



GITLOW’S GAMBLE: THE ACLU AND THE ORIGINS OF FIRST AMENDMENT INCREMENTALISM

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Introduction.....	681
I. Repression in a Revolutionary Age	683
II. Constructing Criminal Anarchy.....	690
III. The Case for Clemency.....	701
IV. A Landmark Loss for Free Speech.....	708
V. Rethinking <i>Gitlow</i> ’s Legacy.....	718
Conclusion: The Turn to First Amendment Incrementalism.....	721

INTRODUCTION

Gitlow v. New York was an inauspicious test case. That reality should have been apparent to the American Civil Liberties Union (ACLU) lawyers who pursued it—and to many within the emerging civil liberties coalition of the interwar period, it was. In 1922, when ACLU attorney Walter Nelles successfully petitioned the Court for a writ of error in *Gitlow*, the respected New York lawyer and civic leader Samuel Untermyer urged him to prioritize *Whitney v. California* instead. “The *Gitlow* case,” wrote Untermyer, “is not nearly as extreme a case of unwarranted prosecution and is accordingly not nearly so useful in testing the constitutionality of the law.”¹

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¹ Letter from Samuel Untermyer to Roger Baldwin (Dec. 30, 1922), in Am. Civil Liberties Union Records, The Roger Baldwin Years, 1917–1950, Princeton University Seely G. Mudd Manuscript Library [hereinafter ACLU Papers], vol. 242.

Despite such warnings, the ACLU pushed ahead. Undeterred by adverse precedent, Nelles hoped for a clean ruling on the constitutionality of New York's Criminal Anarchy Law and others like it. The *New York World* reported Nelles's optimistic assessment that the Court might well invalidate the law, and thereby trigger a "movement to strike out the laws" in thirty other states.² Instead, a seven-justice majority of the Supreme Court upheld the New York statute and affirmed Benjamin Gitlow's conviction for distributing the *Left Wing Manifesto*, a Marxist tract that anticipated a revolutionary class struggle culminating in a provisional proletarian dictatorship.³

Today, *Gitlow* is considered a "landmark case" for its famous dicta incorporating First Amendment rights into the Due Process Clause of the Fourteenth Amendment and rendering them enforceable against the states.⁴ At the time, however, free speech advocates understood the decision as a colossal defeat rather than a momentous civil liberties victory. The outcome came as no surprise to allies and observers, who regarded the ACLU's ambitious brief in the case as intemperate if not naïve. Although support for government suppression had dropped off markedly between Gitlow's 1919 arrest and the Supreme Court's 1925 decision, what the ACLU demanded in its briefs—a right to advocate even force and violence so long as the likelihood of follow-through was low—remained deeply unpalatable, even to those otherwise sympathetic to free speech. On any realistic appraisal, Gitlow's prospects in the Supreme Court were exceedingly slim.

That *Gitlow v. New York* was an unpromising vehicle for constitutional change does not, however, detract from its historical significance. On the contrary, *Gitlow* was important precisely because of the ACLU's decisive loss, which was as avoidable as it was predictable. In the runup to the Supreme Court's decision, the ACLU was so confident in its litigation strategy that it persuaded Benjamin Gitlow to decline a pardon to pursue his claims in court. When the Court's unfavorable decision came down, the ACLU's lawyers felt compelled to reassess their approach to First Amendment litigation. What followed was a pragmatic reorientation that came to

² *Laws in 30 States May Be Changed If Gitlow Wins Case*, N.Y. WORLD, Nov. 29, 1922.

³ *Gitlow v. N.Y.*, 268 U.S. 652 (1925).

⁴ See, e.g., Paul C. Bartholomew, *The Gitlow Doctrine Down to Date*, 50 A.B.A. J. 139, 139 (1964): ("A very acceptable argument can be made for the proposition that *Gitlow* was and remains one of the half dozen or so most important decisions of the Court in this century. Certainly it is a landmark case by any standard.").

define the organization's interwar program.⁵ More than any other case, it was the defeat in *Gitlow* that pushed the ACLU to pursue an incrementalist strategy which ultimately, if haltingly, persuaded the courts to protect free speech.

I. REPRESSION IN A REVOLUTIONARY AGE

That the *Left Wing Manifesto* was relatively circumspect about its authors' revolutionary aims—indeed, that attorney Clarence Darrow could plausibly call it the “tamest, the dullest, the most uninteresting document ever submitted”⁶—offered little protection to Benjamin Gitlow when he was arrested in fall 1919.⁷ As “Red Hysteria” gripped the nation in the wake of the 1917 Russian Revolution,⁸ the idea that a revolutionary group might attempt the forcible overthrow of the government struck observers as both possible and deeply concerning.

Gitlow's path to radicalism was a familiar one in early twentieth-century New York. Born in 1891 in Elizabethtown, New Jersey, to Russian Jewish immigrants, he followed his parents into labor activism and the Socialist Party. He rose quickly through the party's ranks and was elected to the New York State Assembly on an antiwar, anti-conscription platform.⁹ Inspired by the Bolsheviks' success in Russia, Gitlow aligned himself with the party's Left Wing section. When the faction was expelled after a period of intense internal debate, he helped found the Communist Labor Party and soon became business manager of *The Revolutionary Age*, a communist publication edited by Louis Fraina.¹⁰

In November 1919, Gitlow was arrested alongside Irish activist James Larkin, known for leading Dublin's 1913 transit workers' strike.¹¹ The two were indicted

⁵ On the ACLU's evolving attitude toward impact litigation during the interwar period, see generally Laura M. Weinrib, *From Left to Rights: Civil Liberties Lawyering Between the World Wars*, 15 L. CULTURE & THE HUMANITIES 622 (2019).

⁶ Quoted in Harold Josephson, *Political Justice During the Red Scare: The Trial of Benjamin Gitlow*, in AMERICAN POLITICAL TRIALS 139, 145–46 (Michael R. Belknap, rev. ed. 1994).

⁷ Similarly, Zechariah Chafee wrote in the *New Republic* that “any agitator who read these thirty-four pages to a mob would not stir them to violence, except possibly against himself. This Manifesto would disperse them faster than the Riot Act.” *The Gitlow Case*, NEW REPUBLIC (July 1, 1925), at 141.

⁸ *The Red Hysteria*, NEW REPUBLIC (Jan. 28, 1920), at 249.

⁹ Josephson, *supra* note 6, at 142–43.

¹⁰ *Id.* at 143.

¹¹ MARC LENDLER, GITLOW V. NEW YORK: EVERY IDEA AN INCITEMENT 55 (2012).

together with Charles D. Ruthenberg and Isaac E. Ferguson, prominent Communist Party leaders from the Midwest.¹² The state alleged that the July 5, 1919, issue of *The Revolutionary Age*, which contained the *Left Wing Manifesto*, violated New York's criminal anarchy law, passed in 1902 in response to the assassination of President William McKinley by anarchist Leon Frank Czolgosz.¹³ According to the indictment, *The Revolutionary Age* had promoted "the doctrine that organized government should be overthrown by force, violence and unlawful means"¹⁴—a felony under the law. In fall 1919, that was a serious and alarming allegation.

The magistrate who first encountered the case in November 1919 described Gitlow's Left Wing faction as a "formidably organized *army*, with its recruiting barracks in our midst."¹⁵ The martial rhetoric was no accident; the postwar Red Scare that swept up Gitlow emerged directly from the repressive climate of World War I. During the war, state and federal officials had shown little tolerance for antiwar dissent.¹⁶ In addition to German sympathizers, they aggressively targeted radicals and pacifists who condemned the war as a tool of capitalist exploitation.¹⁷ Among these groups was the Socialist Party, which declared in the spring of 1917 that "the only struggle which would justify the workers in taking up arms is the great struggle

¹² On Ruthenberg's trial, see David Skover & Ronald Collins, *A Curious Concurrence: Justice Brandeis' Vote in Whitney v. California*, 2005 SUP. CT. REV. 333, 354–61.

¹³ The first two counts of the indictment pertained to the Revolutionary Age. The third, which was later dropped, charged them with being "evil disposed and pernicious persons." Josephson, *supra* note 6, at 144. The impetus for the law was the frustration of New York authorities that Emma Goldman, whose lectures had allegedly motivated Czogolz, was not subject to prosecution under New York law. Marc Lendler, *The Time to Kill a Snake: Gitlow v. New York and the Bad-Tendency Doctrine*, 36 J. SUP. CT. HIST. 11, 12 (2011).

¹⁴ Indictment, Transcript of Record, *Gitlow v. United States*, October Term 1922, no. 770, p. 48.

¹⁵ *People v. Gitlow*, City Magistrate's Court, City of New York, in *ACLU Papers*, vol. 103, at 11. McAdoo's opinion also stated, "we are still at war, no legal peace having yet been arrived at, and we are to construe this law under these conditions—the aftermath of the bloodiest and greatest war the world has ever seen." *Id.* at 10.

¹⁶ See generally DAVID M. KENNEDY, *OVER HERE: THE FIRST WORLD WAR AND AMERICAN SOCIETY* (1980); see also ROBERT ZIEGER, *AMERICA'S GREAT WAR: WORLD WAR I AND THE AMERICAN EXPERIENCE* 78–84 (2000).

¹⁷ See, e.g., C. ROLAND MARCHAND, *THE AMERICAN PEACE MOVEMENT AND SOCIAL REFORM, 1898–1918*, at 244–48 (1972); JAMES WEINSTEIN, *THE DECLINE OF SOCIALISM IN AMERICA, 1912–1925* ch. 3 (1967); MICHAEL KAZIN, *WAR AGAINST WAR: THE AMERICAN FIGHT FOR PEACE* (2017).

of the working class of the world to free itself from economic exploitation and political oppression.”¹⁸ Government efforts to crush such views only intensified after the Bolshevik Revolution of November 1917 made the dangers of radicalism apparent.

Meanwhile, the government also moved to suppress strike activity that might disrupt wartime production, turning to federal prosecutions and deploying federal troops when state authorities proved unequal to the task.¹⁹ The 1918 Sedition Act amendments to the 1917 Espionage Act prohibited not only “disloyal, profane, scurrilous, or abusive language about the form of government of the United States,” but also the advocacy of “any curtailment of production in this country” of anything “necessary . . . to the prosecution of the war”²⁰—in other words, strikes in war-related industries.

Although the government’s heavy-handed tactics met with little sustained opposition, a handful of groups emerged to resist wartime repression and defend radical dissenters in court. The most prominent of these was the National Civil Liberties Bureau (NCLB), the organizational precursor to the ACLU, which believed that officials were “us[ing] the war as a means to crush labor.”²¹ Despite their own labor-inflected ambivalence toward judicial review, NCLB leaders pursued constitutional

¹⁸ VICTOR L. BERGER: HEARINGS BEFORE THE SPECIAL COMMITTEE 19 (1919).

¹⁹ Their most prominent target was the Industrial Workers of the World (IWW). See MELVYN DUBOFKY, *WE SHALL BE ALL: A HISTORY OF THE INDUSTRIAL WORKERS OF THE WORLD* 438–531 (1969); WILLIAM PRESTON JR., *ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS, 1903–1933*, at 88–117 (1963); LAURA WEINRIB, *THE TAMING OF FREE SPEECH: AMERICA’S CIVIL LIBERTIES COMPROMISE* ch. 3 (2016); AHMED WHITE, *UNDER THE IRON HEEL: THE WOBBLIES AND THE CAPITALIST WAR ON RADICAL WORKERS* (2022).

²⁰ Sedition Act of 1918, 40 Stat. 553 (1918). On the Sedition Act, see GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 183–91 (2004); DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS, 1870–1920*, at 250–55 (1997); PAUL MURPHY, *WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES* 98–103 (1979); DONALD JOHNSON, *CHALLENGE TO AMERICAN FREEDOMS: WORLD WAR I AND THE RISE OF THE AMERICAN CIVIL LIBERTIES UNION* 97–98 (1963).

²¹ Resolution, *in* ACLU Papers, vol. 3. On the NCLB and early ACLU, see generally DONALD JOHNSON, *CHALLENGE TO AMERICAN FREEDOMS: WORLD WAR I AND THE RISE OF THE AMERICAN CIVIL LIBERTIES UNION* (1963); SAMUEL WALKER, *IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU* (1990); ROBERT COTTRELL, *ROGER NASH BALDWIN AND THE AMERICAN CIVIL LIBERTIES UNION* (2000); JOHN FABIAN WITT, *PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW* ch. 3 (2007); WEINRIB, *supra* note 19.

litigation on behalf of their clients, urging judges to extend the same solicitude they showed for property rights to the “personal” rights, such as freedom of speech and conscience, that the wartime defendants invoked.²² On the whole, however, the courts rejected such arguments, deferring to government claims that radical agitation, including abstract advocacy, posed a threat to the war effort.²³ Many of the era’s best-known prosecutions targeted radical defendants, including anarchist Jacob Abrams and socialists Charles Schenck and Eugene V. Debs. The Supreme Court’s decisions upholding their convictions against First Amendment challenges became the key precedents for prosecutions not only under wartime legislation, but also under the state peacetime sedition laws that followed.²⁴

Pressure to pass repressive laws only mounted after the cessation of hostilities in Europe in November 1918. Industrial production dropped off just as soldiers returned home to rising prices and dwindling job opportunities, fueling anti-immigrant sentiment and stoking racial violence.²⁵ Republicans gained control of Congress that year, shifting the Wilson administration away from its pro-labor stance and undercutting the wartime gains of mainstream unions affiliated with the American Federation of Labor (AFL).²⁶ Then, in the spring of 1919, two waves of bombs were mailed to prominent public figures and government officials, accompanied by a leaflet signed “The Anarchist Fighters.”²⁷ Although most left-wing groups swiftly condemned the violence, the press called for immediate and decisive action.²⁸ Within the Bureau of Investigation of the Department of Justice, the newly

²² See WEINRIB, *supra* note 19, at ch. 2.

²³ See MURPHY, *supra* note 20, at 179–247; Geoffrey R. Stone, *The Origins of the “Bad Tendency” Test: Free Speech in Wartime*, 2002 SUP. CT. REV. 411, 415–19.

²⁴ *Abrams v. United States*, 250 U.S. 616, 630 (1919); *Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919).

²⁵ DAVID MONTGOMERY, *THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865–1925*, at 388–89 (1987).

²⁶ JOSEPH A. MCCARTIN, *LABOR’S GREAT WAR: THE STRUGGLE FOR INDUSTRIAL DEMOCRACY AND THE ORIGINS OF MODERN AMERICAN LABOR RELATIONS, 1912–1921*, at 220–22 (1997); MELVYN DUBOFSKY, *THE STATE AND LABOR IN MODERN AMERICA* 72 (1994); MONTGOMERY, *supra* note 25, at 442–46.

²⁷ PAUL AVRICH, SACCO AND VANZETTI: THE ANARCHIST BACKGROUND 137–59 (1991).

²⁸ ROBERT K. MURRAY, *RED SCARE: A STUDY IN NATIONAL HYSTERIA, 1919–1920*, at 80 (1955).

formed General Intelligence Division, under the direction of J. Edgar Hoover, readily obliged.²⁹

In short, in the months following the Armistice, as labor militancy and radical agitation intensified, the machinery of repression was retooled for peacetime use. Americans had grown accustomed to both alarmism and suppression; as the socialist *New York Call* observed, "A Constitution that could be torn to tatters under the strain of alleged military necessity could not be easily restored to its former effectiveness."³⁰

In Congress, the Senate's Overman Committee—originally tasked with investigating pro-German activity among beer brewers—devoted the winter of 1919 to hearings on the Bolshevik threat.³¹ Its star witness was New York attorney Archibald Stevenson, who stunned both the senators and the public with a list of allegedly dangerous and disloyal individuals, including much of the NCLB leadership.³² Although Stevenson was concerned about terroristic violence, he believed the most insidious threat to America was not the "small groups which seek to use the torch and bomb," but rather "those quasi-political and economic organizations which teach that the workers should organize into revolutionary industrial unions."³³ In his view, it was the "coercive power of the general strike" that posed the greater danger—a concern seemingly validated when general strikes caused massive disruptions in Seattle in February and in Winnipeg in May.³⁴

Stevenson's warnings attracted a new upswell of adherents as labor unrest swept the nation during the summer and fall of 1919. When nearly four million American workers went on strike, government officials aligned themselves firmly with industry.³⁵ President Wilson denounced a strike by Boston police officers as a

²⁹ *Id.* at 77–79, 193–200; STANLEY COBEN, A. MITCHELL PALMER: POLITICIAN 215–21 (1963).

³⁰ *The Liberals Wake Up*, N.Y. CALL, Mar. 24, 1919.

³¹ REGIN SCHMIDT, RED SCARE: FBI AND THE ORIGINS OF ANTICOMMUNISM IN THE UNITED STATES, 1919–1943, at 136–46 (2000).

³² See TODD J. PFANNESTIEL, RETHINKING THE RED SCARE: THE LUSK COMMITTEE AND NEW YORK'S CRUSADE AGAINST RADICALISM, 1919–1923, at 11–15 (2003).

³³ Archibald E. Stevenson, *The World War and Freedom of Speech*, N.Y. TIMES, Feb. 13, 1921.

³⁴ *Id.* On the Seattle general strike, see ROBERT L. FRIEDHEM, THE SEATTLE GENERAL STRIKE (1964). On the Winnipeg general strike, see Tom Mitchell & James Naylor, *The Prairies: In the Eye of the Storm, in THE WORKERS' REVOLT IN CANADA, 1917–1925*, at 176–230 (Craig Heron ed., 1998).

³⁵ DUBOFSKY, *supra* note 26, at 76–79.

“crime against civilization,”³⁶ while his administration deployed federal troops to put down striking steel workers and secured a federal injunction against striking coal miners.³⁷ In November 1919—the same month Benjamin Gitlow was arrested—the House of Representatives refused to seat Victor Berger, a Wisconsin Socialist who was then in the midst of successfully appealing a conviction under the Espionage Act for opposing the war.³⁸ Meanwhile, Attorney General A. Mitchell Palmer, emphasizing that he himself had been a target of the previous spring’s anarchist bombings, oversaw the summary deportation of foreign-born radicals.³⁹

As events unfolded, the Palmer Raids marked the climax of the nation’s multifront campaign to root out suspected subversives. Labor’s crushing defeat at the hands of government and industry, coupled with mounting alarm over the lawlessness of federal roundups of alleged Reds, sparked growing reluctance to grant authorities further power to silence dissent. Progressives increasingly questioned the narrative promoted by industry and the mainstream press that Bolsheviks were orchestrating the strikes, and their skepticism soon extended to the broader machinery of the Red Scare.⁴⁰ By the winter of 1920, a chorus of prominent lawyers and public figures was calling for restraint. When Congress took up federal peacetime sedition legislation early that year, the measure failed.⁴¹

By contrast, restraint arrived more slowly to New York, where the state’s Legislative Committee to Investigate Seditious Activities—known as the Lusk Committee—stubbornly pursued its Red Scare agenda.⁴² Though the committee was named for State Senator Clayton R. Lusk, its work was largely directed by Stevenson, who oversaw months of investigations and arrests under the state’s criminal anarchy law. In June 1919, in an operation the *New York Times* described as “the biggest of the kind in the history of the city,” the Lusk Committee orchestrated sim-

³⁶ *Police Unions in Thirty-Seven Cities*, N.Y. TIMES, Sept. 14, 1919 (quoting Wilson). On the Boston strike, see Joseph Slater, *Public Workers: Labor and the Boston Police Strike of 1919*, 38 LABOR HISTORY 7 (1989).

³⁷ See DAVID BRODY, *LABOR IN CRISIS: THE STEEL STRIKE OF 1919*, at 60–77 (1987).

³⁸ *Berger v. United States*, 255 U.S. 22 (1921); see MURRAY, *supra* note 28, at 227–29.

³⁹ MURRAY, *supra* note 28, at 77–79, 193–200; COBEN, *supra* note 29, at 215–21.

⁴⁰ MURRAY, *supra* note 28, at 140.

⁴¹ *Id.* at 239–62. The Sterling-Graham bills provoked strong opposition and died in committee.

⁴² See generally PFANNESTIEL, *supra* note 32.

ultaneous raids on the Rand School of Social Science, the local offices of the Industrial Workers of the World, and the Left Wing of the Socialist Party.⁴³ The committee's pursuit of the Rand School ultimately backfired; the NCLB's defense of the organization, urging public scrutiny as the best antidote to subversive teachings and promoting free speech as essential to democratic governance, won support from prominent attorneys⁴⁴ and served as a wake-up call to "liberal Americans."⁴⁵ Still, the Lusk Committee pressed on. In the new decade, it drew both local and national criticism for its role in the expulsion of Socialists from the New York State Assembly and later for its unrelenting promotion of the so-called Lusk Laws, which Governor Al Smith condemned for granting state officials near-dictatorial powers.⁴⁶

It was at the direction of the Lusk Committee that New York City police officers raided the Communist Labor Party headquarters on November 8, 1919, and arrested Benjamin Gitlow.⁴⁷ Gitlow was one of 67 people indicted by a special grand jury under New York's criminal anarchy law. At the urging of Stevenson and Assistant District Attorney Alexander Rorke, Gitlow was the first to go to trial. Although he had not authored the content in question, his role as business manager of *The Revolutionary Age* made him a convenient test case for the legal question at hand: whether the *Left Wing Manifesto* violated the New York statute. The manifesto did not explicitly call for violent revolution. Instead, it advocated a "mass political strike against capitalism and the state," of the kind witnessed in Seattle and Winnipeg the previous spring.⁴⁸

For Stevenson, who testified before Chief Magistrate William McAdoo, that aim was both dangerous and unlawful. As he would explain after the Supreme Court's decision came down, Stevenson considered it permissible to advocate for a

⁴³ *Raid Rand School*, N.Y. TIMES, June 22, 1919.

⁴⁴ *Court Dismisses Rand School Case*, N.Y. TIMES, July 31, 1919.

⁴⁵ NCLB, *Bolshevism and Cool Heads* (draft), July 5, 1919, in ACLU Papers, vol. 159A. The *New York Times* printed large excerpts of the statement. *Want Rand School Opened*, N.Y. TIMES, July 19, 1919. See generally JULIAN F. JAFFE, *CRUSADE AGAINST RADICALISM: NEW YORK DURING THE RED SCARE, 1914–1924* (1972).

⁴⁶ Smith vetoed the bills in 1920, but when the legislature passed them again in 1921, Governor Nathan L. Miller signed them into law. Only in May 1923, after Smith's reelection, were the provisions repealed.

⁴⁷ Josephson, *supra* note 6, at 144.

⁴⁸ *The Left Wing Manifesto*, REVOLUTIONARY AGE, July 5, 1919, at 8.

soviet form of government through formal constitutional amendment. To promote such a transformation by means of violence or a general strike, however, would “constitute[] the highest crime against the principles of civil liberty and democratic government.”⁴⁹ In the name of free speech, he suggested, Gitlow was threatening democracy itself.

II. CONSTRUCTING CRIMINAL ANARCHY

Stevenson’s warnings did not go unheeded. Chief Magistrate McAdoo, evidently moved by his testimony, showed no reluctance in binding Gitlow and Larkin over for the grand jury. As McAdoo explained matters, the Communist Party was seeking to sharpen the contradictions of capitalism: to “make social and economic conditions worse” in order to foment “universal unrest and discontent” and hasten the path to a “universal strike.”⁵⁰ Were the revolution successful, McAdoo emphasized, the proletariat would stifle majority opposition through “*coercion and suppression*.”⁵¹ It would enforce its will not through constitutionally authorized mechanisms but through “mass action”—a so-called strike the goal of which was not to improve the wages or hours of the workers, but to destroy the state and, with it, the Constitution.⁵² Against such aims, McAdoo would not be distracted by “nice disquisitions” about the “liberty of speech.”⁵³ Notwithstanding the “subtle evasiveness” of the *Left Wing Manifesto*’s language, it was easy for him to conclude that the “law of the land,” decisively established by the Supreme Court in *Abrams v. United States*, prescribed clear instructions for “dealing with such people” as Benjamin Gitlow.⁵⁴

Despite the best efforts of Gitlow’s defense team, including radical lawyer Charles Recht, Walter Nelles of the NCLB and, at trial, Clarence Darrow, a jury

⁴⁹ IV THE REFERENCE SHELF no. 9, at 148 (Edith M. Phelps, compiler 1927) (reproducing a circular on the *Gitlow* case written by Stevenson on behalf of the National Civic Federation Committee on Free Speech).

⁵⁰ *People v. Gitlow* (N.Y. City Mag. Ct. Nov. 14, 1919), <https://perma.cc/2LVK-NS3K>.

⁵¹ *Id.* at 4 (emphasis in original).

⁵² *Id.*

⁵³ *Id.* at 5.

⁵⁴ *Id.* at 3–4.

eventually agreed. There were three elements the prosecution needed to prove under New York's criminal anarchy statute:⁵⁵ first, that the manifesto engaged in advocacy, not merely prediction or theoretical discussion; second, that what it advocated was the overthrow of organized government; and third, that the means it advocated for achieving that overthrow were force, violence or other unlawful means.⁵⁶ Each of the last two prongs generated extensive discussion at trial. The defense made arguments about intent, incitement, and immediacy. It also countered the prosecution's argument, relying on an excerpt from the *Revolutionary Age*, that the only difference between the anarcho-syndicalists and the Communists was that the former "want to destroy the government now" while the latter aspire "to conquer the state and then destroy it."⁵⁷ According to the defense, the manifesto urged not the destruction of organized government writ large, as anarchists did, but rather the replacement of one form of government with another: the dictatorship of the proletariat. As Gitlow himself put it, the "manifesto stands for a new order in society and a new form of government."⁵⁸

The prosecution called eight witnesses, including an undercover federal agent, some of whom argued that Gitlow believed in violent revolution.⁵⁹ What is most striking about the trial testimony, however, is that no one accused Gitlow of using the *Left Wing Manifesto* to advocate bombings, assassinations, or violence in the streets. Rather, the trial focused largely on the issues that Stevenson had long emphasized: the threats to legal ordering and lawfully designated authority posed by mass strikes. For example, over Darrow's objection,⁶⁰ the state elicited testimony

⁵⁵ N.Y. PENAL LAW §§ 160, 161.

⁵⁶ See Charge to Jury, Transcript of Record, *Gitlow v. United States*, October Term 1922, no. 770, at 151–53.

⁵⁷ *Rorke Tries to Link Gitlow to "Left" Weekly*, N.Y. CALL, Jan. 31, 1920, in ACLU papers, vol. 157.

⁵⁸ THE "RED RUBY": ADDRESS TO THE JURY BY BENJAMIN GITLOW 8 (Communist Labor Party n.d.).

⁵⁹ Ronald Collins, "Everybody Is Against the Reds": Benjamin Gitlow and the First and Fourteenth Amendments, in WE MUST NOT BE AFRAID TO BE FREE: STORIES OF FREE EXPRESSION IN AMERICA 25 (2011). One witness called by the prosecution, Rose Pastor Stokes, was herself an accused Communist and was arrested as she left the witness stand. *Case Against Gitlow Closed; R. Stokes Seized*, Clipping, Feb. 4, 1920, in ACLU papers, vol. 157.

⁶⁰ *Case Against Gitlow Closed*, *supra* note 59.

about the decision by the Winnipeg Strike Committee to permit some policing and healthcare activity to continue during the Winnipeg general strike—an indulgence that the prosecution described as an unlawful usurpation of municipal government that verged on the creation of a “proto-Soviet.”⁶¹

Darrow, who defended Gitlow at trial, called no witnesses for the defense.⁶² He did not contest the government’s allegation that Gitlow was responsible for the publication and circulation of *The Revolutionary Age*. Instead, he insisted that the *Left Wing Manifesto* did not fall within the criminal anarchy law because it did not advocate violent revolution. That is not to say that Darrow doubted that force and violence were likely to accompany revolutionary change. On the contrary, he conceded that in the course of revolution, “somebody is going to get hurt.”⁶³ Moreover, he acknowledged that the manifesto documented violence in past revolutionary struggles and predicted its use in the future. But in Darrow’s assessment, it contained “not a word inciting anyone to violence, not a word inciting to unlawful action.”⁶⁴ He also claimed that the statute itself was unconstitutional because it unduly restricted free speech.

Although Gitlow did not testify at trial, he did make a statement to the jury. In it, he offered a primer on Marxist theory, celebrated the Russian Revolution, and denounced the prosecution as political persecution and an assault on expressive freedom. Gitlow was candid about his beliefs, as well as those expressed in the *Left Wing Manifesto*, and he “ask[ed] no clemency.”⁶⁵ “In order to bring about socialism,” he explained, “capitalist governments must be overthrown” and replaced by the dictatorship of the proletariat.⁶⁶

The trial concluded on February 5, 1920. Judge Weeks instructed the jury that it should not consider Gitlow’s constitutional claims, since the criminal anarchy

⁶¹ Lendler, *supra* note 13, at 15. Weeks permitted the evidence, explaining that “this sort of strike did usurp the functions of the municipal government.” *Id.* On judicial opposition to perceived usurpation of state law-making authority by labor groups, see WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 65–66 (1991).

⁶² Josephson, *supra* note 6, at 145.

⁶³ THE “RED RUBY,” *supra* note 58, at 9.

⁶⁴ *Id.* at 12.

⁶⁵ *Id.* at 8.

⁶⁶ *Id.*

law did not constitute “an invasion of any right of free speech.”⁶⁷ He declined the defense’s request to charge that “unlawful means” under the statute must be limited to “conduct of the same character as force and violence.”⁶⁸ On the contrary, he instructed the jury using New York’s criminal conspiracy statutes, which had long been applied in the labor context to prosecute secondary strikes. He acknowledged that workers could legally strike to improve their own wages but explained that it was unlawful in New York to take private property without compensation or to conspire to injure trade or commerce.⁶⁹ And he left it to the jury to decide whether the *Left Wing Manifesto* advocated the overthrow of government by means of unlawful strikes.

Predictably, the jury found Gitlow guilty in just three hours.⁷⁰ Weeks congratulated the jury members for their “proper and just verdict”; echoing Chief Magistrate McAdoo, he told them that the state must have a right to protect itself.⁷¹ He explained that “in this organized government there is a lawful means to overthrow it, a means provided in the constitution, without force, violence or unlawful means.”⁷² One might urge the creation of new laws or the repeal and replacement of old ones. Gitlow, however, had eschewed these lawful mechanisms, seeking to “impose the will of the minority upon the majority.”⁷³ He sentenced Gitlow to five to ten years in prison at hard labor, the maximum penalty authorized under the statute. The defense team enlisted no less a figure than Charles Seymour Whitman, a prominent attorney and former governor of New York, to help secure Gitlow’s release on bail.⁷⁴ But Whitman’s argument that a law aimed at anarchist violence

⁶⁷ Charge to Jury, *supra* note 56, at 145.

⁶⁸ *People v. Gitlow*, 187 N.Y.S. 787, 805 (1921).

⁶⁹ Charge to Jury, *supra* note 56, at 153.

⁷⁰ LENDLER, *supra* note 11, at 46.

⁷¹ *Gitlow Found Guilty by Jury; Faces 10 Years*, N.Y. CALL, Feb. 6, 1920, in ACLU papers, vol. 157.

⁷² *Limits of Free Speech*, PHILADELPHIA RECORD, Clipping, Feb. 9, 1920, in ACLU papers, vol. 157. Weeks’s distaste for Gitlow seemingly reflected wartime concerns as well as Red Scare ones. He lambasted Gitlow for his wartime pledge to the Socialist Party as a member of the New York State Assembly not to vote for any appropriations for military purposes. *Gitlow Found Guilty by Jury; Faces 10 Years*, *supra* note 71.

⁷³ *Limits of Free Speech*, *supra* note 72.

⁷⁴ LENDLER, *supra* note 11, at 79–81.

should not be applied to a Left Wing socialist failed to persuade the court, and Gitlow was sent to Sing Sing to begin serving his sentence.

In the months that followed, Weeks presided over the trials of Larkin, Ruthenberg, Ferguson, and Winitsky. All were convicted, despite Larkin's insistence at trial that violence "is exactly what we are against and what we disbelieve,"⁷⁵ and Winitsky's decision to retain a conventional criminal defense lawyer who avoided political argument.⁷⁶ Before Gitlow's sentencing, the prosecution made plain what was at stake: "If the program of a general strike advocated by this defendant and his associates were carried out there would be a general paralysis of society."⁷⁷

Despite these alarming implications, reactions to Gitlow's conviction were mixed. The *New York Times* captured conservative sentiment when it criticized Gitlow for defending his subversive activities as an exercise of free speech—an argument "so often and so wearisomely appealed to by the men and women who seek to overthrow freedom."⁷⁸ Even as the initial wave of Red Scare fervor began to subside, concerns about Bolshevism and radical labor activism persisted in much of the country. New York's criminal anarchy law became a model for legislation in dozens of states, which continued to enact criminal syndicalism, criminal anarchy, sedition, and symbolic "red flag" statutes well into the 1920s.⁷⁹

To progressives, however, the conviction exemplified what many increasingly viewed as the excesses of Red Scare persecution. Central to this critique was the belief that Gitlow, like the AFL strikers of fall 1919, had been targeted on legally tenuous and politically motivated grounds. Section 580 of the New York Penal

⁷⁵ *Larkin Closes Defense After Day as Witness*, N.Y. CALL, Clipping, Apr. 24, 1920, in ACLU papers, vol. 157. Larkin represented himself at trial. For a discussion of his decision to do so, see Louise Bryant, *Jim Larkin Goes to Jail*, LIBERATOR, Clipping, June 1920, in ACLU papers, vol. 157.

⁷⁶ Lendler, *supra* note 13, at 16. Ferguson, a graduate of the University of Chicago Law School, represented himself and Charles Ruthenberg at trial. Although they were convicted, they won a motion for a new trial on the basis that the evidence linking them to the Left Wing Manifesto was insufficient. No new trial took place, though Ruthenberg famously faced subsequent charges for attending a meeting of the Communist Party. *Id.*

⁷⁷ *Gitlow Unmoved by Five to Ten Year Sentence*, N.Y. TRIBUNE, Feb. 12, 1920.

⁷⁸ *A Criminal Anarchist*, N.Y. TIMES, Feb. 7, 1920.

⁷⁹ PAUL L. MURPHY, THE MEANING OF FREEDOM OF SPEECH: FIRST AMENDMENT FREEDOMS FROM WILSON TO FDR 42 (1972); see also Preston, *supra* note 19; AHMED WHITE, UNDER THE IRON HEEL: THE WOBBLES AND THE CAPITALIST WAR ON RADICAL WORKERS (2022).

Law—the conspiracy provision upon which Judge Weeks relied to establish the unlawfulness of mass strikes—stirred bitter resentment among mainstream labor organizations, which viewed it as a blunt instrument for suppressing secondary strikes and boycotts. To many union advocates, the act of withholding one's labor or purchasing power in solidarity with mistreated workers, even at another workplace, was a far cry from advocating bombings or assassinations. Writing in the *New Republic* shortly before the trial ended, Swinburne Hale complained that officials who claimed to oppose “force and violence” were, in reality, prosecuting individuals who merely “advocated the general strike.”⁸⁰

That was a plausible argument in light of Justice Holmes's powerful dissent in *Abrams v. United States*, issued just weeks after Gitlow was arrested. Like *Gitlow*, *Abrams* involved a call for a general strike. As in *Gitlow*, the government had argued in *Abrams* that the purpose of the strike was “not to improve the conditions of the employees either as to wages or hours of labor.”⁸¹ And while the majority in *Abrams* was satisfied that “men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce,”⁸² Holmes had demanded something more: that “the aim to produce” the forbidden consequence “is the proximate motive of the specific act.”⁸³ That minority view was consistent with his earlier opinions in labor cases, which had treated unions as a “necessary and desirable counterpart” to industry and had declined to impute either malicious intent or implicit “threats of force” to striking workers.⁸⁴ Discussion of the *Abrams*

⁸⁰ Swinburne Hale, *The Force and Violence Joker*, NEW REPUBLIC, Jan. 21, 1920, at 231; cf. *Where is the Law? Soak 'Em Anyway!*, SOLIDARITY, Clipping, Apr. 23, 1921, in ACLU papers, vol. 157 (“The prosecution's theory was that the left wing manifesto and the Communist Party manifesto advocated the general strike as a means of overthrowing the existing government, and that to advocate the general strike for such a purpose was ‘unlawful means.’”).

⁸¹ Brief on Behalf of the United States, *Abrams*, 250 U.S. 616 (1919) (No. 316) at 35–36. The purpose, according to the government, was “generally to prevent, at a most critical period of the war, the manufacture and shipment of munitions.” *Id.*

⁸² *Abrams*, 250 U.S. at 621.

⁸³ *Id.* at 627 (Holmes, J., dissenting).

⁸⁴ *Vegeahn v. Guntner*, 167 Mass. 92, 108 (1896). In *Vegeahn*, Holmes invoked the analysis in his 1894 article, Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894). See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 131–36 (1992).

case in spring 1920 expressly invoked this point.⁸⁵ Zechariah Chafee, writing in the *Harvard Law Review* that April, noted that “[s]trikes are not ordinarily illegal, and it would be startling if Congress intended to prohibit all incitement to them in war.”⁸⁶ Sir Frederick Pollock, a British jurist and one of Holmes’ longstanding correspondents, similarly emphasized this issue. He cautioned that the majority opinion might be read in such a way that “every strike of workmen employed in producing anything of warlike use would be an act of resistance to the United States.”⁸⁷ To be sure, the strikes envisioned in the *Left Wing Manifesto* were not aimed at improving wages or hours. But by the spring of 1920, even a sweeping call for the cessation of work was widely understood in progressive circles as categorically distinct from an explicit incitement to assassination of the kind the New York criminal anarchy law had originally been intended to prevent.

Meanwhile, even those who believed Gitlow guilty of advocating violence—and who therefore supported his conviction—increasingly saw the case as a reason for moderation rather than renewed repression. The *New York Evening Post* praised the outcome as a “refreshing example of the good old American way of dealing with those who would make violence a political weapon.”⁸⁸ The verdict, on this view, marked a victory for the “orderly processes of the law” and confirmed that existing legal tools were sufficient to meet the dangers of the day.⁸⁹ It was far better, the paper reasoned, to rely on the consistent enforcement of a sensible statute than on the “spasmodic[]” administration of “an extreme law passed under stress of feeling.”⁹⁰ In short, Gitlow’s conviction rendered any new sedition legislation both unnecessary and ill-advised.

The unanimous decision of the New York Appellate Division one year later, affirming Gitlow’s conviction, only deepened public sympathy for him and the

⁸⁵ See, e.g., Zechariah Chafee Jr., *A Contemporary State Trial—The United States Versus Jacob Abrams et al.*, 33 HARV. L. REV. 747, 758–68 (1920); see generally Laura Weinrib, *Power and Premises: The Contested Meanings of the Abrams Dissent*, 51 SETON HALL L. REV. 61 (2020).

⁸⁶ Chafee, *supra* note 85, at 767.

⁸⁷ Frederick Pollock, *Abrams v. United States*, 36 L. Q. REV. 334, 336 (1920).

⁸⁸ N.Y. EVENING POST, Clipping, Feb. 6, 1920, in ACLU papers, vol. 157.

⁸⁹ *Id.*

⁹⁰ *Id.*

other criminal anarchy defendants.⁹¹ Writing for the court in April 1921, Judge Frank Laughlin held that the jury was justified in concluding that *The Revolutionary Age* violated the statute—even though its articles contained no express advocacy of force or violence.⁹² He rejected the argument that the law applied only to unlawful means equivalent to force and violence, reasoning that the legislature intended to reach “any new scheme” aimed at overthrowing government, including the mass strike.⁹³ He declared it “obvious[ly]” unlawful for the proletariat, through striking, to “usurp” official functions and govern instead “through a proletarian dictatorship or committee.”⁹⁴ Most pointedly, he deemed it “too incredible to require discussion” that the advocates of mass strikes might “honestly believe[,]” as Gitlow’s counsel contended, that the owners of property would surrender it “without the use of force or violence.”⁹⁵ Laughlin’s opinion was notably vague as to where that force was expected to come from.

True to its earlier stance, the *New York Times* applauded the outcome.⁹⁶ Outside the editorial pages, however, even legal elites were beginning to waver. A comment in the *Yale Law Journal* expressed concern that the Appellate Division’s approach might endanger legitimate labor activity. “If a similar policy is applied to that most difficult of present problems, industrial warfare, i.e. in connection with strikes which are not ‘mass strikes,’” the author warned, “the misunderstanding

⁹¹ The decision came down just weeks after the New York Extraordinary Jury (Almirall Grand Jury)—convened in 1919 to pursue violation under the Criminal Anarchy statute—issued its March 1921 presentment, which suggested that the effectiveness of the law would be improved by an amendment explicitly including the general strike. *Wants Prosecutor Named by Court*, N.Y. TIMES, Mar. 4, 1921. In a bulletin, Walter Nelles suggested that further repression was likely to backfire by fueling resentment and driving dangerous ideas underground. Walter Nelles, *Law and Freedom Bulletin* #13 (A.C.L.U. 1921), in ACLU papers, vol. 159a.

⁹² Echoing both McAdoo and Weeks, he wrote that “it behooves Americans to be on their guard to meet and combat the movement, which, if permitted to progress as contemplated, may undermine and endanger our cherished institutions of liberty and equality.” *Gitlow*, 187 N.Y.S. at 797.

⁹³ *Id.* at 798.

⁹⁴ *Id.* at 801.

⁹⁵ *Id.* at 802.

⁹⁶ *A Criminal Anarchist*, N.Y. TIMES, Apr. 4, 1921. The article explained: “If the Legislature has the right to pass laws to prevent that overthrow by unauthorized means, ‘the initial and every other act knowingly committed for the accomplishment of that purpose may be forbidden and declared to be a crime.’”

and hatreds likely to result seem distinctly undesirable.”⁹⁷ On this account, the Red Scare convictions had only deepened resentment toward government officials and further eroded faith in rule of law. Far from deterring violence, cases like *Gitlow* risked inflaming it—compromising both public safety and the legitimacy of legal institutions.

The New York Court of Appeals issued its decision in *Gitlow* on July 12, 1922.⁹⁸ This time, the court was split. In one of two opinions affirming the conviction, Judge Frederick E. Crane began from the premise that all seven judges agreed on the constitutionality of the Criminal Anarchy Law.⁹⁹ From there, he argued that “the strikes advocated by the defendant were not for any labor purposes, or to bring about the betterment of the workingman, but solely for political purposes to destroy the state or to seize state power.”¹⁰⁰ He reasoned that such strikes were prohibited by Section 580 of the Penal Law and therefore satisfied the “unlawful means” requirement of the criminal anarchy statute.¹⁰¹ Even Crane acknowledged that the sentence *Gitlow* received “may have been heavy for the offense.”¹⁰² Nonetheless, he deemed the conviction both constitutional and appropriate.

In a separate opinion, Chief Judge Frank Hiscock echoed Crane’s arguments about unlawful strikes and rejected the notion that the statute required explicit endorsement of force or violence. “It is true that there is no advocacy in specific terms of the use of assassination or force or violence,” he explained, but “[t]here was no

⁹⁷ *Constitutional Law—Freedom of Speech and Press—Conviction for Criminal Anarchy*, 30 YALE L.J. 861 (1921). The comment also noted that the decision rejected the “clear and present danger test” and applied the doctrine of “constructive intent.” The author concluded, “One may share the court’s aversion to the defendant’s views and yet doubt the corrective effect and the social desirability of the means of repression adopted.” *Id.*; cf. *Present Day Labor Litigation*, 30 YALE L. J. 280 (1921) (on the illegality of some strikes and boycotts).

⁹⁸ *People v. Gitlow*, 234 N.Y. 132 (1922). The same day, the court issued companion decisions reversing the convictions of Charles Ruthenberg and Isaac Ferguson on the ground that there was no direct evidence connecting them to publication of *The Revolutionary Age*. *People v. Ferguson*, 234 N.Y. 159 (1922). Winitsky’s and Larkin’s convictions were upheld.

⁹⁹ *Gitlow*, 234 N.Y. at 136 (Opinion of Crane, J.).

¹⁰⁰ *Id.* at 141.

¹⁰¹ *Id.* at 141–42.

¹⁰² *Id.* at 142.

need to be.”¹⁰³ In Hiscock’s view, “no specific words were necessary to inform either the readers of the manifesto or the jury which was passing upon it that a revolutionary mass strike conducted by one great class of workers for the purpose of destroying the rights of all other classes and government itself . . . would inevitably function with force and violence.”¹⁰⁴

Judge Cuthbert W. Pound, joined by Judge Benjamin Cardozo, dissented. The opinion was hardly friendly to Gitlow’s political ambitions, which Pound described as a “pretentious and vicious program.”¹⁰⁵ Nonetheless, Pound distinguished between anarchism, which was proscribed by the statute, and the Marxist doctrine espoused by Left Wing Socialists, which he believed was not. Although the latter envisioned the eventual dissolution of organized government, Pound explained, it did so through an intermediate stage of proletarian dictatorship. To urge the dismantlement of the existing order by means of the mass strike might count as sedition, criminal conspiracy, or rebellion—but it did not fall within the statutory definition of criminal anarchy.¹⁰⁶ Pound accepted that an effort to establish proletarian class rule in practice would be unlawful. But the *Left Wing Manifesto* was a work of advocacy, not action. Absent a breach of the peace, Pound reasoned, there was nothing in the law that made it a crime “to teach such revolutionary doctrines.”¹⁰⁷ He therefore concluded that the judgment should be reversed, and a new trial ordered.

To Benjamin Gitlow, who was headed back to prison after a brief period out on bail, Judge Pound’s finely parsed opinion amounted to little more than hair-splitting.¹⁰⁸ From the ACLU’s perspective, however, the value of a dissent lay in its potential to galvanize public opinion and spur action by sympathetic officials. In that

¹⁰³ *Id.* at 149 (Opinion of Hiscock, C.J.).

¹⁰⁴ *Id.* at 150.

¹⁰⁵ *Id.* at 157 (Pound, J., dissenting).

¹⁰⁶ *Id.* at 157–58.

¹⁰⁷ *Id.* at 158.

¹⁰⁸ Gitlow had spent 26 consecutive months in prison, from February 1920 until April 1922 (and would eventually serve more than 34 months in total). A call for funds in the *Worker* noted that Gitlow had spent his time out on bail “taking a hand in every fight that faced the workers of the various industries,” and that “he went back to prison more convinced and more determined that the only position for the class conscious worker is the militant position, the waging of an open battle with the capitalist class.” *Ben Gitlow Goes Back to Prison*, *WORKER*, Sep. 16, 1922. Gitlow twice ran

context, the rationale for the dissent was secondary; what mattered was that some of the judges believed the judgment should be reversed.

Nelles, now working with Walter Pollak, wasted no time in putting Pound's opinion to strategic use. The two lawyers issued pamphlets, gave interviews, and enlisted prominent allies to rally support for their broader free speech campaign. In a memorandum on the criminal anarchy prosecutions, the ACLU decried "the prosecution of persons for expression of their political or economic views" as a betrayal of "American traditions."¹⁰⁹ From a practical standpoint, they suggested, such actions merely pushed political propaganda underground and amplified views that would otherwise have engendered little support. "The evils of suppressing opinion on public matters are always greater than the evils of unlimited expression," the ACLU insisted; however tempting, repression threatened to undermine the very foundations of democratic government.¹¹⁰

The ACLU's message resonated beyond activist circles, and legal and academic commentators soon echoed the organization's concerns. A note in the *Harvard Law Review* drew explicitly on Pound's dissent, arguing that proletarian dictatorship retained the "essential attribute" of government—namely, "the power to compel obedience"—and that Gitlow therefore could not be said to advocate the overthrow of organized government.¹¹¹ The note also emphasized that the theory of mass strikes was nonviolent and warned that "to make criminal the advocacy of a conspiracy to cripple business by striking is very different from punishing advocacy of assassination."¹¹² It further suggested, anticipating the concept later known as the "heckler's veto," that punishing a speaker for provoking a violent response

for office from prison (first for mayor, then Congress), but the New York Board of Elections omitted his name from the ballot. He also campaigned for New York governor and, in 1924, became the Workers Party candidate for Vice President of the United States, alongside William Foster. Josephson, *supra* note 6, at 147.

¹⁰⁹ *Memo on the Criminal Anarchy Law and the Prosecutions Under It*, Jan. 12, 1923, in ACLU papers, vol. 244.

¹¹⁰ *Id.*

¹¹¹ *The New York Criminal Anarchy Act*, 36 HARV. L. REV. 199, 201 (1922).

¹¹² *Id.* at 203. The author considered it "settled" that neither the Bill of Rights nor the Privileges or Immunities Clause restricted state legislation, but, citing Justice Brandeis in *Gilbert*, suggested that the guarantee of "liberty" within the Due Process Clause of the Fourteenth Amendment might "protect[] against state denial of the liberty to advocate overthrow of the government by a mass strike."

might perversely amount to “making a man a criminal simply because his neighbors have no self-control.”¹¹³

Buoyed by emerging support for its position, the ACLU moved quickly to capitalize on the momentum generated by Judge Pound's dissent, within and outside the courts.

III. THE CASE FOR CLEMENCY

In July 1922, Walter Nelles filed a petition for a writ of error with the United States Supreme Court. Justice Brandeis referred the application to the full Court, which agreed in November to take the case.¹¹⁴ After interviewing Nelles, the *New York World* proclaimed that “the cause of unrestricted expression” had “won [a] victory . . . through the writ of error granted by the United States Supreme Court to Benjamin Gitlow.”¹¹⁵ The state's criminal anarchy law, it went on to say, might now be struck down on constitutional grounds. The *World* acknowledged that the justices might not ultimately prove sympathetic, but thought “such writs [were] sufficiently rare . . . to give assurance that in the mind of the Supreme Court there is room for controversy over the constitutionality of the statute.”¹¹⁶

To seasoned legal observers, however, the *World's* optimism, like Nelles's, seemed misplaced. The Supreme Court's grant of a writ of error was narrowly confined to the constitutional question: whether New York's Criminal Anarchy Law, as construed and applied to the *Left Wing Manifesto* by the state courts, violated Gitlow's freedom of expression under the Due Process Clause of the Fourteenth Amendment. The ACLU would not be permitted to raise the state-law arguments that had resonated most strongly with both judges and legal commentators: first, that calling for a proletarian dictatorship did not amount to advocating the overthrow of government; and second, that the statute contemplated only methods of overthrow equivalent to force and violence, not the general strike.

¹¹³ *Id.* at 202 n.17.

¹¹⁴ There was initial doubt concerning whether the federal question was raised at trial; the Court of Appeals subsequently amended its remittitur to show that the federal question was passed upon. Brief for Plaintiff-in-Error at 8, *Gitlow v. N.Y.*, 268 U.S. 652 (1925) (No. 770).

¹¹⁵ *Laws in 30 States May Be Changed*, *supra* note 2.

¹¹⁶ *Id.*

More fundamentally, the constitutional claims available to Gitlow's defense would have required a wholesale transformation of the Court's approach to freedom of speech. Recent decisions upholding convictions against First Amendment challenges had accepted even the expansive forms of constructive intent advanced by prosecutors under wartime legislation. The Espionage Act prohibited interference with the nation's war effort, including obstruction of the draft; with the partial exception of *Abrams*, which arose under the 1918 Sedition Act amendments, the central question in those cases was whether antiwar speech might undermine support for the war effort or discourage compliance with conscription. None of the defendants in the landmark Supreme Court cases of 1919 and 1920 had asserted a constitutional right to explicitly advocate the overthrow of government by unlawful means, let alone by force or violence—regardless of how clear or present the danger of implementation might have been.¹¹⁷ Moreover, even those who pushed back against the wartime decisions construing the Espionage Act to encompass criticism of the war complained primarily that overzealous prosecutors and judges had distorted congressional intent, not that a democratically enacted legislature lacked the power to police dangerous speech.¹¹⁸ In short, *Gitlow* raised far more radical constitutional questions than any the Court had previously entertained under the First Amendment.

The audacity of Gitlow's constitutional claims did not go unnoticed. As the ACLU worked to build a network of prominent attorneys to support its free speech litigation, it reached out to the influential corporate lawyer and civic reformer Samuel Untermyer. The organization hoped he might assist in challenging California's Criminal Syndicalism Act, which made it a crime to remain a member of a group advocating political or industrial change through violence or sabotage—even if the individual did not personally endorse those methods. Untermyer expressed tentative interest in the case of Charlotte Anita Whitney, the Act's most visible target,

¹¹⁷ The NCLB's argument for a "right of agitation" may have come closest. From the perspective of the organization's leadership, peaceful mass strikes were themselves First Amendment protected activity, even if their goal was to induce the owners of capital to turn over the tools of production to the workers. See WEINRIB, *supra* note 19, at ch. 3.

¹¹⁸ See Laura Weinrib, *Against Intolerance: The Red Scare Roots of Legal Liberalism*, 18 J. GILDED AGE & PROGRESSIVE ERA 7 (2019).

whose prosecution would eventually reach the Supreme Court as *Whitney v. California*.¹¹⁹ He believed Whitney's case presented a much clearer constitutional issue than Gitlow's and recommended that the two cases be argued together.¹²⁰ In Untermyer's incrementalist view, the Court should first be asked to strike down the most egregious laws—such as those punishing mere association—building from victories in less controversial cases toward more ambitious goals. Nelles was not persuaded. He feared that a loss in *Whitney* would doom *Gitlow* as well.¹²¹ He also worried that if the two cases were linked, the Court might be tempted to reach a compromise, sacrificing Gitlow's claim to preserve the appearance of moderation. He therefore felt strongly that Gitlow should receive a "prior and independent hearing."¹²² Whitney's lawyer, John Francis Neylan, agreed, though for different reasons. "I am not familiar with the detail of the Gitlow case," he wrote, "but from the little I know of it I am sure it does not present such a clean-cut issue as the Whitney case."¹²³

That Nelles and his colleagues relentlessly pursued a Supreme Court ruling on the constitutional issues is all the more surprising given the ACLU's general posture toward the courts and constitutional litigation during the early interwar years. In the wake of the war, the organization's leaders saw the judiciary not as a vehicle for reform, but as a major impediment to labor organizing and to the broader social and economic transformation they believed the country needed. They routinely condemned what they viewed as judicial overreach and called explicitly for a constitutional amendment to eliminate judicial review. When the ACLU litigated First

¹¹⁹ *Whitney v. California*, 274 U.S. 357 (1927). Untermyer's participation faced multiple hurdles, including a miscommunication with John Francis Neylan, who affixed his name to the record before securing his approval. See, e.g., Letter from John Francis Neylan to Roger Baldwin, Oct. 25, 1922, in ACLU papers, vol. 212. Roger Baldwin told Neylan that Whitney was "the most important single case of its sort in the country and there could be no more effective advocate for Miss. Whitney than Mr. Untermyer." Letter from Roger Baldwin to John Francis Neylan, Oct. 30, 1922, in ACLU papers, vol. 212.

¹²⁰ Letter from Roger Baldwin to John Francis Neylan, Dec. 29, 1922, in ACLU papers, vol. 212; Letter from Samuel Untermyer to Roger Baldwin, Dec. 30, 1922, in ACLU papers, vol. 242.

¹²¹ Letter from Walter Nelles to Samuel Untermyer, Dec. 28, 1922, in ACLU papers, vol. 242.

¹²² *Id.*

¹²³ Letter from John Francis Neylan to Roger Baldwin, Jan. 2, 1923, in ACLU papers, vol. 242.

Amendment cases during this period, it did so primarily to expose judicial hypocrisy, discredit the courts, and draw attention to its clients' causes. By generating publicity around unjust convictions, the organization hoped to pressure public officials and mobilize popular support. Rarely did its leaders expect to prevail on the merits.¹²⁴

In short, the ACLU was acutely aware that Gitlow's case was vulnerable, if not an outright long shot. Had an appeal to the Supreme Court been Gitlow's only hope for release, the choice to pursue it, whether independently or in conjunction with a more promising companion case, would have been understandable, despite the risk of establishing adverse precedent. But litigation was not Gitlow's only option. On the contrary, the ACLU had reason to believe that alternative strategies might yield better results.

Indeed, even as Nelles prepared Gitlow's filings for the Supreme Court, the ACLU was actively pursuing more plausible avenues, moving to parlay Judge Pound's dissent into a broader call for political tolerance. An ideal opportunity arose with Governor Al Smith's decisive election to a nonconsecutive second term in November 1922. The ACLU joined forces with the Socialist *New York Call* and a coalition of prominent lawyers and politicians in urging Smith to pardon those convicted under the criminal anarchy law—an action that former Governor Nathan Miller had refused to take the previous summer.¹²⁵ The ACLU argued that the statute had never been intended to punish "spokesmen of a political philosophy," but rather "utterances directly inciting to an overt act," such as the assassination that had originally prompted the legislation.¹²⁶ Prosecuting abstract ideas would be counterproductive. It would serve only to "arouse bitterness and hostility to the government" and to push revolutionary political groups "underground into secret channels," where they might promote "revolutionary tactics unknown before in American political life."¹²⁷

¹²⁴ See generally Laura Weinrib, *The Myth of the Modern First Amendment*, in *THE FREE SPEECH CENTURY* 48–67 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019).

¹²⁵ *Smith May Pardon Larkin and Others*, N.Y. TIMES, Jan. 10, 1923.

¹²⁶ *Gov. Smith Gets Facts He Wants from Liberties Union*, N.Y. CALL, Clipping, Jan. 7, 1923, in *ACLU Papers*, vol. 239.

¹²⁷ *Id.*; cf. Letter from ACLU to Alfred Smith, Jan. 5, 1923, in *ACLU papers*, vol. 244.

As a celebrated labor leader and prominent political prisoner, Jim Larkin's case offered the clearest path to clemency. The British government had agreed to permit Larkin's return to Ireland if released, and at a January pardon hearing, no one appeared in opposition.¹²⁸ A representative of the Daughters of the American Revolution told Governor Smith she believed "the people of the state would approve of his freeing Larkin and other political prisoners."¹²⁹ Alexander Rorke, the former Assistant District Attorney who had prosecuted *Gitlow* and other criminal anarchy cases, also testified in support. He expressed his "absolute accord with the sentiments expressed here in behalf of Larkin and others," stating that they had "served long enough and should be pardoned at once."¹³⁰ Rorke pointed out that even the strikers who had committed actual violence in the Winnipeg strike had been pardoned by Canadian authorities within eighteen months.¹³¹

From the start, Smith expressed sympathy for the pardon effort. He stressed that even some of the judges in the Court of Appeals majority in *Gitlow* had considered the sentences excessive and said he was "inclined to give great weight to [the] dissenting judicial opinions."¹³² In mid-January, he granted Larkin an unconditional pardon.¹³³ The *New York World* hailed the statement accompanying the decision as the "most striking expression of the governor's political liberalism in his entire public career."¹³⁴ While condemning the aims and methods of the *Left Wing Manifesto*, including the general strike, Smith insisted that "our state rests too firmly upon the devotion of its citizens to require for its protection an imprisonment of five years for the mere expression of an erroneous, or even an illegal, political doctrine unaccompanied by any overt act."¹³⁵ He attributed the convictions to the excesses of postwar zeal and justified the pardon by emphasizing that

¹²⁸ *Smith May Pardon Larkin and Others*, *supra* note 125.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Smith Weighs Dissension in Larkin Opinion*, N.Y. CALL, Jan. 10, 1923, in ACLU Papers, vol. 239.

¹³² *Id.*

¹³³ *Larkin Pardoned, Leaves Sing Sing; Others May Follow*, N.Y. TIMES, Jan. 18, 1923.

¹³⁴ "Big Jim" Larkin is Pardoned; Governor Upholds Free Speech, Even When Aimed at Government, N.Y. WORLD, Jan. 18, 1923.

¹³⁵ *Id.*

“political progress results from the clash of conflicting opinions.”¹³⁶ Larkin, he concluded, had already spent enough time in prison. To extract a harsher sentence “for the utterance of a misguided opinion,” Smith warned, would do the state a “distinct disservice”—stifling “that full and free discussion of political issues which is a fundamental of democracy.”¹³⁷

Even before Larkin received his pardon, the ACLU urged Governor Smith to extend clemency to New York’s lesser-known “political prisoners”¹³⁸ as well. The organization promptly filed applications on their behalf,¹³⁹ and before long, Smith granted the requests. When the pardon recipients whom the *New York Call* described as the “last four of the gag law victims” were released in February, Smith offered a simple justification: they had been convicted on much the same as evidence as Larkin.¹⁴⁰

Needless to say, Smith’s resounding endorsement of free speech so soon after the Red Scare crested is striking. Even more surprising is how little opposition it provoked.¹⁴¹ To be sure, Archibald Stevenson and Clayton Lusk condemned Larkin’s pardon: Stevenson voiced the familiar argument that free speech did not extend to “license,”¹⁴² while Lusk warned that the action might lead to “incalculable harm.”¹⁴³ Meanwhile, the federal government moved swiftly to deport those pardon

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ ACLU Press Release, Jan. 8, 1923, in ACLU papers, vol. 244.

¹³⁹ *Id.*

¹⁴⁰ *Last Four of Gag Law Victims Are Freed By Smith*, N.Y. CALL, Feb. 13, 1923. The four were Paul Manko, Ignatz Mizher, Minni Kalnin, and Anna Lesiman. *Last New York Political Prisoners Freed*, WEEKLY PEOPLE, clipping, Feb. 24, 1923, in ACLU Papers, vol. 239. *Weekly People* reported that Mizher was immediately rearrested and charged with being an “undesirable alien,” an action they attributed to blowback against Smith’s pardon statement. *Id.* Leisman died ten days after her release. *Anna Leisman Dies Victim of New York Prison Conditions*, WORKERS, Clipping, Mar. 17, 1923, in ACLU Papers, vol. 239.

¹⁴¹ Lendler, too, notes that Smith’s pardon of Larkin and Winitsky aroused little opposition. Lendler, *supra* note 13, at 18.

¹⁴² *Condemn Pardon of Jim Larkin*, N.Y. TIMES, Jan. 19, 1923.

¹⁴³ *Smith Defends, Lusk Raps Larkin Pardon*, WORLD, Jan. 19, 1923.

recipients who were not U.S. citizens, including Larkin.¹⁴⁴ Yet the ACLU's pardon petitions drew support from many of New York's most distinguished public figures, including "a large number of well-known lawyers, clergymen and publicists" eager to aid the cause.¹⁴⁵ Their position, in turn, found backing in the mainstream press. The *New York World* denounced the "official red baiting of the three years immediately following the war [as] a thing nauseating to remember," and expressed hope that the pardons would help lay the wartime excesses to rest.¹⁴⁶

That they failed to do so owed at least in part to a conspicuous omission from Smith's pardon list: Benjamin Gitlow. His absence did not reflect any particular reluctance on the part of Smith, who was open to including him. Nor was the source of recalcitrance Gitlow himself, as was the case with several of the ACLU's wartime clients who refused executive clemency while their comrades remained behind bars.¹⁴⁷ Rather, Gitlow was excluded at the express request of the ACLU. A January memorandum on the criminal anarchy cases laid out the organization's reasoning for leaving Gitlow out. "While the governor could extend executive clemency, the effect of it would be to kill the appeal"—and it was "very important that this case should be carried to the United States Supreme Court."¹⁴⁸ Only if the Court affirmed Gitlow's conviction, the memo concluded, should the governor, "if he saw fit, extend executive clemency."¹⁴⁹

ACLU co-founder Roger Baldwin reinforced this position in correspondence with New York State Senator John Hastings, a supporter of repealing the criminal anarchy law and an ally in urging Governor Smith to act on the other pardon petitions. In January, Baldwin sent Hastings a copy of Judge Pound's dissent, along with memoranda outlining legal justifications for a gubernatorial pardon and public statement.¹⁵⁰ Soon after, the ACLU followed up with a letter drawing Hastings's

¹⁴⁴ *Jim Larkin to be Deported as an Undesirable Alien*, N.Y. TIMES, Apr. 19, 1923; *Not Criminals, Says Governor Smith*, MIAMI VALLEY SOCIALIST, Clipping, Feb. 23, 1923, in ACLU Papers, vol. 239.

¹⁴⁵ ACLU Press Release, Jan. 8, 1923, in ACLU papers, vol. 244.

¹⁴⁶ *A Vindication of Free Speech*, N.Y. WORLD, Clipping, Jan. 19, 1923, in ACLU Papers, vol. 239.

¹⁴⁷ On the ACLU's amnesty efforts, see Weinrib, *supra* note 85, at 92–98.

¹⁴⁸ *Criminal Anarchy Cases on Bail*, Jan. 12, 1923, in ACLU papers, vol. 244.

¹⁴⁹ *Id.*

¹⁵⁰ Letter from Roger Baldwin to Senator John Hastings, Jan. 13, 1923, in ACLU Papers, vol. 244.

attention to Gitlow and urging that, given the significance of the constitutional questions involved, “we do not want the governor to act on his case at this time.”¹⁵¹ Although Gitlow “would prefer personally to withdraw his appeal and take a pardon,” the letter noted, he was “willing to subordinate his personal interests to the larger issue involved.”¹⁵² Despite the high stakes, the ACLU wanted a definitive ruling on the constitutional issues, and it explicitly requested that Smith hold Gitlow’s pardon application until the Supreme Court decided the case. At least in the short term, that decision—whether born of steadfast principle or strategic miscalculation¹⁵³—proved costly both for Benjamin Gitlow and for the ACLU’s broader constitutional campaign for freedom of speech.¹⁵⁴

IV. A LANDMARK LOSS FOR FREE SPEECH

The drawn-out resolution of Gitlow’s case in the Supreme Court has been thoroughly recounted elsewhere, including important contributions to this symposium. Working on behalf of the ACLU, attorneys Walter Nelles and Walter Pollak served

¹⁵¹ Letter to Senator John Hastings, Jan. 15, 1923, in *ACLU Papers*, vol. 244.

¹⁵² *Id.*

¹⁵³ The National Defense Committee, which the ACLU’s Roger Baldwin described as an “official organization for the defense of Workers’ Party cases” that was “well managed and deserve[d] support,” was similarly sanguine. In a March 1923 letter, the organization expressed its hope for a favorable decision that would “serve as a precedent” to the dozens of states where criminal anarchy and criminal syndicalism laws had been used to suppress “both radical political and conservative labor organizations.” National Defense Committee Letter, Mar. 25, 1923, in *ACLU papers*, vol. 244; see also Memorandum on Benjamin Gitlow Case, *Federated Press Bulletin*, Apr. 21, 1923, in *ACLU papers*, vol. 244 (“Should the court hand down a decision favoring Gitlow, it is believed the decision will serve as a precedent in 34 other states which have criminal anarchy and criminal syndicalism laws patterned on that of New York.”).

¹⁵⁴ Whether the decision also breached the lawyers’ ethical obligations is a difficult question to answer on the historical record. Gitlow may have agreed with the ACLU’s lawyers that pursuing constitutional change to protect radical advocacy and agitation—the movement goal to which the ACLU was then committed—was worth risking prolonged prison time. It is unclear, however, whether the ACLU adequately explained the potential conflict between its long-term goals and Gitlow’s short-term interests or conveyed the scope of the risk that Gitlow was undertaking by declining an immediate pardon. On lawyers’ duties under circumstances of this kind, see Susan Carle & Scott L. Cummings, *A Reflection on the Ethics of Movement Lawyering*, 31 *GEO. J. LEGAL ETHICS* 447, 468 (2018).

as lead counsel for Gitlow in the Supreme Court.¹⁵⁵ The Court heard oral argument twice: first in April 1923, and again in November. Justice Edward T. Sanford was assigned to write the majority opinion. After many months of drafting and deliberation, the Supreme Court finally issued its decision in June 1925.¹⁵⁶ Over the dissents of Justices Holmes and Brandeis, a seven-justice majority affirmed the judgment of the New York Court of Appeals, holding that neither the criminal anarchy law nor its application to Gitlow's publication of the *Left Wing Manifesto* were unconstitutional.

Sanford's opinion devoted little time to the questions that consumed the New York courts. After briefly describing the emergence of the Left Wing Section of the Socialist Party and the content of the *Left Wing Manifesto*, along with Gitlow's uncontested role in publishing and circulating it, Sanford identified the sole contention before the Court: "essentially, that as there was no evidence of any concrete result flowing from the publication of the Manifesto or of circumstances showing the likelihood of such result, the statute as construed and applied by the trial court" violated the Due Process Clause of the Fourteenth Amendment.¹⁵⁷ Although the Court was willing to "assume that freedom of speech and of the press" were among the fundamental personal liberties encompassed within the Due Process Clause of the Fourteenth Amendment,¹⁵⁸ it was unwilling to follow Gitlow's lawyers in construing the statute as a prohibition on "abstract 'doctrine.'"¹⁵⁹ According to Sanford, what New York's criminal anarchy law proscribed was "language advocating, advising or teaching the overthrow of organized government by unlawful means."¹⁶⁰ The Court would indulge "every presumption" in favor of the New York legislature's determination that "utterances advocating the overthrow of organized government by force, violence, and unlawful means are so inimical to the general

¹⁵⁵ Albert DeSilver, a founding member of the ACLU who died unexpectedly in 1924, also appeared on the brief, which was filed in April 1923. Charles S. Ascher was listed as *of counsel*. Brief for Plaintiff-in-Error, *supra* note 114.

¹⁵⁶ For an account of the deliberations, including a change in heart from Chief Justice Taft, who initially favored reversal but ultimately joined the majority, see Robert Post, *The Enigma of Gitlow: Positivism, Liberty, Democracy, and Freedom of Speech*, 6 J. FREE SPEECH L. 569, 593–95 (2025).

¹⁵⁷ *Gitlow*, 268 U.S. at 664.

¹⁵⁸ *Id.* at 666.

¹⁵⁹ *Id.* at 665.

¹⁶⁰ *Id.* at 664–65.

welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power.”¹⁶¹ Such a determination, according to the Court, lay soundly within the sphere of legislative discretion. So too did the determination whether any particular utterance, “not too trivial to be beneath the notice of the law,” fell within the prohibition of the statute.¹⁶²

To understand the constraints imposed by the Court’s limited grant of review, it bears repeating several key features of the decisions below. Gitlow had argued to the Appellate Division that “or by any unlawful means” in the criminal anarchy law should be construed as limited to “unlawful means of a like nature” to force or violence. The Appellate Division rejected that argument and held that each of the statute’s three clauses—advocacy by force, by violence, or by unlawful means—had to be given “separate effect.”¹⁶³ In other words, even peaceful but unlawful methods would trigger liability under the statute. At the same time, the court concluded that although the authors of the *Left Wing Manifesto* did “not expressly advocate the use of weapons or physical force,” they were “chargeable with knowledge that their aims and ends cannot be accomplished without force, violence, and bloodshed.”¹⁶⁴ The New York Court of Appeals agreed, and it sustained Gitlow’s conviction on all three grounds. Gitlow’s advocacy of a general strike satisfied the “unlawful means” element and, by virtue of its foreseeable consequences, also implicated “force” and “violence.”¹⁶⁵

Perhaps Gitlow’s lawyers might have argued that it was unconstitutional to presume the advocacy of force in the absence of express language to that effect, or of specific intent to bring it about. Alternatively, they might have claimed that advocating a misdemeanor offense deserved greater constitutional protection than advocating violent revolution, a suggestion that some judges had already entertained.¹⁶⁶ Such arguments might have been more plausible and palatable to the

¹⁶¹ *Id.* at 668.

¹⁶² *Id.* at 670.

¹⁶³ *Gitlow*, 187 N.Y.S. at 792.

¹⁶⁴ *Id.* at 791.

¹⁶⁵ *Gitlow*, 234 N.Y. at 150 (opinion of Hiscock, C.J.).

¹⁶⁶ Brandeis would soon embrace this argument in *Whitney v. California*, though the Court did not adopt it. *Whitney*, 274 U.S. at 378 (Brandeis, J., concurring) (“It is hardly conceivable that this Court would hold constitutional a statute which punished as a felony the mere voluntary assembly with a society formed to teach that pedestrians had the moral right to cross unenclosed, unposted,

Court than the claim that even express, intentional advocacy was protected if its likely consequences were temporally removed.

Yet those were not the questions certified for review by the Court when it granted the writ of error, nor were they the arguments that Nelles and Pollak made in their brief. Likewise, Nelles and Pollak declined to examine whether Gitlow had advocated peaceful but unlawful strikes as opposed to bloody bombings, or whether he had urged the replacement of one form of government with another as opposed to the overthrow of organized government writ large—questions on which the justices would likely have deferred to the New York courts, but which might nonetheless have influenced their reasoning.¹⁶⁷

Instead, Gitlow's brief advanced one argument only: that New York's criminal anarchy law was unconstitutional because it "penalize[d] doctrine as doctrine without regard to consequences or the proximate likelihood of consequences."¹⁶⁸ In other words, Nelles and Pollak contended that both the statute and Gitlow's conviction under it were unconstitutional because the law prohibited "advocacy as such," untethered from the likelihood that immediate law violation would follow.¹⁶⁹ To prevail on this ambitious argument, they sought to persuade the Court that the Constitution protected even express advocacy of force or violence, so long as the force or violence was unlikely imminently to follow.¹⁷⁰

wastelands and to advocate their doing so, even if there was imminent danger that advocacy would lead to a trespass.").

¹⁶⁷ See, e.g., Brief for Defendant-in-Error at 5, *Gitlow v. N.Y.*, 268 U.S. 652 (1925) (No. 770) ("The plaintiff-in-error does not raise, and cannot raise in this court, the contention that the manifesto in question does not fall within the ban of the New York criminal anarchy statute.").

¹⁶⁸ Brief for Plaintiff-in-Error, *supra* note 114, at 5.

¹⁶⁹ *Id.* at 4 ("Our contention is that the statute, prohibiting advocacy as such, without a showing of circumstances in which it is properly punishable, is unconstitutional. We do not therefore discuss the construction of the Manifesto.").

¹⁷⁰ The State of New York, which limited its brief to the constitutionality of the Criminal Anarchy Law, argued that Gitlow's arguments would lead to the absurd conclusion that "no statute forbidding . . . the advocacy of murder or treason would be constitutional." Brief for the State of New York at 5–6, *Gitlow v. N.Y.*, 268 U.S. 652 (1925) (No. 770). Notably, New York's brief also argued—citing *United States v. Cruikshank*, among other cases—that the Fourteenth Amendment extended only to rights granted to citizens of the United States by its Constitution or statutes, and not to freedom of speech. *Id.*

The brief began with an account of why the “liberty” protected by the Fourteenth Amendment should be understood to include freedom of speech and press, drawing on liberty-of-contract cases regularly maligned by labor groups, from *Allgeyer v. Louisiana* to *Coppage v. Kansas*.¹⁷¹ It then argued that free speech could be constrained only “where its exercise bears a causal relationship with some substantive evil, consummated, attempted or likely,” an inquiry that Nelles and Pollak insisted required taking circumstances into account.¹⁷² In other words, they argued that mere expression, disconnected from dangerous “surrounding circumstances,” was always protected—that “guilt may not rest upon the fact of publication alone.”¹⁷³ Those circumstances might include the exigencies of war, as they argued was true of the Espionage Act cases. But they insisted that “advocacy of doctrine may not in itself be a subject of punishment” and that the suppression of opinion could never be justified absent a “causal connection with a substantive evil.”¹⁷⁴

In building their argument, the lawyers relied on a long historical discussion that ranged from the English common law of seditious libel to the widespread repudiation of the 1798 Sedition Act to the adoption and aftermath of the Fourteenth Amendment. They concluded that the constitutional problem with New York’s criminal anarchy law was that it punished “the mere utterance—‘advocacy’—of certain doctrines,” regardless of whether the advocacy was “calculated to persuade persons” to unlawful conduct or likely to cause any substantive harm.¹⁷⁵ “Only circumstances,” they reasoned, “can transform advocacy into incitement.”¹⁷⁶

Given the posture of the case, Nelles and Pollak devoted only two pages of their 105-page brief to describing the *Left Wing Manifesto*. The Supreme Court therefore imported the construction adopted by the courts below, namely, that the manifesto had called for the “destruction of organized parliamentary government” through “mass industrial revolts,” “political mass strikes,” and “revolutionary mass action”—means that were “inherently unlawful” and “necessarily imply the use of

¹⁷¹ Brief for Plaintiff-in-Error, *supra* note 114, at 11.

¹⁷² *Id.* at 19.

¹⁷³ *Id.* at 31.

¹⁷⁴ *Id.* at 97.

¹⁷⁵ *Id.* at 34.

¹⁷⁶ *Id.* at 36.

force and violence.”¹⁷⁷ It was “clear” to the majority that the jury was justified in finding “that the Manifesto advocated not merely the abstract doctrine of overthrowing government by force, violence and unlawful means, but action to that end.”¹⁷⁸ The Manifesto was a “call to action,” couched in the “language of direct incitement.”¹⁷⁹ And it was an essential attribute of constitutional government that freedom of speech “does not protect publications prompting the overthrow of government by force.”¹⁸⁰

Stated in those terms, it should not be surprising that Gitlow and the ACLU lost in the Supreme Court. None of the wartime dissents, much less the majority opinions, had suggested that the First Amendment protected speech of that kind.¹⁸¹ On the contrary, most of the wartime cases involved speech that ostensibly undermined the war effort by *opposing* the violence of war. In other words, the much-maligned “bad tendency” of the wartime speeches by radicals and pacifists lay in their potential to interfere with recruitment by criticizing the country’s war aims or decrying the needless deaths of American soldiers. Even the dissenting justices had never contended that the First Amendment encompassed a right to expressly advocate violence, whether “clear and present” or at some distant date.¹⁸²

¹⁷⁷ *Gitlow*, 268 U.S. at 666.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 665.

¹⁸⁰ *Id.* at 668.

¹⁸¹ In *Abrams*, 250 U.S. at 620, the majority had described one of the defendants’ circulars as “an appeal to the ‘workers’ of this country to arise and put down by force the Government of the United States which they characterize as their ‘hypocritical,’ ‘cowardly’ and ‘capitalistic’ enemy.” Holmes, who concluded that the defendants’ object was “to help Russia and stop American intervention there against the popular government—not to impede the United States in the war that it was carrying on”—did not explicitly address whether the defendants had advocated force or violence in service of that cause. He did state, however, that no specific intent to commit “some forcible act of opposition to some proceeding of the United States in pursuance of the war” “was proved or existed in fact.” *Id.* at 629 (Holmes, J., dissenting).

¹⁸² Lower courts, too, declined to protect express advocacy, regardless of whether the defendant advocated violence or non-violent law violation. Notably, even Judge Learned Hand’s celebrated *Masses* test (which turned on statutory interpretation rather than the First Amendment) would have protected only speech that “stops short of urging upon others that it is their duty or their interest to resist the law.” *Masses Publ’g Co. v. Patten*, 244 F. 535, 538 (S.D.N.Y. 1917), rev’d, 246 F. 24 (2d Cir. 1917). On the *Masses* case, see GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE*

As for Justice Holmes's dissent, the short opinion baffled both contemporaries and later scholars.¹⁸³ As critics complained, Holmes's observation that "every idea is an incitement," however pithy and poetic, offers little in the way of doctrinal guidance.¹⁸⁴ Nor does his apparent reliance on the dullness of the *Left Wing Manifesto* supply a workable legal standard; one reader's "redundant discourse" is another's call to arms.¹⁸⁵ The dissent's most lasting insight lies in Holmes's frank acknowledgment of the ultimate stakes of unfettered expression, eagerly quoted in ACLU briefs and reprinted in radical pamphlets throughout the next decade: "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."¹⁸⁶ Yet even that forceful proposition ultimately fails to furnish a satisfying justification for the dissent's position. After all, from the majority's perspective, the problem with advocating overthrow of government by force, violence, or unlawful means, as opposed to democratic channels, was that it imposed the will of the minority on a majority that had *declined* to accept its views. Indeed, Holmes himself felt compelled to stipulate that "there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views."¹⁸⁷

However persuasive Holmes's and Brandeis's dissents might have proved in other cases, Holmes's dissent in *Gitlow* attracted little support from the press, which overwhelmingly praised the majority opinion.¹⁸⁸ Most newspapers treated the Court's decision as practically inevitable. The *New York Times* described the majority opinion as, "in essence, simply a reaffirmation of an old principle of law and government" that the state is "entitled to protect itself against overthrow by

(1994); Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975).

¹⁸³ See LENDLER, *supra* note 11, at 121.

¹⁸⁴ *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ See Post, *supra* note 156.

violence.”¹⁸⁹ The *Christian Science Monitor* summed it up in similar terms, as a “re-affirmation of the established right of a constitutional government to perpetuate itself by protecting itself against overthrow by violence.”¹⁹⁰ The *Wall Street Journal* considered the majority’s rule “so obvious that the wonder is that the Supreme Court should ever have been called to make such a decision.”¹⁹¹ Freedom of speech “gives anyone the right to advocate a change in the form of government, but not a change brought about by the torch and the bomb,” it explained.¹⁹²

At first glance, this warm reception of the majority position in *Gitlow*—which reflects a sharp break from progressives’ handwringing over the Espionage Act cases and their subsequent repudiation of the New York Court of Appeals decision in *Gitlow* itself—is puzzling. The decision was issued on June 8, 1925, well after the Red Scare had receded. In fact, it coincided with the emergence of what contemporaries described as a new “spirit of liberalism.”¹⁹³ As early as 1923, the distinguished Columbia political and constitutional theorist John Burgess, whose racial and economic views were deeply conservative, called the judicial enforcement of the First Amendment the “fundamental principle of American political philosophy.”¹⁹⁴ By 1925, such views—increasingly described as “liberal,” as opposed to “conservative” or “progressive”—were widespread. Just months after the *Gitlow* decision, President Calvin Coolidge told the American Legion that the “clash of disagreeing

¹⁸⁹ *When Anarchy Is Criminal*, N.Y. TIMES, June 9, 1925. The *Times* was explicit about its perception of what the Supreme Court had said a state could criminalize consistently with the Constitution: not abstract doctrine, but “advocacy of the destruction of the Government by arms.” *Id.*

¹⁹⁰ *The Gitlow Case Decision*, CHRISTIAN SCIENCE MONITOR, June 11, 1925.

¹⁹¹ *A Well Defined Liberty*, WALL ST. J., June 15, 1925. One notable exception was the *St. Louis Post-Dispatch*. After describing *Gitlow*’s construction of freedom of speech as “absolute license of speech without curb or justification,” the paper went on to question the “wisdom” of the Court’s decision, given that the “danger of soap-box vehemency is imaginary” and “Government cannot be protected from verbal assaults by suppression.” *The Free Speech Decision*, ST. LOUIS POST-DISPATCH, June 10, 1925.

¹⁹² *Id.*

¹⁹³ *Leading Americans Discuss Liberalism*, AMERICAN HEBREW, Sept. 18, 1925, at 540. See generally Weinrib, *supra* note 118.

¹⁹⁴ JOHN W. BURGESS, RECENT CHANGES IN AMERICAN CONSTITUTIONAL THEORY 26 (1923). The same year, the conservative Columbia president Nicholas Murray Butler worried that free speech and the right of assembly were “endangered or ignored” and identified the Bill of Rights as the “historic basis on which liberalism rests.” *Says Liberalism in Eclipse Here*, N.Y. TIMES, Nov. 10, 1923.

judgment . . . makes progress possible.”¹⁹⁵ That same year, following its high-profile defense of John Scopes’s right to teach evolution in the Tennessee schools, the ACLU itself began attracting substantial support from establishment lawyers, educators, and religious leaders.¹⁹⁶ Free speech was becoming mainstream.

Given this shifting civil liberties landscape, the dominant view that *Gitlow* was rightly decided demands an explanation. An editorial in the *Chicago Daily Tribune* supplies one. The piece began by expressing its sympathy for the dissent’s position. Journalists were “natural[ly]” inclined toward free speech as a function of both self-interest and conviction, the editorial explained.¹⁹⁷ More fundamentally, the authors lamented an “extension of government regulation over private conduct” that was “steadily advancing even into the more dangerous field of private thought and conscience.”¹⁹⁸ Despite this speech-friendly baseline, however, the *Tribune* ultimately rejected Holmes’s and Brandeis’s theory of the case. “With any practical regard for the actual problems of social order,” it concluded, “we cannot think that the principle of free speech in our country covers the deliberate preaching of a transformation of our institutions by methods of violence.”¹⁹⁹

In short, what distinguished *Gitlow* from other free speech cases of the interwar period was the assumption that what *Gitlow* was demanding was a right to advocate violence. Those legal commentators who understood that the *Left Wing Manifesto* contained no explicit references to force or violence tended to be more ambivalent about, or even disparaging of, the Court’s decision.²⁰⁰ Writing critically about *Gitlow* in the *New Republic*, Zechariah Chafee struck a sober note, emphasizing the

¹⁹⁵ *Karolyi Counsel Appeal to Coolidge*, N.Y. TIMES, Nov. 23, 1925 (quoting Coolidge).

¹⁹⁶ WEINRIB, *supra* note 19, at ch. 5. Notably, the *Daily Worker* observed that “[f]rom the capitalist press which either denounces or ridicules the prosecution of *Scopes* came a chorus of approval for the action in the *Gitlow* case.” *Evolution, Capitalism, and the Workers*, DAILY WORKER, Clipping, in ACLU papers, vol. 275.

¹⁹⁷ *Free Speech Under Popular Government*, CHICAGO DAILY TRIB., June 14, 1925.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ See G.G.O., *Constitutional Law: Freedom of Speech*, 14 CAL. L. REV. 54, 58 (1925) (criticizing the majority opinion and noting that the wartime decisions cited by the majority had “received much unfavorable criticism”); *Constitutional Law—Freedom of Speech*, 25 COLUM. L. REV. 966, 967 (1925) (observing that the Manifesto had not “expressly counsel[ed] force or violence” and treating *Gitlow* as “an example of the unfortunate manner in which the test of ‘bad tendency’ can lead to the

narrowness of the Court's promise for free speech. Although he acknowledged "one new gain" of the decision—the extension of constitutional protection to the states—he stressed that this advance was unlikely to curb the bulk of objectionable state restrictions. "Such extreme laws as the Tennessee evolution statute may be invalidated," he surmised, but when it came to sedition and syndicalism laws, Chafee regretted that Justice Sanford had demonstrated an unwillingness to intervene.²⁰¹ For the foreseeable future, freedom of speech would have to rely on enlightened state legislatures and "state governors like Alfred E. Smith, who pardoned Gitlow's associates."²⁰²

From our contemporary vantage point, Chafee's critique of the *Gitlow* majority is intuitive, even axiomatic. To most observers at the time, however, Gitlow's asserted right seemed different in kind from the right to criticize government policy that many had come to accept. As the *Tribune* put it, political dissenters were free to advocate for the soviet form of government, so long as their advocacy steered clear of the "cruelty and destruction of violence."²⁰³ Chafee famously reflected in his *New Republic* piece that "the victories of liberty of speech must be won in the mind before they are won in the courts," and he hoped that the *Gitlow* dissent would help to build support for "toleration."²⁰⁴ In the aftermath of the decision, however, the dominant reaction to *Gitlow* appeared to be the opposite. Advocates of free speech might reasonably have worried that the ACLU had squandered its victory in the mind in service of a defeat in the courts.

punishment of utterances and publications which under the sounder test of 'clear and present danger' would be protected by the First or Fourteenth Amendment"); *Constitutional Law—Freedom of Speech and Press*, 35 YALE L. J. 108, 108–09 (1925) (construing the opinion as "limit[ing] the 'clear and present danger' test"). By contrast, a note in the *Michigan Law Review* concluded after reading the Manifesto that it was not "academic in any sense" and felt that *Gitlow* properly fell "within the rule of the Schenck case." *Recent Decisions*, 24 MICH. L. REV. 182, 187–89 (1925). In general, *Gitlow* attracted relatively little attention in law journals, and commentary was mostly confined to case comments. The principal exception is Charles Warren, *The New Liberty Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926).

²⁰¹ *The Gitlow Case*, NEW REPUBLIC, July 1, 1925, at 141.

²⁰² *Id.* at 142.

²⁰³ *Free Speech Under Popular Government*, *supra* note 197.

²⁰⁴ *The Gitlow Case*, *supra* note 201, at 142.

V. RETHINKING *GITLOW*'S LEGACY

Once the Supreme Court issued its decision in *Gitlow*, the ACLU wasted no time on debating next steps. It announced in the press its intention to immediately seek a pardon from Governor Smith. Joseph Brodsky, a Communist attorney affiliated with the International Labor Defense, filed the petition, and the ACLU registered its support.²⁰⁵ Relying on the governor's cooperative stance in the previous criminal anarchy cases, the organization's leaders assumed swift action would follow.²⁰⁶

Not everyone was so confident. The Supreme Court's decision carried a finality and firmness that litigation in the New York courts had not. As the *Daily Worker* observed, Smith's willingness to pardon Harry Winitsky despite his failed state-level appeals seemed a promising precedent, but it was "unknown whether or not Gov. Smith will issue a pardon in the face of the decision of the U.S. Supreme Court."²⁰⁷ *Gitlow*'s case no longer seemed merely a local New York matter. As far away as California, the *Los Angeles Times* urged that the Supreme Court "has confirmed his conviction and there should be no further stay of judgment."²⁰⁸

To the great dismay of Walter Nelles, the ACLU, and Benjamin Gitlow, the *Daily Worker*'s doubts proved well-founded: Governor Smith declined to act. The ACLU's leaders were stunned. "It is incredible to me that the governor would not grant this application at once in view of his former action in similar cases," Roger Baldwin wrote in July to Belle Moskowitz, a close advisor to the governor.²⁰⁹ In the ACLU's view, the facts in the *Gitlow* case were indistinguishable from the facts in the many other cases in which he had issued pardons. But Moskowitz's efforts to sway Smith were unavailing. She explained that, at least for the time being, Smith was unwilling to exercise executive clemency because "he doesn't want to fly in the face of the Supreme Court decision."²¹⁰ In Smith's view, *Gitlow*'s case differed from the earlier criminal anarchy cases in that Gitlow "wanted to take his chances with

²⁰⁵ *Gitlow Loses Fight in Highest Court to Annual Anarchy Law*, N.Y. TIMES, June 9, 1925.

²⁰⁶ Letter from ACLU to Hon. Alfred M. Smith, June 12, 1925, in ACLU Papers, vol. 288.

²⁰⁷ *Release of Ben Gitlow Now Up to Gov. Smith*, DAILY WORKER, June 11, 1925.

²⁰⁸ *Keep to the Light*, L.A. TIMES, June 12, 1925.

²⁰⁹ Letter from Roger Baldwin to Mrs. Henry Moskowitz, July 22, 1925, in ACLU Papers, vol. 288.

²¹⁰ Letter from Lucile Milner to Henry G. Alsberg, July 27, 1925, in ACLU Papers, vol. 288.

[the] Supreme Court,” and he should be willing to accept the consequences.²¹¹ The ACLU's executive secretary, Lucille Milner, insisted that “this reasoning is all wrong.”²¹² It was the ACLU, anxious for a decision on the constitutional issue, that had “persuaded Gitlow to make the appeal.”²¹³ But it was Gitlow who was returned to prison.²¹⁴

During the fall of 1925, the ACLU sent a stream of increasingly anxious letters to contacts within the administration and to other “prominent and influential persons.”²¹⁵ They emphasized Gitlow's “gentle” character and suggested that he had already “suffered sufficient punishment.”²¹⁶ They noted that his “prison record ha[d] . . . been a good one.”²¹⁷ They even solicited a statement from Raymond Almirall, the foreman of the grand jury that indicted Gitlow, contending that Gitlow had provided a “useful” service to the state of New York by bringing his case to the Supreme Court, since the decision had conclusively “established the constitutionality of the statute.”²¹⁸

After six long months—and, pointedly, only after the city primaries had passed²¹⁹—Governor Smith finally relented in December.²²⁰ This time, his pardon statement did not celebrate political disagreement as a prerequisite for democracy.

²¹¹ Letter from Lucille Milner to Walter Pollak, July 29, 1925, *in* ACLU Papers, vol. 288 (summarizing Moskowitz's explanation of Smith's position).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Gitlow Goes Back to Serve His Term*, N.Y. TIMES, Nov. 10, 1925.

²¹⁵ Letter from ACLU Associate Director to Ramond V. Ingersoll, Oct. 5, 1925, *in* ACLU Papers, vol. 288; *see, e.g.*, Letter to Alfred Smith, Nov. 7, 1925, *in* ACLU Papers, vol. 288 (signed by Harry Ward, John Haynes Holmes, Samuel Untermyer, Sherwood Eddy, Frank P. Walsh, and F. Ernest Johnson).

²¹⁶ Letter from ACLU Associate Director to Ramond V. Ingersoll, *supra* note 215.

²¹⁷ Letter from Walter Pollak to Alfred E. Smith, Dec. 3, 1925, *in* ACLU Papers, vol. 288.

²¹⁸ Letter from Raymond Almirall to Forrest Bailey, Oct. 22, 1925, *in* ACLU Papers, vol. 288.

²¹⁹ Letter from Roger Baldwin to Frank P. Walsh, Sept. 22, 1925, *in* ACLU Papers, vol. 288 (“My understanding of the Governor's attitude is that in view of the Supreme Court's decision he is very reluctant to grant a pardon. He evidently fears its political effect because he has postponed action until after the city primaries.”).

²²⁰ Telegram to Harry F. Ward from Owen L. Potter, Dec. 11, 1925, *in* ACLU Papers, vol. 288.

Instead, Smith said it was the Supreme Court that had vindicated important democratic values by affirming Gitlow's conviction. He justified the pardon solely on the grounds that Gitlow had served sufficient time to satisfy the ends of justice.²²¹ Even that proved too much for some observers. Upon his release from prison, Gitlow vowed that he would "continue to carry forward the fight for which he was imprisoned,"²²² and he threw himself fully into organizing for the Communist Party—prompting a call by Smith's critics to evaluate the "harm done through the pardon power" and to "bring to bear public opinion against [its] liberal exercise."²²³

For the ACLU's lawyers, the combination of the Supreme Court's adverse ruling and the near-denial of Gitlow's pardon provoked a crisis of conscience and a reexamination of ACLU strategy. Gitlow had served many more months at hard labor than he had wanted or needed to. He very nearly spent the rest of the decade in prison. And all the ACLU had to show for it was a Supreme Court decision that would become a formidable barrier in future First Amendment cases.

Indeed, in the coming years, *Gitlow* cast a long shadow over the ACLU's activities. The organization's 1929 efforts to thwart pending criminal syndicalism legislation in Colorado offer an illustrative example. Roger Baldwin wrote to Carol Weiss King—a prominent left-wing lawyer who edited the ACLU's *Law and Freedom Bulletin*—seeking suggestions for opposing the bill. King responded candidly that the window for legal objections had effectively closed: the Court had been "decisive[]" in its determination in *Gitlow*, reinforced in *Whitney*, that "such legislation is constitutional."²²⁴ Under the circumstances, there was no "further use of

²²¹ Notably, Gitlow was critical of the governor's statement, and Belle Moskowitz expressed distress that he had "abrogated" the governor's "magnanimity." Letter from Belle Moskowitz to Roger Baldwin, Jan. 4, 1926, in ACLU Papers, vol. 306. The ACLU's Forrest Bailey agreed with her that Gitlow's "indifference to considerations of courtesy and appreciation is extraordinary." Letter from Forrest Bailey to Mrs. Henry Moskowitz, Jan. 6, 1926, in ACLU Papers, vol. 306. Even Roger Baldwin, who sought to explain Gitlow's position on ideological grounds, accused him of "bad manners." Letter from Roger Baldwin to Mrs. Henry Moskowitz, Jan. 7, 1926, in ACLU Papers, vol. 306.

²²² Quoted in Collins, *supra* note 59, at 37.

²²³ *And Just Recently Pardoned, Too*, Clipping, Jan. 30, 1926, in ACLU papers, vol. 313. Later, Gitlow traveled to Moscow, where he argued with Stalin. LENDLER, *supra* note 11, at 145. After bouncing among various leftist groups in the 1930s, he testified voluntarily before the Dies Committee in 1939. *Id.* at 157.

²²⁴ Letter from Carol Weiss King to Roger Baldwin, Jan. 28, 1929, in ACLU papers, vol. 372.

urging constitutional objections to the Colorado bill.”²²⁵ In fact, the Court’s decision had been so unequivocal that even “the dissenting opinions in those cases would seem to me to be of little value.”²²⁶ To be sure, one could find promising arguments in older legal scholarship, but King advised they were effectively obsolete “because written before the *Gitlow* decision.”²²⁷ In short, “much of the legal argument urged is now definitely foreclosed.”²²⁸ The only option was to turn to “practical arguments,” such as the expense of prosecutions—and perhaps to Governor Smith’s pardon letter.²²⁹

CONCLUSION: THE TURN TO FIRST AMENDMENT INCREMENTALISM

In the weeks after Gitlow received his pardon, the ACLU’s lawyers exchanged an impassioned round of correspondence grappling with the question of “what briefs in civil liberty cases are *written* for.”²³⁰ Is the ACLU’s goal “to win the case,” Nelles asked, “or to make propaganda?”²³¹ The debate began when Arthur Garfield Hays—then an ACLU cooperating attorney and soon to be the organization’s co-general counsel—complained that a draft brief that Walter Nelles was helping to prepare in an unrelated case was too legalistic; there was nothing in it, Hays said, to “make the judges feel that the case is anything out of the ordinary.”²³² Hays argued that briefs involving questions of civil liberty should include “some history and some philosophy.”²³³ If the point of a test case was to build support for civil liberties, then the briefs should be at least as effective as the ACLU’s pamphlets.

Nelles’s despondent response sounds like the confession of a lawyer who believed he had made a grave error. In 1917, he explained, he was determined “to say

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ King suggested in a follow-up letter that the pardon letters for Gitlow and Whitney from Governors Smith and C. C. Young might prove useful. Letter from Carol Weiss King to Roger N. Baldwin, Jan. 29, 1929, in *ACLU Papers*, vol. 372.

²³⁰ Letter from Walter Nelles to Roger Baldwin, Jan. 23, 1926, in *ACLU papers*, vol. 159a.

²³¹ *Id.*

²³² Letter from Arthur Garfield Hays to Roger Baldwin, Jan. 19, 1926, in *ACLU papers*, vol. 159a. The case, which involved Roger Baldwin’s arrest for leading a labor picket in New Jersey, is discussed in WEINRIB, *supra* note 19, at ch. 4.

²³³ Letter from Arthur Garfield Hays, *supra* note 232.

what [he] thought, with complete indifference to effect on the court.”²³⁴ He had therefore packed his briefs with history, philosophy, and grand civil liberties claims. That approach had been core to the ACLU’s original strategy, which aimed to generate sympathy for civil liberties through high-profile legal defeats. But the *Gitlow* case and other recent losses had convinced Nelles to revise his tactics. “With realization that whatever you say in briefs is absorbed and deadened by the padded walls of appellate courtrooms, [and] that human persons are involved who quite reasonably do not want to spend time in jail,” he wrote, “I’ve found it impossible to say ‘to hell with the client.’”²³⁵ History and philosophy simply did not win cases: “What discretion did not eliminate from my comparatively scholarly adduction of history in the *Gitlow* case drew only from [Justice] Sanford the facile . . . assertion that my analogies were not analogous.”²³⁶

Going forward, Nelles thought the ACLU should argue on narrower nonconstitutional grounds, such as faulty pleadings and insufficient evidence, that might help a liberal judge marshal a majority. “The less the facts are encumbered with suggestion that reversal is sought in aid of a subversive social tendency, the more effectively he can use them,” he wrote. “To make a big constitutional argument implies a concession that the case is so doubtful on the facts as to make that holding likely.”²³⁷ The more modest tack that Nelles proposed instead necessarily entailed trade-offs. Some ACLU veterans considered it too conciliatory or feared it would divert attention from their clients’ substantive causes—that it was unlikely to inspire support for economic justice, as opposed to the right to espouse it. Others, like Hays himself, continued to believe that staking out strong claims might eventually shift the window of possibility in the courts.

²³⁴ Letter from Walter Nelles to Roger Baldwin, Jan. 23, 1926, in ACLU papers, vol. 159a.

²³⁵ *Id.*

²³⁶ *Id.* Cf. *Gitlow*, 268 U.S. at 672 (“We need not enter upon a consideration of the English common law rule of seditious libel or the Federal Sedition Act of 1798, to which reference is made in the defendant’s brief. These are so unlike the present statute that we think the decisions under them cast no helpful light upon the questions here.”).

²³⁷ *Id.*

In fact, Hays pursued just such a strategy on behalf of Gitlow himself, who was a repeat client of the ACLU.²³⁸ The case, *Gitlow v. Kiely*,²³⁹ began in July 1930 when the Postmaster General deemed Gitlow's revived *Revolutionary Age* non-mailable under the wartime Espionage Act, applying the statute to bar a radical paper for the first time in a decade.²⁴⁰ The language of the new journal—which emerged from a schism within American communism and the 1929 expulsion of Gitlow's faction from the Communist Party USA—was far bolder than its predecessor. It openly endorsed “a civil war of toilers against the capitalists,”²⁴¹ described “terror [as] a weapon of the revolution for exterminating the class enemy,”²⁴² and declared, “we are traitors to the capitalist class which exploits us and oppresses us and we will fight militantly to get rid of our capitalist masters.”²⁴³ Borrowing from the ACLU's approach in postal censorship cases involving sex education and birth control materials, Hays argued that the courts, as the “real bulwark of liberty” under the Constitution, should aggressively review “the acts of executive officers which tend to

²³⁸ The ACLU represented Gitlow on multiple occasions during the 1920s and 1930s.

²³⁹ *Gitlow v. Kiely*, 44 F.2d 227 (S.D.N.Y. 1930), *aff'd*, 49 F.2d 1077 (2d Cir. 1931), *cert. denied*, 284 U.S. 648 (1931).

²⁴⁰ See ACLU Bulletin 453, Apr. 24, 1931, in ACLU Papers, vol. 444. Over the next year, the Post Office excluded four communist papers and one anarchist paper. ACLU Press release, May 18, 1931, in ACLU Papers, vol. 493.

²⁴¹ Brief of Appellant at 4, *Gitlow v. Kiely*, 49 F.2d 1077 (2d Cir. 1931), in ACLU Papers, vol. 493.

²⁴² *Id.* at 6.

²⁴³ *Id.*

restrict” free speech.²⁴⁴ He urged that the word “advocacy” in the statute be interpreted to mean “direct incitement.”²⁴⁵ “It has been suggested that this kind of propaganda may sow the germs of future revolution,” Hays conceded—but “so might any idea,” as Justice Holmes had argued.²⁴⁶ Hays also suggested in his brief that *Gitlow* required deference only to state laws, not federal ones, and that the “clear and present danger” furnished by the war context in earlier Espionage Act cases no longer pertained.²⁴⁷ Predictably, these arguments were unavailing. The District Court upheld the exclusion in an opinion Hays called “very dangerous because . . . so well reasoned.”²⁴⁸ The Court of Appeals affirmed in a one-line per curiam opinion “on the authority of *Gitlow v. People of New York*,”²⁴⁹ and the Supreme Court denied certiorari. In this new landscape, cases like *Gitlow v. Kiely* seemed all but hopeless, and the ACLU’s role in litigating them potentially counterproductive.

In the end, then, it was Walter Nelles’s subdued post-*Gitlow* approach that prevailed within the ACLU. Increasingly, the organization focused on more palatable causes, like academic and artistic freedom, that might more gradually move the law. To be sure, the ACLU continued to defend radicals and labor activists, and in the late 1930s, it scored important incremental victories in such cases as *De Jonge v.*

²⁴⁴ *Id.* at 8–9. Notably, the brief contains an early endorsement of what might be described as viewpoint neutrality in a public forum: “The argument is that the post office could refuse to carry all newspapers and that so long as there are other means of transmission, there is no denial of a Free Press. The argument goes too far. Possibly a city might do without a public police or fire department or without public Water Works, yet if it provides these facilities, all persons are entitled to the use of them unequal terms. No doubt congress may classify as it pleases, but any discrimination based on views or opinions would certainly be an abridgement of the press.” The District Court Judge, Woolsey, accepted the ACLU’s arguments in the sex education context but was unwilling to extend them to *Gitlow*’s case.

²⁴⁵ *Id.* at 11. Hays’s ACLU co-counsel, Morris Ernst, similarly urged “arguing on very broad social principles,” including invoking inflammatory language by respected figures and seeking to mail speeches by Thomas Jefferson “urging the right of revolution.” Letter from Morris Ernst to Forrest Bailey, Dec. 19, 1930, in ACLU Papers, vol. 493. Ernst favored raising a constitutional argument despite *Gitlow*. *Id.* (“The fact that the supreme court previously declared it constitutional does not mean that they might not change their opinion. This is a very long shot but the educative value of pressing on this point should not be overlooked.”).

²⁴⁶ Brief of Appellant, *supra* note 241, at 15.

²⁴⁷ *Id.* at 20.

²⁴⁸ Letter to Harry Elmer Barnes, Nov. 11, 1930, in ACLU papers, vol. 427.

²⁴⁹ *Kiely*, 49 F.2d at 1077.

Oregon, *Herndon v. Lowry*, and *Hague v. CIO*.²⁵⁰ Still, the ACLU never successfully challenged the New York criminal anarchy law, which remained on the books until its repeal in 1965—the day after Gitlow's death.²⁵¹ It was not until 1969, in *Brandenburg v. Ohio*, that the organization finally convinced the Supreme Court to adopt a test resembling the one it had championed in *Gitlow*: protecting speech unless it is directed to inciting or producing imminent lawless action, and such imminent lawless action is likely to result.²⁵²

Notably, Felix Frankfurter was one of several ACLU-affiliated lawyers who wrote to express “complete agreement” with Nelles's revised position after the *Gitlow* decision came down.²⁵³ “I am no friend, as you know, of promoting propaganda by defeats in court,” he wrote to Nelles.²⁵⁴ Nor did he believe one should seek a “landmark opinion” instead of a “favorable decision.”²⁵⁵ “I am afraid I am more philistine in that regard than you are,” he told Nelles, “but I regarded it, and still regard, the *Gitlow* appeal as an unwise move after you got through with the Court of Appeals and Smith was ready for a pardon.”²⁵⁶

The ACLU's core leadership came to agree, and the organization spent the next decade pursuing a revised approach to civil liberties cases: a “thorough-going concentration upon the single matter of winning the case.”²⁵⁷ Slowly but steadily, that narrower focus yielded the organization's first judicial victories. In time, it gave shape to the modern First Amendment.

²⁵⁰ *DeJonge v. Oregon*, 299 U.S. 353 (1937); *Herndon v. Lowry*, 301 U.S. 242 (1937); *Hague v. CIO*, 307 U.S. 496 (1939).

²⁵¹ Lendler, *supra* note 13, at 25.

²⁵² *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (“[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).

²⁵³ Letter from Felix Frankfurter to Walter Nelles, Jan. 25, 1926, in ACLU papers, vol. 159a.

²⁵⁴ *Id.*

²⁵⁵ Letter from Felix Frankfurter to Sam Smoleff, Jan. 25, 1926, in ACLU papers, vol. 159a.

²⁵⁶ Letter from Felix Frankfurter, *supra* note 253.

²⁵⁷ Letter from Walter Nelles to Roger Baldwin, Jan. 23, 1926, in ACLU papers, vol. 159a.

