scopes, 10 August 1926, ACLU Papers, reel 44, vol. 299 (“[I]t is not a radical case and
does not require a man whose economic philosophy is radical to handle it. Furthermore, we believe that the
importance of the issue demands that we should get the lawyer most likely to impress the Supreme Court, and
certainly one who would not prejudice the court in advance. We believe that the man for that job is Charles Evans
Hughes, who has already made a corking public statement as the President of the American Bar Association on the
issues involved in your case. Furthermore, there is something to the psychology of having before the court a man
who is not an agnostic or atheist.”).}

To Baldwin, the Scopes trial was an opportunity to reach out to a new constituency for
financial and political support.\footnote{Larson, Summer for the Gods, 206–07.} “Persons who have not contributed before to the defense of
civil liberty will do it now on such an issue as this,” he reflected. “Supporters of educational and
scientific work will be interested, of course, and some liberal spirits in the churches. They need
not fear contamination with the defense of reds!”\footnote{Letter from Roger Baldwin, undated, ACLU Papers, reel 38, vol. 274.}
To that end, Baldwin was careful to maintain
an independent defense fund for the “Tennessee Evolution Case,” distinct from the general
ACLU finances, “banked and handled separately under the auspices of the distinguished
committee” that the organization assembled for the task.\footnote{Ibid.}
The ACLU assured correspondents
that its purpose in Scopes was neither to denigrate religion nor to eliminate moral instruction in
the schools.\footnote{Telegram from ACLU to Noah W. Cooper (President, Davidson County Sunday School Association), 11 June
1925, ACLU Papers, reel 38, vol. 274; ACLU, “Statement on Civil Liberty Situation in America at Present,” 29
August 1925, ACLU Papers, reel 41, vol. 285 (“It is not as an advocate of the theory of evolution but of academic
freedom that the American Civil Liberties Union is presenting an appeal to the Tenn. Supreme Court to test the
constitutionality of the statute. If similar legislation were aimed at the teachings of a religious group in the U.S. it
would be equally obnoxious to those who advocate civil liberties.”).}
Rather, it was to preserve American liberty by preventing the “complete
standardization” of the “intellectual life of [the] nation.”\footnote{Forrest Bailey to Rev. Noah Cooper, 15 June 1925, ACLU Papers, reel 38, vol. 274.}
The enemy was “force[d]
conformity”—which was why the ACLU could advocate the right of Catholics to private
education in Oregon and the right of Tennessee school teachers to explain evolution in the same breath.\textsuperscript{68}

In the Oregon public school controversy, the ACLU’s nod to inviolate traditions and family values had garnered conservative sympathy; in the evolution context, the notion that experimentation and diversity in intellectual inquiry was the source of democratic progress resonated with progressive audiences. As Roger Baldwin told James P. Cannon, the ACLU had a particular crowd to reach in the overarching struggle for economic equality.\textsuperscript{69} It was up to the “liberals”—or, as Baldwin preferred to call them, “Libertarians”—to “fight for civil liberty as a principle of progress.”\textsuperscript{70} The ACLU’s pamphlet on the \textit{Scopes} trial lumped anti-evolution laws together with compulsory bible reading and restrictions on radical teachers. “All of them,” it claimed, “involve precisely the same issues as the laws punishing opinion passed during the war, and the criminal syndicalism and sedition laws passed in 35 states during and just after the war.” All were part of an immense and unprecedented effort “to regulate public opinion and to penalize minority and heretical views,”\textsuperscript{71} and they were bound to narrow human understanding. Such rhetoric was effective. In the fall of 1926, Baldwin recounted that “the Scopes evolution case in Tennessee [had] opened the eyes of hundreds to the growth of intolerance and brought them into camp.”\textsuperscript{72}

These early seminal cases—the Rand School, \textit{Pierce}, and the \textit{Scopes} trial—were instrumental in attracting another constituency besides Baldwin’s Libertarians: lawyers. With the battle over education, the source of repression had subtly shifted. Even more than before, the

\textsuperscript{68} Ibid.
\textsuperscript{69} Roger Baldwin to James P. Cannon (ILD), 26 May 1926, ACLU Papers, reel 46, vol. 303.
\textsuperscript{70} Roger Baldwin, “Civil Liberties in the United States” (draft), fall 1926, ACLU Papers, reel 46, vol. 303. According to Baldwin, liberals were “persons who merely welcome change without fighting for it.”
\textsuperscript{71} American Civil Liberties Union, \textit{The Tennessee Evolution Case} (New York: American Civil Liberties Union, July 1925), in ACLU Papers, reel 44, vol. 299.
\textsuperscript{72} Roger Baldwin, “Civil Liberties in the United States” (draft), fall 1926, ACLU Papers, reel 46, vol. 303.
ACLU came to define itself in opposition to state authority.73 Perhaps because the old progressive convictions were so deeply ingrained, or perhaps because progressive ideology was so pervasive and its language so dominant, the early ACLU had continued to pursue a number of familiar and tested tactics. It had reached out to government agencies and public officials in opposition to restrictive legislation and in pursuit of amnesty for political and industrial prisoners. When mobs and vigilantes shamelessly beat dissenters, it had called upon officials to intervene, notwithstanding its concerns about government abuses. More tellingly, when local officials aligned with courts to quash local labor struggles, even Roger Baldwin had been tempted to enlist state and federal assistance in leveling the playing field.74 But for political and legal reasons, the indoctrination of young citizens through state channels was best countered by other means.75

73 Roger Baldwin to William H. Jefferys, 22 December 1926, ACLU Papers, reel 46, vol. 303 (“[A]ll through history governments have been the chief persecutors. It is with government agencies that we have to deal all the time, opposing the repressive and often lawless tactics of the executive and of government by an appeal to the judiciary. And the judiciary now has pretty nearly emasculated civil liberties as they have been conceived by the forefathers and maintained for a hundred years.”).

74 E.g., ACLU Executive Committee Minutes, 26 September 1921, in ACLU, Minutes: “Mr. Baldwin reported at length on his recent trip to West Virginia, where he organized the publicity in connection with the presentation of the miners’ case to the United States Senate investigation committee. . . . Mr. Baldwin gave it as his opinion that the only possible solution of the conflict lies in action by the federal government, forcing an agreement between operators, workers and the state authorities. The committee agreed to address a communication to the president, urging upon him either the appointment of a special commission to do this work, or a request by him to the Senate committee to endeavor to effect a settlement.” Other examples include the ACLU-sponsored Committee of Inquiry on Coal and Civil Liberties, which was produced for incorporation into the findings of the United States Steel Commission, and the ACLU’s successful appeal to Pennsylvania Governor Gifford Pinchot to restore civil liberties in the coal regions of his state.

75 See, e.g., Acting Commissioner, Bureau of Education, to Roger Baldwin, 10 May 1924, ACLU Papers, reel 35, vol. 248 (“This Bureau, being a branch of the Federal Government, exercises no control or supervision over the public school systems of the several States. . . . Whatever any official of this office might say with regard to religious tests would be of the nature of mere opinion, and the only action which has thus far been taken has been to refrain from the expression of an opinion.”). Until the Supreme Court’s 1925 decision in Gitlow v. New York, 268 U.S. 652 (1925), the federal courts were equally powerless to prevent the curtailment of expressive or religious freedom by state and local government.
The ACLU only gradually came to regard the rights it supported as enforceable primarily by the courts. Roger Baldwin was notoriously hostile to court-based activism in the early 1920s. His distrust of judicial methods stemmed not only from notorious exercises of judicial review, like *Lochner v. New York*, but also from the less mandarin but equally reviled labor injunctions issued by the trial courts. As ACLU counsel Walter Nelles observed: “Judges are chosen from lawyers of standing at the bar, and standing is attained by devoted service to important property interests. It is extraordinary when a judge can slough off the prepossessions which his practice has engendered.”

Ever a pragmatist, however, Baldwin encouraged experimentation rather than ideological rigidity, and the organization’s lawyers continued to pursue judicially enforceable constitutional rights, despite serious reservations from much of the ACLU’s membership—most notably Felix Frankfurter, who staunchly opposed the pursuit of civil liberties through constitutional litigation and regarded the Supreme Court’s “occasional services to liberalism” as a dangerous step toward judicial legislation. In the early years, of course, judicial victories were few and far between. In 1921, the ACLU reported on the disheartening series of defeats in all cases pertaining to freedom of speech, freedom of press, and the rights of labor. The Supreme Court, the organization declared, had “gone over to the side of reaction.”

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76 On constitutionalism outside the courts, see Chafee, *Freedom of Speech*, 3–6 (“It is often assumed that so long as a statute is held valid under the Bill of Rights, that document ceases to be of any importance in the matter, and may be henceforth disregarded. On the contrary, [the First Amendment] is much more than an order to Congress not to cross the boundary which marks the extreme limits of lawful suppression. It is also an exhortation and a guide for the action of Congress inside that boundary. It is a declaration of national policy in favor of the public discussion of all public questions.”).


80 In one field of civil liberties activity, freedom from unlawful searches and seizures, the Supreme Court had gradually extended protection in a series of Prohibition cases culminating in *Gouled v. United States*, 255 U. S. 298
But eventually, a combination of periodic state-court successes, Holmes’s and Brandeis’s powerful Supreme Court dissents, and victories in such non-labor cases as *Meyer v. Nebraska* and *Pierce v. Society of Sisters* would make the courts an inviting venue. The ACLU sought to build on the Supreme Court’s existing understanding that respect for “personal rights” was crucial to rule of law. For the most part, ACLU lawyers were unabashed legal realists, and they brought their cases to the courts because, increasingly, that is where they were most likely to win. In spring 1925, within a week of its decision in *Pierce*, the Supreme Court implied in *Gitlow v. New York* that the First Amendment’s freedoms would henceforth be binding on the states. Notably, *Gitlow*—like *Whitney v. California*—was argued by Walter Nelles and Walter Pollak of the ACLU. By the end of the year, litigation appeared sufficiently promising to prompt ACLU counsel Arthur Garfield Hays to propose a study of “affirmative legal action” as a means of securing “labor’s civil rights.” To labor leaders, seeking judicial protection for striking workers was a betrayal of deeply held beliefs. But as Baldwin freely admitted, he was “not

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81 Ibid.

82 Walter Nelles reflected in 1920 that the rights against search and seizure were the only ones that had weathered the Red Scare. Perceived violation of these rights by the Department of Justice were largely responsible for the backlash against the Palmer Raids. Most famously, a group of twelve prominent lawyers and academics, including Felix Frankfurter, Zechariah Chafee, Ernst Freund, and Roscoe Pound, were sufficiently outraged to write a “Report upon the Illegal Practices of the United States Department of Justice,” which condemned the recent wave of warrantless searches and arrests and other unlawful methods, though it explicitly declined to “raise any question as to the Constitutional protection of the free speech and a free press.” National Popular Government League, *Report upon the Illegal Practices of the United States Department of Justice* (Washington, D.C.: National Popular Government League, May 1920). The statement argued: “Free men respect justice and follow truth, but arbitrary power they will oppose until the end of time. There is no danger of revolution so great as that created by suppression, by ruthlessness, and by deliberate violation of the simple rules of American law and American decency.” Ibid., 8.

83 Executive Committee Minutes, 26 October 1925, ACLU, Minutes (“Mr. Pitkin’s favorable report on Mr. Hays’s proposal for a study of affirmative legal action was adopted, with a recommendation to the American Fund that that organization pay the costs of the investigation.”). American Civil Liberties Union, *The Fight for Civil Liberty, 1927–1928* (New York: American Civil Liberties Union, 1928), 58 (“This was a fund of $650 appropriated by the American Fund for Public Service to make a study of legal means to secure labor’s civil rights. The material was incorporated in the book ‘Don’t Tread on Me’ by Arthur Garfield Hays.”).

84 See Chapter 4.
troubled . . . about any issue of theory or principles.”

Throughout his career, he was more concerned with achieving results than with ideological consistency. And for the time being—for the ACLU’s core leadership, if not the growing number of members and National Committee members from across the political spectrum—securing the rights of labor remained the organization’s overarching goal.

Integral to the ACLU’s embrace of academic freedom in the 1920s was the deep conviction of the leadership that radical propaganda could in fact bring about fundamental social change. The ACLU’s establishment allies typically assumed that exposing radical ideas to scrutiny would ensure their demise. For example, a brief of the Special Committee of the Association of the Bar of the City of New York, of which Charles Evans Hughes was a member, opposed the expulsion of Socialists from the New York Assembly on the theory that tolerance of dissent was “the most efficient safety-valve against resort by the discontented to physical force.”

By contrast, the ACLU leadership (though it often articulated the conservative line) believed that a proper airing would convert the masses. Education, as Leon Whipple put it in his ACLU-sponsored treatise on civil liberties, was “the source of all true progress in social liberty.” In Whipple’s view, civil liberties were most important not at revolutionary moments—“in serious struggles,” he argued, they were “but one part of the battle” in which the most powerful force would prevail—but in the calm periods in between.

Whipple explained that once an emergency has passed, “the executive, the courts, and the police sink back into normalcy from which they have been prodded.” Active violence ceases and restrictive laws are ignored, repealed or struck down as unconstitutional. “In such times,” he continued,

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85 Roger Baldwin to James P. Cannon (ILD), 26 May 1926, ACLU Papers, reel 46, vol. 303.
86 Quoted in Chafee, Freedom of Speech, 189. The expulsion proceedings were initiated by the Lusk Committee. Holmes and Brandeis often invoked this rationale as well.
87 Whipple, Civil Liberty, 317–18.
88 Whipple, Ancient Liberties, 146.
“constitutional liberty has perhaps its greatest value for it is the educational force of new ideas that produces social change, not the spectacular struggles that are in fact only symbols of how far the change has gone.”89

A muted radicalism infused the ACLU’s theory of civil liberties in the 1920s. The organization’s leaders ordinarily spoke in terms of pluralism and tolerance, but their true objectives were more ambitious, and occasionally they came out. In Roger Baldwin’s understanding, “the Klan’s attempt to compel all children to go to public schools” and the “Fundamentalist attack on scientific teaching” were instances of a more general phenomenon, namely, “the effort of all groups in power to hold on their privileges, and to write those privileges into law.”90 The consolidation of power of which they were reflective had coincided with the War, but its true cause was the Russian Revolution: “Bolshevism is the issue which has aroused the propertied classes to the defense of things as they are all over the world.”91 Baldwin invoked familiar progressive tropes even while he speculated that “political liberalism [was] dead.” The prewar radicals, when they fought for the initiative, the referendum, and “other devices for popular control,” had “voiced the old American faith that privileged classes could be controlled by the ‘Public.’” Indeed Baldwin, “as a humble members of the reformers’ crew of those hopeful days,” had “believed it too.” But he had since come to recognize that there “is no ‘Public’; the ‘People’ as a political party are unorganizable.” In place of the public interest there were only “economic classes.” Industrial autocracy had taught Roger Baldwin that “the only power that works is class-power.”92

89 Ibid.
92 Ibid.
As Baldwin often emphasized in correspondence with critics, his views were his own, not the ACLU’s.93 Still, they were echoed in the private correspondence of many within the organization’s inner circle.94 The ACLU leadership promoted a broad right to education because it hoped that the radical labor movement, if given the opportunity to educate the masses, would ultimately triumph.95 The organization’s new rallying cry was Justice Holmes’s dissenting proclamation in *Gitlow v. New York*96: “If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.”97

By the mid-1920s, the ACLU was staunchly committed to contesting the government regulation of unconventional ideas in the education context. The question for the next half-decade was how far its new program would reach. In the minds of the ACLU leadership, state inculcation of religious orthodoxy was clearly inimical to revolution. So was the effort to shut unconventional ideas, whether political or otherwise, out of the schools (including the

93 Roger Baldwin to C. H. Scovell, 21 October 1926, ACLU Papers, reel 46, vol. 303 (“As an organization, we stand for everybody’s civil rights, and I think we have never failed to defend all comers impartially. But since by far the larger part of the struggle for free speech centers around industrial conflict, just as it did in the Middle Ages around religious conflict, it is natural most of our friends and supporters should be those who feel the importance of the labor movement as a creative force. While that has nothing to do with the official position of the organization, it motivates many of us. . . . I have often said that if the Union could find an enthusiastic executive who was not committed as I am to partisanship for the labor movement and to test radical expressions, they would make the philosophy of free speech stand on firmer ground. But although we have tried, we have not found anyone who could tackle it in so dispassionate a spirit.”).

94 Forrest Bailey, Baldwin’s co-director, revealed his personal biases in a letter admonishing the Field Secretary of the ACLU’s Southern California branch to be more discrete in his public statements: “Let me be perfectly clear on this point. I too am a radical and am as much concerned as you can possibly be to see the end of the capitalist system. The only point I wished to raise . . . was that we consider it an error to give out the overthrow of the capitalist system as one of the aims about which this organization is concerned.” Forrest Bailey to Robert Whitaker, 1 February 1926, ACLU Papers, reel 46, vol. 303.

95 Baldwin nonetheless had his pessimistic moments. *E.g.*, ACLU News Release, April 1926, reel 46, vol. 303 (quoting remarks by Baldwin: “Tolerance can be achieved only by making repression and intolerance difficult. Whether such a spirit can be aroused in a country so prosperous and so constantly extending throughout the world its economic power, is doubtful.”). Even the Rand School lamented in 1923 that while enrollment was high and its lectures on art and literature were full, “the proletariat ha[d] begun to weary of ‘serious subjects.’” “Tired Proletarians,” *New York Times*, 11 January 1923.

96 Quoted, *e.g.*, in Roger Baldwin, Draft Speech, ACLU Papers, reel 46, vol. 303.

97 *Gitlow*, 268 U.S. at 673.
prohibition on ACLU-sponsored meetings in the New York Public Schools, an ongoing battle
that in 1927 the ACLU deemed the “most important free-speech fight of the year”).98 There was
one field, however, into which the organization had not yet ventured. In spite of the
longstanding association of radicalism with “free love,”99 the ACLU had resolutely excluded the
regulation of sexual relations from its purview. Nonetheless, there was a mounting sentiment
within the ACLU that social progress was threatened not only by laws directly suppressive of
radical ideas, but (in Leon Whipple’s words) by the “steady extension of the police power over
health, morals, and personal habits”—the “slow encroachment” of the state onto all aspects of
personal liberty.100 With the suppression of Mary Ware Dennett’s foundational sex education
pamphlet, the ACLU faced the new terrain head on.

*The Sex Side of Life*

Mary Ware Dennett had challenged social norms throughout her life, politically and
personally. Born in 1872 to a middle-class family in Worcester, Massachusetts, she attended
Boston-area schools (public and private) and studied at the School of Design and Decoration at
the Boston Museum of Fine Arts. From 1894 to 1897 she headed the department of decoration
and design at the Drexel Institute in Philadelphia. In 1898 she and her sister opened a gilded
leather shop, the kind of fancywork to which aspiring female artists could turn for an income,
and the two women garnered national attention for rediscovering a lost process for making
cordovan gilded leathers.101

100 Whipple, *Ancient Liberties*, 146.
101 “Mrs. Dennett, 75, Suffrage Leader: A Founder of National Birth Control League Dies—Fought to Legalize Sex
Mary Ware married William H. Dennett in 1900. Together, they had three children, one of whom died in infancy. Dennett separated from her husband in 1909 when he declared himself a free lover and sought to convince her to accept his relationship with their friend and neighbor, whose own husband sanctioned the relationship and invited William to live in their home. The custody proceedings and subsequent divorce generated sensationalist news coverage, which distressed Dennett deeply.\textsuperscript{102} Despite her aversion to publicity, however, she remained active in public life. During the first decade of the twentieth century she served as field secretary of the Massachusetts Woman Suffrage Association, and in 1910, she was elected corresponding secretary of the National American Woman Suffrage Association. During the First World War, Dennett became a prominent pacifist. She was a founding member of the People’s Council of American for Democracy and Peace and a member of the Woman’s Peace Party in New York. Notably, she also served as field secretary for the American Union Against Militarism and, once it was organized as a separate entity, for the NCLB. In that capacity, she witnessed first-hand the unchecked use of postal censorship to curtail public exposure to unpopular views.

When the war drew to a close, Dennett’s focus shifted to birth control, the cause that would dominate her life for the next two decades. In 1915, Dennett had helped organize the United States’ first birth control organization, the National Birth Control League. Four years later, she founded the Voluntary Parenthood League—the institutional rival of Margaret Sanger’s American Birth Control League—and became Sanger’s chief contender for leadership of the birth control movement. While Sanger tempered her demands for birth control reform in the interwar period by advocating medical regulation rather than open access, Dennett called for

\begin{footnote}
\textsuperscript{102} William Dennett unabashedly professed his love for Chase, as well as his free love ideology in general, in the court proceedings. “Lover of Wife Honored by Complaisant Husband,” \textit{Atlanta Constitution}, 24 September 1909. The husband of his lover, H. Lincoln Chase, joined the couple at their small town farmhouse in 1913. Two years later, the press reported that the arrangement was a success. \textit{E.g.}, “Chase to Join Wife and Her Soul Mate,” \textit{New York Times}, 25 January 1915.
\end{footnote}
repeal of all restrictions on contraception. In particular, she was a fierce and vocal opponent of
the 1873 Comstock Act. A federal statute, the Comstock Act gave the postal authorities
immense discretion to censor obscene material, and Dennett considered it a formidable obstacle
to birth control reform. Under its terms, the postal service was free to suppress not only “lewd”
images and literature, but also publications considered morally suspect, such as arguments
against the legal regulation of marriage and pamphlets providing information about
contraception, as well as contraceptive devices themselves.\textsuperscript{103}

In the early 1920s, Dennett believed the Comstock Act was on its way out. Under the
leadership of Postmaster General William Hays, censorship of political materials had declined
from its wartime heights, and Dennett thought Hays might even petition Congress for a change in
the laws.\textsuperscript{104} But the postal crusade against obscenity and birth control redoubled under Hubert
Work, who took over the office in 1922 when Hays was named president of the Motion Picture
Producers and Distributors of America (it was in this role, which he held for more than twenty
years, that he would implement the influential 1930 “Hays Code” for movie self-censorship).
Consequently, Dennett spearheaded a legislative effort to repeal the prohibition on the
dissemination of information about birth control, which she unavailingingly distinguished from the
dissemination of contraception itself. In 1923, after a long effort, she managed to find sponsors
in the Senate and the House. The Cummins-Vaile Bill, which Dennett drafted, would have
prohibited postal censorship of birth control materials.\textsuperscript{105} But despite her unflagging efforts,
including her publication in 1926 of \textit{Birth Control Laws},\textsuperscript{106} a book that criticized the Comstock

\textsuperscript{103} Those found guilty of violating the Act were subject to six months to five years imprisonment at hard labor or a
fine of between one hundred and two thousand dollars. Comstock Act, 17 Stat. 598 (1873).
\textsuperscript{104} Mary Ware Dennett to Senator Ferris, 21 April 1925, Dennett Papers, reel 22, file 470.
\textsuperscript{105} The bill would have deleted the phrase “for the prevention of contraception” from the Comstock Act.
\textsuperscript{106} Mary Ware Dennett, \textit{Birth Control Laws: Shall We Keep Them, Change Them, or Abolish Them} (New York: F.
H. Hitchcock, 1926).
laws and advocated legislative change, the bill reached a dead end. According to Dennett, few members of Congress actually opposed the bill, but it was kept off the floor to avoid the liability of a vote.\footnote{Mary Ware Dennett, “Cummins and Birth Control,” \textit{New York Times}, 22 August 1926.}

Ultimately, it would be the courts rather than the legislatures that would rein in the postal censors. The impetus for change was Dennett’s own sex education pamphlet, \textit{The Sex Side of Life: An Explanation for Young People}. The pamphlet was heralded by secular and religious reformers as an indispensable educational tool,\footnote{Among the pamphlet’s thousands of supporters and subscribers were the Bridgeport, Connecticut public library; the First Methodist Episcopal Church in Pueblo, Colorado; the Juvenile Court of Cook County, Illinois; the Boy Scouts of Louisville, Kentucky; the Massachusetts Department of Public Health; the Bethel Evangelical Church in Detroit, Michigan (whose pastor, from 1915 to 1928, was Reinhold Niebuhr); the Minnesota Department of Education; and numerous YMCA chapters. List of Larger Contributors, Dennett Papers, reel 21, file 445.} and its censorship, coupled with Dennett’s conviction for mailing an obscene publication, touched off a firestorm of public outrage and offended judicial sensibilities.

For all the controversy it would engender, \textit{The Sex Side of Life} was penned, ostensibly, with very modest intentions. Dennett claimed that when she wrote the pamphlet in 1915, she had particular “young people” in mind: her sons Carl (then fourteen years old) and Devon (age ten). According to Dennett, Carl asked her a series of questions about sex in his letters home from summer camp. She prepared the pamphlet by way of response and sent it to him while he was away. Coincidentally, at just that time, the Metropolitan Life Insurance Company was sponsoring a competition for the best pamphlet on sex education for adolescents between the age of twelve and sixteen.\footnote{Chen, \textit{Story of Mary Ware Dennett}, 176.}

Dennett sampled more than sixty books and pamphlets on sex before writing her own. She rejected their tone of disapproval and insisted that sex, in the appropriate context, “is the very greatest physical and emotional pleasure there is in the world.”}

\footnote{107 Mary Ware Dennett, “Cummins and Birth Control,” \textit{New York Times}, 22 August 1926.}
at sex education for its “old-fashioned stupid idea about women,” which made her indignant because it implied that “women were made to be taken care of” rather than being “partners in life with men.” Moreover, she worried that the literature assumed prior knowledge and traded in euphemisms instead of frankly explaining the terminology and physiology of sex.

Dennett’s introduction to The Sex Side of Life attributed the deficiency in sex education literature to the fact that “those who have undertaken to instruct the children are not really clear in their own minds as to the proper status of the sex relation.” Educational literature was confused with respect to physiology and sentimental in its description of natural science, but it was most troubling in its moral treatment of sex; it presented children with a “jumble of conflicting ideas,” from fear of venereal disease and the duty of suppressing one’s “animal passion” to the sacredness of marriage. Emotionally, Dennett noted, the subject was simply ignored.

Endeavoring to correct these omissions, Dennett outlined the physiological process of sex, including an explicit description of the mechanics of intercourse. She addressed tabooed topics from venereal disease (which, she assured her readers, was treatable by modern medicine) to masturbation, which she discouraged unless the urge was “overwhelming.” Finally, she made the “frank, unashamed declaration that the climax of sex emotion is an unsurpassed joy, something which rightly belongs to every normal human being.” By the time Dennett was haled into court, sentiments like these would be par for the course (Sanger, for one, also utilized them). Indeed, social scientists would make mutual sexual gratification a prerequisite of the new

110 Quoted in ibid., 172.
112 Dennett, Sex Side of Life, 3.
113 Ibid., 22.
114 Ibid., 4.
companionate marriage.115 But in 1915, Dennett’s celebration of sexual pleasure was unconventional, even radical.116

_The Sex Side of Life_ combined advanced views about women’s sexuality circulating among sophisticated feminists with the social hygiene impulse that was burgeoning at that time.117 A progressive-era reform initiative, the social hygiene movement sought to hold men and women to a “single standard” of sexual fidelity in order to combat prostitution, venereal disease, and associated social pathologies. Social hygienists—particularly the women among them—also imagined sexual responsibility as a mechanism for achieving sex equality, though their ambitions were predictably undermined in practice.118

Where Dennett broke from the social reformers was in her permissive approach to sexuality. Dennett, too, advocated a single standard for men and women, but hers was a standard of relative leniency. Whereas her reformist counterparts sought to mobilize state regulatory authority on behalf of sexual purity, Dennett consistently counseled her young correspondents that sexual experimentation was natural and desirable. This bolder message, however, was understated in _The Sex Side of Life_, and Dennett generally minimized it when she promoted the

116 For prewar feminists, equality in the bedroom was merely one facet of a larger struggle for women’s equality. Stansell, _American Moderns_, 227. These broader implications of _The Sex Side of Life_ fell away in the intervening years. Cott, 157 (“What was thrown overboard in the transformation of Feminist critiques into social scientists’ proposition of companionate marriage was the ballast anchoring harmony between the sexes to sexual parity in the public world as well as the bedroom.”). One acquaintance from Dennett’s suffrage days advised her in 1930 that she had sought to reframe birth control and sex education as “necessary for the performance of marital and parental obligations” in order to accommodate the conservative tendencies of the League of Women Voters. S. P. Breckenridge to Mary Ware Dennett, 15 January 1930, Dennett Papers, reel 23, file 483.
117 See generally Kristin Luker, “Sex, Social Hygiene and the Double-Edged Sword of Social Reform,” _Theory and Society_ 27 (1998): 601–34. Though _The Sex Side of Life_ was more celebratory of sex and more tolerant of “deviant” sexual practices than its social hygiene counterparts, the difference between them was relatively modest, as Dennett’s defenders were eager to point out. See, e.g., Remarks of Dr. Louis I. Harris, former New York City Commissioner of Health, Public Hearing on Sex Education – Freedom of Censorship, Town Hall, New York City, 21 May 1929, Dennett Papers, reel 23, file 484.
118 The male physicians allied with female social hygienists were more interested in medical prophylaxis than in gender equality, and the new policies disproportionately targeted prostitutes and promiscuous young women. Luker, 619–20.
pamphlet. As late as the early 1930s, organized vice crusaders assumed that Dennett was an ally in the struggle against sexual promiscuity.\(^\text{119}\)

Consistent with her family-friendly narrative, Dennett kept the focus on Carl and his wholesome boyhood curiosity. According to Dennett, Carl did not mention his mother’s essay until he returned home from camp, when he called out from the shower, in the hearty manner young boys used in sex education literature long afterward, “Hi, mother, that paper you sent me was all right.” “Did it fit the bill?” Dennett asked. “It sure did,” he replied.\(^\text{120}\) Carl’s enthusiastic endorsement was only the beginning. His friends began borrowing the text, and her own friends and colleagues requested copies. Soon thereafter, the medical community took an interest in Dennett’s explanation. *The Sex Side of Life* was printed in *The Medical Review of Reviews*, alongside a glowing editorial review, in February 1918. Dennett began producing the text in pamphlet form. Copies were distributed by the YMCA, a chief purveyor of social hygiene literature, and used for instruction in the Union Theological Seminary and the Bronxville, New York public schools.

Despite the warm response to Dennett’s pamphlet in educational and social science circles,\(^\text{121}\) circulation of the pamphlet was beset by legal difficulties. In 1922, Postmaster General Work declared *The Sex Side of Life* obscene and unmailable. Three years later, a second postmaster agreed and upheld the ban. Notwithstanding Dennett’s repeated requests, the postal service refused to identify the offending characteristics or passages of the pamphlet.\(^\text{122}\)

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\(^{119}\) See note 239 and corresponding text.

\(^{120}\) Lewis Gannett, “Books and Other Things,” *New York Herald-Tribune*, 20 March 1930.

\(^{121}\) At her sentencing hearing, Dennett told Judge Burrows that the “total number of adverse criticisms which [she had] received by letter [had] been less than a dozen in eleven years, and all of those criticisms were purely of an academic character.” Sentencing Hearing, Trial Transcript, Second Circuit Case File 10712, United States Court of Appeals for the Second Circuit, in National Archives and Records Administration Northeast Region, New York, New York (hereafter NARA Northeast Region), Record Group 276, 97.

\(^{122}\) In June 1925, Edgar Blessing, Solicitor of the Post Office Department, confirmed that Dennett’s pamphlet contained matter forbidden admission to the mails by Section 211 of the United States Penal Code but refused to
solicited letters from senators and other prominent individuals in an effort to convince the postal service to reconsider the ban, but the campaign was unsuccessful.  Dennett believed her pamphlet was targeted in retaliation for her outspoken criticism of postal censorship practices, and she was outraged.

After trying to reason with the postal authorities, Dennett began to consider her other options. Newspaper accounts, to make her a more sympathetic defendant, would later portray Dennett as a matronly grandmother who had been dragged into a humiliating judicial entanglement against her will. In fact, many journalists quite consciously constructed Dennett as an unassuming figure, over Dennett’s own objections. According to most reports, Dennett’s only ambitions were to educate her children and to help other mothers do the same; they painted the outspoken feminist as an appropriately modest woman, the unwitting victim of a ruthless legal assault. Dennett, however, resented this characterization. It was true that she was shy of publicity, and while her case was pending, she turned down all but one of the many speaking invitations she received. But Dennett, at fifty-three and in robust health, had always taken a much more calculated and proactive approach to the law, and her own case was no exception.

indicate in writing which passages he considered objectionable. Edgar M. Blessing to Mary Ware Dennett, 13 June 1925, Dennett Papers, reel 22, file 463.

See, e.g., Mary Ware Dennett to Senator William E. Borah, 9 April 1925, Dennett Papers, reel 20, file 415; Mary Ware Dennett to Senator George Norris, 7 April 1925, Dennett Papers, reel 22, file 463.

Mary Ware Dennett to Florence Garvin, 17 August 1929, Dennett Papers, reel 21, file 436.

In the New York Times, Dennett urged the press to “mention the public work [she had] done during the last thirty years rather than to stress the individual facts of private life.” Mary Ware Dennett, “Mrs. Dennett Expects” (letter to the editor), New York Times, 3 May 1929. Though Dennett preferred to emphasize her accomplishments and public work, the newspapers refused to budge, since the fact that Dennett was a grandmother “carried great weight with the newspaper reading public.” W. P. Beazell (editor for The World) to Mary Ware Dennett, 1 May 1929, Dennett Papers, reel 21, file 456.

Many organizations asked Dennett to speak at their functions, panels, and symposia during 1929 and 1930, but Dennett refused virtually all invitations. Mary Ware Dennett to Vine McCasland and Myra Gallert, 1 March 1929, Dennett Papers, reel 21, file 438.

After meeting with Ernst, Dennett immediately wrote to him that despite her “very real dread of the publicity” she was ready—indeed, “heartily glad”—to have the case proceed. Mary Ware Dennett to Morris Ernst, 20 October 1928, Dennett Papers, reel 23, file 485.
Dennett was intimately familiar with her potential allies in the effort to end postal
censorship. After all, as secretary of the NCLB she had organized the 1918 conference on
“American Liberties in Wartime.” She had met or corresponded with most of the leaders of the
interwar civil liberties movement, and she counted as friends and acquaintances many of the
early board members of the ACLU.128 The challenge, as she well knew, was to convince her
former colleagues that sex education was part of the broader struggle for expressive freedom.

The ACLU and Obscenity

Although the ACLU professed to “make[] no distinction as to whose liberties it
defend[ed]” and to put “no limit on the principle of free speech,”129 this sweeping language was
misleading. Baldwin and his peers were adamantly opposed to the silencing of ideas, but they
were relatively untroubled by “moral” censorship and its implications for personal autonomy.130
The monthly ACLU bulletins reporting on the “civil liberty situation” occasionally included
blurbs on obscenity cases, but the organization rarely took an aggressive stand on such
prosecutions.131 Even as rampant artistic censorship in Boston rendered the city a laughing stock
in much of America, the ACLU remained largely aloof from the debate.

The censorship cases in which the organization did become involved almost invariably
pertained to political speech132 or to the prior restraint of expression, an issue with a very

128 For example, John Haynes Holmes served as a Vice President of the Voluntary Parenthood League.
130 Rabban, Forgotten Years, 311–12.
131 See, e.g., Report on the Civil Liberty Situation for Month of April 1926, ACLU Records and Publications, reel 1
(listing under the heading “freedom of the press” the acquittal in Boston of H. L. Mencken, the editor of the
American Mercury, for “obscene and indecent” content).
132 See, e.g., John S. Codman to Roger Baldwin, 4 November 1924, ACLU Papers, reel 37, vol. 260; ACLU Press
Release, 28 April 1927, ACLU Records and Publications, reel 1. Less commonly during this period, the ACLU
participated in religion cases. E.g., ACLU Bulletin No. 185, 9 February 1926, ACLU Records and Publications, reel
1.
established pedigree. The limits of this enterprise were conspicuous to prewar free speech activists. In correspondence between Theodore Schroeder and Baldwin in 1918, the former complained that the ACLU was narrowing the scope of civil liberties to the political, to the exclusion of “the more personal liberties which are being very much invaded.” Baldwin, unpersuaded, dismissed these issues as peripheral to “the wider political question which we are discussing.”

In the mid-1920s, however, a new minority within the ACLU began to argue that obscenity prosecutions were of considerable public importance and ought to receive more attention from the organization. The two most prominent voices for expansion were Arthur Garfield Hays and Morris Ernst, who were appointed general counsels during this transitional period. As contemporaries of their ACLU colleagues (almost all of whom were born in the 1880s and came of age during the progressive era), Hays and Ernst endorsed protective labor laws and distrusted judicial oversight in the economic realm. And yet, they were uneasy about state interference with personal conduct and beliefs. They defended free speech not because they thought it the surest way of securing radical economic change, or even of finding political truth,

133 Chafee, The Censorship in Boston, argued that prior restraint was untenable because it afforded too much discretion to individual government agents. The pamphlet was written by Baldwin but attributed to Chafee. Walker, American Liberties, 83.
134 Theodore Schroeder to Roger Baldwin, 27 November 1917, ACLU Papers, reel 1, vol. 3. Schroeder mentioned such issues as Sunday regulations, the appropriation of public funds to religious institutions, the suppression of secularists and free thought lecturers, biblical instruction in public schools, the exemption of church property from taxation, compulsory medical licensing, optometry regulation, anti-liquor and anti-tobacco laws, and laws regulating women’s propriety and behavior. Theodore Schroeder to Roger Baldwin, 4 December 1917, ACLU Papers, reel 1, vol. 3.
135 Roger Baldwin to Theodore Schroeder, 7 December 1917, ACLU Papers, reel 1, vol. 3.
136 ACLU Bulletin 325, 18 October 1928, ACLU Papers, reel 1; ACLU Bulletin 391, 14 February 1930, ACLU Records and Publications, reel 2. In 1926, Baldwin invited Ernst to act as the organization’s chief counsel, but Ernst preferred to serve in an informal capacity until his appointment as associate general counsel in 1930. Roger Baldwin to Morris Ernst, 13 March 1926, Ernst Papers, box 399, folder 3.
137 John Haynes Holmes was born in 1879; Hays in 1881; Frankfurter in 1882; Scott Nearing in 1883; Baldwin, John Nevin Sayre, and Norman Thomas in 1884; Albert DeSilver and Ernst in 1888; Elizabeth Gurley Flynn in 1890. A few members of the early leadership, including L. Hollingsworth Wood (born 1873) and Henry R. Linville (born 1866) were born earlier.
but because they recognized how rapidly public morality (as well as political ideology) shifted. They were skeptical that any overarching truth was ascertainable by anyone, let alone the government.

Though they were cynical about the process of judicial decision-making, Ernst and Hays were lawyers. As such they tended to favor the courts as a venue for protecting civil liberties. Moreover, both maintained successful private law practices and regularly defended periodicals and publishing houses against obscenity charges. In these private censorship matters, they based their legal strategies on the long-term interests of their clients. And their clients, though fully conversant in the language of “public good” and community enrichment, were unenthusiastic about submitting their investments to government review. They knew that respectability conferred certain advantages, but the costs of confiscation and prosecution far outweighed the benefits of official approval. Keeping the state out was best for the bottom line.

Relatively speaking, then, Ernst and Hays stood out as liberal individualists in a circle of reformers and radical activists. Moreover, as Jews in an overwhelmingly Protestant movement, they came to the ACLU from different backgrounds and with different values. By 1928, both were vocal opponents of censorship. In 1926, Hays had represented H. L. Mencken, 

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138 Only three of twenty executive committee members were lawyers in 1920. Walker, *American Liberties*, 69.
139 As was customary during this period, see, e.g., Gordon, “Legal Profession,” 319–20, both Hays and Ernst maintained lucrative private law practices in addition to their civil liberties work. Over the next decade, as the ACLU professionalized and increasingly focused on legal work, the national office (but not the local affiliates) began to employ fulltime attorneys. See generally Kutulas, *Modern Liberalism*.
140 In October 1928, Arthur Garfield Hays debated the question “Is Liberalism a Menace” at the Ford Hall Forum. He argued that liberalism was the way forward and that radicalism was an ill-advised theory. Circular, Dennett Papers, reel 22, file 477.
editor of the *American Mercury*, in his notorious battle with Boston’s Watch and Ward Society, and he was celebrated as a hero in the Boston anti-censorship campaign. Meanwhile, Ernst was fighting censorship through multiple channels. In 1926, he testified before the Senate Committee of Interstate Commerce against the Dill Bill to restrict broadcasting. He advocated the free use of radio for the expression of public opinion, cautioning that “[o]nce the country has become accustomed to censorship of broadcasting, it is but an easy step to the censorship of newspapers.” And while he was certainly concerned about the suppression of political speech, he was eager to protect artistic expression as well. In 1927, Ernst unsuccessfully defended John Herrmann’s *What Happens*, an unremarkable book containing an apparently objectionable profanity, before a New York jury. In the wake of the defeat, he undertook a systemic study of obscenity censorship in America. His 1928 book, *To the Pure: A Study of Obscenity and the Censor*, co-authored with William Seagle, was a scathing critique of the obscenity laws.

Notwithstanding their opposition to the vice societies, Ernst and Hays tended to separate their service to the ACLU from their private (and usually remunerative) anti-censorship work. By the late 1920s, however—just as Ernst and Hays were gaining influence within ACLU—the organization’s agenda was in flux. After several years of largely haphazard expansion in its
activities, the ACLU leadership lacked the clarity of its early vision, and a revised statement of its principles and commitments was in order. Meanwhile, the mounting success of civil liberties claims in the courts commended litigation as a strategy for reform and afforded a new measure of power to the organization's lawyers. In November 1928, Ernst proposed to the National Committee the expansion of the ACLU's activity to include censorship of the movies and talkies, and the committee approved the addition.148 Yet, as late as 1929, the organization stated that while it opposed advance censorship of any kind, prosecution of a published work was not a civil liberties concern. Despite their public position, however, many ACLU members had begun to reassess their views on this issue.

In February 1929, Roger Baldwin, on behalf of the executive committee, urged a formal clarification and extension of the organization's objectives. Baldwin reminded members of the national committee that "the policy of the American Civil Liberties Union since its foundation has been to protect the civil liberties described as 'freedom of speech, press, and assemblage'..." But these rights, he emphasized, were not the only ones protected by the state and federal constitutions. The letter laid out several avenues for expansion, ranging from civil rights and criminal defense to opposition to the draft and American imperialism. Among its various proposals was opposition to the censorship of books, plays, radio, and movies, though the committee likely intended to curb political censorship rather than foster artistic freedom. The members of the National Committee were open to some changes and hostile to others. Baldwin received a flood of letters opposing the ACLU's expansion into fields not previously addressed. In fact, Baldwin insisted that "the best way to control...downright obscenity is by criminal prosecution" after the fact.149

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The ACLU leadership lacked the clarity of its early vision, and a revised statement of its principles and commitments was in order. Meanwhile, the mounting success of civil liberties claims in the courts commended litigation as a strategy for reform and afforded a new measure of power to the organization's lawyers. In November 1928, Ernst proposed to the National Committee the expansion of the ACLU's activity to include censorship of the movies and talkies, and the committee approved the addition. Yet, as late as 1929, the organization stated that while it opposed advance censorship of any kind, prosecution of a published work was not a civil liberties concern. Despite their public position, however, many ACLU members had begun to reassess their views on this issue.

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directly associated with freedom of speech and press. In response to this criticism, the Executive Committee promised not to take on such issues as the rights of criminal defendants, civil liberties in areas under American military control, or the validity of the draft ("as a violation of liberty of conscience, instead of as now, opposition only to interference with agitation against it"151). A few members of the National Committee, including labor activist and University of Chicago settlement house director Mary McDowell, opposed any new involvement in censorship work.152 Most, however, supported or at least accepted the ACLU’s recommendations with respect to censorship.

A letter to Baldwin from Harvard Law professor and future Supreme Court justice Felix Frankfurter cogently expressed concerns shared by much of the National Committee.153 Frankfurter argued against diluting the ACLU’s message and spreading its resources too thin. He explained: “I am emphatically for a restriction of the Union to the protection of freedom of speech, press and assembly, and equally emphatically against assuming responsibility for the protection of negroes, the promotion of pacific ideals, the resistance of economic penetration in Latin-America, etc., etc., etc., except in so far as activities or opinions in regard to the foregoing or any other item, like birth control, raise questions of freedom of speech, press, and assembly.”154 Frankfurter wanted the ACLU to be interested in such issues as civil rights, pacifism, internationalism, and birth control only to the extent that they implicated the freedom to espouse those causes. He reasoned: “[I]t is one thing to ‘back up’ local groups that seek to gain a hearing for birth control; it is a totally different thing to ‘back up’ that local group in

151 Roger Baldwin to the National Committee, 5 April 1929, ACLU Papers, reel 63, vol. 360.
152 In response to McDowell’s letter, Baldwin sought to frame the censorship provision as a clarification rather than expansion of the ACLU’s position on censorship. Roger Baldwin to Mary E. McDowell, 25 February 1929, ACLU Papers, reel 63, vol. 360.
154 Ibid. (emphasis in original).
securing birth control legislation. The former is the Union’s essential concern; the latter is none of the Union’s business.\footnote{Felix Frankfurter to Roger Baldwin, 1 March 1929, ACLU Papers, reel 63, vol. 360.}

Like an increasing contingent of civil libertarians, Frankfurter was ready to defend speech regardless of its viewpoint. But he had a particular kind of speech in mind—namely, speech advocating political or economic change, or access to the democratic process. As a veteran of the post-World War I civil liberties movement, that is what “free speech” meant to him and to the majority of his colleagues. A more libertarian position on artistic censorship would require a major change in public values as well as the law. That change found an unexpected form in United States v. Dennett.

United States v. Dennett

In 1926, Dennett proposed a legal challenge of the Comstock laws to Arthur Garfield Hays. She hoped a court might be persuaded to enjoin the postal service from censoring The Sex Side of Life. Hays was sympathetic to the project, but he thought their chances slim and counseled Dennett to wait for a more opportune moment.\footnote{Arthur Garfield Hays to Mary Ware Dennett, 21 May 1926, Dennett Papers, reel 21, file 441.} The problem, he explained, was the standard of review. A court would declare the postal ruling invalid only if it was “arbitrary and wholly without foundation”—a decidedly difficult hurdle. Dennett’s pamphlet was explicit in its description of sex, and if a court considered its propriety subject to debate, it would uphold the ban.\footnote{Dennett continued to write to Hays periodically for over a year. In October 1927, Hays finally, frankly advised her that “there would be very little chance of obtaining an injunction,” and she let the matter drop. Arthur Garfield Hays to Mary Ware Dennett, 4 October 1927, Dennett Papers, reel 21, file 441.} In other words, in the mid-1920s, postal suppression of Dennett’s pamphlet was so clearly lawful that a renowned civil liberties attorney considered it imprudent to bring a test case.
No court was likely to consider the censorship inappropriate, let alone declare it contrary to legislative intent or, even more radically, unconstitutional.

Two years later, however, Dennett had better luck. When Morris Ernst published an article attacking censorship, she wrote to him about her plight. Responding to her overture, Ernst told her that he had followed her work for years and asked whether she had “ever considered testing out the legality of the pamphlet in the courts.” Dennett was forthright about Hays’s discouraging advice. Nonetheless, after some initial hesitance, Ernst enthusiastically devoted himself to Dennett’s case, and he promptly began exploring possibilities for getting *The Sex Side of Life* into court.

Postal authorities beat Ernst and Dennett to the punch. Despite the postal ban, a resolute Dennett had continued to send her pamphlet through the mail in sealed envelopes throughout the 1920s. The postal service quietly tolerated her defiance until 1928. In that year, however, in purported response to a complaint by members of the Daughters of the American Revolution, the Post Office Department ordered *The Sex Side of Life* from Dennett under a fictitious identity. Dennett obligingly mailed out a copy of the pamphlet. Soon thereafter, in December 1928, she was indicted under the Comstock law in the Federal District Court sitting in Brooklyn, the jurisdiction in which her Astoria, Queens home was located. Dennett faced a maximum sentence of five years in prison or a five thousand dollar fine or both.

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158 Morris Ernst to Mary Ware Dennett, 30 August 1928, Dennett Papers, reel 23, file 485.
159 Mary Ware Dennett to Morris Ernst, 1 September 1928, Dennett Papers, reel 23, file 485.
160 The postal service was legally prohibited from opening sealed envelopes. Even during the litigation, Dennett never stopped circulating the pamphlet, though she did so by express. “Author of Sex Guide Wins Plea,” *Los Angeles Times*, 4 March 1930.
161 American Civil Liberties Union, *The Prosecution of Mary Ware Dennett for “Obscenity”: Who Determines Obscenity* (New York: American Civil Liberties Union, June 1929), in Dennett Papers, reel 23, file 481.
162 The fact that *Dennett* was litigated as a criminal matter helped her case immensely. Ernst, however, was disappointed that he would not be able to seek an injunction as he had hoped. Mary Ware Dennett to Vine McCasland and Myra Gallert, 1 March 1929, Dennett Papers, reel 21, file 438.
represent her (he donated his time at both the trial and appellate levels\textsuperscript{164}), and he convinced the ACLU to sign on as well.

When the ACLU agreed to sponsor Dennett’s case, no one on the Executive Committee was advocating a full-scale assault on the obscenity laws. Rather, still reeling from their divisive role in the \textit{Scopes} trial, they saw Dennett’s prosecution as another opportunity to defend a contentious contribution to modern science from the censorial reach of old-fashioned moralists—this time, they hoped, without triggering public resentment.\textsuperscript{165} According to ACLU literature, \textit{The Sex Side of Life} contributed to an important public discussion about sexual hygiene and sexual relations within marriage. No one, they insisted, actually thought the pamphlet was “obscene” in any legitimate sense of the word; squeamish, if not vindictive, authorities were using the obscenity laws to quell discussion on an important but uncomfortable social issue.

Ernst’s strategy in the District Court was consistent with the ACLU’s expectations. His first act as Dennett’s attorney, in January 1929, was to file a motion to quash her indictment. That is, he asked Grover M. Moscowitz, the presiding judge, to rule that \textit{The Sex Side of Life} was not obscene as a matter of law. To do so, he sought to portray the pamphlet as an irreproachable example of good, clean sex education—in the words of one of its medical endorsers, as “[t]he simplest, sweetest, and most direct treatment of the subject”\textsuperscript{166} ever produced. Adolescents,

\textsuperscript{164} Executive Committee Minutes, 29 April 1929, ACLU Records and Publications, reel 2. Ernst insisted on representing Dennett without compensation, despite her reluctance to accept charity. In January 1929, Dennett accepted ACLU sponsorship of the appeal “[o]n the basis that this sort of a fight does involve more than the victim’s welfare.” Mary Ware Dennett to Vine McCasland, 1 March 1929, Dennett Papers, reel 21, file 438. Meanwhile, an “unknown Cambridge woman,” Frances W. Emerson, sent Dennett one thousand dollars, essentially bankrolling her for the duration of the defense. Mary Ware Dennett to Family, 8 May 1929, Dennett Papers, reel 21, file 433. Emerson—who was married to William Emerson, the Dean of Architecture at M.I.T. (where Dennett’s ex-husband, also an architect, had once studied)—was an active philanthropist and was eager to assist in Dennett’s case. When she became aware of Dennett’s financial difficulties, she asked her to “keep [her] check for [her] own personal expenses.” Frances W. Emerson to Mary Ware Dennett, 20 May 1929, Dennett Papers, reel 20, file 431.

\textsuperscript{165} Ernst repeatedly compared Dennett’s case to the \textit{Scopes} trial. Mary Ware Dennett to Rae Morris, 9 May 1929, Dennett Papers, reel 21, file 449.

\textsuperscript{166} Memorandum in support of motion to quash indictment, NARA Northeast Region, Record Group 276, 8.
Ernst suggested, are not satisfied with cryptic allusions, and when no appropriate literature exists, they rely on the “filthy misinformation of the streets, the dirty words chalked upon signboards and the obscene gossip of other children.”167 By contrast, the truth, unadorned and respectful, was not obscene.

Ernst also urged the court to consider the motives and circumstances of publication.168 Dennett’s rationale for producing the pamphlet—her belief that existing sex education literature was inadequate because it did not grapple with the physical, moral or emotional implications of sex—was, according to Ernst, “in complete accord with modern scientific thought.” The fact that Dennett produced the pamphlet “as an unselfish social service,”169 rather than to make money, confirmed that her motives were pure.170

In short, rather than challenge the existing definition of obscenity, Ernst argued that *The Sex Side of Life* was safely outside its realm. The pamphlet, he insisted, “is neither smut nor pornography. There is not a dirty word or a dirty thought in it.”171 His memorandum to quash the indictment quoted at length from a pamphlet produced by the New York State Department of Health describing a need for comprehensive sex education materials of precisely the kind Dennett had produced.172

In the face of Ernst’s argument, Judge Moscowitz felt inadequate to the task of assessing the pamphlet’s character. He therefore proposed an open hearing at which representatives from both sides would express their opinions of the pamphlet. And he called three members of the clergy—a Catholic priest, a Protestant minister, and a Jewish rabbi—to join him on the bench.

167 Ibid.
168 Ibid., 4.
169 Ibid.
170 In reality, Dennett always had her precarious financial situation in mind. When the *Medical Review of Reviews*, a professional journal, offered to publish the essay, she expressed reluctance to publish without compensation.
171 Ibid., 8.
172 Appellant’s Second Circuit Brief, Dennett Papers, reel 23, file 490, 34.
during arguments and to “aid the conscience of the court on the matter.”

All of this may sound like the setup for a joke. And indeed, the exaggerated rhetoric of the prosecuting attorney, United States District Attorney James E. Wilkinson, seems comical in retrospect. Wilkinson denounced “The Sex Side of Life” as “pure and simple smut.” “If I can stand between this woman and the children of the land,” he proclaimed in court, “I will have accomplished something.”

To Moscowitz, however, the issues were serious. Although he privately believed that Dennett’s pamphlet was not obscene, he did not feel comfortable deciding the issue without submitting it to a jury. To make matters worse, Moscowitz was facing legal difficulties of his own—charges of misconduct in an unrelated matter—and he feared the publicity that might attend a decision either way in the highly publicized Dennett case. As it turned out, Moscowitz never made use of his clerical guests; instead, he permitted the parties to submit written statements. Ernst chose a representative sample from the scores of endorsements the pamphlet had received, and Wilkinson submitted a collection of letters solicited in opposition. Even then the decision was too much for Moscowitz, and he delayed the trial yet again. After a series of postponements, he simply punted. With apologies, he convinced Ernst to have the case transferred. Ernst thereupon withdrew his motion to quash the indictment and filed a

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173 ACLU, Prosecution of Mary Ware Dennett, 5.
174 Ibid., 6.
175 Ibid. An article in the Nation said of Wilkinson, “He learned his fundamentalism in Georgia where he was born.” Dudley Nichols, “Sex and the Law,” Nation, 8 May 1929, 552.
176 Moscowitz told Ernst that had he retained the case, he would have sent it to the jury, but “if he had been on the jury he would have voted for acquittal.” Mary Ware Dennett to Vine McCasland and Myra Gallert, 13 March 1929, Dennett Papers, reel 21, file 438.
177 Moscowitz canceled the hearing at the last minute on the grounds that the witnesses would unduly influence the jury. ACLU, Prosecution of Mary Ware Dennett, 6. After Dennett’s conviction, Wilkinson claimed in argument before Judge Burrows that all three of the clergy members consulted by Judge Moscowitz had privately considered the pamphlet inappropriate. Motion to Set Aside the Verdict, Trial Transcript, NARA Northeast Region, Record Group 276, 93.
178 Dennett confided to her close friends that Moskowitz feared a favorable decision in her case would be used against him by his “enemies” and “practically beg[ged]” Ernst to have the case transferred to another judge. Mary
demurrer instead, which brought the matter before another judge, Marcus B. Campbell. Judge Campbell heard argument from Ernst and Wilkinson on the demurrer, which he denied. He then reassigned the case on the theory that Ernst would no longer want him to preside over the matter.

Dennett’s case finally went to trial April 1929, before Judge Warren B. Burrows. The only evidence submitted to the jury, despite Ernst’s best efforts, was the pamphlet itself. Burrows excluded all evidence of Dennett’s motives as well as the approval of the pamphlet by educators and physicians.179 The all-male jury returned a guilty verdict in under an hour.180 Dennett was fined three thousand dollars, but she refused to pay and declared that she would serve out her prison term instead.181 Ernst promptly filed an appeal.

Although Ernst’s strategy did not avail Dennett in the District Court, he was optimistic about persuading the appellate judges to reverse her conviction. He hoped that public outrage over the lower court’s decision would carry weight on the appellate level. He devoted the bulk of the brief to arguing that the District Court improperly excluded evidence of Dennett’s

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179 ACLU, Prosecution of Mary Ware Dennett, 4.
180 Several explanations were offered for the jury’s behavior, which seemed so inconsistent with public opinion. First, and most important, outside assessments of the pamphlet were kept from the jury. Secondly, potential jurors were excluded if they were familiar with sex education literature. Dudley Nichols, in his article for The Nation, offered a third possible explanation: “mankind’s universal sex fears.” Nichols, “Sex and the Law,” 554. The sex composition of the jury was also notable. As women were ineligible to serve on juries in New York until 1937, Linda K. Kerber, No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship (New York: Hill and Wang, 1998), 142, all twelve members of the jury in Dennett’s case were men. Influenced perhaps by their verdict, Ernst became a strong advocate of gender inclusion in the jury system. In a 1931 article, he explained: “In the final analysis law is nothing more [or] less than the expression of the wishes, the customs and the modes of the people. With the jury composed only of men the jury system must fail because it represents only one-half of the population.” “Take Your Choice—Should Women Serve on Juries?” New York American, 15 June 1931.
181 Dennett was willing to serve time in prison to help the anti-censorship cause. Mary Ware Dennett to family, 8 May 1929, Dennett Papers, reel 21, file 433. Because the appeal was successful, however, she was never imprisoned.
motivations and of the pamphlet’s positive reception, and that the case should never have gone to trial.\textsuperscript{182}

But he also made a series of powerful substantive claims about the Comstock Act that moved beyond his arguments at trial. First, he argued that \textit{The Sex Side of Life} did not fall within the category of obscenity as it \textit{ought} to be defined. In his brief, Ernst traced the history of obscenity in the law and argued that the “essence of the crime is sexual impurity, not sex itself.”\textsuperscript{183} A publication like Dennett’s, which neither was impure nor “pander[ed] to the prurient taste,” was not properly within the meaning of the statute.

In this regard, Ernst’s rhetorical task was to portray \textit{The Sex Side of Life} as an “honest presentation of sex facts,” firmly planted in an educational mission. He was at pains to distinguish the pamphlet from those modes of speech deemed subject to regulation in the past: “lurid literature and advertisements distributed by quacks to beguile the public into buying worthless nostrums” (that is, the information on birth control that had once been grist for the Comstock mill), “violent attack[s] on religion or religious customs,” “defense[s] of illegitimacy or moral laxity,” and “forthright pornography.” And Dennett’s book was indeed a departure from these earlier forms of sexualized literature, some informative, some prurient.

Ernst also made a bolder argument on appeal: he claimed that the Comstock Law was unconstitutional. He argued first that the federal government had exceeded its authority in propagating the statute—that control over people’s morality had never been relinquished to it. He cautioned that if the obscenity law were deemed constitutional, the government would be empowered to enforce a federal moral standard that might directly conflict with the local

\textsuperscript{182} Ernst also presented a technical deficiency (insufficiency of indictment), but he urged the court to decide the case on the merits rather than relying on “legalistic grounds.” The fact that the judges complied suggests that they wanted to reach the merits of the case. Appellant’s Second Circuit Brief, 40–42.
\textsuperscript{183} Ibid., 12 (italics in original).
standards of the various states, to which such decisions were entrusted. But Ernst, unlike the historical predecessors he cited, did not merely suggest that the statute fell outside the federal power to control the post roads under Article I, Section 8 of the Constitution. He also argued that it flatly contravened the First Amendment to the Constitution of the United States.

Ernst was not naïve about his chances. The ACLU had written off constitutional argument in a 1928 bulletin describing its position on obscenity. “There is no longer any doubt that so-called obscene publications are not protected by the federal constitution,” it reported with apparent resignation. The Supreme Court had ruled in *Ex parte Jackson* that the First Amendment did not apply to the mails, and it had given no indication that it was about to change its mind. Indeed, Ernst conceded that obscenity statutes had been repeatedly deemed constitutional by the federal courts. He nonetheless contended that changing public mores warranted reconsideration of the issue. Most important, he sought to extend the powerful rhetoric of Justice Holmes and Brandeis’s dissents in the Supreme Court’s recent First Amendment cases, which dealt with political speech, to the obscenity cases. For example, he quoted from Justice Holmes’s dissenting opinion in *United States v. Schwimmer*: “if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.”

In 1930, the vast majority of what today falls within the scope of the First Amendment was beyond its purview. Even in the realm of political speech, few interwar free speech

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184 Ibid., 51–52.
185 Ibid., 9, 52.
187 *Ex Parte Jackson*, 96 U.S. 727 (1877).
188 Memorandum in support of motion to quash indictment, 53.
advocates believed that the Founders had anticipated and enshrined in the Constitution a robust vision of freedom of expression. Rather, ACLU attorneys sought consciously to write free speech into the First Amendment. Law, to these legal realists, was not a vehicle for protecting natural rights. It was a political tool. And while Ernst’s First Amendment argument was predictably unavailing, the fact that he made it at all reflects a sense of new possibility. He argued that the Comstock Law was unconstitutional because he believed there was a fighting chance that the Second Circuit would agree.

Judge Augustus N. Hand, writing on behalf of a three-judge panel, accepted the spirit of Ernst’s argument if not its implications. Hand insisted that there could be no doubt about the constitutionality of the statute, but he nonetheless reversed Dennett’s conviction on the basis that The Sex Side of Life was not obscene. The decision implicitly modified the test adopted by the Supreme Court fifty years earlier in United States v. Bennett. In Bennett, the defendant had been convicted of mailing a pamphlet advocating the legalization of prostitution. Judge Samuel Blatchford affirmed the District Court’s application of the “Hicklin test,” named for the 1868 British case, Regina v. Hicklin, from which it was derived. In that case, Lord Chief Justice Cockburn had inquired “whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a

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190 Morris Ernst conveyed this idea in a letter: “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. 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.” Morris Ernst to Heywood Broun, 21 May 1935, Ernst Papers, box 8, folder 2.

191 The other judges were Judges Thomas W. Swan and Harrie B. Chase.

192 United States v. Bennett, 16 Blatch. 338 (1879).
publication of this sort may fall.”

Under the *Hicklin* test, a work could be judged obscene on the basis of a single passage that would corrupt youth, the most susceptible of audiences.

Judge Hand’s opinion in *Dennett* was more permissive. A sex education pamphlet like Dennett’s might have an “incidental tendency to arouse sex impulses,” he explained, but that effect was “apart from and subordinate to its main effect.” Any sex instruction might titillate some of its readers, but in Dennett’s case, this tendency “would seem to be outweighed by the elimination of ignorance, curiosity, and morbid fear.” A work must be judged in its entirety; an explicit passage in a truthful and socially constructive sex education pamphlet would not render the whole work obscene. In sum, the court held, “an accurate exposition of the relevant facts of the sex side of life in decent language and in manifestly serious and disinterested spirit cannot ordinarily be regarded as obscene.”

*Dennett* was decided as a matter of statutory interpretation. Modest in its reasoning, it left the Comstock Act more or less intact. And yet, it signaled the end of judicial deference to postal censorship. Judge Hand’s opinion meant that judges would henceforth subject administrative determinations of obscenity to genuine examination. Moreover, it acknowledged for the first time that sexual matters were not always or necessarily destructive of social values. Indeed, its basic recognition of a public interest in sex laid the groundwork for the Supreme Court’s mid-century extension of First Amendment protection to sexually explicit speech.

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194 The *Hicklin* decision was motivated by concerns about the corruption of youth, and it defined as obscene any material that would elicit in “the young of either sex . . . thoughts of a most impure and libidinous character.” Ibid. It is ironic that the Second Circuit chose to abandon this emphasis in the *Dennett* case, which involved a pamphlet explicitly addressed to “young people.”
195 United States v. Dennett, 39 F.2d 564, 569 (2nd Cir. 1930). The ACLU announced the reversal of Dennett’s conviction in ACLU Bulletin 394, 6 March 1930, ACLU Records and Publications, reel 2.
196 In *Roth v. United States*, 354 U.S. 476, 487 (1957), Justice Brennan wrote on behalf of a six-justice majority of the Supreme Court that “[t]he portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.” Sex, he explained, “is one of the vital problems of human interest and public concern.” He then went on to reject the *Hicklin* test as an
Despite her relief, Dennett refrained from celebrating for a several days while the government decided whether to appeal the case to the Supreme Court. The United States Attorney filed a request to do so, but the Solicitor General, Thomas T. Thacher, decided to let the Second Circuit’s decision stand. According to Thacher, *Dennett* was a mere factual dispute unworthy of consideration by the Supreme Court. In reality, of course, the Second Circuit’s decision effected a very real change in the law of obscenity. But public opposition to the case, along with the possibility of an adverse judgment in the Supreme Court, no doubt dissuaded Thacher from pursuing the issue.

A few years after *Dennett*, Morris Ernst would declare: “The decisions of the courts have nothing to do with justice. . . . [T]he point of view of the judge derives from the pressure of public opinion.” While Ernst’s claim is an oversimplification, it rang true in the *Dennett* case. Many prominent men and women, along with myriad organizations and members of the clergy, had rallied to Dennett’s defense. Indeed, in her letters to her family, Dennett described an abridgement of First Amendment freedoms and to adopt the modified common law test—“whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest”—as the new constitutional standard. Ibid., 489. Gerald Gunther described a similarly delayed constitutionalization of statutory interpretation in the context of Learned Hand’s “direct incitement” test in the *Masses* case.


Draft of Interview between Thomas Stix and Morris Ernst, 23 January 1935, Ernst Papers, box 11, folder 3. In the *Married Love* case, which was patterned on *Dennett* and litigated the following year, Ernst’s office circulated requests for letters of support, explaining: “In the numerous obscenity cases which we have handled, we have found the opinions of representative citizens in the community most helpful in influencing the courts to arrive at common sense decisions. We have always maintained that obscenity, in the last analysis, is measured not by the application of a statute, but by public opinion and that public opinion could best be crystallized in getting the opinions of representative persons in the community.” Alexander Lindey to Messrs. G. P. Putnam’s Sons, 24 September 1930, Ernst Papers, box 359, folder 1.

“Mrs. Dennett Freed in Sex Booklet Case,” *New York Times*, 4 March 1930. Private congratulations poured in. See, e.g., B. W. Huebsch to Mary Ware Dennett, 3 March 1930, Dennett Papers, reel 20, file 423; telegram from Rupert Hughes (historian and screenwriter) to Mary Ware Dennett, 3 March 1930, Dennett Papers, reel 20, file 423. John Dewey, who chaired the Defense Committee for some time, wrote: “I don’t know when I have had such a spontaneous outburst of elation. I feel as if I had been let out of jail myself.” John Dewey to Mary Ware Dennett, 3 March 1930, Dennett Papers, reel 20, file 423.
outpouring of assistance and encouragement from all reaches of society. “The support for the case is rolling up till it looks like a mountain range,” she reported. Aid was forthcoming from organizations as well as private citizens. The New Republic donated its back cover to the Defense Committee. Associations and universities issued official statements on Dennett’s behalf. Old friends and colleagues from Dennett’s suffrage and Voluntary Parenthood League days—including muckraker Ida Tarbell—reestablished correspondence and offered to help, and hundreds of strangers sent letters, donations, and orders for The Sex Side of Life. Dennett was most touched by the support she received from ordinary people, including an Italian worker, whose letter Dennett had translated by a neighbor, and a “colored” man who offered to serve Dennett’s sentence in her stead.

When the decision was announced, newspapers throughout the country ridiculed the prosecution and congratulated Dennett on her victory. Journalistic support may have been particularly enthusiastic given the financial and editorial interests at stake. One might suppose, for example, that Roy Howard agreed to chair the Dennett Defense Committee because the prospect of leniency in the obscenity laws appealed to his business sense as well as his aesthetic sensibilities. But whatever the underlying motivation, coverage of the Second Circuit decision was unqualifiedly exuberant. The Kansas City Star considered it “preposterous that [Dennett]
should have been put to trial." The World called the reversal of Dennett’s conviction “a denial of the archaic idea on which this prosecution rested and which threatened free thought so seriously,” a decision “manifestly of the first importance.” Lewis Gannett of the Tribune labeled Dennett “an historic case, a landmark in the history of America’s attitude toward sex,” and he hailed the court’s decision as a clarion call for broader reform.

The ACLU was effusive, calling the Second Circuit’s decision “an outstanding victory for free speech” that would dissuade the government from bringing future prosecutions. Dennett too was gratified by the outcome. Ernst, however, was less sanguine. Certainly, he was pleased by Judge Hand’s opinion and its vindication of The Sex Side of Life. He nonetheless regretted that the decision did not undermine postal censorship more broadly.

In this context, a final point about Ernst’s litigation strategy bears mentioning. It is a prerogative of the lawyer to argue in the alternative—to set out multiple and even inconsistent theories according to which a court might reach a decision for the litigant. In the Dennett case, Ernst did precisely that. The Second Circuit reversed Dennett’s conviction not because The Sex Side of Life expressed the author’s imagination or because it evoked an intellectual response in the reader or even because it did no harm, but rather because it enhanced the public good. Though formulated a full decade after World War I, Ernst’s brief supplied the court with a progressive vision of First Amendment Law: “[I]f enlightenment and breadth of vision are necessary to social welfare; if it is right to try and banish ignorance from a realm of human study where taboos and truth-dodging have been definitely established as the causes of incalculable

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207 “Mrs. Dennett Vindicated,” World, 6 March 1930.
211 Ernst seems to have better appreciated the magnitude of the victory in retrospect, particularly when vice crusaders held it up as their principal obstacle to enforcement of censorship laws. Morris Ernst to Mary Ware Dennett, 31 December 1934, Dennett Papers, reel 20, file 414.
harm in the past, then the judgment of conviction must be set aside, and the defendant discharged.”

Ernst argued throughout the proceedings that Dennett’s pamphlet deserved protection because it was of substantial social value. This was a position that the Second Circuit proved willing to accept.

And yet Ernst also gestured, in conclusion to his brief, toward a bolder principle. “[E]ven if the pamphlet were not educational, even if it were utterly worthless,” he suggested, “the mere fact that it deals with sex would not bring it within the statute.” He clarified: “[T]o be obscene within the meaning of the law [the pamphlet] must be more than coarse, vulgar or indecent, more than scurrilous and vicious, more than indelicate and shocking to the sense of modesty of the community, more than offensive to the institutions, ideals and doctrinal conceptions of the people. It must be found to have a lewd, lascivious and obscene tendency calculated definitely to corrupt and undermine the minds and morals of the community.”

Put simply, Ernst argued that regardless of social worth, all expression should be permissible unless its principal purpose was to pollute public morals. In doing so, he urged the court to break from precedent and accept a radical new vision of free speech.

Ernst would litigate dozens of obscenity cases over the next decade, winning most of them. The early cases involved “wholesome” materials of the Dennett variety. Over time, however, Ernst became more ambitious. Still citing Dennett as a central precedent, he defended a body of literature and illustrations that verged increasingly on the pornographic. It is evident

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212 Appellant’s Second Circuit Brief, 15.
213 Ibid., 61.
214 He would later explain that the exclusion of “clearly” obscene language would result in “the censor winning all cases.” Morris Ernst to Roger Baldwin, 4 February 1938, ACLU Papers, reel 157, vol. 1081.
215 Books that Ernst successfully defended in the New York state courts include Radclyffe Hall’s Well of Loneliness, Arthur Schnitzler’s Casanova’s Homecoming, Hsi Men Ching, Clement Wood’s Flesh, Octave Mirbeau’s Celestine, Louis Charles Royer’s Let’s Go Naked, and Erskine Caldwell’s God’s Little Acre, among others.
216 Ernst and his associates continuously pushed the boundary of acceptability by portraying whatever book they were presently defending as the paragon of purity while referring to earlier works—which they themselves had
from Judge Hand’s decision that in 1930 the courts were not yet ready to accept this approach, which would have removed government from the business of deciding which ideas are good for society. Ernst, however, was ready to espouse it. And the Dennett case had made this new position possible, even before the Second Circuit’s decision was handed down.

The ACLU’s Campaign against Censorship

In histories of free speech, United States v. Dennett is generally cast (often in footnotes) as a pivotal precursor to United States v. Ulysses and the final demise of the Hicklin test. And indeed, as a doctrinal matter, Dennett did provide the basis for future decisions. But Dennett was more than a step along the way to the judicial protection of artistic expression. In the months after the Second Circuit’s decision, the ACLU capitalized on the popularity of the Dennett case to reevaluate and expand its position on censorship. The reformulation was not a matter of simple opportunism. Rather, the public conversation about censorship unleashed by Dennett’s conviction and subsequent vindication changed the way that the ACLU related to the law and politics of obscenity. Although it began as an education case in the mid-1920s mold, United States v. Dennett sparked a debate about whether censors could ever be trusted to advance the public good. The appeal and its aftermath strongly influenced the beliefs and tactics of influential civil libertarians, as well as their contributors and supporters. Within a few years of the Second Circuit’s decision, civil libertarians were aggressively advocating not only open sex education but also artistic freedom and even, in some cases, birth control.

United States v. Dennett marked a turning point in the intellectual trajectory of the ACLU and, more broadly, in American understandings of and relationships to civil liberties. There is no doubt that extrinsic developments, from the cultural experimentalism of the Roaring Twenties to the compelling rhetoric of Holmes and Brandeis’ First Amendment dissents, influenced the course of events. The ACLU appointed Ernst and Hays as general counsel in the late 1920s because free speech was becoming an increasingly liberal and lawyerly affair. Ernst, for his part, was moving toward a theory of expressive autonomy well before Mary Ware Dennett sought his services. He was resistant to morals regulations from the start, and the professional and financial pressures of his private law practice were nudging him ever more forcefully in that direction. The circumstances of Dennett’s prosecution were, however, particularly well suited to Ernst’s needs. Ernst was acutely aware that an unfavorable legal posture or an unsympathetic defendant could undermine the soundest of litigation strategies. He knew that a public relations defeat for the ACLU would be costly for the organization; if it happened on his watch, it threatened to shift internal authority to the board’s progressive holdouts. Dennett was Ernst’s opportunity to bring together the tolerance of dissent and the freedom from sexual squeamishness under a single civil liberties banner.

In a period when government regulation of private life seemed increasingly trivial, ineffectual, and ill advised, the defense of sex education was a singularly persuasive cause. A constellation of factors made Dennett a landmark event in the history of civil liberties, ranging from popular support for the case and the financial contributions it generated to Ernst’s newfound confidence in strategic litigation. The very fact of winning in United States v. Dennett made a broader agenda seem possible.

218 See note 277 and accompanying text.
As an organizational and institutional matter, Dennett’s ordeal was instrumental in expanding the ACLU’s position on censorship. The Executive Committee officially offered Dennett the organization’s support in January 1929. In April of that year, the board constituted “The Mary Ware Dennett Defense Committee,” which was to include educational, religious, and scientific leaders from across the country and drum up public support for Dennett’s cause. In early November, the Defense Committee (headed by John Dewey, after several months under the leadership of Scripps-Howard newspaper publisher Roy Howard) launched a national campaign on Dennett’s behalf, soliciting support throughout the United States.

Early on, the ACLU was enthusiastically committed to Dennett’s defense but conservative in its justification of the pamphlet. It explained its participation in the case in narrow terms, emphasizing the propriety and importance of *The Sex Side of Life* rather than asserting an abstract right against state interference in private matters: “[W]e condemn the prosecution as an evidence of an intolerant and unenlightened attitude toward the serious discussion of the facts of sex. Obscenity should not be defined in law or in facts as governing the instruction of youth in matters of vital concern to wholesome living. Mrs. Dennett’s high-minded motive, her wisdom in presenting a difficult subject and the practical value of her pamphlet have been attested over ten years by thousands of educators, clergymen, and social

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219 Executive Committee Minutes, 21 January 1929, ACLU Records and Publications, reel 2. The ACLU formally announced its offer of assistance to Dennett on January 24, 1929. ACLU Press Bulletin 339, 24 January 1929, ACLU Records and Publications, reel 2. Within a month, it authorized the formation of a special committee to raise funds for printing costs associated with a possible appeal and to appoint a subcommittee for that purpose. Executive Committee Minutes, 18 February 1929, ACLU Records and Publications, reel 2.

220 The formation of the committee was unanimously approved by the Executive Committee of the ACLU.


222 Prior to the Armistice of November 1918, Dewey had been skeptical of free speech claims. The failure of the Versailles Peace Conference to “make the world safe for democracy” prompted him to reevaluate his position. Rabban, *Forgotten Years*, 301.

Freedom of the press, argued the ACLU, "means the right to print and distribute freely facts or opinions on public issues." The Sex Side of Life was not obscene because it did just that: it provided children with sorely needed information on sex education, a public issue of the utmost importance. Even one year later, as the appellate decision neared, the ACLU clung to its early position. A press bulletin issued in January 1930 quoted Forrest Bailey, secretary of the Mary Ware Dennett Defense Committee: "The real question the court is asked to decide," he said, "is whether a serious and accurate piece of writing on sex that has been found valuable for ten years in the work of leading educational and welfare agencies can be condemned as 'obscene' in the meaning of the law."

At Ernst's urging, however, the Second Circuit's decision ventured significantly beyond the modest question that Bailey described—indeed, it fundamentally changed the legal doctrine of obscenity. And the litigation, sensationalistic from the outset, generated outpourings of public support that changed the ACLU's vision of civil liberties. The change did not quite happen overnight. As late as 1932, Ernst complained that "many people who belong to an organization such as the Civil Liberties Union are afraid of the right to spread sexual ideas."

Still, after Dennett, obscenity was undeniably a civil liberties issue. The Executive Board of the ACLU, guided by Ernst, seized on the Dennett case to explore and excoriate postal censorship more generally. "The importance of the case in court far exceeds the issue of [The Sex Side of Life] itself," an ACLU pamphlet explained. "It involves the whole method of determining

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224 Minutes of the Executive Committee Meeting, 29 April 1929, ACLU Records and Publications, reel 2.
229 Morris Ernst, "Sex Wins in America," Nation, 10 August 1932, 123.
obscenity, the rules of evidence in trials, and the constitutionality of the law under which the Post Office Department operates its censorship.”

Just as the Dennett case convinced civil libertarians that obscenity was a worthwhile civil liberties issue, it also persuaded many anti-obscenity activists that censorship laws at least occasionally resulted in the suppression of desirable speech. Mainstream organizations, including the League of Women Voters and the Woman’s Christian Temperance Union, advocated “rigid enforcement of anti-vice laws,” but they also lobbied for better sex education. Like their male counterparts in the anti-vice movement, they condemned “dirty” magazines, movies, and burlesque shows. At the same time, however, they regarded marital sex as natural and desirable. Characteristically, Catheryne Cooke Gilman, a leading anti-obscenity reformer, circulated The Sex Side of Life to teenagers (and planned to adapt the text for younger children) in order to discourage the sex delinquency that she attributed to inadequate sex education and induced ignorance, or “the conspiracy of silence.”

Gilman’s attitude was representative of an increasingly influential segment of the anti-obscenity movement that sought simultaneously to eliminate prurience and to promote healthy and fulfilling sexual practices within marriage. “Old-fashioned” vice crusaders, such as

\[230\] ACLU, Prosecution of Mary Ware Dennett, 8.
\[232\] Male social hygienists also tentatively supported The Sex Side of Life. While the American Social Hygiene Association did not officially endorse the pamphlet, several of its members used it as a reference in preparing the organization’s own materials. Bascom Johnson, Director of the Division of Legal and Protective Measures, American Social Hygiene Association, to Morris Ernst, 20 April 1929, Ernst Papers, box 46, folder 1. The president of the American Social Hygiene Association disapproved of Dennett’s lenient attitude toward masturbation but nonetheless asked Judge Moscovitz not to condemn the pamphlet, lest an adverse decision “occasion the suppression of similar documents published by the American Social Hygiene Association.” E. L. Keyes, M.D., to Hon. Grover Moscovitz, 4 February 1929, Ernst Papers, box 46, folder 1.
\[233\] Gilman observed that men were far more likely than women to oppose sex education. Wheeler, Against Obscenity, 126. Men—both critics and supporters of Dennett—generally agreed with this assessment. William Sheafe Chase, Gilman’s longtime anti-obscenity ally, submitted an amicus brief on behalf of the government in the Dennett case. He told Gilman that Dennett “was thinking as a woman and of women, rather than of her boys as their father would think of them.” Ibid., 125.
\[234\] Ibid., 118.
Boston’s Watch and Ward Society and the New York Society for the Suppression of Vice, indiscriminately condemned all sexually explicit material. Indeed, from their perspective, materials like Dennett’s were even more dangerous than outright pornography, because they threatened to make sex respectable. By contrast, reformers like Gilman saw sex education materials as an antidote to sexual prurience rather than its cause. They feared that prosecutors would target educational offerings rather than the more worrisome but better financed commercial ones. Many endorsed explicit medical materials about sex, and few frankly opposed contraception. While Gilman and her allies continued to distinguish desirable treatments of sex, like *The Sex Side of Life*, from the more vulgar sort, Dennett’s prosecution demonstrated how easily censorship laws could target the former and prompted many social moderates to question censorship in general.

In short, ordinary citizens felt strongly that Dennett’s prosecution crossed a line, and free speech enthusiasts pressed their advantage. In May 1929, fifteen hundred people attended a Town Hall meeting to discuss the *Dennett* case and associated issues. Speakers cited a need for freedom of instruction on “sex subjects” by health authorities, religious bodies, and educators, among other groups. “Because this freedom [was] shown by the recent trial and conviction of Mary Ware Dennett to be seriously menaced,” the attendees called for the formation of a permanent agency on censorship. Its principal purpose was to resist the censorship of sex

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235 John Sumner, head of the New York Society for the Suppression of Vice, vigorously supported the Dennett prosecution and submitted one of the few letters to the District Court that was critical of the pamphlet. Critics often attributed the vice crusaders’ excessive zeal to their hypersensitivity to sexual materials, which they believed stemmed from Victorian repression as well as an underlying perversity on the part of the censors. *E.g.*, Samuel Marcus to Morris Ernst, 16 January 1940, Ernst Papers, box 5, folder 1 (asserting that various prominent vice crusaders “derived a vicarious sex satisfaction out of pornography”).


237 Ibid., 5.

238 Gilman had vocally supported Dennett’s distribution of “The Sex Side of Life,” but when she discovered that Dennett was on the letterhead of the ACLU’s National Committee for Freedom from Censorship, she wrote Dennett to express her disapproval. Ibid., 131.
education, but its agenda would encompass the “systematic consideration of censorship and the problems of public policy underlying it,” as well as “recommendation for alterations in existing laws, federal and state, wherever required to insure the necessary freedom.”

Out of this meeting, the National Committee for Freedom from Censorship (“NCFC”) was born. Crucially, contributions to the Dennett Defense Fund had far exceeded what was necessary for the appeal, and the ACLU voted to finance the NCFC out of the surplus. The fundraising potential of the anti-censorship work took on increasing significance in the wake of the stock market crash and encouraged the organization’s new direction. From the outset, the NCFC emphasized the need for direct action as well as litigation. In March, a few days after Judge Hand issued his opinion in *Dennett*, an ACLU bulletin instructed members to urge their local broadcasting stations to protest exclusion of the subject of birth control from the air. One year later, the ACLU’s Monthly Bulletin for Action asked ACLU constituents to monitor for news of censorship initiatives or ordinances in their cities and towns.

By 1931, the ACLU was ready to enter the censorship fray in full force. The Board of Directors hoped to unify the anti-censorship campaign, and to that end it hired a full-time secretary for the NCFC. In July, the council announced a “drive against censorship in all its forms” headed by Pulitzer Prize-winning playwright Hatcher Hughes. It pursued reform through a combination of legislative change and test case litigation. In particular, it focused on

240 Forrest Bailey, letter to the editor, 23 May 1929, ACLU Records and Publications, reel 2.
241 After the stock market crash, ACLU funds steeply declined, and extension into new terrain was economically difficult. By the time the Dennett defense fund was exhausted, however, censorship work had become such an integral part of the ACLU’s agenda that the board found ways to support it through other means. Board Minutes, 5 October 1931, ACLU Records and Publications, reel 3.
243 Board Minutes, 20 April 1931, ACLU Records and Publications, reel 3.
post office censorship, state movie censorship laws, the New York state theater padlock law, and the vice societies.245

Dennett herself became a powerful voice for civil liberties, and she was influential in expanding the ACLU’s mission. Fresh from her court battle, she had a lot to say about the ACLU’s new project. “Censorship is like wearing gray clothes because they don’t show the dirt,” she quipped in a 1930 forum.246 For Dennett, the crusade against obscenity censorship meant doing battle with the “miserable old concept that sex itself is dirty.” On the one hand, she advocated the free distribution of birth control and sex education literature because she deemed it “clean.”247 But she went much further, at this point suggesting that sexually explicit expression might be worth protecting even if she—or progressive social and scientific circles more broadly—deemed it perverse instead of illuminating.248

The antidote to obscenity, according to Dennett, was more speech. “In the course of time it will become clear to all normal citizens,” she insisted, “that the dirt-seeing faculty can be educated but not legislated out of people. As that discovery is made by larger and larger sections of the public, the demand will grow for dumping the obscenity laws into the legal scrap-basket as just so much useless clutter.”249 Her stated goal—to “gradually eliminate the obscene mind from the world”— was still publicly oriented, but no amount of legal finessing and fine-tuning would accomplish the task.250 “The cure for the situation,” she insisted, “lies not in more suppression, but in less and less.”251

245 Ibid.
246 “Censorship Analyzed by Noted Publicists; Merits and Faults of System Are Placed in Limelight,” Paterson (N.J.) Call, 22 May 1930.
247 Mary Ware Dennett to F. L. Rowe, 29 December 1934, Dennett Papers, reel 20, file 414.
249 Ibid.
250 Ibid.
251 Mary Ware Dennett to F. L. Rowe, 29 December 1934, Dennett Papers, reel 20, file 41.
Significantly, Dennett was proposing the same remedy for antisocial and corruptive speech in the moral realm as civil libertarians had been advocating in the political sphere for the past half-decade. Her reasoning, however, was subtly different. In the political context, ACLU lawyers argued that bad ideas (for example, the Ku Klux Klan’s) would be less powerful, and less damaging, if they were exposed to scrutiny; good ideas, even unpopular ones, would withstand a critical barrage. That rationale did not easily translate to the circulation of sexually explicit speech, where legalization seemed sure to increase consumption of lascivious materials. Dennett claimed that education would operate more effectively when its target was out in the open, but the argument was clearly a stretch, as her former allies in the social hygiene movement were quick to point out.

In reality, Dennett was approaching a libertarian stance on speech issues that far outstripped her reformist roots. The problem, for Dennett, lay in specifying a legal definition of obscenity. In her view, obscenity was by its very nature culturally dependent. “It varies ridiculously from time to time and from place to place,” she noted, in a formulation that presaged the language of the Supreme Court decades later. Given the slipperiness of social norms, it was foolhardy and dangerous to enforce community standards from the top down. Though Dennett still invoked the “public interest,” that notion was becoming increasingly theoretical and abstract. When she said that the tolerance of divergent beliefs and behaviors served the public interest, she simply meant that the best society was one that valued cultural pluralism, if not individual freedom. The ACLU actively solicited Dennett’s views on what sorts of projects the NCFC should pursue, and her evolving free speech absolutism pushed the organization in new directions.252

252 See, e.g., Forrest Bailey to Members of the Executive Committee, Dennett Papers, reel 20, file 414. Dennett referred several cases to the ACLU. See, e.g., Memorandum, 3 July 1930, Dennett Papers, reel 23, file 483.
Of course, Dennett and *Dennett* were only one part of the new movement. The NCFC capitalized (literally and figuratively) on its victory in *Dennett*, but mounting public opposition to censorship had helped make the groundswell of public support for Dennett possible in the first place. As is so often the case, government efforts to ratchet up the suppression of speech gave rise to a broad-based resistance movement. Already in 1929, as vice crusaders in Boston and New York intensified their efforts to suppress “immoral” speech, the ACLU counted the censorship of books, plays and talking movies among the three new issues facing civil libertarians. The onset of the Depression made matters worse, as publishers and producers pushed the boundaries of acceptability in order to attract bigger audiences and stay afloat. In New York State, the ACLU mobilized against a 1931 censorship bill that would have created a bureaucratic mechanism for regulating plays, akin to the one already in place for motion pictures. Civil liberties advocates took advantage of the heated public debate surrounding the proposal to attack censorship more generally. Participants at a meeting organized to discuss the bill roundly condemned it, but they also “pledge[d] unremitting effort to repeal existing censorship laws,” including post office censorship, the restrictive regulation of the airwaves by the FCC, the censorship of moving pictures, mandatory curricula, and sectarian religious exercises in the public schools.

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254 In January 1929 the ACLU announced that it regarded “the censorship of the talking movies as a new angle of the fight for free speech.” ACLU Bulletin 339, 24 January 1929, ACLU Records and Publications, reel 2. Just a few months later, however, an ACLU bulletin counseled that “hope of relief from censorship seems to lie rather with the legislature than with the court.” ACLU Bulletin 67, “Civil Liberty and the Courts: Censorship of the Films,” March 1929, ACLU Records and Publications, reel 2.


256 The Mastic Bill would have made all plays subject to the approval of a bureau within the State Board of Education. ACLU News Release, 24 March 1931, ACLU Records and Publications, reel 3.

The public attention generated by the effort to defeat theater censorship also spilled over into the NCFC’s campaign against customs censorship. During the 1920s, the Customs Office unilaterally prevented the importation of thousands of medical, scientific, and artistic texts. In the fall of 1929, the NCFC worked with Senator Bronson Cutting to craft amendments to the tariff bill that sharply curtailed customs censorship authority by transferring the power to determine whether a work was obscene from the customs office to the federal courts.\(^{258}\) The change in venue reflected a concerted effort on the part of civil libertarians to weaken administrative control over speech. The post office, of course, had long been an eager censor, from its quest for prurience after passage of the Comstock laws through its crusade to weed out national disloyalty under the Espionage Act. But the interwar expansion of the administrative state made the threat of bureaucratic authority increasingly pressing. As the *Dennett* case demonstrated, unchecked administrative discretion was apt to target not only unpopular speech, but even popularly valued speech—especially when its authors were critical of the state. Rather than extol agencies for their expertise and insulation from political influence, as they had done several years prior, groups like the NCFC overcame their lingering *Lochner*-era inhibitions and hailed the courts as a fairer forum for resolving disputes.

*Censorship in the Courts*

 Appropriately enough, the new tariff law became the vehicle for Morris Ernst’s next major legal battles. Within a year of Judge Hand’s opinion in *Dennett*, Judge John M. Woolsey

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\(^{258}\) Ibid. Cutting’s bill would have removed all reference to the customs censorship of obscene books from the statutes, thereby leaving the battle against obscene books entirely to the state courts. The following March, the bill was amended to give that power to the federal courts (with their right of trial by jury in civil cases). ACLU Bulletin 396, 19 March 1930, ACLU Records and Publications, reel 2. On the ACLU’s role in the tariff bill debate, see Christopher M. Finan, *From the Palmer Raids to the Patriot Act: A History of the Fight for Free Speech in America* (Boston: Beacon Press, 2007), 104.
produced two trail-blazing obscenity decisions in the Southern District of New York. Both involved the exclusion by customs agents of books written by Dr. Marie C. Stopes, a leading British birth controller; both were argued by Ernst; and both were filed under the Tariff Act of 1930, which prohibited the importation of any material “which is obscene or immoral.”\textsuperscript{259} In both cases, as in the many others he would argue in the coming years, Ernst emphasized changing public mores. The public, he insisted, was ready to talk openly about sex.\textsuperscript{260}

The first case, \textit{United States v. One Obscene Book, entitled “Married Love,”}\textsuperscript{261} centered on Stopes’ sex manual for married couples. Stopes was a longtime friend of Dennett’s, and Dennett urged Ernst to take up the case.\textsuperscript{262} Although Judge Woolsey decided the matter on procedural grounds (the proceeding was barred, he held, by a prior decision in the Eastern District of Pennsylvania that deemed the work not obscene and thus eligible for importation), he was moving toward a wholesale reformulation of the \textit{Hicklin} test, at least in the customs context. In doing so, he relied heavily on the \textit{Dennett} precedent. Ernst devoted three full pages of the brief to comparison with \textit{Dennett}, and he submitted a copy of \textit{The Sex Side of Life} as well as his appellate brief from the case to the court.\textsuperscript{263} The strategy worked. The book was not obscene, in Woolsey’s view, because it “treat[ed] quite as decently and with as much restraint of the sex


\textsuperscript{260} Ernst made particular use of this strategy in the state courts. See, \textit{e.g.}, Memorandum Submitted on Behalf of Defendants, People v. Samuel Roth (N.Y. City Mag. Ct. 1931), Ernst Papers, box 90 (“We have developed sturdier tastes. And we have grown wiser in the process. We have found that it is better to encourage freedom of expression than to risk the evils of suppression.”).

\textsuperscript{261} \textit{United States v. One Obscene Book, entitled “Married Love,”} 48 F.2d 821 (S.D.N.Y. 1931).

\textsuperscript{262} Letter from Mary Ware Dennett to Alexander Lindey, 16 October 1930, Dennett Papers, reel 23, file 487. Coincidentally, during the 1920 hearings over the Lusk Committee bill, a proponent of the law sought to impugn the morality of the Rand School by reading passages of \textit{Married Love} (which was available in the Rand School bookstore). “Defends Rand School and Criticized Book,” \textit{New York Times}, 17 May 1920. Algernon Lee called the book “a frank discussion of certain facts of sex from the viewpoint of personal hygiene” and told reporters that he “would welcome a thorough comparison of the private life and personal character of our staff and our student body” with that of the bill’s advocates.

\textsuperscript{263} \textit{Married Love} case materials, Ernst Papers, Box 90. Dennett expressed to Lindey that she was “really surprised at the extent to which [her] case serve[d] as a precedent.” Mary Ware Dennett to Alexander Lindey, 18 March 1931, Ernst Papers, box 359, folder 3.
relations as did Mrs. Mary Ware Dennett in ‘The Sex Side of Life, An Explanation for Young People.’”

Married Love, according to Woolsey, “may fairly be said to do for adults what Mrs. Dennett’s book does for adolescents.”

In The Nation, Dennett—who by virtue of her published writing as well as her own travails had come to be regarded as something of an expert on obscenity law—celebrated Woolsey’s decision in the Married Love case. She identified two factors that appeared promising for future cases. First, judges had begun to appraise publications based on their total effect and intent rather than considering isolated excerpts. Second, the recent decisions presupposed a reader of normal intelligence and demeanor, not an unusually susceptible one.

Both ideas had been latent in her own case, but Judge Woolsey’s opinion in Married Love made them explicit. His decision, according to Dennett, “has established another precedent by which the absurd obscenity statutes of this country may be slowly but surely broken down.”

Three months later, in July 1931, Judge Woolsey built upon that precedent in United States v. One Book Entitled “Contraception.” Ernst and his colleague Alexander Lindey, acting together on behalf of the NCFC, represented the book in what Gordon Moss called “the first test case undertaken by this Council in an effort to liberalize the Customs censorship of foreign books.”

The Contraception case, like Married Love, involved the importation of a practical guide by Dr. Stopes. This one, however, was bolder in its content. Contraception was an explicit account of the theory, history, and practice of birth control. Applying the test he had

264 District Court Opinion (Judge Woolsey), Section III, Admiralty Case File 106-165, NARA Northeast Region, Record Group 21.
265 In Married Love, Stopes urged husbands to be more attentive to their wives’ sexual and emotional needs.
266 Dennett, “‘Married Love’ and Censorship,” 580.
267 Ibid.
articulated in the *Married Love* case, Judge Woolsey reasoned that the reading of *Contraception* “would not stir the sex impulses of any person with a normal mind.” As a “scientific book written with obvious seriousness and with great decency,” it was not obscene. Nor was it a drug, medicine, or article for the prevention of conception within the meaning of the statute. Woolsey therefore dismissed the action against the seized book and held that *Contraception* was eligible for importation into the United States. His opinion made it permissible to import birth control information for the first time since the practice was made illegal in 1890.

However progressive Woolsey’s views, his decisions in the two obscenity cases are as notable for what they did not hold as for the relief they granted. In both cases, the ACLU argued that the customs law violated the First Amendment’s guarantee of freedom of the press. Woolsey rejected this argument in short shrift. “I think there is nothing in this contention,” he wrote. “The section does not involve the suppression of a book before it is published, but the exclusion of an already published book which is sought to be brought into the United States. . . . Laws which are thus disciplinary of publications whether involving exclusion from the mails or from this country do not interfere with freedom of the press.” Freedom of the press, for Woolsey, meant freedom from prior restraints on publication. He was not yet ready for an extension of the First Amendment on the order of what the ACLU was suggesting. The constitutional argument was a long shot in the customs case, just as it was in *United States v. Dennett*.

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270 District Court Opinion (Judge Woolsey), Section VI, Admiralty Case File 107-197, United States District Court for the Southern District of New York, NARA Northeast Region, Record Group 21.

271 Gordon W. Moss to the Editor, 29 July 1931, ACLU Records and Publications, reel 3. The favorable decision was unexpected, and Stopes cabled from London to congratulate the ACLU on its “surprising victory.” ACLU Bulletin 466, 24 July 1931, ACLU Records and Publications, reel 3.

272 District Court Opinion (Judge Woolsey), Section I, Admiralty Case File 106-165, United States District Court for the Southern District of New York, NARA Northeast Region, Record Group 21.

273 Woolsey thus rejected the seemingly plausible argument that prohibiting the importation of a book to the United States constitutes a prior restraint because it wholly prevents its circulation within American borders.
Nor did the Woolsey decisions represent a frontal assault on the Comstock Laws. As NCFC Secretary Gordon Moss was careful to emphasize, the Contraception case involved the Customs Bureau law, a statute far narrower than the postal laws, which explicitly prohibited the transportation of birth control materials by mail. Moss was skeptical that the decision (or any others) would have much weight in “whittl[ing down the meaning of the postal prohibition,” which “appear[ed] to be water-tight.”

Finally, Married Love and Contraception applied only to medical and scientific tracts. The judiciary had not yet signaled a similar openness with respect to literary texts. The ACLU was ready to move on this issue, but it was waiting for an ideal test case. In a letter to Arthur Garfield Hays regarding a medical text containing “many illustrations of a decidedly risqué character,” Gordon Moss relayed the position of at least one representative of Ernst’s office when it came to strategic litigation: “[W]e should take only those cases where the cards [are] stacked in our favor, and where a favorable decision would establish precedent for an entire class of literature heretofore prohibited.” The constraints were even more rigid in the realm of artistic expression, where the ACLU was hesitant to defend any book written in the twentieth century. Strategic litigation had availed the ACLU well in the past decade, and it was a method

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275 Gordon W. Moss to W. W. Norton, 7 November 1932, ACLU Papers, reel 86, vol. 503.
276 By 1937, a Harvard Law Review article reported confidently, citing Dennett, that “[u]nder any ‘test,’ it seems clear that serious medico-scientific works are not within the obscenity ban.” “Recent Cases: Obscenity, Test of Obscene Literature,” Harvard Law Review 48 (Jan 1935): 519.
278 For example, in June 1931, Forrest Bailey recommended a test case of Massachusetts’s revised obscenity law based on Marshall McClintock’s We Take to Bed, which had been censored in Boston because it contained “an adjective ending in ing—the present participle of the most dreadful of the four-letter words that make pure people tremble.” Forrest Bailey to Morris L. Ernst, 20 June 1931, ACLU Papers, reel 806, vol. 503. He admitted to Ernst that Roger Baldwin was “a little squeamish about taking up this particular book-defense because he fears we may in some way involve ourselves in defending the use of that word.” Forrest Bailey to Morris Ernst, 30 June 1931, ACLU Papers, reel 806, vol. 503. Ernst ultimately counseled Bailey to “pick a better volume.” Morris Ernst to Forrest Bailey, 2 July 1931, ACLU Papers, reel 806, vol. 503.
with strict practical guidelines. Gordon Moss believed that censorship “in the field of literature” should first “be taken up on behalf of these old classics.”

Nonetheless, the book that would break down the censorship barriers turned out to be decidedly modern: James’s Joyce’s *Ulysses*, a book as celebrated by critics as it was castigated by vice crusaders. Ernst represented Random House, which had contracted with Joyce to publish an American trade edition of the book, and he actively sought to avoid litigation in the matter.

Although the U.S. Attorney’s office chose (reluctantly) to prosecute, Ernst was able to arrange for Judge Woolsey to preside over the case. Chastened by Woolsey’s dismissive tone in the Stopes cases, Ernst did not even raise a First Amendment claim. Instead, he played up *Ulysses*’s artistic innovativeness and its reliance on real and familiar patterns of colloquial speech. Joyce’s profanity was not intended to incite lustfulness, he argued; it was designed to reveal the harsh reality of human expression and behavior. Judge Woolsey was convinced. In *United States v. One Book Entitled Ulysses*, Woolsey explicitly repudiated the *Hicklin* test. Once again deeming the customs laws inapplicable, he reasoned that even in the literary context a book must be judged by its aggregate effect, not by isolated passages, and that obscenity must “be tested by the court’s opinion as to its effect on a person with average sex instincts.” In November 1933, the Second Circuit agreed.

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279 Gordon Moss to Sidney J. Abelson, 7 April 1931, ACLU Papers, reel 86, vol. 503. Ernst was less discriminating when it came to private clients, like publishers and booksellers, whom he defended in the New York state context. The New York state courts relaxed their obscenity standards slightly earlier than the federal courts, though eventually the two forums began to leapfrog one another, and Ernst routinely cited the most lenient examples from one court to the other.

280 Ernst and Lindey wrote a series of letters to Customs officials and to the U.S. Attorney’s office seeking to persuade them that *Ulysses* ought to be admitted as an artistic masterpiece. Ernst Papers, box 93. Lindey apparently hoped for a test case, but given the firm’s fee arrangement with Random House, which gave it royalties in the book but provided limited reimbursement for legal fees, Ernst sought to avoid protracted litigation if possible.

281 Morris Ernst to Alexander Lindey, Office Memorandum, 12 August 1932, Ernst Papers, box 270, folder 3. U.S. Attorney George Medalie was sympathetic to the book but felt obligated to prosecute.


283 *United States v. One Book Entitled Ulysses*, 72 F.2d 705 (2d Cir. 1934).
The public outcry over the censorship and prosecution of *Ulysses* became a political liability for the Hoover administration, a lesson that the newly elected Roosevelt took to heart. The devastating effects of the Depression had made the vice crusaders’ efforts to curb the circulation of sexual materials seem increasingly trivial. As Ernst explained in 1934, “In this period while men’s stomachs have been empty, there appears to have been less fear of writings dealing with sex.” The press coverage of *Ulysses* drove this point home, and in the wake of the Second Circuit’s decision, the Customs Service hired a special advisor on obscenity matters and downsized its censorship effort substantially. In short, *Ulysses* changed the practice as well as law of customs censorship—and, by extension, it precipitated a real shift in mainstream American attitudes about obscenity. After *Ulysses*, many foreign books long since barred as obscene were made available in reputable American bookstores for the first time. This ease of access, in turn, encouraged many American readers to rethink the acceptable parameters of sexual propriety in literature. Whatever its limitations, the *Ulysses* case was a major victory for Ernst and the civil liberties movement. A 1938 *Harvard Law Review* article, reflecting on the decision, called it a “new deal for literature.”

A new public appreciation for artistic freedom and the reformulation of obscenity law were the most visible legacies of *United States v. Dennett*. But birth control was Dennett’s true and enduring passion, and it is appropriate that her own legal battle paved the way for a major liberalization on that issue as well. As with obscenity, the legal battle was only part of the story. To begin with, Americans were becoming increasingly suspicious of government regulation of private life. The failure of Prohibition provided a timely example of the folly of interfering with

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284 Roger Baldwin and Morris Ernst, “The New Deal and Civil Liberties” (radio debate over the Blue Network of NBC), 27 January 1934, ACLU Papers, reel 109, vol. 717. Ernst foresaw a shift from sexual to political censorship.  
private morality. A few years later, in the aftermath of Judge Woolsey’s decision in *Ulysses*, Morris Ernst tellingly declared: “The first week of December 1933 will go down in history for two repeals, that of Prohibition and that of squeamishness in literature. . . . Perhaps the intolerance which closed our breweries was the intolerance which decreed that basic human functions had to be treated in books in a furtive, leering, hypocritical manner.”287

Ernst might easily have extended the comparison to contraception.288 Opinion polls over the course of the late 1920s and early 1930s showed a steady upward trend in popular support for birth control, which was rapidly winning mainstream approval.289 The Depression was instrumental in this change. Many Americans regarded family limitation as a necessary corollary to their increasingly strained household finances.290 In 1931, the Federal Council of Churches of Christ in America, a coalition of mainline Protestant denominations (and the precursor to the National Council of the Churches of Christ in the United States of America), tentatively approved the use of birth control by married couples. A substantial majority of its Committee on Marriage and the Home believed that “the careful and restrained use of contraceptives by married people is valid and moral” and that “[s]ex union between husbands and wives as an expression of mutual affection, without relation to procreation, is right.”291

Still, as in the case of obscenity regulation, the courts moved more closely in step with public opinion than the legislatures did. Despite growing approval for contraception, state and

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288 Dennett did so. In 1929, she complained that “sexual knowledge [was] being conducted on a bootleg basis.” “Mrs. Dennett Goes on Trial Today,” *New York Times*, 6 March 1929.
290 Leslie J. Reagan, *When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867–1973* (Berkeley: University of California Press, 1997), 132–36. By the late 1930s, the federal government assisted in the provision of contraceptives under limited circumstances, and in 1937, the American Medical Association repudiated its longstanding opposition to birth control. Ibid.
federal governments were reluctant to anger religious constituencies by tackling the issue directly, and they continued to censor materials advocating and explaining their use.\textsuperscript{292} Disillusioned with the prospects of legislative change, Morris Ernst suggested “nullification” of prohibitions on birth control, a process which entailed executive non-enforcement as well as judicial erosion of the laws.\textsuperscript{293} Significantly, and somewhat counter-intuitively, this strategy was predicated on the realist assumption that judicial decisions would reflect changing social norms—not the modern, liberal notion that courts would serve as a check on repressive majoritarian impulses. In other words, Ernst believed, \textit{Lochner} notwithstanding, that courts were more likely than legislatures to resist pressures by powerful donors or by small but influential voting blocs. Partly, the difference was a function of framing: whereas a legislative vote to legalize birth control (or to permit communist leafleting) would look like a substantive endorsement of promiscuous sex (or of communism), an equivalent judicial decision could more easily be cast as an abstract commitment to individual rights. Consequently, Ernst increasingly focused his energies on incremental judicial reform. His approach was fruitful, and \textit{Dennett} was among its critical components. The doctrinal progression from \textit{United States v. Dennett} to the pivotal 1936 birth control case \textit{United States v. One Package} was indirect in comparison with the parallel path from \textit{Dennett} to \textit{Ulysses}, but the \textit{Dennett} precedent was nonetheless crucial.

One step in the “nullification” process was the \textit{Contraception} case. As Dennett had long argued, the practice of birth control would never be made legal as long as information about contraceptives was forbidden. The Comstock Act, however, had prohibited more than writing about contraception; it had also banned from the mails “any drug or medicine, or any article

\textsuperscript{292} See, \textit{e.g.}, Reagan, \textit{When Abortion Was a Crime}, 139–140.
\textsuperscript{293} Ernst, “Sex Wins,” 123. Ernst believed birth control legislation would never be directly repealed. Morris Ernst to Charles G. Norris, 22 January 1930, Ernst Papers, box 267, folder 28.
whatever, for the prevention of conception, or for causing unlawful abortion.” That provision, too, needed to be whittled down.

The first major breakthrough came in 1930, with the *Youngs Rubber* case.\(^{294}\) In it, the United States Court of Appeals for the Second Circuit was asked to decide a trademark infringement lawsuit by the manufacturer of Trojan condoms. In his opinion, Judge Thomas Swan, who had been a member of the Second Circuit panel that reversed Dennett’s conviction, declared (albeit in dicta\(^{295}\)) that contraceptives were permissible when prescribed by physicians. Three years later, the Comstock laws were limited still further, with the Sixth Circuit’s decision in *Davis v. United States*.\(^{296}\) The defendants in that case, contraceptive wholesalers, were charged in Ohio with the circulation of contraceptive devices by common carrier.\(^{297}\) The Sixth Circuit judges were not bound by Second Circuit precedent, but they nonetheless cited *Dennett* for the proposition that birth control laws “must be given a reasonable construction.”\(^{298}\)

The *Davis* decision, in turn, provided a persuasive doctrinal basis for the Second Circuit’s 1936 decision in *United States v. One Package*, which invalidated importation restrictions on medically indicated contraceptives.\(^{299}\) That case was sponsored by Margaret Sanger and the American Birth Control League. Like so many others, it was argued by Morris Ernst, who would serve for many years as general counsel of Planned Parenthood. As fate would have it, it was heard in the District Court by Judge Grover Moscowitz, who by then had ridden out the

\(^{294}\) *Youngs Rubber Corp. v. C. I. Lee & Co.*, 45 F.2d 103 (1930).

\(^{295}\) The Second Circuit decided the case on the basis that a plaintiff could maintain a suit for trademark infringement in equity even if he was violating the statute.

\(^{296}\) *Davis v. United States*, 62 F.2d 473 (6th Cir. 1933).

\(^{297}\) The indictments in *Davis* were brought under Sections 334 and 396 of Title 18 U.S.C.A., a statute regulating the carriage of contraceptive devices and of explanations for their use by express companies and other common carriers operating in interstate commerce.

\(^{298}\) *Davis*, 62 F.2d at 475.

\(^{299}\) *United States v. One Package*, 86 F.2d 737 (2d. Cir. 1936).
misconduct charges that stole him away from the *Dennett* case.\(^{300}\) Moscowitz held that the diaphragms at issue had been seized improperly by customs because they were intended for medical purposes. Judge Augustus Hand, once again writing for the Second Circuit, affirmed Moscowitz’s decision.\(^{301}\) According to Hand, Congress would not have intended to “prevent the importation, sale, or carriage by mail of things which might intelligently be employed by conscientious and competent physicians for the purpose of saving life or promoting the well being of their patients.”\(^{302}\)

Like *Dennett* itself, the case was decided as a matter of statutory interpretation only. It did not create a liberty interest in contraception, despite Ernst’s efforts,\(^{303}\) nor did it use the term “right.” It applied only to the importation of contraceptives; as a matter of precedent, it had virtually no relevance to a subsequent interpretation of a state statute by a state court. And many such statutes still existed. A summary of birth control laws in the United States prepared by the NCFC in July 1931 provides a useful snapshot of the regulations and restrictions on the books at that time. According to the report, twenty-one states specifically prohibited the dissemination of information about contraception (though only Connecticut forbade actual use).\(^{304}\) Despite all this, Sanger celebrated the decision as “the end of birth control laws,” “an emancipation proclamation to the motherhood of America.”\(^{305}\)

\(^{300}\) Although the House declined to impeach Moscowitz, it issued a Public Condemnation of his business dealings. *Time*, 12 April 1930, 1.

\(^{301}\) The Solicitor General chose not to file a petition for a writ of certiorari. Lamar Hardy, U.S. Attorney, to Greenbaum, Wolff & Ernst, 25 January 1937, Ernst Papers, box 69, folder 15.

\(^{302}\) 86 F.2d at 739.

\(^{303}\) Ernst argued that due process required that medical professionals be free to prescribe contraception. Trial transcript, *United States v. One Package*, Ernst Papers, box 69, folder 9, 71; Brief for Claimant-Appellee, Ernst Papers, box 69, folder 11, 36.


\(^{305}\) David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* (New York: Macmillan, 1994), 42 (quoting Sanger). She also called it a “complete victory.” “Mrs. Sanger Sees Court Ruling as Victory for Birth Control,” *New York World-Telegram*, 6 December 1936. Morris Ernst and Harriet Pilpel proclaimed, “[the decision] marks the successful termination of a 60 year struggle to make clear that the federal
Dennett, no doubt, was more reserved about the decision. Beginning with her effort to repeal the Comstock Act—which, of course, began her long civil liberties saga—she had criticized Sanger for advocating a narrow medical exception to the birth control laws. Dennett believed strongly that only universal access would guarantee “birth control knowledge for all citizens instead of class privilege.” ³⁰⁶ The dispute came to a head in the early 1930s, when Dennett argued against Sanger’s proposed amendment to the birth control laws because it exempted medical professionals from penalty without removing birth control from the auspices of the obscenity laws. In the same month that the ACLU endorsed Sanger’s bill, Dennett urged a “clean repeal amendment”³⁰⁷—prompting an editor of Time to advise Dennett to “get together for unified action in behalf of birth control, voluntary parenthood or what you agree to call your movement” lest people come to regard their “several causes as the mere fields of action for ambitious ladies.”³⁰⁸ Still, even for Dennett, United States v. One Package must have seemed an important victory. In it, Ernst did not argue that advocacy of birth control was permissible, or even that instructions on the use of birth control was permissible. He argued that birth control itself was an inappropriate subject for government regulation.

Almost a decade after her indictment, Dennett retired from public life. In her letters to colleagues and friends, she often reflected on how future historians would regard her, and one wonders whether she later was satisfied with her legacy. Dennett dedicated her life to “public work,” and she was vehement that she had “done a thing or two beside achieve ‘silver hair’”

³⁰⁶ Mary Ware Dennett to Margaret Sanger, 15 February 1930, Dennett Papers, reel 86, file 502.
³⁰⁸ Myron Weiss (Associate Editor, Time) to Mary Ware Dennett, 12 March 1931, Dennett Papers, reel 20, file 412.
during her years of service. In addition to her many accomplishments as a suffragist and birth control advocate, she helped limit the scope of obscenity laws and, indeed, helped redefine civil liberties. Still, she believed that future generations would enjoy a robust individual autonomy that her contemporaries could barely imagine. In a celebration of Judge Woolsey’s decision in *Married Love*, she wrote, “If we who are living now could come back to this earth a hundred years hence we should probably view with amused incredulity the records of the preposterous doings of our century in the field of censorship.”

As for her disagreement with Sanger, Dennett felt strongly that half-measures were destructive and that history would vindicate her approach.

For his part, Ernst assisted and in turn was influenced by Sanger as well as Dennett. An article in *The Nation* written while Dennett’s appeal was pending reflected on the irony that the “[t]wo well-known women” had come together in the New York penal system. “For on successive days Mrs. Dennett, the conservative, was convicted of sexological heresy by a federal jury over in Brooklyn, while Mrs. Sanger, the militant, sat in a Manhattan police court and heard eminent volunteers from the medical profession so smash charges against her birth-control clinic that it appears improbable that the magistrate will hold the case for trial.” Ernst, of course, was defense counsel in both matters.

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309 Mary Ware Dennett to Heywood Broun, 1 May 1929, Dennett Papers, reel 20, file 416; Mary Ware Dennett to family, 8 May 1929, Dennett Papers, reel 21, file 433.
310 Dennett, “‘Married Love’ and Censorship,” 580.
311 See, e.g., Morris Ernst to Margaret Sanger, 20 May 1933, Ernst Papers, box 267, folder 28 (“[O]n all general principles, I am in favor of birth control. Incidentally, I am also very much in favor of you.”); Morris Ernst to Mary Ware Dennett, 15 January 1930, Dennett Papers, reel 23, file 487 (declaring that the time for formalities had long passed, and addressing Dennett by her first name).
312 Nichols, “Sex and the Law,” 552. Ernst regularly corresponded with and provided legal advice to Sanger, but she was not actually a named defendant in the clinic case, which involved a 1929 raid on the Birth Control Clinical Research Bureau—an office that “was not operated or controlled by the Birth Control League, but [in which] Mrs. Sanger was vitally interested.” Samuel J. Schur to Covington, Burling & Rublee, 17 April 1930, Ernst Papers, box 358, folder 1.
In retrospect, there was much to recommend both strategies. Dennett’s disillusionment with legislative change made the social reformist ever more radical; Sanger’s success at ingratiating herself with professionals endeared the erstwhile socialist to incremental reform. The differences were ideological as well as strategic. In time, Dennett adopted a theory of civil liberties much like the rights-based individualism that Sanger had espoused decades earlier and gradually repudiated.\textsuperscript{313} For the mature Dennett, birth control was a matter best left to private discretion, despite its public implications. Government interference in individual decisionmaking was impossible to modulate and undesirable as a matter of principle. Sanger’s compromises may have yielded more in the way of concrete results, but the ACLU was deeply indebted to Dennett for the civil liberties revolution it wrought.

The question whether to sacrifice principle in favor of stop-gap gains would plague the ACLU for decades. In his many years of service to the ACLU, Ernst himself would often face precisely this dilemma.\textsuperscript{314} Indeed, he foresaw with astounding acuity the path that birth control litigation would follow over the coming decades, with its halting expansion of the health exception to include, eventually, threats to a woman’s psychological wellbeing, irrespective of her marital status.\textsuperscript{315} He was uneasy about this medical “compromise,” and yet he regarded it as

\textsuperscript{313} In 1916, when Sanger (along with her sister, Ethyl Byrne) was arrested for operating the country’s first public birth control clinic, she had argued (as the judge summarized it) for “[a] right of copulation . . . that cannot be invaded by the Legislature forbidding the sale of articles necessary to the free enjoyment of such right.” In her attorney’s words, the statute was “an infringement upon [a woman’s] free exercise of conscience and pursuit of happiness” because it denied “her absolute right of enjoyment of intercourse. . . .” \textit{Law Journal}, 5 December 1916, Supreme Court, Part I. Mr. Justice Kelby, Kings County, in Ernst Papers, box 358, folder 3. This language reflected an earlier, radical moment in the free speech fight. After World War I, bold rights claims of this sort more or less disappeared. Even at the time, it was unavailing as a legal strategy. The judge dismissed Sanger’s suggestion of a “personal right” to “copula[e] without conception” as preposterous. Ibid., 13. Sanger herself later abandoned this approach for a more conservative and politically palatable strategy that played up physicians’ professional duties rather than women’s choices.

\textsuperscript{314} Most famously, during World War II, Ernst discouraged criticism of the administration because he felt it undermined ACLU credibility and influence. Walker, \textit{American Liberties}, 156.

\textsuperscript{315} Essay draft, Ernst Papers, box 198.
a potentially fruitful strategy.\textsuperscript{316} In their court briefs, however, ACLU lawyers were free to make their boldest arguments. And while practical exigencies influenced what cases they chose to pursue, their theory of civil liberties became ever more capacious.

\textit{Conclusion}

\textit{United States v. Dennett} ushered in a new era of civil liberties advocacy in America. In the years immediately after World War I, the reformers-turned-radicals who led the civil liberties movement had envisioned free speech as a vehicle for working-class power, a backdoor approach to a just society. As the enforced conformity of the 1910s gave way to the pluralistic ambivalences of the 1920s, their rhetoric subtly shifted. Increasingly, they called for an open public conversation about how best to govern America. Throughout, they retained a progressive emphasis on advancing the public good, and they defended free speech in political and economic terms.

After \textit{Dennett}, a new theory of civil liberties steadily gained ground. Lawyerly and individual-centered, that vision prioritized autonomy over equality. Where earlier free speech advocates (including Dennett herself for much of her career) had hoped that a rich and varied public discourse would ensure the best political and social outcome, a growing crop of civil libertarians felt that government intervention in the realm of private beliefs was inherently against the public interest. For some, even this abstract interest in maximizing the public good

\textsuperscript{316} Ibid. (“Possibly those who are in favor of compromising on this issue feel sure that if birth control material and information can be made legal for the offices of doctors and prescription rooms of druggists, there will be no practical way of preventing such literature reaching the eyes of the general public.”).
receded into the background. By 1942, the Colorado Supreme Court framed the central tension of one First Amendment case as the “liberty of the individual v. the general welfare.”

Many within the ACLU resisted the new approach. Some still clung to a radical vision of the right of agitation. Others, such as Alexander Meiklejohn, thought that art was worth protecting only to the extent that it enabled the “voting of wise decisions.” An important minority, however, were articulating the alternative justification for civil liberties, at least in the non-political context. These influential few defended free speech not as an avenue to peaceful revolution, or as a prerequisite of self-governance, or even because they thought it the surest way of discerning the truth, but rather because they believed that people’s convictions and dispositions were their own concerns. Put simply, they were committed to what a 1934 NCFC statement labeled “personal choice.” The committee explained: “A certain amount of unworthy material is bound to come into existence in one form or another, as time goes on. It is for the individual to approve or condemn whatever he encounters—to accept what he deems desirable for himself and to reject the rest. However, it is he, the individual who must exercise this choice.”

Crucially, Dennett taught Ernst and the ACLU that “civil liberties” was a pliable category. If it could hold non-political speech, perhaps it could also stave off state interference with private conduct. Sex education was only the beginning. Lawyers like Ernst called for the protection of artistic expression and later of self-expression of any sort—political, artistic, or

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319 Statement by the National Council on Freedom from Censorship, 16 July 1934, ACLU Papers, reel 105, vol. 678.
“personal”—as long as it did not cause actual harm to others. They would ultimately conclude that birth control advocacy and birth control use are flip sides of the same civil liberties coin.320

In short, after Dennett, key figures within and outside the ACLU understood the category “free speech” and the scope of civil liberties advocacy differently than they had at the outset of litigation. Perhaps that transformation was a product of broader forces and would have occurred even absent Ernst and Dennett’s intervention, though a close reading of the historical record points to contingency rather than inevitability. But whatever its immediate effects, United States v. Dennett demonstrates that popular and judicial acceptance of a negative vision of civil liberties in America—one that incorporated nonpolitical speech and embraced individual autonomy—was a new development. Today, the protection of speech like Dennett’s seems fundamental to civil liberties advocacy; it is hard to imagine a world in which administrative censorship on the basis of morality was thought to facilitate free speech, by enhancing the quality of public discourse. Nonetheless, that is precisely the sort of world in which Ernst and Dennett lived.321

The freedoms grouped together under the new civil liberties tent were framed against a common enemy: the state. In the early interwar period, the ACLU’s progressive allies had maintained their commitment to regulatory governance even as they distanced themselves from majoritarian politics. They imagined the legislative and executive branches as potential protectors of minority interests, a counterbalance to powerful private forces (primarily, industry)

320 Ernst’s 1940 article for the Britannica Book of the Year listed as one of the year’s crucial civil liberties developments the refusal of United States Supreme Court to review a Massachusetts decision closing birth control clinics in that state. He noted that new cases would seek to persuade the courts “that medically regulated contraception should not be interfered with.” In the same paragraph, he lauded a new Post Office Department ruling that permitted the free circulation of birth control information and supplies to doctors and pharmacists. Morris Ernst, “Civil Liberties,” in Britannica Book of the Year, 1940 (Chicago: Encyclopaedia Britannica, 1940).

321 To borrow from Robert Gordon, Dennett has the potential to “tell[ ] us that the difficulties we have in imagining forms of social life different from and better than those we are accustomed to may be due to the limits on our conceptions of reality rather than to limits inherent in reality itself.” Robert W. Gordon, “Critical Legal Histories,” Stanford Law Review 36 (1984): 100. That is true whether Dennett itself changed everything or, rather, was merely one “episode,” albeit an important one, “in an ongoing story of bargaining and conflict between contending normative orders.” Hendrik Hartog, “Pigs and Positivism,” Wisconsin Law Review (1985): 935.
as well as mass ignorance and prejudice. Administrative censorship cases, including Dennett, brought home the dangers of central government authority much more convincingly than did earlier appeals to labor voluntarism. They also demonstrated that free speech, properly framed, could attract popular support. And they rehabilitated the judiciary—a longtime bastion of anti-democratic values and a reviled instrument of corporate power—as a potential forum for social advocacy.

Whatever the costs and benefits of the new approach, and there were many of each, the new model of free speech was wildly successful. Its institutionalization during the next half-century gradually erased the stigma of a more radical free-speech past. By promoting artistic freedom and sexual autonomy, the ACLU made civil liberties into something more than a stepping stone to economic redistribution. Critics alleged that its defense of personal freedom was disingenuous—that it ventured into the new realm precisely to bolster its credibility. 322 For some members, no doubt, the allegations were true. Nonetheless, over the course of the 1930s, much of the ACLU leadership internalized a more generalized commitment to civil liberties. In turn, the vision of civil liberties that United States v. Dennett helped to validate gave rise to an individualist language that anticipated, and perhaps even supplied, the state-skeptical rhetoric of postwar American liberalism. 323

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322 For example, Harold Lord Varney alleged in the American Mercury that Alexander Woolcott, “a genuine Liberal,” joined the ACLU because he “was persuaded that the Union was primarily a defender of artistic freedom against the throttling hand of censorship”—and that an additional 300 members signed on as a result. Harold Lord Varney, “The Civil Liberties Union,” American Mercury 39 (December 1936): 386.

323 More obliquely, it paved the way for what mid-century aesthetes and intellectuals would celebrate as the fulfillment of individual identity and cultural critic Phillip Rieff would denigrate as “post-communal culture.” Philip Rieff, The Triumph of the Therapeutic: Uses of Faith After Freud (New York: Harper and Row, 1966), 11. Rieff explained: “Much of modern literature constitutes a symbolic act of going over to the side of the latest, and most original individualist. This represents the complete democratization of our culture.” Ibid., 9.
CHAPTER 4: FROM LEFT TO RIGHTS

A deep irony pervades the story of civil liberties during the 1930s. For over a decade, the ACLU leadership had been promoting 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. And yet, at the precise moment when its project became possible, the organization abandoned its commitment to 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 both labor policy and the civil liberties agenda. In the early months of Roosevelt’s presidency, the ACLU was optimistic. Before he even took office, the ACLU sent Roosevelt a series of proposals for safeguarding civil rights through federal action.\(^1\) Recommendations for administrative action included the restoration of rights to those convicted under the Espionage Act, issuance of passports irrespective of political views, provision of radio airtime to minority viewpoints, and continuation of the Department of Justice’s hands-off policy with respect to working-class political and economic movements.\(^2\) Legislative proposals touched on such issues as the abolition of postal censorship, prohibitions on wire tapping to obtain evidence in federal

\(^1\) ACLU, “Proposals for Restoring or Protecting Civil Rights Through Federal Action,” 16 February 1933, ACLU Papers, reel 97, vol. 608.
\(^2\) The last recommendation entailed declining to pursue federal injunctions against strike activities or to assist in state prosecution of radicals.
cases, and the admission of pacifist aliens to citizenship. Given the change in administration, the ACLU was hopeful that its proposals would be enacted. In fact, Baldwin professed to be “embarrassed by the number of friends of Civil Liberty in public office in Washington and in the states.”

Although the ACLU was pleased with Roosevelt’s personnel choices—especially the Secretary of the Interior, ACLU member Harold I. Ickes—Baldwin expressed concern that it would be “difficult to quarrel with friends.” His apprehension turned out to be prescient. During the 1920s, when liberals, progressives, and radicals all were shut out of power, the disagreements among them posed little threat to a unified civil liberties campaign. In the 1930s, by contrast, seemingly small differences took on immense proportions. Over the course of the decade, ACLU supporters would split over the desirability of radio censorship, the extension of free speech to Nazi marches, and the propriety of racial discrimination in public accommodations. The most important fracture in the civil liberties alliance, however, occurred over New Deal labor policy.

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3 Harry Ward, Helen Phelps Stokes, James Maurer, Arthur Garfield Hays, and Roger Baldwin to Franklin D. Roosevelt, 16 February 1933. Where an earlier ACLU had traced policies like these to the prewar repression of labor radicals, by 1933 the ACLU leadership was insisting that “all of these issues involve new policies adopted during or after the war, wholly out of keeping with American traditions of civil liberty.”


5 Roger Baldwin to Harold L. Ickes, 28 February 1933, ACLU Papers, reel 97, vol. 608 (“We have all welcomed, with the greatest satisfaction, the announcement by Mr. Roosevelt yesterday of your appointment as the Secretary of the Interior. I know of no department of the government in which your progressive views can render more significant service than there. We shall be descending upon you in Washington shortly with half a dozen problems affecting Indians and the Colonies where issues of civil liberty have been unhappily neglected.”).

6 Ibid. For example, Frances Perkins had strong connections to the ACLU and Baldwin expected her to advance the ACLU’s agenda. Roger Baldwin to Allan Harper, 8 March 1933, ACLU Papers, reel 97, vol. 608 (speculating that Homer Cummings, a “routine politician,” would not last as Attorney General and advising Harper to “count on Frances Perkins to take precisely the stand we do in regard to aliens.”).

7 Former Georgia Senator Thomas Hardwick joined the ACLU National Committee in August 1930 after Baldwin assured him that his views on race would not bar him from membership. Hardwick explicitly told Baldwin that he did not believe “that segregation makes for inequality [of] treatment between the races, nor . . . that either political or social equality is possible between the races.” Thomas Hardwick to Roger Baldwin, 28 July 1930, ACLU Papers, reel 71, vol. 384. Baldwin responded that the board appreciated his “frankness” and took “no stand on social equality as such,” though it “believe[d] in the right to advocate it.” He also warned Hardwick that “there are two
The NIRA

The first test of the administration’s commitment to labor was the National Industrial Recovery Act, signed by President Roosevelt in June 1933 after heated congressional debate. Although the primary purpose of the act was to modify antitrust laws to permit trade associations and to promote industrial efficiency, it was drafted in consultation with the AFL and contained several concessions to labor. Section 7(a) of the NIRA affirmed workers’ right to organize without employer interference and to engage in collective bargaining. Most labor leaders celebrated the provision, and in July, the ACLU wrote to labor organizations to offer its help in enforcing the act. Employers, it emphasized, were creating company unions and discharging employees for union membership, in “plain denial of the rights accorded to organized labor by the law.” The ACLU was confident that complaints by unions would be taken up by federal officials as long as “the facts are plainly put to them.” It therefore requested any information on employers’ unlawful activity and promised to present all complaints to the Labor Advisory Committee initially charged with enforcement of the labor provisions of the act.

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8 Labor leaders and advocates had been instrumental in Roosevelt’s victory and expected the President to reciprocate with union-friendly policies. They were favorably disposed toward many of the Wilson administration veterans who were tapped as officials and advisors. It was quickly evident, however, that Roosevelt’s economic program was only peripherally concerned with organized labor. Early initiatives focused on reinvigorating industry and agriculture and relieving poverty among the unemployed. Frances Perkins, Roosevelt’s selection as secretary of labor, had few connections to organized labor. William E. Leuchtenburg, *Franklin D. Roosevelt and the New Deal, 1932-1940* (New York: Harper & Row, 1963), 60–62.

In practice, however, Section 7(a) proved largely ineffectual. A combination of poor leadership and inconsistent support from the administration served to buttress organization in already strong unions while abandoning the most vulnerable.\textsuperscript{10} Employers quickly discovered that their recalcitrance would be quietly accepted. In August 1933, Roosevelt sought to address widespread labor conflict by creating a National Labor Board (NLB) empowered to investigate and mediate labor disputes. Its chair, Senator Robert F. Wagner, was a staunch union advocate. Although the NLB lacked independent enforcement power, it often issued decisions favorable to labor. It opposed company unions, promoted secret elections, and ordered companies to recognize and negotiate with unions. And yet, at the same time, the National Recovery Administration (NRA) charged by statute with implementing the NIRA opposed the closed shop and exclusive representation by majority unions, and it defended employers’ rights to form company unions.\textsuperscript{11} Roosevelt vacillated between the two approaches, ultimately undercutting the authority of the NLB. In December, the ACLU organized a Committee on Workers and Farmers Rights. Its first order of business was to submit to both President Roosevelt and the officers of the AFL a list of violations of labor’s right to organize, strike, and picket to demonstrate the ways that NRA officials had thwarted the collective bargaining clause of the NIRA.\textsuperscript{12}

The administration’s failure to enforce the NIRA was only one of the ACLU’s objections. In fact, a sizeable contingent of the board was relieved at the weakness of the NLB. During the 1920s, the ACLU had supported left-wing miners in their struggle to disrupt John L. Lewis’s

\textsuperscript{10} E. Michael White, “Labor under the NRA: A Report to the Discussion Group,” 27 December 1933, ACLU Papers, reel 96, vol. 598 (noting that the Compliance Division of the NRA had proven inefficentual and that the codes and the President’s Reemployment Agreement were violated by employers except where strong unions were available to enforce them); Bernard Bellush, \textit{The Failure of the NRA} (New York: Norton, 1975).

\textsuperscript{11} Ibid.

\textsuperscript{12} Roger Baldwin to friends, 2 December 1933, ACLU Papers, reel 96, vol. 598.
control of the United Mine Workers of America. It continued that policy when a group of Illinois
miners split off from the UMW to form the Progressive Miners of America, and it expressed
concern to Secretary of Labor Frances Perkins that the NIRA would buttress Lewis’s ability to
secure an exclusive bargaining arrangement that would marginalize the radical minority.\textsuperscript{13} The
ACLU’s longstanding concern for minority representation became a basis for cooperation with
the far left, whose representatives were most likely to suffer the effects of the government policy
and thus were most vocal in denouncing the NIRA.

Despite frequent allegations to the contrary by patriotic groups and congressional
inquiries, the ACLU was never simply a front or an apologist for the Communist Party.
Although the two groups had often worked closely together on particular cases and issues, they
clashed on multiple occasions.\textsuperscript{14} Nonetheless, many ACLU board members were attracted to the
Soviet experiment, and while none but Elizabeth Gurley Flynn officially joined the Communist
Party, several made regular financial contributions and expressed sympathy for communist
ideology, if not party practices. In 1935, when the Communists abandoned their opposition to the
New Deal in favor of an anti-fascist united front, relationships like these would become

\textsuperscript{13} Daniel, \textit{ACLU and the Wagner Act}, 34. Cletus Daniel’s extensive treatment of the ACLU’s position on the
Wagner Act is an excellent resource. Daniel, however, assumes that the ACLU condemned the Wagner Act because
it believed the New Deal was inadequate to rescue its preferred medium, liberalism, from its inevitable demise.
Ibid., 18–19. He implies that the ACLU’s involvement with labor prior to the New Deal had been passing only;
“with the launching of the New Deal in the spring of 1933, federal labor policy suddenly became a subject of
transcending interest and concern to the membership of the ACLU as well as to liberals in general.” Ibid., 21.
Reading the 1930s ACLU through the lens of modern civil libertarianism, he concludes that the broadening of the
ACLU’s agenda “to the point of encompassing fundamental issues of political economy” went “far beyond the
defense of civil liberties.” Ibid., 46.

\textsuperscript{14} Significant conflicts arose over the refusal of the Communist Party to discourage bail jumping, which prompted
the ACLU and the Garland Fund to withhold bail to Communist defendants, in turn precipitating the resignation of
William Foster from the ACLU national committee; interference by Communists with socialist meetings, which
elicted increasingly stern rebukes from the ACLU during the late 1920s and early 1930s; and differences between
ACLU attorneys and the Communist-affiliated International Labor Defense, whose court tactics emphasized the
class struggle rather than legal rights. ACLU Board Minutes, 24 November 1930, ACLU Papers, reel 71; vol. 384;
commonplace. In the early 1930s, however, they were a source of significant tension within the ACLU.

The ambivalence on the ACLU board toward the NIRA was divisive. When Roger Baldwin submitted a letter to President Roosevelt and to NRA chief Hugh Johnson demanding protection for minority unions, the labor experts within the ACLU strongly objected. Morris Hillquit considered the ACLU’s stated concern for minority unions to be meddlesome as well as misguided, and he threatened to resign over the board’s position. Joseph Schlossberg, the general secretary-treasurer of the Amalgamated Clothing Workers of America and a member of the ACLU’s National Committee, cautioned Baldwin that his well intentioned intervention would undercut labor’s strength by propping up company unions. Despite these criticisms, the left wing of the ACLU board, including Harry Ward, Corliss Lamont, William B. Spofford, and Robert W. Dunn, along with Baldwin, steered the ACLU toward a radical course. In September, Baldwin began collaborating with radical unionists in devising a statement on the NRA. The program they produced entailed unchecked freedom to strike (regardless of the terms of any applicable NRA code), prohibition of racial discrimination by unions, and proscription of the

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15 John Fitch, John R. Commons, and W. Jett Lauck all refused to sign it.
16 Daniel, *ACLU and the Wagner Act*, 37–39. Hillquit thought unified leadership essential for unions, and he was outraged that the ACLU would presume to interfere in union affairs. He told Helen Phelps Stoke that the ACLU was qualified to “combat any actions or policies of public officials or quasi public authorities in derogation of the constitutional rights of the citizens.” On the other hand, there were few representatives of organized labor in the ranks of the National Committee, and the organization had “neither call nor capacity to deal with the internal affairs of trade unions.” Morris Hillquit to Helen Phelps Stoke, 30 August 1933, quoted in ibid., 41. Hillquit died five weeks after sending a second threat of resignation.
17 Joseph Schlossberg to Roger Baldwin, 2 April 1934, ACLU Papers, reel 107, vol. 698 (referencing previous correspondence in which Schlossberg took the position that “minority group recognition would be used by the employers for the promotion of company unions,” a concern borne out by the “so-called automobile settlement and the modifications proposed in the Wagner bill”). Baldwin conceded that Schlossberg was right but felt that “all that has happened since merely confirms the fact that none of this federal machinery can work to the advantage of labor’s right to organize and strike unless you’ve got a fighting labor movement to exercise them.” Baldwin to Joseph Schlossberg, 3 April 1934, ACLU papers, reel 107, vol. 698.
closed shop, in addition to more conventional recommendations for the elimination of labor spies, the union shop, and compulsory arbitration. They sent a delegation to discuss the program with Roosevelt and asked him for decisive presidential action.20 Roosevelt, though polite, was unsympathetic.

Conflict within the ACLU temporarily abated when it became clear that the NRA, in practice, was serving to buttress employer interests; leftists and liberals alike condemned the new turn in administration of the Act, albeit for different reason and in different tones. By the end of 1933, the ACLU’s board was able to recruit a respectable group of liberals to a new Committee on Workers and Farmers Rights, convened at the request of radical socialists and Communists to marshal liberal support for their anti-New Deal agenda.21 Mary Van Kleeck—director of industrial studies for the Russell Sage Foundation, and a communist sympathizer—was appointed chair of the committee, ensuring that it would follow a reliably anti-state path. Like the other leftists on the ACLU Board, Van Kleeck had come to believe that economic planning that aimed to ameliorate the dangers of capitalism would undercut the class struggle and lead America down a path to fascism. To Van Kleeck, the right of trade unions to engage in collective bargaining was an important civil liberty that was threatened rather than protected by the NIRA.22 Her initial draft of a memorial to President Roosevelt was so critical of New Deal policies that the ACLU Board asked her to revise it. Baldwin helped write the final version,

19 Ibid., 51.
20 According to Daniel, Roosevelt “had no interest in promoting the growth of an independently powerful labor movement that was likely to insist on defining and pursuing its own particular wants without regard to the larger purposes and broader designs of the ‘organic’ nation envisioned by New Dealers.” Ibid., 58.
21 Ibid., 59. Dunne, Muste, and Weinstock had all been active in organizing the Cleveland Trade Union Conference for United Action, which brought together radical socialists and Communists in condemnation of the New Deal. They asked the ACLU to spearhead the National Committee on Workers and Farmers Rights.
22 According to Van Kleeck, unions had enthusiastically greeted Section 7(a), and they had dutifully called off strikes when the government urged them to cooperate, but “no single example can be cited of the success of the government in fulfilling its promise as the workers have understood it, by actually securing a trade union agreement.” Mary Van Kleeck, Address on Labor’s Rights in the NRA, at the Annual Meeting of the ACLU, 19 February 1934, ACLU Papers, reel 105, vol. 678.
which lamented the administration’s tolerance of company unions and the failure of the National Labor Board to support strikes.

For Baldwin, opposition to the NIRA reflected broader antipathy to state intervention in the field of labor relations. In a 1934 radio discussion, Morris Ernst told Baldwin that if the major avenues of communications—the newspapers, the radio, and the movies—were kept open, the problem of labor relations would take care of itself.²³ Although Ernst claimed that he was “not much of a believer in law,” he thought “the fundamental right of free speech” could be preserved as long as “responsible positions” were filled by “fair-minded men.” Baldwin was far less sanguine about administrative solutions. He conceded that Roosevelt had thus far proven tolerant of minority viewpoints—he had not censored the realm of ideas, despite having the power to do so, and he had evinced tolerance toward aliens, Indians, the unemployed, and political dissenters—but Baldwin believed that the relative openness of the administration stemmed merely from a lack of significant opposition to its goals.²⁴ He also thought that civil liberties entailed something more than the right to air disfavored ideas. Indeed, the “central struggle involving civil liberties” was the conflict between capital and labor, and on that score, the influence of the New Deal had been detrimental and far-reaching. Baldwin explained: “We have seen in these ten short months an enormous growth of trade-union organization, inspired by the codes. At the same time, we have seen an unparalleled attack by employers upon trade union rights. Troops have been called out against strikers in five states. Police, gunmen, indeed every

²³ Baldwin reiterated the ACLU’s commitment to an earlier bill, vetoed by President Hoover, “requir[ing] station-owners to give equal facilities to all sides of controversial questions.” He acknowledged that some degree of censorship was inevitable but thought the “alternative of government ownership . . . far worse.” Roger Baldwin and Morris Ernst, “The New Deal and Civil Liberties” (radio debate over the Blue Network of NBC), 27 January 1934, ACLU Papers, reel 109, vol. 717.

²⁴ Baldwin considered issues like race discrimination, lynching, and injustice in the south to be “less important” than economic rights, “but yet vital.” He noted that on such issues relief was generally sought through federal action (for example, “on lynchings by federal prosecution of negligent officials, and on Scottsboro and the Mooney cases by appeals to the federal courts, backed by the nation-wide agitation carried on by working class elements”). Speech of Roger Baldwin, Annual Meeting of the ACLU, 19 February 1934, ACLU Papers, reel 105, vol. 678.
weapon known in the struggle between capital and labor, has been invoked. Scores of strikers have been killed or wounded and hundreds have been jailed. On the whole we have seen the N.R.A. administration refuse to interfere in this strike except to get workers back to work by accepting some form of government mediation or arbitration, usually to their disadvantage.”

Baldwin insisted that the New Deal was paving the way to economic fascism, that is, the protection through “dictatorship [of] the economic system of business for private profit,” if not the “wholesale suppression of all opposition.” He pointed to the abrogation of states’ rights and the centralization of power in the federal government, “reaching out to every home and business in the land,” and he dismissed as naïve the hope that the New Deal was “a back-door entrance to state socialism.” He expressed the same point more strongly in his speech at the ACLU’s Annual Meeting in February 1934. Whereas the ACLU of the 1920s had been embroiled in local struggles, the New Deal necessitated action on the national stage. Baldwin emphasized that in the “new federal arena of combat,” resistance to the expansion of state power was minimal. “On the right it comes from employers still wedded to laissez-faire economics,” he explained. “On the left it comes from radicals who oppose state capitalism as a form of economic fascism, denying to the working class a chance to develop its power.” Even the workers and farmers, however, had largely abandoned their opposition in the face of doles and subsidies. “The price of a temporary industrial peace,” he lamented, “is the sacrifice of their own struggle for increased power.”

According to Baldwin, the New Deal had not delivered on its promise to support organized labor, which Baldwin considered the only plausible mechanism for improving social and economic conditions. The Roosevelt administration had failed to protect activity by

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26 Ibid.
27 Speech of Roger Baldwin, Annual Meeting of the ACLU, 19 February 1934, ACLU Papers, reel 105, vol. 678.
independent trade unions and, despite protests from the ACLU and many other groups, had declined to outlaw company unions. It had curtailed the right to strike and discriminated against left-wing unions. It had withheld union representation on the code authorities—a right in any case far less valuable than the rights to organize, convene mass meetings, and hold a picket line. Baldwin concluded: “The present tendencies are to take labor into camp as part of the governmental industrial machine and thereby to lull opposition to sleep by making the workers believe the government will look after their interests. It will do nothing of the sort. Labor gets its rights only as it fights for them.” In the history of the New Deal to date, the workers who had accomplished most were the ones who had struck hardest. “The real fight is on the job,” he said, “not in Washington.”

Baldwin’s view became the institutional position of the ACLU. The 1934 annual report cautioned that the “enormous increase of the power of the federal government under New Deal policies carries with it inevitable fears of inroads on the rights of agitation. Alarms are widely expressed over alleged dictatorship by the President, the abrogation of States’ rights and the vast economic powers of the federal government.”

For the next year, Baldwin would sound the consistent message that “the issue of liberty is inseparable from economic power.” He reiterated his longstanding belief that “only as

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30 Ibid. According to Baldwin, this principle was responsible for the particularly disfavored plight of “Negro workers” in the current administrative scheme. “Exploited by the employers in the hardest and lowest-paid jobs, they are also excluded from most unions. They cannot organize and fight in independent unions, Negro Workers’ rights—N.R.A. or no N.R.A.—are pretty near zero.” Ibid.
31 American Civil Liberties Union, Liberty under the New Deal: The Record for 1933–34 (New York: American Civil Liberties Union, 1934), 3.
32 He condemned the President’s appeal for a “moratorium” on the class struggle, issued against a backdrop of rapidly burgeoning violence against strikers by troops, vigilantes, and local law enforcement agencies, because he
channels of agitation are relatively open for the growth of all political forces can the struggle be carried on without bloodshed and violence.”33 His understanding of the right of agitation had, however, shifted subtly. In Baldwin’s increasingly Marxian historical view, the liberties enshrined in the Bill of Rights had grown out of the triumph of capitalism over feudalism; “civil liberty and democracy were the necessary political tools of the new system of free competition in business.”34 According to Baldwin, it was up to the middle class to ensure the preservation of civil liberties and to reduce the incidence of violence during times of crisis. In fact, it was the “disinterested agitation” of the middle class that would “keep open the high road of tolerance.” Baldwin acknowledged that the complete absence of repression was “impossible in a society made up of warring class and controlled by the strongest,” since “the state is always an instrument of violence and compulsion in the hands of the dominant economic class.”35 He was adamant that the slide into Fascism could be prevented, but only if the channels for organization and protest were preserved. “No greater tasks confronts that active section of the middle class outside the immediate conflict between capital and labor,” he believed, “than the maintenance of

33 Ibid. Baldwin continued: “The New Deal’s main objective is manifestly to save and prolong the life of the profit system in private hands. Property-owners now exercise their power through their role in governmental bodies, as in the days of rugged individualism mainly they did from outside the government. But the New Deal is not wholly the creature of business pressures. Its liberal elements represent the interests of consumers and producers. In effect it is a coalition government—an unstable union of forces representing property-owners and those who in effect work for them.” Ibid.
34 Roger Baldwin, “Coming Struggle for Freedom,” 12 November 1934, ACLU Papers, Reel 109, Vol. 717. He added that “these rights of agitation are demanded so instinctively by forces in revolt that they are championed generally in all lands.”
35 To buttress the point, he quoted Lenin: “So long as the state exists there can be no liberty. When we can speak of liberty there will be no state.” On the issue of political and economic power, he explained: “The new collective forms of business have shifted control slightly from bankers to industrialists, and on the intellectual side from lawyers to professors, but power lies precisely where it was before—with the masters of property. We have traded individual capitalism for state capitalism.” Ibid.
those rights of agitation, of organization, of the building of power from below through which, throughout all history, progress has come.”

In light of these views, Baldwin and the other leftists on the ACLU board were even more hostile to Senator Robert F. Wagner’s labor disputes bill than they were to the NIRA. Introduced in March 1934—the same month that President Roosevelt betrayed the trust of union organizers in the automobile industry by endorsing proportional representation and company unions—the Labor Disputes Act would have given the National Labor Board power to enforce the labor-protective measures of Section 7(a) of the NIRA. It sought to prohibit company unions, and it required recognition of independent unions and exclusive majority representation. It also ensured that mediation and arbitration were voluntary and guaranteed the right to strike. The bill received enthusiastic support from the NLB, the AFL, and the Socialist Party. The Communist Party, however, condemned it as a tool to break strikes and cripple working class agitation, and Mary Van Kleeck adopted the Communist Party line. She told Senator Wagner that “to prevent or discourage strikes which have for their purpose gradual increase in the workers’ power in a period when fundamental economic change in the ownership of industry can clearly be envisaged may only serve to check the rising power of the exponents of human rights.”

Baldwin supported Van Kleeck’s position but treaded gingerly around his labor allies. He invited Van Kleeck, along with a representative of the International Juridical Association, a left-wing labor lawyer group, to explain their reservations about the bill at a meeting of the Board. After discussion, the board authorized Baldwin and Harry Ward to write to Massachusetts Senator David I. Walsh, chair of the Senate labor committee, in opposition to the bill. They told Walsh that they “regard[ed] the regulation of labor relations by the Federal Government as

36 Ibid.
dangerous to the rights of labor to organize and strike.” Administration of the NIRA had demonstrated that any state machinery for the conciliation of conflict, no matter how well intentioned, was bound to undercut the rights of labor to organize and strike in the long run. In conclusion, they suggested that in the event that action on the bill was inevitable, amendments proposed by the IJA would correct the worst of its faults. The letter angered both moderate labor advocates and committed leftists, especially Van Kleeck. Baldwin sought to appease Van Kleeck by assuring her that although he was constrained to moderate his position in official communications on behalf of the ACLU, he had “always objected to the N.R.A. as well as to the New Deal,” since its underlying purpose was to “help prolong the capitalist system.”

The ACLU was never forced to settle its internal disagreement over the labor disputes bill. In the end, Wagner’s version met with vehement opposition from business interests and received little support in Congress. Critics charged that it was unconstitutional because it extended to manufacturers not in interstate commerce and because it trampled due process by combining prosecutorial and adjudicative roles in a single body. Senator David Walsh’s committee offered an amended bill that expressly disavowed class antagonism and jettisoned the

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38 International Juridical Association, “Memorandum Suggesting Certain Amendments to the Labor Disputes Act,” ACLU Papers, reel 107, vol. 698. The IJA suggested that all representatives on the NLB either be designated as government representatives or be directly elected by employees and employers respectively, and, notably, that enforcement of provisions outlawing unfair labor practices should be available through the courts as well as the NLB. It also urged explicit protection of the right to strike and picket; provision for representation of substantial minority groups; and the inclusion of espionage and blacklisting as unfair labor practices.
39 Harry Ward and Roger Baldwin, for the Board of Directors, to David I. Walsh, Chairman, Senate Committee on Education and Labor, 20 March 1934, ACLU Papers, reel 107, vol. 698. They also asked Wagner’s secretary to arrange an opportunity for representatives of the ACLU and IJA to testify before the Senate Committee on Education and Labor.
40 George Soule to Roger Baldwin, 30 March 1934, ACLU Papers, reel 107, vol. 698 (“I again question the wisdom of opposing the creation of a National Labor Board by statute. It seems to me that industrial experience proves that the existence of bodies for arbitration and mediation favor the growth of a union movement.”); Mary Van Kleeck to Roger Baldwin, 30 March 1934, ACLU Papers, reel 108, vol. 698 (“The point is that one must either be opposed to this bill or accept it, and it is not correct to suggest amendments if one opposes it.”).
41 Roger Baldwin to Mary Van Kleeck, 4 April 1934, ACLU Papers, reel 107, vol. 698.
pro-labor provisions of the original. The new, watered down version made collective bargaining voluntary and permitted company unions. An ACLU communication urged members of Congress to oppose the amended bill as a “sham and a fraud” that weakened existing rights and would “inevitably serve as a weapon in the hands of employers to crush organized labor.”43 In fact, the ACLU considered it “the severest blow to organized labor yet proposed,” and the International Juridical Association condemned it “unequivocally.”44 Although the revised bill had significant political approval, it never reached a vote. Roosevelt, convinced by a wave of strikes in the late spring that some kind of immediate action was necessary, pushed his National Industrial Adjustment Act, or Resolution No. 44, through Congress. The resolution authorized a National Labor Relations Board to conduct investigations, hold elections, and issue orders in furtherance of Section 7(a). Wagner thought it best to accept the stopgap measure while building good will for a more aggressive bill. A permanent resolution would have to wait for the new Congress.

The summer and fall of 1934 witnessed violent and widespread strikes among radicals as well as established AFL unions. It was soon clear the new NLRB, which was governed by a progressive vision of bureaucratic expertise as a means of maintaining orderly industrial relations, would be inadequate to the task of administering national labor policy. Its decisions were very much like those of the NLB’s, and as with the earlier board, they were summarily ignored by employers. The Department of Justice initially proved unwilling to sue for enforcement of NLB orders, and when it was finally convinced to do so, it lost in the federal

Meanwhile, in January 1935, Roosevelt announced that the NLRB would not operate in industries already governed by code authorities. In February, a federal district court issued a decision in a case involving an NLB order, holding that manufacturing did not fall within Congress’s power to regulate interstate commerce. Frank Nebeker, who had so eagerly prosecuted the IWW in Chicago almost two decades earlier, argued and lost the government’s case. In March, NLRB chair Francis Biddle pronounced that Section 7(a) was a mere “paper right, a sort of innocuous moral shibboleth.”

In the meantime, Roger Baldwin set about mobilizing support for his critical vision of the New Deal and labor’s rights. Much of his energy in the fall of 1934 was invested in a conference on “Civil Liberties under the New Deal,” held in Washington, D.C. in early December. Its stated purpose was “to put pressure on Congress and on the administration to make good those professions of belief in liberty voiced by the President last spring.” The announcement for the conference, which labeled the ACLU a “militant organization,” stated that three hundred prominent liberals would attend, with the goal of recommending federal legislation, changes in federal regulations, and test cases in the courts “to protect rights of labor and minorities and to assure freedom of expression.” The final program included representatives of a broad range of liberal and radical organizations, including the American Federation of Teachers, the Church League for Industrial Democracy, the Committee for Protection of Foreign Born, the Fellowship

47 Quoted in Irons, New Deal Lawyers, 225.
48 The conference was hosted at the Hotel Arlington, which promised orally not to discriminate on the basis of race. When this representation was violated, the attendees unanimously voted to depart the hotel. The remaining sessions were held at the Howard University Law School at the invitation of Charles H. Houston.
49 Topics for the conference on Civil Liberties under the New Deal, ACLU Papers, reel 110, vol. 719.
50 Announcement of Conference on Civil Liberties under the New Deal, 28 October 1934, ACLU Papers, reel 110, vol. 719.
of Reconciliation, the International Labor Defense, the National Committee on Federal
Legislation for Birth Control, the National Urban League, and the NAACP. Representatives of
the government were invited to reply to arguments and data presented. President Roosevelt
was asked to prepare a statement to be read at the Conference on Civil Liberties, but on receiving
the ACLU’s file from the Bureau of Investigation, he declined. ACLU chair Harry Ward
explained that the conference, which in his view had “historic significance,” was designed to
“raise[] a test not only of the value of the New Deal but also of the whole democratic process,”
by asking “whether the claim that civil liberties are the means to orderly social change is
anything more than an idealistic belief.”

The organizers sought to present a comprehensive picture of the state of civil liberties in
all its manifestations. Panels touched on such far-ranging issues as anti-lynching legislation,
tribal autonomy for American Indians, expansion of political asylum, transfer of colonial
possessions from naval to civilian rule, and the rights of the unemployed. Legislative proposals
discussed at the conference included bills to expand asylum for political refugees, to provide jury
trials in postal censorship cases, to repeal the postal censorship provision of the Espionage Act,
to require equal radio airtime on all sides of controversial questions, and to criminalize lynching

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51 Program of Conference on Civil Liberties under the New Deal (December 8–9, 1934), ACLU Papers, reel 110, vol. 721.
52 ACLU Press Bulletin 641, 30 November 1934, ACLU Papers, reel 110, vol. 719. Government officials and
members of Congress who appeared on the program included Col. Daniel MacCormack, Commissioner General of
Immigration and Naturalization; Hugh L. Kerwin of the Department of Labor; Louis G. Caldwell and Bethuel M.
Webster of the Federal Radio Commission; and Robert Weaver and Nathan Margold of the Department of the
Interior. Karl A. Crowley, Solicitor of the Post Office Department, failed to attend as scheduled. ACLU Press
53 John Clayton to Stephen T. Early, 4 December 1934, Franklin D. Roosevelt Papers, Official File 2111 (American
Civil Liberties Union, 1933–45).
54 Harry F. Ward, Statement at the Conference on Civil Liberties under the New Deal, 8 December 1934, ACLU
Papers, reel 110, vol. 721.
55 The conference’s publicity director encouraged graphic presentation of dramatic issues like “lynchings,
discrimination against Negroes, breaking up of demonstrations of the unemployed, [and] concentration camps for
workers”—all of which could be “made more real, more shocking, more immediate by effective exhibits.” Clifton
Read to cooperating organizations, 1 December 1934, ACLU Papers, reel 110, vol. 719.
under federal law.\textsuperscript{56} There were occasional differences of opinion between New Deal
representatives and their critics and between the competing camps among the representatives.
For example, in debating a resolution protesting the conviction of the Scottsboro boys, NAACP
representatives refused to endorse language “support[ing] the legal defense of the boys by the
International Labor Defense,” until Baldwin proposed compromise wording. Members of the
panel on radio censorship clashed over the dangers of administrative discretion, the desirability
of federal regulation of radio content, and the tradeoffs between private and public control of the
airways.\textsuperscript{57} On the whole, however, the delegates “showed surprising unanimity of opinion on
fundamentals,” and the ACLU was optimistic “that a comprehensive civil rights legislative
program,” to be drafted by a continuing committee, would “receive support of all the liberals and
radicals of the 22 cooperating organizations including church, legal, Negro, educational, anti-
censorship, farm, student, and labor defense groups.”\textsuperscript{58} At the end of the month, representatives
drafted a letter to President Roosevelt asking him to sponsor some of its strongest legislative
proposals.\textsuperscript{59}

\textsuperscript{56} Memorandum of Bills Proposed for Discussion, Conference on Civil Liberties under the New Deal, ACLU
Papers, reel 110, vol. 719. The Committee on Action Affecting Negroes adopted a resolution in favor of a broad
civil rights bill with an anti-lynching provision as one of its provisions. Report of Committee on Action Affecting
Negroes, Conference on Civil Liberties Under the New Deal, 9 December 1934, ACLU Papers, reel 110, vol. 721.
\textsuperscript{57} E.g., Louis G. Caldwell, “Excerpts from ‘Freedom on the Air,’” Conference on Civil Liberties and the New Deal,
ACLU Papers, reel 110, vol. 721.
\textsuperscript{59} Harry Ward, Arthur Garfield Hays, Roger Baldwin, Walter White, Powers Hapgood, and Bethuel Webster, Jr., to
Franklin D. Roosevelt, 26 December 1934, ACLU Papers, reel 110, vol. 721. The authors urged a Senate
investigation of anti-labor vigilantes, the equal provision of radio facilities on public issues, federal jury trials in
postal censorship cases, and a bill for the federal prosecution of lynchers (modeled on the Costigan-Wagner anti-
lynching bill). On the labor issue, the proposals included measures to outlaw company unions, to require employers
to enter into collective bargaining with majority unions, and to lodge final decisionmaking power in the NLRB.
Carol King complained to Baldwin that he submitted the bills drafted by the ACLU before the conference, rather
than the revised versions adopted at the conference. Carol King to Roger Baldwin, 3 January 1935, ACLU Papers,
reel 117, vol. 784.
For Baldwin, of course, the most important proposals formulated at the conference were those involving labor relations. The agenda, if not the output, of the labor sessions was heavily slanted to the left. The attendees took up a bill to bring farm workers within the provisions for collective bargaining, amendments to Section 7(a) to buttress rights of collective bargaining and to prohibit company unions, and a measure to prevent discrimination against black workers under the NRA. Mary Van Kleeck was supposed to speak on “The Rights of Labor Under the new Deal,” but she withdrew several days before the conference. Instead, a speech submitted by Francis Gorman of the United Textile Workers, also absent, was read aloud by an aide. Although Gorman was critical of the manner in which Section 7(a) had been administered, he was not opposed to an effective legislative solution. Like most of the socialists and liberals within the ACLU and in the New Deal coalition, he thought that reform within the existing system was a tenable, if not preferable, alternative to revolution. So did the conference’s predominantly socialist Committee on Labor’s Rights, which submitted a report condemning the NRA and regional labor boards for declining to enforce Section 7(a) but withholding criticism of Roosevelt and the NLRB.

The introduction to the resolutions issued by the conference noted that New Deal legislation, “at the most important point of conflict, that between capital and labor,” had failed to follow through on its promise to facilitate collective bargaining. A qualified anti-New Deal

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60 In his address to the participants, Baldwin proclaimed that government agencies had failed “to make good the promise implied in law of support of genuine collective bargaining.” Roger Baldwin, “The Main Issues of Civil Liberties under the New Deal,” 8 December 1934, ACLU Papers, reel 110, vol. 721. He continued, “Company-controlled unions are recognized as legitimate agencies for bargaining when they should long since have been outlawed. Compulsory arbitration has been written into the coal code. The merit clause in the auto code promotes discrimination against union labor. All the codes are administered by employers’ associations, with a rare representative of labor here and there. . . . When government boards have taken a forthright stand on labor’s rights, enforcement machinery is lacking or ineffective.”

61 Memorandum of Bills Proposed for Discussion, Conference on Civil Liberties under the New Deal, ACLU Papers, reel 110, vol. 719.

62 Daniel, ACLU and the Wagner Act, 94–95.
statement presented by a special committee on labor’s rights was “vigorously debated” on the floor and passed, in amended form, with several opposing votes.\(^{63}\) It declared that the NRA, in practice, had served to buttress employer control and to “deceive the workers as to their rights, and to weaken the power of reliance upon their own organized strength.” It therefore concluded that the “principle of the NRA” was “in violation of the interests of workers’ rights to organize and strike—their only sources of power and liberty.” The conference participants had “no illusions as to the place of law in achieving civil liberties”—“we know from experience that economic power and organized pressure alone make for strength,” they explained—but they nonetheless proposed legislation that would undercut the influence of industrial interests.\(^{64}\) In the end, the labor proposals sent to Congress were modest ones: to outlaw company unions and to require employers, in agriculture as well as industry, to bargain collectively with representatives of the majority of their workers.\(^{65}\) In fact, the resolutions were so compatible with mainstream liberal sentiment that many members of Congress promised their support.\(^{66}\)

\(^{63}\) Minutes of the Conference on Civil Liberties under the New Deal, ACLU Papers, reel 110, vol. 721. The special committee included Max Bedacht, Powers Hapgood, and Roger Baldwin.

\(^{64}\) Resolutions, Conference on Civil Liberties under the New Deal, 9 December 1934, ACLU Papers, reel 110, vol. 721. Cf. ACLU Press Bulletin 643, 14 December 1934, ACLU Papers, reel 110, vol. 721 (“Asserting that ‘economic power and organized pressure’ alone make for strength, the conference declared ‘that existing laws or any laws which may be enacted will remain without meaning or force unless backed by wide and militant organization of workers, tenant farmers, share croppers and unemployed workers.’”).

\(^{65}\) ACLU Bulletin 646, 11 January 1935, ACLU Papers, reel 117, vol. 784. The other proposals were substantially the same as those submitted to President Roosevelt. Baldwin had apparently taken Joseph Schlossberg’s advice on minority representation to heart. He wrote: “[A]s long as company-controlled unions exist, I think we would be in favor of the position taken by the National Labor Relations Board in requiring employees to deal with representatives of a majority of their workers and without rights for minority groups to make separate contracts. If company-controlled unions are outlawed, then I think we would doubtless favor the principle of representation of workers according to their own choice on the theory of proportional representation. We have not discussed the point you raised of a company controlling several plants in which a minority might be located in a particular plant where it constituted in that plant a majority.” Roger Baldwin to Paul Furnas, 12 January 1935, ACLU Papers, reel 115, vol. 772.

\(^{66}\) E.g., J. J. Hoeppel to Harry Ward, 10 January 1935, ACLU Papers, reel 117, vol. 784 (“Four out of the five projects outlined are, in my opinion, meritorious.”); Harry Sauthoff to Harry Ward, 11 January 1935, reel 117, vol. 784 (“I want you to know that I am with you one hundred per cent, and I feel I can safely say that all the Progressives from Wisconsin take the same position on these matters as I do.”); Robert Wagner to Roger Baldwin, 11 January 1935, ACLU Papers, reel 117, vol. 784 (expressing substantial agreement); F. J. Sisson to Roger...
The NLRA

By the spring of 1935, persistent labor tensions, coupled with a newly elected labor-friendly Congress, rendered true congressional reform a realistic possibility for the first time. On February 21, Senator Wagner introduced his new National Labor Relations Act in Congress. Wagner told Baldwin that “some of the suggestions which were made last year by the American Civil Liberties Union and by some of the lawyers associated with the International Juridical Association [had] proved most helpful in connection with the preparation of a new bill.” The Wagner Act was a revised version of the earlier bill, with a new preamble to insure against constitutional challenge. It drew from the most protective strains of American labor policy. As Senator Edward P. Costigan noted during debate over the bill, it codified the very provisions that the Commission on Industrial Relations had endorsed two decades before. It guaranteed workers’ right to organize without employer interference, mandated that employers bargain with representative unions, and preserved the right to strike. It also ensured that employers would not unduly influence representation elections and legitimated exclusive majority representation. And it created a three-member quasi-judicial board to resolve labor disputes, whose orders would be enforceable by the federal courts. In short, it gave collective bargaining the stamp of government approval. As with Wagner’s earlier bill, labor endorsed it wholeheartedly. The President once again waffled. Employers were just as adamant that it be defeated, and they were eagerly assisted in their propaganda efforts by the recently founded American Liberty League, an

Baldwin, 11 January 1935, ACLU Papers, reel 117, vol. 784 (supporting four of five proposals); B. J. Gehrmann to ACLU, 13 January 1935, reel 117, vol. 784 (supporting four of five proposals).

organization of conservative Democrats and other New Deal opponents who deemed the bill an affront to the American constitutional tradition.

For the ACLU, the debate over the Wagner Act provoked a heated controversy between its liberal and leftist contingents. Despite the position adopted at the Conference on Civil Liberties, the leftist majority on the board remained opposed to state regulation of labor relations. The ACLU’s committee on labor’s rights, which was assigned to make further recommendations on pending legislation, was dominated by three members of the International Juridical Association who had shared Baldwin’s and Van Kleeck’s view of the 1934 bill. Among them were Carol Weis King, a lawyer for the International Labor Defense who would go on to join the Communist Party, and Nathan Greene, co-author with Felix Frankfurter of *The Labor Injunction*, whom Baldwin would later describe as a “fellow traveler with the Communist opposition.” On March 18, the ACLU board considered a memorandum by the IJA on the faults of the Wagner bill and voted to oppose the proposed legislation.

In a letter to Senators Wagner and Walsh, Baldwin explained that the ACLU would not support the Wagner Act because no federal agency “intervening in the conflicts between employers and employees [could] be expected to fairly determine the issues of labor’s rights.” Almost in passing, Baldwin expressed several concrete objections, including the ability of the board to act on its own initiative, the exclusion of agricultural workers, and the failure of the act to prohibit “discrimination on account of sex, race, color or political convictions.”

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69 Quoted in Daniel, *ACLU and the Wagner Act*, 97. For the next half-decade, Greene would play a dominant role in formulating the ACLU’s policy on labor issues. The other committee members were Milton Handler and Paul Brissenden, both liberal labor scholars at Columbia University, and Isadore Polier of the International Juridical Association.
70 Wagner declined to address the objections in light of Baldwin’s “frank statement that [he was] philosophically against any legislation that might set up a government agency as one of the areas within which the industrial struggle might be waged.” Robert Wagner to Roger Baldwin, 5 April 1935, ACLU Papers, reel 116, vol. 780. In general, those advocates of the Wagner Act who were concerned with racial discrimination thought that “racial
years, the latter objections would become major civil liberties concerns. For the time being, however, Baldwin’s central objection was to the desirability of any governmental intervention in the labor struggle. He pointed out that all of the boards established by the federal government had “tended to take from labor its basic right to strike by substituting mediation, conciliation or, in some cases, arbitration.” He reiterated the view, first adopted by the ACLU board in 1920, that “only unions militant enough and strong enough to withstand many pressures have been able to achieve anything like an unrestricted exercise of their rights.”

Baldwin acknowledged that the labor movement believed Wagner’s bill would strengthen its ranks but insisted, based on “a very wide contact with struggles of labor for its rights to organize, strike and picket all over the country,” that the dominant view was misguided.

Wagner was disappointed at the ACLU’s position and considered it short-sighted. He told Baldwin, “Whether we will it or not, government in every country is going to be forced to play a more important role in every phase of economic life, and for that reason it seems to me more useful to attempt to direct the nature of that role rather than merely to state the truism, that government is likely to be influenced by the forces in society that happen to be strongest.” Wagner believed that governmental authority was the only feasible means of countering powerful private interests. Over “a decently long period of time,” appropriate state policies...
would buttress labor, not quash it. In fact, in Wagner’s view, even Section 7(a) had proven to be “a galvanizing force.”

After fifteen years, the ACLU was up against fundamentals. For the first time, the progressive project for the affirmative protection of labor’s rights was a realistic possibility. The ACLU had been founded on resistance to state power. Its concept of civil liberties as a right of agitation was premised on a theory of labor voluntarism that labor itself had come to abandon. When the state appeared ready to come genuinely to its aid, the labor movement set aside its reservations (which, in any case, had always been qualified) and embraced government action. But for the ACLU, resistance to state authority was a core unifying ideology, within and outside the labor context. In such cases as Pierce, Scopes, Dennett, and Ulysses, they had convinced others and themselves that the governmental oversight of ideas is dangerous and misguided. Over the course of the 1920s, they had expanded from a skeptical stance toward state intervention in labor disputes to a general aversion to state interference with minority viewpoints, personal morality, and private life.

Significantly, the liberals within the ACLU were less hostile to the motivating philosophy of the Wagner Act than were the labor radicals. For lawyers like Arthur Garfield Hays and Morris Ernst, as for other New Dealers, the rights to organize, picket, and strike had always been derivative of a larger commitment to expressive freedom. They had never entirely accepted the notion of a right of agitation as an independent revolutionary force, productive of (rather than protected by) the marketplace of ideas. More to the point, they never were opposed to state power as such, merely to the intrusion of the state into the realms of democratic decisionmaking.

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73 Morris Ernst to Roger Baldwin, 29 April 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, 10 May 1935, ACLU Papers, reel 116, vol. 780.
and private conduct. As a result, they were willing to bracket the regulation of labor relations as an appropriate forum for the exercise of state power—even if the result was ameliorative and counter-revolutionary—as long as rights derived from the First Amendment were preserved. In other words, for liberals, fundamental transformation of the economic system might be accomplished through the exercise of civil liberties, but it was not a civil liberty in and of itself.74

Indeed, for many, the notion that labor relations should be isolated from state intervention smacked of the Lochner-era tradition of economic liberty, which they had all expressly repudiated. Francis Biddle, chair of the NLRB created under Public Resolution No. 44, wrote Baldwin to express his surprise that the ACLU board was opposing the Wagner bill in the face of “enthusiastic support” from organized labor, particularly as it contained no mediation provision.75 Baldwin answered that Biddle’s board had been “the only bright spot in the whole record of the past two years of the government’s mediation of labor disputes.” He expressed support for the provisions of the bill outlawing company unions and protecting the right to strike, but he fell back on his conviction from “experience” that “labor wins its rights to organize and bargain collectively not by dependence upon governmental agencies but by its own organized power.”76 Reliance on administrative machinery inevitably would weaken unions’ independent strength, Baldwin concluded. Biddle thought that Baldwin was “too damned theoretical.” He was convinced that the Wagner bill would enhance union cohesion and power. More to the

74 Letter from Arthur Garfield Hays, 7 May 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.”).
75 Francis Biddle to Roger Baldwin, 12 April 1935, ACLU Papers, reel 116, vol. 780.
76 Roger Baldwin to Francis Biddle, 13 April 1935, ACLU Papers, reel 116, vol. 780.
point, he told Baldwin: “You sound a little, I confess to say, like the Liberty League. If that
doesn’t stop you I don’t know what will.”

Biddle was right: his criticism struck close to home. For months, Baldwin had been
concerned that the board’s objection to federal labor legislation seemingly allied it with
industrial interests. In fact, he professed “to hesitate to use so misunderstood a word as ‘liberty,’
invoked today so loudly by those rugged defenders of property rights, the ‘Liberty League’ and
allied organizations,” who understood liberty as a “right to exploit the American people without
governmental interference.” Baldwin took great pains to distinguish the agenda of the Liberty
League from the ACLU’s, emphasizing that “the historic conception of liberty” was “the
freedom to agitate for social change without restraint.” In his address to the Conference on
Civil Liberties Under the New Deal, he again clarified that the ACLU was “not concerned with
those liberties so loudly proclaimed today by reactionaries opposed to the New Deal economic
controls,” whose conception of liberty was based on “property rights,” rather than “human
rights.” And in his letter to Wagner, he noted that although the board regretted that its
opposition was shared by “reactionary employers,” its position was based on “diametrically
opposite grounds.”

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77 Francis Biddle to Roger Baldwin, 17 April 1935, ACLU Papers, reel 116, vol. 780.
79 Ibid. 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
80 Baldwin, “The Main Issues of Civil Liberties under the New Deal,” 8 December 1934, ACLU Papers, reel 110,
vol. 721.
81 Roger Baldwin to Robert Wagner, 1 April 1935, ACLU Papers, reel 116, vol. 780. See also Joseph Schlossberg to
Roger Baldwin, 14 May 1935, ACLU Papers, reel 116, vol. 780 (“Rightly or wrongly the American Federation of
Labor is committed to the Wagner Bill. By your opposition to the bill you unwillingly lined up with the employers
and all reactionaries who opposed the bill. . . . This is one case in which the Civil Liberties Union can well afford to
take no official position.”).
Baldwin’s vigorous protestations betrayed an underlying insecurity, and when pressed hard enough, he capitulated. In light of substantial support for the Wagner Act both within the ACLU and among the organization’s allies in the labor movement and the government, the board ultimately agreed to reconsider its position. In May 1935, it held a referendum for the members of the National Committee and local branches on the desirability of the Wagner bill. Notwithstanding the strong convictions of the ACLU leadership, the majority of the returns favored support of the Wagner Act in some form, and the board voted to rescind its opposition and take no official position on the bill.

As it turned out, the ACLU’s change in position was of little relevance except as a matter of internal politics. By the time the board issued its retraction, passage of the bill was all but assured. The Committee on Education and Labor reported favorably on it, and it passed both houses of Congress with decisive majorities. When the Supreme Court unanimously declared

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82 E.g., John W. Edelman, David S. Schick, and Isadore Katz to Roger Baldwin, 3 May 1935, ACLU Papers, reel 116, vol. 780 (“There is very little left in the field of radicalism that we can cling to, what with the state of affairs in the Socialist Party, etc. Civil Liberties is one thing we regard with affection. We do not need to cite to you that in previous difficulties with the American Federation of Labor over the defense of Communists etc., it was us that went to the bat, stuck our labor necks out and fought like hell with Bill Green. . . . It is therefore with a greater chagrin that we bump up against the A.C.L.U. condemnation of the Wagner-Connery Bill for which we individually and organizationally are fighting.”); John W. Edelman to Roger Baldwin, ACLU Papers, reel 116, vol. 780 (“Trade unionists who know ‘what it’s all about’ realize well enough that the Labor Disputes Bill has many weaknesses and will not bring about social justice, but they also know that the passage of some such legislation is essential to enable the organization drive in the unorganized industries to continue. . . . The Civil Liberties [Union] functions usually for the alleged radical unions who are so weak that they are licked before getting started with or without a Labor Disputes Bill. In fact the Communist led unions don’t really want to settle strikes and you know that is the case. But some of us are connected with really militant-acting unions who do things and who want to settle strikes. We have used the government mechanisms and the arbitration technique very effectively to that end. . . . The Civil Liberties Union in the end must work with the conservative as well as the radical labor movement; you cut off cooperation with the conservative movement and don’t gain anything with the radical group by attacking the Disputes Bill.”).

83 Roger Baldwin to members of the National Committee and local branches, 8 May 1935, ACLU Papers, reel 115, vol. 772. Members were asked to choose among five options: “against creating any such federal board for labor relations,” “in favor of the Wagner bill substantially as it stands,” “in favor of the Wagner bill with amendments as indicated,” “for the substitute proposals suggested,” or “Against the Civil Liberties Union taking any position on the bill.” Roger Baldwin to board members, 8 May 1935, ACLU Papers, reel 115, vol. 772. Baldwin reported that only 25 ballots were received out of 84 eligible voters. Felix Frankfurter personally supported the bill but was opposed to the ACLU taking a position on it. Roger Baldwin to Felix Frankfurter, 17 May 1935 (annotated return ballot undated), ACLU Papers, reel 116, vol. 780.

84 ACLU Statement, 27 May 1935, ACLU Papers, reel 116, vol. 780; Baldwin to board, 22 May 1935, ACLU Papers, reel 116, vol. 780. Baldwin reported that only 25 ballots were received out of 84 eligible voters. Felix Frankfurter personally supported the bill but was opposed to the ACLU taking a position on it. Roger Baldwin to Felix Frankfurter, 17 May 1935 (annotated return ballot undated), ACLU Papers, reel 116, vol. 780.

the NIRA unconstitutional in the *Schechter Poultry* case, it was clear that a new measure was necessary. And on July 5, 1935, President Roosevelt signed the bill into law.

For the ACLU, the split over the Wagner Act was symptomatic of a fundamental shift in its understanding of civil liberties. The board’s memorandum issued in conjunction with its referendum on the Wagner Act acknowledged the sentiment of some members of the ACLU that its central argument—that labor could advance “only through its own economic power, not through dependence on legislation”—was not properly within the field of civil liberties. This perceived slippage was a substantial point of contention for liberals on the national committee, who had never shared the board’s commitment to the right of agitation. Alexander Meiklejohn, writing to record his support for the bill, commented on “the tendency of the Board to engage in industrial disputes instead of fighting for the maintaining of civil liberties in connection with them.”86 Judge Charles Amidon, head of the ACLU-sponsored National Committee on Labor Injunctions, thought the organization should limit its work to “the civil liberties rights of persons when those rights are directly invaded.” He cautioned that “to carry on campaigns against economic wrongs, which ultimately affect civil liberty, would probably lead the union into controversies that would impair its usefulness in the field of its special work.”87

Until the Wagner Act, the ACLU did not regard civil liberties as bounded by the Bill of Rights. The board often merged the right of workers to a living with the right of workers to espouse their economic program, emphasizing that civil liberty preexisted the Constitution. The debate over the Wagner Act taught the ACLU leadership an important lesson. The organization’s impressive successes during the 1920s had generated broad-based support for a vision of civil liberties based on expressive freedom. The upshot of the ACLU’s expansion into

87 Charles F. Amidon to Roger Baldwin, 27 April 1934, ACLU Papers, reel 105, vol. 678.
new realms and its enlistment of new constituencies was a change in its perceived purpose. The new supporters of the civil liberties agenda did not regard it as appropriate for the ACLU to intervene in “purely” economic matters. Even longtime members had come to rethink the theoretical basis for their commitment to free speech. For the time being, the leftist majority on the board clung to its substantive commitments, but its justification for doing so had begun to crumble.

Ironically, the ACLU’s early understanding of civil liberties found its strongest ally in the NLRB, which came to regard the effective organization of workers as the most important of civil liberties. The new vision, of course, was enforced by the state, not asserted against it. Still, the underlying objective of the Wagner Act was to strengthen organized labor, and labor leaders wasted little time in using the new mandate to their fullest advantage. In the months after its passage, John L. Lewis, Sidney Hillman, and other AFL labor veterans turned aggressively to organizing unskilled workers in the mass production industries. When the AFL rebuffed their strategy in its 1935 convention, Lewis assembled his allies in the new Committee for Industrial Organization. He also worked closely with New Deal Democrats, who enacted additional protections to foster CIO efforts.88

For their part, employers flagrantly resisted compliance with the new legislation. They continued to engage in blatant anti-labor practices, including industrial espionage, strikebreaking, and the use of munitions and private police forces.89 Although these methods were clear violations of workers’ new statutory rights, employers’ lawyers advised that the Wagner Act was unconstitutional and would shortly be declared so by the Supreme Court. True to form, employers mobilized around a legal campaign, supported most visibly by the American

88 For example, Senator James Byrne’s anti-strikebreaking bill, enacted in June 1936.
Liberty League’s National Lawyers Committee, a collection of corporate lawyers who believed that the Wagner Act was incompatible with \textit{Lochner}-era values. The threat of an adverse decision was so menacing that the NLRB devoted much of its energy during 1935 and 1936 to formulating its own legal strategy.

Congress, however, did not leave the new body without recourse. In the spring of 1936—prompted by the suppression of the Southern Tenant Farmers Union, an organization of tenant farmers and sharecroppers in northeastern Arkansas, and by the ineffectuality of the NLRB—Wisconsin Senator Robert M. La Follette, Jr. submitted a Senate resolution authorizing the investigation of “violations of the rights of free speech and assembly and undue interference with the right of labor to organize and bargain collectively.”\textsuperscript{90} La Follette initially doubted that the Senate would act on his proposal, but after highly effective preliminary hearings, the resolution was approved in June with significant public support.\textsuperscript{91} Known as the La Follette Civil Liberties Committee, the new body, like the NLRB, regarded civil liberties as synonymous with the rights of labor, whether statutory or constitutional. It set out to investigate the activities of detective agencies, employer associations, corporations, and individual employers “in so far as these activities result in interference with the rights of labor such as the formation of outside unions, collective bargaining, rights of assemblage and other liberties guaranteed by the

\textsuperscript{90} See generally Auerbach, \textit{Labor and Liberty}.

\textsuperscript{91} Gardner Jackson to Roger Baldwin, 9 April 1936, Jackson Papers, box 42, folder La Follette Civil Liberties (“At first . . . [La Follette] took the position that there was not a ghost of a show of getting a resolution through the Senate and that the best we could hope for was to string out a preliminary hearing as long as we could with good headline stuff and then push another resolution next session on the basis of what was turned up at this preliminary hearing. Now, however, he is taking the position that with a comparatively few witnesses presenting as strong material as possible, his subcommittee will make a favorable report to the whole committee with a chance that the whole committee will, in turn, report it out favorably and get action on it this session. He says that it is our job to pressure the whole committee with letters, wires, etc.”). See also Robert Wohlforth to Senator Elbert D. Thomas, 6 October 1936, in \textit{Violations of Free Speech and Rights of Labor, General Data and Information}, Sen 78A-F9, Record Group 46 (Records of the United States Senate), National Archives and Records Administration, Washington, D.C. (hereafter La Follette Committee Papers), 10.25, box 4, folder October 1936 (enclosing nine editorials from New York and Washington papers and commenting that “nearly all of the editorials, with few exceptions, are favorable”).
Constitution.” The younger Senator La Follette, whose famous father had begun his career as a law partner of the Free Speech League’s Gilbert Roe, chaired the subcommittee, which was organized within the Senate’s Committee on Education and Labor.

Several members of the ACLU, including Morris Ernst, Norman Thomas, and the Washington-based Gardner Jackson, were instrumental in engineering the new measure, which they had first proposed at the Conference on Civil Liberties under the New Deal. The ACLU suggested situations that warranted investigation, and it recommended appropriate witnesses and offered to pay their travel expenses. Baldwin was convinced that “the worst evil which should be investigated is the mounting rise of force and violence by employers against the organization of labor,” which threatened “rights presumably guaranteed by federal legislation.” He thought a successful inquiry would justify a full slate of federal legislation protecting the rights of labor against public and private curtailment. At first, the ACLU urged the committee to investigate civil liberties abuses in other contexts as well. It soon became evident, however, that the La

92 Felix Frazer (Investigator) to James A. Kinkead, 9 October 1936, La Follette Committee Papers, 10.25, box 4, folder October 1936.
93 The committee also included Elbert Thomas, a Utah Democrat, and Louis Murphy, who died soon after his appointment.
94 Roger Baldwin to Robert La Follette, 16 April 1936, ACLU Papers, reel 131, vol. 887.
95 Ibid. In particular, he recommended legislation involving an amendment to the Civil Rights statute; the federal licensing of detective agencies engaged in interstate business; the relation of federal aid to state troops used in strikes; the importation of strike-breakers; and the relation of the federal government to local interference with the rights of the unemployed.
96 Morris Ernst to Roger Baldwin, 9 April 1936, ACLU Papers, reel 131, vol. 887 (“The testimony should, of course, be headed up toward federal legislation such as control of private employment bureaus, radio, post office jury trials, a method of handling employment through federal employment service during times of strikes, etc.”). At the preliminary hearings, Arthur Garfield Hays and Morris Ernst were prepared to testify regarding postal and radio censorship, sedition and criminal syndicalism laws, and alien laws, as well as the operation of the federal civil rights statute, the use of state troops against strikers in relation to the federal government’s aid to the national guard, and other issues. Memorandum Re: La Follette Investigation, 20 April 1936, ACLU Papers, reel 131, vol. 887. La Follette told Baldwin that he “sincerely appreciate[d]” the ACLU’s interest and was grateful for the offer of assistance but “in the interest of prompt action upon this resolution the sub-committee hesitates to prolong these preliminary hearings any more than absolute necessary.” Robert La Follette to Roger Baldwin, 22 April 1936, ACLU Papers, reel 131, vol. 887.
Follette Committee would confine its inquiry to labor relations. At the preliminary hearings, NLRB chair J. Warren Madden was the first witness. He tellingly declared, “The right of workmen to organize themselves into unions has become an important civil liberty.” The connection between the two bodies was not merely ideological; much of the La Follette Committee’s staff was borrowed from the NLRB.

The civil libertarianism of the La Follette Committee was in many ways a holdover from the ACLU’s early days. Its principal goal was the elimination of all interference with workers’ right to organize, whether perpetrated by local law enforcement or by employers themselves. Like the ACLU, the committee sought to generate liberal support for its vision by invoking the specter of totalitarianism—“We are unquestionably the most powerful agency against Fascism in this country,” one staff member wrote—and the corresponding collapse of American democracy. In his testimony at the hearings, NLRB member Edwin Smith recited the ACLU’s well-worn argument that the unchecked abuse of civil liberties would lead to violent revolt. He denounced “entrenched interests” and “alleged patriotic organizations” for arguing that repression was the only means of saving America from the radicals. “You cannot suppress freedom of expression,” he cautioned, “without rapidly undermining democracy itself.” The true goal of the committee, however, was something more than expressive freedom or individual rights. As Smith put it in an address to the ACLU: “Civil liberties are not abstractions which

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97 It seems that Baldwin concurred in the committee’s decision. An unsigned letter, probably written by Baldwin, reported that based on an examination of ACLU materials it appeared that “the Senate Committee can be most useful by confining itself largely to the attack on the rights of labor, particularly strikers.” Letter to Rabbi Sidney Goldstein, 27 March 1936, ACLU Papers, reel 131, vol. 887.
98 Quoted in Auerbach, Labor and Liberty, 65.
99 Felix Frazer to Byron Scott, 3 February 1937, La Follette Committee Papers, 10.25, box 5, folder February 1937.
100 Statement by Edwin S. Smith before Hearings of Subcommittee on Senate Resolution 266, 23 April 1936, ACLU Papers, reel 131, vol. 887. The committee was careful to maintain an air of impartiality to maintain its credibility. See, e.g., Robert Wohlforth to Harold Cranefield, 9 March 1937, La Follette Committee Papers, 10.25, box 5, folder March 1937 (“Under no condition should you or any members of this Committee try to address any union meetings. However well intentioned this may be, it is providing ammunition for those opposed to the Committee to give us a terrific smear.”).
hover above the passions of contending groups and can be successfully brought to earth to promote the general welfare.”¹⁰¹ Robert La Follette was adamant that “the right of workers to speak freely and assemble peacefully is immediate and practical, a right which translates itself into the concrete terms of job security, fair wages and decent living conditions.”¹⁰²

In the coming years, the ACLU would do its utmost to sustain the work of the La Follette Committee through publicity, lobbying, and letter-writing campaigns.¹⁰³ Indeed, it considered it to be “the most helpful single agency in exposing violations of labor’s rights by employers.”¹⁰⁴ Like the committee, the ACLU would defend the Wagner Act as a guarantor of labor’s rights to strike, picket, and organize. Still, the perceived threat of the expansion of state power would linger in the background. Eventually, it would reemerge as a shield against intrusion on employers’ “personal rights,” in the form of constitutional protection for employer free speech and procedural safeguards on the discretion of the NLRB. The ACLU leadership had come to accept government intervention in the realm of labor relations, but in the process, paradoxically, it had shifted its agenda from the rights of labor to a content-neutral Bill of Rights.

Civil Liberties in the Courts

For the ACLU, mounting support for a theory of civil liberties premised on the Bill of Rights translated into a complicated relationship with the federal courts. During the 1920s, the federal judiciary had been one of many institutions to which the ACLU turned for protection of

¹⁰³ Roger Baldwin to Gardner Jackson, 14 April 1936, Jackson Papers, box 42, folder La Follette Civil Liberties (“Our board has agreed to go to the limit on this”); Roger Baldwin, “The Senate Investigates Civil Liberties,” 23 November 1936, ACLU Papers, reel 131, vol. 887; Baldwin to friends, 24 July 1937, ACLU Papers, reel 142, vol. 969 (urging support for additional appropriations).
¹⁰⁴ Roger Baldwin to Frederick Wright, 28 December 1937, ACLU Papers, reel 156, vol. 1078.
constitutional rights—and for much of the decade, not the most important one. Increasingly, however, the federal courts were a favorable forum for the ACLU’s efforts to protect civil liberties, particularly in cases involving infringements by state courts and legislatures. On the other hand, federal litigation threatened to undermine the labor movement’s most important legislative victories, including the Wagner Act. The ACLU had long struggled with these tensions, but the president’s ill-fated judiciary reorganization proposal finally forced the organization to face it squarely.

As soon as the Wagner Act took effect, dozens of challenges to the statute began making their way up through the federal courts. In May 1936, the Supreme Court had declared in *Carter v. Carter Coal Company* that labor provisions in the Bituminous Coal Conservation Act were an unconstitutional extension of Congress’s commerce power. ¹⁰⁵ Relying on *Carter Coal*, corporate attorneys easily convinced judges that the Wagner Act was inconsistent with a century of settled judicial precedent. Unlike earlier measures (for example, the Clayton Act), the new legislation was unmistakably pro-union in its statutory language. Courts nonetheless proved ready and willing to invalidate it on constitutional grounds. Lower court decisions severely undercut the NLRB’s authority to issue orders in all but the most clearly interstate industries, such as transportation and communications. Industry and labor alike considered it a matter of time until the Supreme Court took up the Wagner Act and expressly declared a broader application unconstitutional.

President Roosevelt was determined to forestall that outcome. With the help of Labor’s Nonpartisan League, founded by John L. Lewis to mobilize labor voters, the 1936 presidential election resulted in a landslide victory for Roosevelt. The President considered the results a

mandate for the New Deal. Popular support for his new labor policies seemed unequivocal, and he pledged to do whatever was necessary to preserve them. With the NLRB mired in constitutional litigation, its legitimacy squarely rejected by industry and its lawyers, preserving those labor policies meant doing something about the courts.

There was substantial liberal support for measures to curb the power of judicial review in economic cases through such means as constitutional amendment or statutory limitations on federal jurisdiction. 106 The approach on which Roosevelt ultimately settled, however, was less direct and distinctly unpopular, even among critics of the Court. 107 In February 1937, Roosevelt recommended a bill that would have authorized the appointment of an additional justice to the Supreme Court for every sitting justice who had not retired within six months after reaching the age of seventy (up to a maximum of six). Had the bill passed, Roosevelt would have been able to appoint six new justices. Although it was clearly designed to ensure a pro-New Deal majority, Roosevelt publicly justified the measure on the grounds that the current justices were unable to meet the demands on their resources.

The proposal polarized supporters of the New Deal. Organized labor endorsed it, as did many administrators of the NLRA. 108 Liberals, however, were divided, 109 and the ACLU, which

107 See generally Brinkley, End of Reform; Osmond Fraenkel, An Open Letter to the President, 8 February 1937, ACLU Papers, reel 143, vol. 978 (“May I take the liberty of expressing the opinion that you have been less ably advised than usual, to recommend the appointment of additional justices to the United States Supreme Court? . . . The precedent you are creating seems to me to be not only unsettling, but to carry in it the seeds of its own destruction.”).
108 “Liberals Divided on Plan to Enlarge Supreme Court,” New York World-Telegram, 5 February 1937 (noting that Elinore M. Herrick, an NLRB regional director, supported the plan, as did Rose Schneiderman, president of the Women’s Trade Union League).
109 Ibid. For example, Rabbi Stephen Wise supported the plan, Karl Llewellyn gave it qualified approval, and Frank Walsh opposed it.
had never satisfactorily resolved its own relationship to the courts, found it difficult to settle on a position. In its early years, the ACLU had only grudgingly adopted a judicial strategy for the vindication of civil liberties. Roger Baldwin thought the courts would simply enforce existing power disparities as they had in previous decades. Felix Frankfurter staunchly opposed the pursuit of civil liberties through constitutional litigation, and he regarded the Supreme Court’s ‘occasional services to liberalism’ as a dangerous step toward judicial legislation.110 Even the ACLU’s general counsels turned to the courts out of practical exigency rather than ideological commitment.

On the other hand, the ACLU had always proven willing to use the courts when it suited their cause. Unlike labor lawyers, many of whom spurned the judiciary on principle, the organization had spent two decades whittling away at adverse precedent in the domain of free speech. Baldwin would have preferred to rely on grass-roots agitation and direct action, but he had 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.”111 In fact, when Baldwin refused to endorse the Wagner Act in light of past administrative denials of the rights of labor, his labor allies were quick to criticize his inconsistency. That, “in many cases, the right of free speech, assemblage, and press have been denied in the courts,” they told him, “has not led us to fight against the courts and to seek to strike down the rights guaranteed in the constitution.”112 On the contrary, they had used the courts to their fullest advantage.

To be sure, the ACLU was not sanguine about the power of the federal judiciary. It had bitterly opposed the use of federal labor injunctions and, along with the AFL and state labor

111 Roger Baldwin to Robert Whitaker, 6 April 1934, ACLU Papers, reel 105, vol. 678.
federations, it had been instrumental in securing passage of the Norris-LaGuardia Act. In 1931, its National Committee on Labor Injunctions, whose four hundred members included Frank P. Walsh, managed to produce a draft anti-injunction measure agreeable to the AFL, labor lawyers, law professors, and interested organizations. The bill eliminated ex parte hearings, ensured that all violations of injunctions would be tried by juries, limited punishment of contempt, abolished yellow dog contracts, and ensured that no acts “which involve only workers’ rights to meet, speak, [or] circulate literature” would be enjoined. Once the federal bill was passed, William Green, president of the AFL, arranged for the ACLU to assist in the preparation of state anti-injunction bills, as well. The object of such laws, the ACLU explained, was to stop judicial “law-making.”

At the same time, however, the ACLU was urging labor lawyers to turn the power of injunctions to their advantage. A 1930 ACLU pamphlet called Legal Tactics for Labor’s Rights, condensed from a book co-authored by Arthur Garfield Hays, laid out a “new policy for aggressive fighting in the courts to establish labor’s rights.” The pamphlet, aimed at labor groups, argued that judicial action was advisable even when defeat appeared inevitable, because lawsuits generated positive publicity and produced “a good moral effect.” Moreover, in the long run, they were capable of whittling away the courts’ approval of repressive employer

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113 Monthly Bulletin for Action, January 1931, ACLU Papers, reel 79, vol. 444. The ACLU sought to elicit press support through an amendment providing for jury trials for all contempts of courts not committed in the court’s presence, including criticism by journalists. E.g., Roger Baldwin to Roy Howard, 3 February 1932, ACLU Papers, reel 90, vol. 536. Frankfurter, who drafted the amendment, though it better not to push the matter. “What you have got is not wholly what you want, but it is a good deal,” he said, “and I think we had better forego creating an atmosphere whereby the Supreme Court will feel that this is just the beginning of continuous onslaughts upon the present charges of the federal courts.” Felix Frankfurter to Roger Baldwin, 29 March 1932, ACLU Papers, reel 90, vol. 536.

114 Memorandum on the Proposed Injunction Bill, January 1932, ACLU Papers, reel 90, vol. 536.

115 William Green to Roger Baldwin, 29 December 1933, ACLU Papers, reel 99, vol. 615D.


117 American Civil Liberties Union, Legal Tactics for Labor’s Rights (New York: American Civil Liberties Union, April 1930), 3, in ACLU Papers, reel 90, vol. 536. The book on which the pamphlet was based was Arthur Garfield Hays, Clement Wood and McAlister Coleman, Don’t Tread on Me (Vanguard Press, 1928).
practices. The authors hoped that the pursuit and denial of injunctions would convince the public that labor had been wrongfully oppressed by law—that its “ancient legal rights of civil liberty” were being violated. They encouraged attorneys to appeal all strong cases, even after a strike had ceased, to build favorable precedent or, if relief were consistently denied, to buttress their charge of bias. If they were successful, they mused, employers themselves might come to favor legislation to curb the power of the courts. “The vital thing for labor to realize, and to make labor attorneys realize,” the pamphlet insisted, “is that the chief object to be gained is, not the winning of legal actions, but the bringing of them.”

The ACLU understood that organized labor was hesitant to make use of the federal courts because it “regard[ed] the injunction as a weapon which should be abolished” and was reluctant to “sanction it by using it.” The organization nonetheless dismissed such concerns as overly scrupulous. “It is almost like saying to the employers ‘we won’t use this because you do,’” one ACLU pamphlet protested. 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,” and the pursuit of legal remedies was the most effective way of doing so. Of course, even more than in the administrative context, unions were hesitant to compromise their independence by relying on judicial redress of their grievances. Veteran labor leaders, the ACLU acknowledged, were likely to regard a favorable court decision as a palliative that undermined the cure. On the other hand, the “impatient tactician . . . maintains that there is no conflict between pressing for strong organization and at the same time seeking relief in the

118 Ibid.
119 Ibid., 4.
120 Ibid. (emphasis in original).
121 Ibid., 8–9.
122 “Injunctions to Protect Civil Liberties” (undated), ACLU Papers, reel 72, vol. 395.
123 Ibid.
curiously, despite Baldwin’s profound concern that the Wagner Act would weaken unions, he was less concerned by the pursuit of judicial remedies. After passage of the Norris-LaGuardia Act, he felt that injunctions were “pretty well hedged in,” and that “under the new rule” labor’s use of injunctions was potentially advantageous. “As a matter of fact,” he added, “I have always taken the position . . . that labor made a mistake in being so ethical about not using weapons so often used against it.”

Injunctions were not the only use that the ACLU made of the federal judiciary. During the 1920s, the national office and its local affiliates were involved in virtually every significant civil liberties decision that made its way to the United States Supreme Court. In 1931, in *Stromberg v. California*, which the ALCU handled jointly with the ILD, the Supreme Court invalidated a California red-flag law. The same year, in *Near v. Minnesota*, 283 U.S. 697 (1931), it prohibited prior restraint on the press in a case involving a hate-mongering Minnesota newspapers shut down under a public nuisance law. The ACLU immediately agreed to represent the targeted newspaper, but it turned the defense over to the *Chicago Tribune* and the American Newspaper Publishers’ Association. The ACLU was intimately involved in the Alabama trial of the “Scottsboro boys,” falsely accused of raping two white women. Two cases involving the defendants reached the Supreme Court, and both were argued by ACLU attorney Walter Pollak upon the request of the ILD. Then, in January 1937, the Supreme Court decided *De Jonge v.*
Oregon, involving a Communist Party organizer convicted under the Oregon criminal syndicalism law.\textsuperscript{129} ACLU attorney Osmond Franekel argued the case. The decision was the first of a flood of civil liberties victories in cases involving Communists, Jehovah’s witnesses, and the labor movement.

Within the ACLU, debate over the “court-packing plan” centered less on its immediate threat to civil liberties decisions than on the general desirability of judicial review. After all, the addition of pro-New Deal justices was unlikely to disrupt the trend toward greater protection of civil liberties, particularly in cases involving radical speech. Norman Thomas thought it was possible that an enlarged court would be favorable to civil liberties, but he also noted the possibility that “the psychological and practical effects” of the proposal, as a precedent for future maneuvers, might prove injurious. Thomas noted that the Supreme Court had rarely protected civil liberties against congressional encroachment. On the other hand, it had proven willing to intervene in cases involving repressive state legislation. Indeed, Thomas thought that stripping the court of all review would prompt “a flood of legislation, especially in Southern states, of what I might call a Ku Klux Klan sort,” “a whole series of Herndon cases.”\textsuperscript{130}

Many members were concerned that weakening the Court would undermine civil liberties.\textsuperscript{131} William Fennell was adamant that the board should oppose the President’s plan, and he was outraged when it expressed hesitation. “Have they forgotten the Oregon school case?” he asked. “The Herndon case? The Scottsboro case? The De Jonge case? I hope a small group of


\textsuperscript{130} Norman Thomas to Roger Baldwin, 25 February 1937, ACLU Papers, reel 142, vol. 969.

\textsuperscript{131} \textit{E.g.,} Ruth and Russell Jewell to Roger Baldwin, 11 February 1937, ACLU Papers, reel 143, vol. 978.
New Dealers and socialists on the committee will not be permitted to overlook the point . . . that when the courts are subservient to the executive all hope of democracy dies.”\textsuperscript{132} John Haynes Holmes thought that the ACLU should consider only the effect of the Supreme Court problem on “the sanctity and authority of the provisions for civil liberty embodied in the Constitution,” not labor and industrial questions. “What impresses me,” he commented, “is that the United States Supreme Court, so far as civil liberties is concerned, is for us and not against us, and we should be for and not against the Court.”\textsuperscript{133}

Not everyone was so impressed. In fact, a lively debate unfolded within the ACLU on the desirability of judicial review in civil liberties cases. Critics of the Court accused their opponents of whitewashing its record, while defenders of judicial review thought the detractors were “mak[ing] the Court’s record worse than it is.”\textsuperscript{134} In an attempt to formulate a position, the ACLU circulated a survey to ten “eminent lawyers,” including Hays, Ernst, Fraenkel, and Thomas, requesting their views of the most commonly cited proposals.\textsuperscript{135} Although the responses were submitted after the President’s plan was unveiled, the survey predated it, and none of the participants addressed it. They did, however, offer their opinions of other proposals.

The responses ran the gamut. Most of those polled thought the Court should retain its power to invalidate both acts of Congress and state legislation on constitutional grounds. Several thought it acceptable to require a supermajority of the Supreme Court in decisions invalidating federal laws. The participants split over suggestions to permit a two-thirds congressional veto of constitutional decisions or to make the constitutional amendment process less demanding.

\textsuperscript{132} William Fennell to Lucille Milner, 14 March 1937, ACLU Papers, reel 143, vol. 978.
\textsuperscript{135} 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.
Notably, all thought it acceptable to restrict the due process clause to procedural matters while making the Bill of Rights binding on the states, as long as the provision was carefully worded. In effect, that was the compromise that the Supreme Court itself ultimately adopted.

The participants’ comments illuminate the various tensions among self-described civil libertarians with respect to state and judicial power. Walter Gellhorn, an administrative law scholar who was then serving as regional attorney for the Social Security system, considered all of the proposals to be harmless. He thought the importance of the courts in safeguarding liberties was exaggerated. The principal threat to civil liberties, in his view, was administrative abuse. Lloyd Garrison, dean of the University of Wisconsin Law School and the first chair of the original NLRB, thought that all of the measures posed some danger to civil liberties and cautioned against “giving majorities too much say over minorities.”136 Morris Ernst felt that some check on the Supreme Court was necessary, but he favored a congressional override, and in fact wrote a book advocating just that.137 Edwin Borchard, a law professor at Yale, commented that he did not think it necessary to weaken the Court or its influence. “On the contrary,” he wrote, “it ought to be apparent that the current danger is an expansion of the executive power into dictatorship”—and he considered the Court to be “the greatest safeguard we have against executive arbitrariness.”138 Finally, Norman Thomas emphasized that a simple count of Supreme Court decisions would underestimate the effectiveness of the federal judiciary in fostering civil liberties. He noted the “psychological effect of the review power of the Court,” which he

136 Ibid.
137 Morris L. Ernst, The Ultimate Power (Garden City, N.Y.: Doubleday, Doran, 1937).
In May, the ACLU issued an analysis of the Court’s record in civil liberties cases in an effort to educate the public regarding the pending proposals. The pamphlet was designed to address the question frequently posed to the ACLU as to “how far the Court has been a defender of civil liberties.” It tallied the Court’s decisions in such far-ranging areas as military trials, slavery or peonage, searches and seizures, freedom of religion, education, aliens and citizenship, freedom of speech, and labor relations. Its author, Osmond Fraenkel, was the ACLU’s Supreme Court litigator and was optimistic about future gains. He acknowledged that the Court had “more often failed to protect the Bill of Rights than preserve it,” and that those decisions favorable to civil liberties involved “less important issues.” Pointing to decisions sustaining convictions under the Espionage Act and state criminal syndicalism laws, he concluded “that the Court has been unable to withstand popular hysteria.” Nonetheless, he thought the Court had begun to protect personal rights more vigilantly as a result of its “widening conception” of the due process clause. In responding to the board’s survey on proposals for limiting the Court’s power, he emphasized that “so long as we believe in safeguarding the rights of minorities, the power of review is essential to protect these rights.”

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139 Norman Thomas to Roger Baldwin, 25 February 1937, ACLU Papers, reel 142, vol. 969. He also thought the “due process of law clause . . . should be confined to matters of procedure.” Thomas, like many others within the ACLU, favored a constitutional amendment granting Congress the power to legislate “in economic and social matters” and a corresponding restriction on judicial review in those cases only.

140 ACLU Press Release, 21 May 1937, ACLU Papers, reel 143, vol. 978. According to Fraenkel, the Supreme Court had “spoken strongly against federal laws restricting civil liberties” only once, in *Ex parte Milligan*, 71 U.S. 2 (1866). Felix Cohen went further. By his interpretation of the case law, “No person deprived of any civil liberty by an oppressive act of Congress has ever received any help from the Supreme Court. On the other hand, when Congress has extended aid to those deprived of civil liberties, the Supreme Court, in five cases out of seven, has nullified the aid that Congress tendered.” Felix Cohen to Osmond Fraenkel, 24 April 1937, ACLU Papers, reel 143, vol. 978.

141 Preliminary Report of the American Civil Liberties Union Temporary Committee Concerning the Supreme Court, ACLU Papers, reel 143, vol. 978.
In the end, the ACLU board elected not to adopt a formal position on the judiciary reorganization plan in light of the substantial disagreement among its members. Other groups, however, proved eager to voice their opinions on the connection between civil liberties and the President’s proposal. For example, Robert La Follette favored a constitutional amendment but thought that Roosevelt’s statutory measure was warranted as a stopgap measure. He acknowledged the importance of preserving civil liberties but argued 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.” Similarly, the National Lawyers’ Guild and the International Juridical Association endorsed the President’s plan as the best possibility for immediate action, though they believed a constitutional amendment would be “necessary in the end.” An IJA pamphlet distributed by the Guild minimized the protective potential of the Court in civil liberties cases. According to the pamphlet, the only satisfactory solution was “fundamental action” in the form of a constitutional amendment preventing any court, state or federal, from invalidating any legislation of Congress or the state legislatures on constitutional grounds. “Judicial protection for civil liberties by means of the power to invalidate laws cannot be separated from judicial protection for the selfish interests of large property,” it argued, nor from “dangerous restraints upon legislative authority to provide for the general welfare.” In a view diverging increasingly from the ACLU majority’s, the pamphlet concluded that “there can

142 He continued: “Liberals, be realists; do not let a lot of professional legalists, paid to do the job, bind you to the woods while they are showing you the trees.” Radio Address by Hon. Robert M. La Follette, 13 February 1937, ACLU Papers, reel 143, vol. 978.
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.”

On the other hand, those members of the ACLU who valued judicial independence as a check on majoritarian repression had ample company. In the face of mounting criticism of the federal courts, conservative lawyers, most of whom had resisted the Supreme Court’s speech-friendly turn, evinced a sudden concern for the preservation of civil liberties. In protesting the growing strength of the New Deal state, a Liberty League lawyer reasoned that “the lawyer is, in the nature of his profession, a conservative force, and is constantly called upon to defend the individual against the tyranny of the majority.” It was the lawyer’s duty, he argued, to speak out against violations of the Constitution. Indeed, he promised that “if and when any American citizen, however humble, is without means to defend his constitutional rights in a court of justice,” a Liberty League lawyer would agree to take the case without compensation. When Arthur Garfield Hays wrote to inquire whether the offer was genuine, Beck responded that it was. “I have always had a feeling of sympathy for the work of your Civil Liberties Union in defending constitutional rights of citizens,” he said, “even though I might not always agree with your intervention in every case.”

Mainstream lawyers shared the Liberty League’s new enthusiasm for civil liberties. The American Bar Association staunchly opposed any restriction on the power of the federal courts, and it mobilized a massive publicity campaign that substantially weakened the prospects for

144 Ibid.
passage of the President’s bill. In convincing New Deal supporters that the independence of
the Supreme Court should be preserved, the Court’s recent civil liberties decisions proved
invaluable. An ABA committee brainstormed methods for arousing popular hostility toward
reorganization of the judiciary, and its “best idea” was to develop a series of radio broadcasts
featuring “famous case[s] in which personal rights have been upheld by the Supreme Court” in
the face of contemporary criticism. In the two issues of the *ABA Journal* devoted to the court-
packing plan, its threat to the Bill of Rights was a dominant theme. One article cautioned that
labor leaders, by attacking the court, were undermining their future strength; the power to
organize rested on free press and the right of assemblage, it argued, and in these “unsettled and
quickly changing times” a future Congress might forbid unions altogether. Another urged
minority groups, including labor, “to wake up to the fact that an independent judiciary is their
best friend.” William Joseph Donovan (later a founder of the Office of Strategic Services)
devoted an entire article to “the question whether the existence of an independent judiciary in

147 A referendum taken in March 1937 revealed that ABA members overwhelmingly opposed the plan (6 to 1). William L. Ransom, “Members of the American Bar Association Decide Its Policies as to the Federal Courts.” *American Bar Association Journal* 23 (April 1937): 271–74, 277. Those figures were presented to the Senate. “Association’s Views on the Supreme Court Issue Presented to Senate Committee,” *American Bar Association Journal* 23 (May 1937): 315–18. In the member referendum, 18,695 ballots were returned and with reference to the Supreme Court 16,132 (86 percent) were against the proposal and 2563 (13 percent) were in favor. 142,320 ballots were sent to non-members. Of those, 40,021 (77.3 percent) were opposed and 11,770 (22 percent) were in favor. The ABA concluded that “the lawyers of America in every section and State of the Union are more aroused over the Supreme Court proposal, and the threat to an independent judiciary, than they have been on any previous occasion since the Civil War.” Ibid., 316. On the strategic use of personal liberties in opposition to the court packing plan, see radio address on behalf of Committee for Constitutional Democracy, C.B.R. to Arthur Vanderbilt, 24 May 1937, Vanderbilt Papers, box 369, folder Publicity: Committee on Public Relations.

148 Arthur Vanderbilt to Frank Grinnell, 18 March 1937, Vanderbilt Papers, box 113, folder Correspondence 1937.

149 Warren Olney, Jr., “The President’s Proposal to Add Six New Members to the Supreme Court,” *American Bar Association Journal* 23 (April 1937): 237–41. Olney also asked, “Has the President forgotten that during the frenzy generated by the World War, legislation was enacted by Congress and approved by the then chief executive, under which thousands of our citizens were suspected, many hundreds arrested and convicted on charges of which they were not in fact guilty?” Ibid., 246.

150 George Wharton Pepper, “Plain Speaking: The President’s Case Against the Supreme Court,” *American Bar Association Journal* 23 (April 1937), 247–51.
this country has protected the civil liberties of minority groups.”151 Citing Pierce v. Society of Sisters, Meyer v. Nebraska, the Scottsboro cases, and DeJonge, he concluded that they had.

In the end, of course, liberals sympathetic to the ABA’s arguments were spared the choice between judicial enforcement of civil liberties and the New Deal economic agenda. For three long months during the spring of 1937, as the public debated the President’s proposal, the Supreme Court deliberated over five cases testing the constitutionality of the Wagner Act.152 In April, Chief Justice Charles Evans Hughes wrote for a five-member majority in upholding the broadest construction of the statute. All of the companies in question, he insisted, operated within interstate commerce, and the NLRB’s procedures were consistent with due process. Employers and unions could not be made to agree on a contract, he concluded, but they could lawfully be compelled to try. The administration declared victory. Henceforth, the Supreme Court would allow Congress significant latitude in its regulation of labor and industry, but it would become ever more vigilant in upholding the Bill of Rights.

151 William J. Donovan, “An Independent Supreme Court and the Protection of Minority Rights,” American Bar Association Journal 23 (April 1937), 254–60. Ironically, among the minorities Donovan thought protected by the Supreme Court were southerners in the post-Civil War cases. He explained: “That majority sought to dictate to the prostrate South by legislation in regard to matters which were purely local and social, and which were of no economic concern whatsoever. In a series of courageous decisions, such as United States v. Reese [92 U.S. 214 (1876)], United States v. Cruikshank [92 U.S. 542 (1876)], and the Civil Rights Cases [109 U.S. 3 (1883)], among others, which like many of its recent opinions, stirred up a storm of protest among the administration’s supporters and caused it to be subjected to violent abuse in Congress, the Supreme Court declared that regulation of hotels, theaters, voting, and the like was a purely local matters which was not subject to control by the Federal Congress. These cases involved no economic or labor problems, but were purely questions of civil rights, and no one today would challenge the useful service which the Supreme Court performed in upholding the right of the local communities to settle these matters for themselves.” Ibid., 255.

152 The NLRB devoted considerable attention to its legal strategy. Because NLRB orders were enforceable only through the federal courts, the Board had the strategic advantage of choosing which cases to pursue, and where. They selected sympathetic cases in comparatively liberal circuits. In order to ascertain the limits of the statute’s constitutional applicability, they chose cases involving a broad cross-section of industries, including a steel producer, large manufacturers, and a small men’s clothing company. NLRB v. Jones & Laughlin Steel Corporation, 301 U.S. 1 (1937); NLRB v. Fruehauf Trailer Company, 301 U.S. 49 (1937); NLRB v. Friedman-Harry Marks Clothing Company, 301 U.S. 58 (1937). Six weeks later, in Senn v. Tile Layers Protective Union, 301 U.S. 468 (1937), the Supreme Court held that a state could constitutionally prevent a court from issuing an injunction against peaceful picketing.
Residents of Jersey City during the 1930s had little doubt about the attitude of their municipal government toward labor relations. Their mayor, Frank Hague, had staked the economic vitality of the New Jersey industrial center on its employer-friendly reputation. The signs posted on the major thoroughfares made Hague’s commitments unmistakable. “This is Jersey City,” they boldly proclaimed. “Everything for Industry.”

By most accounts, Hague’s opposition to organized labor was a matter of convenience rather than conviction. When the Depression hit Jersey City, Hague was halfway through his thirty-year reign as one of America’s last and most powerful political bosses. During the 1920s, Hague had professed support for labor. In the early 1930s, however, Jersey City was struggling. Hague had raised corporate taxes to the breaking point, and industry was fleeing the city. His solution was to lure New York-based employers to Hudson County by clamping down on unions. In 1934, Hague and the Chamber of Commerce began a campaign to attract potential employers by emphasizing that Jersey City industries were more than 80 percent open shop.

“We took a hand and reorganized labor without regard for national heads of organized labor

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3 “The Real Issue Behind ‘Hague Terror,’” New York Post, 16 May 1938 (“The Hague machine is even more corrupt than most other notorious ones. It is built to a greater extent on graft and pay-roll padding than probably any other in American history. The Case Committee proved that in 1928, and it’s been demonstrated every time any one poked a finger into the mess since.”).

4 In the New York Post, David Wittels published a series of articles exposing “what is really behind the Hague terror.” Wittels alleged that Hague had supported labor as long as doing so was profitable. Together with a corrupt union ally, he had dictated terms to unions for his own enrichment. He also declared that Hague’s underlying motive was a $5,000,000 dollar a year business, “set up like an underworld empire.” Wittels argued that Hague’s machine had “looted” Jersey City to the point of bankruptcy and then drummed up the Red Scare as a last effort to shut down criticism. “The Real Issue Behind ‘Hague Terror,’” New York Post, 16 May 1938. Rather than refuting the Post articles, Hague dismissed them as “scurrilous.” McKean, Boss, 10.

themselves,” he boasted that year. “The leaders who planted a feeling of hatred in the minds of
the men are gone, and in their place are leaders with whom you can deal.”

To ensure the most agreeable arrangements for employers, Hague’s police force harassed,
beat, and arrested agitators and shut down all picketing, meetings, and leafleting by organized
labor—even after Congress as well as the state and federal courts had made it unlawful to do so.
When organizers began provoking arrests in order to challenge local ordinances and police
practices in the courts, Hague simply had them deported across city lines by southbound buses or
by ferry or the Hudson tubes to Manhattan. Given the relatively robust protection of labor’s
rights in nearby communities, these draconian tactics gave the city a distinct competitive edge.

They also led to a series of clashes between Hague and the ACLU beginning in 1934, when
board member Corliss Lamont was arrested for picketing. By 1938, many prominent ACLU
activists, including several of the organization’s attorneys, had become entangled in the struggle.

It is unclear what the people of Jersey City thought of their well advertised labor policy.
Hague routinely won reelection by overwhelming margins, and there was little vocal opposition
to his administration. According to Hague’s critics, much of his support was secured by bribery
or intimidation; the election fraud in Jersey City was sufficiently famous to make the term
“Hagueism” a household word. The New York Post reported that ten thousand New Jersey
families held their publicly funded jobs at Hague’s sufferance and that his most vocal and ardent
supporters depended on him directly for their incomes. Many Jersey City residents were won

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6 “Hague Always Labor’s Friend—When It Paid,” New York Post, 2 February 1938 (quoting a 1934 welcome
speech to an employer, the Baltimore Transfer Company).
8 “Hague’s Control Extends Even To Jury System.” New York Post, 24 May 1938 (“The term ‘Hagueism,’ meaning
vote frauds and corruption, has become a common word in the language. Every time any one has made any sort of
an investigation in Jersey City, a multitude of crimes against the election laws has been uncovered, and the criminals
named. Yet never in all these years has even one Hague henchman been put on trial in Hudson County for vote
fraud.”).
9 “10,000 Families Dependent on the Boss,” New York Post, 17 May 1938.
over by Hague’s Red Scare tactics and his appeals to patriotism. Moreover, the high revenues generated by the Hague machine supported generous municipal services and a famously low crime rate, in addition to the mayor’s lavish vacation homes.10

Whatever Hague’s popularity among his voters, outsiders came to regard him as an unequivocal menace to American democracy.11 His mistake, in large measure, was his failure to adapt to changing times. In a 1938 address, Hague promised to protect the “great industries” of Jersey City from outside threats. “We hear about constitutional rights, free speech and the free press,” he observed, echoing leaders of an earlier generation. “Every time I hear these words I say to myself ‘that man is a Red, that man is a Communist.’”12

By the late 1930s, Hague’s insistence that a “real American” would never invoke the Bill of Rights sounded outdated, even unpatriotic.13 Dozens of prominent national organizations condemned his flagrant disregard for rule of law. Free speech advocates emphasized the similarities between Hague’s autocratic practices and similar speech restrictions under Hitler and Stalin. Like Father Coughlin and Huey Long, Boss Hague was emblematic of dangerous totalitarian tendencies within the United States.14 His oft-quoted pronouncement, “I am the law,” was palpable evidence that fascism could happen at home.15 Indeed, Reinhold Niebuhr, in

10 Walter C. Parkes, “Political War Rages in Jersey,” Salisbury Evening Post (N.C.), 20 January 1938 (noting that “an FBI investigation indexed Jersey City with less crime than any other city over 100,000, and there hasn’t been a gang there since 1918, significantly before national prohibition”).
12 Address by Mayor Hague before Jersey City Chamber of Commerce, 12 January 1938, quoted in Jersey Observer (Hoboken, N.J.), 13 January 1938.
13 Ibid.
14 This argument was also invoked at trial. Hague Injunction Proceedings, Transcript of Record, Ernst Papers, box 59 (hereafter Hague trial transcript), vol. 2, 2259. Hague resented the term “Boss.” McKean, Boss, 11.
15 In interviews, Hague sought to clarify the statement, which was made in the context of a juvenile delinquency panel at a local church. Hague insisted that he had merely wanted to assure parents that he would circumvent laws preventing him from adopting the right course for rehabilitating the youth. He explained, “My conscience is perfectly clear in this matter. I did not mean I wanted to be a dictator or anything of the sort. I believe in the law, and that it must rule all of us.” “Tyranny’ Charges Resented by Hague,” New York Times, 12 January 1938.
agreeing to sit on a committee for civil liberties in Jersey City, remarked that “Mayor Hague’s defiance of our laws is one of the most flagrant pieces of fascism in the modern day.”16 With prodding from the ACLU, President Roosevelt overcame his initial reluctance to censure a fellow Democrat and declared in a fireside chat that “[t]he American people [would] not be deceived by any one who attempt[ed] to suppress individual liberty under the pretense of Patriotism.”17

With the force of public opinion behind it, the ACLU adopted a bold strategy in Jersey City. When Hague prohibited CIO leafleting and rejected meeting requests by the ACLU and the Socialist Party, ACLU attorney Morris Ernst sought and secured an injunction in federal court. The litigation culminated in the Supreme Court’s 1939 decision in *Hague v. CIO*,18 which affirmed the district court’s order. The victory for civil liberties, though limited, was celebrated not only by labor groups, but by mainstream individuals and organizations throughout the country.19

The events leading up to *Hague* fundamentally influenced the articulation and reception of free speech advocacy during the 1930s. When *Hague* was decided, civil libertarians had

16 Reinhold Niebuhr to Morris Ernst, 13 December 1937, Ernst Papers, box 280, folder 1.
17 “For Creatures of Habit,” *Time*, 4 July 1938. Meanwhile, the Department of Justice initiated a grand jury investigation of working conditions in Jersey City.
already convinced much of the public that some modes of censorship—in the realms of academic freedom, sex education, and literature, for example—were more damaging than edifying. On the whole, however, they had failed to translate those lessons into the political realm. With the 

*Hague* case, for the first time, many Americans enthusiastically endorsed the judicial protection of radical speech. Most tellingly, the American Bar Association, known for its conservative politics, established a Committee on the Bill of Rights in 1938. Its first action was to file an *amicus curiae* brief on behalf of free speech in *Hague v. CIO*.

The ACLU’s emphatic disavowal of radicalism was effective, but it precipitated a deep rift with the left. In time, it eclipsed the radical origins of the civil liberties movement, just as its proponents had hoped. In 1934, Roger Baldwin considered “the struggle of capital and labor . . . the most conspicuous and vital application of the free speech principle.” At mid-decade, the ACLU sent its representatives into the field to picket alongside union organizers, as it had throughout the 1920s. Just a few years later, ACLU leaders carefully divorced advocacy of free speech from the underlying messages of the radical groups they were defending. At trial and in interviews, they stressed the rights of fascists and conservatives as well as leftist groups. In their courtroom arguments and briefs, the enemy was censorship, not substantive oppression. At the heart of this shift in strategy lies a fundamental transformation in the relationship between the

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21 See, e.g., Trial transcript, vol. 2, 1142–43 (arguing that Arthur Garfield Hays was not a “Red” because he had represented the American League of the Friends of New Germany of Hudson County in a 1934 Chancery case). Hays’s absolutism on the right of the Nazi party to march was controversial within the ACLU. A Special Committee of the ACLU assigned to consider legislation to curb fascist activities in the United States concluded: “The problem of parades in brown shirts with Swastikas, which has aroused so much discussion, cannot in our judgment be attacked except as a police regulation. The right to parade should never be denied, but it may be regulated in accordance with conditions of traffic. Where it is obviously aimed at intimidation and violence, and where violence can be plainly demonstrated to have resulted beyond police power to control, as in the case of Klan demonstration in Negro districts, police regulation in routing such parades may be warranted.” This was a striking exception in light of the ACLU’s arguments in the *Hague* case. Memorandum of the Special Committee to consider Legislation To Curb Fascist Activities in the United States, 21 January 1938, ACLU Papers, reel 156, vol. 1080.
radical labor movement, individual rights, and state power—a transformation that the ACLU itself had helped to create.

*The Hague Machine*

“For a great many years,” according to the *New York Herald Tribune*, the United States Constitution was “a dead letter in Jersey City.” The Hague machine commanded complete obedience, and potential dissenters were either bought off or crushed. To Frank Hague, the state legislature and state courts were tools of local government, and their federal counterparts, when they could not be turned to useful ends, were irrelevant.

In 1938, the *New York Times* described Hague as “a tall, red-faced, vigorous-looking man in his sixties,” with “hawk-like features.” The *New Yorker* called attention to “his pale blue eyes,” which were “heavy-lidded and suspicious,” and his thin lips that curved “morosely downward.” According to Dayton David McKean, author of a 1940 biographical exposé on the Hague Machine, “no political boss ever looked less like one than Mayor Hague.” The mayor of Jersey City was an avid walker, health enthusiast, and mild hypochondriac. “His physique,” McKean reported, “was that of a prizefighter now elderly but excellently preserved.” Appropriately, he was feared for his quick temper and frequent resort to physical violence. Indeed, he was known to pummel police officers and politicians who resisted his demands.

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26 Ibid.
27 Most accounts of Hague’s political career rely heavily on McKean’s biography. Alan Karcher, Speaker of the New Jersey General Assembly from 1982 to 1985, believed that McKeen exaggerated the degree of corruption within the Hague administration. Alan J. Karcher, *New Jersey’s Multiple Municipal Madness* (Rutgers University Press, 1998), 185. Pointing to the memoirs of Hague adversary Governor Walter Edge, who recounted that Hague’s operations were orderly, Karcher linked most of Hague’s corruption to support of bootleggers and bookmakers.
Born in 1876 to Irish immigrants, Hague was the third of eight children. He spent his youth (as he habitually reminded his constituents) in the slums of Jersey City’s Horseshoe District.\textsuperscript{28} He was expelled from the public school system for misbehavior in the seventh grade, and he made no subsequent effort to compensate for his lack of formal education;\textsuperscript{29} despite his lavish tastes in clothing and travel,\textsuperscript{30} his syntax and demeanor always retained the strong flavor of his working class upbringing. After a brief stint as assistant to a blacksmith—“playing nursemaid to a locomotive,” as he described it—he tired of manual labor.\textsuperscript{31} He next tried his hand managing a mediocre boxer from Brooklyn. Although he made little money, he began cultivating connections, and by the age of twenty-one he was elected to his first public office.

From there, Hague engineered a swift and shrewd ascent up the political ladder. He was intimately familiar with the gritty realities of Hudson County governance. Graft and election fraud were staples of the Jersey City tradition, and though Hague presented himself as a municipal reformer, he adeptly turned them to his advantage. In 1913, he became Commissioner of Public Safety under the new form of commission government. The police and fire departments, which were under his jurisdiction, had organized into AFL locals. Citing corruption (though most likely exaggerating its extent), he gave their members the choice between leaving the unions and resigning from the departments. The union charters were

\footnotesize\textsuperscript{28} The Horseshoe was the product of an 1871 gerrymander designed to concentrate Democratic voters in a single district. McKean, \textit{Boss}, 17.

\footnotesize\textsuperscript{29} See, \textit{e.g.}, McKean, \textit{Boss}, 7 (“The only reference in any of his speeches or statements that would indicate that Mayor Hague has read a book since he left old Public School 21 is an extensive quotation in one of them from Mrs. Dilling’s \textit{The Red Network}.”). Hague often emphasized his flirtation with juvenile delinquency. A police historian claimed that two of Hague’s brothers were members of a violent street gang in the 1880s. Ibid.

\footnotesize\textsuperscript{30} By the 1930s, Hague spent significantly more time in Florida and Europe than he did in Jersey City. He nonetheless kept abreast of developments in New Jersey, governing actively by telephone (letters would have left a paper trail).

\footnotesize\textsuperscript{31} Ibid., 26.
surrendered, and Hague succeeded in replacing the existing leadership of both groups with grateful and reliable subordinates.\textsuperscript{32}

This combination of suppressing criticism and promoting fealty was a trademark of Hague’s political style.\textsuperscript{33} In fact, Hague once stated publicly that he had studied Tammany Hall and considered his own organization to be superior. When Princeton University students were sent to Jersey City in 1921 to monitor elections on behalf of the Honest Ballot Association, they were beaten to the point of hospitalization.\textsuperscript{34} In addition to informal persuasion, Hague ensured that repression would have legal sanction. In the early 1920s, he introduced a series of measures restricting the ability of dissenters to air their views. For example, three years after Hague became mayor, the city introduced a permit requirement for public meetings advocating political change in private halls and event spaces. In 1924, the Board of Commissioners adopted an ordinance restricting the distribution of handbills and periodicals in public places and in residential neighborhoods. And in 1930, it passed the ordinance at the heart of *Hague v. CIO*, forbidding public assembly without a permit and authorizing denial of a permit to prevent riots or “disturbances.”\textsuperscript{35}


\textsuperscript{33} Jersey City was seventy-five percent Catholic, and Hague contributed generously to the Catholic Church. He also supported the church on issues of morality. He kept burlesque shows and associated venues out of Jersey City, though they were plentiful elsewhere in Hudson County. On one vice, he would not budge: he loved horseracing and led the campaign to repeal the antigambling amendment of the New Jersey Constitution. He forestalled attacks from other religious groups by the same methods he used on dissenters in general: he threatened to increase property assessments or retaliated against family members on the city payroll. McKean, *Boss*, 216.

\textsuperscript{34} “Name Mayor Hague in Election Inquiry,” *New York Times*, 19 March 1921.

\textsuperscript{35} Specifically, the ordinance provided that “no public parades or public assembly in or upon the public streets, highways, public parks or public buildings of Jersey City shall take place or be conducted until a permit shall be obtained from the Director of Public Safety.” The Director of Public Safety could refuse a permit “when, after investigation of all of the facts and circumstances pertinent to said application, he believes it to be proper to refuse the issuance thereof; provided, however, that said permit shall only be refused for the purpose of preventing riots, disturbances or disorderly assemblage.” Ordinance, in Committee of Industrial Organizations et al. vs. Frank Hague, Mayor of Jersey City, et al., U.S. District Court of N.J., Equity 5865 (1938), Record Group 21, NARA Northeast Region (hereafter Hague District Court Papers), Bill of Complaint (hereafter Complaint), Schedule D.
Control and expansion of the municipal payroll was a core feature of Hague’s influence, and it was expensive. Under Hague, the city added thousands of new employees and awarded many new contracts, often in exchange for minimal provision of services. In return, Hague’s party received loyalty, as well as “contributions” amounting to at least three percent of most employees’ salaries.

To sustain this system, Hague increased taxes on businesses operating in Jersey City by as much as an order of magnitude. Among the most important potential revenue sources were the railroad companies. Nearly all were forced to route their trains through Hudson County in order to reach New York City, and Hague took advantage of his bargaining position to impose threefold increases in assessments. When the State Board of Taxes and Assessments in Trenton tried to thwart Hague’s maneuvers, he resolved to elect a governor who would appoint a more sympathetic board, along with friendlier prosecutors and judges. Hudson County was populous enough to sway elections for state office, and within a few years it obligingly secured the governorship for A. Harry Moore, a Jersey City political ally who would serve three terms plus a stint in the United States Senate over the next two decades. By the late 1920s, Hague asserted his authority throughout the state, even under Republican governors.

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36 Despite the dramatic increase, the ratio of municipal employees to residents seems modest by modern standards. Connors, *Cycle of Power*, calculated that there was at most one employee per 750 residents, and that at the height of the Depression the figure was closer to 1 to 1000.

37 For example, he increased assessments on the Standard Oil Company from 1,500,000 to 14,000,000 dollars and on the Public Service Corporation from 3,000,000 to 30,000,000 dollars. McKean, *Boss*, 44.

38 More than half of all second-class railroad property in New Jersey was within Jersey City borders. Taxes on the railroad amounted to more than twenty percent of Jersey City’s total levy. Ibid., 255.

his policies were challenged, the state court judges who owed him their appointments decided in his favor.\textsuperscript{40}

Although Hague’s political dominance removed all external constraints on Jersey City’s taxing authority, businesses were so strained by the increased rates that many eventually relocated. The problem became particularly acute during the Depression, when many companies could not afford to pay. Hague’s first solution was to decrease the level of municipal services. A 1929 investigation revealed that more than a quarter of children in Jersey City were denied a fulltime education due to school overcrowding. A decade later, school playgrounds were the smallest in the state, and many schools still had outdoor toilets. Meanwhile, the streets were rarely cleaned, and public recreational spaces were sparse and decrepit.\textsuperscript{41} These reductions, however, were minimal in comparison with the city’s other expenses. The Hague machine depended on its ability to remunerate its loyal servants with lucrative employment, and reductions in the city’s revenue stream threatened to undercut the source of Hague’s power. Lowering taxes was not an option.

Federal assistance helped some, notwithstanding Hague’s complicated relationship with the Roosevelt administration. Hague had been vice chairman of the Democratic National

\begin{footnotes}
\item[40] See, e.g., Ex parte Hague, 104 N.J. Eq. 369 (N.J. Err. & App. 1929) (Court of Errors and Appeals held the legislature had no right to ask Hague about his wealth); In re New Jersey Bar Association, 162 A. 99 (N.J. Ch. 1932) (in which the court held that a vice-chancellor could not be investigated by an officer of the court and that the chancellor could not remove a vice-chancellor even if corrupt); Ferguson v. Brogan, 171 A. 685 (N.J. Sup. 1934) (in an election fraud case in which no votes were recorded for the anti-Hague candidate and residents claimed that had voted for the other ticket, Chief Justice Brogan, a Hague pick, ruled that the superintendent of elections had no right to open the ballot boxes; the court had the power but refused to open them); Clee v. Moore, 195 A. 530 (N.J. Sup. 1937); Petition of Clee, 196 A. 476 (N.J. Sup. 1938). In addition to prosecutors and judges, Hague controlled the selection of jury panels, because the sheriff and jury commissioner were both county officials.

\item[41] See generally McKean, \textit{Boss}. The only public institution to weather the downturn was the Jersey City Medical Center, which Hague routinely invoked as a rejoinder to critics. It featured state-of-the-art facilities (including seven skyscrapers), an employee to patient ratio approaching one to one, and nearly twice as many hospital beds as guidelines recommended. The Jersey City maternity hospital boasted the lowest mortality rate of any in the world and provided clinics for complicated pregnancies, classes for expectant mothers, and home visits by nurses after discharge. Hague was a pioneer in the use of socialized medicine for political gain, and he was reluctant to make cuts to his flagship program. McKean, \textit{Boss}, 167–80.
\end{footnotes}
Committee since 1924, and Hudson County voted Democratic in every presidential election thereafter. The mayor might have exerted considerable national influence were it not for a political blunder in 1932, when he endorsed his close friend Al Smith—who shared Hague’s love of boxing, baseball, and expensive vacations—for president. At the 1932 Democratic Convention, Hague imprudently announced that Roosevelt was unelectable (indeed, “the one man who is weakest in the eyes of the rank and file”) and intimated that he would not back him if he were nominated. When his ploy failed, however, Hague threw his support to Roosevelt, at the cost of his friendship with Smith. With aggressive campaigning, he delivered New Jersey for Roosevelt by a margin of thirty thousand votes. He also voiced his unequivocal support for New Deal policy. Although the President disliked Hague, he understood his value and was hesitant to rebuke him. More important, he ensured that Jersey City would receive ample federal funds. Hague claimed to receive 500,000 dollars a month for distribution to the needy, and as usual, he exercised considerable discretion in determining which recipients were most worthy.

Still, Hague faced a dramatic shortfall in the municipal budget, and Jersey City industry was increasingly unwilling to make up the difference. As the tax base declined, Hague was forced to explore new methods for making Jersey City businesses more profitable. His solution was to ensure businesses that they could offset high taxes by paying low wages to unorganized workers. According to the New Jersey Labor Department, in the late 1930s more than three

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hundred thousand Jersey City workers were paid less than the minimum living wage. In the end, the policy was unsuccessful; wages could not drop indefinitely, and the astronomical tax rate outweighed low labor costs for all but a handful of sweatshops, to which Hague claimed to be “utterly opposed.” Hague was nonetheless determined to deliver on his “pro-industry” promise.

Hague had always followed an instrumentalist course when it came to the labor problem. In his early years, his policies were sufficiently pro-labor to prompt a prominent political writer to label him an incipient leader of the urban proletariat. In 1919, his police blocked fifty strikebreakers who were sent from New York to unload a steamship. The following year, he openly declared himself “a friend of labor” when he defended a strike by breakaway railroad workers who believed the AFL was no longer protecting the interests of the rank and file. “Have confidence in me,” he assured the workers, after A. Mitchell Palmer denounced the strike as a Red plot: “I shall be at your command every hour and every minute.”

Notwithstanding Hague’s ostensive support, unions were a minimal presence in Hudson County during the 1920s. They were more significant only in the building trades, where they generally played by Jersey City rules. Early on, Hague developed a close working relationship with Theodore Brandle, a corrupt union organizer who headed the Jersey City ironworkers’ union and went on to lead the Hudson County Central Labor Union and eventually the State Federation of Labor. Although Hague rarely intervened on labor’s behalf, the Central Labor Union endorsed him during his first election and throughout the 1920s. In 1927, a prominent

46 Quoted in McKean, Boss, 193.
47 Ibid., 272 (quoting Clinton W. Gilbert).
48 “Strike Doubt is Cleared,” New York Times, 13 April 1920. Hague was among the commissioners elected in 1917. Harry Moore received more votes but remained director of parks and public buildings, leaving the mayoral position to Hague, who ceded his own commission of public safety to become director of public affairs. McKean, Boss, 43.
industrialist pronounced that Jersey City residents were “less affected by the radical tendencies of the age than . . . people of any community on earth.”

By the early 1930s, organized labor was no longer consistent with Hague’s design for Jersey City. With Hague’s blessing, the McClintic-Marshall Company employed non-union labor in constructing the General Pulaski Skyway, the freeway system connecting Jersey City and Newark en route to Manhattan. Hague and Brandle clashed over the project, and their alliance broke down altogether in February 1932, when striking union members attacked six non-union workers with iron bars, killing one. After the incident, Hague ordered the police to crush the strike. He justified his change in policy by claiming that he had only recently discovered that union organizers were “racketeers” who accomplished their objectives through “sabotage, double-dealing, brutality, terrorism, intimidation, exploitation, and gorilla-rule.” Thereafter, Jersey City was unequivocally hostile to organized labor. Union members engaged in peaceful picketing were routinely arrest for disorderly conduct and equivalent violations. In most cases, charges were dropped or never filed in order to forestall legal challenges.

When the Furniture Workers Industrial Union went on strike in 1934, ACLU board member Corliss Lamont was arrested along with prominent observers, including a future New York City magistrate. All convictions were set aside, and the acting mayor apologized, but Jersey City’s draconian policy continued. In February of 1936, the chamber of commerce estimated that Jersey City was more than 80 percent open shop. The population was largely unskilled and semi-skilled workers (more than one fifth of Jersey City residents were foreign-

50 McKean, Boss, 184 (quoting Thomas C. Sheehan, president of the Durham Duplex Razor Company).
51 Brandle spent all of his accumulated wealth on strike relief and on medical and legal assistance for strikers.
52 McKean, Boss, 187.
53 The same year, Hague defended the rights of a Nazi group, the Friends of New Germany, to hold meetings in Hudson Count. American League of the Friends of New Germany v. Eastmead (1934). The meeting was held in Union City, but the case was tried before Vice Chancellor Bigelow in Jersey City. ACLU v. Casey, 5 March 1937, before Hon. William Clark, Newark: Testimony of Arthur Garfield Hays, ACLU Papers, reel 153, vol. 1051.
That spring, when a state anti-injunction bill was under consideration by the New Jersey Senate, Hague denounced it as radical and claimed it would injure New Jersey industries. Despite efforts by the ACLU’s National Committee on Labor Injunctions—which described the “open political line-up of the leading Democratic politician in the state with commercial interests against organized labor” as an unprecedented development and emphasized that all of New Jersey’s neighboring states had enacted similar legislation without ill effect—Hague’s opposition ensured the bill would never reach a vote. Meanwhile, New Jersey’s Disorderly Persons Act of 1936 permitted the arrest of any person who could not “give a good account of himself.” Under the act pickets were arrested and jailed, often until the relevant strike was broken. Union halls were closed for building code violations, leaders were deported, and property and pamphlets were seized.

Jersey City’s anti-labor practices prompted an inquiry by a special commission of the National Committee for the Defense of Political Prisoners (NCDPP), organized as an adjunct to the International Labor Defense for the investigation of racial, industrial, and political persecution. Established in 1936, the commission—whose members represented such organizations as the Hudson County Committee for Labor Defense and Civil Rights and the New Jersey Civil Liberties Union, in addition to the NCDPP—invited testimony from all people who

55 Frank Hague to Senator, 16 April 1936, ACLU Papers, reel 138, vol. 942; J. Owen Grundy to Roger Baldwin, 24 April 1936, ACLU Papers, reel 138, vol. 942 (“Mayor Hague first kept his hands off and allowed Democrats in the legislature to favor the Anti-Injunction Bill and then waited for reactions. When he saw such strong and conservative bodies as the State Bar Association and Chamber of Commerce oppose the bill, then he writes an open letter to his hand-picked senator, Edward P. Stout, declaring that the bill is radial and ill advised.”).
58 Alan Wald, The New York Intellectuals: The Rise and Decline of the Anti-Stalinist Left from the 1930s to the 1980s (Chapel Hill: University of North Carolina Press, 1987), 56. The idea for the NCDPP came from Theodore Dreiser, who had been working with Communist Party organizer Joe Pass. Dreiser served as chair, Lincoln Steffens was treasurer, and Elliott Cohen was executive secretary. The organization was active in Harlan County and in the Scottsboro and Herndon cases.
felt that their constitutional rights had been suppressed by Jersey City officials. The final report was based on transcripts of testimony, sworn statements, and resumes of court cases. It pointed to “a systematic strangulation of progressive labor forces and civil rights by police, municipal and county authorities in Hudson County, New Jersey.”

Jersey City, it concluded, had become a haven for New York City manufacturing concerns attempting to evade agreements that they had made with the labor unions to which their employees belonged.

The First Injunction Suit

The conflict between organized labor and the Hague machine intensified in late 1936, when a massive seamen’s strike initiated on the west coast shut down the Hudson County waterfront. The International Seamen’s Union, associated with the AFL but flirting with more radical tactics, picketed non-union crews in eastern ports, including Jersey City’s piers. Jersey City’s Chief of Police, Harry Walsh, forbade the picketing and vowed to use necessary force rather than arrests to ensure his orders were obeyed. He also ordered reporters not to approach the scene of attempted picketing. Abraham Isserman, a left-wing New Jersey attorney who was a member of the ACLU board, was acting as counsel for the seamen’s union. At the union’s request, he invited the national office of the ACLU to become involved. The ACLU was eager to comply, and in late December it convened a meeting of local labor groups, including conservatives ones. Most of the important organizations attended, and all agreed to plans for a test case. Members of the International Seamen’s Union, along with several other unions,

volunteered to provoke arrest by picketing in contravention of Walsh’s orders. They agreed to remain in jail, without requesting bail, in order to “break down police resistance.” If packing the jails proved ineffective, they would turn to “well known liberals” like John Haynes Holmes and Corliss Lamont to attract public attention.62

Jersey City authorities were determined to keep the entire affair out of the courts.63 The coming weeks witnessed a few incidents of police violence, including assaults on reporters and observers. Reverend Jay T. Wright of the New Jersey Civil Liberties Union was among the victims.64 For the most part, however, would-be picketers were turned back without arrest. Representatives of the La Follette Civil Liberties Committee sent to Jersey City noted that actual violence was minimal because participants offered little resistance for fear of being beaten.65 On January 1, union headquarters dispatched more than six hundred strikers to a mass demonstration, but nearly all were denied entry at the ferry docks.66 Civil liberties delegates, too, were ordered out of the district, though they persistently snuck back across city lines.67 In the end, the secretary of the La Follette Committee decided that further observations were futile and moved on to other inquiries, despite advice from an NLRB correspondent that the Hudson County situation could refocus attention from industrial espionage to the Bill of Rights, which, “as far as Labor [was] concerned, . . . [did] not exist in Jersey.”68

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62 Ibid.
63 For example, a café frequented by strikers had its license revoked for “harboring god-damn Anarchists and Communists,” but when an ACLU attorney offered to challenge the decision, the license was restored.
65 R. D. Cullen to Robert Wohlforth, 31 December 1936, La Follette Committee Papers, 10.25, box 5, folder Jan. 1937.
66 Felix Frazer to Robert Wohlforth, 1 Jan 1937, La Follette Committee Papers, 10.25, box 5, folder Jan. 1937.
67 According to Felix Frazer, a La Follette Committee investigator, picketing of all kind was forbidden in Jersey City, and informants ensured that no effective protest could be mounted. Ibid.
68 Robert Wohlforth to Felix Frazer and H. D. Cullen, 5 January 1937, La Follette Committee Papers, 10.25, box 5, folder January 1937.
The legal strategy, too, turned out to be a non-starter. Arthur Garfield Hays, acting for the ACLU, arranged a conference with Jersey City officials before Judge William Clark of the federal district court. At the conference, the parties arranged for four picketers to march on a designated street without interference, and the police allowed them to proceed as agreed. The following day, however, the picket line was again disbanded. At Clark’s urging, Hays went to Jersey City to investigate. The police (apologetically) attempted to turn him away, but when he demanded to be arrested or released, they let him through. Although Hays’s sign was torn off and his companions were all evicted into Hoboken, he was permitted to march for several hours with an American flag. A few days later, others tried to emulate his performance and were promptly cast out of town. After consulting with Judge Clark, Hays returned to the street and was himself turned away. He asked the court for an injunction, but the strike settled before any challenge made it into court.

By that point, however, Hays and the ACLU were determined to open Jersey City to labor organizing. The same day that he requested an injunction in the seamen’s strike case, Hays witnessed the police haul two picketers from the AFL-affiliated Boot and Shoe Makers union onto the subway to Manhattan. He subsequently arranged for tests of Jersey City’s anti-labor practices, and he applied to Judge Clark for an injunction on their behalf.69 At the hearing, Jersey City officials were remarkably candid about their anti-labor policies. Hays examined Joseph Glavin, Assistant Corporation Counsel (and co-counsel with James A. Hamill in the case)

69 The plaintiffs were also represented by Abraham Isserman, Edward Malament, Julius J. Rosenberg, and Sol D. Kapelsohn. Brooklyn Local No. 654 of the Boot and Shoe Workers Union picketed the Uneeda Slipper Corporation, which relocated from Brooklyn to Jersey City to take advantage of Mayor Hague’s labor policy. Picketing was also conducted by members of the Upholsterers, Carpet and Linoleum Mechanics International Union of North America at the plant of the Pacific Parlor Frame Company. In January Hays, along with two other members of the ACLU staff, filed a thirty thousand dollar damages suit against Hague and other city officials for assault and battery as a result of their picketing efforts on behalf of the Boot and Shoe Workers Union. ACLU Bulletin 793, 3 December 1937, ACLU Papers, reel 153, vol. 1051; ACLU Bulletin 797, 31 December 1937, ACLU Papers, reel 153, vol. 1051. The two staff members withdrew their suits when they left the ACLU staff. ACLU Bulletin 809, 35 March 1938, ACLU Papers, reel 167, vol. 2063.
regarding Jersey City’s legal policy with respect to strikes. Glavin relied on the “law of necessity” as a basis for ejecting agitators from the city; arresting them, he explained, would simply feed their sense of martyrdom and encourage further displays. He also insisted that unions had no right to strike to close a shop when employees were “perfectly satisfied” with existing conditions.70 Daniel Casey, the Acting Commissioner of the Department of Public Safety, testified that the determination whether or not workers were on strike was left to his discretion, and that he would prohibit picketing that was aimed at persuading workers to unionize.71

Casey also admitted to instructing the police to remove trouble-makers from the city. Hays found this policy particularly disturbing, and he charged that it violated the “fundamental right of the American citizen to be arrested.” Jury trials and the writ of habeas corpus, he reasoned, were meaningless in the absence of an arrest. Indeed, deportations to concentration camps in Nazi Germany and Soviet Russia demonstrated that the right to be arrested and brought before a court was the “most fundamental right we have.” Judge Clark agreed. “The trouble with [your] theory,” he told Casey, “is that when you make up your minds as to the sort of people that are undesirable and escort them out, you are putting yourself right in the position that Hitler puts himself in.”72

One of the more colorful exchanges of the injunction hearing involved Hays’s personal beliefs and political affiliation: Glavin accused Hays, a strong supporter of organized labor but a

70 Excerpts from testimony of Jersey City officials at injunction hearing during Boot and Shoe Workers strike, before Judge William Clark, 1 March 1937, ACLU Papers, reel 153, vol. 1051, 3. Judge William Clark disagreed, and advised Glavin to review the case law.
71 Judge Clark encouraged him to reconsider his testimony, but Casey held firm. Ibid., 2. When asked by what authority he decided the legitimacy of strikes, Casey responded that he was not a lawyer. Judge Clark concurred and offered his opinion that the Casey’s lawyers were not very good ones.
consummate and self-described liberal, of Communist agitation. During the 1936 presidential campaign, the Communist Party was permitted to rent a hall in Jersey City only after obtaining a court order with the assistance of the ACLU. Hague put his position plainly in a statement to the president of the Hudson County Central Labor Union that December: “When the time comes, if ever, when Jersey City will be compelled to stand for Communist demonstrations, there will be war, and either the Communists or I will have to leave Jersey City.”

Communism, of course, was interpreted loosely in Hudson County, and Judge Clark insisted that Hays be given a chance to respond to the city’s allegations. Glavin proceeded to present a long list of organizations with which Hays was affiliated and which Glavin seemed genuinely to believe were Communist fronts, from the National Committee for Freedom from Censorship to the Committee on Coal and Giant Power. Hays denied any connection between the named organizations and the Communist Party, and he drew sharp distinctions among various left-wing ideologies.

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74 For example, in 1932, Alfred Butel and Joseph Bloom were arrested when they stopped to ask a Jersey City police officer for directions, and the officer searched their car and found communist literature. Judge Barison sentenced Bloom to 90 days in the Hudson County Penitentiary for being a member of the Communist Party. McKean, Boss, 214.
78 Other suggestions were apparently more plausible. For example, Glavin questioned Hays regarding his role in the American Society for Cultural Relations with Russia, which Hays helped to found. Hays described it as a liberal organization with many respectable members. Similarly, Hays was a member of the reception committee for the Soviet flyers, who were communist, and he sat on the Advisory Board of Russian Reconstruction Farms, an effort to raise funds and send American machinery and agriculturalists to Russia. Hays explained that there were many Americans who promoted social schemes in Russia who were not Communists. Ibid., 45–53.
79 Hays told the court that he regretted that he was not a Communist, as he deplored anti-Red propaganda and would have liked to argue for his own right as a Communist to walk the Jersey City streets. Asked whether he considered himself radical, he responded that Glavin would probably deem all of his ideas radical but that his radical friends considered him “terribly conservative.” He attributed his own “so-called radicalism” to the close friendship between
As for the ACLU, he emphasized the substantial conservative support for the organization’s work (“we get funds from the most ardent reactionaries,” he said) in such cases as *Scottsboro, Herndon, and Mooney.* Notably, he insisted that both he and the ACLU were committed to free expression for all individuals and groups, not just radical ones. “We have defended the right of the Ku Klux Klan to hold meetings, as well as the right of labor to hold meetings, as well as the right of people who believe in birth control, as well as the right of negroes to hold meetings in the south,” he recounted. “We all over the country have defended the right of free assemblage of everybody, no matter what they believed in.” Hays had personally defended the right of the Nazi party to march in Hudson County. Judge Clark was highly sympathetic to Hays’s explanation and interjected arguments on his behalf. “Certainly you cannot accuse Mr. Hays of being a Nazi,” he admonished Glavin. “He has tried to explain to you the American Civil Liberties Union is an organization interested in free speech and free assemblage, so that whether he is interested in the labor movement as a member of the American Civil Liberties Union, is irrelevant.”

No one was surprised by Judge Clark’s decision. He awarded the unions a temporary injunction restraining the city from interfering with the plaintiffs’ peaceful picketing, access to the public streets, distribution of printed materials, and organizing efforts. On appeal, however, his grandfather and the freethinker Robert Ingersoll, whose ideas heavily influenced Hays’s upbringing. Ibid., 49–50.

In describing sources of funding, Hays disclosed that Helen Hayes, a professor of astronomy at Wellesley, left him $20,000 to use at his discretion to promote the ends of justice. He drew on those funds in civil liberties cases. Ibid., 22.

He also addressed allegations that Roger Baldwin was a Communist. According to Hays, Baldwin was a philosophical anarchist of the “Kropotkin type,” who believed that human being “should never be compelled to do things that they wouldn’t do if it weren’t for the pressure of an unfair economic system.” Ibid., 35.

Ibid. Hays voiced the same message several months later, declaring: “The Communist bogey has long passed. Today we are called upon chiefly to defend the rights of workers who belong to all political parties, and chiefly to your own.” Arthur Garfield Hays to Frank Hague, 10 December 1937, ACLU Papers, reel 153, vol. 1051.

Jersey City secured a stay. The Court of Appeals delayed for more than a year before dismissing the case as moot because one of the plants had declared bankruptcy and the other had settled with the striking workers.\textsuperscript{84} By that time, national attention was directed toward a Jersey City injunction far greater in scope—one directed not at labor’s right to organize, but at the meaning of civil liberties in a constitutional democracy.

\textit{The CIO in Jersey City}

At the 1937 injunction hearing before Judge Clark, Hays testified that the ACLU would continue its efforts in Jersey City until Hague agreed to “obey the fundamental law.”\textsuperscript{85} In November 1937, an ideal opportunity arose to deliver on that promise. That month, the CIO launched a Jersey City organizing drive.\textsuperscript{86} Quoting statements by William J. Carney, regional director of the CIO for New Jersey, local newspapers proclaimed an imminent “invasion.” According to reports, Carney had promised a “show down” between Hague and the CIO and implicitly threatened violence if the city refused to permit peaceful organizing efforts.\textsuperscript{87}

On November 29, between fifty and one hundred CIO members tried to gather at their headquarters in New Jersey. They were blocked by police, who searched them and the premises and seized circulars announcing a scheduled meeting and informing residents of their rights.

\textsuperscript{84} The Third Circuit issued its decision on December 13, 1938. Casey v. ACLU, 100 F.2d 354 (3rd Cir. 1938).
\textsuperscript{85} In September 1937, the ACLU announced that it was initiating another injunction proceeding against the city. The case began when the Jersey City police seized more than five hundred copies of a labor weekly, the People’s Press, during a Hudson County organizing drive. Two members of the Can Workers Union were arrested for distribution of the newspaper. ACLU Bulletin 780, 4 September 1937, ACLU Papers, reel 153, vol. 1051.
\textsuperscript{86} The timing coincided with one of Hague’s typical political maneuvers. In October 1937, Governor-elect A. Harry Moore offered Hague his soon-to-be vacated Senate seat as a present for the mayor’s sixty-second birthday. Citing his obligations to his constituents to continue fighting the “Red group,” Hague declined. A more skeptical account of his decision emerged from “persons close to the political scene,” who pointed to controversy over voting conditions in Hudson County and to the uncertain reception Hague would receive in Washington from New Deal Democrats. Clipping, Newark Star-Eagle, 17 January 1938, ACLU Papers, reel 162, vol. 2020. Hague’s personal attorney, John Milton, was seated instead.
\textsuperscript{87} Hague v. CIO, 101 F.2d 774 (3rd Cir. 1939).
under the Wagner Act. Officers were stationed at the Hudson Tube stations to prevent entry to
Jersey City of all CIO members arriving from New York City or Newark. A few made it into
town, but the police muscled them into squad cars, drove them to the city border, and ordered
them not to return, even if they were Jersey City residents. Those who disregarded the warning
were arrested and, within hours, made to stand trial. Anthony Botti, the city magistrate who
presided over the proceedings, voiced his approval of the city policy. “We don’t want the CIO in
Jersey City,” he announced, “and we’ll go to the limit to keep them out.”88 He refused to
consider a motion for adjournment to prepare a defense, denied a jury trial, and excluded facts
challenging the court’s jurisdiction and the constitutionality of the city’s ordinance. Then he
sentenced seven of the defendants to five days in jail.

At the invitation of Lee Pressman, General Counsel for the CIO, Morris Ernst agreed to
assist the CIO with its legal challenge. Ernst seemed the ideal candidate for the job. Over the
past several years, he had been intimately involved in labor causes. In 1933, he had founded the
journalists’ union, the American Newspaper Guild, which had recently affiliated with the CIO.89
He had just helped to organize the National Lawyers Guild for the purpose of defending New
Deal labor legislation from an over-zealous judiciary. For Ernst, however, the legal problem in
Jersey City was not one simply, or even primarily, of labor organizing. It presented a natural
extension of the principles he had defended in Dennett, Ulysses, and United States v. One
Package: the right to be free from the arbitrary control of an intrusive and irresponsible
authority. As he had emphasized during the early New Deal and again during the court-packing
controversy, the reality of totalitarianism abroad made the threat of government overreaching at

home all the more palpable. In Jersey City, however, that threat emanated not from the Post Office or the Customs Bureau, but from a local despot.

In his capacity as special counsel, Ernst (along with the law firm of Isserman & Isserman) appealed the convictions, which the Hudson County Court of Appeals had declined to review on the basis that the controversy was moot. More important, Ernst orchestrated a broader approach to the Jersey City legal campaign. In the past, virtually every civil liberties case that reached the Supreme Court, and the vast majority of the ACLU’s legal work, involved defense against criminal prosecution. *Hague v. CIO* was one of the first cases in which the ACLU sought to marshal the authority of the federal government rather than to cabin it.

In Jersey City, the ACLU asked both Congress and the federal courts to intervene actively on labor’s behalf. In fact, of all the possible and attempted mechanisms for opening the city to labor activity and dissenting speech, Ernst considered a La Follette Committee investigation and federal injunction proceedings to be the most important. Together with William Carney, he submitted affidavits and evidence to the Senate Civil Liberties Committee and requested resumption of its inquiry in Jersey City. La Follette expressed interest in the matter but claimed to lack the funds for an investigation. The staff was nonetheless agreeable to an “agitational campaign to get the committee interested,” since the publicity would “strengthen[] the general support of the committee’s work.”

The federal judiciary ultimately turned out to be more forthcoming than its legislative counterpart. In mid-December, drawing on its robust history of direct action in civil liberties

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90 Committee on Civil Rights in Jersey City, 21 December 1937, ACLU Papers, reel 153, vol. 1051.
91 Memorandum on conference with Morris Ernst, 3 January 1938, ACLU Papers, reel 153, vol. 1051.
92 Memorandum for Roger Baldwin, ACLU Papers, reel 153, vol. 1051.
93 Although the Senator reportedly thought that a Jersey City investigation was advisable, the expectation was that it would “call for a bigger outlay, probably, than any project so far undertaken.” Louis Colman, Assistant National Secretary, ILD, to Roger Baldwin, 24 January 1938, ACLU Papers, reel 167, vol. 2063.
cases, the ACLU boldly announced plans for a “siege” on Jersey City in conjunction with the “CIO onslattles.”\textsuperscript{94} Consistent with the advice of the ACLU’s 1930 pamphlet on anti-industry injunctions, Ernst arranged for the CIO to file a request for a meeting permit, with the expectation of challenging a denial in court. But he also involved the ACLU directly, in an effort to generate interest in the broader constitutional issues implicated by Mayor Hague’s polices. To highlight the denial of rights, he proposed a “free speech mass meeting,” to be addressed by members of Congress and “leading liberals,” within or near the city limits.\textsuperscript{95} In keeping with Ernst’s plan, the ACLU applied for a permit to hold an open air assembly featuring three members of Congress and a New York attorney. The Director of Public Safety allowed the proposed dates to pass without issuing a permit, citing the danger of public disorder in light of purported public protest, most notably by a veterans’ committee consisting largely of Jersey City employees.\textsuperscript{96} “What Hague means when he talks of violence,” the \textit{Philadelphia Record} explained, “is that when the C.I.O. comes to Jersey City it will be the police who will resort to violence.”\textsuperscript{97}

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\textsuperscript{94} ACLU Bulletin 795, 17 December 1937, ACLU Papers, reel 153, vol. 1051. In its 1930 pamphlet on anti-industry injunctions, based on Arthur Garfield Hays’s book on the same subject, the ACLU had encouraged labor organizers who were up against municipal permit ordinances to apply for permits on a large number of dates and at a broad range of venues; if city officials refused to designate a permissible meeting time, an applicant could sue to compel issuance of a permit. ACLU, \textit{Legal Tactics}, 14. Hays thought that Hudson County was the ideal forum for testing the “new procedure” that he had been advocating for nearly a decade. Arthur Garfield Hays to ACLU, 1 December 1937, ACLU Papers, reel 153, vol. 1051. Ernst ultimately sued for an injunction rather than a writ of mandamus, though the CIO intended to sue in state courts for a writ of mandamus to compel issuance of a meeting permit.

\textsuperscript{95} In a memorandum for organizers, Baldwin indicated that the principal issues at stake in Jersey City were the rights to hold meetings in private halls and public places, to distribute literature on the public streets, to picket, to open CIO offices, and to be free from expulsion from the city. Memorandum from Roger Baldwin, ACLU Papers, reel 162, vol. 2020. Ernst thought picketing was a low priority because Hague had allowed limited picketing in the wake of \textit{Lovell v. City of Griffin}, 303 U.S. 444 (1938). Memorandum for Roger Baldwin, ACLU Papers, reel 153, vol. 1051.

\textsuperscript{96} In addition to veterans’ associations, protests were made by the Jersey City Chamber of Commerce, the Association of the Sons of Poland, the Jersey City Real Estate Board, and the Ladies of the Grand Army of the Republic. The Third Circuit credited “evidence that Mayor Hague and his associates inspired at least some of these protests.” Hague, 101 F.2d at 779.

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The centerpiece of Ernst’s program was an omnibus injunction suit in federal court, in which the ACLU itself, not just the CIO, was a plaintiff. But Ernst pursued a broad range of tools and objectives in Hudson County during the months of preparation before trial. In addition to public meetings, the ACLU and CIO were interested in opening Hague’s terrain to picketing, literature distribution, and meetings in private halls, and to ending unlawful police practices, including violence and expulsions. They also wanted recognition of the CIO’s right to open offices in Jersey City. The civil liberties forces were pursuing arrests and test case litigation under the literature distribution ordinance, and even legislative impeachment proceedings. To minimize conflict in coordinating the multifaceted campaign, interested organizations agreed to cede control to a joint committee headed by the CIO. All cooperating groups were asked to clear proposals with Ernst’s office before acting.

As usual, Hague’s answer was to denounce his critics as Communists—and in particular, as Communist intruders bent on radicalizing a peaceful and patriotic community. According to Hague, the suppression of the CIO was not intended to “deprive anybody of their civil liberties,” but rather to “protect the rights of the people of this city against outsiders.” The ACLU anticipated and understood this challenge, which was a common rhetorical frame for excluding labor organizers. Its 1930 pamphlet had acknowledged that “a large part of the public

98 The list of issues is outlined in Memorandum on the Jersey City Work, 24 December 1937, ACLU Papers, reel 153, vol. 1051.
99 Other groups, such as the Workers’ Defense League, had undertaken independent efforts—much to the ACLU’s frustration. Roger Baldwin to William Carney, 29 December 1937, ACLU Papers, reel 153, vol. 1051. See also Roger Baldwin to Joint Board on Civil Rights in Hudson County, 31 December 1937, ACLU Papers, reel 153, vol. 1051.
100 Memorandum on Conference with Morris Ernst, 3 January 1938, ACLU Papers, reel 153, vol. 1051. Due to the number of actors interested in the Jersey City problem and the attendant confusion in executing a centralized strategy, the ACLU agreed to take no independent action without first securing confirmation in writing from Ernst’s office. Jerome Britchey to Roger Baldwin, 17 December 1937, reel 153, vol. 1051; Board Minutes, 20 December 1937, ACLU Papers, reel 138, vol. 942 (“Resolution was adopted requesting Carney to consult with Joint Committee on Strategy on any move to be made in Jersey City and to tell other organizations to do the same.”).
still believes that strikes are the results of ‘outside agitation’” and had noted that “any action on
the part of the strikers which brings home to the community tyranny on the part of employers or
officials, has not only a legal, but also a great publicity value.”\textsuperscript{102} The advice might have been
written for the Jersey City fight. Indeed, in a memorandum outlining the ACLU’s strategy and
objectives, Roger Baldwin wrote, “obviously one of the real difficulties is to overcome the fear
and apathy of Jersey City inhabitants and to switch the campaign from an apparent invasion of
outsiders to a movement by Jersey City residents themselves.”\textsuperscript{103} Appropriately enough, Hague
touted that very memorandum (which was intercepted by postal officials in Jersey City\textsuperscript{104}) as
“documentary proof” that Baldwin was a “leading communist.”\textsuperscript{105} Ernst, according to Hague,
was “second in command.” Together, the two men were “the leaders” of the Communist Party
and, “from behind the scenes,” they were “directing the whole CIO program.”\textsuperscript{106}

For the most part, the leadership of the Jersey City free speech effort responded to
Hague’s red-baiting by disclaiming affiliation with the Communist Party. Dean Spaulding
Frazer of the Newark Law School, who served as counsel for the CIO in the Supreme Court,
pleased, “Let us not be misled by any herrings dragged across the trail, even though they be red
ones.”\textsuperscript{107} William Carney pronounced himself a devout Catholic and challenged Hague to
“prove his charge that CIO leaders in the State are Communists,” which he dismissed as a

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\item \textsuperscript{102} ACLU, Legal Tactics, 14–15.
\item \textsuperscript{103} Memorandum from Roger Baldwin, 24 December 1937, ACLU Papers, reel 162, vol. 2020.
\item \textsuperscript{104} The ACLU demanded an official investigation and indictment for mail tampering. “Baldwin Denies Red or CIO
Affiliation in Talk at Church,” Bayonne (N.J.) Times, 15 January 1938. Ernst presented evidence of the alleged
tampering to Attorney General Cummings and Postmaster General Farley; only six copies of the reproduced letter
were mailed, and all but one intended recipient (Syd Ross, chair of the Hudson County Committee on Civil
Liberties) received their letters. Ross’s letter was misaddressed and returned to the ACLU by the Jersey City post
office. It had been opened before it was sealed. ACLU News Release, 5 January 1937, ACLU Papers, reel 153, vol.
ACLU Bulletin 815, 6 May 1938, ACLU Papers, reel 165, vol. 2041. The Hudson County grand jury unsurprisingly
\item \textsuperscript{105} Clipping, Hoboken (N.J.) Observer, 1 January 1938, ACLU Papers, reel 162, vol. 2020.
\item \textsuperscript{106} Ibid.
\item \textsuperscript{107} Clipping, Hoboken (N.J.) Observer, 7 January 1938, ACLU Papers, reel 162, vol. 2020.
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distraction from the primary issue, namely, labor’s right to organize. Baldwin disavowed any sympathy for violent revolution, falling back on his pacifist determination to “fight[] violence on every front.” His appearance at a church in Bayonne, New Jersey was an orchestrated display of anti-totalitarian, God-loving Americanism; his speech was preceded by remarks from a war veteran and first commander of the Essex County American Legion committee.

Still, Baldwin was unwilling to vilify Communists outright. Whatever his misgivings about the Stalinist suppression of civil liberties, he believed the Soviet economic program to be laudable and had even declared in a 1935 Harvard Class Book that “communism is the goal”—though he always insisted he meant “economic communism” rather than its political counterpart. When Ernst urged him to invoke the names of prominent anti-Communists and to announce himself opposed to “any form of dictatorship—right or left,” Baldwin emphatically refused. In the winter of 1937–1938, well before the Ribbentrop-Molotov Pact shattered his remaining hopes for the Soviet experiment, Baldwin would not equate the Soviet Union with Nazi Germany. Instead, he criticized Hague for his “high-handed dictatorship,” which was incompatible with the commitments of the Roosevelt administration he claimed to support. He

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108 “Prove Us Reds, Carney Invites,” Hackensack (N.J.) Record, 14 January 1938; Statement of William J. Carney, ACLU Papers, reel 167, vol. 2063 (“When Hague and his Open Shop employers attempt to divert the public’s attention from this clear-cut issue by dragging in such matters as Communism, the radicalism of certain individuals, the conservatism of others, they simply show the weakness of their case.”).
110 Barred from Jersey City, Baldwin scheduled the public appearance in Bayonne instead. Bayonne veterans organized a rally to protest the visit by the “convicted draft-dodger” and presumptive Communist. “Thousands to Join in Anti-Red Rally,” Bayonne (N.J.) Times, 10 January 1938.
112 Memorandum to Baldwin, 4 January 1938, ACLU Papers, reel 153, vol. 1051. The memorandum relayed Ernst’s recommendations. Baldwin struck a line through the suggestions and wrote and underscored “no” at the bottom of the page. Ernst himself would soon use the suggested language himself. Letter from Morris Ernst, 13 December 1937, Jackson Papers, cont. 23, folder Ernst, Morris (“Those of us who oppose dictatorships, right or left must appreciate how essential it is to defend our civil liberties at this time.”).
113 E.g., Lyman Bryson, ed., America’s Town Meeting of the Air: Personal Liberty and the Modern State (New York: American Book Company, 1935), 31 (forced with the choice between Fascist dictatorship and Communist dictatorship, “I know which one I am going to take”). Ernst deflected one accusation of Communism by carefully informing Hague that the ACLU was “just as Communist as the Bill of Rights and no more.” Telegram from Roger Baldwin to Frank Hague, 10 December 1937, ACLU Papers, reel 153, vol. 1051.
predicted, “your baseless charges of communism to obscure the real issues will fall as flat as your un-American denial of constitutional rights.”

This basic strategic difference was a source of tension among the various organizations challenging Hague’s repressive policies. William Carney’s goal in Jersey City was to “tell the world that the fundamental issue is that of the right to organize.” The lawyers, on the other hand, were eager to dissociate the civil liberties campaign from the substantive demands of their labor clients. Hays told the New York World-Telegram that the ACLU would oppose violence committed by organized labor against unorganized workers, just as it would protest employer or police abuses. Ernst was even more emphatic. Drawing on his experience with sex education and artistic freedom cases, in which public opinion had proved to be a powerful influence on judicial decision-making, he assembled a new Committee on Civil Liberties in Jersey City composed of sixty-four of “the nation’s front-page figures in literature, the theatre, medicine, religion, law, art, journalism, housing and the academic world.” Labor leaders were notably absent from the group. In his letter to potential members, Ernst emphasized that while the current fight involved the CIO, Hague had employed the same tactics against the AFL. “It does not matter where you stand on the question of industrial versus craft unionism, or even as

114 Telegram from Roger Baldwin to Frank Hague, 4 January 1938, ACLU Papers, reel 153, vol. 1051.
116 Arthur Garfield Hays to Westbrook Pegler (New York World-Telegram), 4 January 1938, ACLU Papers, reel 167, vol. 2063. Hays noted that violence against unorganized workers by unions was comparatively rare, and that victims of such violence were ordinarily protected by employers and the police. See also statement of William J. Carney, ACLU Papers, reel 167, vol. 2063 (emphasizing that the central CIO interest was “whether or not the workers of Jersey are to be free to organize in unions of their own choosing”). Baldwin wrote Ernst in February to convey the concerns of members of the board regarding Hays’s testimony in the injunction hearing as to the ACLU’s attitude toward Soviet Russia. “Of course, we have no attitude to any foreign country, and none of us should be quoted as expressing other than a personal view,” he reminded him. Roger Baldwin to Arthur Garfield Hays, 3 February 1938, ACLU Papers, reel 167, vol. 2063.
between organized and unorganized labor,” he told them. “The real issue in Jersey City is
democracy versus dictatorship.”

When Ernst labeled Hague “the greatest radical of our day” in a radio address, CIO
organizers thought he had gone too far. Neil Brant of the United Electrical, Radio, and
Machine Workers of America complained that the radio slot should have been given to the CIO’s
leadership rather than its lawyers. A remark of that nature “may sound cute,” he chided Ernst,
“but in my opinion it only tends to confuse the people and, intentionally or otherwise, it is a bit
of red-baiting because it holds up the word ‘radical’ to contempt.” Ernst’s opposition to a
“dictatorship of the left,” however sincere, was not the issue in the CIO’s fight against Hague.
Moreover, his cooperation with outspoken CIO opponents like Dorothy Thompson and General
Hugh Johnson, who were interested only in the free speech aspects of the case, would serve to
undermine the CIO’s broader objective. The goal in Jersey City was to facilitate a successful
organizing campaign, he told Ernst, not “to show the world how really respectable you are.” It
was Brant’s opinion, shared by the Steering Committee, that Ernst’s “‘extra-legal’ activities were
not aiding the organizing drive, but on the contrary were doing it some harm.” Months later,
that sentiment was even stronger. Aside from Carney, the CIO leadership “took the attitude that
the civil liberties angle was of no use to them.”

118Letter from Morris Ernst, 13 December 1937, Jackson Papers, cont. 23, folder Ernst, Morris; Clipping, Newark
2020.
120Neil Brant to Morris Ernst, 7 January 1938, ACLU Papers, reel 162, vol. 2067.
121Baldwin chose not to become involved in the dispute, noting that Ernst was representing the CIO rather than the
122Jerome Britchey to Morris Ernst, 6 April 1938, ACLU Papers, reel 165, vol. 2040.
A few days after calling Hague “the greatest radical,” Ernst complained that he was “being ragged” by the “extreme left, who are inevitably bad tacticians.”123 But the dispute was about something more than mere tactics. Ernst was increasingly focused on the right of the CIO to voice its views, not the likelihood that its message would ultimately triumph. And the right to speak, by 1938, was an effective rallying cry. The battle over the judiciary reorganization plan, still fresh in public memory, had strengthened the association between free speech and American values. To Ernst, it was precisely Dorothy Thompson’s dislike for the CIO that made her an ideal ally. In the New York Tribune, Thompson told readers she felt duty-bound to speak out in Jersey City for the same reason that she had fought the court-packing plan: because she believed that “the powers of government should be limited, and the basic rights guaranteed to individuals under the Constitution should not be left to the interpretation of a ‘kept’ Court, switched into line—to use the Nazi phrase—with the policy of this or that Administration.”124 By the same logic, Walter Lippmann reasoned in an article that proponents of an independent judiciary were bound to join him in condemning the denial of civil liberties in Jersey City.125 John Haynes Holmes, impressed by such appeals to liberalism, declared the “Hague business” to be the most important issue the ACLU had encountered in years.126

Rule-of-law was a particularly persuasive argument in Jersey City in light of recent developments in international politics. At a moment when Americans daily encountered totalitarian purges and propaganda—when, faced with Hitler, Stalin, Franco, and Mussolini, many believed that democracy in Europe was poised to topple altogether—Ernst emphasized the

123 Morris Ernst to McAlister Coleman, 17 January 1938, Ernst Papers, box 123. He claimed that he had declined a number of invitations for radio and public appearances in deference to the long-term actors in the Jersey City fight, who resented watching “an alien like Ernst run away with part of the show.”
124 Dorothy Thompson, “Who Loves Liberty,” New York Tribune, 10 January 1938. She urged conservative groups like the ABA to prove their own consistency.
slippery slope from Mayor Hague to fascist dictatorship. He broadcast the message by all available means, and a radio speech in December prompted dozens of congratulatory letters.\footnote{Ernst Papers, box 123.} Others in the ACLU also embraced it. For example, Arthur Garfield Hays compared Germany’s imprisonment of so-called Communists in concentration camps to Jersey City’s policy of expelling them to Hoboken. He told Hague that his record in labor disputes amounted to “a system of Fascism,” based on unbridled executive power.\footnote{Arthur Garfield Hays to Frank Hague, 10 December 1937, ACLU Papers, reel 153, vol. 1051.} Norman Thomas, in a speech titled “Hagueism Is Fascism,” charged that Hague’s “process of working the masses up into a patriotic, nationalist frenzy, is characteristically fascist.”\footnote{Thomas, \textit{Hagueism is Fascism}, 4. He continued, “He has wrapped terror and exploitation in the flag and made the people like it.”} And the CIO declared that “‘I am the Law’ Frank Hague, Mayor of Jersey City, is playing the role of Adolph [sic] Hitler.”\footnote{Congress of Industrial Organizations, “Theatre Nite: Bring Democracy to Jersey City,” 20 February 1938, ACLU Papers, reel 167, vol. 2063.}

“roaring back ‘Fascist’ and ‘Dictator’ at Hague”—and “out of the tumult, the Mayor of Jersey City has suddenly burgeoned big and menacing on the political horizon of America.”

To make the case for broad popular resistance to Hague’s autocratic policies, Ernst enlisted support from such disparate groups as the National Lawyers Guild, the Republican Party, the Association of Catholic Trade Unionists, and the Teachers Union. Organized labor, unsurprisingly, was divided. By late 1937, the AFL and the CIO were embroiled in a bitter organizing battle, and the AFL was reluctant to come to its rival’s defense. Hague tried his best to retain AFL support, citing an honorary membership conferred on him by Samuel Gompers and a purported commitment to excluding outside strikebreakers. The New Jersey State Federation of Labor was so hostile to the CIO that it sided with Hague, notwithstanding his policy in the Pulaski Highway strike. The president of the Hudson County Building Trades Council went so far as to call Hague the “protector of the people.” And William Green,


134 Memorandum on the Jersey City Work, 24 December 1937, ACLU Papers, reel 153, vol. 1051. Help came from unexpected quarters. In early January, Horace K. Robertson, the director of public safety in Bayonne, New Jersey, was dismissed from his post after declining to bar a public appearance of Roger Baldwin. Clipping, Philadelphia Record, 16 January 1938, ACLU Papers, reel 162, vol. 2020. As a veteran, Robertson found Baldwin “personally objectionable” because of his refusal to serve during World War I. Still, he considered the rights of free speech, press and assembly crucial to preventing the rise of dictatorship in America. Channeling two decades of civil liberties propaganda, he described expressive freedom as an “inherent right belonging to all people regardless of class or condition,” fiercely protected “from our earliest days as a nation” and never denied to any minority group. “We have always recognized the wisdom of freely expressing our opinions on all matters of public interest,” he proclaimed, “so that out of free discussion we could distinguish the good from the bad and adopt those views which would work for the general good.” Speech delivered over WEVD by Horace K. Robertson, Bayonne Director of Public Affairs, January 1938, ACLU Papers, reel 167, vol. 2063.

135 The NLRB’s purported CIO favoritism was a major source of the controversy. Tellingly, NLRB member Edwin Smith was one of a handful of New Deal officials who openly condemned Hague. “Hague Attacked by NLRB Member,” New York Times, 19 June 1938.


137 McKean, Boss, 197 (quoting Robert Lynch).
president of the AFL, “held his peace.” Still, at the CIO’s request, some AFL unions agreed to overcome sectarian differences in pursuit of a common goal. In January 1938, a gathering of AFL and CIO unions demanded that Governor Moore apply the NLRA in Jersey City and resolved “that this un-American censorship cease at once, by Federal intervention if necessary.” The same month, the presidents of three AFL unions sought to revoke Hague’s honorary membership in the national organization. They expressed concern at Hague’s use of “the difference between the A. F. of L. and the C. I. O. to hide his own anti-labor purposes.”

The CIO may have felt ambivalence toward Ernst’s tactics, but it accepted assistance from “progressive and liberal elements,” including consumers’ groups, women’s clubs, and fraternal organizations, as “the genuine sentiment of the foremost citizens of the State.” That sentiment was substantial. The Liberal Ministers Club cautioned “that Fascism can happen here” and issued a resolution “heartily support[ing]” the work of the ACLU. The _Labor Leader_, the organ of the Association of Catholic Trade Unionists, emphasized that Hague was fighting not Communism, but the CIO’s attempt “to win a living wage and a little sorely needed economic security for the workers of Jersey City and New Jersey.”

The Newark diocese of the Protestant Episcopal Church “call[ed] upon all American citizens who value the precious heritage of liberty won for us by our forefathers to stand firm” for the freedom of speech, press,
assembly and religion, which were “fundamental to our democracy.” Even the Jehovah’s Witnesses agreed to help; Olin Richmond Moyle, counsel for the Watch Tower Bible and Tract Society, noted Hague’s long history of persecuting Witnesses in Hudson County and offered “to cooperate in any way in bringing that dictator to time.” Reactions like these had little effect on Hague, who vowed in early January that the CIO would never come into Jersey City as long he was mayor.

The appeal to civil liberties was all the more poignant in contrast to Hague’s flagrant disregard for all criticism. The mayor dismissed with a “pshaw!” the suggestion that he was acting as a “tyrant and a dictator” in the vein of Mussolini and Hitler. “The answer to all that,” he said, “is on election day.” Hague acknowledged that he exercised significant power in Hudson County, but he insisted that the people had invested him with it because they trusted him to apply it “for the benefit of the people.”

Certainly Hague had his share of supporters. The working class electorate of Jersey City consistently handed him landslide victories, and his rallies and demonstrations reliably attracted massive crowds. Skeptics argued that many of the spectators were motivated by fear of job loss or retaliation, and the New York Post reported that “scores of letters [were] pouring in from Jersey readers too scared to sign.” Privately, however, the ACLU acknowledged that

145 “Roosevelt Avoids Comment on Hague,” New York Times, 11 May 1938. Suffragan Bishop Theodore R. Ludlow declared that Hague, “by his highhanded methods, is hastening into power the very movements which he claims he wants to destroy, by giving them a grievance and a cause.” While he noted that the church should not engage in politics he insisted that “to be concerned about human rights is not politics.”
146 O. R. Moyle to Harriet Pilpel, 18 December 1937, Ernst Papers, box 280, folder 1.
148 McKean attributed the mayor’s political acumen in local matters to experience rather than intuition—and Hague’s experience outside New Jersey was limited to leisure and travel. McKean, Boss, 13.
150 “‘Tyranny’ Charges Resented by Hague,” New York Times, 12 January 1938 (noting that Hague received approximately 114,000 out of 120,000 ballots cast in previous election).
many Hudson County residents favored Hague’s approach. As Ernst put it in a letter to Hays, “despite the feeling of many of our friends the people of Jersey City, through fear and ignorance, are to a great extent back of Hague and have been right along.”

For some, the sense that geographic and cultural outsiders were criticizing their ways strengthened their allegiance to Hague. When Jersey City Rabbi Benjamin Plotkin gave an address defending free speech, the Jewish Community Center in which his congregation was housed cautioned him not to discuss the Hague administration if he wanted it to remain there. A month later, Plotkin told the ACLU that “retaliatory measures [were] being taken against some of the Jewish people, and the wave of vigilante spirit [was] rising.” Although Hague carefully avoided antisemitic rhetoric, the mayor’s supporters did not fail to notice that many of his most outspoken detractors—including attorneys Abraham Isserman, Arthur Garfield Hays, and Morris Ernst—were Jews.

Rising antisemitic sentiments brought the threat of totalitarian violence that much closer to home. 

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154 The president of the Jewish Community Center was a Hague organization leader, and its treasurer was a member of the Jersey City Board of Education. Outside of Jersey City, the Jewish community was generally hostile to Hague. Manhattan Borough President Stanley Isaacs declared that “[t]he Jew who gives aid to a man like Mayor Hague is a traitor to his race.” He explained: “We must be on the side of those who are supporting democracy, for the forces that would destroy democracy would likewise destroy liberty and Judaism. We must join those groups and prevent the inroads of those destructive influences which have threatened Jews in Germany, Austria and other countries of Europe.” “Isaacs Denounces Jews Aiding Hague,” New York Times, 19 May 1938. See also Press Release, the Social Justice Committee of the Rabbinical Assembly of the Jewish Theological Seminary of America, 22 December 1938, Ernst papers, box 280, folder 8 (resolution denouncing “the attempt being made in Jersey City to establish a dictatorship and deny the rights of free speech and assembly,” as well as “interference with the rights of labor to organize for collective bargaining under auspices it itself deems proper”).
156 In the Plotkin affair, he ensured that only members of the Jewish community would publicly criticize the rabbi.
157 Ernst received numerous antisemitic letters. E.g., “A Loyal Patriotic American” to Morris Ernst, 21 June 1938, Ernst Papers, box 123 (“[I]f you damned Jews don’t cease your un-American, un-Christian agitation, you’ll get the same medicine you are getting in Germany and other parts of the world. As a resident of Jersey City, I want you to know that the people of our city are 100% behind Mayor Hague in this fight to keep crackpots, radicals, Bolsheviks and all left-wingers out of Jersey City, one of the few American cities in the East. . . . And don’t get too cocky with
Jersey City residents stood by their mayor for less menacing reasons, as well. Many pointed to Hague’s reforms in the fire and police departments, which he achieved by ousting corrupt union influences.\(^{158}\) Moreover, the administration had convinced Jersey City workers that it was protecting their jobs against competition with neighboring cities.\(^{159}\) And many Jersey City residents, in an era of national uncertainty, were simply shy of change.\(^{160}\) The apparent fervency of local support led the *New York Times* ruefully to conclude, “[T]here is in Jersey City a large population which is satisfied with things as they are and which really believes that radicalism represents a menace to the United States.”\(^{161}\)

In the wake of a national CIO organizing campaign marked by radical methods—most notably, the sit-down strikes of spring 1937—Hague could plausibly query whether his adversaries had “any regard for constitutional rights, or for any law” when they took possession of factories or blocked employees from getting to work. He had ample company in claiming that such techniques were not legitimate labor tools and that the CIO was actually “trying to seize the greatest Mayor in the U.S., you little sawed-off runt. You are a son-of-a-bitch trying to bore from within, but we’re wise to you and your kind, you dirty little kike.”\(^{3}\) At the same time, Ernst received “a mass of letters from rich Jewish people begging [him] to withdraw from the matter” lest he exacerbate antisemitic tendencies, a form of criticism that he evidently found more troubling. Morris Ernst to Hon. Louis Brandeis, 22 June 1938, Ernst Papers, box 123. For example, Otto Abraham advised him that “American Jews of prominence should seriously consider whether it is advisable to continuously remain in the limelight and to head movements which, right or wrong, are considered by the majority of people as inimical to the best interests of this country.” Abraham explained that he had always defended his own rights, “but in this very serious hour of our race, we all must lay aside personal ambitions; the quieter the Jews of this country, and the more dignified their behavior will be, the better will be their future lot and that of their children.” Otto Abraham to Morris Ernst, 18 June 1938, Ernst Papers, box 123. Ernst told Abraham that “members of all religious groups should act like Americans” and that “as soon as the Jews or the Catholics or the Protestants start to act as if they were not Americans first but Jews, Protestants or Catholics first, they are conceding the concept of a divided America.” He added that he was “proud of [his] Jewish heritage” and would not “avoid an act of public service because of that precious treasure.” Morris Ernst to Otto Abraham, 21 June 1938, box 23. Despite his apparent self-assurance, Ernst wrote to Justice Louis Brandeis for his view of the situation and enclosed his correspondence with Abraham. Brandeis told him his answer was a “good one” and invited him to visit and discuss the matter. Louis Brandeis to Morris Ernst, 24 June 1938, Ernst Papers, box 123.


\(^{159}\) “Pledges No Invasion As Long As He Is Mayor,” *Hudson Dispatch (Union City, N.J)*, 13 January 1938 (“I have always been a friend of labor. . . . When industry is driven out of here, thousands lose employment.”).

\(^{160}\) One Hague devotee was so distressed by the attack on her mayor that she threw a jar of red pepper at Arthur Garfield Hays. The assailant posted as an admirer of Hays and asked to watch him speak during a radio broadcast. The radio station offered an award for her arrest. ACLU Papers, reel 162, vol. 2020.

power by creating violence and disorder.”162 Indeed, in a sense, the question is not why so many of Hague’s constituents supported him, but rather why so much of America condemned him.163 

After his anti-CIO rally at the Jersey City armory in January 1938, Hague reportedly received hundreds of congratulatory letters and telegrams from throughout the United States.164 Had he limited his attack to the CIO—had he permitted speeches by liberal groups, members of Congress, and the ACLU even while resisting CIO organizing efforts—he would very likely have garnered considerable sympathy. When the ACLU challenged his despotic practices, many of his advisors encouraged him to do just that.165 Hague, however, ignored their suggestions. He adopted policies so extreme as to seem a caricature; Heywood Broun aptly likened Jersey City officials to “vulgarized” versions of the characters in Marc Blitztein’s Broadway musical, “The Cradle Will Rock” (which, notably, Ernst invoked in court).166 Urged on by business groups and the Catholic Church, Hague denounced free speech itself as a Communist ploy.167 In 1938, that was no longer a palatable strategy.

The Civil Liberties Campaign

In the four months before the injunction proceedings commenced, a broad array of groups and individuals expressed their support for the ACLU’s civil liberties campaign by attempting to

162 “‘Tyranny’ Charges Resented by Hague,” New York Times, 12 January 1938 (“This was the same defiance of constituted authorities, the same flouting of law, that had accompanied C.I.O. strikes in the West.”); “‘Tyranny’ Charges Resented by Hague,” New York Times, 12 January 1938, ACLU Papers, reel 162, vol. 2020 (“Did they have any regard for constitutional rights, or for any law, when they sat down and took possession of factories, stores and business offices all over the country last year? Do they have any regard for constitutional rights when they throw mass picket lines around a plant and refuse to let its owners use it, or men who want to work get in and out? They don’t do these things for legitimate labor union ends. These Reds are trying to seize power by creating violence and disorder, and if they ever get into power nobody will have any constitutional rights. They have got to be stopped somewhere, and Jersey City is going to stop them.”).

163 On the sit-down strikes and national opinion, see Chapter 6.


165 For example, his personal attorney, John Milton.


speak publicly against Hague and his policies in Jersey City. The Hague administration reliably
denied meeting permits to these would-be speakers, whatever their topic or political bent. While
some were labor and radical groups, others were not. For example, the American Whig-
Cliosophic Society of Princeton University wanted to host a speech by Senator Borah, and the
Independent Speakers’ Association of New York City, whose members included Thomas Dewey
and Fiorello La Guardia, sought permission to hold an open-air meeting to discuss free speech.
These proposals and many others were summarily rejected.168

In February, the civil liberties forces decided to circumvent the permit requirement and,
appropriating Hague’s own terminology, “invade” Jersey City. At a meeting convened by the
Hudson County Committee for Labor Defense and Civil Rights, an ACLU affiliate, 250 Hague
opponents crowded into a rented hall (too small, but the only one they could secure) to
“denounce the Mayor’s campaign of repression.”169 Another 250 listened through amplifiers
outside. The featured speakers were United States Representative Jerry O’Connell, a Montana
Democrat, and John T. Bernard of the Minnesota Farmer-Labor Party. Local Hague opponents
also addressed the audience, including Rabbi Plotkin, John R. Longo, and Jeff Burkitt. Longo,
an anti-Hague Democrat, was about to receive a nine-month prison sentence on a specious
charge of election fraud170—and Plotkin would nearly lose his congregation for serving as a
character witness at Longo’s trial.171 Burkitt’s history with Hague stretched back to the late

168 Commissioner Casey claimed that Borah had not in fact consented to appear at the meeting. Russell B. Porter,
169 ACLU Bulletin 806, 4 March 1938, ACLU Papers, reel 167, vol. 2063. See also ACLU Press Release, 24
170 A Hague judge, Robert V. Kinkend, found that petitions filed by Longo on behalf of a slate of anti-Hague
candidates during the September 1937 Democratic primary contained fictitious names. Objective evidence was
lacking and witnesses were reputedly bribed. “Hague’s Control Extends Even to Jury System,” New York Post, 24
its intention to evict Congregation Emanu-El, which was unable to obtain other quarters. William Carney urged an
1920s, when he was routinely arrested and beaten by the police for challenging Jersey City speech restrictions. Many of his allegations against the city were validated by the investigation of the New Jersey Senate’s Case Commission, and in 1929 the ACLU had volunteered to assist him in appealing a 90-day sentence for disorderly conduct based on an address to an anti-Hague political meeting. The events of 1938 brought Burkitt back to anti-Hague agitation after a five-year hiatus.

After the February meeting, civil liberties groups were even more eager to defy Hague’s oppressive policies, including the bans on gathering in public spaces and on circulation of handbills. A perfect opportunity arose in March, when the United States Supreme Court invalidated a Griffin, Georgia license requirement for the distribution of printed materials. In Lovell v. City of Griffin—at the urging of the ACLU as amicus curiae, among other groups—the Court overturned the conviction of a Jehovah’s Witness for distributing literature without a permit, declaring the ordinance constitutionally overbroad. The ACLU immediately informed Hague that Jersey City’s permit requirement was unconstitutional. At first, the city resisted. A police captain explained to one representative of the Workers Defense League that Jersey City
officials were “enforcing the Jersey City ordinance—not the Constitution.” Eventually, Corporation Counsel James A. Hammill conceded that the Lovell decision was applicable and advised the Department of Public Safety that the orderly distribution of circulars and pamphlets should be tolerated. He nonetheless insisted that unlawful assemblage would be strictly prohibited. “Under no circumstances,” he announced, “shall mass demonstrations such as were attempted by the C.I.O. and other groups several months ago be tolerated.”

Jubilant announcements that Hague was no longer “the law” were premature. In mid-April, Jeff Burkitt was arrested when he attempted to speak publicly against Hague and on behalf of John Longo, despite denial of a meeting permit. The Jersey City Journal ominously noted that an ACLU membership card was found on his body upon his arrest. At trial, Judge Antony Botti chastised Burkitt for using obscene language and sentenced him to six months in the county penitentiary.

A few weeks later, the International Labor Defense announced a test meeting featuring a repeat performance by Representatives O’Connell and Bernard. The night before the scheduled event, two thousand Hague supporters, primarily veterans, gathered at the Jersey City armory at the invitation of Colonel Hugh A. Kelly, secretary to New Jersey Governor A. Harry Moore. The crowd adopted resolutions demanding that Commissioner Casey take action to prevent the

180 The case was initially handled by the International Labor Defense, although the ACLU offered assistance. Jerome Britchey to Jeff Burkitt, 4 May 1938, ACLU Papers, reel 165, vol. 2042; Claire Burkitt to Jerome Britchey, 28 September 1938, ACLU Papers, reel 165, vol. 2042 (passing along her husband’s request for assistance from the ACLU after severing relations with Samuel L. Rothbard and the ILD).
meeting and calling upon all members of patriotic organizations to appear in Journal Square in uniform in case the speakers nonetheless appeared. They implicitly threatened vigilante violence if the meeting were allowed to proceed. At first, the ILD and its guests refused to back down. “We are going,” Bernard announced, “because we believe that this is still America and not Nazi Germany.” The following evening, however, a huge crowd of public employees, veterans, AFL members, and other Hague supporters assembled in Journal Square to overwhelm the ILD’s audience.

After conferring at the ILD offices in Manhattan for more than three hours, the two representatives decided to cancel their appearance. Observers for the ILD and the National Committee for People’s Rights, including a delegation of twenty “prominent writers and liberals,” concluded that attacks by the crowd were inevitable. Vito Marcantonio, ILD president and a former United States Representative for New York, explained that the organizers would have happily risked arrest, but the situation had become more dire in light of the “armed mob instigated and directed by Hague himself through his stooges.” Noting that the police had taken measures to facilitate rather than prevent violence, Marcantonio contrasted the vigilantism and corruption of Jersey City with the ILD’s commitment to “the democratic and civil rights of the American people,” and he called upon President Roosevelt to “restore law and order.”

According to the New York Daily News, a majority of those involved had been “won over to the

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184 “Congressmen Stand on Bill of Rights, Defy Hague,” Daily Worker, 5 May 1938.
theory that direct action should be abandoned and an appeal made to the Federal courts to
enforce the rights of free speech in Hague’s dominion.”188 Although the retreat garnered its
share of criticism, the press and even a few Hague constituents accepted the decision as the
responsible move in the face of mass hysteria.189 A *New York Times* editorial cautioned that the
ture threat of totalitarianism in America came not from Hague himself, but from the mobs that
enforced his will—that is, from the “substantial number of persons so short-sighted that they
have as little respect for constitutional rights as he has.”190

Still, the spring’s most celebrated free speech incident involved not mob action, but
police action. A week before the ILD’s attempted meeting, the deportation of Norman Thomas
at a Socialist Party rally made national headlines.191 Thomas tried to address a May Day Eve
meeting at Journal Square, for which Casey had denied a permit. He was immediately seized by
police, pushed into a car, driven to the ferry dock, and eventually forced onto a boat bound for

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Despite the change of tack, O’Connell vowed to return to Jersey City to deliver his speech; when he appeared before
an equally hostile crowd of 10,000 to 15,000 people in late May, he was promptly whisked away by the police.
announced that he would petition for Hague’s removal as vice chairman of the Democratic National Committee and
request an investigation by the Senate Civil Liberties Committee.

189 In the aftermath of the rally, the *New York Times* noted “some dissension among Mayor Hague’s own
constituents”; when Hague solicited letters from local clergy members stating their views of his public meeting
policy, two Protestant churches offered qualified support for the tolerance of minority views. “Balked Hague Foes
Plan New Attacks,” *New York Times*, 9 May 1938. A third pastor told Hague that he supported his policy but would
not ask his church to adopt the resolution Hague had requested.

Tribune*, 9 May 1938 (“With the championship of civil liberties successfully pre-empted by the International Labor
Defense, whose sinuous interventions have managed to wreck so many other good causes before now, and with the
two Congressmen retreating in an atmosphere of ignominious fiasco under cover of a not too convincing propaganda
statement by Mr. Marcantonio, the technical victory may perhaps rest with Mayor Hague. . . . We do not know who
won. But we do know that the rather simple but native American faith in the constitutional guaranties and sound
police administration suffered a disastrous loss.”).

the ACLU as exclusively pro-labor, but condemning Hague’s tactics as un-American and unwise and professing
“irrevocable” commitment to the “American principle of free speech”); George Sokolsky, “Hague Must Stop,”
He is fighting against the capitalist system. He is attacking the justification for democracy.”).
New York. Spectators fared little better; many were beaten or escorted to the city borders, and Thomas’s wife Violet was allegedly punched in the jaw. Thomas returned later in the evening “to find out what happened to [his] wife and other American citizens in Hitler-Hague fiefdom.” He was again escorted from the city, this time by the Hudson Tube.

The episode triggered a flood of newspaper editorials condemning Hague. Public figures expressed outrage, including Alf M. Landon, the 1936 Republican presidential nominee, who told Thomas that he was shocked by “such a gross violation of our sacred right of free speech.” According to the *New York Post*, critics were Republicans and Democrats, conservatives and radicals. The Board of Governors of the New York Republican Club unanimously adopted a resolution condemning Hague. The annual conference of Democratic women, though it did not target Hague by name, declared its support for “freedom of speech and thought in the United States, so that all Americans may retain their priceless heritage as free citizens of a free democracy.” Within a few weeks, the Workers Defense League asserted confidently that “Mayor Hague’s regime was now on the defensive.”

Critics clamored all the more loudly because Arthur T. Vanderbilt’s Newark law firm agreed to represent Thomas in the matter, without financial compensation. Vanderbilt, who was serving as president of the American Bar Association, was a prominent Republican lawyer.

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193 One month later, after securing a permit, Thomas attempted to deliver the speech he had prepared for Jersey City in Newark. The speech was drowned out by music and the platform was pelted with rotten eggs and tomatoes. “Thomas Is Routed As Riot Halts Speech in Newark,” *New York Times*, 5 June 1938. Newark officials expressed regret and agreed to set aside a downtown park for public speeches for a ninety-day test period. “Newark to Set Aside a ‘Hyde Park’ As Sequel to Attack on Thomas,” *New York Times*, 9 June 1938.
and academic (and future drafter of the 1947 New Jersey Constitution, under which he was appointed Chief Justice of the New Jersey Supreme Court). The *New York Post* labeled him “an extremely conservative man,” but in reality, he was no stranger to civil liberties fights. At the urging of Felix Frankfurter, the ACLU had approached him for legal assistance in 1928, after Roger Baldwin was convicted of breaching the peace for his part in organizing a protest on behalf of striking silk workers in Paterson, New Jersey. Vanderbilt agreed to take the case for the cost of his office overhead, and much to the organization’s surprise, he argued it successfully before the New Jersey Court of Errors and Appeals. The speech-protective decision—for which Baldwin thought Vanderbilt deserved “a large part of the credit”—was regarded as the ACLU’s first important judicial victory.

Vanderbilt’s demonstrated commitment to individual rights had lent credibility to the ABA’s position during the judiciary reorganization controversy. Indeed, Morris Ernst, one of the principal architects of the National Lawyers’ Guild, told him that his nomination as ABA president had undercut the Guild’s recruitment and organizing efforts; the Guild had been hoping to “launch[] an attack on the ABA as being wholly reactionary,” but Vanderbilt’s election spoiled that plan. “It just so happens that I have spent a good many years in liberal movements and have taken more body blows in these fights than have most of the men who are leading the

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200 Vanderbilt was born in Newark, New Jersey in 1888 and attended the Newark public schools. He received a Bachelor of Laws from Columbia Law School in 1913. He became a full professor at NYU Law School in 1918 but remained an active and highly successful litigator and served as director for several financial institutions. Biographical note, 18 October 1937, Vanderbilt Papers, box 130, folder 1938. He became dean of NYU Law School in 1943 and was named first Chief Justice of the newly organized New Jersey Supreme Court under the 1947 New Jersey Constitution.


204 Arthur Vanderbilt to John H. Riordan, 7 December 1937, Vanderbilt Papers, box 130, folder National Lawyers Guild.
National Lawyers’ Guild,” Vanderbilt explained to an ABA colleague. “I have even been so brash as to represent the American Civil Liberties Union in our court of last resort. Think of that!”205 A 1937 biographical sketch for the ABA attributed to Vanderbilt “an enlightened and progressive view of the lawyer’s duty to protect the rights of individuals against the encroachments of arbitrary power in public or private hands.” The new president firmly believed in “personal and civil liberties” and had “given freely of his services to defend these rights in the Courts.”206 Vanderbilt, in short, was the ideal spokesperson for a content-blind model of free speech. Just as his track record in civil liberties cases had allowed him to champion the Bill of Rights without provoking charges of hypocrisy from the New Dealers, his status as head of the eminently conservative ABA belied Hague’s claim that free speech was simply a vehicle for Communist agitation. Vanderbilt confidently brushed aside such allegations (along with Hague’s accusation that Vanderbilt had taken Thomas’s case for “a large fat fee”), explaining that “Mr. Hague does not yet understand that the lawyers of the country are deeply concerned with the preservation of civil liberties guaranteed by our Federal and State Constitutions.”207

Lawyers at Vanderbilt’s firm organized a comprehensive legal challenge on Thomas’s behalf. In federal court, they sought damages from city officials totaling 20,000 dollars.208 They also filed new permit applications with the city, and when those were denied by Commissioner Casey—who cited a threat of violence by hostile spectators, anticipating decades of municipal reliance on the so-called “heckler’s veto”209—they sued in state court for a writ of mandamus.210

205 Arthur Vanderbilt to Reginald Heber Smith, 8 July 1937, Vanderbilt Papers, box 121.
206 Biographical note, 18 October 1937, Vanderbilt Papers, box 130, folder 1938.
208 The suit charged that the police “by force of arms did assault the plaintiff, seized and pulled him, and compelled him to go with them to a ferry slip and board a ferryboat for Manhattan.” It also charged infringement of Thomas’s rights as a citizen to go where he wished. “Broader Inquiry on Hague Urged,” New York Times, 22 May 1938.
At oral argument, Vanderbilt insisted that Thomas should be permitted to speak “even if a riot were to ensue,” but the New Jersey Supreme Court deemed the permit ordinance constitutional and upheld Casey’s right to exclude him (“the people are entitled to their tranquility,” the court explained, and the fact that “the police could quell any disorder is no reason to grant a permit”). Vanderbilt appealed to the state high court, which refused to hear the case before the following spring.

Most notably, Vanderbilt’s firm pursued a federal prosecution under a Reconstruction-era civil rights law. Immediately after the April 30 incident, Thomas, with the assistance of the Workers’ Defense League, requested an investigation by the La Follette Committee and urged J. Edgar Hoover and the Department of Justice to investigate the applicability of the 1932 Lindbergh law, Title 18, Section 408-A of the United States Code, which made it a federal crime to transport a kidnapping victim across state lines. A few days later, J. Dixon Speakman of Vanderbilt’s office filed complaints not only under the Lindbergh Law, but also an 1870 civil rights statute.

The Department of Justice was skeptical of the kidnapping claim. Even sympathetic reporters acknowledged that the law required ransom or torture, neither of which was involved in Thomas’s ejection from New Jersey. Attorney General Homer S. Cummings agreed to

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consider the argument, given that Thomas had employed “very eminent counsel.”216 The more plausible avenue for prosecution, however—one which was the Workers Defense League had advocated in Jersey City as early as December 1937217—was Title 18, Section 51 of the criminal code. Section 51 and its companion provision, Section 52, were passed during Reconstruction to protect black southerners from vigilante violence and from other forms of interference with the rights newly secured to them by the federal government.218 In 1938, they were among just a handful of federal statutes criminalizing the deprivation of civil liberties. As Dean Dinwoodey commented for the New York Times, their use raised “the problem of the affirmative powers of the Federal Government to protect constitutional guarantees against alleged infringement.”219

Section 51 provided for a five thousand dollar fine and up to one year in prison for conspiracy “to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment” of any right “secured by” the United States Constitution or a federal statute. Although the law seemingly implicated a broad range of private interference with such rights, the courts had interpreted it narrowly. In 1938, it was thought to reach only such manifestly national rights as voting in congressional elections, performing the duties of public office, reporting violations of federal law, and freedom from slavery or involuntary servitude. It had been employed primarily in voting rights cases (most notably, in Kansas City), but on one occasion, in

217 Lucile Milner to Roger Baldwin, 31 December 1937, ACLU Papers, reel 153, vol. 1051 (“David Clendenin phoned to suggest that action be brought at Jersey City under the federal civil rights statute and they wanted you to take it up either with the Department of Justice or put it up to Morris Ernst.”).
United States v. Wheeler, it had been invoked under circumstances much like Jersey City’s.\textsuperscript{220} The ACLU had good reason to be familiar with that case, which involved the perpetrators of the 1917 Bisbee deportation of IWW miners.\textsuperscript{221} Federal prosecutors alleged in Wheeler that the sheriff and townspeople who deposited the Arizona miners in neighboring New Mexico, and threatened them with death should they return, had violated the “right and privilege pertaining to citizens of [Arizona] to be immune from unlawful deportation from that state to another state.”\textsuperscript{222} The Supreme Court rejected the government’s argument, holding (without discussing the fact that local law enforcement was instrumental in the episode) that the ejection of the miners by individuals was a matter for state law. The District Court had emphasized that no federal statute had been violated, as the federal kidnapping statute applied only to abductions into slavery, involuntary servitude, and peonage\textsuperscript{223}—a failing that was not remedied until passage of the Lindbergh Law.

The Department of Justice rescued Section 51 from disuse in the fall of 1937, when it obtained an indictment against dozens of coal companies, executives, and public officials in Harlan County, Kentucky for conspiracy to violate the NLRA. According to one ACLU board member, it was an ACLU pamphlet that supplied the idea.\textsuperscript{224} The Pittsburgh Courier, a prominent black newspaper, wryly pronounced it “rather singular that neither Mr. Cummings [nor] any of his predecessors, Republican or Democratic, have ever previously been able to find this law or to talk about using it where and when colored people were concerned.”\textsuperscript{225} Still,

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\textsuperscript{220} Ibid.
\textsuperscript{222} Wheeler, 254 F. at 613.
\textsuperscript{223} Ibid., 616.
\textsuperscript{224} William Fennell to Roger Baldwin, 19 May 1938, ACLU Papers, reel 156, vol. 1078 (“[T]he use which the Department of Justice is making of the ‘Deprivation of Civil Rights Statute,’ as enacted in Reconstruction days, in the Harlan trial and, as announced yesterday, in Jersey City, was suggested in our pamphlet.”).
\textsuperscript{225} “Mr. Cummings Uncovers A Law,” Pittsburgh Courier, 28 May 1938.
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Harlan County was a good candidate for application of the statute. It had been the site of publicly sanctioned anti-union terrorism for a decade, and in 1937, the La Follette Committee had uncovered murders, assaults, and interference with UMW organizing efforts on the part of the county’s “coal barons and deputized thugs.” All efforts to curb the violence and secure miners’ rights in state courts—by the ACLU, among other actors—had failed. As the Department of Justice considered possible courses of action in the Thomas case, its attorneys in Harlan County were about to go to trial.

On May 18, Cummings announced that he had ordered a federal assessment of the Jersey City situation to determine “whether any persons in Jersey City were being deprived of civil rights guaranteed by Federal law.” Assistant Attorney General Brien McMahon, chief of the criminal division and an instrumental figure in the Harlan County prosecution, was assigned to head the investigation. The ACLU and CIO both eagerly offered their assistance. The chair of a New Jersey legislative committee that had examined Hudson County elections requested that its findings be incorporated into the civil rights inquiry. The New York Post, which had recently filed in federal court for an injunction against interference with the distribution of its papers, celebrated the Department of Justice investigation as “the action that we have been expecting

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226 On Harlan County, see “Labor: Case of Mary Helen,” *Time*, 30 May 1938.
227 Throughout the 1930s, the ACLU had been actively engaged in combating anti-union violence in the coalfields of Harlan and Bell Counties in southeastern Kentucky. In 1932, Arthur Garfield Hays announced that he was dispatching an ACLU delegation to the area; when a local prosecutor threatened violence, he sought an injunction in federal court, which was denied on the basis that Bell and Harlan Counties had a right to be “protected from free speech.” When an ACLU party nonetheless attempted to enter Bell County, it was blocked at the border. Hays sued in federal court for damages. American Civil Liberties Union, *Sweet Land of Liberty*, 1931–1932 (New York: American Civil Liberties Union, 1932), 4.
from an Administration led by a man who now stands as the world’s foremost exponent and
defender of the principles of democracy.”231

In practice, however, the Jersey City investigation proceeded half-heartedly. According
to Thomas, the Roosevelt administration was reluctant to antagonize Mayor Hague, who had
become one of the staunchest and most reliable supporters of the President and his agenda. A
federal grand jury considered indictments under the Lindbergh Law and Section 51 in July and,
at Thomas’s urging, requested further investigation by the Department of Justice and the FBI.232

In early September, newspapers reported that the Department was dropping the case.233 A few
weeks later, Cummings’s office—which, in Thomas’s assessment, was pursuing the case “like a
man who is looking for a job but hopes he will never find one”—announced that the inquiry was
still ongoing.234 The New York Times surmised that allegations of “political influence” had
exerted “strong pressure” on the Department of Justice; even New Deal liberals had “loudly
clamored for action.”235 In the end, two special assistant attorneys general, Welly K. Hopkins
and Henry Schweinhaut (both of whom had assisted in the Harlan County prosecution),
assembled well supported indictments.236 The grand jury, which was drawn from Hudson
County, declined to indict, but Hopkins and Schweinhaut promised a new and more sweeping
investigation before jurors from the entire state.237 At the Department’s request, the ACLU and

Times, 10 September 1938.
to Attorney General Cummings, he was informed that the press report was unauthorized and “entirely erroneous.”
Arthur Garfield Hays to Homer S. Cummings, 8 September 1938, ACLU Papers, reel 165, vol. 2041; Gordon Dean
(Special Executive Assistant to the Attorney General) to Arthur Garfield Hays, 10 September 1938, ACLU Papers,
reel 165, vol. 2041.
Angeles Times, 3 June 1938 (“Hague’s Congressmen have a record of supporting Roosevelt legislation and Hague’s
control of the W.P.A. in Jersey City gives him one of the greatest sources of power.”).
New Jersey Civil Liberties Union sent the Attorney General a 60-page report listing 89 court cases, directly involving nearly two thousand people and organizations, related to civil liberties violations in Hudson County between 1930 and 1938. The authors emphasized that the cases included were representative but by no means exhaustive, as many local lawyers had not responded to the organization’s survey. The ACLU was frustrated with the pace of the federal investigation but confident that the Department would give the report appropriate consideration.

Civil liberties advocates applied equivalent pressure to other political bodies and officials, with similarly unimpressive results. Thirty-two members of Congress called for Hague’s appearance before the House Committee on Un-American Activities, presumably without expectation of his compliance. Meanwhile, the Workers Defense League and other groups asked President Roosevelt to censure Hague publicly for his “lawless conduct.” Representative O’Connell described Hague’s “mobsters, thugs and gunmen” and asked the President to intervene. Roosevelt was sufficiently disturbed to request a meeting with the

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239 Categories of oppression included in the report were interference, disbandment, or prevention of public meetings; censorship of publications; interference with leaflet and pamphlet distribution, often through arrests under local ordinances already declared invalid; interference with newspaper distribution and confiscation of newspapers; arrests for possession of printed matter; arrests for refusal to resign from targeted organizations; search and seizure of persons and property; arrests for requesting information about people previously arrested; police brutality; “deportation” of undesirable people from Jersey City; illegal police confiscation of restaurant licenses and closing of retail stores without hearing; prevention of parades; denial of right to counsel; excessive bail and denial of bail; prevention of picketing and arrest of peaceful pickets during strikes; and interference with union management. American Civil Liberties Union and New Jersey Civil Liberties Union, Report to the Attorney General of the United States on Interference with Labor and Civil Rights in Hudson County, New Jersey, November 1938, ACLU Papers, reel 165, vol. 2041.

240 “Free Speech” Test Trial Opens Today,” Jersey (City) Journal, 1 June 1938.

241 Jerry O’Connell to Franklin D. Roosevelt, 9 May 1938, Franklin D. Roosevelt Papers, Official File 1581, folder Civil Liberties 1933–1945. O’Connell called upon Roosevelt to demand Hague’s immediate resignation from his position as Vice-Chair of the Democratic National Committee. After receiving the letter, the President requested a meeting with the Attorney General Cummings about the case. Franklin D. Roosevelt, Memorandum, 14 May 1938, Roosevelt Papers, Official File 1581, folder Civil Liberties 1933–1945. Cummings thought it would be undesirable for the President to respond to the letter and advised him to ask a staff member to acknowledge its receipt and
Attorney General, but Cummings advised him not to become directly involved.\textsuperscript{242} A few days later, when Upton Sinclair wrote to suggest prosecution of Hague for conspiracy to deprive citizens of their civil rights, the President’s Appointments Secretary, Marvin H. McIntyre, was tempted “just to file [the] telegram.”\textsuperscript{243} In late June, a group of clergy members, including one of Roosevelt’s Harvard classmates, requested an audience to discuss Hague’s policies. McIntyre wired that it would be impossible to arrange a conference with the President in the foreseeable future, and the delegation was invited to meet with the Attorney General instead.\textsuperscript{244}

The ACLU was hesitant to pressure Roosevelt directly.\textsuperscript{245} Many board members were staunch New Dealers, and Morris Ernst was a frequent correspondent and informal advisor to the President, as well as an occasional houseguest in Hyde Park.\textsuperscript{246} But in early May, when Roosevelt dismissed the issue as a “local police matter,” a vocal minority within the organization demanded an ACLU response.\textsuperscript{247} William Fennell, who regularly chastised the administration for its infringements on the “civil liberties” of New Deal critics (including employers regulated by the NLRA\textsuperscript{248}), denounced the President’s “weasel words” and admonished the ACLU to propose a future meeting.

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\textsuperscript{242} Franklin D. Roosevelt, Memorandum, 14 May 1938, Roosevelt Papers, Official File 1581, folder Civil Liberties 1933–1945; Homer Cummings to Franklin D. Roosevelt, 18 May 1938, Roosevelt Papers, Official File 1581, folder Civil Liberties 1933–1945. Cummings suggested that a member of the President’s staff acknowledge receipt of the letter and propose a future meeting with O’Connell to discuss the matter. Roosevelt followed his advice.

\textsuperscript{243} M. H. McIntyre to Attorney General, 16 May 1938, Franklin D. Roosevelt Papers, Official File 1581, folder Civil Liberties 1933–1945. Cummings thought there would be no harm in acknowledging receipt and indicating that the matter had been referred to the Department of Justice for consideration. Upton Sinclair to Franklin D. Roosevelt, 11 May 1938, Franklin D. Roosevelt Papers, Official 1581, folder Civil Liberties 1933-1945; M. H. McIntyre to Homer Cummings, 16 May 1938, Franklin D. Roosevelt Papers, Official File 1581, folder Civil Liberties 1933–1945; Homer Cummings to M. H. McIntyre, 17 May 1938, Franklin D. Roosevelt Papers, Official File 1581, folder Civil Liberties 1933–1945.

\textsuperscript{244} William Spofford to Roger Baldwin, 25 June 1938, ACLU Papers, reel 165, vol. 2042.

\textsuperscript{245} E.g., Roger Baldwin to William Fennell, 17 May 1938, ACLU Papers, reel 156, vol. 1078 (“Our Board came to the conclusion yesterday that Mayor Hague’s political position in the Democratic Party is none of our business.”).

\textsuperscript{246} See Guest Log, Franklin D. Roosevelt Presidential Library, Hyde Park, N.Y.


\textsuperscript{248} See Chapter 6.
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“plac[e] blame where it belongs,” lest it become a “party to this buck-passing game.” Fennell was adamant that while Roosevelt was “making a tremendous mistake,” the ACLU would be making “even a greater one if it passes by this ‘wink and a nod’ attitude of the President to the flagrant conditions in Jersey City.” The board was evidently persuaded, because on May 26 it urged Roosevelt, as well as Postmaster General and DNC chair James Farley, “to ‘consider the propriety’ of retaining Mayor Frank Hague of Jersey City as Vice-Chairman of the Democratic National Committee in the light of his ‘flagrant opposition to the policies of the National Administration.’” Eventually the President addressed the situation, but only obliquely. In a move with which the New York Times thought “all thoughtful Americans, ‘conservatives’ and ‘liberals,’ supporters and opponents of the Administration, [could] wholeheartedly agree,” he announced in a fireside chat that “the American people [would] not be deceived by any one who attempts to suppress individual liberty under the pretense of patriotism.” Although there was “no possibility of misunderstanding” the passage, the President refused to rebuke Mayor Hague by name.

The La Follette Committee, too, disappointed the free speech forces. After repeated pleas from Norman Thomas and the ACLU, the Committee indicated that it would launch an investigation over the summer if funds permitted. When the Senate approved the Committee’s requested appropriation (with significant help from an ACLU publicity campaign), Baldwin

253 “The President’s Address,” New York Times, 26 June 1938 (“It means Mayor Frank Hague of Jersey City and those who may be tempted to employ his policies in other sections of the country.”).
assumed that its future work would cover Jersey City.\footnote{Roger Baldwin to Robert La Follette, 24 May 1938, ACLU Papers, reel 167, vol. 2063.} By September, however, there was no indication that the Committee intended to act. A letter from sixty prominent liberals “earnestly request[ing]” an investigation of the “extraordinary and open defiance of constitutional guarantees” in Jersey City was similarly fruitless, despite the inclusion of eight members of Congress.\footnote{Letter to Hon. Robert La Follette, Jr., 13 September 1938, ACLU Papers, reel 165, vol. 2041; ACLU Press Release, 16 September 1938, ACLU Papers, reel 165, vol. 2041.} In November, Baldwin stated that he had “canvassed [the] situation thoroughly” and concluded that no Senate inquiry was forthcoming. He related the Committee’s explanation that “funds [were] limited and that they had other work previously scheduled.” He also accepted La Follette’s professed desire not to step in where other federal agencies, that is, the Department of Justice and Judge Clark, were already involved. Despite the ACLU’s utmost efforts in the public arena, the Jersey City situation was a matter for the federal courts.\footnote{Roger Baldwin to John Longo, 4 November 1938, ACLU Papers, reel 165, vol. 2042.}

Hague v. CIO

By the spring of 1938, Jersey City was a stomping ground for individuals and organizations determined to make their mark in the civil liberties fight. Roger Baldwin, though he advocated greater coordination of the anti-Hague forces, was heartened by the widespread interest.\footnote{Board Minutes, 2 May 1938, ACLU Papers, reel 165, vol. 2041. The Board voted to extend an offer of cooperation to Vanderbilt if he represented Norman Thomas on the deportation issue.} When one ACLU board member (and Communist sympathizer) advised a civil liberties sympathizer to direct his donations toward the ACLU instead of Norman Thomas—\footnote{Thomas intended to take his state court case to the United States Supreme Court, if necessary, and he was soliciting funds for court fees and other expenses. Norman Thomas to William Cochran, 4 November 1938, ACLU Papers, reel 165, vol. 2041.} it made him “rather tired to see Norman and the Workers Defense crashing in and refusing all the
time to play the game in a united front,” he explained—Baldwin demurred.\textsuperscript{260} Indeed, he felt that a “diversified attack is all to the good.”\textsuperscript{261}

Morris Ernst, however, had a different view of the situation. When Arthur Garfield Hays invited arrest by making an impromptu address from the roof of a car in late May, the press hailed him “as the first man to defy the Hague ban on free speech in Jersey City and get away with it.”\textsuperscript{262} Ernst did not share the general enthusiasm. “I have all along been opposed to small groups going in here to speak,” he told a reporter. Ernst thought such small-scale displays merely played into Mayor Hague’s hands. For Ernst, the heart of the Jersey City campaign was the injunction proceeding in the federal district court, and he did not want other parties, even his co-counsel at the ACLU, meddling with his plans.

Although Ernst opposed Hays’s involvement in the realm of legal as well as direct action, he considered it important to enlist the assistance of local counsel.\textsuperscript{263} To that end, it was Dean Spaulding Frazer of the Newark Law School who filed the ACLU and CIO’s complaint.\textsuperscript{264} The plaintiffs claimed that the CIO’s sole objective in Jersey City was to educate workers regarding their rights under the National Labor Relations Act. The ACLU had offered to assist the CIO in light of its own mission, namely, to protect “the rights to freedom of speech, the press, and

\textsuperscript{260} William Spofford to Roger Baldwin, 14 November 1938, ACLU Papers, reel 165, vol. 2041.
\textsuperscript{261} Roger Baldwin to William Spofford, 15 November 1938, ACLU Papers, reel 165, vol. 2041.
\textsuperscript{263} Roger Baldwin to Lucile Milner, 25 May 1938, ACLU Papers, reel 167, vol. 2063 (asking Milner to notify Hays that Ernst would be representing the ACLU in the Jersey City case and was “opposed to any more lawyers coming in,” though noting that there was no animosity between Hays and Ernst). Early on, Ernst and Frazer were both angered when Abraham Isserman and Samuel Rothbard claimed to be CIO counsel and announced plans to file a suit in federal court. Morris Ernst to Lee Pressman, 28 December 1937, Ernst Papers, box 273, folder 3.
\textsuperscript{264} Suit was filed in January 1938, in the wake of Hague’s promise at the armory rally to bar “subversive Communist[s]” from Jersey City. “C.I.O Seeks Writ to ‘Stop’ Hague, \textit{New York World-Telegram}, 7 January 1938, ACLU Papers, reel 162, vol. 2020. The plaintiffs were the ACLU, the CIO, three New Jersey CIO unions, and six CIO organizers. Attorneys for the plaintiffs were Frazer, Ernst, David Stoffer, and Benjamin Kaplan. The defendants were represented by James Hamill, Charles Herschenstein, Edward O’Mara, Joseph Glaving, and John Matthews.
assembly, as guaranteed to the people by the Constitution of the United States and the Constitutions of the respective states." No one, they emphasized, had intended to advocate the overthrow of the local or United States governments.

The complaint named as defendants Mayor Hague, Daniel Casey, and Harry Walsh, individually and in their official capacities, along with the Board of Commissioners. It described in detail the thwarted CIO organizing drive of November 1937—with its deportations, illegal searches, and confiscation of CIO literature—along with other efforts by the ACLU and CIO to hold meetings and distribute materials in Jersey City (it was subsequently amended to include the attempted speeches by Representative O’Connell and Norman Thomas as well). The plaintiffs argued that Jersey City’s leaflet and meeting ordinances were unconstitutional, and they sought to enjoin municipal officials from interfering with public and private meetings, picketing, the distribution of literature, and lawful CIO labor activity. The actions of Jersey City officials, they claimed, violated the Privileges and Immunities clause of Article IV, Section 2 of the United States Constitution; the Due Process and Equal Protection clauses of the Fourteenth Amendment; the National Labor Relations Act; and the “Civil Rights Act of the United States, which declares criminal conspiracies to injure persons in the exercise of their civil rights secured to them by the Constitution or laws of the United States.”

Hague v. CIO went to trial on June 1, 1938, after early attempts to reach a settlement fell apart. The case was heard by Judge William Clark, the same judge who had decided Hays’s

265 Complaint, 3.
267 Complaint, 18; ACLU Bulletin 798, 15 January 1938, ACLU Papers, reel 167, vol. 2063.
268 Complaint, 15–16.
269 On May 21, newspapers reported that John L. Lewis, head of the CIO, had agreed to Ernst’s proposed creation of a free speech park and that officials close to Hague had encouraged him to accept a settlement. “Jersey City Free Speech Arena Urged,” New York Daily News, 21 May 1938, ACLU Papers, reel 162, vol. 2021. Negotiations soon fell apart, however, as Hague refused to budge and many of Ernst’s allies opposed the compromise measure. “Foes of Hague Are Split on Tactics to Bring About a Settlement,” New York World-Telegram, 21 May 1938, ACLU
injunction suit in the ACLU’s favor the previous year. As a concession to civil liberties advocates, President Roosevelt had promised Morris Ernst that he would nominate Clark to the Court of Appeals; the appointment was confirmed in the midst of the trial, and Clark had to obtain permission from the Third Circuit to sit as a district judge in order to finish hearing the case.\(^{270}\) Unsurprisingly, Clark was sympathetic to the anti-Hague forces. He repeatedly admonished Hague and the defense team to adopt a more respectful tone, and he made a number of interjections on behalf of the plaintiffs. On one occasion, reflecting on “the difference between actual government and paper constitutions,” he quoted the free speech provisions of the Soviet constitution. “I don’t know whether I will be accused of being a Communist,” he added tellingly.\(^{271}\)

The courtroom testimony unfolded along predictable lines. Witnesses recounted numerous episodes of interference with CIO meetings, leaflet distributions, and other organizing activities, and the deportations, violence, and other abusive practices employed by the Jersey City police. They described court proceedings in which CIO organizers were deprived of basic

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legal rights. They reported conversations with private hall owners who were unwilling to rent their facilities after receiving threats from city officials.272

Daniel Casey, called as a witness for the plaintiffs, testified that as Commissioner of Public Safety he was solely responsible for decisions whether to grant meeting permits.273 To Ernst, Casey’s prophylactic denial of permits to forestall rioting was a patently unconstitutional example of prior restraint. It was also a bridge to totalitarianism. “[T]he operation of preventive devices in anticipation of overt acts is the threshold of a dictatorship, no question about it,” he declared. “It is the Hitler, the Stalin, the Mussolini, the Japan of today; they all start in the same pattern. They say ‘We have got to prevent disorder; we have got to do it in advance.’”274

The climax of the trial was the four-day “direct examination” of Hague, who appeared as the plaintiffs’ principal witness. Ernst and Frazer hoped that Hague’s sense of infallibility would prove self-defeating, and they were not disappointed. The mayor frequently referred to himself in the third person, and he routinely answered questions over the objections of his own counsel.275 Though he professed to “have no desire to stop anybody from talking,”276 he openly conceded his restrictive policies and practices, with the sole exception of coercing halls owners to rent to CIO speakers (he explained that a “mere expression” of displeasure would be sufficient to induce proprietors to close their doors).277 In his view, the seizure of subversive literature and the prevention of radical meetings were wholly justified in the interest of public safety. The proper means of dealing with potential insurgents was to “suppress them,” he explained, “just as we are

273 Russell B. Porter, “Hague Aide Says He Barred Thomas,” 8 June 1938. He conceded that his files contained only a single written protest to a proposed CIO or ACLU meeting prior to his denial of a CIO permit in December 1937. Casey defended the city’s practice of deporting “undesirables” and acknowledged that he had given orders to bar or eject unwanted speakers and organizers. Russell B. Porter, “Hague Police Head Backs ‘Ejections,’” New York Times, 9 June 1938.
suppressing them in this case.” On the issue of deportation, he insisted that eviction was “a favor” compared with arrest.

Hague adopted a largely cooperative stance on the witness stand as long as Frazer handled the questioning. Once Ernst took over, however, Hague abandoned the “congenial manner” he had assumed during the first two days. When his lawyer tried to prevent him from answering a potentially damaging line of inquiry, Hague ignored him and challenged Ernst to “go to the limit.” Borrowing a metaphor from his favorite pastime, he told Ernst to “go right after it” and “take the gloves off.” “At times the scene took on the aspect of a Donnybrook fair,” wrote New York Times correspondent Russell Porter, “with the Mayor and Mr. Ernst both shouting at each other, and the Mayor’s lawyers also yelling at the top of their voices in a bedlam through which nothing could be clearly heard.”

According to Hague, Ernst had fooled President Roosevelt and the New York Governor Herbert Lehman into thinking he was a liberal. Hague, however, would not be duped. When Ernst attempted to contain Hague’s longwinded answers, Hague scornfully accused the lawyer of attempting to curtail his freedom of speech.

To Hague (as the New York Times put it), “Americanism and law and order, not free speech and constitutional rights” were the values at stake in Jersey City. Hague assured the

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280 Ibid.
282 Russell B. Porter, “Hague Holds Reds Lack Civil Rights,” New York Times, 17 June 1938; Hague trial transcript, vol. 2, 1150 (“There is no constitutional rights involved in this question, Americanism is involved in this question.”). Defense counsel adopted the same rhetoric. For example, O’Mara referred to the “so-called free speech issue” and argued that “the right of free speech is not and never was involved.” Ibid., 2148–49. Interestingly, in
court that the “question of free speech . . . [was] not involved in this controversy.”

He was unmoved by Ernst’s suggestion that he, as a Jew, and Hague, as a Catholic, should be particularly mindful of the First Amendment’s protection of minority rights. To Hague, those who advocated revolution were simply not entitled to the protections of the Constitution—anyone who demanded civil rights could be expected to have “a Russian flag under his coat.” A broad range of organizations came within Hague’s definition of Communism, from the American Labor Party to the IWW. Indeed, according to Hague all of the CIO’s leaders were Communists, with the inexplicable exception of founder John L. Lewis. So were Norman Thomas, Representatives O’Connell (who was “ten communists”) and Bernard, Roger Baldwin, and the worst offender, Morris Ernst.

Hague insisted that his peculiar classifications were grounded in experience. After spending a few days in Russia in 1936, he professed to be an expert on all things Communist. He also relied heavily on the report of the 1930 Fish Congressional Committee, which identified the ACLU and the Garland Fund as pivotal Communist organizations (notably, even Hamilton Fish was critical of Hague’s anti-speech policy). Hague claimed that the true purpose of the attempted CIO meetings was to overthrow the government—an effort that the organization arguing against federal jurisdiction, Hershenstein claimed that the rights to organize, rent halls, and picket were “merely aids to the right to earn a livelihood—the right to do business,” a property right, rather than independent constitutional rights, and that the amount in controversy requirement consequently applied. Ibid., 2133.

286 Hague trial transcript, vol. 2, 1051. Hague labeled a broad range of organizations Communist, from the American Labor Party to the IWW.
288 Ernst and Hague sparred over Ernst’s purported Communist affiliation. Ernst admitted to founding the Newspapers Guild and the National Lawyers Guild, but emphasized that Franklin Roosevelt, while Governor of New York, had appointed him to the Banking Commission and that Governor Herbert Lehman had also appointed him to high office. Hague trial transcript, vol. 2, 1262, 1267.
initiated during the 1936–1937 (AFL) seamen’s strike, when it dispatched five hundred “strong-arm men and killers” to the city, of which Morris Ernst was the alleged “master mind.”

Indeed, Hague was sufficiently concerned by the imminent threat of Communist invasion to advocate the deportation of alien radicals from the United States and the creation of a concentration camp in Alaska for citizen “Reds.”

Hague intended to buttress his claims that the plaintiffs in the case were Communist operatives (and thus came to the court with unclean hands). His attorneys issued sweeping subpoenas to the CIO, the ACLU, and many of the individuals who had been denied permits by Commissioner Casey. Hague promised in his testimony to prove that Ernst, as treasurer of the Garland Fund, was responsible for supplying “all the funds to the active Communist groups in the country” and to expose Ernst as a “known Communist” in the process. In fact, he claimed confidently that Ernst, “when he gets on this stand,” would be “made to admit [it].” In the end, however, the defendants declined to call any witnesses, hinting out of court that there was no need to mount a defense in light of the patent inadequacy of the plaintiffs’ case. Baldwin countered that Hague “did not dare put any of his witnesses on the stand, for fear that the reckless charges he has so elaborately built up and smeared on the record would collapse.”

After such a strong showing, the plaintiffs hoped for a quick decision. Much to their disappointment, Judge Clark announced that he would not issue a decision in the case before

In the interim Mayor Hague’s spin fell just as flat outside the courtroom as it had within it. In early June, the Hague administration mounted a massive “Americanism” demonstration (“Against Communism and Against the Red Invasion”) to display its continued popularity in Jersey City. With the exception of a few stunts—the word “Bunk” was painted across some of the posters advertising the demonstration, and swastikas were painted under Hague’s photos—locals did not let their mayor down. The New York Times estimated that half of Jersey City’s 300,000 residents turned out for the two-hour event. Nationally, however, Hague faced increasing criticism across the political spectrum. Newspaper rhetoric comparing Hague to Hitler and Mussolini was ubiquitous during the trial, and the Americanism rally only exacerbated matters. A Washington Post editorial predicted that “those who have studied the development of modern dictatorship [would] find a distinctly ominous note” in the demonstration, which “contained, in embryonic form, many of the attributes of those Fascist or Nazi demonstrations which accompanied the overthrow of democracy in Italy and Germany.” Despite its “liberal display of American flags,” cautioned the author, the mass display of loyalty (by a largely immigrant population) was distinctly un-American. Hague’s credibility further plummeted when a Nazi radio broadcast praised Hague as a “man fighting for the cause in the United States.”

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296 Several issues were briefed over the summer, including the defendants’ claim that the plaintiffs came to the court with “unclean hands.” ACLU Bulletin 829, 13 August 1938, ACLU Papers, reel 156, vol. 1079.
297 The Hudson Dispatch reprinted Hague’s “Appeal to the People,” which invited Jersey City residents to “take part in the greatest demonstration for Americanism ever held.” The notice also advised all homes and buildings to display the American flag. Hudson Dispatch (Union City, N.J.), 3 June 1938. The June 6 demonstration was intended “to display to the whole world that ‘America first’ is the motto of Jersey City” and to “determine whether communism or Americanism is to prevail in Jersey City.” “Hague Proclaims ‘Americanism’ Fete,” New York Times, 4 June 1938.
300 “New Jersey Fascists,” Washington Post, 8 June 1938.
States.”

Even veterans groups began to denounce Hague for his un-American suppression of constitutional rights.

For the ACLU, on the other hand, the courtroom proceedings and surrounding publicity were a tremendous success. Press coverage of the trial was overwhelmingly favorable to the plaintiffs, and the ACLU received a “flood” of congratulatory letters from throughout the country, many of which were accompanied by contributions. The challenge for the ACLU was to maintain its momentum over the summer. Despite widespread optimism about the outcome, holding the various civil liberties groups together was proving to be increasingly difficult. Ernst left for vacation in July and beseeched Baldwin to “keep them all cool” in his absence. “It’s our luck,” he confided in Baldwin, “that Hague’s attorneys never understood all the petty jealousies of those organizations that want to build organizational strength on the Jersey fight, with a loss of sight at times as to the real objective, that is opening Jersey City.”

Ernst thought it important that no new test cases be filed pending the decision, and the ACLU board urged compliance with his recommendation. He also thought it ill-advised to hold additional meetings or to spend significant funds on publicity efforts over the summer months. Instead, Ernst asked Baldwin to begin preparations for disseminating the decision once it was handed down. For Ernst, the greatest challenge was not the legal battle (he had “no doubt” about a “swell decision”), but convincing Jersey City residents that they could safely disregard

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302 See Maurice Simmons (Past commander-in-chief, United Spanish War Veterans), to Roger Baldwin, 27 May 1938, ACLU Papers, reel 165, vol. 2042; Press Release, Council of United States Veterans, 4 January 1938, Ernst Papers, box 275, folder 2. A Newark American Legion post asked that the charter of the Jersey City post be revoked if its members appeared at the Americanism rally in their Legion regalia, invoking a charter provision proscribing participation in any dispute of a racial, religious, political or industrial nature. Resolution Presented to Newark Post 1, American Legion, Newark, 7 June 1938, ACLU Papers, reel 165, vol. 2042.
305 Board Minutes, 11 July 1938, ACLU Papers, reel 156, vol. 1078; Roger Baldwin to Morris Ernst, 7 July 1938, ACLU Papers, reel 165, vol. 2041.
Hague’s will. He wanted 100,000 copies distributed as leaflets and by mail, which would take “money and some real planning,” and he thought the task should be coordinated by Carney and “any Jersey City people or committees who will really work at the program.” In the meantime, he suggested circulating anti-Hague pamphlets to workers at the factory gates (“After all the courts are sounding boards working on the public and affected by the public opinion”).

The ACLU adopted Ernst’s proposal, and in August, it initiated a “campaign to acquaint the people of Jersey City with the reaction throughout the nation to Mayor Frank Hague’s wholesale suppression of civil rights.” Volunteers received detailed instructions on legal compliance and were advised not to disrupt traffic, argue with police officers, force pamphlets on uninterested pedestrians, or distribute pamphlets without an observer present. Among the leaflets handed out were 50,000 copies of a compilation of editorial cartoons, entitled “Candid Views of Mayor Hague,” lambasting Hague’s dictatorial practices. When local Hague supporters attempted to interfere, “Frankie’s police came along, ‘broke it up,’ and stood by to insure the peaceful distribution of the leaflets.”

Two months later, on October 27, 1938, Judge Clark issued an opinion in Hague v. CIO. The front page of the New York Times announced, “Hague Loses CIO Fight,” and congratulatory letter flooded into the ACLU offices. In the days that followed, however, both

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307 Ibid.
309 Instructions for distribution of pamphlets in Jersey City, 8 August 1938, ACLU Papers, reel 165, vol. 2041.
310 ACLU Bulletin 829, 13 August 1938, ACLU Papers, reel 156, vol. 1079; Lucille Milner to Morris Ernst, 12 August 1938, ACLU Papers, reel 165, vol. 2042. The ACLU published and distributed a total of four leaflets. Three contained excerpts from newspaper editorials, statements by prominent Americans, and newspaper cartoons, respectively. The fourth was a compilation of Hague’s public statements and testimony at trial. “Jersey City Court Decision Awaited,” Civil Liberties Quarterly (September 1938).
311 Jerome Britchey to Morris Ernst, 17 August 1938, ACLU Papers, reel 165, vol. 2042.
313 E.g., Solomon Golat to Morris Ernst, 31 October 1938, ACLU Papers, reel 165, vol. 2041.
sides declared victory.\textsuperscript{314} As expected, the court decided in the plaintiffs’ favor on the issues of deportation,\textsuperscript{315} literature distribution,\textsuperscript{316} and the right to carry placards.\textsuperscript{317} It also held that the city’s past policy for allocating meeting permits was impermissible. According to Ernst however, there was “only one point really open as a matter of law”\textsuperscript{318}—and on that issue, Clark’s language was discouraging.\textsuperscript{319}

To Ernst, holding that the meeting ordinance was unconstitutionally administered was not enough. Rather, he saw the \textit{Hague} case as a “chance to upset all of the damn ordinances.”\textsuperscript{320} He conceded that municipalities could legitimately consider traffic in regulating public gatherings, but in his view, that was the limit of their discretion.\textsuperscript{321} Ernst argued at trial that the recent First Amendment cases—\textit{Near}, \textit{DeJonge}, and \textit{Lovell}—had rendered any law providing for “precensorship of what a man may say” unconstitutional.\textsuperscript{322} He conceded that the law had not always been on his side,\textsuperscript{323} but he assured Judge Clark that the Supreme Court would strike down the Jersey City ordinance as unconstitutional.\textsuperscript{324} Clark was impressed by the gravity of the problem before him. In fact, he thought that the preservation of a “democratic form of government” depended on its “sound solution,” and he expressed his hope that the Supreme

\textsuperscript{315} Hague, 25 F. Supp. at 142 (“[N]either a city, a state, not the nation can resort to the banishment of its citizens even after a compliance with the due process and fair trial requirements and even as a punishment for crime. Any such drastic power is manifestly an attribute of sovereignty. . . . Any contrary doctrine would destroy our national unity and relegate us to the passport system of earlier times.”).
\textsuperscript{316} That issue was resolved by \textit{Lovell v. City of Griffin}, 303 U.S. 444 (1938).
\textsuperscript{317} Hague, 25 F. Supp. at 151 (“[T]he prohibition of placards must be restrained.”).
\textsuperscript{318} Morris Ernst to Roger Baldwin, 18 July 1938, ACLU Papers, reel 165, vol. 2041.
\textsuperscript{319} The court did not consider the plaintiffs’ claims under the NLRA in light of its decision on the same claims in the context of the 1937 injunction, which was still pending in the Third Circuit. That case was dismissed as moot in December 1938. “Old Curb on Hague Voided on Appeal,” \textit{New York Times}, 14 December 1938.
\textsuperscript{320} Morris Ernst to Roger Baldwin, 18 July 1938, ACLU Papers, reel 165, vol. 2041.
\textsuperscript{321} The court’s decision left open the question whether street meetings could be denied, as the plaintiffs had requested access to public parks. Clark assumed, however, that a city could deny access to all speakers. Communication to attorneys, 7 November 1938, Hague District Court Papers.
\textsuperscript{322} Hague trial transcript, vol. 2, 2173.
\textsuperscript{323} Davis v. Massachusetts, 167 U.S. 43 (1897).
\textsuperscript{324} Hague trial transcript, vol. 2, 2259.
Court would settle the issues before him swiftly and surely.\textsuperscript{325} In the meantime, however, he arrived at a compromise solution.

Judge Clark’s decision opened with a theoretical treatment of free speech, which featured excerpts from such diverse thinkers as Spinoza, Machiavelli, John Locke, Aristotle, Herbert Spencer, John Stuart Mill, Thomas Jefferson, and Oliver Wendell Holmes.\textsuperscript{326} Clark seemingly embraced Zechariah Chafee’s assessment that “one of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern.” That aim was made possible only by “absolutely unlimited discussion,” as force might be as easily asserted on the side of falsehood as of truth. Following Chafee, Clark acknowledged that unfettered expression might interfere with other legitimate purposes of government (including “order, the training of the young, [and] protection against external aggression”) but believed that “freedom of speech ought to weigh very heavily” in the equation.\textsuperscript{327} “As in many matters of political science,” he explained, “there exists a necessity for balance,” and the trouble was to strike the right “adjustment of the scales.”\textsuperscript{328} That the issue was one of political science, not mere legal doctrine, was significant. In the years since the First World War, political scientists had traded in their idealistic vision of the public welfare for a hardboiled model of interest group pluralism. In fact, to many, the erasure of difference in the public interest was the distinguishing

\textsuperscript{325} Ibid. See also Communication to attorneys, 7 November 1938, Hague District Court Papers.
\textsuperscript{327} Ibid., 129.
\textsuperscript{328} Ibid.
feature of totalitarianism. Clark was no relativist. He believed that some ideas, some forms of government, were better than others. In particular, he considered Communism “economically unworkable” and the methods employed in its propagation “abhorrent to all true believers in democracy”—though he was loathe to make martyrs of its advocates. He also believed that abusive epithets or inflammatory rhetoric were unlikely to persuade, and it was senseless to countenance bloodshed “in the effort to convert those possibly impervious to conversion.” In other words, productive political conversation required civilized public discourse, and to that end, he thought the state might be justified in curtailing speech where riot was truly likely to ensue. The right of access to public places for the purposes of “mental recreation,” that is, “the opportunity to impart and receive instruction,” was limited by “the sovereign’s interest in the public peace.”

Judge Clark was clear that Jersey City’s existing practice of denying permits to all CIO and ACLU speakers—a “deliberate policy” of discrimination to which Hague and Casey freely admitted—violated the constitutional right to free assembly. The CIO was pursuing the organization of workers into labor unions consistently with federal law, and the ACLU was devoted to “enforcement of the rights secured by the First Amendment and the Fourteenth

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331 Ibid., 147.
332 Ibid., 146.
333 Ibid., 129 (“It has not been necessary to seek for proof of that policy in the usual unsatisfactory process of weighing the conflicting testimony of witnesses or in the even more unsatisfactory study of counsel’s conflicting interpretations of that testimony.”).
334 Clark considered the right of assembly to be a “special form” of free speech to which the rules governing free speech were generally applicable.
Amendment of the Constitution of the United States.”

Neither group was after radical social change.

Clark was equally explicit, however, that a municipality was entitled to require permits for meetings in order to ensure public enjoyment and safety. Relying on English case law, he concluded that if a speaker’s past conduct was sufficiently provocative, the city could require a copy of the speech to be delivered and censor it “in the light of the reasonable apprehension of disorder of ‘firm and courageous’ city officials.” Alternatively, the speaker could be “bound over to keep the peace and be of good behavior.” On the other hand, a speaker who had observed “the decencies of discussion” in the past “should be given the full protection consistent with the strength of the local guardians of public safety.” Whether mob violence was in fact likely to ensue was bound to be difficult to judge. “The effect of opinion upon the human mind lies in the field of psychology,” Clark conceded, and was “not an exact science.” Moreover, the danger of “mob censorship” was troubling. Still, the city’s determinations would be reviewable in the courts, and the question was “again that matter of balance.” Judge Clark had expressed the same sentiment more colloquially during the trial: “As far as public meetings are concerned, it might be the law, or it should be the law, rather, that if the persons who live in the city object to the views, and really object, I mean without fomentation or anything of that character, from what the speakers either have in the past expressed or say that they are about to express, the authorities need not permit those views to be expressed on the public streets or the

335 Findings of Fact and Conclusions of Law, 7 November 1938, 2, Hague District Court Papers.
336 Access was limited by a “municipal right of regulation” to ensure enjoyment by the public. The city could require designated public spaces to be left open for recreational activities and could limit speaking engagements to reduce congestion.
338 Ibid., 147.
339 Ibid., 130.
340 Ibid., 147.
341 Ibid.
public parks.” In his opinion, Judge Clark laid down precisely that rule, though without addressing the issue of “fomentation.” Although the problem was posed by the Hague case itself, he made no provision for a municipality that actively promoted vigilantism in order to justify denial of a permit.

To the Jersey City authorities, Judge Clark’s decision was an invitation to continue denying meeting permits to the ACLU and CIO. In the days after the opinion was issued, the city announced that there would be “no let up” in the drive to exclude “radicals and Red.” According to James Hamill, corporation counsel, Judge Clark had declared the ordinance constitutional. Hamill added that where the district court’s opinion differed from that of the New Jersey Supreme Court, upholding the same ordinance in the Thomas matter, the city would follow the latter—a position that Spaulding Frazer cautioned would put the Jersey City authorities in contempt of court. When the New Jersey Civil Liberties Committee (on behalf of the Hudson County Committee for Labor’s Defense and Civil Rights) requested a permit for a meeting celebrating Judge Clark’s decision, Commissioner Casey denied the application. Because Judge Clark had not yet filed his final order, there could be no proceedings for contempt. Still, Baldwin chastised Hague for “flout[ing] the dignity of the Federal Courts.”

As the shortcomings of Judge Clark’s opinion became clear, the ACLU abandoned its initial celebratory posture. The board expressed gratification “with the general attitude expressed by Judge Clark” but formally instructed its counsel to oppose inclusion of the

342 Hague trial transcript, vol. 2.
345 Morris Ernst had not approved the application and was frustrated that it was filed prematurely. Morris Ernst to Lucille Milner, 28 October 1938, ACLU Papers, reel 165, vol. 2041.
censorship provision in the final decree. Requiring manuscripts in advance, it announced in a press statement, was “contrary to the principle of free speech,” “wholly unnecessary to preserve public order,” and “without precedent in American law.”

Other civil liberties advocates were equally anxious. The International Juridical Association (IJA), a leftist legal organization devoted to labor law and civil liberties issues, was unwilling to defer to the ACLU and opted instead to take matters into its own hands. At the Newark courthouse, Ernst bumped into Morris Cohen, who was carrying papers for a petition to intervene—prepared by IJA attorney and ACLU board member Nathan Greene. Cohen was cooperative, and Ernst convinced him that “intervention could do no good and might hurt.” Still, he was concerned once again by the lack of coordination. The various groups involved in Jersey City were operating at cross-purposes. “What with Norman proceeding in a state court action bound inevitably for defeat, and other groups proceeding with intervention and other collateral moves, the situation is greatly confused,” he complained. “Can’t you get the group to have patience? They have gone for a decade with nothing but total defeats.” He expressed the same sentiment to ACLU secretary Lucille Milner. “If we only had a united front in civil liberties in a case like this,” he lamented, “life would be fairly simple.” Ernst was “entirely convinced” that the “obiter dicta in regard to the reading of speeches in advance was merely dicta,” and that final

348 Morris Ernst to Roger Baldwin, 3 November 1938, ACLU Papers, reel 165, vol. 2041. Nathan Greene attributed the decision to miscommunication with the ACLU office. Lucille Milner to Morris Ernst, 4 November 1938, ACLU Papers, reel 165, vol. 2041. Ernst eventually dismissed the issue as “another one of these constant difficulties that arise which we will just have to accept as inevitable as long as some people are crusading for what appears to be, on the face of it, civil liberties but actually for other ends.” Morris Ernst to Lucille Milner, 5 November 1938, ACLU Papers, reel 165, vol. 2041. On Greene and the division between liberals and radicals within the ACLU board, see Chapter 6. On Morris Cohen, see David A. Hollinger, Morris R. Cohen and the Scientific Ideal (Cambridge: MIT Press, 1975).
349 Morris Ernst to Roger Baldwin, 3 November 1938, ACLU Papers, reel 165, vol. 2041.
350 Morris Ernst to Lucille Milner, 28 October 1938, ACLU Papers, reel 165, vol. 2041.
The decree would be “satisfactory.” Indeed, he told Baldwin, Clark had said as much from the bench.\(^{351}\)

Ernst turned out to be right. The final order enjoined city officials from excluding or deporting the plaintiffs; from restraining them except in connection with a lawful search or seizure; and from interfering with their rights to distribute leaflets, converse with passersby in public places, or carry placards.\(^{352}\) On the crucial issue of public meetings, it forbade the city “from placing any previous restraint upon or in any other manner whatsoever directly or indirectly interfering” with the right of the plaintiffs to hold meetings and assemblies in the open air and parks, “provided that an application for a permit to hold such meetings . . . has been made three days in advance.”\(^{353}\) The city could refuse a permit only if the designated time or place for the meeting would undermine the public recreational purpose of the parks, reasonably construed. Morris Ernst got everything he requested.

In fact, he got more. Judge Clark did not merely require the city to stay out. He set the further condition, unprecedented in the federal courts and rarely followed in subsequent decisions until the Civil Rights era,\(^{354}\) that the city actively prevent “interruption by such persons as may be present.” In other words, he required the police to protect the plaintiffs against interference by hostile spectators, “provided only that such protection is reasonably consistent with the ability of defendants to carry out their obligations in regard to the safety of the residents

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\(^{351}\) Morris Ernst to Roger Baldwin, 3 November 1938, ACLU Papers, reel 165, vol. 2041.

\(^{352}\) Final Judgment and Decree, 7 November 1938, Hague District Court Papers. Because the court entered a permanent injunction (rather than a temporary injunction, as it had in the 1937 case), it could not be stayed except after full hearing by the Court of Appeals. ACLU Bulletin 841, 5 November 1938, ACLU Papers, reel 165, vol. 2041.

\(^{353}\) Final Judgment and Decree, 7 November 1938, Hague District Court Papers.

Judge Clark’s affirmative guarantee of access had its limits. He implied that the city could lawfully adopt a policy of “forbidding meetings of any kind” on the public streets and thoroughfares. But in those public parks that were “dedicated for the purposes of the general recreation of the public,” the plaintiffs were entitled to speak their minds.

This time, civil liberties groups were justifiably elated. The ACLU called the injunction a “clear-cut victory.” The New York Post, which (to Ernst’s dismay) had harshly criticized Judge Clark for his initial opinion, was “happy to pay tribute to him . . . for his splendid and unequivocal final decree.” Although the fight against Hague’s “dictatorial lawlessness” was not yet over, the ACLU was confident that “the power of a federal court order [would] go far toward winning it.” Judge Clark evidently shared the organization’s optimism. In a communication to the attorneys involved in the case, he implicitly repudiated Hague’s posturing of the previous weeks. Noting that “the passions aroused by this sort of controversy are disruptive of democracy,” he told the lawyers that he expected his opinion would “carry[y] sufficient convictions to the clients to effect a reasonable modification of their conflicting points of view.”

355 Final Judgment and Decree, 5, 7 November 1938, Hague District Court Papers. The city’s obligation would be terminated “by words or conduct of the plaintiffs or any of them in violation of existing law.”
356 In practice, Hague did not settle the issue of the heckler’s veto. The decision applied only to permit applications (a problem clearly implicating prior restraint), not to ongoing speeches at which violence was extant. Moreover, the issue was not resolved by the Supreme Court, which instructed the District Court simply to declare the ordinance invalid, without providing guidance for future administration. On Hague’s application to “hostile audiences” problems, see Ruth McGaffey, “The Heckler’s Veto: A Reexamination,” Marquette Law Review 57 (1973): 43–48.
358 Morris Ernst to Lucille Milner, 28 October 1938, ACLU Papers, reel 165, vol. 2041.
361 Communication to Attorneys, 7 November 1938, Hague District Court Papers.
The ABA Committee on the Bill of Rights

The ACLU opted not to test the city’s compliance with Judge Clark’s warning. In mid-November, Baldwin reported that the only activities the ACLU would pursue pending appeal were the distribution of the court decree and a possible meeting in New York. Hague continued his public relations campaign against the “invaders”; he accused Arthur Vanderbilt of unethical conduct, and he called Baldwin, Ernst, and Thomas “the three Communist leaders of the country.” On the whole, however, the parties’ attention was focused on the legal campaign.

On that front, the months between Judge Clark’s decree in November and the Third Circuit’s decision in January were momentous ones. Procedurally, a few unusual developments attracted newspaper attention (for example, when the plaintiffs challenged an effort to “pack” a Third Circuit panel with Hague supporters). In December, the Court of Appeals ruled that Judge Clark’s injunction in the Boot and Shoe Makers Union case was moot. The Camden Post cited the decision as evidence of the importance of observing a national Bill of Rights week. “No one ever openly attacks the Bill of Rights,” it reflected, “yet it is in danger from officials and

362 Board Minutes, 14 November 1938, ACLU Papers, reel 165, vol. 2041.
363 “Hague Lays Attack by Bar of 3 ‘Reds,’” New York Times, 27 December 1938; “Thomas Issues Reply to Hague Criticism,” New York Times, 1 January 1939 (“I am not a Communist and sharply disagree with Communists at many points, largely because Stalin in Russia treats liberty very much as you do in Jersey City. For this reason we Socialists did not have a joint May Day meeting with the Communists in New York City.”).
364 The District Court denied Hague’s motion for a stay pending appeal. Hague then made a request for supersedeas in the Third Circuit. Appellants’ Memorandum on Application for Supersedeas, in Hague v. CIO, Third Circuit Case No. 6939, United States Court of Appeals for the Third Circuit, National Archives and Records Administration Mid Atlantic Region, Philadelphia, Penn. (hereafter NARA Mid Atlantic Region), Record Group 276. The presiding Judge, J. Warren Davis, replaced the ordinary three-judge panel with five judges, two of whom were retired. Alleging that this “extraordinary behavior” had “shaken public confidence in . . . the Circuit Court of Appeals,” Ernst and Frazer requested a writ of mandamus from the Supreme Court preventing the judges from considering the motion. “Hague Foes Charge ‘Packing’ of Court,” New York Times, 20 November 1938. The Supreme Court declined jurisdiction in the matter. ACLU Board Minutes, 28 November 1938, ACLU Papers, reel 165, vol. 2041.
courts who tacitly disregard it and evade enforcement of it.” The Third Circuit’s decision was a “perfect example” of this phenomenon.365

But the truly noteworthy development came in the form of an amicus brief in Hague v. CIO. According to the New York Times, it was a brief that “ought to stand as a landmark to American legal history.” It offered a lucid and compelling argument for constitutional rights, and it was worthy of being “spread about in all communities in which private citizens, private organizations or public officials dare threaten or suppress the basic guarantees of American liberty.” It was submitted by the American Bar Association’s Committee on the Bill of Rights.366

That committee had its origins in a public relations initiative under the presidency of Arthur Vanderbilt, in the wake of Roosevelt’s judiciary reorganization proposal. Vanderbilt began contemplating proposals to improve the ABA’s image in early 1937. In February of that year, Reginald Heber Smith of the Association’s Committee on Legal Aid Work wrote to request additional funds for his committee’s work. He advised Vanderbilt that the ABA, out of a gross income of almost 250,000 dollars, “devotes to the whole subject of legal aid for poor persons the sum of $500.” Smith thought people would be appalled by the figure if it were made public. He also speculated that increased expenditures would pay for themselves in good will.367 Vanderbilt felt constrained to turn him down. He explained that in light of a budget deficit made worse by the court packing controversy, no additional funds would be available in the foreseeable future.368 Still, Smith persisted. In July, he tried to convince Vanderbilt that increasing legal aid (and advertising the step in a “manifesto” to be printed in the nation’s newspapers) would detract

367 Reginald Heber Smith to Arthur Vanderbilt, 15 February 1937, Vanderbilt Papers, box 115, folder Legal Aid; Reginald Heber Smith to Arthur Vanderbilt, 10 March 1937, Vanderbilt Papers, box 115, folder Legal Aid. He also noted that Chief Justice Hughes was the first chairman of the ABA Committee on Legal Aid Work.
attention from the newly created National Lawyers Guild. The Guild, he emphasized, had already formed a Committee on Legal Aid and approached the National Association of Legal Aid Organizations to offer its assistance. Smith hoped the ABA would not “fumble the ball and let the Guild pick it up.”

Although Vanderbilt never acted on Smith’s request, he found his argument compelling. The National Lawyers Guild posed a seemingly significant threat to the continued vitality of the American Bar Association. The Guild distinguished itself from the ABA by endorsing programs and reform proposals “designed to promote human welfare,” such as the Child Labor Amendment, social security legislation, minimum wage laws, and protections for collective bargaining—all of which the ABA had opposed. Its early executive committee included many prominent officials, academics, and politicians, including Jerome Frank, Wisconsin Governor Philip La Follette, and Washington Senator Homer T. Bone, as well as counsel for both the AFL (Charlton Ogburn) and the CIO (Lee Pressman). Its first president—who lived to see many of his most idealistic ambitions championed by prominent lawyers and implemented by the Roosevelt administration, before his death from a heart attack in 1939—was Frank P. Walsh.

Also on the executive committee was Morris Ernst, who was instrumental in founding and promoting the new organization. Ernst was an outspoken critic of the ABA, which he considered a force of reaction. He had refused to join as a young lawyer when he learned that a

370 Reginald Heber Smith to Arthur Vanderbilt, 9 July 1937, Vanderbilt Papers, box 115, folder Legal Aid; Reginald Heber Smith to Arthur Vanderbilt, 1 July 1937, Vanderbilt Papers, box 115, folder Legal Aid.
371 John Devaney, “The Quarterly,” National Lawyers Guild Quarterly 1 (December 1937): 1. The ABA’s position on the Child Labor Amendment was seen as particularly harmful to its reputation. George Maurice Morris to Frederick M. Stinchfield, 4 February 1937, Vanderbilt Papers, box 114, folder Correspondence Re Committee 1937.
black candidate had been admitted to membership “by mistake.” Ernst imagined the National Lawyers Guild as an opportunity for a segment of the legal profession to advance the causes that he himself promoted in his private legal work and public service for such groups as the NAACP, the CIO, and the ACLU. As the Guild’s “Call to American Lawyers” explained: “the civil rights of the American people are under wide-spread attack. . . . Millions of people are actually wanting of the necessities of life.” Lawyers were well equipped to improve social conditions, but the organized bar had shirked its responsibility. Worse, it had acted to block the will of the people as expressed in popular legislation. It had pandered to the interests of a minority of the profession, for whom “concern for liberty” was “secondary to its concern for property.”

Vanderbilt was determined to soften this widely shared perception of the ABA. In the winter of 1937–1938, he launched a “Public Relations” program on behalf of the ABA, and in January, a conference on the issue was convened at his request. To Vanderbilt, the ABA’s public relations problem was twofold. The first problem was the relationship between the Association and the membership of the bar. The ABA leadership was formulating strategies for undercutting the Guild’s recruitment in law schools (where students were favorably disposed to the “revolutionary movement at the bar”) and among economically dissatisfied attorneys. But the second, more pressing problem, was the negative perception of lawyers, and the ABA in

374 According to the New York Times, every year “the association sends him a letter soliciting his membership; he writes back inquiring whether Negroes are accepted as members; and receives the reply, ‘We’re sorry, we didn’t know you were a Negro.’” “The Bar Association Held Reactionary,” New York Times, 23 December 1936.
375 National Lawyers Guild, “A Call to American Lawyers,” Vanderbilt Papers, box 130, folder National Lawyers Guild. The ABA leadership believed that the organization’s policy was representative of lawyers’ views. See, e.g., George Maurice Morris to Charles Racine, 2 February 1937, Vanderbilt Papers, box 114, folder Correspondence Re Committee 1937 (“Views of the House of Delegates are much more likely to be representative, than either the Lawyers Guild or the Liberty League Committee are, of what the American lawyers are thinking and want done.”).
376 See, e.g., M.L.R. to Arthur Vanderbilt, 3 January 1938, Vanderbilt Papers, box 369, folder Supreme Court of the United States: Controversy of 1937.
378 George Morris to Arthur Vanderbilt, 9 December 1937, Vanderbilt Papers, box 369, folder Supreme Court of the United States: Controversy of 1937.
particular, among the general public. Increasing legal aid was one potential solution to this problem, but the ABA eventually opted for a more glamorous (and less expensive) way to redirect the National Lawyer Guild’s positive press: creation of a new and high-profile Committee on the Bill of Rights.

The idea for the committee came not from Vanderbilt, though it had his enthusiastic support, but from Grenville Clark. Clark was a Wall Street lawyer, self-described conservative, and frequent correspondent of Felix Frankfurter’s, who was actively involved in public service throughout his life. In June 1938, Clark delivered an address on “Conservatism and Civil Liberty” to the Annual Meeting of the Nassau County Bar Association. Clark told his audience that the problem of civil liberties in America had “entered upon a new and crucial phase.” The importance of “reconciling authority with individual freedom” stemmed not primarily from the “growth of dictatorships abroad,” but from the “growth, largely inevitable, of governmental interference with the social and economic life of citizens.” True civil liberty, he explained in terms much like Morris Ernst’s, required both democratic self-government and the “reign of law,” that is, the absence of arbitrary government action.

According to Grenville Clark, it was up to conservatives, not liberals or radicals, to strike the appropriate balance. Conservatives wanted reform to come “gradually and with a minimum

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379 See Report of the Public Relations Committee of the Section of Bar Organizations Activities of the ABA, 1936–37, Vanderbilt Papers, box 369, folder Publicity: Committee on Public Relations (describing “lay hostility”).
380 On Clark and his role in creating the ABA Committee on the Bill of Rights, See Gerald T. Dunne, Grenville Clark: Public Citizen (New York: Farrar, 1986).
381 Grenville Clark, “Conservatism and Civil Liberty,” Address at Annual Meeting of the Nassau County Bar Association, 11 June 1938, Vanderbilt Papers, box 127, folder Civil Liberties.
382 Ibid. Later, Clark would revise his theory of civil liberties. In 1939, he justified free speech in terms of democratic decision-making and legitimacy. He explained: “The basic conception on which our institutions rest is that all government should rest on ‘the consent of the governed.’ . . . But ‘consent of the governed’ is no mere phrase. It implies that consent shall be real. And this in turn implies two conditions—first, that the consent shall not be coerced, and second, that it shall be reasonably well-informed.” He also noted that the rights protecting free expression were inconsistent, having evolved through application in particular cases, but on the whole were workable. Grenville Clark, “The Limits of Free Expression,” Lecture at the Association of the Bar of the City of New York, 23 May 1939, Vanderbilt Papers, box 127, folder Civil Liberties.
of friction.” They recognized that “vast changes” in society necessitated “new methods and
devices in government and new relations between the government and the individual,” but they
also desired to retain “the best of those values that have been brought out of the past.” In
practice, however, “the active defense of civil liberty [had] been allowed to drift very largely into
the hands of the elements of ‘the left.’”383

Conversely, many Americans had come to believe leftist claims that conservatives were
more interested in the protection of property, not the “great rights guaranteed by the First
Amendment.” Clark emphasized that the ACLU, notwithstanding the “admittedly radical views”
of much of its leadership, deserved credit for serving the “underdog” and defending unpopular
causes.384 He believed, however, that by cornering the field of civil liberties so completely, the
organization had created the “public impression that the active defense of civil liberties is not a
matter of primary concern with those of more moderate views.”385 In other words, he suggested
that conservatives might have defended civil liberties more vigorously if the ACLU had not so
strongly stamped the cause with the taint of radicalism.

The time had come, in Clark’s view, for conservatives to reclaim the mantle of civil
liberties. That conservatives themselves, under the New Deal, were facing the purported
deprivation of civil rights for the first time was evidence of the need for a neutral defense of

383 Grenville Clark, “Conservatism and Civil Liberty,” Address at Annual Meeting of the Nassau County Bar
Association, 11 June 1938, Vanderbilt Papers, box 127, folder Civil Liberties.
384 Ibid. The Junior Bar Report on civil liberties later praised the ACLU for its “hard, intelligent and often thankless
work.” It felt that the ABA’s participation was important for two reasons. First, the ACLU had an operating budget
of only 25,000 dollars and could not handle all cases warranting attention. Second, the perception of the ACLU was
that it was “left of center.” By contrast, “The Junior Bar Conference is neither a left-wing nor an ultra-conservative
group. It supports no ‘isms’ and grinds no ‘axes.’ Its entry into the field should arouse in many a new interest in
helping to preserve civil rights.” “Report of the Sub-Committee on Civil Rights of the Executive Council of the
Junior Bar Conference of the American Bar Association,” 27–28, 26 July 1938, Vanderbilt Papers, box 127, folder
Civil Liberties 1939–1940.
385 Grenville Clark, “Conservatism and Civil Liberty,” Address at Annual Meeting of the Nassau County Bar
Association, 11 June 1938, Vanderbilt Papers, box 127, folder Civil Liberties.
constitutional rights.\footnote{Clark cited the example of Sherman Minton’s Senate committee, which had ordered corporate tax returns from the Treasury Department in a move that prompted the companies under investigation to decry the violation of their civil liberties.} American conservatives could not “have it both ways,” Clark cautioned. They could not countenance the oppression of minorities while conservatives were “in the ascendant,” lest their own rights be suppressed when the situation reversed.\footnote{For example, Clark criticized the D.A.R. for promoting and passing “teachers’ oath laws” in 22 states, and he celebrated Governor Lehman’s veto of the New York State McNaboe bill, which would have barred communists from public office.} The only feasible position was a “firm and impartial” defense of all constitutional rights, in all cases, “irrespective of whether we approve or disapprove the sentiments and policies of the persons affected.” In promoting that ideal, lawyers had a particularly crucial role to play. After all, lawyers were conservative by nature and training. They had led the defense of civil liberties for generations, and despite their quiescence of the past decades, they had recently rediscovered the central importance of constitutional rights. What, he asked, was the secret of the legal profession’s “united and powerful movement” to defeat the court-packing plan? “It was their conviction, arrived at both by reason and instinct, that the proposal . . . was fundamentally a threat to our civil liberties.” He concluded with an exhortation: “this zeal and power that manifested itself in the crisis of a year ago ought not to be permitted to lapse but should be better organized for opposition to other attacks on civil liberty that are constantly occurring.”\footnote{E.g., “Bar Urged to Fight for Civil Liberties,” \textit{New York Times}, 12 June 1938. The speech was reprinted in the August issue of the ABA Journal.}

Grenville Clark’s pronouncements resonated within and outside the bar, and they were widely publicized in professional journals and the popular press.\footnote{Ibid. In the days after his address, Clark received numerous letters applauding his suggestion, and he wrote Arthur Vanderbilt to advocate the creation within the ABA of a committee on civil liberties or civil rights. The District of Columbia bar association had already created such committees, he advised Vanderbilt,}
and other local associations (for example, in Chicago and New York County) were
contemplating similar proposals. Perhaps most important, the National Lawyers Guild had
one390; creating it was among the organization’s first priorities, and it was approved in February
1937, at the Guild’s inaugural national convention.391

Vanderbilt was convinced. When the ABA’s Board of Governors met in Cleveland in
July 1938, he put the matter on the agenda—though at the request of his successor, Frank Hogan,
he “laid the matter over until the new Board took office.”392 The new board, in turn, acted
promptly to implement Clark’s proposal. In his inaugural address as ABA president, Hogan
admonished the organization’s membership to be “alert and vigilant” in defending the “rights
and liberties of the individual.”393 The protection of these rights, he insisted, was a historic
obligation of the bar. Hogan himself claimed a lifelong commitment to civil liberties work.
Twenty years earlier, he had delivered an address called “The Bill of Rights and What It means
to You,” and in the intervening decades he had “observed with increased regret” that individuals
were alert to the suppression of liberties only when their own views were suppressed.394 Hogan
echoed Clark’s statement that civil liberties were worth protecting even when the underlying
speech was offensive or its proponents unlikable. He insisted that “violations of the Bill of
Rights are intolerable, no matter whom they affect.”395 Rhetorically, he adopted precisely the
same line as the “liberals” on the ACLU board, who were constantly called upon to justify their

390 Grenville Clark to Arthur Vanderbilt, 30 June 1938, Vanderbilt Papers, box 114, folder Correspondence Re
Committee, 1936–1938.
392 Arthur Vanderbilt to Grenville Clark, 8 August 1938, Vanderbilt Papers, box 115, folder Correspondence A–C.
393 American Bar Association, “The American Bar Association’s Committee on the Bill of Rights,” Bill of Rights
Review 1 (Summer 1940): 64 (published by the Bill of Rights Committee of the American Bar Association).
Hogan).
defense of conservatives and reactionaries (most notably the Nazi Party) to their leftist colleagues.

For Hogan, however, economic rights clearly still remained within the ambit of constitutional protection. Indeed, Hogan portrayed the businessmen whose interests were jeopardized by reform initiatives at the turn of the century as the unheralded victims of gross authoritarian abuses. “Perhaps, because the trampling recently sometimes has been upon well-worn shoes,” he mused, “the hurt done thereby has been considered more important than 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.”396 It is little wonder that initial reactions to the ABA’s announcement evinced skepticism toward its underlying objectives.397

Still, Hogan’s examples achieved their effect. Later that day, the ABA House of Delegates adopted a resolution creating a Special Committee on the Bill of Rights. Its mission was to ensure that “whenever rights or immunities secured by the Bill of Rights are anywhere denied to any citizen or threatened with denial, there shall be a speedy and impartial investigation of the facts, and where the facts warrant it, there shall be certainty of the assistance of competent lawyers and defense in protection of such rights.”398 The new committee would intervene, where necessary, to protect civil liberties by filing amicus briefs, educating the public, and cooperating with state and local bar associations. Zechariah Chafee agreed to serve on the committee, and Grenville Clark was appointed committee chair.399 Clark was not personally acquainted with all of the members, most of whom were conservative in their political views, but

396 Ibid. (quoting Hogan).
397 Ibid.
398 ABA, “Committee on the Bill of Rights,” 64.
399 Ibid.
he thought it was a “good committee which will be really interested in the subject.”

Perhaps its most notable member, aside from Chafee and Clark, was Joseph A. Padway, general counsel for the American Federation of Labor.

The ACLU, while cautious, was gratified by the ABA’s emerging interest in civil liberties. As rightwing critics quickly realized, the ABA’s involvement promised to make civil liberties work truly respectable, with evident implications for ACLU fundraising and advocacy work. In a press statement, the ACLU offered its “full cooperation” with the new committee—though it pointedly suggested that the ABA “lift its membership ban on Negroes as the initial act on behalf of minority rights,” much to the distress of ABA members already nervous about the ABA’s new venture, including Robert Carey, a vocal Jersey City lawyer. Arthur Garfield Hays wrote Hogan personally to “welcome the American Bar Association’s long-delayed recognition of its responsibility in this field” (he, too, mentioned the discriminatory membership policy, and he threatened to resign from the ABA unless the issue was addressed).

400 Grenville Clark to Arthur Garfield Hays, 1 September 1938, ACLU Papers, reel 156, vol. 1079. For reports on the personnel, see ACLU Papers, reel 156, vol. 1079.

401 Robert Carey, writing to the ABA Board of Governors in opposition to the Committee’s work, quoted Morris Ernst’s statement in court that the “American Bar Association can’t be deemed radical and is now a party to these proceedings.” Robert Carey to members of the House of Delegates of the American Bar Association, 2 March 1939, Vanderbilt Papers, box 123, folder Correspondence September 1938–July 1939.

402 Board Minutes, 8 August 1938, ACLU Papers, reel 156, vol. 1079. See, e.g., Robert Carey to Grenville Clark, 30 December 1938, Vanderbilt Papers, box 123, folder Correspondence September 1938–July 1939 (“[O]ne of the next things they are going to dump in our lap is going to be the question of the exclusion of colored men from membership in the American Bar Association. One of these things leads to another, of course.”).

403 Arthur Garfield Hays to Frank Hogan, 10 August 1938, ACLU Papers, reel 156, vol. 1079. Hogan disingenuously claimed in a return letter that there was no provision in the bylaws or the Constitution of the ABA for exclusion on the basis of race, color or creed, but that membership in the Association was “selective” and many applications were therefore rejected that deserved to be approved. He was critical of Hays’s threat to resign, reasoning: “Often you and I have differed with those who for the time being were in control of the government, either of nation or state, or both; but we did not pack up and leave the country; we worked for the views we believed in, in the rank and file of citizens.” Frank Hogan to Arthur Garfield Hays, 22 August 1938, ACLU Papers, reel 156, vol. 1079. Hogan’s commitment to individual rights appears to have been genuine. See, e.g., Frank Hogan to Robert Carey, 23 January 1939, Vanderbilt Papers, box 127, folder Civil Liberties (“[I] cannot take the view that crass violations of the guarantees of the Bill of Rights are of mere local concern and that hence the striking down of the liberty of the press provision in Louisiana and Minnesota, the sentencing to death of nine men, irrespective of their
The Committee on the Bill of Rights reciprocated the ACLU’s interest. Immediately after the announcement of the new committee, its members were flooded with requests from criminal defendants complaining about denial of process. The committee considered these cases to be of primarily local concern, however, and it recommended the appointment of local committees to assume responsibilities for such matters.404 The national committee, by contrast, wanted to reserve its services for issues of national significance.405 To that end, Clark asked Hays to suggest areas in which it could most usefully intervene.406 The ACLU board, after discussion, recommended a few areas of particular importance, including the appeal of the Minersville, Pennsylvania flag salute case, radio censorship, and third degree legislation. The first and most pressing concern, unsurprisingly, was Jersey City.407

At the ACLU’s urging, the Committee agreed at its first meeting, in November 1938, to file an amicus brief in *Hague v. CIO*. Although *Hague* presented many issues, the Committee was concerned only with one: the city’s arbitrary refusal to issue meeting permits. For the Committee, the central problem was “the right of public assembly,” a “vital” civil liberty not yet considered by the Supreme Court.408 The brief was written primarily by Zechariah Chafee and

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404 By the summer of 1940, there were fifty-five such committees in operation. ABA, “Committee on the Bill of Rights,” 65.
405 Roger Baldwin, Memorandum on conference with Grenville Clark, 28 October 1938, ACLU Papers, reel 156, vol. 1079.
406 Grenville Clark to Arthur Garfield Hays, 1 September 1938, ACLU Papers, reel 156, vol. 1079.
407 They also recommended the “Oklahoma Negro primary case.” They may have meant *Lane v. Wilson*, 307 U.S. 268 (1939), which involved the Oklahoma grandfather clause (not its primary). Board Minutes, 3 October 1938, ACLU Papers, reel 156, vol. 1079. The previous week, the board suggested asking the ABA to urge Attorney General Cummings to continue his investigation in Jersey City. Board Minutes, 26 September 1938, ACLU Papers, reel 156, vol. 1079.
408 ABA, “Committee on the Bill of Rights,” 65.
Grenville Clark.\textsuperscript{409} Doctrinally, it considered the Supreme Court’s recent First Amendment decisions—\textit{Fiske}, \textit{Stromberg}, \textit{Near}, \textit{Grosjean}, \textit{Herndon}, and \textit{Lovell}—to have altered the constitutional balance between state authority and liberty of expression. One case, \textit{DeJonge}, dealt specifically with the right of assembly in so far as it prohibited punishment for mere participation in a meeting. \textit{Davis v. Massachusetts}, upon which the city relied, was distinguishable on the facts.\textsuperscript{410}

On the whole, however, the authors were more concerned with free speech theory and policy than with case law. With respect to the latter, they deferred to the lengthy brief submitted by the ACLU, which covered such issues exhaustively and—in stark contrast to the ABA’s brief—with barely any reflection on the more capacious values at stake. By contrast, the ABA committee’s brief argued that freedom of assembly was worthy of constitutional protection because it was essential to the “American democratic system.” That system, in turn, was premised on the “consent of the people,”\textsuperscript{411} which was only meaningful when secured through “adequate information and discussion.”\textsuperscript{412} Legislation passed in the absence of robust debate could not command popular support and would not be “law in a real sense.” Moreover, oversight by an engaged constituency provided a check on administrative abuses. In short, it was “only through free discussion” that democracy could “function at all.”\textsuperscript{413} While there were many

\textsuperscript{409} Jerome Britchey told Clark that despite rumors that Chafee had written the brief, there were “whole paragraphs” that Britchey recognized from Clark’s course at the New School. Jerome Britchey to Grenville Clark, 26 December 1938, ACLU Papers, reel 165, vol. 2041. Clark responded that he and Chafee had written the brief “in collaboration, dividing it up but each being responsible for the whole.” He also credited the other committee members with making several suggestions that were incorporated into the final version, “so it is really the brief of the eight members.” Grenville Clark to Jerome Britchey, 4 January 1939, ACLU Papers, reel 176, vol. 2133.

\textsuperscript{410} Brief of the Special Committee on the Bill of Rights of the American Bar Association As Friends of the Court (hereafter ABA Third Circuit brief), Hague v. CIO, Third Circuit Case No. 6939, 4, NARA Mid Atlantic Region, Transcript of Record, Vol. 4. \textit{Davis v. Massachusetts}, 167 U.S. 43 (1897), was decided prior to the incorporation of the First Amendment into the Fourteenth Amendment. Moreover, Davis asserted a property rather than liberty interest in the use of the Boston Commons to deliver a speech.

\textsuperscript{411} Cf. Post, “Reconciling Theory and Doctrine” (describing the “democratic theory” of free speech).

\textsuperscript{412} ABA Third Circuit brief, 6.

\textsuperscript{413} Ibid., 7.
available forums for public debate—including print media, radio, and movies—the face-to-face encounter of a meeting on the street corner or at the town square performed a unique and crucial role in the production of public opinion. This was particularly true in the context of unpopular minorities, who often had limited financial resources and whose ideas were otherwise unlikely to be heard.

The brief’s authors were adamant that the unpopularity of an idea could not be cited as justification for suppressing it. Indeed, they considered “the right to express unpopular opinions and to hold unpopular meetings” to be the “essence of American liberty,” which was fundamentally premised on tolerance.414 This principle, the brief emphasized, applied not only to determinations by officials that a particular idea was dangerous or undesirable, but also to the perceived hostility of a crowd. A threat of disorder by opponents of a speaker (as opposed, potentially, to a threat by the speakers themselves) was no reason to prohibit a public appearance, whether spontaneous or contrived.415 Rather, the appropriate response on the part of the authorities was to schedule the meeting at an appropriate time and place and, more important, to ensure adequate police protection in the event that violence indeed occurred.416 Government actors were bound not only to tolerate dissenting speech, but to take reasonable measures to protect it from private disruptions. “Surely a speaker ought not to be suppressed because his

414 “[T]olerance is of the essence of the American system and of the American way of life—not only tolerance in matters of religion, but also tolerance in matters of political, economic and social belief; tolerance not only of views that we can approve, but also (as Mr. Justice Holmes said) of views that we hate; tolerance not only of views that accord with our interests but also of views that are inimical to our interests.” Ibid., 37.
415 The brief noted that the claim that the Hague administration had in fact fomented the threatened disorder was “interesting but . . . not essential to the rightness of the decree.” Ibid., 18.
416 On this issue, the brief cited New York Police Commissioner Arthur Woods. Arthur Woods, Policeman and Public (New Haven: Yale University Press, 1919), 73–78. It left open the possibility that denial of a permit might be constitutionally permissible on an “extreme state of facts,” in which the police were demonstrably incapable of controlling public unrest. It explained: “The constitutional doctrine for which we contend is that the public authorities have the obligation to provide police protection against threatened disorder at lawful public meetings in all reasonable circumstances. It is, we submit, their duty to make the right of free assembly prevail over the forces of disorder if by any reasonable effort or means they can possibly do so.” ABA Third Circuit Brief, 17.
opponents propose to use violence,” the brief proclaimed. “Let the threateners be arrested for assault, or at least put under bonds to keep the peace.” After all, “It is they who should suffer for their lawlessness, not he.”

For the authors, the purpose of free speech was to facilitate discussion of pressing social issues, to ensure both the legitimacy and optimal outcome of the democratic process. It was not enough, then, merely to prohibit state discrimination against unpopular speakers; the government needed to prevent interference by hecklers, too. By the same token, a city could not elect to close all of its property to public meetings. In the Supreme Court, the ABA would argue that to “safeguard the guaranteed right of public assembly,” the government was obligated “to provide adequate places for public discussion.” The Committee wanted the state to do more than stay out. It was advocating an affirmative role for government in providing unpopular speakers with an opportunity to air their views, if not the means to make them heard.

As Clark had hoped, the Committee’s involvement in the Hague case was “favorably received.” In fact, editorial comments were “unanimous in commending the intervention as a constructive public contribution by the American Bar Association.” Jerome Britchey, for the ACLU, called it “one of the finest and clearest briefs [he had] had the pleasure of reading.” William Ransom, president of the ABA from 1935 to 1936, despised Ernst, Baldwin, Thomas, and the CIO “for their incessant warfare against individual rights and in favor of an obnoxious

417 Ibid., 19.
418 On this issue, the authors suggested in the Supreme Court that “the sound constitutional doctrine which should control this problem is that a city must in some adequate manner provide places on its property for public meetings—as distinguished from a more rigid doctrine that would compel both its streets and its ordinary parks to be made available,” as the District Court and Court of Appeals had each endeavored to do (arriving at different rules). “Under such a doctrine,” the brief continued, “the basic constitutional requirement of protecting freedom of assembly would be fulfilled, but without imposing rigid specific requirements as to either streets or parks that might in practice prove difficult or unworkable.” Brief of the Committee on the Bill of Rights of the American Bar Association as Friends of the Court, Hague v. CIO, U.S. Supreme Court, 31.
419 Ibid., 30.
420 ABA, “Committee on the Bill of Rights,” 65.
421 Jerome Britchey to Grenville Clark, 26 December 1938, ACLU Papers, reel 165, vol. 2041.
collectivism.” Nonetheless, he thought the Committee’s brief was “one of the finest things the
American Bar Association has ever done,” and he told Clark that it would stand “for years to
come an historic document, often referred to and quoted by those who are trying to fulfill the
responsibility of so-called conservatives for the maintenance of civil liberties and free
institutions.”

On the legal front, too, the ABA’s intervention was a success. On January 26, 1939, the
Third Circuit sustained Judge Clark’s injunction. On the issues of deportation, searches and
seizures, unlawful arrests, the posting of placards, and the distribution of leaflets, the Court of
Appeals unanimously approved Judge Clark’s reasoning and considered his findings to be amply
supported by the record. The central question, about which the judges on the panel disagreed,
was the constitutionality of the meeting ordinance. The dissenting judge thought the issue was
not “primarily free speech at all”; if it were, he surmised, the American Legion and Veterans of
Foreign Wars, many of whose members “risked their very lives . . . ‘to make democracy safe for
the world,’ would not be opposing the plaintiffs. Conversely, the decision of the two-judge
majority was even more deferential to free speech than the district court’s.

In his majority opinion, Judge John Biggs, Jr., a recent Roosevelt appointee, held that the
ordinance was unconstitutional as administered. There was no tangible threat of rioting,
despite Hague’s effort to “build up a dangerous situation,” and no evidence that the police would
have been unable to maintain order at any of the meetings for which the plaintiffs requested

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422 William Ransom to Grenville Clark, 28 December 1938, Vanderbilt Papers, box 127, folder Civil Liberties.
423 Hague, 101 F.2d at 808 (Davis, J., dissenting in part).
424 Judge Albert Maris joined in Biggs’s decision. Maris, a Quaker, was also appointed by Roosevelt (first to the
district court, in 1936, and then in 1938 to the Court of Appeals). He wrote the majority decision in Minersville
School District v. Gobitis, 108 F.2d 683 (3d Cir. 1939), which was overturned by the Supreme Court. The dissenting
judge was John Warren Davis, a Wilson appointee, who was about to face federal charges for bribery (prosecution
resulted in two hung juries, and Davis retired from the bench).
permits.\textsuperscript{425} Nor had the plaintiffs intended at those meetings to advocate the overthrow of the government, which might have complicated the issue.

More boldly, the majority considered the ordinance unconstitutional on its face. Freedom of speech and of the press were “fundamental civil rights,” the hallmarks of “democratic governments.”\textsuperscript{426} The ordinance permitted city officials to curtail those rights in a manner inconsistent with the due process clause of Fourteenth Amendment. Citing \textit{Near}, Judge Biggs condemned the prior restraint of speech as patently unconstitutional. The threat of violence was not a legitimate basis for “prevent[ing] speakers from presenting their views.” Rather, it was the function of the police to “preserve order while they speak.” The defendants’ interpretation of free speech and assembly was “shocking,” in that it “place[d] these rights in the hands of those who would destroy them.”\textsuperscript{427} Indeed, following the defendants’ reasoning to its local conclusion “would result eventually in the existence of but one political party as is now the case under totalitarian governments.”\textsuperscript{428}

As for the District Court’s suggestion that Jersey City could close all streets to public meetings, the Third Circuit majority disagreed. In Judge Biggs’s view, a municipality owned and administered its streets and parks as trustees for the people. The people had an affirmative right of access to public spaces for the purpose of public debate. Accordingly, the court required Jersey City to open its streets in the same manner as the parks. “Minorities, however unpopular, must be allowed to make their voices heard,” the court concluded. “Fundamental civil liberties must not be tampered with if our system of democratic government is to survive.”\textsuperscript{429}

\textsuperscript{425} Hague, 101 F.2d at 786.
\textsuperscript{426} Ibid., 787.
\textsuperscript{427} Ibid., 784.
\textsuperscript{428} Ibid.
\textsuperscript{429} Ibid., 786.
Like the ABA’s brief, the Third Circuit’s decision was hailed by the press.\(^{430}\) It was clear, however, that the true test would take place in the Supreme Court, which promptly granted certiorari in the case. Until then, there was plenty to keep the parties busy. A week before oral argument, New Jersey Governor Harry Moore nominated Frank Hague, Jr., Hague’s thirty-four year old son, to serve as a lay judge on New Jersey’s highest court. Thomas Glynn Walker, the former Democratic leader in the New Jersey Assembly, resigned to create the vacancy, and he was appointed to a newly created opening on the Hudson County Court of Common Pleas.\(^{431}\) Hague, in turn, persuaded President Roosevelt to appoint Walker to the federal district court, much to the distress of the ACLU.

That the young Hague (who was admitted to the New Jersey bar in 1936) had never earned an undergraduate degree, let alone a law degree, did not stop his sponsors from pushing his appointment through. Neither did vocal protest by the ACLU, CIO affiliates, the Workers Defense League, or outraged citizens.\(^{432}\) Reportedly, many state senators opposed the nomination but were unwilling to risk reprisals from the court, before which most of them regularly practiced as lawyers.\(^{433}\) The Governor, cognizant of his many debts to the Mayor, was unselfconscious about his motivations: “I know this appointment will make his dad happy,” he said.\(^{434}\)


\(^{431}\) Judge Thomas F. Meaney, in turn, resigned to become counsel in a private matter.

\(^{432}\) ACLU Board Minutes, 27 February 1939, ACLU Papers, reel 176, vol. 2133 (recording resolution condemning appointment); “New Jersey: Happy Dad,” *Time*, 6 March 1939; “Hearing Sought on Young Hague,” *New York Times*, 22 February 1939. Hague, Jr., attended school for eight years at Princeton, the University of Virginia Law School, and Washington & Lee without attaining a degree. He was confirmed by a vote of 14 to 6.

\(^{433}\) “Governor Defense Hague, Jr., Job,” *Christian Science Monitor*, 26 February 1939. Several days later, the Speaker of the New Jersey Assembly introduced a resolution to reduce the number of judges on the court from sixteen to seven and to eliminate lay judges. He claimed that there was no connection between his proposal and the Hague, Jr., nomination. “Denies Court Bill Hits at Hague Jr.,” *New York Times*, 27 February 1939.

While Hague made arrangements for his son’s future livelihood, the ABA was building on its newfound popularity. In the January 1939 issue of the American Bar Association Journal, the Committee on the Bill of Rights urged all state and local bar associations to form their own committees to operate in local matters. The announcement advised the new committees to secure counsel in meritorious cases, to protest legislative or administrative violations of civil liberties, and to conduct discussions and disseminate information. It also suggested that “considerable representation” should be given to the members of the Junior Bar.435

The national committee, meanwhile, was eager to continue its efforts in Hague. The next step was to file an amicus brief in the Supreme Court (Joseph Padway, AFL general counsel, was “particularly anxious” to do so).436 Both Arthur Vanderbilt and Frank Hogan supported the endeavor,437 and with minimal internal opposition and the approval of both parties to the litigation, the Committee submitted a brief that was substantially identical to its earlier version.438

435 Baldwin corresponded with the Junior Bar Committee on Civil Rights and commended the members on their suggested programs of action. Paul Hannah to Roger Baldwin, 7 December 1938, ACLU Papers, reel 177, vol. 2141; Roger Baldwin to Louis Powell, Jr., 28 February 1939, ACLU Papers, reel 177, vol. 2141.
436 Frank Hogan to members of the Board of Governors, 14 February 1939, Vanderbilt Papers, box 123, folder Correspondence September 1938–June 1939.
437 Arthur Vanderbilt to Frank Hogan, 16 February 1939, Vanderbilt Papers, box 123, folder Correspondence September 1938–June 1939.
438 Robert Carey, the New Jersey lawyer who had earlier expressed his opposition to the admission of black candidates to ABA membership, was vehemently against the Committee’s participation in the case. In personal correspondence with Hogan as well as an open letter to the House of Delegates, Carey explained his position. Robert Carey to members of the House of Delegates of the American Bar Association, 2 March 1939, Vanderbilt Papers, box 123, folder Correspondence September 1938–July 1939 (warning, for example, that the ABA would “now be sought out as window dressing by radicals from one end of our land to the other”). Hogan dismissively rejected Carey’s objections. Frank Hogan to Robert Carey, 7 February 1939, Vanderbilt Papers, box 123, folder Correspondence September 1938–June 1939 (“Just why the lawyers in New Jersey should fear to proclaim that they stand for a militant defense of the most sacred guarantees which the American people have, and, so standing, are willing to lend their aid to the maintenance of those guarantees, is beyond me. . . . You seem to be worried that radicals will be found going arm in arm with the American Bar Association or its Committee. That doesn’t bother me for a moment. I prefer to walk arm in arm with an angel in support of the guarantees I have referred to, but I am willing to walk arm in arm with the devil if doing so will help keep the American people eternally vigilant with regard to the importance of those guarantees and of the necessity of standing up for them.”). At the ABA’s Annual Meeting in July 1939, Carey again objected to the Committee’s intervention in Hague and proposed a resolution.
The ABA Committee on the Bill of Rights had accomplished precisely what it was supposed to. In February, Hogan noted to Vanderbilt that the National Lawyers Guild, for all its publicity, was shrinking rather than growing.\footnote{Frank Hogan to Arthur Vanderbilt, 17 February 1939, Vanderbilt Papers, box 123, folder Correspondence September 1938–June 1939.} Vanderbilt attributed the Guild’s failure in large part to “the stand taken this year . . . on civil rights.”\footnote{Arthur Vanderbilt to Henry Armistead, 10 February 1939, Vanderbilt Papers, box 123, folder Correspondence September 1938–June 1939.} Hogan agreed, and he wholeheartedly endorsed the committee’s work in a letter to the Board of Governors. “Numerous editorials, many of them contained in the leading newspapers of the country,” had commended the ABA for its Third Circuit brief. The brief was expertly written and a genuine contribution to the development of constitutional law. It had prompted praise from “all parts of the United States”: the Deep South and the “Far West” as well as the Midwest and East.\footnote{Frank Hogan to members of the Board of Governors, 14 February 1939, Vanderbilt Papers, box 123, folder Correspondence September 1938–June 1939.} In fact, there had been no press criticism whatsoever.

To Hogan and Vanderbilt, the \textit{Hague} brief was only the beginning. In the spring, the Carnegie Foundation (whose President was none other than Frederick Keppel, the NCLB’s correspondent in the War Department during World War I) made a substantial grant to the ABA to support the “editorial and publication program” of the Special Committee on the Bill of Rights.\footnote{Frank Hogan to the Board of Governors, 8 June 1939, Vanderbilt Papers, box 123, folder Correspondence September 1938–June 1939 (reporting that the grant was 24,000 dollars, approximately equivalent to the operating budget of the ACLU).} That grant funded the ABA’s \textit{Bill of Rights Review}, which was intended not so much to raise awareness of civil liberties—that job, the introduction emphasized, had already been done—as to connect the hundreds of lawyers and dozens of bar committees devoted to civil

prohibiting the Committee from participating in litigation. The resolution, however, garnered very little support. ABA, “Committee on the Bill of Rights,” 65.
liberties work. Meanwhile, the Committee’s legal work continued. In the coming months, it would intervene in a variety of important cases, including *Minersville v. Gobitis.* “It is not too much to say,” Hogan wrote in reference to the Committee’s involvement in *Hague,* “that the good ‘public relations’ reaction which has come to the Association from (a) the creation of the Bill of Rights Committee, (b) the personnel of that Committee, and (c) its brief, has been of more value, along the much discussed line of public relations, than anything since our stand in opposition to the proposal to pack the Supreme Court.” By the summer, he went even further. He told the board that nothing the American Bar Association had done in recent years, not even its “remarkably fine work” in opposition to the court-packing proposal, had produced “such excellent public relations.”

*The Civil Liberties Unit*

One particularly noteworthy development took place in the months before the Supreme Court issued its decision in *Hague v. CIO.* On January 3, 1939, Frank Murphy succeeded Homer Cummings as Attorney General of the United States. Murphy was accustomed to public office.

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443 American Bar Association, “A New Venture and Its Purposes,” *Bill of Rights Review* 1 (Summer 1940): 3. At the time of publication, the *Review* reported fifty state and local bar committees, comprising 450 lawyers.
444 The ABA first intervened in *Johnson v. Town of Deerfield,* 25 F. Supp. 918 (D. Mass. 1939), which challenged the compulsory flag salute law in Massachusetts. Because the Supreme Court had dismissed two appeals in similar cases for lack of a substantial federal question, the Bill of Rights Committee filed a Memorandum in Support of Jurisdiction in April 1939. The Supreme Court nonetheless issued a per curiam opinion affirming the lower court’s judgment upholding the law. In October 1939, the Committee resolved to participate in *Gobitis v. Minersville School District,* which was then pending in the Court of Appeals for the Third Circuit. In that case, the Eastern District of Pennsylvania had deemed compulsory flag salute to be unconstitutional. *Gobitis v. Minersville School District,* 24 F. Supp. 271 (E.D. Pa. 1938). When the Third Circuit affirmed the District Court’s judgment, it was clear that *Gobitis* was bound for the Supreme Court. Minersville School District v. Gobitis, 108 F.2d 685 (3d Cir. 1939). The Committee, concluding that the case raised issues of “personal freedom and religious liberty,” chose to file an *amicus* brief. The House of Delegates authorized that action, albeit by a close vote. ABA, “Committee on the Bill of Rights,” 66–68. The Supreme Court, of course, disagreed with the ABA. Minersville School District v. Gobitis, 310 U.S. 586 (1940).
445 Frank Hogan to members of the Board of Governors, 14 February 1939, Vanderbilt Papers, box 123, folder Correspondence September 1938–June 1939.
446 Frank Hogan to the Board of Governors, 8 June 1939, Vanderbilt Papers, box 123, folder Correspondence September 1938–June 1939.
As mayor of Detroit from 1930 to 1933, he had been a strong advocate for the unemployed. He was also one of the New Deal’s “most enthusiastic supporters,” for which the President rewarded him with an appointment as governor-general of the Philippines (and subsequently, United States Commissioner). In 1937, Murphy was elected governor of Michigan. Shortly after he took office, he refused to call in state troops to break a sit-down strike by the fledgling UAW. That decision was influential in the subsequent rise of the CIO. It was also sufficiently unpopular to prompt Murphy to request a hearing before the Senate subcommittee assigned to assess his fitness for office, even though it had already approved his nomination. In a prepared statement, Murphy explained that workers in Michigan had been angry at the failure of employers to abide by the Wagner Act, as well as the prevalent use of industrial espionage to defeat unionization. In seizing control of industrial property, thousands of misguided but “honest citizens” had acted to “defend[] their own rights against what they believed to be the lawless refusal of their employers to recognize their unions.” Murphy emphasized that he had never condoned sit-down strikes, and he had advised union representatives that they were illegal and imprudent. He nonetheless believed that in the face of widespread disobedience, it was necessary to “weed out the cause,” not merely to “enforce the law.”

Murphy brought the same sensibilities to his duties as Attorney General. He was intimately familiar with the work of the La Follette Committee in his home state and elsewhere, and he was convinced that the abridgement of workers’ “civil liberties” by employers and their government collaborators was a major source of class strife. But Murphy’s commitment was not

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448 See Chapter 6.
449 Statement of Honorable Frank Murphy, Attorney General of the United States, Before a Sub-Committee of the Committee on the Judiciary of the United States Senate, in National Archives and Records Administration, College Park, Md., Record Group 60, General Records of the United States Department of Justice, Records of the Special Executive Assistant to the Attorney General, 1933–40, Subject Files, 1933–1940 (hereafter Attorney General Papers), box 5, entry 132, folder Murphy (Attorney General—Items about Him).
limited to workers’ rights. He considered civil liberties to be fundamental to every part of life, “social, political, and economic.” They extended to such far-ranging ideals as “the right of self-government, the right of every man to speak his thoughts freely, the opportunity to express his individual nature in his daily life and work, [and] the privilege of believing in the religion that his own conscience tells him is right.” The American model of civil liberties represented a crucial compromise between governmental regulation, which was “necessary for an orderly society,” and the unbounded freedom of nature. More basically, the rights to speak freely, to practice one’s religion, to assemble peaceably and to petition government for the redress of grievances were essential to a functioning democracy. They applied with equal force to “the business man and the laborer,” to “the Jew and the Gentile,” to “people of all racial extractions.”

Murphy, in short, believed passionately in civil liberties, and from his first day in office, it was clear that he would make them a priority. Shortly after his confirmation, Murphy’s special assistant in charge of public relations helped him arrange a radio program on the protection of civil liberties by the Federal Government (as well as a speaking engagement with the National Lawyers Guild). He declined an invitation to attend the ACLU’s Bill of Rights celebration, but he was “very sorry” to do so. He told Roger Baldwin that the subject was “one of the things that interest[ed him] most keenly,” and that the opportunity to pursue it was one of the “great satisfactions” of his service as Attorney General. Indeed, he was “anxious that the weight and

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450 “Civil Liberties,” radio address by Hon. Frank Murphy, National Radio Forum, 27 March 1939, Attorney General Papers, box 5, entry 132, folder Civil Liberties.
451 Gordon Dean, Memorandum for the Attorney General, 27 January 1939, Attorney General Papers, box 5, entry 132, folder Murphy (Attorney General—Items about Him) (suggesting Murphy speak with the director of America’s Town Meeting of the Air); Gordon Dean, Memorandum for Miss Bumgarnder, 27 January 1939, Attorney General Papers, box 5, entry 132, folder Murphy (Attorney General—Items about Him) (“The Attorney General knows all about the Lawyers Guild and that it is the liberal national lawyers’ group.”).
influence of the Department of Justice should be a force for the preservation of the people’s liberties.”

On February 3, one month after he was sworn in, Murphy’s office made an announcement. Within the Criminal Division of the Department of Justice, a new entity had been established, to be known as the Civil Liberties Unit. Headed by former Assistant U.S. Attorney Henry A. Schweinhaut—who had distinguished himself during investigations in both Harlan County and Jersey City—its principal function was to prosecute violations of the constitutional and statutory provisions “guaranteeing civil rights to individuals.” In particular, it would pursue cases of beatings and violence, denial of workers’ rights under the NLRA, and deprivation of freedom of speech and assembly. Murphy explained that in a democracy, the enforcement of law entailed the “aggressive protection of the fundamental rights inherent in a free people.” The Civil Liberties Unit, consistent with the recommendations of the La Follette Committee, would undertake “vigilant action” in ensuring that those rights were respected. For the first time, it would throw the “full weight of the Department” behind the “blessings of liberty, the spirit of tolerance, and the fundamental principles of democracy.” In Murphy’s estimation, the creation of the Civil Liberties Unit was “one of the most significant happenings in American legal history.”

The ACLU board wrote immediately to express its appreciation and to offer its “hearty support and complete cooperation in an undertaking so significant as a development in the

452 Frank Murphy to Roger Baldwin, 3 February 1939, ACLU Papers, reel 168, vol. 2070.
453 Order No. 3204, Office of the Attorney General, 3 February 1939, Attorney General Papers, box 22, e132, folder Civil Liberties.
455 Ibid.
456 Press Release, 3 February 1939, Attorney General Papers, box 22, entry 132, folder Civil Liberties.
457 Frank Murphy to Franklin D. Roosevelt, 7 July 1939, Attorney General Papers, box 5, entry 132, folder Murphy: 6 Months Report.
application of federal law.”458 It expressed confidence that the Department of Justice could “render immense service” in redressing deprivations of the “rights of citizens under federal law.”459 The organization had often sought to involve the Department of Justice in cases that seemingly fell under federal jurisdiction, but the lack of a “special machinery of investigation” had hampered effective action. The Department’s recent efforts in Harlan County and Jersey City were “most gratifying” and hinted at what the Civil Liberties Unit might accomplish with the appropriate internal support.460

By the spring of 1939, there were many bodies devoted to advancing civil liberties, including the La Follette Committee and the ABA Committee on the Bill of Rights, in addition to the ACLU. Still, the Civil Liberties Unit was particularly important. It had the authority not only to identify violations of civil liberties, but to redress them. And its mechanism for enforcement was unique. The NLRB, too, could command compliance with the law (at least in cooperation with the injunctive authority of the court), but only the Civil Liberties Unit had the power to prosecute violations. At a nationwide gathering of U.S. Attorneys in Washington, D.C. (the first such conference ever held), Murphy enjoined the federal prosecutors to wield that power responsibly—to enforce the civil rights statutes “not just for some of the people but for all of them,” “no matter how humble.”461 Civil liberties, he told them, were more important than at any previous time in history. The Depression had brought with it “the usual demands for

459 Board to Frank Murphy, 6 February 1939, ACLU Papers, reel 168, vol. 2070.
460 Ibid.
461 At the press conference following his swearing in as Attorney General, Murphy held up a Bible given to him by his mother for his grammar school graduation and from which he claimed to have read an hour every day since. He read aloud from his “favorite text,” Isaiah XI: “But He shall judge the poor with justice and shall approve equity for the meek of the earth.” “Murphy Sworn in at the White House,” New York Times, 3 January 1939.

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repression of minorities,” and it was up to the federal government to stave off the rampant incursions.

Murphy’s plans for the civil liberties unit were ambitious. Among other functions, it would alert local officials that the federal government would not tolerate arbitrary and abusive conduct, alone or in conjunction with private interests. It would also raise awareness and influence public opinion. Murphy was adamant that the federal government could “take the initiative,” but it could not “do the whole job.” The problem was partly jurisdictional; some rights inhered in individuals as residents of the separate states, and they could not be vindicated by federal authorities. The threats to American freedom came not only from city ordinances and the arbitrary exercise of state power, but from mob murder, lynchings, and vigilante violence. More basically, however, “the great protector of civil liberty, the final source of its enforcement” was the “invincible power of public opinion.” The courts could provide a remedy for lawlessness, but they could not prevent it. The Golden Rule, Murphy quipped, could not be implemented by United States Marshals. The only true solution was “an overwhelming public determination that it must not happen here.”

In the immediate term, the Civil Liberties Unit had a concrete program. It would study and evaluate (and eventually prosecute under) the potential constitutional and statutory provisions applicable to civil rights enforcement, including laws prohibiting kidnapping, peonage, and mail fraud. The most important of the potential causes of action, at least for the

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462 “Murphy Tells Aides To Guard Civil Rights,” Washington Post, 20 April 1939.
463 In 1940, Solicitor General Francis Biddle told the Junior Bar Conference that this deterrent effect was the most important function of the Civil Liberties Unit. “Civil Rights Protection,” Buffalo Daily Law Journal, 14 September 1940.
464 “Civil Liberties,” radio address by Hon. Frank Murphy, National Radio Forum, 27 March 1939, Attorney General Papers, box 5, entry 132, folder Civil Liberties.
time being, were under Title 18, Sections 51 and 52 of the criminal code.\textsuperscript{466} The Department expected to make generous use of the statutes, though it recognized their limitations. Section 52 was applicable only to deprivations of civil liberties under color of State laws. It also suffered “from the malady of old age”; after many years of disuse, it was likely to face significant resistance. Section 51 was similarly limited in its usefulness. It was passed to rein in the Ku Klux Klan, “and by reason of that fact, together with its severe punishment, it [was] a somewhat difficult statute, for psychological reasons, to prosecute under.” Moreover, although it permitted prosecution for violation of constitutional rights, few constitutional provisions could be construed to limit private action. Finally, both sections faced an additional obstacle, in that both criminalized conduct in violation of rights “secured by” the Constitution or federal statutes. Defendants were apt to argue, as they had (unsuccessfully) in Harlan County, that Section 51 applied only to rights “created,” not “guaranteed,” by the Constitution, and that the rights of free speech and assembly preexisted the federal government.\textsuperscript{467} In light of these obstacles, the Civil Liberties Unit expected to make recommendations for “some modern legislation on civil rights.”\textsuperscript{468}

Until such legislation was passed, however, the Civil Liberties Unit would make do with existing options. Within its first month of operation several hundred complaints were referred to the Civil Liberties Unit, including lynchings, interference with meetings, illegal police practices,
deportations, and voting rights violations. The Department also contemplated prosecutions under Section 51 for violations by employers of the Wagner Act. Among the many requests that the Civil Liberties Unit received, one was particularly tempting. A week after the new body was announced, delegates from the Workers Defense League of New Jersey met with Henry Schweinhaut to discuss the situation in Jersey City. They asked the Department to continue its investigation of the Hague administration and to pursue an indictment for, among other things, the deportation of Norman Thomas.

Jersey City, of course, was very much on Murphy’s mind. He considered filing an amicus brief in the Hague case, with an eye to action in future civil liberties cases. In the end, he decided not to, reportedly because a favorable outcome was expected without government intervention. Still, the interest of the Civil Liberties Unit was evident to all involved, including the Supreme Court.

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469 Gordon Dean to Leigh Danenberg, 6 March 1939, Attorney General Papers, box 22, entry 132, folder Civil Liberties.
470 Joseph Matan, Memorandum to Assistant Attorney General Brien McMahon, 14 May 1937, Attorney General Papers, box 22, entry 132, folder Civil Rights (“[T]he provisions of the Wagner Act as interpreted by the Supreme Court now secures to those laborers, who are engaged in interstate commerce, a right to organize and to bargain collectively and that a conspiracy to injure, etc., them in the exercise of their right to organize would be within the statute.”).
471 “Labor Group Asks Hague Indictment,” New York Times, 12 February 1939. The delegates had scheduled an appointment with the Attorney General himself, but Murphy was too sick to attend.
The Supreme Court Decision

In its brief to the Supreme Court, Jersey City disputed only two significant points: federal jurisdiction and the constitutionality of the meeting ordinance (both facially and as applied).\textsuperscript{474} On the latter issue, it repeated the same arguments it had made in the two courts below. Municipal officials, it claimed, have the authority and duty to maintain public spaces for the enjoyment and tranquility of the public. Relying heavily on the \textit{Davis} decision, it insisted that there was no “catch-all” concept of “free expression” in the Constitution, as the ACLU and CIO implied. Rather, rights were specific and idiosyncratic, tied to the “particular time, place and circumstance of the particular attempted type of ‘expression.’”\textsuperscript{475} In public places, the boundaries of acceptable communication were constrained by the rights of the greater community.

Ernst and Frazer likewise reiterated their earlier arguments. They rehearsed the many abuses to which the ACLU and CIO were subjected and argued that broad injunctive relief was justified notwithstanding the city’s concessions. They reviewed the Supreme Court’s recent First Amendment decisions to make a case for a robust freedom of assembly. And they argued that the right to speak in public places was a basic feature of democratic governance. In fact, it had become “so integral a part of American democracy” that a number of state courts had already moved to protect it by striking down permit requirements much like the one in Jersey City.\textsuperscript{476}

The Supreme Court, which issued a decision in \textit{Hague} on June 5, 1938, barely touched upon these arguments. The monthly bulletin of the International Juridical Association lamented that the Court’s reasoning was largely technical and lacked the lucidity and urgency of the great free speech cases. Unlike Holmes’s and Brandeis’s dissents and the Court’s recent decisions in

\textsuperscript{474} They also argued that the decree exceeded the court’s power and was impracticable of enforcement.
\textsuperscript{475} Petitioners’ Supreme Court Brief, Hague v. CIO, 41.
\textsuperscript{476} Respondents’ Supreme Court Brief, Hague v. CIO, 63.
De Jonge, Herndon, and Lovell, “not half a dozen paragraphs,” over five separate opinions, were “devoted to a discussion of the scope of the civil rights involved and their significance in our scheme of government.” The article declined to add that the opinions were as muddled as they were dry—a feature that likely explains the relative obscurity of the case in the subsequent development of First Amendment law.

Of the seven justices who participated in the case (the recent appointments, Justices Frankfurter and Douglas, did not take part), five voted to modify but affirm the district court’s order, and two, Justices Butler and McReynolds, dissented. Two competing theories were advanced on behalf of the majority’s conclusion that the meeting ordinance was facially unconstitutional. Justice Stone, in an opinion joined by Justice Reed, considered the city’s policy to be an abridgment of the privileges or immunities of United States citizenship. Justice Roberts, in a decision joined by Justice Black, analyzed the case through the lens of due process instead. Justice Hughes split the difference.

Both opinions focused on the applicable cause of action and the district court’s jurisdiction over the case, not the meaning or importance of freedom of assembly. Both began by asserting that general federal question jurisdiction under 28 U.S.C. § 41(1) was lacking. Although the case was clearly one “arising under” federal law, the plaintiffs had failed to meet

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478 Justice McReynolds thought the issue was properly one for the state courts, and Justice Butler thought Davis v. Massachusetts was controlling. With respect to the meeting ordinance, the majority concluded that the District Court should simply have struck down the ordinance, without issuing instructions for future administration of permit applications. “The courts cannot rewrite the ordinance, as the decree, in effect, does.” Hague, 307 U.S. at 518.
479 Hughes agreed with Roberts “with respect to the merits.” Hague, 307 U.S. at 532 (Hughes, J., concurring). He also approved Roberts’s reasoning with respect to jurisdiction but believed that it was not adequately supported in the record. On that issue, he concurred in the opinion of Justice Stone.
480 Federal question jurisdiction is now codified at 28 U.S.C. § 1331.
the amount in controversy requirement of 3000 dollars. The lower courts, however, had located jurisdiction on alternative grounds as well. A provision of the Civil Rights Act of 1866, § 24(14) of the judicial code (28 U.S.C. § 41(14)), conferred jurisdiction over suits at law or in equity to redress the deprivation “of any privilege or immunity secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights” of citizens of the United States or others within its jurisdiction. A subsequent measure, R.S. § 1979—then codified at 8 U.S.C. § 43 and now familiar to civil rights lawyers as 42 U.S.C. § 1983—originated in Section 1 of the Civil Rights Act of April 20, 1871. It provided a private cause of action for the denial of “rights, privileges, or immunities secured by the Constitution and laws.”

Both Justice Roberts and Justice Stone concluded that the plaintiffs— with the exception of the ACLU, which was not a natural person —had stated a cause of action under 8 U.S.C. § 43. Both also concluded that the district court appropriately asserted jurisdiction over the claim under § 24(14). From there, however, the two opinions diverged widely. Justice Roberts—nervous, perhaps, about a broad expansion of federal jurisdiction—limited his analysis to a

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481 Roberts explained that “a mere averment of the amount in controversy” would not confer jurisdiction. The plaintiffs had failed to establish the value of the rights they asserted. Hague, 307 U.S. at 507.

482 The section was reenacted by the Civil Rights Act of 1870. In full, it provided jurisdiction for any suit “at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.”

483 That section provided: “Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State, or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.”

484 Both justices (Roberts under the Privileges or Immunities Clause and Stone under the Due Process Clause) concluded that only natural persons were entitled to sue and thus barred the claim of the ACLU, which was incorporated. Hague, 307 U.S. at 514; ibid., 527 (“the liberty guaranteed by the due process clause is the liberty of natural, not artificial, persons.”). The ACLU considered Justice Stone’s conclusion to be incompatible with freedom of the press. Respondents’ Supreme Court Brief, 151–52 (“A ruling that corporations are not entitled to the benefit of the liberty clause of the Fourteenth Amendment in so far as freedom of speech and press are concerned would be unthinkable. Three-quarters of the nearly 1,000 publishers of daily and Sunday newspapers in the United States are corporate entities.”). The Equal Protection Clause, upon which none of the Justices relied, had been held clearly to apply to corporations.
“narrow question.”485 The relevant inquiry, he reasoned, was whether freedom to disseminate information about the Wagner Act and its advantages was within the scope of the Privileges or Immunities Clause of the Fourteenth Amendment and was therefore among the rights for which the Civil Rights Act provisions “afford[ed] redress in a federal court.” According to Roberts, there was no need to consider the larger questions briefed by the parties, including the scope of freedom of assembly. “[T]he respondents had no other purpose,” he claimed, “than to inform citizens of Jersey City by speech, and by the written word, respecting matters growing out of national legislation.”486 It was similarly unnecessary to address the city’s contention that jurisdiction was lacking because the rights at stake preexisted the United States and were thus not “secured by” it within the meaning of the statute.487 It was indisputable, even under the Court’s narrow interpretation of the Civil Rights Act in the Slaughterhouse cases and United States v. Cruikshank, that “the right of the people peaceably to assemble for the purpose of petitioning Congress” on issues implicating the power of the federal government was an attribute of national citizenship, and thus safely within the protective ambit of the federal courts.488 On the merits, Jersey City’s meeting ordinance was unconstitutional because it gave city officials arbitrary authority to refuse a permit. Accordingly, it infringed the right of the public to use the streets and parks “for purposes of assembly, communicating thoughts between citizens, and discussing public questions”—and in particular, the privilege of a citizen to use them “for communication of views on national questions.”489

Relying on the Privileges and Immunities Clause had a number of pitfalls, as Justice Stone was quick to point out. First, the provision applied only to citizens of the United States

485 Hague, 307 U.S. at 512.
486 Ibid.
487 See Petitioners’ Supreme Court Brief; Dodd, “Constitutional Torts.”
489 Ibid., 515–16.
and thus limited freedom of speech in an unprecedented fashion.\textsuperscript{490} Second, there was no basis in the record for assuming that the plaintiffs were in fact citizens—nor, for that matter, that they had intended to discuss the Wagner Act at the prohibited meetings. For that reason, Justice Robert’s decision seemingly opened the door to an expansion of the Privileges or Immunities Clause beyond the rule laid down in the Slaughterhouse Cases, which had confined its application to rights arising out of the relationship of United States citizens to the national government. The injunction, which the Court had resolved to sustain, was not limited to interference with meetings pertaining to national labor legislation. Rather, it protected the right to hold any lawful meeting and to circulate any lawful information. Justice Roberts, by loosely construing the rights of “national citizenship,” was inadvertently “enlarg[ing] Congressional and judicial control of state action” and endangering the “rightful independence of local government.”\textsuperscript{491}

Instead of the Privileges and Immunities Clause, Justice Stone based his opinion squarely on the Due Process Clause of the Fourteenth Amendment. Freedom of speech and assembly were rights of personal liberty, and “no more grave and important issue” could be brought before

\textsuperscript{490} The Department of Justice worried that Justice Roberts’s opinion might be used to justify anti-alien measures that implicated civil liberties. Address by O. John Rogge, National Conference on Civil Liberties, 14 October 1939, Attorney General Papers, box 22, entry 132, folder Civil Rights.

\textsuperscript{491} Hague, 307 U.S. at 520 n. 1. An IJA Monthly Bulletin explained the issue clearly: “Justice Roberts has either gone beyond the facts in the record before him or has in fact, though not in terms, overruled the Slaughter-House and Cruikshank cases . . . If Mr. Justice Roberts thought that the C.I.O.’s meetings would be forum discussions on the merits of the Labor Act, the answer is that he was probably wrong as a matter of fact and that not an iota of record evidence points in that direction. If, as some language in the opinion indicates, he thought the Constitutional provision to be applicable because the C.I.O was seeking to exercise the right of collective bargaining which is implemented by the Labor Act (but also by state law) then it is plain that the operation of the Constitutional provision has been broadened far beyond the scope assigned to it by the Slaughter-House Cases. For it could as well be said that one who carries on a business with the aid of an RFC loan, or who by making interstate shipments brings himself within the protection accorded shippers by the Interstate Commerce Act, is exercising a privilege or immunity of federal citizenship which the Fourteenth Amendment protects from state interference.” “The Hague Case in the Supreme Court,” International Juridical Association Monthly Bulletin 8 (July 1939), Vanderbilt Papers, box 127, folder Civil Liberties, 6–7. That the IJA, a leftist organization, criticized Roberts’s extension of the Privileges and Immunities Clause stems most likely from concern that it could be construed to provide an alternative justification for invalidating New Deal labor legislation. Justice Stone presumably shared those fears.
the Supreme Court. They were, moreover, rights that applied to all persons, regardless of their
citizenship. And they were squarely among the rights for the vindication of which 8 U.S.C. § 43
provided a federal cause of action; as Ernst and Frazer had argued in their brief, earlier cases to
the contrary (including United States v. Wheeler, the IWW case) were inapposite, because they
predated the Supreme Court’s incorporation of the First Amendment into the Fourteenth. The
only open question, according to Justice Stone, was whether due process claims could be
maintained in the federal courts under § 24(14). After reviewing the legislative history of that
provision, he concluded that they could.

That the ACLU and other organizations could sue in federal court for injunctive relief
had obvious implications for future litigation strategy. Previously, the vast majority of ACLU
cases had originated in the state courts, generally as criminal defenses. The new rule gave the
ACLU an option to initiate test case litigation in federal court. Except in criminal cases, the
organization and its allies could henceforth avoid the state courts when their independence was
compromised—not just under circumstances like Hague, but in cases involving the civil rights of
racial minorities, particularly in the South. When the ACLU was founded, one of its central
objectives was to curb the injunctive power of the federal courts. Twenty years later, it was
responsible for a momentous extension of that precise power—which it would invoke often in
the years to come when seeking vindication of civil liberties claims.

The Supreme Court’s decision had ramifications for another body, as well. Henry
Schweinhaut, head of the Civil Liberties Unit in the Department of Justice, was “elated” by the

492 Respondents’ Supreme Court Brief, 133–36.
493 “The conclusion seems inescapable that the right conferred by the Act of 1871 to maintain a suit in equity in the
federal courts to protect the suitor against a deprivation of rights or immunities secured by the Constitution, has been
preserved, and that whenever the right or immunity is one of personal liberty, not dependent for its existence upon
the infringement of property rights, there is jurisdiction in the district court under s 24(14) of the Judicial Code to
entertain it without proof that the amount in controversy exceeds $3,000.” Hague, 307 U.S. at 531–32.
Court’s decision in *Hague* and regarded it as a strong endorsement of the Civil Rights Act.\(^{494}\) The Court’s interpretation of the jurisdictional and private action provisions were a seeming invitation for criminal prosecutions under Sections 51 and 52. Justice Stone’s opinion implicitly rejected the narrow interpretation of Section 51 in *United States v. Cruikshank*, an 1876 case growing out of the mob murder of more than a hundred black Republicans in Reconstruction Louisiana.\(^{495}\) *Cruikshank* was just the sort of case that Section 51 was designed to cover. The defendants were convicted of conspiracy to deprive citizens of the United States of their rights to assemble and bear arms, among other charges. The Supreme Court reversed the convictions on the theory that such rights were not protected by the Fourteenth Amendment. Justice Stone’s opinion suggested that *Cruikshank* was no longer good law.\(^{496}\)

Of course, the court’s decision left one fundamental limitation of the Civil Rights Act intact. As Assistant Attorney General O. John Rogge told the ACLU’s National Conference on Civil Liberties in October 1939 (which was designed to “honor the men in government service who have done most to advance the cause of civil liberties in the United States”\(^{497}\)): “No matter how much the content of the due process clause has been expanded, rights under the due process clause are not protected against mere individual action, on the standard interpretation of the Fourteenth Amendment as a restriction on State action only.” The state action requirement expressed in such cases as *Cruikshank* and *Wheeler* meant that the statute was inapplicable to “the great mass of civil liberties cases” the Department would otherwise have pursued. Rogge

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\(^{495}\) The victims had assembled at the courthouse to ward off its takeover by Democrats after the disputed gubernatorial election of 1872.

\(^{496}\) “The observation of the Court in *United States v. Cruikshank* [] that the right of assembly was not secured against state action by the Constitution, must be attributed to the decision in the Slaughter-House Cases that only privileges and immunities peculiar to United States citizenship were secured by the privileges and immunities clause, and to the further fact that at that time it had not been decided that the right was one protected by the due process clause,” *Hague*, 307 U.S. at 526.

\(^{497}\) “Civil Rights Conference,” *Civil Liberties Quarterly* (September 1939), 1, ACLU Papers, reel 167, vol. 2061.
assured the audience that the Criminal Division was evaluating those cases to determine whether they represented “sound law.” If they did not, the Civil Liberties Unit would have “no hesitation” in asking the Supreme Court to overrule them.\footnote{Address by O. John Rogge, National Conference on Civil Liberties, 14 October 1939, Attorney General Papers, box 22, entry 132, folder Civil Rights.}

There was one category of private action that Section 51 could be made to reach without a radical revision of existing case law. The Department of Justice read the Court’s decision in \textit{Hague} to mean that “if a Federal statute otherwise constitutional gives a private right to a citizen, Section 51 will serve for prosecution of any group of persons who attempt to take it away from him.” This reasoning arguably applied to private acts of violence affecting statutory rights “under the recently extended commerce clause.” The NLRA was the most prominent such example, and its curtailment by employers was the theory of the Harlan County case.\footnote{Ibid. (citing Hague as well as the Pennsylvania System case, which arose under the 1930 Transportation Act). The Harlan case itself never reached the court, because it was nolled as part of a negotiated settlement.} In the Department’s view, Hague was an invitation to seek additional indictments under the statute.\footnote{See Goluboff, \textit{Lost Promise of Civil Rights}, 116–17, for a discussion of the Department’s labor focus in these cases.}

The CIO quickly announced that it would “request the Department of Justice to take steps for criminal prosecution of all who interfere with its organizing activities by violating the civil rights of workers.”\footnote{Lewis Wood, “Hague Ban on CIO Voided by the Supreme Court,” 6 June 1939 (quoting Lee Pressman).} Over the coming years, the Department vigorously pursued the new strategy, albeit with uneven results.\footnote{“Annual Report of the Attorney General of the United States for the Fiscal Year 1939,” 63, Attorney General Papers, box 30, HM 1994 (reporting cases prosecuted by the Civil Liberties unit in 1939 and 1940, including \textit{United States v. Sam B. Powe} (S. District of AL), in which defendants were charged with conspiring to deprive a newspaper editor of the rights of free speech press in violation of Section 51, which was reversed by the Fifth Circuit); see also “Recent Development: Conspiracy To Coerce Employees into Union Activity Not Indictable Under 18 U.S.C. 241,” \textit{Columbia Law Review} 55 (1955): 103–06 (noting that indictments against employers for conspiring to deprive their employees of their statutory rights to organizer under the NLRA were sustained by district courts in two unreported cases); Tom C. Clark, “A Federal Prosecutor Looks At the Civil Rights Statutes,” \textit{Columbia Law Review} 47 (1947): 175–85; “The Press: In Mobile,” \textit{Time}, 22 May 1939 (describing use of Section 51).}
In the meantime, Frank Murphy, was confident that the Court’s decision would bolster efforts by the Department of Justice to prosecute infringements of constitutional rights. Indeed, he predicted that the Civil Liberties Unit would soon “grow into something very important.” Americans had come to recognize the importance of the fundamental rights the unit was designed to protect. “It has been obvious for some time in our country,” he observed, “that our people are becoming increasingly civil liberties conscious, as they should.”

Murphy was right. By the spring of 1939, civil liberties had a popular cogency that would have astounded World War I dissenters. Public approval of the outcome in *Hague* was a foregone conclusion. The dominant sentiment in press coverage of the decision was that the Supreme Court had not gone far enough.

*Aftermath*

In the wake of their Supreme Court victory, the civil liberties forces were uniformly jubilant. On June 12, the ACLU convened a “monster public meeting” to celebrate free speech in Jersey City. The announcement for the celebration called the Court’s decision “a clear mandate to American citizens to exercise their rights of freedom of speech and assembly,” as well as “a mandate to local officials not to interfere with those rights.” Most of the participants would be New Jersey residents, the ACLU emphasized, and the purpose of convening was not to espouse “radicalism or foreign doctrines.” Rather, the audience would include Republicans and

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504 E.g., “The Jersey City Case,” *Washington Post*, 6 June 1939 (commending the result but noting that Justice Stone’s decision was more expansive and thus preferable); “Affirming the Obvious,” *Baltimore Sun*, 7 June 1939 (“The court’s decision in the Hague cases might have been more reassuring if the majority had accepted Justice Stone’s view.”). Some editorials were strictly celebratory, e.g., “The Basic Freedom,” *Christian Science Monitor*, 6 June 1939 (“In affirming the injunction against Mayor Hague’s ordinance which arbitrarily limited freedom of speech in Jersey City, the United States Supreme Court has upheld again—and impressively—the right which is fundamental to all others in a Democracy.”).

Democrats; Catholics, Protestants and Jews. “This,” the statement declared, “is fundamental Americanism.”

At the meeting, the speakers echoed the sentiments expressed in the announcement. That civil liberties captured the true “spirit of America” was the theme of Rabbi Benjamin Plotkin’s address. Norman Thomas, true to his ministerial roots, stressed the importance of individual conscience, as he always had. He also argued that civil liberties were crucial to a functioning democracy—that free discussion provided the opportunity for minorities to “become majorities by persuading their fellow man,” and thereby to correct the country’s mistakes. The Jersey City battle, he concluded, had “helped to assert the principle of liberty in which America has found its true greatness.” Roger Baldwin emphasized that while the controversy was pending he had never attempted to make a speech in Jersey City. He was finally doing so, he said, “merely to express a conception of Americanism which the Supreme Court has approved.”

Seven or eight thousand people attended the meeting, by Jerome Britchey’s estimate, and the crowd was overwhelmingly sympathetic to the civil liberties cause. The Hague administration, at last, had determined that it was time to cut its losses. Daniel Casey assured that preparations for the meeting proceeded smoothly, and on the evening of the event, city representatives offered their full cooperation (according to Britchey, it was a “wholly different show and a totally different attitude”). The whole evening, there were only a “few lone

506 ACLU Press Release, 7 June 1939, ACLU Papers, reel 176, vol. 2133.
507 Statement of Rabbi Benjamin Plotkin, 12 June 1930, ACLU Papers, reel 177, vol. 2134.
508 On Thomas’s theory of individual conscience and its relation to his theology, see Thomas, Conscience.
509 Statement by Norman Thomas at Journal Square Meeting, 12 June 1930, ACLU Papers, reel 177, vol. 2134.
510 Remarks of Roger Baldwin at Meeting, Jersey City, 12 June 1939, ACLU Papers, reel 177, vol. 2134. Among the other speakers were Rev. Archey Ball, chair of the New Jersey Civil Liberties Union, and Morris Milgram, secretary of the Workers Defense League.
511 See also Telegram from Daniel Casey to Arthur Garfield Hays, 7 June 1939, ACLU Papers, reel 177, vol. 2134 (advising Hays that the city would make “whatever requirements [were] necessary” to facilitate the event).
hoots.” Britchey thought the effect was better, even, than the newspapers described. “It was a wondrous sight to behold,” he mused, “all those heads close together and not a nightstick coming down on any one of them; all the police on hand to help—not to pull down a speaker.”

This accommodating posture persisted through the summer. In July, Jersey City adopted a new ordinance—the ABA called it “a model municipal enactment”—authorizing the issuance of meeting permits in public places (it required four days notice in the city’s four major parks, where “unfettered discussion” would be permissible, and twenty-four hours elsewhere). Mayor Hague announced deferentially that “the Supreme Court [had] spoken” and that the city desired “to comply in every way with the decision of the court.” City officials administered the ordinance liberally, and mass meetings (as well as literature distribution, picketing, and labor activity) were allowed to proceed without interference.

The *Washington Post* thought that Hague’s capitulation to the Supreme Court’s decision was an “occasion for rejoicing.” The distinguishing feature of a democracy, according to an editorial, was “the readiness of the people voluntarily to submit to the law’s dictates.” The coercive authority of the democratic state lay primarily in rule of law, not in physical force. Hague, in capitulating to the Court’s decision, showed that he was “mindful of this fundamental fact and fully prepared to live up to it.” That Hague’s about-face was strategic rather than ideological did not render his retreat less significant; the important thing was that democratic liberties had been restored. By September, an update in the ACLU’s *Civil Liberties Quarterly*

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512 The *New York Times*’ assessment was less optimistic. It estimated that a “hootling, jeering crowd” of a thousand people, mostly teenagers, followed Norman Thomas to the tube station. “Hague Safeguards Rally of His Foes,” *New York Times*, 13 June 1939. The *Times* also noted the presence of agents of the Department of Justice, “presumably gathering material for a report to the recently established Division of Civil Liberties of the department.” Ibid.

513 Jerome Britchey to Morris Ernst, June 1939, ACLU Papers, reel 176, vol. 2133. Ernst missed the meeting because he was away on vacation, but the crowd cheered him in his absence.

514 ABA, “Committee on the Bill of Rights,” 66.

515 Lucille Milner, Memorandum, 10 July 1939, ACLU Papers, reel 177, vol. 2134.

516 “Jersey City Open to Free Assembly,” *Civil Liberties Quarterly* (September 1939), 2.

was titled “Jersey City Open to Free Assembly” and began with a heartening assessment: “All’s quiet on the Jersey City front.”

In addition to its implications for free speech generally, the Hague decision was an unmistakable “go signal” (as California’s state bar journal put it) for labor organizing in Jersey City and elsewhere. In the days after the decision, the CIO launched a massive organizing campaign in Hudson County. The program, which it developed in consultation with Morris Ernst, was months in the planning. In addition to a general literature distribution, it entailed stationing CIO organizers at the factory gates, serving the court’s decree on government employees (Ernst hoped official-looking papers would scare them into submission), radio broadcasts, renting halls, outdoor meetings, and the relocation to Jersey City of the main CIO offices. William Carney, in his public statement on June 5, announced that the 30,000 CIO members in Hudson County had “enlisted for the duration of the war” and would not give up until Hague was “either in jail or in political oblivion.”

As it turned out, the parties came to terms much more easily than Carney expected. According to Hague’s biographer, the CIO’s “defiant, anti-Hague attitude” lasted a month. On August 1, CIO representatives visited Mayor Hague’s office and emerged with assurances that “the doors of City Hall [were] always open” to them. On August 2, the Hague administration

518 “Jersey City Open to Free Assembly,” *Civil Liberties Quarterly* (September 1939), 2.
519 Harry Graham Balter, “Recent Civil Rights Decision Discussion,” *California Bar Journal* 14 (June 1939): 200–04. See also clipping, “Hague Court Upset Spurs C.I.O. Drive,” Vanderbilt Papers, box 371 (“Instructions to the New Jersey Regional Directors from Washington, and presumably that means John L. Lewis, are that Jersey City is to become a concentration point for organization.”).
520 Ernst formulated a plan together with John L. Lewis. Morris Ernst to William Carney, 12 April 1939, ACLU Papers, reel 176, vol. 2133. The ACLU had advised organizations involved in the Jersey City work that action would have to await a final mandate and should not be made without the advice of counsel. The ILD promised not to act independently and to coordinate activity in the “best interests of the CIO.” Baldwin to Organizations of the Joint Committee for Civil Rights in Jersey City, 27 April 1939, ACLU Papers, reel 176, vol. 2133; Letter to Roger Baldwin, 28 April 1939, ACLU Papers, reel 176, vol. 2133.
sided with a local CIO affiliate in a labor dispute. Union officials announced that New Jersey Republicans had supported them during the court fight for strategic reasons only and were hostile to the larger objectives of the labor movement. “We must depend on the Democratic machine,” one reportedly said, and “we will work with anyone who’ll help us.” Hague, who proclaimed a few days later that he was “one hundred percent” for a Roosevelt third term, had determined that cooperation with local labor leaders was a more profitable strategy than defiance.

Hague was not the only one who proved willing to compromise for political reasons. It was generally understood that the Hague administration was “so conspicuously devoted to the third term” because it was “desperately afraid of Federal prosecution” and wanted to appease federal officials. Shortly after Hague’s endorsement, reports emerged that the Civil Liberties Unit was dropping its investigation in Jersey City. Frank Murphy, who had spearheaded anti-corruption efforts within the Department of Justice and was widely regarded as self-righteously moral (he did not smoke, drink, swear, or eat meat, according to the *Baltimore Sun*), was accused of selling out.

As the featured speaker at the commencement exercises of Jersey City’s John Marshall College on June 21, Murphy stressed the importance of civil liberties and obliquely criticized Mayor Hague. During his trip, however, he was “taken in hand by the authorities, wined, dined, . . . and told that there was ‘no vice, no crime, no racketeering’ in Jersey City.” For the next half-year, Murphy made little mention of Frank Hague. Then, a few hours before he was sworn in as Associate Justice of the Supreme Court, on January 18, 1939, Murphy issued a

524 Quoted in McKeen, *Boss*, 200.
529 McKeen, *Boss*, 103.
statement on his “unfinished business” as Attorney General. He denied “insinuations and implications” that he had “for political purposes suppressed possible proceedings against . . . Mayor Hague of Jersey City and other political leaders.” He insisted that there had been no criminal prosecution of Hague because there was no evidence of criminal activity to support a prosecution.530 Murphy’s Jersey City allies—more likely out of obligation or prudence than true conviction—backed him up. Norman Thomas said he had “no quarrel” with Murphy and had made “no insinuations,” though he noted that the Department was slow to investigate civil liberties violations unless doing so was politically expedient. Morris Ernst, who by 1940 was a close personal advisor to President Roosevelt, went further. He stated publicly that he was convinced that the Department of Justice had no basis for prosecuting Hague; he had worked with the criminal division and knew it had made a “most thorough investigation of the field.” He added, “Not only was there no suppression of the investigation, but the only way they could have prosecuted Hague would have been by violating the Mayor’s civil liberties.”531

Ernst’s willingness to modify or sacrifice his broader principles in the interest of political expediency manifested in other issues as well. Although Ernst heartily supported the CIO’s labor program and helped formulate its organizing campaign in Jersey City, he felt that the goals of organized labor were distinct from those of the ACLU. In fact, the battle with Mayor Hague was the last notable occasion on which the ACLU fought in the trenches alongside its labor allies. For two decades, the ACLU leadership had stood at the head of the rallies and picket lines

531 “Murphy, Jackson Inducted Together,” New York Times, 19 January 1940. In February, the Washington Post reported that the investigation was complete and that Attorney General Jackson, together with Schweinhaut, was deciding whether to present the case to a grand jury. At that time, the contemplated charges included neither suppression of the CIO nor the deportation of Norman Thomas. “Inquiry on Hague Complete, Jackson Weighs Charges,” Washington Post, 12 February 1940.
that precipitated the organization’s major court challenges.\textsuperscript{532} In the 1920s, Roger Baldwin had narrowly escaped a prison sentence for spearheading a demonstration by striking silk workers in Paterson, New Jersey, just a few miles away from Hudson County. Throughout the 1930s, ACLU representatives, including Corliss Lamont and Arthur Garfield Hays, had employed the familiar tactics of direct action in Jersey City. But as the litigation in \textit{Hague v. CIO} unfolded, Morris Ernst and the ACLU decided that it was more effective to stand aloof from the fray as a defender of neutral liberties than to provoke arrest by carrying placards or making car-top speeches—a sentiment captured in Ernst’s public criticism of Hays as the legal proceedings began.

By the time Judge Clark began hearing testimony in \textit{Hague}, ACLU attorneys had convinced the courts and the public that free speech was an important American value. Hague himself, while insisting that free speech was not implicated in Jersey City, agreed during trial that nobody “should be denied the right to talk.”\textsuperscript{533} Over the course of the legal proceedings, however, the meaning and purpose of civil liberties were still very much in flux. Increasingly, the ACLU took steps to ensure its “neutrality,” as the CIO angrily pointed out. Whatever his personal feelings, Ernst publicly and ardently disavowed labor issues as concerns of the ACLU. Borrowing from his rhetoric in sex education and artistic freedom cases, he insisted that the rights at stake were the right to air disfavored ideas and the right to be free from the censor’s arbitrary and autocratic reach. As the La Follette Committee yielded the spotlight to Martin Dies,

\textsuperscript{532} In the \textit{Casey} case, Hays testified that it was ACLU policy to arrange for representatives to picket or otherwise challenge restrictive laws. \textit{ACLU v. Casey}, 5 March 1937, before Hon. William Clark, Newark: Testimony of Arthur Garfield Hays, ACLU Papers, reel 153, vol. 1051. Asked whether it provoked conflict without invitation by an involved party, Hays responded, “generally we wait until we are requested, but if we find a situation to be a very bad one, we investigate and bring about a situation where we are requested to lend our help.”

\textsuperscript{533} \textit{Hague} trial transcript, vol. 2, 1077. Similarly, despite his acknowledgment of the importance of free speech as an abstract principle, Hague’s attorney insisted that the rights to organize, rent halls or picket were mere adjuncts to the constitutional right to earn a livelihood. The latter he considered “a right of substance”—“a property right, which the courts should and have protected.” Ibid., 2133.
Jr.’s House Committee on Un-American Activity, Ernst and the ACLU made civil liberties more palatable to mainstream liberals.534

By the spring of 1939, the ACLU’s national office considered ousting Abraham Isserman as counsel for the New Jersey Civil Liberties Committee on the ground that he, along with his work in Jersey City, was “too pro-labor.”535 At the public celebration following the Court’s decision, William Callahan, an editor for the Catholic Worker reminded his audience that the judicial victory was “only a small part of the larger, grander work of securing the fruits of democracy for the millions to whom they are yet denied”—a project imperiled by the mounting “danger of the Wagner Act’s being scrapped.”536 But Callahan’s determination to use Hague as a “springboard towards a larger, more generous freedom” was an increasingly marginal view within the ACLU. Indeed, the meeting was intentionally divorced from the CIO and its organizing efforts in Jersey City.537

Even Roger Baldwin, in his speech, abandoned the radical rhetoric that he had so resolutely embraced for the past two decades. At the outset of the litigation, Baldwin had denounced Hague’s policies as inconsistent with the “striking advances made in the exercise of civil rights under new labor laws, favorable court decisions and a growing trade union movement.”538 Around that time, a correspondent offered Baldwin some telling advice: “I know

534 The hearings of the Special Committee on Un-American Activities were convened on August 12, 1938 by Representative Martin Dies of Texas. On the relationship between the Dies Committee and civil liberties, see Auerbach, “La Follette Committee,” Journal of American History, 450 (“The Dies Committee, more than any single institution, abetted the charge that the La Follette Committee’s origins, composition, and direction evidenced affinity for communism.”).
535 Abraham Isserman to Roger Baldwin, 29 April 1939, ACLU Papers, reel 176, vol. 2133.
536 Address by William Callahan at Journal Square, ACLU Papers, reel 177, vol. 2134.
537 Norman Thomas to Morris Ernst, 7 June 1939, Ernst Papers, box 126, folder 3 (“The C.I.O. may be right in waiting and building up its meeting, which will of necessity primarily be concerned with Labor organizations. Because that will be its main concern and because there is still war between the C.I.O. and A.F. of L., the meeting cannot be principally a celebration of a great victory for civil liberty. . . . Better far, one big meeting while public interest is still directed toward Jersey City, at which the praises of civil liberty can be sung.”).
you’re a Marxist and all that, and I know the argument that civil liberties and economic liberties are all of one piece and are as inseparable as the Trinity. Well, from my point of view that’s good theology, but damn poor tactics.”539 One year later, Baldwin had internalized that lesson, and he no longer thought of civil liberties in staunchly labor terms. He acknowledged that “the real issue” at stake in Jersey City “was the right of independent trade unions to organize in what has been proudly heralded as an open shop town.” He nonetheless assured his audience that the ACLU defended everyone’s rights without distinction and had “no ‘ism’ to promote except the Bill of Rights.” Baldwin’s remarks neatly captured his organization’s mature position. The ACLU, he insisted, was no more concerned with the rights of unions than the rights of employers. Still, employers were better equipped to defend their own interests, whereas “unions need help.” “It is our business to open doors that are closed to them,” he explained. “It is their business to walk through the doors after they are opened.”540

All told, Morris Ernst estimated that the Hague case took more of his firm’s time “than all the other cases [it had] handled for the ACLU put together.”541 The legal bill, which included only expenses (Ernst donated his time), came to thousands of dollars and led to a spat between the plaintiffs as to which group should pay.542 The dispute over reimbursement, however, was

540 Remarks of Roger Baldwin at Journal Square Meeting, 12 June 1939, ACLU Papers, reel 177, vol. 2134.
541 Morris Ernst to Roger Baldwin, 16 November 1938, ACLU Papers, reel 165, vol. 2041.
542 Ernst requested reimbursement for almost five thousand dollars in expenses (according to Ernst, that was the “cheapest bill that any organization ever got” for a five-week trial carried to the Supreme Court, though the CIO considered it excessive). Morris Ernst to Spaulding Frazer, 1 March 1939, ACLU Papers, reel 176, vol. 2133; Roger Baldwin to Morris Ernst, 8 June 1939, ACLU Papers, reel 176, vol. 2133. Ernst’s understanding was that the case and attendant financial responsibilities were the CIO’s, as the ACLU had come in after the fact at the CIO’s suggestion. Morris Ernst to Spaulding Frazer, 1 March 1939, ACLU Papers, reel 176, vol. 2133. Lee Pressman, CIO general counsel, told Baldwin that the designation of plaintiffs had been left to Ernst, who was acting for both parties. Accordingly, he felt the two organizations stood as co-plaintiffs, and each should pay half of the expenses. Lee Pressman to Roger Baldwin, 21 February 1939, ACLU Papers, reel 176, vol. 2133. Baldwin insisted that the ACLU had not committed funds in advance and advised Ernst that if Pressman would not pay, he would have to look to John L. Lewis for further funds. Roger Baldwin to Lee Pressman, 8 February 1939, ACLU Papers, reel 176, vol. 2133; Roger Baldwin to Morris Ernst, 8 June 1939, ACLU Papers, reel 176, vol. 2133. Frazer’s firm was paid
the least important of the many disagreements that the *Hague* case spawned between the ACLU and the CIO.

From the perspective of the ACLU’s dwindling labor constituency, the Jersey City campaign had been most costly in non-financial terms. *Hague v. CIO* was the first time that an ACLU legal action on behalf of organized labor attracted widespread public support. But its popular resonance stemmed precisely from the erasure of labor issues from its central terms. As the *New York Times* observed, “The notion that the right of free speech or public assembly may properly be denied to persons with whom a political leader and his satellites disagree was an astounding contradiction of democracy,” and it “served to wake people up.”543 More pointedly, the *Yale Law Journal* reflected that “when practically every shade of public opinion became outraged at what appeared to be a blatant denial of fundamental rights, emphasis shifted from specific attempts by one group at raising abnormally low Jersey City working conditions to the more basic issue of whether constitutional guaranties of free speech, free press, and free assembly apply to union sympathizers as well as to other citizens.”544

Rightwing critics had feared that support for the civil liberties cause by self-described conservatives, and particularly such eminent bodies as the ABA, would make the ACLU more respectable—and indeed it did. Their fear, however, was largely misplaced. Respectability attracted new members and new allies to the ACLU. In turn, it created new expectations. After *Hague v. CIO*, the ACLU would rarely defend its labor clients on anything other than generally applicable First Amendment grounds. The next step was to extend those same rights to the very individuals and entities whose dominance the ACLU was founded to resist. In 1940, the ABA’s

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by the CIO, though in Ernst’s estimation, far below market rate. Morris Ernst to Roger Baldwin, 26 July 1938, ACLU Papers, reel 165, vol. 2041.
Committee on the Bill of Rights announced its intention to file its next *amicus* brief in a case involving the right of employers to free speech, asserted against the coercive apparatus of the NLRA. Its position on the matter was squarely in line with the ACLU’s.

545 ABA, “Committee on the Bill of Rights,” 69.
On May 26, 1937, a few dozen representatives of the United Automobile Workers of America assembled near the Ford Motor Company’s River Rouge plant in Dearborn, Michigan to distribute union leaflets. They were greeted by Ford agents and, in the presence of peaceful observers and press representatives, brutally beaten. The message was clear: the Ford Motor Company would not be organized.

The “Battle of the Overpass,” as the events of May 26 came to be known, is among the most notorious of American labor struggles. The well documented and widely publicized violence perpetuated by agents of the Ford Motor Company against peaceful organizers for the United Automobile Workers of America soured Americans’ widespread image of Henry Ford as a model of industrial benevolence. In a period when organized labor was under attack, it generated much-needed support for the efforts by workers to secure union recognition.

The River Rouge assault is widely acknowledged as a pivotal event in negotiations between the Ford Motor Company and the UAW. But an equally important legacy of the Battle of the Overpass has been largely lost to history. The attack on union organizers occurred just six weeks after the Supreme Court upheld the constitutionality of the National Labor Relations Act.\(^1\) The National Labor Relations Board’s swift condemnation of Ford’s labor policies in the wake of Ford’s violence precipitated a second and more protracted battle with implications that were as far-ranging, if not more so, than the first. Ford’s attorneys, hard pressed to defend the propriety of the company’s response to UAW organizing efforts, instead launched a legal and public relations campaign against the NLRB itself. Their indictment of Board procedures shook

\(^1\) *NLRB v. Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937), was decided on April 12, 1937.
the already precarious public confidence in the adjudicative capabilities of the NLRB and, in significant respects, paved the way to the Taft-Hartley Act, enacted ten years later.

The most original contribution of Ford’s lawyers, however, was not in the field of procedure—where a battle between industry and the NLRB was already raging—but rather in the ongoing struggle over the meaning of civil liberties in New Deal America. In *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, the Supreme Court had foreclosed the standard employer argument that the legislative enforcement of collective bargaining infringed on its Fifth Amendment right to manage its business in an orderly fashion of its choosing.\(^2\) For employers, *Jones & Laughlin Steel* meant coming to terms with a new constitutional landscape in which they no longer could count on the federal courts simply to strike down pro-labor machinery. They would need instead to whittle away at state power by invoking those checks on majoritarian power capable of mustering broad popular and political support. And so, seizing on civil libertarian rhetoric of the past two decades, Ford introduced a new twist on old liberties. By dictating the terms of employers’ communications with their employees, it argued, the NLRB was trenching on freedoms that were guaranteed by the Constitution to protect democratic processes. The NLRB was curtailing employers’ freedom of speech.

Organized labor and the left quickly dismissed the new argument. Although they acknowledged free speech as an important value, they insisted that anti-union statements by employers were coercive per se and therefore outside the protection of the First Amendment. To hold otherwise, they insisted, would be subversive of the public interest in precisely the same fashion as substantive due process. For the ACLU, however, the issue was more complicated. As Lucille Milner, longtime secretary of the ACLU, put the matter in a 1938 letter to the

\(^2\) *Jones & Laughlin Steel*, 301 U.S. at 43.
NLRB’s regional director in St. Louis: “This subject of the employer’s right in the N.L.R.B.’s order has been the most controversial one which has ever come before the Board and we have been discussing it for the past six months. . . . We have never seen the Board so completely at loggerheads on any issue since the organization has been in existence.”3 *Ford v. NLRB* fundamentally challenged the ACLU’s relationship to labor and the state, forcing the organization to rethink its broader policy agenda and to reassess the meaning of free speech.

*The NLRA, the ACLU, and the Retreat of Radical Labor*

During the winter of 1936-1937, national attention was directed not toward Dearborn, Michigan, but toward Flint. Over the course of a forty-four day sit down strike, the UAW-CIO forced the General Motors Company, the world’s largest industrial corporation, to recognize it as the exclusive bargaining representative of GM workers. Although the strike organizers had embarked on their course with little hope of success, the New Deal realignment of state power in labor relations facilitated a stunning victory for labor. When GM secured an injunction against the strikers, Michigan’s new governor, Frank Murphy, refused to intervene on the company’s behalf.4 Like President Roosevelt, Murphy conceded that the seizure of GM property was illegal—but so too, he insisted, was GM’s violation of the Wagner Act.5 Murphy mobilized the National Guard troops but ordered them to maintain the peace and protect the strikers from local law enforcement and vigilantes rather than break the strike. In the end, the strikers secured their most aggressive demands, including at least six months of exclusive UAW representation.

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3 Lucile Milner to Dorothea de Schweinitz, 1 August 1938, ACLU Papers, reel 160, vol. 2002.


5 Notably, Murphy cited findings of the La Follette Committee to GM representatives as evidence of their non-compliance with federal law. He also invoked the Committee findings in gubernatorial addresses.
Nationally, the victory generated a mix of outrage and admiration. Labor justified the sit-down strike as a remedy for employers’ ongoing disregard of the rights of labor. UAW attorney Maurice Sugar claimed that the practice was both ethical and legal. An employee had “a right to work for decent wages, for decent hours and under decent conditions,” he charged, and in an era of industrial monopolies and rampant unemployment, workers were entitled to fight to retain their jobs. When the right of workers to live conflicted with the right of an employer to dispose freely of its property, a decision had to be made as to which right took priority. And that, he claimed, is precisely what New Deal legislation had done. Recent laws had recognized the right of labor to engage in practices that encroached upon employers’ property. Whether that encroachment took place inside or outside the plant was irrelevant to the balancing of relative rights. “The American worker is breaking his chains,” Sugar concluded. “The employer protests loudly and indignantly that his chain law has been violated. But it hasn’t been violated. Actually, whether we know it or not, the chain law has fallen with the chains.”

Like other radical labor leaders, Sugar regarded the sit-down strike as an essential weapon in labor’s struggle. By the spring of 1937, sit-downs had directly affected 400,000 workers, and UAW membership had reached a quarter-million. As the architect of the new strategy, the CIO had become a formidable opponent. In March, United States Steel entered into bargaining agreement with the Steel Workers Organizing Committee-CIO, no strike necessary.

By late spring, however, the tide had begun to turn against labor. Almost one quarter of organized labor was unionized, and the majority, for the time being, belonged to CIO-affiliated

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7 “Rights do not exist in a political or economic vacuum,” he reasoned, “and no man can assert a right without at the same time asserting it against another man.” Ibid.
9 Ibid., 329–30.
unions. But the CIO was already struggling to maintain its power and legitimacy. Employers groups organized—some drawing explicitly on the ACLU’s methods of earlier years—to mobilize public opinion against worker lawlessness and to pressure local police and administrators to enforce the law. Increasingly, public and political figures expressed concern at unions’ aggressive attitude, and momentum was seeping from the congressional labor agenda. The economy had contracted sharply as a result of Roosevelt’s fiscal policy, fueling frustration and desperation by industry and workers alike. By summer, fear of sit-downs was pervasive, and the Senate had roundly condemned the practice.

Sit-down strikes were only the first congressional casualty. The failure of Roosevelt’s judiciary reorganization plan had suggested that pro-labor legislation was vulnerable. The Wagner Act, newly secured by the Supreme Court from constitutional attack, was suddenly open to legislative challenge. Republican opponents of the New Deal reached out to Southern Democrats, who feared that active intervention in labor disputes would open the door to federal interference with Jim Crow. To make matters worse, the AFL attacked the NLRB for favoring the CIO and undermining labor voluntarism. New Deal Democrats responded by citing the violent and unlawful suppression of labor by employers, relying heavily on the findings of the La Follette Civil Liberties Committee. By the summer of 1938, however, the committee’s staff was regularly fielding demands that it investigate labor unions in addition to employers. One outraged citizen, voicing widely shared anti-union sentiments, insisted that “people read the

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10 Many of its members were not paying dues. Dubofsky, *State and Labor*, 138.
11 “Partial Report of Proceedings, Meeting, Organization Committee, National Committee of One Thousand on Civil Rights,” La Follette Committee Papers, 50.25, box 86, folder March 1937. Archibald Stevenson, who had been intimately familiar with the ACLU ever since his Lusk Committee days, helped organize the National Committee of One Thousand on Civil Rights to combat sit-down strikes.
News Papers and know that if strikers did not attack men hired to protect plants, there would be no fighting.”14 In this anti-union climate, the administration was no longer willing to stake its political leverage on organized labor.15

Neither, for that matter, was a sizable contingent of the ACLU’s National Committee. Between 1935 and 1937, differences of opinion within the ACLU had been a matter of degree. Through decades of litigation and advocacy, the organization had established a broad consensus around the impropriety and unconstitutionality of interference with the speech of radicals and other unpopular minorities. They had restored a measure of credibility to the courts, persuading some of the most recalcitrant labor advocates to regard the federal judiciary as a potential forum for vindicating their rights. They had convinced many Americans, including many judges, that government had no business interfering with academic freedom, artistic expression, sex education, or even birth control, because efforts at suppression stifled democratic change and unduly burdened individual autonomy. On the whole, however, they had always agreed that the rights of labor were the most pressing civil liberties concerns.

In the spring of 1937, changing circumstances called for a reevaluation of the organization’s underlying goals. The CIO’s new tactics were not obviously about speech or expression. Nor was the ACLU board’s endorsement of the Wagner Act or the NLRB. And

14 J.C. Pinkney to Robert La Follette, 2 February 1937, La Follette Committee Papers, 50.25, box 85. An “old war horse independent Democrat” who claimed to been a working man and to have known both Gompers and La Follette’s father well wrote: “I sincerely appeal to you and your honorable committee and especially in view of the present insurrection and plain anarchy we are now viewing, that you should investigate the Labor unions activities and inform the Citizens of our Country the true picture of all sides, turning back the pages and delving into action for the past twenty years.” George Porter to Robert La Follette, Jr., 5 February 1937, La Follette Committee Papers, 50.25, box 85. See also John J. White to Robert Wohlforth, 25 February 1937, La Follette Committee Papers, 50.25, box 86 (impugning both the Committee and unions) and W. L. Jones to Robert La Follette, 23 June 1927, La Follette Committee Papers, 50.25, box 86. One letter suggested that the committee should investigate Roosevelt for his court-packing plan. J. D. Fidler to Robert La Follette, Jr., 25 February 1937, La Follette Committee Papers, 50.25, box 85.

15 During the Little Steel Strike, the Chicago police opened fire on unarmed demonstrators, killing ten of them. Even this Memorial Day massacre, however, failed to generate support for the CIO.
increasingly, the mainstream press and the ACLU’s own members—many of whom had recently joined—were critical of the organization’s identification with the labor cause.

In a March 1937 statement, the ACLU Board of Directors took a first cut at clarifying its position. “So many friends and critics have recently raised questions as to the purposes of the American Civil Liberties Union in relation to current issues,” it began, “that we desire to make it clear beyond debate that the Union has no purpose to serve other than the maintenance of democratic rights.” The ACLU, the statement explained, was a “united front” of people who agreed only on the defense of civil rights. Its only commitment was to “protect orderly and peaceful progress through the exercise of those civil rights guaranteed in the Constitution.” The board reiterated the organization’s longstanding claim to political neutrality, but this time, it also professed to have no “economic direction” or connection with any “economic movement.”

The latter claim was both disingenuous and novel. ACLU annual reports had always proclaimed the organization’s allegiance to labor; indeed, defending labor’s right to organize had been the reason for its coming into existence. Its entire understanding of civil liberties had derived from a commitment to the rights of labor to picket and strike. In the 1937 statement, some of the old flavor was retained. The board assumed, for example, that the Bill of Rights was “originally intended . . . to cover all forms of agitation and propaganda not associated with acts of violence.” The old “right of agitation” appeared alongside the “guarantees of personal liberty set forth in the Bill of Rights.” But the emphasis was different. In lieu of substantive results, the Board invoked the “maintenance of democratic processes.”

As in earlier statements, the board justified the disproportionate representation of “radicals” in the ACLU leadership as a function of the reluctance of conservatives to “take a

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16 Statement on Current Issues of Civil Rights by the Board of Directors, March 1937, ACLU Papers, reel 142, vol. 969.
stand.”

For the time being, the ACLU was comfortable resting on the assumption, still reasonable in 1937, “that an inclusive organization is bound to number among its active members those who have a radical economic outlook.” Still, the board was unusually clear about its eagerness for broader support. It promised not only to “welcome the more active cooperation” of individuals with differing economic views, but to “so reorganize its personnel as to put such persons into positions of official responsibility.” It backed up its claim by reference to its willingness to “defend those who do not espouse progressive causes.” It emphasized that it would even protect, “if occasion required, as it does not, the rights of non-union workers.”

The board’s general policy statement did not, however, put the matter to rest. While much of the organization could agree about abstract commitments, conflict quickly arose over the application of those principles to the specific case of the sit-down strike, much as it had when the NCLB had considered defending the IWW’s use of “sabotage” two decades earlier. A proposed statement on “So-Called Sit-Down and Stay-In Strikes” opened by acknowledging the sharp divide on the issue among advocates of civil liberties and stating the case for both sides. Whereas some people considered such strikes to be clear cases of trespass, it explained, others asserted that workers have a property interest in their jobs. The board conveyed the position of labor advocates—naïve in hindsight, but a mark of the dramatic shift in labor’s opinion of the federal judiciary—that soon the courts might recognize sit-down strikes as appropriate and lawful under certain circumstances.

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17 That excuse would not hold up for long: in just a few months, Grenville Clark would convince the ABA to take up the civil liberties cause. See Chapter 5.
18 “Proposed Statement on So-Called Sit-Down and Stay-In Strikes Submitted to the National Committee of the American Civil Liberties Union by a Subcommittee Appointed by the Board of Directors,” March 1937, ACLU Papers, reel 142, vol. 970.
19 The statement made a slightly stronger case for protection under the rubric of civil liberties of the occupation of public relief offices or legislative halls by the unemployed.
20 As late as August 1937, Maurice Sugar wrote to Homer Martin: “It has been amply demonstrated that with sufficient power on the industrial field reflecting itself in the political consciousness of the judiciary, judges are
tactic allowed a minority of workers “to deny rights to a majority” and, in certain industries, to “cripple service essential to a whole community.” The ACLU, the statement concluded, would not take a position as between these two views other than to discourage excessive force in making arrests. The chief concern of the organization in the field of industrial relations was to “keep open the processes of discussion and negotiation as against coercion and violence.” Such, said the board, was “the heart of the civil liberties doctrine.”

The board’s decision not to take a firm stand on the sit-down strike, intended to be diplomatic, pleased no one. By failing to follow Congress and the press in condemning the tactic outright, the board alienated its more conservative members. For refusing to endorse labor’s most powerful weapon, it was attacked just as vigorously from the left. Both of the ACLU’s attorneys wrote to complain, though for different reasons. Morris Ernst wanted the Board to draw a distinction between “personal and social property.” Though he had long been the ACLU’s most vigorous defender of “personal rights” on such issues as obscenity and birth control, he had been thoroughly won over by the New Deal. Notably, he was not suggesting that workers had a civil liberty interest in sharing the wealth of their employers; he was arguing that economic equality had nothing to do with “civil liberties” at all. Arthur Garfield Hays, conversely, was concerned about labor’s new strategy. He acknowledged that the sit-down was an important and effective tool, and he was personally inclined to celebrate “the splendid result that was accomplished in Michigan.” Like Ernst, he felt that his sympathy for labor had no place in the ACLU. Hays, however, went one step further. He worried that the sit-down strike

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21 Morris Ernst to Roger Baldwin, 16 March 1936, ACLU Papers, reel 142, vol. 970.
22 Arthur Garfield Hays to ACLU, 19 March 1937, ACLU Papers, reel 142, vol. 970. He was little concerned with the property rights of the employer and admitted that he could not “get excited at peaceful violation of the law on the part of unionists where there is such a continual violation by the other side.”
might undermine “the right of non-union men to work”—an extraordinary and unexpected concern for a labor sympathizer who had so often proven willing to provoke his own arrest in defending the right to strike.  

For both lawyers, the sit-down strike involved more than the expression of opinion, and unlike the ordinary strike, it was not a tactic that the organization could reasonably defend as integral to freedom of speech.

These criticisms were sufficiently pervasive within the ACLU to prompt the board to submit the matter to the National Committee for an advisory referendum. The results revealed a deep division within the ACLU and prompted several threats of resignation. John Codman, for many years the most conservative voice on the National Committee, thought the issue was simple: “If employees are idle or do work unsatisfactory to the management and are therefore ordered to leave, they are trespassing if they do not do so.” There was no such thing as a property right in one’s job in the absence of an employment contract that so provided. Similarly resolute statements came from Edward Tittman, an Arizona attorney whose disagreements with the Board’s labor policies would unfold in an increasingly hostile series of letters over the coming months, culminating in his resignation, and William Pickens, an NAACP field secretary and columnist for the Associated Negro Press, who thought that sit-downs would lead to revolution and dictatorship.

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24 Roger Baldwin to Members of the National Committee, 30 March 1937, ACLU Papers, reel 142, vol. 970.
25 E.g., Clough Turrill Burnett to ACLU Board, 7 April 1937, ACLU Papers, reel 142, vol. 970 (“If you’re endorsing sit-downs, delete me from the list.”); Edward D. Tittman to Roger Baldwin, 3 April 1937, ACLU Papers, reel 142, vol. 970 (“Unless the Union comes out in opposition to the sit down strike I shall feel compelled to resign from its national committee.”).
26 John Codman to Roger Baldwin, 2 April 1937, ACLU Papers, reel 142, vol. 970.
27 Edward D. Tittman to Roger Baldwin, 3 April 1937, ACLU Papers, reel 142, vol. 970. “The Union, if it desires to retain the support of persons who believe in orderly methods of reform, must come out in support of court rule over mob rule and must take a stand against the sit down strike.”
At the other end of the spectrum, A. J. Muste called the Board’s statement “inadequate, weak [and] timorous” and thought it “so seriously understate[d] the arguments for the sit-down strike” as to promote the attitude of AFL President William Green and the Liberty League. He wanted the ACLU to emphasize that the sit-down was a remedy for persistent denial by employers of the right to strike. Elizabeth Gurley Flynn was bewildered that the ACLU leadership would credit the crippling of essential services as a legitimate concern when they had so often refuted it in the past. Frederic Howe recognized that sit-downs were technically unlawful, but he emphasized the vast range of daily practice in which Americans routinely ignored the law. Ethically, he considered the sit-down to be an important assertion of “the right to something more than a daily wage in connection with a job,” and he predicted that it would soon be a legal right as well. Howe believed what Baldwin had long proclaimed: the sit-down would be successful because it was a show of power. “Pragmatically,” he reflected, “things survive in conflicts of this sort that are socially effective. And pragmatically, anything that is effective is to be approved.”

In the face of this barrage, the board elected to maintain its non-committal course. The statement it ultimately circulated was almost identical to the draft. Baldwin’s views on the issue were influenced by Ernst’s. He told his left critics that their arguments were grounded in labor policy rather than civil liberties and could not be espoused by the ACLU. On the other hand, he refused to condemn seizure of property, which he insisted was none of the ACLU’s

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30 Elizabeth Gurley Flynn to ACLU, 11 April 1937, ACLU Papers, reel 142, vol. 970 (“Did we see more clearly in our younger days in the A.C.L.U.?“).
32 “ACLU Statement on So-Called Sit-Down and Stay-In Strikes,” April 1937, ACLU Papers, reel 142, vol. 970.
33 E.g., Roger Baldwin to A. J. Muste, 12 April 1937, ACLU Papers, reel 142, vol. 970.
Perhaps the most telling response to the referendum was that of Herbert S. Bigelow, who personally thought the sit-down justifiable but considered the issue largely moot. “With the Labor Relations Act in force,” he said, “there should be little provocation for sit-down strikes.”

Disagreement about sit-down strikes was only the beginning of a more general fracturing of allegiance within the ACLU. Controversy erupted over every pressing issue in the rapidly changing world of labor relations. The ACLU consistently professed neutrality, and yet it leaned heavily toward labor in its assessment of conditions, prompting criticism from its more cautious and moderate members who resented “the Union’s partiality toward union labor.” For example, in the summer of 1937 it issued a statement on violence in strikes in which it claimed that “the Civil Liberties Union does not take sides in the industrial struggle” and would act against violence by organized labor “on precisely the same basis as violence by its opponents.” It nonetheless presented its conclusion that allegations of union violence were largely fabricated.

The most fundamental division in the board pertained to the NLRB itself. Rather than quieting discussion, the Supreme Court’s decision upholding the Wagner Act had only

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34 Roger Baldwin to Edward D. Tittman, ACLU Papers, reel 142, vol. 970 (“The American Civil Liberties Union will take no position on the question of property rights which are not properly within the field of civil liberties, leaving such matters to be determined by the courts.”).
35 Herbert S. Bigelow to Roger Baldwin, 15 May 1937, ACLU Papers, reel 142, vol. 970. A year later, the Board revisited the issue of sit-down strikes, but after a long discussion and a request for revisions by its drafters, it made few significant changes. Committee on Labor’s Rights, “Proposed Statement on Sit-Down Strikes,” 9 February 1938, ACLU Papers, reel 156, vol. 1080; Board Minutes, 14 February 1938, ACLU Papers, reel 156, vol. 1080. The ACLU stated that it was obliged to regard the sit-down as a trespass (a substitution in the revised version for “illegal”) barring a decision to the contrary by the courts. On the other hand, it protested the issuance of injunctions to employers who came into court with unclean hands. It also opposed laws specifically criminalizing sit-down strikes, arguing that existing penalties for trespass were adequate and harsher measures would only encourage violence. Finally, it defended the right of the unemployed to petition at relief offices and before legislatures in an orderly fashion.
36 John Codman to Roger Baldwin, 17 August 1938, ACLU Papers, reel 156, vol. 1078. Baldwin tried to appease conservative critics by promising to consider their views. See, e.g., Roger Baldwin to John Codman, 7 July 1937, ACLU Papers, reel 142, vol. 969 (“I am going to present your questions and my answers to the Board because I think some of us need just this kind of caution. Keep after us!”).
exacerbated public and congressional complaints against the NLRB. Constitutional legitimacy emboldened the Board, and within a few months, it had more than tripled its caseload. Almost always, it ruled against employers. When congressional opponents sought to water down the act by amendment, ACLU members and sympathizers called for a statement of the Union’s position on efforts to rein in the NLRB. The organization complied by waffling. It noted that increased labor activity and the prevalence of the sit-down strike had prompted proposals for compulsory incorporation of unions, the forced disclosure of union accounting practices, the requirement of public notice before strikes, and the criminalization of occupying company property. The ACLU opposed the new measures not on substantive grounds, but because they had not been sufficiently studied.38

Taking a frank position on the Wagner Act amendments became unavoidable over the coming months. In the summer of 1937, Republican Senator Arthur Vandenburg suggested provisions that would have restrained unions and introduced new employer rights. Many similar proposals followed, fueled by an increasingly bitter struggle between the AFL and the CIO.39 The AFL felt that NLRB policy favored the CIO, and at its October convention, it unanimously passed a resolution calling for the collection of evidence regarding the NLRB’s improper

38 “Statement by the American Civil Liberties Union in Regard to Legislation for Control of Trade Unions and Trade-Union Activities,” April 1937, ACLU Papers, reel 142, vol. 969.
39 Melvyn Dubofsky and Warren Van Tine, John L. Lewis: A Biography (New York: Quadrangle Books, 1977), 307–09. The AFL gained considerably in strength and membership from the NLRA, but NLRB policy favored CIO unions. For example, when employers signed closed shop agreements with AFL unions, the NLRB would scrutinize the election for signs of employer influence; in open elections, the CIO typically beat out AFL unions by significant margins. The NLRB favored exclusive majority representation and was usually unwilling to certify small AFL crafts as separate bargaining units. Under the “Globe Doctrine” (which took its name from a case involving the Globe Machine and Stamping Company), the NLRB would designate a separate craft unit only when all other factors in a case were “evenly balanced.” James A. Gross, The Making of the National Labor Relations Board: A Study in Economics, Politics, and the Law, 2 vols. (Albany: State University of New York Press, 19741981), vol. 1, 45. See also Tomlins, State and the Unions, 165–66. As early as April 1937, the AFL convinced Senator David Walsh to sponsor an amendment addressing this concern. The ACLU’s labor contingent strongly favored the CIO. E.g., Nathan Greene, “Draft of Report of the Committee on Civil Rights in Labor Relations on Proposed Amendments to National Labor Relations Act,” 31 December 1938, ACLU Papers, reel 156, vol. 1078.
administration of the NLRA and recommending a slate of amendments to the Act. In 1938, the AFL leadership allied with business to oppose the NLRB—going so far as to collaborate with former Liberty League attorneys who were representing the National Association of Manufacturers. Although these congressional efforts to curb the NLRB were unsuccessful, they were reflective of growing public and political opposition to the administration of the act.

Many of the efforts to counteract the increased power of trade unions focused on bringing labor under greater state control. In January 1938, the ACLU came out squarely in opposition to proposed legislation providing for compulsory incorporation of trade unions and compulsory publication of financial statements. This was precisely the sort of strangulation through regulation that Baldwin had worried about when the Wagner Act was first debated. As a result, the ACLU’s articulation of its position was both predictable and less controversial than others then under consideration. The report, formulated by a newly organized Committee on Labor’s Rights, argued that the provisions were discriminatory because they imposed burdens on unions that were not applicable to trade associations and other voluntary associations. The differential treatment, it stressed, was not justified by any social evil particular to labor unions. On the contrary, the La Follette Committee had gathered extensive evidence that industrial racketeering was also rampant. Compulsory incorporation would transform the right to organize into a licensed privilege, revocable at will. Moreover, it would enable a worker hostile to the union

40 In December, Republican Senator Edward Burke called for an investigation of the NLRB by the Senate judiciary committee, citing complaints by the AFL. Gross, National Labor Relations Board, vol. 1, 43–45.
41 Most unions at the time were voluntary unincorporated associations. Employers complained that while industrial corporations were subject to lawsuits for breach of contract and other violation, unions were free to break contracts with impunity. ACLU materials explained that the proffered justification was based on an outmoded common law rule according to which an unincorporated association could not be sued as an artificial person unless all of its members were joined, typically an impossible task. The Coronado Coal case, however, subjected unions to suit in the federal courts through their officers and allowed the attachment of their funds for payment of damages. The state courts had largely adopted this rule, and state statutes commonly made officers liable for money damages as well. Moreover, the Danbury Hatters case, Loewe v. Lawlor, 208 U.S. 27 (1908), made union members who participated in an illegal boycott individually liable. Harvey J. Bresler, “Proposed Legislative Control of Labor Unions,” distributed to ACLU Committee on Labor’s Rights on 2 February 1938, ACLU Papers, reel 156, vol. 1078.
(and perhaps hired by the employer for the purpose) to tie the union up in court by citing small violations of the union by-laws.\textsuperscript{42} According to the statement, the true purpose for the proposed amendments was not protection of the public welfare, but restricting legitimate trade union growth.\textsuperscript{43}

The flip side, of course, was that insofar as the proposed amendments were really about labor policy, a growing contingent of the ACLU thought the organization had no business interfering. One member told Baldwin that a substantial majority of the organization’s members were using constitutional liberties instrumentally to advance the radical cause. “In fact,” he complained, “many of them have no use for the Constitution or any other document that places a curb upon excesses.”\textsuperscript{44} Others argued more insistently that the ACLU should be supporting amendments to temper the administrative power of the NLRB, on the one hand, and to protect the constitutional rights of employers and non-union employees, on the other.\textsuperscript{45} Both strains flowed directly out of the ACLU’s prior language, if it not its substantive policy.\textsuperscript{46} Like other advocates of administrative law reform, the members of the ACLU worried about unchecked administrative discretion, even while they believed that administrative expansion had been necessary “to meet the demands of a new era of unparalleled change and of increasing

\textsuperscript{42} Ibid.
\textsuperscript{43} Committee Report on Legislative Proposals for Trade Union Control, 20 January 1938, ACLU Papers, reel 156, vol. 1078.
\textsuperscript{44} Frederick B. Wright to Roger Baldwin, 3 January 1938, ACLU Papers, reel 156, vol. 1078.
\textsuperscript{45} For example, William Fennell supported an amendment to separate the judicial and prosecutorial functions in the resolution of labor disputes by replacing trial examiners with referees appointed by the federal courts. William Fennell, “Proposed Amendments to the Wagner Act,” 14 May 1938, ACLU Papers, reel 156, vol. 1078 (presenting amendments based on Senator Vandenberg’s bill).
\textsuperscript{46} The first class of amendments was a variation of a broader indictment of unchecked administrative authority during the New Deal. Many ACLU members were sympathetic to proposals by the ABA and other organizations for the reform of administrative procedure. Like the advocates of administrative law reform, they understood that the exigencies of the First World War had required the proliferation of administrative agencies to manage a complicated economy, and that much of the resulting bureaucracy had persisted and expanded in the interwar period. George Farnum (Former Assistant Attorney General of the United States), “America Confronts Bureaucracy,” Address before the ABA Annual Meeting, 26 August 1936, 2–3.
complexity in business and society.” The call to administer the new machinery in a manner consistent with the framework of American “constitutional democracy” hardly seemed objectionable from a civil liberties standpoint. Indeed, at the very moment the ACLU was opposing legislation to curb fascist activity in the United States because it raised the specter of improper administrative enforcement against radicals and religious minorities. There was little principled basis for distinguishing the NLRB from the Post Office Department or the Federal Radio Commission, whose censorship the ACLU routinely opposed. The ACLU’s labor sympathizers sidestepped this problem by claiming that the NLRB, unlike those other entities, had operated responsibly and within the bounds of constitutional law. A vocal minority of the organization’s membership found that response unconvincing.

Meanwhile, a growing number of ACLU members, even those who personally supported labor, were persuaded that the Wagner Act curtailed the civil liberties of non-union members. The first and, from the perspective of past ACLU practice, less troublesome such example was opposition to the closed shop. One member suggested to Morris Ernst that the ACLU’s advocacy of the rights of CIO picketers in New Jersey be followed by a “similar effort on behalf of those who through no fault of their own—except in the refusal to contribute to an organization of which they disapprove—are denied the right to work in the jobs they have held for so many years?” The Committee dutifully drafted a statement in defense of the closed shop, which it

47 Arthur T. Vanderbilt, One Hundred Years of Administrative Law (New York: New York University Press, 1937), 123; O. R. McGuire to Jerome Britchey, 14 December 1939, ACLU Papers, reel 170, vol. 2081 (Discussing Logan-Walter Bill and suggesting that “the enactment into law of the Administrative Law Bill is absolutely necessary for the protection of the civil liberties of the American people” and the ACLU “should lend its vigorous support for the enactment of this bill”); Jerome Britchey to O. R. McGuire, 18 December 1939, ACLU Papers, reel 170, vol. 2081 (“We ourselves are interested in the problem and shall study all the material on the matter with great care.”).
48 Farnum, “America Confronts Bureaucracy,” 3.
49 Memorandum of the Special Committee to consider Legislation To Curb Fascist Activities in the United States, 21 January 1938, ACLU Papers, reel 156, vol. 1080.
50 William D. Scholle to Morris Ernst, 20 January 1938, ACLU Papers, reel 156, vol. 1078. ACLU secretary Lucille Milner forwarded the letter to the chair of the committee on labor’s rights, noting that it raised new issues for the
circulated for comment.  R. W. Riis, the son of muckraker Jacob Riis and a longtime member of the ACLU, told Baldwin: “For the life of me I cannot see why it is any more a civil liberty to join the union than to refuse to join the union.” William Fennell, the lone conservative member of the Committee on Labor’s Rights (tellingly, at Fennell’s request the board eventually voted to change the committee’s name to the Committee on Civil Rights in Labor Relations), echoed Riis’s sentiments. The ACLU had consistently argued that discharge of an employee for membership in a union was a violation of civil liberties and had endorsed the Norris-La Guardia Act, outlawing the yellow-dog contract, on precisely that basis. He felt that the ACLU was bound to defend with equal vigor the rights of employees not to join a union.

Writing at a time when the ACLU’s defense of content- and value-neutral rights had become axiomatic, Fennell’s argument fundamentally misconstrued the organization’s earlier justification for its indictment of yellow-dog contracts. The ACLU had never claimed that an employee’s right to join a union was a matter of personal autonomy. Nor did it suggest that irrespective of contractual language to the contrary, the employee’s choice could not be curtailed because it was derivative of the constitutional right of free expression. Such a theory—that judicial enforcement of a private contract providing for the abrogation of one party’s constitutional rights was unconstitutional state action—would have required an expansive

ACLU and that Baldwin thought it should be discussed at the committee’s next meeting. Lucile Milner to Nathan Greene, 25 January 1938, ACLU Papers, reel 156, vol. 1078. See also William Fennel to Roger Baldwin, 7 February 1938, ACLU Papers, reel 156, vol. 1078 (“I have thought quite seriously about the question raised by the discharge of employees in a closed shop for failure to join the union which we discussed briefly last night. It seems to me that an issue of civil liberties is raised there, and I think the Committee on Labor’s Rights should make some statement about it.”).

Report to the Board of Directors by the Committee on Labor’s Rights, 22 June 1938, ACLU Papers, reel 156, vol. 1072.

Born in 1894, Riis served in the United States Naval Reserves and was associate editor for the American Legion Weekly in 1920 (and for Collier’s Weekly in 1921 and 1922), before going into publicity work. He joined the ACLU in 1926. Obituary, Time, 2 February 1952.


ACLU Board Minutes, 11 July 1938, ACLU Papers, reel 156, vol. 1072.

construction of state action rarely endorsed and almost never effectuated.\textsuperscript{56} In the early 1930s, the ACLU had unselfconsciously assumed that the right of labor to bargain collectively was a substantive right of its own, whether constitutional or otherwise. Indeed, it had always been the most important of rights to which the ACLU was committed. In place of the right to unionize—the ACLU’s “right of agitation”—Fennell was (re-)introducing a right of autonomy and individual conscience that had more in common with the proffered right of conscientious objection during World War I than with the rights of labor championed by the ACLU thereafter.

Rather than address this misunderstanding, the ACLU avoided it. As it had in the case of the sit-down strike, it summarized competing points of view on the closed shop. It then concluded without explanation that “the American Civil Liberties Union sees no issue of civil liberty in the claims of non-union workers against a closed shop agreement except where they may be excluded from union membership by reason of any arbitrary or unreasonable restriction on membership,” such as racial discrimination. In such cases, it promised, the organization would “defend the[] right to continued employment by recourse to the courts.”\textsuperscript{57}

The ACLU’s increasing ambivalence toward a radical theory of rights was the source of its trouble in a final class of arguments about civil liberties and the labor movement: the controversy over employer free speech. The issue first attracted the organization’s notice in the fall of 1937, when the NLRB’s purported interference with the press in two investigations caused a media uproar. In the first case, a local newspaper printed an editorial speculating that the town’s largest industry, which was under investigation for unfair labor practices by the NLRB, would be forced to fire workers if the employees decided to unionize. The vice-president of the company was a director and substantial stockholder in the newspaper, and the author of the

\textsuperscript{56} The notable exception is \textit{Shelley v. Kraemer}, 334 U.S. 1 (1948).

\textsuperscript{57} “Resolution in Regard to Closed Shop Recommended by the Committee on Labor’s Rights and Adopted by the Board of Directors at the Meeting on June 27, 1938,” ACLU Papers, reel 156, vol. 1080.
editorial was the wife of a company engineer. The NLRB sought to introduce evidence that the company had paid for or otherwise influenced the newspaper to publish an indictment of the union.58 In the second case, the NLRB subpoenaed the editor of *Mill and Factory* to testify about an article in its October 1937 issue. The article had criticized the board’s investigation of the Weirton Steel Company, and the Board was investigating whether Weirton had encouraged or written the article.59

Newspapers and politicians were quick to condemn the NLRB’s new practice, which they claimed threatened the autonomy of the press.60 Republican Senator H. Styles Bridges called the NLRB’s subpoena of the *Mill and Factory* editor “one of the most open attacks on the freedom of the press that we’ve ever seen.”61 The *New York World Telegram*, noting that “bureaucracy at best is never too popular in this country,” predicted that the “high-handed performance” of the NLRB would fan popular outrage against the NLRA.62 ACLU members began asking for a statement of the organization’s position on the controversy.63

Nathan Greene, co-author with Felix Frankfurter of *The Labor Injunction*, was chair of the Committee on Labor’s Rights, and he drafted a response to the charges. A staunch labor advocate, he sprang unflinchingly to the defense of the NLRB. For Greene, the only question raised by the incident was “the propriety of obtaining evidence as to an employer’s unlawful course of conduct from the editor of a newspaper”—specifically, whether compelling a newspaper editor to disclose information in such an inquiry was a restriction of freedom of press. His argument centered on a journalist’s privilege, denied in most states, to withhold confidential

communications relevant to a pending inquiry before a legal tribunal. He accepted the Board’s explanation that it was concerned not with the right to write the article, but whether the employers had interfered with the rights of their employees.64

An important prerequisite of Greene’s argument was the assumption that employers themselves could be prevented from expressing anti-union views. Of this fact, Greene had no doubt. Citing the NLRB’s October decision in *Mansfield Mills*,65 he approved the Board’s conclusion that distribution by an employer of anti-union statements “constitutes an attempt to circumvent the act by interfering with his employees’ rights unprejudiced by the employer to make up their own minds regarding self-organization.” In Greene’s view, preventing an employer’s distribution of anti-union propaganda was not the sort of violation of free speech with which the ACLU should be concerned. “We defend free speech as a deliberative force and as an application of the power of reason intended to touch off, in Brandeis’s phrase, ‘thought, hope and imagination,’” he insisted. Anti-union propaganda, by contrast, amounted to an order rather than an argument, and the ACLU would be “deluded” to protect it. He concluded by insisting that the ACLU would “not defend speech when it is but the velvet glove that conceals the iron fist”—an unusual qualification for an organization founded to protect radicals, as the press soon pointed out.66

Baldwin was convinced by Greene’s disposition of the matter. In fact, he found it so persuasive that he secured the board’s approval to redraft it as a letter, send it to the chair of the

66 See, e.g., Roger Baldwin to New York World-Telegram, 30 December 1937, ACLU Papers, reel 143, vol. 978. Baldwin backtracked from the broad statement: “Standing alone we certainly do not subscribe to any such doctrine. Taken in its context in a lawyer’s analysis of the cases, it is clear that what is meant is that we do not defend free speech when used by an employer to intimidate his employees from joining a union.”
NLRB, and issue it as a press release.\textsuperscript{67} The letter reported that the ACLU had evaluated the widespread criticism of the NLRB and had concluded that it was unjustified. Past experience had taught the ACLU to be wary when the issue of freedom of press was raised; it had been invoked as an excuse for resistance to the labor organization of newspaper staff (a case argued successfully by Morris Ernst on behalf of the Newspaper Guild), to cite a recent example. After careful study of the situation, the ACLU considered the NLRB “entirely justified in determining whether an employer has purchased publications used among his employees to say what he has no right under the law to say himself.”

After sending the letter, Baldwin circulated it to the National Committee.\textsuperscript{68} If he was expecting consensus in favor of the Board’s position, however, he was sorely disappointed. Almost immediately, a flood of critical letters poured in.\textsuperscript{69} Amos Pinchot told Baldwin that he “disagree[d] profoundly” with the letter.\textsuperscript{70} Whatever the ostensive target of the investigation and however noble the NLRB’s intentions, he insisted, the ability to order an editor to appear before the board and open its files to inspection was bound to intimidate the press. And he felt compelled to register a vigorous protest. “At this time when the doctrine that the end justifies the means is decimating the ranks of American liberals,” he cautioned, “the Civil Liberties Union should be extremely careful not to abandon a vital principle of liberty.” John Codman expressed similar concerns. As a general matter, Codman objected to the ACLU’s recent pronouncements that the establishment of labor’s rights under the NLRA had been the greatest civil liberties gain

\textsuperscript{68} Roger Baldwin to National Committee, 20 December 1937, ACLU Papers, reel 143, vol. 978.
\textsuperscript{69} Many members, of course, supported the board’s position. \textit{E.g.}, H. R. Mussey to Roger Baldwin, 28 December 1937, ACLU papers, reel 143, vol. 978.
\textsuperscript{70} Amos Pinchot to Roger Baldwin, 21 December 1937, ACLU Papers, reel 143, vol. 978.
in years. He was not sure, he said, that the Wagner Act itself was not a violation of civil liberties.71

The Board initially responded to members’ reservations by emphasizing that the investigations targeted employers only, and that newspapers were not at risk of direct sanction.72 But the assumption that the press could properly be questioned regarding the unlawful activity of employers begged the more important question: whether the NLRB could constitutionally prohibit employers from expressing their opinion on unions in the first place.73 For Baldwin, this was a matter of “sound public policy”; the NLRB could not guarantee the rights of labor in the face of “employer coercion.”74 Baldwin equated employer distribution of anti-union literature with employer efforts to influence employees’ votes in public elections. In the past, the ACLU had supported legislation prohibiting employers from circulating political advice in pay envelopes; attempts to intervene in union elections seemed to Baldwin theoretically indistinguishable.75

Many ACLU members disagreed. Arthur Garfield Hays urged the board to “fight against interpretations of the Wagner Act which would prevent an employer from expressing his opinion of labor unionism or of anything else.”76 Amos Pinchot thought the board’s attitude “short-

71 John Codman to ACLU, 28 December 1937, ACLU Papers, reel 143, vol. 978. Baldwin claimed that his celebration of the NLRA referred only to the reduction in violence and substitution of legal procedure since the Supreme Court decision. Roger Baldwin to John Codman, ACLU Papers, 31 December 1937, reel 143, vol. 978.
72 Nathan Greene to Pittsburgh Press, 28 December 1937, ACLU Papers, reel 143, vol. 978 (“No proceedings were taken against an editor or a newspaper, either criminal or civil. No attempt was made to interfere in the slightest with what an editor had written or intended to write. The defendants in both cases were not newspapers or newspaper editors but industrial companies.”).
73 Amos Pinchot to Roger Baldwin, 27 December 1938, ACLU Papers, reel 143, vol. 978.
74 Roger Baldwin to T. Henry Walnut, 23 December 1937, ACLU Papers, reel 143, vol. 978. Baldwin eventually conceded that the practice of issuing subpoenas, whether legal or not, was bad policy. He noted that the NLRB itself had considered the criticism seriously and had issued a confidential order to examiners not to subpoena editors without prior approval from Washington. Roger Baldwin to Lloyd Garrison, 19 January 1938, ACLU Papers, reel 160, vol. 2002.
76 Hays had signed the letter to the NLRB because he believed that newspaper editors could be required to testify about unlawful conduct associated with the preparation of an article. On closer examination, however, he was not so
sighted” and predicted that it would “land the Civil Liberties Union in a lot of trouble.” It was his opinion that the ACLU should be resisting “any kind of law, or any kind of procedure, that breaks down, or in any way tends to break down, the guarantees of free speech and free press.”

Another member, Philadelphia attorney T. Henry Walnut, recounted his defense of labor’s rights during the soft coal strike of 1922. When operators had complained that union speech was unfair and unjustified, he had always told them their remedy was to denounce the unions with equivalent expressive force. That, he told Baldwin, is what he “considered to be the American conception of freedom of speech.” To Walnut, freedom of the press was an ancillary issue. The heart of the matter was the right of any individual, including employers, to express criticism of existing conditions. “Both you and I have lived long enough to see the wheel turn,” he cautioned Baldwin—and in the future, employers were bound to reclaim control of state power. Once they did, the ACLU would be best served by a consistent record of the rigorous protection of all opinions, no matter how unpopular or distasteful.

Faced with a barrage of comments like these, the board agreed to address the issue of employer free speech head on. In January, it requested an advisory vote on two memoranda: a “proposed statement on employers’ rights in industrial conflict,” together with a minority report by R. W. Riis. The majority report reiterated Greene’s earlier arguments. It noted that
the ACLU’s defense of free speech was not absolute, and it introduced a long list of examples that the organization would regard as properly punishable. Given the coercive nature of the employer-employee relationship, it concluded that the regulation of employers’ anti-union speech was “sound public policy.” Notably, the majority report sought to assuage fears of NLRB censorship by stressing the inability of the Board to act without judicial approval. It emphasized that no employer could be punished for violating a mere order of the Board; the United States Courts of Appeals had the power to enforce, modify, or set aside any order of the NLRB. Consequently, remedies at law provided “ample protection” for employers.

Riis submitted the minority report because he felt that the board had abandoned its motivating principles. In his assessment, those who approved the NLRB’s suppression of employer opinion did so for fear that “pro-union utterances may not be able to get themselves accepted in the free competition of the market.” In his report, he articulated the true stakes of the controversy, and he called the board to task for its attempt to avoid the crucial decision that it faced. “The desire to restrict the employer’s potential anti-union speech stems from a desire to bring about a more equitable propaganda-balance between employer and employee,” he explained, anticipating one of the central questions in scholarly debate over free speech. In

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82 The report listed criminal libel, the encouragement of runs on banks, clearly obscene language, or the encouragement of lotteries. Morris Ernst objected vehemently to these examples. Morris Ernst to Roger Baldwin, 4 February 1938, ACLU Papers, reel 157, vol. 1081.
84 To Riis, any effort to rig the outcome of free and open debate was a betrayal of the civil liberties cause. Even if it “delay[ed] the millennium to permit the employer to set forth his case,” the ACLU was obligated to maintain a neutral course; whitewashing the issue was bound eventually to backfire. R. W. Riis to Roger Baldwin, 7 January 1938, ACLU Papers, reel 160, vol. 2002.
85 Riis noted that his view was not shared by other members of the Committee on Labor’s Rights but had been expressed by many members of the organization. R. W. Riis, “Minority Report on the National Labor Relations Act and Free Speech,” 31 January 1938, ACLU Papers, reel 156, vol. 1078.
86 The question whether government should redress inequalities in the “marketplace of ideas” has troubled free speech theorists since World War I. See, e.g., Chafee, Introduction to Civil Liberty; Meiklejohn, Self-Governance; Fiss, Liberalism Divided; Cass R. Sunstein, Democracy and the Problem of Free Speech (New York: The Free Press, 1993); Graber, Transforming Free Speech.
Riis’s assessment, the pro-labor contingent of the ACLU was not really satisfied with neutrality, despite its claims to the contrary. It professed commitment to the marketplace of ideas, but it wanted to be sure that radical voices would be heard. And for Riis, “laudable and humane” as the board’s desire was, it was not a legitimate objective for an organization devoted to free speech. The ACLU, he insisted, “must not attempt to control speech, even in the interests of social betterment.”

The National Committee found Riis’s argument convincing. The committed leftists, of course, endorsed the majority statement. To Elizabeth Gurley Flynn, “coercion [was] the whole point, as opposed to free speech,” and it was naïve to advocate an abstract commitment to viewpoint neutrality when employers exercised such disproportionate power. In the same vein, A. F. Whitney, president of the Brotherhood of Railroad Trainmen, argued that the theoretical availability of a legal remedy for unlawful discharge could not counteract the real and immediate effects of losing one’s livelihood. But many members of the National Committee, including reliable labor advocates, questioned the propriety of suppressing employer speech under any circumstances. Morris Ernst, about to go to trial in *Hague v. CIO*, worried that the reasoning of the majority report would jeopardize the ACLU’s effort in Jersey City. Arthur Garfield Hays wanted a frank statement by the board “that we disapprove of any law which would prohibit the expression of opinion of any kind, at any time, by anyone or anywhere.” Playwright Elmer Rice was concerned that the board’s position sanctioned administrative censorship by the NLRB.

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87 Elizabeth Gurley Flynn, Postcard, 2 February 1938, ACLU Papers, reel 157, vol. 1081. Dorothy Kenyon also endorsed the majority statement. Dorothy Kenyon to ACLU, 9 February 1938, ACLU Papers, reel 157, vol. 1081. Whitney believed that an employer’s “power to deprive a man and his family of the means of living, has a peculiar power of coercion that does not exist in other forms of free speech.” He nonetheless acknowledged that a sufficiently vigorous labor movement could level the playing field and eventually render legal sanction for employer speech unnecessary. A. F. Whitney to Roger Baldwin, 7 February 1938, ACLU Papers, reel 157, vol. 1081. Morris Ernst to Roger Baldwin, 4 February 1938, ACLU Papers, reel 157, vol. 1081. He approved prohibitions of frank coercion and threats but thought employer opinion should be protected, particularly when coupled with clarification that employees could not be discharged if they choose to disregard their employer’s advice. Arthur Garfield Hays to ACLU, 5 February 1938, ACLU Papers, reel 157, vol. 1081.
He reminded the board of the ACLU’s “traditional policy” opposing any limitation on free speech by administrative action. As in the customs context, “the question of whether or not an individual in the exercise of his constitutional right to freedom of speech has been guilty of a violation of law should be determined by a judicial process.”\textsuperscript{91} Even those members who supported the majority report acknowledged a problem of appearances. Lloyd K. Garrison, dean of the University of Wisconsin Law School, emphasized that the freedom of workers to organize was a civil liberty in its own right; in a contest between two important values, the board’s resolution was a reasonable one. Nonetheless, Garrison thought the argument should come from the NLRB, not the ACLU, and he counseled against any statement at all.\textsuperscript{92}

In practice, however, ignoring the issue was no longer a practicable option. The circulation of the majority and minority reports had touched off a firestorm in the ACLU that would not be truly quieted until 1940, with the expulsion of Communists from the ACLU Board. In the meantime, a heated exchange of letters between two major players in that controversy—Harry Ward, longtime ACLU chair, and John Haynes Holmes, who replaced him in that capacity once the anti-Communist resolution was passed—captures the brewing tension within the ACLU’s leadership. Holmes thought that Riis’s statement was “magnificent, and unanswerable,” while the majority report was “the most specious document” the ACLU had ever produced. Accepting the board’s position would mean promoting fascism; it would destroy the ACLU and leave Holmes no choice except to resign.\textsuperscript{93} He asked Ward to convene a special meeting to address head-on the meaning of civil liberties in the field of labor. The Union, he

\textsuperscript{91} Letter from Elmer Rice, 4 February 1938, ACLU Papers, reel 156, vol. 1080.
\textsuperscript{92} Lloyd Garrison to Roger Baldwin, 7 February 1938, ACLU Papers, reel 157, vol. 1081. Garrison assumed that a judicial decision, once made, would put the matter to rest.
\textsuperscript{93} John Haynes Holmes to Roger Baldwin, 2 February 1938, ACLU Papers, reel 157, vol. 1081 (“The majority report proposes to isolate one group in the community, the employers of labor, and deny to them freedom of speech on the most important issues which concern their lives.”).
said, was “face to face with fundamentals.”

Like many members of the ACLU, Holmes supported the labor movement and belonged to organizations committed to protecting its rights. The ACLU, however, was about civil liberties, not the class struggle. Holmes worried that the organization’s detractors were correct to challenge its impartiality. Gradually, “almost without . . . realizing it,” the leadership of the ACLU had been seduced by its “real sympathy for labor’s cause,” he said. Rather than upholding the “basic universal right of every man to express his convictions,” the ACLU had become a “mere advocate[] of the rights of labor.”

Ward agreed to bring Holmes’s request to the board, but he flatly denied the premise of his argument. According to Ward, the true conflict was between free speech, on the hand, and a constitutionally protected right to organize on the other. Within the board, there was an “honest difference of opinion” as to where to strike the balance. By questioning the motives of those who would strike it differently, he warned, Holmes would only exacerbate the conflict within the organization. Holmes, of course, was not persuaded. He reaffirmed his belief that there were members of the board who believed in civil liberties only as a matter of tactics, not of principle. Free speech, for them, was a means to an end, and “if or when this end is achieved, they will drop civil liberties as promptly as they were dropped in Russia.” For the time being, Holmes was “not asking for any excommunications or purges,” let alone the “abrogation of free thought and speech inside our Board.” But he could not sanction the leftists’ instrumentalist approach. As for the proposed test of coercion, it was bad precedent, impossible to implement in

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95 Harry Ward to John Haynes Holmes, 10 February 1938, ACLU Papers, reel 156, vol. 1080.
97 He told Ward, “I would not for the world have the slightest misunderstanding come between you and me who have stood together on so many occasions in times of bitter feeling and utter confusion with perfect understanding and good will.” John Haynes Holmes to Harry Ward, 16 February 1938, ACLU Papers, reel 156, vol. 1080.
practice, and inconsistent with the ACLU’s commitment to protecting all speech short of violence.

Holmes was right to regard the cleavage within the board as a fundamental turning point. The ACLU had occasionally acted to restrict individual choice to enhance opportunities for dissenting expression. For example, it had advocated the mandatory allocation of radio airtime to political minorities, over the stated opposition of private radio stations. But the right of an employer to criticize unions was an unprecedented problem for the ACLU, because it involved the right of the establishment to uphold the status quo. In the 1920s, the federal government had almost exclusively targeted radical speech. State and local governments had sought to suppress such reactionary groups as the Ku Klux Klan and the Nazi party, but these episodes, contentious as they were at the time, did not raise the same fundamental challenge to the ACLU’s theory of free speech. After all, the rights of the KKK to rally in Catholic Boston or of the Nazi party to march in New Jersey were the rights of disfavored minorities to make their viewpoints, however repugnant, known. The ACLU acknowledged as much in its statement defending free speech for Nazis: “Those who defend the right of free speech defend it because they believe that few more effective weapons against oppression exist. . . . Defense of free speech today means one of two things—either defense of minorities or defense of the working class.” In 1937, a full forty percent of the cases handled by the ACLU involved infringements on the rights of labor, usually the CIO.

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98 The most analogous issue was the ACLU’s position on federal radio censorship, and in particular, licensing rules discouraging racial and religious animus in broadcasting by local stations. These stations, in many cases, were espousing hatred of racial minorities in localities where they were most vulnerable.
100 “Communist Cases Declined in 1937,” Civil Liberties Quarterly (March 1938), 2. In a letter to the editor in the Hague case, an ACLU attorney put the figure at 80 percent.
Before the New Deal, there was no realistic possibility that the state, with the approval of
the courts, would operate to curtail the expressive freedom of the capitalists—which, in part, was
what made the free speech strategy so appealing. The ACLU could pursue its “right of
agitation”—the pre-constitutional right of an oppressed class to disrupt the prevailing political
and economic system—while simultaneously appealing both to progressive notions of progress
through democratic deliberation and to conservative ideals of individual rights. Never before
had the ACLU faced a situation in which defending free speech legitimately threatened the
substantive gains of labor. For the first time, upholding the right to speak meant undercutting the
right of agitation.

Even for those who supported free speech for strategic reasons, the issue of employer
speech raised a genuine question whether the cause of labor was best served by expansive
expressive freedom or sympathetic state control. Some within the ACLU thought that the
controversy over employer speech was exaggerated. They assumed that an employer’s distaste
for unionization would be known to employees regardless of whether it was explicitly
articulated,\textsuperscript{101} and that it was far better to “err on the side of free speech,” both in the immediate
term (to forestall attacks on the NLRA) and as a general policy.\textsuperscript{102} The crucial thing, they
insisted, was to eradicate coercive employer conduct like espionage and discharge, not mere
speech. This view, of course, hinged on a belief that radical speech—whether in the form of the
picket and the strike, or advocacy of political change—was capable of making a concrete
difference in political and economic conditions. It also assumed that workers would not be
persuaded by their employers’ pronouncements on the shared benefits of welfare capitalism and

\textsuperscript{101} Walter Fischer to Roger Baldwin, 5 October 1938, ACLU Papers, reel 156, vol. 1078 (arguing that an employer’s
position would be obvious and “the coercion will come more from the nature of the employer’s position rather than
from the arguments he makes”).

\textsuperscript{102} Roger Baldwin to Dorothea de Schweinitz, 1 September 1938, ACLU Papers, reel 160, vol. 2002.
the perils of organization. The other side, which began as the progressive view, was voiced by an increasing contingent of political activists and academics over the coming years. It emphasized that free speech, in a society dominated by commercial media, was never really free, and that radical ideas were bound to be drowned out in a marketplace of pre-packaged ideas. It danced around the edges of a theory of false consciousness, harking back to the master-servant relationship and insinuating that the oppressed were no longer capable of perceiving their chains. Ever since the IWW trial, the ACLU leadership had been aware that private checks on expressive freedom were just as repressive as, if not more so than, the state. In fact, the Wagner Act was a notable effort to protect workers’ speech from private curtailment. As the NLRB frequently boasted, the NLRA had operated to uphold the civil liberties of workers, who for generations had been silenced in the workplace. Like the La Follette Committee and the Civil Liberties Division of the Department of Justice, the NLRB was protecting, for this brief moment, a robust vision of free speech as a substantive right to be heard, independent of—indeed, protected by—state action.

In the end, “in view of the almost even distribution of opinion in the Board and in the returns from the members of the National Committee,” the board tabled both the majority and minority reports. Instead of issuing a statement, it finally heeded the lawyerly advice that Felix Frankfurter had given the board a year earlier, when the controversy over the NLRA first erupted—namely, to establish its policy in particular applications rather than issuing abstract statements of principle.

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103 See, e.g., Roger Baldwin, “Coming Struggle for Freedom,” 12 November 1934, ACLU Papers, reel 109, vol. 717 (“Censorship of the press is not only an issue of government control. More important is control of the press by its owners. Naturally the defenders of the property system, they oppose any effective challenge to that system.”).
104 ACLU Board Minutes, ACLU Papers, 7 February 1938, ACLU Papers, reel 156, vol. 1080.
105 E.g., Felix Frankfurter to Roger Baldwin, 1 April 1937, ACLU Papers, reel 142, vol. 970.
The case that it chose to examine had been brewing since the fall, and it had been
invoked in support of both positions on employer free speech. That case was *Ford Motor
Company v. NLRB*.107

*Prelude to Battle*

Henry Ford was adamant in his belief that unions were bad for labor. He was an
outspoken proponent of welfare capitalism, and his company prided itself on its excellent
package of salary and benefits for employees. In 1914, the Ford Motor Company announced a
profit-sharing-plan. It introduced the 40 hour-work week in 1926. Working conditions were, in
Ford’s view, as attractive to workers as business necessity would permit. But Ford was also a
true believer in the individualist creed of the *Lochner* era, and on the issue of unions, he would
not budge.108

Indeed, Ford was determined to prevent his workers from organizing by any means
necessary. He delegated the task of combating unionization to the Ford Service Department,
whose head, Harry Bennett, was a trusted confidant and close personal friend. Bennett’s
unsavory connections with organized crime were a valuable recruitment tool in assembling
Ford’s private army, which the UAW referred to as Ford’s Gestapo.109 His “Servicemen”

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107 There is very little literature on the Ford case, most likely because it was largely an administrative case. For short descriptions, see Donahue, *Politics*, 47–50; Kersch, “How Conduct Became Speech,” 287–88.
108 The problem, according to Ford, was the ascendency of “money-controlled” as opposed to “independent” employers. The latter, constrained to pay out high dividends and therefore unable to invest in improvements and high wages, had colluded with labor to centralize control of labor and industry, in disregard for the wellbeing of workers employed by “independent business.” Brief for Respondent, *NLRB v. Ford Motor Company*, Sixth Circuit, October Term 1939 (2 April 1940), in Ford Motor Company Legal Papers, Ford Motor Company and UAW before the NLRB, Seventh Region, Benson Ford Research Center, Dearborn, Mich. (hereafter Ford Legal Papers), acc. 51 (NLRB Suits, Ford Motor Company Legal Department), box 4, 35–38.
included boxers, wrestlers, gangsters, ex-convicts, and retired policemen. They were responsible for preventing the organization of the Ford workers through espionage, intimidation, and violence, and they were very effective at their job.\(^\text{110}\)

By the spring of 1937, the UAW was determined to take on its most formidable adversary. In Michigan, as in the rest of the country, public opinion had turned against labor. The radical tactics of the CIO were an inescapable presence in daily life. In March, thirty-five thousand workers seized every Chrysler Corporation plant in the Detroit vicinity, along with hotels, industrial laundries, restaurants, and department stores, culminating in a half-day general strike that shut the city down.\(^\text{111}\) In April 1937, a sit-down strike failed at a small Yale and Towne Company plant in Detroit, when the company secured an injunction and the police used tear gas and riot sticks to break the strike and arrest organizers, two of whom were sentenced to jail terms. In the wake of the strike, Yale and Towne closed the plant and fired all of its workers.\(^\text{112}\) Michigan residents were demanding the restoration of order, and neither the state nor the federal government was willing to intervene on labor’s behalf.

That the state was no longer actively assisting labor may have been a disappointment to the UAW, but it was not a surprise.\(^\text{113}\) If labor wanted to improve its lot, it would have to organize. And to the UAW, the failure at the Yale and Towne plant made organization at the Ford Motor Company all the more crucial.\(^\text{114}\) Not only had Ford kept unions out of its own


\(^{111}\) Lichtenstein, *Reuther*, 74, 80.

\(^{112}\) Ibid., 81.

\(^{113}\) As future CIO General Counsel Maurice Sugar told UAW President Homer Martin in August 1937, an employer who faced serious challenge from labor had always turned for assistance to the machinery of the state—which, with rare exceptions, was “completely dominated and controlled” by industrial interests. “As a general rule,” he added, “he has not turned in vain.” Maurice Sugar to Homer Martin, 9 August 1937, Sugar Papers, box 4, folder 4-15. Sugar thought the primary goal of legal work should be the protection of labor’s right to engage in direct action.

plants, but it had stood in the way of efforts to organize its purchasers and suppliers.\textsuperscript{115} The atmosphere of the mid-1930s had made the company even more determined to resist the organization of its workers. As strikes rocked Detroit, Ford invested thousands of dollars in guns and tear gas, increased the size of the Service Department, and distributed antiunion literature. During the GM sit-down strike, the UAW had carried banners declaring, “Today GM Tomorrow Ford!”\textsuperscript{116} By April, Homer Martin proclaimed that the Ford campaign was set to begin,\textsuperscript{117} and in late April there was a sit-down strike at the Ford plant in Richmond, California.\textsuperscript{118} Richard Frankensteen, a UAW field general at the GM and Chrysler strikes, was assigned to head the organizational efforts and announced on May 18 that the UAW would mobilize 200,000 organized workers to help convince Ford employees to join.\textsuperscript{119} Ford’s River Rouge plant in Dearborn was a crucial organizing target. It dominated the local landscape, and it set the tone for labor relations in the Detroit area.

For months, UAW organizers had been holding secret meetings in the River Rouge plant, but it was evident by late spring that a more visible gesture would be necessary to reach the largely insulated employees. To that end, they planned a literature distribution for late May. After surveying the terrain, they settled on a location for the demonstration: an overpass constructed by the Ford Company to provide a walkway from the plant gates to a nearby streetcar stop. Because the company had leased the overpass to the Detroit Street Railway Commission, it was public property, as was the abutting road.

\textsuperscript{115} E.g., L. W. Beman, Regional Director, to Robert Wohlfirth, 11 December 1936, La Follette Committee Papers (“The Ford Motor Car Company told the Midland Steel Company if they wanted any more business from them, they were to club these fellows and throw them out of the plant.”).
\textsuperscript{119} “200,000 Summoned to Aid Ford Drive,” \textit{New York Times}, 19 May 1937.
On May 26, 1937, when they arrived at the River Rouge plant, UAW organizers were not expecting a fight. If anything, Walter Reuther had been unusually cautious. He had obtained approval of the UAW pamphlets from the Dearborn city clerk and secured a permit for the event. He had ensured attendance by respected observers, including clergy members, the local press, and La Follette Committee staff. To further forestall the likelihood of violence, a women’s auxiliary was designated to pass out the union literature. Reuther assured the participants that peaceful leafleting was constitutionally protected activity and would not be forcibly stopped. Of course, union organizing was always a risky endeavor, particularly in Dearborn. But there was no reason to suspect any more than the usual trouble.

When Walter Reuther and Richard Frankensteen posed for a photo outside the plant gates, however, a menacing group of Ford Servicemen wrongly informed them that they were trespassing on company property and ordered them to leave. Reuther and Frankensteen peacefully turned to comply, but they only made it a few steps before they were attacked from behind. Reuther was beaten severely in the face, chest, and groin and then picked up and dropped onto the concrete seven or eight times. Frankensteen was pummeled repeatedly and thrown down three flights of stairs. The women distributing the leaflets were punched, albeit less forcefully, and were “called all manner of vile names usually attributed to women of the streets.” Richard Merriweather was brutally assaulted and suffered a broken back, among many other injuries. Many of the participants were knocked unconscious and spent days in the hospital recovering.

The assailants, concerned about bad publicity, pursued press photographers to seize their films and plates. Nonetheless, a few managed to slip through. Ford servicemen chased one reporter on foot for five miles, until he reached safety in a police station.¹²¹ Detroit News photographer James Kilpatrick held on to his photographic films by hiding them under a car seat. His iconic images of the brutal attack on Reuther and Frankensteen were circulated throughout the world and inspired the Pulitzer committee to introduce a prize for photography.

In the span of a few hours, the Ford Motor Company ensured the demise of its reputation for treating its workers fairly. In the process, it opened itself up to a powerful unionization drive.¹²² In the days after the Battle of the Overpass, as UAW organizers sought to capitalize on a rare wave of favorable publicity,¹²³ Maurice Sugar took the lead on the legal front. Sugar was alert to the need for effective legal representation. As he told Martin, employers had long understood the importance of legal work, and labor would do well to take that lesson to heart; the efforts of the UAW and CIO in the legal field had “contributed in no small measure to their phenomenal success.”¹²⁴ Almost immediately, he initiated charges before Common Pleas Judge Ralph Liddy, who called for the prosecution of eight Ford servicemen on charges of assault and

¹²² Lichtenstein, Reuther, 83–86. Over the next four years, four thousand Ford employees would lose their jobs for union activity, in plain contravention of the Wagner Act. As CPUSA chair (and past ACLU National Committee member) William Foster predicted, Ford would “make a militant resistance against all this organization work and [would] have recourse to the usual open shopper’s use of violence.” William Foster, “Organizing the Ford Workers,” UAW Local 212 Collection, Walter P. Reuther Library of Labor and Urban Affairs, Wayne State University, Detroit, Mich., acc. 76, box 4, folder “Newspaper articles, 1937.” Foster was insistent that the UAW continue with its educational and recruiting work. Nonetheless, he recognized that “such activities as fights in courts and before public boards”—not as a “substitute for solid organization trade union building, but only as auxiliary to it”—would be an important component of a successful effort.
¹²³ The NLRB, Seventh Region, noted that the Battle of the Overpass “boosted organization.” J. T. C., Memorandum for Mr. McCormack, Investigation of Smith Committee Exhibits, 2 January 1941, 5, Ford Legal Papers, acc. 897 (Legal-Labor cases), box 2, file Re-Examination of Exhibits in Smith Committee Investigation.
¹²⁴ Maurice Sugar to Homer Martin, 9 August 1937, Sugar Papers, box 4, folder 4-15. Sugar urged Martin to create a permanent legal department. Martin, however, did not act on his recommendation, and it would be two years before the UAW-CIO created a legal office and named Sugar its Chief Legal Counsel. Maurice Sugar to R. J. Thomas, UAW President, 24 April 1939, Sugar Papers, box 4, folder 4:17. In his letter, Sugar blamed Martin for his failure to create a legal department earlier. His proposal was finally accepted in April 1939. Minutes of Executive Board, 28 April 1939, Sugar Papers, box 4, folder 4:18.
battery. Concurrently, Sugar prepared a lengthy complaint for a hearing before the NLRB. In it, he alleged that the Ford Motor Company had engineered the events of May 26. He also accused Ford of a host of other unfair labor practices, including threatening and intimidating its employees; soliciting members for the Ford Brotherhood of America, allegedly a company union; and discharging, demoting, transferring or otherwise adversely affecting the employment status of three dozen employees for engaging in union activities. Finally, the NLRB complaint charged the company with distributing statements and propaganda critical of labor organizations and discouraging union membership.

The hearings began on July 6 before NLRB Trial Examiner John T. Lindsay. The federal courtroom in which they were held was filled to capacity, including standing room, every day of the trial. The attorney for the NLRB was Laurence A. Knapp. Ford was represented by a local attorney, Louis J. Colombo—who, according to the attorneys at Cravath, Swaine & Moore, the white-shoe New York law firm that represented the company on appeal, did a barely passable job. After addressing such preliminary matters as the public status of the overpass and the details of the UAW’s permit, the bulk of the testimony focused on the Battle of the Overpass. Witness after witness described the callous brutalities in vivid detail. Victims described being beaten unconscious. Richard Frankensteen recalled being “bounced, thrown, dragged and knocked down three flights of stairs.” An observer filled in the gaps, describing how Frankensteen was “kicked in the groin and kidneys and knocked down, . . . lifted to his feet and then knocked down and beaten again.” A member of the women’s auxiliary saw a group of men

127 Ford Motor Company (Highland Park and Dearborn, Mich.), 4 N.L.R.B. 621 (1937). The complaint originally named thirty-eight employees. Some of them were dropped and other added over the course of the proceedings.
128 J. T. C., Memorandum for Mr. McCormack, Investigation of Smith Committee Exhibits, 2 January 1941, 6, Ford Legal Papers, acc. 897, box 2, file: Re-Examination of Exhibits in Smith Committee Investigation.
leaning over Richard Meriweather shouting “Kill him! Kill him!” while blood poured out of his nose and mouth. A reporter who had been covering the events summed things up neatly in his testimony: “everywhere you looked there was someone getting kicked around.”

As a public relations tool, the hearings were a resounding success for the UAW. Newspapers reprinted large portions of the testimony documenting Ford’s history of spying, intimidation, blacklisting, and other unlawful practices, as well as the harrowing events of May 26. The UAW, by contrast, was portrayed as peaceful and law-abiding. For the first time in months, the NLRB was presented in popular accounts as a forum where the trampled underclass could secure justice against the tyranny of its employers.

Legally, too, the UAW scored an important victory. The trial examiner’s voluminous report, which served as the basis for the Board’s order in the case, was highly favorable to the UAW. In internal memoranda, Ford’s Cravath attorneys described the case for the Board as “well-prepared and well-presented,” almost certain to create an impression unfavorable to Ford. They thought there was ample evidence to sustain any findings the Board was likely to make. The statement of what happened on May 26 accorded fully with the testimony, and while there might be some room to argue about Ford’s responsibility for the incident, it would be “entirely impossible to deny on the record that union members were beaten without provocation.”

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130 Johnson, Sugar, 225.
131 For years, labor groups had complained about Ford’s high-handed anti-labor tactics. Ford was a powerful company with well placed allies, and despite clear evidence of unlawful behavior, state and federal officials had stood passively by. In 1933, the NRA Compliance Board had unavailingly urged the Department of Justice to prosecute the company for violations of Section 7A of the NIRA. Watts, People’s Tycoon, 457.
133 E. F. B., Memorandum for Mr. H. A. Moore, 28 August 1937, Ford Legal Papers, acc. 897, box 1, vol. 1.
134 H. D., Memorandum for Mr. Wood, Comments on extent to which Board’s findings are supported by evidence, 26 December 1937, Ford Legal Papers, acc. 897, Memoranda of Fact through Dec. 1938.
case for Ford, on the other hand, was “deficient, both by omission and commission.” 135 Many of the Board’s charges, and many descriptions of damaging conversations and events, were never answered or refuted.

After meeting with their clients in late December, the Ford lawyers began to formulate a strategy. They spoke extensively with Everett Moore, Bennett’s second-in-command at the River Rouge plant, who oversaw the Servicemen’s preparations for the scheduled UAW literature distribution. Moore had ordered the closure of five plant gates and had parked trucks inside several others to repel a possible automobile cavalcade. In the midst of the spring sit-down strikes, Moore had been preparing for the possibility of “actual invasion of the plant.” 136

Of course, there was no evidence that the UAW was planning anything of the sort. But their actual intentions were irrelevant, because Moore and Bennett “both seemed to genuinely believe that . . . this visit to the Rouge Plant on May 26 was for the purpose of entering into the plant and going among the workmen and calling a sit-down strike at that very moment.” If Ford’s lawyers could convince the courts to take judicial notice of the prevailing hysteria in May 1937, they could perhaps provide a measure of justification for the brutality with which the company shut down a peaceful UAW organizing event.

Still, given that the case did “not appear very favorable on the facts,” the heart of Ford’s legal plan was to attack the NLRB itself. 137 Ford’s lawyers accused the Board of acting as a prosecutor rather than an unbiased tribunal. They insisted that the administrative machinery developed in the fields of trade and commerce were “not suited to the field of labor relations, in which emotion is dominant and partisanship is rife,” and they questioned whether the quasi-

137 H.D., Memorandum for Mr. Whitney, 24 December 1937, Ford Legal Papers, acc. 897, box 1.
judicial function could be fulfilled “by handing down quasi-decisions based upon a quasi-record which has been fabricated out of quasi-evidence unearthed at a quasi-hearing.”\(^{138}\)

Ford’s lawyers were realistic about their chances on this front. By 1938, the federal judiciary, particularly the Supreme Court, was a friendlier forum for labor than the legislature was. In fact, in the late 1930s the Supreme Court overturned NLRB orders and procedures only a handful of times.\(^{139}\) The legal team discussed the situation at length with Edsel Ford, president of the company and Henry’s Ford son, whose opposition to organized labor was less obstinate than his father’s. One attorney pointed out that the Detroit case “was just one battle in a general war.” The Wagner Act, he explained, was a federal law, and the Supreme Court had pronounced it constitutional. Although minor amendments were possible, there was no reasonable prospect of reversing national labor policy in the foreseeable future.\(^{140}\) Nonetheless, the courts might be open to arguments about frank bias in the NLRB, or its failure to act in the “quasi-judicial manner required of administrative bodies.”

First, however, the company would have to exhaust its remedies before the NLRB. The Board issued its order on December 22. Accepting virtually all of the trial examiner’s findings, the Board emphasized “the unconcealed hostility with which the Ford Motor Company views

\(^{138}\) A June memo focused on anti-employer statements by Edwin Smith and concluded that “the attitude of the Board, as revealed in the public utterances of its members, leaves no room for doubt that a member of the employing class who is haled before this tribunal is viewed as an implacable foe of organized labor, ready to resort to extreme measures in order to maintain his domination over his employees.” F. A. E. S., Memorandum for Mr. Wood, Statements by Members of the National Labor Relations Board Pertaining to Their Administration of the Act, 10 June 1938, Ford Legal Papers, acc. 897, Memoranda of Facts, vol. 1.

\(^{139}\) In *NLRB v. Mackay Radio & Telegraph Company*, 304 U.S. 333 (1938), a unanimous 1938 decision, the Court upheld the Board’s construction of the NLRA as including striking workers within its definition of employee, but it also affirmed the right of an employer to hire and retain strikebreakers. More significantly, in *NLRB v. Fansteel Metallurgical Company*, 306 U.S. 240 (1939), the Court reversed an NLRB order requiring an employer to reinstate workers who were discharged for participating in a sit-down strike, despite clear evidence that the employer engaged in unfair labor practices in violation of the NLRA. On the whole, however, the Supreme Court was deferential to the NLRB and reluctant to overturn its findings.

\(^{140}\) W. D. W., “Memorandum for Mr. Wood,” 11 January 1938, Ford Legal Papers, acc. 897, box 5, vol. 1, Memoranda of Fact. Edsel Ford, in turn promised to ensure that company policy tolerated unions in compliance with the law—though the attorneys expected that any evidence they could prove of unionization would be “chiefly as to A. F. of L. men.”
bona fide labor organizations and the utter ruthlessness with which it has fought the organization of its employees by the U. A. W.”

The Ford Motor Company had conveyed its antagonism to labor not only through public statements, but also through direct admonitions to employees, buttressed by the hostility of supervisors and foremen, the discharge of union advocates, and the employment of hired thugs. No Ford employee could fail to comprehend that disregarding Henry Ford’s opinion on unions was an unacceptable choice. Accordingly, the Board ordered the company to cease and desist from discouraging union membership, dominating or interfering with any labor organization of its employees, threatening or assaulting any member of a union, or otherwise interfering with employees’ rights to self-organization or collective bargaining.

On January 3, Ford filed a petition to vacate and set aside the decision to provide an opportunity for rehearing and additional testimony. In addition to drawing attention to industrial unrest in Michigan the previous spring, the petition emphasized Ford’s high wages and good working conditions, a statement by Henry Ford that he would not prevent union membership, and other mitigating circumstances.

Above all, however, it focused on questions of law. Ford claimed that it was denied a fair hearing and due process because the trial examiner had never issued an intermediate report to which it could file exceptions. And it claimed that the Board’s order, which prohibited Ford from disseminating its anti-union views, was an unconstitutional

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141 Ford Motor Company, 4 N.L.R.B. at 674.
142 Ibid., 677.
143 The petition noted that Henry Ford, despite his anti-union sentiments, had told a reporter in April 1937 that he would not prevent union membership; stressed that the Michigan Supreme Court had held that the attacks on May 26 were not felonious; and denied that it had dominated and supported the Ford Brotherhood of America. It stated that the purpose of Service Department was to guard the gates and preserve order in the plant, not to intimidate the workers. The purported discharges affected only a handful of the plant’s 80,000 employees, and many known union members were thriving within the company. Exhibit A, Petition of Ford Motor Company to Vacate and Set Aside Decision and Order and For Rehearing before the NLRB, Answer to Petition for the Enforcement of an Order of the NLRB, 6th Circuit, 11 April 1938, Ford Legal Papers, acc. 51, box 4, 7919.
infringement of free speech. The Board denied Ford’s petition and, on January 7, filed in the
Sixth Circuit for enforcement of its order.144

Over the coming months, it was Ford’s last argument that would attract the most
attention. Paragraph 1(e) of the Board’s order required Ford to cease and desist from
“circulating, distributing or otherwise disseminating among its employees statements or
propaganda disparaging or criticizing labor organizations or advising its employees not to join
such organizations.” The provision was meant to address the company’s distribution at the River
Rouge plant of various anti-union materials. The first was a pamphlet entitled “Ford Gives
Viewpoint on Labor,” in which Henry Ford explained his belief that union membership was
unnecessary and ill-advised.145 Ford supervisors also distributed cards that listed, under the
heading “Fordisms,” various excerpts from Henry Ford’s written criticism of organized labor.146

When Ford’s lawyers first considered the free speech angle, it was by no means an
obvious approach.147 One attorney wrote in an internal memorandum that the Board could likely
limit speech when it infringed on other fundamental rights.148 Although an employer could
probably advise employees not to join a union, “if such right is exercised in such a way as to
interfere with, coerce or intimidate employees in the exercise of their fundamental right to self-

144 Petition of Respondent, Ford Motor Company, for Leave to Adduce Additional Evidence, and Exhibit A Thereto,
4 April 1938, Ford Legal Papers, acc. 51, box 4.
145 “Paragraph 1(e) of the Board’s order should be set aside,” 23 May 1938, Ford Legal Papers, Memoranda of
Facts, vol. 2. In another part of the quoted interview, he stated that he had never prevented his employees from any
association, whether religious, racial, political or social. “No one who believes in American freedom would do that,”
he added.
146 Representative examples included: “A monopoly of JOBS in this country is just as bad as a monopoly of
BREAD”; “Figure it out for yourself. If you go into a union they have GOT YOU—but what have YOU GOT?”;
and “Our men ought to consider whether it is necessary for them to PAY SOME OUTSIDER every month FOR
THE PRIVILEGE OF WORKING at Ford’s.” ACLU Memorandum on the Ford Case, Ford Legal Papers, acc. 897,
box 5, vol. 1.
147 The only prior case under the NLRA in which freedom of speech had explicitly been raised was Associated Press
v. NLRB, 301 U. S. 103 (1937), in which a majority had considered it unnecessary to decide whether the NLRA
violated the First Amendment because there was no denial in the record that the employee was discharged for union
activities.
148 E. F. B., Memorandum for Mr. H. A. Moore, 28 August 1937, Ford Legal Papers, acc. 897, box 1, Memoranda of
Law, vol. 1.
organization... such an exercise of the right by the employer may be prohibited by the Board
without doing violence to the constitutional right of the employer under the First Amendment.”
A few months later, another lawyer read and summarized every Supreme Court decision
involving freedom of speech and press (which, in 1938, was still a manageable task).149 He
concluded that Henry Ford was entitled to make public statements about his views without
NLRB interference, but he anticipated difficulty “as to the reprinting and circulation among
employees of statements by Henry Ford and as to any other publication by the Company itself.”
Whatever its doctrinal vulnerabilities, however, it was immediately clear that free speech
strategy was an immensely popular one. When newspapers decried the NLRB’s encroachment
on freedom of the press in the cases involving subpoenas of editors, they often noted the Board’s
order in the Ford case as well.

Ford did not file an answer to the Board’s petition for enforcement of its order by the
Sixth Circuit until April 11, 1938.150 Its arguments were largely the same ones it had presented
to the NLRB, but the court never had an opportunity to rule on them. On May 2—following an
intervening Supreme Court decision, Morgan v. United States,151 in which a rate-fixing order of
the Secretary of Agriculture was held void for lack of a “full hearing”—the NLRB filed a motion
for leave to withdraw its transcript of record and its petition for enforcement without

149 H. D., Memorandum on Ford Labor Case: Questions of Law to be Investigated, 15 January 1938, Ford Legal
Papers, acc. 897, box 1.
150 One of the attorneys had concluded that the usual form of attack on administrative findings—arguing that they
were not supported by the evidence—would be largely futile given the record in the case. H. D., “Memorandum for
Messrs. Wood, Cooke, Diggs: Ford Labor Case: Method of Handling Factual Material in Brief,” 15 April 1938,
Ford Legal Papers, acc. 897, box 1. “Another approach,” he suggested, “would be to argue that the Board, in making
its decision, failed to act as a judicial or quasijudicial body, and that consequently the proceeding must be remanded
to the Board for reconsideration.” Such a victory would be less desirable, of course, but “it seems to me that it is the
only victory we can hope to get and that, if we attempt to take the former position, we will inevitably lead the Court
into considering the facts themselves and reaching the conclusion that we are guilty.”
151 Morgan v. United States, 304 U.S. 1 (1938). The case was decided on April 28, 1938.
prejudice.152 The Sixth Circuit granted the NLRB’s motion a few days later, but Ford challenged it on procedural grounds. For the next half-year the case would be stalled, until the Supreme Court finally held in January 1939 that the Sixth Circuit’s judgment was proper.153

In the meantime, however, the legal team continued to prepare the company’s substantive case. It investigated the legislative history of the NLRA and discovered that the House had adopted an amendment providing that “nothing in this act shall abridge the freedom of speech or the press as guaranteed in the first amendment of the constitution.”154 The Senate and House conferences had recommended that it be dropped as unnecessary, since nothing in the act could be construed to undermine First Amendment protections.155 During Senate debate on the bill, Senator David I. Walsh, Chair of the Committee on Labor and Education, had stated that employers and employees alike would have the right to discuss the merits of any organization. “Indeed,” he clarified, “Congress could not constitutionally pass a law abridging the freedom of speech.”156

The more Ford’s lawyers researched, the more confident they became that the NLRB’s order was an unconstitutional infringement on free speech. The Act, they concluded, could not reasonably be construed to prohibit substantive argument about the desirability or necessity of

152 Notice of Motion for leave to withdraw petition for enforcement and transcript of record without prejudice, 29 April 1938, Ford Legal Papers, acc. 51, box 4. The Supreme Court had upheld several Board decisions without intermediate reports. While the Board’s petition for enforcement in the Ford Case was pending, however, the Supreme Court decided the Morgan case, in which it held that the absence of formal complaint—which was in fact required under the Board’s procedure—was a sufficiently severe procedural defect to invalidate the order issued. Rather than risk an eventual Supreme Court decision requiring an intermediate report, the Board elected to withdraw its decision voluntarily in order to issue provisional findings of fact to which Ford could file exceptions. The Board stated that the public in general and labor in particular should be “profoundly disturbed” at the growing trend in the Courts of Appeals of disregarding the Board’s findings of facts, and it complained about the negative press coverage following its proposal to revise its order in the Ford case. Edwin Smith, “The Drive against the National Labor Relations Board,” address of 21 May 1938, reprinted in NLRB Press Report, 21 May 1938, Ford Motor Company Press Release, 9 April 1940, Ford Legal Papers, acc. 897, box 2, file of Press Releases.
154 79 Cong. Rec. 10111.
155 79 Cong. Rec. 10549, 10627, 10668.
156 79 Cong. Rec. 7960.
unionization. The Supreme Court’s March 1938 decision in Lovell v. City of Griffin—which the ACLU was using to such great effect in its campaign against Mayor Hague in Jersey City—provided additional ammunition. In a case involved leafleting by Jehovah’s Witnesses, it further established the inviolability of free speech and free press. In May 1938 draft brief, Ford’s lawyers quoted from Zechariah Chafee’s scholarship and from Justice Holmes’s Abrams dissent, as well as the Supreme Court’s newer entries in the First Amendment debate, including Stromberg v. California and Grosjean v. American Press Co. To connect these cases to employer speech, they invoked the metaphor of industrial democracy so often promoted by labor. It was congressional intent, they argued, that “workers should have the same freedom of action in determining the manner of their organization as citizens have in the sphere of politics.” If free speech facilitates the appropriate and informed exercise of rights in the political sphere, it is “likewise essential in order that workers may intelligently exercise their rights to organize or to designate representatives or engage in concerted activity.” Ford’s workers had been exposed to a broad range of opinions about the desirability of unionization. The CIO and UAW had been actively engaged in recruitment and had made their views known in the national press as well as in the plant. What could be objectionable, they asked, about advising workers that they should consider the potential disadvantages of joining a union before they made up their

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157 “Paragraph 1(e) of the Board’s order should be set aside,” 23 May 1938, Ford Legal Papers, acc. 897, box 4, vol. 2.
158 Stromberg v. California, 283 U.S. 359 (1931) (“The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people . . . is a fundamental principle of our constitutional system.”).
159 Grosjean v. American Press Company, 297 U.S. 233 (1936) (“Since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.”).
160 “Paragraph 1(e) of the Board’s order should be set aside,” 23 May 1938, 18, Ford Legal Papers, acc. 897, box 4, vol. 2.
minds? By the summer of 1938, the Ford Motor Company and its lawyers considered the free speech argument to be the strongest element of their case.161

The Ford Case and the ACLU

When the NLRB’s order in the Ford case erupted onto the public stage in the fall of 1937, demands for ACLU comment immediately poured in.162 The case was bound to cause controversy within the already divided organization. After all, it brought together all of the elements about which the ACLU’s board and its national committee had been fighting since spring. It was closely tied to the sit-down strikes of spring 1937 and raised questions about the propriety of employers’ measures to safeguard their property. It involved the procedural limitations of the Wagner Act in the immediate aftermath of the constitutional revolution. It touched upon company unions and industrial espionage. But above all, it squarely raised the question whether employer speech was constitutionally protected. And on this issue, the Ford case precipitated a major shift in the rhetoric of civil liberties and in the internal politics of the ACLU.

161 H. G. W. Jr., Memorandum for Messrs. Wood and McCormack, Ford Labor Cases Settlement Possibilities, 26 August 1938, Ford Legal Papers, acc. 897, box 5, vol. 1. In the intervening months, the NLRB had initiated charges of unfair labor practices at Ford plants throughout the country. Many involved facts less sympathetic than those of the Detroit case, but the Board consistently prohibited anti-union communications by the company. In August, one of Ford’s attorneys advised that the moment was opportune for settling the eight cases then pending. At the time, divisiveness within the UAW made the union vulnerable. Homer Martin, president of the UAW, was attempting to oust the communists from union office, angering the CIO leadership and escalating existing tensions within the organization. The conflict would eventually culminate in Martin’s resignation in January 1939 and his formation of a competitor AFL-affiliated union. Dubofsky and Van Tine, Lewis, 234. In advocating settlement of the Ford case, the attorney predicted that a loss by Martin would shift control to leaders “much more radical in thought and action,” and that Ford should act while a more moderate agreement was possible. He thought the NLRB would be amenable to a settlement, since only a few of the cases were clear-cut and settling would end the attack on the Board’s procedure in the Detroit case. As events unfolded, settlement between the UAW and Ford would wait another three years. Tellingly, the attorney acknowledged the likelihood that no compromise whatsoever “would be acceptable to the client on the free speech issue.”

162 One ACLU member wrote to Baldwin in December 1937 to tell him that while he was “strongly sympathetic with the law of unions in this fight to bring Henry [Ford] to his knees,” he and his wife felt that the Ford order was a clear infringement of free speech. John Beardsley to Roger Baldwin, 27 December 1937, ACLU Papers, reel 143, vol. 978.
Ford v. NLRB was by no means the first encounter between the Ford Motor Company and the ACLU. Roger Baldwin had corresponded at length with Maurice Sugar after the “Ford Massacre” of 1932, in which the Dearborn police, assisted by Harry Bennett and his servicemen, opened fire on hunger marchers outside the River Rouge plant and killed four members of the Youth Communist League. Baldwin made multiple visits to Detroit and worked diligently with Sugar and the International Labor Defense to assemble a damages suit, but they were unable to collect sufficient evidence and eventually abandoned the effort. Throughout the mid-1930s, Baldwin worked closely with local civil rights groups, including the Conference for the Protection of Civil Rights and the Professional League for Civil Rights. The former organization, which became the Civil Rights Federation in the summer of 1937, handled publicity after the Battle of the Overpass, and the ACLU helped it translate public sympathy for the UAW into a broader organizing drive. When the organization issued a pro-UAW

163 A fifth victim died months later of his injuries. Ford subsequently discharged anyone who evinced sympathy for the slain marchers or contributed to their funeral fund. Johnson, Sugar, 116–24.
164 The ACLU initially exonerated the Detroit police, probably out of deference to Mayor Frank Murphy, and focused instead on the Ford Motor Company and the Dearborn police. Maurice Sugar convinced Baldwin to reassess the situation, and Baldwin dutifully wrote to Murphy to demand further investigation. Roger Baldwin to Maurice Sugar, 31 March 1932, Sugar Papers, box 53, folder 53:12; Roger Baldwin to Frank Murphy, 30 March 1932, Sugar Papers, box 53, folder 53:12. On the damage suits, see Roger Baldwin to William L. Patterson (National Secretary, ILD), 28 February 1933, ACLU Papers, reel 103, vol. 661; Carl Hacker (ILD) to Roger Baldwin, 2 March 1933, ACLU Papers, reel 103, vol. 661; Roger Baldwin to William Patterson, 10 October 1933, ACLU Papers, reel 103, vol. 661.
165 The Conference for the Protection of Civil Rights was a leftist organization that defended the rights of racial minorities. Its platform included “the rights of free speech, press, assembly and worship as granted in the Bill of Rights,” the “rights of labor to organize and carry out the functions essential to collective bargaining as guaranteed in the Wagner Act,” and “equal rights with all others in the community of religious, racial and political minorities.” Quoted in Angela Dillard, Faith in the City: Preaching Radical Social Change in Detroit (Ann Arbor: University of Michigan Press, 2007), 81.
166 Baldwin sought to establish a local branch of the ACLU to supplement existing groups, but initial efforts failed. See correspondence between Roger Baldwin and William Gallagher, ACLU Papers, reel 152, vol. 1037. In the fall of 1938, Walter Nelson reached out for support in assembling a local committee. Nelson cautioned that the committee should not include representatives of either the CIO or the AFL, given the pending struggle between them. Walter Nelson to Roger Baldwin, 27 September 1937, ACLU Papers, reel 152, vol. 1037. It appears that Nelson assembled a skeleton committee to provide immediate legal assistance in appropriate cases.
pamphlet on the NLRB hearing in the Ford case in August 1937, Baldwin only regretted that it did not include the names of the ACLU’s National Committee. For years, the Ford Service Department and the local police had worked together to shut down every attempt at unionization in the River Rouge plant. They had trampled over workers’ constitutional rights to march, picket, and distribute literature, often through use of violence. Given this context, the efforts by Ford’s lawyers and the conservative press to present the company’s anti-union literature as a mere expression of opinion were understandably infuriating to much of the ACLU leadership.

Nonetheless, the Wagner Act had reshaped the free speech landscape, and the ACLU would need to adjust to the new terrain. The ACLU was accustomed to attacking the Ford Motor Company for its flagrant interference with civil liberties. For the first time, *Ford v. NLRB* pushed an increasing contingent of ACLU members to consider whether employers had corresponding rights of their own. The ACLU had never considered property rights to be part of the civil liberties program; the organization was born out of opposition to *Lochner*-era judicial reasoning, and it had always flatly dismissed efforts by groups like the Liberty League to equate the deprivation of property or freedom of contract with attacks on other liberties protected by the Bill of Rights. But the problem of employer free speech was a different one. It involved precisely the same constitutional provision that the ACLU had invoked for decades. Many ACLU members, including the attorneys, worried that a narrow reading of the First Amendment would inevitably backfire against the radical groups to whom the organization was most strongly committed.

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169 See Chapter 4.
In February 1938, Arthur Garfield Hays tried to address these issues in a draft statement on the Ford case. *Ford* presented an opportunity for concrete application of the theory that he had been working toward in debate over the ACLU’s general statement on employer free speech. Hays thought that the NLRB could lawfully prohibit direct threats or acts of coercion. But his definition of coercion was clearly narrower than that of the leftists on the ACLU board. He announced that any attempt by the NLRB or the courts to restrict employers’ “expression of opinion” would be contested by the ACLU. And in keeping with the policy he espoused, he considered the non-distribution provision in the Ford case to be a violation of civil liberties. He was careful to specify that the ACLU did not disapprove of the judgment against the Ford Company, which was justified by ample evidence of unlawful labor practices.\(^{170}\) But the order to cease and desist from circulating statements critical of labor unions was too broad, and it infringed on important constitutional guarantees.

Nathan Greene was deeply opposed to Hays’s report. He insisted that the NLRB’s order could be understood only in its broader context, namely, as a remedy for “merciless beatings,” “shameless violence,” and “bitter and uncompromising warfare” against workers’ every effort to organize. Greene wanted to except from constitutional protection speech like Ford’s that was “implemented by force.” While the ACLU would defend the right of employers to voice their anti-union sentiments in a “normal way,” the literature distributed at the River Rouge plant was far more than a mere expression of opinion. It was “simply and clearly a promise of beatings to come.”\(^{171}\) Greene’s theory found expression in a substitute statement endorsed by the Committee on Labor’s Rights, which concluded that speech effectuated by force or threat of


\(^{171}\) Nathan Greene, Memorandum on Hays’s Report, 14 February 1938, ACLU Papers, reel 156, vol. 1080.
violence was unworthy of ACLU attention. In its sole concession to the Hays camp, it concluded with a clarification: “We assume that the provision in the order prohibiting the circulation of propaganda among its employees was intended to be limited to conduct coercive in character, and we deem it advisable that any court decree entered to enforce the Board’s order make this clear. It would follow, therefore, that the section of the order will not survive the genuine abandonment by the Ford Company of its policy of coercion.” Baldwin was clearly attracted to Greene’s interpretation. He admonished Hays that the ACLU had always drawn the line between words and deeds—a distinction that would seem to favor Hays’s views, but that Baldwin construed as support for Greene’s. According to Baldwin, Ford’s words contributed to an unlawful act and were therefore subject to regulation.

The ACLU board, however, gravitated toward Hays’s version instead. The issue was one of several on the agenda at the special meeting requested by John Haynes Holmes and attended by twenty-five members of the board. After lengthy discussion, the majority of the board concluded that “there should be no limitation on the expression of views.” They voted to adopt Hays’s statement and authorized transmission of the memo—along with a request for clarification of the order—to the NLRB. Significantly, the tally of the National Committee’s votes on the majority and minority statements on employer free speech were reported to the board at the same meeting. The majority report had received sixteen votes, and the minority

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172 Memorandum on the Ford Case by the Committee on Labor’s Rights, 28 February 1938, ACLU Papers, reel 156, vol. 1078.
173 He explained somewhat ambiguously: “In the Ford case the language so clearly contributed to the acts that I do not think we can defend it. Another employer might confine himself to language without interfering with his employees’ rights. Such an employer we should defend.” Roger Baldwin to Arthur Garfield Hays, 23 February 1938, ACLU Papers, reel 164, vol. 2037.
174 Other issues included the sit-down strike (the committee’s report was adopted with amendments), the ACLU’s policy in regard to employers’ rights, revision of the ACLU’s Statement of Principles as proposed by Ernst and Rice (which were tentatively approved), and a bill to prohibit employers from engaging in political coercion. Special Meeting of the Board of Directors, 2 March 1938, ACLU Papers, reel 156, vol. 1080.
175 ACLU Memorandum on the Ford Case, Ford Legal Papers, acc. 897, box 5, vol. 1.
176 Minutes of Special Board meeting, 2 March 1938, ACLU Papers, reel 156, vol. 1078.
report fifteen. Two members had counseled against any statement at all. The ACLU, it seemed, was equally divided. Baldwin subsequently circulated the statement to the National Committee. He did not request a formal vote, because he claimed that there had been no departure from existing ACLU policy.

The ACLU’s allegiances were clearly shifting in conjunction with the dispute. During this same period, the board resolved to reach out more vigorously to “outwardly conservative characters.” It had often been criticized for the disproportionate representation of radicals among its members, and it decided to address the imbalance at last. As part of this effort, it invited Grenville Clark, chair of the ABA’s Committee on the Bill of Rights, to join the ACLU board. Clark declined but promised to steer toward the organization “a number of men whom we all feel would be desirable.” The board was increasingly willing to chastise New Dealers for civil liberties abuses. When Sherman Minton’s Senate committee ordered tax returns from the Treasury Department for corporations under investigation, the ACLU wrote him a public letter in protest for acting in a manner “out of line with the spirit, if not the letter, of our Constitution.”

These maneuvers were a stinging rebuke to the leftists and labor advocates on the ACLU board. Soon after Hays’s statement was adopted, Baldwin sent the Ford memo to J. Warren Madden in keeping with the board’s instructions. In language suggesting that he was relaying the opinion of others rather than his own views, Baldwin told Madden that “an organization concerned with the issues of free speech must necessarily take note of the charges made by employers that in the administration of the National Labor Relations Act their rights of

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177 Ibid. The minutes reported: “In view of the fact that the Union’s general attitude is covered by the Board’s statement on the Ford case, it was agreed not to consider any further memorandum.”
178 Roger Baldwin to National Committee, 4 March 1938, ACLU Papers, reel 157, vol. 1081.
180 Arthur Garfield Hays to ACLU, 23 March 1938, ACLU Papers, reel 156, vol. 1080.
181 Special Committee to Investigate Lobbying Activities to Hon. Sherman Minton, 27 May 1938, ACLU Papers, reel 157, vol. 1078.
expression are curtailed.”\textsuperscript{182} The no-distribution provision of the board’s order, he suggested, would “create an unfortunate precedent” if upheld by the Court of Appeals, because it would continue to apply even if Ford ceased all coercive conduct. “We assume,” Baldwin said, that the Board intended only to prohibit language that is “coercive in effect” and that it had concluded, in light of the context, that all of Ford’s statements was coercive. But he hoped that the NLRB would clarify its order to accommodate this “comparatively minor distinction.”

Unsurprisingly, Madden was not mollified by Baldwin’s efforts to minimize the effect of the ACLU’s position. He knew that the effect of the ACLU board’s decision would be to embarrass the NLRB and provide ammunition not just to the Ford Motor Company, but to all of the Wagner Act’s detractors. Madden claimed with a touch of defensiveness that no other organization had done more to protect the rights of free speech and free assembly during the period of its existence than the NLRB.\textsuperscript{183} He insisted that he and his colleagues were fully alert to the importance of free speech, and that employers were at liberty to speak publicly in any manner they chose. They were limited only in conversation with their employees, “in which their economic position gives them peculiar power.” Madden took issue with the ACLU’s assumption that expressions of opinion are necessarily non-coercive. Indeed, he reported to Baldwin on the Board’s experience “that anti-union statements made by employers directly to employees, even though stated in the form of expression of opinion, are normally coercive per se.”\textsuperscript{184} However an employer conveyed its disapproval of unions, the message was that employees who joined would be subject to discharge or discrimination. In Madden’s view, “any attempted distinction in our orders between ‘coercive language’ and ‘expressions of opinion’ not

\textsuperscript{182} Roger Baldwin to J. Warren Madden, 4 March 1938, ACLU Papers, reel 164, vol. 2037.
\textsuperscript{183} Nathan Greene agreed with this assessment. Nathan Greene to Harry Ward, 22 March 1938, ACLU Papers, reel 164, vol. 2037 (“We feel that the NLRB, in the short period of its active operation, has done more for the true realization of civil liberties than has ever been done before by any agency of the Government.”).
\textsuperscript{184} J. Warren Madden to Roger Baldwin, 11 March 1938, ACLU Papers, reel 164, vol. 2037.
only would draw a line where none in fact exists but would go far to defeat the whole purpose of
the National Labor Relations Act.”

The pro-labor faction of the ACLU was outraged by the organization’s criticism of the
NLRB. Harry Ward had been ill the evening of the special meeting, and he was unable to attend.
When he heard what had happened, he immediately sought reconsideration of the board’s
position, and he offered a substitute statement on the case. Where Hays had distinguished
between opinion and coercion, Ward wanted the analysis to turn on the overall “course of
conduct of an employer.”185 An employer engaged in the sort of anti-labor activity practiced by
the Ford Motor Company could be constrained in its expression, whereas an employer that had
negotiated willingly with a union and had acted lawfully in all other respects would be free to
make its opinion of unions known. These were distinct theories, and Ward’s was clearly
friendlier to the NLRB. For their part, the proponents of employer free speech accused the labor
advocates of split loyalties. R.W. Riis thought the release of the statement adopted by the ACLU
board would “do the ACLU an incalculable amount of good” in convincing skeptics that the
organization was dispassionately committed to the civil liberties cause. True, it might harm the
NLRB, but “as between the ACLU or the NLRB, our decision seems simple as childhood and
clear as day.”186

For another two months, the board remained hopelessly divided. Madden asked the
ACLU to reconsider its position, and the board complied by inviting NLRB counsel Charles
Fahy to attend one of its meetings (Riis tellingly told Baldwin that he “hate[d] to miss a meeting

1080.
these days, lest the NLRB take over the [ACLU] Board"). Fahy did not manage to persuade
the majority, however, and in late April, Baldwin reported that the ACLU was reaffirming its
original position. Madden, in turn, was equally firm. Throughout the spring, Baldwin urged
minor revisions in the wording of the Board’s order. When the NLRB announced its intent to
withdraw its order for further consideration, Baldwin tried to convince Madden to take the
ACLU memorandum into account in formulating its revisions. Madden responded by stating
that the NLRB was clearly without authority to prohibit language that did not “interfere with,
restrain or coerce employees in the exercise of their right to self-organization and collective
bargaining,” and that any clarification that the order was intended to prohibit only coercive
communications would be superfluous. The only accommodation that he offered the ACLU
was an opportunity to be heard before the Board if the case was in fact withdrawn and
reargued.

Meanwhile, Harry Ward continued to advocate revision of the ACLU’s statement. He
argued that the board had misconceived the true tension in the Ford case, which represented a
conflict not between civil liberties and majoritarian policy, but rather between two competing
civil liberties: the right to free speech, and the right to join a union. To Ward, the latter deserved
more deference as a matter of law as well as “social necessity.”

187 Lucille Milner to Warren Madden, 15 March 1938, ACLU Papers, reel 164, vol. 2037. Fahy attended a meeting
on April 11, at which he and the board agreed to publish an exchange of letters on the issue, although the board
maintained its original view. Charles Fahy to Roger Baldwin, 25 April 1938, ACLU Papers, reel 164, vol. 2037. For
Riis’s comment, see R. W. Riis to Roger Baldwin, 12 May 1938, ACLU Papers, reel 164, vol. 2037.
188 Roger Baldwin to Charles Fahy, 28 April 1938, ACLU Papers, reel 164, vol. 2037.
189 Roger Baldwin to J. Warren Madden, 2 May 1938, ACLU Papers, reel 156, vol. 1072.
190 J. Warren Madden to Roger Baldwin, 7 May 1938, ACLU Papers, reel 156, vol. 1072.
192 He explained: “Civil liberties as rights, for either the worker or the employer, give way to civil liberties as an
instrument of social progress. Therefore, in supporting the law, and an order under it, which limits the right of the
employer to express himself at the point where the exercise of that right becomes restrictive of the right of the
worker to organize, we are not taking sides in an economic conflict, we are acting in behalf of orderly social
to political speech as inapposite, because an employer “uses words in organic relationship to his use of coercion and violence.” It was possible to advocate assassination without incitement to it, but the employer who inveighed against unions, even without direct threat or violent act, was using words “as part of a planned course of conduct in violation of labor’s rights and in defiance of the law.” If the anti-labor faction thought that Ward was acting as a partisan of labor, Ward thought that his detractors were acting out of a misguided desire to prove the ACLU’s neutrality, and he threatened to voice his opposition publicly in a dissenting opinion if the board persisted in its views.

R. W. Riis objected to reopening discussion on what he considered to be a settled matter that had been more than amply discussed. He also demurred on ideological grounds. Adopting what had become a familiar line, he argued that “today’s error may be tomorrow’s truth” and insisted that “since man first emerged from protoplasm, he has progressed in accordance as his thought has been free.” Ward’s memo reduced freedom of expression to a political and economic instrument, he complained, and it was incompatible with the agenda of the ACLU. “To say that the right to join a labor union is the greatest of all the civil rights is to bare a crusading partisanship for labor unions. That is right enough in its place. Its place is not the Civil Liberties Union.” Harold Fey, another board member, expressed similar views. For the first time, he said, he was unsure whether he would remain active in the organization.

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193 The ACLU publicized its pro-employer decisions. See, e.g., “Employers’ Rights Defended by Union,” Civil Liberties Quarterly (June 1938), 3. Ward presumably had in mind press coverage skeptical of the ACLU’s commitment to employers’ rights, e.g., Clipping, Gadsden (Ala.) Times, 8 June 1938, ACLU Papers, reel 163, vol. 2023 (“Promises of the [ACLU] that it will in future seek to protect the rights of the employer as well as the employee will be accepted with tongue in cheek until some tangible evidence of good intentions is produced. There is in this country ample room for an organization devoted to the preservation of civil liberty but the existing outfit has taken very little interest in the subject except as it relates to instances in which it could get a lot of publicity.”). 194 Harry Ward, Dissenting Opinion in the Ford Case, 17 June 1938, ACLU Papers, reel 156, vol. 1080. 195 Letter from R. W. Riis, 14 June 1938, ACLU Papers, reel 156, vol. 1078. 196 Harold Fey to Harry Ward, 25 June 1938, ACLU Papers, reel 164, vol. 1037 (noting the ACLU’s “historic support of individual civil rights as against the real or imagined necessities of mass entities”).
Finally, at the end of the month, the Committee on Labor’s Rights recommended adopting Ward’s proposed statement as an addendum to the original. In a desperate ploy to preserve organizational unity, it declared that there was “no substantial difference” between the two statements except in “points of emphasis.” At the following board meeting, the moderates agreed to delete from the first statement a paragraph pledging the ACLU to further action. It also adopted the committee’s recommendation and issued Ward’s report as a supplemental statement. For many members of the ACLU, the statement went too far in protecting employers’ anti-union utterances; for many others, it was not far enough. For the time being, the board chose to gloss over fundamental differences to preserve a measure of organizational peace.

The truce held for the summer months. In September, the Committee on Civil Rights in Labor Relations took up the Muskin Shoe Company case, a case involving industrial espionage and clear-cut discharge for union activity as well as the distribution of anti-union pamphlets. The board accepted the committee’s conclusion that the literature distribution was “so colored by the whole factual setting of employer coercion that it may properly be considered coercive.” The same reasoning applied in the Mock-Judson-Voehringer Company case, in which

197 Report to the Board of Directors by the Committee on Labor’s Rights, 22 June 1938, ACLU Papers, reel 156, vol. 1078.
198 E.g., Memorandum from W. G. Fennell for Consideration of the Board of Directors, 14 July 1938, ACLU Papers, reel 156, vol. 1078 (commenting that the ACLU had “adopted a viewpoint which seriously circumscribed freedom of speech of employers”). Notably, to the extent Fennell accepted the argument that employer speech was inherently coercive, he thought it particularly applicable in the context of speech by officials of government relief agencies regarding political issues and elections. Fennell’s persistent disagreement with the leftists on the Committee for Civil Rights in Labor Relations prompted Abraham Isserman to request his removal from the committee on technical grounds (the committee was a subcommittee of the board, and Fennell was no longer a board member). Abraham Isserman to Roger Baldwin, 26 July 1938, ACLU Papers, reel 156, vol. 1078. The board subsequently adopted a resolution prohibiting membership in policy subcommittees by non-members. Board Minutes, 8 August 1938, ACLU Papers, reel 156, vol. 1078. Fennell decried the ousting as a “liberal purge.” Willliam Fennell to Lucille B. Milner, 19 August 1938, ACLU Papers, reel 156, vol. 1078.
200 In August, the ACLU circulated a collection of its policies on labor relations. Its introductory comments emphasized the difficulty of resolving problems in the field. “Policies Concerning Civil Rights in Labor Relations,” adopted by the American Civil Liberties Union August 1938, Meiklejohn Papers, box 47, folder 2.
201 Muskin Shoe Company, 8 N.L.R.B. 1 (1938).
the company distributed materials critical of the CIO.\textsuperscript{202} The ACLU stressed that the Board had taken the employer’s anti-union literature into account in finding an unlawful course of conduct, but it had not prohibited future dissemination of literature in either case.\textsuperscript{203} A public statement reported that the ACLU had concluded, after exhaustive study, that “no violations of employers’ ‘rights of free speech’ [were] involved” in either case.\textsuperscript{204} When one former board member complained, Baldwin replied that there was no reconciling the absolutist view “that employers should be allowed to carry on anti-union activity until overt acts are committed and the view shared by most members of our Board that the test of coercion is valid.”\textsuperscript{205}

Subsequent NLRB cases, however, impinged more boldly on employer speech, and the shaky equilibrium in the board soon began to break down. In October, Baldwin sent Nathan Greene a copy of the Labor Relations Report, with a notice of a Court of Appeals decision refusing to enforce an NLRB order. Superintendents of the employer, Union Pacific Stages, had told employees that union membership was not advantageous. The Ninth Circuit found that there was no substantial evidence of discharge for union membership, and thus there was no adequate ground for prohibiting employer speech.\textsuperscript{206} “The right of workers to organize freely must be conceded,” the court explained. “It is a natural right of equal rank with the great right of

\textsuperscript{202} Mock-Judson-Voehringer Company, 8 N.L.R.B. 133 (1938). The American Federation of Hosiery Workers, a CIO union (formerly affiliated with the AFL), began an organizational drive at the plant in March 1937. The Board found that the company had discharged an employee for union activity and had discouraged union activity through the distribution of anti-union literature (including a monthly magazine mailed to employees’ homes, as well as a biased document purporting to explain the Wagner Act, distributed immediately after the constitutionality of the Act was sustained) and through anti-union statements by supervisory employees. Supervisors had also threatened organizers with physical violence.

\textsuperscript{203} The same report declined to propose a comment on the St. Louis Ford case because the intermediate report had advised only that the Board order Ford to cease and desist from interference with organizing, not specifically that it cease its distribution of literature. Report to the Board of the ACLU by the Subcommittee on Civil Rights in Labor Relations, 9 September 1938, ACLU Papers, reel 156, vol. 1078. The Board’s approval of the committee’s statement was reported in Board Minutes, 12 September 1938, ACLU Papers, reel 156, vol. 1078. The Trial Examiner’s intermediate report in the St. Louis case was filed in July 1938, but the Board did not issue its final report until 1940. Ford Motor Company (St. Louis, Mo.), 23 N.L.R.B. 342 (1940).

\textsuperscript{204} “Employers’ ‘Free Speech’ Not Curbed,” \textit{Civil Liberties Quarterly}, September 1938.

\textsuperscript{205} Roger Baldwin to William Fennell, 16 September 1938, ACLU Papers, reel 156, vol. 1078.

\textsuperscript{206} NLRB v. Union Pacific Stages, 99 F.2d 153 (9th Cir. 1938).
free speech, protected by the Constitution. But the right of the workers to organize is not
destroyed by expressions of opinion of the employer or employees, such as referred to above.”

_Union Pacific Stages_ was the first federal court decision on employer speech under the NLRA,
and Baldwin thought it warranted favorable ACLU comment.  Greene disagreed. He felt that
the case involved the typical acts of employer interference and discriminatory discharge, and
while the court had reversed the Board’s findings of facts, the NLRB had relied on them in
formulating their order. There was no way to predict how the Board would have construed an
anti-union statement standing on its own, and he therefore recommended withholding
comment. Despite Greene’s opinion, the board concluded that further investigation was
warranted.

In early cases, including Ford, employers’ clearly abusive conduct had rendered a precise
definition of coercion unnecessary. When the NLRB curtailed the expression of employers
whose interference with organizing was less flagrant, the ACLU’s initial theory became less
plausible. Increasingly, it seemed that the Board was implementing Madden’s notion of
employer communications to employees as coercive per se. The Wagner Act, as NLRB member
Edwin Smith explained, was meant to ensure “that the working population may attain a fuller life
within the framework of the democratic state.” In Smith’s view, that goal justified the
occasional curtailment of existing rights. Indeed, the NLRA was “frankly predicated on the
proposition that the employer must give up a number of important rights, in order that rights of
his employees, which the Congress and the courts have found deserving of public protection,

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207 Roger Baldwin to Nathan Greene, 4 October 1938, ACLU Papers, reel 156, vol. 1078.
208 Nathan Greene to Baldwin, 17 October 1938, ACLU Papers, reel 156, vol. 1078; Board Minutes, 24 October
209 Roger Baldwin to Nathan Greene, 18 October 1938, ACLU Papers, reel 156, vol. 1078.
may not be impaired.” For Smith and Madden, the abrogation of an employer’s right to communicate with employees was no different from the right to hire and fire at will. Both had been protected by the Constitution as interpreted by the federal courts, and both were expendable in the interest of social progress.

For the ACLU, the calculation was much more complicated. Free speech was not simply one among many attributes of democracy, subject to balancing in the interest of social progress. Certainly, there was a time in the 1920s when such an interpretation might have been possible—when “free speech” was a component of “civil liberties,” not its core value. That moment, however, had long since passed. The ACLU could no longer claim, like the NLRB, that a frank denial of free speech was necessary to counteract inequalities of bargaining power in the employer-employee relationship. It was left with an unstable compromise, a distinction between coercion and opinion that seemed bound to collapse. For the first time, the right to speak without state interference was fundamentally incompatible with the best interests of labor. The organization was trying to maintain its underlying commitment to the rights of labor to agitate—to challenge the existing allocation of resources, and with it the basic social structure—while preserving a neutral right of expression as a political tool. Eventually, the ACLU would have to choose.

*Ford in the Courts*

When the Supreme Court handed down its decision on the procedural issue in the Ford case in January 1939, the NLRB was under attack. In the 1938 Democratic primaries, anti-

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New Deal candidates overwhelmingly defeated Roosevelt’s supporters, and the general elections swept almost one hundred Republican candidates into Congress and many more into state and local office. Frank Murphy, the Michigan governor whose conduct during the sit-down strikes had invigorated the UAW (and who would soon be appointed Attorney General\footnote{When Murphy was appointed Attorney General, Harry Bennett, no doubt concerned about federal prosecution, wrote to congratulate him. Harry H. Bennett to Frank Murphy, 10 January 1939, Attorney General Papers, box 5, entry 132, folder Murphy (Attorney General—Items about him) (“We feel that in appointing you, President Roosevelt has selected a man who completely comprehends the requirements of the employed and those of the employer, who can distinguish between the rights of Capital and the demands of Labor, who can recognize the justice in the claims of each, and mediate between them. You have in the past, and particularly as Governor of Michigan, shown a keen and ultimately fair understanding of what the separate obligations of Capital and Labor should be and where each should have a beginning and an ending. Regardless of what expressed opinion may have been, we personally have always felt that your actions were guided and prompted by a spirit of fairness and justice.”).}), suffered a stinging defeat.\footnote{Gross, \textit{National Labor Relations Board}, vol. 2, 68-74, Fine, \textit{Murphy}, vol. 2, 481–516. In November the CIO reorganized as the Congress of Industrial Organizations, an independent labor organization rather than a committee.}

In early 1939, a congressional coalition of Republicans and Southern Democrats introduced a host of amendments designed to curb the authority of the NLRB. Some commanded considerable support. The most notable was a set of amendments proposed by Senator Walsh with the backing of the AFL. Walsh’s amendments addressed such familiar concerns as the separate certification of craft workers. Others more directly favored employers. For example, one would have allowed an employer to call an election independently, and another provided for more robust judicial review. This time, the ACLU paused to consider the issue. Arthur Garfield Hays convened a committee to study quasi-judicial boards.\footnote{Board Minutes, 30 January 1939, ACLU Papers, reel 189, vol. 2233.} He agreed with the Committee on Civil Rights in Labor Relations that it was unadvisable to single out the NLRB for special requirements. He nonetheless thought the time had come for the ACLU to make a general declaration of policy on the subject of procedure before government boards.\footnote{Arthur Garfield Hays to ACLU, 26 January 1939, ACLU Papers, reel 169, vol. 2080.} Hays lamented the growing trend toward “trial by commissions,” and he believed that citizens should have the

\textit{\textsuperscript{212}} When Murphy was appointed Attorney General, Harry Bennett, no doubt concerned about federal prosecution, wrote to congratulate him. Harry H. Bennett to Frank Murphy, 10 January 1939, Attorney General Papers, box 5, entry 132, folder Murphy (Attorney General—Items about him) (“We feel that in appointing you, President Roosevelt has selected a man who completely comprehends the requirements of the employed and those of the employer, who can distinguish between the rights of Capital and the demands of Labor, who can recognize the justice in the claims of each, and mediate between them. You have in the past, and particularly as Governor of Michigan, shown a keen and ultimately fair understanding of what the separate obligations of Capital and Labor should be and where each should have a beginning and an ending. Regardless of what expressed opinion may have been, we personally have always felt that your actions were guided and prompted by a spirit of fairness and justice.”).\textit{\textsuperscript{213}} Gross, \textit{National Labor Relations Board}, vol. 2, 68-74, Fine, \textit{Murphy}, vol. 2, 481–516. In November the CIO reorganized as the Congress of Industrial Organizations, an independent labor organization rather than a committee.\textit{\textsuperscript{214}} Board Minutes, 30 January 1939, ACLU Papers, reel 189, vol. 2233.\textit{\textsuperscript{215}} Arthur Garfield Hays to ACLU, 26 January 1939, ACLU Papers, reel 169, vol. 2080.
same protections before commissions as before the courts. Although he acknowledged the cost and inconvenience of modifying the existing system, he felt that “practically these commissions amount to a censorship on business, which is just as bad as a censorship over literature.”

One of Senator Walsh’s suggestions demanded particular attention: a provision guaranteeing an employer’s right to free speech. The free speech amendment capitalized on liberal disquiet over the free press cases, *Union Pacific Stages*, and, of course, *Ford v. NLRB*. The testimony of J. Warren Madden before the Senate Committee on Education and Labor only exacerbated matters. It was clear from Madden’s testimony that the NLRB’s interpretation of coercive speech was far broader than that of the liberal establishment. Madden told the committee than an anti-union statement made by an employer to a longstanding union, with which it had negotiated over time, might not constitute coercion. On the other hand, “those same expressions in a situation where the union was new and timid and where you had a history of anti-union attitude on the part of the employer” probably would. Ohio Senator Robert Taft, a Republican, pointed out that Madden’s distinction effectively meant that “you could call an A.F.L. union anything, but you cannot call a C.I.O. union anything”—an implication that Madden acknowledged but considered an irrelevant historical accident. Madden further suggested that under most circumstances an employer’s accurate statement that the leaders of a union were communists would constitute coercion, because an employee would assume the organization would be ill regarded and would therefore be unlikely to join. “The fact that it is true,” he insisted, “does not keep it from being coercive.” Citing labor injunctions, he argued that

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216 Testimony of J. Warren Madden, Hearings before the Senate Committee on Education and Labor, 19 April 1939, ACLU Papers, reel 169, vol. 2080.
“there is no privilege against being enjoined from telling the truth if you state it at such times or under such circumstances that you destroy somebody else’s rights.”

Unsurprisingly, the ACLU was not willing to endorse Madden’s reasoning, which threatened to undercut a decade of civil liberties gains. The day after Madden testified, John Haynes Holmes wrote Baldwin to complain. “I see that Brother Madden, of the NLRB, is testifying that it is against the law for an employer to tell his employees that a Union representative is a Communist, even though he is a Communist,” he said. If Madden’s interpretation was correct, Holmes felt that the Wagner Act should be amended to conform with the Bill of Rights. If Madden was wrong, Holmes considered him unfit to continue in his capacity as chair of the NLRB. Either way, he insisted, “this is business for our Board.” And for the first time, the board was significantly divided on the desirability of amending the NLRA. Just over a month before the Supreme Court issued its decision in *Hague v. CIO*, Hays wrote to Lee Pressman, CIO General Counsel, for his assessment of the free speech amendment. Pressman told him that the CIO was “violently opposed.” Like Madden, Pressman was convinced that “mere expression” of an employer’s distaste for unionism was “tantamount to a threat of discharge.” Hays was evidently unconvinced, and he told the board that the Ford case had demonstrated the necessity for an amendment like the one Walsh had proposed.

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217 The question, he suggested, was one of parity. “If there were any constitutional doctrine that people could go about the world speaking the truth or speaking their opinions under any and all circumstances, and regardless of its destructive consequences, we of course would follow it. The courts do not follow any such doctrine when they are protecting property or when they are protecting employers against picketing and that kind of thing.” Any other decision, he concluded, would amount to class discrimination. Ibid.


220 Lee Pressman to Arthur Garfield Hays, 10 February 1939, reel 169, vol. 2080. The CIO had explained its position in an earlier pamphlet (in which it implicitly compared the proposed curtailment of the Board’s powers to Roosevelt’s judiciary reorganization plan). The Committee For Industrial Organization, “Why the Wagner Act Should NOT Be Amended,” October 1938, ACLU Papers, reel 156, vol. 1078 (“[It is] useless to pretend that constitutional rights of free speech are being invaded. There are many kinds of speech which are unlawful. . . .

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The ACLU finally opposed the free speech amendment, along with the other amendments, as “either unnecessary or dangerous to the fundamental purpose of the act.” The organization did not, however, endorse the NLRB’s position on employer speech. In formulating its position on the Wagner Act amendments, the ACLU billed its criticism of the NLRB’s order in the Ford case as a compromise. The organization would not bow to the anti-NLRB hysteria, but neither would it defer without qualification to every NLRB decision. In fact, the Ford case was a perfect opportunity to test its theory that existing limitations on the Board’s authority were adequate. The ACLU would ask the NLRB to modify its order to comport with constitutional concerns. If it proved unwilling to do so, the federal courts would serve as an adequate check.

Thus in January 1939, when the NLRB issued an order setting aside its original findings, Baldwin wrote to Madden to reintroduce the ACLU’s now familiar free speech concern. A return letter indicated that the Board was now acting in its judicial capacity and would no longer consider informal communications. The ACLU would be free, however, to file a brief setting forth its views. The ACLU board was satisfied with this option, and Hays suggested redrafting its letters and memoranda in brief form. Meanwhile, in late January, the NLRB issued

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Society is entitled to impose such reasonable limitations upon freedom of speech and press as may be necessary to its own protection. It has always done so and always will.”).  
221 Arthur Garfield Hays to ACLU, 14 February 1939, ACLU Papers, reel 169, vol. 2080 (arguing that the Ford case indicated that a free speech amendment was necessary). William Fennell also favored the free speech amendment. William Fennel to Osmond Fraenkel, 28 January 1939, ACLU Papers, reel 169, vol. 2080.  
222 ACLU Press Release, 24 April 1939, ACLU Papers, reel 176, vol. 2130; Statement on Proposed Amendments to the NLRA, adopted by the Board on 30 January 1939, ACLU Papers, reel 168, vol. 2080 (“We . . . believe that the amendments which have been so far proposed are either dangerous to the fundamental purposes of the act or unnecessary for the protection of the various interested groups. Procedural requirements which may be desirable can be accomplished by rules of the Board.”).  
223 The Board was not unwilling to adapt in the face of public concern, even if it regarded change as unwarranted. For example, in June the NLRB obviated a particularly popular amendment proposal by announcing that it had amended its rules to permit employers to petition the Board for an election in cases where two or more bona fide labor organizations were claiming a majority. NLRB Press Release, 21 June 1939, ACLU Papers, reel 169, vol. 2080.  
224 Roger Baldwin to J. Warren Madden, 9 January 1939, ACLU Papers, reel 189, vol. 2233.  
a proposed order in the case.\textsuperscript{226} The new order was practically identical to the original. A Ford press release noted that the “Board ha[d] copied word for word the report which it previously withdrew, except for minor changes in the parts of the report and proposed order which prohibited Henry Ford and the Ford Motor Company from making statements ‘criticizing or disparaging’ any labor organizations, [which] were subject to severe criticism from many sources, including a stinging rebuke from the Civil Liberties Union.”\textsuperscript{227} In the earlier version, the Board had required Ford to cease and desist from the dissemination of anti-union views. In the revised order, this clause was slightly qualified; the Board prohibited the Company from “interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act” by engaging in the communications it had previously proscribed.

In effect, the NLRB had done precisely what Greene and Wald had advised it to do: it had implicitly limited its prohibition to communications that interfered with employees’ rights under the NLRA. ACLU staff counsel Jerome Britchey therefore concluded that the new wording “cure[d] one of the defects we had in mind when we objected to the order.”\textsuperscript{228} He noted, however, that the NLRB’s intention was ambiguous. It was unclear whether the Board would construe mere expressions of opinion as permissible, or rather consider all anti-union communications to fall within the qualifying clause, as its public statements had suggested.

The two camps within the ACLU had never been farther apart. Greene believed the clarification fully addressed the ACLU’s earlier concerns and thought it “would be tragic to contend otherwise.”\textsuperscript{229} Hays, on the other hand, thought it was time for the ACLU to take a more aggressive stand. He told the board: “I think we must take the position that an expression

\textsuperscript{226} NLRB press release, 27 January 1939, ACLU Papers, reel 189, vol. 2233.
\textsuperscript{227} Ford press release, quoted in Memorandum for Mr. McCormack, 17 February 1939, Ford Legal Papers, acc. 897, box 4, vol. 2.
\textsuperscript{228} Jerome Britchey to Arthur Garfield Hays, 20 February 1939, ACLU Papers, reel 189, vol. 2233.
\textsuperscript{229} Nathan Greene to Jerome Britchey, 6 April 1939, ACLU Papers, reel 189, vol. 2233.
of opinion is lawful under any and all circumstances." He acknowledged the difficulty in certain cases of distinguishing between opinion and veiled threat, but he considered that to be the only question for the NLRB to decide. If the ACLU had previously suggested that expression of opinion could be curtailed when it was accompanied by unlawful acts, it had been mistaken. “It isn’t the opinion that is unlawful,” he insisted, “it is the acts.” Mere speech should never be subject to punishment or prohibition. In response, Ward reiterated his earlier distinction between expression by an employer in the workplace and expression by a speaker in a public forum. In his view, an employer’s words themselves were the conduct forbidden by the law.

The board rejected Hays’s absolutist position and, for the time being, adhered roughly to the parameters of its two earlier statements. The leftists on the board sought to ensure that Hays would not inject his own views into the ACLU’s official communications. Although the NLRB had invited the ACLU to defend its views in oral argument, they refused to endorse Hays’s appearance. They also insisted that a neutral party be assigned to draft the brief, and Osmond Fraenkel was selected for the job. Fraenkel sought to hew as closely as possible to the 1938 memoranda. In April, shortly before the brief was due, Britchey circulated Fraenkel’s brief, Hays’s letter in opposition, and Ward’s comments. “The whole problem,” he explained, “boils down to this: which of the two views follows more closely the position we took in the original Ford order.”

231 Harry Ward to Roger Baldwin, 4 April 1939, ACLU Papers, reel 189, vol. 2233.
233 The ACLU was granted until April 17 to file a brief. Estelle Frankfurter to Jerome Britchey, 27 March 1939, ACLU Papers, reel 189, vol. 2233.
234 Jerome Britchey to Whitney North Seymour, 6 April 1939, ACLU Papers, reel 189, vol. 2233.
In the end, the ACLU filed its brief, signed by Fraenkel and Walter Frank, while Hays was abroad. The final version urged the NLRB to rephrase its order to forbid only those communications that “interfere with or coerce employees in the exercise of their rights.” The brief opened by declaring the ACLU’s belief that “all groups in the community” were entitled to free speech, “be they powerful or weak,” employers or employees. According to Fraenkel and Frank, employer speech could be punished only when the speech in itself was coercive or when its relation to other unlawful acts produced a coercive effect. Although the Board’s order did not specifically limit the prohibition to coercive materials, nor was it clear whether the prohibition would continue once the company ceased commission of other unlawful acts. In its most concrete gesture toward clarification of its position, the brief contended (citing DeJonge) that a statement must be “in fact intimidatory” to justify curtailment consistent with constitutional rights, implicitly repudiating the NLRB’s assumption that employer speech was inherently

235 Board Minutes, 10 April 1939, ACLU Papers, reel 189, vol. 2233; Brief on Behalf of the ACLU as Amicus Curiae, In the Matter of Ford Motor Company and International Union, United Automobile Workers of America, ACLU Papers, reel 189, vol. 2232.


237 From the perspective of protecting labor movement speech, this was an important distinction. A number of cases had banned even peaceful picketing by a labor union once any picketing in a given conflict had proven violent. E.g., Nann v. Raimist, 255 N.Y. 307 (1931). These decisions, however, had been condemned by labor advocates. See “Note: Prior Illegal Acts as a Ground for Blanket Injunctions against Picketing,” Harvard Law Review 44 (1931): 971–76; “Recent Case: Prior Illegal Picketing as Ground for Enjoining All Picketing Despite Anti-Injunction Act,” Harvard Law Review 52 (1939): 1183–84. In 1941, the Supreme Court upheld this rule. In a case involving a state-court injunction against picketing by a union that had acted violently, the Court held that “utterance in a contest of violence can lose its significance as an appeal to reason and become part of an instrument of force,” thereby losing its constitutional protection. Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941). Reflecting on this case in an internal memorandum, one Ford lawyer thought it plausible “that Justice Frankfurter was encouraged to go so far in limiting peaceful picketing because the ruling would establish a precedent which would sustain the Labor Board’s position on free speech.” H. D., Memorandum for Messrs. Wood and McCormack, 13 February 1941, Ford Legal Papers, acc. 897, box 4, vol. 5.

238 It quoted: “These rights may be abused by using speech or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.” Brief on Behalf of the ACLU as Amicus Curiae, In the Matter of Ford Motor Company and International Union, United Automobile Workers of America, ACLU Papers, reel 189, vol. 2232.
coercive. In concluding, however, Fraenkel and Frank once again hedged. “There can be little doubt that in the setting of this particular case, distribution of anti-union literature would constitute an unfair labor practice so long as any of the other practices referred to in the order continued,” they claimed. Nonetheless, given the lapse of nearly two years since the Ford proceedings had begun, “it would hardly seem appropriate to bar the Ford Company from the distribution of non-coercive anti-union literature if its other acts of hostility toward the union had completely ceased.” The ACLU announced its conclusion in the same press release in which it stated its continued opposition to amendment of the NLRA. The brief’s timid chastisement of the NLRB was enough for the *New York Times* to proclaim, “Liberties Union Again Aids Ford.”

Fraenkel’s and Frank’s brief was the last ACLU statement on the matter until the NLRB issued its final order in the fall. In the meantime, the Ford Motor Company refined its strategy for the case. In March 1939, Ford’s attorneys filed a motion to reopen the record and introduce additional evidence, but their motion was denied. In April, when the ACLU submitted its amicus brief, Ford submitted a brief of its own. Ford continued to pursue its arguments about sit-down strikes and the partiality of the NLRB, but it focused on free speech.

In various memoranda and draft briefs, Ford’s attorneys assembled a mass of case law and legislative history in support of its position. Their primary obstacle in this department

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239 They explained: “A suggestion lurks in the new provision that all propaganda ‘disparaging or criticizing’ labor organizations amounts to interference or coercion. If such influence represents the intention of the Board, then we are, in effect, back where we started from. . . . While we recognize that anti-union statements of employers are generally part of a campaign of intimidation, we cannot concede that they must necessarily be so and, unless they are in fact intimidatory, they cannot under our Constitution be prohibited.” Ibid.

240 As ACLU attorney, it fell on Hays to relay the ACLU’s comments and request their insertion in the record. He noted in his correspondence that the ACLU was not a partisan of labor. Arthur Garfield Hays to Hon. Elbert D. Thomas, 1 May 1939, ACLU Papers, reel 169, vol. 2080.


was, appropriately enough, the body of pro-industry labor injunction cases that had plagued labor for so many years. Notably, they did not assume that pre-1937 cases hostile to labor speech and picketing had been overruled. Rather, they sought to distinguish these cases or fit them to the facts of the Ford case. One memorandum, for example, concluded that advice was constitutionally protected as long as the speaker did not interfere with the hearer’s “free right to choose” whether to comply, a test with obvious limiting implications for employer speech. Ford’s attorneys also worried about the question of corporate personhood, which the ACLU seems never to have considered. The most immediate cause for concern was Justice Harlan Fiske Stone’s opinion in the *Hague* case, in which Justice Stone had assumed (citing *Northwestern Life Insurance v. Riggs* and *Western Turf Association v. Greenberg*) that the ACLU could not be “said to be deprived of the civil right of freedom of speech and assembly, for the liberty guaranteed by the due process clause is the liberty of natural, not artificial persons.”

In all of its internal documents and in its communications to the NLRB, Ford quoted frequently and fervently from the free speech decisions that the ACLU had fought so hard to promote and defend. One memorandum declared that “the nearest approximation to truth is arrived at by the clashing against each other of rival theories.” It then explained that employers

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*Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548 (1930), and noting that while the Railway Labor Act of 1926 had prohibited speech exerting an “influence” on organizer, the NLRA had substituted the word “restraint”); P. B., “Memorandum on Free Speech,” 11 June 1939, Ford Legal Papers, box 3, vol. 3 (articulating free choice test and noting that the Supreme Court’s recent decision in *Senn v. Tile Layers Protective Union*, 301 U.S. 468 (1937), implied that the right to inform the public of an ongoing strike was protected.

E.g., American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184 (1921) (holding mass picketing coercive).


A Ford attorney thought Hague was distinguishable because it involved the Civil Rights Act of 1871. This view found support in *Grosjean*, in which the Court upheld a constitutional challenge of Louisiana’s tax law by newspaper corporations. P. B., “Freedom of Speech and Corporations,” 13 June 1939, Ford Legal Papers, box 3, vol. 3. See also P. B., Memorandum for Mr. Wood, “Freedom of Speech in Corporations,” 11 August 1939, Ford Legal papers, acc. 897, box 3, vol. 3.
were the most motivated to formulate arguments against organized labor, and they consequently made the “most effective cross-examiners of the proponents of labor unions.” To prevent the expression of their opinions would be to impoverish the marketplace of ideas.246

After several months of deliberation, the NLRB issued its final order in the Ford case in August 1939. In it, the Board eliminated its earlier finding that Ford Motor Company had “deliberately planned and carried out” the Battle of the Overpass to crush unionization in the plant. On the free speech issue, however, the new order was virtually unchanged from the January order or the original of December 1937.247 In a press release, the NLRB noted public concerns about employer free speech but explained that the company’s circulation of literature had to be considered in context.248 “Coming at a time when the U.A.W. was conducting a drive to organize the respondent’s employees,” the Board concluded, “the publications had the unmistakable purpose and effect of warning employees that they should refrain from joining the union.” Ford’s statements denounced labor organizations and characterized their leaders as liars and racketeers. Under the circumstances, they were not “directed to the reason of the employee.” On the contrary, “no employee could fail to understand that if he disregarded the warning he might find himself in difficulties with his employer.” The publications signaled to employees that joining a union likely would result in discrimination or discharge, and at the least would lead the employer to regard them as gullible and foolish. “The employees could not fail to believe that in matters of promotion or selection of men for lay-offs, such an opinion would have weight.”

247 The only difference was a tense change that was generally agreed to be irrelevant. Osmond Fraenkel to Jerome Britchey, 18 August 1939, ACLU Papers, reel 189, vol. 2233.
Responses to the decision within the ACLU fell along predictable lines, though an air of resignation had settled on both camps. Green assumed that “those who quarreled with the proposed order [would] quarrel with this one,” and he also predicted a strong attack in the courts. Fraenkel thought the Board’s contextualization of Ford’s literature distribution took the “sting out of our objection” by clarifying that the Board was concerned only with communications that were coercive in intent and effect. The Committee on Civil Rights in Labor Relations voted not to object to confirmation of the order in the Sixth Circuit and authorized Fraenkel to prepare a report to distribute to the press.

The draft report recounted the ACLU’s earlier suggestion that the Board rephrase its order to bar only employer statements that operated to deprive employees of their rights. Although the Board had not adopted the ACLU’s recommendation, it had indicated its intention to interpret the language of the order to apply only to coercive speech. That was good enough to render the order consistent with the Constitution. The report concluded by stating that if Ford had “faithfully obeyed the provisions of the order and complied with the spirit of the National Labor Relations Act, it, like any other employer, should remain free to state to its employees its opinion concerning labor unions or any other relevant subjects.” With that proviso, the ACLU board voted to adopt the committee’s report, over John Haynes Holmes’s dissent. Much of the

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249 E.g., R. W. Riis to Theodore Irwin, 8 October 1939, ACLU Papers, reel 189, vol. 2233 (“I object permanently to the Union releasing a statement saying that indications are that a certain Government order will probably not interfere with free speech as long as . . . etc. etc. Our job is to be jealous for free speech, not apologetic for the Labor Board.”).
250 Nathan Greene to Jerome Britchey, 19 August 1939, ACLU Papers, reel 189, vol. 2233.
251 Osmond Fraenkel to Jerome Britchey, 18 August 1939, ACLU Papers, reel 189, vol. 2233.
252 Jerome Britchey to Board, 12 October 1939, ACLU Papers, reel 189, vol. 2233.
253 The NLRB had stated that the issue in the Ford case was “whether, under the circumstances of this case, the respondent interfered with, restrained, and coerced its employees in the exercise of their rights of self-organization by distributing to its employees literature criticizing and disparaging labor organizations.” Ford Motor Company (Highland Park and Dearborn, Mich.), 14 N.L.R.B. 346, 377 (1939).
254 Report of Committee on Civil Rights in Labor Relations with Regard to the Ford Case, Adopted by the Board of Directors, 16 October 1939, ACLU Papers, reel 176, vol. 2130.
discussion centered on the statement that the ACLU would “vigorously protest” and offer to come to Ford’s assistance if the Board attempted to punish the company for non-coercive expression, a statement that the labor contingent thought superfluous and the absolutists considered empty verbiage. The board ultimately struck it out, but a promise to scrutinize all efforts by the NLRB to enforce its order stayed in. At the end of the month, the ACLU released a public statement explaining its position and its decision not to file a brief.

Meanwhile, the NLRB once again filed for enforcement of its order in the Sixth Circuit. In response, Ford made all the familiar arguments: the Trial Examiner was biased, partisan, and abusive, thereby depriving Ford of a full and fair hearing; the Board erroneously failed to consider the facts and circumstances leading up to the May 26 clash; the decisionmaking process was procedurally flawed; and the Board’s findings of facts were insufficient to support its order and unsupported by the evidence. It also fully briefed its First Amendment argument—namely, that the limitations imposed by the Board on the Ford Company’s right to distribute anti-union literature were not authorized by the NLRA, and that the act, if construed to permit them, would violate the First Amendment.

255 Abraham Isserman to Jerome Britchey, 7 October 1939, ACLU Papers, reel 189, vol. 2233 (claiming the statement indicated suspicion “which negates our finding that there is no further reason for criticism”); R.W. Riis to Jerome Britchey, 5 October 1939, ACLU Papers, reel 189, vol. 2233.
256 “The promise that the Union will vigorously come to the support of Mr. Ford in the future doesn’t mean a thing except that it is evidence that we are feeling somewhat uneasy in the whole situation.” R.W. Riis to Jerome Britchey, 5 October 1939, ACLU Papers, reel 189, vol. 2233.
257 Board Minutes, 16 October 1939, ACLU Papers, reel 189, vol. 2233.
259 Ford filed a cross-petition to set aside the order, as well as collateral motions to compel the Board to answer its allegations, to direct the Board to supplement the record, and to file additional parts of the record, together with a petition for a commission to take depositions of various officers and employees of the Board in respect to the practice by which decision was reached. The petition was denied on the grounds that it fell within the court’s earlier decision, affirmed by the Supreme Court. The motions were not disposed of by the Sixth Circuit until its final decision in the case.
260 Brief for Respondent, NLRB v. Ford Motor Company, Sixth Circuit, October Term 1939 (2 April 1940), Ford Legal Papers, acc 51, box 4 (hereafter Respondents’ Sixth Circuit brief).
Ford rejected the NLRB’s contention that the introductory clause in its order prohibiting literature distribution satisfied constitutional requirements. It argued that the proposed construction was inconsistent with the rules of interpretation and with the Board’s public position that anti-union communications from employers to employees were coercive on their own terms. Moreover, Ford argued that the general climate at the River Rouge plant was not in fact coercive. Only eight of the employees purportedly discharged for union activities were there at the time the literature was circulated, and there was no evidence that their discharges or the reasons for them were widely known in the plant. “To give the literature circulated by respondent—not in itself of an intimidatory or coercive nature—the character of intimidation and coercion because of the effect on the readers’ minds of extraneous facts, it must be shown that those facts were known to the readers. There is no such showing.”

According to Ford, suppression of an employer’s opinion as to the merits of unionization was never contemplated by the NLRA. In discussing the bill, Senator Walsh had stated that nothing in the act would prevent an employer from expressing anti-union sentiments. Ford’s lawyers made much of international events, of “current history in other countries,” which pointed to the importance of the vigorous protection of First Amendment principles. “It is not difficult to prophesy,” they declared ominously, “that if ever, at some unhappy time in the future, citizens of this country are prosecuted for expressing beliefs contrary to those held by the government of the day, the leaders of that government will seek to justify themselves by the very statement

261 Ibid (citing Senate Committee on Education and Labor, Hearings on Bills to amend the NLRA (76th Cong., 1st session), 155, 171–72).
262 Ibid., 39–40.
263 He explained that the decision to replace the word “influence,” used in the Railway Labor Act, with stronger language of interference and coercion was meant to address precisely this situation. Walsh gave the examples of “posting a notice, or writing that he thinks their best interest is to form a company union, that is violently opposed to so-and-so who is attempting to organize a union.” Ibid.
264 Ibid., 46.
which the Board has made.”265 “There are no qualifications whatever to the provisions of the First Amendment,” they emphasized, in language that would have bewildered labor lawyers two decades earlier. Citing Lovell v. City of Griffin and Schneider v. New Jersey, they celebrated the important place of pamphleteering in American history and culture, a practice that the Supreme Court had declared “vital to the maintenance of democratic institutions.”266 The Board’s order, they cautioned, amounted to a prior restraint on utterance and threatened the heart of the constitutional guarantee of free speech.

The Board, in turn, found itself in the unlikely situation of defending the curtailment of free speech by relying on the cases that had haunted labor for generations. It invoked the “verbal act” cases in the Schenck line, as well as Gompers v. Bucks Stove.267 In arguing that freedom of speech for employers should be no greater than that afforded employees, they risked undercutting the tremendous gains secured for labor speech in the past decade. Ford’s attorneys appreciated the irony. “It is generally admitted that those cases went too far in restraining legitimate union activities,” they reasoned, “and it is surprising to find the Board arguing, in effect, that past injustices to unions should now be matched by corresponding injustices to employers.”268 They pointed to the Supreme Court’s recent decision in Senn v. Tile Layers Protective Union, the first in an unfolding line of cases reversing the earlier judicial understanding. Earlier courts had resisted legislative efforts to protect labor speech, enjoining pickets and boycotts and trampling on the First Amendment in the process. Now, Ford was

265 Ibid., 46–47.
266 Schneider v. New Jersey, 308 U.S. 147, 151 (1939).
267 Ford sought to distinguish the many cases introduced by the Board in which anti-union communications were enjoined. Many of them were under the Railway Labor Act and, according to Ford, all involved something more than “mere distribution of statements.” Those cases arising under the NLRA had largely involved threats, they claimed. Respondents’ Sixth Circuit Brief, 44.
268 Ibid., 48.
asking the court to undercut legislative protection for labor once again, only this time by invoking free speech.

The irony must have been as distressing and confusing to labor advocates as it was to the ACLU. The reversal of opinions in these cases is, of course, standard fare for legal argument. It is a neat corollary to the ACLU’s own appropriation of constitutional language at the outset of World War I, at a time when individual rights and personal liberty were watchwords of labor’s oppression. In the Ford case, however, the shift in positions indicated something more than the malleability of lawyers. It reflected a fundamental realignment in the relationship of various American constituencies to the courts, the Constitution, and the state.

The Communist Purge

In its statement on the NLRB’s revised order in the Ford case, the ACLU had only forestalled the inevitable. Within a matter of months, the temporary calm within the organization erupted into full-fledged crisis, culminating in the expulsion of Communists from the ACLU’s board of directors and the resignations of Harry Ward and many other longstanding leaders and members of the ACLU.

The controversy over employer free speech was crucial to the conflict, though it was not the only source. The Soviet-Nazi pact, and the corresponding deterioration in relations between American Communists and their liberal allies, was a crushing blow to many Soviet sympathizers, including Roger Baldwin. In the wake of the agreement, the board’s centrists became increasingly suspicious of Communist influence.269 In addition, the board divided over the

269 “Statement for the Press by the ACLU To Accompany Announcement of Resolution Adopted on February 5, 1940,” Jackson Papers, General Correspondence, cont. 3 (claiming that the impetus for the new resolution was the “direction of the Communist international movement”—namely, its “abandonment of the struggle against
House Committee Investigating Un-American Activities, chaired by Representative Martin Dies, Jr., a Texas Democrat. The Dies Committee was directed toward foreign subversive activity in the United States, including Nazi propaganda, but in practice it focused on alleged Communist collaboration (including the CIO’s and the NLRB’s), prompting a wave of anti-Communist hysteria and passage of the Smith Act, the nation’s first peacetime sedition law. The Dies Committee was in the process of scrutinizing many members of the ACLU board, along with the Popular Front organizations to which they belonged. The most notable victim was Harry Ward, who was serving concurrently as chair of the American League of Peace and Democracy; after he testified before the Dies Committee on behalf of the American League, many members of the ACLU’s leadership demanded his resignation. Among them was Norman Thomas, who charged in *The Call* that Ward was one of “six or seven Communists or fellow travelers” on the ACLU board and cautioned that “men and women of ordinary common sense should not entrust the defense of civil liberties in America to those who condone or fail to denounce Stalin’s purges and his crimes against decency and humanity.”

On the other side, the leftists accused Morris Ernst and Arthur Garfield Hays, among others, of striking a deal with Martin Dies to forestall an investigation of the ACLU (and, in Ernst’s case, the National Lawyers Guild as well). In October, Dies publicly absolved the

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271 Ernst was allegedly motivated by his political aspirations. During the late 1930s, he developed a close personal and political relationship with the President (as well as Eleanor Roosevelt, who joined the ACLU in 1950). See, *e.g.*,
ACLUs of Communist collaboration; whether he received anything in turn was the subject of intense speculation for decades.\textsuperscript{272} Certainly, the ACLU board’s official criticism of the Dies Committee was half-hearted and equivocal. What the moderates considered “pragmatic liberalism” or “political realism,” the radicals denounced as hypocrisy.\textsuperscript{273}

After months of mounting tension at ACLU board meetings—depending on who was present, slim majorities would alternately pass and rescind anti-Communist statements\textsuperscript{274}—the board passed (and the National Committee approved) its notorious “1940 Resolution” in February.\textsuperscript{275} The resolution affirmed that the ACLU would “defend[] the right to hold and utter any opinions” and would not disqualify general members on the basis of “political or economic questions.”\textsuperscript{276} For the governing committees and staff, however, it established a “test of consistency in the defense of civil liberties in all aspects and all places,” and it presumed that the requisite consistency was “inevitably comprised by persons who . . . justify or tolerate the denial

\begin{footnotesize}
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\item\textsuperscript{272} In 1970, the ACLU undertook a study of the 1939–40 events and investigated the charges that Ernst had promised to remove the Communists.
\item\textsuperscript{273} \textit{E.g.}, Gardner Jackson to Florence H. Luscomb, Civil Liberties Committee of Massachusetts, 21 December 1939, Jackson Papers, General Correspondence, cont. 3, box 3, folder American Civil Liberties Union.
\item\textsuperscript{274} Walker, \textit{American Liberties}, 130–32.
\item\textsuperscript{275} The 1970 investigation by the ACLU concluded that the resolution was written by Morris Ernst. Second Report, ACLU Papers, box 75, folder 11.
\item\textsuperscript{276} A pamphlet on the resolution claimed that the defense of the rights of Communists was the “acid test of fidelity to civil liberty, because they are the minority most detested and attacked.” The board rationalized that it could do a “far better job” defending Communists if its own allegiance was not subject to question. ACLU, “Statement to Members and Friends regarding the February 5th Resolution, 9, May 1940, Jackson Papers, General Correspondence, cont. 3 (hereafter ACLU, “Statement to Members”).
\end{itemize}
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of civil liberties by dictatorship abroad.” It therefore excluded from leadership positions any
member of a political organization “which supports totalitarian dictatorship in any country” or
any person who publicly indicated “support of such a principle.” In justifying the new
measure, the board cited internal criticism of Communist influence, which had prompted several
resignations during the fall of 1939. The resolution was an effort to “create greater harmony”
by clarifying existing ACLU policy.

Despite the board’s ambition, the members and supporters of the ACLU immediately
erupted into bitter debate. In a move welcomed by the resolution’s authors, Harry Ward—
lamenting that “the Civil Liberties Union which did this is not the Civil Liberties Union with
which I have been glad to work for twenty years”—resigned as chair. Seventeen prominent
liberals, eight of whom were not members of the organization, demanded in an open letter that
ACLU “restore civil liberties” by rescinding the resolution. More than thirty members
resigned, while others joined or made contributions. The most active local committees

277 Resolution Adopted by the Board of Directors and National Committee, 5 February 1940, ACLU Papers, box 74,
folder 6.
278 John Dos Passos had resigned from the National Committee and Margaret DeSilver from the Board of directors.
279 ACLU, “Statement to Members.” The board insisted that the resolution was consistent with the original policy of
the ACLU, and it noted that members of a local committee who had been discovered to belong to the Ku Klux Klan
had been removed, as had a vice-chairman of a local committee who supported an antisemitic gubernatorial
candidate in Kansas. Ibid. In a press statement, the ACLU claimed never to have “originally elected” any member to
its Board of Directors or National Committee whose unqualified support for civil liberties was questionable. This
included members of the Communist Party; according to the statement, two members of the National Committee had
joined the Party only after their election. “Statement for the Press by the ACLU To Accompany Announcement of
Resolution Adopted on February 5, 1940,” Jackson Papers, General Correspondence, cont. 3. Critics emphasized
that the claim to consistency was belied by the board’s past statements. See, e.g., New Jersey Civil Liberties Union
Opinion, Jackson Papers, General Correspondence, cont. 3.
280 Harry Ward to National Committee and Board of Directors, 4 March 1940, ACLU Papers, box 74, folder 4.
281 I.F. Stone, Press Release, 18 March 1940, ACLU Papers, box 74, folder 4. The signers included Former
Representative John T. Bernard, Professor Frank Boaz, Howard Costigan, Gardner Jackson, and Theodore Dreiser.
Many similar letters were circulated. E.g., Frank Boaz, Robert S. Lynd, and I.F. Stone to Friends, 1 March 1940,
Jackson Papers, General Correspondence, cont. 3; Alexander Meiklejohn to Board of Directors, 15 February 1940,
Meiklejohn Papers, box 4, folder 4 (“The Union has changed its policy at the most vital point in its program. It has
shown that it cannot itself take the medicine which, for twenty years, it has been prescribing for others.”).
condemned the resolution or considered it unnecessary; only one approved. \(^{282}\) As for the ACLU’s broader audience, the Union insisted that the decision was not a concession to outside pressure. There was not, it claimed, “the slightest desire to become ‘respectable’ to conservatives.” \(^{283}\) Still, there was “no question but that the Union ha[d] been greatly strengthened in public opinion by this action,” as the “unanimous and strongly worded approval of newspapers in editorial comment throughout the country” (the radical press excepted) had clearly revealed. \(^{284}\) Opponents of the resolution could not help but notice an April memorandum from the chair of the ACLU’s Membership Advisory Committee: “This seems the ideal time to promote our old plan to increase the membership of the Union. The organization has never been more highly regarded by the press and public than now, and a determined effort will bring us declared adherents in larger numbers and contributions in larger volume than at any period in our twenty years.” \(^{285}\)

If the February resolution was contentious, the board’s enforcement of its terms—its expulsion of its one openly Communist member—was a declaration of war. \(^{286}\) Elizabeth Gurley Flynn was a founding member of the ACLU. As she angrily reminded the board, she had been a

\(^{282}\) See, \emph{e.g.}, Statement of the New Jersey Civil Liberties Union, ACLU Papers, box 74, folder 4 (“[I]t is most valuable and indeed essential that for the most effective support of this principle the widest possible representation of political, economic, religious and racial viewpoints is desirable on the governing committees and staff of the ACLU—as has been the case in the past.”). Gardner Jackson, chair of the ACLU’s Washington committee, reportedly advised members to resign from the ACLU if the resolution was not rescinded. Roger Baldwin to Gardner Jackson, 14 February 1940, Jackson Papers, General Correspondence, cont. 3.

\(^{283}\) Ibid., 14. The ACLU sent a slew of letters to journals in response to articles and editorials suggesting that the expulsion was intended to make the organization “respectable,” insisting that ACLU policy had not changed. \emph{E.g.}, Baldwin to \emph{Johnson City (Tenn.) Chronicle}, 11 April 1940, ACLU Papers, box 74, folder 5.

\(^{284}\) There were thirty-two local committees at the time, but most were inactive and declined to express a view.

\(^{285}\) B. W. Huebsch to Fellow Directors, 19 April 1940, ACLU Papers, box 74, folder 6. The ACLU in fact received a number of contributions from anti-Communists after the resolution. \emph{E.g.}, Morrie Ryskind to Roger Baldwin, 4 March 1940, ACLU Papers, box 74, folder 14 (“I’m sending ten dollars herewith as a thanks-offering for the ousting of Dr. Harry F. Ward and the other Communists from the ACLU . . . . I think when I get back to Hollywood, I can again enlist a lot of people who have been worried by the presence of the Commies.”).

\(^{286}\) On the Flynn expulsion, see Corliss Lamont, ed., \emph{The Trial of Elizabeth Gurley Flynn by the American Civil Liberties Union} (New York: Horizon Press, 1968); Burt Neuborne, “Of Pragmatism and Principle: A Second Look at the Expulsion of Elizabeth Gurley Flynn from the ACLU’s Board of Directors,” \emph{Tulsa Law Review} 41 (2006): 799–815; Walker, \emph{American Liberties}, 132–33; Kutulas, \emph{Modern Liberalism}, 75–81 (discussing personal as well as political considerations, including Flynn’s intimate relationships with Baldwin and prominent donors).
“consistent military fighter” for civil liberties ever since her IWW days and the Spokane free speech fight. For almost three decades, she had argued unflinchingly for the rights of dissenters; during that period, the organization’s conservatives had never once “been in jail for free speech.”

Until the mid-1930s, Flynn had difficulty finding a political home. She had belonged briefly to the Socialist Party and to the Workers Party, but she professed quarrels with their platforms. In 1934, when asked what party “most clearly represent[d her] political and economic beliefs,” she gave two answers: the I.W.W. and the American Communist Party, “not controlled by Stalin.” Despite her reservations about a policy dictated by Moscow, she joined the Communist Party in February 1937, and in the summer of 1938, she became a member of its National Committee. She was nonetheless reelected to the ACLU board in 1939, after inquiring whether there was any objection to her membership in the Communist Party. According to the board, those were different times.

Flynn was vehemently opposed to the board’s new policy, and after its passage, she refused to resign. In the New Masses, she echoed Ward’s view that the ACLU had changed. She described a “steady infiltration of new elements”—including lawyers, businessmen, and ministers, “but not a single representative of organized labor”—“wealthy people” who were “actually out of sympathy with the traditional position of the ACLU.” Flynn thought the attack on the Communists was symptomatic of an “anti-labor, anti-union attitude.” It was entirely in keeping with “the Union’s constant sniping at the labor Relations Board,” its opposition to the sit-down strike, and “its persistent and unsolicited defense of Henry Ford’s ‘right of free

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287 Reply of Elizabeth Gurley Flynn to Charges Filed by Dorothy Dunbar Bromley, ACLU Papers, box 75, folder 1.
288 Flynn’s response to survey of 18 April 1934, ACLU Papers, reel 105, vol. 678. To clarify, she noted at the bottom of the survey: “I am not a liberal; nor a radical (tired, retired or otherwise). I hope I am a revolutionist.”
289 Transcript of proceedings, ACLU Papers, box 74, folder 2, 95, 110.
speech.” Flynn dismissed as “metaphysic[al]” her critics’ contention that she believed in civil liberties not “in a vacuum of pristine purity, but as a means to an end.” In Flynn’s view, it was precisely those members who were “must pure in their own estimation on the abstractions” who were most willing to compromise on the “practical issues, especially where labor is concerned.”

On May 7, 1940 (the proceeding was postponed several weeks in light of the death of Flynn’s only son), the ACLU’s board of directors convened proceedings to expel Flynn from its governing body. The controversy, the anti-Communists openly conceded, was not about Flynn. No one questioned her personal loyalty to the civil liberties cause. Rather, she was a “symbol” of a struggle to define the Union’s “whole attitude toward collaboration with Communists in defense of civil liberties, both inside and outside the Union.”

At 2:20 in the morning, after hours of debate over procedural matters, organizational politics, and the principles of free speech, the board voted. Nine members (including Morris Ernst, Elmer Rice, and R. W. Riis) favored expulsion; nine members (including Osmond Fraenkel and Arthur Garfield Hays, in addition to the committed leftists) opposed. John Haynes Holmes, as chair, broke the tie in favor of removal.

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290 Elizabeth Gurley Flynn, Clipping, *New Masses*, 19 March 1940, ACLU Papers, box 74, folder 6. See also Elizabeth Gurley Flynn, Clipping, “I am Expelled from Civil Liberties!” *Daily Worker*, 17 March 1940, ACLU Papers, box 74, folder 6 (“Time was, when the ACLU was young, they were Anarchists, Socialists, Christian pacifists, trade unionists, IWW, Quaker, Irish Republican and Communist! Today, they are no longer heretics, non-conformists, radicals—they are respectable. They cooperate with the Department of Justice; they play with Mr. Dies for a whitewash. . . . Today they are not defending Communists or unions. They are defending ‘employers’ rights!’”).

291 Reply of Elizabeth Gurley Flynn to Charges Filed by Dorothy Dunbar Bromley, ACLU Papers, box 75, folder 1. Cf. Arthur Garfield Hays, Transcript of proceedings, ACLU Papers, box 74, folder 2, 156 (“I think the record ought to show that, of all the people of the so-called ‘left’ group, Elizabeth Flynn has done less to impede the progress of work; she hasn’t made long talks [or] interrupted proceedings.”).

292 ACLU, “Statement to Members,” 9. Cf. Arthur Garfield Hays, Transcript of proceedings, ACLU Papers, box 74, folder 2, 156 (“I think the record ought to show that, of all the people of the so-called ‘left’ group, Elizabeth Flynn has done less to impede the progress of work; she hasn’t made long talks [or] interrupted proceedings.”).

293 Hays did not vote on the original resolution because he did not want to create a test equivalent to teachers’ oaths. Arthur Garfield Hays to ACLU, 20 February 1940, ACLU Papers, box 75, folder 2. Norman Thomas, who was not at the meeting, thought that the board should wait for Flynn to resign. Norman Thomas to John Haynes Holmes, 22 March 1940, ACLU Papers, box 74, folder 3.

294 The National Committee voted to approve Flynn’s removal, 27 to 12. ACLU Papers, box 75, folder 4.
Much has been made of the intemperance of the ACLU’s purge—its inexplicable curtailing of dissent and presumed capitulation to popular pressures in a period when Communists were most in need of the organization’s support. In fact, Flynn’s expulsion was regarded as such a black mark in ACLU history that in 1976 the organization posthumously restored her membership. Baldwin, however, consistently defended the board’s decision. Throughout his life, he argued that decisive action had been necessary to prevent the Communists and fellow travelers within the board from standing in the way of the ACLU’s commitment to free speech. He claimed in public statements and private letters that the new policy was merely an affirmation of the organization’s commitment to civil liberties as an independent principle rather than a tool.

Historians and ACLU insiders have long assumed that Baldwin’s defense was disingenuous—that he was in fact concerned with the organization’s appearances, the Dies Committee, fundraising efforts, the investigations and aspersions of red baters, and other seemingly petty concerns. However valid such criticisms may be, the crisis within the board needs to be understood against the backdrop of conflict over employer free speech and the NLRB. In correspondence with Alexander Meiklejohn, who staunchly opposed the resolution and considered resigning over it, Baldwin explained that the board was at an impasse; expressly excluding Communists was “an unhappy way out of a bad mess.”295 John Haynes Holmes was even more adamant. The board had been paralyzed for months by a “militant minority,” he explained. The resolution was painful; it was difficult to “live[] up to the full dictates of the civil

295 Roger Baldwin to Alexander Meiklejohn, 13 February 1940, Meiklejohn Papers, box 4, folder 4. In a subsequent letter also signed by George P. West and Edward L. Parsons, Meiklejohn speculated that “bad feelings between factions, with the factor of personalities playing its part, [was] at the bottom of this deplorable situation.” George P. West, Alexander Meiklejohn, and Edward L. Parsons to National Committee and Board of Directors, 21 March 1940, ACLU Papers, box 74, folder 4. In 1942, Meiklejohn told Baldwin that he had been tempted to resign ever since the resolution but had not done so for fear of harming the civil liberties cause. Alexander Meiklejohn to Roger Baldwin, 20 January 1942, Meiklejohn Papers, box 1, folder 21.
liberties principle” at the expense of “good friends.” Circumstances, however, had left the board
with no choice. “For the first time in our history, we discover those among us no longer
believing in full civil liberties,” he complained. “They have themselves become so hysterical that
they are actually insisting that they can and should remain associated with us when they are no
longer primarily interested in our work—nay worse, are moved consciously or unconsciously to
oppose it, to block it, and to defeat it from within.”

The conventional understanding of the 1940 events is based on the modern understanding
of civil liberties as the freedom from state curtailment of expression. Historians immersed in
modern liberal culture have interpreted the board’s action as a prelude to McCarthyism, an
abandonment of the ideal of protection for all expression, no matter how distasteful. They
have rejected Baldwin’s explanation that the move was primarily organizational and that the
ACLU remained fully committed to the defense of Communist speech. They have presumed, in
short, that it was the conservatives on the board who rejected a robust construction of free
speech.

*Ford v. NLRB* is an important corrective to this well-worn story. Above all, the expulsion
of communists needs to be understood as a fundamental shift in the underlying objectives of the
ACLU—not from the defense of all to the defense of some, as critics have long charged, but

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296 *Cf.* John Haynes Holmes to A. F. Whitney, Brotherhood of Railroad Train-men, 26 August 1940, ACLU Papers,
box 75, folder 1 (“If we were to transact any business at all, we had to exorcise this ghost—get rid of this political
controversy.”). The plan evidently worked. By the end of April, Holmes reported that the resolution had “brought
infinite relief to both sides in the controversy,” and the board had been “functioning at all of its meetings with ease,
speed, efficiency and fine cooperation all around.” John Haynes Holmes to Alexander Meiklejohn, 26 April 1940,
Meiklejohn Papers, box 16, folder 37. When Abraham Isserman’s membership term expired, he was asked whether
he was in compliance with the resolution. He did not reply, and he was not re-nominated. Roger Baldwin to
Alexander Meiklejohn, 21 February 1941, Meiklejohn Papers, box 4, folder 4.
297 John Haynes Holmes to Alexander Meiklejohn, 23 February 1940, Meiklejohn Papers, box 16, folder 37; see also
John Haynes Holmes to Alexander Meiklejohn, 13 March 1940, Meiklejohn Papers, box 16, folder 37 (“I could tell
you some things being done by the minority members of our Board today, in reaction upon our Resolution, which
would amaze you, and I think disgust you. If what is being reported to me is true, we are up against sabotage of the
worst description.”).
298 See Kutulas, *Modern Liberalism*, 79 (recounting and echoing criticism by Richard Steele, Samuel Walker, and
Brian Wright of the ACLU’s purported departure from the principle of free speech for everyone).
from the complicated calculus of the “right of agitation” to a streamlined civil libertarianism that was blind to inequalities in the marketplace of ideas. The ACLU retained its hostility toward state overreaching, even as the New Deal demonstrated that industrial interests were separable from state power.

Significantly, opponents of the resolution emphasized only its tendency to curtail debate—to exclude minority opinions that might have enriched the ACLU’s policy agenda. Labor equality had become a viewpoint, not an objective. In broader context, such vocal critics as Alexander Meiklejohn were not so far away from the majority as they now seem. In fact, the only member of the board who acknowledged the ACLU’s departure from its founding principles was Elizabeth Gurley Flynn. During the proceedings, she expressed her belief that some of the board’s members were “in blissful ignorance of what the ACLU really stands for,” and she blamed the veterans for failing to educate them properly. Flynn charged that those members who were “abandoning . . . the fight for labor’s rights” did not belong on the board. 299

But by 1940, it was Flynn who no longer belonged.

Unsurprisingly, the reconfiguration of the ACLU board prompted a reevaluation of the organization’s position on employer free speech. In January, the board rejected a recommendation of the Committee on Civil Rights in Labor Relations and voted to protest the NLRB’s failure to protect employer speech in a case involving anti-union communications by the Adams Brothers Manifold Printing Company. 300 That same month, the NLRB issued an order in conjunction with a Massachusetts case against the Ford Motor Company, in which it

299 Transcript of proceedings, 136, ACLU Papers, box 74, folder 2.
300 Report of the Committee on Civil Rights and Labor Relations, 20 December 1939, ACLU Papers, reel 180, vol. 2165 (concluding that the Board was justified in finding that statements made by the employer were coercive). Board Minutes, 22 January 1940, ACLU Papers, reel 180, vol. 2165 (voting to ask NLRB to revise its order to include language permitting non-coercive employer speech).
said that free speech was a “qualified” rather than absolute right.\footnote{Jerome Britchey to Charles Fahy, 28 January 1940, ACLU Papers, reel 189, vol. 2232; Ford Motor Company (Somerville, Mass.), 19 N.L.R.B. 732 (1940).} John Haynes Holmes wrote to Baldwin, “If we don’t get into this fight and carry it through to a finish, we no longer have any mission as a civil liberties organization.” He added that it would be “be interesting to see the reasons which our fellow-travelers cook up for supporting the NLRB.”\footnote{John Hayes Holmes to Roger Baldwin, 22 January 1940, ACLU Papers, reel 189, vol. 2232.} The order in the Massachusetts case was precisely the same as in the Detroit case, but the sole basis for finding unfair labor practices was anti-union expression by chief inspectors and supervisory officials and surveillance by supervisory foremen.\footnote{Memorandum on the NLRB order in the Massachusetts Ford Motor Company Case, 26 January 1940, ACLU Papers, reel 189, vol. 2232.} There were no violent assaults, no proven attempts to organize a company union, no discharges or demotions because of union membership. Though it was still in the midst of internal battle, the ACLU board voted to protest the NLRB order.\footnote{ACLU Board Minutes, 29 January 1940, ACLU Papers, reel 189, vol. 2232.} Hays wrote to the NLRB to convey the organization’s position: “You have held in effect that the distribution of literature to employees as such, violates their rights under the Act. In the absence of discharges, threats of discharge or other acts of coercion, it seems to me that your Board has construed mere language in print as coercive.”\footnote{Arthur Garfield Hays to NLRB, 2 February 1940, ACLU Papers, reel 189, vol. 2232.} That was a position that the ACLU could not condone, and in a February press release, the ACLU announced its “strong objections” to the NLRB’s order.\footnote{ACLU Press Release, 5 February 1940, ACLU Papers, reel 189, vol. 2232.}

Despite its new vigilance in employer speech cases, there were never more than a few conservatives in the ACLU ranks. John Haynes Holmes was a socialist. Arthur Garfield Hays had proved his mettle in many labor battles, and he personally favored the CIO. These longtime veterans defended anti-union speech by employers because they believed that doing so, in the long run, would better serve to defend the rights of labor. It is therefore unsurprising that when
the NLRA was deeply threatened, the ACLU rallied to its defense. In the summer of 1939, Virginia Representative Howard Smith had called for a House committee investigation of the NLRB. Public hearings commenced in December and lasted two months. The unmistakable agenda of the hearings was to convince the American public that the CIO and NLRB were dominated by communists. The committee’s intermediate report, issued in March 1940, alleged that the NLRB had forced employers to sign contracts in violation of the NLRA and had acted unconstitutionally on a regular basis. It then proposed twenty-one amendments to the Wagner Act, ranging from the exclusion of workers in agricultural industries to procedural reforms. Among them was the protection of employer free speech. The ACLU opposed the free speech amendment, along with the others. It reaffirmed its commitment to defending employers’ rights, but it declared that they were adequately protected by the Constitution and needed no additional support in law;307 existing mechanisms for judicial review were an adequate check on administrative discretion. In its statement, the ACLU said that nothing in the NLRA curtailed free speech and that “despite all the controversy there has as yet been no actual interference with employers’ right of free speech by the NLRB.” The ACLU wanted to ensure that employers received as much protection as the Constitution guaranteed, but no more. The amendment, by contrast, might be construed to “giv[e] employers’ speech more protection than the speech of others.” 308

The Smith bill never made it out of committee in the Senate, and for the time being, the Wagner Act was spared aggressive legislative overhaul. The NLRB, however, understood that it

308 The proposed amendment would have protected “any expressions of opinion with respect to any matter which may be of interest to employers or the general public, provided that such expressions of opinion are not accompanied by acts of coercion, intimidation, discrimination or threats thereof.” The ACLU protested that it would have prohibited the board from acting where coercion preceded or followed the expression of opinion and was directly associated with it. Ibid.
would need to moderate its approach. When Madden’s term as chair expired in August 1940, Roosevelt appointed a more conciliatory replacement, and the NLRB significantly revised its policies and procedures to accommodate complaints by the AFL, employers, and the general public.

Two months later, the Sixth Circuit finally issued its decision in *Ford v. NLRB*. In its opinion, the court took judicial notice of the wave of sit-down strikes that had swept through Michigan between December 1936 and March 1937. It condemned the seizure of property as illegal and noted that it had been recognized as such by the Supreme Court. It accepted then-Governor Frank Murphy’s description of the events as “the greatest industrial conflict of all times.” And it claimed that “no one who lived through the period can ignore the terror which this lawless labor technique imposed not only upon the automobile industry and its non-union employees fearing loss of their jobs, but upon all employers of labor in Michigan, including manufacturers, retail establishments, hotels, public utilities and others.” The court acknowledged that legal remedies had been unavailable to the owners of property. Under those circumstances, it considered Ford’s increased security to be a reasonable precaution. It nonetheless concluded that the company’s lawful preparations were “more than adequate to repel an attempted seizure which the approach of 50 to 75 union organizers, mostly women, might signify even to the most fearful, as imminent.” Everett Moore, chief of Ford Service Department, had known that a literature distribution was planned, and he told the press that while company employees would keep their hands clean, he expected violence to occur. The opinion did not dwell long on the “Vote of Confidence” engineered by plant supervisors as evidence of internal opposition to the UAW. It accepted the Board’s findings that foremen had taken the

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309 *NLRB v. Ford Motor Company*, 114 F.2d 905 (6th Cir. 1940).
badge numbers of those employees who refused to sign. On those facts, the Board was justified in finding interference with employees’ rights under Section 7 of the NLRA.

With these preliminary matters out of the way, the court turned to “the major issue, at least from the point of view of the public interest.”311 Ford expected its lawyers to “win on this point, if no other,” and it was not disappointed.312 The court declared that “the right of employees to organize for collective bargaining, to select representatives of their own choosing, and to unite for concerted action in other respects, is now so clearly recognized as a fundamental right that citation is superfluous.” But according to the court, “the right to hold views upon any and all controversial questions, to express such views, and to disseminate them to persons who may be interested, has even more venerable sanction.” Citing *Lovell v. Griffin*, the court emphasized that the circulation of pamphlets was an important American tradition and one that had proven effective in the dissemination of opinion. Ford Motor Company’s communications expressed disapproval of unions, to be sure. But according to the court, they did not threaten discharge and were therefore constitutionally protected speech.

Ironically, by securing statutory rights to employees in contravention of the common law, the NLRA had made the NLRB’s claim about the coercive effect of employer speech untenable. In the past, the court acknowledged, the power relations between employer and employee, namely that of master over servant, might have given an employer’s statement disproportionate influence. But the NLRA—upheld as constitutionally valid, strictly enforced by the NLRB, and

311 Ford, 114 F. 2d at 912.
312 F. H. Wood, “Memorandum for Messrs. McCormack, Duncombe and Borie,” 27 March 1940, Ford Legal Papers, acc. 897, box 4, vol. 2. The issue was no longer novel, and the Ninth Circuit’s opinion in *Union Pacific Stages*, 99 F.2d 153 (9th Cir. 1938), indicated that courts would be receptive to a free speech claim. Although the Supreme Court had upheld Board orders prohibiting the circulation of anti-union statements, it had never addressed the issue squarely. In *Consolidated Edison v. NLRB*, 305 U.S. 197 (1938), the Court affirmed an order with a provision requiring employees to “cease and desist from . . . indicating to its employees the respondent’s attitude and desires with respect to the relationship of its employees to any particular labor organization” or “expressing to its employees its approval of anti-union sentiment or activities.” The Court did not expressly consider the provision.
liberally construed by the courts “so as best to effectuate its great social and economic purpose”—belied any argument about inherent coercion in labor relations.\textsuperscript{313} “The servant,” declared the court, “no longer has occasion to fear the master’s frown of authority or threats of discrimination for union activities, express or implied.”\textsuperscript{314}

The court concluded with a paean to freedom of speech. The right to speak, it insisted, was the basis for the rights secured by the NLRA. And as such, it was protected by the First Amendment. Invoking the Supreme Court’s decision in \textit{Hague v. CIO}, it declared that “the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.”\textsuperscript{315} The court entered a decree enforcing the Board’s order in every other important respect,\textsuperscript{316} but it pronounced the Ford Motor Company free to circularize its employees.

\textit{Conclusion}

On June 20, 1941—four years after the Battle of the Overpass—the Ford Motor Company signed a contract with the UAW-CIO covering 123,000 employees. Union recognition was a condition of Ford’s settlement of all pending cases involving the UAW-CIO.\textsuperscript{317} In the wake of the Detroit Ford case, Ford’s attorneys had advised the company that it had won the most that it could hope for from the courts: “The free speech point—in some ways the most

\footnotesize{\textsuperscript{313} A Ford memorandum made the same argument. Employees were aware that their employer could not legally act against them. Should unlawful discrimination nonetheless occur, the appropriate recourse was to the NLRA’s provisions for reinstatement and back pay—not to enjoining speech before the fact, which would amount to prior restraint. P. B., “Memorandum: Ford Cases, Free Speech,” 10 January 1939, Ford Legal Papers, acc. 897, box 3, vol. 3.}

\footnotesize{\textsuperscript{314} Cf. Orren, Belated Feudalism. The court left open the possibility that sufficiently egregious employer conduct, with a high percentage of known discharges for union activity, might justify curtailment of speech under certain circumstances.}

\footnotesize{\textsuperscript{315} 114 F. 2d at 914 (citing Hague).}

\footnotesize{\textsuperscript{316} It found that there was insufficient evidence to sustain the finding of discharge for union activity in the case one employee.}

\footnotesize{\textsuperscript{317} NLRB Press Release, 20 June 1941, Ford Legal Papers, acc. 897, box 2, file Press Releases.}
important point in the case—has been decided in our favor in an opinion which leaves nothing to be desired.”318

If the Battle of the Overpass was a seminal turning point in the organization of the Ford Motor Company, *Ford v. NLRB* was a flashpoint in the larger war over administrative authority, New Deal labor policy, and constitutional interpretation. Dayton, Ohio’s *News Week* called Ford “one of the most controversial decisions ever handed down by the National Labor Relations Board.”319 The *New York Times* reprinted the Sixth Circuit’s decision practically in full.320 Dozens of bar journal and law review articles gave detailed consideration to Ford and the issue of employer free speech.321 Dean James M. Landis of Harvard Law School considered the issues so novel and significant that he designed an Ames moot course based on the case.322

In the summer of 1940, the ABA’s first issue of its *Bill of Rights Review* devoted an article to the “The Labor Board and Free Speech.”323 It reported that the new Committee on the Bill of Rights had voted to file an *amicus* brief in an appropriate Supreme Court test case concerning employer free speech. It explained that the NLRB’s infringement on the right of employers to express anti-union views had “handicapped the attainment of harmonious relations” and threatened equal protection, in addition to violating the First Amendment. “The decision of the first test case by the Supreme Court may well establish a landmark in the history of the Bill

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318 F. H. W., Memorandum for Mr. McCormack, NLRB v. Ford Motor Company, 13 October 1940, Ford Legal Papers, acc. 897, box 4, vol. 2. Although the victory had been anticipated, the legal team emphasized that the argument was “not quite as simple as generally considered by the public and the press, since it involve[d] not the right of Mr. Ford to express his opinions, but the right of the Company to disseminate them among the employees.”
322 ABC Union, Em One et al. v. Dorf Company, Supreme Court of Ames, Ford Legal Papers, acc. 897, box 4, vol. 5.

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of Rights,” the article predicted, “and it seems proper that the appropriate Committee of the American Bar Association should express its views.” A few months later, the Sixth Circuit’s decision in the Ford case rendered ABA involvement unnecessary. The Review’s second issue described the case in detail. “The import of the decision,” it concluded, was “to place upon the Board the burden of proving that the employer’s expression of opinion would in fact operate as coercion.” That rule, according to the ABA, “seem[ed] to be a justifiable one.”

The NLRB, with the guidance of the Supreme Court, soon adopted a policy that was almost indistinguishable from the ACLU’s stated position. It seems fitting that the Supreme Court’s first opinion on the issue was written by Frank Murphy, who in the span of a decade had served as (among other roles) mayor of Detroit, governor of Michigan, Attorney General of the United States, and finally as an associate justice of the United States Supreme Court. Murphy had corresponded regularly with the ACLU in each of those capacities—especially in conjunction with his creation of the Civil Liberties Unit within the Department of Justice—and he was deeply sympathetic to the organization’s views.

In his 1941 opinion in NLRB v. Virginia Electric & Power Company, Justice Murphy clarified that the Board, in considering whether an employer had “interfered with, restrained, and coerced” its employees under the NLRA, was permitted to inquire into “what the Company has

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324 See also “Report of the Sub-Committee on Civil Rights of the Executive Council of the Junior Bar Conference of the American Bar Association,” 26 July 1938, Vanderbilt Papers, box 127, folder Civil Liberties (“Your committee is inclined to the view that if an employer cannot express publicly his personal views about unions, any particular union or the Wagner Labor Relations Act without thereby furnishing evidence of a law-breaking spirit, or being held guilty of a violation of law, then his right of free speech on the subject of labor unions has been effectively taken away.”).


326 American Civil Liberties Union, A Report on American Democratic Liberties in War-Time (New York: American Civil Liberties Union, 1942), 39 (“Employers’ rights of free speech were upheld by the Supreme Court for the first time in a decision involving an order by the National Labor Relations Board against the Virginia Power Company. The court took the position—substantially that taken by the Civil Liberties Union—that language by employers directed to their workers cannot be restrained under the National Labor Relations Act unless it is clearly coercive.”).

said, as well as what it has done.” He concluded, however, that language must be actually coercive or part of a coercive course of conduct to justify curtailment by the NLRB. In the case under consideration, the employer had conveyed orally and in writing the opinion that unions were ineffective and divisive, but it had specifically stated that employees were free to join without retaliation from the company. The Board had considered this expression of views to be unlawful without situating it in a broader complex of unlawful activities. Murphy was careful to emphasize that the Supreme Court could not substitute its own interpretation of the facts for that of the NLRB, and he left ample room on remand for the Board to buttress its order with concrete findings (“perhaps,” he wrote, “the purport of these utterances may be altered by imponderable subtleties at work which it is not our function to appraise”). On their own terms, however, the employer’s views did not rise to the level of constitutionally regulable coercion.

Murphy’s opinion for the Court, its formal protection of free speech coupled with broad interpretative deference to the NLRB, set the stage for the Board’s decision for the next five years. The Board’s interpretation of “coercion” was predictably broad, and employers continued to complain about interference with their First Amendment rights. For its part, the ACLU never again wavered in its commitment to employer free speech. The December 1945 edition of the statement defining its position on civil liberties contained a section on “labor’s rights.” In it, the ACLU underscored the right of workers to organize, and it called for vigilant enforcement of the provisions of state and national labor relations acts preventing employer coercion. But it insisted that the police should protect the civil rights of all “portion[s] of the community,” a principle which called “for the protection not only of organized workers but of non-union

328 Several post-Ford NLRB decisions had made similar findings. See, e.g., Huch Leather Company, 11 N.L.R.B. 394, (1939) (violation of NLRA to refer to CIO as “a bunch of Bolsheviks”); Leitz Carpet Corporation, 27 N.L.R.B. 235 (1940) (coercive to refer to unions as “shyster outfits”).

workers and managers in their right of access to places of employment.” Moreover, it called for
the defense of minority rights against labor union discrimination “on account of race, religion,
sex, nationality or political views,” and where unions “unreasonably restrict[ed] membership,” it
opposed the closed shop.” Finally, it insisted that the “administration” of labor legislation,
where employer communications regarding unions were not coercive, “should be so guarded as
not to infringe upon employers’ rights of free speech.”

In 1947, with the voice of industry behind them, congressional conservatives at last
succeeded in crippling the NLRB. That June, the Taft-Hartley Act was enacted over the veto of
President Harry S. Truman. On many issues, it adopted the very proposals that the ACLU had
come together to oppose in the spring of 1940, at a time when it was otherwise so thoroughly
divided. But on the issue of employer free speech, Taft-Hartley instituted precisely the rule that
the absolutists on the ACLU board had championed in the Ford case. The act ensured that “the
expressing of any views, argument, or opinion, or the dissemination thereof, whether in written,
printed, graphic, or visual form, shall not constitute or be evidence of unfair labor practice under
any of the provisions of this subchapter, if such expression contains no threat of reprisal or force
or promise of benefit.”

The ACLU denounced Taft-Hartley as a “direct violation of labor’s rights.” It cautioned
that the act’s provisions were “fraught with peril to the maintenance of civil liberties in labor

330 American Civil Liberties Union, Civil Liberty: A Statement Defining the Position of the American Civil Liberties
Union (New York: American Civil Liberties Union, 1945).
Adams and Richard L. Wyatt, Jr., “Free Speech and Administrative Agency Deference: Section 8(C) and the
National Labor Relations Board—An Exposutlation on Preserving the First Amendment,” Journal of Contemporary
Law 22 (1996): 20–27. On the new policy, see Harry A. Millis and Emily Clark Brown, From the Wagner Act to
174–89 (tracing change in NLRB interpretation from strict neutrality to “separability”); W. Willard Wirtz, “The
New National Labor Relations Board: Herein of ‘Employer Persuasion,’” Northwestern University Law Review 49
disputes.” Its next annual report jettisoned the optimistic outlook of the late 1930s and 1940s. Citing Taft-Hartley, among other setbacks, it expressed “justified skepticism concerning the immediate future of our democratic liberties as instruments of progress.” It described the popular desire, expressed in the 1946 elections, to break free of the “irritating shackles” of state control and to reinstate “the presumably sound leadership of private business.” The new skepticism toward state economic regulation had “produced an atmosphere increasingly hostile to the liberties of organized labor, the political left and many minorities.”

The ACLU’s protest came too late. By 1947, employers and their allies had come to believe, however much the ACLU willed it to be otherwise, that free speech and “economic liberty” were inextricably linked—not as a matter of constitutional law, but of political will and sound public policy.

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334 Notably, after passage of the act, Republican Senator George D. Aiken and Democratic Senator Carl A. Hatch introduced an amendment removing a prohibition against union contributions to political campaigns. Aiken said, “At the time the Taft-Hartley Act was passed over the President’s veto, it was realized by some that the bill went too far in restricting freedom of speech and of the press and that the act would have to be amended.” “Revision in Labor Law Is Asked to End Political Spending Curb,” New York Times, 12 July 1947. See “Section 304, Taft-Hartley Act: Validity of Restrictions on Union Political Activity,” Yale Law Journal 57 (March 1948): 806–27.
On the eve of the Second World War, President Franklin D. Roosevelt counted “freedom of speech” and “freedom from want” among America’s most fundamental values.¹ Military necessity, he promised, would not serve as a license for repression, as it had during World War I. “No matter what comes we must preserve our national birthright,” he told the nation: “liberty of conscience and of education, of the press and of free assembly, and equal justice to all under the law.”² In Roosevelt’s vision, democracy entailed both economic security and the liberty to demand it. Although both would yield significantly to wartime pressures, the President’s rhetoric was a symbol of how far the country had come.³

And yet, despite Roosevelt’s enthusiastic endorsement of both freedoms, there was a significant distance between the two. Economic rights were a matter of government policy, conditioned on democratic deliberation. By contrast, free speech was a “civil liberty,” and thus

¹ Franklin D. Roosevelt, “Annual Message to Congress,” Franklin D. Roosevelt, Annual Message to Congress, 6 January 1941, Record Group 46, NARA I, Sen. 77A-H1. Morris Ernst considered Roosevelt’s Four Freedoms to be an important civil libertarian project and, in conjunction with the White House, pursued a book project exploring the connections among them and the best means of achieving them. Morris Ernst to Franklin D. Roosevelt, 21 September 1943, Ernst Papers, box 97, folder 3.

² “President Aids Campaign for Civil Liberty,” Washington Post, 27 December 1939. One week after the bombing of Pearl Harbor, on Bill of Rights Day, he declared: “We will not, under any threat, or in the face of any danger, surrender the guarantees of liberty our forefathers framed for us in our Bill of Rights.” Bill of Rights Day Speech, 15 December 1941, quoted in American Civil Liberties Union, Freedom in Wartime: A Report of the American Civil Liberties Union in the Second Year of War (New York: American Civil Liberties Union, 1943), 1. See also Address by O. John Rogge, National Conference on Civil Liberties, 14 October 1939, Attorney General Papers, box 22, entry 132, folder Civil Rights (voicing the hope that the country would avoid war but noting that an espionage unit, if it proved necessary, would be “closely coordinated with the Civil Liberties Unit, in order that the Department of Justice, which seeks to maintain those liberties, will not become an instrument of oppression”).

³ See generally Richard W. Steele, Free Speech in the Good War (New York: St. Martin’s Press, 1999); Stone, Perilous Times. The notable departures from the Administration’s prewar civil liberties commitments included the Japanese internment camps and prosecutions under the Espionage Act. The Civil Rights Section (successor to the Civil Liberties Unit) advised U.S. Attorneys to curtail civil rights only when “absolutely necessary to the efficient conduct of the military and economic war effort of the United States.” Francis Biddle to all United States Attorneys, Department of Justice Circular No. 3356, Supplement 2, 4 April 1942, Franklin D. Roosevelt Papers, Official File 1581, Civil Liberties 1933–1945.
grounded in the Bill of Rights. An adequate standard of living was affirmative, but aspirational; expressive freedom, though subject to balancing against important governmental interests, was a negative guarantee, asserted against the state.

During the 1920s and 1930s, industry, labor, government officials, and the ACLU all had experimented with alternative understandings of civil liberties. Especially after enactment of the NLRA, they had grappled with a novel and untested allegiance between organized labor and state power. For the NLRB, collective bargaining was just as much a “right” as free speech. In a 1938 address, Edwin Smith declared that union organization was the only means of preserving democracy, and that to survive it must receive from the government firm protection against those who have the power and will to destroy it.5 Indeed, to Warren Madden, the workers were entitled to state protection by a new and fundamental right—for “a liberty to emerge from a condition of economic helplessness, and dependence upon the will of another, to a status of having one’s chosen representative received as an equal at the bargaining conference table, must be recognized as fundamental.”6 This liberty was antecedent to the rights of speech, press, and assembly, which working people could not enjoy until their right to collective bargaining was met. Labor leaders made the same point more bluntly. Joseph Schlosberg, speaking at a mass

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4 It was the “invocation of the Constitution,” a Department of Justice Circular explained, that gave “civil liberties” their distinctive “honorable character.” Circular No. 3356, Supplement 1, Federal Criminal Jurisdiction Over Violation of Civil Liberties, Franklin D. Roosevelt Papers, Official File 1581, Civil Liberties 1933–1945.

5 Address by Edwin S. Smith before the Carolina Political Union, 30 March 1938, quoted in “Memorandum in Support of Proposal to Confine the National Labor Relations Board of the Functions of Accusing and Prosecuting and to Transfer its Judicial Functions to a Separate Administrative Body Similar to the Board of Tax Appeals,” 15, Ford Legal Papers, box 3, vol. 3.

6 Radio address by Warren Madden, 29 January 1939, quoted in Respondents’ Sixth Circuit Brief, Ford v. NLRB, 54.
meeting of Ford Workers, recounted that twenty-five years earlier “the employers refused to speak to us because we were just that many nobodies, men and women without rights.”

Although union organizers continued to stress direct action, they grew increasingly reliant on state assistance even while they remained skeptical of judicial review. Nathan Greene—writing not for the ACLU but for the International Juridical Association, a Popular Front civil liberties group—stressed the malleability of terms like liberty, which for so long had been invoked on employers’ behalf. Echoing a younger Roger Baldwin, Greene declared that “liberty in action draws its true meaning from the power by which it is impelled” and that “the only defensible concept of liberty is one that makes some room, at least, for the concept of equality.” For Greene, “liberty” was a dangerous abstraction, and economic power was a prerequisite for free speech. His explanation neatly captures the insurmountable distance between Greene and the ACLU: “I have heard an important person in this City defend what he called Henry Ford’s right of free speech in the cases I have discussed, in this way. He said, ‘I am for free speech though the universe shall smash.’ Forgive the I.J.A. We are for free speech in an unsmashed universe, or to narrow the figure just a little, in an unsmashed world. We believe speech and the other civil liberties are meaningful only to men who dare to use them. And that before ‘daring’ come bread and water, come roots in the community, comes respite from fear. Only a reasonably whole world, not a ‘smashed’ world, will ever tolerate free speech.”

If the labor movement and its allies were increasingly skeptical of free speech, the legal establishment had fully endorsed its elevation by the ACLU to the top of the constitutional

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7 However helpful the recent decisions of the NLRB, “American history [had] shown that wherever workers united through a union, they protected their rights.” Transcript of Ford Workers’ Mass Meeting Held at Fordson High School Auditorium, 44–46, 13 February 1938, Ford Legal Papers, acc. 897, box 101.
8“The Civil Liberties and the NLRB,” International Juridical Association, reprinted from speech by Nathan Greene, 8 March 1940, 5, Sugar Papers, folder 54:17, Ford Organizing Drive and Riot.
9 Ibid.
hierarchy. In the *Bill of Rights Review*, the ABA heralded the emergence of “civil liberties” as a “distinct field of law.” It noted that a law school “would be abreast of the times” in offering a class devoted solely to civil liberties or the Bill of Rights.\textsuperscript{10} It also urged the adoption of an annual Bill of Rights Week throughout the United States, and it recommended “that study of the Bill of Rights be made a permanent, daily part of the curriculum in all American schools.”\textsuperscript{11}

On economic issues, the conservative bar retained its longstanding aversion to administrative authority, but it shifted its efforts to procedural reform rather than congressional authority. The Administrative Procedure Act, enacted in 1946 after years of lobbying by the ABA, subjected administrative decision-making to judicial review in a manner reminiscent of the ACLU-sponsored Cutting Bill in the realm of customs censorship. Roscoe Pound, as chair of the ABA’s committee on administrative procedure, argued that judicial oversight would preserve constitutional democracy and prevent America from becoming “an avowed dictatorship.”\textsuperscript{12} It is telling that his growing preference for the judiciary coincided with a new sympathy for free speech.\textsuperscript{13}

When it came to the Bill of Rights, the ABA believed that the courts had a crucial role to play. It was their task to ensure equal treatment for all Americans, including beleaguered employers. Like “the press, the commentator, the employee and the general public,” employers deserved the freedom to exercise “the rights of free expression” that the Constitution provided.\textsuperscript{14} Freedom, of course, had its limits. As America readied for war, it necessarily imposed

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\textsuperscript{10} “Civil Liberties—A Field of Law,” *Bill of Rights Review* 1 (Summer 1940): 7–9. The article noted that a seminar on the topic had been given at Yale Law School and a similar course was forthcoming at the New York University School of Law.

\textsuperscript{11} “Democracy Must Introspect,” *Bill of Rights Review* 1 (Summer 1941): 259.

\textsuperscript{12} Wigdor, *Pound*, 273–74.


\textsuperscript{14} “Labor Board and Free Speech,” 6.
onerous duties on its citizens, and the balance between liberty and responsibility shifted toward the latter. This “principle of relativity” subjected such “privileges” as the “so-called ‘right to strike’” to moderation, “in the field of labor relations as in others.” Still, said Grenville Clark, to the extent they were compatible with national security, the government was bound to respect people’s rights.  

More than any other body, it was the ACLU that anticipated and in significant ways produced the constitutional compromise of the post-New Deal era. By investing in the Bill of Rights, the ACLU produced its most important victories: the Supreme Court decisions of the 1930s, which protected the rights of radicals to articulate their views without interference by the state. Well after 1937, legal academics and practitioners remained wary of judicial review. The new vision of court-based constitutionalism would take years to find a firm hold among liberal activists. Whatever their hesitation about constitutional interpretation, however, liberal lawyers had come to regard the courts as a friendly forum for resolving disputes, whether among individuals or between individuals and the state. By 1940, former progressives who were sympathetic to free speech routinely decried administrative censorship but “[took] comfort in evidences of an enlightened judiciary.”

Seizing on the conservative rhetoric of time-honored individual rights, the ACLU had attracted supporters within and outside the courts. The threat of totalitarianism, which the ACLU had invoked to such great effect in Hague v. CIO, buttressed the appeal of state restraint. An estimated two thousand people attended the ACLU’s National Conference on Civil Liberties in

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October 1939, representing a broad range of political and economic views. By the end of the decade, free speech was an undeniable American value.

But the constitutional strategy also came at a cost. The majority within the ACLU had convinced themselves, employers, and the ABA that freedom of speech meant freedom from government censorship. It was a right held by all equally, worker and employer alike. In 1940, the labor press accused the ACLU of “turning against labor,” citing a long list of changes in ACLU policy, including its position in the Ford case. That year’s edition of the organization’s pamphlet on civil liberties professed a commitment to the legal protection of strikebreakers in “their right of access to places of employment.” Several members of the ACLU had denounced the closed shop as a threat to civil liberties. Some had commended the Dies Committee for its investigation of “destructive” trade union activity. Subsequent annual reports expressed support for the “democratic rights” of workers to be free of union discrimination based not only on race (as in earlier years) but also on “political views or opposition to union administration.” The board created a Committee on Trade Union Democracy to monitor union compliance with its principles.

17 Board Minutes, 16 October 1939, ACLU Papers, reel 189, vol. 2233.
18 Alexander Crosby, “Baldwin Denies Civil Liberties Union Is Turning Against Labor,” 7 March 1940, Jackson Papers, General Correspondence, cont. 3. See also Merle D. Vincent (Conference on Civil Rights, Washington Committee for Democratic Action) to John Haynes Holmes, 9 May 1940, ACLU Papers, box 75, folder 8 (“[T]he ACLU made a basic shift from its old position to new ground. Labor and the public are justified in regarding this basic change as an abandonment of a large part of the field of battle for civil liberties. This new position clearly makes the ACLU a new accession to the ranks of strike-breaking powers of which the Ford Motor Company is probably the most perfect example.”).
19 Crosby’s article noted that the ACLU’s statement was “more bluntly worded than that of such a strikebreaking organization as the Detroit Council for Industrial Peace.” The article named as the opponents of conservatism the precise actors who had supported the NLRB’s position in Ford: Osmond Fraenkel, A. J. Isserman, Mary Van Kleeck, Elizabeth Gurley Flynn, Nathan Green, Rev. William B. Spofford, and Robert Dunn.
20 In addition, Morris Ernst had advocated an “S.E.C.” for civil liberties, under which labor unions would be required to disclose their financial affairs and activities. Draft of Proposal, Ernst Papers, box 411, folder 8; Abraham Isserman to Board of Directors, 28 February 1940, Ernst Papers, box 411, folder 9.
21 ACLU, Liberties in War-Time, 22.
Almost alone among progressives and liberals, the ACLU never was fully seduced by the New Deal. To be sure, official ACLU statements after 1935 lavished high praise on the NLRA. But the ACLU’s mature vision of civil liberties was not the NLRB’s. In March 1939, the ACLU rallied behind Senator La Follette’s bill “to eliminate certain oppressive labor practices affecting interstate and foreign commerce.” Had it passed, it would have made espionage, munitions, private police, and strikebreaking punishable by fine or imprisonment. William Green and John L. Lewis both supported the bill. So, “heartily,” did Attorney General Murphy, who believed “that the Federal Government has a definite role to play in the preservation of civil liberties.”

For the ACLU leadership, as for Murphy, the La Follette bill was a quintessential civil liberties measure. Preserving civil liberties meant promoting and protecting speech, not controlling it. It meant ensuring that employers would counter the speech of their workers not with force, but with words.

The ACLU proved consistent in enforcement of that principle. It continued to criticize violent interference with the right to organize and strike. But it held labor to the same standard. It admonished pickets to “keep traffic open for pedestrians and vehicles, to insure

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22 Debate on the bill centered on the supposed Communist threat to American industry. Amendments proposed by North Carolina Senator Robert R. Reynolds prohibited all companies from hiring aliens in excess of 10 percent of their workforces or from employing “any Communist or member of any Nazi Bund organization.” The Senate bill, thus amended, passed by a vote of 47 to 20. The House version was buried in committee. Auerbach, “La Follette Committee,” 454.


24 Robert Jackson, Murphy’s successor as Attorney General (and his future colleague on the Supreme Court), was even more skeptical of a state-centered approach. “Compared with [the] rather narrow powers to advance civil rights the possibilities that the Department of Justice by misuse of power will invade civil rights really gives me more concern,” he wrote in the *Bill of Rights Review*. Robert Jackson, “Messages on the Launching of the ‘Bill of Rights Review,’” *Bill of Rights Review* 1 (Summer 1940): 35. By then, the ACLU had reason to agree. It noted in its 1940 Annual Report that Murphy had undertaken “numerous prosecutions . . . which struck at minority political groups.” It considered Jackson’s record slightly better. *American Civil Liberties Union, In the Shadow of War: The Story of Civil Liberty, 1939–1940* (New York: American Civil Liberties Union), 17.

access to places picketed, to prevent the use of fraudulent signs, and to maintain order.”

In place of the right of agitation, the ACLU touted the marketplace of ideas. Workers were free to express their discontent. They could reason with strike-breakers. But union “coercion,” like its employer counterpart, fell squarely outside the realm of civil liberties.

The same general principle applied outside the labor context. The ACLU’s ambition was robust discussion on all public issues, broadly defined. In the 1940s, the organization acknowledged that free speech could not flourish without a platform. As Morris Ernst put it, “our market place in thought only has vitality and a chance of serving as an arena in which thought can win out if as many diverse currents of thought flow into the market place as is mechanically and physically possible.”

Toward that end, the ACLU encouraged the government to promote conversation, first by creating “Hyde Parks” and other public forums, and increasingly by more creative means. Ernst persuaded President Roosevelt to introduce a discounted postage rate to facilitate the circulation of printed matter. He also advocated ACLU

26 “Pickets Criticized by Liberties Union,” New York Times, 21 January 1946. The ACLU urged the leaders of organized labor, including CIO president Phillip Murray and AFL president William Green, to curtail “violence” by pickets. The pickets in question had excluded maintenance crews, clerical workers, and executive officers. In the ACLU’s view, “the two rights—of picketing and of access to places picketed—[were] not conflicting.”


28 See Fred Rodell, “Morris Ernst, New York’s Unlawyerlike Liberal Lawyer is the Censor’s Enemy, The President’s Friend,” Life, 21 February 1944. The measure was justified on the basis that “in this democracy of ours, unlike the dictatorship lands, we are dedicated to the ever increasing extension of a free market in thought as a means to the perpetuation of our national ideals. As they burn books abroad, we extend their distribution.” Announcement by National Committee to Abolish Postal Discrimination Against Books, Oscar Cox Papers, Franklin D. Roosevelt Presidential Library, Hyde Park, N.Y., Alphabetical File, Douglas-Ernst, box 9, folder Ernst, Morris. Ernst reported to the board of directors: “[Book rate postage] made possible books such as Pocket Books, impossible without it. But it also permitted a flow into the market place of great additional diversity of points of view, and exciting evidence now shows that this single proclamation of the President has actually increased the flow of the printed word in increased volume between libraries of the country, between individuals and libraries, not to mention the great effect on the literature used in the schools of the land.” Ernst, “Memorandum for Special Meeting,” 5–6.
legal action against newspaper owners for “restraint of trade.”

Although the ACLU did not follow Ernst quite that far, it met him partway. In 1945, the board formally adopted a new policy extending its “traditional principles” to contexts in which “private agencies rather than public authorities” restricted freedom of speech. It demanded from government “not only forbearance from interfering with the liberties of its citizens but also restraints on interference with those liberties by private agencies.”

It opposed restraints on expression by motion picture distributors, for example. Over time, it would add company towns and, eventually, shopping malls.

More contentiously, it also adopted Ernst’s longstanding position on broadcast radio, dating back to his Dill Bill days. In 1946, it endorsed the FCC’s new standards for granting and renewing radio licenses, which required stations to allocate time for the discussion of “important public questions” and to cover all sides of controversial issues. The radio industry denounced the measures as censorship, but the ACLU disagreed. It explained in a statement that the limited number of radio channels made some form of intervention necessary. “The ACLU position does not favor the principle of government regulation, but accepts it as a practical necessity,” it claimed. Importantly, if the government sought to withhold radio licenses based on its assessment of the content of programming, the station owners had recourse to the courts.

29 Acknowledging that the program would involve the ACLU in issues of economics, he said, “I see nothing to the arguments that if we go into a consideration of the monopoly of the AP, or a radio chain that it means that we have to go into the monopoly of the chain grocery store. We should stick to ideas and not go in for broccoli.” Ibid.

30 American Civil Liberties Union, Liberty on the Home Front: In the Fourth Year of War (New York: American Civil Liberties Union, 1945), 60.

31 The government and labor both shared Ernst’s view of media consolidation, to varying degrees. E.g., “Little Americanism,” Address by Robert H. Jackson for New York Press Association, 28 January 1938, Attorney General Papers, box 6, folder Jackson (“Every newspaper man and every newspaper owner is acutely aware that the freedom of the press is something different today from what it was in the years before its ownership began to get concentrated.”); “For the Freedom of the Press,” Buffalo Daily Law Journal, 23 September 1938 (reporting statement by the state convention of CIO-affiliated unions, sponsored by the American Newspaper Guild, voicing equal opposition to state censorship and to “distortion of the news by newspaper owners who may through whim, caprice or malice select for publication such items as please them, alter other items to suit their fancy, and omit such news as displeases them”).

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“Freedom of speech is not abridged,” the statement reasoned. “The standards fixed provide for more speech, not less.”  

Some within the ACLU wanted the government to increase the value of speech in addition to its volume. Alexander Meiklejohn, voicing the standard progressive line, thought that government ownership of the airwaves would serve the “public interest” and enrich the quality of radio programming. On that point, however, the board of directors staunchly disagreed. John Haynes Holmes decried public ownership as “the first step in the direction of totalitarianism” and an “invasion of what we have called ‘the free market in thought.’” Holmes acknowledged the need for government regulation of public utilities, but he insisted that “such regulation should not touch the distribution of opinion.”  

Morris Ernst concurred with Holmes. He warned that recent proposals for government-run newspapers and radio stations posed the “greatest peril” to free thought and counseled, “This we should crack and crack hard.”  

An ACLU pamphlet expressed the organization’s position: “The evils of big business ultimately invite government correction, a cure as bad as the disease. Once the government enters to correct, it will remain to control. And government domination of the public mind cannot be reconciled with democracy.”

The ACLU approved efforts to multiply speech, but never to curtail it. It countenanced no consideration for the relative worth of speech, however provocative, hateful or abusive. It even condemned distinctions between commercial and non-commercial speech. So too in the

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35 ACLU, Are You Free. It continued, “Let us use the Bill of Rights as more than just a shield to protect freedom of expression from attack. It must also be a sword cutting through private restraints on the market-place of thought.”
36 ACLU, Liberties in War-Time, 17 (citing a commercial handbill decision, presumably Valentine v. Chrestensen, 316 U.S. 52 (1942)). It did except private libel and, for the time being, though to a lesser degree, frank obscenity.
context of labor. As Baldwin told Alexander Meiklejohn, the ACLU advocated complete freedom of expression for both unions and employers. Restricting both sides was no solution to disparities in bargaining power, he advised. “You know we are of course opposed to restraints on either.”

By the early 1940s, civil liberties were no longer radical. On the contrary, they served as industry’s most potent weapon against state control. Employers quickly embraced the rhetoric of free speech, within and outside the courts. In the *Ford* case and many others, they seized upon the language of recent pro-labor decisions and earlier pro-labor dissents to justify their own prerogatives. Such is the standard course in a legal system built on precedent; corporations hired the most skilled and best trained of lawyers, and it would have been surprising had they not availed themselves of every argument in their arsenal.

And yet, their embrace of free speech was not simply a fallback to the least bad alternative. Rather, employers quickly understood that free speech was a powerful industrial tool. The ACLU had naively hoped, in an era when revolution seemed possible, that a mere right to agitate would pave the way to substantive change. Implicit in their position was the confidence that radicalism was truth—that it would win out in the marketplace of ideas. By the 1940s, employers understood that no free exchange in ideas existed. They understood that a

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37 Roger Baldwin to Alexander Meiklejohn, 8 December 1941, Meiklejohn Papers, box 4, folder 4.
38 Apparently, Ford’s attorneys had not yet anticipated the application of free speech doctrine to advertising and other commercial applications. One attorney wrote: “There is a very clear line of authority, both with regard to the equity injunctions and with regard to Federal Trade Commission cease and desist orders, that the making of statements in good faith with regard to a competitor’s goods, or that the plaintiff’s patents are invalid, may not be enjoined. . . . With regard to these cases generally, it seems to me to be a mistake to drag the free speech issue into the field at all. The kind of statements which are made are very rarely expressions of any opinions concerning matters of current public interest. The statement that X’s rifles do not shoot straight, if false, or, even if true, has nothing to do with the political reasons for free speech.” P. B., “Memorandum on Free Speech,” 11 June 1939, 56–57, Ford Legal Papers, box 3, vol. 3.
right to free speech would almost invariably favor those with superior resources. As Nathan Greene put it, employer speech was “a protected commodity in a monopoly market.”

The constitutional revolution, as distilled in the famous footnote four of *Carolene Products*, guaranteed Congress full reign over economic regulation, subject only to the constraints of the most fundamental American liberties, including free speech. Substantive due process no longer was available as a defense against progressive legislation. During the Second World War, when critics decried the “expanded war-time powers of government” as a bridge to totalitarianism, the ACLU demurred. “[T]hese measures largely concern economic controls which do not directly affect freedom of opinion and debate, nor the right of opposition or of criticism,” it explained, and accordingly they raised no constitutional questions for the courts.

Like the ACLU leadership, the courts had come to accept state regulation of the economy as a positive force that served the public interest. No longer would they regard freedom of contract or the rights of property as a trump on social progress. But they would demand, lest America slide into dictatorship, that the state remain neutral in the realm of thought. In short, industry was free to dominate the marketplace of ideas. It could marshal all of its economic might to lobby government and to disseminate its views in the workplace and the public forum. And the First Amendment would ensure that no one would stand in its way.

39 “Civil Liberties and the NLRB,” International Juridical Association, reprinted from speech by Nathan Greene, 8 March 1940, 5 (emphasis in original), Sugar Papers, folder 54:17.
40 In the 1938 decision, Justice Stone repudiated Lochner-era judicial activism—the case itself rejected a due process challenge to a federal law prohibiting the interstate shipment of filled milk—but intimated that legislation imposing on the Bill of Rights (as applied to the states through the Fourteenth Amendment), as well as “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation,” would be subject to greater judicial oversight than ordinary acts of Congress. *United States v. Carolene Products Company*, 304 U.S. 144, 152 n. 4 (1938). Footnote 4, which provided the basis for the most familiar civil-rights victories of the twentieth century, was initially invoked far more frequently in First Amendment cases than in race cases. Indeed, the languages of civil rights and civil liberties remained hopelessly ambiguous and intertwined for decades. Goluboff, *Lost Promise*, 24–25.
Roger Baldwin consistently denied the charges that the ACLU had gone conservative. When pressed by former friends and colleagues, he fell back on his pre-Wagner Act belief that the best protection for workers was a strong union, not the state. He reasserted his distrust of state power, which had always operated before to trample the rights of the least empowered.

Such arguments, however, were quickly fading into the background; the ACLU’s emerging program emphasized other ideas. In the 1940s, “the issue of race relations . . . occup[ied] first place in the struggle for civil liberties.”42 Also central were “religious liberty,” “aliens’ liberties,” and the “rights of women.” In securing these rights the ACLU stressed its “complete impartiality.” The organization, it claimed, had no “‘isms’ or other objects to serve.”43 It defended the freedoms to speak, worship, and assemble as essential to “political democracy.”44 The right to picket was an application of a general commitment to free speech. “We are neither anti-labor nor pro-labor,” Baldwin insisted in 1940. “With us it is just a question of going wherever the Bill of Rights leads us.”45

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43 ACLU, Are you Free, 8.
44 ACLU, Presenting (1947), 2–3.
45 Alexander Crosby, “Baldwin Denies Civil Liberties Union Is Turning Against Labor,” 7 March 1940, Jackson Papers, General Correspondence, cont. 3. See also ACLU Outline, “Democracy in Trade Unions,” September 1941, Jackson Papers, General Correspondence, cont. 3 (listing various “discriminatory practices” by unions, including exclusion on account of race, sex, political affiliations, and vocational training, as well as high initiation and dues and “closed” membership).
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