



WEAPONIZED FROM THE BEGINNING

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Standard accounts of the modern First Amendment attribute its origins to a moment of hopeful discovery of the value of free speech for democratic self-government. But the reverse is also true. The modern law of speech arose simultaneous with the World War I-era realization that unregulated communication in mass society also meant propaganda, lies, and the distortion of public opinion. Key figures in the first generation of modern free speech thus treated speech freedoms as necessary but radically insufficient in the production of democratic public opinion. Intermediary institutions, they believed, shaped information flows and helped produce public opinion. Some, like Walter Lippmann, turned to the administrative state. Others, like Roger Baldwin, championed labor organizations and industrial democracy. A century later, our crisis arises in part out of attacks on the administrative state and the collapse of labor unions, which have undermined the very institutions that prescient observers a century ago believed crucial for managing distortion in the democratic public sphere.

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INTRODUCTION

Accounts of modern free speech law typically begin in a moment of pragmatic optimism about the value of free speech in a flourishing democracy. In the usual story, which Laura Weinrib helpfully calls “the myth of the modern First Amendment,” young progressives like Zechariah Chafee, Felix Frankfurter, Learned Hand, and Harold Laski draw on pragmatist philosophers like William James and Charles Pierce to persuade Justices Holmes and Brandeis of the U.S. Supreme Court that censorship was antithetical to democratic self-government.¹ Holmes announced that the production of more speech served as the best test of truth.² Brandeis, championed speech as a guarantor of democracy.³ Still others believed they had found in

¹ LOUIS MENAND, *THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA* (2002); EDMUND WILSON, *PATRIOTIC GORE: STUDIES IN THE LITERATURE OF THE AMERICAN CIVIL WAR* (1962); THOMAS HEALY, *THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA* (2013); BRAD SNYDER, *THE HOUSE OF TRUTH: A WASHINGTON POLITICAL SALON AND THE FOUNDATIONS OF AMERICAN LIBERALISM* 289–93 (2017); G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 412–54 (1993). On the mythology of this standard story, see this excellent essay: Laura Weinrib, *Rethinking the Myth of the Modern First Amendment*, in *THE FREE SPEECH CENTURY* 48–67 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019).

² RICHARD POLENBERG, *FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH* 218 ff. (1987); see also Robert C. Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2355 (2000); Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975); Fred D. Ragan, *Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919*, 58 J. AM. HIST. 24–45 (1971); David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L. J. 514, 591–94 (1981); Yosai Rogat & James M. O’Fallon, *Mr. Justice Holmes: A Dissenting Opinion—The Speech Cases*, 36 STAN. L. REV. 1349, 1386–91 (1984); see also Robert C. Post, *Writing the Dissent in Abrams*, 51 SETON HALL L. REV. 21 (2020).

³ ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* (2012); MELVIN I. UROFSKY, *LOUIS D. BRANDEIS: A LIFE* (2009); MARK A. GRABER, *TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM* (1992).

freedoms to speak a better way of managing dangerous radicalisms.⁴ Leading commentators ever since rest their accounts of the advent of free speech law on one or another variation of a new and hopeful conception of the function of speech in democracy.⁵

Strangely, something like the opposite is more accurate. The distinctive feature of the moment in which modern free speech law arose was but grave new worries about the relationship between free communication and self-government.⁶ When Holmes and Brandeis first gave voice to free speech ideas in their famous dissents in the fall of 1919 and 1920, keen observers were coming to terms with a world of distortion and misinformation. Four long years of war propaganda had shown that speech by the powerful could dangerously destabilize public opinion in ostensibly democratic societies.⁷ The return to peace, too, had been accompanied by stunning displays of communications power. Storms of racist and nativist public opinion

⁴ EDWARD A. ROSS, *SOCIAL CONTROL: A SURVEY OF THE FOUNDATIONS OF ORDER* (2017); EDWARD L. BERNAYS, *CRYSTALLIZING PUBLIC OPINION* (1923); WILLIAM S. GRAEBNER, *THE ENGINEERING OF CONSENT: DEMOCRACY AND AUTHORITY IN TWENTIETH CENTURY AMERICA* (1987); Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1083 (2014).

⁵ GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 198 ff. (2004); HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* 125–46 (Jamie Kalven ed., 1988); see also Tim Wu, *Is the First Amendment Obsolete?*, 17-01 KNIGHT FIRST AMEND. INST., Sept. 1, 2017, <https://knightcolumbia.org/content/tim-wu-first-amendment-obsolete> [<https://perma.cc/9FQ7-ND7M>] (describing the key assumptions of twentieth-century free speech law).

⁶ For suggestive essays that start down a path like this one, see Richard W. Steele, *Fear of the Mob and Faith in Government in Free Speech Discourse, 1919–1941*, 38 AM. J. LEGAL HIST. 55, 57–58 (1994); Samantha Barbas, *The Death of the Public Disclosure Tort: A Historical Perspective*, 22 YALE J. L. & HUMAN. 171, 204 & n.179 (2010).

⁷ J. MICHAEL SPROULE, *PROPAGANDA AND DEMOCRACY: THE AMERICAN EXPERIENCE OF MEDIA AND MASS PERSUASION* (1997); STEWART HALSEY ROSS, *PROPAGANDA FOR WAR: HOW THE UNITED STATES WAS CONDITIONED TO FIGHT THE GREAT WAR OF 1914–1918* (1996); CHRISTOPHER CAPOZZOLA, *UNCLE SAM WANTS YOU: WORLD WAR I AND THE MAKING OF THE MODERN AMERICAN CITIZEN* (2008).

produced a wave of postwar racial pogroms.⁸ Employer propaganda smashed postwar strikes in the steel industry and elsewhere.⁹ A generation of public relations men left war propaganda efforts, entering new industries like marketing and advertising firmly convinced by their wartime work that information was supremely susceptible to manipulation and control.¹⁰

At the beginning of modern free speech doctrine, close observers were coming to see speech as more than an indispensable foundation for democratic self-government, though it was that, too. Speech had also become—to adapt Justice Kagan’s iconic phrase from a century later—a weapon for democracy’s subversion.¹¹

Early observers of the World War I-era crisis of propaganda and misinformation did not treat it as a problem of free speech law, or not exactly. Freedom of speech in 1919 had barely been invented as a judicial doctrine; courts would not begin to protect speech against repressive laws until at least the late 1920s and 1930s.¹² Absent a First Amendment to rely on, critics and advocates turned not to free speech doctrine in the courts—or not *only* to free speech doctrine in the

⁸ WALTER JOHNSON, *THE BROKEN HEART OF AMERICA: ST. LOUIS AND THE VIOLENT HISTORY OF THE UNITED STATES* (2020); ALFRED L. BROPHY, *RECONSTRUCTING THE DREAMLAND: THE TULSA RACE RIOT OF 1921: RACE, REPARATIONS, AND RECONCILIATION* (2002); CAMERON MCWHIRTER, *RED SUMMER: THE SUMMER OF 1919 AND THE AWAKENING OF BLACK AMERICA* (2011); ROBERT WHITAKER, *ON THE LAPS OF GODS: THE RED SUMMER OF 1919 AND THE STRUGGLE FOR JUSTICE THAT REMADE A NATION* (2008); CHARLES L. LUMPKINS, *AMERICAN POGROM: THE EAST ST. LOUIS RACE RIOT AND BLACK POLITICS* (2008); MALCOLM McLAUGHLIN, *POWER, COMMUNITY, AND RACIAL KILLING IN EAST ST. LOUIS* (2005); RICHARD C. CORTNER, *A MOB INTENT ON DEATH: THE NAACP AND THE ARKANSAS RIOT CASES* (1988).

⁹ GRAEBNER, *supra* note 4; DAVID MONTGOMERY, *THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1856–1925* (1988).

¹⁰ ALAN AXELROD, *SELLING THE GREAT WAR: THE MAKING OF AMERICAN PROPAGANDA* (2009); LARRY TYE, *THE FATHER OF SPIN: EDWARD L. BERNAYS AND THE BIRTH OF PUBLIC RELATIONS* (1998); *see also* DAVID GREENBERG, *REPUBLIC OF SPIN: AN INSIDE HISTORY OF THE AMERICAN PRESIDENCY* (2016).

¹¹ *Janus v. Am. Fed’n of State, Cnty., and Mun. Emps.*, 585 U.S. 878, 955 (2018) (Kagan, J., dissenting) (“The majority . . . does so by weaponizing the First Amendment. . .”).

¹² ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* 39 (2014); Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2197–2203 (2015); Rabban, *supra* note 2, at 521; Robert C. Post, *The Classic First Amendment Tradition under Stress: Freedom of Speech and the University*, in *THE FREE SPEECH CENTURY* 106 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019).

courts—but to mediating institutions that offered bulwarks against distortions in the domain of public opinion.¹³

In what follows, I sketch the views of two key participants in the formation of the free speech tradition in America. Walter Lippmann and Roger Baldwin both began their professional lives in the first and second decades of the 20th century on the left of American politics. Each participated in the formation of the modern First Amendment tradition: Lippmann as an interlocutor in the group of progressive pragmatists around Justice Holmes and Baldwin as founder of the American Civil Liberties Union. Over the course of their long careers, the two men veered toward different positions. Lippmann would become a center-right technocrat and a skeptic of democracy's capacity to rationally manage modern social problems. Baldwin would become the nation's best-known defender of civil liberties, offering a different kind of skepticism about majority rule, one rooted in individual rights against majoritarian control. But in the immediate wake of the war, they offered overlapping and trenchant accounts of the relationship between speech and what Jürgen Habermas would later call the public sphere.¹⁴ Neither man believed that unrestricted communication flows alone would sustain a flourishing domain of public opinion. To the contrary, each man came to see that powerful interests and propaganda campaigns badly distorted the kinds of public information on which democracy depended. Despairing of a solution to the crisis of information in the modern age, Lippmann turned to neutral expertise in the administrative state. Baldwin, by contrast, believed that the labor movement offered a more promising path, one that could rescue democratic values by offering a better ecosystem for the formation of opinion on collective questions. Like many of his generation, Baldwin called this vision industrial democracy.

Both strategies held value a century ago—and still do today. Much of our difficulty with lies and propaganda in early 21st century public opinion resides precisely

¹³ For contemporary parallels, see Jack M. Balkin, *To Reform Social Media Reform Informational Capitalism*, in *SOCIAL MEDIA, FREEDOM OF SPEECH, AND THE FUTURE OF OUR DEMOCRACY* 233, 233 (Lee C. Bollinger & Geoffrey R. Stone eds., 2022) (“The problem is not First Amendment doctrines that protect harmful speech. The problem is the health of the digital public sphere[.]”); Jan-Werner Müller, *Democracy's Critical Infrastructure: Rethinking Intermediary Powers*, 47 *PHIL. & SOC. CRITICISM* 269 (2021).

¹⁴ JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* (Thomas Burger & Frederick Lawrence trans., 1991).

in the legitimacy crisis of the administrative state and the collapse of the labor movement.

Baldwin's strategy for dealing with distortion in the public sphere is less well known than Lippmann's. In some respects, however, it is more promising as a model for our current moment. Unlike Lippmann, Baldwin never made the mistake of imagining that experts could stand outside the information cycles of the societies they purport to govern. Baldwin's industrial democracy is distinctive because it is to be built on institutions that are unabashed partisans in the struggle for life and in the management of information. Labor unions are not above the fray, they are in it. They are on their members' side. They pass along information that working-class citizens in a mass society can trust because it is in their interest to do so. At the same time, labor organizations' role constrains them from certain kinds of distortions. Unions' institutional interest in preserving the firms with which they bargain tethers them to reality. Labor, in other worlds, is dependent on and invested in rival institutions in a given community. For Baldwin, the genius of industrial democracy is thus that it offers what we might call an endogenous institutional foundation for public opinion formation. Industrial democracy does not rest on the impossible Lippmannian goal of transcending clashing interests through external authority. Instead, industrial democracy makes the interests of workers central to the way information is produced and received in public life.

The stories of Lippmann and Baldwin suggest that our crisis today is not only that new speech technologies like the internet have occasioned evermore dangerous opportunities for distortion of the public sphere. Distortion predated our particular technological juncture. Nor are lies and propaganda chiefly a problem in First Amendment doctrine; they have haunted the democratic public sphere under wildly varying doctrinal regimes. Our crisis today is in large part that key mediating institutions like the administrative state and the labor movement are in decay or even catastrophic decline.¹⁵

I. LIPPMANN AND THE ADMINISTERED SOLUTION

One week after the U.S. Supreme Court decided *Abrams v. United States* in November 1919, a young Lippmann wrote to Justice Holmes.

¹⁵ See POST, CITIZENS DIVIDED, *supra* note 12; Robert C. Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477 (2011).

The Court in *Abrams* had upheld the Espionage Act and Sedition Act convictions and 20-year prison terms for five radical Russian immigrants charged with encouraging resistance to the U.S. in the First World War. Holmes had dissented, joined by Justice Brandeis, offering a view that has resonated in First Amendment decisions for a century since. The “ultimate good,” Holmes declaimed, “is better reached by free trade in ideas.” The “best test of truth,” he continued, “is the power of the thought to get itself accepted in the competition of the market.”¹⁶ Holmes’s dissent quickly garnered praise from younger jurists and political observers.¹⁷

But Lippmann disagreed. The 30-year-old journalist noted with some trepidation that he had just published a study of how public opinion is made. The article had come out in *The Atlantic* in the very same month as the *Abrams* opinion.¹⁸ And in it, Lippmann had expressed doubts that free speech rights could be explained by the pursuit of truth. “You say ‘truth is the over ground, etc., etc.,’” the younger man told Holmes. But that claim overlooked the difficult fact that institutions “block the road to truth.” Lippmann listed “the press, propaganda, and censorship.” Given what Lippmann called “men’s natural limitation in apprehending truth about society,” more speech would not inevitably produce better truths.¹⁹ Truth, as Lippmann explained at greater length in his article, “can prevail only if the facts to which they refer are known” firsthand, such that listeners are in a position to evaluate and test them. When the facts of the matter are distant, by contrast, Lippmann proposed that “false ideas are just as effective as true ones.”²⁰

Lippmann’s study, soon published as a slim but electric volume titled *Liberty and the News*, carried forward a set of ideas drawn from Graham Wallas, one of

¹⁶ *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting).

¹⁷ STONE, *supra* note 5, at 201–04; BRAD SNYDER, *HOUSE OF TRUTH: A WASHINGTON POLITICAL SALON AND THE FOUNDATIONS OF AMERICAN LIBERALISM* (2017); HEALY, *supra* note 1; JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: LAW AND THE INNER SELF* (1993); Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1 (2004); Joseph Blocher, *Free Speech and Justified True Belief*, 133 HARV. L. REV. 439 (2019); *see also* FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982).

¹⁸ Walter Lippmann, *The Basic Problem of Democracy*, *THE ATLANTIC*, Nov. 1919, at 616; WALTER LIPPMANN, *LIBERTY AND THE NEWS* 779–87 (1920).

¹⁹ Letter from Walter Lippmann to Oliver Wendell Holmes (Nov. 18, 1919), *in* JOHN MORTON BLUM, *PUBLIC PHILOSOPHER: SELECTED LETTERS OF WALTER LIPPMANN* 132–33 (1985).

²⁰ Lippmann, *supra* note 18, at 1.

Lippmann's teachers at Harvard. A British socialist, Wallas was a leading member of a far-flung group of academics and public intellectuals working on the question of public opinion in a new age of mass population and mass media. European intellectuals had begun late in the 19th century to focus attention on the ways in which unconscious suggestibility shaped collective human behavior: Gustave Le Bon studied the crowd; Gabriel Tarde described publics turned like iron filaments before a magnet; Wilfred Trotter coined the concept of the herd instinct.²¹ Variations on the idea soon appeared in the work of Norman Angell, Antonio Gramsci, and Karl Mannheim, among others.²² But Wallas conceived the problem in a distinctive way. Where Le Bon had worried about the psychology of the crowd, Wallas observed that modern society was too vast for "any considerable proportion of the citizens" to gather at any one place or time. In place of the 19th century crowd, 20th century modernity had delivered mass society. The problem, as Wallas saw it, was that the era of mass—what he called the era of "the Great Society"—entailed an unprecedented new scale of social interaction. No longer did citizens have firsthand experience of most of the issues that shaped their lives. Instead, modern stimuli came secondhand, through newspapers and other intermediaries. Symbols took the place of original stimuli to the senses. "The solidarity of a modern state,' he wrote in his 1908 book *Human Nature*, "must therefore depend on facts not of observation but of imagination."²³

Lippmann's first two books bore powerful evidence of Wallas's influence. *A Preface to Politics*, published in 1913, and *Drift and Mastery*, which came out the next year, championed political leaders who self-consciously managed populations by harnessing and channeling people's irrepressible desires, lusts, and fantasies.²⁴

²¹ GUSTAVE LE BON, *THE CROWD: A STUDY OF THE POPULAR MIND* (1896); GABRIEL DE TARDE, *THE LAWS OF IMITATION* (1962); Wilfred Trotter, *Herd Instinct and Its Bearing on the Psychology of Civilised Man*, 1 SOCIO. REV. 227 (1908); see also Richard W. Steele, *Fear of the Mob and Faith in Government in Free Speech Discourse, 1919–1941*, 38 AM. J. LEGAL HIST. 55–83 (1994).

²² NORMAN ANGELL, *THE GREAT ILLUSION: A STUDY OF THE RELATION OF MILITARY POWER TO NATIONAL ADVANTAGE* (1903); NORMAN ANGELL, *THE PRESS AND THE ORGANISATION OF SOCIETY* (1922); ANTONIO GRAMSCI, *PRISON NOTEBOOKS* (Antonio Callari ed., Joseph A. Buttigieg trans., 2011); KARL MANNHEIM, *STRUCTURES OF THINKING* (David Kettler et al. eds., 1982).

²³ GRAHAM WALLAS, *THE GREAT SOCIETY: A PSYCHOLOGICAL ANALYSIS* (1914); GRAHAM WALLAS, *HUMAN NATURE IN POLITICS* xv, 294 (1908).

²⁴ WALTER LIPPMANN, *A PREFACE TO POLITICS* (1913); WALTER LIPPMANN, *DRIFT AND MASTERY: AN ATTEMPT TO DIAGNOSE THE CURRENT UNREST* (1914).

As war neared, Lippmann viewed “the horror in Europe” and “the unreasonableness of it all”²⁵ as symptoms of a collective unconscious gone mad. Watching the pell-mell race to arms up close while living in Belgium and England in the summer of 1914, Lippmann saw the arrival of war in Europe as a mass demonstration of Wallas’s ideas about the dangerous manipulability of public opinion in the age of scale—a demonstration working itself out in a spectacularly destructive form.²⁶

Once the U.S. entered the conflict, propaganda machines sprang into motion to exploit collective unreason in American public life, too. Wilson, who had run for reelection in 1916 on the platform of keeping the country out of the war, established a Committee on Public Information, or CPI, to arouse the “ardor and enthusiasm” of the nation. George Creel, Wilson’s chairman of the CPI, had begun his career as a muckraking journalist and critic of corrupt political machines and business trusts. In 1912, he had become police commissioner in Denver, where he became well known for, among other things, the ingenious strategy of allowing the ordinarily disruptive free speech fights of the Industrial Workers of the World to go forward unimpeded. (“Go ahead boys,” Creel slyly told the radical labor union’s startled leaders, “speak as much as you like.”²⁷) In the election campaign of 1916, Creel had slipped seamlessly into a new role as a public relations man for Wilson’s second term. In his public relations campaign for the CPI, Creel distributed 75 million pamphlets, published a daily newspaper, issued press releases and weekly digests, and produced material for distribution in the nation’s schools. The CPI’s Speaking Division coordinated events for 10,000 speakers in support of the war effort, including the famous “Four Minute Men,” who spoke in moving picture houses at the beginning of shows. By the end of the war, the CPI had delivered three-quarters of a million four-minute speeches before audiences three times the size of the American population.²⁸

War drew Lippmann into the propaganda business, too. Though he disdained Creel’s crude methods and huckster attitude, and despite his initial skepticism of

²⁵ WALTER LIPPMANN, *PUBLIC PHILOSOPHER: SELECTED LETTERS OF WALTER LIPPMANN 19–20*, 28 (John Morton Blum ed., 1985).

²⁶ RONALD STEEL, *WALTER LIPPMANN AND THE AMERICAN CENTURY* (1981).

²⁷ WILLIAM D. HAYWOOD, *BILL HAYWOOD’S BOOK: THE AUTOBIOGRAPHY OF WILLIAM D. HAYWOOD* 276 (1929).

²⁸ AXELROD, *supra* note 10, at 119–20; GEORGE CREEL, *COMPLETE REPORT OF THE CHAIRMAN OF THE COMMITTEE ON PUBLIC INFORMATION* 21–33 (1920).

the war effort itself, Lippmann was swept up into the wartime Wilson administration. In the summer of 1918, he traveled to the western front with a team of military propagandists. Stationed along the trenches at a town called Saint-Mihiel along the Meuse River, Lippmann and his team men printed messages appealing to German soldiers and urging them to surrender. Military historians typically credit the victory at Saint-Mihiel to the young commander of American forces, a colonel named George Patton, who successfully deployed a squat new military vehicle called the tank. But Lippmann came away convinced more than ever of the power of public relations.²⁹

* * *

Wartime propaganda efforts inspired Lippmann to study public opinion more systematically. Lippmann set out in particular to make sense of the structure of the public domain by investigating how newspapers and magazines conveyed information about public affairs.

Lippmann's first article, titled *The Basic Problem of Democracy*, anticipated Holmes's *Abrams* dissent—and offered stinging critiques of its theoretical basis and its practical value. There were, to be sure, “traditional liberties of speech and opinion,” Lippmann wrote, even if the courts declined to enforce them. But the supposed position of neutrality toward the content of political speech was a false start, Lippmann insisted. Lippmann called it “the notion of indifference”: the idea held that the law could adopt a bloodless neutrality as to speech on the critical questions of public life. But indifference, he concluded, was “too feeble and unreal a doctrine to protect the purpose of liberty.” The crucial questions of human life, whether they were about existence of God or the morality of war, could never be objects of indifference or neutrality. Insisting on individual rights to dissent on such questions distracted citizens from the forces that were pervasively shaping the foundations of public opinion. The “time and energy that should go to building and restoring” democratic life were instead being “consumed in warding off the pinpricks of prejudice and fighting a guerilla war against misunderstanding and intolerance.”³⁰

²⁹ HEBER BLANKENHORN, *ADVENTURES IN PROPAGANDA: LETTERS FROM AN INTELLIGENCE OFFICER IN FRANCE* (1919); STEEL, *supra* note 26.

³⁰ Lippmann, *supra* note 18.

As Lippmann conceived it, the most important questions about communication in the public sphere were about the institutional structure of political communication, not about individuals' free speech rights. Leaning heavily on Wallas, Lippmann observed that in the modern world, news came "from a distance." Electorates relied on "catchwords and headlines" to form opinions on even the gravest matters of public import. But having thus "lost their grip upon the relevant facts of their environment," Lippmann continued, the inhabitants of a mass society were exceedingly vulnerable to quacks, charlatans, and worse. They could be made to believe, he said, "whatever fits most comfortably with their prepossessions."³¹ Commercially funded publications catered to existing biases and entrenched beliefs—or, which was worse, pushed new biases and beliefs that could be exploited in the marketplace. Either way, the chances that more robust communication flows would yield truths about important public questions in large-scale mass society were dim indeed. Perhaps free speech rights might root out the crudest censorship. But Lippmann asserted that protection against the heavy hand of the state was hopeless in light of the "real censorship" produced by the brute fact of the institutional structures mediating information. The high cost of transmitting news over the wires, for example, was simply more important in shaping the public sphere than the right to speak or the lack thereof. Barriers to entry into the column inches of widely read newspapers and magazines mattered more than free speech claims.³²

Lippmann was skeptical of free speech in 1919 for at least one more reason. As a Wilson administration insider, he understood that freedom of expression was not only a rallying cry of the resisters to the war. It was also a strategy adopted by key Wilson administration insiders, of whom Lippmann was one. In *Preface to Politics*, published in 1914, Lippmann had praised innovative statesmen who aimed not to stifle their subjects' interests but instead to redirect them. Creative statesmen, he observed, allowed dissidents to give speeches on the city streets—and thereby stripped them of their martyr status.³³ Well-placed figures in the administration agreed. Wilson's friend Arthur Bullard persuaded the president to reject the Army's general plan for a comprehensive system of wartime censorship (the plan had been written by Douglas MacArthur) on the grounds that censorship would

³¹ *Id.* at 624.

³² *Id.* at 622.

³³ LIPPMANN, *supra* note 24, at 50.

“impede the mobilization of popular opinion,” which was the real imperative for the homefront.³⁴ Secretary of War Newton Baker concurred, as did Secretary of the Navy Josephus Daniels, the influential Assistant Secretary of Labor Louis Post, and a youthful War Department administrator named Felix Frankfurter.³⁵ Over at the CPI, George Creel drew on his experience as police commissioner during the Industrial Workers of the World’s (IWW’s) free speech fights in Denver to argue that suppressing dissident speech was almost always “criminally stupid.” Allowing the Wobblies to speak had defanged their martyrdom tactics and made plain the unpopularity of their views. Creel now advocated a similar stance on antiwar speech. He openly criticized Espionage Act prosecutions, called Attorney General Thomas Gregory “a vicious old reactionary,” and was barely on speaking terms with the heavy-handed Postmaster General Albert Burleson. What the war effort needed, Creel believed, was not censorship, but instead the CPI’s affirmative strategy to “mobilize the mind of the world” and win the “verdict of mankind.”³⁶

Journalists friendly to the administration at The New York Times and The (New York) World concurred in Creel’s judgment about the value of speech for the war effort. Open communication, they contended, was actually one of the chief advantages of the U.S. over the German enemy.³⁷ John Dewey said the same thing from time to time, as did leading legal scholar Ernst Freund.³⁸ Upton Sinclair piped

³⁴ Stephen Vaughn, *First Amendment Liberties and the Committee on Public Information*, 23 AM. J. LEGAL HIST. 95 (1979); Memorandum on Censorship from Arthur Bullard ([n.d.]) (in group no. 466, ser. No. III, box 185, folder 1/220 of the Papers of Colonel E. M. House, Sterling Library Manuscript and Archives, Yale University).

³⁵ DONALD JOHNSON, *THE CHALLENGE TO AMERICAN FREEDOMS: WORLD WAR I AND THE RISE OF THE AMERICAN CIVIL LIBERTIES UNION* 26–54 (1963); JAMES R. MOCK & CEDRIC LARSON, *WORDS THAT WON THE WAR: THE STORY OF THE COMMITTEE ON PUBLIC INFORMATION, 1917–1919*, at 49–50 (1939); BRAD SNYDER, *DEMOCRATIC JUSTICE: FELIX FRANKFURTER, THE SUPREME COURT, AND THE MAKING OF THE LIBERAL ESTABLISHMENT* (2022); Kessler, *supra* note 4.

³⁶ GEORGE CREEL, *HOW WE ADVERTISED AMERICA* xiii, 4 (1972).

³⁷ Frank L. Cobb, *The Press and Public Opinion*, NEW REPUBLIC, Dec. 31, 1919, at 144; Arthur S. Link, *That Cobb Interview*, 72 J. AM. HIST. 7 (1985); NORMAN ANGELL, *WHY FREEDOM MATTERS* (1917); CHARLES ROETTER, *THE ART OF PSYCHOLOGICAL WARFARE, 1914–1945*, 50 (1974).

³⁸ John Dewey, *Conscription of Thought*, NEW REPUBLIC, Sept. 1, 1917, at 128; Harry Kalven, Jr., *Ernst Freund and the First Amendment Tradition*, 40 U. CHI. L. REV. 235, 241 (1973).

in to observe that affirmative “weapons of truth,” were far stronger than the negative force of “the policeman’s club.”³⁹ Even President Wilson agreed, at least sometimes. To be sure, Wilson also signed the Espionage and Sedition acts into law. He presided over attorneys general who prosecuted thousands of cases against war opponents. But Wilson also rejected more severe suppression plans. “I can imagine no greater disservice to the country,” he wrote early in the war, “than to establish a system of censorship that would deny to the people of a free republic like our own their indisputable right to criticize their own public officials.”⁴⁰

* * *

When Holmes wrote his short, trenchant *Abrams* dissent in the fall of 1919, he was not so much casting a vote of opposition to the Wilson administration as he was taking a side in a debate within the White House, one that pitted Burleson, Gregory, and the administration’s Southern reactionary wing against the progressive faction of Lippmann and Baker.⁴¹

All of which is to say that by the fall of 1919, debates over freedom of speech had already cast doubt on the unduly optimistic ideas that expression libertarianism always advanced truth and inevitably promoted democratic ends as against an overweening state. Public opinion had been reconceived as both indispensable and dangerous, as a foundation of democracy and as a tool for the exercise of power.

Any number of factors had contributed to this mixed thinking about public opinion. The economic changes that Habermas would later describe as the “structural transformation” of the public sphere had something to do with the new configuration of ideas. Giant firms like U.S. Steel had essentially become public entities, while progressive-era states had become ever more involved in the regulation of theretofore prototypically private organizations, such that the 19th century public sphere no longer existed, if it ever had.⁴² The arrival of mass society seemed to have

³⁹ 44 WOODROW WILSON, *THE PAPERS OF WOODROW WILSON* 467–72 (Arthur S. Link ed., 1966–1994).

⁴⁰ 42 WOODROW WILSON, *THE PAPERS OF WOODROW WILSON* 129 (Arthur S. Link ed., 1966–1994).

⁴¹ This is the suggestion in Jeremy K. Kessler’s brilliant piece. For more, see Kessler, *supra* note 4.

⁴² HABERMAS, *supra* note 14.

altered the speech environment, too, fundamentally changing the formation of public opinion in the ways Wallas and Lippmann diagnosed.

Whatever the source of the changes in the public sphere, the brave new world of modern communications soon led Lippmann to a crucial new idea about the state. Lippmann's 1922 book, *Public Opinion*, asserted that decisions in modern democracies turned on how people form pictures in their heads about the world outside. Authority therefore inhered in the power to shape those pictures. That was what powerful leaders did: "cultivate the symbols which organize his following."⁴³ The successful political actor was in a position not to be responsive to public opinion, but to make it. Lippmann called it "the manufacture of consent." And though it was "not a new art," it was one that psychological research and modern communications had radically improved.⁴⁴ The "practice of democracy" in America had thus "turned a corner." Indeed, it was "no longer possible," Lippmann concluded, "to believe in the original dogma of democracy," at least not in its orthodox form.⁴⁵ Statesmen shaped citizens, not vice versa. Political leaders designed and constructed the images in their citizens' heads. Leaders manufactured the political beliefs that authorized their own power.⁴⁶

Lippmann moved the idea forward in his 1927 book *The Phantom Public*. The public, he contended, could not possibly be expected "to deal with the substance of a problem, to make technical decisions, to attempt justice or impose a moral precept." By now, his readers understood the point. Members of the electorate were at the mercy of images planted in their heads by others. In a world whose scale had become inaccessible, the people were no longer (if they ever had been) a "dispenser of law or morals." The public was merely a "dupe or unconscious ally" of hidden special interests.⁴⁷ Democracy was a comforting myth.

* * *

Over the next few years, in the wake of Weimar's collapse in Germany and in the midst of the Great Depression, Lippman began to develop a prescription for the modern state. In 1927, he invoked Socrates's model of a "true pilot"—the person

⁴³ WALTER LIPPMANN, *PUBLIC OPINION* 234 (1922).

⁴⁴ *Id.* at 248.

⁴⁵ *Id.* at 248–49.

⁴⁶ *Id.* at 243–48.

⁴⁷ WALTER LIPPMANN, *THE PHANTOM PUBLIC: A SEQUEL TO "PUBLIC OPINION"* 96 (1925).

who “knows what is best for the ship.”⁴⁸ And in the years that followed, Lippmann refined the idea, offering a highbrow theoretical defense of administrative agencies in the modern era. In his Godkin Lectures at Harvard in 1934, Lippmann called for a mechanism that would interrupt the errant views of the herd. The state needed to “counteract the mass errors of the individualist crowd by doing the opposite of what the crowd is doing.” When “the crowd” overspent, the state would save; when the crowd saved too much, the state would borrow, just as it would spend when the people were too frugal. Central bankers and Keynesian administrators were the models here. But how could representative democracy produce such a state? The crucial question, Lippmann continued, was whether the people would consent to “decisive actions” by the state that were “in their longer-term interest but contrary to immediate opinion.” Would democracy, Lippmann asked, “authorize the government, which is its creature, to do the very opposite of what the majority at any time most wishes to do?”⁴⁹

Lippmann’s answer was a turn toward independent administrators—true pilots—who could steer the ship of state without the kind of crippling sensitivity to mass public opinion that absolute democracy of the modern form entailed. Only official power “reasonably independent of transient opinion and organized pressure,” he wrote, would be able to achieve sensible policymaking under modern conditions. “The initiative is transferred,” Lippmann explained, “to the executive who in theory represents the whole nation.” The managers of the modern state would be “independent of the currents of contemporary politics.” Indeed, they would have to be, because to the very project of statecraft was to adopt “a continual contrariness to the popular mood.”⁵⁰

Lippmann’s critique of democracy reverberates still today. His prescriptions for expert administration animate much of the administrative state and indeed large swaths of democratic theory a century later. Yet his account of the role of the expert has grave flaws, too. Lippmann could not explain why the defects that undermined democratic decision-making would not also subvert the objectivity of his expert administrators. He offered no reason why the knowledge of technocrats would not itself be partial and self-interested, and no rationale for substituting their

⁴⁸ LIPPMANN, *supra* note 43, at 412–13.

⁴⁹ WALTER LIPPMANN, *THE METHOD OF FREEDOM* 74 (1934).

⁵⁰ *Id.* at 78, 85.

values over those of others. To be sure, the experts may in some respects be accountable to the people for whom they work. But if the people are as constrained in their capacities for self-government as Lippmann suggested they are, accountability will be minimal at best.

II. BALDWIN AND THE INDUSTRIAL DEMOCRACY SOLUTION

Holmes's dissents in the fall of 1919 arrived simultaneously with the founding of the American Civil Liberties Union a year later. In the mythology of the modern First Amendment, the two developments are joined at the hip. By the second half of the 20th century, the ACLU would become famous as an organization committed to a near-absolutist commitment to free speech for one and for all, carrying forward the confident idea that the best approach to dangerous speech was more speech.⁵¹

In truth, however, the early ACLU and the Holmesian vision were powerfully different from one another. Like Lippmann, the founders of the ACLU began the 1920s already chastened about the conditions for free speech in the public sphere.

The progressive social workers who founded the ACLU in 1920 had begun their careers in the prewar period with great confidence in public opinion's promise for improving the social condition of American life. Crystal Eastman, for example, got her start as an investigator of social conditions among working-class families in Pittsburgh, producing reports on basic questions about labor, poverty, and workmen's compensation.⁵²

Baldwin had been a social worker, too. Working in prewar St. Louis, he hoped that public opinion would be the fix for what he called in 1915 "fundamental economic wrongs." Public sentiment, he believed, also held the solution to what he called "the problems of Colored People in cities." Baldwin supported ballot reforms such as the initiative and the referendum, which he asserted would let the people

⁵¹ JUDY KUTULAS, *THE AMERICAN CIVIL LIBERTIES UNION & THE MAKING OF MODERN LIBERALISM, 1930–1960* (2006); SAMUEL WALKER, *IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU* (2d ed. 1999).

⁵² CRYSTAL EASTMAN, *WORK-ACCIDENTS AND THE LAW* (1910); AMY ARONSON, *CRYSTAL EASTMAN: A REVOLUTIONARY LIFE* 69–96 (2019); Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 *YALE L. J. F.* 450, 466–70 (2020); John Fabian Witt, *Crystal Eastman and the Internationalist Beginnings of American Civil Liberties*, 54 *DUKE L. J.* 705 (2004); John Fabian Witt, *Internationalists in the Nation State: Crystal Eastman and the Puzzle of Civil Liberties*, in *PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW* 157, 157–208 (2007).

express their true opinions without the corrupting influence of political party machines and special interests.⁵³

Such progressive hopes for public opinion had begun to collapse even before the war began. Eastman watched as the workmen's compensation statute she labored to enact was struck down as unconstitutional by the courts one week before 146 women died in the Triangle Shirtwaist Fire. (Compensation statutes were reenacted, but on a new model that favored employers.)⁵⁴ Baldwin's disillusionment came when his success in adding ballot initiatives and recall elections to the St. Louis city charter instantly produced vicious new racial segregation legislation. (The new St. Louis ordinance, wrote one understated observer, revealed a "state of public opinion" that was "most discouraging.")⁵⁵ A year later, in 1917, anti-Black propaganda among white labor union members led to race massacres across the river in East St. Louis, killing between 100 and 200 Black Americans and destroying the area's fastest-growing Black neighborhood. White rioters left thousands of Black residents of the St. Louis area homeless.⁵⁶

During the war itself, many of the most spectacular episodes of intolerance and repression result not from repressive government action, but from public sentiment gone awry. Mobs whipped pacifist and socialist Herbert Bigelow (attacked by the Klan in Kentucky in October 1917), kidnapped and beat Black preacher J. H. Ellis (falsely imprisoned by a self-appointed Council of Defense in Arkansas in November 1917), lynched German immigrant and suspected socialist Robert Praeger (hanged in Illinois by a mob of 200 so-called patriots in April 1918), and hanged

⁵³ Letter from Roger Nash Baldwin to Frank P. Walsh (Sept. 15, 1915) (in box 13, folder 9 of The Papers of Roger Nash Baldwin (1885–1981), Princeton University); Roger Nash Baldwin, "A Suggested Outline of Work on the Problems of Colored People in Cities," (n.d. [April 1913]) (in box 9, folder 44 of The Papers of Roger Nash Baldwin (1885–1981), Princeton University); ROBERT C. COTTRELL, *ROGER NASH BALDWIN AND THE AMERICAN CIVIL LIBERTIES UNION* (2000).

⁵⁴ JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 152–86 (2006).

⁵⁵ Roland G. Usher, *Negro Segregation in St. Louis*, *NEW REPUBLIC*, Mar. 18, 1916, at 176; Roger Baldwin, *St. Louis's Successful Fight for a Modern Charter*, 3 *NAT'L MUN. REV.* 720, 720–26 (1914).

⁵⁶ JOHNSON, *supra* note 8, at 217–50.

IWW organizer Frank Little (lynched in Butte, Montana, in August 1917).⁵⁷ Pogroms like the one in East St. Louis and then again in Washington, D.C., Chicago, Tennessee, Nebraska, and Arkansas testified to the waves of ferocious racial violence to which opinion among white Americans was prone. Eastman and Baldwin decried such episodes of crowd brutality, blaming newspaper distortions and capital's control of newspaper editorial positions.⁵⁸ Creel, whose CPI was partly responsible for whipping up the nativist crowds, asserted (self-servingly, to be sure) that censorship was "not imposed by Washington, but by the intolerances and bigotries of individual communities."⁵⁹

Baldwin confirmed the problem when he went to join the postwar moment's largest and most industrially important labor action: the strike taking place in and around the steel manufacturing district in Pittsburgh. The American Federation of Labor (AFL) had launched an effort to unionize the steel industry for the first time since Henry Clay Frick and the Pinkertons had crushed the labor movement at the Carnegie Mills in Homestead, Pennsylvania, in 1892. A quarter-million workers—half of the industry's workforce—walked off the job in the Great Steel Strike in the fall of 1919. Posing as a scab while working secretly as a spy for the AFL, Baldwin saw indelible evidence of the power of propaganda and misinformation. Simple brute repression was in abundant evidence, too, to be sure. State troopers broke up meetings and scattered crowds of strikers. General Leonard Wood, a veteran of colonial occupations in Cuba and the Philippines, led federal troops and announced martial law in the steel manufacturing town of Gary, Indiana. But alongside such attention-getting repression, U.S. Steel launched a vastly successful communications strategy. Pittsburgh newspapers simply repackaged the company's press releases and presented them as news. A reader of the papers encountered a steel strike

⁵⁷ DAVID M. KENNEDY, *OVER HERE: THE FIRST WORLD WAR AND AMERICAN SOCIETY* (1980); CAPOZZOLA, *supra* note 7.

⁵⁸ *E.g.*, NAT'L C.L. BUREAU, *THE "KNIGHTS OF LIBERTY" MOB AND THE I.W.W. PRISONERS AT TULSA, OKLA.*, (Nov. 9, 1917).

⁵⁹ George Creel, *Public Opinion in War Time*, 78 *ANNALS OF AM. POL. & SOC. SCI.* 185, 192 (1918).

that always seemed to be fading and near its end. According to the headlines, the mills were always running full, strikers be damned.⁶⁰

Close observers of the strike couldn't help but notice the distorted media coverage of the strike. An organization of church leaders sympathetic to labor commented on the "almost unbroken silence regarding the actual industrial grievances of the steel workers." Muckraking journalist Mary Heaton Vorse called steel communities "dark towns," because the spotlight of actual journalistic reporting never reached their streets.⁶¹ One of Lippmann's colleagues in wartime propaganda for the Army wrote a report titled *Public Opinion and the Steel Strike*, documenting the steel industry's iron grip over the newspapers. Writing in the pages of *The New Republic* (which Lippmann had helped found), journalist Frank Cobb argued in the wake of the strike that "private propaganda" was now the order of the day. Where pragmatists like Holmes argued that more information produced more knowledge and better decisions, Cobb responded more cynically: "The more of that kind of publicity we have," he concluded, "the less we know." Lippmann himself made the steel strike a lead example of the distortions of public opinion in the postwar world. "In order to tell the truth about the steel worker in the Pittsburgh district," Lippmann wrote, "there was needed a staff of investigators, a great deal of time, and several fat volumes of print." Such truth-telling mechanisms were not in place, of course. It surprised no one, Lippmann and Baldwin least of all, that the AFL called off the steel strike in January with none of the unions' goals met. A long 12-hour day, a seven-day week, and impoverishing wages for the unskilled would remain the industry standards for another decade and more.⁶²

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The Pittsburgh steel strike turned out to be a case study in the destructive mechanics of public opinion and its formation. The "romantic notion that 'the People

⁶⁰ DAVID BRODY, *LABOR IN CRISIS: THE STEEL STRIKE OF 1919* (1965); INTERCHURCH WORLD MOVEMENT OF N. AM., *REPORT ON THE STEEL STRIKE OF 1919* (1920); INTERCHURCH WORLD MOVEMENT OF N. AM., *PUBLIC OPINION AND THE STEEL STRIKE: SUPPLEMENTARY REPORTS OF THE INVESTIGATORS TO THE COMMISSION OF INQUIRY, THE INTERCHURCH WORLD MOVEMENT* 135 (1921); ROBERT C. COTTRELL, *ROGER NASH BALDWIN AND THE AMERICAN CIVIL LIBERTIES UNION* 110 (2001).

⁶¹ INTERCHURCH WORLD MOVEMENT OF N. AM., *PUBLIC OPINION AND THE STEEL STRIKE*, *supra* note 60, at 111, 147; MARY HEATON VORSE, *MEN AND STEEL* 113–16 (1920).

⁶² Cobb, *supra* note 37; Lippmann, *supra* note 43, at 219; BRODY, *supra* note 60.

could rule,” Baldwin reflected, needed to be abandoned. He rejected his old “crusades for the initiative, referendum and other devices for popular control.” He dismissed the muckraking he had once favored against the party machines, too. All of these were futile strategies because, as he wrote echoing Lippmann, “there is no public.” The “people,” or at least the people conceived as a whole, seemed unorganizable for purposes of significant economic change. Adopting a phrase he drew straight from Lippmann, he denied there was a public at all—only, he said, a “phantom public.”⁶³

Baldwin’s Lippmannian skepticism of the public, however, did not lead him to Lippmann’s embrace of expert administrators. To the contrary, as Weinrib has shown, during the war, Baldwin turned toward a distinctive form of left-leaning syndicalism—he sometimes loosely called it anarchism—that aimed for revolutionary economic transformation outside the state.⁶⁴ Relying on the good will of government, as he had when he was a social worker, turned out to be a fatal mistake. “The state, the vote, and majority control,” he wrote to his friend the radical economist Scott Nearing in 1918, had become “merely the instruments” of “the most powerful interests in society,” an “expression of the controlling economic power.”⁶⁵

Nor did Baldwin’s worries about public opinion lead him to the First Amendment and the courts. Weinrib observes that pro-labor advocates like Baldwin regarded the courts as the “arm of the state” that was “most active in stifling workers’ self-help and in undermining their political achievements.”⁶⁶ The courts, Baldwin believed, and not without reason, were the staunchest allies of the capital classes. The point was a familiar one among left critics. Anyone who relied on the law and the courts to make substantial change, as the Black political scientist and critic Ralph Bunche would say a few years later, failed to appreciate “that the instruments of the state are merely reflections” of the “dominant group.” The Constitution, as Bunche put it, would be nothing “more than the controlling elements of American

⁶³ Roger N. Baldwin, *Where Are the Pre-war Radicals?*, THE SURVEY, Feb. 1926, at 556, 560.

⁶⁴ LAURA WEINRIB, *THE TAMING OF FREE SPEECH: AMERICA’S CIVIL LIBERTIES COMPROMISE* (2016).

⁶⁵ Letter from Roger Nash Baldwin to Scott Nearing (Nov. 18, 1918) (in box 14, folder 28 of The Papers of Roger Nash Baldwin (1885–1981), Princeton University).

⁶⁶ WEINRIB, *supra* note 64, at 65.

society wish it to be.”⁶⁷ Baldwin held much the same view. In 1920, the same year he and Eastman founded the ACLU, Baldwin wrote that the “fiction that constitutional American rights can be maintained through law has been pretty well exploded.” He continued, mincing no words: “Everywhere the realization is growing that legal rights are hollow shams.”⁶⁸

For Baldwin and the inner core of the ACLU in the 1920s, litigation and efforts to appeal to the courts were strategic in a narrow and defensive sense: They aimed at “preventing the other side from using the power of the state against them.” It was no wonder, Baldwin observed, that attacks on speech in 1920s America were almost always attacks “on the right of labor to organize, strike, and picket.” The aim of fights “against free expression” was, Baldwin contended, “largely motivated by a desire to weaken organized labor.” Speech limits like criminal syndicalism laws, sedition acts, anti-picketing laws, and injunctions were of a piece with “the prohibition of strikes through industrial courts” and strikebreaking state police. Moreover, Baldwin added, the dominant forces in a society would have their voices heard regardless of First Amendment doctrine. Powerful interests would get their messages across because the propaganda of the powerful was already free. It was dissenting speech that got no hearing. (“The lid is on,” he said in 1920, “the hysterical anti-red campaign has clamped the lid on free speech.”) Speech protections would release the communicative energies of the nation’s dissenters, radicals, and workers. Free speech victories would liberate unpopular communication such as radical economic literature and labor picketing.⁶⁹

Even this narrow and defensive account of the value of courts was hard to explain given Baldwin’s thoroughgoing skepticism of the state. If the law were merely the instrument of the dominant classes in a society, why would it offer even a crabbed and defensive tool to the objects of its oppression? By his own admission, Baldwin was no theorist. He rode roughshod and recklessly over such inconsistencies, experimenting relentlessly to identify strategies that might work, theory be damned. But he too chafed at the limits of his defensive theory of the law. Merely giving labor the chance to communicate, he sensed, would be insufficient. By 1927,

⁶⁷ Ralph J. Bunche, *A Critical Analysis of the Tactics and Programs of Minority Groups*, 4 J. NEGRO EDUC. 308, 315 (1935).

⁶⁸ Roger Baldwin, *Freedom of Opinion*, 9 SOCIALIST REV. 115, 116 (1920).

⁶⁹ *Id.*; Letter from Roger Nash Baldwin to Scott Nearing, *supra* note 65.

after a few early victories on speech rights, Baldwin would complain that “there is plenty of free speech but not much listening.” What men like Baldwin really aimed to do in the ACLU’s early years was intervene in the communications and propaganda battles on behalf of labor in a way that would make a difference in shaping the public mind.

Upon founding the ACLU, Baldwin committed the organization first and foremost to supporting labor organizations that might be able to support worker interests in the public sphere. “The cause we now serve is labor,” he wrote in a memo forming the organization in 1919.⁷⁰

He began, too, to look for funding that might allow the ACLU and its labor allies to launch their own front in the propaganda battle for control over the levers of economic power. Baldwin soon found a source for such funds in the American Fund for Public Service, known as the Garland Fund after its namesake, Charles Garland, a Harvard College dropout who donated a million-dollar inheritance. Together with a cluster of liberal and left-leaning fellow directors, Baldwin dedicated the Garland Fund’s resources to supporting the left-wing of the American labor movement in its efforts to organize and to change the way Americans thought about economic questions. The goal, as Baldwin wrote to Garland in 1922, was “freeing people’s minds from the bonds of old institutions.” The fund would thus invest, as Baldwin told newspapers in 1922, in “the field of propaganda for free speech and civil liberties,” issues that had been “brought to the front by the war and by conditions since.” Sure enough, the American Fund invested more than a quarter of its resources in periodicals, publications, and publishers. The directors supported socialist magazines, a labor-side news service, and founded a significant New York publishing house. A fifth of its funds went to workers’ education projects in unions and in a series of “labor colleges” that helped train many of the labor leaders of the 1930s. The fund paid for research on industry and labor economics.

⁷⁰ WEINRIB, *supra* note 64; WILLIAM A. DONOHUE, *THE POLITICS OF THE AMERICAN CIVIL LIBERTIES UNION* (1985); *see also* RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007); Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057, 2065 (2018); Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1964–65 (2018); Emily Zackin, *Popular Constitutionalism’s Hard Work When You’re Not Very Popular: Why the ACLU Turned to Courts*, 42 L. & SOC’Y REV. 367 (2008); John Fabian Witt, *Internationalists in the Nation-State: Crystal Eastman and the Puzzle of American Civil Liberties*, in *PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW* 15 (2007).

It financed educational propaganda and (to a lesser extent) education programs for children. Its best remembered project was the NAACP litigation campaign that led, a quarter-century after its beginning, to *Brown v. Board of Education*. The campaign began as an experiment in reorganizing the education of working-class America in a way that might solve the crisis of racial division that had badly hampered American labor organizing for decades.⁷¹

* * *

Baldwin's work with the ACLU and the Garland Fund in the 1920s is better thought of as opinion-formation advocacy than as free speech advocacy per se. Once again, Weinrib makes the point. The reorganization of the National Civil Liberties Bureau as the new American Civil Liberties Union reflected the organization's transition from "a bureau of legal service to a propaganda organization."⁷² Baldwin, Eastman, and company shifted toward opinion formation even as they, like Lippmann, had become skeptical of the existence of anything like a "public" with a common sentiment.

The ACLU's early leaders sometimes clung to an unrealistic hope that working-class consciousness would harbor a latent resistance to modern propaganda. In this they were mostly disappointed through the 1920s. But they aimed to build a flourishing opinion infrastructure for the labor movement. The public may have been a mere phantom; the "people" as an abstraction may have been "unorganizable." But "economic classes can be organized," Baldwin observed. Class power was a "power that works." Indeed, legal rights need not be mere shams when there exists "the political and economic power to enforce them." Baldwin asserted that "the only places in the United States today with free press and free assemblage" were regions "where the workers or the farmers are strongly enough organized to take and hold

⁷¹ See John Fabian Witt, *Garland's Million; or, the Tragedy and Triumph of Legal History: American Society for Legal History Plenary Lecture, New Orleans, 2021*, 40 L. & HIST. REV. 123 (2022); Megan Ming Francis, *The Price of Civil Rights: Black Lives, White Funding, and Movement Capture*, 53 L. & SOC'Y REV. 275 (2019); Megan Ming Francis & John Fabian Witt, *Movement Capture or Movement Strategy? A Critical Race History Exchange on the Beginnings of Brown v. Board*, 31 YALE J. L. & HUMANS. 520 (2021); see also MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950* (1987); RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (2004); GLORIA GARRETT SAMSON, *THE AMERICAN FUND FOR PUBLIC SERVICE: CHARLES GARLAND AND RADICAL PHILANTHROPY, 1922–1941* (1996).

⁷² Quoted in WEINRIB, *supra* note 64, at 125.

these rights.” Economic strength and organized solidarity among the laboring classes would produce not only speech rights that could be enforced but then also concomitant benefits for workers seeking to organize.⁷³

Norman Thomas, Baldwin’s colleague and perennial Socialist Party candidate for the presidency, articulated the point especially effectively. Thomas was a founding member of the ACLU. He was on the board of directors of the Garland Fund. And since 1922, Thomas had served as the co-director of the League for Industrial Democracy, an organization of left-leaning intellectuals and activists, whose members over time included Clarence Darrow, John Dewey, Florence Kelley, Upton Sinclair, and any number of other leading progressives.⁷⁴ In a pamphlet published in the mid-1920s, Thomas explained that owners and managers had “enormous advantages” in a political order that claimed to be democratic. The “principal means of communication” belonged to them. Their “power of propaganda, often for all but deliberate misstatement of fact,” was “all but unlimited.” The simple Band-Aids of progressive-era election reforms had been insufficient, Thomas continued, because the owning class had, in addition, a “power of mass intimidation of voters.”⁷⁵

As Thomas saw it, lies and disinformation campaigns were routine features of American democratic life. Propaganda had killed worker-ownership plans put forward for the railroads at the end of the war. Public ownership of industry, too, had also been discredited by “an elaborate and well-financed propaganda” effort. Business interests had led a successful campaign against the Child Labor Amendment, one that relied on the wide circulation of deliberate misstatements. Indeed, Thomas added, “the art of propaganda during and since the Great War” had come to “a marvelous development.” An entire industry had sprung up for public relations and communications—what Thomas called “a propaganda developed and controlled by those who profit by it.” The modern craze for public relations, Thomas warned, “may for the time being serve its masters well”—but its likely outcome would be “ruin for us all.”⁷⁶

⁷³ Baldwin, *supra* note 63; Baldwin, *supra* note 68.

⁷⁴ LEAGUE FOR INDUS. DEMOCRACY, THIRTIETH ANNIVERSARY REPORT 1905 [TO]1935 (1935).

⁷⁵ NORMAN THOMAS, WHAT IS INDUSTRIAL DEMOCRACY? 5 (1925).

⁷⁶ *Id.* at 17, 51–52.

The great difficulty was that capitalism left to its own devices produced “political democracy but industrial autocracy,” which was an unsustainable combination. And so, Thomas announced, Americans found themselves “forced to face the question of the meaning and value of democracy in general.”

Thomas, Baldwin, and the early ACLU were hardly alone in seeing industrial democracy as the central question for the postwar public sphere. Dewey became a champion of free speech and supported industrial democracy as a crucial building block for self-government.⁷⁷ Justice Brandeis held a version of the same idea, too. Brandeis had long believed that democracy rested on the decentralization of economic power. In the 1920s, his two great First Amendment opinions (both in dissent) expressed a deep commitment, as Robert Post has observed, to the proposition that self-government required maintenance of a public sphere independent of the state. Speech protections were vital, Brandeis wrote in 1920, because they were “essential to effective democracy.”⁷⁸

For each of these figures, ending censorship was only a halfway answer to the key question of democracy in the age of industrial scale and public relations propaganda. Sophisticated, well-resourced actors were already using speech freedoms to their own ends, deceiving audiences and altering the way people saw the world. Too much information was part of the difficulty, just as it would be a century later, if on a greater scale. And as a result, 1920s ACLU leaders like Baldwin and Thomas could not fall back on Holmes’s marketplace of ideas as an answer; they had every expectation that the marketplace of ideas would often produce bad outcomes. Nor were they satisfied with Lippmann’s administered system of experts. They shared much of Lippmann’s diagnosis of the underlying problem. (Lippmann even worked on occasion with the Garland Fund directors in reviewing its grant applications.) But they held the state in contempt. How, they wondered, did Lippmann imagine that his administrative experts would themselves remain outside the system they purported to regulate? The state seemed to Baldwin and company to be a part of the problem, not the solution, for it was a tool of precisely those dominant

⁷⁷ ROBERT B. WESTBROOK, *JOHN DEWEY AND AMERICAN DEMOCRACY* esp. 275–78 (1991); Robert B. Westbrook, *Schools for Industrial Democrats: The Social Origins of John Dewey’s Philosophy of Education*, 100 AM. J. EDUC. 401 (1992); see also RABBAN, *supra* note 2, at 1021–26 (1997).

⁷⁸ *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., dissenting); *Gilbert v. Minnesota*, 254 U.S. 324, 337–38 (1920) (Brandeis, J., dissenting); POST, *CITIZENS DIVIDED*, *supra* note 12, at 39–40; UROFSKY, *supra* note 3, at 228–54.

forces whose interests had so badly distorted and distended public opinion in the first place.

The early ACLU's answer was neither Holmesian freedoms in ideas, nor Lippmannian experts in administration. The ACLU's answer was industrial democracy: a reallocation of power and control into the hands of workers instead of owners. Only such a reorganization of the institutions of economic and industrial life could create what labor scholars like Kate Andrias and Benjamin Sachs today call a "countervailing power" strong enough to combat the power of capital to shape opinion in the town square.⁷⁹

"Every halting advance toward industrial democracy," Thomas wrote, "tends somewhat to limit the power of these exploiters of passion and prejudice." Economic foundations, in other words, were the key to a vibrant public sphere. Were power to fall into just a few hands, or into the hands of only one economic class, public opinion would falter. Support for the labor movement through defensive civil liberties work was thus a self-conscious effort to shape the modern public sphere. So, too, were the affirmative efforts of the Garland Fund.⁸⁰

⁷⁹ Cf. Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Inequality*, 130 YALE L. J. 546 (2021).

⁸⁰ Lippmann, Baldwin, and their allies were hardly lone voices in describing the crisis of the democratic public sphere during World War I and its aftermath. Black intellectuals gave voice to some of the same sentiments, too. American pogroms from East St. Louis in 1916, to Washington, D.C., in 1919, to Tulsa in 1921, combined with the failure of anti-lynching legislation, helped produce a new round of Black nationalist disenchantment with the prospects of winning over public opinion in a majority white country. See BROPHY, *supra* note 8; MCWHIRTER, *supra* note 8; WHITAKER, *supra* note 8. Black leaders like James Weldon Johnson aimed self-consciously, if sometimes despairingly, to build new institutions of counterpropaganda like the NAACP or the Black New York arts flowering known to many as the Harlem Renaissance. See Megan Ming Francis, *The Battle for the Hearts and Minds of America*, 13 SOULS 46–71 (2011). W.E.B. DuBois championed forms of counterpropaganda. See DAVID LEVERING LEWIS, *W.E.B. DUBOIS: THE FIGHT FOR EQUALITY AND THE AMERICAN CENTURY, 1919–1963*, at 175 ff. (2000); JEFFREY C. STEWART, *THE NEW NEGRO: THE LIFE OF ALAIN LOCKE* 521–43 (2018). Or consider influential progressive critic Frederic Howe, who recalled that he had come into the war years believing in that "mind that would save the world" and that the mind of his generation would vindicate "the clear light of reason," reported glumly at war's end that "mind had failed as completely as morals." ("Men," he wrote looking back on decades of work, "were not concerned over the truth" but only their "economic interests.") FREDERIC C. HOWE, *CONFESSIONS OF A REFORMER* 322 (1925).

CONCLUSION

At midcentury, when historians began to write the story of the still-new law of free speech, the world in which they wrote conferred a misleading allure on the idea that more and freer speech leads to truth. The point here is not that more and freer speech never helps produce truths. Of course, it often does and is often indispensable in doing so. But a whole array of institutional, political, and technological features of the midcentury world obscured what progressives like Lippmann and Baldwin had been able to see more clearly a generation or two earlier.

Scarcity in broadcast frequencies helped produce legal doctrines and market environments that directed political expression on radio and television away from the polarized fringes, constraining bald misrepresentation and muting some of the most polarizing ideas. New restrictions on government information, as Sam Lebovic has shown, limited the scope of the public sphere. Newspapers adopted an establishment strategy that drew them away from their partisan predecessors in the genre and toward claims of objectivity. The shutting off of immigration and the exclusion of Black Americans from the electoral process helped further restrict the boundaries of the public sphere. So did insider control of political parties' nominating processes. Or consider the effects of the Cold War's collective imperatives and its political purges. Any number of features of the political system—many of them morally indefensible—contributed to what we might call midcentury exceptionalism in the public sphere.⁸¹

The influence of lies and propaganda in our political culture has followed something like the U-shaped curve made famous in Thomas Piketty's account of economic inequality across the 20th century: Sustained early attention to misinfor-

⁸¹ TIM WU, *THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES* (2011); Brian Leiter, *The Epistemology of the Internet and the Regulation of Speech in America*, 21 *GEO. J. L. PUB. POL.* 903 (2022); Emily Bazelon, *The Problem of Free Speech in an Age of Disinformation*, *N.Y. TIMES MAG.* (Oct. 13, 2020), <https://www.nytimes.com/2020/10/13/magazine/free-speech.html> [<https://perma.cc/R43Y-FPWQ>]; Gregory P. Magarian, *Forward Into the Past: Speech Intermediaries in the Television and Internet Ages*, 71 *OKLA. L. REV.* 237 (2018); Tim Wu, *Is Internet Exceptionalism Dead?*, in *THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET* 179 (Berin Szoka & Adam Marcus eds., 2011); SAM LEBOVIC, *FREE SPEECH AND UNFREE NEWS: THE PARADOX OF PRESS FREEDOM IN AMERICA* (2016); MICHAEL SCHUDSON, *DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS* (1978).

mation campaigns in the public sphere gave way to an era in which centrist institutions deferred worries about propaganda, which in turn gave way to a renewed age of anxiety about propaganda and lies.⁸²

This is not to endorse the midcentury moment as a better or healthier moment in American politics. The point, rather, is that the political strategies of the powerful were more often worked out not through distortion and lies but through exclusions of dissenting political voices from the political process. McCarthyism, Jim Crow, and immigration restrictions, rather than the production of propaganda, were the paradigmatic mechanism of shaping political discourse at midcentury.

One consequence of the historical U-shaped structure of lies and propaganda, however, has been a distortion in the literature. Our accounts of free speech law in the United States are unduly influenced by the unrepresentative middle period in the modern public sphere—the exceptional bottom of the “U.”⁸³ Under the extended influence of the midcentury moment, it has been comforting to write a history of modern free speech resting on the idea that once upon a time, back at the dawn of the modern First Amendment, more and freer speech meant more reliable speech.⁸⁴ But contemporaries in the era of the Great War and its aftermath knew that was simply not so, even if it seemed more plausible a few decades later. The longer history of the 20th century public sphere, one that goes back to the early years of the century, is one of pervasive misrepresentation, lies, and propaganda of precisely the kinds that so worried critics of the public domain after World War I—and of the kinds that concern observers again now.⁸⁵

⁸² THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer trans., 2014).

⁸³ Cf. Weinrib, *supra* note 1, at 66.

⁸⁴ David Pozen, “*Truth Drives Out Lies*” and Other Misinformation, KNIGHT FIRST AMEND. INST. (Feb. 9, 2022), <https://knightcolumbia.org/blog/truth-drives-out-lies-and-other-misinformation> [<https://perma.cc/H4RR-JXS3>]; Yochai Benkler, *Of Noisy Songs and Mighty Rivers*, KNIGHT FIRST AMEND. INST. (Feb. 10, 2022), <https://knightcolumbia.org/blog/of-noisy-songs-and-mighty-rivers> [<https://perma.cc/9V4E-QPY3>]; Amy Kapczynski, *Freedom from the Marketplace of Speech*, KNIGHT FIRST AMEND. INST. (Feb. 14, 2022), <https://knightcolumbia.org/blog/freedom-from-the-marketplace-of-speech> [<https://perma.cc/TE9W-D9AL>].

⁸⁵ Balkin, *supra* note 12, at 233; YOCHAI BENKLER ET AL., *NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS* (2018).

An account like the one I have sketched here holds a number of interpretive advantages. It aligns better than the standard view with the influential story offered by Habermas in *The Structural Transformation of the Public Sphere*, which identified early 20th century social revolutions as crucial for the shape of political discourse. It sheds light on the vast importance of developments like changes in the basic organization of the mass media and the newspaper in the first half of the 20th century. It recasts the story of the long middle of the 20th century, too. With its robust labor union membership, with a confident and growing administrative state, with relative economic equality, and with very particular techno-political-market conditions for the production and dissemination of information, midcentury was the exceptional moment for the political economy of the First Amendment neutrality. The fantasy of a free market in ideas actually rested on heavily regulated and institutionally contingent circumstances.

Recasting speech as a weapon in the early 20th century (and not just in our own time) also helps us make sense of why so many of the Americans most engaged with the shape of public discourse in the 1920s were focused not on establishing speech rights but on addressing propaganda and power in political speech. Whether that was because (as Baldwin believed) the strong would always have their say, regardless of freedom of speech protections, or because (as Lippmann contended) the secondhand information of mass society permitted dangerous distortions, thoughtful critics turned to institutions that might be able to manage the flow of information.

Last and certainly not least, emphasizing the weaponization of speech in the founding years of the modern free speech tradition helps us make sense of our crisis of misinformation today. Undoubtedly today's madness has many causes. But a crucial and often overlooked dimension of the story of the public sphere is that for us today, a century after Lippmann and Baldwin, both of the institutional strategies their generation first proposed are in collapse. Any number of studies conclude that unions have virtuous democratic spillover effects, encouraging engagement, improving the information environment, and diminishing polarization.⁸⁶ Yet the industrial democracy for which Baldwin and Thomas worked has faded in the face of

⁸⁶ E.g., JAKE ROSENFELD, WHAT UNIONS NO LONGER DO (2014); David Macdonald, *How Labor Unions Increase Political Knowledge: Evidence from the United States*, 43 POL. BEHAV. 1 (2021); Paul Frymer & Jacob M. Grumbach, *Labor Unions & White Racial Politics*, 65 AM. J. POL. SCI. 225 (2021);

private sector union density that has fallen from 35.7% at its high point in 1953 to a mere 6.1% at the beginning of 2022. Union membership rates have fallen during every decade since the 1940s.⁸⁷ Nearly all observers agree that the administrative state, too, is under assault from multiple directions in the courts and in public opinion.⁸⁸ Today, the solutions at which the early architects of the modern First Amendment arrived are either in tatters or in crisis.⁸⁹

Torben Iversen & David Soskice, *Information, Inequality, and Mass Polarization: Ideology in Advanced Democracies*, 48 COMPAR. POL. STUD. 1781 (2015); Alexander Hertel-Fernandez, *Power and Politics in the U.S. Workplace*, ECON. POL'Y INST. (Oct. 7, 2020), <https://www.epi.org/unequalpower/publications/power-and-politics-in-the-u-s-workplace-what-imbances-of-workplace-power-mean-for-civic-engagement-and-democracy/> [<https://perma.cc/XT38-BBTU>]; Gregory Lyon & Brian F. Schaffner, *Labor Unions and Non-Member Political Protest Mobilization in the United States*, 74 POL. RSCH. Q. 998 (2021); see also Andrias & Sachs, *supra* note 79; Catherine L. Fisk, *The Once and Future Countervailing Power of Labor*, 130 YALE L. J. FORUM 546 (2021); DOUG MCADAM ET AL., DYNAMICS OF CONTENTION (2001); John W. Budd et al., *Learning about Democracy at Work: Cross-National Evidence on Individual Employee Voice Influencing Political Participation in Civil Society*, 71 INDUS. & LAB. REL. REV. 956 (2018); Benjamin Radcliff & Patricia Davis, *Labor Organization and Electoral Participation in Industrial Democracies*, 44 AM. J. POL. SCI. 132 (2000); Roland Zullo, *Union Membership and Political Inclusion*, 62 INDUS. & LAB. REL. REV. 22 (2008). As Cynthia Estlund shows, work itself provides a distinctly valuable institutional context for encountering and managing differences in viewpoint and background. See CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY (2003).

⁸⁷ Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419, 443 (2015); Cynthia Estlund, *Labor Law Reform Again? Reforming Labor Law as a Regulatory Project*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 383, 385 (2013); Ruth Milkman, *Union Decline and Labor Revival in the 21st Century United States*, 95 CHI.-KENT L. REV. 273, 273 (2020).

⁸⁸ Avery White & Michael Neblo, *Capturing the Public: Beyond Technocracy & Populism in the U.S. Administrative State*, 150 DAEDALUS, 172, 172 (2021) (“[M]any observers regard the administrative state in the United States . . . as facing a ‘crisis’ of legitimacy.”); Philip A. Wallach, *The Administrative State’s Legitimacy Crisis*, BROOKINGS INST. (Apr. 20, 2016), <https://www.brookings.edu/research/the-administrative-states-legitimacy-crisis/> [<https://perma.cc/K2ME-CCVM>]; *Public Trust in Government: 1958–2022*, PEW RSCH. CTR. (June 6, 2022), <https://www.pewresearch.org/politics/2022/06/06/public-trust-in-government-1958-2022/> [<https://perma.cc/ZKN2-U9CV>].

⁸⁹ Margaret Levi, *Labor Unions as a Critical Intermediary Association* (2017) (https://fsi-live.s3.us-west-1.amazonaws.com/s3fs-public/labor_unions_as_critical_intermediate_associations.pdf [<https://perma.cc/5R6B-WZCP>]).

If there is good news in the excavation of the history of the public sphere, it is perhaps that potential solutions to our current crisis are not outside our recent history. To the contrary, efforts to deal with distortion and lies in public opinion are at the root of the modern free speech tradition.

