# Popular Constitutionalism's Hard When You're Not Very Popular: Why the ACLU Turned to Courts

Emily Zackin

Through a case study of the early American Civil Liberties Union (ACLU), this article examines the empirical ramifications of constitutional scholars' recent exhortations to "take the Constitution away from the courts" in order to promote democratic deliberation about constitutional meaning. While it is now one of the most prominent examples of a litigation-based interest group, the ACLU began its existence demonstrating a commitment to constitutionalism outside the courts. Through coding a decade's worth of meeting minutes and examining archival sources, I demonstrate that the ACLU's mounting unpopularity rendered extrajudicial politics impossible, precipitating the ACLU's shift toward litigation. The ACLU's move toward litigation, despite its early devotion to political activism outside the courts, suggests that it is not always possible for political actors to make constitutional arguments without courts. Furthermore, the ACLU's use of courts to publicize and dramatize its constitutional arguments demonstrates that litigation may actually promote popular deliberation about constitutional meaning. These political realities both highlight and contradict two empirical assumptions underlying arguments about the normative desirability of restricting courts' involvement in constitutional politics. First, the state is not a neutral arena in which all political actors are equally free to pursue their constitutional visions through majoritarian processes. Second, courts may facilitate (rather than hinder) popular deliberation about constitutional questions.

In recent years, prominent constitutional law scholars have made arguments for greater popular participation in determinations about the U.S. Constitution's meaning. Kramer and Tushnet have offered two of the most prominent arguments for restricting the court's role in determining the meaning of the Constitution. Kramer emphasizes popular conclusions about the Constitution, while Tushnet stresses congressional deliberation. Yet these authors share the central conviction that courts' active involvement in

I am grateful to Keith Whittington, Paul Frymer, Hendrik Hartog, and Kenneth Kersch for their advice and direction on this article. Daniel Linke and the entire staff of the Seeley Mudd Manuscript Library were also very generous with their time and assistance. Carroll Seron and anonymous reviewers provided helpful feedback and support. I also owe many thanks to Justin Crowe, Roban Kramer, and Tiffany Lennon for their careful readings and thoughtful comments. Please address correspondence to Emily J. Zackin, Princeton University Department of Politics, 130 Corwin Hall, Princeton, NJ 08544-1013; e-mail: ezackin@princeton.edu.

*Law & Society Review,* Volume 42, Number 2 (2008)


https://doi.org/10.1111/j.1540-5893.2008.00345.x Published online by Cambridge University Press

constitutional politics discourages and distorts the participation of nonjudicial actors (Tushnet 1999; Kramer 2004). The main thrust of both arguments is that American politics would be more democratic, and therefore better, if courts played an extremely limited role in determining how Americans understand and apply their fundamental law. Thus these authors argue for the normative desirability not only of constitutional debate outside the courts, but also of constitutionalism without the courts.

This article does not participate directly in the normative debate about the value of popular and judicial constitutional interpretations. Instead, it is one of the growing number of studies that examines how nonjudicial actors, and even nonlawyers, make arguments about the meaning of the Constitution and make these arguments outside of courts. However, by focusing on why the American Civil Liberties Union (ACLU) might seek to use courts, this study uncovers (and challenges) some of the empirical assumptions upon which Tushnet and Kramer's normative arguments rest. For instance, Tushnet advocates that interest groups engage in the politics of pluralism, rather than litigation, and seems to assume that it is possible for even unpopular or subversive groups to participate. Both Kramer and Tushnet also suppose that litigation can only hamper popular deliberation about the Constitution, not stimulate it. I do not wish to argue that popular deliberation or pluralist politics are normatively undesirable, or even empirically impossible. Instead, I want to examine organizations' move to litigation in light of the historical and institutional realities that these groups may face. Historical circumstances may place groups squarely on the wrong side of public opinion and, as a consequence, they may find that political institutions other than courts are effectively unavailable as avenues for advancing their political arguments.

The ACLU's history is instructive in comparing such political realities to the empirical assumptions of scholars such as Tushnet and Kramer. While it is now one of the most prominent examples of a litigation-based interest group, it began its existence demonstrating a significant commitment to constitutionalism outside the courts. In fact, during the first decade of its existence, the ACLU began to litigate largely in response to its mounting unpopularity both within and without the government. Thus this case study suggests that, while constitutional activism without courts may prove successful some of the time for some groups, others will find themselves unable to pursue their constitutional visions without using courts. It is certainly possible that the normative dangers of judicial review may outweigh the problems associated with the suppression of unpopular arguments, but an empirical assessment of the challenges that unpopular minorities face when they pursue

https://doi.org/10.1111/j.1540-5893.2008.00345.x Published online by Cambridge University Press

constitutional change without courts as well as the role courts may play in popularizing constitutional debate provide a useful caveat to arguments opposing constitutional litigation.

## Constitutionalism Outside the Courts

The existence of constitutional debate outside the courts has garnered increasing scholarly attention. Some studies demonstrate that formal political institutions other than courts make decisions about the Constitution's meaning and its implications for politics. Some, such as Pickerill, describe the way that Congress grapples with the Constitution's meaning, which it does largely in response to Supreme Court decisions about the constitutionality of federal legislation (Pickerill 2004). Though courts are largely irrelevant to the production of constitutional meaning that Whittington (1999) describes, his study of constitutional politics outside the courts, like Pickerill's, focuses on debates among elected officials and members of formal political institutions. Whittington notes that, while courts are primarily concerned with interpreting the text of the Constitution, nonjudicial actors often engage in a different endeavor, constructing meaning from parts of the text that are otherwise indeterminate (Whittington 1999). Though both of these scholars note the existence of constitutional debates outside of courts, neither argues that courts should cease to engage in these debates as well.

Tushnet (1999) differs on this point. Like Pickerell and Whittington, Tushnet sees Congress as a potential site of constitutional deliberation. However, unlike these scholars, Tushnet advances an argument about the normative desirability of constitutional interpretation inside institutions such as Congress and the consequent undesirability of judicial review. In Tushnet's view, the active exercise of judicial review hinders elected representatives' abilities to deliberate about the meaning of the Constitution. He is particularly concerned that democratic bodies interpret the Constitution's sweeping and ambiguous statements of principle, which he terms the "thin Constitution." While the "thick Constitution" contains detailed, mundane, or self-enforcing provisions, the "thin Constitution" contains "fundamental guarantees of equality, freedom of expression, and liberty" (Tushnet 1999:11). Tushnet argues that because judicial review is exercised so actively and justices' views are treated as the final word on constitutional meaning, the practice of judicial review (at least relating to matters of fundamental principle) denies legislators the political incentive to think seriously about the Constitution's content. He reasons that legislators have not assumed their proper roles as the arbiters of constitutional

https://doi.org/10.1111/j.1540-5893.2008.00345.x Published online by Cambridge University Press

meaning because the Supreme Court's prominence in determining that meaning has convinced voters that they ought not hold their congressional representatives accountable for doing so (Tushnet 1999:66). Furthermore, he fears that Congress may not even understand what the Court has ruled or may design legislation primarily to preempt unfavorable Court decisions. He speculates that such dynamics might result in the production of distorted or inferior legislation (Tushnet 1999:58–9). In the "thought experiment" through which he advances his argument about the desirability of eliminating judicial review, Tushnet suggests that the national project to make constitutional meaning may well be better served if courts were deprived of the authority to overturn the constitutionality of legislation. At the very least, he argues, "Doing away with judicial review would have one clear effect: It would return all constitutional decision-making to the people acting politically. It would make populist constitutional law the only constitutional law there is" (Tushnet 1999:154). Although Tushnet's earlier work focused on the National Association for the Advancement of Colored People's (NAACP) litigation campaign on behalf of minority rights (Tushnet 1987), he nonetheless suggests that minority groups, such as the NAACP, both can and should advance their agendas through legislative bargaining, rather than litigative, means (Tushnet 1999:158–9).

Other studies have focused on the constitutional interpretations offered by social movements and constitutional conclusions drawn by the general electorate. For instance, Ackerman argues that in extraordinary circumstances the citizenry as a whole will consider and decide constitutional questions, registering their decisions primarily through the election of political representatives (Ackerman 1991). Similarly, Siegel demonstrates that social movements have had significant effects on judicial interpretations of the Constitution. Siegel even sees the exchange between judges and advocacy groups as a necessary and productive mechanism through which constitutional meaning is shaped (Siegel 2001).

Like Ackerman and Siegel, Kramer emphasizes popular capacity to interpret the Constitution. Yet unlike these scholars, Kramer argues that the active exercise of judicial review is destructive to the people's capacity to interpret the Constitution. Like Tushnet, Kramer is particularly disturbed by the assertion that court rulings ought to trump populist or popular constitutional interpretations. Instead of emphasizing the role of the legislature, he argues that ordinary citizens must claim the primary responsibility for interpreting their highest law. Furthermore, Kramer argues that because American citizens now accept judicial interpretations as binding, they have abdicated responsibility for interpreting the Constitution and have therefore ceased to consider its

https://doi.org/10.1111/j.1540-5893.2008.00345.x Published online by Cambridge University Press

meaning. He calls for a renewed effort on the part of the citizenry to curb the court in order for citizens to reclaim their capacity and fulfill their obligation to determine the Constitution's meaning. Though Kramer does not advocate the abolition of judicial review, he does argue that people should resist constitutional interpretations that they dislike, not only through their own interpretations, but also through political means. He writes, "Justices can be impeached, the Court's budget can be slashed, the president can ignore its mandates, Congress can strip it of jurisdiction or shrink its size or pack it with new members or give it burdensome new responsibilities or revise its procedures" (Kramer 2004:249).

Kramer emphasizes the people's interpretations of the Constitution, while Tushnet stresses congressional interpretations. Yet these authors share the central conviction that courts' active involvement in politics is damaging to democracy, and therefore normatively unappealing. The main thrust of both arguments is that American politics would be more democratic, and therefore better, if courts played a much more limited role in constitutional politics. Thus they call on "the people" to both consider themselves the proper arbiters of constitutional meaning and to "take the Constitution away from the courts." In effect, they are advocating for constitutional politics to be conducted not only outside courts, but largely without the courts. In the article that follows, I argue that the normative arguments of both Tushnet and Kramer rely on empirical assumptions that are often unfounded. Tushnet's argument for constitutionalism among elected representatives assumes that these representatives constitute a neutral, pluralist state, but the existence of such a state is belied by the ACLU's experience. In addition, both Tushnet's and Kramer's calls for purely popular constitutionalism assume that litigation stifles popular debate. However, the ACLU's early use of litigation suggests that litigation may actually stimulate such debate. Thus by studying an early instance of popular constitutionalism, this article highlights the flawed empirical assumptions of those who would severely restrict the courts' role in constitutional interpretation.

## The ACLU and Constitutionalism Outside the Courts

Despite its now-famous tradition of litigation, the ACLU was founded predominantly by activists who professed and demonstrated a strong commitment to both institutional and grassroots forms of constitutionalism outside the courts. The story of the ACLU's founding begins in 1914, when Americans began to debate the wisdom of entry into the European war. Those who opposed participation formed a host of antiwar organizations. The most

https://doi.org/10.1111/j.1540-5893.2008.00345.x Published online by Cambridge University Press

prominent of these was founded at the end of 1915 by the prominent Internationalist and lawyer Crystal Eastman, the Settlement House founder Lillian Wald, and the nationally known Progressive leader Paul Kellogg. This group was also associated with well-known Progressives such as Hull House founder Jane Addams and, later, Roger Baldwin, a young social worker making a name for himself in St. Louis. It adopted the name American Union Against Militarism (AUAM). Thanks to its illustrious members, the AUAM was well-respected nationally and wielded considerable political clout.

Despite the efforts of the AUAM, Congress declared war in April 1917 and instituted a draft in May. The day after Congress passed the Selective Service Act, Baldwin began to organize a special bureau of the AUAM to defend those who would choose not to fight (D. Johnson 1963:18). The bureau began to refer to its charges as "conscientious objectors" and to itself as the Conscientious Objectors' Bureau. It prepared to defend men from the legal consequences of refusing to comply with the Selective Service Act. From the outset, the Conscientious Objectors' Bureau argued that draft laws were unconstitutional and, in July 1917, it expanded its mission to the wartime defense of all personal liberties, renaming itself the National Civil Liberties Bureau (NCLB) (D. Johnson 1963:21). The NCLB became independent of the AUAM in October 1917 and began to distance itself from its pacifist and internationalist roots (Witt 2004:46–8). Under Baldwin's leadership, the organization adopted a new focus on the rights of labor rather than on conscientious objectors and renamed itself the American Civil Liberties Union (ACLU). Though it began to represent labor leaders with more frequency after 1920, the organization maintained the same general character throughout its name change (D. Johnson 1963:146). Consequently, this analysis treats the NCLB and ACLU as a single organization.

These commitments of the early ACLU were strongly influenced by the aims and experiences of the Progressive movement, which emphasized the need for government regulation to protect society from the moral and physical consequences of industrialization and capitalism. The progressive intellectuals of the early twentieth century were generally skeptical of individual rights and tended to associate the protection of civil liberties such as free speech with their more salient concerns about economic and social justice (Graber 1991). For instance, when the AUAM's Executive Committee first discussed establishing a bureau "for the maintenance of American liberties in wartime," in June 1917, it tied these liberties directly to the importance of improved working conditions. An AUAM press release explained, "Part of the maintenance of liberty is the preservation of . . . labor laws . . . An eight-hour law,

https://doi.org/10.1111/j.1540-5893.2008.00345.x Published online by Cambridge University Press

a full crew law, a child labor law, a Sherman Act—these things are more than fine phrases about freedom. They are the fruit of self government,—They are democracy made real in the lives of the people" (AUAM Executive Committee 1917: n.p.). Despite this rhetoric, the NCLB devoted most of its wartime energies to the novel tasks of advocacy for and defense of conscientious objectors. In this work, the organization's tactics reflected its leaders' orientation toward constitutional deliberation outside of the courts.

The minutes of the ACLU's executive committee describe its efforts to coordinate letter-writing campaigns and petitions, stage mass meetings and protests, and sponsor lecture tours by prominent liberal intellectuals. The NCLB employed many of these tactics in an effort to secure amnesty for conscientious objectors who had been jailed during the war and for those who had been jailed under the Espionage and Sedition Acts for the content of their speech. Throughout its early years, the ACLU also published a large volume of pamphlets, aimed at creating popular support for conscientious objection and the exercise of other civil liberties. This approach can be seen as an outgrowth of Progressive Era calls for popular constitutionalism (Kramer 2004:215). Many of the Progressive Era's left-leaning political figures defined their views on courts in direct opposition to the Supreme Court's famous *Lochner* decision,[1] concluding that democratic majorities ought to determine the Constitution's meaning in light of societal needs rather than individual freedoms.

In addition to promoting popular activism, the ACLU also made constitutional arguments to elected representatives. This version of constitutionalism outside the courts can also be understood in light of Progressive politics. Progressives argued that democratically elected governments should play a strong role in regulating industry and improving the living conditions of the urban poor. Consequently, they stressed the social benefits of strong and interventionist government and attempted to work alongside government officials in their social improvement projects. While Progressives are known for their admiration of social science and expertise, the general antipathy of judges to the protective legislation that Progressives valued made some of the organization's founders quite leery of courts and judges. Accordingly, the ACLU attempted to make constitutional arguments in Congress

[1] In *Lochner* (*Lochner v. New York* 1905), the Court struck down a New York statute that capped the workday of bakers at 10 hours. The Court ruled that the statute violated the individual's freedom of contract and that the state's right to legislate could not supersede the individual's right to contract freely. The statute in question was typical of a host of legislation passed at the turn of the century to protect workers from the dangers of industrialization, and the ruling typical of a host of judicial decisions striking down such legislation.

https://doi.org/10.1111/j.1540-5893.2008.00345.x Published online by Cambridge University Press

and to work alongside government agencies as counselors and allies. For instance, when the Espionage Act was being debated in Congress, the organization put a great deal of effort into Congressional lobbying, sending three lobbyists from its small full-time staff to Washington (Walker 1990:19). Even in the work of defending people whom the government had forced into military service, the ACLU described itself as a friend and advisor of President Woodrow Wilson's administration. Eastman explains the plan to "endeavor at every point (through advising the War Department at Washington) . . . to aid the President in so administering the law that it may become in effect merely an efficient organizing of the fighting forces of the nation, not as a means of forcing men into the army against their conscience. Thus we might really help, and not hinder, the administration" (Eastman 1917:3). Baldwin wrote a letter to the Secretary of War, Newton Baker, stating, "We are entirely at the Service of the War Department," and told Baker's assistant that "We don't want to make a move without consulting you" (as quoted in Walker 1990:18). Throughout its early years, the ACLU continued negotiating with government officials about the meaning of civil liberties (Baldwin 1920a).

From its inception, the NCLB was also active in the courts. Affiliated attorneys defended conscientious objectors at their trials and before their draft boards. Yet simultaneously, the members of the New York staff worked behind the scenes with government officials to alleviate their clients' sentences and secure them pardons. The ACLU's initial relationship to courts and the law can also be understood in terms of its roots in the Progressive Era. As historian Michael Willrich describes, Progressive lawyers and social workers convinced municipal legislatures to establish a plethora of new courts specifically designed to remedy social ills (Willrich 2003). In his youth as a reformer, ACLU founder Baldwin was heavily involved in this movement, even coauthoring a book about juvenile courts (Walker 1990:33). Deriding procedural and individual rights, Baldwin viewed these courts primarily as a site of contact and engagement with the juveniles whom he intended to help.[2] Like Baldwin, many members were quite skeptical about the usefulness of courts. Consequently, the NCLB/ACLU did most of its work on behalf of conscientious objectors by raising awareness of their plight and by leveraging its members' status as political insiders. But the early Executive Committee also contained moderate

[2] In his writings about juvenile courts, Baldwin argued that formal legal protections, such as due process, had no place in a system of juvenile justice, consequently, he believed "that it is rarely necessary or desirable for counsel to appear in the interest of children" (quoted in Walker 1990:33). Like Baldwin, many Progressives believed that, instead of legal arguments, social science (administered by trained social workers) could best protect the interests and meet the needs of delinquent citizens.

and even conservative lawyers who believed that legal arguments could be made against conscription and in favor of safeguarding other individual liberties. In spite of these members, it is clear that, in the first years of its existence, the NCLB/ACLU placed far greater emphasis on extrajudicial methods of interpreting and applying the Constitution than it did on judicial methods. In his proposal for reorganization of the NCLB, Baldwin summarized the activities of this organization by saying, "The methods the [NCLB] has followed have been almost exclusively those of a protesting and petitioning group. Together with the legal aid work in particular cases" (Baldwin 1920b: n.p.).

## The ACLU's Embrace of Litigation

Despite its early commitment to both institutional and grassroots forms of constitutionalism outside the courts, over the course of the 1920s, the ACLU placed increasing emphasis on the value of the same legal, procedural protections and judicial interpretations that its founders had once derided. Scholars of the civil liberties movement, Murphy (1979) in particular, have long noted this transformation of liberal ideas about free expression and have attributed the shift to the unprecedented power of the centralized, administrative state during World War I as well as its new role in regulating political expression. The transformation of ACLU tactics reflects this phenomenon. However, this study of the ACLU's tactics not only illustrates a shift in thinking about liberties, but also describes a liberal shift in thinking about, and seeking support from, courts and judges. The domestic politics of World War I not only convinced liberals of the importance of individual liberties, but also convinced some liberals of the importance of courts and judges in interpreting and enforcing constitutional guarantees of liberty.

Another influence on the ACLU may have been that other left-wing organizations of this period were also beginning to employ test-case litigation, most notably the NAACP.[3] In fact, almost from its inception in 1909, the NAACP used courts as one avenue to promote its political agenda. Upon its founding, it established a national legal committee to review relevant cases and recommend promising ones for the organization's involvement (Carle 2002). By 1915, the NAACP even achieved a significant legal victory at the

[3] As Carle details in "Race, Class, and Legal Ethics in the Early NAACP (1910–1920)" (2002), several other civil rights groups also adopted the strategy of test-case litigation in this period. These included Booker T. Washington's Afro-American Council, W. E. B. Du Bois's Niagara Movement, and the Constitution League, founded by John Milholland (Carle 2002:4).

https://doi.org/10.1111/j.1540-5893.2008.00345.x Published online by Cambridge University Press

Supreme Court level through its participation in *Guinn v. United States*. The case declared Oklahoma's "grandfather clause" unconstitutional, thereby addressing electoral disenfranchisement, one of the organization's earliest concerns (Kellogg 1967:206). Not only did the NAACP meet with early success in the courts, but it also had several founding and/or influential members in common with the ACLU.[4] This network of contacts between these organizations may have facilitated the ACLU's development of its litigative strategies.

It is difficult to chart the ACLU's shift in thinking about and participating in litigation. However, I attempt to demonstrate the shift in two ways. First, I employ the minutes of the Executive Committee's weekly meetings, and second, I point to evidence of the shift in archival documents. The NCLB/ACLU's Executive Committee made all decisions regarding the activities of the organization and served as a forum for discussing current tactics as well as proposing future plans. From the minutes, it appears that these meetings consisted of reports on the various activities of the organization as well as discussions and decisions about how to proceed with each activity. A typical meeting seems to have comprised between 10 and 15 items for discussion and addressed tactical and administrative concerns. For instance, a typical entry from the minutes of a meeting held in January 1923 reads:

> The committee discussed the campaign proposed against criminal syndicalism laws in the legislatures [*sic*] meeting in January. Mr. Baldwin recommended that a short intensive campaign be organized through the office with the publication of a pamphlet, circulars, etc. to other interested organizations, in an effort to stir up the issue, on the assumption that these laws cannot be repealed but can be made unpopular enough to stop further prosecutions. The alternative of a more extensive nation-wide campaign on the issue was also discussed by the committee, but it was agreed that a small intensive campaign was preferable. An estimate of its cost as part of the office work, not to exceed $300.00, was authorized. (ACLU Executive Committee 1923: n.p.)

I sampled the minutes from weekly meetings between 1918 and 1928, examining an entire month's worth of meetings at six-month intervals with the idea that the topics discussed in these meetings

[4] The early NAACP and ACLU shared several of the same prominent pacifists as influential members, including Jane Addams, Lillian Wald, and Oswald Garrison Villard (Kellogg 1967:249). Though Wald resigned from the early ACLU when it began to litigate, the similar staffs of these organizations suggest that the early leaders of both groups traveled in the same social and political circles. In addition, the Garland Fund, which financed some of the NAACP's test case litigation in the 1930s, was primarily administrated by Baldwin and had both NAACP and ACLU members serving on its board. James Weldon Johnson, who became the general secretary of the NAACP in 1920, also served on the national board of the ACLU as well as on the board of the Garland Fund.

(as captured by the minutes) reflect the allotment of the organization's time and resources. I classified each entry in the minutes according to the tactic it described (e.g., publish a pamphlet, hold a march, hire a lawyer, etc.). I then characterized the tactics as focused either outside the courts, focused inside the courts, or attending to administrative details. It is important to note that each entry does not represent a discrete ACLU activity, so that the particular number of minutes in each category is not meaningful. However, it seems reasonable to suppose that the percentage of total minutes from a given meeting (or a given year) that are devoted to a particular type of tactic ought to reflect the relative amount of time and energy that the organization devoted to that type of tactic. Thus I present a time-series of the fraction of court-based or non-court-based strategies described in the minutes from each year.

Many of the entries in the minutes describe tactics designed to publicize the ACLU's activities. The question of how to characterize these publicity-oriented tactics was a difficult one. On one analysis, publicity about civil liberties violations could be construed as a tactic aimed at generating democratic interpretation of the Constitution outside of the courts. However, publicity about particular court cases could be considered part of a litigation strategy, in which the ACLU used courts to frame and publicize the constitutional questions at issue. On this understanding, publicity-related activities are coded as court-based tactics when they relate to cases and as extrajudicial when they do not (for a complete description of this coding scheme, see Appendix A). The results of this analysis, presented in Figure 1 below, suggest that over the course of the 1920s the ACLU's Executive Committee used an increasing percentage of meeting time to discuss court-based tactics. The figure indicates a corresponding decrease in the percentage of the meeting time used to discuss tactics that involved constitutional interpretation by actors outside the courts.

Another view of ACLU activities might lead one to distinguish all publicity-related activities from either court-based or non-court-based tactics. It seems reasonable to imagine that the ACLU publicized its activities and concerns regardless of the content of those activities. When minutes discussing publicity are distinguished from those that discuss court-based and non-court-based strategies, the picture of the ACLU's energies, shown in Figure 2, remains largely unchanged.

The light gray line near the bottom of the graph represents the publicity-oriented activities discussed during meetings of the Executive Committee. This line remains fairly flat, suggesting that publicity was a reasonably consistent part of the early ACLU's activities, regardless of its degree of involvement with courts. More

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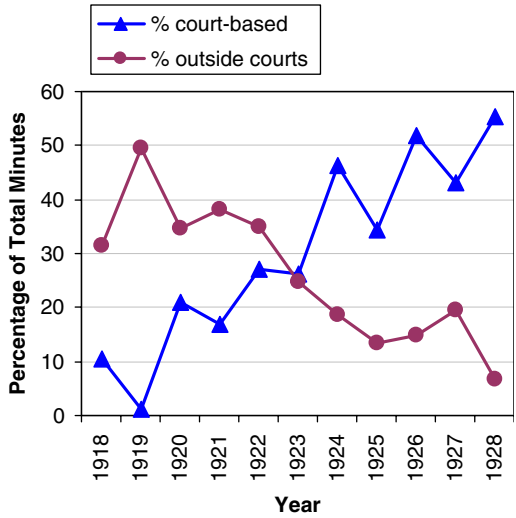


**Figure 1. ACLU Strategy: 1918–1928.**

important, treating publicity as a separate category seems to have little effect on the committee's clear trend away from tactics outside the courts and toward court-based strategies. In his history of the ACLU, Walker (1990) notes that in 1920, only three of the 20 Executive Committee members were lawyers and that lawyers had little influence on the activities of the ACLU. Walker highlights the appointment of Arthur Garfield Hayes and Morris Ernst as the ACLU's co-general counsels in 1929, arguing that the appointment

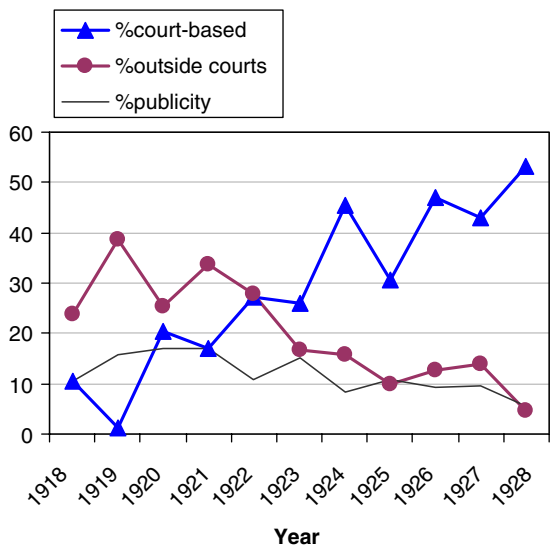


**Figure 2. ACLU Strategy With Publicity Distinguished: 1918–1928.**

https://doi.org/10.1111/j.1540-5893.2008.00345.x Published online by Cambridge University Press

of two general counsels "signaled a decisive shift in the ACLU's priorities" (Walker 1990:69). While Walker singles out the 1929 appointments as a decisive turning point in ACLU strategy, the analysis presented above suggests that these appointments actually represent the culmination of a gradual transformation that occurred over the course of the previous decade.

Archival evidence also indicates that a shift away from popular constitutionalism (and toward court-centered tactics) was under way well before 1929. This transformation is evident most clearly in ACLU members' opposition to it. Opposition surfaced within the AUAM immediately upon the founding of a branch of the organization devoted to defending the rights of conscientious objectors. In response to the suggestion that the AUAM should found such a bureau, prominent Progressive social worker Lillian Wald threatened to resign, arguing that the defense of conscientious objectors and expression rights more generally would force the bureau into an unacceptably confrontational stance with respect to the government (Eastman 1917). Three years later, another founding member of the AUAM, Zona Gale, leveled a different criticism at the ACLU. Gale's primary concern was with the ACLU's defense of individual liberties at the expense of social harmony. When the end of World War I allowed the ACLU to spend less and less time defending conscientious objectors, it turned its attention to the defense of other forms of suppressed, political speech. In particular, the ACLU intensified its defense of Communist rhetoric, some of which urged the need for a violent, proletarian revolution. For the antiwar Progressive Gale, the ACLU's defense of the individual right to advocate violent revolution was simply beyond the pale. Interestingly, Gale seems to have agreed with the ACLU's interpretation of the Constitution, but in a moving letter to Baldwin, she wrote, "[t]he constitutionality is not enough. It is the extra-constitutional, extra-legal right that I mean. The moral right, if you will. The moral right to stand for the right to 'violent and obnoxious speech'! I can't square it" (Gale 1920a: n.p.). Gale's distinction between moral rights and legal rights went hand in hand with her disdain for judicial interpretations of the Constitution. Not surprisingly, then, in her final letter of resignation from the ACLU's board, Gale revealed that she had tolerated, but disliked, the ACLU's move toward the use of court-based tactics. She wrote, "I have even been willing to pass over the need to use the courts—which I do not use, and by which I feel one loses more than one gains, even when anything is gained" (Gale 1920b: n.p.).

Though both Wald and Gale resigned early in the organization's history, and in response to particular policy decisions, the ACLU's larger shift away from popular constitutionalism was not the result of an intentional or decisive switch. In fact, the ACLU

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had always been involved with the courts, offering legal advice and defense to conscientious objectors who found themselves on trial. In 1917, the *New York Times* quoted from the organization's first press release: "Its chief purpose will be to give legal aid and advice through attorneys and committees of citizens in all parts of the United States to persons whose rights are invaded under pressure of war" ("Bureau to Defend Lovers of Peace," *The New York Times*, 3 July 1917, p. 5). The same article quoted Baldwin saying, "It will be the object of the Civil Liberties Bureau to act as a clearing house for complaints of injustice" ("Bureau to Defend Lovers of Peace," *The New York Times*, 3 July 1917, p. 5). In 1920, Baldwin suggested that the ACLU affiliates not only defend people who happen to find themselves in court, but also that they start getting themselves dragged into court on purpose. Baldwin noted near the end of the document, "Of course we should retain our cooperating attorneys and such legal aid as is necessary" (Baldwin 1920b: n.p.). From this description, it appears that while defendants would no longer be on trial against their will, their ACLU-affiliated lawyers would play largely the same role as they had previously, offering the best defense possible to defendants who were not of their choosing.

By 1923, the ACLU had still not identified courts as the primary venue for its work. Yet the annual report for that year reflected the possibility of pursuing legal change through litigation. In discussing a case of police interference with Worker's Party meetings, the report stated, "[t]he case is important as involving the right to hold meetings on private property without interference . . . The case presents a clear issue and may be carried to the Supreme Court of the state" (ACLU 1923: n.p.). By the end of 1924, however, the ACLU began to intentionally generate test cases. For instance, Baldwin explained his arrest to *The New York Times* by telling the paper, "[i]t [is] part of the tactics of [my] organization to defy efforts to prevent meetings and thus force such cases into Court" ("Defends Parading for Civil Liberties," *The New York Times*, 18 Dec. 1924, p. 15). By 1927, 10 years after the NCLB was founded as a "clearinghouse for complaints of injustice," the ACLU's annual report stated, "It should be remembered that we do not take up all cases involving civil rights. We are not a general defense organization . . . *The Union tackles test cases* involving laws and regulations, demonstrations in places of conflict, proceedings against lawless officials, public protests and propaganda against repression and intolerance in any form" (ACLU 1927: n.p.; emphasis added). This description of tactics reveals the ACLU's eventual reliance not only on legal defense, but also on the intentional challenge of laws through the careful selection of test cases. Thus by the late 1920s, not only was the ACLU still active in courts,

but this activity had also become central to its mission, which had become the realization of legal change.

## Why Litigate?

Though some of the literature on interest group litigation suggests that groups begin to litigate when they begin to believe judges will rule in their favor (Hansford 2004:173), the ACLU's leadership shifted the organization's resources to the courts before they believed it would win cases. Despite the fact that the ACLU did not accomplish its first real Supreme Court victories until 1931, it had already devoted most of its energies to a strategy of litigation.[5] Though the ACLU's shift in tactics cannot be attributed to a change in the courts, it can be explained in large part by the failure of its original strategies. Throughout the 1920s, the ACLU was primarily committed to defending the speech of decidedly unpopular figures, such as labor leaders, socialists, and communists. These defendants did not engender broad public support for their civil liberties and made it extremely difficult for the ACLU to pursue grassroots, activist strategies. During World War I, Baldwin attempted to organize a series of mass meetings to rally public opinion behind freedom of conscience, but he found some auditorium

[5] The ACLU first began making arguments about freedom of expression as part of its opposition to the draft. Such arguments did not fare well in court. In the Selective Draft Law cases of 1919, the Supreme Court upheld the draft law as a legitimate exercise of Congress's power to declare war. The ACLU then extended its freedom of expression arguments to criticism of the Espionage Act but met with an equal lack of judicial sympathy. When the first crop of Espionage Act cases (*Schenck v. United States, Frohwerk v. United States,* and *Debs v. United States*) reached the Supreme Court in 1919, the Court unanimously upheld the Espionage Act as well as all three convictions. Few lower courts proved much more sympathetic to the ACLU's First Amendment arguments against the Act (Rabban 1997:256). The Court's *Abrams* decision, five months after *Schenck*, also upheld the Espionage Act, as well as Abrams's conviction under it (*Abrams v. United States* 1919). However, in this case, Justices Oliver Wendell Holmes and Louis Brandeis began their famous tradition of pro-speech dissents, arguing that speech was protected by the First Amendment unless it created a clear and present danger. The Supreme Court upheld the Espionage Act in three more cases in 1920 and 1921, though Justices Holmes and Brandeis dissented in these as well, again arguing in favor of the clear-and-present-danger test. The ACLU won its first partial victory in 1925 in the case of *Gitlow v. New York*, which incorporated the First Amendment's free speech guarantee against the states and established freedom of speech as a fundamental liberty. However, the Court upheld Gitlow's conviction under a New York statute prohibiting the advocacy of anarchy, thereby convincing many ACLU members that the case represented yet another defeat (Walker 1990:80). The Supreme Court also upheld California's criminal syndicalism laws and the conviction of a Communist Labor Party founder in the 1927 case *Whitney v. California* (Lewis 1991:65–91). Despite the encouraging nature of Justices Holmes's and Brandeis's dissents, the ACLU did not win an unmitigated victory before the Supreme Court until the 1931 *Stromberg* and *Near* cases (*Stromberg v. California, Near v. Minnesota*), in which the Court overturned a California law outlawing the display of a red flag and a Minnesota law authorizing prior restraint of the press (Walker 1990:90). These two decisions represented a shift in First Amendment doctrine and signaled a newly sympathetic Court.

https://doi.org/10.1111/j.1540-5893.2008.00345.x Published online by Cambridge University Press

managers unwilling to rent space to him when they discovered the topic of his meetings (Walker 1990:23). On occasion, the ACLU was also denied the use of public venues because of its association with radicals ("Sanctions Bar Talks for Pupils: Board of Education Refuses Use of School Hall to Civil Liberties Union," *Los Angeles Times*, 21 Aug. 1923, p. I17; "Beach Talk on Debs Refused," *Los Angeles Times*, 20 Sept. 1923, p. II10). When ACLU leaders were allowed to speak, their affiliations with extremists were often held up as their sole cause for existence. One particularly expressive *Washington Post* columnist wrote, "[The ACLU] is a part of the malignant movement which has been extant for some years for sapping the spirit of American patriotism and poisoning our national life with Sovietism and international Communism . . . They clamor like howling dervishes for the right to promote every anarchistic fad that has oozed out of the ferment of old world corruption" ("Against Teaching Patriotism," *The Washington Post*, 6 Nov. 1924, p. 6).[6]

Even more discouraging to the practice of direct, popular constitutionalism were the extremely violent responses that radicals faced while trying to enact their vision of the Constitution through public meetings, speeches, and strikes. They often found themselves targets of vigilante justice perpetrated by groups such as the Ku Klux Klan and the American Legion. According to the ACLU's estimates, more than 800 alleged radicals fell victim to mob violence between September 1920 and June 1922 alone ("More than 800 Victims of Mobs in 7 Months," *The Washington Post*, 22 Nov. 1922, p. 2). In light of this extraordinary hostility, it also seems foreseeable that the ACLU would begin to place less emphasis on popular interpretations of the Constitution while stressing the need for judges to enforce due process protections and individual rights.[7]

The ACLU's shift to the courts was also driven by the failure of its attempts to promote its vision of the Constitution among

[6] Several decades later, the NAACP also found its attempts to organize rallies thwarted by its association with communist groups. In fact, because communist groups continued to pursue the tactic of the mass rally in order to protest police brutality, the NAACP began to file civil suits instead (M. Johnson 2003:219). This shift in tactics is yet another example of the way that that an interest group's political context often determines whether popular mobilization or litigation will render the members of that group as more effective or appealing in a particular period.

[7] AUAM, Proposed Announcement for Press, September 24, 1917, AUAM Collected Records, Swarthmore College Peace Collection. Even as early as 1917, Eastman expressed her sense that the mainstream public, which had been so supportive of many of the AUAM's early activities, might not be dependable in safeguarding the expression rights of pacifists. She explained, "It takes an exceedingly large-minded liberal to fight for the right of another man to say exactly what he himself does not want said. He may stand for free speech, but he won't really fight for free speech, so long as what he wants to say goes. With rare exceptions the minority must depend upon itself and its own unaided efforts to maintain its right to exist" (Eastman 1917: n.p.).

members of the government. Though the ACLU began its existence hoping to serve as a friend and advisor to the Wilson administration during wartime, it soon found that most members of the administration desired neither the organization's friendship nor its advice. The NCLB was only granted admittance to the White House once during the entire decade after the war (Walker 1990:56). Furthermore, although President Wilson had appointed a liberal staff to the Department of War, this staff became much less friendly to the NCLB after military intelligence agents investigated the NCLB and determined that it was encouraging draft-dodging. Frederick Keppel, a senior staff member of the War Department and close personal friend of several NCLB members, formally severed relations with the NCLB in 1918, writing that further contact with the organization would be "embarrassing" (D. Johnson 1963:37). Citing the Espionage Act, the Post Office Department began to suppress the socialist newspaper *The Masses*. When Baldwin responded as an ally of the government, seeking guidelines about what content would be considered legal, the Post Office Department flatly refused to provide any. Postmaster General Albert Burleson responded to requests for guidance by suggesting that the NCLB was free to sue over any decisions with which it disagreed (D. Johnson 1963:58–9). Shortly thereafter, the Post Office Department seized several of the NCLB's own mailings (D. Johnson 1963:60–1). The FBI raided the ACLU's offices in September 1918, which prompted the ACLU to hire outside counsel (Phillips 1954:67). In his oral history, Baldwin explained, "In the First World War Years, the savage repression of dissent alienated us from government" (quoted in Phillips 1954:180). In 1920, Baldwin wrote to Gale, "To my mind, there is no violence greater than that of governments" (Baldwin 1920c: n.p.). Given the antagonism that the Wilson administration displayed toward the ACLU, it is not surprising that the ACLU was forced to abandon its strategy of cooperating with the government.

## The Empirical Assumptions Underlying Calls for Constitutionalism Without Courts

In order to understand the ACLU's turn to the courts, it is necessary to understand the state as the ACLU leaders came to understand it—as an active agent with its own agenda and coercive power (Evans et al. 1985). Yet this view of the state is notably absent from calls to abolish judicial review. For instance, Tushnet (1999) declares that, despite the conventional wisdom that disadvantaged and insular minorities require judicial protection, he sees no reason why such minorities should not simply use conventional political

https://doi.org/10.1111/j.1540-5893.2008.00345.x Published online by Cambridge University Press

bargaining to overcome their disadvantages. He suggests that disadvantaged minorities ought to identify an issue on which the majority is closely divided and offer its entire vote share to the side that agrees to meet its terms. He writes, "It is pretty easy to see how such a minority actually can get quite a bit of what it cares about . . . say to both sides 'we will deliver our votes on *that* issue to whichever side votes for *our* issues'" (Tushnet 1999:159). The ACLU's early history speaks to this suggestion. Though ACLU leaders professed and demonstrated devotion to the principle of popular constitutionalism, they found themselves unable to bargain in the way Tushnet suggests. Tushnet's image of bargaining assumes that unpopular minorities function as well-organized political units. However, in the case of the ACLU's early clients, the formation of such political units was exactly what the state and federal governments had outlawed through the Espionage Act and criminal syndicalism laws and punished through mail stoppages, surveillance, and office raids. Not only had the government banned the political expression of unpopular groups, but the high levels of private violence perpetrated against these groups made it difficult for them assemble, let alone trade votes.

This fly in Tushnet's bargaining ointment highlights his assumptions about the state, as well as the empirical problems with those assumptions. The bargaining that Tushnet describes takes place within a state that appears to be an arena, one that sets the rules for political competition but never enters the fray. However, the state that the ACLU and its radical clients encountered had its own agenda, largely independent of the citizens it governed. It sought to eliminate criticism of its methods, actions, and existence by outlawing such criticism. While an outraged citizenry might have been able to overcome this agenda, the ACLU's clients were generally so unpopular in this period that private actors also made it difficult for them to argue their cases outside the courts. In short, it became difficult for the ACLU to motivate constitutional deliberation outside of the courts without using the courts.

The ACLU discovered that litigation could facilitate the kind of grassroots movement around constitutional meanings that it was trying to spark. Advocates of court-free constitutionalism assume that constitutional litigation precludes popular interpretation of the Constitution. They are particularly rankled by ACLU-style litigation, which often relies upon courts to nullify laws passed by elected legislatures or to interpret the law in order to forbid a widespread practice.[8] Yet many leaders of the early ACLU

[8] In order to be effective, this type of litigation relies on the consensus that judges' interpretations of the Constitution are legally binding, even if people disagree with the ruling or dislike its implications for public policy. Kramer asserts that the idea that the

conceived of their court-based tactics as serving the goal of stimulating constitutional deliberation among the general public. This vision is particularly evident in many of Baldwin's remarks, including his 1920 plan for the reorganization of the ACLU. Baldwin argued that, to get people to understand the importance of protecting civil liberties, the ACLU had to exercise those civil liberties in places where they were threatened. In response to prohibitions on labor meetings, he wrote, "[this] denial of civil liberties can only be dramatized by defying it through the exercise of constitutional rights. In addition, a procession of strikers' wives, for instance, could be organized with well-known sympathizers at its head to go to the Sheriff demanding the repeal of his order. The fight could be carried by meetings and demonstrations to the Governor's office" (Baldwin 1920b: n.p.). These test meetings, as suggested by Baldwin, became a staple of ACLU strategy. Yet as this quotation makes clear, the ACLU began to employ test meetings and cases as part of a larger strategy of popular constitutionalism that included more recognizably democratic tactics, such as demonstrations and the petitioning of public officials.

ACLU attorney Hayes also saw court proceedings as a platform for political and philosophical arguments. He did not see much potential in changing legal precedents, but he did believe that trials provided valuable opportunities to educate both judges and the broader public (Walker 1990:53). Another ACLU attorney, Walter Nelles, did see promise in bringing test cases before the court in order to obtain legal victories. Yet Nelles also believed that the courts could play a positive role in popular deliberation about constitutional questions. Though Nelles agreed with the basic notion of dramatization, he felt that a magazine, explaining the issues involved in the ACLU's test cases, was necessary to promote effective deliberation among members of the public. Nelles believed that "as dramatizations of the issues of civil liberty, sedition trials ought to be effective" but that the press generally focused on sensationalist details, rather than pertinent questions of law (Nelles 1919:2). Yet Nelles clearly believed that trials had a role to play in popular constitutionalism. He wrote, "The job of getting the real nature of these cases before the court of public opinion ought to be done by a lawyer; it cannot professionally be done by a lawyer who is counsel in the case. That job I should like to take on. The Abrams

public should accept judicial rulings even when they dislike them "is an ideological tenet whose whole purpose is to persuade ordinary citizens that, whatever they may think about the Justices' constitutional rulings, it is not their place to gainsay the Court. It is a device to deflect and dampen the energy of popular constitutionalism" (Kramer 2004:233). He states that the object of this idea is "to maximize the Court's authority by inculcating an attitude of deference and submission to its judgments" (Kramer 2004:233). Thus Kramer argues that policy-oriented litigation is wholly at odds with popular deliberation about the Constitution's meaning.

https://doi.org/10.1111/j.1540-5893.2008.00345.x Published online by Cambridge University Press

case leaves the status of civil liberty hopeless so far as it is the concern of the courts of law'' (Nelles 1919:2). This letter raises several important points. The first is that, even when the courts did not seem likely to rule in the ACLU's favor, Nelles still saw value in litigating. Litigation under these circumstances struck Nelles as valuable because it reached the members of, and may even have created, a ''court of public opinion.'' While judges were determining the meaning of the Constitution in a court of law, informed citizens were simultaneously determining the meaning of the Constitution in the court of public opinion. This image of dual courts suggests that litigation was not merely aimed at generating publicity, but that the publicity it generated was in the service of public deliberation and interpretation about constitutional cases. As demonstrated by Francis in her description of the NAACP's campaign against lynching and mob violence, the early NAACP also treated court cases as part of a larger strategy to publicize the repression it opposed. Like the ACLU, the NAACP used courts in part to supplement its other efforts to change the public understanding of lynching and mob violence (Francis n.d.).

This use of courts suggests that litigation may not stunt popular constitutionalism, as Kramer and Tushnet argue, but on the contrary, it may promote the public consideration of politics through a constitutional lens. This notion is echoed by modern legal scholars, such as Post and Siegel, who also identify a reciprocal relationship between popular and judicial interpretations of the Constitution. They challenge arguments such as those of Tushnet and Kramer, declaring, ''We are capable of prizing law by denigrating politics, or of prizing politics by denigrating law, but we rarely imagine law and politics as respectfully coexisting, as they often do'' (Post & Siegel 2003:20). Just as Post and Siegel object to the Supreme Court's assertion of total supremacy over the Constitution, so too do they object to notions of a Constitution to which political majorities alone give meaning. Instead, they recall Corwin's trenchant description of the Constitution as a double symbol, representing both a check on tyranny (of the majority and its state) as well as the establishment of the right of that majority to political self-determination (Corwin 1936). These dual functions may exist in tension with one another; however, we need not imagine that they are mutually exclusive. By asking judges to interpret the Constitution, in hopes of encouraging private citizens to do the same, ACLU leaders recognized and utilized this dual symbolism of the Constitution.

In using the courts for public relations purposes, the ACLU also recognized the theatrical nature, and therefore educative potential, of court cases. Both Baldwin and Nelles used the word *dramatize* in their description of litigation's role in popular constitutionalism.

https://doi.org/10.1111/j.1540-5893.2008.00345.x Published online by Cambridge University Press

This term is quite suggestive. One component of dramatization is clearly the generation of publicity. However, the term also suggests the creation of a drama or story line, intended for spectatorship. Litigation packages an abstract rights claim into a particular narrative, centered on a single incident and defendant. Such cases are made even more educative because the proceedings offer defendants (and their lawyers) an opportunity to argue for the justness of their claims. These arguments are protected when made inside a courtroom and are amplified by the media attention that court cases, particularly those before high courts, often draw. These properties help explain why the ACLU turned to litigation well before it was likely to win any notable judicial victories. Even when a judicial victory is outside the realm of possibility, test cases may secure a victory "in the court of public opinion" by dramatizing civil liberties issues.

The ACLU's awareness of the way test cases could stimulate public discussion and influence public opinion was reflected by the types of test cases it engineered as well as its policy of notifying the press before staging disobedience to repressive laws.[9] In a display that typified the ACLU's tactics, Upton Sinclair responded to a ban on labor meetings by alerting the police that he planned to violate the ban and then by reading the First Amendment in the hopes of getting arrested. Though Sinclair personally hoped that the case would be dropped, he wrote many articles and gave many speeches publicizing and criticizing his arrest and prosecution (Zanger 1969:392–7). The publicity generated by this demonstration was instrumental in forming the Southern California chapter of the ACLU. From the perspective of dramatization, however, the Scopes trial was perhaps the most effective test case in which the early ACLU participated. As a result of the case's famous attorneys (William Jennings Bryan and Clarence Darrow) and of the battle between science and religion that the case seemed to represent, it generated an enormous amount of media attention. Most of this attention presented the ACLU in a favorable light. Scopes was a sympathetic defendant; a young, white, middle-class native of Tennessee, he was popular around town and with his students. Furthermore, Tennessee's anti-evolution statute represented something of a regional outlier. To much of the country, the case seemed to pit progress and freedom of thought against superstition and the narrow-minded repression of ideas. As far as the Scopes case was concerned, the ACLU seemed to represent progress (Garey 1998:81–5). As a result, the Scopes trial bolstered the national image of the ACLU. In connection with the case, it received its first wholehearted endorsement from a national newspaper, and the

[9] Notification of the press is discussed in Philips (1954:175).

https://doi.org/10.1111/j.1540-5893.2008.00345.x Published online by Cambridge University Press

American Academy for the Advancement of Science as well as the American Bar Association made positive public statements about the organization (Walker 1990:75–6). However, most of the ACLU's early clients remained decidedly unpopular figures.

The ACLU's transition to litigation is interesting not only because of what it can tell us about theories of constitutionalism without courts, but also because it illustrates why courts may be useful to unpopular minorities. It is important to note that the courts are by no means guaranteed to protect the rights of unpopular minorities. Yet as the ACLU discovered, even when judges decide with the majority, litigation may still aid unpopular minorities. Because courts had the power of judicial review, they provided the ACLU with an avenue for political participation when the organization found its more accustomed avenues inaccessible. Baldwin explained, "Just to make a fight, even hopeless, testified to a courage and determination which built up the power of resistance to injustice, good anyhow, as we saw it, for the future" (Phillips 1954:152). No matter how unpopular it got, the ACLU could engineer test cases, and at least lower-level courts could not keep them out. This property of litigation has been noted in other contexts, most explicitly in McCann's study (1994) of women's pay equity struggles of the 1970s and 1980s. McCann explains that even when the courts do not serve as countermajoritarian heroes, litigation provides activists with a vehicle for challenging a firmly entrenched status quo.

## Conclusion

The legal strategies of groups such as the NAACP and ACLU are often described as examples of "disadvantaged constituencies [practicing] a minoritarian politics that allow[s] them to reach beyond the limits of the political process by making direct appeals to constitutional principles through litigation" (Ivers 1995:9). The idea that courts ought to protect unpopular minorities, by validating their direct appeals to constitutional principles, is famously expressed in Ely's influential theory of judicial review (Ely 1980). It has certainly become the conventional wisdom. Kramer and Tushnet are part of a larger scholarly movement aimed at discouraging interest groups, particularly those on the left, from believing this conventional wisdom and continuing to seek social change through litigation. For instance, Rosenberg's *The Hollow Hope* famously argues that the Supreme Court is like flypaper, attracting and then ensnaring unsuspecting activists (Rosenberg 1991:336). Much of this literature implies that today's political organizations have been confused into continued litigation by the legacy of the Warren

https://doi.org/10.1111/j.1540-5893.2008.00345.x Published online by Cambridge University Press

Court. This article suggests that well before the Warren Court existed, minority groups felt the need to litigate. Consequently, it serves as a reminder that the idea of courts protecting minorities pre-dates the 1960s.

In fact, the idea that courts could defend minorities can be traced back to the Federalists' concern for the necessity of checking majoritarian politics. The minorities imagined in this scenario were economic minorities—in other words, economic elites. At the turn of the twentieth century, business groups with this frame of reference turned to the courts for protection against threatening trade unionism and regulatory legislation. One of the earliest such groups, the American Anti-Boycott Association (AABA), was founded in 1902 with the express purpose of litigating and lobbying against trade unionism (Ernst 1995:5). From 1903 to 1925, it conducted a sustained program of litigation seeking, through its lawsuits, to eradicate the practice of closed union shops (Ernst 1995:91). Litigation seemed like an obvious strategy for this group because, for the previous half-century, judges had denounced unions as anticompetitive, conspiratorial, and illegal cartels (Ernst 1995:6). Thus the AABA's founders believed that precedent lay squarely on their side. AABA historian Ernst explains, "The goal of making new law, so readily acknowledged by today's legal defense funds was no part of the employers' plans for the AABA. To adopt such a goal would go against their deep conviction that existing law already recognized the justice of their cause" (Ernst 1995:22). This kind of litigation was designed to convince courts that prevailing constitutional norms should be applied in defense of the status quo.

Progressive Era interest groups on the political left also found themselves concerned that judicial interpretations of the Constitution would uphold the status quo. In fact, they often feared precisely this outcome. For instance, the National Consumers' League found it necessary to attend to the judicial branch in order to defend the protective labor legislation for which it had successfully lobbied from judges who consistently declared such legislation unconstitutional (Vose 1957). This organization found that it needed to develop the capacity to litigate, not because courts were relatively sympathetic to its aims or even a last resort when majoritarian politics became impossible. On the contrary, the National Consumers' League was interested in courts because they were so disruptive to its political program. It litigated in order to defend majoritarian legislative outcomes from the courts, rather than to defend minority rights from legislation. This litigation was quite different from that of groups such as the ACLU and NAACP. At a time when courts were strongly associated with conservative causes, these left-wing organizations began to develop the understanding that courts might be useful to them. Though the decisions of the Warren Court undoubtedly

https://doi.org/10.1111/j.1540-5893.2008.00345.x Published online by Cambridge University Press

strengthened the modern-day perception that courts are the guardians of social (rather than economic) minorities, groups such as the ACLU and NAACP began to model the view that courts could facilitate social change decades before the Warren era. In fact, in the 1940s, Jewish advocacy organizations, most notably the American Jewish Congress, emulated this model, adopting litigation strategies like those of the NAACP and ACLU (Ivers 1995:51).

The interest group literature has traditionally focused on the properties, costs, and benefits of large-scale litigation campaigns. By focusing on these groups' transition to litigation, this study offers insights about extrajudicial strategies aimed at changing constitutional norms as well as the political challenges that accompany those strategies. The ACLU's experience demonstrates that groups may be driven to courts as a result of the empirical problems with court-free constitutionalism. Tushnet's and Kramer's normative arguments do not seem to account for such problems. For instance, Tushnet's vision of constitutionalism seems to be that legislatures and executives will allow unpopular and even threatening minorities to develop the political organizations necessary to participate in pluralist politics. As the Espionage and Sedition Acts demonstrate, however, institutional actors pursue their own interests, which often dictate that such groups are not allowed to even organize, let alone participate. Another empirical flaw in the theory of court-free constitutionalism is that it poses litigation as being in total opposition to popular deliberation about the meaning of the Constitution. As the ACLU's test cases demonstrate, however, litigation may actually help stimulate popular discussion of constitutional questions.

This article does not argue that the ACLU should have won its cases or that the real meaning of the Constitution has been validated through court decisions. Furthermore, it does not even claim that the ACLU was ultimately successful or that its litigation accounted for any success it may have had. Instead, the ACLU serves as an example of an organization that tried popular constitutionalism but found that empirical realities made it nearly impossible to continue the pursuit of this strategy. The scholars who call for constitutionalism without courts do not discuss these obstacles. They seem to imagine that groups must choose to either litigate or participate in democratic politics and that either option will always be available. As this case demonstrates, these assumptions do not always hold. It is not clear whether those who call for restrictions on judicial review are willing to accept the consequence that some groups will find popular constitutionalism beyond their reach. However, it is worth considering whether such an outcome presents a normative cost and, if so, whether that cost offsets the benefit that scholars hope to achieve by restricting the role of courts in constitutional interpretation.

## Appendix A: Coding Scheme Used to Generate Figure 1

### Topics Coded as "Court-Based"

- informational report about a court ruling or case made to meeting
- publicize a case
- write/make remarks in court
- civil disobedience/test meeting
- test case
- discussion of whether to accept an individual case
- consult or retain a lawyer
- application for injunction
- write of a legal brief
- summary of cases ACLU was handling at time of meeting

### Topics Coded as "Outside Courts"

- letter-writing campaign
- public or press statement
- public meeting
- public protest
- coordinate speaking tour
- write letter to the editor
- publish a pamphlet or book
- conference with member of administration
- ask a congressman to make a statement or introduce a bill
- arrangement with War Department
- memo to congressman or state legislator
- letter to government official
- advertisement in newspaper
- miscellaneous political activities

### Topics Not Coded in Either Category

- hold a benefit
- informational report given during meeting
- gather information/stage an investigation
- bail fund
- sue or threaten to sue a newspaper for libelous statements about ACLU
- administrative details
- letter to members/friends of organization
- unspecified publicity

https://doi.org/10.1111/j.1540-5893.2008.00345.x Published online by Cambridge University Press

**Table 1.** Data for Figure 1

| Date | Court-Based Number | Outside Courts Number | Neutral Number | Total Minutes for Year | % Tactics Court-Based | % Tactics Outside Courts | % Tactics Neutral |
|---|---|---|---|---|---|---|---|
| 1918 | 4 | 12 | 22 | 38 | 10.53 | 31.58 | 57.89 |
| 1919 | 1 | 41 | 38 | 83 | 1.20 | 49.40 | 45.78 |
| 1920 | 32 | 53 | 66 | 153 | 20.92 | 34.64 | 43.14 |
| 1921 | 12 | 27 | 31 | 71 | 16.90 | 38.03 | 43.66 |
| 1922 | 35 | 45 | 45 | 129 | 27.13 | 34.88 | 34.88 |
| 1923 | 36 | 34 | 60 | 138 | 26.09 | 24.64 | 43.48 |
| 1924 | 50 | 20 | 35 | 108 | 46.30 | 18.52 | 32.41 |
| 1925 | 38 | 15 | 54 | 111 | 34.23 | 13.51 | 48.65 |
| 1926 | 45 | 13 | 27 | 87 | 51.72 | 14.94 | 31.03 |
| 1927 | 31 | 14 | 25 | 72 | 43.06 | 19.44 | 34.72 |
| 1928 | 58 | 7 | 37 | 105 | 55.24 | 6.67 | 35.24 |

Percentages do not sum to 100 because some minutes could not be classified.

## Appendix B: Coding Scheme Used to Generate Figure 2

### Topics Coded as "Court-Based"

- informational report about a court ruling or case made to meeting
- write/make remarks in court
- civil disobedience/test meeting
- test case
- discussion of whether to accept an individual case
- consult or retain a lawyer
- application for injunction
- write of a legal brief
- summary of cases ACLU was handling at time of meeting

### Topics Coded as "Outside Courts"

- letter-writing campaign
- public meeting
- public protest
- coordinate speaking tour
- conference with member of administration
- ask a congressman to make a statement or introduce a bill
- arrangement with War Department
- memo to congressman or state legislator
- letter to government official
- miscellaneous political activities

https://doi.org/10.1111/j.1540-5893.2008.00345.x Published online by Cambridge University Press

**Topics Coded as "Publicity"**

- publicize a case
- public or press statement
- write letter to the editor
- publish a pamphlet or book
- unspecified publicity
- advertisement in newspaper

**Topics Not Coded in Any Category**

- hold a benefit
- informational report given during meeting
- gather information/stage an investigation
- bail fund
- sue or threaten to sue a newspaper for libelous statements about ACLU
- administrative details
- letter to members/friends of organization

**Table 2.** Data for Figure 2

| Date | Court-Based Number | Outside Courts Number | Neutral Number | Publicity Number | Total Minutes for Year | % Tactics Court-Based | % Tactics Outside Courts | % Tactics Publicity | % Tactics Neutral |
|---|---|---|---|---|---|---|---|---|---|
| 1918 | 4 | 9 | 21 | 4 | 38 | 10.53 | 23.68 | 10.53 | 55.26 |
| 1919 | 1 | 32 | 34 | 13 | 83 | 1.20 | 38.55 | 15.66 | 40.96 |
| 1920 | 31 | 39 | 55 | 26 | 153 | 20.26 | 25.49 | 16.99 | 35.95 |
| 1921 | 12 | 24 | 22 | 12 | 71 | 16.90 | 33.80 | 16.90 | 30.99 |
| 1922 | 35 | 36 | 40 | 14 | 129 | 27.13 | 27.91 | 10.85 | 31.01 |
| 1923 | 36 | 23 | 50 | 21 | 138 | 26.09 | 16.67 | 15.22 | 36.23 |
| 1924 | 49 | 17 | 30 | 9 | 108 | 45.37 | 15.74 | 8.33 | 27.78 |
| 1925 | 34 | 11 | 50 | 12 | 111 | 30.63 | 9.91 | 10.81 | 45.05 |
| 1926 | 41 | 11 | 25 | 8 | 87 | 47.13 | 12.64 | 9.20 | 28.74 |
| 1927 | 31 | 10 | 22 | 7 | 72 | 43.06 | 13.89 | 9.72 | 30.56 |
| 1928 | 56 | 5 | 35 | 6 | 105 | 53.33 | 4.76 | 5.71 | 33.33 |

Percentages do not sum to 100 because some minutes could not be classified.

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***Emily Zackin*** *is a Ph.D. candidate in politics at Princeton University. Her dissertation focuses on positive rights in U.S. state constitutions.*

https://doi.org/10.1111/j.1540-5893.2008.00345.x Published online by Cambridge University Press

https://doi.org/10.1111/j.1540-5893.2008.00345.x Published online by Cambridge University Press