Deaths Greatly Exaggerated

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In 1940, in the inaugural issue of its *Bill of Rights Review,* the American Bar Association's Bill of Rights Committee expressed its conviction "that a distinct field of law—that of civil rights—[was] emerging."[1] From the standpoint of lawyers, judges, and scholars looking forward from that moment, the contours of the new field were largely unknown. In large part, that uncertainty was due to the Supreme Court's dismantling of the dominant doctrinal framework governing the relationship between individuals and the state in the 1930s.

James Henretta offers a new perspective on that constitutional revolution by describing it through the lens of the ideological development of Chief Justice Charles Evans Hughes. For most of Hughes's public life, individual rights referred mainly to the rights to contract and property that the Supreme Court located in the due process clause of the Fourteenth Amendment in cases like *Lochner v. New York.*[2] In the late 1930s and early 1940s, with Hughes as a sometimes unwilling participant, such established constitutional thought underwent dramatic change. Beginning in 1934 with *Nebbia v. New York,* [3] gaining momentum with the Supreme Court's validation of New Deal legislation in the late 1930s, and culminating in 1942 with an expansion of Congress's power under the Commerce Clause, the Supreme Court dismantled the doctrines underpinning and structuring *Lochner*-era jurisprudence. In 1939, Robert Cushman, a political scientist at Cornell University and frequent commentator on the Court, described Justice McReynolds, one of the minority of justices who still adhered to *Lochner*-era precedents, as "stand[ing] like the boy on the burning deck

1. "Civil Liberties—A Field of Law," *Bill of Rights Review* 1 (1940): 7–8, 7.
2. 198 U.S. 45 (1905).
3. 291 U.S. 502 (1934).

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amidst what obviously appears to him to be the imminent destruction of the old constitutional system."[4]

Henretta ably describes Hughes's role in that destruction, the path by which he came to play that role, and the reluctance with which he sometimes embraced it. Perhaps because Hughes retired from the United States Supreme Court in 1941, Henretta concludes his history of liberalism with the constitutional revolution of the late 1930s and what he calls the "Strange Death of American Liberalism." Henretta alternately labels what replaced American liberalism "welfare-state liberalism," "New Deal Statism," and the "Servile State" (a term he takes from British political philosopher Hilaire Belloc).[5] Henretta does not describe in detail what he means by these terms, but two implications are clear. First, like many historians and legal scholars, Henretta implies that the basic contours of the modern American state were set by the end of the New Deal's constitutional revolution. Second, Henretta suggests that the post-1937 American state is largely characterized by centralized, large-scale bureaucratic regulation with little room for individual rights. Indeed, the very premise of the Servile State, and the reason Henretta laments its establishment, is that it sacrifices individual freedom for economic security and signals the end of rights-based liberalism as progressives like Hughes had known it.

But a look beyond the late 1930s, and beyond Hughes's tenure as chief justice, casts doubt on both of these conclusions. The New Deal revolution—whether internal or external, abrupt or evolutionary—initiated a period of experimentation with the relationship between individuals and their governments that ended only with the Supreme Court's decision in *Brown v. Board of Education* in 1954.[6] No coherent model of individual rights existed during the 1940s, as legal doctrine provided no definitive answer. If one thing was clear, it was that the future of American liberalism, and the future of constitutionally protected individual rights, was anything but clear. The precise way in which the doctrinal terrain had shifted in the 1930s, and the consequences of the shift, lacked the kind of clarity with which Henretta endows it.

The Court revealed its own uncertainty in fractured opinions and frequent overrulings of precedent. It disinterred the privileges and immunities clause, only to rebury it almost immediately. And it cast about for new

4. Robert E. Cushman, "Constitutional Law in 1938–1939: The Constitutional Decisions of the Supreme Court of the United States in the October Term, 1938," *American Political Science Review* 34 (April 1940): 249–83, 249.

5. James Henretta, "Charles Evans Hughes and the Strange Death of Liberal America," *Law and History Review* 24 (2005): 170.

6. 347 U.S. 483 (1954).

ways of understanding both judicial review and individual rights. Justice Stone's suggestion (aided by Chief Justice Hughes) in footnote four of *United States v. Carolene Products* that perhaps a new conception of individual rights could replace the old was part of this experimentation.[7] After *Brown* and the cases that followed, scholars have frequently treated the footnote as a conclusive way forward. But at the time it was offered as a mere suggestion among a plethora of suggestions. According to Louis Lusky, Justice Stone's law clerk, "The footnote was being offered not as a settled theorem of government or Court-approved standard of judicial review, but as a starting point for debate—in the spirit of inquiry, the spirit of the Enlightenment. . . . [I]t did not purport to decide anything; it merely made some suggestions for future consideration."[8] Indeed, throughout the decade that followed, the footnote was occasionally but inconsistently used in First Amendment cases, and it was not applied in race cases as we understand it today until the decade was almost over. Rather than answering the question of what individual rights would look like in a post-*Lochner* world, *Carolene Products* was merely one articulation of the question.

Lawyers, scholars, and other jurists were no less perplexed than the Court itself. They explicitly recognized that the state of constitutional rights was "unsettled."[9] In 1942, the Colorado Supreme Court, for example, hesitated to categorize a First Amendment case. It stated instead, "Here then is another case involving a conflict between liberty and authority, a conflict that is sometimes labeled 'civil rights v. the police power' or 'liberty of the individual v. the general welfare.'"[10] As the quotation suggests, even the terminology available for use was clumsy and imprecise, riddled with contested and unresolved meanings.

As court-watchers and lawyers tried to make sense of the destruction of the old order, some saw what they thought was a new rights-based liberalism emerging from the ruins. In the new regime, workers' rights to organize into unions, bargain collectively, and strike appeared paramount. These rights had a long, if rocky, pedigree. Throughout the *Lochner* era, laborers, unions, and progressive reformers had countered the Supreme Court's protection of contract rights with assertions of this different kind of workers' rights. Indeed, the battle over workers' rights comprised what many saw as the civil rights issue of the period. As one journalist wrote in

7. 304 U.S. 144, 152 n. 4 (1938).

8. Louis Lusky, "Footnote Redux: A *Carolene Products* Reminiscence," *Columbia Law Review* 82 (October 1982): 1093–1109, 1098 (internal quotation marks omitted).

9. Robert M. Hutchins, "Foreword" to *Political and Civil Rights in the United States,* ed. Thomas I. Emerson and David Haber (Buffalo: Dennis and Co., 1952), iii.

10. *Hamilton v. City of Montrose,* 124 P.2d 757, 759 (Colo. 1942).

1936, "[t]he crucial struggle for civil liberty today is among tenant farmers and industrial workers, fighting for economic emancipation and security."[11] A contributor to the *Lawyers Guild Review* agreed about the "position of prominence" held by "the drive for protection of the civil liberties of the industrial workers."[12]

Until the 1930s, however, such challenges were largely unsuccessful. Over the course of the Depression decade, Congress, the president, and the Supreme Court all appeared to join labor activists and progressive reformers in championing workers' rights. In the 1932 Norris-LaGuardia Act, the 1933 National Industrial Recovery Act, and most importantly the 1935 Wagner Act, Congress emphasized the centrality of the new collective rights of workers to organize and bargain. Senator Wagner, the latter bill's sponsor, described "[t]he spirit and purpose of the law" as creating "a free and dignified workingman who had the economic strength to bargain collectively with a free and dignified employer in accordance with the methods of democracy. The . . . curtailment of the right to strike," he warned, "is a denial of the principles of democracy and a substitution of the methods of the authoritarian state."[13]

When the Supreme Court upheld the Wagner Act in *NLRB v. Jones & Laughlin Steel Corp.,* it appeared to give credence to the instantiation of workers' rights. Although much of the Court's decision focused on Congress's Commerce Clause power, the Court found no due process limitation on that power. Moreover, the Court affirmed the collective rights of labor, describing "the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer" as "a fundamental right."[14] In other cases around the same time, especially in cases concerning the Court's burgeoning free speech doctrine, the Court emphasized repeatedly the fundamental importance of these rights of labor.

Within the historical context of competing paradigms of rights, observers considered these cases and the rhetoric they employed to be neither a mere vindication of federal authority to regulate the economy nor the subordination of workers' rights to the goal of industrial peace. J. Warren Madden, the

11. "New Attacks Upon Liberties," *Social Action* 2 (Jan. 10, 1936), 19, quoted in Jerold S. Auerbach, *Labor and Liberty: The LaFollette Committee and the New Deal* (Indianapolis: Bobbs-Merrill, 1966), 75.

12. Edwin S. Smith, "The Current Attack on Our Civil Liberties," *Lawyers Guild Review* 1, no. 4 (June 1941), 5–10, 5.

13. *Hearings on National Labor Relations Act and Proposed Amendments: Before the S. Comm. on Educ. and Labor,* 76 Cong. 17 (1939) (statement of Senator Robert F. Wagner), quoted in *The Wagner Act: After Ten Years* (Washington, D.C.: Bureau of National Affairs, 1945), ed. Louis G. Silverberg, 31.

14. 301 U.S. (1937), 34–35.

NLRB's chairman, stressed that the "most significant result" of the Wagner Act "is that it has created a new and important civil liberty and has given new vitality to the old civil liberties."[15] Roger Baldwin of the ACLU saw *Jones & Laughlin* as affecting "civil liberties in the one major area where they had been most grossly violated."[16] The Lawyers' Guild emphasized "the importance of safeguarding and extending the rights of workers and farmers upon whom the welfare of the entire nation depends."[17]

To these observers, federal legislation and judicial approval had not created a regulatory apparatus at the expense of individual rights, as Henretta's reference to Belloc's Servile State suggests. Instead, this apparatus appeared to offer judicial vindication of a new kind of rights. According to eminent Supreme Court scholar Edward Corwin, "the social teachings of the New Deal" had led the Court "practically to dismiss the conception of 'freedom of contract' as a definition of 'liberty' and to substitute for it a special concern for 'the rights of labor.'"[18] Corwin compared decisions from forty years earlier in which "it is the right of employers to the unrestricted use of their economic superiority in bargaining with employees, or those seeking employment which appears as the very essence of 'liberty,'" with recent decisions in which "it is the opposed right of employees, or those seeking employment, to use their organizing strength which furnishes the term its special importance."[19] The rights of labor, not the rights of the individual in his labor, now seemed paramount.

T. V. Smith, a professor of philosophy and member of the Illinois state senate, generally agreed, invoking a positive conception of rights to replace the negative one that dominated the *Lochner* era. "Since in general we must admit that a man is free when he feels and keeps on feeling that he is free, we must come out with the conclusion that political regulation may enlarge the economic freedom of some men and may enlarge the general freedom of some, with or without the enlarging of their economic freedom." Taking a pragmatic stance, he concluded, "The truth is that politicians are always interfering with somebody's economic freedom for the sake of somebody else's freedom, economic or otherwise."[20]

What workers' rights consisted of specifically was unclear. Certainly

15. Quoted in D. O. Bowman, *Public Control of Labor Relations* (New York: Macmillan, 1942), 445.

16. Quoted in Auerbach, *Labor and Liberty,* 212.

17. Quoted in Percival Roberts Bailey, "Progressive Lawyers: A History of the National Lawyers Guild, 1936–1958" (Ph.D. diss., Rutgers, 1979), 112.

18. Edward S. Corwin, *The Constitution and What It Means Today* (Princeton: Princeton University Press, 1941), 169.

19. Ibid., 200.

20. T. V. Smith, "Political Liberty Today: Is It Being Restricted by Economic Regulation?" *American Political Science Review* 31 (April 1937): 243–52, 249.

they encompassed the right to organize, bargain collectively, and strike. Some suggested they might go further. As solicitor general in 1938, Robert Jackson described how "[o]ur generation is groping toward an economic bill of rights that will protect our people from irresponsible exercise of economic power, just as past generations worked toward the constitutional bill of rights which has long restrained the irresponsible exercise of political power." Such rights included not only procedural protections but also more substantive rights like "the ending of the oppression of starvation wages and sweatshop hours, the right of the willing to work, the right to a living when work is not available, the right to some shelter from the cruelties of impoverished age." Jackson saw "that political rights, valuable as they are, too often depend on other rights. Due process of law loses much of its practical value to a man who cannot hire a lawyer. The franchise to vote for a mayor of a city may mean less than the right collectively to bargain for a fair wage. We must guard political rights by guarding the economic independence necessary to assert and defend those rights."[21] Where those economic rights came from, whether they could find constitutional grounding, and how they would be implemented remained largely unresolved.

What Jackson, Corwin, and others were articulating was very different from the Servile State. It was a new liberalism of workers' rights. They saw not a dichotomy between governmental power and individual rights, but the possibility that affirmative governmental power would be used to protect individual rights against debilitating private power. As Joseph Tussman and Jacobus tenBroek put it in 1949, "Even in areas in which constitutional restraints have been traditionally read as prohibitions, [like] [t]he First Amendment, . . . the course of events has radically altered the social context . . . and made necessary positive administrative action to promote and secure these rights. To think primarily in terms of protection against encroachment by public authority is now to commit the sin of irrelevance."[22] These commentators, then, did not see the necessary dichotomy between rights and regulation that Henretta implies. The old rights had indeed passed from the scene, but at the time it appeared likely that a new set of rights, rather than no rights at all, were replacing the old.

The ascendance of such workers' rights in the 1940s may sound unlikely to modern ears, but not because of Henretta's conclusion that the death of liberalism meant the creation of the Servile State. Rather, it sounds strange

21. Robert H. Jackson, "The Call for a Liberal Bar," reprinted in *The National Lawyers Guild: From Roosevelt through Reagan,* ed. Ann Fagan Ginger and Eugene M. Tobin (Philadelphia: Temple University Press, 1988), 23–24.

22. Joseph Tussman and Jacobus tenBroek, "The Equal Protection of the Laws," *California Law Review* 37 (Sept. 1949): 341–81, 380.

because the rights-based liberalism we know as our own associates individual rights with the rights of racial minorities and women rather than with the rights of workers. Even as workers' rights seemed the likely repository of judicial protection in the early 1930s, they were neither the only possible nor the ultimate recipient of such protection. Minorities' civil rights had long been championed by groups like the NAACP, although in the 1930s they were not as nationally prominent as workers' rights. Just as the New Deal Court upended longstanding legal conceptions of individual rights and destabilized constitutional doctrine, World War II and the Cold War that followed massively dislocated pre-war political, social, and economic structures. World War II profoundly changed the relative position of race and labor in the national consciousness as well as the meaning and direction of legal possibilities for individual rights. Where previously lawyers and activists had linked rights, both politically and doctrinally, to economics, the domestic dimensions of the war raised the profile of minority groups and the question of their place in American society.

The pressures and constraints of first the hot war and then the cold one deepened the uncertainties about the future of liberalism. The greater attention to race did not mean the disappearance of workers' rights during World War II; rather, the rights of racial minorities joined economic rights as national issues. Throughout the forties, fundamental questions of what constitutional rights would look like remained unanswered. Contemporaries saw how deeply uncertain were the contours of civil rights, their foundational constitutional texts, and the extent of public and private responsibility for their vindication.

By the time resolutions to these questions began to appear, in *Brown* and beyond, they looked considerably different from the Servile State Henretta and Belloc describe. As civil rights lawyers successfully pressed African American rights in the courts and as the Cold War deepened, a new liberalism finally began to take shape in the mid-1950s. As a doctrinal matter, *Brown*'s invalidation of school segregation in 1954 neither began nor completed the creation of an individual rights regime that would occupy the field. Nonetheless, that case fundamentally changed the scope of civil rights law and American liberalism. *Brown* and its progeny resurrected the *Carolene Products* dichotomy between economic regulation and racial rights. Together with Cold War political limitations on the expansion of a robust welfare state, they culminated in a rights-based liberalism largely denuded of the economic rights of the 1940s. The liberalism that eventually emerged in *Brown* and the decades that followed belie Henretta's prediction of the Servile State. It is one in which the negative rights of non-economic minorities against government replaced economic rights. At least some economic security was traded for these rights, not the other way around.

Henretta's suggestion that 1937 represented an end to American liberalism and the beginning of a new political and constitutional order in which individual rights had been sacrificed to economic regulation, then, lands somewhat wide of the mark. In fact, the political and social fundamentals of the latter half of the twentieth century remained deeply uncertain as the New Deal made way for the war. The 1940s were not a relatively uneventful interlude between the New Deal's creation of the modern bureaucratic state and the Supreme Court's fulfillment in *Brown* of a long immanent promise to protect the rights of racial minorities. The decade was a signal period of ferment, in which the contours of the bureaucratic state, the form of individual rights, and the relationship between them were still unsettled. Contemporaries saw an explicit connection between discrimination and economics, rights and reform, individual entitlement and government obligation. Indeed, workers' rights to economic security—sometimes on their own and sometimes in conjunction with racial minorities' rights to be free from discrimination—were at the heart of conceptions of individual rights in this period. Liberalism, far from having died a statist death in 1937, remained a strong, if uncertain and fluid, presence in the 1940s. By 1954, it was perhaps the Servile State, rather than rights-based individual liberalism itself, that had met its demise.