Civil Liberties Outside the Courts

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Confidence in liberal legalism as a framework for social change appears to be in a period of decline. In areas ranging from same-sex marriage to racial equality, recent decades have witnessed a resurgence of interest in extrajudicial strategies for advancing civil rights. Debates over popular constitutionalism and calls for constitutional amendment and judicial restraint manifest a growing aversion to the court-centered rights mobilization that dominated legal academia and the liberal imagination for almost half a century.[1]

Even in the domain of First Amendment protection for free speech—long considered an unassailable case for robust judicial review—the Warren Court consensus has begun to crumble. From the Second World War until the Rehnquist Court, it was an article of faith among activists and academics that a strong First Amendment would preserve a platform for transformative political ideas. In an era when state and federal actors targeted radical agitators, civil rights protestors, and anti-war demonstrators, the Supreme Court was comparatively (if unevenly) friendly to the rights of dissenters. In the 1980s and 1990s, however, a growing chorus of legal scholars described a shift in First Amendment law from the protection of disfavored minorities against state suppression to the insulation of industrial interests against government regulation.[2]

Over time, such appraisals have become more prevalent and more frenzied. Today, a broad range of legal scholars and cultural critics decry the Court's "Lochnerization" of the First Amendment: its persistent invalidation of legislative and administrative efforts to temper corporate dominance, and its use of the First Amendment to undermine federal programs or to qualify public sector collective bargaining agreements.[3] They lament its

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[1] The vast literature includes works from a variety of disciplinary and methodological perspectives, including Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago 1991); William Forbath, *Law and the Shaping of the American Labor Movement* (Harvard 1991); Michael McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago 1994); Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard 1999); Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton 1999); Jack Balkin and Sanford Levinson, *Understanding the Constitutional Revolution*, 87 Va L Rev 1045 (2001); Michael Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford 2004); Larry Kramer, *The People Themselves* (Oxford 2004); Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 Iowa L Rev B 61 (2011); John Paul Stevens, *Six Amendments: How and Why We Should Change the Constitution* (Little, Brown and Company 2014). On the relationship between adjudication and popular constitutionalism, see Robert Post and Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 Harv CR-CL L Rev 373 (2007).

[2] See, for example, Owen Fiss, *Liberalism Divided* (Westview 1996); Cass R. Sunstein, *Democracy and the Problem of Free Speech* (The Free Press 1993); Mark A. Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* (University of California 1991); Morton Horwitz, *Foreword: The Constitution of Change*, 107 Harv L Rev 30, Section *The Lochnerization of the First Amendment* at 109 (1993). Commentators have lamented the tendency of the Supreme Court to uphold and extend unfettered participation in the marketplace of ideas at the expense of meaningful access for underfunded and underrepresented speakers.

[3] In addition to the campaign finance cases, see Hobby Lobby; the DC Circuit's recent decision in

simultaneous retreat from involvement in mitigating poverty, expanding equality, and securing economic justice. They have urged judicial deference toward democratic efforts to balance competing constitutional values, within and outside the First Amendment context.

Students of the First Amendment may be surprised to discover well developed antecedents of such critiques in the modern history of free speech.[4] They have accepted two basic premises that have distorted their historical understanding and colored their consideration of potential paths forward. First, they have presupposed a well established tradition of progressive support for free speech, at least after the First World War demonstrated the dangers of government censorship.[5] That is, they have imagined the expansion of First Amendment protections beginning with the famous Holmes and Brandeis dissents as a victory for advocates of oppressed groups. Second, and relatedly, they have assumed that conservatives resisted free speech claims in the late 1930s, as they had during World War I and as they would during the Cold War. Because the judiciary's retreat from judicial review in economic cases corresponded to a new vigilance with respect to free speech and "discrete and insular minorities," they regard both halves of the New Deal Settlement as repudiations of the Right.

Both of those assumptions are incomplete. In other work, I argue that conservatives were a key constituency of the New Deal coalition responsible for securing strong First Amendment rights in the courts. In this Article, I address the corresponding lack of enthusiasm for a court-centered First Amendment strategy among a substantial subset of liberal New Dealers. Then, as now, many critics of a comparatively conservative Court preferred to pursue their agenda outside the judiciary.

Moreover, faith in the First Amendment during the New Deal did not necessarily entail a preference for judicial enforcement. Some New Dealers who advocated state protection of social and economic rights perceived a strong First Amendment as a threat to their legislative agenda and thus opposed free speech as a constitutional value altogether. Others, however, regarded unfettered deliberation as a normatively and constitutionally necessary prerequisite for democratic rights but nonetheless rejected the courts as the primary institution for implementing the First Amendment. Still others

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National Association of Manufacturers v SEC; and especially Harris v Quinn.

[4] The extensive literature on constitutionalism outside the courts has largely neglected the First Amendment. The principal exception is Paul Horwitz*, First Amendment Institutions* (Harvard 2013), which focuses on non-state institutions. Cf. Frederick Schauer, *Towards an Institutional First Amendment*, 89 Minn L Rev 1256 (2005) (arguing for greater judicial attention to institutional difference in First Amendment analysis). Work on civil liberties and congressional constitutionalism has focused on the Speech or Debate Clause or, like other scholarship, has regarded the First Amendment as a potential barrier to congressional activity in other domains. E.g., Josh Chafetz, *Congress's Constitution*, 160 U Pa L Rev 715 (2012); David Currie, *The Constitution in Congress* (Chicago 1997). In the administrative context, Reuel Schiller has argued that agency interpretations have informed judicial doctrine. Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 Va L Rev 1, 3–4, 101 (2000).

[5] The observation that progressives were skeptical of First Amendment claims by pacifists and radicals during World War I is a distinct claim. David M. Rabban, *Free Speech in Its Forgotten Years, 1870-1920* (Cambridge 1997); Graber; Weinrib, *From Public Interest to Private Rights* (34 L & Soc Inq 187 (2009).

turned to the judiciary for validation of free speech claims, but in a manner quite foreign from today's defensive practices. Rather than invoking the First Amendment as a shield against government infringement, they urged and secured federal prosecution of local officials and even private actors who curtailed expressive freedom.

That these disparate approaches have been forgotten owes in significant part to a terminological misunderstanding. Between the Second New Deal and the Second World War, the courts emerged as the legitimate locus of interpretive authority in the domain of rights that eventually occupied the category "civil liberties." Although it has no specific doctrinal significance, that phrase has come to encompass a recognizable and distinctive set of legal rights. Those rights ordinarily include the freedom of speech and religion, the procedural rights of criminal defendants, perhaps reproductive rights or the right to bear arms. Such rights, as they are conventionally understood, are asserted to block the state. They are invoked in court by private actors—individuals and their representatives—often in the course of a criminal prosecution. They are routinely described, albeit contentiously, as "negative" rather than "positive."[6] Health care, old-age security, or a living wage may be desirable policy goals, but they are not now considered civil liberties.[7]

During the New Deal, by contrast, the designation was capacious enough to encompass all these rights and more. Progressives, conservatives, radicals, and liberals espoused antithetical views of state power, social and economic ordering, and individual

[6] On the "controversy surrounding the positive-negative distinction," see Emily Zackin, *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights*, 42-47 (Princeton 2013). While acknowledging the role of government in enforcing "negative" rights and in shaping putatively private relationships, Zackin provides a compelling argument for the use of the terms "positive" and "negative" in the context of American constitutional history: "[A]t the level of their lived experiences, the activists who shaped state constitutions perceived an important difference between governmental action and restraint. They also distinguished between threats posed directly by government itself and dangers that stemmed from other sources." Id at 45. The same might be said of the civil liberties advocates described in this Article. In 1935, David J. Saposs drew on the terms to describe AFL-style labor voluntarism. He explained: "The workers were especially tutored to eschew becoming the 'wards of the state' by shunning legislation and other forms of government intervention in labor matters. Only legislation of a negative intent was to be acceptable." With the exception of legislation affecting women and children, "positive legislation," that is, "legislation whereby the government directly takes a hand in improving working conditions, such as social insurance, minimum wage, limitations on the hours of work … [was] bound to corrupt and weaken the workers' reliance upon their voluntary economic organizations, the unions." David J. Saposs, "The American Labor Movement Since the War," 49 Q J Econ 236, 237 (1935).

[7] The Court's reluctance to protect socioeconomic rights has been a distinguishing feature of American constitutionalism. See, eg, Martha Nussbaum, "Foreword: Constitutions and Capabilities: 'Perception' Against Lofty Formalism,'" 121 Harv L Rev 4, 57 (2007); Frank I. Michelman, "Socioeconomic Rights in Constitutional Law: Explaining America Away" (2008); Cass R. Sunstein, "Why Does the American Constitution Lack Social and Economic Guarantees?" (2005). In the First Amendment context, a socioeconomic view has been particularly disfavored. See, eg, Frederick Schauer, "The Exceptional First Amendment," in American Exceptionalism and Human Rights (Princeton 2005), 46 ("The Constitution of the United States is a strongly negative constitution, and viewing a constitution as the vehicle for ensuring social rights, community rights, or positive citizen entitlements of any kind is, for better or for worse, highly disfavored…And while the libertarian culture that such attitudes of distrust engender is hardly restricted to freedom of communication, this skepticism about the ability of any governmental institution reliably to distinguish the good from the bad, the true from the false, and the sound from the unsound finds its most comfortable home in the First Amendment").

rights. And yet all framed their programs in civil liberties terms. When scholars today see endorsements of "civil liberties" in judicial opinions, administrative records, and congressional debates, they assume that New Deal actors meant to invoke a basically compatible set of constitutional principles. Occasionally, contemporaneous observers made the same mistake.

In reality, celebrants of civil liberties were advancing distinct positions, even when they shared a set of overarching social and economic goals. There was only one legal and policy commitment that all placed squarely under the label they championed: the right of workers to engage in "peaceful" picketing.[8] The subsequent relegation of labor activity to second-class status under the First Amendment renders that single commonality almost inconceivable in retrospect.[9] During the 1920s, however, an unlikely coalition of lawyers and activists led by the American Civil Liberties Union had made the right to organize central to the definition of civil liberties. For a variety of reasons—some theoretical, some opportunistic—all embraced what Justice Frank Murphy would call "the right to discuss freely industrial relations which are matters of public concern."[10] There was marked disagreement over the ideological justification for that conclusion, as well as the larger bundle of rights from which the rights of labor derived.

When New Deal liberals spoke in terms of civil liberties, they were laying claim to a label that had recently come to be viewed as normatively desirable and central to American governance. The content of that category remained ambiguous, but for much of the decade, among most of the groups who invoked it, it was linked to economic justice. Disparate competencies and areas of focus led competing advocates and institutions to envision the evils of modern society in different ways. In claiming to be the true defenders of civil liberties, and in defining the optimal enforcement of those rights, those actors wrestled over the contours of constitutional democracy in the United States. They expressed their clashing conceptions through a common vocabulary, but they voiced opposing judgments about which rights took priority and how they should be secured.

The vision of civil liberties that prevailed in the late New Deal established the judiciary as a check on majoritarian democracy and administrative discretion. State action was its target, not its engine. Civil liberties enforcement was a species of judicial review that closely resembled substantive due process—that is, it curtailed government's power to interfere with "private" behavior, without disturbing the legal framework through which market power was allocated and preserved—a feature that industry understood and quickly endorsed. I describe this constellation of commitments as the liberal vision of civil liberties. Its central pillar was the First Amendment.

But this narrow adherence to a state-constraining Bill of Rights was the terminus of the New Deal interpretive struggle rather than its origin. The goal of this Article is to

[8] Participants defined "peaceful" in a variety of ways. For some, the term excluded mass picketing and methods defined as coercive under the common law.

[9] See, eg, Kenneth G. Dau-Schmidt et al, *Labor Law in the Contemporary Workplace,* 711 (West 2d ed 2014) ("labor union speech receives less First Amendment protection than that of other activists").

[10] *Thornhill v Alabama*, 310 US 88 (1940).

recover an earlier, more capacious moment, when the meaning of "civil liberties" was fluid and porous. Understanding how particular objectives and ideas were excluded from its purview yields important insights into the perceived advantages and limitations of the modern First Amendment, as well as the larger universe of strategies for social and constitutional change outside the courts. Many of the approaches advanced and tested during the New Deal resonate with current proposals. Others are scarcely recognizable as theoretical possibilities.

Drawing on archival materials, including unpublished organizational records, government documents, and personal correspondence, this Article introduces an unfamiliar account of the articulation and enforcement of civil liberties during the 1930s. Its major players are government actors and private organizations. The ACLU, whose deep state-skepticism initially stemmed from the tenets of radical trade unionism, framed popular and judicial understandings of civil liberties in the interwar period and after. The account of civil liberties that the organization espoused and the Court eventually accepted reflected a strategic partnership with such unlikely entities as the American Bar Association and the American Liberty League. Meanwhile, many of the ACLU's liberal and labor allies broke with the organization over its increasing reliance on judicial review. The labor movement, after all, had railed for more than a century at its ill treatment by the courts.[11] For their part, the New Deal reformers who called for active intervention in the economy also demanded active intervention on behalf of disfavored ideas. They advocated adjustments in the marketplace of ideas to correct distortions stemming from inequality of access or relative power. And many sought to implement that vision in spite of, rather than through, the courts.

The first Part identifies four discrete visions of civil liberties in circulation among advocates and government actors during the New Deal: a radical, state-skeptical vision rooted in the "direct action" of militant trade unionism; a progressive vision premised on deliberative openness in the formulation of public policy; a conservative vision that linked economic liberty to the Bill of Rights; and a labor interventionist vision that regarded state support of collective bargaining as instrumental to achieving material social and economic goals. By the late New Deal, these competing understandings yielded to a synthetic, liberal vision that privileged judicial enforcement.

Part II then takes up, in turn, the practice of civil liberties enforcement within four New Deal institutions that vied for interpretive power. The Supreme Court was sympathetic to state efforts to effectuate labor's rights even while it constrained the government's ability to target the coercive effects of workers' (and eventually, employers') concerted activity. The Senate Civil Liberties Committee sponsored legislation to safeguard labor's organizational activity against intervention by both government and employers. The National Labor Relations Board subordinated free speech to the right to organize and legitimated state intervention with expression that exercised a coercive effect due to disparities in bargaining power. Finally, the Civil

[11] See, eg, William E. Forbath, *Law and the Shaping of the American Labor Movement* (Harvard 1991); Christopher L. Tomlins, *Law, Labor and Ideology in the Early American Republic* (Cambridge 1992); Victoria C. Hattam, *Labor Visions and State Power: The Origins of Business Unionism in the United States* (Princeton 1993); Daniel R. Ernst, *Lawyers Against Labor* (Illinois 1995).

Liberties Unit within the Department of Justice imagined workers' associational rights as part of a broader constellation of freedoms enforceable, with state assistance, against recalcitrant employers and the local officials who countenanced their illegal practices. For the administrative actors discussed in this Article, the modal civil liberties were workers' rights to organize, boycott, and strike. The labor-centric view contended with other alternatives, however, which foregrounded individual autonomy in place of group rights.

In Part III, I draw several tentative conclusions from these historical materials with respect to the relationship between institutional constraints and the pursuit of particular rights. Sometimes, the institutional actors featured in this Article operated at cross purposes. Often, their efforts overlapped. All proved to be responsive to popular pressures and yet capable of resisting public opinion to protect disfavored rights claimants against both government and private repression. And yet, it is possible to identify some salient differences between them, including, most notably, their respective attitudes toward state power.

As a matter of historical circumstance, the theory of civil liberties that prevailed during the New Deal foregrounded the courts as a check on state abuses. During the 1930s, the judiciary emerged for the first time as a potential guardian and even emblem of personal freedom. Reconstructing the alternative visions of civil liberties and their optimal enforcement reveals the anticipated advantages of the judicial strategy as well as its costs. That undertaking should matter to constitutional theorists as much as historians.

I. Visions of Civil Liberties During the New Deal

In May 1937, just one month after the Supreme Court upheld the constitutionality of the National Labor Relations Act,[12] the American Civil Liberties Union issued a report on the merits of judicial review. Its subject was only incidentally the Court's persistent invalidation of New Deal economic legislation, which prompted President Franklin D. Roosevelt's ill-fated Judicial Procedures Reform Bill.[13] Instead, the ACLU's report on the Court-packing plan—prepared by Osmond Fraenkel, a member of the Board of Directors and the ACLU's Supreme Court litigator—addressed the question "how far the Court has been a defender of civil liberties." To that end, it evaluated the Court's record since the nineteenth century.[14] It concluded that the Court had "more often failed to protect the Bill of Rights than preserve it," and that those decisions favorable to civil liberties involved "less important issues." Still, the Court had begun to protect "personal

[12] *NLRB v Jones & Laughlin Steel Corporation,* 301 US 1 (1937).

[13] On the constitutional revolution, see William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (Oxford 1995); Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (Oxford 1998); Richard A. Maidment, *The Judicial Response to the New Deal: The United States Supreme Court and Economic Regulation, 1934–1936* (St. Martin's 1991); Alan Brinkley, *The End of Reform: New Deal Liberalism in Recession and War* (Knopf 1995).

[14] It tallied the Court's decisions in such far-ranging areas as military trials, slavery or peonage, searches and seizures, freedom of religion, education, aliens and citizenship, freedom of speech, and labor relations.

rights" (a term encompassing privacy, bodily integrity, and expressive freedom) more vigilantly as a result of its "widening conception" of the due process clause.[15] As Fraenkel reflected in comments to the ACLU Board, "so long as we believe in safeguarding the rights of minorities, the power of review is essential to protect these rights."[16]

The ACLU's report is a striking document. It represents the organization's effort to grapple with one of the most divisive questions facing social movements and sympathetic government officials during the 1930s: whether efforts to defend political minorities and facilitate economic change should proceed through the legislature, government agencies, or the courts. That question was intimately bound up with an equally fundamental debate over how civil liberties should be defined and what goals and values they served.[17]

To assess the field, the organization administered a survey to prominent legal authorities, soliciting their views on the implications for civil liberties (without defining that term) of various proposals to limit judicial review. Walter Gellhorn, an administrative law scholar who was then serving as regional attorney for the Social Security system, believed the courts could be constrained without significant danger to civil liberties. Lloyd Garrison, dean of the University of Wisconsin Law School and the first chair of the original NLRB, was somewhat friendlier to judicial involvement, and he cautioned against "giving majorities too much say over minorities."[18] Edwin Borchard, a law professor at Yale, thought it "apparent that the current danger is an expansion of the executive power into dictatorship"—and he considered the Supreme Court to be "the greatest safeguard we have against executive arbitrariness."[19] The socialist leader and Presbyterian minister Norman Thomas favored a constitutional amendment clarifying congressional power to legislate in "economic and social matters" and restricting judicial

[15] ACLU Press Release, 21 May 1937, ACLU Papers, reel 143, vol. 978. According to Fraenkel, the Supreme Court had "spoken strongly against federal laws restricting civil liberties" only once, in *Ex parte Milligan*, 71 U.S. 2 (1866). Felix Cohen went further. By his interpretation of the case law, "No person deprived of any civil liberty by an oppressive act of Congress has ever received any help from the Supreme Court. On the other hand, when Congress has extended aid to those deprived of civil liberties, the Supreme Court, in five cases out of seven, has nullified the aid that Congress tendered." Felix Cohen to Osmond Fraenkel, 24 April 1937, ACLU Papers, reel 143, vol. 978.

[16] Preliminary Report of the American Civil Liberties Union Temporary Committee Concerning the Supreme Court, ACLU Papers, reel 143, vol. 978.

[17] See Laura Weinrib, *The Liberal Compromise: Civil Liberties, Labor, and the Limits of State Power, 1917–1940* (PhD diss., Princeton University, 2011); Emily Zackin, *Popular Constitutionalism's Hard When You're Not Very Popular: Why the ACLU Turned to the Court*s, L & Soc Rev 42 (2008), 367–96. In the wake of the First World War, the nascent civil liberties movement had sought unsuccessfully to secure its agenda through propaganda and popular persuasion. Its constituents subsequently experimented with a range of top-down methods for cabining state repression—including, but not limited to, a court-based approach—despite conflicting conceptions of government's appropriate reach. Even in the domain of legal argument, its early victories were rarely decided on constitutional grounds; rather, civil liberties advocates counseled prosecutorial restraint and, in court, argued that criminal statutes and the common law contained safe harbors for dissenting views. By the end of the 1920s, however, civil liberties advocates increasingly pressed, and occasionally won, constitutional claims.

[18] Ibid.

[19] Edwin Borchard to Osmond Fraenkel, 4 February 1937, ACLU Papers, reel 143, vol. 978.

review exclusively in those domains.[20] These respondents and others uniformly endorsed civil liberties, but they differed profoundly with respect to the content of the rights they defended, the source of the threat to those rights, and the best means of preserving them.

In contrast to liberals' ambivalence, mainstream conservatives and the American Bar Association publicly celebrated the Supreme Court's recent decisions upholding (if tepidly) free speech and the rights of criminal defendants—decisions, that is, in cases argued by Fraenkel and the ACLU, which most members of the bar had staunchly opposed when they were handed down. Newly converted, the ABA proclaimed to radio audiences that the Supreme Court had proven its worth by defending personal and property rights alike. To Fraenkel, that was precisely the problem. "Since property can defend itself more effectively," he cautioned, "administrative officials and lower courts follow the Supreme Court more consistently in protecting property than personal rights." The result was that "the fight for personal rights has constantly to be fought over."[21]

Historians and constitutional scholars have approached New Deal perspectives on the First Amendment through an unduly narrow lens—a focus shaped by the state-skeptical and court-centered vision of civil liberties that ultimately prevailed. They have looked for struggles over the appropriate scope of state power to curb advocacy and expression, framed as a contest between national security or the public interest, on the one hand, and individual autonomy or deliberative openness on the other. They have found them in the seminal First Amendment cases that populate the pages of constitutional law casebooks.

Certainly these familiar battles over seditious speech were understood by many New Dealers as important civil liberties concerns. To cabin civil liberties in this way, however, is anachronistic. During the 1930s, the meaning of civil liberties was in flux. More to the point, it was vehemently contested. Whatever their underlying objectives, advocates across the political spectrum defended them in civil liberties terms. To some, civil liberties were constraints on state power; to others, they served as a basis for state intervention against private abuses or economic inequality. Civil liberties might undercut administrative discretion or justify government intrusions. By the end of the decade, even constituencies that had long decried free speech as a cover for subversive activity claimed the mantle of civil liberties as their own.

This convergence reflects a common engagement with (if not a shared solution to) a basic New Deal problem, namely, the appropriate balance between state power and individual rights in a period of rapid government growth. Under the rubric of civil liberties, New Deal insiders and sympathizers debated such far-ranging issues as anti-lynching legislation, tribal autonomy for American Indians, expansion of political asylum, transfer of colonial possessions from naval to civilian rule, and the rights of the unemployed. At an ACLU-sponsored conference on Civil Liberties Under the New Deal in 1934, representatives from such groups as the International Labor Defense, the National Urban League, and the NAACP discussed legislative proposals to expand asylum for political refugees, provide jury trials in postal censorship cases, and

[20] Norman Thomas to Roger Baldwin, 25 February 1937, ACLU Papers, reel 142, vol. 969.
[21] ACLU Press Release, 21 May 1937, reel 143, vol. 978.

criminalize lynching under federal law.[22] Although they "showed surprising unanimity of opinion on fundamentals,"[23] delegates clashed over the desirability of federal regulation of radio content—including a requirement to allocate equal radio airtime to all sides of controversial questions—and the tradeoffs between private and public control.[24] Over the course of the decade, self-described civil liberties advocates would split over anti-fascist security measures, the extension of free speech to Nazi marches, and the propriety of racial discrimination in public accommodations.

If there was a single issue, however, that most poignantly foregrounded the costs and benefits of an interventionist state vis-à-vis personal rights, it was the labor question.[25] Between the First World War and the New Deal, the modern civil liberties movement evolved from a radical fringe group espousing labor's right of revolution to a mainstream exponent of widely held (if inconsistently enforced) principles of constitutional democracy. The primary architect of that feat was the ACLU. After an unsuccessful stint as a "frankly partisan[]" labor adjunct,[26] the organization had extended its operations into such areas as academic freedom, artistic expression, and sex education, in which broad-based consensus was feasible.[27] When it solicited assistance in labor cases during the 1920s, it was careful to emphasize the neutrality of its principles. And yet, for the radical core of the ACLU leadership, civil liberties were synonymous with the "right of agitation"—roughly, a right of private actors to marshal persuasion, propaganda, and collective power in the arena of political and economic struggle, without intervention by the state.

Needless to say, theirs was not the only view. While conservatives were marginal in the 1920s civil liberties coalition, some were sympathetic to expanding the scope of private autonomy.[28] Progressives, meanwhile, played a central part. For many of them,

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[22] Memorandum of Bills Proposed for Discussion, Conference on Civil Liberties under the New Deal, ACLU Papers, reel 110, vol. 719.

[23] ACLU Press Bulletin 643, 14 December 1934, ACLU Papers, reel 110, vol. 721.

[24] Eg, Louis G. Caldwell, "Excerpts from 'Freedom on the Air,'" Conference on Civil Liberties and the New Deal, ACLU Papers, reel 110, vol. 721.

[25] Although historians have largely neglected the labor history of the modern civil liberties movement, there is an extensive bibliography on efforts by the labor movement to mobilize constitutional rights, including free speech, during earlier periods (especially before World War I). The most famous examples are the IWW's Free Speech Fights and the AFL's boycott campaign. See, e.g., David M. Rabban, *Free Speech in Its Forgotten Years, 1870-1920* (Cambridge 1997); John Wertheimer, *Free Speech Fights: The Roots of Modern Free-Expression Litigation in the United States* (Ph.D, diss., Princeton University, 1992); Melvyn Dubofsky, *We Shall Be All: A History of the Industrial Workers of the World* (Quadrangle 1969); Philip S. Foner, *History of the Labor Movement, vol. 9, The T.U.E.L. to The End of the Gompers Era* (New York: International Publishers, 1991); Philip S. Foner, ed., *Fellow Workers and Friends: I.W.W. Free Speech Fights as Told by Participants* (Greenwood 1981); Glen J. Broyles, *The Spokane Free-Speech Fight, 1909–1910: A Study in IWW Tactics*, Labor History 19 (Spring 1978): 238–52; Stewart Bird, Dan Georgakas, and Deborah Shaffer, *Solidarity Forever: An Oral History of the IWW* (Lake View Press 1985).

[26] Walter Nelles, Suggestions for Reorganization of the National Civil Liberties Bureau (undated), ACLU Papers, reel 16, vol. 120.

[27] Laura M. Weinrib, "The Sex Side of Civil Liberties: *United States v. Dennett* and the Changing Face of Free Speech," 30 L & Hist Rev 325 (2012).

[28] See David E. Bernstein, *Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform* (Chicago 2011). Cf. Ken I. Kersch, *Constructing Civil Liberties: Discontinuities in the*

civil liberties served to buttress rather than undermine state power. When they endorsed the rights of workers to organize or disseminate their views, they emphasized the marketplace of ideas and disavowed radical ends. Their defense of labor radicals echoed Justice Holmes's dissenting pronouncement in *Gitlow v. New York*: "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."[29]

As long as civil liberties were primarily aspirational, disagreements within the civil liberties campaign were relatively inconsequential. In the 1930s, by contrast, aspiration stood to become reality. As a result, seemingly small differences took on immense proportions. And the most important fracture in the civil liberties alliance occurred over New Deal labor policy. Put simply, when New Dealers argued over the appropriate scope of government involvement in securing civil liberties, they were far more concerned about protections for unions and collective bargaining than adjustments in the marketplace of ideas. Indeed, their attitudes toward the latter were often mere applications of theories they developed in the labor context.

The core of the conflict involved competing attitudes toward state power and the federal courts. The various efforts to regulate labor relations during the New Deal prescribed a strong role for the state in brokering disputes between workers and their employers. This development marked a substantial departure from labor's longstanding skepticism toward state involvement, most familiarly expressed in the American Federation of Labor's commitment to labor voluntarism. Although they had often endorsed political candidates and welcomed government support in return, AFL unions had vehemently opposed compulsory arbitration and favored collective bargaining over statist protections for workers' rights. And while radical trade unionists anticipated the eventuality of a proletarian state, in the short term many promoted non-state "direct action." Consistent with American labor leaders' deep distrust of the state, previous measures to protect labor's rights—most famously, the 1933 Norris-LaGuardia Act, which the ACLU had helped to draft[30]—had sought to shield the struggle between workers and industry from government (understood to include the courts) intervention, not to invite the state in. Indeed, in the early interwar period, insulating the instruments of direct action had been the civil liberties movement's most pressing goal.

Against this trajectory, the New Deal's state-centered labor policy reflected an ironic reversal of the civil liberty movement's founding assumptions. New Deal

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Development of American Constitutional Law (Cambridge 2004).

[29] 268 US 652 (1925).

[30] In 1931, its National Committee on Labor Injunctions managed to produce a draft anti-injunction measure agreeable to the AFL, labor lawyers, law professors, and interested organizations. Monthly Bulletin for Action, January 1931, ACLU Papers, reel 79, vol. 444. The bill eliminated ex parte hearings, ensured that all violations of injunctions would be tried by juries, limited punishment of contempt, abolished yellow dog contracts, and ensured that no acts "which involve only workers' rights to meet, speak, [or] circulate literature" would be enjoined. Memorandum on the Proposed Injunction Bill, January 1932, ACLU Papers, reel 90, vol. 536. Once the federal bill was passed, William Green, president of the AFL, arranged for the ACLU to assist in the preparation of state anti-injunction bills, as well. William Green to Roger Baldwin, 29 December 1933, ACLU Papers, reel 99, vol. 615D.

legislation explicitly recognized the "right of employees to organize" and preserved the "right to strike." In the National Labor Relations Act (NLRA), Congress eventually declared its intention to protect "the exercise by workers of full freedom of association, self organization, and designation of representatives of their own choosing."[31] Importantly, it accomplished these objectives not merely by preventing *state* incursions on workers' organizing efforts, but employer interference as well. That is, it marshaled the power of the state to facilitate labor activity. In the process, it sharply limited employers' common law prerogatives, including some—such as freedom of contract—that had long been accorded constitutional status.

From the perspective of state involvement, the NLRA reflected a compromise. The statute employed state power to shield workers from employer retaliation for concerted activity and to force employers to the bargaining table. But it was equally central to the statutory framework that the parties would negotiate and police their own substantive contractual terms. The NLRA sought to equalize bargaining power by removing legal and economic obstacles to worker power. The role of the NLRB was to ensure that employers played by the rules.

The new approach satisfied most, but not all, proponents of labor's rights. Within the mainstream labor movement, the dissenters were committed voluntarists representing established craft unions. Their relatively strong bargaining power rendered government assistance unnecessary; in their view, the risks of administrative meddling outweighed the benefits.[32] By contrast, the industrial unionists who sought to organize unskilled workers overwhelmingly favored affirmative protections in part because they had more to gain.[33]

But there were critics on the Left, as well—and the Communists and other radicals who opposed the Wagner Act framed their objections as civil liberties concerns.[34] Influenced by their formulations, the ACLU informed Senators Wagner and Walsh in a letter that the organization would not support the Wagner Act because no federal agency could be trusted "to fairly determine the issues of labor's rights." It expressed several concrete objections, including the bill's exclusion of agricultural workers and its failure to prohibit "discrimination on account of sex, race, color or political convictions."[35] In

[31] NLRA Section 13; Section 1.

[32] James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1958*, 102 Colum L Rev 1 (2002).

[33] William E. Forbath, *Law and the Shaping of the American Labor Movement* (Harvard 1991).

[34] In addition to the concerns described below, Communists worried that exclusive representation (coupled with the closed shop) would interfere with organizing efforts by radical unions.

[35] Wagner declined to address the objections in light of Baldwin's "frank statement that [he was] philosophically against any legislation that might set up a government agency as one of the areas within which the industrial struggle might be waged." Robert Wagner to Roger Baldwin, 5 April 1935, ACLU Papers, reel 116, vol. 780. In general, those advocates of the Wagner Act who were concerned with racial discrimination thought that "racial discrimination, etc. will only be eliminated after economic injustices are corrected." John W. Edelman to Roger Baldwin, ACLU Papers, reel 116, vol. 780; John P. Davis to Roger Baldwin, 25 January 1935, in Gardner Jackson Papers, 1912–1965, Franklin D. Roosevelt Presidential Library, Hyde Park, N.Y. (hereafter Jackson Papers), General Correspondence, box 3, folder ACLU: Labor (advising against a prohibition on racial discrimination in trade unions because "such promises, even if enacted into law would be unenforceable in any real sense" and would in any case "be used by the industry

later years, these would become major civil liberties issues.[36] For the time being, however, the ACLU emphasized other defects, including the ability of the board to act on its own initiative. To ACLU co-founder Roger Baldwin, who authored the letter, any governmental intervention in the labor struggle was an independent and fundamental incursion on civil liberties.[37]

Baldwin considered the contest between labor and capital to be the "central struggle involving civil liberties," and he believed that administrative intervention would inevitably undermine labor's cause. He acknowledged that his continuing state skepticism was increasingly out of line with mainstream opinion. Opposition to administrative power emanated from two principal sources, he explained: "employers still wedded to laissez-faire economics," and their unlikely allies, those "radicals who oppose state capitalism as a form of economic fascism, denying to the working class a chance to develop its power."[38] Baldwin was in the latter camp, and he believed that government could not be trusted to safeguard labor's interests. The workers who accomplished most were the ones who struck hardest. "The real fight is on the job," he said, "not in Washington."[39]

Where Baldwin saw violence and compulsion, others saw the potential for buttressing labor's strength. Wagner was disappointed at Baldwin's position and considered it short-sighted. In his view, which many progressives shared, government regulation was the only feasible means of countering powerful private interests. According to Wagner, appropriate state policies would facilitate organizing, not quash it.[40] As it turned out, the ACLU's national membership sided with Wagner rather than Baldwin, and the organization eventually rescinded its opposition to the bill.[41]

Historians who have noticed the ACLU's engagement with New Deal labor policy

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as another weapon to defeat the solidarity of the trade-union movement," and urging the ACLU instead to enlist the support of the union rank and file in defeating segregation).

[36] See Sophia Lee, T*he Workplace Constitution from the New Deal to the New Right* (Cambridge forthcoming 2014).

[37] Roger Baldwin to Robert Wagner, 1 April 1935, ACLU Papers, reel 116, vol. 780; Roger Baldwin to David I. Walsh, 30 March 1935, Jackson Papers, General Correspondence, box 3, folder ACLU: Labor.

[38] Speech of Roger Baldwin, Annual Meeting of the ACLU, 19 February 1934, ACLU Papers, reel 105, vol. 678.

[39] Ibid. According to Baldwin, this principle was responsible for the particularly disfavored plight of "Negro workers" in the current administrative scheme. "Exploited by the employers in the hardest and lowest-paid jobs, they are also excluded from most unions. They cannot organize and fight in independent unions, Negro Workers' rights—N.R.A. or no N.R.A.—are pretty near zero." Ibid.

[40] Robert F. Wagner to Roger Baldwin, 5 April 1935, ACLU Papers, reel 116, vol. 780.

[41] Eg, John W. Edelman, David S. Schick, and Isadore Katz to Roger Baldwin, 3 May 1935, ACLU Papers, reel 116, vol. 780; John W. Edelman to Roger Baldwin, ACLU Papers, reel 116, vol. 780 ("Trade unionists who know 'what it's all about' realize well enough that the Labor Disputes Bill has many weaknesses and will not bring about social justice, but they also know that the passage of some such legislation is essential to enable the organization drive in the unorganized industries to continue. . . . The Civil Liberties [Union] functions usually for the alleged radical unions who are so weak that they are licked before getting started with or without a Labor Disputes Bill. In fact the Communist led unions don't really want to settle strikes and you know that is the case. But some of us are connected with really militant-acting unions who do things and who want to settle strikes. We have used the government mechanisms and the arbitration technique very effectively to that end.").

have regarded it as an aberration—a diversion from the organization's true and abiding concerns. In so doing, they have missed or misconstrued the organization's core commitments before and during the New Deal. Civil liberties, in 1935, was not reducible to the Bill of Rights.

What, then, are we to make of the fact that debates over New Deal labor legislation were framed around civil liberties? The NLRA created concrete, state-supported rights of a kind typically absent in accounts of American constitutionalism, much less civil liberties. These rights sometimes sounded in constitutional language, and they often intersected with claims to freedom of speech. Did the Wagner Act's proponents stake out an alternative constitutional vision, or did they reject constitutionalism altogether? Relatedly, what was the connection between their substantive commitments and the architecture they established for civil liberties enforcement? How did their new sympathy toward state solutions to the labor problem translate to more familiar aspects of the civil liberties agenda, such as the expressive freedom of political dissenters?

In discussions over the Wagner Act, advocates for workers' "civil liberties" were up against fundamentals. For the first time, the progressive project for the affirmative protection of labor's rights was a realistic possibility. The modern civil liberties movement had been founded on resistance to state power. When the state appeared ready to come genuinely to its aid, much of the labor movement set aside its reservations (which, in any case, had always been qualified) and embraced government action.

But for some civil libertarians, resistance to state authority had become a core unifying ideology, even outside the labor context. In such cases as *Pierce v. Society of Sisters*, the *Scopes* trial, and *United States v. Dennett*, they had denounced the governmental oversight of ideas as dangerous and misguided.[42] Over the course of the 1920s, they had expanded from a skeptical stance toward state intervention in labor disputes to a general aversion to state interference with minority viewpoints, personal morality, and private life.

The founding leaders of the interwar civil liberties movement were victims of their own success. To keep the state out of labor relations, they had hitched the right of agitation to the First Amendment. They emphasized a neutral commitment to freedom of speech and association consistent with government oversight of the economy, rather than a revolutionary right to restructure government and the economy through collective power. Strikes were legitimate not because the proletariat retained the right to reconstitute the state, but because picketing communicated workers' views.

The result was a fundamental reshuffling of the civil liberties lineup. The loose coalition of the 1920s was destined to dissolve. In its place, at least four competing visions of civil liberties emerged. The first was the *radical vision*, which Baldwin and some labor radicals continued to espouse. On this account, which foregrounded the right of agitation, state regulation of labor slid inevitably into fascism. To be sure, state

[42] *Pierce v Society of Sisters*, 268 US 510 (1925) (invalidating an Oregon compulsory public education law); *Scopes v Tennessee*, 152 Tenn 424 (Tenn 1925) (involving academic freedom, among other issues); *United States v Dennett*, 39 F2d 564 (2d Cir 1930) (overturning a criminal conviction for distribution of a sex education pamphlet). On these cases, see Weinrib, "The Sex Side of Civil Liberties."

suppression of artistic expression and sexual freedom was also ill-advised. But the true civil liberties threat was the institutionalization and consequent vitiation of labor's collective, revolutionary power. These radicals did not regard civil liberties as bounded by the Bill of Rights. On the contrary, as they often emphasized, civil liberty preexisted the Constitution. The right of agitation mapped almost fully onto the labor struggle, and it was broad enough to encompass all of workers' tools.

The second view was a *progressive vision* of civil liberties that is still familiar to us today. For many New Dealers, the rights to organize, picket, and strike were derivative of a constitutional commitment to expressive freedom. Theirs was the understanding associated—in distinct but basically compatible forms—with Justices Holmes and Brandeis as well as influential First Amendment theorists such as Zechariah Chafee and Alexander Meiklejohn. Thus, in his capacity as a member of the ACLU's National Committee, Meiklejohn wrote to register his support for the NLRA, lamenting "the tendency of the [ACLU] Board to engage in industrial disputes instead of fighting for the maintaining of civil liberties in connection with them."[43]

The progressives had never entirely accepted the notion of a right of agitation as an independent revolutionary force, productive of (rather than protected by) the marketplace of ideas. More to the point, they never were opposed to state power as such, merely to the intrusion of the state into the realms of democratic decision-making and private conduct. As a result, they were willing to bracket labor relations as an appropriate forum for regulation—even if the result was ameliorative and counter-revolutionary—as long as rights derived from the First Amendment were preserved. In other words, for progressives, transformation of the economic system might be accomplished through the exercise of civil liberties, but it was not a civil liberty in and of itself.[44]

It bears emphasis that the progressive understanding was, as yet, neither negative nor necessarily tied to the courts. It was, however, a constitutional vision. An earlier generation of progressives had understood civil liberties (though they did not yet use that phrase) as a thumb on the scale, not a constitutional right. Often, civil liberties served simply as a background condition for the exercise of state authority, hardly distinguishable from good policy. Wherever possible, they argued, it was advisable to tolerate dissent rather than suppress it. Police commissioners, prosecutors, and administrative agencies exercised their discretion to accommodate minority interests and unpopular views—on occasion, disregarding explicit legislative directives in the process.[45] They did so because they believed that open discussion enhanced democratic legitimacy, defused violent conflict by avoiding the production of martyrs, and facilitated social and scientific progress. During the interwar period, they constitutionalized those commitments, and the progressive vision of civil liberties was born.

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[43] Alexander Meiklejohn to Roger Baldwin, 22 May 1935, ACLU Papers, reel 116, vol. 780.

[44] For some, however, the definition remained capacious. Letter from Arthur Garfield Hays, 7 May 1935, ACLU Papers, reel 116, vol. 780 ("From the point of view of civil liberties the subject of unionism should be confined to the rights of free press, free speech, free assemblage, the right to organize, strike, picket and demonstrate, the right to be free from unfair injunctive processes and cognate matters.").

[45] Jeremy Kessler, *The Administrative Origins of Modern Civil Liberties Law,* 114 Colum L Rev 1083 (2014); Rabban, *Free Speech in Its Forgotten Years* (Cambridge 1997).

Progressives were not sanguine about state power. They acknowledged that administrative discretion posed a threat to unpopular minorities and views; postal censorship under the wartime Espionage Act and a wide array of invasive state practices thereafter had made that reality unavoidable. In their view, however, insulating unpopular ideas against state interference served to legitimate rather than undermine state power; as an ACLU-commissioned treatise had prematurely opined a decade earlier, the courts had abandoned their reliance on "natural rights" in favor of the "modern idea that grants liberty to men . . . for the sake of the state."[46]

Just as they believed that civil liberties might justify government power, the progressives believed that government power was a necessary prerequisite for civil liberties. Their reasoning is succinctly captured by philosopher and longtime ACLU member John Dewey: "social control, especially of economic forces, is necessary in order to render secure the liberties of the individual, including civil liberties."[47] Even as they called for limits on state power in the domain of expressive freedom, they extolled the state's unique capacity to protect important rights. Accordingly, the First Amendment test they endorsed was deferential to government efforts to correct market asymmetries, whether economic or ideational. Notably, that was a battle they lost in the courts, notwithstanding the strong purchase of their views in legal scholarship.

A third defense of civil liberties would emerge during the 1930s. Rooted in a commitment to individual autonomy, the *conservative vision* regarded the Bill of Rights as a bulwark against an intrusive state. Although antecedents of this idea appear in nineteenth century treatises and in classical liberal thought, conservatives had typically opposed civil liberties claims, distinguishing between "liberty and license" and relegating disfavored speech to the latter, unprotected category. During the 1920s, the organized bar had opposed ACLU efforts to defend radical speech. In the 1930s, however, shifting political winds prompted a reevaluation of conservative ideals. The New Deal posed an unprecedented threat to the speech and association of conservative groups. Equally important, a vigorous defense of personal rights was poised to counter claims of judicial hypocrisy and buttress the case for judicial review.

Progressives were quick to note the resonances between the radical and conservative understandings. The notion that labor relations should be isolated from state intervention smacked of the *Lochner*-era tradition of economic liberty, which they had unequivocally repudiated.[48] The radicals registered the objection. In opposing state labor policy, Roger Baldwin was hesitant "to use so misunderstood a word as 'liberty,' invoked today so loudly by those rugged defenders of property rights" who understood liberty as a "right to exploit the American people without governmental interference."[49] He took

[46] Leon Whipple, *Our Ancient Liberties: The Story of the Origin and Meaning of Civil and Religious Liberty in the United States* (1927; reprint, New York: De Capo Press, 1972).

[47] John Dewey, "Liberalism and Civil Liberties," The Social Frontier (February 1936), 137.

[48] Francis Biddle, chair of the NLRB created under Public Resolution No. 44, accused Baldwin of sounding like the Liberty League; Francis Biddle to Roger Baldwin, 17 April 1935, ACLU Papers, reel 116, vol. 780.

[49] Roger Baldwin, "Civil Liberties under the New Deal," 24 October 1934, ACLU Papers, reel 109, vol. 717.

great pains to distinguish the position of the ACLU leadership, emphasizing that "the historic conception of liberty" was "the freedom to agitate for social change without restraint"[50]; although both groups opposed the NLRA, their reluctance was justified on "diametrically opposite grounds." [51] The radical concern was "human rights," which were expressed collectively rather than as individual rights.[52] Like the radicals, conservatives linked civil liberties to labor relations, but in place of the radicals' abolition of wage labor or the progressives' social welfare, they privileged individual autonomy of the *Lochner*-era ilk, including the freedom to sell one's labor under conditions that progressives and radicals deemed coercive. Although this Article focuses on the left-liberal constituents of the civil liberties coalition, the conservative foil played a powerful background role during this period, and it is important to bear it in mind.

Finally, debates over the Wagner Act hinted at a fourth conception of civil liberties that would take root within the NLRB and its congressional counterpart over the coming years. Like the radical understanding, the *labor interventionist vision* evinced unabashed support for labor's cause. Unlike the radicals, however, proponents of the interventionist view—like the progressives—imagined a strong role for the state in enforcing civil liberties.[53] Their aspirations for the administrative enforcement of civil liberties were intimately bound up with their antagonistic relationship to the judicial construction of constitutional rights. Importantly, the civil liberties they defended encompassed not only the rights to picket, boycott, and strike, but also a stronger position at the bargaining table. They believed affirmative state support for labor organizing would best serve the end goals of labor activity, including higher wages and better working conditions. Indeed, To NLRB chair J. Warren Madden, it was the state's role to enforce as "fundamental" the liberty of the workers "to emerge from a condition of economic helplessness, and dependence upon the will of another, to a status of having

[50] Ibid. He added: "Practically today that means freedom for the working-class to organize and of minorities to conduct their propaganda."

[51] Roger Baldwin to Robert Wagner, 1 April 1935, ACLU Papers, reel 116, vol. 780. See also Joseph Schlossberg to Roger Baldwin, 14 May 1935, ACLU Papers, reel 116, vol. 780 ("Rightly or wrongly the American Federation of Labor is committed to the Wagner Bill. By your opposition to the bill you unwillingly lined up with the employers and all reactionaries who opposed the bill. . . . This is one case in which the Civil Liberties Union can well afford to take no official position.").

[52] Baldwin, "The Main Issues of Civil Liberties under the New Deal," 8 December 1934, ACLU Papers, reel 110, vol. 721; Roger Baldwin, "Coming Struggle for Freedom," 12 November 1934, ACLU Papers, reel 109, vol. 717 ("[The American Liberty League and Americans First] are the dying gladiators of individualism in business of laissez faire economics. But the landslide has buried their straw man of liberty. Collectivism has come to stay.").

[53] I borrow the emphasis on "interventionism" from David Saposs's classic 1935 account of the demise of voluntarism. According to Saposs, who served as chief economist of the NLRB from 1935 to 1940, organized labor had been most successful during "periods of widespread government intervention in industrial relations." He considered the N.R.A. to be a "continuation, with a painful interlude, of government intervention in industrial relations first introduced during the war." He explained: "[I]n a modern industrial country voluntarism is an archaic philosophy. Furthermore, the conclusion is inevitable that a strong trade union movement is only possible when aided by the government. The capitalistic interests are so powerfully entrenched that the unions are at a tremendous disadvantage in a bare handed economic struggle." David J. Saposs, The American Labor Movement Since the War, Quarterly Journal of Economics 49 (1935), 239.

one's chosen representative received as an equal at the bargaining conference table."[54] This liberty was prior to all other rights—including the rights of speech, press, and assembly—which might benefit the workers only after their right of collective bargaining was realized.[55]

These categories are, of course, ideal types. They are meant to capture, in broad strokes, diverse understandings of the conditions for human thriving and their underlying values. Those values, in turn, are linked to divergent accounts of the proper scope of state power and private rights. Many of the figures discussed in this Article flitted between these commitments, drawing on strains of each in service of legal and political goals. Few would have drawn the lines between them so starkly.

Indeed, the permeability of the boundaries rendered the categories unstable and susceptible to revision. In the late 1930s, these competing accounts of civil liberties would attain a rough equilibrium. A fifth, *liberal vision* of civil liberties embraced a broad spectrum of the earlier views but, in finding common ground, fundamentally transformed them.

II. Civil Liberties in the New Deal State

In other work, I explore the process through which ideological convergence on a state-skeptical and judicially enforceable First Amendment emerged during the interwar period and culminated in the New Deal settlement commonly associated with *Carolene Products'* Footnote Four.[56] The goal for this project is a different one. In the remainder of this Article, I examine how the various understandings of civil liberties manifested and differed within the institutions designated for their enforcement in the years before the new constitutional framework crystallized. In elucidating these ideas, I refer to specific concepts, such as free speech or the right to organize, where feasible. Where I use the more general term, either I intend to draw attention to its fluidity, or I link it to one of the four visions described above in Part II. In the latter case, I mean it to encompass the bundle of rights and policy preferences that adherents of a particular vision ascribed to it.

What follows are suggestive snapshots of the four principal New Deal institutions in which ideological contestation over civil liberties took place. They are not comprehensive histories of these institutions or of the mundane administration of rights claims within their respective domains. Rather, they focus on discrete examples of consensus and conflict. In order to make this project feasible within a single Article and, more importantly, because of its central significance to the actors who articulated the contours of civil liberties during the New Deal, the discussion focuses on the labor question. The hope is that observing the tangible legal and political consequences of contestation, while holding the underlying ideological objectives relatively constant, will

[54] Radio address by Warren Madden, 29 January 1939, quoted in Respondents' Sixth Circuit Brief, Ford v. NLRB, 54.

[55] Ibid.

[56] *United States v. Carolene Products Company*, 304 US 144, 152 n 4 (1938). Footnote 4, which provided the basis for the most familiar civil-rights victories of the twentieth century, was initially invoked far more frequently in First Amendment cases than in race cases.

yield insight into the relationship between government institutions and the rights they are designated to protect.

The Judicial Enforcement of Civil Liberties

Strong judicial enforcement of the Bill of Rights is properly regarded as a keystone of the New Deal settlement. The transformation in constitutional law during the late 1930s is conventionally understood to contain two distinct but interconnected parts: first, a relaxation of structural constraints on Congress's control over the economy, entailing the complete revision of commerce clause and federalism doctrine, in addition to the abrogation of freedom of contract and property rights; and second, an invigoration of constitutional protections for "discrete and insular minorities" along with free speech.[57] The latter is said to ensure the democratic legitimacy of the former. That is, judicial deference to the outcomes of democratic processes requires robust debate, with ample protection for minority interests, as state policy is formulated and enforced.[58]

However sensible the new arrangement appears in hindsight, however, few contemporaries understood judicial review as susceptible to decoupling in this way. On the contrary, most critics, as well as conservative opponents of the Court-packing plan, assumed that judicial review came as a package, and that in the absence of constitutional amendment, expansion of the First and Fourteenth Amendments to protect expressive freedom would buttress the Court's economic due process doctrine as well. That was a trade-off few were willing to make. Accordingly, many New Dealers were willing to forgo judicial enforcement of the Bill of Rights, and some actively resisted it. They insisted that the stewardship of personal liberties belonged in the political branches. Any other path, they assumed, would facilitate the judicial dismantling of the New Deal economic program.

As events unfolded, the judiciary's anti-regulatory constitutionalism evolved along less predictable lines. The Supreme Court definitively abandoned its aggressive defense of property and economic liberty. And yet, industry rapidly assimilated free speech as a second-best alternative to *Lochner*-era economic rights. By 1940, the First Amendment would stand in for substantive due process as a shield against government regulation of industry, a process I explore elsewhere. Labor's rights to picket and boycott would largely be written out of the First Amendment, even while the rights of corporations to

[57] See, eg, Kramer, 122; Bruce Ackerman, *We the People* (Harvard 1991), 105-30; Friedman, The History of the Counter-Majoritarian Difficulty, Part Four: Law's Politics, 148 U Pa L Rev 971, 974 (2000); Jack Balkin, "The Footnote," 83 Nw U L Rev 275 (1989); Richard Epstein, *How Progressives Rewrote the Constitution* (Cato Institute 2006); G. Edward White, *The Constitution and the New Deal* (Harvard 2000). The New Deal ideological consensus is developed in Laura Weinrib, *The Taming of Free Speech* (book manuscript, on file with author). The expansion of personal rights was associated with the "incorporation" of the First Amendment into the Fourteenth Amendment, which extended the protections of the former to incursions by state and local governments. Over the ensuing decades, many of the remaining provisions of the Bill of Rights would be incorporated as well.

[58] See Mark A. Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* (California 1991).

circularize their employees and to influence political elections were written in.[59]

In 1937, however, the disaggregation of personal and property rights still harbored radical potential—and an account of civil liberties that is true to historical circumstances has to evaluate civil liberties claims as they were framed, not as they have been remembered. Such an approach necessitates a reassessment of the line between the two halves of the New Deal settlement. In the late 1930s, the Court's vigorous enforcement of "preferred freedoms" and its newfound deference toward labor and economic legislation were of a single civil liberties piece. Both advanced that crucial segment where the various civil liberties visions intersected: the protection of workers' rights to organize, bargain collectively, and strike.

Of the many institutions that construed and enforced civil liberties during the New Deal, the Supreme Court is undoubtedly the most familiar. Constitutional law scholars have painstakingly traced the Court's evolving understanding of expressive freedom between the World Wars: its flagrant dismissal of the Holmes and Brandeis dissents; its tepid incorporation of the First Amendment into the Fourteenth beginning with *Gitlow v. New York*; its rejection of prior restraint in *Near v. Minnesota*; its bold extension of First Amendment protection to freedom of assembly and religious proselytizing in *DeJonge v. Oregon* and *Lovell v. City of Griffin*.[60]

Sometimes, accounts of the Supreme Court's early First Amendment jurisprudence observe that the interwar cases disproportionately involved labor speech. They assume, however, that the Court's inquiry pertained only to the freedom of radicals and revolutionaries to disseminate their subversive views. In short, the constitutional law canon has fallen victim to winners' history. That is, it has been distorted by the near total dominance in the postwar era of a liberal vision of civil liberties premised on judicially enforceable constitutional rights. Given the wide circulation and high salience of alternative understandings of civil liberties during the New Deal, it is unsurprising that the liberal conception was not the only one to reach the Supreme Court.

Consequently, this section starts not with the well-worn First Amendment cases, but rather their Commerce Clause and freedom of contract counterparts. Two features of the "Constitutional Revolution" are often elided in discussion of the best known cases. First, insofar as the Wagner Act advanced the rights of labor, *Jones and Laughlin Steel* was not a complement to the Supreme Court's civil liberties decisions; it was itself a civil liberties decision.[61] To be sure, the Supreme Court upheld the NLRA as a valid exercise of the Commerce Clause, not a constitutional mandate. In other words, it did not justify the statute as a legitimate means of enforcing the underlying constitutional rights of

[59] Notably, the First Amendment has recently been used to undermine union security agreements, particularly in the public sector. On the inconsistent treatment of corporate speech and labor unions under the First Amendment, see Catherine L. Fisk and Erwin Chemerinsky, *Political Speech and Association Rights After* Knox v. SEIU, Local 1000, 98 Cornell L Rev 1023 (2013); Benjamin I. Sachs, Unions, *Corporations, and Political Opt-Out Rights After Citizens United*, 112 Colum L Rev 800 (2012).

[60] Gitlow v New York, 268 US 652 (1925); Near v Minnesota, 283 US 697 (1931); DeJonge v Oregon, 299 US 353 (1937); Lovell v City of Griffin, 303 US 444 (1938).

[61] *NLRB v Jones & Laughlin Steel Corporation*, 301 US 1 (1937*); NLRB v Fruehauf Trailer Company*, 301 US 49 (1937); *NLRB v Friedman-Harry Marks Clothing Company*, 301 US 58 (1937).

employees to organize, whether under the Thirteenth Amendment (an argument advanced by Andrew Furuseth and other conservative trade unionists) or the First.[62] It does not follow, however, that the justices were blind to the labor interventionist vision of civil liberties that motivated the NLRB. Given how dominant that understanding was in public rhetoric and political debate, it would have been hard to miss.[63]

Historical work suggests that the NLRB was reluctant to frame its legal claims in terms of constitutional rights for fear that the Court would cabin them.[64] Rightly or wrongly, the courts were understood to hold an interpretive monopoly in the domain of constitutional rights, and labor advocates were all too aware of their past biases. New Deal lawmakers believed the Wagner Act vindicated substantive rights—even constitutional rights—and they loudly proclaimed as much outside the courtroom.[65] Their legal arguments, however, emphasized neutral principles and congressional prerogatives, in a poignant parallel to the debates over free speech. In light of this strategic approach, it is striking that the labor interventionist vision of civil liberties found its way into the majority opinion in *Jones and Laughlin Steel*, even if the Court did not rely on it.[66] Notwithstanding the NLRB's cautious approach, Hughes described "the right of employees to self-organization" as a "fundamental right."[67]

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[62] Pope, "Thirteenth Amendment"; William E. Forbath, *The New Deal Constitution in Exile*, 51 *Duke Law Journal* 165 (2001).

[63] William Forbath has extensively documented Wagner and Roosevelt's promotion of "social citizenship." Forbath, "Constitution in Exile"; Forbath, *Shaping of the American Labor Movement*.

[64] Forbath, "Constitution in Exile," 182 ("In public political discourse, New Dealers cast the changes they sought as fundamental rights reinvigorating the Constitution's promise of equal citizenship by reinterpreting it. Yet, as a matter of statutory drafting and litigation strategy, they consistently relied on congressional power clauses, not on rights-affirming clauses of the Constitution. The New Deal Constitution took this odd and, from today's perspective, lamentable form not for lack of constitutional commitment, but because of a specific conception of the rights at issue and the appropriate allocation of interpretive and enforcement authority regarding them, combined with a strategic concern about judicial interpretation and enforcement.")

[65] Ibid., 176.

[66] Pope, "Thirteenth Amendment," argues that the Court adopted a narrow, Commerce Clause approach because it wanted to empower administrators rather than the working class.

[67] Jones & Laughlin Steel at 33. Justices Hughes's surprising opinion merits lengthy quotation: "In its present application, the [NLRA] goes no further than to safeguard 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. That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority. Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that, if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer. We reiterated these views when we had under consideration the Railway Labor Act of 1926. Fully recognizing the legality of collective action on the part of employees in order to safeguard their proper interests, we said that Congress was not required to ignore this right, but could safeguard it. Congress could seek to make appropriate collective action of employees an instrument of peace, rather than of strife. We said that such collective action would be a

Of course, the NLRA was designed to eliminate *employer* interference with labor organizing. It was not directed at state suppression of the right to picket or strike, and justifying it on First Amendment grounds would have required a revolutionary conception of state action and the scope of the Bill of Rights.[68] Such an approach was not unthinkable, but New Deal officials and NLRB brief-writers had good reason to doubt it would succeed. In other contexts, however, the federal courts had ample opportunity to evaluate labor activity in constitutional terms. In cases involving interference with strikes and pickets by state or local officials, sometimes as a direct result of state legislation or city ordinances, they faced the question whether labor activity was constitutionally protected head on.

Thus, the second important corrective to the conventional account of the Constitutional Revolution stems from the observation that labor cases and First Amendment cases often overlapped in unfamiliar ways. For example, Justice Brandeis's 1937 decision in *Senn v. Tile Layers Protective Union* is well known by labor scholars for upholding a state statute authorizing labor picketing and withholding injunctive relief. The ACLU filed an amicus brief in the case, but it nowhere mentioned the First Amendment, instead invoking the "right to organize" to buttress the legitimacy of the labor bill it had helped to secure.[69] Notwithstanding the organization's framing of the issues, Justice Brandeis's opinion presumed that "members of a union might … make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."[70]

Indeed, the foundational labor and speech cases often involved the same parties, the same lawyers, and the same underlying activity. Take *Associated Press v. NLRB*, decided the same day as *Jones and Laughlin Steel*.[71] In a world divided between newly deferential economic review and preferred personal freedoms, the case falls squarely on the labor side of the line. After all, it was among the five foundational cases upholding the constitutionality of the Wagner Act. The Supreme Court concluded that the Associated Press was involved in interstate commerce and therefore validly within the reach of the statute. In a surprising twist, the AP had also asserted a First Amendment claim premised on the conservative civil liberties vision ("Freedom of expression," it

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mockery if representation were made futile by interference with freedom of choice. Hence, the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, 'instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both.'"

[68] For this reason, the Thirteenth Amendment appeared to some contemporaries to be a stronger alternative. Pope, "Thirteenth Amendment."

[69] Senn v. Tile Layers Protection Union, Brief on Behalf of the ACLU and International Juridical Association, at 17-18. The brief explained: "The complaint which has been heard so continuously in legislative halls, and to which so-called anti-injunction legislation was a response, stems from the basic contention by working men that recognition of labor's abstract right to organize necessarily implies recognition and sanction of labor's concrete right to use, among other economic measures, the appeal for public support in its controversies with employers."

[70] 301 U.S. 468, 478.

[71] Associated Press v. NLRB, 301 U.S. 103 (1937). On AP v. NLRB, see Jeremy Kessler, "The Civil Libertarian Conditions of Conscription" (draft); Sam Lebovic, "The Failure of New Deal Press Reform" (draft).

concluded, "is as precious as either due process or the equal protection of law"). Citing recent First Amendment victories for radical defendants, among other cases,[72] it argued that the compulsory employment of unionized workers would undermine its control of editorial content. "Freedom of the press and freedom of speech, as guaranteed by the First Amendment, means more than freedom from censorship by government," the AP's brief argued, albeit unsuccessfully.[73] "[I]t means that freedom of expression must be jealously protected from any form of governmental control or influence."

In another context, those words might have been warmly endorsed by the ACLU—but in *Associated Press v. NLRB*, they encountered fierce resistance. Indeed, the attorney for the American Newspaper Guild was none other than ACLU co-counsel Morris Ernst. In an amicus brief for the Guild, he squarely rejected the AP's reasoning. The First Amendment, he argued, did not license the press to discriminate against unionized employees. On the contrary, non-enforcement of editors' organizing rights posed the graver threat to the First Amendment. "Non-action of a governmental agency may be far more destructive of a fundamental guarantee than positive legislation," Ernst explained. That Congress could not abridge the freedom of the press did not preclude it from combating "an evil which threatens of itself to nullify that freedom." Labor unrest was an impediment to the free flow of information and liberty of thought; the key to a free press was a strong union.[74]

Notably, Ernst also served as counsel in a seminal First Amendment case, *Hague v. CIO*. The case stemmed from the suppression of CIO organizing activities in Jersey City, across the Hudson River from New York. By the time it was decided, the Supreme Court's hands-off approach to economic legislation was firmly entrenched, and the NLRA was secure against judicial invalidation. The trouble in Jersey City was not recalcitrant employers, though they played a role. Rather, the principal obstacle to organizing in Jersey City was the town's powerful mayor, Frank Hague.

Boss Hague, as he was known to his political foes, was determined to keep the CIO out of Jersey City. Facing a fiscal crisis owing as much to mismanagement as the Great Depression, he had launched a campaign to attract New York businesses to Jersey City by keeping unions at bay. Hague's police force harassed, beat, and arrested agitators and

[72] *E.g.,* Stromberg v. California, 283 U.S. 359 (1931); De Jonge v. Oregon, 299 U.S. 353 (1937).

[73] In a dissenting opinion, the conservative justices embraced the First Amendment argument. Justice Sutherland wrote: "No one can read the long history which records the stern and often bloody struggles by which these cardinal rights were secured, without realizing how necessary it is to preserve them against any infringement, however slight." He continued, more dramatically: "Do the people of this land—in the providence of God, favored, as they sometimes boast, above all others in the plenitude of their liberties—desire to preserve those so carefully protected by the First Amendment?...If so, let them withstand all beginnings of encroachment. For the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time." Associated Press at 135, 141 (Justice Sutherland, dissenting).

[74] Ernst Brief, 26-27. As in Jones and Laughlin Steel, the NLRB characterized the right to organize as a "recognized and essential liberty." Brief for NLRB, 93. Justice Sutherland, by contrast, squarely embraced the conservative civil liberties view. He wrote: "We may as well deny at once the right of the press freely to adopt a policy and pursue it, as to concede that right and deny the liberty to exercise an uncensored judgment in respect of the employment and discharge of the agents through whom the policy is to be effectuated." 657-58.

shut down all picketing, meetings, and leafleting by organized labor—and by the ACLU observers who endeavored to defend them. When organizers began provoking arrests in order to challenge local ordinances and police practices in the courts, Hague simply had them deported across city lines.

Hague, then, involved civil liberties violations in recognizable guise. As Jersey City officials, Hague and his henchmen were unmistakable state actors, and the Supreme Court had clearly indicated that they were within First Amendment reach. In a 1939 decision, the Court upheld the CIO's right to picket and hold meeting in Jersey City's public spaces, subject to reasonable limitations to maintain order in the public interest. In this, they implicitly validated the lower courts' implementation of the progressive civil liberties vision. The Court of Appeals had insisted that the city was obligated to open space for public discussion, and if private violence threatened, it was the function of the police to "preserve order while they speak."[75] Mere non-interference would not suffice.

The various opinions in *Hague* (none commanded a majority) turned on a highly technical jurisdictional issue. It is notable, however, that Justice Roberts's opinion, which uncharacteristically rested on the Privileges and Immunities Clause of the Fourteenth Amendment, deemed the CIO's activity in Jersey City protected because the rights of national citizenship encompassed discussion of the NLRA.

In the face of international totalitarianism, the ACLU secured broad-based support for its legal and publicity campaigns in *Hague*. It even managed to solicit an amicus brief from the American Bar Association's newly formed Committee on the Bill of Rights—a development that marked the ascent of the conservative vision of civil liberties in the wake of the Court-packing plan. The wide consensus gratified the ACLU, but the CIO leadership was more ambivalent. On the one hand, the *Hague* decision was an unmistakable "go signal" (as California's state bar journal put it) for labor organizing in Jersey City and elsewhere.[76] On the other, public enthusiasm for free speech was supplanting support for labor activity per se. The *Yale Law Journal* reflected that "when practically every shade of public opinion became outraged at what appeared to be a blatant denial of fundamental rights, emphasis shifted from specific attempts by one group at raising abnormally low Jersey City working conditions to the more basic issue of whether constitutional guaranties of free speech, free press, and free assembly apply to union sympathizers as well as to other citizens." In other words, civil liberties claims were shifting markedly away from labor interventionist demands.

The transition took some time. As late as 1940, the Supreme Court handed down two monumental decisions on labor and free speech that also advanced labor interventionist goals. In *Thornhill v. Alabama*, the Court (invoking footnote four of *Carolene Products*) upheld the right to picket as an expression of ideas.[77] The decision established that "the dissemination of information concerning the facts of a labor dispute"

[75] Hague, 101 F2d at 784.

[76] Harry Graham Balter, *Recent Civil Rights Decision Discussion*, California Bar Journal 14 (June 1939): 200–04.

[77] *Thornhill v Alabama*, 310 US 88, 95 (1940). Ibid., 102–03.

was within the realm of "free discussion" protected by the Constitution.[78] As in *Senn v. Tile Layers Protection Union*, the Court stressed the public communicative function of picketing. Even if its effect was to induce action in others, picketing was speech.[79] The court observed: "Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." In *Thornhill*'s lesser known companion case, *Carlson v. California*, the Court declared that "publicizing the facts of a labor dispute in a peaceful way" were likewise entitled to constitutional protection against abridgement by a state.[80] Here was the vindication of longstanding radical and labor interventionist goals, cloaked in the language of expressive freedom.

Thornhill and *Carlson* were argued in the Supreme Court by, respectively, Joseph Padway, AFL general counsel and a member of the ABA's Committee on the Bill of Rights, and Lee Pressman, CIO general counsel.[81] Padway, who had argued *Senn*, had good reason to be optimistic about vindicating labor's rights in the judiciary. Pressman had long expressed skepticism toward the courts, but he had come to believe that the First Amendment might offer a counterbalance to its protection of property rights. In his brief, he cited *Hague* for the proposition that "danger to the state arises not from the picket line but from the vigilantes who would suppress the picket line by force and violence."[82] Despite his general antipathy toward a "legal approach to labor action," he saw great potential in "the growing realization and acceptance of the fact that labor action is nothing more or less than the exercise of constitutional rights" to freedom of speech and assembly.[83]

The constitutional status of labor's most effective methods—including mass picketing and the secondary boycott—was, however, far from secure.[84] A rapid contraction of First Amendment protection for labor activity followed on *Thornhill and Carlson*'s heels. In its 1941 decision in *Milk Wagon Drivers Union v. Meadowmoor Dairies*, the Supreme Court upheld a state-court injunction against picketing by a union that had engaged in violence and destruction of property, explaining that "utterance in a contest of violence can lose its significance as an appeal to reason and become part of an instrument of force."[85] Under such circumstances even peaceful expression could be constitutionally curtailed, Justice Frankfurter explained for the Court. To the extent that labor doubted that judicial review would reliably serve its interests, its fears were well

[78] Ibid., 102.
[79] Ibid., 104.
[80] Carlson v. California, 310 U.S. 106. 106 (1941).
[81] Lee Pressman to Arthur Garfield Hays, 10 February 1939, reel 169, vol. 2080.
[82] CIO brief.
[83] Quoted in Gilbert J. Gall, *Pursuing Justice: Lee Pressman, the New Deal, and the CIO* (Albany: State University of New York Press, 1990), 108. He was optimistic that the "simple protection of these constitutional rights will solve many of the complicated legal problems that are involved in the exercise of labor's right to picket and to boycott." Gall traces the use of the civil rights statutes by the DOJ's Civil Liberties Unit to Pressman's urging. Ibid., 109.
[84] See James Gray Pope, book manuscript, chapter 12 (on file with author).
[85] *Milk Wagon Drivers Union v Meadowmoor Dairies, Inc*., 312 US 287 (1941).

founded. Indeed, from the perspective of the ACLU's foundational goals, the modern First Amendment turned out to be an abject failure. Radical propaganda retained its protected status, but the right to organize quickly fell out of the realm of ideas.

The Congressional Enforcement of Civil Liberties

In the years between passage of the Wagner Act and its validation by the Supreme Court in *Jones and Laughlin Steel*, employers flagrantly resisted compliance with the new legislation. Indeed, they continued to engage in blatant anti-labor practices, including industrial espionage, strikebreaking, and the use of munitions and private police forces.[86] Although these methods were clear violations of workers' new statutory rights, employers' lawyers advised that the Wagner Act was unconstitutional and would shortly be declared so by the Supreme Court. True to form, employers mobilized around a legal campaign, supported most visibly by the American Liberty League's National Lawyers Committee, a collection of corporate lawyers who believed that the Wagner Act was incompatible with *Lochner*-era values. The threat of an adverse decision was so menacing that the NLRB devoted much of its energy during 1935 and 1936 to formulating its own legal strategy.

Congress did not leave the beleaguered NLRB without recourse. In the spring of 1936—prompted by the suppression of the Southern Tenant Farmers Union, an organization of tenant farmers and sharecroppers in northeastern Arkansas, and by the ineffectuality of the NLRB—Senator Robert La Follette, Jr. (whose famous father had begun his career as a law partner of the Free Speech League's Gilbert Roe), submitted a Senate resolution authorizing the investigation of "violations of the rights of free speech and assembly and undue interference with the right of labor to organize and bargain collectively."[87] La Follette initially doubted that the Senate would act on his proposal, but after effective preliminary hearings, the resolution was approved in June with significant public support.[88] He went on to chair the subcommittee, which was organized within the Senate's Committee on Education and Labor.[89]

Known as the La Follette Civil Liberties Committee, the new body was an early and powerful voice for the labor interventionist vision of civil liberties. As its title suggests, the committee regarded the rights of labor, whether statutory or constitutional, as core

[86] Jerold S. Auerbach, *The La Follette Committee: Labor and Civil Liberties in the New Deal*, Journal of American History 51 (Dec. 1964): 443.

[87] See generally Jerold S. Auerbach, *Labor and Liberty Labor and Liberty: The La Follette Committee and the New Deal* (Bobbs-Merrill 1966).

[88] Gardner Jackson to Roger Baldwin, 9 April 1936, Jackson Papers, box 42, folder La Follette Civil Liberties. See also Robert Wohlforth to Senator Elbert D. Thomas, 6 October 1936, in Violations of Free Speech and Rights of Labor, General Data and Information, Sen 78A-F9, Record Group 46 (Records of the United States Senate), National Archives and Records Administration, Washington, D.C. (hereafter La Follette Committee Papers), 10.25, box 4, folder October 1936 (enclosing nine editorials from New York and Washington papers and commenting that "nearly all of the editorials, with few exceptions, are favorable").

[89] The committee also included Elbert Thomas, a Utah Democrat, and Louis Murphy, who died soon after his appointment.

civil liberties issues. It set out to investigate the activities of detective agencies, employer associations, corporations, and individual employers "in so far as these activities result in interference with the rights of labor such as the formation of outside unions, collective bargaining, rights of assemblage and other liberties guaranteed by the Constitution."[90] No one bothered to explain how employers, as private actors, might infringe upon constitutional rights.

Prominent members of the ACLU were instrumental in engineering the new measure, which they had first proposed at the Conference on Civil Liberties under the New Deal. Roger Baldwin, newly reconciled to state involvement in labor relations,[91] was convinced that "the worst evil which should be investigated is the mounting rise of force and violence by employers against the organization of labor," which threatened "rights presumably guaranteed by federal legislation."[92] He thought a successful inquiry would justify a full slate of federal legislation protecting the rights of labor against public and private curtailment.[93] At first, the ACLU urged the committee to investigate government abuses in other contexts as well.[94] It soon became evident, however, that the La Follette Committee would confine its inquiry to labor relations. At the preliminary hearings, NLRB chair J. Warren Madden was the first witness. He tellingly declared, "The right of workmen to organize themselves into unions has become an important civil liberty."[95] The connection between the two bodies was not merely ideological; much of the La Follette Committee's staff was borrowed from the NLRB.

The La Follette Committee aimed to eliminate all interference with workers' right to organize, whether perpetrated by local law enforcement or by employers themselves. Its engineers, however, were seasoned and savvy politicians. They sought to generate support by invoking the specter of totalitarianism—"We are unquestionably the most powerful agency against Fascism in this country," one staff member wrote—and the corresponding collapse of American democracy.[96] In his testimony at the hearings, NLRB member Edwin Smith recited the civil liberties movement's well-worn argument

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[90] Felix Frazer (Investigator) to James A. Kinkead, 9 October 1936, La Follette Committee Papers, 10.25, box 4, folder October 1936.

[91] It bears emphasis that Communists, too, abandoned their resistance to the NLRA in 1935. At the height of the so-called Popular Front, many CIO organizers identified with or were sympathetic toward the Communist Party.

[92] Roger Baldwin to Robert La Follette, 16 April 1936, ACLU Papers, reel 131, vol. 887.

[93] Ibid. In particular, he recommended legislation involving an amendment to the Civil Rights statute; the federal licensing of detective agencies engaged in interstate business; the relation of federal aid to state troops used in strikes; the importation of strike-breakers; and the relation of the federal government to local interference with the rights of the unemployed.

[94] Morris Ernst to Roger Baldwin, 9 April 1936, ACLU Papers, reel 131, vol. 887. At the preliminary hearings, Arthur Garfield Hays and Morris Ernst were prepared to testify regarding postal and radio censorship, sedition and criminal syndicalism laws, and alien laws, as well as the operation of the federal civil rights statute, the use of state troops against strikers in relation to the federal government's aid to the national guard, and other issues. Memorandum Re: La Follette Investigation, 20 April 1936, ACLU Papers, reel 131, vol. 887. La Follette declined their offer. Robert La Follette to Roger Baldwin, 22 April 1936, ACLU Papers, reel 131, vol. 887.

[95] Quoted in Auerbach, *Labor and Liberty*, 65.

[96] Felix Frazer to Byron Scott, 3 February 1937, La Follette Committee Papers, 10.25, box 5, folder February 1937.

that unchecked abuses would lead to violent revolt. He denounced "entrenched interests" and "alleged patriotic organizations" for arguing that repression was the only means of saving America from the radicals. "You cannot suppress freedom of expression," he cautioned, "without rapidly undermining democracy itself."[97]

La Follette and his staff were policymakers, not scholars or theorists. There was much slippage in their characterization of civil liberties. Still, some salient features emerge from their public defenses of the committee and from their private communications. First, the true goal of the committee was something more than expressive freedom or individual rights. As Edwin Smith put it, "civil liberties are not abstractions which hover above the passions of contending groups and can be successfully brought to earth to promote the general welfare."[98] Robert La Follette was adamant that "the right of workers to speak freely and assemble peacefully is immediate and practical, a right which translates itself into the concrete terms of job security, fair wages and decent living conditions."[99] Progressives and conservatives increasingly were casting civil liberties in neutral terms—as a commitment to deliberative openness rather than particular values. The La Follette Committee, by contrast, was most focused on economic security.

Second, and relatedly, threats to civil liberties did not emanate exclusively, or even primarily, from the state. The Committee was determined to introduce new, affirmative protections for labor's organizing efforts, many of which were directed against private action. These rights would be established by statute and enforceable through administrative actors—namely, the NLRB—as well as the state and federal courts.

The La Follette Committee did not clarify the relationship between its operations and the Constitution. In common usage, civil liberties were increasingly associated with the Bill of Rights, and defenses of the committee's work often capitalized on the cachet of the American constitutional tradition. Certainly the La Follette Committee considered its recommendations to be consistent with the Constitution, even important extensions of its underlying goals. To justify incursions on employers' property rights and managerial discretion as constitutional *mandates*, however, would require a revision of constitutional thought more radical than the so-called Constitutional Revolution.

A changing political climate made any such claim untenable before it could be tested. In spring 1937, the same season in which the Supreme Court upheld the constitutionality of the NLRA, the tide began to turn against labor's demands for state support. Following a major CIO organizing effort involving a wave of powerful sit-down

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[97] Statement by Edwin S. Smith before Hearings of Subcommittee on Senate Resolution 266, 23 April 1936, ACLU Papers, reel 131, vol. 887. The committee was careful to maintain an air of impartiality to maintain its credibility. See, *e.g.*, Robert Wohlforth to Harold Cranefield, 9 March 1937, La Follette Committee Papers, 10.25, box 5, folder March 1937 ("Under no condition should you or any members of this Committee try to address any union meetings. However well intentioned this may be, it is providing ammunition for those opposed to the Committee to give us a terrific smear.").

[98] Edwin S. Smith, Civil Rights for Labor, before Washington, D.C. branch of ACLU, January 1938, ACLU Papers, reel 156, vol. 1078.

[99] Robert M. La Follette, Jr., *Management, Too, Must be Responsible*, National Lawyers Guild Quarterly 1 (December 1937): 4.

strikes, employers' groups organized to mobilize public opinion against worker lawlessness and to pressure local police and administrators to enforce the law. Some specifically invoked the language of "civil rights."[100] Increasingly, public and political figures expressed concern at unions' aggressive attitude, and momentum seeped from the congressional labor agenda. The economy had contracted sharply as a result of Roosevelt's fiscal policy, fueling frustration and desperation by industry and workers alike.[101]

The Wagner Act, newly secured by the Supreme Court from constitutional attack, was suddenly open to legislative challenge. Republican opponents of the New Deal reached out to Southern Democrats, who feared that active intervention in labor disputes would open the door to federal interference with Jim Crow. To make matters worse, the AFL attacked the NLRB for favoring the CIO and undermining labor voluntarism. New Deal Democrats responded by citing the violent and unlawful suppression of labor by employers, relying heavily on the findings of the La Follette Civil Liberties Committee.

By the summer of 1938, however, neither Congress nor the public considered the Committee to be a credible source. The staff was regularly fielding demands that it investigate labor unions in addition to employers. One outraged citizen, voicing widely shared anti-union sentiments, insisted that "people read the News Papers and know that if strikers did not attack men hired to protect plants, there would be no fighting."[102] Another, who claimed to have known the elder Senator La Follette as well as Samuel Gompers, lamented the nation's decline into "anarchy" and urged the Committee to present a "true picture of all sides."[103] In a move that captures the growing incompatibility between the labor interventionist vision of civil liberties and its alternatives, one correspondent suggested that the committee investigate President Roosevelt for his court-packing plan.[104]

In March 1939, the work of the La Follette Civil Liberties Committee drew to a close. Its extensive findings over years of congressional hearings culminated in a bill "to eliminate certain oppressive labor practices affecting interstate and foreign commerce." Had it passed, it would have made anti-labor espionage, munitions, private police, and strikebreaking punishable by fine or imprisonment. William Green and John L. Lewis both supported the bill.[105] So, "heartily," did Attorney General Murphy, who believed

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[100] "Partial Report of Proceedings, Meeting, Organization Committee, National Committee of One Thousand on Civil Rights," La Follette Committee Papers, 50.25, box 86, folder March 1937. Archibald Stevenson, who had been intimately familiar with the ACLU ever since his Lusk Committee days, helped organize the National Committee of One Thousand on Civil Rights to combat sit-down strikes.

[101] On "Roosevelt's Depression," see Richard Polenberg, *Reorganizing Roosevelt's Government: The Controversy over Executive Reorganization, 1936–1939* (Harvard 1966), 149.

[102] J.C. Pinkney to Robert La Follette, 2 February 1937, La Follette Committee Papers, 50.25, box 85.

[103] George Porter to Robert La Follette, Jr., 5 February 1937, La Follette Committee Papers, 50.25, box 85.

[104] Fidler to Robert La Follette, Jr., 25 February 1937, La Follette Committee Papers, 50.25, box 85.

[105] Debate on the bill centered on the supposed Communist threat to American industry. Amendments proposed by North Carolina Senator Robert R. Reynolds prohibited all companies from hiring aliens in excess of 10 percent of their workforces or from employing "any Communist or member of any Nazi Bund organization." The Senate bill, thus amended, passed by a vote of 47 to 20. The House version was buried

"that the Federal Government has a definite role to play in the preservation of civil liberties."[106] By 1939, however, a sweeping congressional endorsement of the labor interventionist vision of civil liberties was bound to fail. Instead, the La Follette Committee yielded the spotlight to Martin Dies, Jr.'s House Committee on Un-American Activity. Among the many insinuations made by that Committee was that the La Follette Committee's civil liberties work was corrupted by Communist influence.[107]

The Administrative Enforcement of Civil Liberties

Consistent with the La Follette Committee's labor interventionist vision of civil liberties, the early NLRB considered the rights of labor to be independent rights deserving of state protection. NLRB member Edwin Smith put the point bluntly. In his view, organized labor was the only force capable of preserving democracy. To survive, he insisted, it must "receive from the government firm protection against those who have the power and will to destroy it."[108]

In its enforcement of the Wagner Act, the NLRB sought to implement this ideal. The early operations of the NLRB have been documented in tremendous depth and detail. On the whole, its members were unexpectedly aggressive in advancing labor's interests. Whether state support energized organized labor or instead de-radicalized it is a much debated question. So too is the effect of the NLRB's preference for CIO-style industrial unionism over the established craft model of the AFL. These questions have important implications with respect to the effects of institutional differences on civil liberties enforcement, and I will briefly address them in Part III. For now, I want to stress that the NLRB often spoke in terms of civil liberties when it enforced the NLRA.

For much of the 1930s, civil liberties advocates within and outside the NLRB assumed they were defending the same ideals. Labor interventionists at the NLRB proclaimed their commitment to protecting the civil liberties of workers. Proponents of the progressive civil liberties vision celebrated the agency's service on behalf of labor but regarded its operations as economic regulation outside the sweep of civil liberties concerns. In early 1939, however, the two visions clashed head on. Building on mounting hostility toward CIO organizing tactics and perceived partisanship of the NLRB, a congressional coalition of Republicans and Southern Democrats introduced a host of amendments designed to curb the Board's authority. Concurrently, Massachusetts

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in committee. Auerbach, "La Follette Committee," 454.

[106] Statement of Attorney General Murphy before the Senate Committee of Education and Labor, re: Bill S. 1970, Attorney General Papers, box 6, entry 132.

[107] The hearings of the Special Committee on Un-American Activities were convened on August 12, 1938 by Representative Martin Dies of Texas. On the relationship between the Dies Committee and civil liberties, see Auerbach, "La Follette Committee," *Journal of American History*, 450 ("The Dies Committee, more than any single institution, abetted the charge that the La Follette Committee's origins, composition, and direction evidenced affinity for communism.").

[108] Address by Edwin S. Smith before the Carolina Political Union, 30 March 1938, quoted in "Memorandum in Support of Proposal to Confine the National Labor Relations Board of the Functions of Accusing and Prosecuting and to Transfer its Judicial Functions to a Separate Administrative Body Similar to the Board of Tax Appeals," 15, Ford Legal Papers, box 3, vol. 3.

Democrat David I. Walsh proposed a more moderate bill, which was backed by the AFL and commanded considerable support.

Two provisions in the Walsh bill were particularly divisive among civil liberties advocates. The first provided for more robust judicial review of NLRB decisions. Although progressive civil libertarians opposed the measure because it singled out the NLRB for special treatment, they were beginning to regard administrative agencies as incipient civil liberties threats. In other words, the progressive civil liberties vision was in transition. One of its longstanding pillars—confidence in unfettered administrative regulation of economic relations, if not free speech—had begun to crumble. In response to the bill, ACLU attorney Arthur Garfield Hays called for enhanced procedural protections in "trial by commission" and convened a committee to study quasi-judicial boards.[109] Hays thought the commissions were censoring business, "which [was] just as bad as a censorship over literature."

Another of Senator Walsh's suggestions was even more pressing: a provision guaranteeing an employer's right to free speech in the context of union organizing efforts. During the late 1930s, the NLRB had aggressively policed the employer distribution of anti-union materials on the theory that it coerced employees in the exercise of their right to organize under the NLRA. In response, the ACLU reluctantly defended the right of such notorious anti-labor employers as Henry Ford to circulate anti-union propaganda—a position that polarized the ACLU and coincided with the expulsion or resignation of its board's Communists and fellow travelers.[110]

Testimony by J. Warren Madden before the Senate Committee on Education and Labor captures the NLRB's understanding. Madden told the committee that an employer's accurate statement that the leaders of a union were Communists might dissuade an employee from joining and would therefore constitute coercion. "The fact that it is true," he insisted, "does not keep it from being coercive." Citing labor injunctions, he argued that "there is no privilege against being enjoined from telling the truth if you state it at such times or under such circumstances that you destroy somebody else's rights."[111] Madden was weighing employers' speech rights against the rights of workers to organize. Both were arguably grounded in the Constitution. For Madden, that the suppression of workers' rights stemmed from private coercion rather than state action was not dispositive. Building on the Realist insight that rights claims involve trade-offs, he argued that the state was best positioned to make the necessary calculations and intervene on behalf of the weaker party. If free speech was incompatible with economic justice, the former would have to give way.

From the progressive perspective, "Brother Madden['s]" reasoning threatened to

[109] Board Minutes, 30 January 1939, ACLU Papers, reel 189, vol. 2233; Arthur Garfield Hays to ACLU, 26 January 1939, ACLU Papers, reel 169, vol. 2080.

[110] See Weinrib, Liberal Compromise, Chapter 6.

[111] The question, he suggested, was one of parity. "If there were any constitutional doctrine that people could go about the world speaking the truth or speaking their opinions under any and all circumstances, and regardless of its destructive consequences, we of course would follow it. The courts do not follow any such doctrine when they are protecting property or when they are protecting employers against picketing and that kind of thing." Any other decision, he concluded, would amount to class discrimination. Ibid.

undercut a decade of civil liberties gains.[112] Indeed, labor activity had often been regulated for precisely the reasons Madden was endorsing; the Supreme Court had long denied First Amendment protection to labor picketing in light of its coercive effect. Despite "violent[] oppos[ition]" to the free speech amendment from longtime labor allies,[113] many progressives thought some sort of legislative reformulation was desirable.[114] The ACLU ultimately opposed the free speech amendment, along with the other amendments, as "either unnecessary or dangerous to the fundamental purpose of the act."[115] The organization did not, however, endorse the NLRB's view of employer speech. Instead, it argued that existing limitations on the Board's authority were sufficient—that the abridgement of employer speech was inconsistent with the NLRA as well as unconstitutional.[116]

In this, the progressive and conservative visions of civil liberties aligned. The demise of economic due process had made civil liberties all the more appealing: the dispute over employer speech demonstrated that the First Amendment might succeed where freedom of contract had failed. The ACLU's position on employer speech was warmly celebrated by the United States Chamber of Commerce and the ABA.

The Executive Enforcement of Civil Liberties

Enforcement of constitutional rights through the courts is often reduced to the practice of judicial review. During the New Deal, however, a strategy emerged for advancing those rights through litigation—one that entailed vindicating rather than invalidating government interests. Over the course of the 1930, the state began to pursue

[112] John Haynes Holmes to Roger Baldwin, 20 April 1939, ACLU Papers, reel 169, vol. 2080.

[113] Lee Pressman to Arthur Garfield Hays, 10 February 1939, reel 169, vol. 2080. CIO General Counsel Lee Pressman told Arthur Garfield Hays that the CIO was "violently opposed" to the amendment The CIO had explained its position in an earlier pamphlet (in which it implicitly compared the proposed curtailment of the Board's powers to Roosevelt's judiciary reorganization plan). The Committee For Industrial Organization, "Why the Wagner Act Should NOT Be Amended," October 1938, ACLU Papers, reel 156, vol. 1078 ("[It is] useless to pretend that constitutional rights of free speech are being invaded. There are many kinds of speech which are unlawful. . . . Society is entitled to impose such reasonable limitations upon freedom of speech and press as may be necessary to its own protection. It has always done so and always will.").

[114] The 1938 Annual Report had still celebrated the NLRA as "in substance a civil liberties document." ACLU, *Eternal Vigilance*, 25. John Haynes Holmes thought Madden's interpretation was sufficiently troubling to justify removal of Madden as chair or amendment of the NLRA. Even Arthur Garfield Hays thought the Ford case had demonstrated the necessity for an amendment like the one Walsh had proposed. Arthur Garfield Hays to ACLU, 14 February 1939, ACLU Papers, reel 169, vol. 2080 (arguing that the Ford case indicated that a free speech amendment was necessary). William Fennell also favored the free speech amendment. William Fennel to Osmond Fraenkel, 28 January 1939, ACLU Papers, reel 169, vol. 2080.

[115] ACLU Press Release, 24 April 1939, ACLU Papers, reel 176, vol. 2130; Statement on Proposed Amendments to the NLRA, adopted by the Board on 30 January 1939, ACLU Papers, reel 168, vol. 2080.

[116] The Board was not unwilling to adapt in the face of public concern, even if it regarded change as unwarranted. For example, in June the NLRB obviated a particularly popular amendment proposal by announcing that it had amended its rules to permit employers to petition the Board for an election in cases where two or more bona fide labor organizations were claiming a majority. NLRB Press Release, 21 June 1939, ACLU Papers, reel 169, vol. 2080.

civil liberties enforcement through its prosecutorial arm, by bringing transgressors to justice in the federal courts.

On January 3, 1939, Frank Murphy succeeded Homer Cummings as Attorney General of the United States. As mayor of Detroit from 1930 to 1933, Murphy had been a strong advocate for the unemployed. In 1937, he was elected governor of Michigan. Shortly after he took office, he refused to call in state troops to break a sit-down strike by the fledgling UAW. That decision was influential in the subsequent rise of the CIO. As Murphy explained the affair, workers in Michigan had been angry at the failure of employers to abide by the Wagner Act, as well as the prevalent use of industrial espionage to defeat unionization. In seizing control of industrial property, thousands of misguided but "honest citizens" had acted to "defend[] their own rights against what they believed to be the lawless refusal of their employers to recognize their unions." Murphy emphasized that he had never condoned sit-down strikes, and he had advised union representatives that they were illegal and imprudent. He nonetheless believed that in the face of widespread disobedience, it was necessary to "weed out the cause," not merely to "enforce the law."[117]

Murphy brought the same sensibilities to his duties as Attorney General. He was intimately familiar with the work of the La Follette Committee in his home state and elsewhere, and he was convinced that the abridgement of workers' "civil liberties" by employers and their government collaborators was a major source of class strife. But Murphy's commitment was not limited to workers' rights. He considered civil liberties to be essential to every part of life, "social, political, and economic." They extended to such far-ranging ideals as "the right of self-government, the right of every man to speak his thoughts freely, the opportunity to express his individual nature in his daily life and work, [and] the privilege of believing in the religion that his own conscience tells him is right." The American model of civil liberties represented a crucial compromise between governmental regulation, which was "necessary for an orderly society," and the unbounded freedom of nature. More basically, the rights to speak freely, to practice one's religion, to assemble peaceably and to petition government for the redress of grievances were essential to a functioning democracy. They applied with equal force to "the business man and the laborer."[118] Here, then, was the progressive vision of civil liberties, grafted onto a prosecutorial model of civil liberties enforcement.

From his first day in office, it was clear that Murphy would make civil liberties a priority. Shortly after his confirmation, his special assistant in charge of public relations helped him arrange a radio program on the protection of civil liberties by the Federal

[117] Statement of Honorable Frank Murphy, Attorney General of the United States, Before a Sub-Committee of the Committee on the Judiciary of the United States Senate, in National Archives and Records Administration, College Park, Md., Record Group 60, General Records of the United States Department of Justice, Records of the Special Executive Assistant to the Attorney General, 1933–40, Subject Files, 1933–1940 (hereafter Attorney General Papers), box 5, entry 132, folder Murphy (Attorney General—Items about Him).

[118] "Civil Liberties," radio address by Hon. Frank Murphy, National Radio Forum, 27 March 1939, Attorney General Papers, box 5, entry 132, folder Civil Liberties.

Government.[119] He told Roger Baldwin that the subject was "one of the things that interest[ed him] most keenly," and that the opportunity to pursue it was one of the "great satisfactions" of his service as Attorney General. Indeed, he was "anxious that the weight and influence of the Department of Justice should be a force for the preservation of the people's liberties."[120]

On February 3, one month after he was sworn in, Murphy's office made an announcement. Within the Criminal Division of the Department of Justice, a new entity had been established, to be known as the Civil Liberties Unit. Its principal function was to prosecute violations of the constitutional and statutory provisions "guaranteeing civil rights to individuals."[121] In particular, it would pursue cases of beatings and violence, denial of workers' rights under the NLRA, and deprivation of freedom of speech and assembly.[122] Murphy explained that in a democracy, the enforcement of law entailed the "aggressive protection of the fundamental rights inherent in a free people." The Civil Liberties Unit, consistent with the recommendations of the La Follette Committee,[123] would undertake "vigilant action" in ensuring that those rights were respected.[124] For the first time, it would throw the "full weight of the Department" behind the "blessings of liberty, the spirit of tolerance, and the fundamental principles of democracy." In Murphy's estimation, the creation of the Civil Liberties Unit was "one of the most significant happenings in American legal history."[125]

At the first nationwide gathering of U.S. Attorneys in Washington, D.C., Murphy enjoined federal prosecutors to wield their power responsibly—to enforce the civil rights statutes "not just for some of the people but for all of them," "no matter how humble."[126] Civil liberties, he told them, were more important than at any previous time in history. The Depression had brought with it "the usual demands for repression of minorities," and it was up to the federal government to stave off the rampant incursions.[127]

Murphy's plans for the Civil Liberties Unit were ambitious. Among other functions, it would alert local officials that the federal government would not tolerate arbitrary and abusive conduct, alone or in conjunction with private interests.[128] It would also raise

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[119] Gordon Dean, Memorandum for the Attorney General, 27 January 1939, Attorney General Papers, box 5, entry 132, folder Murphy (Attorney General—Items about Him) (suggesting Murphy speak with the director of America's Town Meeting of the Air); Gordon Dean, Memorandum for Miss Bumgarnder, 27 January 1939, Attorney General Papers, box 5, entry 132, folder Murphy (Attorney General—Items about Him) ("The Attorney General knows all about the Lawyers Guild and that it is the liberal national lawyers' group.").

[120] Frank Murphy to Roger Baldwin, 3 February 1939, ACLU Papers, reel 168, vol. 2070.

[121] Order No. 3204, Office of the Attorney General, 3 February 1939, Attorney General Papers, box 22, e132, folder Civil Liberties.

[122] "'Civil Rights' Unit Set Up By Murphy," *New York Times*, 4 February 1939.

[123] Ibid.

[124] Press Release, 3 February 1939, Attorney General Papers, box 22, entry 132, folder Civil Liberties.

[125] Frank Murphy to Franklin D. Roosevelt, 7 July 1939, Attorney General Papers, box 5, entry 132, folder Murphy: 6 Months Report.

[126] "Murphy Sworn in at the White House," *New York Times*, 3 January 1939.

[127] "Murphy Tells Aides To Guard Civil Rights," *Washington Post*, 20 April 1939.

[128] In 1940, Solicitor General Francis Biddle told the Junior Bar Conference that this deterrent effect was the most important function of the Civil Liberties Unit. "Civil Rights Protection," *Buffalo Daily Law*

awareness and influence public opinion. Murphy was adamant that the federal government could "take the initiative," but it could not "do the whole job." The problem was partly jurisdictional; some rights inhered in individuals as residents of the separate states, and they could not be vindicated by federal authorities. The threats to American freedom came not only from city ordinances and the arbitrary exercise of state power, but from mob murder, lynchings, and vigilante violence. More basically, however, "the great protector of civil liberty, the final source of its enforcement" was the "invincible power of public opinion."[129] The courts could provide a remedy for lawlessness, but they could not prevent its taking hold.

In the immediate term, the Civil Liberties Unit had a concrete program. It would study and evaluate (and eventually prosecute under) the potential constitutional and statutory provisions applicable to civil rights enforcement, including laws prohibiting kidnapping, peonage, and mail fraud.[130] The most important of the potential causes of action, at least for the time being, were under the Reconstruction era civil rights statutes, Title 18, Sections 51 and 52 of the criminal code.[131] The Department expected to make generous use of the statutes, though it recognized their limitations. Section 52 was applicable only to deprivations of civil liberties under color of State laws. It also suffered "from the malady of old age"; after many years of disuse, it was likely to face significant resistance. Section 51 was similarly limited in its usefulness. It was passed to rein in the Ku Klux Klan, "and by reason of that fact, together with its severe punishment, it [was] a somewhat difficult statute, for psychological reasons, to prosecute under." Moreover, although it permitted prosecution for violation of constitutional rights, few constitutional provisions could be construed to limit private action. Finally, both sections faced an additional obstacle, in that both criminalized conduct in violation of rights "secured by" the Constitution or federal statutes. Defendants were apt to argue that Section 51 applied only to rights "created," not "guaranteed," by the Constitution, and that the rights of free speech and assembly preexisted the federal government.[132] In light of these obstacles, the Civil Liberties Unit expected to make recommendations for "some modern legislation on civil rights."[133]

Journal, 14 September 1940.

[129] "Civil Liberties," radio address by Hon. Frank Murphy, National Radio Forum, 27 March 1939, Attorney General Papers, box 5, entry 132, folder Civil Liberties.

[130] Order No. 3204, Office of the Attorney General, 3 February 1939, Attorney General Papers, box 22, entry 132, folder Civil Liberties; "Memorandum for the Attorney General Re: Tentative Proposal for Attorney General's Conference on Civil Liberties," 23 February 1939, Attorney General Papers, box 22, entry 132, folder Civil Liberties. Frank Murphy and Senator Robert Wagner were also on the program. Program, National Conference on Civil Liberties in the Present Emergency, 13 October 1939, Jackson Papers, General Correspondence, cont. 3.

[131] Those provisions are now codified at 18 USC 241 and 242. The peonage laws would in fact prove more useful, in light of the state action requirements of Section 51 and 51. See Risa Lauren Goluboff, *The Lost Promise of Civil Rights* (Harvard 2007).

[132] Memorandum for Mr. Dean, Attorney General Papres, box 22, entry 132, folder Civil Liberties. On the origins and implications of this interpretation of "secured by" in the Civil Rights Acts of 1870 and 1871, see Lynda Dodd, "Constitutional Torts in the Forgotten Years" (forthcoming).

[133] Gordon Dean to Leigh Danenberg, 6 March 1939, Attorney General Papers, box 22, entry 132, folder Civil Liberties. For example, the Unit was considering recommending legislation that would allow

Within its first month of operation several hundred complaints were referred to the Civil Liberties Unit, including lynchings, interference with meetings, illegal police practices, deportations, and voting rights violations.[134] The Department also contemplated prosecutions under Section 51 for violations by employers of the Wagner Act.[135] That program seemingly received judicial sanction with the Supreme Court's decision in *Hague v. CIO*, which the Department regarded as a strong endorsement of the Civil Rights Act.[136] The Court's interpretation of the jurisdictional and private action provisions were an apparent invitation for criminal prosecutions under Sections 51 and 52.[137] The Department of Justice read the Court's decision in *Hague* to mean that "if a Federal statute otherwise constitutional gives a private right to a citizen, Section 51 will serve for prosecution of any group of persons who attempt to take it away from him." This reasoning arguably applied to private acts of violence affecting statutory rights "under the recently extended commerce clause." The NLRA was the most prominent such example,[138] and the CIO quickly announced that it would "request the Department of Justice to take steps for criminal prosecution of all who interfere with its organizing activities by violating the civil rights of workers."[139] For a time, the Department vigorously pursued the new strategy, albeit with uneven results.[140]

Within a few years, however, the Department abandoned its ambitious program in favor of a more manageable task. In 1941, the Civil Liberties Unit was renamed the Civil Rights Section. Although the terms "civil liberties" and "civil rights" were often used interchangeably during this period, the new nomenclature reflected a shift in the unit's

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the federal government to seek injunctive relief as an alternative to criminal action. "This would overcome the difficulties pointed out above and would also free the case of local prejudice on the part of citizenry from which jurors must be selected." "Memorandum for Mr. Dean," Attorney General Papers, box 22, entry 132, Folder Civil Liberties.

[134] Gordon Dean to Leigh Danenberg, 6 March 1939, Attorney General Papers, box 22, entry 132, folder Civil Liberties.

[135] Joseph Matan, Memorandum to Assistant Attorney General Brien McMahon, 14 May 1937, Attorney General Papers, box 22, entry 132, folder Civil Rights.

[136] Lewis Wood, *Hague Ban on C.I.O. Voided by the Supreme Court*, New York Times 1 (June 6, 1939).

[137] Justice Stone's opinion implicitly rejected the narrow interpretation of Section 51 in *United States v. Cruikshank*, an 1876 case growing out of the mob murder of more than a hundred black Republicans in Reconstruction Louisiana. The defendants were convicted of conspiracy to deprive citizens of the United States of their rights to assemble and bear arms, among other charges. The Supreme Court reversed the convictions on the theory that such rights were not protected by the Fourteenth Amendment. Justice Stone's opinion suggested that *Cruikshank* was no longer good law. *Hague*, 307 US at 526.

[138] Ibid. (citing Hague as well as the Pennsylvania System case, which arose under the 1930 Transportation Act). Its curtailment by employers was the theory of the Harlan County case. The Harlan case itself never reached the court, because it was nolled as part of a negotiated settlement.

[139] Lewis Wood, *Hague Ban on CIO Voided by the Supreme Court*, 1 New York Times (June 6, 1939) (quoting Lee Pressman).

[140] "Annual Report of the Attorney General of the United States for the Fiscal Year 1939," 63, Attorney General Papers, box 30, HM 1994 (reporting cases prosecuted by the Civil Liberties unit in 1939 and 1940; see also *Recent Development: Conspiracy To Coerce Employees into Union Activity Not Indictable Under 18 U.S.C. 241*, 55 Colum L Rev 103 (1955); Tom C. Clark, *A Federal Prosecutor Looks At the Civil Rights Statutes*, 47 Colum L Rev 175 (1947); "The Press: In Mobile," *Time*, May 22, 1939 (describing use of Section 51).

priorities from industrial labor to race. During the 1940s, the CRS focused on economic justice for African Americans, eschewing the type of formal equality arguments that would mark the NAACP's litigation strategy in the run-up to *Brown. v. Board of Education*.[141] Still, the claims the CRS took up were those of desperate black farmworkers, not the powerful unions of the new labor regime. Rescuing the country's most vulnerable workers from conditions close to slavery threatened America's racial hierarchy, a goal of patent historical importance. Nonetheless, the CRS considered its new commitments, like its new name, to be less "radical" and more politically palatable than its earlier path.[142]

In any case, the continued validity of the state action doctrine made earlier proposals to pursue claims against individual employers for interference with labor activity unfeasible. The Fourteenth Amendment did not reach individual action, as the CRS well understood.[143] The state action requirement expressed in such cases as *Cruikshank* and *Wheeler* meant that Section 51 was inapplicable to "the great mass of civil liberties cases" the Department would otherwise have pursued. In 1939, Assistant Attorney General O. John Rogge reported that the Criminal Division was evaluating those cases to determine whether they represented "sound law." If they did not, the Civil Liberties Unit would have "no hesitation" in asking the Supreme Court to overrule them.[144] The Supreme Court, however, declined the offer, and a legislative solution was by that time off the table.[145] Even if authorization were possible, CRS reservations may have stood in the way. Robert Jackson, Murphy's successor as Attorney General (and his future colleague on the Supreme Court), was skeptical of a state-centered approach. "Compared with [the] rather narrow powers to advance civil rights," he reflected, "the possibilities that the Department of Justice by misuse of power will invade civil rights really gives me more concern."[146]

III. The Uncertain Stakes of Civil Liberties Enforcement

During the late New Deal, a broad range of government actors and private organizations openly endorsed civil liberties. Indeed, the federal government contained multiple entities explicitly committed to securing them, including a Senate committee and

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[141] Notably, its project was premised on the Thirteenth Amendment, not the Equal Protection Clause of the Fourteenth.

[142] Goluboff, *Lost Promise*, 112. Goluboff's work on the Civil Rights Section is crucial here. See also Richard D. McKinzie, Oral History Interview with Eleanor Bontecou, 5 June 1973, Washington, D.C. (explaining that the peonage cases were successful because they were in line with public opinion).

[143] As Assistant Attorney General O. John Rogge told the ACLU's National Conference on Civil Liberties in October 1939: "No matter how much the content of the due process clause has been expanded, rights under the due process clause are not protected against mere individual action, on the standard interpretation of the Fourteenth Amendment as a restriction on State action only." "Civil Rights Conference," *Civil Liberties Quarterly* (September 1939), 1, ACLU Papers, reel 167, vol. 2061.

[144] Address by O. John Rogge, National Conference on Civil Liberties, 14 October 1939, Attorney General Papers, box 22, entry 132, folder Civil Rights.

[145] See *Screws v United States*, 321 US 91 (1945).

[146] Robert Jackson, *Messages on the Launching of the* Bill of Rights Review, 1 Bill of Rights Review 35 (1940).

Department of Justice unit with the term "civil liberties" in their names. There were, however, essential differences in the ways that the various actors understood their underlying objectives. That is, congruence at the level of rhetoric belies a growing distance between competing conceptions of civil liberties' substantive sweep, as well as methods of civil liberties enforcement. The question for this Part is the extent to which those variations tracked institutional lines.

Scholars of legal change have long asked which institutions are best suited to advancing particular rights. Judicial enthusiasts cite the ability of courts and constitutional victories to reshape cultural understandings, resist popular pressures, and energize potential supporters at relatively low cost. Critics counter that court-based constitutionalism privileges individual over collective rights, de-radicalizes social movements, and alienates the organizational base. Champions of grass-roots organizing, political activism, and interest group pluralism charge that resources devoted to litigation could be spent more productively on mobilizing, lobbying, or influencing administrative actors on behalf of broader goals.

Meanwhile, accounts of popular constitutionalism evaluate the influence of public opinion on judicial decisions construing constitutional rights. In doing so, they assume—often implicitly, and sometimes explicitly—that legislative and administrative actors are inherently more responsive to popular pressures.[147] Similarly, the countermajoritarian difficulty presumes that the laws and policies subjected to judicial review more closely approximate democratic consensus than the decisions that strike them down.[148] Above all, there is a broad consensus that constitutional interpretation in the federal courts restrains the state, in contrast to a reliance on government power in the political branches.[149]

The history of civil liberties during the New Deal presents something of a natural experiment with respect to these claims. In this moment of profound uncertainty and possibility, meaningful alternatives to judicial review were proposed and tested. Institutions formulated their own distinctive approached to defining and enforcing civil liberties commitments. Observers debated which were best.

Unsurprisingly, those committed to a labor interventionist view of civil liberties were relatively hostile to the courts. Even as he championed the Senate Civil Liberties Committee, Robert La Follette favored a constitutional amendment to curtail judicial review. He argued that "no kind of legal guaranty has ever been able to protect minorities from the hatreds and intolerances let loose when an economic system breaks down."[150]

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[147] For the idea that popular constitutionalism is better suited to constitutional theories that limit rather than expand state power, see Christopher W. Schmidt, *Popular Constitutionalism on the Right: Lessons from the Tea Party*, 88 Denver U L Rev 523 (2011).

[148] Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill 1962); Ackerman, *We the People*.

[149] For example, Cass Sunstein has argued that legislators are better suited to implement positive rights. Cass R. Sunstein, *The Partial Constitution* (Harvard 1993).

[150] He continued: "Liberals, be realists; do not let a lot of professional legalists, paid to do the job, bind you to the woods while they are showing you the trees." Radio Address by Hon. Robert M. La Follette, 13 February 1937, ACLU Papers, reel 143, vol. 978.

That assessment diverged increasingly from the progressive civil liberties vision. It found echoes in a statement by the leftist International Juridical Association (and reproduced as a pamphlet by the National Lawyers Guild), which concluded that "there can be no true enforcement of the Bill of Rights in the interests of persons instead of wealth, except by the elected representatives of the people."[151]

Many New Dealers regarded Congress as the institution most responsive to majoritarian impulses and the judiciary as the most insulated, with administrative agencies somewhere in between.[152] They doubted the will or power of the courts to create labor rights, and they assumed that administrative actors were more apt to invoke state power on behalf of rights claimants against private abuse. In the face of contending constitutional claims, they called upon Congress to curtail employers' use of economic weapons, with the hope of tipping the constitutional balance from property to speech and association and from the rights of employers to the rights of labor. While these assumptions and aspirations were based in part on prevailing political alignments, it may be that some have generalizable significance.

To be sure, it is always dangerous to extrapolate from historical cases. At the level of discrete institutions, there is simply too much noise: strong personalities, budget constraints, idiosyncratic preferences. In short, there are too many shocks and too much contingency to justify generalization. That problem is all the more acute where, as here, the interval of observation is short; in light of rapid political retrenchment, opportunities for experimentation were quickly foreclosed.

Take the NLRB. Although Congress justified the Wagner Act on the basis of industrial stability as well as workers' rights, the historical evidence points strongly to the primacy of the latter in early understandings and enforcement.[153] The principal threat to labor's civil liberties came from private sources, that is, employers. In combating private abuses, industrial unions hitched themselves to the enforcement powers of the state. Notwithstanding their caution in court, they routinely cloaked their demands in constitutional language. If any institution held out the promise of a distinct, extra-court constitutionalism this was it.

By the late 1930s, however, it was evident that the agency's partiality toward labor—and by extension, its aggressive enforcement of labor's rights—would not last. The NLRB never fully realized the vision of civil liberties that its early leadership espoused. On some accounts, that failure flowed from institutional constraints. In stark contrast to the sympathetic treatment of legislation and regulation securing civil rights, labor scholars have often argued that a state-centered approach is inherently accommodationist. They have reasoned that agencies are subject to regulatory capture, and that within a capitalist economy, the NLRB was bound to capitulate to industrial interests.

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[151] Ibid.

[152] By contrast, the ACLU believed that judicial tenure insulated judges against lobbying from strong special interests. That is, judges were freer than legislators to follow public opinion. Accordingly, the ACLU often organized efforts to influence judges through letter-writing campaigns by prominent citizens.

[153] Forbath, "Thirteenth Amendment."

If one takes seriously the NLRB's conception of its mandate as a civil liberties project, then its treatment of workers' rights during the 1940s makes a neat counterpoint to the liberal civil liberties vision. After all, the courts assumed a largely deferential stance toward the NLRB in the 1940s. Certainly the members of the NLRB were acutely aware of the Administrative Procedure Act, along with the ever-present and increasing threat of judicial review. Still, labor historians have amply documented the Board's hasty retreat from its early ambitions. In place of fundamental rights, the new NLRB emphasized industrial pluralism. The strike quickly gave way to collective bargaining.[154] The NLRB of the 1940s put more stock in stabilizing production than in equalizing the bargaining power between workers and their employers.

After a wave of powerful labor activity in the wake of World War II, Congress would pass the Taft-Hartley Act in 1947 over President Truman's veto. By then, there was broad-based agreement that the labor movement had grown too strong and too reckless. A rare holdout, the ACLU denounced Taft-Hartley as a "direct violation of labor's rights" and cautioned that the act's provisions were "fraught with peril to the maintenance of civil liberties in labor disputes."[155] It described the popular desire, expressed in the 1946 elections, to break free of the "irritating shackles" of state control and to reinstate "the presumably sound leadership of private business." The statute accomplished that goal in part by altering the substantive provisions of the NLRA, and in part by buttressing the supervisory role of the courts. The new skepticism toward state economic regulation had "produced an atmosphere increasingly hostile to the liberties of organized labor, the political left and many minorities."[156] In other words, Americans had forgotten that curbing state power might undermine, rather than buttress, constitutional rights.

Historians have characterized Taft-Hartley as little more than an afterthought. Perhaps the NLRB's state-centered approach dulled organized labor's radical edge, as critics have alleged.[157] No doubt politics played a part as well. Even before the Second World War, the rightward shift within Congress and in public opinion led to changes in personnel at the NLRB, which in turn tempered the agency's pro-labor stance. To be sure, the NLRB continued to police employers' unfair labor practices, and the right to organize was firmly entrenched. Union density would not peak until the 1950s, and it would take decades for labor to register the depth of its subsequent decline. Still, by 1947, the labor interventionist vision of civil liberties had long since lost its bite, within Congress and the NLRB just as much as the courts.

In fact, it was arguably in the judiciary—where decision-makers were most

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[154] Christopher L. Tomlins, "The New Deal, Collective Bargaining, and the Triumph of Industrial Pluralism," *Industrial and Labor Relations Review* Vol. 39 (Oct. 1985): 19-34. Historians and labor scholars have emphasized that the mature NLRB validated the strike only as a response to employer interference with collective bargaining. Klare; Irons.

[155] "Civil Liberties Union Condemns Labor Bill," New York Times (June 16, 1947).

[156] "Setback Reported for Civil Liberties," 3 September 1947, New York Times. Ironically, Congress was reintroducing by statute some of the very same restraints on labor's rights to strike and picket that the Supreme Court, before 1937, had imposed on constitutional grounds.

[157] See Christopher L. Tomlins, *Law, Labor and Ideology in the Early American Republic* (Cambridge 1992).

insulated from rapidly shifting politics—that the progressive, labor interventionist, and radical visions of civil liberties coexisted longest.[158] Even as they clashed in the legislative and administrative arenas, the various civil liberties constituencies made common ground in the courts. For a time, robust First Amendment protection for labor activity seemed plausible. *Thornhill* and *Carlson* all but collapsed the radical, labor interventionist, and progressive visions into a unitary celebration of labor's rights. Just as quickly, however, the Supreme Court pulled back from the transformative potential of such decisions. By the 1940s, it read civil liberties through a liberal lens that privileged the Bill of Rights.

By the early 1940s, then, a new, liberal vision of civil liberties commanded substantial, though not absolute, consensus across institutions. That vision regarded the state as hostile and valorized the checking power of the courts. It shared the radicals' call for a neutral state. It shared the progressives' concern for robust policy debate. It shared the conservatives' reliance on judicially enforceable rights. Only the labor interventionists were excluded from its domain.

It is impossible fully to disentangle institutional explanations from external political pressures. It is likely that the two were closely linked. I argue elsewhere that the new liberal commitment was a compromise between competing constituencies and advocacy groups, all of whom shared an aversion to state power in the realm of expressive freedom. Radicals feared and predicted that the state would turn against them before long. Progressives valued deliberative openness in formulating and legitimating social and economic policy. Conservatives, for the first time, had reason to fear that the state suppression of speech would undermine their prerogatives, and that a laissez-faire approach to the First Amendment would redound to their benefit. Whatever the causal chain, the moment for experimentation quickly passed. Less than five years after the ACLU issued its equivocal assessment of judicial review, the organization declared resolutely that its "battleground [was] chiefly in the courts."[159] Its volunteer attorneys had carried "scores of civil liberties issues" to the Supreme Court of the United States, "where decisions in case after case [had] firmly established the interpretations of the Bill of Rights which the Union supports."[160]

Given the rapidity of this shift and the copious confounding variables, what lessons can we derive from the proliferation of institutional mechanisms for the enforcement of civil liberties before the new consensus crystalized?

The first is the basic historical insight that alternative paths existed. The liberal vision of civil liberties familiar to us today was not the only or, necessarily, the preferable possibility. Some New Deal officials rejected state-constraining constitutionalism in favor of legislative or administrative efforts to secure labor's rights. Others accepted a

[158] Political scientists have suggested that changes in court decisions may lag behind similar shifts in the political branches due to judicial tenure. E.g., Frymer.

[159] American Civil Liberties Union, *Presenting the American Civil Liberties Union, Inc., November 1941* (American Civil Liberties Union 1941).

[160] American Civil Liberties Union, *Presenting the American Civil Liberties Union, April 1947* (American Civil Liberties Union 1947), 5.

central role for the Bill of Rights but resisted the premise that courts were best suited to enforce its provisions. In investigating, legislating, and litigating, they understood themselves to be legitimate stewards of First Amendment freedoms.

Second, regardless of their substantive views, New Deal actors had a capacious understanding of the opportunities for collaboration across institutions. In framing its prosecutorial program, the Civil Liberties Unit of the Department of Justice responded to and pushed the limits of state action doctrine as construed by the courts. The NLRB looked to the La Follette Committee to expand and vindicate its power. And the judiciary acknowledged legislative and administrative priorities in assessing the appropriate scope of First Amendment rights. Sometimes that meant accommodating expressive freedom to political judgments about public safety or national security, as it does today.[161] Sometimes, the Court invoked changing legislative priorities in expanding the First Amendment to admit new activity, like labor picketing, into the ambit of First Amendment protection.[162]

Third, it is a crucial feature of this period that extra-judicial judgments about civil liberties were not consigned to the shadows of court decisions. In other words, when the NLRB reasoned that the right of workers to organize trumped the right of employers to distribute anti-union literature, it was not operating strictly in the interstices of existing doctrine, nor was it merely attempting to influence judicial reasoning.[163] Rather, in a moment of profound constitutional change, it imagined itself as a coequal partner in the New Deal realignment of powers and rights. Not only had the Supreme Court signaled a new deference to the political branches, but President Roosevelt had proven willing to challenge the entire enterprise of judicial review. And despite the failure of the court-packing plan, there was still considerable support for alternative court-curbing measures if circumstances so required. Constitutionalism outside the courts was never unconstrained, but non-judicial actors in the late New Deal operated with a degree of independence unprecedented at the time and unparalleled since. How they exercised their perceived power offers a glimpse of what an unmediated extra-court constitutionalism might accomplish, at least in the First Amendment context.

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[161] E.g., Gobitis.

[162] E.g., Thornhill, 102-03 (In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution… The merest glance at State and Federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.").

[163] On the ways in which non-court actors account for the Constitution, see, eg, Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 Admin L Rev 501 (2005); David A. Strauss, *Presidential Interpretation of the Constitution*, 15 Cardozo L Rev 113, 113–14 (1993). On constitutional interpretation within administrative agencies, see Gillian Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 Colum L Rev 480; Reuel E. Schiller, *The Administrative State, Front and Center: Studying Law and Administration in Postwar America*, 26 L & Hist Rev. 415, 422–23 (2008); and especially Sophia Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 Va L Rev 799 (2010).

These were new and momentous developments. It was not that earlier government actors were autocratic in their suppression of dissent. On the contrary, they had often exercised their discretion to accommodate disfavored speakers and views. Congress had considered free speech in debating such measures as the Espionage and Sedition Acts, and it had expressly avoided provisions that were perceived to go too far.[164] Occasionally, the Department of Justice had declined prosecution in cases involving political agitation. Various federal agencies, including the post office, the customs service, and the War Department, had considered constitutional and policy constraints in formulating and administering their policies.[165]

By the same token, the federal government of the 1930s garnered its share of criticism with respect to the Bill of Rights. The Roosevelt administration was responsible for a massive expansion of secret surveillance by the FBI, and Frank Murphy's justice department authorized spurious prosecutions of radical dissenters.[166] As for Congress, the Smith Act prohibitions on "subversive activities" and the House Committee on Un-American Activities quickly supplanted the LaFollette Civil Liberties Committee and its legislative program as the signature contributions of the prewar period.

Such qualifications notwithstanding, the New Deal ushered in a thoroughgoing revision of the relationship between state power and the Bill of Rights. At least since the Palmer Raids, that relationship had been primarily oppositional. When the federal government entertained civil liberties claims, it was to constrain executive discretion or moderate repressive laws, not to curb abuses by local governments or private actors. Put differently, state actors operated in the shadow of the Constitution, as they ordinarily do today.[167] Sometimes, they expressly limited or altered their policies to avoid running afoul of the First Amendment; constitutional interpretation, to the extent they engaged in it, served to cabin instead of empower them.

In the 1930s, in a marked departure from its historic practices, the state marshaled its resources to protect rather than suppress the rights of unpopular minorities as well as the channels of protest and dissent.[168] In all reaches of government, administrators and policymakers professed allegiance to civil liberties as a central value of American democracy, and they deployed state power to effectuate civil libertarian ends.

The short window of experimentation and the swift ideological reconfiguration has obscured the significance of these alternative enforcement regimes. Their influence, however, persisted for decades. Perhaps there is no better example than the brief for the

[164] Geoffrey R. Stone, *The Origins of the Bad Tendency Test: Free Speech in Wartime*, 2002 S Ct Rev 411 (2002); Rabban, *Forgotten Years*, 250–55.

[165] Weinrib, Liberal Compromise; Kessler.

[166] Samuel Walker, *Presidents and Civil Liberties from Wilson to Obama: A Story of Poor Custodians* 96-97 (Cambridge 2012),.

[167] This is the interpretive process ordinarily addressed in the literature on constitutionalism outside the courts.

[168] During Reconstruction, the federal government had endeavored (unevenly) to protect the rights of African Americans in the South. The New Deal efforts expanded on that precedent in creating an institutional structure to promote the dissemination of unorthodox views and to insulate dissent more broadly.

United States as amicus curiae in *Brown v. Board of Education*. "Few Americans believe that the government should pursue a laissez-faire policy in the field of civil rights, or that it adequately discharges its duty to the people so long as it does not itself intrude on their civil liberties," the brief declared in language strongly reminiscent of New Deal civil liberties enforcement. It is possible, of course, that the government's formulation was a throwback to a prior era. Still, it is noteworthy that the brief invoked popular support for a principle that seems incongruous with civil liberties claims today: a "general acceptance of an affirmative government obligation to insure respect for fundamental human rights."[169]

Finally, it is worth underscoring that the liberal civil liberties vision that prevailed across institutions by the early 1940s unequivocally privileged the courts. Whether the courts, in turn, favored the liberal vision remains an open question. Put simply, it is unclear whether the judiciary embraced the anti-state, court-centered approach because it was most consistent with its institutional interests and competencies, or whether the courts, like their administrative and legislative counterparts, were channeling broader developments.[170] The answer is elusive, just as it is difficult to discern from the historical record whether the Constitutional Revolution flowed from jurisprudential or doctrinal concerns as opposed to court-packing pressures or popular demand. In the late New Deal, economic contraction, hostility toward labor, and the rise of totalitarianism abroad all abetted the liberal civil liberties vision. But it is telling, at the very least, that so many actors across the political spectrum believed—some optimistically, some with real trepidation—that the judiciary was bound to serve a checking function on state power and labor rights.

Conclusion

That the architects of the liberal civil liberties vision were deeply ambivalent about the institutional mechanisms for rights enforcement has largely been forgotten. It is an observation with important implications for debates about extra-court constitutionalism and the scope of the First Amendment today. As scholars and advocates contemplate the allocation of institutional authority to define and defend constitutional rights, they would do well to consider the anticipated advantages and limitations of the court-based constitutionalism that prevailed.

I do not mean to overstate this claim. The trans-institutional convergence on the liberal vision of civil liberties challenges the assumption that the judicial forum is altogether distinctive in its conception of rights, or that the tradeoffs entailed in constitutional litigation are limited to its purview. There was more ideological variation within institutions and less ideological variation across institutions than contemporaries predicted and modern scholars might suppose. Indeed, a capacious account of civil liberties lasted longest in the judiciary. Today, even as First Amendment scholars lament the judiciary's stubborn adherence to a free marketplace of ideas, labor law scholars

[169] Ibid.

[170] Cf. Mehrotra, 24-25; James T. Kloppenbeg, "Institutionalism, Rational Choice, and Historical Analysis," Polity 28:1 (1995).

query whether unions would not have fared better in the courts.[171]

But if institutional distinctions in civil liberties enforcement were less apparent than New Dealers might have expected, neither were they inconsequential. The effects on civil liberties of domestic economic conditions and an imminent World War no doubt dwarfed the impact of institutional distinctions. Still, especially outside the labor context, tangible differences emerged.

In the years after the Constitutional Revolution, the federal government sought out ways to increase access to competing ideas without favoring particular outcomes. That is, government actors developed methods to promote and secure a forum for expressive contestation—just as they had created a framework for collective bargaining, without prescribing particular results, through the NLRA. In 1938, President Roosevelt introduced a discounted postage rate to facilitate the circulation of printed matter. ACLU Attorney Morris Ernst, who persuaded Roosevelt to adopt the program, proclaimed that it "permitted a flow into the market place of great additional diversity of points of view."[172] In 1946, the FCC adopted new standards for granting and renewing radio licenses, which required stations to allocate time for the discussion of "important public questions" and to cover all sides of controversial issues. In practice, of course, such requirements served to increase access by disfavored and marginal speakers; popular and commercial speakers were likely already to have ample coverage. The radio industry denounced the measures as censorship, but the ACLU disagreed. If the government sought to withhold radio licenses based on its assessment of the *content* of programming, it explained, the station owners had recourse to the courts. As things stood, "[t]he standards fixed provide[d] for more speech, not less."[173] Such developments emerged directly out of the New Deal's more ambitious experimentation in civil liberties enforcement.[174]

In an era when radical revolution seemed possible—when the goal of labor activity was the general strike, not a union contract—minor differences like these would have seemed inconsequential. Proponents of the radical civil liberties vision naively hoped that a naked right to agitate would pave the way to substantive change. Implicit in their position was the confidence that even in an unfettered marketplace, their agenda would prevail. By the 1940s, employers understood that no free exchange in ideas existed. They

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[171] See, eg, Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 Colum L Rev 1527 (2002).

[172] See Fred Rodell, "Morris Ernst, New York's Unlawyerlike Liberal Lawyer is the Censor's Enemy, The President's Friend," *Life*, 21 February 1944. The measure was justified on the basis that "in this democracy of ours, unlike the dictatorship lands, we are dedicated to the ever increasing extension of a free market in thought as a means to the perpetuation of our national ideals. As they burn books abroad, we extend their distribution." Announcement by National Committee to Abolish Postal Discrimination Against Books, Oscar Cox Papers, Franklin D. Roosevelt Presidential Library, Hyde Park, N.Y., Alphabetical File, Douglas-Ernst, box 9, folder Ernst, Morris; Ernst, "Memorandum for Special Meeting," 5–6.

[173] American Civil Liberties Union, *Radio Programs in the Public Interest* (New York: American Civil Liberties Union, July 1946). *Cf.* Red Lion Broadcasting Company v. Federal Communications Commission, 395 U.S. 367 (1969).

[174] Even here, institutional distinctions are murky. 1946 was the same year that the Supreme Court issued its aberrational decision requiring a private actor to open its property to public discussion. Marsh v. Alabama, 326 U.S. 401 (1946).

understood that a right to free speech would almost invariably favor those with superior resources. As Nathan Greene (co-author with Felix Frankfurter of *The Labor Injunction*) cautioned in relation to anti-union propaganda, employer speech amounts to "a *protected* commodity in a *monopoly* market."[175] On this view, it was not that New Deal institutions de-radicalized the labor-friendly civil liberties visions; it was the liberal civil liberties vision that de-radicalized the New Deal state. That is, what was determinative was ideological contestation and compromise, not institutional enforcement.

Then again, a young Roger Baldwin might have suggested that the radicals' mistake was to trust in state institutions at all. The story of civil liberties between the Depression and World War II conforms to a truism of labor advocacy during the Progressive Era: namely, that courts, no less than administrators or legislatures, are creatures of the state. Indeed, the notion that the Supreme Court could have stretched the First Amendment to encompass labor's most coercive tactics seems fanciful in retrospect. Even prospectively, many within the labor movement considered the judicial strategy to be misguided. At the dawn of the New Deal, the architects of the modern civil liberties movement had pitted the administrative enforcement of civil liberties against labor's collective power rather than the courts. Theirs was not liberal constitutionalism, administrative constitutionalism, or even popular constitutionalism. They defended civil liberties as rights prior to the Constitution, enforceable by "economic power and organized pressure alone."[176]

[175] "Civil Liberties and the NLRB," International Juridical Association, reprinted from speech by Nathan Greene, 8 March 1940, 5 (emphasis in original), Sugar Papers, folder 54:17.

[176] Resolutions, Conference on Civil Liberties under the New Deal, 9 December 1934, ACLU Papers, reel 110, vol. 721.