What follows is an early draft of an article that I plan to submit to a peer-reviewed legal history journal. The article grows out of my current book project, which is a history of constitutional privacy that stretches from the Civil War to the late 20th century. The framing of the article’s contributions is quite new and I welcome your feedback on those as well as the history on which they are based. My apologies that the footnotes are still a work in progress.

Thank you for reading; I’m looking forward to the conversation.
The Lost History of Fourth Amendment Civil Liberties

Sophia Z. Lee

In 1918, amid a nation mobilized for war and whipped up against traitors in their midst, attorney George F. Vanderveer squared off in Chicago against the best prosecutors the United States Department of Justice could assemble. The government was trying over 100 leaders of the Industrial Workers of the World (IWW), a radical labor organization famous for its bloody strikes and goal of creating “one big union.” The defendants (also known as “Wobblies”) were charged with crimes ranging from conspiracy to thwart the war effort to interfering with employers’ constitutional freedom of contract. The government had seized over five tons of evidence in nationwide raids of IWW offices and admitted a large quantity of that at trial. The introduction of this evidence was hardly a lively affair. According to the IWW, the assembled reporters and jurors were “having difficulty keeping awake [as] endless files of routine letters are read to the jury.” It could not have helped the somnolence of the courtroom’s occupants that the admission of each piece of evidence was preceded by Vanderveer’s rote Fourth Amendment objection: “said paper...
was unlawfully seized from the defendants and unlawfully presented before the Grand Jury that returned the indictment herein, all as more specifically appears in defendants’ motion for return of papers, filed herein, which said motion is incorporated and made a part of this objection.”

Scholarship on the modern civil liberties movement has largely overlooked the Fourth Amendment aspects of the IWW’s Chicago trial, and the Red Scare litigation it inaugurated. For historians, *United States v. Haywood* (titled for the IWW’s notorious general secretary, “Big Bill” Haywood), was about freedoms of speech, assembly, and the press, to the extent it was about the Constitution at all. Their treatment of the case is emblematic of histories of civil liberties in the 1910s and 20s more generally, which focus on First Amendment rights. Meanwhile, histories of

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6 See, for example, U.S. v. Haywood, Bill of Exceptions, May 28-June 12, 1918, Folder 5, Box 107, Wayne State IWW Papers Subseries VB, *passim*.

7 William Preston Jr., *Aliens & Dissenters: Federal Suppression of Radicals, 1903-1933*, 121 (1963) describes the government as indicting the IWW leadership “for their political and economic views and their labor agitation.” Labor historians have also noted that the government, unable to prove that the IWW engaged in treason resorted to trying the organization based on its “philosophy and publications.” Dubofsky, *We Shall Be All*, 435; see also Philip S. Foner, “*United States of America vs. William D. Haywood et al.*: The I.W.W. Indictment,” *Labor History* 11, no. 4 (1970): 500-530, 505. Those scholars do not focus on the civil liberties implications of this strategy, however, emphasizing instead that the prosecution was designed to destroy the IWW, by which measure it was a remarkable success. Dubofsky, *We Shall Be All*, X; Selig Perlman and Philip Taft, *History of Labor in the United States, 1896-1932* (New York, 1957), X. Cole, *Wobblies on the Waterfront*, 5 instead attributes the IWW’s decline to internal issues. Historians of free speech or civil liberties, for their part, long ignored the case. See, for example, Geoffrey Stone, *Perilous Times: Free Speech in Wartime* (2004); David Rabban, *Free Speech in Its Forgotten Years, 1870-1920* (1997); Jerold S. Auerbach, *Labor and Liberty: The La Follette Committee and the New Deal* (1966). Those who address the Haywood trial noted only the fairness issues Roger Baldwin and his National Civil Liberties Bureau (precursor to the ACLU) raised about the trial. Samuel Walker, *In Defense of American Liberties: A History of the ACLU* (1990), 25; Robert C. Cottrell, *Roger Nash Baldwin and the American Civil Liberties Union* (2001), 72. Recent works, however, have recognized the relevance of freedoms of speech, assembly, and the press to the trial. Laura Weinrib, *The Taming of Free Speech: America’s Civil Liberties Compromise* (2016), chap. 3, esp. 83, 88, 107-08 (though Weinrib also emphasizes that the rights at stake weren’t speech as currently defined but a broader right to agitate that covered any labor action short of physical violence); Clemens P. Work, *Darkest Before Dawn: Sedition and Free Speech in the American West* (2005), 161-63.

the Fourth Amendment bypass its connection to civil liberties. Tellingly, Sarah Seo, who has written the first serious legal history of the Fourth Amendment in this period, does not frame her excellent book as a history of civil liberties: there is no discussion of the elite group of activists, lawyers, law professors, and judges who made up the budding civil liberties movement or the mass of workers and radicals to whom they linked their cause. Seo also does not discuss the cases arising from the federal government’s pursuit of radicals and unions. Instead, she and other historians focus on Prohibition which they argue ushered in modern Fourth Amendment doctrine and set the United States on the road toward mass incarceration. Legal scholars, for their part, recognize that Supreme Court justices drew links between the Fourth and First Amendments but overlook those links’ roots in the early civil liberties movement.

Like the tedious objections Vanderveer entered in the trial record, however, the Fourth Amendment provided a plain and technical, but indispensable, substrata to the more dramatic rights to speech and assembly that have dominated histories of early civil liberties. To an extent, 

9 Seo argues that the advent of the automobile combined with Prohibition to transform first policing and then, by extension, Fourth Amendment doctrine, a process that passed the largely carless working-class by. Sarah A. Seo, Policing the Open Road: How Cars Transformed American Freedom (HUP: 2019). See also Lisa McGirr, The War on Alcohol: Prohibition and the Rise of the American State (HUP: 2015); Wesley M. Oliver, The Prohibition Era and Policing: A Legacy of Misregulation (2018). Dean Strang covers the Fourth Amendment aspects of the 1918 IWW trial but focuses on the case’s role in building the government’s criminal prosecution capacity, not as this article does, on the modern civil liberties movement. Strang, Keep the Wretches.

historians’ equation of civil liberties in this period with the First Amendment makes sense. After all, radicals and Progressives appropriated the term “civil liberty” during World War I to refer to their defense of pacifists who spoke out against or refused to serve in the war. But cases like *U.S. v. Haywood*, in which criminal laws were used to suppress speech, quickly taught civil libertarians that the Fourth Amendment was an essential balustrade for the First Amendment freedoms they held dear. By not following their lead, scholars have not only missed the place of Fourth Amendment rights in the early history of civil liberties, but also overlooked how labor radicals and civil libertarians in the postwar years reconceived the First and Fourth Amendments as inextricably linked. Further, they did so before that view was reflected in the opinions of Supreme Court justices. In other words, attending to the Fourth Amendment revises the history of civil liberties in the additive sense of including a new constitutional provision. But it also amends that history in a transformative sense: in the face of federal crackdowns on labor agitation, civil libertarians came to see that the rights to speech and assembly; to organize, picket, and strike were dependent on robust Fourth Amendment protections.

Recognizing the lost history of Fourth Amendment civil liberties contributes productively to the extant legal and historical literature. First, by integrating Fourth-Amendment focused histories of mass incarceration with First-Amendment focused histories of civil liberties, this article invites further scholarship at their intersections. Second, recent histories of civil liberties have focused on the New Deal as the period in which civil liberties were coopted by deregulatory conservatives, a turn they attribute to civil libertarians’ turn to the courts.12 The history that follows shows, however, that those liberties’ political flexibility dated to the movement’s World War I-era

inception. Further, their flexibility was as evident outside the courts as within. As a result, this history suggests that political flexibility may be inherent to civil liberties, rather than attributable to their judicial pursuit.13 Third, this article provides richer political, legal, and intellectual grounding to those arguing for syncretic approaches to the First and Fourth Amendments today and more squarely roots such approaches in the civil liberties tradition. At the same time, this history offers a cautionary tale. Civil libertarians turned to the Fourth Amendment to bolster freedom of speech at a time when the Court provided more robust Fourth than First Amendment protections. But as this history shows, linking them risked the Court diminishing those Fourth Amendment protections through their connection with disfavored speech. Today the situation is reversed: the Court has vastly expanded First Amendment protections and narrowed those under the Fourth Amendment,14 leading scholars to seek additional protection from government surveillance under the First Amendment.15 The history that follows warns that drawing such a linkage can weaken the stronger right, not only enhance the feeble Amendment’s protection.

**Organized Labor’s Fusion of Free Speech and Criminal Procedure Rights**

On April 1, 1909, exactly 9 years to the day before the IWW trial would commence in Chicago, an article appeared in an IWW newspaper chastising the Spokane, Washington City Council for passing a law that outlawed speaking in the streets. “Even those parts of the employers’ national constitution which working people used to value are more and more a dead letter,” the author charged.16 The IWW had a complicated relationship to the law. While it often criticized

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13 In this respect, this article joins new work arguing that the civil liberties movement was already grappling with the political instability of the rights it championed during its earliest years. John Fabian Witt, “Weaponized from the Beginning” (September 2, 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4208158.

14 Solove, “The First Amendment,” 114 (arguing that the Fourth Amendment’s role in protecting First Amendment activities is “much diminished” compared to 100 years ago).


courts and legal institutions, even denying an obligation to obey the capitalists’ law, it also embraced the Constitution and likened its members to the revolutionaries who created the United States. The IWW’s radicalism made it a target for repression and free speech its frequent rallying cry. Soon after its founding in 1905, the IWW launched a series of “free-speech fights,” in which members challenged municipal restrictions on public speaking: as soon as one speaker was arrested, the next would take over. In a city that was about to witness one of the IWW’s largest and most successful free-speech fights, it is no surprise that the article on the Spokane law primarily had speech rights in mind. But that was not the only legal protection the Wobblies felt they had been denied. Members “have been clubbed time and again; arrested without warrant and the rooms and dwellings of men active in the union have been broken into and searched and there has never been an investigation,” the author raged. “The petty grafters who fill the Spokane City Hall[,] in repealing the constitution,” targeted not only the workingman’s freedom of speech but also his protections against police abuse, the article implied.

The IWW’s radicalism made it a target for repression. It eschewed the traditional trade unionism of the American Federation of Labor (AFL), which organized only the most skilled workers and divided the workplace into a honeycomb of craft-based union locals. Instead, the IWW promised to one-day organize all workers into a single giant union; in the meantime, it organized industry-wide unions (known as “industrial unions”) among unskilled workers in the mines, lumber camps, and wheatfields out West or the factories and docks in the East. At a time

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18 Scholars debate the degree to which these actions were intended to defend free speech or merely an organizing tactic. Compare, for example, Cal Winslow, *Radical Seattle* (2020), 51, 78, 81-84, 135 with Rabban, *Free Speech*, 77-78, 83-86.
19 Foner, *History of the Labor Movement*, 177-84
20 “Grafters Hate Free Speech.”
21 “Grafters Hate Free Speech.”
22 For IWW critiques of the AFL, see Foner, *History of the Labor Movement*, 32-33.
when the AFL fought to exclude foreign and non-white workers, the IWW welcomed immigrant and Black workers to its ranks. Echoing socialists, the IWW called for worker ownership and control of industry, but it was more forthrightly revolutionary. Most notably, the IWW rejected socialists’ engagement in electoral politics not only union organizing; the IWW insisted that building a strong economic organization should come first. The IWW was also aggressive—it believed in organizing and striking, looking down on the AFL for its emphasis on winning contracts.

Radical or not, since well before the Haywood trial, the labor movement had a contentious relationship with the police, the courts, and the law more generally. The late nineteenth and early twentieth centuries were a period of extreme labor conflict. The industrial revolution eroded workers’ control on the job; exposed them to brutal, even deadly, conditions; and eclipsed household economies, making workers and their families ever-more dependent on a boss and his (or its) inadequate wages. From railroads, textiles, and mines to ports, lumber, and streetcars, strikes and boycotts shut down cities and roiled industries across the nation. The IWW extended those actions to migrant and unskilled workers and to Black and immigrant workers excluded from the AFL, like those in Spokane subject to local employment sharks’ “nefarious method of fleecing the workers.”

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23 For the IWW’s inclusion of Black workers, see Cole, Wobblies on the Waterfront, 3. For its inclusion of immigrants see Perlman and Taft, History of Labor, 262 (1966); Foner, History of the Labor Movement, 121-23. For how its immigrant members linked the IWW to global anticolonial struggles, see Seema Sohi, Echoes of Mutiny 93-94 (2014); Maia Ramnath, Decolonizing Anarchism, 96, 116 (2011).
25 Foner, History of the Labor Movement, 470-72; Dubofsky, We Shall Be All, 156-65.
27 “Seattle Wins Free Speech,” Industrial Worker 1, no. 3 (April 1, 1909), 1.
These were bareknuckle affairs. Unionists attacked scabs and destroyed employer property to shut the workplace down.\textsuperscript{28} Indeed, the 1899 strike by miners in Coeur D’Alene, Idaho that led “Big Bill” Haywood to help found the IWW several years later involved armed workers seizing a train and destroying mine equipment.\textsuperscript{29} Employers hired strikebreakers (also called “sluggers”: their job was to break strikers not just strikes) and private detectives to spy on and disrupt the union.\textsuperscript{30} In Coeur D’Alene, one such labor spy not only infiltrated the union years before Haywood arrived, but got himself elected to leadership and fomented members’ armed seizure of two mines.\textsuperscript{31}

The legal system was also wielded in defense of property and against organized labor. Workers sometimes found allies in local government, as was the case in Coeur D’Alene before the mine seizure.\textsuperscript{32} In general, however, employers counted on local police, and when they were stretched too thin, state militias to surveil and suppress strikes.\textsuperscript{33} Cities banned gatherings in working-class neighborhoods when a strike was imminent and arrested those who violated the ban. Police made use of vague charges such as vagrancy and disturbing the peace to round up labor leaders and break up meetings. Violence was frequent—the police beat, clubbed, shot, and killed strikers and supporters alike.\textsuperscript{34} When Wobblies took to the soapbox for their “free-speech” fights, the police hauled them down. In Spokane, free-speech fighters were beaten, near-starved, overcrowded, and exposed to such extreme winter temperatures that prisoners caught pneumonia

\textsuperscript{29} Dubofsky, \textit{We Shall Be All}, 37; “Coeur D’Alene Labor Troubles” (June 5, 1900), 56th Cong, 1st Session, Report no. 1999, p. 1 [hereinafter Coeur D’Alene Report].
\textsuperscript{30} Harring, \textit{Policing A Class Society}, X.
\textsuperscript{31} Dubofsky, \textit{We Shall Be All}, 30, 32. For the argument that historians have inaccurately downplayed the violent class warfare marking this period, see Beverly Gage, \textit{The Day Wall Street Exploded: A Story of America in Its First Age of Terror} (2008).
\textsuperscript{32} Dubofsky, \textit{We Shall Be All}, 30-31.
\textsuperscript{33} Harring, \textit{Policing A Class Society}, X.
\textsuperscript{34} Harring, \textit{Policing A Class Society}, X.
and died.\textsuperscript{35} Not surprisingly, an index to turn-of-the-century labor periodicals is replete with entries for articles about “police, local and state.”\textsuperscript{36} More rarely, federal troops might be called in. Indeed, federal troops entered Coeur D’Alene to quell the union after the mine and train seizures.\textsuperscript{37}

Labor developed a cogent critique of this policing as an infringement on labor’s freedoms of speech and assembly. For the IWW, this was most explicitly manifested in their free-speech fights, like that spurred by the Spokane ordinance. But “free speech” was not a cause found only on labor’s radical fringes. At least as early as 1908, Samuel Gompers, president of the AFL, spoke out in defense of labor’s free speech rights.\textsuperscript{38} Indeed, it was an issue that, at the local level, could bring the traditional craft unions of the AFL into temporary alliance with their radical erstwhile enemies.\textsuperscript{39} Once the Spokane jails filled up in 1909 with free-speech fighters, for instance, local AFL unions unsuccessfully called on Gompers to speak out against the crackdown, arguing that it threatened the free speech rights of all organized labor.\textsuperscript{40}

The federal Commission on Industrial Relations, created in 1912 to investigate labor strife, captured just how central speech rights were to labor. The Commission’s investigation, which produced thousands of pages of hearing transcripts, concluded in 1915 in a splintered report. The portion written and endorsed by those closest to labor devoted a section to “Free Speech.” “One of the greatest sources of social unrest and bitterness,” it declared, “has been the attitude of the police toward public speaking.”\textsuperscript{41} The report recommended removing “every barrier to the freedom of speech.”\textsuperscript{42} Unfortunately, the report observed, courts had interpreted most of the U.S.

\begin{itemize}
  \item \textsuperscript{35} Foner, \textit{History of the Labor Movement}, 180-81.
  \item \textsuperscript{36} [Kheel index]
  \item \textsuperscript{37} Dubofsky, \textit{We Shall Be All}, 32-33; 37.
  \item \textsuperscript{38} Luff, \textit{Commonsense}, 9.
  \item \textsuperscript{39} See, for example, Foner, \textit{History of the Labor Movement}, 196-199.
  \item \textsuperscript{40} Foner, \textit{History of the Labor Movement}, 183.
  \item \textsuperscript{42} CIR Report, 99.
\end{itemize}
Constitution’s rights-bearing provisions to constrain only the acts of the federal government. Accordingly, the report urged Congress to extend the Constitution’s protections for speech and assembly to state governments and private “individuals, associations, and corporations.”

Yet the Commission, like the IWW article about Spokane’s corrupt City Council, addressed criminal procedure rights as well, particularly rights against unwarranted search and seizure. For instance, the report’s proposed constitutional amendment extending protections beyond the federal government was not limited to speech and assembly. The report also called for extending procedural rights, including the right “to be free from unreasonable searches and seizures.” In recommending how to “remove every barrier to the freedom of speech,” the report called for state laws establishing that “the military may not forcibly enter nor search a private home … without a search warrant.” In other words, these unabashed labor allies proclaimed, freedom of speech was interrelated with the procedural rights necessary to ensure its protection.

Even before World War I, then, labor identified a right against unreasonable and unwarranted searches and seizures as among the rights workers deserved to have protected. Policing of labor remained largely a state and local affair and courts (as the Commission noted) interpreted most rights in the U.S. Constitution as restraining the federal government exclusively. Labor agitators did not always observe this legal technicality, as the IWW article accusing the Spokane City Council of violating the national constitution demonstrates. As a general matter, however, discussion of the Fourth Amendment cropped up only in the rare instances, such as Coeuer D’Alene, when federal troops were called in. But in this period of extreme labor conflict

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43 CIR Report, 48.
44 CIR Report, 48, 61.
45 CIR Report, 61.
46 CIR Report, 100.
47 Coeuer D’Alene Report, 75-76. The U.S. military also helped quell the massive railroad strikes of the late 19th century. [add cites]
and aggressive policing of labor, it was not only free speech that labor came to hold dear, but procedural rights such as jury trials, protections against inhumane treatment like that in Spokane, and the right to be free of unreasonable searches and seizures.

**Federalizing the Crackdown on Labor**

Thanks to World War I, the federal government became a greater threat to labor’s rights. On August 24, 1917, Assistant Attorney General William Fitts wrote to a team of federal agents and prosecutors assembled in Chicago to prepare the government’s case against the IWW. “This is not an instance in which there is any danger of doing any injustice to innocent citizens,” Fitts counseled the Chicago team, so they must “push forward vigorously and with dispatch.” To underscore his point, Fitts urged them that “nothing is of more importance [to the Department] than this undertaking.” Act with dispatch they did: within 10 days, the Attorney General himself had approved the team’s plan to conduct raids on over 50 IWW offices and a few private residences from Philadelphia to Portland, Oregon, including the “forms and warrants” to be used. The next day, federal agents descended, seizing filing cabinets, typewriters, printing presses, clocks, pictures, and office supplies; financial and organizational records; books, pamphlets, letters, and buttons. They left behind receipts that gave scant clue as to what had been taken. “There was so

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48 Fitts, AAG for the AG to Frank C. Dailey, c/o U.S. Attorney, Chicago, 8/24/17, Image 522-24, Reel 4, Kheel DOJ Papers, 2.
much of this stuff that we coult [sic] list it and give a receipt,” one U.S. Marshall protested, “so on the instructions of the Special Agents who were with us we took the whole business.”

Much about the IWW raids was novel. To begin with, before World War I, the federal government did not have much of a civilian police force with which to conduct this sort of major operation. Before the Civil War, the federal government relied on the military or the posse comitatus to police Native peoples, territorial residents, and escaped slaves. The first civilian police force was the Secret Service. Created in 1865 and detailed to the Treasury Department, its agents mainly pursued counterfeiters, though the 1902 assassination of President McKinley led Congress to also task them with protecting Presidents. In 1908, the Department of Justice gained a Bureau of Investigation, whose agents were supposed to police government corruption, but it was tiny. World War I changed that: between 1914 when the war began and 1917 when the U.S. joined the battle, the Bureau tripled in size, from 100 to 300 agents. Military intelligence officers also mushroomed from a total of 2 in 1915 to around 300 in 1917. Even still, the Bureau relied heavily on deputized private agents, from detectives serving the labor-spy industry to the businessmen volunteers of the American Protective League. Indeed, the Chicago team included two prosecutors called in from private practice.

52 Quoted in 11/15/17, C. H. Libby, lawyer to Vanderveer, Folder 15, Box 99, Subseries VA: Raids and Plots, Series V: Legal Problems, Trials and Defense; Accession No. 130; Industrial Workers of the World Collection, Wayne State University Labor History Archives, Detroit, Mich.
54 [Hunt, 159-60; Luff, 44; ACLU appropriations memo from ’24 says approx. 100 in 1913]
55 [Luff, 44]
56 [Luff, 44]
57 [Luff; Cappazola, 43-44]
The Department of Justice had previously resisted targeting labor. Employers and local officials were gravely alarmed by the IWW’s free-speech fights and mass strikes.\(^59\) They amplified its most revolutionary rhetoric to whip up community opposition and vigilante violence, secure police and state militia crackdowns, and win hyperbolic press coverage (one typical local paper exclaimed “hanging is none too good for them”).\(^60\) As early as 1912, California officials urged the Attorney General to use federal laws against the Wobblies, warning that the IWW was preparing to “overthrow the [federal] Government.”\(^61\) But when the Attorney General’s investigation turned up no evidence to support their claim, he denied their pleas.\(^62\) In 1917, when IWW strikes shut down mines in the Southwest and lumber operations in the Pacific Northwest, calls for intervention heated up again.\(^63\) This time, however, there was also general wartime hysteria about the IWW’s treasonous intentions and a perception that its copper and lumber strikes were impeding war production. In the summer of 1917, the Department of Justice decided to act.\(^64\) At a secret meeting in Chicago, the regional head of the Bureau of Investigation helped hatch a plan to shut the IWW down: prosecute its leaders under the wartime Selective Service and Espionage Acts, deport its immigrant members, and freeze its communications through postal censorship of its mail.\(^65\)

Those freshly minted wartime statutes ended up being pivotal for the government’s prosecution of the IWW. While the government indicted the IWW’s leaders on numerous charges, the counts under those two laws, which accused the IWW leaders of discouraging enlistment and service in the military, were the only ones that survived appeal.\(^66\) But it was not only the

\(^{59}\) See for example the accounts of the 1912 Lawrence, Mass. strike and San Diego, Cal. free speech fight in Foner, IWW, pp. 194-205 and chap. 13, respectively.

\(^{60}\) Quoted in Foner, IWW, 196.

\(^{61}\) Quoted in Dubofsky, We Shall Be All, We, 193.

\(^{62}\) [Foner, IWW, 203; Rabban, Free Speech article, 1063, 1103-06]

\(^{63}\) [Dubofsky, We Shall Be All, We, 376-80, 393-95]

\(^{64}\) [Dubofsky, We Shall Be All, We, 376-78; Preston; Foner]

\(^{65}\) [Dubofsky, We Shall Be All, We, 395]

\(^{66}\) [add cites about ct dropping ct 5 and cite to 7th cir dismissing cts 1 and 2]
criminalization of anti-war propaganda that made these laws so crucial to pursuing the IWW. Tucked away in the 1917 Espionage Act was Title XI, which authorized the government to seek search warrants for property or papers used to commit a crime in violation of the Act.\(^{67}\) This provision was particularly important to the IWW prosecution because, before its passage, Congress had only authorized search warrants in customs, revenue, and counterfeiting cases. It was at best unclear if the Justice Department could seek warrants without such express authorization.\(^{68}\) As one legal observer noted, under the Espionage Act, “the use of search warrants in the Federal Courts has been greatly extended.”\(^{69}\)

Having received its charge, the Justice Department’s Chicago team proposed prompt and sweeping action. As the lead attorney told Fitts (in telegram speak) “immediate procuring search warrants here and few other places all to be served same day under … [Title XI] charging use of [the IWW’s] Solidarity Newspaper Property to commit felonies [under the Espionage Act] … in hope getting valuable evidence.”\(^{70}\) As it turned out, the evidence was not only valuable to the charge under the Espionage Act, it was necessary to securing all the counts on which the IWW leaders were indicted. As the U.S. Attorney in Philadelphia understood it, the purpose of the raids was “very largely to put the I.W.W. out of business.”\(^{71}\) The government’s ability to achieve that purpose would turn on the constitutionality of those raids, and the government’s resulting ability to rely on the seized evidence to secure indictments and convictions against the IWW’s leadership.

*From the First to the Fourth Amendment*

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\(^{67}\) Espionage Act, Public Law 65-24, Chap. 30, 40 Stat. 217 (1917), 65 Congress, Session 1, Title XI.

\(^{68}\) [Fraenkel, Searches and Seizures, 380; U.S. v. Jones, 230 F. 262, 266-69 (N.D.N.Y. 1916)]

\(^{69}\) [Fraenkel, Searches and Seizures, 380.]

\(^{70}\) 8/30/17 Clyne to Fitts, Image 521, Reel 4, Department of Justice Investigative Files, Part I: The Industrial Workers of the World, No. 5863, Kheel Center for Labor-Management Documentation and Archives, Cornell University Library, Ithaca, N.Y.

\(^{71}\) [quoted in Dubofsky, We Shall Be All, We, 407—note this is Kane who is part of NGPL storyline]
The government’s lawyers faced a formidable opponent. Even Vanderveer’s detractors warned the Attorney General that he was “one of the best criminal lawyers in the U.S.” and “so thoroughly smooth … that it is almost impossible to detect him.” Declaring the government’s evidence “mostly smoke,” Vanderveer began the Chicago trial with “the utmost confidence in our defense.” Courtroom observers thought the four-month trial unfolded in Vanderveer’s favor. But no amount of smoothness could save the Wobblies from a jury seeped in war hysteria: despite an over 12,000-page trial transcript and thousands of pieces of evidence, they returned 400 guilty verdicts in less than half an hour. After the jury’s speedy verdict, Vanderveer and his co-counsel, Otto Christensen, managed to get two of the counts thrown out by a federal appeals court. But the Selective Service and Espionage Act convictions remained. Christensen and Vanderveer thought the Chicago verdicts suffered many remaining errors. As they prepared in late 1920 to petition the Supreme Court for review, however, Arthur DeSilver, co-director of the recently formed ACLU, thought they should make their petition to the highest court turn on a single issue. “I feel that the point … which is most likely to appeal to the Supreme Court,” he counseled, “is the search warrant point.” Christensen and Vanderveer should focus the justices’ “entire attention solely on that,” he advised. “I would discuss every phase of it … and leave the court with a clear impression that

72 [Chamberlain 12/3/17]
73 4/1/18, GV to RB, Correspondence-Organizational Matters: (IWW Trials), Volume 27, 1917-18, Sub-Series 18: Organizational Matters – Correspondence, 1917-1951, Subgroup 1, The Roger Baldwin Years, 1912-1950, American Civil Liberties Union Records, Mudd Library, Princeton University, Princeton, N.J.
74 [Weinrib, diss]
there is something radically wrong,” DeSilver advised, “not only about the way evidence was secured but about its use against these particular defendants.”

Vanderveer and the IWW had sought unsuccessfully to make the Chicago prosecution about the First not the Fourth Amendment. Even before the trial began, the IWW charged that the case threatened the right to organize and future of the “few remaining liberties of the workers.” Members cheered when Vanderveer questioned potential jurors about the rights to strike, picket, and organize and their belief in free speech. Vanderveer, in an opening statement the IWW deemed “one of the greatest orations on the labor question” and a “virile defense” of the working class, contended that the IWW distributed literature on sabotage not to endorse it, but to exercise free speech and inform debate. He requested a jury instruction on the First Amendment on the theory that the jurors might find most of the evidence against the IWW, which consisted of its publications, incapable of being the basis of a crime. And at sentencing, individual defendants insisted that “I was found guilty for something what I consider I was exercising my rights – to resent or criticize any act by any official. That is all.”

On appeal, however, the Fourth Amendment took center stage. While the lawyers prepared the IWW defendants’ appeal, the Supreme Court issued its first Espionage Act decisions.

78 [GDC 2/21/18]
79 [Miners Def News Bull 5/4/18; see also DB 5/1/18; DB 4/26/18
80 [DB 6/25/18] Historians debate whether the IWW’s promotion of sabotage was largely rhetorical or actionable. Compare Dubofsky, We Shall Be All, 162-63 (contending that the IWW practiced property destruction and violence if anything less than AFL unions) with Rebecca H. Lossin, The Point of Destruction: Sabotage, Speech, and Progressive Era Politics (Columbia U. Diss 2020), 5-7, 10-11 (arguing historians are wrong to dismiss sabotage as a “minor and purely rhetorical aspect of the I.W.W.’s organizing strategy”).
82 Weinrib, Diss, 153-54.
83 [8/30-31/18, U.S. v. Haywood, Trial Transcript, Folder 6, Box 118; Subseries VB: Trials—U.S. vs. Haywood et al.; Series V: Legal Problems, Trials and Defense; Accession No. 130; Industrial Workers of the World Collection; Wayne State University Labor History Archives; Detroit, Mich., 28 (testimony of X). See also ibid. at 93, 111, 120.]
unanimously upholding the conviction of labor radicals.\textsuperscript{84} While the Court recognized that the defendants’ speech might have been protected had it occurred in peacetime, the Court ruled that the wartime context placed it outside the First Amendment’s freedoms.\textsuperscript{85} This likely explains why the IWW defendants largely dropped that aspect of their appeal and highlights how the Fourth Amendment became the only available constitutional route for protecting the IWW and other radicals from lengthy sentences for their speech.\textsuperscript{86} For the Haywood defendants, in other words, the Fourth Amendment became not only a substrata but also a backdoor to protecting the First Amendment rights.

The two sides’ arguments over “the warrant point” consumed hundreds of pages in the appellate court briefs but they boiled down to a few contentious issues. One of the least was whether the warrants used in the September 5th raids were legally sufficient. According to the defendants, they were unlawful because the warrants, and the affidavits on which they were based, did not describe the property to be searched for and seized. Instead, the defendants charged, the government “set out upon a fishing expedition,” siphoning up evidence that it then “submitted to the grand jury as the basis of the indictment.”\textsuperscript{87} This “amounted to conspiracy against the


\textsuperscript{85} Schenck v. United States, 249 U.S. 47, 52 (1919).

\textsuperscript{86} Later that year, Holmes and Brandeis dissented in a decision upholding Espionage Act convictions against First Amendment challenges but unlike Schenck, which, like Haywood, involved the conviction of leaders in a voluntary organization, that case involved individuals convicted for throwing two pamphlets out a window—in other words, quite different facts than in Haywood. Abrams v. United States, 250 U.S. 616, 627-28 (1919).

fundamental constitutional rights of the defendants,” Christensen and Vanderveer argued. The problem was not just that the warrants and their underlying affidavits should have set out with greater specificity what law enforcement was being authorized to search for. According to a draft law review article DeSilver shared with Christensen, numerous opinions suggested—even if they did not squarely decide—that a warrant could be “condemned solely on the ground that it is for the purpose of seeking evidence” generally, as opposed to locating an instrument of crime. The Haywood trial was unlikely to be the case to resolve this question, however, because the government all but conceded, the district court had ruled, and the appeals court had assumed that the warrants were unlawful.

The defense was also in a strong position on the government’s claim that the defendants had waived “the warrant point” by not raising it before the courts that had issued the warrants immediately after the September raids. Instead, months after the raids, the IWW was still trying to determine what exactly had been seized by the government (in part, assumedly, because the warrants and receipts were so vague). Vanderveer first raised the warrant point at the December arraignment, and did not petition for return of the illegally seized property until the following February. Further, the government argued, the Espionage Act set out a procedure for challenging a warrant issued under the Act before the judge or commissioner that issued it. Because Congress had bothered to do that, the government contended, the Act’s process was the only one available

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89 [Fraenkel, Search and Seizure at 379; DeS to OC sharing draft of Fraenkel’s article. That don’t have copy of the draft.]
90 [add cites—SCOTUS pet’n/br has DC pre-trial motion transcript re unlawfulness of warrants; Brandeis memos also quote this portion of pre-trial motion transcript; gov’t stipulation]
91 [add cite to November reports of what taken in raid]
92 [Weinrib and Dub on 4th A raised at arraignment; Taft article on pet’n for return]
to defendants. Ten years earlier, the government would have had a strong case. Before then, raising issues about warrants before a trial court (referred to as a collateral attack on the warrant court) was generally not allowed. But in the last decade, lower federal courts, and then the Supreme Court, had established that defendants could petition the trial court to return to them illegally seized property, depriving the government of the evidence needed to make out its case. According to the author of the draft law review article, after the Supreme Court “definitely established that practice” it had “since been very generally followed.”

Thus, the “warrant point” really boiled down to two hard-fought issues. The first had to do with the curability of the government’s defective warrants. Before trial, the defense filed motions to return the evidence and quash the indictments and the government moved to impound the evidence. At the hearing on those motions, the trial judge offered to sit as a warrant court and, based on a new affidavit submitted in support of the government’s motion to impound and the already seized evidence, retroactively determine whether there had been probable cause for the September raids. The defendants refused. The court then denied their motions and granted the government’s motion to impound. The government subsequently claimed that, if the warrant issue had remained live at this point, then the defense waived it by refusing the trial judge’s offer. The defendants countered that there was no support for the government’s claim that “the impounding order could in any manner purge the plaintiff’s wrongful possession of the taint of unlawful seizure.” Yet the court of appeals, while not deciding the issue, seemed to find merit in the

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93 [add cites to gov’t briefs]
94 [Fraenkel, Search and Seizure, 368.]
95 [Fraenkel, Search and Seizure, 371 (citing Wise v. Mills, 220 U.S. 549, 555 (1911) and Wise v. Henkel, 220 U.S. 556, 558 (1911). Note that this suggests, contra Seo, that Fourth A could be practically useful issue to raise prior to exclusion.]
96 [Fraenkel, Search and Seizure, 371]
government’s position when it opined that “there was a sufficient basis of facts [in the motions before the court] to justify the trial judge in finding that there was probable cause.”\textsuperscript{98} The defense was roused. Christensen, described as “phlegmatic as a rule,” incredulously charged to the Supreme Court that “the District Court could not right the Government’s wrongs by making itself a party to them.”\textsuperscript{99} Osmond Fraenkel, who had authored the draft law review article on search and seizure, agreed. Fraenkel was a rising New York attorney and Socialist Party member.\textsuperscript{100} He worried that if courts followed the Seventh Circuit and allowed seized property to cure a defect in the original warrant, it would “permit[] the government to benefit by its own wrong.”\textsuperscript{101}

The other aspect of the “warrant point” that was hotly contested was whether the warrant issue, even if not waived, was simply not the defendants’ to raise. This was the position the appeals court took in upholding the convictions, and it was one that obviated all the others.\textsuperscript{102} The government had argued that the seized material belonged to the IWW, with the defendants holding it in a representative capacity only. As a result, only the IWW’s Fourth Amendment rights were infringed by any insufficiency in the warrants. But only the individual defendants, not the IWW, had ever challenged the seizures.\textsuperscript{103} At first, Vanderveer and Christensen countered that the IWW

\textsuperscript{98} Haywood v. U.S., 268 F. 795, 801-02 (7th Cir. 1920).
\textsuperscript{100} [Fraenkel NYT obit] In 1912, he had opposed the Party’s ouster of Haywood, Foner, IWW, 409-10.
\textsuperscript{102} Haywood v. U.S., 268 F. 795, 804 (7th Cir. 1920).
\textsuperscript{103} n.d. [1919-20], “Defendant’s Reply Brief,” “Haywood Appeal Arguments and Briefs,” Item 3, Box 122, Subseries VB: Trials—U.S. vs. Haywood et al.; Series V: Legal Problems, Trials and Defense; Accession No. 130; Industrial Workers of the World Collection; Wayne State University Labor History Archives; Detroit, Mich., pp. 8-9. [check title of brief] [note this contested—defendants claimed some of them had raised Fourth A in their representative as well as personal capacity]
should be thought of as a partnership, such that each defendant had an ownership interest in all the seized property, and thus a personal Fourth Amendment protection at stake. But the appeals court rejected that conceptualization. If the government illegally seized instruments of crime used by “Burglar Smith” from the home of “Burglar Jones,” the court of appeals reasoned, “it does not follow that Burglar Smith will be heard to complain that the Fourth Amendment has been violated.” And in the court’s view, the defendants were Burglar Smiths and the IWW was Burglar Jones. 

Perhaps sensing defeat or at least unsure how to evade it, Christensen and Vanderveer did not address the issue fully in their petition to the Supreme Court. They argued that the appeals court’s application of the burglar analogy was inaccurate because the government had used evidence taken from individual defendants against them. But this really by-passed the crux of the issue, which was not in whose possession the material had been but to whom—or what—it belonged? They also argued that the analogy was inapt when the “burglars” were being tried for conspiring together, but this ignored the appeal court’s conclusion that the crucial Burglar Jones (that is the IWW) was not accused of a crime at all. Fraenkel, for one, was not hopeful. If the property belonged to the IWW, he advised the defense team, “I am afraid the court was quite right

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105 U.S. v. Haywood, 268 F. 795, 804 (7th Cir. 1920).
106 U.S. v. Haywood, 268 F. 795, 803-04 (7th Cir. 1920).
107 U.S. v. Haywood, 268 F. 795, 804 (7th Cir. 1920).
109 Petition for Writ of Certiorari and Brief in Support of Petition, Petition of Haywood, et al., Case No. 419, O.T. 1920, Supreme Court of the United States, pp. 21-22.
in holding that the individual defendants could not object to the seizure, even though the property may have been in the physical custody of some of the defendants.”

**Forging a Civil Libertarian Fourth Amendment**

Even as the defendants attempted to thread the existing rules of Fourth Amendment doctrine, they and their supporters also began to generate a new way of thinking about the Amendment. Before the appeals court, the government complained that the defendants, in making their Fourth Amendment arguments, were trying to use technicalities to escape the consequences of their guilt. The defendants countered indignantly that they were merely “seeking the preservation of their most fundamental constitutional liberties.”

Vanderveer and Christensen charged that the government’s argument, in contrast, sounded like those through which “King Phillips sought to justify the thumbscrew, the rack and the various other tortures of the Spanish inquisition.” Indeed, they observed, “[s]uch has been the plea of every tyrant from time immemorial.” The defendants were confident, however that “neither the plea of counsel [for the government] nor the autocratic abuses he seeks to excuse, can find favor with any court where constitutional rights and personal liberties are held in proper esteem.”

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to monarchy, tyranny, and autocracy and placing the defendants and their Fourth Amendment claims on the side of liberty and constitutional government, the defendants helped reconstrue the First and Fourth Amendments. For the IWW and its allies, these were increasingly seen as syncretic, not merely complementary, claims.

In legal arguments, the fusion of these concepts was perceptible, though barely so. For instance, the defendants sought to elevate the importance of their appeal because of the First Amendment issues lingering in the background. They raised before the appellate court the fact that the trial judge refused their request for a jury instruction on the First Amendment. But they did so not to appeal on those grounds but because it pointed to how the questions in their case “seem rather more serious than the questions discussed in the average criminal appeal.”115 As seen above, they set their free-speech-enhanced Fourth Amendment claims on the side of democracy and the prosecution on the side of autocracy. The defendants also insisted the court approach the Fourth Amendment like other rights. When the government made a version of the Burglars Smith and Jones argument, the defense counsel criticized its formalism, arguing that this logical exercise was “hardly the spirit in which constitutional rights should be safeguarded.”116

Outside the courts, however, the experience of the Haywood trial led to a more express and fundamental fusing of First and Fourth Amendment protections. Nowhere is this better reflected than in the trial’s shaping of the ACLU. Almost immediately after the 1917 raids, the ACLU’s predecessor organization, the NCLB, and its chairman, Roger Baldwin, got heavily involved in

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the case. Baldwin was a Harvard-educated child of the elite impassioned by radical causes. From his perch at the NCLB, he partook in ultimately unsuccessful efforts to displace Vanderveer as counsel in favor of Clarence Darrow and Frank Walsh, the nation’s two most prominent labor lawyers. He then worked closely with Vanderveer in early 1918 to try to convince President Wilson and key members of his administration to call off the prosecution. Once the case proceeded to trial, the NCLB created a pamphlet about the case, hired a “publicity man” to help secure fair news coverage of the trial, and raised bond money for the defendants while the case was on appeal. Indeed, Baldwin was so involved with the IWW defendants that the federal government intensified its surveillance of him and the NCLB, blocked his pamphlet about the case, and scared Baldwin’s allies away from supporting his work on the IWW’s behalf.

As the NCLB transitioned to the ACLU, the Haywood trial and the constitutional issues it raised shaped the organization. Initially, the NCLB’s work on the case was focused on neither the First nor the Fourth Amendment. The organization instead depicted the trial as “involv[ing] the whole question of the right of agitation” and argued that the prosecution was directed not at the IWW’s interference with the war but against “the essential operations of the I.W.W. as a labor organization.” In other words, the case was about the legality of union activity generally, not speech specifically. In its publicity about the case, the NCLB did not emphasize the First or Fourth Amendments. Instead, it spoke, if anything, in terms that evoked the Fifth Amendment’s general promise of due process. “A fair trial is an American right,” the NCLB’s first major

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117 Laura Weinrib argues that "of the many government abridgements of labor's right to organize over the course of the First World War, the NCLB considered the Chicago IWW trail to be the most troubling." (Weinrib, Taming, 84).
118 [add cites]
119 [add cites]
120 [add cites]
121 Cottrell, RNB; 65-79; Walker, In Defense, 37-39; Weinrib, Taming, 94-96.
122 Quoted in Weinrib, Taming, 87.
123 Weinrib, Taming, 95.
pamphlet about the case opened, “[e]ven the I.W.W. is entitled to one.” Still, there were hints that First and Fourth Amendment concerns were infusing the organization’s arguments for a fair trial: “[i]s there a provision anywhere in our charter law [(a reference to the Constitution)] allowing the police to suspend the rules in the case of ‘agitators,’ ‘disturbers,’ or ‘anarchists,’” the pamphlet asked. “Are there people in America whose beliefs … are so repugnant … that they may be said to have no rights?”

Over the course of the trial and appeals, Baldwin and his compatriots came to frame the case expressly as about freedom of expression and to link those freedoms with the Fourth Amendment. As early as March 1919, the NCLB issued a pamphlet titled “The Persecution of the Radical Labor Movement in the U.S.” which highlighted warrantless raids on IWW offices as an example of the movement’s “persecution” and tied these directly to the First Amendment. “Every right guaranteed by our government for the protection of freedom of opinion and utterance has been grossly violated in the case of the I.W.W.,” the NCLB decried. By the time the ACLU designed publicity for the Haywood defendants’ Supreme Court petition, it deemed theirs “The Greatest Free Speech Trial of the War” even as it identified “the chief constitutional point at issue … [as] the illegality of the search warrants under which practically all the documentary evidence was seized.”

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As the ACLU linked the First and Fourth Amendment issues in the Haywood trial, it came to see these two amendments as interconnected in a broader sense. The ACLU was founded in January 1920, while the defendants were working on their appeal. The NCLB had been a wartime organization focused on freedom of conscience and of opinion. Now, it was “completely reorganizing [its] work … to aid in the present struggles of labor for the freedom of speech, press and assemblage.”\textsuperscript{129} As reflected in the principles the ACLU adopted in the following months, it saw Fourth Amendment rights as integral—and integrated—into this fight “for civil liberty in the industrial struggle.”\textsuperscript{130} The ACLU’s first four principles addressed freedoms of speech, press, and assemblage and the right to strike that was “embodied in our constitutional law and Anglo-Saxon tradition.”\textsuperscript{131} The fifth insisted that these protections apply to “law enforcement,” whether constituted by “public officials, employes [sic] of private corporations, [or] leaders of mobs.”\textsuperscript{132}

And the sixth guiding principle? Titled “Search and Seizure,” it directly linked that issue to the protection of the aforementioned freedoms.\textsuperscript{133} “It is the custom of certain federal, state and city officials, particularly in cases involving civil liberty,” the ACLU observed, “to make arrests

\textsuperscript{129} 12/29/19, L. Hollingsworth Wood, Chairman, Norman Thomas, Vice Chairman, Albert De Silver, Director, Roger Baldwin, Directing Committee, National Civil Liberties Bureau to FF, “American Civil Liberties Union, 1919-1934,” Folder 14, Reel 76, Felix Frankfurter Papers, Manuscript Division, Library of Congress, Washington, D.C.

\textsuperscript{130} 12/29/19, L. Hollingsworth Wood, Chairman, Norman Thomas, Vice Chairman, Albert De Silver, Director, Roger Baldwin, Directing Committee, National Civil Liberties Bureau to FF, “American Civil Liberties Union, 1919-1934,” Folder 14, Reel 76, Felix Frankfurter Papers, Manuscript Division, Library of Congress, Washington, D.C.

\textsuperscript{131} Enclosed in 5/24/20, Harry F. Ward to Members of the National Committee, Correspondence—Organizational Matters, Volume 120, Sub-Series 18: Organizational Matters—Correspondence, 1917-1951, Subgroup 1, The Roger Baldwin Years, 1912-1950, American Civil Liberties Union Records, Mudd Library, Princeton University, Princeton, N.J., 1-2.

\textsuperscript{132} Enclosed in 5/24/20, Harry F. Ward to Members of the National Committee, Correspondence—Organizational Matters, Volume 120, Sub-Series 18: Organizational Matters—Correspondence, 1917-1951, Subgroup 1, The Roger Baldwin Years, 1912-1950, American Civil Liberties Union Records, Mudd Library, Princeton University, Princeton, N.J., 2.

\textsuperscript{133} Enclosed in 5/24/20, Harry F. Ward to Members of the National Committee, Correspondence—Organizational Matters, Volume 120, Sub-Series 18: Organizational Matters—Correspondence, 1917-1951, Subgroup 1, The Roger Baldwin Years, 1912-1950, American Civil Liberties Union Records, Mudd Library, Princeton University, Princeton, N.J., 2.
without warrant, to enter upon private property, and to seize papers and literature without legal process.” Ensuring Fourth Amendment protections, for the newly minted ACLU, was a way to defend those liberties. “Officials so violating constitutional guarantees” against unlawful search and seizure, it advised, “should be proceeded against.” In 1921, when the ACLU issued a pamphlet, “The Fight for Free Speech,” setting out the new organization’s agenda, it included this Fourth Amendment-inspired principle along with the others.

Thus, by the time the Haywood defendants petitioned the Supreme Court for review, the budding civil liberties movement and the lawyers that served the radicals and laborites it sought to protect had fused the First and Fourth Amendments. The Fourth Amendment, in their view, provided essential protection to purveyors of disliked opinions. Meanwhile, the First Amendment values those agitators advanced elevated their Fourth Amendment claims above those of the average criminal. This was a version of Fourth Amendment rights infused with the goals of the First Amendment, even as speech freedoms became linked to the protections associated with the Fourth Amendment.

The Dangers of Fusing the First and Fourth Amendments

On its face, the Court’s opinion in Gouled v. United States, issued just days after the Haywood defendants filed their petition, seemed auspicious. “It would not be possible to add to the emphasis with which the framers of our Constitution and this Court,” Justice Clarke opined,

134 Enclosed in 5/24/20, Harry F. Ward to Members of the National Committee, Correspondence-Organizational Matters, Volume 120, Sub-Series 18: Organizational Matters—Correspondence, 1917-1951, Subgroup 1, The Roger Baldwin Years, 1912-1950, American Civil Liberties Union Records, Mudd Library, Princeton University, Princeton, N.J., 2.
135 Enclosed in 5/24/20, Harry F. Ward to Members of the National Committee, Correspondence-Organizational Matters, Volume 120, Sub-Series 18: Organizational Matters—Correspondence, 1917-1951, Subgroup 1, The Roger Baldwin Years, 1912-1950, American Civil Liberties Union Records, Mudd Library, Princeton University, Princeton, N.J., 2.
“have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed” by the Fourth Amendment. 137 “Such rights … are to be regarded as of the very essence of constitutional liberty,” Clarke advised, and their guaranty is “as important and as imperative as are the … other fundamental rights of the individual citizen.” 138 As a result, Clarke reasoned, “they should receive a liberal construction” to prevent their erosion by courts or “well intentioned, but mistakenly overzealous, executive officers.” 139 Despite this promising language, however, there were reasons to be concerned. The very interrelationship of First and Fourth Amendment claims that civil libertarians embraced might threaten rather than bolster the Haywood defendants’ chances before the Court.

Circa the Haywood defendants’ cert petition, the Supreme Court protected the Fourth Amendment far more robustly than it did the First Amendment. The federal courts were still relatively new to reviewing the constitutionality of the executive branch’s actions. 140 Since they began doing so, a good amount of the review that had occurred addressed the Fourth Amendment. Nonetheless, the caselaw was still slim. Osmond Fraenkel’s article on the law of search and seizure exemplified this fact, citing many cases interpreting state as opposed to federal search and seizure protections. 141 But in those decisions that existed and as seen in Gouled, the Court seemed solicitous toward those seeking Fourth Amendment protections, steadily expanding who and what was protected. 142 In those cases, the defendants were corporations facing investigation or people accused of postal crimes or defrauding the government, however. The Haywood defendants were hoping the Court would liberally construe the Fourth Amendment when it came to them too.

140 [Lee, Our Administered Constitution]
141 [Fraenkel, Search and Seizure]
142 [Hale v. Henkel, Weeks, Silverthorne, e.g.]
They were not helped by the fact that no one involved knew much about litigating before the Supreme Court.\textsuperscript{143} The ACLU, with its connections to civil liberties-minded lawyers, investigated the matter for Christensen, who took the lead in drafting the defendants’ brief. Roger Baldwin, who was not a lawyer, advised Christensen to submit his petition to Justice Louis Brandeis, because he had opposed the IWW prosecutions when they were first announced.\textsuperscript{144} Unfortunately, this was not actually an option. DeSilver, though a lawyer unlike Baldwin, had never practiced before the Supreme Court. He was surprised to learn that Christensen and Vanderveer would have to file their brief along with their petition, and that there would be no opportunity for oral argument or supplemental briefing. That brief, he warned Christensen, “is the only shot you have and you must say everything you have to say in support of the application.”\textsuperscript{145} The ACLU also tried to recruit a “head-line lawyer” to sign on to the brief, only to learn that none would join if they had not in fact had a hand in writing the brief.\textsuperscript{146} Baldwin next asked Harvard Law Professor Felix Frankfurter to write an article on the case in the \textit{New Republic} as a “way to get the case to the attention of those liberal minds of the Supreme Court.”\textsuperscript{147} Frankfurter responded that publicity was not likely to be an effective (or proper), way “to direct attention … to an application for certiorari,” which, he assured Baldwin, received the Court’s careful attention as a matter of course.\textsuperscript{148}

In addition, the minds of the Supreme Court’s justices were not seeming very liberal when it came to Espionage Act defendants. As described above, in the first Espionage Act cases the Court decided, its most liberal justices disappointed civil libertarians. They not only joined but, in

\textsuperscript{143} This unfamiliarity supports Laura Weinrib’s argument that the early ACLU did not see the courts as a major, let alone primary, target for its advocacy. Weinrib, Taming, X.
\textsuperscript{144} 10/6/20 RB to GDC.
\textsuperscript{145} 11/18/20 DeS to OC.
\textsuperscript{146} 12/17/20 RB to OC (“headline”); 12/17/20 RB to Allinsen. In
\textsuperscript{147} 1/6/21 RB to FF.
\textsuperscript{148} 1/8/21 FF to RB.
Justice Holmes’s case, authored the opinions upholding the conviction of Socialist Party leaders and publishers of a radical newspaper.\textsuperscript{149} That the Court’s March 1919 decisions rejected the defendants’ First Amendment claims has been most remarked by historians.\textsuperscript{150} But one of the decisions, \textit{Schenck v. United States}, also boded ill for the IWW defendants’ opportunity to make use of a Fourth Amendment backdoor. \textit{Schenck}, like \textit{Haywood}, involved a Fourth Amendment challenge to a search of the Socialist Party’s Philadelphia headquarters and the use of the seized Party records to convict the defendants.\textsuperscript{151} The Court easily rejected that claim. Aspects of the case were distinguishable. For instance, the Court described the search warrant as “valid so far as appears.”\textsuperscript{152} But the Court observed that “[t]he search warrant did not issue against the defendant, but against the Socialist headquarters . . . and it would seem that the documents technically were not even in the defendants’ possession” (even though taken from his office).\textsuperscript{153} More generally, \textit{Schenck} suggested that Espionage Act cases might be excepted from the Court’s ongoing expansion of Fourth Amendment protections.

Perhaps it was all to the best, then, that the Court quickly denied the Haywood defendants’ petition.\textsuperscript{154} That left dozens of them in Leavenworth prison to wage a dozen-year campaign for a presidential pardon.\textsuperscript{155} At the same time, however, this outcome prevented the war’s minimizing of radicals’ First Amendment rights from bleeding into the Supreme Court’s Fourth Amendment

\begin{itemize}
\item \textsuperscript{149} Schenck v. United States, 249 U.S. 47, 53 (1919); Frohwerk v. United States, 249 U.S. 204, 206 (1919); Debs v. United States, 249 U.S. 211, 215 (1919).
\item \textsuperscript{150} [add cites to historiography]
\item \textsuperscript{151} Schenck v. United States, 249 U.S. 47, 50 (1919).
\item \textsuperscript{152} Schenck v. United States, 249 U.S. 47, 50 (1919).
\item \textsuperscript{153} Schenck v. United States, 249 U.S. 47, 50 (1919).
\item \textsuperscript{154} Haywood v. United States, 256 U.S. 689 (1921).
\end{itemize}
On reviewing the Haywood defendants’ petition, Justice Brandeis hinted at this potential. Brandeis’s report on the case observed that “constitutional rights should not be frittered away by such technical arguments” as whether “the government has the right to seize without search warrant papers in one’s possession simply because the legal title to them is in another.” That was “unless the fourth amendment is to be made as empty as the first.” There is no record of the justices’ vote on whether to grant review. Perhaps not enough of them felt the need to prevent the frittering caused by the appeals court’s opinion. Indeed, maybe those who agreed with Brandeis’s report found it better to leave the frittering with the imprimatur of an appeals court rather than risk elevating it to Supreme Court doctrine. The Court’s denial of review thus may have saved the Fourth Amendment from being watered down by its newfound connections to the First Amendment. Those connections, however, would endure outside the courts as civil libertarians and labor radicals faced a new wave of peacetime repression.

**Fourth Amendment Civil Liberties Outside the Court and Beyond Free Speech**

“Raid! Raids!! Raids!!!” screamed a circular Haywood sent out in the first days of January 1920. “While the civilized world was extending happy New Year’s greetings,” Haywood told Baldwin, “the man-hunters of … the Department of Justice … started their merciless raids.”

Now, “telegrams are coming in from all parts of the country telling of” offices smashed, literature

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157 According to Brandeis’s biographer, he reviewed and decided all petitions for certiorari himself. Melvin Urofsky, “Louis D. Brandeis and His Clerks,” University of Louisville Law Review 49, no. 2 (2010): 163-184, 171. That said, I cannot be sure that his report on the case was written by him as opposed to his clerk, Dean Acheson.
seized, and members beaten and thrown in jail.\textsuperscript{162} In lieu of a search warrant, one story went, an officer offered his fists.\textsuperscript{163} World War I’s end did not ease the federal government’s war on labor radicals. In 1918 Congress enacted a law that made immigrants’ advocacy of the overthrow of the U.S. government (including by membership in organizations deemed to so advocate) grounds for deportation or exclusion from the United States.\textsuperscript{164} Immigration officials steadily rounded up immigrants, who were well represented in the IWW, for deportation under this so-called Alien Act. Vanderveer, frustrated by representing the many Wobblies caught up in these sweeps one-by-one, penned an incendiary article advising the government’s targets to take a vow of silence if questioned or detained by the authorities.\textsuperscript{165} The government’s turn to the New Year’s raids, and their often warrantless searches for evidence of membership in prohibited organizations, was spurred in part by the effectiveness of Vanderveer’s advice.\textsuperscript{166} But this time the IWW was not alone in the government’s cross-hairs; the so-called “Palmer raids” (so named for their leader, Attorney General A. Mitchell Palmer), also grabbed “a large number of Communist Party … and other radical elements,” Haywood informed Baldwin.\textsuperscript{167} The peacetime raids outraged a wider circle of legal elites than the Haywood trial, spreading the intersectional understanding of the First and Fourth Amendment it forged to an expanding civil liberties movement.

\textsuperscript{165} Preston, A&D, 196-97, 215.
\textsuperscript{166} Preston, A&D, 217-19.
\textsuperscript{167} 1/10/20 Haywood to Baldwin, Correspondence-Cases by State: Illinois, Indiana, Iowa, Kansas, Volume 136, 1919-1921, Sub-Series 21: States – Correspondence, 1917-1950, Subgroup 1, The Roger Baldwin Years, 1912-1950, American Civil Liberties Union Records, Mudd Library, Princeton University, Princeton, N.J. For histories of the Palmer raids, see Salyer (emphasis on immigration); Preston, add cites]
Likely the most influential response was a report published in May 1920 by an organization called the National Popular Government League. Less well-known than the ACLU, the League had spent the last decade promoting state-level political reforms said to enhance democracy, such as the voter initiative and referendum. In 1920, however, it turned its sights on Washington, D.C. and to the fight for civil liberties. The League’s leader, Judson King, had a knack for publicity. He recruited an impressive group of legal luminaries to co-author the report, including prominent legal academics such as Ernst Freund of the University of Chicago as well as Harvard’s Dean Roscoe Pound and rising stars Felix Frankfurter and Zechariah Chafee. The report received national news attention, reprints by the ACLU among other organizations, and “requests … for copies all the way from members of the U.S. Supreme Court to a prisoner in the Leavenworth penitentiary.”

Attorney General Palmer only extended interest in the report when he decried it during testimony in Congress later that summer. His spat with the authors led to a Senate investigation of their findings, replete with extensive hearings and dueling reports.

The NPGL report further promoted civil libertarians’ fusion of the First and Fourth Amendments. On its face, the NPGL report disentangled the First and Fourth Amendment concerns raised by the Palmer raids, targeting the latter only. The report set aside “any question as to the Constitutional protection of free speech and a free press,” instead focusing its fire on the government’s infringement of the Fourth Amendment’s warrant requirements, the Fifth Amendment right against self-incrimination, and the Eighth Amendment’s guarantee against cruel

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170 6/3/20 Hale to signers; 6/18/20 JK to Ch.
and unusual punishment. But as the report’s fallout percolated through Congress, the authors revealed that their criminal procedure concerns were connected to and heightened by First Amendment freedoms. According to King, a group of “reactionaries” in Congress, with ties to “the Morgan interests and all the big business groups” were preparing a slate of bills to outlaw seditious speech. An NPGL ally in the Senate approached King about proposing counter-legislation that would criminalize federal officers’ violation of the public’s “civil liberty rights.” King set about recruiting some of the report’s authors to draft the bill. They also called for such a law when, in January 1921, they sent the Senate investigators a brief answering Palmer’s critique of their report. The NPGL bill emphatically linked Fourth Amendment and First Amendment rights. The bill created civil and criminal penalties for any federal officer who interfered with the free exercise of the public’s constitutional rights. King asked the report’s authors whether it should make clearer that it was “free speech legislation.” In special sections, the bill singled out for punishment officers who interfered with the speech rights of those advocating changes to United

States law. But it also penalized officers who conducted unwarranted searches of such advocates’ “house, office, room or other premises.”

The raids also brought the connections between the First and Fourth Amendments into sharp relief for one of the report’s authors, Zechariah Chafee. Chafee was unlike his academic co-authors. Freund, Frankfurter, and Pound had heated disagreements about how to legally structure and control the administrative state but they were all tried and true Progressives, committed each in his way to social and political reform. They also rejected the dominant method of legal instruction, in which legal rules were derived from close study of cases alone. Instead, they each saw the law as embedded in social, political, and economic context and insisted that legislation and administration were as important subjects of law as courts’ common law decisions. Chafee shared none of these priors when he joined Harvard’s law faculty in 1916. A blue-blood who had previously worked for his family’s lucrative iron foundry, historians describe Chafee as a “Reluctant Libertarian.” A “believe[r] in making money” and scholar of financial instruments, Chafee became interested in the First Amendment during the war, publishing a pioneering law

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179 For their conflicts, see Ernst, Tocqueville’s Nightmare, chap. 1, 107-15.

180 Horwitz, Transformation of American Law, 1870-1960, 34; Parrish, Frankfurter and His Times, 64-65. This characterization is only partially true of Freund, who studied legislation and administrative law, but with the taxonomic methods of what Horwitz terms “Classical Legal Thought.”

review article on “Free Speech in Wartime” in 1919. The article focused strictly on how the government’s wartime Espionage Act prosecutions threatened free speech, however.

The Palmer raids not only turned Chafee into a more committed civil libertarian; they also convinced him that protections against unlawful searches were part of the law of “free speech.” A federal district court judge asked Chafee and Frankfurter to serve as amicus curiae for the habeas petitions of 14 Boston-area residents ordered deported as a result of the Palmer raids. The hearings in Colyer v. Skeffington unearthed rampant Fourth Amendment abuses, leading the presiding judge to cancel the deportations of 10 of the petitioners in part because he “doub[ed] whether a single search warrant was obtained or applied for.” The experience led Chafee and Frankfurter to join the NPGL report and left its mark when Chafee developed his law review article into a book, Freedom of Speech, later that year. Chapters 5 and 6, which were his newest work and addressed the Palmer raids and postwar raids by New York state officers, put warrantless searches front and center. Indeed, Chafee argued that the “absence of search-warrants in the recent deportation round-ups [i.e. Palmer raids] … should not only result in the release of most of the aliens, but subject the members of the Department of Justice, including Attorney General Palmer” to civil damage actions.

The view that the First and Fourth Amendment were interlinked cropped up in other locations as well after the Palmer raids. A Montana Wobbly who had been arrested after a

183 Smith, Zechariah Chafee, 45-46.
186 Zechariah Chafee, Freedom of Speech (Harcourt, Brace and Howe, Rahway, NJ: 1920), 241-47 (describing Palmer raids) and 294-310 (examining John Wilkes’ fight against unreasonable searches and seizures and its relevance to contemporary efforts to suppress speech).
warrantless and violent raid on an IWW meeting sought a writ of habeas corpus. The federal judge hearing his petition accused the federal agents of “perpetrat[ing] a reign of terror, violence, and crime against citizen and alien alike, whose only offense seems to have been peaceable insistence upon and exercise of a clear right.”188 A socialist attorney representing another deportee raised First and Fourth Amendment challenges in a brief to an immigration inspector, urging him not to allow the government to “ride[] rough-shod over the constitutional rights and guarantees that are the very bed-rock of our government.”189 An interfaith group’s report on the suppression of a major steel-industry strike similarly interwove the speech and criminal procedure violations involved, observing that both were widely perceived to have a singular purpose: to “break strikes.”190

But whereas previously the Fourth Amendment was depicted as a critical support to First Amendment rights, now the focus at times flipped, with speech suppression described as a threat to Fourth Amendment rights. After joint local and federal raids on Communists in New York, Osmond Fraenkel, author of the 1921 article on the law of search and seizure, joined the ACLU’s counsel in moving to dismiss the criminal charges. They argued that the local court should follow the precepts of the Fourth Amendment. “In the last five years,” they explained, “our government has enormously extended the range of its censorship over individual conduct,” including regarding “speech and writing,” as was the case here.191 “[T]here has been a corresponding increase in administrative attacks upon our historical liberties,” such as the protection against unlawful

188 Ex parte Jackson, 263 F. 110, 112 (D.C. Mont. 1920). An unpublished copy of this opinion was also included in the NPGL report.
searches and seizures, they continued.\textsuperscript{192} “[A]s long as police officers are able to profit—i.e., secure convictions—by such methods,” the lawyers warned, “they will continue to invade the privacy of the home with-[*]out warrant or authority.”\textsuperscript{193}

Civil libertarians also came to express First and Fourth Amendment infringements as examples of a larger threat of government lawlessness, one not limited to or defined by any one amendment. During the wartime crackdown on the IWW, the government described the Wobblies as “lawless.”\textsuperscript{194} After the Palmer raids, the broadening civil liberties movement turned that epithet back on the government. When King recruited authors to draft legislation and testify at the Senate hearing, he insisted the nation needed “a distinguished group of men, outside the ranks of the reds and radicals, … [to] protest[] against the government itself becoming the law breaker.”\textsuperscript{195} Elsewhere, he described the Senate hearings as an “inquiry into Palmer’s lawlessness.”\textsuperscript{196} The NPGL report’s authors warned Congress that if it left the raids unrebuked, it risked “creat[ing] an impression among [government] officers … that they are not bound to observe the law and

\textsuperscript{192} n.d. [8/21], Memo in Support of Def.’s Motion to Dismiss the Indictment, New York v. Seibart et al., Correspondence-Cases by State: Nebraska, New Jersey, New Mexico, New York, Volume 184, 1921, Sub-Series 21: States – Correspondence, 1917-1950, Subgroup 1, The Roger Baldwin Years, 1912-1950, American Civil Liberties Union Records, Mudd Library, Princeton University, Princeton, N.J., 30.

\textsuperscript{193} n.d. [8/21], Memo in Support of Def.’s Motion to Dismiss the Indictment, New York v. Seibart et al., Correspondence-Cases by State: Nebraska, New Jersey, New Mexico, New York, Volume 184, 1921, Sub-Series 21: States – Correspondence, 1917-1950, Subgroup 1, The Roger Baldwin Years, 1912-1950, American Civil Liberties Union Records, Mudd Library, Princeton University, Princeton, N.J., 30-31.

\textsuperscript{194} 5/9/18, Daily Bulletin, No. 25, Folder 35, Box 123; Subseries VB: Trials—U.S. vs. Haywood et al.; Series V: Legal Problems, Trials and Defense; Accession No. 130; Industrial Workers of the World Collection; Wayne State University Labor History Archives; Detroit, Mich. (describing prosecution strategy at trial). See also 1/9/18, Clabaugh, BoI Division Superintendent, to Beilaski, Chief BoI, Image 552-53, Item 6, Reel 9, Department of Justice Investigative Files, Part I: The Industrial Workers of the World, No. 5863, Kheel Center for Labor-Management Documentation and Archives, Cornell University Library, Ithaca, N.Y. (accusing Vanderveer of having “encouraged a psiriti of lawlessness”).

\textsuperscript{195} 12/21/20, King to Chafee, Folder 1, Box 29, Zechariah Chafee Papers, 1898-1957, Harvard Law School Library, Cambridge, Mass.

\textsuperscript{196} 1/26/21 King to the Committee of Twelve and All Attorneys to Whom the Bettman Draft Was Sent January 22d, “urgency memorandum,” Folder 2, Box 29, Zechariah Chafee Papers, 1898-1957, Harvard Law School Library, Cambridge, Mass.
Constitution.” King’s correspondents warned that Palmer’s raids “had increased the spirit of lawlessness [among officials] everywhere.”

Indeed, in some instances, civil libertarians disentangled the issue of lawlessness from the First Amendment altogether. During Chafee’s Senate testimony, he insisted that “[t]he issue in this case is between law and order on the one hand and on the other hand Government officials who are willing to accomplish objects which they consider desirable at the sacrifice of personal liberty and the constitution of the United States.” Distancing this threat from speech issues, Chafee warned that unless Congress condemned these methods the government would use them again.

“There is just as much opportunity for illegal acts in the enforcement of the Volstead Act[, which implemented Prohibition,] as in the deportation statute,” Chafee noted, “just as much chance for illegal arrests, illegal searches, extensive use of spies.” Similarly, when Fraenkel and the ACLU’s counsel sought to dismiss the charges against the New York Communists, they argued it was not just censorship that had increased the risk of unlawful searches. “Laws forbidding the possession of intoxicating liquor are as much a standing incitement to ill-considered invasions of the security of the individual as laws regulating speech and writing,” they warned.

As the Fourth Amendment sprang increasingly free of the First Amendment, it drew allies to the civil liberties cause who embraced the Fourth Amendment as a shield against the regulatory

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state. The NPGL’s King remained a died-in-the-wool Progressive. For him, the fight was about ensuring that the “forces of Reaction and Privilege cannot control … government” and have the “arm of the law wielded in its behalf … at American organizations of labor, of farmers, or any other effective effort at reform.” But others involved in the Senate hearings on the Palmer raids saw a different threat. For instance, Ernst Freund likened the Alien Act to the Sherman Anti-Trust law in his Senate testimony and said it should have been implemented with similar caution. “The danger from anarchistic doctrines seems remote and almost visionary,” he opined, while “the danger from undue growth of administrative power is much more real.” The state, not the Reds, in other words, was the true threat. King sought John Lord O’Brien to testify because of a speech he made criticizing the Palmer Raids. O’Brien had been at the Justice Department during the Haywood trial, and was no fan of radicals. But he joined a number of former Justice Department officials whose reaction to the raids moved them from the side of the government to that of the civil libertarians. Yet O’Brien objected to the raids not because of the speech implications per se but because they exemplified the “menace” of the administrative state writ large, which, he urged, posed a grave threat to “life and property.” The Senator who called for the investigation also felt no sympathy for radicalism, having introduced a bill to outlaw the IWW in the summer

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204 Walker, Defense 25. He also represented the government in Schenck v. United States.

205 Others included Alfred Bettman who authored the NPGL’s draft legislation and Francis Fisher Kane, on of the NPGL report’s co-authors.

of 1918.\textsuperscript{207} Now he concluded that the investigation’s findings “justify the fears the founders of our Government quite generally entertained of a highly centralized government.”\textsuperscript{208}

The Palmer raids thus shaped the civil liberties movement and the role of the Fourth Amendment within it in surprising ways. Due to the raids, the view that the Fourth Amendment played an important role in securing First Amendment freedoms would not be a wartime anomaly but would instead become a core feature of the peacetime civil liberties movement. The broad sweep of the raids and their procedural anomalies also brought people who had sided with the government during the Haywood trial under the civil liberties banner. At the same time, this expanded civil liberties movement began to delink the First and Fourth Amendments, spinning the Fourth Amendment off into an independent “civil liberty.” Shorn of its connection to the First Amendment, the Fourth Amendment attracted conservatives to the civil liberties cause and proved a useful vehicle for their opposition to Progressive-era economic regulation.

\textit{Conclusion}

The lost history of Fourth Amendment civil liberties makes several important contributions to legal and historical scholarship. First, it creates a more robust usable past for scholars concerned about the speech implications of government surveillance today. Indeed, it roots those connections in the work of one of the key progenitors of modern First Amendment theory, Zachariah Chafee, as well as early civil libertarian and future Supreme Court Justice Felix Frankfurter.\textsuperscript{209} Contemporary legal scholars writing about the intersection of the First and Fourth Amendments in the early twentieth century have emphasized the First Amendment roots of Justice Brandeis’s

\textsuperscript{207} Weinrib, Taming, 90.
\textsuperscript{208} Walsh, “Charges of Illegal Practices of Department of Justice,” Senate Report (May 1, 1922), 38.
\textsuperscript{209} I reserve exploring what new light this history casts on Frankfurter’s prioritization of Fourth over First Amendment rights in the 1940s for future work. For Frankfurter’s role in shaping civil liberties during World War I, see Jeremy Kessler, The Administrative Origins of Civil Liberties Law, Columbia Law Review, 114, no. 5 (2014): 1083-1166.
seemant Fourth Amendment dissent in *Olmstead v. United States*. Brandeis argued there that the Founders “conferred, as against the Government, the [Fourth Amendment] right to be let alone” to “protect Americans in their beliefs, their thoughts, their emotions, and their sensations.” Legal scholars today rightly note that Brandeis first insisted that a constitutionally protected zone of privacy was necessary to protect freedom of thought in his earlier First Amendment opinions stemming from the government’s postwar crackdown on radicals. As this history shows, however, those First Amendment opinions were likely themselves informed by early civil libertarians’ arguments that the Fourth Amendment formed a critical balustrade for First Amendment rights.

This history also provides a bridge between work on the early civil liberties movement and the roots of the modern carceral state. That latter work traces the law, politics, and institutions of the modern carceral state to governments’ 1920s Prohibition enforcement. The history of Fourth Amendment civil liberties casts new light on that Prohibition history, however, revealing that some of its key events were informed not only by policing Prohibition but also the earlier repression of labor radicals. Brandeis’s *Olmstead* dissent, discussed above, is a good example. For these historians, Prohibition is the relevant context for *Olmstead*. Instead, the crackdowns that largely preceded it also shaped Justice Brandeis’s First Amendment inflected approach to Fourth

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210 Richards, Brandeis, 1342; Richards, Intellectual Privacy, 410-11.
211 *Olmstead* 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)
212 Richards, Brandeis, 1340; Solove, First Amendment, 120-21. Gilbert v. Minnesota, 254 U.S. 325, 335-36 (1920) (Brandeis, J., dissenting) (contending that a state statute that “aims to prevent not acts, but beliefs” and “invades the privacy and freedom of the home” by prohibiting parents from teaching pacifism to their children, “is inconsistent with the conceptions of liberty hitherto prevailing”). Brandeis developed his concept of freedom of thought further in Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (observing, in explaining the purposes of rights to free speech and assembly, that the founders “believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth) and Schaefer v. United States, 251 U.S. 466, 495 (1920) (Brandeis, J., dissenting in part) (arguing that Espionage Act convictions “such as these, besides abridging freedom of speech, threaten freedom of thought and of belief”).
213 See sources cited above, note X.
Amendment privacy. The same can be said for the Wickersham Commission. President Hoover assembled the commission in 1929 to address a perceived breakdown in respect for the law brought on by widespread opposition to Prohibition. But the commission examined the influence of police lawlessness on the public’s disrespect as well. Generally overlooked is that the police lawlessness reports spoke as much to the outrages of the crackdown on labor radicals as to Prohibition. For starters, they were authored by Chafee and two other attorneys who had represented victims of those crackdowns. Most directly, however, one report was a case study of the crackdowns. True to Fourth Amendment civil liberties, it critiqued warrantless searches as part of a “continuous and systematic course by the prosecution, working unfairly to the disadvantage of the defendants.”

The history presented here thus invites scholars to further explore the interaction between early civil liberties and the rise of mass incarceration, and to see the shadow political repression cast over those shaping constitutional limits on the emerging carceral state.

That said, this history offers cautions as well as invitations and support to historians and legal scholars. As described above, Justice Brandeis worried in 1920 that linking the Fourth Amendment to the “empty” First Amendment risked “fritter[ing] away” the Fourth Amendment’s more robust protections. His calculation provides a warning to legal scholars that linking the expansively interpreted First Amendment today too closely with a hollowed out Fourth Amendment could serve to ratchet speech protections down, rather than privacy protections up. For legal historians, this article demonstrates that the political flexibility of civil liberties was not

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214 [Historians arguing that Prohibition focused attention on criminal procedure, determined the shape of constitutional criminal procedure, and/or led to the formation of the Wickersham Commission include McGirr, War on Alcohol, 88, 119; Oliver, Prohibition Era and Policing, 3, 5; Walker, Critical History Police Reform, 132; Post, “Federalism and Taft Court.” Sarah Seo argues that it was the automotive revolution that really transformed Fourth Amendment law but recognizes that Prohibition catalyzed the Court’s attention to criminal procedure. Seo, Policing Open Road, 73-74, 117-24, 141-42]


a product of their advocates’ New Deal-era turn to the courts. Instead, that flexibility dates to the early 1920s. Those deregulatory invocations of the Fourth Amendment also began outside the courts. This suggests that political flexibility may be inherent to civil liberties rather than result from the institution in which they are vindicated. If so, reverting to political civil liberties will merely shift the terrain of battle rather than ensure outcomes progressives seek.