Charles Evans Hughes and the Strange Death of Liberal America

JAMES A. HENRETTA

"Liberalism! Not in all history has a word been so wrenched away from its true meaning and dragged through the gutter of defilement," the Wilsonian Progressive George Creel protested angrily in a memoir of 1947: "Where it once stood for the dignity of man, . . . it now stands for the obliteration of individualism at the lands of a ruthless, all-powerful state."[1] For nearly fifty years, most scholars have given little heed to the rage vented by Creel and other critics of New Deal "liberalism." Amidst the expansion of the American welfare state, the outlook and ideas of the anti-New Dealers seemed at best naively outdated and at worst positively pernicious. History—in the form of an increasingly massive, paternalist, neo-mercantilist, bureaucratic state—seemed to be firmly on the side of those who advocated the expansion of federal authority over more aspects of American life.

1. George Creel, *Rebel at Large* (New York: G. P. Putnam's Sons, 1947), quoted in Otis Graham, *An Encore for Reform: The Old Progressives and the New Deal* (New York: Oxford University Press, 1967), 90.

James A. Henretta is the Priscilla Alden Burke Professor of American History at the University of Maryland <henretta@umd.edu>. In 1991–1992 he was the Harold Vyvyan Harmsworth Professor of American History at Oxford University, where he delivered a very preliminary version of this article as his Inaugural Lecture. He would like to express his thanks to the Trustees of the Rothermere Foundation and Major and Mrs. Vivian Harmsworth for their kind support, and to Provost and Fellows of the Queen's College for their hospitality. Various colleagues in England and the United States—Bruce Ackerman, James Banner, Alan Brinkley, John Buenker, Gary Gerstle, James Gilbert, David Grimsted, Stanley Katz, James Kloppenberg, Robyn Muncy, J. R. Pole, Daniel Rodgers, John Rowett, Christopher Tomlins, and Rebecca Starr—offered helpful criticism and suggestions, as did members of the Washington Seminar on American History and Culture. The author revised this article while enjoying the John Hope Franklin Senior Fellowship at the National Humanities Center.

Law and History Review Spring 2006, Vol. 24, No. 1
© 2006 by the Board of Trustees of the University of Illinois

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

Recent political and judicial debates—and events—have jolted that conception of historical change. More important for our purposes, they have renewed scholarly interest in American liberalism in its "laissez-faire" and Progressive era forms and in the "constitutional revolution" of 1937 that, in the accounts of many political historians and some legal scholars, effectively marked the transition to a new regime of "welfare-state liberalism."[2]

This article places the events of 1937 in the context of the evolution of American liberalism over the previous half-century and suggests, with Creel, that those events represented a sharp and important break not only from laissez-faire constitutionalism but also from progressive-era liberalism. It focuses on the career—and evolving liberal outlook—of Charles Evans Hughes, one of the most influential men in American public life during the first half of the twentieth century. Born in 1862 and coming of political age in the period of "good government" Mugwumpism, Hughes became a Progressive Era reformer and governor. Indeed, he helped to define modern state government by enhancing the powers of the governor and the administrative bureaucracy—an achievement that nearly won him the presidency in 1916 and led to his appointment as Secretary of State from 1921 to 1925. Hughes's impact on American law was even greater, first as an associate justice of the United States Supreme Court from 1910 to 1916 and then as chief justice from 1930 to 1941. Despite his prominence in many fields, Hughes is known today primarily by legal historians, so that the fate of his public reputation is one Strange Death we must understand.[3]

A second Strange Death is central to Hughes's ideological odyssey: the rise and eclipse of the transnational reform movement known in Britain as the New Liberalism and in the United States as Progressivism. In Britain, the New Liberalism rose rapidly, achieved much, and then quickly died.

2. For accounts by political historians, see the essays in *The Rise and Fall of the New Deal Order, 1930–1980,* ed. Steve Frazer and Gary Gerstle (Princeton: Princeton University Press, 1989); Christopher L. Tomlins, *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880–1960* (Cambridge: Cambridge University Press, 1985); Sidney M. Milkis, *The President and the Parties: The Transformation of the American Party System since the New Deal* (New York: Oxford University Press, 1993); and William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York: Oxford University Press, 1995).

3. Nearly all treatments of Hughes's life and political career are dated and most present him in a very favorable light, partly because they rely heavily on papers that Hughes personally selected and deposited in the Library of Congress (hereafter LC). The best studies are the two-volume authorized biography by Merlo Pusey, *Charles Evans Hughes* (New York: Columbia University Press, 1951) and the interpretative study by Dexter Perkins, *Charles Evans Hughes and American Democratic Statesmanship* (Boston: Little Brown, 1956). See also Robert Wesser, *Charles Evans Hughes: Politics and Reform in New York, 1905–1910* (Ithaca: Cornell University Press, 1967).

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

During World War I, the rise of the Labour Party and a hardening of class lines eclipsed the Liberal Party and its ameliorative social agenda.[4] In the United States, the fate of Progressivism was more complex and protracted. More complex because American Progressivism was not a political party but a congeries of reform groups with distinct social bases and political priorities. More protracted because the strength of capitalist institutions and ideology, along with the federal character of American government, delayed the appearance of a class-divided polity and a centralized administrative state until the mid-1930s. At that historical moment, as Daniel Rodgers suggests in *Atlantic Crossings: Social Politics in a Progressive Age,* many of the European-influenced reforms advocated by American New Liberals between 1900 and 1914 came to fruition. The key events came in 1936, in the overwhelming electoral triumph of Franklin D. Roosevelt (the equivalent of the Liberal Party's crushing victory in the British general election of 1906), and in 1937, in the acceptance by the Supreme Court of the New Deal's regulatory and welfare-state regime.[5] However, contrary to Rodgers, I will argue that this constitutional revolution represented not the fulfillment of Progressive-era liberalism but its death knell. By accepting the legitimacy of the centralized direction of American life through congressional legislation and presidential executive orders—what conservatives of the time condemned as "Statism" and their counterparts today call "big government"—the Supreme Court permitted and encouraged the creation of a bureaucracy-rich, national administrative regime.[6]

My account draws heavily on the extraordinarily rich legal scholarship on the constitutional history of the 1930s while refracting it through the life and ideology of the chief justice. It suggests that there was a significant shift in 1937 in Hughes's stance and addresses six important recent interpretations of the Hughes court. Three of them, by Barry Cush-

4. This interpretation stems from George Dangerfield's brilliant narrative history of prewar liberalism, *The Strange Death of Liberal England* (New York: H. Smith & R. Haas, 1935). Recent scholarship views the demise of British liberalism as primarily the result of World War I.

5. See Daniel Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (Cambridge: Harvard University Press, 1998).

6. Between 1930 and 1960, the proportion of civilian government employees in the American workforce nearly doubled, from 6.3 percent to 11.9 percent. The number of federal government workers increased even more dramatically, from 526,000 to 2.2 million, and the number of non-government workers paid with federal tax dollars rose in an even more impressive fashion. In 1930 there was a single federal worker for every five state and local government employees (526,000 to 2.6 million); in 1940, the ratio had risen to 1 to 3.3 (956,000 to 3.2 million); and by 1950 it was 1 to 2.2 (1.9 to 4.1 million). For discussions of the conception of "Statism" in the Progressive and New Deal eras, see notes 43 and 129 and the accompanying text.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

man, Richard Friedman, and Edward White, deny that there was a constitutional revolution in 1937. Adopting an internalist legal perspective, Cushman maintains that by the 1930s the Supreme Court had accepted so much regulatory legislation that it had destroyed the "coherence and symmetry" of the old system of laissez-faire constitutionalism; by 1937, there was hardly anything to overthrow. Cushman also suggests that the Court rejected early New Deal legislation because it was poorly drafted and approved later statutes not because of external political pressure but because they were carefully crafted to avoid constitutional challenge.[7] Richard Friedman likewise depreciates the importance of 1937. In his view, the conservative outlook of the Taft court of the 1920s was undermined initially *in 1930* by the appointment of Hughes and of Owen J. Roberts and then, more decisively, *after 1937* by the judges named by Franklin Roosevelt. Moreover, Friedman's close analysis of the leading cases and the court-packing controversy fails to reveal a "switch in time that saved nine" either by Hughes or (though with less certainty) by Roberts.[8] Edward White similarly argues that the decisions of 1937 were part of a doctrinal revolution that began in the late 1920s and concluded only in the early 1940s. This decade-long transformation swept aside the traditional view that "fundamental constitutional principles" were fixed and eternal and required only a restatement in order to "accommodate" events. In its place stood a "new orthodox conception of constitutional adaptivity" in which justices and legislatures assumed that a "living constitution" should be "responsive to changing economic and social conditions."[9]

Despite their many merits, these interpretations fail to capture the political and rhetorical intensity on the Court in Depression-era America. In private correspondence Chief Justice Taft labeled his three liberal colleagues as "the Bolsheviki" and Judge Learned Hand called the four conservative justices the "Mastiffs" and the "Battalion of Death." More important, they obscure the fundamental shift in American ideology and institutions that enraged Creel and deeply troubled Hughes: the transit from American

7. Barry Cushman, "Rethinking the New Deal Court," *Virginia Law Review* 80 (1994): 201–61; Cushman, "A Stream of Legal Consciousness: The Current of Commerce Doctrine from *Swift* to *Jones & Laughlin,*" *Fordham Law Review* 61 (1992): 105–81; and Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1998).

8. Richard Friedman, "Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation," *University of Pennsylvania Law Review* 142 (1994): 1891–1984; Friedman, "Charles Evans Hughes as Chief Justice, 1930–1941" (unpublished D.Phil. diss., Oxford University, 1979).

9. G. Edward White, *The Constitution and the New Deal* (Cambridge: Harvard University Press, 2000), 235, 204–5.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

New Liberalism to New Deal Statism. In this regard, the accounts by Cass Sunstein, Bruce Ackerman, and Michael Parrish are more persuasive.[10] In different ways, these scholars argue that the election of 1936 and the subsequent court decisions profoundly altered the "baseline" of constitutional doctrine and political possibility. However, these interpretations are too narrow, because their constitutional focus and American particularism obscure both the transnational dimension of the decline of the New Liberalism and its replacement by more powerful, centralized, and social-redistributive regimes—Labour Party social democracy in Britain and the New and Fair Deals in the United States. However, this is to anticipate my argument, which must begin with a short sketch of Hughes's character and his career as a lawyer-reformer.

I. The Shaping of a Personality

Charles Evans Hughes was a self-made man, the archetypal nineteenth-century Anglo-American bourgeois. The only child of a pious American Baptist mother and an immigrant Welsh minister, Hughes imbibed from his parents a religiosity, discipline, and will that is almost too much of a caricature of the Calvinist work ethic to be believed. "Have a little memorandum with a classification of rules," the elder Hughes wrote to his fourteen-year-old son at college, "And write down our counsel under respective heads. e.g.—Rules for Health—Rules for Conduct . . . Rules for Religion. . . . Do not deviate from your systematic plan. . . . I mean your regular daily and hourly routine."[11]

Although Hughes eschewed the ministerial career his parents envisioned, he internalized their godly sanctioned discipline of time and work. At college he rose "at six o'clock every morning, and study right along until nine

10. For the remarks of Taft and Hand, see notes 87 and 89, below. Bruce Ackerman, *We the People: Foundations* (Cambridge: Harvard University Press, 1991), chaps. 4–5, and *We the People: Transformations* (Cambridge: Harvard University Press, 1998); Cass R. Sunstein, "Lockner's Legacy," in *Law and Liberalism in the 1980s,* ed. Vincent Blasi (New York: Columbia University Press, 1991), 157–204; Michael E. Parrish, *The Hughes Court: Justices, Rulings, and Legacy* (Santa Barbara: ABC-CLIO, Inc., 2002).

11. Letters of 6 and 23 October 1876, quoted in Pusey, *Hughes,* 1:31, and chaps. 1–4. Although a Methodist in Wales, the elder Hughes served Baptist congregations in the U.S. Oliver Wendell Holmes, Jr., who befriended the younger Hughes during his six years as an associate justice, was struck both by his colleague's intense religiosity and capacity for independent thought, noting that Hughes had "doubts that open vistas through the wall of a nonconformist conscience." Letter to Sir Frederick Pollock, quoted in Paul A. Freund, "Charles Evans Hughes as Chief Justice," *Harvard Law Review* 81 (1967): 38.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

or ten at night," consciously using work to achieve mastery over self and the world. "I have countless desires and yearnings which I repress," the young man confessed to his father a few years later. "That is the best cure for all mental ailments—work."[12] Work was an obsession for the young Hughes and became the central core of his personality. As the editor of his *Addresses* as governor of New York noted with astonished admiration: "His work literally takes possession of him. It is consequently impossible for him to do anything he undertakes in a half-hearted or slipshod manner."[13]

Mid-Victorian bourgeois liberalism taught that hard work brought worldly success, and it certainly did so for Hughes. Graduating near the top of his class at Brown, he took his law degree at Columbia and passed the New York State bar examination with a grade of 99.5. In 1883, he joined the firm of Chamberlain, Carter & Hornblower, which in 1888 (the year of his marriage to Carter's daughter, Antoinette) became Carter, Hughes & Cravath.[14] As a Wall Street lawyer, Hughes committed himself completely to what Adam Smith called "the race for wealth, honour and preferments" and nearly worked himself to death. To protect his health, in 1891 he opted for the leisure and genteel poverty of academic life by assuming a professorship of law at Cornell University. Two years later, Hughes returned to Wall Street but now punctuated his exhausting work routine with yearly mountain-climbing trips to Europe and tamed his nervous energy by following a rigid daily schedule.[15]

As a lawyer-reformer, Hughes's rigorous intellect earned him the dubious popular reputation of "a mental machine, a human icicle," while as governor his austere self-righteousness won him the title of "Charles the Baptist." In his years as chief justice, Hughes consciously cultivated an Olympian, god-like image, wearing a dignified white beard and resembling, in the view of one newspaper reporter, "a Victorian child's image of Almighty God, a prophet ready to thunder forth the decree of justice."[16] And thunder he

12. CEH to his parents, 13 April 1878, Hughes Papers, LC; CEH to his father, 30 April 1882, in Pusey, *Hughes,* 1:65.

13. See the remarks of Jacob Gould Schurman in *The Addresses of Charles Evans Hughes, 1906–1916* (New York: G.P. Putnam's Sons, 1916), 3–4. Professor Thomas Reed Powell of Harvard noted Hughes's "well-nigh titanic" capacity for work, quoted in Friedman, "Charles Evans Hughes," 161. As Hughes explained in an interview in 1945, at age eighty-three: "I inherited a continuing ambition to excel in good work and do my job as well as it could be done. I couldn't bear the thought of leaving undone anything which could be done. . . ." Pusey, *Hughes,* 1:95.

14. Wayne K. Hobson, "Symbol of the New Profession: Emergence of the Large Law Firm, 1870–1915," in Gerald W. Gawalt, ed., *The New High Priests: Lawyers in Post-Civil War America* (Westport, Conn.: Greenwood Press, 1984), 17–19.

15. Pusey, *Hughes,* 1: chaps. 7–9 and 1:298, 2:664. His income as a partner in Carter's law firm was $13,500; at Cornell, $3,000.

16. Quoted in Friedman, "Charles Evans Hughes," 158; see also Pusey, *Hughes,* 1:174.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

did, his mode of argument often reflecting his personal conviction of right and wrong. As Hughes's contemporaries and later legal scholars noted, his judicial opinions had "a strong result-orientation marked by a willingness to manipulate doctrine to reach the outcome he desired."[17]

Yet Hughes's deep knowledge of the law and superb analytic skills won praise from virtually every lawyer who knew him, including Felix Frankfurter, a sharp critic of the chief justice before 1937 and his colleague on the Supreme Court from 1939 to 1941. When Hughes—then in his late seventies—convened his colleagues to decide cases, Frankfurter observed, he was in complete control: "You just didn't like to talk unless you were dead sure of your ground, because that gimlet mind was there ahead of you." Finally, there was Hughes's personality, totally austere and totally powerful. When he retired as Secretary of State in 1925, the British statesman Arthur Balfour remarked that Hughes was "the most dominating figure I have ever met in public life."[18]

II. The Making of a Reformer

Hughes's early life provides a guide to the late nineteenth-century transition from Mugwump reform to Progressivism. As a student at Brown in 1880, he enthusiastically supported the Republican ticket of Garfield and Arthur and, eight years later, joined the National Republican Club. However, until 1905, when he was forty-three, Hughes focused primarily on his legal practice, which was devoted to contracts and bankruptcies. Like many elite lawyers, Hughes doubted the wisdom of universal suffrage and condemned machine politics; an admirer of Grover Cleveland, he supported the efforts of upper class Mugwumps to promote "good government."[19] Hughes also admired

17. Editor's Note: "Governor on the Bench: Charles Evans Hughes as Associate Justice," *Harvard Law Review* 89 (1976): 966. John W. Davis, a leading member of the American Bar and the Democratic presidential candidate in 1924, noted that Hughes was "too apt to reach his conclusion and then reason to it, instead of reasoning to it and reaching his conclusion." Ibid., 966.

18. Frankfurter, quoted in Friedman, "Charles Evans Hughes," 137. To Justice Robert H. Jackson, Hughes "was one of the two great personalities of my time. The other was the President [FDR]." Eugene C. Gerhart, *America's Advocate: Robert H. Jackson* (Indianapolis: Bobbs-Merrill, 1958), 145. Balfour quoted in Pusey, *Hughes,* 2:614. William R. Castle, Jr., who worked under Hughes at the State Department, wrote in his diary in 1924: "It is inspiring to come into contact with his mind, the most perfect mental machine in the whole world; with his courage, which always dares to do the right thing." Quoted in Pusey, *Hughes,* 2:610.

19. CEH to his father, 2 November 1880, and to Charles Evans Hughes, Jr., 28 March 1924, Hughes Papers, LC. Between 1894 and 1904 Hughes argued twenty-five cases before the New York Court of Appeals, none of them dealing directly with large questions of

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

William Ewart Gladstone, the great British Liberal, probably because of Gladstone's efforts to reform the civil service, eliminate corrupt electoral practices, and impose strict economy in government.[20]

Hughes came to public attention in 1905 as chief legal counsel for a New York State legislative committee. A Republican initiative, the committee was probing an inflated contract for public lighting between the Consolidated Gas Company and a New York City government controlled by Tammany Hall Democrats. Most politically conscious New Yorkers expected little from the investigation because many state legislators were beholden to railroads, utilities, and other corporations. Nor did Hughes inspire much confidence. An unknown lawyer (recruited when prominent figures declined to serve), he was an acquaintance of the Rockefellers, who were alleged to control the gas monopoly, and a former partner of Paul Cravath, one of the attorneys for the big utilities.[21]

However, like many new professionals around 1900, Hughes was influenced more by occupational norms than by social ties. Renowned in legal circles for tracking down concealed corporate assets in bankruptcy cases, Hughes lived up to his reputation. In three weeks of grueling oral examination of gas company executives, he established a pattern of overcapitalization, fraudulent bookkeeping, and tax evasion that gave Consolidated Gas a net profit of 100 percent on each kilowatt-hour of electricity sold. To eliminate these abuses, Hughes drafted three bills and, taking his case directly to the Republican-dominated state legislature, won their enactment. One measure reduced all gas prices by twenty percent, while another

---

public policy. For Hughes's views on Cleveland, see the comments of his secretary, R. H. Fuller, Hughes Papers, LC, Reel 149, Frame 763. Opposing Hughes's renomination in 1908, Republican party boss (and Speaker of the Assembly) William Barnes, Jr., complained that it would "put the Republican party in this state in the hands of the Mugwumps." Quoted in Richard L. McCormick, *From Realignment to Reform: Political Change in New York State, 1893–1910* (Ithaca: Cornell University Press, 1981), 234.

20. For Gladstone's influence in the United States, see Robert Kelley, *The Transatlantic Persuasion: The Liberal Democratic Mind in the Age of Gladstone* (New York: Knopf, 1969). Unlike Gladstone, whose portrait graced Hughes's home in the 1890s, Hughes was not a free-trader. Before World War I he favored a protective tariff with rates set by "an expert commission" (see Schurman, *Addresses,* 39), and as Secretary of State he did not speak out against high import duties, despite their impact on the ability of Europeans to pay their war debts to the United States. See Perkins, *Hughes,* 115-39, and Pusey, *Hughes,* 1:208 and 2:571–73, 593.

21. Pusey, *Hughes,* 1:134; Wesser, *Hughes,* 22; for the details of Hughes's appointment, compare Edwin McElwain, "The Business of the Supreme Court as Conducted by C. J. Hughes," *Harvard Law Review* 63 (1949): 8–9, with David J. Danelski and Joseph S. Tulchin, eds., *The Autobiographical Notes of Charles Evans Hughes* (Cambridge: Harvard University Press, 1973), 108–9 and 119–20.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

created a publicly financed Commission of Gas and Electricity with the power to set utility rates throughout the state. A third bill gave New York City the option of using its water supply to generate electricity, a venture in municipal socialism that was not pursued.[22]

This legislation suggested that Hughes accepted the legitimacy of the municipal ownership of utilities. As well-educated Americans knew, "municipal socialism" was popular in Germany and especially in England, where local governments sold eighty percent of the water, sixty percent of the electricity, and almost forty percent of the natural gas. At the same time, most influential Americans viewed municipal ownership as politically unwise in large, boss-dominated cities, so the success of Hughes's bill in Albany was surprising. In 1898 the state assembly had ignored excessive fares and financial corruption in New York City's transit companies and summarily dismissed an advisory referendum advocating public ownership. Invoking classical liberal doctrine, the assembly declared that "no government . . . should embark in a business that can be as well conducted by private enterprise."[23]

Hughes likewise preferred private ownership of utilities but wanted them to be regulated by an independent commission. Regulation was not new in 1905 but neither was it very successful. In 1886 and again in 1896, popular agitation had won legislation setting maximum prices for natural gas in New York City. However, the utilities industry had found other ways to profit at the public's expense and to pad the membership of the regulatory agency, the Board of Railroad Commissioners. Hughes's new three-member commission had much more power than the Railroad Board or regulatory agencies in other states. It had the authority to inspect the books and property of power companies, regulate their issue of stocks and bonds, specify quality standards for their products, and set their rates. Moreover, the state government financed the commission, which was also independent of the legislature and its partisan imperatives.[24] Finally, if Hughes had his way,

22. Pusey, *Hughes,* 1:136–38; McCormick, *Realignment to Reform,* 195–96. Consolidated Gas declared its tax value as $35 million, but calculated its rates on an inflated value of $47 million and, in 1904, paid dividends of $8 million (or 10 percent) on $80 million of stock. In fact, the actual rate of return on capital was between 20 and 30 percent, since Hughes determined that the replacement value of the Gas Company's assets was $27 million.

23. On European municipal socialism, see Rodgers, *Atlantic Crossings,* 117–30. Assembly Report quoted in McCormick, *Realignment to Reform,* 157. Municipal ownership of utilities existed in many small American towns. As Rodgers notes (147–59), a well-justified fear of political corruption in large cities, the result of universal suffrage and machine politics, undercut American movements for municipal ownership and urban progressivism.

24. In defining the powers of the commission, Hughes may have noted the commission created in 1829 by Martin Van Buren to regulate member banks of the New York Safety

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

the commission would be largely autonomous of the judiciary as well. He argued that its orders should not be reviewable by the courts unless there was a clear deprivation of property rights—a controversial approach in New York, where the courts had regularly upheld the principles of laissez-faire constitutionalism.[25]

As these initiatives began to define Hughes's political credo, they made him a popular hero, celebrated in the press as "the potent and persistent prober of the gas trust abuses." More fame quickly followed, when Hughes was called back from a European vacation to investigate the life insurance industry.[26] Although centered in New York City and under investigation by the state legislature, life-insurance companies were nation-wide businesses. The three largest New York insurers—Mutual, Equitable, and New York Life—each had assets over $260 million and tens of thousands of middle-class policyholders: lawyers, small-scale businessmen, commercial farmers, white-collar workers, well-to-do artisans and shopkeepers—those Americans who would form the core of the Progressive Movement. Already muckraking journalists had raised the ire of these middling property owners by exposing corruption by political bosses and naked exploitation by industrial "robber barons"—attacking Rockefeller and the Standard Oil Monopoly, predatory pricing by Swift, Armour, and other members of the "beef trust," and the pro-corporate policies of the United States Senate, which they condemned as a "Millionaires' Club."[27]

In the fall of 1905 Hughes added his voice to the chorus of reform. In fifty-seven public hearings, the "mental machine" subjected leading industry executives, such as George W. Perkins of New York Life, and their

---

Fund. See James A. Henretta, "The Birth of American Liberalism: New York, 1820–1860," in *Republicanism and Liberalism in America and the German States, 1750–1850,* ed. Jürgen Heideking and James A. Henretta (Cambridge: Cambridge University Press, 2002), 173, and Don C. Sowers, *The Financial History of the State of New York: From 1783 to 1912* (New York: Columbia University Press, 1914), chap. 4.

25. McCormick, *Realignment to Reform,* 32, 149–50, 178, 194–97; Hughes, "Address to the Attica Chamber of Commerce," April 1, 1907, in Schurman, *Addresses,* 152–54 and, below, notes 89–93 and the accompanying discussion; William E. Nelson, *The Legalist Reformation: Law, Politics, and Ideology in New York, 1920–1980* (Chapel Hill: University of North Carolina Press, 2001), 19, 27–28; Randolph E. Bergstrom, *Courting Danger: Injury and the Law in New York City, 1870–1910* (Ithaca: Cornell University Press, 1992), 81n.

26. Hughes had chosen the legal profession in part because it was "the one most favorable to high ambition." The insurance probe was the opportunity of a lifetime, and he seized it with both hands. "My dear," he wrote to his wife from the German Alps, "you don't know what this investigation would mean. It would be the most tremendous job in the United States." CEH to Antoinette Hughes, 6 May 1905, Hughes Papers, LC; Pusey, *Hughes,* 1:60, 141–42.

27. Harold U. Faulkner, *The Decline of Laissez-Faire* (New York: Harper & Row, 1951), 371.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

political friends, including United States Senator Chauncey M. Depew, to rigorous, remorseless, and devastating questioning. His probing revealed insurance policies biased against policyholders, extravagant corporate salaries, speculative investments, and political payoffs, including a large contribution to the 1904 presidential campaign of Theodore Roosevelt. To derail the lawyer-crusader, Republican bosses offered Hughes their party's nomination for mayor of New York, a proposal he self-righteously refused. Completing the investigation, Hughes dashed off an impressive book-length report and proposed ten bills—forbidding political contributions, regulating lobbying, giving policyholders greater rights, setting rules for investment and underwriting—that became law virtually as he wrote them. This legislation moved New York (as one scholar has argued) toward a new system of political economy, "one based on regulation, administration, and planning."[28]

Insurance reform further defined Hughes's political outlook and underscored his professional skills. By 1900, most elite lawyers represented large corporate clients and, in their writing of contracts, handling of claims, and fashioning of business-related legislation, created the framework of corporation law. Writing regulatory legislation required only a shift in perspective. The child of middle-class parents and not yet a man of wealth, Hughes wrote rules reflecting most Americans' fear of concentrated financial power. His report warned that giant insurance companies might extend their influence over banks and trust companies and buy up railroads and industrial enterprises, thus creating "vast combinations of capital and assets." To avoid this outcome, Hughes won laws that prohibited insurance companies from owning corporate stock, controlling banks, or underwriting securities. The companies had to stick to their core businesses and to invest their assets in "conservative and durable investments," such as bonds. These stringent rules shaped American financial life for the next half-century, creating a conservative corporate culture within the insurance industry and fragmenting bank ownership in the United States to a greater extent than was the case in Britain, Germany, and Japan.[29] As a middle-class reformer, Hughes instinctively favored small property, while as a

28. McCormick, *Realignment to Reform,* 197–205, 218 (quote); Pusey, *Hughes,* 1:164-68.

29. Robert W. Gordon, "'The Ideal and the Actual in the Law': Fantasies and Practices of New York City Lawyers, 1870–1910," in Gawalt, ed., *The New High Priests,* 59–61. Hughes "Report" quoted in Mark J. Roe, *Strong Managers, Weak Owners: The Political Roots of American Corporate Finance* (Princeton: Princeton University Press, 1995), 69. See also Morton Keller, *The Life Insurance Enterprise, 1885–1910* (Cambridge: Harvard University Press, 1963), 259–64. Harold Perkin, *The Rise of Professional Society: England since 1880* (London: Routledge, 1990), chaps. 1, 4, and 8 develop the concept of the professional ideal.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

deeply moral legal professional, he was coming to view property rights as contingent—as compensation for service to society—and therefore subject to state regulation.

This outlook placed Charles Evans Hughes in the mainstream of Progressive thought and catapulted him into politics. Seeking a candidate for governor who could save the scandal-tainted Republican Party from almost certain defeat at the hands of William Randolph Hearst, the press tycoon and Democratic nominee, President Theodore Roosevelt persuaded the party bosses to nominate Hughes. "He is identified in the public mind as a reformer," Roosevelt argued, but he is "a sane and sincere reformer, who really has fought against the very evils which Hearst denounces, while yet free from any taint of demagogy."[30]

Roosevelt's charge of "demagogy" reflected the increasing economic divisions in American society and Hearst's class-based political rhetoric. An extraordinarily ambitious man, the publisher of the New York *Evening Journal* was also an avid advocate of municipal socialism—founder of the influential Municipal Ownership League. To Roosevelt and most of New York's *haute bourgeoisie,* Hearst was a dangerous radical. He heaped abuse on private utility companies and actively sought workers' votes, proposing an alliance with the Independent Labor Party, the political wing of the Central Federated Union of New York City.[31]

Roosevelt was well aware of the working-class challenge to America's capitalist political economy. During his governorship (from 1898 to 1900), New York workers had insisted on enforcement of existing eight-hour day legislation and campaigned for new limitations on the laissez-faire doctrine of "freedom of contract," such as state-imposed health and safety regulations. Indeed, in 1902, the New York Workingmen's Federation had won passage of an Employers' Liability Act limiting the reach of the common law doctrines of "assumption of risk" and the "fellow-servant" rule and thereby encouraging an ever-increasing number of lawsuits for job-related injuries.[32] Now the Federation proposed a comprehensive system of Workers' Compensation, another European-derived reform. Hearst's election would give additional momentum to labor and, possibly, begin a fundamental realignment of American politics along the lines of class.

30. Quoted in Pusey, *Hughes,* 1:173. In the spring of 1906, Roosevelt had tried to recruit Hughes to investigate illegal trade combinations in the coal industry.

31. Wesser, *Hughes,* 86–91. In 1886, the Union had backed the nearly successful mayoral bid of utopian socialist Henry George.

32. See Bergstrom, *Courting Danger,* 15–30 (tables 1–12) and 158–66 (tables 22–31) for increases in the number of cases and the size of awards, and, in general, Lawrence M. Friedman and Jack Ladinsky, "Social Change and the Law of Industrial Accidents," *Columbia Law Review* 67 (1967): 50–82.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

"It would be a dreadful calamity if we saw this country divided into two parties," Roosevelt confided to his attorney general, "one containing the bulk of property owners and conservative people, the other the bulk of the wage workers. . . ."[33]

Hughes shared these concerns and, while always his own man, found it easy to play the role that Roosevelt assigned him. To reassure the *haute bourgeoisie,* the Republican gubernatorial candidate defended the business corporation as an instrument of American economic growth. To win over rural and middle-class voters, he attacked unscrupulous owners and managers and promised greater regulation of errant companies. And to entice workers away from Hearst, he called for an eight-hour day on public works projects, the regulation of child labor, and reorganization of the state's labor department. In the election, Hughes carried the traditionally Republican rural areas and small towns and won the votes of urban reform-Democrats. But his margin of victory over Hearst (fifty-two percent to forty-eight percent) was provided by Tammany boss Charles Murphy, who wanted to retain the allegiance of New York City's immigrant workers and threw the weight of his Democratic machine against the ambitious press baron.[34]

How had Charles Evans Hughes, a political unknown in 1905, become the highest elected official in New York state by the end of 1906? Chance certainly played a role, but Hughes's energy, will, and intelligence were even more important. A lesser man would have bungled the gas and insurance investigations; or failed to secure innovative legislation; or been unable to make the transition from a good-government Mugwump to a crusader-lawyer to a reform-politician. To ponder the dynamics of Hughes's rise is to probe the mystery of human agency: the personal qualities that account for one person's failure and another's success.

It is also to trace the changing character of American political liberalism. Hughes's meteoric ascent recalled that of Grover Cleveland, another lawyer-reformer, who rose from mayor of Buffalo in 1881, to governor of New York in 1883, to president of the United States in 1885. Cleveland and Hughes had much in common: both were middle class and minister's sons, both honest and hardworking, both courageous and self-righteous. Their moralistic politics offered an alternative to the corruption of party machines and corporate interests and transcended party boundaries: just

33. Roosevelt to Philander Knox, 10 November 1904, quoted in Martin J. Sklar, *The Corporate Reconstruction of American Capitalism, 1890–1916: The Market, the Law, and Politics* (Cambridge: Cambridge University Press, 1988), 357; McCormick, *Realignment to Reform,* 152, 178–79.

34. Irwin Yellowitz, *Labor and the Progressive Movement in New York State, 1897–1916* (Ithaca: Cornell University Press, 1965), 213; McCormick, *Realignment to Reform,* 206-8, 220–27; Wesser, *Hughes,* 88–99.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

as the Democrat Cleveland won Republican Mugwumps to his cause, so Hughes appealed to Reform Democrats. Because they rose to prominence in different political generations, there was a crucial distinction between the two New Yorkers. A traditional liberal-democrat in the tradition of Andrew Jackson and William Gladstone, Cleveland stood for the old ideal of the "negative state" and condemned excess in government, political patronage and corruption, extravagant pensions for Civil War veterans, and protective tariffs. Carried to fame by the more complex politics, muckraker journalism, and class divisions of turn-of-the-century New York, Hughes entered the governorship as somewhat more than a Gladstonian Mugwump and would soon become a socially conscious Progressive, an advocate of a "positive regulatory state."

III. A Progressive Governor

To understand Hughes's political agenda, it is useful to compare it to that of Liberal Party reformers in Britain, who faced an even more daunting challenge from below. Since the 1870s British Liberals had assimilated the aristocracy of labor into the world of bourgeois property and politics. This Lib-Lab alliance had assisted the "bread and butter" reformers of the Trades Union Congress to win the allegiance of the majority of unionized British workers and thwarted the efforts of the Socialist Labor Party and other radical movements. However, in the General Election of 1906—the year after William Randolph Hearst's appeal to the working class of New York—the Labour Representation Committee within the Liberal Party dramatically changed the face of British politics by electing twenty-nine candidates (including twelve miners) to the House of Commons. With the subsequent formation of the Labour Party, "the first intentionally class-based party in capitalist society," the Liberal Party faced the loss of its working-class supporters.[35]

35. Perkin, *Professional Society,* 52 (quote). Dangerfield, *Strange Death,* points to the pre-war decline of British liberalism, while Peter F. Clarke, *Lancashire and the New Liberalism* (Cambridge: Cambridge University Press, 1971) and Clarke, "The Progressive Movement in England," *Transactions of the Royal Historical Society* 24 (1974): 159–81, argues for its vitality. See also Kenneth O. Morgan, "The Future at Work: Anglo-American Progressivism, 1870–1917," in *Contrast and Connection: Bicentennial Essays in Anglo-American History,* ed. H. C. Allen and Roger Thompson (Columbus: Ohio State University Press, 1976), 245–71. On the rise and fall of the Lib-Lab alliance, see Gregory M. Luebbert, *Liberalism, Fascism, or Social Democracy: Social Classes and the Political Origins of Regimes in Interwar Europe* (New York: Oxford University Press, 1991), 15–27.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

To stem the political appeal of the Labour Party, blunt rising class consciousness, and address the problems of poverty and exploitation, progressive British politicians espoused a "New Liberalism." Some of them, such as Lloyd George, were (like Hughes) educated as lawyers. Imbued with the new professional ideal of social efficiency, they were ready to break from the laissez-faire Gladstonian tradition and enact social legislation. His party, the New Liberal Winston Churchill wrote in 1908, had "become acutely conscious of the fact that political freedom, however precious, is utterly incomplete without a measure of social and economic independence." To ensure a minimum level of wages in certain industries, New Liberals proposed a Trade Boards Bill that Churchill championed on the hustings and in the Commons. "We want to draw a line below which we will not allow persons to live and labour," Churchill declared in support of this anti-sweating legislation. "We want to have free competition upwards; we decline to allow free competition to run downwards." Other measures quickly followed. Between 1908 and 1911 New Liberals won the enactment of a Trade Disputes Bill, a means-tested Old Age Pensions Act, and National Insurance legislation. Then, in the so-called People's Budget of 1909, Chancellor of the Exchequer Lloyd George imposed a series of taxes—higher death duties, a levy on coal royalties and undeveloped land, a super-tax on high incomes—and used traditional Liberal policies directed against the landed classes to fund new social welfare programs.[36]

Because class conflict in the United States was less well defined than in Britain and political corruption more prevalent, reform-minded American politicians had a different agenda. During his two terms as governor of New York from 1906 to 1910, Hughes devoted most attention to administrative efficiency and political reform. Consequently, labor historian John Buenker calls him a "structural reformer," concerned with the mechanisms of government rather than conflicts within society. That interpretation is too narrow. In fact, Hughes's quest for an efficient state government represented a middle-class assault on the corrupt alliance between corporate executives and party bosses; its goal was to restore political power to citizens of modest means. Moreover, like Theodore Roosevelt, Hughes recognized that the creation of a "positive" state with a purposeful bureaucracy would encour-

36. Churchill quoted in Kenneth Morgan, *The Age of Lloyd George* (New York: Barnes and Noble, 1971), 145, see also 43–47; Winston Spencer Churchill, *Liberalism and the Social Problem* (London: Hodder and Stoughton, 1909), 82 and 240–49. The legislation proposed by New Liberals was strongly contested and sometimes defeated; in 1908 the Liberal-dominated Parliament rejected a "Right to Work" plan for public employment during times of depression. See H. V. Emy, *Liberals, Radical and Social Politics, 1892–1914* (Cambridge: Cambridge University Press, 1973), 171–72; George L. Bernstein, *Liberalism and Liberal Politics in Edwardian England* (Boston: Allen & Unwin, 1986), 200.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

age workers to seek political power and class-based social legislation. To defuse that threat, he pursued his own version of the Lib-Lab alliance by supporting the reform initiatives of "social progressives." Hughes's politics was that of the propertied center; he attacked the corporation-boss alliance on the right and labor-socialist agitation on the left.[37]

Hughes first addressed political corruption. In 1906 and 1907 he secured campaign laws that limited political contributions by corporations and forced candidates to account for their receipts and expenses, legislation that was quickly copied in fifteen other states.[38] The reform-minded governor likewise expanded the number of civil service positions while refusing many patronage requests from party leaders. Hughes treated Republican politicians "with such wanton and foolish insolence," Theodore Roosevelt complained, "that it is very difficult to get the organization people to support him." To enact legislation opposed by party leaders, Hughes appealed directly to the public. One reporter likened his style of governance to a referendum, "with the legislators acting as the special agents of the people to carry out their definite decrees."[39]

However, Hughes's reservations about popular democracy, a legacy of his Mugwump past, undermined his efforts at electoral reform. He rejected the option of a direct primary in which voters could choose between declared candidates and instead proposed a complicated system of nominations by party committees. When the political bosses opposed his plan because they preferred party conventions, which they could control completely, Hughes was hamstrung—unable to mobilize popular support because he was unwilling to advocate popular power. On three occasions in 1909 and 1910, the legislature rejected Hughes's scheme. These defeats cast a shadow over his second two-year term, soured his appetite for elected politics, and perhaps accounted for his decision in 1910 to accept

37. John D. Buenker, *Urban Liberalism and Social Reform* (New York: Scribner, 1973), 26. For Hughes's definition of the governorship, see Schurman, *Addresses,* 79–80; for his appointment and veto activities, see Pusey, *Hughes,* 1:197 and Wesser, *Hughes,* 121–23, 179–80, and 254. The best general discussion of the links among parties, state finance, and corporations is Clifton K. Yearley, *The Money Machines: The Breakdown and Reform of Governmental and Party Finance in the North, 1860–1920* (Albany: SUNY-Press, 1970).

38. See Schurman, *Addresses,* 61; McCormick, *Realignment to Reform,* 215–16. James Wadsworth, Jr., the new speaker of the assembly, also took steps to curtail corrupt ties between the railroads and the legislators. See Wesser, *Hughes,* 150–51 and 276–79.

39. Roosevelt quoted in McCormick, *Realignment to Reform,* 228. The upstate industrialist reformer, Thomas Mott Osborne, a Democrat, had a different perspective, declaring that Hughes represented "the fight against *boss-rule* better than anyone . . . in our time." Quoted in Robert F. Wesser, *Response to Progressivism: The Democratic Party and New York Politics, 1902–1918* (New York: New York University Press, 1986), 34. Reporter quoted in McCormick, *Realignment to Reform,* 230.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

an appointment to the United States Supreme Court rather than to seek the presidency in 1912.[40]

Nonetheless, Hughes recast the office of the governor and bolstered the regulatory bureaucracy. He won passage of the Moreland Act, which enabled the chief executive to oversee city and county officials as well as bureaucrats in semi-autonomous departments of the state government. This measure allowed Hughes to dismiss dozens of corrupt politicians and bureaucrats.[41] Continuing his work as a lawyer-reformer, he also secured new powers for the Public Service Commissions and fought strenuously, if not completely successfully, to protect their decisions from judicial review. This legislation won the support of many corporate executives. Thomas M. Osborne, a wealthy Democrat industrialist that Hughes appointed to head one commission, noted that "the law will be the Corporations' best defense against dangerous legislation. . . . [D]emogogic appeals will lose their effectiveness; the corporations will be protected against dangerous competition and [legislative] blackmail and assured of a fair return on honest investment." Hughes's goal was not low rates for public utilities but "fair" rates. On two occasions the governor vetoed legislation that would have reduced railroad fares, arguing that his expert commissioners rather than the people's elected representatives should set fares. His ideal was not government *by* the people but *for* the people. As Hughes put it, "you must have administration by administrative officers."[42]

Hughes's initiatives began to define modern state government. "One can distinctly see the coming of a New Statism . . . ," the *Nation* remarked when Hughes left office, "and of that movement Gov. Hughes has been a leading

40. See Wesser, *Hughes,* chap. 11 and McCormick, *Realignment to Reform,* 244–47. For details of the primary plan, see Danelski and Tulchin, *Autobiographical Notes,* 152. Hughes had been an obvious presidential candidate in 1908, but, in what historian Arthur Link calls "his one great mistake," Roosevelt picked William Howard Taft as his successor, in part because of Hughes's unwillingness to compromise with Republican party bosses (Arthur Link, *Woodrow Wilson and the Progressive Era* [New York: Harper, 1954], 3). Hughes's disregard of the party nearly cost him the election; in 1908, Taft carried New York by 203,000 votes but Hughes won reelection by only 69,000 votes. See Pusey, *Hughes,* 1:233–39 and Wesser, *Hughes,* chap. 9.

41. On the Moreland Act, see Wesser, *Hughes,* 141–42 and J. Ellesworth Missall, *The Moreland Act: Executive Inquiry in the State of New York* (New York: King's Crown Press, 1946). Also, Elihu Root to CEH, 1 May 1907, Hughes Papers, LC.

42. Quoted in Bruce W. Dearstyne, "Regulation in the Progressive Era: The New York Public Service Commission," *New York History* 58 (1977): 336. For opposition to "government by commission" by Robert Wagner and other pro-worker and pro-immigrant "urban liberals," see Wesser, *Hughes,* 157 ff.; and by national Democrats, see Scott C. James, "Building a Democratic Majority: The Progressive Party Vote and the Federal Trade Commission," *Studies in American Political Development* 9 (1995): 346–54. Hughes quoted in McCormick, *Realignment to Reform,* 237.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

prophet and exponent."[43] By "statism" the *Nation* meant more efficient *state* governments with competent civil-service bureaucracies to carry out traditional administrative tasks and regulate private business enterprises. This new administrative system would replace the government of "courts and parties" that had managed American life through private litigation and privately drafted legislation. Thus, in 1910 Hughes had instructed the comptroller to create an executive budget, beginning the process of rationalizing the state's bureaucracy and enhancing executive authority. This initiative reached a major milestone in 1926. At the request of Democratic Governor Al Smith, Hughes chaired a State Reorganization Commission that finally won legislative approval for Smith's plan to place the governor at the head of a rationalized state bureaucracy—bringing to fruition the administrative transformation that Hughes himself had begun.[44]

Hughes's willingness to expand the power of the state had significant implications for New York's working classes. Beginning with the Jacksonian constitution of 1846, the state's political tradition embodied what historian Robert Kelley has called "The Transatlantic Persuasion," a laissez-faire liberal ethos that celebrated individual economic opportunity, religious tolerance, and fiscal conservatism.[45] In Britain, this ideology typified Gladstonian Liberalism; in the United States, it found its home primarily in the Democratic Party. Fearing state laws that would restrict their religious and cultural practices, Irish and German Democrats championed localism and "home rule." Indeed, in New York "negative" government had support across the political and social spectrum. To limit raids on the state treasury by business corporations, rural and small town Republicans imposed constitutional rules requiring a balanced budget and limiting taxes. Wealthy New Yorkers also welcomed a small state; they celebrated the primacy of the marketplace and the legal doctrines upon which it depended, particularly "freedom of contract."

Broad support for limited government banished many economic issues from the realm of politics and undercut the efforts of workers to secure governmental aid. When Samuel Gompers of the American Federation of

43. *Nation* quoted in Samuel Hendel, *Charles Evans Hughes and the Supreme Court* (New York: King's Crown Press, 1951), 15.

44. New York State, *Report of the State Reorganization Commission* (Albany: State Printing Office, 1926). For Hughes's thinking on the executive budget, see Danelski and Tulchin, *Autobiographical Notes,* 139. See also McCormick, *Realignment to Reform,* 230–31; Pusey, *Hughes,* 1:259–66; and Yearley, *Money Machines,* 270–75. Hughes's interest in administrative efficiency formed an important theme throughout his public life. As Secretary of State, Hughes was largely responsible for the Rogers Act of 1924, which reorganized the Foreign Service. See Perkins, *Hughes,* 96; Pusey, *Hughes,* 2:624.

45. Kelley, *TransAtlantic Persuasion,* passim.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

Labor proposed a public works project to assist workers during the depression of 1893, Governor Roscoe Flowers, a fiscally conservative Cleveland Democrat, replied: "In America, the people support the government; it is not the province of the government to support the people. Once recognize the principle that government must supply public works for the unemployed, and there will be no end of official paternalism." However, by 1900 a few assemblymen and state senators from New York City ("urban liberals," John Buenker has called them) were actively seeking government intervention in the form of worker's compensation legislation, state regulation of factory conditions and transit company rates, and a progressive tax system. They got little support from Tammany Hall, which had its own agenda. In 1902, for example, Tammany aldermen approved a contract for a railroad tunnel under the Hudson river that, unlike most public works contracts, did not mandate an eight-hour day and payment of the "prevailing wage." As a result, the Pennsylvania Railroad got a cheaper tunnel, and Tammany boss Charles Murphy, whose construction firms did some of the work, amassed part of his "honest-graft" fortune of two million dollars.[46]

Would Hughes do more for New York's workers than the Tammany bosses had done? His rural and small town Republican supporters opposed activist government and, during the 1906 election campaign, Hughes had explicitly condemned "legislation for classes . . . working classes or any other classes." Once in office, however, Hughes compiled a credible record as a labor reformer. He took his cues from "social progressives," affluent men and women who, like Hughes, were committed both to social reform and social stability. As Mary Kingsbury Simichovitch of the Greenwich House settlement put it, she stood "for the principle of social idealism, which opposes all class privileges that interfere with the development of the State as a whole."[47] Spurred on by such moral imperatives, middle-class members of New York City's Consumers League pressed department stores to provide a minimum wage of six dollars per week and a paid vacation for

46. Flowers quoted in McCormick, *Realignment to Reform,* 57. Buenker, *Urban Liberalism and Social Reform,* chap. 1; Yellowitz, *Labor and the Progressive Movement,* 166, 180–82. For other instances of Tammany's devotion to "honest graft" and party interests at the expense of the poorer citizens and the unions, see Adonica Y. Lui, "The Machine and Social Policies: Tammany Hall and the Politics of Public Outdoor Relief, New York City, 1874–1898," *Studies in American Political Development* 9 (1995): 386–403.

47. Hughes quoted in Wesser, *Hughes,* 92–93; for his defense of property rights, see the New York City and Youngstown speeches of 1908 in Schurman, *Addresses,* 86–107, 328. Mary Kingsbury Simichovitch quoted in Yellowitz, *Labor and the Progressive Movement,* 95; but her fellow settlement worker Louis Pink complained: "Many of those who are most active in housing reform" support "vested property rights [and] . . . are bitterly opposed to city built tenements." Ibid., 97.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

their employees while the Society for the Prevention of Cruelty to Children sought state regulation of child labor.

Hughes strongly supported such—relatively limited—social reforms. He endorsed the Page-Prentice Act of 1907, which set an eight-hour day and forty-eight-hour week for factory workers—but only for those under the age of sixteen. By employing the well-established legal distinction between ordinary and hazardous work, the governor also won legislative approval for a Dangerous Trades Act that barred young workers from thirty occupations. To enforce these and other regulations, in 1907 Hughes reorganized the Department of Labor and appointed a well-qualified commissioner. Two years later, the governor created a new bureau for immigrant issues in the Department of Labor and appointed reformer Frances Kellor to head it.[48]

Although these measures were much more limited than the social insurance and minimum wage legislation enacted by New Liberals in Britain, Hughes and his allies hoped they would thwart the rise of a class-based labor party. "The true aim of the best socialism," wrote Richard Ely, the first president of the anti-laissez-faire American Economic Association and a consultant to Hughes on labor issues, "is that general social amelioration which proposes to sacrifice no class, but to improve and elevate all classes. . . . What is called an 'all classes' socialism is stronger than a working-class socialism."[49] Labor leaders and socialists in New York scoffed at the reforms proposed by Ely and other middle-class social progressives. "Is human nature so constituted that the workers can trust matters affecting their real liberty in the hands of 'disinterested' outsiders?" asked Samuel Gompers. As head of the American Federation of Labor, Gompers championed collective bargaining and mobilized union opposition to the compulsory arbitration of labor disputes advocated by the American Association for Labor Legislation (AALL), an organization founded by Ely and John R. Commons, the prominent University of Wisconsin labor historian.[50] The

48. Hughes acted upon receiving the report of his special Commission on the "Condition, Welfare, and Industrial Opportunities of Aliens." See Yellowitz, *Labor and the Progressive Movement,* 43–49; Wesser, *Hughes,* 309–25.

49. Ely quoted in James Kloppenberg, *Uncertain Victory: Social Democracy and Progressivism in European and American Thought, 1870–1920* (New York: Oxford University Press, 1986), 286. As this quotation suggests, Ely was more a critic of laissez-faire than a socialist ideologue and had little faith in political democracy. In 1882, he praised the restrictions on municipal voting in Berlin and criticized the results of universal suffrage in New York City. Two decades later, he turned away from municipal socialism because of fears of political corruption and administrative incompetence. See Rodgers, *Atlantic Crossings,* 98–99, 137, 155.

50. Nancy Cohen, *The Reconstruction of American Liberalism, 1865–1914* (Chapel Hill: University of North Carolina Press, 2002), 5 and passim, argues that Mugwump reformers and the first generation of social science reformers, such as Ely,

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

Central Federated Union of New York City likewise rejected the AALL's proposals "since the working men have no part and small influence in government." Similarly, when the Consumers League proposed minimum wage boards for women's work (similar to those proposed in the New Liberal Trade Boards Bill in Britain), New York's labor leaders denounced such government-sanctioned regulations as "a condition akin to slavery."[51]

Ignoring union opposition, Hughes endorsed the reform agenda of the American Association for Labor Legislation. In 1908 he called for an official study of industrial accidents and appointed two members of the AALL to an expert commission of inquiry. After surveying British and German systems of compensation for workers' injuries, the commission recommended a partial change in New York law. The Worker Compensation Act of 1910, which Hughes pushed through a reluctant senate, resembled the (Old Liberal) British Worker Compensation Act of 1897; it required a compulsory, employer-paid plan of compensation for workers injured in hazardous industries and a voluntary system for other workers. Alleging that the Act violated due process (because it imposed liability on a company without regard to its negligence) and fell outside the state's "police power" over health, safety, and morals, the New York Court of Appeals struck it down in 1911.[52] The Court's decision pleased few and outraged many. Workers condemned the decision, and it won little support among corporate lawyers, who wanted to rid the delay-ridden judicial system of injury cases, and manufacturers, who hoped to quiet labor unrest. To overturn the decision, voters quickly approved an amendment to the state's constitution, and the legislature passed a compulsory compensation act that now covered most industrial laborers and imposed the cost on both employers and workers.[53]

Commons, John Bates Clark, Simon Patten, and Edwin R. A. Seligman, "invented a new liberalism that posited an active role for the state in society and economy even as it justified constraints on democracy and the ascendancy of corporate capitalism."

51. Quotations from Yellowitz, *Labor and the Progressive Movement,* 56–57, 133, and 143. See Emy, *Social Politics,* 264, for British union opposition to compulsory arbitration.

52. The battle over the legislation in New York is recounted in Yellowitz, *Labor and the Progressive Era,* 108–18, and Wesser, *Hughes,* 317–20. Rodgers, *Atlantic Crossings,* 247–61, provides a general, pan-Atlantic analysis. The Court struck down the act in *Ives v. So. Buffalo Ry. Co.,* 201 N.Y. 271 (1911). See Edward S. Corwin, "Social Insurance and Constitutional Limitation," *Yale Law Journal* 26 (1917), 431–43.

53. Barbara C. Steidle, "Reasonable Reform: The Attitude of Bar and Bench Toward Liability Law and Workmen's Compensation," in *Building the Organizational Society: Essays on Associational Activities in Modern America,* ed. Jerry Israel (New York: The Free Press, 1972), 31–42; Rodgers, *Atlantic Crossings,* 247–51. See also, William Thomas, *Lawyering for the Railroad: Business, Law, and Power in the New South* (Baton Rouge: Louisiana State University Press, 1999).

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

Hughes's commitment to moderate labor reform had grown during his years as chief executive. Initially opposed to "legislation for classes," once in office he argued that "we are so interdependent that . . . the opportunities for labor [should be] protected and enlarged" by state action.[54] Not quite a British New Liberal, Hughes had moved well beyond the precepts of classical bourgeois liberalism. A pragmatic reformer like his mentor Theodore Roosevelt, he would seek responsible legislation to prevent social strife and a class-divided polity.

IV. Progressive Jurisprudence

As an associate justice of the Supreme Court from 1910 to 1916, Hughes remained an advocate of regulation and authored decisions that weakened the legal foundations of laissez-faire capitalism. He also mastered a new set of issues regarding the commerce clause and, in a deliberately restrained manner, wrote constitutional decisions that expanded the regulatory powers of both the state and federal governments.[55]

The respective authority of federal and state governments under the Constitution's commerce clause had long been in dispute. In *Cooley v. Board of Wardens* (1852) the Court headed by Roger B. Taney had allowed the states, in the absence of federal legislation, to control those aspects of commerce that did not require a single national policy. However, more recent decisions, such as *Weldon v. Missouri* (1875), had curtailed the power of the states to tax or license out-of-state products or sales agents. Influenced perhaps by his experience as a state governor, Hughes authored a series of decisions that upheld state laws that affected—and, it might be argued, infringed on—congressional authority over interstate commerce. For example, invoking police power arguments, he upheld a Georgia statute requiring electric headlights on locomotives, including those engaged in interstate commerce.[56]

54. Hughes's rethinking of labor issues was apparent as early as 1908, when he was talked about as a presidential candidate. The quotation comes from his "Address to the Republican Club of New York City" (January 1908), Schurman, *Addresses,* 86–107. In 1916, Hughes supported women's suffrage for similar circumstantial reasons; he thought that opposition would be futile and create unnecessary political strife.

55. David P. Currie, "The Constitution in the Supreme Court: 1910–1921," *Duke Law Journal* (1985): 1111–62.

56. *Cooley,* 53 U.S. (12 How.) 299 (1851); *Weldon,* 91 U.S. 275 (1875); Editor's Note, "Charles Evans Hughes," 971–73, 979–80; *U.S. v. E. C. Knight,* 156 U.S. 1 (1895); *Atlantic Coast Line R.R. v. Georgia,* 234 U.S. 280 (1914); Currie, "Constitution in the Court," 1139n.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

The most important of these federalism-related decisions were the *Minnesota Rate Cases* of 1913. In these, Hughes enhanced state regulation of railroads by reviving the *Cooley* doctrine of "concurrent powers." To persuade his colleagues, Hughes composed a detailed and carefully argued opinion. He began with the generally accepted proposition that Minnesota and the other states had the authority, using their police powers, to regulate commerce within their bounds. He then extended this logic to include rate-regulation when such internal commerce was intermeshed with interstate traffic to towns in bordering states.[57]

Even as Hughes expanded the regulatory power of the states, he took a nationalist stance with respect to the authority of Congress over commerce, including that within the various states. Thus, in the important *Shreveport Cases* of 1914, Hughes sustained a decision of the Interstate Commerce Commission voiding intrastate rates set by the Railroad Commission of Texas. The Texas rates encouraged the development of Dallas and Houston by blatantly discriminating against Texas shippers who marketed their goods via Shreveport, Louisiana. In striking down these rates as an interference with interstate commerce, Hughes recognized that the logic of his argument would permit federal regulation of *any* action that affected commerce. Thus, it might be used to challenge the sharp distinction made in *U.S. v. E. C. Knight* (1895) between commerce, which was subject to federal regulation, and manufacturing, which was not. Reluctant to infringe upon precedent, he inserted language that sought to limit the decision's reach to railroad carriers: "the agencies of interstate commerce." By leaving *Knight* intact, the associate justice restricted the authority of the federal government over local businesses or factories whose raw materials or products were part of interstate commerce. Yet the logic of his argument pointed to the position he would espouse during the constitutional crisis of 1937.[58]

In cases involving the controversial issue of anti-trust regulation, the Supreme Court was divided. The faction led by John Marshall Harlan and Rufus Peckham embraced a small-producer ethic and a fully competitive market; these justices used the Sherman Act's prohibition of "restraint of trade" to outlaw price fixing by businesses. A second group, headed by Chief Justice Edward D. White and Oliver Wendell Holmes, Jr., stood for "reasonable" market regulation, managed either by private agreements among

57. *Minnesota Rate Cases,* 230 U.S. 352, at 416–17 (1913).

58. *Houston, East and West Texas Railway v. U.S.,* 234 U.S. 342 (1914); Editor's Note, "Charles Evans Hughes," 985. Currie, "Constitution in the Court," 1118–21, suggests that Hughes limited the reach of the decision in an effort to meet the objections of two dissenting justices; Hughes noted that some senators opposed his appointment as chief justice in 1930 because they felt that *Shreveport* "unduly interfered with the authority of the States." See Danelski and Tulchin, *Autobiographical Notes,* 295.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

producers (long permitted under common law) or by public administrative agencies.[59] Preferring administrative regulation to the play of market forces, Hughes usually voted with White and Holmes in anti-trust cases.

In three other sets of cases, Hughes also authored opinions that bolstered the regulatory powers of state legislatures and administrative bodies. In the first line of decisions, he gave a narrow interpretation to the "contract clause" of the United States Constitution, which prohibits states from enacting any law "impairing the obligation of contracts." Refusing to give a literal reading to the state-granted charter of the Southern Pacific Railroad, which specified that the company could "collect and receive such tariffs . . . *as it may prescribe,* Hughes contended that this clause "necessarily implies that the charges shall be reasonable and does not detract from the power of the State . . . to prescribe reasonable rates."[60]

In a second set of opinions, Hughes favored regulation over certain claims of individual rights. Thus, in *Wilson v. U.S.* (1911), he asserted that corporate officers could not resist a subpoena for company records by invoking the Fifth Amendment's privilege against self-incrimination. This decision made corporations more vulnerable to prosecution by limiting the rights of individuals as delineated in *Boyd v. U.S.* (1886). The Court's reasoning in *Boyd* had extended "the personal security of the citizen" guaranteed by the Fourth and Fifth Amendments to include an individual's personal papers. Sensing danger to *Boyd's* broad definition of individual rights, Justice McKenna dissented in *Wilson,* declaring that Hughes's distinction between personal and corporate papers was "a limitation by construction" on an important "constitutional security for personal liberty."[61] For his part,

59. Sklar, *American Capitalism,* 86–178, explores the divisions in the Court over the Sherman Act and argues that the triumph of White's faction in the "rule of reason" decisions of *Standard Oil* and *American Tobacco Company* cases was not a victory of laissez-faire principles but rather the revival of common law practices that permitted price fixing by private companies and (now) public agencies. For Hughes's acceptance of White's position, see his opinion in *Dr. Miles Medical Co. v. Park & Sons Co.,* 220 U.S. 373, at 406–7 (1911). See also James, "Building a Democratic Majority," 338–42. During his years as chief justice, Hughes hung a portrait of White (and of John Stuart Mill) in his home office. See Pusey, *Hughes,* 2:667.

60. *Southern Pacific Company v. Campbell,* 230 U.S. 537 (1913), emphasis added. In *New York Electric Lines Company v. Empire City Subway Company,* 235 U.S. 179 (1914) Hughes upheld the power of the state to revoke a franchise for non-performance; previously, misuse of a grant had been the only ground for revocation. See Hendel, *Hughes,* 42–45 and Editor's Note, "Charles Evans Hughes," 990. In his lectures on the Court, Hughes cited *Charles River Bridge* in observing that "Charter grants are also strictly construed against the grantees. . . ." (*The Supreme Court of the United States: Its Foundation, Methods and Achievements: An Interpretation* [New York: Columbia University Press, 1928], 202).

61. *Wilson v. U.S.,* 221 U.S. 361 (1911); see also *Dreier v. U.S.,* 221 U.S. 394 (1911) and Editor's Note, "Charles Evans Hughes," 985–86. On McKenna's dissent, Arthur M. Allen, "The Opinions of Mr. Justice Hughes," *Columbia Law Review* 16 (1916): 565–84.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

Hughes was unwilling to construe individual rights so that they frustrated the government's efforts to achieve a legitimate regulatory goal.

In a third set of pre-1916 cases, Hughes addressed the laissez-faire doctrine of "liberty of contract." Using this legal principle, many judges in Britain and the United States had voided, as an infringement of an individual's property rights, legislation that regulated common law bargains made in the marketplace between employers and their workers. But in a seminal article of 1881, "Liberal Legislation and Freedom of Contract," the Oxford political philosopher Thomas Hill Green disputed this reasoning. Green pointed out that the British Factory Acts had already limited the liberty of industrial capitalists and that legislation requiring compulsory schooling had circumscribed the freedom of parents. Extending the logic of these measures, Green adumbrated a positive and collectivist definition of liberty, a concept of "public freedom" that justified legislative oversight of economic life, especially land ownership and use. He likewise proposed legislative intervention into the terms of private bargains, to "provide against contracts being made which, from the helplessness of one of the parties to them, instead of being a security for freedom, become an instrument of disguised repression." Picking up this line of argument and declaring "a great departure from the principles of free contract," Gladstone created an Irish Land Court with complete control over rents and other landlord-tenant issues. Two decades later, Churchill and other New Liberals regularly invoked Green's arguments in parliamentary debates over English legislation.[62]

Similar arguments appeared in the United States. In an article in the *Columbia Law Review* in 1908, Roscoe Pound of the University of Chicago mounted a vigorous attack on "mechanical jurisprudence," the judicial practice of "rigorous logical deduction from predetermined conceptions in disregard of . . . the actual facts." Citing *Lochner v. New York,* the controversial decision of 1905 upholding freedom of contract, Pound assailed the Supreme Court for giving "us rules which, when applied to the existing commercial and industrial situation, are wholly inadequate." In 1909 Pound continued his assault on conceptual thinking in an essay on "Liberty of Contract." Focusing upon *Adair v. U.S.* (1908), which invalidated another law regulating labor contracts, he berated the Court for not recognizing the "practical conditions of inequality."[63]

62. T. H. Green, *Lectures on the Principles of Political Obligation,* ed. Paul Harris and John Morrow (Cambridge: Cambridge University Press, 1986), 205, 209. For Emile Durkheim's somewhat similar search for a collectivist definition of liberal society, see Richard Bellamy, *Liberalism and Modern Society: A Historical Argument* (University Park: Pennsylvania State University Press, 1992), 74–104. Gladstone quoted in Kelley, *Transatlantic Persuasion,* 216; for Churchill, see his *Liberalism and the Social Problem,* 84, 24, 266.

63. "Mechanical Jurisprudence," *Columbia Law Review* 8 (1908) 108–9; "Liberty of Contract," *Yale Law Journal* 18 (1909): 454.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

The central problem, Pound argued, was that the legal system "exhibits too great a respect for the individual" and "too little respect for the needs of society." Pound came to this position partly through long debates with his former colleague at the University of Nebraska, the rising sociologist Edward A. Ross.[64] "We have grown into an organic society," Ross argued, "in which the welfare of all is at the mercy of each." The two men continued their dialogue when Ross moved to the University of Wisconsin, where he became a colleague of Richard Ely. Influenced like Pound by German social and legal thinkers, Ely in 1903 had ascribed "the coercion of economic forces" in American society "to the unequal strength of those who make a contract."[65]

Hughes undoubtedly was aware of these intellectual currents. There is no evidence that he was directly influenced by T. H. Green; however, he knew Ely through the AALL and had probably read Pound's essays. Whatever the precise links, the associate justice wrote opinions that mirrored the arguments of the Oxford philosopher of "positive liberty" and the sociologically inclined Midwestern professors. "Freedom of contract is a qualified and not an absolute right . . . ," Hughes declared in upholding an Iowa law that voided contracts limiting the legal rights of railroad workers: The state may "interfere where the parties do not stand upon an equality. . . ."[66] Using similar reasoning, the associate justice upheld a California law that mandated a forty-eight-hour work-week for women in various industries and allowed a federal statute to override a contract between an interstate railroad and its employees.[67] Finally, Hughes joined

64. "Do We Need a Philosophy of Law?" *Columbia Law Review* 5 (1905): 344, quoted in N. E. H. Hull, *Roscoe Pound and Karl Llewellyn: Searching for an American Jurisprudence* (Chicago: University of Chicago Press, 1997), 58. "I believe you have set me in the path the world is moving in," Pound told Ross in 1906. See David Wigdor, *Roscoe Pound: Philosopher of the Law* (Westport, Conn.: Greenwood Press, 1974), 112. For Pound's fully developed view, see "The Scope and Purpose of Sociological Jurisprudence," *Harvard Law Review* 24 (1911): 591–619, and 25 (1912): 140–68, 489–516.

65. Ross, *Sin and Society* (Boston: Houghton, Mifflin and Company, 1907), 90, quoted in Wigdor, *Pound,* 113. Ely quoted in Morton Horwitz, *The Transformation of American Law, 1870–1960* (New York: Oxford University Press, 1992), 166, who notes that Ely dedicated *Studies in the Evolution of Industrial Society* (New York: Macmillan, 1903) to Justice Holmes.

66. *Chicago, Burlington & Quincy Railroad Company v. McGuire,* 219 U.S. 549 at 571 and 566 (1911). Hughes also used the concept of "public interest" to prevent a patent medicine manufacturer from specifying, by contract, the price that retailers might charge for its goods (*Dr. Miles Medical Co. v. Park & Sons Co.,* 220 U.S. 373, 31 Sup. Ct. 376 [1911]). In dissent, Holmes took the laissez-faire position that the market should determine prices, unless there was a clear case for interference. See Allen, "Opinions of Hughes," 568–69.

67. *Miller v. Wilson,* 236 U.S. 373 (1915); *Philadelphia, Baltimore & Western Railroad Co. v. Schubert,* 224 U.S. 603 (1912).

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

Justice Day's dissent in *Coppage v. Kansas* (1915), a case in which a majority of the Court struck down a Kansas law forbidding "yellow dog contracts" that prevented workers from joining a union. Citing the police power, Day and Hughes argued that a state could legitimately ban such contracts.[68]

Hughes's jurisprudence as an associate justice mirrored his activist, instrumentalist, regulatory governorship. It began from traditional liberal premises—a contractual model of economy and polity that privileged the individual's right to work and own property. Then it "socialized" this model by asserting the authority of the government to regulate private property and market bargains through legislation and administrative tribunals. To reach this end, Hughes used two means. First, he asserted the paramount police power of the state to protect the health, safety, and morals of the community. Second, he redefined contractual principles, which had gained an ascendant position in legal thinking, so that they necessarily included regulation in the public interest. By recasting classical liberalism to include "public" as well as "private" freedom, the discipline of the state as well as that of the market, Hughes had adopted the intellectual framework of British New Liberals and American sociological jurisprudence.[69]

V. A Shift to the Right

But would Hughes, British New Liberals, and American social progressives go beyond the regulation of capitalist enterprise and undertake the redistribution of capitalist wealth? Would they enhance the power of the state to achieve this and other goals? By 1914 many British and American politicians had begun to ponder these questions; by 1920, under the pressure of World War I and the Bolshevik Revolution in Russia, they had been forced to answer them.

68. *Coppage v. Kansas,* 236 U.S. 1. Holmes wrote a separate dissent, which argued that the state had a right "to establish the equality of position between the parties in which liberty of contract begins." *Coppage* was an atypical decision; while Hughes was an associate justice, the Court rejected due process claims in nearly two hundred cases and sustained only a dozen or so of such allegations. See Currie, "Constitution in the Court," 1130n. Hughes, *Supreme Court,* 207–40, cites many cases in which judges used the same principles to justify contradictory decisions but never explicitly criticizes the Court for rendering inconsistent or ideologically driven decisions.

69. For judicial efforts before 1910 to adopt a community-oriented definition of private contracts, see Samuel R. Olken, "Charles Evans Hughes and the *Blaisdell* Decision: A Historical Study of Contract Clause Jurisprudence," *Oregon Law Review* 72 (1993): 513–602. My discussion of Hughes's "socialization" of market contracts follows that in Friedman, "Charles Evans Hughes."

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

Charles Evans Hughes revealed the limits of his social liberalism—and of his political skills—during his contest with Woodrow Wilson for the presidency in 1916. Wilson had garnered only forty-two percent of the popular vote in 1912 and won the presidency because the Republican Party split between the progressives who supported Theodore Roosevelt and the conservatives who followed William Howard Taft. In 1916 Hughes stood at the head of a re-united Republican Party, supported by Taft and with credentials as a progressive as impressive as those of Wilson. As governor of New Jersey, Wilson had enacted reforms similar to those of Hughes in New York: corrupt practices legislation, workers' compensation, regulation of railroads and public utilities and, going beyond Hughes, a direct primary system. Yet Wilson also espoused the laissez-faire principles of the "Transatlantic Persuasion," supported "states' rights" to appease southern Democrats, and opposed progressive-inspired moral legislation that threatened the drinking habits and other customs of immigrants and Catholics.

This Jacksonian Democrat individualist outlook informed the first years of Wilson's presidency. In 1913 *The New Freedom* proclaimed "the ideal of absolutely free opportunity, where . . . men win or lose on their merits." In Wilson's rhetoric this individualistic precept became a societal imperative: "If America is not to have free enterprise, then she can have freedom of no sort whatsoever." Acting on this philosophy, Wilson refused to support a federal loan scheme for farmers, declaring that it was "unwise and unjustifiable to extend the credit of the government to a single class of the community." Reflecting his states' rights outlook, the president also declined to support federal legislation mandating women's suffrage and restricting child labor. Certain initiatives, such as the Federal Reserve system, signaled Wilson's commitment to economic reform, but without the strong bureaucracy advocated by Theodore Roosevelt. Under the Federal Reserve, banks remained not only privately owned but also privately controlled—regulated not by a public bureaucracy but by a corporate-government partnership.[70]

Had Wilson maintained this philosophy of limited government, even the popular slogan "He kept us out of war" would not have kept him in the White House. Even before he was challenged by Roosevelt and the Progressive Party in the mid-term election of 1914, the president had enacted some New Liberal legislation. In an American analogue of Lloyd George's

70. Wilson quoted in Richard Hofstadter, *The Age of Reform: From Bryan to F. D. R.* (New York: Knopf, 1955), 223; Link, *Wilson and the Progressive Era,* 21, 58. Alan Dawley, *Struggles for Justice: Social Responsibility and the Liberal State* (Cambridge: Harvard University Press, 1991), 147–55, 170, calls this system of public-private regulation a "parastate."

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

People's Budget of 1909, Wilson and his Democratic allies in Congress passed the Underwood Act of 1913. It cut taxes for millions of consumers by lowering protective tariffs and, to make up the resulting budget deficit, used the authority granted by the recently ratified Sixteenth Amendment to levy $100 million in taxes on the estates and incomes of wealthy Americans (the top two percent of households). Such a graduated-tax policy, historian James Kloppenberg has pointed out, was the "quintessential progressive reform" in the United States and Western Europe.[71]

During and after the mid-term election of 1914, Wilson adopted a full-fledged progressive agenda. He abandoned the Democratic approach to trust busting, which had relied on the courts to enforce the Sherman Act's ban on *any* "restraint on trade"; in its place, he endorsed Roosevelt's proposal for a Federal Trade Commission staffed by experts. Bureaucrats began to replace judges as the guardians of the public interest.[72] As the election of 1916 approached, Wilson began to endorse the demands of progressive interest groups. He sponsored federal child labor legislation, a six-million-dollar farm credit bill, and workers' compensation for federal employees. To underline his new support of workers and trade unions (whose membership had grown from 450,000 in 1897 to 2.4 million in 1911), the president elevated the Department of Labor to cabinet rank, created a Commission on Industrial Relations, and appointed lawyer-reformer Louis Brandeis to the Supreme Court.[73] Most dramatic of all, he defied the vociferous opposition of the railroad corporations (and many of the unions) to win approval for the Adamson Act, which mandated an eight-hour day for railroad work-

71. Kloppenberg, *Uncertain Victory,* 355. From the Civil War to 1914, the federal government had an extraordinarily regressive tax system; most of its revenue came from excise taxes (primarily on alcohol and tobacco) and from tariffs (58 percent in 1887, for example). This Republican tax regime survived politically because it protected American workers and allocated much of the revenue in a progressive fashion through pensions to Union Army veterans and their families. See Ballard C. Campbell, *The Growth of American Government: Governance from the Cleveland Era to the Present* (Bloomington: University of Indiana Press, 1995), 17, and W. Elliot Brownlee, "Tax Regimes, National Crisis, and State-building in America," in *Funding the Modern American State, 1941–1995: The Rise and Fall of the Era of Easy Finance,* ed. W. Elliot Brownlee (Cambridge: Cambridge University Press, 1996), 47–69. Robert Stanley, *Dimensions of Law in the Service of Order: Origins of the Federal Income Tax, 1861–1913* (New York: Oxford University Press, 1993) argues that the income tax was primarily symbolic, used by politicians to deflate class tensions, but Brownlee provides evidence of a Democratic "soak the rich" tax policy after 1914.

72. James, "Building a Democratic Majority," provides an extensive and convincing interpretation of Wilson's embrace of the FTC.

73. Brandeis was the architect of the famous brief in *Mueller v. Oregon,* 208 U.S. 414 (1908), which used sociological evidence to defend an Oregon law limiting working hours for women.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

ers. "A politician, a man engaged in party contests," Wilson remarked in a speech, "must be an opportunist . . . to lure the majority to your side." "That is politics, and it is perfectly legitimate."[74]

For one of the few times in his public life, Hughes failed to rise to the challenge. His six years on the Supreme Court had insulated the Republican candidate from the cut and thrust of the political arena. Moreover, Hughes's moralism and commitment to rational procedures prompted him to denounce political opportunism. He condemned the Adamson Act as "the most shameful proceeding that has come to my attention since I have observed public life," accused Wilson of knuckling under to railroad workers, and insisted that arbitration was the correct way to resolve the dispute. Because of Hughes's opposition to the Adamson Act, his resistance to the Sixteenth (Income Tax) Amendment, and his failure to focus his campaign on progressive issues, most former leaders of the Bull Moose Party endorsed Wilson. Many farmers and industrial workers, impressed by Wilson's initiatives, likewise deserted the Republican Party. "No other candidate for President within the memory of living man ever ran downhill so rapidly," observed the conservative New York *World.*[75]

Even so, Hughes lost the election only because of his political ineptness in California. Campaigning in that state, Hughes placed himself in the hands of wealthy bankers and oilmen, crossed a union picket line, and failed to court Hiram Johnson, the progressive Republican candidate for the United States Senate. Johnson won California by nearly 300,000 votes while Hughes, deserted by organized labor and many reformers, lost California—and the presidency—by 4,000 votes. In the end, Wilson had proved himself more politically adept and more of a New Liberal than had Hughes.[76] The president had made a commitment both to federal administrative regulation, through the Federal Trade Commission, a measure that Hughes could support, and

74. Wilson, "The Ideals of Public Life" (1907), quoted in James, "Building a Democratic Majority," 331. In general, see S. D. Lovell, *The Presidential Election of 1916* (Carbondale: Southern Illinois University Press, 1980).

75. Hughes, quoted in Pusey, *Hughes,* 1:253 and chap. 32; *World* quoted in Link, *Woodrow Wilson,* 238, and 247–51; Lovell, *Election of 1916,* 80–88, 106–7, 123–24. Edward S. Corwin, who favored most progressive measures, including workers' compensation, argued at the time that the Adamson Act was unconstitutional because it benefited a restricted group of workers and not the "public welfare." See Corwin, "Social Insurance," 57–58. For Hughes's opposition to the Sixteenth Amendment, see below, at note 109.

76. Nonetheless, Wilson was not a committed social reformer. When Joseph Tumulty argued in 1918 that "the real antidote for Bolshevism is social reconstruction" and urged the president to propose a Lloyd George-type program of social reform: old age pensions, health insurance, and federal wage and hours' legislation, Wilson ignored his advice. See Rodgers, *Atlantic Crossings,* 301.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

to "class legislation" in the form of graduated taxes and direct assistance to farmers and railroad workers that he could not.[77]

Yet, New Liberalism was not the wave of the future, either in Britain or in the United States. Even before World War I, relations between property-owning progressives and the working classes were fragile. "What *was* reform, after all," asks a leading historian of British liberalism, "but . . . the ingenious expression of that middle-class philosophy which believed in resisting at once the aggressions of the rich and the pretensions of the poor?" In fact, as municipal socialism in Britain cut entrepreneurial opportunities and raised property taxes, it deepened class tensions and prompted the creation of the Association for the Protection of Property Owners and the Middle Class Defence Association.[78] The subsequent triumph of Bolshevism in Russia struck fear into the hearts of the bourgeois classes both in Europe and in the United States. Embarking for the Paris Peace Conference in 1919, Wilson warned of "a flood of ultraradicalism, that will swamp the world."[79]

Wilson's words struck a responsive note among British New Liberals. Following T. H. Green, they had long assumed that a strong state was compatible with—indeed, essential to—personal liberty. Now, alarmed by the growth of Britain's national bureaucracy during the war (from 325,000 to 850,000 employees) and by strident voices within the Labour Party, they feared that state power meant state socialism—the nationalization of the railroads, coal mines, and electricity system—and a capital levy to pay for the war. Such measures would place a significant portion of private wealth in the hands of the state and create a bureaucratic absolutism.[80] The General Election of 1922 sealed the issue. The Labour Party garnered 147 seats in the House of Commons, more than the Liberals, who would never again command a majority in Parliament.

Many British social progressives moved to the right. The New Liberal C. F. G. Masterman redefined his creed as a commitment to "property, possession, competition: . . . a capitalism widely diffused amongst a whole

77. However, as a private counsel for bond houses several years later, Hughes supported the constitutionality of the Federal Farm Loan Act of 1916 and continued to support that position during his chief justiceship. See below, at note 134.

78. Rodgers, *Atlantic Crossings,* 128. Between 1890 and 1905 spending by local governments in Britain increased from 38 percent to 50 percent of total government expenditures. James E. Cronin, *The Politics of State Expansion: War, State, and Society in Twentieth-Century Britain* (New York: Routledge, 1991), 43, 51–57.

79. Dangerfield, *Strange Death,* 218. As the American intellectual Herbert Croly put it, reform liberalism was essentially "a species of higher conservatism." Quoted in Graham, *Encore for Reform,* 174; Wilson, quoted in Dawley, *Struggles for Justice,* 218.

80. See Cronin, *State Expansion,* 47–72; Rodgers, *Atlantic Crossings,* 290–301.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

community, with each man and family owning a 'stake in the country.'" Sharing this anti-socialist ideology, leading New Liberal politicians—including Churchill and Lloyd George—joined with the Conservative Party in an anti-Labour coalition. Similar Center-Right political coalitions appeared in many European countries, breaking up the alliances between middle-class progressives and workers that had fostered a generation of social reform.[81]

The political dynamic was similar in the United States. Frightened by the nationalization of private property in Russia and a wave of labor strikes at home, the American middle classes supported the federal government's deportation of aliens and restriction of immigration as well as the National Association of Manufacturers' systematic attack on trade unions. Reflecting the changing political climate, the Supreme Court launched an attack on the progressive regulatory legislation enacted under Wilson. In *Hammer v. Dagenhart* (1918) the Court voided the federal child labor statute and in *Adkins v. Children's Hospital* (1923) a minimum wage provision for women workers in the District of Columbia.[82]

As in Britain, American progressives reevaluated their creed. In 1916 presidential candidate Hughes had praised Americans as a "practical people" who had devised pragmatic ways "to exercise governmental control." During the war, Wilson and Treasury Secretary Robert McAdoo pushed administrative pragmatism to new limits. They placed the railroads under government control, enforced price regulations, quadrupled the size of the Bureau of Internal Revenue (from 4,000 to 15,800 employees), and imposed heavy taxes on the income of wealthy Americans and the "excess profits" of corporations.[83] By 1920, Hughes was decrying the enhanced power of the national state and asking "whether constitutional government . . . could survive another great war. . . ." Like Max Weber, the great German Liberal sociologist, Hughes now feared that bureaucratic power would subordinate

81. Masterman, *The New Liberalism,* quoted in Morgan, *Age of Lloyd George,* 202; Edward David, "The New Liberalism of C. F. G. Masterman," in *Essays in Anti-Labour History,* ed. Kenneth D. Brown (Hamden, Conn.: Archon Books, 1974), 17–41; Michael Bentley, "The Liberal Response to Socialism, 1918-1929," in ibid., 42–72; and Clarke, "Progressive Movement," 178. In general, see Michael Freeden, *Liberalism Divided: A Study in British Political Thought, 1914–1939* (Oxford: Oxford University Press, 1986) and Luebbert, *Liberalism, Fascism, or Social Democracy,* chap. 6, esp. 191–210.

82. 247 U. S. 251 (1918) and 261 U. S. 525 (1923). Dawley, *Struggles for Justice,* 235–43, 282–84, 295–325. Robert Gordon notes the outright opposition to progressivism of some leading American lawyers during the 1920s and the "withdrawal" from "issues of public concern" of many others. "New York City Lawyers," 68–74.

83. Hughes, "Speech to the New York State Bar Association" (1916), in Schurman, *Addresses,* 335; Brownlee, "Tax Regimes," 64–69, notes that these taxes paid for 37 percent of the cost of the war.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

law to its own ends, destroying individualism and political self-rule. In 1924, perhaps reacting to the socialistic proposals of Robert La Follette's Progressive Party to nationalize the railroads and public utilities, he warned of "those insidious encroachments upon liberty which take the form of an uncontrolled administrative authority—the modern guise of an ancient tyranny, not more welcome to intelligent free men because it may bear the label of democracy." Like other American leaders who feared popular rule—John Adams in the distant past and Supreme Court Chief Justice William Howard Taft in the present—Hughes looked for salvation to the "spirit of the common law." Once a champion of regulatory commissions that were independent of judicial oversight, Hughes now celebrated the courts as "expert agencies of democracy expressing deliberate judgment under conditions essential to stability, and therefore in their proper action the necessary instrumentalities of progress."[84]

Hughes's worries were premature. Although La Follette's Progressive Party captured seventeen percent of the popular vote in 1924, it quickly vanished. Except in a few states, there was no party-of-the-left to push the agenda of social progressivism. One reason was that the Republican administrations of the 1920s accepted the legitimacy of many progressive measures. Although Secretary of the Treasury Andrew Mellon scaled back wartime estate tax rates (from forty to twenty percent), he deliberately retained income taxes on corporate profits and wealthy individuals. From 1926 to 1930, these two income levies accounted respectively for thirty-eight percent and twenty-eight percent of federal revenue.[85] Other Republicans leaders pursued Progressive era goals of government efficiency and economic reform. As secretary of state from 1921–1925, Hughes reorganized the foreign service. Secretary of Commerce Herbert Hoover formed associations of business corporations and encouraged "welfare capitalism." Like Churchill and Lloyd George, their newly conservative

84. Hughes, *Autobiographical Notes,* 195 (Harvard Speech, 1920); "The Shrine of the Common Law" (Speech at Westminster Hall, London 1924), in Charles E. Hughes, *The Pathway of Peace: Representative Addresses Delivered During His Term as Secretary of State (1921–1925)* (New York: Harper & Brothers, 1925), 208; for his faith in the judiciary, see Perkins, *Hughes,* 49.

85. Mark H. Leff, *The Limits of Symbolic Reform: The New Deal and Taxation, 1933–1939* (Cambridge: Cambridge University Press, 1984), table 1. Between 1926 and 1930, about one-third of federal revenues came from regressive tariffs and excise taxes. In 1935, when federal revenue levels were similar, regressive levies accounted for 59 percent (tariffs: 9 percent; excise taxes: 37 percent; and agricultural processing: 14 percent) of the total, while progressive taxes (on corporations, incomes of the wealthy, and estates) accounted for only 36 percent. However, Mellon's tax policy did not dramatically redistribute the nation's highly concentrated wealth because federal revenues amounted to only 5 percent of the Gross Domestic Product.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

New Liberal counterparts in Britain, Hoover and Hughes supported social efficiency but eschewed bureaucratic statism. They were now committed to limited government, private property, and individual liberty—presided over by common law judges.[86]

VI. The Hughes Court: Liberty and Property

It was not surprising, therefore, that in 1930 President Hoover nominated Hughes to be the new chief justice of the United States. While Richard Friedman argues that this appointment (and that of Owen J. Roberts in 1931) signaled a decline in the Court's conservatism, informed contemporaries did not did not see it that way. Joseph Cotton—Wall Street lawyer, Bull Moose Progressive, friend of Felix Frankfurter, and close adviser to Hoover—warned: "Anyone who takes Owen Roberts for a liberal is going to be disappointed." Chief Justice Taft and his conservative allies on the Court likewise applauded Hughes's appointment. Disparaging Hoover as "a Progressive just as [Justice Harlan Fiske] Stone is and just as Brandeis is and just as Holmes is," Taft saw Hughes as a bulwark against the three "Bolsheviki" justices on the Court.[87] Taft's estimate had much to recommend it. He correctly perceived that Hughes's mid-life activism as a lawyer-investigator and reform governor reflected the zeitgeist of the Progressive Era rather than a deep personal commitment to reform. By temperament, Hughes was a conservative, committed from his years of legal practice to the rationalistic procedures and precedents of the common law. Taft also understood that the new chief justice was increasingly wary of the authority of the bureaucratic state and of the utopian schemes of social reformers. "We shall always have crusaders," Hughes would tell an audience at Amherst College in 1938. "But crusaders may have more fervor than wisdom, and extreme demands may create an intolerable civil strife." Nonetheless, Taft failed to capture the complexities of Hughes's character and outlook. On issues of free speech, the new chief justice was a committed liberal. Moreover, because of his intense moralism and sense of social duty, Hughes was often prepared to limit individual rights for the sake of

86. Believing Hughes to be more conservative than Hoover, in 1928 Thomas W. Lamont of J. P. Morgan and other conservatives attempted to draft him as the Republican candidate; citing his age, Hughes declined. See Pusey, *Hughes,* 2:628.

87. Associate Justices Willis Van Devanter and Pierce Butler traveled to New York to urge Hughes to indicate his interest in the position. For a comprehensive and balanced account of Hughes's appointment, see Gerald Gunther, *Learned Hand: The Man and the Judge* (Cambridge: Harvard University Press, 1994), chap. 9; for Cotton's judgment, see ibid., 446.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

the common good. Finally, even at age sixty-eight, he was intellectually active and jurisprudentially ambitious.[88]

In his new position (as in his New York governorship), Hughes found himself in the political center. On the Left in the ideologically divided court were Taft's "Bolsheviki": Holmes (replaced by Benjamin Cardozo in 1932), Brandeis, and Stone. As justices of a progressive or New Liberal outlook, they usually supported the expansion of federal authority and of state regulatory legislation. On the Right were Willis Van Devanter, James McReynolds, Pierce Butler, and George Sutherland, known then to the public as "conservatives" and later, among liberals and academics, as the "Four Horsemen" of the Apocalypse, who began from laissez-faire premises and accepted New Liberal reforms only with reluctance.[89] The fate of constitutional law rested in the hands of Hoover's two appointees: Roberts and Hughes.

In doctrinal terms, Hughes's jurisprudence during the extended constitutional crisis of the 1930s was multifaceted. It reflected his long-held principles (Friedman), forty years of constitutional evolution (Cushman), and a commitment to "guardian review" (White). Considered analytically, as Michael Parrish has discerned, it consisted of three distinct elements: first, a dramatic elaboration of Hughes's longstanding support for civil rights and civil liberties; second, a strong affirmation of his New Liberal outlook on regulatory issues; and, third, his resistance to New Deal nationalism and corporatism and then, in 1937, his reluctant and partial acceptance of Welfare State Liberalism.[90] Most important of all, Hughes's chief justice-

88. After dining with Hughes in the 1930s, the formidable Washington hostess Agnes Meyer noted in her diary "What a rigid creature he is. His faith in the power of reason is boundless. He never suspects that there are all sorts of majestic beauties that cannot be captured by a syllogism." Quoted in Friedman, "Charles Evans Hughes," 38. Hughes spoke at the Amherst graduation of his grandson, the future historian H. Stuart Hughes, Pusey, *Hughes,* 2:762. Hughes was so eager to become chief justice that he sacrificed the public career of his son Charles, who, to avert a conflict of interest, had to resign his position as Solicitor General of the United States.

89. White, *Constitution and New Deal,* 106, 267–71, 295–97, and elsewhere seeks to minimize the ideological and doctrinal differences on the Hughes court but his analysis is not convincing. While Taft was labeling the liberals as "the Bolsheviki," Judge Learned Hand called the four conservative justices the "mastiffs" and the "Battalion of Death." See Felix Frankfurter to Harlan Fiske Stone, 2 June 1931, Frankfurter Papers, Reel 64, and 14 February 1936, Box 13, Stone Papers, LC. As early as 1930, Oliver McKee, Jr., described Hughes as one of four "liberals" on the Court along with four "conservatives." "A Liberal Supreme Court," *The Outlook,* 171–72. In April 1930, McReynolds upbraided Stone for the number of his dissents, eliciting a sharp reply from Stone. Stone Papers, Box 76, LC.

90. Using different categories Michael E. Parrish offers a similar interpretation. See "The Hughes Court, the Great Depression, and the Historians," *The Historian* 4 (1978): 286–308, and *The Hughes Court,* passim.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

ship reflected his powerful personality and his unwavering determination to control the evolution of doctrine despite the sharp ideological divisions among the justices. As Stone saw it, the result was a series of compromises by Hughes that were intellectually inconsistent and undermined the work of the Court.[91]

Civil Rights and Civil Liberties

Throughout his public career, Hughes consistently advocated civil rights for African-Americans and civil liberties for dissenters. Early in the century he defied social convention by escorting Booker T. Washington at a public dinner, and his initial judicial opinions challenged, in a meliorist fashion, the social customs of the Jim Crow regime. In 1914 Hughes gave a literal interpretation to the "separate but equal" doctrine of *Plessy v. Ferguson* (1896) by insisting, in *McCabe v. Atchinson, Topeka, and Santa Fe Road,* that African-Americans receive "equal treatment" as railroad passengers. As chief justice, Hughes wrote for the Court in *Gaines v. Canada* (1938), which forced the state of Missouri either to admit a black student to its law school or to provide equal facilities.[92] On two other occasions Hughes wrote important constitutional decisions affecting African-Americans. In *Bailey v. Alabama* (1911) he refused to accept the purported purpose of a statute governing contracts for personal service as regulating fraud, since "its natural and inevitable effect" was to impose criminal penalties for refusing to perform a work contract and thereby created a system of debt peonage akin to slavery. Subsequently, in *Norris v. Alabama* (1935) he pointed to the exclusion of blacks from jury duty and used the Fourteenth Amendment's guarantee of "equal protection" to reverse the rape conviction of one of the Scottsboro boys.[93]

91. Stone to Frankfurter, 15 February 1936, Box 13, Stone Papers, LC.

92. Danelski and Tulchin, *Autobiographical Notes,* 112; *McCabe v. Atchinson, Topeka, & Sante Fe Railroad,* 235 U.S. 151 (1914), which then denied relief on technical grounds; *Missouri ex rel. Gaines v. Canada,* 305 U.S. 337 (1938) and, in general, R. Perry Sentell, Jr., "The Opinions of Hughes and Sutherland and the Rights of the Individual," *Vanderbilt Law Review* 15 (1962): 559–615, and A. Leon Higginbotham, Jr., and William C. Smith, "The Hughes Court and the Beginning of the End of the 'Separate But Equal' Doctrine," *Minnesota Law Review* 76 (1992): 1099–1131.

93. *Bailey v. Alabama,* 219 U.S. 219 at 238 (1910); *Norris v. Alabama,* 294 U.S. 587 (1935). In 1915 Hughes had laid the procedural basis for *Norris* by asserting the power of the Supreme Court to review in habeas corpus hearings the content of criminal trials in state courts: *Frank v. Mangum,* 237 U.S. 309 (1915); 35 Sup. Ct. 582. See Arthur M. Allen, "The Opinions of Mr. Justice Hughes," *Columbia Law Review* 16 (1916): 565–84. Holmes, accounted a liberal on many issues, did not support Hughes's efforts to secure equal rights for African Americans. See G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (New York: Oxford University Press, 1993), 335–36, 341–42.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

Hughes's approach to issues of free speech, like his views on race, stemmed primarily from his rigorous religious upbringing. Proud of "the noble tradition of the Baptists as the protagonists in the struggle for religious liberty," Hughes defended political dissent. In 1920, he mobilized New York City's Bar Association to protest the expulsion of five Socialists from the state assembly. As chief justice, he quickly encouraged the Court to expand the limits of free speech. His opinion in *Stromberg v. California* (1931) struck down as "vague and indefinite" a law prohibiting the raising of a red flag, while in *Near v. Minnesota* (1931) he voided on similar grounds a Minnesota statute banning newspapers that were "malicious, scandalous and defamatory."[94] That same year he dissented vigorously when the Court upheld the denial of naturalization to two conscientious objectors.[95] As early as 1934, one commentator concluded that Hughes had shown a "greater fondness for the Bill of Rights than any Chief Justice this country ever had." By the end of his tenure in 1941, the Court had silently "incorporated" the entire First Amendment into the Fourteenth Amendment.[96]

Hughes's important opinions on civil liberties are often cited but are rarely quoted. As a reform governor, Hughes had praised the politician "who demands the facts, who is willing to stand or fall by the facts"; as a judge, he reaffirmed this empiricist outlook and emphasized "the necessity of carefully scrutinizing the circumstances of each case." Consequently, Hughes usually made "new law" not by overruling landmark cases with a eloquent statement of principle but rather by deftly arguing, on factual grounds, that an alternative line of precedents applied—a piecemeal approach to legal change that fostered what one commentator called "the controlled evolution of doctrine."[97] This emphasis on precedent and an in-

94. Justices Butler and McReynolds dissented in *Stromberg* and all the Four Horsemen dissented in *Near.*

95. In both cases, the applicants refused to take the prescribed oath to "support and defend the Constitution and laws of the United States against all enemies, foreign and domestic. . . ." *United States v. Bland,* 283 U.S. 636; *United States v. Macintosh,* 283 U.S. 605.

96. Pusey, *Hughes,* 1:110, 392–93; *Stromberg v. California,* 283 U.S. 359 (1931); *Near v. Minnesota,* 283 U.S. 697 (1931); Joseph Pollard, quoted in Pusey, *Hughes,* 2:729. Writing in 1938, Kenneth B. Umbreit, *Our Eleven Chief Justices: A History of the Supreme Court through Their Personalities* (Port Washington, N.Y.: Kennikat Press, 1938), 2:453, notes that Hughes was the first member of a dissenting sect to serve as chief justice; his predecessors had been either Episcopalians or Catholics.

97. Hughes quoted in Hendel, *Hughes,* 8, and in Friedman, "Charles Evans Hughes," 123; Paul A. Freund on Hughes, quoted in Friedman, "Hughes Court," 1951n. Felix Frankfurter was critical of Hughes's commitment to precedent: "If only the theological tradition were not so strong upon our profession . . . [and] some of its leading ministers like the Chief . . . , things would be called by their real names instead of pretending that it is all a logical unfolding. . . ." Frankfurter to Stone, 22 September 1933, Box 13, Stone Papers, LC. In

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

tensely logical prose style account in part for the strange death of Hughes's reputation; although his judicial opinions changed the law, they did not move the heart or shape the public mind.

Thus, it was Justice Cardozo who penned the most elegant opinions of the 1930s and Justice Stone who, in *United States v. Carolene Products Co.* (1938), articulated a doctrine-based rationale for the rights-conscious jurisprudence of the Hughes Court. Indeed, the provenance of the now-famous footnote four in *Carolene* reveals Hughes's reluctance to extend constitutional protections beyond those for free speech. As explained by Stone's law clerk Louis Lusky, the page proofs of Stone's footnote that circulated among the justices made no mention of the first ten amendments to the Constitution. Rather, the note focused on the political dynamics of American life—suggesting more stringent standards of judicial review for state legislation that restricted corrective political processes, limited the right to vote, and discriminated against "discrete and insular minorities." Angered by conservative justices who used the due process and equal protection clauses of the Fourteenth Amendment "as a means of destroying [regulatory] statutes," Stone wanted to use that protean amendment to set a liberal agenda for the Court.[98]

Responding to Stone's draft, Hughes suggested that a different set of rights—those of freedom of speech and the press—were the ones most deserving of judicial attention because they were mentioned in the Constitution. This proposal was at once helpful, because it grounded some of Stone's agenda in existing fundamental law, and limiting, because it drastically narrowed Stone's vision for the Court. Rather than accept this limitation, Stone added a new first paragraph calling attention to legislative acts that infringed on a "specific provision of the Constitution, such as those of the first ten amendments," while retaining his political- and minority-oriented proposals for "more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment" as paragraphs two and three. Having won a modification in Stone's handiwork, the chief justice concurred in both the result of the *Carolene* case (upholding the constitutionality of a federal law prohibiting interstate commerce in adulterated milk) and Stone's opinion. However, Hughes continued to adhere to old

---

his lectures on *The Supreme Court,* 198–99, Hughes endorsed a "guarded application and extension of constitutional principles" through "particular cases."

98. *Carolene Products,* 304 U.S. 144 (1938); Louis Lusky, "Footnote Redux: A *Carolene Products* Reminiscence," *Columbia Law Review* 82 (1982): 1093, 1096–99. On equal protection, see Frankfurter to Stone, 23 March 1933, Stone's reply of 29 March, Box 13 Stone Papers, LC, and Lewis F. Powell, Jr., "*Carolene Products* Revisited," *Columbia Law Review* 82 (1982): 1087, 1090.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

liberal values (both Classical and Progressive) by insisting that economic rights were as important as civil rights and that judicial intervention under due process "applies when rights either of person or of property are protected by constitutional restrictions."[99]

Hughes's support for rights—economic or personal—was always qualified by his respect for the legitimately imposed demands of the community. During World War I Hughes advocated conscription (an issue that tore apart the British Liberal Party) and served as a member of New York City's draft board. On the eve of World War II, the chief justice took a similar communitarian stance in *Minersville School District v. Gobitis* (1940) by voting to uphold Pennsylvania officials who compelled school children to salute the American flag in violation of their religious beliefs.[100]

Along with most Protestant Progressives, Hughes believed also that society might legitimately impose moral rules on its members. As governor of New York in 1908, he insisted that the legislature restrict wagers on horse racing and thereby enforce a long-ignored anti-gambling amendment to the state's constitution. Hughes's Protestant moralism likewise determined his response to the Eighteenth (Prohibition) Amendment to the U.S. Constitution. Rejecting a lucrative offer to serve as counsel for the brewing industry, Hughes filed an *amicus curiae* brief supporting prohibition on behalf of twenty-one state attorneys general.[101]

Economic Regulation: Continuity

This dialectic between liberty and community likewise informed Hughes's view of regulatory issues. During the Progressive Era Hughes had defined a coherent New Liberal position, supporting "freedom of opportunity" for individuals on the one hand and the "police power" of the state on the other. As chief justice, Hughes's communitarian side came to the fore in the controversial *Minnesota Moratorium Cases* (1934). Here his majority opinion upheld a carefully drawn state law permitting courts to postpone

99. Lusky, "Footnote Redux," 1096–99. For Hughes's views on rights, see Pusey, *Hughes,* 2:706–7, and Mason, *Stone,* 489–92, 530. Parrish, "Hughes Court," 300, underlines Hughes's "hostility to legislative interference with property rights."

100. Hendel, *Hughes,* 72; on the *Gobitis* case, see Pusey, *Hughes,* 2:729; Friedman, "Charles Evans Hughes," 26–27. Hughes wanted to uphold the state law both because it was non-discriminatory (it applied to all school children) and because it was based on the police power, the justification for other regulatory legislation. Preferring the public interest to private benefit, Hughes argued (in one of his eleven written dissents) that government employees should not be granted patents for inventions created as part of their official duties: *United States v. Dubilier Condenser Corp.,* 289 U.S. 178, 224 (1933).

101. Pusey, *Hughes,* 1:227; *National Prohibition Cases,* 253 U.S. 350 (1920).

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

mortgage foreclosures. As Sutherland pointed out in a powerful dissent, the Minnesota statute seemed clearly to infringe both the letter and spirit of the "contract clause" of the Constitution. The Philadelphia Convention of 1787 had devised that clause precisely to prohibit such "stay laws," which had been enacted by state legislatures during the depressed times of the 1780s.[102]

Hughes summarily dismissed the argument based on the Founders' intent, declaring that "the great clauses of the Constitution" could not automatically "be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed on them."[103] Instead, he maintained that state governments had the inherent capacity "to protect their fundamental interests," which included the economic foundation of the social order. Here Hughes challenged the primacy of the private property rights that, as Sunstein argues, were so deeply imbedded in the culture and the constitution that they inevitably formed the baseline for legal analysis.[104] The chief justice defended his position by arguing that mortgage contracts were subject to "the reasonable exercise of the protective power of the state," which had to be "read into all contracts as a postulate of the legal order." This argument reiterated Hughes's Progressive Era decisions on contract cases: Holding a socialized, New Liberal view of contract law, he insisted that private bargains were subject to the calculus of the public interest and must be construed so as "to safeguard the economic structure upon which the good of all depends."[105] Hughes's support for

102. As Sutherland noted, the clause was intended to "foreclose state action impairing the obligation of contracts *primarily and especially . . . in time of emergency*" such as the Depression. *Home Building and Loan Association v. Blaisdell,* 290 U.S. 398, 465 (1934), emphasis in original.

103. Stone may have influenced this wording by pointing out to Hughes the scale of the crisis: large banking corporations held the mortgages of hundreds of small farmers, so that society was "confronted with a problem of which Chief Justice Marshall probably never had any conception." 12 December 1933, Box 75, Stone papers, LC.

104. Sunstein, "Lochner's Legacy," 179, 185–86. Without considering *Blaisdell,* Sunstein suggests that "the takings and contracts clauses . . . cannot easily be subject to independent judicial reconstruction" (186).

105. *Home Building and Loan Association v. Blaisdell,* 290 U.S. 398, at 442 (1934); Mason, *Stone,* 359–64. Olken, "Hughes and *Blaisdell,*" views the decision in the context of other historical strategies and rulings that limited the reach of the contract clause; but the constitutional text could be stretched only so far, and Hughes and the three liberals voted with a unanimous court in striking down a federal debtor-relief law, the Frazier-Lemke Act, in *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555 (1935). Hughes's commitment to the societal good likewise determined the inventive holdings in the *Gold Clause Cases* (1935), which prevented the owners of $100 billion in corporate and government bonds from exercising their express contractual rights and profiting from the government's devaluation of the currency. On these cases, see Friedman, "Hughes Court," 1914–18, 1923–27, and 1932.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

other regulatory measures likewise reflected his activist, pro-state stance during the Progressive era. In *O'Gorman & Young, Inc. v. Hartford Fire Insurance Co.* (1931), he voted with the three progressive justices and Roberts to uphold a New Jersey law regulating the commissions paid by insurance companies to their agents; a quarter of a century before (as Brandeis noted in his opinion for the majority), lawyer-reformer Hughes had drafted similar legislation for life insurance agents. Three years later, Hughes and Roberts again joined Stone, Brandeis, and Cardozo to uphold a New York law that set the price of milk. Roberts's opinion in *Nebbia v. New York* (1934) ignored the formalist distinction that restricted regulation to businesses "affected with a public interest." Challenging the doctrine of substantive due process, he declared that "neither property rights nor contract rights are absolute" and that a state was "free to adopt whatever economic policy may reasonably be deemed to promote public welfare."[106] Even as Justice McReynolds lamented to former Solicitor General James M. Beck that *Nebbia* marked "the end of the constitution as you and I regarded it," the chief justice saw it as an appropriate response to legislation that was neither arbitrary nor confiscatory. "Those who find fault with the multiplicity of laws and with vexatious interferences" with their business activity, Hughes had written in *The Supreme Court of the United States* (1928), "normally must address themselves to the legislature, and not to the courts; they have their remedy at the ballot box."[107]

If Hughes, like most New Liberals, granted governments the power to regulate private bargains, the grant was not plenary; individuals still had rights. In particular, Hughes consistently exalted the classical liberal principles of the "freedom of opportunity" and "freedom from confiscation." In 1915 he had written for the Court in voiding an Arizona law that, in certain circumstances, limited employment to United States citizens. "The right to work for a living . . . ," he had declared, "is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." As chief justice, Hughes voted with Brandeis and the conservatives to uphold this perspective in *New State Ice Co. v. Liebman* (1932), which struck down an Oklahoma law that limited the number of icehouses in the state. In Hughes's hierarchy of values, individual opportunity ranked higher than regulation, while the latter trumped corporate enterprise. Thus, he usually voted to uphold state

106. 291 U.S. 502, at 522 and 537.

107. McReynolds quoted in Laura Kalman, "Law, Politics, and the New Deal(s)," *Yale Law Journal* 108.8 (June 1999): 2187; Friedman, "Hughes Court," 1904, 1919–20; Hughes, *Supreme Court,* 195–96.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

laws that imposed higher taxes on chain stores than on the small businesses that competed with them.[108]

Hughes also zealously protected the individual's right to own and bequeath property. While governor of New York he had opposed passage of the Sixteenth (income tax) Amendment. He worried that the amendment might allow Congress to tax the interest on state and municipal securities and thereby "make the performance of the functions of local government a matter of federal grace." His opposition also reflected fear of confiscatory tax policies. "He is crazy about 'confiscation,'" Justice Brandeis lamented at one point, " . . . and that blinds his judgment."[109] Confiscation often arose as an issue in the administrative proceedings of state regulatory commissions. Early in his public career Hughes had worked out a nuanced position. On the one hand, he had supported the autonomy of "expert" commissions to prescribe reasonable regulatory measures. "Pure and efficient administration is the foundation of social progress," Hughes had declared in 1907. Judicial oversight was good neither for a commission, which would become "simply a board to take evidence," nor for the reputation of the judiciary: "With the courts giving a series of decisions . . . hostile to what the public believes," he had prophetically suggested, "you will turn upon our courts . . . hostile and perhaps violent criticism." On the other hand, Hughes had insisted that judicial intervention was imperative "if it be claimed that the action of the Legislature or a commission in fixing a rate operates as . . . a deprivation of property" or if "there is an assumption of arbitrary power not related to public convenience."[110] As an associate justice, Hughes had written this distinction between regulation and confiscation into the judicial law of the land. In 1913, he curtly dismissed an unsupported claim of confiscation by railroad companies in *Southern Pacific Company v. Campbell,* but devoted forty pages in the *Minnesota Rate Cases* to a painstaking

108. *Truax v. Raich,* 239 U.S. 33, at 41 (1915); Sentell, "Hughes and Sunderland," 563; *New State Ice Co. v. Liebman,* 285 U.S. 262 (1932), and *Colgate v. Harvey,* 296 U.S. 404 (1935); on chain stores, see *State Board of Tax Commissioners v. Jackson,* 283 U.S. 527 (1931) and Friedman, "Hughes Court," 1901–2, 1905–6, and 1911–12.

109. Hughes quoted in Pusey, *Hughes,* 1:253; as an associate justice, Hughes joined in an opinion that exempted state and local bonds from federal taxation, Editor's Note, "Charles Evans Hughes," 965; Brandeis quoted in Friedman, "Hughes Court," 1909n, 1905–6; Parrish, "Hughes Court," 299–300.

110. Hughes quoted in Editor's Note, "Charles Evans Hughes," 965; Pusey, *Hughes,* 1:204; Perkins, *Hughes,* 17; see his "Address to the Attica Chamber of Commerce," April 1, 1907, in Schurman, *Addresses,* 152–54 and his speech in Elmira, 3 May 1907, quoted in Danelski and Tulchin, *Autobiographical Notes,* 144. Charles Evans Hughes, *Conditions of Progress in Democratic Government* (New Haven: Yale University Press, 1910), 36–45, offers a justification of administrative governance.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

analysis of the more plausible financial claims made by rail carriers, and upheld one of them.[111]

Viewed in retrospect, Hughes's position on administrative agencies mirrored almost exactly that of Roscoe Pound. Pound had first come to national professional attention—and notoriety—in 1906, when his address at the Annual Meeting of the American Bar Association criticized the cumbersome workings of the common law courts and defended the expansion of administrative tribunals. However, in a subsequent essay, "Justice According to Law" (1913), Pound underlined his preference for a judicial system based on common law courts. He celebrated the demise of "legislative justice" (such as that exercised by the legislator-dominated New York Court of Errors before 1846) because it had allowed "purely partisan or political motives as grounds of decision." His estimate of "executive," or administrative, justice was more complex. Pound acknowledged the usefulness of regulatory commissions in the management of public utilities, workers' compensation, and other governmental tasks requiring specialized knowledge. However, he extolled the superior merits of "legal justice": a common law system managed by "independent judges" and "governed by legal reason rather than by interest or external pressure and watched narrowly by a learned profession."[112]

For Hughes, the experience of World War I fostered a preference for Pound's common law tribunals. Addressing the New York State Bar Association before American entry into the war, Hughes had argued that "the intricate situations created by expanding enterprise" called for administrative agencies staffed by disinterested experts.[113] By the 1920s, the collectivist policies and bureaucratic growth that accompanied the war caused Hughes to fear administrative power. "Bureaucracy was repulsive to him," the solicitor general of the State Department recalled, "and to his mind it assumed a hideous form whenever it enabled or encouraged administrative officers to invade the right of the individual to law itself."[114]

111. *Southern Pacific,* 230 U.S. 537, at 549 (1913); *Minnesota,* 230 U.S. 352 (1913).

112. Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," *Report of the American Bar Association,* 1906, 400–17; Pound, "Justice According to Law," *Columbia Law Review* 13 (1913): 20, 44, 30. See Wignor, *Roscoe Pound,* 123–29.

113. Danelski and Tulchin, *Autobiographical Notes,* 145; White, *Constitution and New Deal,* 102–3. In 1904 Hughes's firm of Carter, Hughes & Dwight was one of the largest in the country, with fourteen lawyers; but it was not the bureaucratic organization that Cravath-influenced firms would soon become. See Hobson, "Large Law Firm," 10–21.

114. Quoted in Umbreit, *Our Eleven Chief Justices,* 2:491. Earlier Hughes had warned that "mere bureaucracy—narrow, partisan, or inexpert—is grossly injurious." Those on the Progressive left were likewise distressed by what Randolph Bourne in 1917 called the

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

For Hughes, as for Pound, the proliferation of administrative agencies during the New Deal raised the specter of a bureaucratic despotism. In 1938, as chair of the American Bar Association's Special Committee on Administrative Law, Pound authored a report that cautioned against the "supplanting of a traditional judicial regime by an administrative regime." In hyperbolic prose, it warned against Soviet-style "administrative absolutism" and championed an elaborate system of judicial review.[115] Using more moderate language, Hughes likewise insisted on judicial oversight. In *Crowell v. Benson* (1932) he wrote for the Court (over a powerful dissent by Brandeis, joined by Stone and Roberts) upholding a trial judge who disregarded an administrative finding and held a *de novo* trial. Hughes's opinion, Frankfurter told Stone, "is the result of a very jejune, unreal conception of administrative law." Four years later, in *St. Joseph Stockyards Co. v. United States* (1936), Hughes reiterated his long-held position that independent judicial determination of rates and regulations was a constitutional requirement where "a large capital investment is involved and the main issue is as to alleged confiscation of that investment."[116] In other rulings the chief justice asserted that administrative proceedings should conform to judicial practice. To do less, Hughes asserted, would be "to establish a government of a bureaucratic character alien to our system." The proper administrative authority, the chief justice now concluded, echoing Pound, "must be the spirit of the just judge."[117]

VII. Hughes and the New Deal State

Despite this retreat on regulation, Hughes's first years at the head of the Court raised the prospect of an early end to the Lochner era. Writing to Frankfurter in June 1931, Stone noted that Holmes and Brandeis "made a remarkable record, going through the year without a single dissenting opinion." Stone predicted that he would soon join them, "on the assumption that most times we will be in the majority and, if not, the Chief will

---

"riveting of a semi-military State-socialism on the country." Quoted in Rodgers, *Atlantic Crossings,* 279.

115. See the discussions in Wignor, *Roscoe Pound,* 266–73; Horwitz, *Transformation of American Law,* 217–20; White, *Constitution and New Deal,* 116–21; and Hull, *Pound and Llewellyn,* 95–96, 256–57.

116. *Crowell,* 285 U.S. 22; *St. Joseph Stockyards,* 298 U.S. 38 (1936), at 52. For a general discussion see Hendel, *Hughes,* 98–113 and Friedman, "Hughes Court," 1910n.

117. Hughes quoted in Hendel, *Hughes,* 102, 113. See also *Ford Motor Co. v. NLRB,* 305 U.S. 364 at 373 (1939).

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

take the laboring oar" and write the dissent.[118] By 1932 Hughes's stance in *Crowell v. Benson* and *Miller v. Standard Nut* undermined this optimism.[119] Both cases involved property rights and placed governmental agencies in conflict with private individuals. In such cases, Hughes, Roberts, and the Four Horsemen stood as a solid phalanx. "I am only a voice crying out in the wilderness," Stone lamented a few years later, as he (and Brandeis and Cardozo) dissented when Sutherland disinterred the privileges and immunities clause of the Fourteenth Amendment to restrain Vermont from taxing certain out-of-state income of its citizens. "The tendency to press constitutional restrictions to their limit and beyond gives me serious apprehension [of the] . . . capacity of the Court to render useful service."[120]

By 1935 Hughes had also become alarmed by the stridency and intransigence of the Four Horsemen. In January, the chief justice joined Stone (and Cardozo and Brandeis) in dissent when Sutherland and his allies ignored three venerable common law rules to allow a new trial in a Massachusetts insurance case.[121] Then, in March, Hughes authored a stinging dissent in *Railroad Retirement Board v. Alton,* in which the conservatives on the Court not only invalidated the poorly drawn Railroad Retirement Act of 1934 but also stated that Congress lacked the authority to enact any such legislation. That conclusion, Hughes declared, was a "departure from sound principles and places an unwarranted limitation upon the commerce clause of the Constitution." Pointing out that the Court had long sanctioned workers' compensation plans for railroad employees, Hughes demanded to know what "sound distinction, from a constitutional standpoint, is there between compelling reasonable compensation for those injured without any fault of the employer, and requiring a fair allowance for those who practically

118. 5 June 1931, and Frankfurter to Stone, 4 December 1931, Box 13, Stone Papers, LC.

119. In *Standard Nut,* 284 U.S. 498 (1932), the Court allowed injunctive relief from a falsely laid tax despite an explicit Rule against such relief in tax cases. See Frankfurter to Stone, 29 February 1932.

120. Stone to Frankfurter, 16 December 1935, Box 13, Stone Papers, LC. The case in question was *Colgate v. Harvey,* 296 U.S. 404. See also *Patton v. United States,* 281 U.S. 276 (1930), in which Stone concurred in the decision but not in Sutherland's opinion regarding the constitutional right to a jury trial, and *Great Northern Railway Co. v. Weeks,* 297 U.S. 135 (1936), in which the Court invalidated, over Stone's dissent, a non-discriminatory assessment by state tax officials. See also the exchange of letters between Stone and Frankfurter on the *Great Northern* decision and Hughes's responsibility for the Court's lack of doctrinal consistency in tax cases: 14, 16, and 25 February 1936, Box 13, Stone Papers, LC. When a tax case favored the government, it elicited one of Hughes's rare written dissents (*Helvering v. Butterworth* [1933], 290 U.S. 365, 371).

121. *Dimick v. Schiedt,* 293 U.S. 474 (1935).

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

give their lives to the service."[122] Since his days as a New Liberal, Hughes had held an expansive view of governmental power under the commerce clause. As an associate justice in 1914, he had argued in the *Shreveport Cases* that Congress possessed "the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end."[123] In his last year as chief justice a quarter of a century later, he still adhered to that position, voting (in dissent) to nullify a New York City sales tax on out-of-state coal and to uphold a heavy fine on a striking labor union for interfering with interstate commerce.[124]

Hughes's New Liberal approach to governmental regulatory authority likewise shaped his response in early 1936 to the Court's backward-looking decision in *Morehead v. New York ex rel. Tipaldo.* Roberts had again joined the Four Horsemen, this time to strike down a New York minimum wage statute for women as a violation of freedom of contract. In response, Hughes penned one of his rare written dissents. The majority relied for precedent on the well-known case of *Adkins v. Children's Hospital* (1923), which had invalidated somewhat similar congressional legislation for the District of Columbia. Perhaps hoping to persuade Roberts to desert the conservatives, the chief justice had carefully (and plausibly) distinguished the New York law from that passed by Congress.[125] What Hughes failed to accomplish with his dissent, either the widespread public outcry against the *Tipaldo* decision or the results of the 1936 election did. When minimum wage legislation again came before the Court in December in *West Coast Hotel v. Parrish,* Roberts concurred in Hughes's opinion, which not only upheld Washington State's minimum wage law but also overruled *Adkins.*

122. 295 U.S. 330 at 375 and 384. For his part, Stone thought that the decision was "about the worst performance of the Court since the Bake Shop [Lochner] case. . . . [It] puts us back at least thirty years." To Frankfurter, 9 May 1935, Box 13, Stone Papers, LC.

123. *Houston, East and West Texas Railway Company v. United States,* 234 U.S. 342 at 353 (1914); Currie, "Constitution in the Court," 1119–21; see above, note 58 and the accompanying discussion.

124. *McGoldrick v. Berwind-White Coal Mining Co.,* 309 U.S. 33; *Apex Hosiery Co. v. Leader,* 310 U.S. 469 (both 1940, Hughes writing in dissent).

125. The three liberals joined Hughes's dissent; Stone wrote a separate dissent urging that Adkins be overruled. As an associate justice, Hughes had supported minimum wage legislation (see *Chicago, Burlington & Quincy Railroad Co. v. McGuire,* 219 U.S. 549, 567 and Danelski and Tulchin, *Autobiographical Notes,* 312) and, quoting from his opinion in *McGuire,* made a strong attack on freedom of contract. See 298 U.S. 587 (1936) at 628; see also *Adkins,* 261 U.S. 525 (1923). On the motivation of Hughes and Roberts, see Friedman, "Hughes Court," 1939–53.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

As Hughes read the decision in *West Coast Hotel,* Robert Jackson recalled, his voice "was one of triumph. He was reversing his Court, but not himself." The chief justice simply dusted off the New Liberal arguments he had used as an associate justice in 1910 and 1915 to uphold California legislation limiting women's working hours and an Iowa law regulating liability for industrial injuries. Then he had argued: "Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." Now he declared that the "Constitution does not recognize an absolute and uncontrollable liberty . . . the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people."[126] As Sunstein suggests, Hughes's decision in *West Coast Hotel* "rejected the theoretical foundations of the Lochner period," which privileged private rights. In fact, as an associate justice, Hughes had adumbrated a socially conscious baseline for the Court a quarter of a century before, at the height of the New Liberalism.[127]

With respect to the issues involved in these Progressive era "Old Deal" cases, the evolutionary thesis advanced by Barry Cushman is correct. For a generation Hughes and other jurists and politicians had confronted these questions—the authority of *state* legislatures and expert commissions to regulate public utilities and private businesses—and resolved many of them along New Liberal lines. Then, in the late 1930s they carried New Liberal regulatory doctrines to their logical conclusion, ending the laissez-faire regime of substantive economic due process.

Economic Regulation: Discontinuities

The "New Deal" was different because it proposed a dramatic expansion in the size and functions of the *national* government. As a regime of *national economic planning and bureaucratic social welfare,* it raised a host of new political and constitutional questions. Did expansive federal legislation violate the Tenth Amendment, which reserved non-delegated powers to the states and the people? Did the General Welfare clause contain taxing authority and allow aid to farmers and a federal old-age pension

126. Jackson quoted in Friedman, "Hughes Court," 1935; *Chicago, Burlington and Quincy Railroad Company v. McGuire,* 219 U.S. 549, at 567 (1911); *West Coast Hotel v. Parrish,* 300 U.S. 379, at 391 (1937), quoted in Friedman, "Hughes Court," 1938. *McGuire* is discussed above, at note 66.

127. Sunstein, "Lochner's Legacy," 159–62. White, *Constitution and New Deal,* 221–25, also sees *West Coast Hotel* (and *Blaisdell*) as representing a new "living Constitution" theory of interpretation.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

system? Was the regulation of local labor disputes within the purview of the commerce clause? Suffusing all of these issues was the looming specter of redistributive class politics—such as taxing urban consumers to subsidize farmers—and a centralized, authoritarian direction of many aspects of American life. As early as 1932 Hughes brooded about "new social schemes resting upon coercion by a class."[128]

Faced with these new issues, active politicians as well as cloistered jurists felt the ground fall away beneath their feet. "Something has taken place in this country," complained Al Smith, the champion of state-level progressive regulation and bureaucratic efficiency: "There is some certain kind of foreign 'ism' crawling over this country. What it is I don't know. . . . But I know it is here." Herbert Hoover knew what it was, and he did not like it: The corporatist National Industrial Recovery Administration was essentially a "state-controlled or state-directed social or economic system," and that, the ex-president declared, is "tyranny, not liberalism." Wilsonian George Creel had also seen Smith's beast and given it a name: "Statism"—a vast national bureaucracy that would stifle individual liberty and creativity.[129]

Initially, the Supreme Court gave the New Deal's Statism a negative reception. Opposition to the National Industrial Recovery Act (NIRA) of 1933 by the conservative justices was hardly surprising and that by the chief justice only slightly less so. The "New Statism" that Hughes championed during the Progressive Era focused primarily on the reform of state and municipal governments and their policing of private businesses. Secondarily, he supported national regulation through the commerce clause with enforcement handled mainly through the judicial system. He was genuinely alarmed by the centralized structure of the NIRA and its comprehensive administrative codes.[130] Even the liberals—Stone, Brandeis,

128. Quoted in Pusey, *Hughes,* 2:692–93.

129. Smith in 1936, as quoted in Oscar Handlin, *Al Smith and His America* (Boston: Little Brown, 1958), 181; Smith, *Progressive Democracy: Addresses and State Papers of Alfred E. Smith* (New York: Harcourt Brace, 1928); Hoover quoted in Dawley, *Struggles for Justice,* 369. "I am on the same side now that I was back in the Collier [magazine] days [of the Progressive era]," the muckraking journalist Mark Sullivan wrote in 1935, "The fight was for individualism then and is for individualism now. The enemy [then] was regimentation attempted by big business; the enemy now is regimentation attempted by the government." When Otis Graham looked at 105 Progressive leaders whose political views toward the New Deal could be determined, he found that 60 opposed it, 40 supported it, and only 5 favored more radical action, with the supporters coming primarily from "social welfare" rather than "good government" reformers, Graham, *Encore for Reform,* 24, 45.

130. As Barry Cushman has shown ("Rethinking the New Deal Court," 247, nn 254, 255), the Four Horsemen had strong civil liberties records and one or more of them often voted to sustain the New Liberal regulatory and reform legislation of the "Old Deal." However, they were even more wary than Hughes of the legislative experiments of the New Deal.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

and Cardozo—opposed the major role given to private trade associations in the NIRA and joined their colleagues in striking down that corporatist regime as well as New Deal measures that extended national power.

The judicial onslaught came in 1935 and may be quickly summarized—keeping in mind that these anti-New Deal decisions may have encouraged Roberts's move to the right between his rejection of substantive due process in *Nebbia* in early 1934 and his traditionalist votes in *Alton* and *Tipaldo* in mid-1935 and 1936.[131] In January, the Court in *Panama Refining Co. v. Ryan* held unconstitutional a provision of the NIRA that authorized the president to bar "hot oil" (oil in excess of a state's quota) from interstate commerce. Writing for the eight-to-one majority (Cardozo dissenting), Hughes argued that Congress had delegated too much authority to the president. In May, the Court unanimously voided the NIRA in *Schechter Poultry Corp. v. United States.* Again writing for the Court, Hughes reiterated the Progressive Era understanding that the commerce clause could not reach various activities within the states and again cited excess delegation; Cardozo concurred and condemned the power given to trade groups to establish industry-wide regulatory codes as "delegation running riot."[132] As political philosopher Hadley Arkes has argued, what troubled the justices (but what they never clearly articulated) was that delegation subverted the process of representative self-government. Because Congress itself did not determine what was illegal, it prevented affected citizens and interest groups from challenging the legislation in a political forum; instead, they had to seek satisfaction from a NIRA trade group or an administrative agency. For Cardozo and Hughes as for the Four Horsemen, such an outcome "was a vice that violated, profoundly, their sense of constitutional propriety."[133]

The unanimity of the anti-NIRA decisions of 1935 was short-lived. The Court divided not only over Progressive Era issues in *Alton* and *Tipaldo* but also over New Deal legislation that expanded national authority, such as the Agricultural Adjustment Act. Hughes probably doubted the constitutionality of some aspects of the AAA but was unwilling to take a definitive stand. Thus, he chose not to write the decision himself (as in *Panama* and *Schechter*) or to entrust it to one of the conservatives, who might—as in *Alton*—take an extreme position. Rather, he assigned

131. "So far as Roberts is concerned," Frankfurter wrote to Stone, "the Chief must bear . . . the responsibility in having encouraged the process of disregard of the judicial function that lies between the Nebbia and the Tipaldo cases." 5 June 1936, Box 13, Stone Papers, LC.

132. *Panama,* 293 U.S. 388 (1935); *Schechter,* 295 U.S. 495 (1935), Cardozo quote at 553; my discussion follows that in Friedman, "Hughes Court," 1923, 1923, 1930–32.

133. Arkes, *The Return of George Sutherland: Restoring a Jurisprudence of Natural Rights* (Princeton: Princeton University Press, 1994), 173 and 99–110, 159–73.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

it to Roberts and then plied him with suggestions. Roberts's opinion assailed the AAA as unconstitutional on two grounds. He suggested that the AAA was a coercive regulation rather than a tax measure, a position that Hughes accepted, and that the federal government lacked authority over agriculture, a view that Hughes disputed. In 1920, while serving as counsel for a private bond house, the Federal Land Bank of Wichita, Hughes had strongly defended the constitutionality of the Federal Farm Loan Acts of 1916 and 1918. He argued that the General Welfare clause contained an independent grant of taxing power, as Alexander Hamilton and Joseph Story had maintained. If the Court accepted that proposition, which James Madison had disputed, then the federal government could use its taxing power to intervene in the many areas of American life where it lacked explicitly delegated authority.[134]

In 1936, this issue was unresolved, because the Taft Court had upheld the Farm Loan Act without addressing the General Welfare clause.[135] But it was not forgotten. The government's argument in *Butler* contained passages from Hughes's earlier brief (illustrating Cushman's point about the increasing astuteness of New Deal lawyers). Moreover, according to Felix Frankfurter, the chief justice persuaded Roberts to endorse the Hamilton-Story view (as dictum) in his *Butler* opinion. This maneuvering may have assured Roberts of the vote of the chief justice to void the AAA, while winning for Hughes an endorsement in a majority opinion of this controversial doctrinal position.[136]

Such maneuvers reflected Hughes's determination to lead his divided court and to oversee the evolution of constitutional doctrine. This goal influenced not only the assignment of opinions but also the votes of the chief

134. *Butler,* 297 U.S. 1 (1936); Friedman, "Hughes Court," 1953–60. See Danelski and Tulchin, *Autobiographical Notes,* 192–93, and 193n, for Hughes's view that the taxing powers in the General Welfare clause allowed Congress "to appropriate moneys for the promotion of the agricultural interests of the country" and his explanation of his negative vote in *Butler* (because of the "essentially coercive character" of the AAA). Rodgers, *Atlantic Crossings,* 340, notes that by 1929 the Farm Loan Act had pumped a billion dollars into the farm economy.

135. *Smith v. Kansas City Title and Trust Co.,* 255 U.S. 180 (1921).

136. See 297 U.S. 1 (1936) at 65–66: After much vacillation, Roberts declares: "Study of all these [views of this issue] leads us to conclude that the reading advocated by Mr. Justice Story is the correct one. . . . It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." See also, Friedman, "Hughes Court," 1955; Danelski and Tulchin, *Autobiographical Notes,* 309–10. Hughes had carefully analyzed the role of dicta in the *Supreme Court,* 165: "Not infrequently a sentence or phrase, or even a paragraph, will get into a majority opinion which does not have majority support and the effect of which one or more of the majority may be desirous of destroying as soon as they get a chance."

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

justice.[137] Hughes habitually voted with the majority. In his eleven years as chief justice, he wrote only eleven dissents and consistently registered fewer minority votes than his colleagues did. This determination to be on the winning side—and therefore have a voice in the opinion—often induced the chief justice to trade his vote in return for changes in wording or in the doctrinal reach of the majority's opinion, as in *Butler.* (Indeed, it was the Four Horsemen's refusal to limit the reach of *Alton* that troubled Hughes more than the decision itself.[138]) However, Hughes paid a price for these tactics. Most of the concessions he won were cosmetic and his maneuvering exposed him to charges of intellectual inconsistency and deviousness. When the conservative-led majority in the Great Northern Railroad tax case rejected "the settled doctrine of the Court itself and in complete disregard of economic views invoked less than a year ago," Frankfurter was perplexed. "I just cannot believe," he wrote to Stone (who dissented) "that Charles Evans Hughes, the man, and not the Chief Justice, would not completely agree with your views."[139]

Hughes's subordination of doctrine to his political agenda appears, with startling clarity, in a series of little studied cases. The issue at stake was the immunity of state government lessees and other contractors from federal income and corporate taxes—an important new concern in the 1920s and 1930s. There was widespread agreement among the justices that federalism protected state and municipal governments, bonds, and employees from federal taxation. Moreover, there was precedent, in *Gillespie v. Oklahoma* (1922), for providing immunity against taxation to private firms acting as government agents.[140] In 1932, the Court revisited this issue in *Burnet v. Coronado Oil.* Writing for the Court, Justice McReynolds argued that Oklahoma's ownership of oil lands and its use of the revenue for state educational purposes protected Coronado, its lessee, from federal taxation. Stone dissented (joined by Brandeis, Cardozo and Roberts) on the grounds that the state had essentially divested itself of the oil through the lease and thereby exposed Coronado to federal taxation. In a separate dissent by Brandeis, the three liberals called for the overruling of *Gillespie*

137. On March 2, 1932, Stone complained to Frankfurter that Hughes acted "as though he were the Court," and that the chief justice assigned opinions to himself "in fields where clearly Brandeis or Cardozo had done some pioneer work. . . ." "Memorandum of Talk with HFS," Reel 64, Frankfurter Papers, LC.

138. Even Stone admitted that the Railroad Retirement Act was "a bad one." Stone to Frankfurter, 9 May 1935, Box 13, Stone Papers, LC.

139. 14 February 1936, and Stone's reply of 16 February, Box 13, Stone Papers, LC.

140. 257 U.S. 501. However, this case involved state taxation of a federal agent. Holmes wrote for the Court; three justices dissented.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

and an end to the use of governmental immunity to protect "vast private incomes" from taxation.[141]

Hughes rejected both propositions. Long worried about the declining powers of state governments and "confiscation" of property through taxation, he usually voted with the conservatives to extend immunity to a variety of state instrumentalities. Much to Stone's chagrin, Hughes held firmly to this position until early in 1938. Then, faced imminently with a court dominated by Roosevelt's appointees, the chief justice suddenly reversed course. In February 1938 he assigned the case of *Helvering v. Mountain Producers Corporation* to himself and announced to Stone his "conclusion that it is absolutely necessary to deal with [the] Gillespie and Coronado cases. . . . [They] should be overruled and I have written accordingly." The performance was vintage Hughes. He would vote with the emergent majority but, by authoring the opinion, would control the evolution of doctrine.[142]

Hughes's personal proclivities—and ideological preferences—are key to understanding his behavior during the crisis year of 1937. When the Court had unanimously struck down the NIRA and the Frazier-Lemke debtor-relief act on the same day in 1935, President Roosevelt publicly accused it of being stuck in "the horse and buggy days." By 1936, Roosevelt had grown more distressed over the Court's decisions. He now mused privately about "the effect packing had on the British House of Lords," the successful threat used by the New Liberal-dominated ministry of 1911 to deter the Conservative-dominated peerage from vetoing its reform legislation.[143] In 1936 in America, as in 1911 in Britain, it appeared to the president that to establish a new mode of liberalism required a basic institutional change.

Hughes sensed the growing hostility to the Court but could do little about it. Both for doctrinal and court-management reasons, he concurred with the position of Roberts and the conservatives (in *Carter v. Carter Coal Co.*)

141. 285 U.S. 393, at 446.

142. From time to time, Hughes wrote opinions that limited immunity (see Frankfurter to Stone, 30 March 1933, Frankfurter Papers, Reel 64, LC), but usually defined it broadly. On 8 December 1937 Stone complained to Frankfurter that the Court had just missed another opportunity to reverse or revise *Coronado* (Box 13, Stone Papers, LC). By early 1938, however, Sutherland and Van Devanter had left the Court (replaced by Hugo Black in 1937 and Stanley Reed in the late spring of 1938) and Frankfurter heard rumors of the imminent retirement of McReynolds. Frankfurter to Stone, 14 January 1938, Reel 64, Frankfurter Papers, LC. In his usual precise language, Hughes limited the reach of the decision. See 303 U.S. 376, at 386–87. Hughes to Stone, 23 February 1938, Box 75, Stone Papers, LC.

143. Roosevelt quoted in Friedman, "Hughes Court," 1932. For the impact on FDR of the British New Liberal legislation of 1906–1914, see Rodgers, *Atlantic Crossings,* 56, 423–24.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

that the commerce power could not sustain the federal labor regulations mandated by the Guffey Coal Act of 1935. At that point, May 1936, the chief justice was both unable and unwilling to move beyond New Liberalism to New Deal statism. Unable, because the Court was deeply split, not only over *Guffey* but also over the AAA and the New York minimum wage case. Unwilling, because he was not convinced that a powerful national bureaucratic state commanded either constitutional legitimacy or broad popular support. Hughes therefore defined a middle ground for himself in a concurring opinion in *Carter* (arguing that the commerce clause allowed Congress to set interstate coal prices—but not local wage regulations) and sought to deflect criticism from the Court by challenging voters to enact a constitutional amendment that would "give Congress the power to regulate industries within the State." "It is not for the Court to amend the Constitution by judicial decision," he declared.[144]

But that, of course, is what the Hughes Court began to do in the spring of 1937 through expansive interpretations of the Commerce and General Welfare clauses. This momentous transition was the result of a confluence of factors: the long erosion of laissez-faire constitutionalism, the year-long crisis within the Court during 1936, Roosevelt's announcement of the court-packing plan in early 1937, and the president's overwhelming victory in the November 1936 election. In 1928 Hughes had urged those opposed to "vexatious interferences" by government to seek "their remedy at the ballot box." As William E. Leuchtenburg has shown, Roosevelt's opponents had consciously made the election into a referendum on the New Deal—and they had lost badly.[145] Here—by proxy as it were—was the expression of the national will on constitutional powers that Hughes had demanded in his *Carter* opinion.[146]

144. 298 U.S. 278, at 317 (1936).

145. Leuchtenburg, "When the People Spoke, What Did They Say?: The Election of 1936 and the Ackerman Thesis," *Yale Law Journal* 108 (1999): 2077. Thus, Democratic Governor Eugene Talmadge urged his fellow Georgians not to "allow a bunch of Communists to have four more years to appoint the successors to such stalwart men as Chief Justice Hughes, and Associate Justices Butler, McReynolds, Sutherland, and Van Devanter" (at 2089). See also, Leuchtenburg, "Franklin D. Roosevelt's Supreme Court Packing Plan," in Harold M. Hollingsworth and William F. Holmes, *Essays on the New Deal* (Austin: University of Texas Press, 1969), 69–115.

146. My interpretation is broadly consistent with Bruce Ackerman's argument that the constitution was judicially "amended" between 1936 and 1941. Ackerman, "Constitutional Politics/Constitutional Law," *Yale Law Journal* 99 (1989): 453–512 and the works cited in note 9. As Charles Wyzanski, Jr., the New Deal lawyer who was a central participant in the constitutional revolution, told Learned Hand: "it was not really Mr. Wyzanski who won the Wagner cases, but Mr. Zeitgeist." Quoted in Gunther, *Learned Hand,* 462.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

More immediately, it showed Hughes the handwriting on the wall—the likely retirement of the Four Horsemen during FDR's second term and their replacement by justices willing to expand the reach of the national government. Ever a man of the middle, Hughes now maneuvered to defeat the court-packing plan and to set limits on the imminent constitutional revolution. The first result of his efforts was the triumph of judicial doctrines adumbrated during the Progressive era.[147] Hughes had come of political and judicial age during that earlier moment of reform and in April 1937 drew upon his New Liberal reasoning in the *Shreveport Cases* (1914) to uphold the extensive federal regulation of wages and working conditions mandated by the National Labor Relations Act.[148] In *NLRB v. Jones & Laughlin Steel Corp.,* the chief justice declared that the commerce power could be used to regulate the "industrial labor relations" of local factories "when industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities."[149]

Whatever the New Liberal antecedents, Hughes's decision to support a revolutionary expansion in the reach of the commerce clause carried him on to new constitutional ground (and, as two written dissents in 1940 indicate, farther than he wished to go).[150] Hughes's new agenda also assisted the liberal jurists to implement their vision of a powerful national state. In his private opinion on the Farm Loan Acts of 1916 and 1918 and his maneuvering in *Butler,* Hughes had pushed forward an expansive view of the General Welfare clause. In May 1937 in *Helvering v. Davis,* Cardozo

147. Rodgers, *Atlantic Crossings,* 414, 415. Crises like the New Deal, Rodgers points, "lead to a frantic rummaging through the existing stock of policy notions" and often allow the adoption that previously had not been politically possible: "The New Deal was a great, explosive release of the pent-up agenda of the progressive past."

148. See note 68. *NLRB v. Jones & Laughlin Steel Corporation,* 301 U.S. 1, at 41 (1937). To justify his support for this expansion of federal authority, Hughes also pointed to the *Minnesota Rate Cases* as indicative of his broad view of the commerce power. See Danelski and Tulchin, *Autobiographical Notes,* 312–13, and *Minnesota Rate Cases,* 230 U.S. 353 at 399 and 431.

149. Friedman, "Hughes Court," 1964, argues that *Jones & Laughlin* "merely stated a corollary" to the doctrine outlined in the *Shreveport Cases* that Congress could regulate intrastate activities that bear "a close and substantial relation to interstate traffic." But Friedman acknowledges that "the Court had previously refused to draw" this corollary proposition; indeed, as Currie points out ("Constitution in the Court," 1120–21), many justices, including Hughes, expended considerable energy trying to limit the scope of the commerce clause. Consequently, *Jones & Laughlin* represents a major change from *Shreveport.* For Cushman's slightly different argument that Hughes continued to rely on Progressive era doctrine, see Kalman, "Law, Politics, and the New Deal(s)," 2178.

150. *Bedford McGoldrick v. Berwind-White Coal Mining Co.,* 309 U.S. 33 (1940), involved a New York City tax on coal, while *Apex Hosiery Co. v. Leader et al.,* 310 U.S. 469 (1940), dealt with a strike that inhibited interstate commerce.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

used that clause to uphold the pension provisions of the Social Security Act. Citing Roberts's dictum in *Butler,* Cardozo declared that Hamilton's and Story's (and Hughes's) broad interpretation of the General Welfare clause "is now settled by decision."[151]

Hughes not only laid the doctrinal basis for the decision and voted for it but also, and most significantly, determined that *Helvering v. Davis* came before the Supreme Court. The liberals and Roberts would have dismissed the appeal by the company on procedural grounds. However, as part of his campaign against Roosevelt's court-packing plan, Hughes wanted an affirmative decision on the constitutionality of this important New Deal statute and so voted with the Four Horsemen (who hoped for a negative outcome) to try the case on its merits. "I wonder how much the historian of the future will convey the performances of this term . . . ," Frankfurter mused in June 1937. "If he knows as much about procedural problems as he should [,] he will find a perfect searchlight upon the Chief's mentality and tactic in his vote to take jurisdiction in the *Davis Pension* case." The Harvard professor found little to praise in such stratagems or in Hughes's devious maneuverings. "When I see how a synthetic halo is being fitted upon the head of one of the most politically calculating of men," he told Stone, "it makes me in the sanctified language of the old gentleman [Holmes] 'puke.' . . . I wonder how long [the Court] . . . can survive observations of the doings and connivings, particularly of the Chief, during the last few years." [152]

Hughes's triumph was short-lived. As Friedman has pointed out, a flock of Roosevelt appointees would shortly extend the scope of the constitutional revolution. These expansive decisions elicited from Hughes a series of dissents and concurrences that sought in vain to limit the New Deal enthusiasms of his new colleagues. At least temporarily, History was on the side of Roosevelt and the New Deal, and that is yet another reason why Hughes and his New Liberal vision have not lived on in the public mind.[153]

151. *Helvering v. Davis,* 301 U.S. 619 (1937) upheld the pension provisions of the Act, while *Steward Machine Co. v. Davis,* 301 U.S. 548 (1937) validated its sections on unemployment.

152. 301 U.S. 619, at 639 for discussion of the procedural issue; Frankfurter to Stone, 2 June 1937, Box 13, Stone Papers, LC.

153. For two of Hughes's dissents, see the cases cited in note 150. Friedman, "Hughes Court," 1974–81, discusses the impact of the change in the composition of the Court. Data presented in C. Herman Pritchett, *The Roosevelt Court* (1948; Chicago: Quadrangle Books, 1969), 32–38, reveals the ideological shift in the Court through an analysis of the dissents of Hughes and Roberts, whom he labels as "moderates" over the entire period. From 1931 to 1935, Hughes and Roberts each voted against the majority 15 times (as compared to an average of 55 dissenting votes by the liberals: Stone, Cardozo, and Brandeis). In 1937, Hughes voted with the majority on every occasion. By 1940, when justices appointed by Roosevelt were a majority, Hughes voted in the negative in 24 cases and Roberts in 32.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

The national bureaucratic regime created by the New Deal enhanced the General Welfare by greatly expanding the power of the federal government and imposing new rules on the society. But there were costs. The Wagner Act forced corporations to engage in collective bargaining and placed restrictive mandates on individual workers and trade unions; as Samuel Gompers had feared, government intervention subordinated the interests of labor to that of industrial peace. Likewise, the Social Security Act provided individuals with old age and unemployment insurance but also carried the federal government deep into the financial and personal lives of most Americans. As historian Alan Dawley has argued, the Act instigated a "mercantilist regulation of family life not seen since the eighteenth century." And the new federal tax system, in its regressive levies first on processed agricultural commodities and then as a social security payroll tax, dipped into the pockets of ordinary citizens.[154]

In a prophetic work of 1912, the British political philosopher Hilaire Belloc had isolated the fundamental contradiction within liberal capitalist society: a moral equality of rights and a profound inequality of property. Belloc, an outspoken critic of the New Liberalism, outlined three possible outcomes. The conflict between rights and wealth might produce a wider and more equal distribution of property, what he called the "Distributive State." Or it might result in the seizure of private productive capital, and create a "Collectivist State." Recognizing the success of the political alliance between property-owning New Liberals and Labour proletarians, Belloc thought that a third scenario was the most likely: a process of empirical reform that "reduces freedom by inches [through] . . . a welter of anarchic restrictions." In this "Servile State," the mass of citizens (as a later commentator put it) "would be constrained by law to labour for the profit of a minority, but as the reward of such constraint, should enjoy a security they did not possess under pure capitalism."[155]

Charles Evans Hughes was just such a practical, empirical reformer and, like Belloc, sensed both the allure and the threat of a national bu-

---

White, *Constitution and New Deal,* 227–28, argues that Hughes remained committed to traditional commerce clause doctrine, only reluctantly joining Stone's opinion in *United States v. Darby Lumber Co.,* 312 U.S. 100 (1941) that went far beyond *Jones & Laughlin* in breaking new doctrinal ground.

154. Tomlins, *The State and the Unions;* Dawley, *Struggles for Justice,* 383; Leff, *New Deal and Taxation,* table 1, shows that in 1940 the income and estate taxes collected from wealthy Americans accounted for 23 percent of federal revenue while the excise, tariff, and social insurance taxes paid mostly by (the much greater number of) less-wealthy citizens brought in 55 percent.

155. My discussion of Belloc follows that in Emy, *Social Politics,* 290–93; Emy's comment appears on 291.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

reaucratic order. But for myriad reasons—the smaller impact of World War I on American society, a less rigid system of class relations, and the emphasis of American progressivism on regulation rather than redistribution—Hughes did not have to confront the reality of bureaucratic statism for another two decades. A man of the nineteenth century, an admirer of John Stuart Mill as well as of Gladstone, Hughes was therefore able during most of his public life to press for civic equality and economic opportunity while upholding property rights, bounded government, and a liberal capitalist economic order.

There is great irony in his fate. Raised as a good-government Mugwump, the defender in his mature years of a modest American version of the New Liberalism of Winston Churchill and Lloyd George, Charles Evans Hughes ended his public career supporting the decisions that began the New Deal constitutional revolution that (in the view of some New Liberal Progressives) marked the advent of Belloc's Servile State in the American republic. It is that irony I have chosen to call the Strange Death of Liberal America.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

Living without Labels

DANIEL T. RODGERS

Charles Evans Hughes's career ran along the fault lines of most of the major political events of his lifetime. Muckraking catapulted him to fame. He governed New York during four key years of the Progressive era as an effective administrator and earnest reformer. He stayed with the Republican Party when the Progressives bolted in 1912. He ran for the presidency in 1916 but missed the prize, albeit by a narrower electoral college margin than any other contender until the very end of the century. He was instrumental in negotiating the international naval disarmament accords of 1921–22, landmarks of progressive internationalism in their day that fell under sharp criticism a decade later. He presided over the U.S. Supreme Court during the key years of the New Deal, though in most histories of the 1930s Court he comes across as something of an also-ran behind its more memorable shapers: Brandeis, Cardozo, Sutherland, Black, even Roberts. Hard to pin to any achievement or distinct idea, slipping in and out of the dramatic movements of his day, he was the kind of man who makes history but easily falls out of the history books.

James Henretta's insistence that Hughes be taken seriously is important, therefore, not simply for Hughes's reputation but for the class of which he was a type. For all his striking strengths of character—his extraordinary capacity for hard work, his incorruptibility, and his "gimlet mind"—what is most important about him as a man of law and public affairs is his normality. From bar to bench to statehouse, his career, Henretta shows, was from beginning to end one of maneuver. Moments of heroic action cohered with moments of remarkable pliability. A man of deep rectitude, he adjusted his aims by his calculation of votes, both as governor and as chief justice. This is the way normal politics works, and the way in which the law works as well.

To bring Hughes's career into focus, Henretta folds these maneuvers, the

Daniel T. Rodgers is the Henry Charles Lea Professor of History at Princeton University <drodgers@princeton.edu>.

Law and History Review Spring 2006, Vol. 24, No. 1
© 2006 by the Board of Trustees of the University of Illinois

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

continuous movement that law-making entails, into containers of consistent ideological categories. Thus Henretta asserts: "During the Progressive Era Hughes had defined a coherent New Liberal position." He "adopted the intellectual framework of British New Liberals and American sociological jurisprudence." If he allowed, at times, a "subordination of doctrine to his political agenda," he remained, at the core, an advocate " . . . of a modest American version of the New Liberalism of Winston Churchill and Lloyd George." Only inadvertently, in an ironic twist of history, did he play a part in opening the door to something starkly different, the regime of "New Deal Statism."

This is a familiar interpretive move in historical and legal analysis, though it is not questioned nearly as often as it should be. Behind the actions of the day-to-day, find the higher ideational consistency. Straighten out the crooks and curlicues of a career by subordinating the raw stuff of maneuver (Hughes's "political agenda") to a more elevated, overarching idea. (Higher) mind is pried apart from (baser) action. Trumping high by low gives us the portrait of a life of crass expedience; the reverse gives us a life of high seriousness. Hughes was, Henretta asserts in this way, a deeply serious figure, all the more so because he played out his convictions at a moment when the reigning idea of the age itself was abruptly changing.

For explanations of this sort to work, however, the ideological positions being advanced need to hold sure, precise traction. Let them skid and slip, and what is advanced as explanation may begin to look like something else: a word game, a post-facto labeling exercise. Take New Liberalism. In British history it is the cover term for the flurry of reform policies that the Liberal Party government put in place between 1906 and 1914: free meals for poor school children, a statutory eight-hour day for miners, pensions for the elderly poor, minimum wage standards for structurally low-wage industries, a national system of sickness and unemployment insurance, new legal immunities for labor unions, and a graduated income tax. In the pre–World War I years, Hughes opposed every one of these. He rejected the Adamson Act's statutory restrictions on railroad employees' working hours; he endorsed none of the plans for social insurance under discussion during his administration in New York; he opposed the federal income tax amendment. The workmen's compensation act he helped push through the New York State legislature was modeled not on New Liberal initiatives but on the British Conservative Party's act of 1897. His deeply felt child labor proposals would have fit unremarkably into late nineteenth-century British social legislation. His powerful conviction that large combinations of capital demanded public regulation was a sentiment he shared with "old Liberal" William Gladstone. In short, if a New Liberal means a person in sympathy with the New Liberal program, Hughes was not even close.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

What Henretta means to identify, clearly, is something looser than this: Hughes's sense of the inadequacies of the old, property-rights claims of the past in the face of the new conditions of labor and the new scale of capital organization. For British New Liberals, the "social problem" was most vividly embodied in the economic struggles of the wage earner and the grinding poverty of the slums. For Hughes, the "social problem" loomed largest as a problem of corruption and overweening corporate power. Hughes's preferred means for achieving higher public efficiency—tighter administrative centralization and adjudication by expert commission—were closer to the program of the Fabian Sidney Webb than to the New Liberal program of Herbert Asquith and David Lloyd George. With all of them, however, he shared a common internalized rhetoric of the public good. Like so many others of his day, in short, Hughes was caught up in a discussion of social politics that spanned the Atlantic, spinning off projects and energies everywhere it touched.[1] If calling Hughes "not quite a British New Liberal" helps to reveal that larger field of transnational political competition and exchange, it may hold some utility. But in any closer meaning of the term, it falls apart in the very act of trying seriously to employ it.

The same is true of the bright-line ideological distinction Henretta posits between progressive "liberalism" and New Deal "statism." The most enthusiastic American promoters of the new techniques of bureaucratic state management were not FDR's contemporaries but Hughes's: progressives like John R. Commons and Herbert Croly, whose rationale for the efficiency and disinterestedness of the administrative state was never again to be so unconditionally articulated. The New Deal's most sweeping experiment in national economic planning, the NRA, was constructed by taking Woodrow Wilson's mechanism for the management of the World War I economy and recreating it for a peace-time emergency. Managed not by bureaucrats but by businessmen, the NRA was, like so many other pieces of the New Deal, much less centralized, much more open to the shaping hand of its constituencies, than the phrase "national bureaucratic regime" comes close to capturing. Working by improvisation and concession, cycling through a bewilderingly unstable mix of ad hoc agencies, drawing hard on preexisting ideas and state-level precedents, the New Deal was perpetually overextended and underconceptualized: the orderly, nationalist bureaucrat's nightmare.

That is not to say that the rules of the game did not change in the 1930s and even more so (as Alan Brinkley has emphasized) in the 1940s.[2] During

1. Daniel T. Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (Cambridge: Harvard University Press, 1998).

2. Alan Brinkley, *The End of Reform: New Deal Liberalism in Recession and War* (New York: Knopf, 1995).

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

those decades, progressive-era visions of administrative efficiency fused with the macro-economic ambitions of the New Dealers. What emerged was a vastly more powerful federal state possessed of unprecedented society-shaping ambitions. Many of the progressives who survived into the 1930s, as Otis Graham pointed out years ago, did not care for the result: some because they distrusted FDR's immigrant-beholdened Democratic Party, some because they could not forgive it for the repeal of prohibition, others because they feared the reach of the New Deal state.[3] But to translate all this into a clear break between competing ideological systems is not so much to hyperintellectualize the course of history and politics (there was thinking aplenty through all of this, as I will suggest) as to mistake a covering term for an analytical one. "New Liberalism," "progressivism," "statism," "statist, social-welfare liberalism": like Hillaire Belloc's package term, "the servile state," they are labels all. Historians tack them to the messy, contradictory experience of the past. But they never stick.

Can historians of law and politics do better than this? Can they make sense of the past without pinning phrases to it, fighting over their verbal inventions, taking labels off, pinning back new ones? Can we do without demanding this kind of pseudo-coherence from the past?

What would Hughes's career look like without labels? We could start not with Hughes's covering principles but with the kinds of problems Hughes took on, the kinds of social arrangements that seemed to him to call for action and redress. Unlike William Beveridge, who shot into prominence at just about the same time with his work on casual London labor, Hughes was never deeply immersed in the experiences of the laboring poor. He left college for a law career, not a settlement house. Unlike Lloyd George or the Fabians, he betrayed no Henry George influences, no sense that swollen unearned wealth was in itself a social problem. But he did care with great outrage about corporate malfeasance and corruption, just as he was later to care intensely about the project of bringing the rivalries of militarized nations under international agreement and law. His sense of the problem—the way that sense allied him with some of his contemporaries and, at the same time, glanced off the problematics of others—was one of the defining things about his mind and politics.

A second marker is the kind of solution that made intuitive sense to him. Solutions, in this sense, are not devices that spring from problems, though at times they may. They are, rather, answers that allow one to travel from issue to issue with a sense of confidence and resolution. The expert-staffed public regulatory commission was a solution of this sort, an answer with

3. Otis L. Graham, Jr., *An Encore for Reform: The Old Progressives and the New Deal* (New York: Oxford University Press, 1967).

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

legs that was, from the early progressive years through the New Deal and beyond, capable of application to many different specific circumstances. The regulatory commission caught Hughes's imagination powerfully in his early years. If he later worried through the precise relationship between commissions and courts, trying to draw a clear line between reasonable and unreasonable commission judgments, he never wavered from the core idea. The "market" would do similar work at the end of the twentieth century as a hinge for political alliances, a fulcrum of argument, and a solution with almost boundless reach.

Plotting Hughes's career along yet another axis, one might ask about the legal-political "language" in which he chose to speak. He recoiled from the language of class. He did "not believe in legislating for classes . . . and in talking about the working classes or any other classes," he claimed in 1906, just as he was making concessions to the labor vote.[4] I do not think that the rhetoric of sentimentality moved him often, as it moved others with whom he cooperated in some of his endeavors, nor FDR's language of solidarity. Asked to speak on the "responsibilities of citizenship" at Yale in 1910, he talked eloquently of public spiritedness, the dignity of public office, and the need for efficiency and dedication in public administration.[5] These were axiomatic to Hughes. By pulling them out of the discourses of the time, absorbing them into his own sense of being, he defined the kind of legal-political figure he was.

Above all, he marked himself by his maneuvers. This was, ultimately, what was most normal about him. Of all the considerations that entered into his ever-active mind, none was more acute than his subtle sense of the location of the middle ground. In his battle with William Randolph Hearst in 1906, he conceded just enough to working-class New York voters to win election, but no more than that required. When in the 1920s energy seeped out of the social-political projects of those who called themselves progressives, Hughes picked out the new coordinates and adjusted himself accordingly. As secretary of state, he drew as centrist a line as he imagined possible between intervention and non-intervention in the Caribbean nations. Trying to have it both ways, he was accused of hypocrisy. Henretta makes much the same judgment in his treatment of Hughes's role on the Court in 1936–38. Hughes's efforts to defuse the court-packing crisis, he writes, led him to the "subordination of doctrine to his political agenda." Low calculation, one understands him to say, tripped up high mindedness.

4. Robert F. Wesser, *Charles Evans Hughes: Politics and Reform in New York, 1905–1910* (Ithaca: Cornell University Press, 1967), 92–93.

5. Charles Evans Hughes, *Conditions of Progress in Democratic Government* (New Haven: Yale University Press, 1910).

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

That Hughes changed his mind in *Helvering* I take as given. Changing one's mind can be a mark of wisdom for everyone except judges, where it is taken to clinch the case for mindlessness. But what if an ultimate commitment to the center, to the position of centrist balance and impartiality that he called public spiritedness, was as much "doctrine" to Hughes as any specific points of law? What if the pattern of his maneuvers was recognized as just as deliberate a part of his thinking self as any of his specific endorsements?

A characteristic sense of the problematic, a repertoire of favored solutions, employment of a distinctive persuasive language, a sense of one's proper location on the shifting field of play: these get us closer to figures like Hughes than do overarching terms that, like coveralls, don't really fit. Where Henretta's portrait brings these to life, this legal-political career comes into vivid relief. He was "ever a man of the middle," Henretta writes. But if such a man needs to be continuously aware of the shifting locations of the political edges, so must we. Taken out of context, straightened on a procrustean bed of abstractions, pinned down by post-facto labels, the thinking element in careers like this eludes us. Living without labels would serve us better.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

The Long Life of Liberal America: Law and State-Building in the U.S. and England

WILLIAM E. FORBATH

Reports of the Strange Death of Liberal America are greatly exaggerated. James Henretta's essay of that title offers a shrewd and insightful portrait of Charles Evans Hughes. But the liberalism whose death Henretta reports did not die. And the "statist," "centralization," "economic planning," and broad "social insurance" minded liberalism he reports as prevailing did not prevail. From a certain lofty altitude (and rueful attitude), all "big," "modern" "welfare states" look the same. That is Henretta's viewpoint. His wonderfully suggestive comparative framework has as one of its premises that America and England proceeded along the administrative-and-welfare-state-building path at different paces but arrived at the same destination. For me, a comparison of the law and politics, processes and outcomes of twentieth-century state-building in the U.S. and England prompts different conclusions. There were conspicuous differences between the New Deal state that was fashioned in 1930s and '40s America and the welfare state England created in those decades. More interestingly, the ideology and institutional contours of this new American state were deeply influenced by that ambivalent (and lawyerly) brand of American liberalism Henretta rightly attributes to figures such as Hughes and Roscoe Pound—poised between "progressive" commitments to social reform, social provision, and administrative-state-building, on the one hand, and older, "classical" liberal commitments to limited (and decentralized, dual federalist) government and the primacy of courts and common law and traditional legal and constitutional niceties, on the other. My notion is that this "transitional" and "forgotten" liberalism and its champions won more important battles than they lost against their "statist" rivals. A "strange death," indeed!

William E. Forbath holds the Lloyd M. Bentsen Jr. Chair in Law and is Professor of History at UT Austin <wforbath@mail.law.utexas.edu>.

Law and History Review Spring 2006, Vol. 24, No. 1
© 2006 by the Board of Trustees of the University of Illinois

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

I'll begin with a few comments on Charles Evans Hughes and Henretta's characterization of his constitutional outlook. Then, I'll offer a condensed sketch of some salient differences between the English and American histories of twentieth-century state-building and their respective outcomes. The architecture of what we've come to call the "New Deal" state and of America's system of social provision was not the product of robust New Deal liberalism. If New Dealers had been able to design the state according to their specifications, its institutions (and their justificatory language) would have looked dramatically different—more like England's and like the picture Henretta paints of American developments. We better understand the state that actually emerged in the U.S. as the product of a half-century of conflict and accommodation between the new liberalism of Progressive and New Deal reformers and the old or "classical legal liberalism" of the *Lochner* Constitution, and the jurists, lawyers, policymakers, and politicians who hewed to it. The modern American welfare and regulatory state was not one that any single group intended or envisioned; but it bore the deep imprint of *Lochner*'s diverse defenders and the court- and common law-dominated institutional order they fought to preserve. Small wonder, then, that members of the legal elite, such as Hughes and Pound who combined vast energy, abilities, and ambition with a self-conscious and astute positioning of themselves as mediators between old and new liberalisms, left such durable legacies.

To gauge Henretta's thesis, one must ask what was Hughes's cause, and what part of it was lost: what old "new liberal" political or constitutional principles, which he prized, suffered defeat at the hands of the New Dealers? Hughes's outlook is not well-rendered by the distinctions on which Henretta often relies: between "regulation" versus "redistribution"; or between court-enforced "regulation" versus "statist," "bureaucratic" measures, such as the Social Security and National Labor Relations (Wagner) Acts, which, on this account, Hughes supported only reluctantly.

Hughes's outlook was more lawyerly, sophisticated, and fluid. He was a consummate elite lawyer/reformer: making social reform, redistribution, and the administrative state safe for the Court, the inherited Constitution, and the social and political authority of the elite bar and bench; and vice versa. It was not centralization but "completely centralized government" that he condemned; not bureaucracy, but bureaucratic power unconstrained by the courts and a large infusion of (judicially modeled) due process; not "redistribution" but raw class-based power politics. Thus, Henretta suggests that for Hughes the Social Security Act of 1935 embodied a frightening new form of centralized, "redistributive class politics." The impulse scared him, but not the statute. In fact, the drafters of the statute crafted it to oc-

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

cupy Hughes's constitutional middle ground, including his commitment to measured, but genuine, federalism-based decentralization. FDR and the more "modern liberal" New Dealers were irked by the decentralizing features of the Act, which they were never able to undo. Thus, Hughes could—and apparently did—find not defeat but vindication in the final shape of New Deal social provision.[1]

The bureaucratic and collectivist dimensions and potentialities of the Wagner Act may have given Hughes pause (we will return to them), but not the Act's sweeping reach, to which Hughes contributed the defining judicial gloss in a characteristic meld of old and new doctrinal discourses. For instance, *Jones & Laughlin* (1937) and *West Coast Hotel v. Parrish* (1937) were not only his most famous opinions; they were also emblematic of his precedent- and common law-minded conception of constitutional change-within-continuity and continuity-within-change. No less so are his decisions in cases like *Crowell v. Bensen* (1932), which linked Hughes to the conservative old liberals and which played a critical part in the infusion of old-liberal, legalist due process norms into the heart of the new state apparatus.[2]

Thus, my thesis: Henretta is right to situate Hughes in between old, classical liberal commitments and robust New Deal liberalism but wrong in his view that this in-between liberalism died and vanished in the fashion of England's Liberal Party after the rise of Labour. Instead, this lawyerly and in-between brand of liberalism found enduring expression in several salient features of the American welfare state that the New Deal Era bequeathed us, features that also distinguished it from England's.

Writing in the aftermath of World War II, as Britain expanded its welfare state and deepened its commitment to full employment, the sociologist T. H. Marshall set out his famous theory of citizenship.[3] Citizenship, ac-

1. Barry Cushman has documented how the Social Security Act and other key New Deal programs from 1935 onward were drafted "in consultation" with the Hughes Court (i.e., with detailed attention to the signals, suggestions, and caveats to Congress contained in opinions, particularly Hughes's own). Cushman also finds evidence that Hughes privately expressed a sense of personal and institutional vindication about the process. See Barry Cushman, "The Hughes Court and Constitutional Consultation," *Journal of Supreme Court History* (1998): 79.

2. Also emblematic are *Blaisdell* (1934), which shows Hughes's combination of care and aplomb in upholding redistributive legislation in the face of the Constitution's plainest anti-redistributive provision, and, finally such prophetic opinions as *McCabe v. Atchinson, Topeka, and Santa Fe Road* (1914), *Near v. Minnesota* (1931), *Norris v. Alabama* (1935), and *Gaines v. Missouri ex rel Canada* (1938). In them Hughes fashioned from old liberal fabric precedent for the post-New Deal era of "modern liberal" judicial activism.

3. See T. H. Marshall, *Citizenship and Social Class* (Cambridge: Cambridge University Press, 1950).

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

cording to Marshall, evolved in three stages. The first, civil citizenship, emerged in the eighteenth century, bringing with it civil rights of property, due process, and personal liberty. The second stage, political citizenship, was a nineteenth-century achievement that expanded rights of political participation through the franchise. Social citizenship, the third and final stage, was being completed in the mid-twentieth century. It encompassed "the whole range [of social rights] from the right to a modicum of economic welfare and security to the right to live the life of a civilized being according to the standards prevailing in the society."[4] Social citizenship, in Marshall's terms, was "at war" with class inequality.[5]

Over the post-war decades, Britain and Western Europe went a long way toward creating institutions of social citizenship. During those same decades, working people in the core sectors of America's industrial economy increasingly enjoyed a robust measure of privately constructed job security, pension rights, and private health insurance—a *private* welfare state that surpassed England's and western Europe's public systems in several areas. Social citizenship and social rights, however, remained largely foreign to American institutions. Compared to Britain, and to the capitalist democracies of continental Europe, America's public welfare state remained a segmented, paltry, and partial affair. Among the democracies of the post-war world, only the U.S. did not institute an economic policy that gave first priority to full employment. Likewise, the U.S. did not enact compulsory health insurance. More broadly, the U.S. relied extensively on private insurance and private employer-administered benefits programs—often publicly subsidized—to provide for the health, old age, accidents, and disabilities of a large and fortunate swathe of its citizenry. England and the rest of the world's advanced capitalist democracies turned far more to public social insurance.

Marshall's narrative has not unfolded in the U.S. Public social provision has remained largely outside the dignifying aura of citizenship, and social citizenship still sounds oxymoronic to American ears.[6] "Welfare" is a ground of disrespect, a threat to citizenship, not its realization. In matters social and economic, our rights talk has remained firmly embedded in the older liberal language of contract; one must earn one's "modicum

4. Ibid., 78.

5. There is a significant body of work criticizing Marshall's evolutionary scheme. It is not relevant to my purposes here.

6. Social security (contributory old-age insurance) is the exception. But we view social security as a "right" rather than a dole, because we see it as earned, although, in fact, it has been a redistributive program.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

of economic welfare and security." Yet, one has no right to remunerative work. What the market giveth, it may take away, and those who do not earn enough to support themselves and their families are widely seen as unworthy of full membership in the American community.

Today, the welfare state is under assault throughout Western Europe. America's system of welfare, labor and employment law, and social insurance is dubbed "the American model," and many policymakers on the other side of the Atlantic envy its "flexibility," unencumbered by their denser labor market regulations and government-enforced social and economic rights. Yet, the heirs of twentieth-century social citizenship in Britain and the rest of Western Europe are not prepared to abandon the social dimension of citizenship guarantees. That is the nub of Blair's "third way" and of Germany's "social market" discourse. Likewise, the new European Constitution will contain a charter of "social rights." The battle is not about whether to include such guarantees but about how far they should be administered and enforced at the national versus supra-national level. Whatever may come of these present trends—and many see an "Americanization" of English and Western European social policy—one should not project the present into the past; one should not assume, as Henretta does, that the institutional and ideological results of the 1900s–1940s welfare-state-building enterprise were the same here and in England. In England, Marshall's social citizenship essays, along with the Beveridge Report, which provided the policy blueprints for social citizenship, became instant classics. Their American analogues were discarded and forgotten. The rights discourse, policies, and institutions of the American "welfare state" unfolded along a different path.

Before examining the two states' paths of development, consider one further difference in the outcomes. How did each state set about administering and enforcing its safeguards and assurances against accidents and the hazards of life? To an astonishing extent, America relied on courts and private litigation. The authority of non-judicial public officials over accident prevention and compensation remained modest. Instead, under the auspices of judges, lawyers, and an individualistic common law discourse, we, again, created a largely private system of risk-spreading—administered by private commercial insurance companies and their attorneys, on the one hand, and the personal injury bar, on the other. Thus, like our trans-Atlantic counterparts, we bureaucratized the world of injury and compensation. But, rather than replacing the nineteenth-century liberal individualism of common law adjudication with the actuarial discourse of insurance, we melded the two. In the process, we kept administration largely in the courts and in private hands. Even where non-judicial *public* officials did gain authority, we *judicialized* the way these public officials exercise administrative power. As comparative scholars like Robert Kagan have documented, ours

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

is an administrative state whose singular, defining attribute is "adversarial legalism."[7] And as Cass Sunstein has remarked, "One of the greatest ironies of modern [American] administrative law—an area whose origins lay in a substantial repudiation of the common law—is its continuing reliance on common law categories."[8]

The stubbornly durable authority of judicial processes and common law categories and baselines did not seem secure a century ago, when the U.S., like England, saw a great spate of welfare-state-building initiatives. Both nations were addressing the momentous "social question"—how to secure citizens of a burgeoning industrial society (or enable them to secure themselves) against exploitation, poverty, and the hazards of accidents, illness, unemployment, and old age.[9] For its part, the U.S. witnessed an epidemic of industrial accidents during the decades bracketing the turn of the last century.[10] New state labor bureaus and commissions and Progressive social scientists tallied and publicized the staggering numbers of workplace injuries and deaths. Industrial accidents were no accident, but inevitable, and devastating not only to the victim but to his or her dependents. In that light, the protracted procedures of the courtroom and the individualistic categories of common law causation, fault, and liability seemed unjust and inefficient. To workers, reformers, and a reform-minded middle-class public, the courts' carefully particularized inquiries into the "due care" of employer and employee seemed absurd. So, as a first installment in the realm of social insurance, Henretta notes, a number of American states set about adopting workmen's compensation schemes, based on the English model.[11]

As states inaugurated workmen's compensation commissions and crafted insurance programs, knowledgeable observers declared that social insurance was on an unstoppable ascent, destined to occupy first the field of industrial accidents, then each of the other realms of social vulnerability.

7. See Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge: Harvard University Press, 2003).

8. Cass Sunstein, "Constitutionalism after the New Deal," *Harvard Law Review* 101 (1987): 421, 426.

9. See Daniel T. Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (Cambridge: Belknap Press of Harvard University, 2000).

10. John Fabian Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (Cambridge: Harvard University Press, 2004).

11. Elsewhere, I've discussed at much greater length the comparative fortunes in England and America of other shared solutions to the social question: protective labor legislation and legislative efforts to repeal the harshly restrictive judge-made law regulating union organizing, strikes, and boycotts. See William E. Forbath, "Labor and the Courts in England and America," *Labor Law in America: Historical and Critical Essays,* ed. Christopher L. Tomlins and Andrew J. King (Baltimore: Johns Hopkins University Press, 1992).

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

"[T]he legislative triumphs of workmen's compensation," John Witt tells us, "spread the appeal of what an Ohio Commission called the 'Social Remedy of Insurance' well beyond its core Progressive supporters. State Commissions from Ohio to New York to Tennessee linked workmen's compensation to the problems of 'unemployment, sickness . . . old age and death.'"[12] Theodore Roosevelt's Progressive Party platform called for compulsory health insurance; and soon the leadership of the American Medical Association—later a steadfast opponent—was endorsing health insurance as the "next step" in social insurance policy.[13]

This trajectory was underway in England. By World War I, England had enacted not only workmen's compensation but also minimum wage boards, a noncontributory old age pension system, and compulsory sickness and unemployment insurance schemes.[14] In the U.S., however, the constitutional question hung over workmen's compensation laws, to say nothing of minimum wages and the other kinds of social insurance, which rubbed more abrasively against the old liberal Constitution's anti-redistributive grain. As state workmen's compensation commissioners gathered, constitutional law "was the most carefully discussed problem." Were compulsory statutes "clearly unconstitutional"? Modest early statutes vexed the very commissioners and social insurance experts who lobbied on their behalf. The bills had been "maimed and twisted so that [they] might commend [themselves] to the judges."[15]

Still, the other shoe dropped. In *Ives v. New York* (1911), New York's high court struck down that state's landmark workmen's compensation statute. As Witt points out, the statute had embodied the critical move from "individualized common sense [common law] causation" to "actuarial causal tendencies."[16] With this, the modern administrative state seemed equipped to socialize and redistribute any number of risks—poverty, old age, unemployment, sickness—on the basis of their causal links to employment. In the name of "personal responsibility" and "political equality," the New York Court of Appeals aimed to block this move, when it declared the statute to be an unconstitutional taking of employers' property, an illegitimate legislative redistribution of wealth, such as the U.S. Supreme Court condemned in *Lochner.*

Like *Lochner,* however, *Ives* was reversed, the one by the Court itself a little over a decade after the decision; the other by a state constitutional

12. Witt, *Accidental Republic,* 148–49.
13. Ibid., 149.
14. Forbath, "Labor and the Courts in England and America."
15. Witt, *Accidental Republic,* 137–38.
16. Ibid., 150–51.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

amendment. But neither event left a broad opening for social citizenship and administrative state-building to unfold anew; sharp constitutional constraints remained. And neither event could turn back the clock; yet, in policy and state formation, timing is crucial. Moments of plasticity—when all agree that fundamental problems must be solved, the old order must change, and the question is only what solutions will prevail—are fairly brief and rare.

The U.S. Supreme Court, for its part, upheld workmen's compensation statutes. But the Court did so in stages. And the Court held that the statutes' constitutionality under the due process clause hinged, partly, on whether they afforded employers a *quid pro quo* for the imposition of strict liability. Thus, the initial framing of the problem in the old liberal discourse of *Ives* "built the baseline entitlements of 19th century common law into the statutes' risk-spreading mechanisms."[17] This left much work for lawyers. Indeed, Witt tells us that after *Ives* leadership in the social insurance movement shifted from social reformers, such as Crystal Eastman, to constitutional lawyers, such as Ernst Freund and Joseph Cotton.[18] The courts also imposed sharp federalism limits on workmen's compensation, forcing the creation of many work accident systems, a patchwork of different legal regimes. In all, it was a protracted process that consumed decades of effort on the part of social insurance advocates. Beyond workmen's compensation, a handful of states also enacted modest old-age pension programs, all of them voluntary. By the 1920s, several state legislatures had passed minimum wages legislation and created boards like England's; but all these laws and agencies were declared unconstitutional.

England's high courts and legal elite were no less hostile than their American counterparts to many redistributive and regulatory reforms, no less anxious about the threat the welfare and regulatory state seemed to pose. But as future Chief Justice William Howard Taft prophesied in the 1890s, in England "the assaults of socialism on the existing order" would meet less effective resistance; for the English bar and bench lacked the "buttress" of a "written Constitution." There Parliament was "omnipotent"; here, the courts could insulate the common law rights of property and contract "much further . . . from the gusty and unthinking passions of turbulent majorities."[19] Looking over the welfare-state-building era from the other side in time and sympathies, Chief Justice Harlan Fiske Stone made a similar observation. In England, Stone remarked, "the Constitution

17. Forbath, "Labor and the Courts in England and America," 182.

18. Witt, *Accidental Republic,*180–81.

19. William Howard Taft, "The Right of Private Property," *Michigan Law Review* 3 (1904): 215, 218–19.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

is a political heritage and ever adaptable; here, it is law and has been a bulwark against dramatic changes in the forms and purposes of government." Elsewhere, I've compared in some detail the reception roughly identical reforms met from old liberal American and English jurists.[20] The former struck them down or interpreted them away; the latter sometimes interpreted them narrowly for a season, but soon acquiesced.[21]

If enacting social insurance and other redistributive reforms was a more protracted and uncertain process in America than England, that did not make the "social question" any less pressing. The problems of injury, loss, and risk, which England began to address with an array of new social insurance programs, demanded new "social" solutions here as well. While America's social insurance proponents found themselves stymied, other players and other risk-spreading solutions began to occupy the field. Other lines of policy development began to unfold. Around them, new bureaucratic organizations and interest groups organized: not public administrations or commissions, but private commercial insurance companies and private employers' associations, the architects of what the era called "welfare capitalism," entrusting responsibility to safeguard against the hazards of illness and old age under industrial capitalism to the consciences and reforms of capitalists themselves, via voluntary employer initiatives, often in tandem with private insurance. These were the "first movers," as political scientists would say; and first movers enjoy large advantages over those who would displace them when a new crisis re-opens the door to reform.

The Great Depression, of course, was that crisis. FDR embraced the language of social rights and the idea of constructing what he called "cradle to grave" social insurance for all Americans. He charged his Commission on Economic Security (CES) to craft a broad national legislative scheme for that ambitious goal. But the draftsmen worked in the shadow of the Hughes Court's treatment of earlier New Deal legislation; and their handiwork reflected a studied determination to win the Chief Justice's approval.[22] They planted the 1935 statute squarely on Hughes's constitutional middle ground. That meant tamping down the CES's redistributive ambitions; it meant sacrificing universal coverage and acquiescing in state as opposed to national administration and standard-setting in several arenas.

20. See Forbath, "Labor and the Courts in England and America."

21. Ibid.

22. See Cushman, "The Hughes Court and Constitutional Consultation"; Arthur J. Altmeyer, *The Formative Years of Social Security* (Madison: University of Wisconsin Press, 1966), 14–15, 19–21; Edwin E. Witte, *The Development of the Social Security Act* (Madison: University of Wisconsin Press, 1962), 100.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

Factors besides constitutional doctrine and lawyerly craft favored these compromises. The Southern Democrats also insisted on state-level administration and exclusion of agricultural and domestic workers for reasons that ran to their region's racialized, caste-ridden labor markets. But they were swift and sincere in invoking the old liberal Constitution's safeguards for states' rights and limits on national power, for which Hughes's Court also seemed to offer some staunch support, circa 1934–1935. Thus, embarrassingly, perhaps, from Hughes's perspective, Jim Crow lined up behind his in-between liberalism and his constitutional scruples about the New Dealers' more robust and centralizing welfare-state ambitions. This helps explain why, *pace* Henretta, Hughes's influence on the parameters of American social provision proved enduring, and the New Dealers' later efforts to exceed the boundaries of Hughes's middle ground proved bootless.

Also active in preventing New Deal America from pursuing England down the path of social citizenship were the "first movers." Historians, such as Jennifer Klein, and political scientists, such as Jacob Hacker, have documented how from the Progressive Era onward, insurance companies, employers' associations, and other professional groups, like the AMA and state medical associations, had coalesced around private forms of risk-spreading and group insurance. Their powerful presence persuaded FDR to abandon hope for national health insurance; it also led New Dealers to lay legal groundwork in and around the 1935 statute for the post–World War II private welfare state.[23]

Meanwhile, out of the crucible of World War II, England completed fashioning a comprehensive welfare state, offering the kind of social insurance FDR and the "modern liberal" New Dealers envisioned. The main architect of the post-war English welfare state was a former high civil servant, William Beveridge. Cast in the visionary language of social citizenship, what is most interesting about the Beveridge Report (*Social Insurance and Allied Services,* 1942) is the fact that its main recommendation was merely to reorganize and revamp the social insurance programs fashioned by the Liberal Party in 1911, even preserving the same financing scheme the Liberals had instituted. The Report garnered wide public acclaim; and the series of White Papers issued in 1944, which mapped out government reconstruction policy, were largely consistent with Beveridge's blueprints.

Also published in 1942 was the "American Beveridge Report" (*Security,*

23. See Jennifer Klein, *For All These Rights: Business, Labor, and the Shaping of America's Public-Private Welfare State* (Princeton: Princeton University Press, 2003); Jacob S. Hacker, *The Divided Welfare State: The Battle over Public and Private Social Benefits in the United States* (New York: Cambridge University Press, 2002).

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

Work, and Relief Policies), prepared by FDR's National Resources Planning Board. It, too, was cast in the language of social citizenship (FDR cribbed his famous "second Bill of Rights" State of the Union address from it) and like Beveridge's blueprints it called for comprehensive social insurance, a national health service, and a commitment to full employment policies and planning mechanisms. The difference is that in Britain the whole endeavor was incremental. The post-war Labour government adopted the Beveridge reforms in 1946, revamping social insurance, but the reforms already had been embraced in the White Papers prepared under Churchill, and these, in turn, highlighted how the blueprints relied on existing foundations. Social citizenship in Britain had been underway for two generations; its institutional and ideological bases were laid, and it readily became the basis of a post-war political consensus, which found its theorist in Marshall.

The "American Beveridge Report" also yielded a spate of legislative proposals to "complete the New Deal" in the early 1940s: to fill in the conspicuous gaps in the 1935 Social Security Act and make its coverage universal, to shift programs from state to national administration, to enact national health insurance and a firm national commitment to, and new economic planning and budget mechanisms for, full employment. Henretta implies that measures like these were enacted. But they were not. The Southern Democrats allied with the Republicans in Congress to thwart them.[24] This conservative coalition took the place of the Court in holding fast to constitutional boundaries on centralization and executive branch expansion. In the early 1940s, Republican and Southern Democratic lawmakers invoked the states' rights tradition, the constitutional limits on executive branch aggrandizement, and the Hughes Court's own federalism and separation of powers precedents as they kept the New Deal welfare state confined to Hughes's middle ground. There the old "new liberalism" lived on, and America's version of British-style social citizenship and welfare statism died its own strange death.[25]

Nowhere was the triumph of the old new liberals more dramatic, or more revealing of the dialectics of American state formation, than in the contest between courts and "bureaucracy" over the operation of the New Deal state. Here Hughes's and Pound's in-between perspective—and personal efforts—most clearly shaped the terms on which the old common law regime and the new administrative order were reconciled. Henretta gets

24. For a closer examination of this history, see William E. Forbath, "Caste, Class and Equal Citizenship," *Michigan Law Review* 98 (1999): 1.

25. SeeWilliam E. Forbath, "The New Deal Constitution in Exile," *Duke Law Journal* 51 (2001): 165.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

their outlook right. He gets their defeat wrong. Few players were more important than these two in shaping the terms and outcome of the long battle that culminated in the Administrative Procedure Act of 1946, the peculiarly old liberal constitution of America's administrative state.

As soon as New Dealers launched their new agencies and began wielding the new administrative machinery against industrial employers and investment bankers, the American Bar Association (ABA) commenced a fierce counter-reformation. The gist of it lay in invoking rule of law values against the new administrative-regulatory state and in favor of bringing all "controversies of a judicial character . . . back into the judicial system."[26] For many, the attack on administrative "autocracy" served simply as a stand-in for opposition to the substantive changes in the rules of economic life. But for others, as Morton Horwitz explains, "the rise of the administrative state raised the most basic questions about the meaning and continued viability of the 'rule of law' in situations where unelected [and non-judicial] officials exercised enormous and unprecedented power to affect the lives and property of citizens."[27] You did not have to be a reactionary to question the New Dealers' blithe faith in administrative expertise and freewheeling agency discretion. And the international scene added fuel to the ABA's fire. The New Dealers were building the nation's first European-looking national "bureaucracies" at a time when several of Europe's great national bureaucracies had become instruments of fascism, and Stalin's bureaucrats reigned in Russia. Not surprisingly, the counter-reformation's flames leapt highest around the National Labor Relations Board. A few years earlier, the nation's major industries had been virtually union-free, and the federal courts had outlawed the kinds of organizing activities the Labor Board was now defending. Worse, the Board was compelling corporations to recognize and bargain with the radical new industrial unions. Meanwhile, even many left-leaning liberals were discomforted by the prominent role of communist attorneys in the NLRB, who seemed to wield agency power in ways that followed the party line.

In this climate, Pound was drawn toward the old Diceyan verities he once scorned as hopelessly one-sided: "administration" was at war with the "rule of law"; only the common law and the courts were reliable guardians of individual rights. In 1938, as Henretta notes, Pound became chair of the ABA's crucial Special Committee on Administrative Law. As author of the "Pound Committee Report," he lent his enormous prestige to a wholesale denunciation of New Deal administrative practices, likening them to

26. *A.B.A. Annual Report* 59 (1934): 539, 549.

27. Morton Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992), 214.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

Soviet-style "administrative absolutism."[28] Labor Board hearings came in for special reproach.

Two strategies commended themselves to the counter-reformation: aggressive judicial review of agency actions, and aggressive judicialization of the administrative machinery itself. Both found essential support from Chief Justice Hughes. Hughes's in-between perspective allied him, as Henretta notes, with the Court's conservatives on questions of administrative law. Throughout the 1930s, he authored key decisions demanding court-like processes in the emerging national administrative apparatus;[29] and at the same time, he insisted on far-reaching judicial review, and even full-blown trial de novo, of the key factual determinations as well as legal conclusions of administrative agencies.[30]

As the ABA brought the counter-reformation to Congress, dyed-in-the-wool conservatives hoped to codify the massive judicial superintendence the Court seemed to favor into a new statutory framework for federal administrative procedure. More sophisticated, "modern" defenders of the old liberal faith emphasized Hughes's other prescription: more court-like rules for the administrative process itself. The "Pound Report," in turn, proposed an omnibus code for administrative practice and procedure that blended the two: ample judicial review and a wide role in agency decision-making for court-like procedures and the participation of attorneys for affected and interested parties. In 1939, Congress passed just such a code. In 1940, FDR vetoed it. But the future of administrative reform belonged to the counter-reformation and not to FDR and his executive branch state-builders whose confidence in an autonomous, enlightened administrative state Congress no longer shared.

In 1946, Congress passed and President Truman signed the Administrative Procedure Act (APA), which remains in force today. Its main ideas and contours limned by Hughes and Pound, the APA made a lawyer-dominated and common law-based process the definition of administrative justice. The

28. [Roscoe Pound,] "Report of the Special Committee on Administrative Law," *A.B.A. Annual Report* 63 (1938): 331, 343.

29. See, e.g., *Morgan v. United States,* 298 U.S. 468 (1936); *Ford Motor Co. v. NLRB,* 305 U.S. 364 (1939).

30. See, e.g., *Crowell v. Benson,* 285 U.S. 22, 57 (1932) (declaring that denying trial de novo on jurisdictional or "constitutional" facts would be "to establish a government of a bureaucratic character alien to our system"); *St. Joseph Stockyards v. United States,* 298 U.S. 38 (1936) (requiring trial de novo). Once FDR's nominees reached the court, Hughes's perspective on judicial review of agency decisions gave way to Brandeis's. Hughes's outlook, however, continued to animate the conservatives in Congress.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

conservative new liberals gave America a "bureaucracy" that remained far more beholden to the courts and the private bar than the New Dealers had envisioned, putting an adversarial legalist stamp on the American version of the "modern administrative state." It is not the state Henretta sketches in his splendid, thought-provoking essay. Hughes's in-between liberalism runs through it.[31] Death announcements are premature.

31. In England, by contrast, "judicial deference to administrative actions became legend. Only in the late twentieth century would British courts begin to expand judicial review of administrative actions. Amazed observers referred to the change as a constitutional revolution." See Michael Les Benedict, "Law and Regulation in the Gilded Age and Progressive Era," in *Law as Culture and Culture as Law: Essays in Honor of John Phillip Reid,* ed. Hendrik Hartog and William E. Nelson (Madison: Madison House Publishers, 2000), 244.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

The Not-So-Strange Birth of the Modern American State: A Comment on James A. Henretta's "Charles Evans Hughes and the Strange Death of Liberal America"

WILLIAM J. NOVAK

James Henretta's "Charles Evans Hughes and the Strange Death of Liberal America" takes up one of the most interesting and important interpretive questions in the history of American political economy. What explains the dramatic transformation in liberal ideology and governance between 1877 and 1937 that carried the United States from laissez-faire constitutionalism to New Deal statism, from classical liberalism to democratic social-welfarism? That question has preoccupied legions of historians, political-economists, and legal scholars (as well as politicians and ideologues) at least since Hughes himself opened the October 1935 Term of the U.S. Supreme Court in a brand new building and amid a rising chorus of constitutional criticism. Henretta, wisely in my opinion, looks to law, particularly public law, for new insights into that great transformation. But, of course, the challenge in using legal history to answer such a question is the enormous increase in the actual policy output of courts, legislatures, and administrative agencies in this period. Trying to synthesize the complex changes in "law-in-action" in the fiercely contested forums of turn-of-the-century America sometimes seems the historical-sociological equivalent of attempting to empty the sea with a slotted spoon. Like any good social scientist, Henretta responds to the impossibility of surveying the whole by taking a sample. Through a case-study of the ideas, political reforms, and

William J. Novak is an associate professor of history at the University of Chicago and a senior research fellow at the American Bar Foundation <nov9@midway.uchicago.edu>.

Law and History Review Spring 2006, Vol. 24, No. 1
© 2006 by the Board of Trustees of the University of Illinois

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

legal opinions of Charles Evans Hughes, particularly as governor of New York and associate and chief justice of the U.S. Supreme Court, Henretta offers us in microcosm the story of the revolution (or rather several revolutions) in modern American governance.

Surprisingly, the story Henretta tells through his intellectual biography holds remarkably true to a still-reigning orthodoxy about the general course of American legal-political development. The tale begins with a portrait of the old regime—nineteenth-century laissez-faire liberalism. "Beginning with the Jacksonian constitution of 1846," Henretta argues, New York's "political tradition embodied . . . a laissez-faire liberal ethos. . . . Indeed, in New York 'negative' government had support across the political and social spectrum. . . . celebrat[ing] the primacy of the marketplace and the legal doctrines upon which it depended, particularly 'freedom of contract.'" In the late nineteenth century, however, the combined socio-economic stresses of industrial consolidation and urban immigration exposed some of the difficulties of relying on a simple liberal faith in property, contract, and the market. While some defended old ideals with new vigor, using arguments supplied by Herbert Spencer and William Graham Sumner, others, the so-called "new liberals," began to take their cues instead from T. H. Green and Lester Frank Ward. "The discovery that business corrupts politics," in Richard L. McCormick's phrase, speeded Charles Evans Hughes's evolution from good-government Mugwump to new liberal reformer, cutting his teeth in New York state politics on such classic progressive issues as public utility regulation, life insurance regulation, and the reform of the political process.[1] By the 1910s, as Hughes was elevated to the U.S. Supreme Court, progressive reform reached a crescendo with a high degree of political synchrony about the need for a greater role for government supervision of American economic and social life.

As Henretta argues through Hughes, however, American progressivism reflected a rather exceptional brand of new liberalism, departing in significant ways from the more radical reform projects underway in Great Britain, Germany, and France. Hughes's social liberalism was characteristically American and middle-of-the-road—moving beyond the proscriptions of classical liberalism but stopping far short of socialist or fundamentally redistributive policy solutions. Hughes's new liberal vision was distinctly limited—at one point Henretta even characterizes his overall temperament as "conservative." He endorsed a more active, instrumental role for government economic and social regulation through the state police power but only as a necessary countervailing supplement to older precepts of private

1. Richard L. McCormick, "The Discovery That Business Corrupts Politics: A Reappraisal of the Origins of Progressivism," *American Historical Review* 86 (1981): 247–74.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

freedom privileging the individual's right to own property, to work, and to contract. After World War I and the Russian Revolution, the limits of Hughes's position became more clear as progressives like him recoiled at the prospect of more statist, nationalist, and redistributive projects. By the time he was appointed chief justice by Herbert Hoover in 1930, the old progressive Hughes could be portrayed as a bulwark against "Bolsheviki" on the Supreme Court.

Henretta completes his orthodox tale by focusing on another staple of American legal-political interpretation—the Constitutional Revolution of 1937. Henretta portrays the New Deal as a great departure that radically transgressed the carefully delimited boundaries of progressive, new liberal reform. The New Deal's expansion of federal governmental regulatory authority, the establishment of a national administrative bureaucracy, and the promotion of redistributive social-welfare policies signified a revolution in government that ultimately required an unwritten revision of the United States Constitution—a revision formally ratified by Chief Justice Hughes's majority opinion in *NLRB v. Jones and Laughlin Steel Corp.* (1937). For Henretta this "switch in time" sounded the death knell of progressive new liberalism and heralded the birth of the statist and civil rights-based liberalism of post-war America. In the end, the story of Hughes's pivotal, but reluctant and almost unwitting, participation in undermining his own moderate credo reflects the irony that Henretta sees underlying the story of the "strange death" of new liberalism in America.

But the orthodoxy of Henretta's story is procedural as well as substantive. For the historical methodology underpinning this article is also strangely traditional. Resurrecting many of the classic secondary histories that he so ably criticized as a former practitioner of the "new social history," Henretta returns to history through biography—the biography of well-known elites—elites engaged in high-level ideological and political struggles. Henretta's legal history focuses only on public and constitutional law and, in fact, relies primarily on a handful of well-known Supreme Court opinions (the usual suspects: *Minnesota Rate Cases, Coppage, Blaisdell, Nebbia, Schechter Poultry, Jones and Laughlin Steel, Carolene Products, Gobitis*). Of course, there is nothing objectionable per se about such methods and sources. If one is interested in explaining the evolution of Charles Evans Hughes's own constitutional thought or his interactions with colleagues on the Court, there are few better places to begin an investigation. But James Henretta asks a different kind of historical question—a bigger and more social scientific question about the modern transformation of the American state and the relationship of that transformation to changing conceptions of liberalism and changing functions of law. For such questions, biography (whether individual or collective, patrician or plebeian)

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

and internalist constitutional history (whether doctrinalist, behaviorist, or institutionalist) are simply not up to the task. Rather than follow the "new" Henretta in his current engagement with classic cases and contemporary constitutional commentary, I would recommend instead heeding the advice of the "old" Henretta—the Henretta fully engaged with social science and social theory, urging his fellow historians to move beyond conventional methods and perspectives and to think broadly and systematically about the complex interrelationships of society, economy, and polity.[2] In legal scholarship that social science perspective has a long and well-established pedigree rooted in the classic legal sociology of Max Weber and Emile Durkheim; the innovations of sociological jurisprudence, legal realism, and critical legal theory; as well as the contemporary development of the fields of legal history and law and society inaugurated by the scholarship of James Willard Hurst.[3]

How might such a broader social scientific perspective affect Henretta's project? One of the most important developments in the social sciences over the past generation has been a resurgence of scholarly interest in the origins and historical significance of the modern nation-state. In historical sociology and political science a new sub-field, American Political Development, has been created around a deluge of studies focused on the emergence of a modern administrative and social-welfare state in the United States. From the pioneering work of Theda Skocpol, Stephen Skowronek, and Richard Bensel to recent studies by Daniel Carpenter, Christopher Howard, and David Moss, our knowledge of the process of American statebuilding between the end of the Civil War and the end of the New Deal has been vastly expanded and reinterpreted.[4] Yet nowhere in Henretta's article—os-

2. See for example James A. Henretta, "Social History as Lived and Written," *American Historical Review* 84 (1979): 1293–1323.

3. For discussions of Hurst's work in the context of this larger legal-sociological tradition, see Robert W. Gordon, "J. Willard Hurst and the Common Law Tradition in American Legal Historiography," *Law and Society Review* 10 (1975): 9–55; William J. Novak, "Law, Capitalism, and the Liberal State: The Historical Sociology of James Willard Hurst," *Law and History Review* 18 (2000): 97–145.

4. Exemplary texts are: Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge: Harvard University Press, 1992); Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920* (New York: Cambridge University Press, 1982); Richard Franklin Bensel, *Yankee Leviathan: The Origins of Central State Authority in America, 1859–1877* (New York: Cambridge University Press, 1990); Daniel P. Carpenter, *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862–1928* (Princeton: Princeton University Press, 2001); David A. Moss, *When All Else Fails: Government as the Ultimate Risk Manager* (Cambridge: Harvard University Press, 2002); Christopher Howard, *The Hidden Welfare State: Tax Expenditures and Social Policy in the United States* (Princeton: Princeton University Press, 1997).

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

tensibly concerned at bottom with the transformation of American law and governance between 1870 and 1940—does this well-known and now quite sizable literature make an appearance. That is unfortunate, as this body of social scientific research has begun to fundamentally revise our understanding of the evolution of American statecraft and its relationship to political economy and law.

At the heart of this revisionist project are two themes that speak directly to Henretta's concerns. The first is that the American state is and has been consistently stronger, larger, more durable, more interventionist and more redistributive than described in any earlier United States historiography. The revisionists challenge us to write histories that can account for the glaring, central fact about modern American history—the development of a global geo-political and legal-economic leviathan. That is what needs explaining in modern American history. And the revisionists have more than begun that interpretive process with new research on such things as the origins of a fiscal-military state in the early republic; the powerful role of the state in policing the institution of slavery, Indian removal, and westward expansion; the role of the federal government in promoting and regulating national commerce; the surprising extent of American state social regulation from temporary experiments like Prohibition to more sustained developments in criminal justice and penal policy; as well as the surprising extent of America's "hidden" social welfare state. The grand meta-narrative of American state weakness, statelessness, or anti-statism is rapidly being abandoned. Given extant social scientific research on the extent of state action and public economic policy in nineteenth-century America (monographic research dating all the way back to the so-called "commonwealth studies"), it is simply no longer intellectually justifiable to characterize New York state policy circa 1846 as "laissez-faire" or "negative government."[5] Similarly, in the larger context of current social-scientific analyses of American state development from 1877 to 1937, historical preoccupation with whether a particular reformer is best characterized as a "Mugwump," an "Old" or "New" Liberal, an aging "Progressive" or an emerging "New Dealer," a "communitarian" or a "conservative," seems almost beside the point given the seismic structural changes in the nature of the policy, law, and governance in this volatile period. Following the "old" Henretta, we should be more systematically investigating "law-in-action" in this period "from-the-bottom-up"—the actual policy output of legislatures, courts, and administrative agencies across the endless fields of

5. For the best surveys of the vast "commonwealth" literature, see Harry N. Scheiber, "Government and the Economy: Studies of the 'Commonwealth' Policy in Nineteenth-Century America," *Journal of Interdisciplinary History* 3 (1972): 135–51; Robert A. Lively, "The American System: A Review Article," *Business History Review* 29 (1955): 81–96.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

modern governmental jurisdiction: crime, health, morals, labor, education, immigration, transportation, energy, public utilities, social welfare . . . .

The second theme of revisionist social science is related to the first. That is, our ability to account for the historical growth and power of the American state is significantly constrained by some familiar historiographical formulas used to tell the tale of modern legal, economic, and political development. Those traditional tropes need to be set aside as scholars develop new languages and interpretations that actually help to explain the expansion of American political and economic authority at home as well as abroad in the twentieth century. What are some of those problematic formulations? A few examples: 1. laissez-faire vs. the general welfare state (it is difficult to explain what did exist and develop in the United States from the Civil War to the New Deal by constant reference to two things that arguably did not fully exist); 2. American classical liberalism vs. European social-welfare democracy (again, even as a delicately deployed ideal type, this construct and its "Why no socialism in America" exceptionalism never fails to produce more heat than light); 3. reaction vs. reform—in this period represented by the politically charged formulation of the Gilded Age vs. the Progressive Era (a formula whose simultaneous attractiveness and substantive vacuity is best reflected in Arthur M. Schlesinger Sr.'s reduction of all of American history to 16.5 year cycles between reaction and reform). Recently, historians like Daniel Rodgers and James Kloppenberg (and social scientistslike Charles Tilly and Michael Mann) have urged their colleagues to widen their frame of reference by looking abroad and adopting a comparative approach to the history of liberalism, modern political economy, and the nation-state so as to avoid the exceptionalism of so many histories of the Gilded Age, the Progressive Era, and the New Deal.[6] Henretta relies heavily on the examples of Rodgers's and Kloppenberg's scholarship. But though he attempts to link American reform to the rise and fall of "new liberal" ideas and policies in Britain, in the end the causal linkages remain obscure[7] and the American

6. Daniel T. Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (Cambridge: Harvard University Press, 1998); James T. Kloppenberg, *Uncertain Victory: Social Democracy and Progressivism in European and American Thought, 1870–1920* (New York: Oxford University Press, 1986); Charles Tilly, ed., *The Formation of National States in Western Europe* (Princeton: Princeton University Press, 1975); Michael Mann, *The Sources of Social Power* (New York: Cambridge University Press, 1985).

7. As Henretta obliquely puts it, "There is *no evidence* that [Hughes] was directly influenced by T. H. Green; however, he *knew* Ely through the AALL and *probably* read Pound's essays. *Whatever the precise links,* the Associate Justice wrote opinions that mirrored the arguments of the Oxford philosopher of 'positive liberty' and the sociologically inclined Midwestern professors" (emphasis added).

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

exceptional story of nineteenth-century laissez-faire, Gilded Age corruption, Progressive reform, 1920s reaction, and New Deal social-welfare revolution is reinforced rather than reevaluated.

A new story needs to be told about the transformation of American liberalism and public policy between the end of the Civil War and the end of the New Deal. And law, courts, and judges are absolutely central characters. But it is not a story accessible through biography or Americana alone, and its primary themes are probably only obscured by the quaint, popular languages with which "Mugwumps," "Progressives," and "Bolsheviki" described their personal political battles. It is the formative story of the creation of a modern state in America—a centralized, administrative, regulatory, welfare state—one of the more formidable legal, political, and economic powers in world history. There was perhaps a time in the not-so-distant past when it was somewhat justifiable to focus social scientific attention on other (primarily European) state regimes and to see American governance as something "less"—less developed, less complicated, less dangerous, less globally significant. Those days are gone. As the American model of law and political economy is rapidly being exported abroad, it is certainly time to reckon with the full scale and scope of American statecraft. There is no better place to begin that investigation than in the formative period of state development that occupies Henretta's article. But our tools of investigation need to move beyond the conventional techniques of the traditional American constitutional narrative.

James Henretta ends his biographical snapshot of this important era with an appropriately ambiguous literary conclusion highlighting irony and strangeness. But as Yevgeny Yevtushenko warned, ironic detachment might not be the best intellectual approach to the power, authority, and violence of twentieth-century states. As he mused in "Irony": "The twentieth century has often fooled us. . . . Bitter knowledge has made us powerless, and our weary irony ironically has turned against ourselves."

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

Deaths Greatly Exaggerated

RISA L. GOLUBOFF

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).

Risa L. Goluboff is an associate professor of law at the University of Virginia School of Law <goluboff@virginia.edu>.

Law and History Review Spring 2006, Vol. 24, No. 1
© 2006 by the Board of Trustees of the University of Illinois

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

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).

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

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).

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

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.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

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.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

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.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

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.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

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.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

In Defense of Traditional Stories and Labels

JAMES A. HENRETTA

Forums are not for the faint of heart. My critics offer a searching analysis of my approach and arguments. William Novak questions the basic assumptions and methods of my article; indeed, he dismisses it out of hand as a well-known "traditional" story told in an equally traditional "narrative" fashion. Somewhat more graciously, Daniel Rodgers contests the validity of some of its arguments; more fundamentally, he disputes the legitimacy—at least for a "normal" political actor such as Charles Evans Hughes—of an ideological frame of reference. Just tell the (traditional) story, he says; come to grips with the man and forget the labels. For his part, William Forbath largely accepts my conceptualization but disputes my contention that the traditional liberal state died in 1937. Rather, he argues, the post–New Deal American state was deeply informed by Hughes's "lawyerly" brand of "transitional" liberalism, which balanced a "progressive" commitment to reform and administrative state-building with a "classical" regard for dual federalism and the primacy of courts and common law. Finally, Risa Goluboff contests my suggestion, via Hilaire Belloc, that the new constitutional order subordinated individual economic rights to the interests of the national state and the elites that control it. The quest for economic rights remained strong, she suggests, until the onset of the Cold War, which limited the reach of the American welfare state, and the *Brown* decision, which gave a racial (and, eventual, gender) definition to liberal reform.

Let me address the concerns of my critics while using their suggestions and insights to present a more refined statement of my understanding of Hughes and the trajectory of American liberalism.

William Novak takes me to task for writing the wrong sort of paper. "Orthodox" in its story line and "traditional" in its methods, my study of Hughes is hopelessly dated amid revisionist studies of "political development" that reveal the "complex interrelationships of society, economy, and polity" and "fundamentally revise our understanding of the evolution of American statecraft." Although Novak (and William Forbath) provide

Law and History Review Spring 2006, Vol. 24, No. 1
© 2006 by the Board of Trustees of the University of Illinois

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

a list of exemplary texts that embody the new methodology and research, Novak does not actually show how that scholarship undermines my account. And for good reason. As we shall see, it buttresses the importance of the traditional story.

In his fine study of *America's Divided Welfare State,* Jacob Hacker points out that, contrary to the accepted wisdom, the United States spends approximately the same percentage of GDP on social welfare programs as the nations of Western Europe.[1] What differs is the sources of that spending. In 1995, American governments spent 16.3 percent of GDP on welfare expenditures and private benefit programs contributed an additional 8.3 percent. This one-third contribution from privately funded programs in the U.S. greatly exceeded that in other industrialized nations, in which private benefits averaged one-tenth of the total expenditure.

Our concern here is the relationship between the public and private welfare programs in the U.S.—precisely the type of institutional study championed by Novak—and especially their chronology. That story is simply told. In 1920, private pensions covered only 5 percent of the private civilian labor force. The percentage rose to 7 percent in 1926 but fell to less than 6 percent in 1935. The percentage of workers who actually received pension benefits was even lower. Of all retired private sector workers in the early 1930s, Jennifer Klein reveals in *For All These Rights,* only about 2 percent were receiving a pension.[2] Among public employees, a small fraction of the work force, only about one-fourth had pension coverage.

Thus, as of 1937, and the 5-to-4 vote of the Supreme Court in *Helvering v. Davis,* only a very few American workers were part of a pension system. "Welfare capitalism" had failed. The Social Security Act changed all that. The Social Security System not only covered 70 percent of private-sector workers by 1950 (90 percent by 1970) but it also spurred the expansion of private pensions. By 1970, 40 percent of the civilian workforce had private pension coverage, about the same level as today. As Christopher Howard explains, other parts of *The Hidden Welfare State* of the United States were also the result of the expansion of federal taxation and spending that took place during the New Deal.[3] Before 1939, the subsidies provided in the income tax code for home ownership (mortgage interest, property tax deductions, and capital gains deferrals) were minuscule, for the simple reason

1. Jacob S. Hacker, *America's Divided Welfare State: The Battle over Public and Private Social Benefits in the United States* (New York: Cambridge University Press, 2002).

2. Jennifer Klein, *For All These Rights: Business, Labor, and the Shaping of America's Public-Private Welfare State* (Princeton: Princeton University Press, 2003).

3. Christopher Howard, *The Hidden Welfare State: Tax Expenditures and Social Policy in the United States* (Princeton: Princeton University Press, 1997).

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

that the income tax reached only 5 percent of the population. However, by 1995, these subsidies amounted to some $86 billion in lost tax revenue.

The moral of this story is twofold. First, most of the early stories of national "political development" that Novak champions are actually tales of failure and frustration. They merely anticipate the really interesting and important institutional story that comes with and after the New Deal. Second, the appearance of this *new* story—the joint evolution of public and private welfare systems—was the direct result of the Constitutional Revolution of 1937. Before that time, employers—and other defenders of capitalism—spent their energies and resources on persuading legislators and courts to defeat social welfare proposals and, more broadly, to arrest the development of state and national government. The innovations of the New Deal, validated after 1936 by the decisions of the Hughes Court, transformed that dynamic of confrontation into one of competition. The old story—however orthodox in substance and traditional in telling—turns out to be the crucial one.

How should it be told? "Forget about labels," John Kerry replied when asked if he was a "liberal"; instead, he urged people to look at the legislation and values that he advocated. Like Kerry, Daniel Rodgers would have us believe that politics and history are too messy, contradictory, and complex to categorize with accuracy. Rather than locate Hughes within an evolving liberal tradition, he asks us to consider the "kinds of problems Hughes took on," the solutions that "made deep, intuitive sense to him," the legal-political "language" he preferred, and his instinctive tendency to seek out the "middle ground." Using this technique, Rodgers astutely and usefully highlights various aspects of Hughes's personality and values.

So there is much to be said for Rodgers's argument. Experience is messy, and political actors often adopt complex and contradictory positions. Yet voting citizens and political pundits usually ignore Rodgers's advice and slap labels on actors and events. They mark Kerry as a "liberal" and plaster the same label on the recent eminent domain decision by the Supreme Court in *Kelo v. City of New London.*[4] And both labels are accurate, in that they identify modern liberalism with governmental activism and social welfare politics. So, too, with Hughes. As a Progressive governor of New York, he was such a "liberal." He took aim at the nineteenth-century "classical" polity of "courts and parties" by undermining the power of political bosses and enhancing the power of state bureaucrats and administrative tribunals. As associate justice of the Supreme Court (1910–1916), he consistently supported the expansion of state police powers. Indeed, given his position

4. No. 04-108, Supreme Court of the United States, 005 U.S. LEXIS 5011.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

on the eminent domain cases that came before that court, there is little doubt he would have voted with the "liberal" majority in *Kelo.*[5]

Rodgers to the contrary, labels do matter. When Chief Justice Taft disparaged Hoover as "a Progressive just as Stone is and just as Brandeis is and just as Holmes is," he had it right as to their origins but not their destinations. Stone and Brandeis went far beyond their Progressive roots to accept the nationalist and bureaucratic state created by the New Deal. Frightened by the prospect of a "state-controlled or state-directed social or economic system," Hoover became a determined foe of the New Deal—in all of its incarnations, however "overextended and underconceptualized" Rodgers believes them to be.

If we follow Forbath's analysis of Hughes as a "consummate elite lawyer/reformer" who resisted far-reaching legal and constitutional change, Taft was on firmer ground when he applauded Hughes's appointment as Chief Justice. Yet Forbath's portrait of Hughes as a traditionalist may be a bit overdrawn. Hughes's *Blaisdell* opinion, both in its substance and its affirmation of a "living constitution," deeply offended Justice Sutherland then and rankles conservatives still.[6] And, if Hughes's opinion in *Jones & Laughlin* melded "old and new doctrinal discourses," it did so in a way as to permit the virtually untrammeled expansion of the commerce power for the next six decades. The real question is whether the Hughes Court, following the Constitutional Revolution of 1937, would have approved legislation that embodied the "social citizenship" of T. H. Marshall and William Beveridge had it been forthcoming from Congress. There is some evidence to suggest it would have done so; for example, in 1949, the Court supported workers' rights by upholding a decision of the National Labor Relations Board that required employers to bargain with unions over retirement benefits.[7] If so, then we should weigh less heavily than does Forbath the restraining impact of Hughes (and Pound) on the post–New Deal legal order.

Indeed, Risa Goluboff detects in various court decisions of the 1940s a "judicial vindication of a new kind of rights . . . a new liberalism of workers' rights." However, she agrees with Forbath that the political power of Southern conservatives and the ideological confrontation of the Cold War scuttled such initiatives, as did the post-1940 expansion of "welfare capitalism." "*Brown* and its progeny resurrected the *Carolene Products*

5. See Hughes's opinions for the court in: *St. Louis and Kansas City Land Company v. Kansas City,* 241 U.S. 419 (1916); *O'Neill v. Leamer,* 239 U.S. 244 (1915); *Union Lime Company v. Chicago and Northwestern Railway Company,* 233 U.S. 211 (1914).

6. *Home Bldg. & Loan Asso. v. Blaisdell,* 290 U.S. 398; Hadley Arkes, *The Return of George Sutherland: Restoring a Jurisprudence of Natural Rights* (Princeton: Princeton University Press, 1994), 243–50.

7. Howard, *Hidden Welfare State,* 122.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press

dichotomy between economic regulation and racial rights," she concludes, and redefined liberalism as "negative" rights against racial (and eventually gender) discrimination rather than a positive legacy of "social citizenship." In either event, Goluboff maintains, conceptions of individual rights remained strong—so that my reference to Belloc's conception of a "servile state" is either misleading or erroneous.

We need to forget the term and focus on Belloc's argument. As he confronted the "social question," he saw three possible outcomes: state socialism, economic democracy, and a capitalist-run, government-regulated economic-security state. As works by various authors—Hacker, Klein, Howard—attest, the last alternative best describes the post-New Deal order. Prizing a traditional conception of "liberty," Belloc and American conservatives cringe at the thought of an elaborate national regulatory state; those on the left, prizing an ideal of "equality," take even greater offense at the immense percentage of the nation's wealth owned by the capitalist classes. The pity is that we have ended up with both extensive regulation and extraordinary inequality—a high price to pay for a tenuous brand of economic security.

https://doi.org/10.1017/S0738248000002297 Published online by Cambridge University Press