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BOOK REVIEW

HISTORICAL REVISIONISM AND CONSTITUTIONAL CHANGE: UNDERSTANDING THE NEW DEAL COURT

Samuel R. Olken[*]

The Constitution and the New Deal. By G. Edward White. Harvard University Press. 2000.

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ONE of the enduring myths of American constitutional history is the apocryphal tale of the "switch in time that saved nine."[1] According to this popular legend, in 1937 the United States Supreme Court abruptly reversed course from the close scrutiny characteristic of its traditional police powers jurisprudence and adopted a more deferential standard of constitutional review in legal disputes arising from public control of private economic affairs. Central to this story is the assumption that the Court altered its constitutional jurisprudence in the wake of a plan to pack the Court with younger Justices presumably more sympathetic to the social and economic reforms of the New Deal.[2] Announced in February of that year by an exasperated President Franklin Delano Roosevelt, who despite strong political support had fared poorly before the Court in cases involving constitutional challenges to the initial phase of his New Deal program,[3] the Court-packing plan un-

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[1] This phrase appears in a May 19, 1937, letter from Edward Corwin to Attorney General Homer Cummings. G. Edward White, The Constitution and the New Deal 319 n.4 (2000); see also id. at 17 (discussing Corwin's coining of the phrase). An influential constitutional historian during the first half of the twentieth century and frequent critic of the Supreme Court, Corwin, a professor of political science at Princeton University, in 1936 consulted with Cummings about the appointment of additional, younger Justices to the Supreme Court in the event the Court's septegenerian members refused to resign. For discussion of Corwin's role in the infamous Court-packing plan, see id. at 318 n.3; see also William E. Leuchtenburg, The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt 115–19 (1995) (discussing the development of the Court-packing plan). The phrase also appears in Joseph Alsop & Turner Catledge, The 168 Days 135 (1938); see also Michael Ariens, A Thrice-Told Tale, Or Felix the Cat, 107 Harv. L. Rev. 620, 623 n.11 (1994) (discussing the provenance of the phrase "switch in time that saved nine").

[2] See, e.g., Alsop & Catledge, supra note 1, at 141; Edward S. Corwin, Court Over Constitution 127 (1938); Benjamin F. Wright, The Growth of American Constitutional Law 200, 203, 221–22. In particular, Wright perceived the result in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), in which the Court appeared to reverse course from precedent invalidating minimum wage legislation for women, as "the opening move in the Court's strategic retreat produced by the Roosevelt Court bill." Wright, supra, at 222.

[3] E.g., Carter v. Carter Coal Co., 298 U.S. 238 (1936) (finding that federal regulation of labor relations within the coal industry violated the Commerce Clause); United States v. Butler, 297 U.S. 1 (1936) (invalidating a processing tax enacted pursuant to the Agricultural Adjustment Act); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (holding that the Commerce Clause prohibited the application of the National Industrial Recovery Act's hour and wage requirements to a local poultry business); Pan. Ref. Co. v. Ryan, 293 U.S. 388 (1935) (ruling the "hot oil" provision of the National Industrial Recovery Act violated the non-delegation doctrine).

derscored the inherent tension in American constitutional democracy between the political branches and an unelected federal judiciary.[4] The Supreme Court, so history tells us, eventually succumbed to the external pressures of political and social sentiment and yielded in its constitutional opposition to New Deal economic legislation.[5]

Over the course of ensuing decades some scholars have subscribed to this notion of constitutional history.[6] Accordingly, they have regarded the Court's pivotal decisions of 1937 involving minimum wage legislation,[7] the Commerce Clause,[8] and social se-

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[4] Pursuant to the plan, the President would appoint, with the advice and consent of the Senate, an additional Justice to the Supreme Court in the event a Justice declined to retire from the Court within six months upon attaining the age of seventy. The plan, which capped the number of Supreme Court Justices at fifteen, presumably would have permitted the President to put onto the Court younger Justices more sympathetic to his economic reform policies than the elderly Justices who comprised the Court. In 1937, six of the Justices were over seventy years of age. Ultimately, the plan died in Congress. For background of the Court-packing plan, see Leuchtenburg, supra note 1, at 82–162.

[5] See, e.g., Alpheus Thomas Mason, The Supreme Court from Taft to Burger 108–28 (3d ed. 1979); Wright, supra note 2, at 200–17, 222.

[6] See, e.g., Mason, supra note 5, at 97–128; Robert G. McCloskey, The American Supreme Court 117–20 (3d ed. 2000); Wright, supra note 2, at 221–22; see also William E. Leuchtenburg, FDR'S Court-Packing Plan: A Second Life, A Second Death, 1985 Duke L.J. 673, 673 (noting the widespread acceptance of this notion in works on American history). But see generally Richard Friedman, Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation, 142 U. Pa. L. Rev. 1891 (1994) (refuting the influence of external political pressure on the Hughes Court).

[7] *W. Coast Hotel Co.*, 300 U.S. at 379 (upholding a Washington minimum wage law for women). *West Coast Hotel Co.* overruled *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) and distinguished, on other grounds, *Morehead v. Tipaldo*, 298 U.S. 587 (1936) (both invalidating minimum wage laws for women).

[8] See Wash., Va. & Md. Coach Co. v. NLRB, 301 U.S. 142 (1937) (upholding application of the NLRA to an interstate transportation company); Associated Press v. NLRB, 301 U.S. 103 (1937) (sustaining the application of the NLRA to the editorial department of a private news agency); NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937) (upholding application of the NLRA to the clothing manufacturing industry); NLRB v. Fruehauf Trailer Co., 301 U.S. 49 (1937) (upholding application of the NLRA to the trailer manufacturing industry); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (sustaining the application of the NLRA to the production of steel). These cases limited the application of *Carter Coal Co.*, 298 U.S. at 238 (invoking the traditional distinction between manufacturing and commerce and finding that labor relations had an indirect and remote effect upon interstate commerce).

curity[9] as part of an elaborate attempt by the justices to avoid the institutional upheaval threatened by the Court-packing plan. In its retreat, the Supreme Court apparently not only spared itself from political reconfiguration but also changed the course of twentieth-century constitutional law. Having shed the shackles of laissez-faire economics and Social Darwinism,[10] through which purportedly several of the Justices had construed the concepts of due process and personal liberty, the Court emerged in the decades immediately thereafter as the ultimate guardian of civil rights in American constitutional democracy.[11] Bifurcated judicial review marked by the primacy of fundamental, mostly enumerated, constitutional rights supplanted a more rigid and idiosyncratic jurisprudence in which the Justices ostensibly had, throughout the late nineteenth and into the early twentieth centuries, interpreted the Constitution through a preconceived set of socioeconomic convictions intended to preserve the status quo and the security of property rights.[12] Viewed

[9] See Helvering v. Davis, 301 U.S. 619 (1937); Steward Mach. Co. v. Davis, 301 U.S. 548 (1937) (both sustaining the Social Security Act of 1935). But see R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330 (1935) (invalidating retirement pension for railroad workers provided by the Railroad Retirement Act).

[10] See generally Ronald F. Howell, The Judicial Conservatives Three Decades Ago: Aristocratic Guardians of the Prerogatives of Property and the Judiciary, 49 Va. L. Rev. 1447 (1963) (linking the police powers jurisprudence of the Supreme Court during the 1920s and 1930s to laissez-faire economics and Social Darwinism); Frank R. Strong, The Economic Philosophy of Lochner: Emergence, Embrasure and Emasculation, 15 Ariz. L. Rev. 419 (1973) (same). But see generally Herbert Hovenkamp, The Political Economy of Substantive Due Process, 40 Stan. L. Rev. 379 (1988) (describing the pervasive influence of classical economic theory while refuting the influence of Social Darwinism during the *Lochner* era); Samuel R. Olken, Justice George Sutherland and Economic Liberty: Constitutional Conservatism and the Problem of Factions, 6 Wm. & Mary Bill Rts. J. 1 (1997) (demonstrating that neither laissez-faire economics nor Social Darwinism significantly influenced judicial behavior during the latter half of the nineteenth and first third of the twentieth centuries).

[11] See, e.g., David P. Currie, The Constitution in the Supreme Court: The Second Century, 1888–1986, at 271–73 (1990).

[12] See generally Howell, supra note 10 (suggesting *Lochner*-era jurists employed judicial review to protect an economic elite and preserve the status quo in the wake of industrial reform legislation); Strong, supra note 10 (same). The term bifurcated review refers to the different standards of judicial review employed in economic regulation (minimal review), and noneconomic regulation cases (heightened review). Compare Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (upholding an economic regulation under the rational basis standard of review), with Schneider v. New Jersey,

from this conventional perspective, the jurisprudential transformation that occurred was a peaceful one marked by the triumph of law over the whims of an unelected judiciary deemed unresponsive to the tides of democracy. This, in summary, is both the lesson and the central meaning of the constitutional revolution of 1937.[13]

Yet, despite its apparent resonance, this story contains significant historical errors that oversimplify the course of early twentieth-century constitutional jurisprudence. Ultimately, the dissonance between fact and fiction reveals the political and sociological biases of both progenitors and subsequent guardians of the conventional narrative. For in advancing the myth of a singular constitutional revolution of 1937, spawned in large part by an ineluctable collision between the elected and judicial branches of the national government, those who have steadfastly perpetuated the mainstream account of early twentieth-century constitutional development have unfortunately created a version of history marked by the distortion of precedent and a chronic misunderstanding of early twentieth-century judicial behavior. Moreover, several of the conventional tenets do not necessarily withstand close examination. Foremost among these is the notion that the Supreme Court justices who dissented from the Court's pivotal Contract Clause, Commerce Clause, and Due Process decisions of the mid- to late-1930s were judicial reactionaries intent upon preserving the property rights of an economic elite.[14]

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308 U.S. 147 (1939) (invalidating, under heightened scrutiny, an ordinance that prohibited the distribution of leaflets on public streets).

[13] This phrase refers to the period between 1935 and 1937 when the Court appeared to suddenly reverse course in its constitutional assessment of New Deal Programs. See Edward S. Corwin, Constitutional Revolution, Ltd. 39–79 (1942) (discussing the Supreme Court and the New Deal).

[14] Associate Justices Pierce Butler, James Clark McReynolds, George Sutherland, and Willis Van Devanter all dissented from the Court's transformative opinions in *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (finding a close and substantial relationship existed between labor relations within a steel plant and the flow of interstate commerce); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding a Washington minimum wage law for women as a reasonable exercise of state police powers); *Nebbia v. New York*, 291 U.S. 502 (1934) (sustaining a New York regulation of milk prices as a reasonable economic measure and collapsing the distinction between public and private economic interests); and *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398 (1934) (upholding a Minnesota mortgage moratorium as a reasonable exercise of local police powers that did not impair the constitutional obligation of contracts). Conventional narratives of constitutional history refer to these dissenting Justices in pejorative terms as either "The Four

As the twentieth century drew to a close, some historians began to reassess various components of the Supreme Court's constitutional jurisprudence between the late nineteenth and early twentieth centuries. Consequently, cracks emerged in the edifice of conventional constitutional history. Charles McCurdy, for example, re-examined the notion of liberty of contract and concluded that *Lochner*-era jurists invoked this doctrine to protect private economic interests as rights of both individual liberty and property from the tyranny of transient democratic majorities.[15] Professor McCurdy also questioned the traditional view that judges of this period imbued constitutional interpretation with preconceived economic biases.[16] Similarly, Professor Michael Les Benedict explained that the laissez-faire constitutionalism characteristic of late nineteenth- and early twentieth-century judicial review actually derived from Jacksonian democratic ideals about equal operation of the law and concerns about class legislation and not necessarily from neo-classical economic theory or Social Darwinism.[17]

More recently, Professor Howard Gillman expanded upon these revisionist theories in a seminal book about the trajectory of *Lochner*-era police powers jurisprudence.[18] Gillman identified factional aversion as the linchpin of judicial review of economic regulation during the late nineteenth and early twentieth centuries. Jurists, therefore, distinguished between partial laws, enacted for the benefit of some classes at the expense of others, and neutral

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Horsemen" or "The Four Horsemen of Reaction." See, e.g., Fred Rodell, Nine Men: A Political History of the Supreme Court from 1790–1955, at 217 (1955). For wry criticism of this approach, see generally Barry Cushman, The Secret Lives of the Four Horsemen, 83 Va. L. Rev. 559 (1997).

[15] See generally Charles W. McCurdy, Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897, 61 J. Am. Hist. 970–1005 (1975) (discussing late nineteenth-century police powers jurisprudence).

[16] See Charles W. McCurdy, The Roots of "Liberty of Contract" Reconsidered: Major Premises in the Law of Employment, 1867–1937, 1984 Y.B. Sup. Ct. Hist. Soc'y 20, 20, 26–33.

[17] See generally Michael Les Benedict, Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism, 3 Law & Hist. Rev. 293 (1985) (distinguishing between laissez-faire economics and laissez-faire constitutionalism).

[18] Howard Gillman, The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence (1993).

laws that advanced the public welfare.[19] Thus, only illegitimate class legislation that bore a tenuous relationship to the public welfare infringed upon liberty of contract and violated due process.[20] From this perspective, heightened judicial scrutiny of minimum wage laws and other forms of redistributive legislation reflected longstanding aversion to political factions and not necessarily the anachronistic socioeconomic theories often ascribed to the Justices on the losing side in the purported constitutional revolution of 1937.

Other historians have focused upon the structural changes in constitutional interpretation that occurred during the first few decades of the last century. Most notable of these is Professor Barry Cushman, whose doctrinal synthesis of Due Process and Commerce Clause cases of this era offered a compelling alternative to the conventional account.[21] Cushman argued that once the Court began to collapse the analytical distinction between public and private economic interests,[22] its traditional jurisprudential tenets concerning legal issues of political economy eventually yielded to a more instrumental conception of judicial review increasingly deferential to economic reform and redistributive legislation. Cushman viewed this doctrinal evolution, rather than the external pressure of New Deal politics, as the fulcrum for transformation of the Su-

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[19] See, e.g., People v. Salem, 20 Mich. 452 (1870) (ruling a state could not pass preferential tax legislation for a railroad). See generally Alan Jones, Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration, 53 J. Am. Hist. 751 (1967) (offering a revisionist historical analysis attributing Cooley's anti-factionalism to Jacksonian democracy).

[20] See Adkins v. Children's Hosp., 261 U.S. 525 (1923) (invalidating a minimum wage law for women); Lochner v. New York, 198 U.S. 45 (1905) (invalidating maximum hours legislation applied to bakers); see also Olken, supra note 10, at 21–35 (discussing the emergence of substantive due process as a limitation on police power regulations benefiting one group over another). See generally Gillman, supra note 18 (explaining that factional aversion and not laissez-faire economic theory influenced judicial review of local police powers). But see Powell v. Pennsylvania, 127 U.S. 678 (1888) (upholding a law prohibiting the sale and manufacture of oleomargarine as a legitimate exercise of state police powers).

[21] Barry Cushman, Rethinking the New Deal Court: The Structure of a Constitutional Revolution (1998) (discussing the doctrinal transformation in the Court's jurisprudence of political economy).

[22] See, e.g., Nebbia v. New York, 291 U.S. 502 (1934) (significantly expanding the common law category of "businesses affected with a public interest" while upholding public regulation of milk sold within New York by seemingly private retailers).

preme Court's constitutional jurisprudence between the 1920s and 1940s. In particular, Cushman suggested that the course of change in constitutional interpretation was much more gradual and layered than represented by conventional accounts of this period.[23]

Now into the fray comes Professor G. Edward White, one of the nation's preeminent legal historians and the author of several important books about the intersection of law and history.[24] Perhaps none of his books is more important, however, than his most recent work, *The Constitution and the New Deal*, an elegant and masterful study of the transformation of the constitutional jurisprudence of the United States Supreme Court during the first half of the twentieth century.[25] Primarily adapted from several law review articles the author published in leading law reviews throughout the past decade, this book re-examines the strands of early twentieth-century constitutional jurisprudence. Not only does it reinforce Cushman's conclusions about the pace of jurisprudential change, it also approaches the issue of reconciling the New Deal and the Supreme Court as a problem of historiography. White offers a revised historical account of early twentieth-century constitutional thought that analyzes the broad contours of change in historical context. Rather than focus on doctrinal intricacies, the book makes selective use of academic commentary from the subject period and representative Supreme Court decisions to illustrate the arc of constitutional development in several areas, including a few often neglected by scholars of this era.

In essence a study of intellectual constitutional history, it also provides extensive criticism of traditional historiography and posits that much of the contemporary misunderstanding about the role of the Supreme Court during the New Deal emanates from flawed

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[23] Cushman, supra note 21, at 33–43.

[24] G. Edward White, The American Judicial Tradition (1976); G. Edward White, Earl Warren: A Public Life (1982); G. Edward White, Intervention and Detachment: Essays in Legal History and Jurisprudence (1994) [hereinafter White, Intervention and Detachment]; G. Edward White, Justice Oliver Wendell Holmes: Law and The Inner Self (1993) [hereinafter White, Justice Oliver Wendell Holmes]; G. Edward White, The Marshall Court and Cultural Change (1988) [hereinafter White, The Marshall Court]; G. Edward White, Patterns of American Legal Thought (1978); G. Edward White, Tort Law in America: An Intellectual History (1980) [hereinafter White, Tort Law in America].

[25] White, supra note 1.

historical methods and modernist assumptions about the judicial behavior of early twentieth-century Supreme Court Justices.[26] To this end, White seeks to recapture the constitutional jurisprudential debates of this era and to advance a more complicated and richly nuanced account of transformative constitutional events. From this perspective, the New Deal and the Court-packing plan recede in importance as catalysts of constitutional change and instead become historical episodes stripped of their mythical importance, which White attributes to the indiscriminate use of political labels and behavioralist presuppositions of generations of scholars.[27] In many respects, White succeeds in attaining his ambitious objective and has written a compelling revisionist history of one of the more controversial and misunderstood periods of American constitutional history.

This Book Review corresponds to White's method of complicating and revising the conventional perspective. After an introductory discussion of the concept of revolution, Part I will address the conventional account of the constitutional revolution of 1937 and the factors White attributes to its enduring position of distorted significance. Part II will examine and respond to White's treatment of three areas of constitutional jurisprudence complicating the conventional account: foreign relations, administrative law, and free speech. With much precision and careful analysis, White illuminates the developments of these areas of law and, for the most part, effectively supports his revised narrative of early twentieth-century constitutional change. Finally, in Part III, this Book Review will examine the heart of White's effort, namely his alternative explanation for the transformation in early twentieth-century constitutional jurisprudence, particularly his emphasis on the ascendancy of modernism and the connection between the Supreme Court's internal intellectual climate and developments in both private and public law jurisprudence. To this end, White offers a detailed and shrewd account of the relationship between the formalism/realism debate in common law and the notion of constitutional adaptivity in political economy constitutional law. As I will discuss below, White's analysis overlooks, at certain points, factors

[26] Id. at 269–312.
[27] Id. at 2–4, 9–10, 14–15, 29, 32, 237–312.

that would even more fully develop his already in-depth treatment of this period of constitutional change. Nevertheless, he generally succeeds in providing a reasoned, subtle, and persuasive revision of the change in constitutional jurisprudence of the early twentieth century.

I. CONSTITUTIONAL REVOLUTION AS CONCEPT AND MYTH

Inherently ambiguous, the term "revolution" actually has multiple meanings, as it refers to three different types of change: sudden, radical, or complete.[28] Therefore, unless carefully defined, this word is susceptible to misuse and may create considerable confusion for those who try to gauge the significance of ideological shifts. Moreover, the term itself may not be all that suitable for discussing the course of jurisprudential change in a legal system marked by the prominence of stare decisis and evolving methods of common law adjudication, both of which tend to constrain judges from making sudden or radical departures from precedent. Brief discussion of some of the analytical pitfalls that arise from indiscriminate use of the word "revolution" provides an essential perspective from which to appreciate White's own characterization of the pattern of constitutional development that occurred during the first few decades of the twentieth century.

A. The Elusive Concept of Constitutional Revolution

Perhaps one problem with understanding the concept of a constitutional revolution lies in the difficulty of using the word "revolution" to describe the transformation of constitutional thought. In common parlance, the term "revolution" refers to an abrupt or sudden change in the course of events, often precipitated by a crisis of political, economic, social or cultural dimensions, that

[28] A leading dictionary defines revolution as "a sudden, radical, or complete change." Webster's Ninth New Collegiate Dictionary 1010 (1986); see also Crane Brinton, The Anatomy of Revolution 3 (Vintage Books 1965) (1938) (noting "[r]evolution is one of the looser words"). Brinton explains that "[t]he term 'revolution' troubles the semanticist not only because of its wide range in popular usage, but also because it is one of those words charged with emotional content." Id. at 2.

results in a sharp departure from previous norms.[29] Most non-historians tend to associate revolutions with singular events such as the signing of the Declaration of Independence or the storming of the Bastille that signify, from popular perspective, the formal beginnings of the American and French Revolutions, respectively.

However, neither of these revolutions really began in such glorious fashion. In fact, their origins arose from the culmination of a series of conflicts marked by shifting ideas and values. To obtain a proper sense of the American Revolution, for example, one must consider the ideological fault lines in the relationship between the colonies and the British foreign office as manifested in tensions that erupted during the French and Indian War, the Stamp Act controversy, and the Boston Massacre, to mention but a few seminal events, before one can begin to appreciate the context of the Declaration of Independence, let alone what it meant to its signatories.[30] Similarly, the root causes of the French Revolution emanated from institutional weaknesses of the monarchy and long-standing strife between the social classes rather than the fleeting political episodes that led to the assault upon the Bastille in the summer of 1789.[31]

By placing inordinate emphasis upon certain occurrences and, in some cases, particular people, revolutionary myths often distort the ideas that compelled change and oversimplify conflicting patterns of thought. They also obscure the structural aspects of transformation. What is so often left, then, is a fragment of history devoid of any real context and susceptible to manipulation by those who mine historical facts in the pursuit of data intended to advance certain political or legal arguments. In this sense, the term

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[29] Brinton, supra note 28, at 3–5, 15–20, 24–25 (discussing the differences between popular and scientific conceptions of revolutions and the task of understanding their structure). See generally Thomas S. Kuhn, The Structure of Scientific Revolutions (3d ed. 1996) (discussing the incremental nature of ideological revolutions).

[30] See generally Bernard Bailyn, The Ideological Origins of the American Revolution (1967) (discussing the ideas that led to the American Revolution); Gordon S. Wood, The Radicalism of the American Revolution (1992) (same).

[31] See generally Georges Lefebvre, The Coming of the French Revolution (1947) (discussing the ideological antecedents of the French Revolution); R.R. Palmer, The Age of the Democratic Revolution: A Political History of Europe and America, 1760–1800—The Struggle 5–65, 99–131 (1964) (discussing the origins of the French Revolution and its initial aftermath); see also generally Brinton, supra note 28, at 72–101 (discussing the initial stages of revolutions).

"revolution" becomes convoluted and loses historical precision, for not every complete systematic political or legal transformation necessarily signifies change that occurred either suddenly or in a particularly radical manner. Yet this is what conventional American constitutional history would have one believe about the purported constitutional revolution of 1937. A principal objective of White's book, therefore, is to demonstrate the fallacy of presuming the Supreme Court abruptly altered its jurisprudential course to accommodate social, economic and political change. Implicitly what he suggests is that much of the misunderstanding about the 1930s Court reflects analytical difficulties arising from misconceptions about the nature of constitutional revolution.

B. Constitutional Revolution as Myth and the Problem of Perspective

In the aftermath of the social and economic turmoil of the 1930s, a narrative emerged that sought to explain the apparent shift in the Supreme Court's constitutional jurisprudence of political economy. Initially crafted by contemporary observers of the Court and later refined by others, this account described doctrinal changes in the Court's Due Process and Commerce Clause jurisprudence as revolutionary and placed considerable emphasis upon the New Deal itself and the Court-packing plan as the catalysts for this jurisprudential shift.[32] Regarded by some as a cautionary tale about the proper role of an unelected judiciary in a constitutional democracy,[33] the notion that a constitutional revolution occurred between 1935 and 1937 had, by mid-century, assumed symbolic importance as an example of how political forces shape legal doctrine in this country. For the most part, the authors of this version of constitutional history were not only the New Dealers who had witnessed the belated triumphs of their reform programs,[34] but also influential

[32] See generally Corwin, supra note 13, at 39–79 (emphasizing the role of the Court-packing plan in the Court's New Deal legislation decisions); Corwin, supra note 2 (analyzing judicial review as an instrument of popular government heavily influenced by public opinion).

[33] See, e.g., Rodell, supra note 14, at 213–54.

[34] For example, Professor Edward Corwin consulted with the Roosevelt Administration about its Court-packing plan. See White, supra note 1, at 319 n.3. In addition, Jerome Frank served as an attorney in the Agricultural Adjustment

members of the press and academics, among them leading political scientists[35] and previous critics of the Court's "mechanical jurisprudence."[36]

Over time, this conventional narrative, with its emphasis on political causation in the transformation of Supreme Court doctrine, took hold and has, as White details at the end of his book, wielded considerable influence upon the way in which both those within and outside of the legal profession regard judicial review and the evolution of constitutional doctrines.[37] Indeed, many old New Dealers went on to teach at leading law schools throughout the nation and, through their constitutional law casebooks and classroom instruction, reinforced the notion that the Court essentially switched jurisprudential course in response to the external pressures of New Deal politics. Not surprisingly, some of their best students who succeeded them at the lectern have continued to perpetuate some of the mythology surrounding the constitutional revolution of 1937.[38]

A principal characteristic of mainstream accounts of Supreme Court decisionmaking during the 1930s is their tendency to compress the chronology of change into a few short years, thus making

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Administration and at the Securities and Exchange Commission. Peter H. Irons, The New Deal Lawyers 299 (1982). For discussion of the seminal influence of New Deal lawyers upon the post-New Deal legal profession and at the nation's elite law schools, see id. at 295–99.

[35] Prominent political scientists in this group were Edward Corwin of Princeton and Benjamin Wright of Harvard.

[36] This phrase comes from the title of an influential law review article critical of *Lochner*-era police powers jurisprudence. Roscoe Pound, Mechanical Jurisprudence, 8 Colum. L. Rev. 605 (1908). See generally Rodell, supra note 14, at 213–54 (decrying the conservatism of the Court).

[37] White, supra note 1, at 11–20, 237–39, 269–312.

[38] In this regard, consider the following passage from a leading constitutional law casebook:

> While opposition to Roosevelt's plan was mounting in the Congress, actions by the Supreme Court did more to thwart the plan. Although the plan was effectively defeated in Congress in June of 1937 when the Senate Judiciary Committee reported it with an unfavorable recommendation, the Court-packing plan may have had its *intended effect.* On April 12, 1937, the Justices who decided *Schechter* and *Carter* decided *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, upholding the National Labor Relations Act against the Commerce Clause challenge of a large, national steel company.

Dan Braveman et al., Constitutional Law: Structure and Rights in Our Federal System 333 (4th ed. 2000) (emphasis added).

it seem as if the Supreme Court abruptly and radically altered its jurisprudence in response to the external pressures of New Deal politics and the inexorable progress of social and economic reform. Rather than consider the trajectory of doctrinal change over decades, as ably demonstrated, for example, by White and Cushman, conventional analysis of Supreme Court precedent from the 1930s often seems to regard the Court as an adjunct political branch and places more emphasis upon the immediate results of its decisions during this time than on how the Justices reached their conclusions.

White and other revisionist historians, however, reject this model of early twentieth-century constitutional change as overly simplistic and instead suggest that although a fairly complete transformation in constitutional thought occurred, it proceeded much more slowly in some respects and in less linear fashion than described in conventional accounts.[39] Viewed from this perspective, what happened between the 1920s and the early 1940s was not a revolution in the sense of an abrupt or sudden change in constitutional doctrine as much as a series of shifts, at times almost imperceptible and seemingly contradictory, that marked a gradual transition from orthodox constitutional notions of judicial review to a more instrumental model of constitutional interpretation through which an emerging majority of the Supreme Court Justices adapted constitutional provisions to changing economic and social conditions. 1937, therefore, was not the end of this transformation but rather a point along the way.

C. Political Labels and Behavioralist Assumptions

White attributes some of the mythology arising from the constitutional revolution of 1937 to the generation of New Dealers who chronicled the triumph of their policies and to their contemporaries who invariably described the process of constitutional change in political terms.[40] In so doing, they tended to overlook the delicate web of constitutional doctrines formed as a result of long-term internal debates within the Court over the nature of constitutional limitations and the permissible scope of public regulation of private

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[39] See, e.g., Cushman, supra note 21 (arguing that external pressures on the Court were not as influential as conventional wisdom suggests).

[40] White, supra note 1, at 14–18, 269–312.

economic affairs and free expression. Rather than try to reconstruct the jurisprudential premises of early twentieth-century jurists who struggled to reconcile the meaning of constitutional provisions with the social and economic demands of a society in flux, commentators interpreted constitutional precedent through the prism of politics and, more often than not, linked judicial decisionmaking during the early decades of the twentieth century to the perceived social, political, and economic attitudes of the Justices.[41]

As a result, political labels were used to describe the process of constitutional adjudication during the 1930s and previous decades. Political terms such as "liberal" and "conservative," "progressive" and "reactionary" dominated commentary about the Court and its Justices. Insofar as this terminology seemingly made the process of constitutional adjudication more accessible to the public and appeared to remove the veil of mystique from the early twentieth-century Court, it also oversimplified constitutional doctrines and distorted judicial behavior. Jurists such as Oliver Wendell Holmes and Louis Brandeis, White notes, were viewed as "progressive" and "liberal" on the basis of a handful of Supreme Court opinions,[42] whereas dissenters from the Court's relatively deferential economic regulation decisions of the mid- to late-1930s were assigued the pejorative labels of "reactionary" and "conservative,"[43] even though a few years before they held mainstream constitu-

[41] See, e.g., Rodell, supra note 14, at 213–54. See generally Drew Pearson & Robert S. Allen, The Nine Old Men (1937) (linking the constitutional jurisprudence of members of the Hughes Court to their political views).

[42] White, supra note 1, at 285; see also Whitney v. California, 274 U.S. 357, 375–77 (1927) (Brandeis, J., concurring) (articulating the importance of free speech in a constitutional democracy); Adkins v. Children's Hosp., 261 U.S. 525, 567–71 (1923) (Holmes, J., dissenting) (criticizing liberty of contract); Abrams v. United States, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting) (articulating the importance of free speech in a constitutional democracy); Lochner v. New York, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting) (criticizing liberty of contract).

[43] See, e.g., Pearson & Allen, supra note 41, at 134–138 (describing Justice Butler's conservative views); id. at 139–41, 159–62 (describing Justice Owen J. Roberts's reactionary streak); id. at 186, 192, 195, 197 (describing Justice Van Devanter's conservatism); id. at 198–206 (describing Justice Sutherland's penchant for protecting property rights and attributing to him an aversion toward industrial reform); id. at 222–37 (characterizing Justice McReynolds as both reactionary and stupid) (1936); Rodell, supra note 14, at 213–54 (describing the pattern of Supreme Court adjudication in New Deal cases).

tional views[44] and some, like then-Senator George Sutherland, had previously endorsed "progressive" reforms such as workmen's compensation[45] and women's suffrage.[46]

Indeed, Justice Sutherland's record both before and after he joined the Court presents something of a paradox that calls into question the facile characterization of him as either "conservative" or "reactionary." For example, as a member of the Utah legislature he helped draft maximum hours legislation applicable to the mining industry,[47] while on the Court he often invoked liberty of contract as a constitutional challenge to economic regulation of private businesses.[48] Yet Justice Sutherland's penchant for property rights did not prevent him from recognizing the virtue of some

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[44] Justices Butler, McReynolds, Sutherland, and Van Devanter, each of whom was part of the majority in both *Adkins*, 261 U.S. at 525, and *Tyson & Brother v. Banton*, 273 U.S. 418 (1927), dissented in *Nebbia v. New York*, 291 U.S. 502 (1934), and *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

[45] With regard to the need for a workmen's compensation law for railroad employees, then-Senator Sutherland remarked: "We must take care that these people do not become wrecks, human driftwood in society. That is one object of this legislation. The law of negligence is hard; it is unjust, it is cruel in its operation. The law of compensation proceeds upon broad humanitarian principles." 48 Cong. Rec. 4846, 4853 (1912) (statement of Sen. Sutherland). The following year, Sutherland reiterated the importance of workmen's compensation as a means of helping the victims of industrial accidents. See George Sutherland, The Economic Value and Social Justice of a Compulsory and Exclusive Workmen's Compensation Law, Address Before the Third Annual Convention of the International Association of Casualty and Surety Underwriters (July 14, 1913) (transcript available in the Sutherland Papers at the Library of Congress), reprinted in S. Doc. No. 131, at 11–12 (1913). In 1916, Sutherland introduced in Congress a workmen's compensation bill for employees of the federal government. See 53 Cong. Rec. 452 (1916) (statement of Sen. Sutherland).

[46] Then-Senator Sutherland stated:

> I give my assent to woman suffrage because ... there is no justification for denying to half our citizens the right to participate in the operations of a government which is as much their government as it is ours upon the sole ground that they happen to be born women instead of men.

51 Cong. Rec. 3598, 3601 (1914) (statement of Sen. Sutherland). In 1915, Sutherland introduced a joint resolution in favor of a constitutional amendment extending to women the right to vote. See 53 Cong. Rec. 75 (1915) (statement of Sen. Sutherland).

[47] See Joel Francis Paschal, Mr. Justice Sutherland: a Man Against the State 36 (1951). The Supreme Court upheld this legislation in *Holden v. Hardy*, 169 U.S. 366 (1898).

[48] See, e.g., *W. Coast Hotel Co.*, 300 U.S. at 406–14 (Sutherland, J., dissenting); New State Ice Co. v. Liebmann, 285 U.S. 262 (1932); Ribnik v. McBride, 277 U.S. 350 (1928); *Tyson & Brother*, 273 U.S. at 429–31; *Adkins*, 261 U.S. at 525.

forms of public control of private economic activity. In this regard, his opinion in *Euclid v. Ambler Realty Co.*,[49] which upheld a zoning ordinance as a legitimate exercise of local police powers, presumably contradicts the popular notion of Justice Sutherland as a reactionary jurist. Similarly, some of his criminal procedure opinions[50] reveal compassion and concern for fair play rarely attributed to Justice Sutherland by conventional commentators.

White posits that with the ascendance by the 1930s of behavioralist assumptions about adjudication, the notion that Supreme Court Justices could not necessarily separate their personal views from the methodology of constitutional interpretation resonated powerfully with critics of the Court's orthodox constitutional jurisprudence of the twentieth century's early decades.[51] Essentially, what White suggests is that once the theory of judicial behaviorialism attained widespread acceptance it provided a convenient after-the-fact rationale for explaining the jurisprudential shift of the Court during the 1930s. It also encouraged the continued use of political labels to describe judicial behavior, even when such labels were inaccurate or somewhat deceiving, as in what White identifies as the deification of Justices Holmes and Brandeis and the demonization of Justice Sutherland.[52] According to White, none of these jurists entirely deserves his reputation in constitutional history,[53] and though detailed examination of their judicial careers is beyond the scope of his study, White manages to make a fairly convincing argument that the pervasive influence of behavioralist

[49] 272 U.S. 365 (1926); see also Olken, supra note 10, at 79 (discussing *Euclid*).

[50] See, e.g., Berger v. United States, 295 U.S. 78 (1935) (invalidating a criminal conviction because of prosecutorial misconduct); Powell v. Alabama, 287 U.S. 45 (1932) (invoking the Sixth Amendment right to counsel of a defendant in a capital felony case).

[51] See White, supra note 1, at 237–312.

[52] Id. at 269–301. See generally Silas Bent, Justice Oliver Wendell Holmes (1932) (highly complimentary biography of Justice Holmes); Alpheus Thomas Mason, Brandeis: a Free Man's Life (1946) (flattering portrayal of Justice Brandeis); Pearson & Allen, supra note 41, at 116–38 (criticizing Justice Butler); id. at 186–97 (mocking Justice Van Devanter); id. at 198–206 (belittling Justice Sutherland); id. at 222–237 (describing Justice McReynolds as tragic).

[53] White, supra note 1, at 269–301. For an example of revisionist analysis of Justice Sutherland, see generally Olken, supra note 10 (reappraising Justice Sutherland's jursiprudence of economic liberty and refuting notions that natural law, laissez-faire economics, or Social Darwinism influenced his views).

theories of adjudication throughout much of the twentieth century is largely responsible for the persistent mythology that surrounds the New Deal Court and its members.

In this regard, White sparingly uses the term "revolution" to describe the course of change in constitutional interpretation during the first half of the twentieth century, preferring instead to use terms such as "transformation" and "transition," which more precisely and carefully characterize the intellectual context in which Supreme Court Justices altered conceptual paradigms of constitutional law.[54] Rather than employ conventional labels such as "conservative" or "reactionary," he characterizes traditional notions of judicial review as "orthodox" or "guardian."[55] At times, White even juxtaposes these terms in order to convey a more accurate sense of the prevalent jurisprudential premise eventually displaced throughout the 1930s and into the 1940s by "the living Constitution theory"[56] and its more flexible notion of constitutional adaptivity. In the lexicon of White's narrative these are far more instructive than the comparatively empty adjectives "liberal" and "progressive."

D. The Distinction Between Law and Politics

In essence, the conventional view that the Supreme Court overhauled its constitutional jurisprudence in reaction to the external

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[54] White, however, uses the term "revolution" to characterize doctrinal change between the 1920s and the 1940s concerning matters of political economy. White, supra note 1, at 198–204. In large part, what he considers revolutionary is the broad scope of substantive change that occurred during this period as the Court gradually discarded many of its orthodox constitutional tenets. For White, therefore, it is the complete nature of the transformation in the Court's constitutional jurisprudence of political economy that rendered it revolutionary. Id. at 198–268. In this context, he narrowly invokes the concept of revolution to describe the scope of change yet expressly refuses to characterize the pace of such doctrinal change as revolutionary. Id. at passim. In this sense, then, his understanding of the constitutional revolution that occurred during the 1930s and into the 1940s is both more precise than and fundamentally distinct from conventional narratives that suggest the Court abruptly altered its constitutional jurisprudence in response to the external pressures of New Deal politics.

[55] Id. at 36–37, 96, 131, 168–69, 225–27, 232–33, 245–54, 269, 299–300, 306–07.

[56] See, e.g., Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426–28, 435, 443 (1934) (illustrating a flexible interpretation of the Contract Clause in light of changing economic conditions).

pressures of New Deal politics and that the swiftness of this transformation rendered it revolutionary ignores the fundamental distinction between law and politics.[57] As White explains at great length in his book, the pace of change was gradual, a bit uneven, and far from complete by the end of the 1930s. From a methodological standpoint, White's revisionism diverges from the traditional account because, unlike the political scientists and early commentators of the Hughes Court, he focuses on the historical development of constitutional thought. This is of particular importance because judicial review differs from political action even though many legal issues derive from political conflicts.[58]

Supreme Court justices interpret the Constitution and use it to resolve questions of law constrained, in large part, by the common law doctrine of stare decisis. Respect for legal precedent is the hallmark of the judicial function and usually tempers the pace of change.[59] Common law methods of applying precedent inform the process of constitutional adjudication in which judges concern themselves primarily with the development of enduring legal principles rather than expedient results.[60] In this regard, White's book is of particular value because of its emphasis upon changes in the structure of constitutional thought and its demonstration that much

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[57] See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137, 164–66, 169–70 (1803) (distinguishing between questions of law and non-justiciable political questions).

[58] See generally Archibald Cox, The Court and the Constitution 341–78 (1987) (discussing the nature of constitutional adjudication).

[59] See Benjamin N. Cardozo, The Nature of the Judicial Process 9–31, 142–67 (1921) (discussing common law adjudication and the evolution of precedent). Of particular relevance are two points made by Cardozo. He wrote:

> [I]n a system so highly developed as our own, precedents have so covered the ground that they fix the point of departure from which the labor of the judges begins. Almost invariably, his first step is to examine and compare them. If they are plain and to the point, there may be need of nothing more. *Stare decisis* is at least the everyday working rule of our law.

Id. at 19–20.

> I think adherence to precedent should be the rule and not the exception.... But I am ready to concede that the rule of adherence to precedent, though it ought not to be abandoned, ought to be in some degree relaxed. I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment.

Id. at 149–50.

[60] See Olken, supra note 10, at 33–35, 74–79 (discussing common law and historical custom in late nineteenth- and early twentieth-century constitutional interpretation).

of the ideological shift occurred as a result of ongoing debates within the Court about the nature of constitutional law and judicial review.

Notwithstanding their disputes over the meaning and adaptation of constitutional provisions and differences of temperament and personal politics, every member of the Hughes Court implicitly understood that the legitimacy of the Court derived from its function to decide legal, as opposed to political, disputes. Therefore, to ascribe political motives to the judicial behavior of early twentieth-century Supreme Court Justices evinces a profound misconception of constitutional adjudication. Indeed, even members of the Court such as Justices Holmes, Brandeis, and Stone, who chafed at their brethren's reluctance to reconsider precedent or reexamine jurisprudential premises, did not necessarily attribute political or socioeconomic bias to their colleagues,[61] nor did they hastily depart from the analytical structure of traditional constitutional arguments.[62] Over time their views prevailed, yet by placing inordinate emphasis upon the end result, the mainstream account of a New Deal-inspired constitutional revolution distorts the context of the changes that occurred in judicial review and reduces the Justices to political actors. White's principal task, therefore, is to recast the

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[61] In a memorial tribute to the late Supreme Court Justice Willis Van Devanter, Chief Justice Harlan Fiske Stone had this to say about his former colleague, with whom he was often in disagreement about the constitution limits of public regulation of private economic affairs:

> In the provisions of the Constitution, and particularly the Fifth and Fourteen[th] Amendments, he (Mr. Justice Van Devanter) saw safeguards to those rights and privileges of the individual which he regarded as the chief spiritual values of the society which he had known in his own life and experience. Those who differed with him differed not in their appraisal of such values but in their judgment that an instrument of government, intended to endure for ages to come, could not rightly be interpreted as casting a dynamic society in so rigid a mold. Both were content to resolve their differences by the appeal to reason in the course of adjudication. Both would have regarded as inappropriate and inept the labelling of their differing views of the appropriate boundaries of constitutional power as either conservative or liberal.

Chief Justice Harlan F. Stone, Memorial to Justice Van Devanter, (Address delivered at the United States Supreme Court, Wash., D.C.) (March 16, 1942) (transcript available in the Harlan F. Stone Papers at the Library of Congress).

[62] See generally Cushman, supra note 21 (discussing the structure of early twentieth-century change in constitutional interpretation); White, supra note 1 (same).

narrative of constitutional transformation so that the focus is on ideological patterns rather than political events.

II. THE VIRTUES OF COMPLICATING CONVENTIONAL CONSTITUTIONAL HISTORY

In the first section of his book, White sets out to complicate the conventional narrative about early twentieth-century constitutional change in order to reveal some of its insular assumptions and logical contradictions. Rather than delve into the most prominent aspect of the story, the Supreme Court's jurisprudential shift in issues involving political economy, White demonstrates that before the New Deal a transformation was well underway in other facets of public law. Against the backdrop of the growing influence of modernity in American thought, the Court began to alter its jurisprudential concepts of foreign relations and administrative law during the initial decades of the twentieth century. In addition, increased judicial recognition of free speech as an essential attribute of democratic civic virtue presaged the eventual separation of economic liberty from First Amendment rights integral to the model of bifurcated judicial review characteristic of modern constitutional law.

A. Foreign Relations

Through extensive historical analysis, White shows the tenuous connection between the New Deal and doctrinal changes within the Court's jurisprudence of foreign affairs. In so doing, he refutes the importance of the New Deal as a causal agent of jurisprudential change and instead suggests that a multitude of factors shaped the course of early twentieth-century judicial review. Several years before the New Deal, White explains, the Court had begun to question the applicability of orthodox constitutional tenets to executive agreements and other instruments of foreign policy, whose relative informality distinguished them from treaties that required Senate ratification. In 1892, for example, it upheld an executive

agreement challenged as violating separation of powers.[63] Moreover, as White indicates, in both the *Chinese Exclusion*[64] and *Insular Cases*[65] of the late nineteenth century, the Court appeared to recognize the fledgling concept of inherent national sovereignty as an extraconstitutional basis for upholding broad federal powers in foreign relations.

Over the course of nearly four decades, the Supreme Court adopted a more deferential stance toward executive branch action in international affairs. Traditional judicial interpretation strictly construed the scope of enumerated federal authority and applied the notion of reserved state powers as an additional constitutional limitation upon the national government in the realm of foreign affairs.[66] Increasing tensions and complexities within the nation's international relations, however, necessitated the exercise of considerable unilateral presidential discretion in the resolution of disputes. Throughout the 1920s and into the 1940s, the Court moved away from an orthodox conception of judicial review in this area toward a pragmatic approach that regarded foreign affairs as analytically distinct from domestic legal issues. No longer were the doctrines of separation of powers and dual federalism the linchpins of a constitutional jurisprudence of foreign relations.[67] For example, in 1920, Justice Holmes invoked the notion of inherent

[63] Field v. Clark, 143 U.S. 649 (1892) (upholding a provision of the Tariff Act of 1890 that conferred upon the President the discretion to lift exemptions from importation duties on certain agricultural goods).

[64] Fong Yue Ting v. United States, 149 U.S. 698 (1893) (upholding the federal government's inherent authority to deport aliens); Chae Chan Ping v. United States, 130 U.S. 581 (1889) (sustaining a federal law prohibiting Chinese laborers from coming into the United States).

[65] See, e.g., Fourteen Diamond Rings v. United States, 183 U.S. 176 (1901); Dooley v. United States, 183 U.S. 151 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Dooley v. United States, 182 U.S. 222 (1901); Goetze v. United States, 182 U.S. 221 (1901); DeLima v. Bidwell, 182 U.S. 1 (1901). The main insular decision, *Downes*, upheld the Foraker Act tariff on goods imported and exported between the United States and its territory of Puerto Rico.

[66] See, e.g., Geofroy v. Riggs, 133 U.S. 258, 267 (1890) ("The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States.").

[67] White, supra note 1, at 36, 61.

national sovereignty in a decision that upheld the supremacy of a federal treaty over local police powers.[68]

For White, a key figure in this jurisprudential transition was George Sutherland, who before joining the Supreme Court articulated a theory of judicial deference in foreign relations that marked a significant departure from the traditional view that, as in domestic affairs, the Court should narrowly construe the scope of federal enumerated powers and preserve the delicate balance between national and local interests affected by international matters. As a member of the United States Senate, Sutherland, however, criticized dogged adherence to orthodox constitutional tenets that had the effect of restricting presidential discretion to make foreign policy and suggested that a distinction existed between the external and internal affairs of the country. In external affairs, he posited, the federal government should enjoy the attributes of inherent national sovereignty derived from the nation's independent status in the world order and not be subject to undue restraint in the formulation and implementation of foreign policy.[69] Conversely, with respect to domestic issues, he believed the Constitution, with its carefully prescribed enumerated powers, required the Supreme Court to adumbrate the limits of governmental authority and preserve individual liberty from the arbitrary actions of public officials and the tyranny of democratic majorities.[70]

White notes that Sutherland refined his views in the Blumenthal lectures he delivered at Columbia University in 1918, two years after he left the Senate and three years before he became a Justice on the Supreme Court. In those lectures, the retired lawmaker asserted that inherent national sovereignty in foreign relations was

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[68] Missouri v. Holland, 252 U.S. 416 (1920) (upholding a treaty protecting the migration of birds).

[69] George Sutherland, The Internal and External Powers of the National Government (1909), reprinted in S. Doc. No. 61-417 (1910).

[70] George Sutherland, Principle or Expedient?, Address Before the New York State Bar Association 8–9 (Jan. 21, 1921) (transcript available in the Sutherland Papers at the Library of Congress).

> The guaranties for safe-guarding life, liberty and property, freedom of speech, of the press and of religious worship, and all the other guaranties of the Constitution, would be of little value if their interpretation and enforcement depended upon arbitrary, shifting, temporary official edicts instead of the calm, judgment of the judiciary under the general law of the land.

Id. at 11.

an essential exercise of extra-constitutional power warranted by both the nature of international affairs and the historical fact that upon the formation of the United States only the federal government had powers of external sovereignty.[71]

Nearly two decades later, toward the end of his judicial tenure and at the height of mounting tension within the Court over the permissible scope of public regulation of private economic activity, a majority of the Justices adopted Justice Sutherland's views. In *United States v. Curtiss-Wright Export Corp.*,[72] the Court upheld a joint resolution of Congress that conferred broad discretion in the President to issue an embargo on the sale of weapons to countries at war. One year later in *United States v. Belmont*,[73] the Court ruled unnecessary Senate ratification of an international agreement which, when executed by the President, interfered with private citizens' claims for just compensation.[74] Justice Sutherland, not surprisingly, wrote the majority opinion in both cases, resting the broad exercise of executive branch discretion and concomitant judicial deference upon the distinction between the internal and external powers of the government[75] and the practical need for vesting the president with nearly exclusive authority to conduct foreign relations.[76] White correctly sees these judicial decisions as representing the culmination of Justice Sutherland's attempt to alter the constitutional jurisprudence of foreign relations.[77]

White's decision to emphasize Justice Sutherland's role in this transformation is critical to his larger points about the historiography concerning the New Deal Court. At the same time Justice Sutherland led the movement toward judicial deference in foreign relations, in the domestic realm he steadfastly resisted departing

[71] George Sutherland, Constitutional Power and World Affairs 24–191 (1919).

[72] 299 U.S. 304 (1936).

[73] 301 U.S. 324 (1937)

[74] Id.

[75] *Curtiss-Wright Export Corp.*, 299 U.S. at 315–16.

[76] Id. at 319–20.

[77] For criticism of Justice Sutherland's approach, see generally David M. Levitan, The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory, 55 Yale L.J. 467 (1946) (disagreeing with Justice Sutherland's theories of inherent sovereignty and extra-constitutional authority).

from the rigid categorical jurisprudence of police powers[78] and the formalistic notion of separation of powers characteristic of orthodox constitutionalism.[79] White notes that this apparent dichotomy within Justice Sutherland's public law jurisprudence does not fit neatly within the conventional view of Justice Sutherland as a judicial reactionary and apostle of property rights.[80] After all, both *Curtiss-Wright* and *Belmont* were cases in which the Court upheld the broad discretion of the executive branch in foreign affairs to the detriment of litigants who claimed federal policies interfered with their private property rights. They also exemplified the type of pragmatic constitutional adjudication Justice Sutherland decried in his more important economic liberty dissents.[81]

Traditional historical analysis of the New Deal Court accounts neither for this ironic contrast in Justice Sutherland's judicial behavior nor for the significant patterns of jurisprudential change in public law that preceded the New Deal. In this regard, White's careful documentation of the origins of this doctrinal transition raises significant doubts about the accuracy of an historical account that makes the New Deal, with its domestic agenda, the cynosure of a constitutional revolution. Moreover, his portrayal of Justice Sutherland as a jurist who recognized the importance of adapting American constitutional law and judicial review to accommodate changes in international policy calls into question the accuracy of using political labels such as "reactionary" or even "conservative" to summarize the whole of his constitutional jurisprudence.

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[78] See, e.g., W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 401–14 (1937) (Sutherland, J., dissenting); Adkins v. Children's Hosp., 261 U.S. 525 (1923).

[79] See, e.g., Panama Refining Co. v. Ryan, 293 U.S. 388, 431–33 (1935) (invalidating the "hot oil" provision of the National Industrial Recovery Act as an unconstitutional delegation of lawmaking power).

[80] White, supra note 1, at 82. For an example of conventional disparagement, see Alpheus Thomas Mason, The Conservative World of Mr. Justice Sutherland, 1883–1910, 32 Am. Pol. Sci. Rev. 443 (1938) (generally criticizing Justice Sutherland and ascribing to him a penchant for natural rights, Social Darwinism, and laissez-faire economics).

[81] See, e.g., *W. Coast Hotel Co.*, 300 U.S. at 401–05 (Sutherland, J., dissenting); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 448–53, 472–73, 483 (1934) (Sutherland, J., dissenting).

Though White never really explains the reasons for the duality of Justice Sutherland's constitutional thought,[82] nor that of other members of the Court, who, in effect, seemed to switch positions on domestic and international issues,[83] the fact that he highlights this contradiction is significant. At the very least, it belies the myth of a monolithic conservatism from which the Court emerged during the 1930s and offers in its place a more nuanced chronicle of change that did not reach its crescendo until the 1940s.[84] Doing this in the opening chapters of the book is particularly effective because it introduces the reader to the scope of White's revised narrative and his methodology.

B. Administrative Law

White further complicates conventional constitutional history with his analysis of the development of administrative law during the first half of the twentieth century. Unlike foreign relations, where the bulk of doctrinal change preceded the New Deal, here the most significant shift from an orthodox theory of separation of powers occurred in the decade after the purported constitutional revolution of 1937 with the debates that led to the passage of the

[82] White attributes the contrast in Justice Sutherland's domestic and international jurisprudential views to his "intuitive belief that the foreign relations sphere was 'different' from the domestic sphere, jurisprudentially, politically, and perhaps constitutionally." White, supra note 1, at 82. However, the dichotomy in Justice Sutherland's thought may be exaggerated. Fundamentally averse to political factions, Justice Sutherland, a former United States Senator, may have realized that it was in the best interests of the country to permit the President a broad measure of discretion given the political factions in Congress. For discussion of Justice Sutherland's factional aversion, see Olken, supra note 10, at 36–88. Justice Sutherland's fervent patriotism may also explain his views about jurisprudence of foreign relations. See Joel Francis Paschal, Mr. Justice Sutherland: a Man Against the State 93–95, 226–32 (1951).

[83] Justices Brandeis and Benjamin Cardozo were part of the *Curtiss-Wright* majority, but, together with then-Justice Stone, dissented in *Belmont*. In general, they were much more deferential toward the exercise of governmental power to regulate domestic economic matters. See, e.g., New State Ice Co. v. Liebmann, 285 U.S. 262, 280–311 (1932) (Brandeis, J., dissenting).

[84] See, e.g., United States v. Pink, 315 U.S. 203 (1942) (applying the Supremacy Clause to the Litvinov Assignment and upholding presidential discretion to implement this executive agreement's provisions).

Administrative Procedure Act.[85] White asserts that the body of administrative law that evolved by the end of the 1940s was actually a by-product of both longstanding orthodox criticisms of agencies and emerging modern theories about law and government spawned in large part by the growing complexity of industrial society.[86]

At the outset of the twentieth century, the predominant model of constitutional adjudication regarded the Constitution as a series of essential principles that judges strictly construed to maintain the limits of governmental authority. White aptly identifies this judicial method as guardian review, noting that late nineteenth- and early twentieth-century jurists perceived they were guardians entrusted with the solemn task of monitoring the prescribed boundaries of public power within a constitutional democracy.[87] Administrative agencies posed considerable problems in this regard because their mixture of executive, rulemaking, and judicial functions seemingly violated the strict conception of separation of powers integral to guardian review. Indeed, from this perspective, courts often questioned the validity of agency decisions throughout the early decades of the twentieth century.[88]

Yet, as White demonstrates, during this period a series of extra-constitutional arguments emerged that sought to validate the role of agencies in modern American government. Harvard Professors Roscoe Pound, Felix Frankfurter, and James Landis, as well as several other prominent legal academicians, criticized orthodox notions of law that viewed delegations of lawmaking authority to specialized agencies as illegitimate. Instead, they posited that agencies with experts empowered to investigate conditions, prescribe rules, and enforce them represented the most effective means for government to resolve many of the socioeconomic problems en-

[85] Ch. 324, 60 Stat. 237 (1946) (current version codified at 5 U.S.C. §§ 551–706 (2001)).

[86] White, supra note 1, at 96.

[87] See, e.g., Mugler v. Kansas, 123 U.S. 623, 661 (1887) (noting that "courts are not bound by mere forms . . . [t]hey are at liberty—indeed under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority"); see also Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 129, 160, 168, 192 (Da Capo Press ed. 1972) (1868).

[88] White, supra note 1, at 96–98.

gendered by the growth of industrial America.[89] Linking these arguments to the advent of modernism in intellectual thought, White explains that proponents of administrative agencies considered them an essential device in the pursuit of democracy; their faith in the agency form reflected the conviction that humans could largely control the course of their lives.[90]

Between the 1920s and 1940s, the debate over the legitimacy of administrative agencies surfaced not only in academic literature but also in the Supreme Court. White attributes the modest success of agencies such as the Federal Trade Commission, the Federal Power Commission, the Federal Communications Commission, and the Interstate Commerce Commission, each of which prevailed in constitutional challenges before the Court,[91] to several factors. Notwithstanding their broad regulatory standards, these agencies derived their authority from fairly uncontroversial enumerated constitutional powers and were administered by officials of independent appointment whose discretion was subject to judicial review. In contrast, some of the agencies created during the initial phase of the New Deal emanated from more attenuated constitutional authority and featured administrators from the very industries subject to regulation.[92] These differences, White believes, in large part explain why the Supreme Court invalidated portions

[89] E.g., James M. Landis, The Administrative Process (1938) (discussing the expertise, efficiency, and tripartite functions of administrative agencies).

[90] White, supra note 1, at 114–16.

[91] See, e.g., Am. Tel. & Tel. Co. v. United States, 299 U.S. 232 (1936) (deferring to Federal Communications Commission decisions made within the scope of agency power); Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (recognizing the validity of a congressional delegation of power to the Federal Trade Commission given the quasi-legislative, rather than legislative, nature of the power); United States v. Smith, 286 U.S. 6 (1932) (presuming the legitimacy of the Federal Power Commission); Interstate Commerce Comm'n v. Brimson, 154 U.S. 447 (1894) (upholding the Interstate Commerce Act).

[92] White, supra note 1, at 112–14. In 1944, Chief Justice Stone explained that one flaw with the National Industrial Recovery Act of 1933, an early New Deal measure intended to prescribe industrial regulations to promote economic stability during the Depression, was that "[t]he function of formulating the codes was delegated, not to a public official responsible to Congress or the Executive, but to private individuals engaged in the industries to be regulated." Yakus v. United States, 321 U.S. 414, 424 (1944).

of the National Industrial Recovery Act[93] ("NIRA") and the Guffey Coal Act[94] during the 1930s as unconstitutional delegations of legislative power, yet upheld other delegations in cases from the preceding decade.

Two other reasons not mentioned by White may also explain this pattern of adjudication. Laws such as the NIRA were hastily enacted at the outset of the New Deal and thus not carefully drafted. Replete with constitutional infirmities, they were ripe for invalidation by the Court.[95] Moreover, counsel for the government did not necessarily make effective arguments before the Court in *A.L.A. Schechter Poultry Corp. v. United States*[96] and *Panama Refining Co. v. Ryan*[97], relying more upon speculation than careful analysis of the facts.[98]

White effectively de-politicizes the New Deal non-delegation cases by placing them within the larger context of modernity and the evolving separation of the field of administrative law from traditional constitutional law. He considers the passage of the Administrative Procedure Act of 1946 the endpoint of this transition and notes that many of the procedural limitations it imposed upon agencies in terms of judicial review, the separation of prosecutorial and adjudicatory functions, and the requirement that agencies publish their decisions marked the reconciliation of orthodox and modern constitutional tendencies.[99] This is in stark contrast to the conventional wisdom that in the aftermath of the New Deal an instrumental constitutionalism swept aside all vestiges of the old constitutional order. White, however, provides a fresh perspective on the development of twentieth-century admin-

[93] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (invalidating the minimum wage and maximum hour provisions of the National Industrial Recovery Act on both Commerce Clause and non-delegation doctrine grounds); Pan. Ref. Co. v. Ryan, 293 U.S. 388 (1935) (invalidating the "hot oil" provision of the National Industrial Recovery Act as an unconstitutional delegation of lawmaking power).

[94] Carter Coal Co. v. Carter, 298 U.S. 238, 311 (1936) (finding unconstitutional the delegation of regulatory power to private individuals in the coal industry).

[95] Cushman, supra note 21, at 36–38.

[96] *Schechter Poultry Corp.*, 295 U.S. at 495.

[97] *Pan. Ref. Co.*, 293 U.S. at 388.

[98] Cushman, supra note 21, at 38–39, 156–58.

[99] White, supra note 1, at 118–25.

istrative law that suggests a more realistic interplay occurred between conventional and modern ideas.

C. The Emergence of Free Speech

One of the more interesting sections of White's book involves his illuminating discussion of free speech between the 1920s and 1940s. Traditionally, scholars have associated the Court's increased solicitude for expression and other core First Amendment rights with the decline in judicial scrutiny of economic regulations.[100] Of particular relevance to this notion is a footnote from a 1938 due process decision in which Justice Stone, writing for a unanimous Court, suggested a more rigorous level of judicial review was appropriate in cases involving non-economic rights or the apparent failure of the political process to protect discrete and insular minorities.[101] Within the context of upholding, pursuant to the rational basis test, a federal law that proscribed the interstate shipment of skimmed milk, Justice Stone remarked: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth."[102] Often regarded as a symbolic expression of judicial objectives in the aftermath of the New Deal constitutional "revolution," Justice Stone's celebrated footnote appeared to herald the adoption of a bifurcated scheme of judicial review marked by deference to public control of private economic affairs and heightened scrutiny of laws that restricted First Amendment liberties.

White, however, views this conception of constitutional history as flawed and oversimplistic. Interestingly, he attributes much of the fault in this regard to Justice Stone himself, whom White thinks may have overstated the Court's willingness in 1938 to abandon guardian review of unenumerated economic rights and the breadth of its fundamental liberties jurisprudence.[103] In addition, White

[100] See, e.g., Gerald Gunther & Kathleen M. Sullivan, Constitutional Law 485 (13th ed. 1997).

[101] United States v. Carolene Products Co., 304 U.S. 144, 152–53 n.4 (1938).

[102] Id.

[103] White, supra note 1, at 130–31. White believes footnote 4 in *Carolene Products* obscures the fact that the Justices decided early twentieth-century free speech cases

finds it ironic that insofar as Justice Stone endorsed close judicial scrutiny of some laws that resulted from the tyranny of democratic majorities, the First Amendment opinions he cited sought to "reinforc[e] the ideal of majoritarian democracy."[104] For White this internal contradiction, in part, underscores the misleading nature of Justice Stone's footnote.

Though White is undoubtedly correct about the hyperbolic characteristics of Justice Stone's footnote, it is not necessarily true that, in 1938, it was inconsistent, from the perspective of democratic values, to conflate judicial intervention on behalf of discrete and insular minorities tyrannized by the excesses of democratic majorities with increasing judicial review of laws that threatened to thwart democratic participation through restrictions upon expression. Indeed, the two rationales for heightened judicial scrutiny were quite consistent in that they both sought to preserve the integrity of the democratic process, albeit in different ways. For example, Justice Brandeis, one of the principal proponents of expanded judicial review in free speech cases involving matters of public discussion, also expressed considerable tolerance for the exercise of local police powers that restricted economic liberty because of his belief in the virtues of the laboratories of democracy.[105] However, Justice Brandeis also subjected to close judicial examination a handful of regulations whose discriminatory effects he believed impeded the equal operation of the law and undermined democratic values.[106]

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from the perspective of guardian review and not the bifurcated review commonly associated with the modern jurisprudence of free expression. Id. at 129–31. In this respect, Justice Stone's implication that, by 1938, there were inverse standards of review for economic liberty and freedom of expression was misleading.

[104] Id. at 131; see, e.g., Whitney v. California, 274 U.S. 357, 375, 377 (1927) (Brandeis, J., concurring) (emphasizing the importance of freedom of expression in a constitutional democracy).

[105] Compare New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), with *Whitney*, 274 U.S. at 375, 377 (Brandeis, J., concurring).

[106] See, e.g., Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673 (1930) (ruling that a Missouri administrative process to collect taxes violated due process); Dorchy v. Kansas, 264 U.S. 286, 289 (1924) (invalidating the application of the compulsory arbitration provision of the Kansas Industrial Relations Act to the coal mining industry); Dawson v. Ky. Distilleries & Warehouse Co., 255 U.S. 288 (1921) (invalidating a Kentucky whiskey tax as an unequal property tax in violation of the state's constitutional requirement of uniform property taxes); Okla. Gin Co. v. Oklahoma, 252 U.S. 339 (1920) (finding that rate-fixing orders of the Oklahoma

This point, however, should not detract from the considerable merits of White's criticisms of the tendency of conventional constitutional history, to perpetuate, to one extent or another, the notion of a chronologically precise inverse relationship between the rise of heightened judicial review concerning non-economic rights and the demise of close scrutiny in the context of economic liberty. In its place, he offers a modified jurisprudential narrative that more accurately emphasizes the evolutionary process of constitutional interpretation and demonstrates some of the pitfalls of historical determinism he essentially attributes to misconceptions fostered, in large part, by Justice Stone's fabled footnote. Through careful analysis of Court precedent and selective discussion of academic commentary, White asserts that the emergence of free speech as a compelling rationale for judicial intervention resulted from three phases of development in constitutional thought.

Initially, the Court perceived rights of expression as complementary aspects of economic liberty protected by the Due Process Clauses.[107] When confronted in the decade after the First World

Corporation Commission violated the Due Process Clause of the Fourteenth Amendment because they did not provide adequate judicial review of administrative decisions); Okla. Operating Co. v. Love, 252 U.S. 331 (1920) (same).

[107] Indeed, the doctrine of liberty of contract, often invoked in late nineteenth- and early twentieth-century economic due process cases, reflected a broad conception of liberty. See, e.g., The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 87–89, 93, 101–11 (1873) (Field, J., dissenting) (suggesting that the Fourteenth Amendment Due Process Clause protected the freedom of individuals to pursue lawful occupations and that such freedom emanated from the pursuit of personal happiness at the heart of constitutional liberty); id. at 116–22 (Bradley, J., dissenting) (same); see also Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co., 111 U.S. 746, 762 (1884) (Bradley, J., concurring) (explaining that liberty meant more than freedom from physical constraint, it also signified "[t]he right to follow any of the common occupations"). In *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), the Supreme Court formally recognized liberty of contract as part of the liberty protected by the Due Process Clause of the Fourteenth Amendment. Thereafter, liberty of contract enjoyed preeminent constitutional status until the 1930s. See, e.g., Adkins v. Children's Hosp., 261 U.S. 525 (1923); Coppage v. Kansas, 236 U.S. 1 (1915); Lochner v. New York, 198 U.S. 45 (1905). As a constitutional doctrine, liberty of contract encompassed both tangible and intangible property rights. Its emphasis upon preserving the pursuit of property through a lawful occupation—itself an intangible property right—anticipated the Court's eventual recognition that the Liberty Clause of the Fourteenth Amendment also protected individuals' other intangible rights such as freedom of expression from interference by the states. Charles Warren, The New "Liberty" Under the Fourteenth Amendment, 39 Harv. L. Rev. 431, 446–58 (1926).

War by a series of cases that raised First Amendment issues about the validity of public regulation of speech and press activities deemed subversive, the Court invoked its traditional jurisprudence of police powers to assess the constitutional limitations of such restrictions. As a result, most of the Justices employed the "bad tendency" test to distinguish constitutionally protected expression from communication considered detrimental to the security of a democratic republic.[108] Justice Holmes, however, criticized this standard as intolerant and unduly repressive. For Justice Holmes, the "free trade in ideas" signified an important means of promoting truth within a constitutional democracy.[109] Accordingly, he believed that only expression that presented "a clear and present

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In 1925, the Supreme Court ruled the Due Process Clause of the Fourteenth Amendment incorporates the First Amendment Free Speech and Free Press Clauses. See Gitlow v. New York, 268 U.S. 652 (1925). In *Gitlow*, Justice Edward Sanford, commented that "we . . . assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the Fourteenth Amendment from impairment by the States." Id. at 666. *Gitlow*'s recognition of freedom of expression as part of the liberty protected by the Due Process Clause of the Fourteenth Amendment reflected the burgeoning recognition of several members of the Court that liberty encompassed a broad spectrum of personal rights aside from freedom of contract. See, e.g., Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (deciding, seven days before *Gitlow*, that the concept of Fourteenth Amendment liberty included the freedom of parents and guardians to make educational decisions for their children); Meyer v. Nebraska 268 U.S. 652 (1923) (ruling that Fourteenth Amendment liberty protected the acquisition of foreign languages); Gilbert v. Minnesota, 254 U.S. 325, 343 (1920) (Brandeis, J., dissenting) (suggesting that, like freedom of contract, the freedom to teach others about pacificism, fell within the protection of the Fourteenth Amendment Due Process Clause); Twining v. New Jersey, 211 U.S. 78, 99 (1908) (suggesting in dicta that the liberty preserved by the Due Process Clause of the Fourteenth Amendment from state incursion included some rights enumerated in the first eight amendments); see also Berea Coll. v. Kentucky, 211 U.S. 45, 67 (1908) (Harlan, J., dissenting) (suggesting that the right to teach not only involved liberty of contract but also a fundamental liberty protected from state infringement by the Due Process Clause of the Fourteenth Amendment); Patterson v. Colorado, 205 U.S. 454, 465 (1907) (Harlan, J., dissenting) (noting "that the privileges of free speech and of a free press . . . constitute essential parts of every man's liberty, and are protected against violation by that clause of the Fourteenth Amendment forbidding a State to deprive any person of his liberty without due process of law").

[108] See, e.g., *Gitlow*, 268 U.S. at 652 (upholding seditious speech conviction).

[109] See, e.g., Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

danger" warranted limitation.[110] Similarly, Harvard Law School professor Zechariah Chafee articulated the need for enhanced judicial protection of speech to encourage discussion of civic affairs and other matters of public interest.[111]

From White's viewpoint, Justice Holmes's and Professor Chafee's criticisms and their predominant concern with free speech as a metaphor for democratic truth represented an early step in the separation of freedom of expression from economic liberty and orthodox notions of police powers.[112] Yet White is also careful to note that Justice Holmes's "clear and present danger" test, while theoretically more protective of speech, nevertheless proved as inept as its predecessor in distinguishing good speech from bad.[113] Inherently skeptical about the democratic process, Justice Holmes, White argues, advocated the unfettered exchange of ideas, including unpopular ones, to foster the primacy of information over political expediency.[114] Rather than a radical reconfiguration of constitutional jurisprudence, the "clear and present danger" test represented a modification of guardian review intended to preserve the boundaries between permissible governmental authority and private activity.[115] Explaining both the "bad tendency" and "clear and present danger" First Amendment standards as manifestations of the Court's traditional jurisprudence of police powers not only underscores the limitations of both tests but also provides a feasible explanation for the essentially cautious pattern of First Amendment decisions rendered by the Court during the 1920s.

110 See, e.g., Schenck v. United States, 249 U.S. 47, 52 (1919) (ruling that the distribution of pamphlets urging men not to comply with the World War I draft constituted a clear and present danger).

111 See generally Zechariah Chafee, Freedom of Speech (1920) (discussing the importance of freedom of expression in a constitutional democracy).

112 White, supra note 1, at 137–38.

113 Id. at 138.

114 Id. at 137; see also White, Justice Oliver Wendell Holmes, supra note 24, at 412–54 (discussing Justice Holmes's free speech jurisprudence). Influenced in part by the Darwinian notion of survival of the fittest, Justice Holmes believed that society ultimately benefited from competition between ideas. Id. at 291, 324, 360; see, e.g., *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) (stating that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market").

115 White, supra note 1, at 138.

White gives much of the credit for enhanced judicial protection of speech to Justice Holmes's younger counterpart on the Supreme Court, Justice Louis D. Brandeis, whose seminal 1927 concurring opinion in *Whitney v. California*[116] expressly linked freedom of expression to civic action. Extolling the virtue of speech as a safeguard against the tyranny of democratic majorities, Brandeis believed that one of the best ways to prevent arbitrary governmental authority was through the dissemination of ideas.[117] Freedom of speech, therefore, was not only a fundamental right explicitly protected by the First Amendment, but also a democratic rite. Noting that Justice Brandeis's justification for heightened judicial review of speech-restrictive laws exceeded those proffered by Justice Holmes and Professor Chafee, White identifies Justice Brandeis's *Whitney* remarks as the catalyst for the eventual separation of free speech from economic liberty in the Court's constitutional jurisprudence and the distinction that later emerged between close judicial scrutiny of First Amendment claims and minimal review of economic regulations.[118]

Yet, in describing Justice Brandeis's critical role in the transition toward bifurcated judicial review, White does not consider the strong parallel in Justice Brandeis's thought between heightened judicial review of free speech and press claims and less stringent

[116] 274 U.S. 357, 372–80 (1927) (Brandeis, J., concurring).

[117] In a famous passage, Justice Brandeis remarked:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary.... They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth... that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.... Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law.... Recognizing the occasional tyrannies of government majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Id. at 375–76 (Brandeis, J., concurring). Later in his concurring opinion, Justice Brandeis said: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." Id. at 377 (Brandeis, J., concurring).

[118] White, supra note 1, at 139–40.

judicial examination of local police powers. Though Justice Brandeis believed the Constitution afforded more explicit protection to expressive than economic rights, his deference to public control of private economic affairs and concern for speech reflected a passion for democracy and respect for civic deliberation. Rather than consider the contrasting standards of judicial review he endorsed as wholly indicative of the comparative value of enumerated First Amendment rights and implied constitutional concepts such as liberty of contract, Justice Brandeis may have understood that both operated to ensure democratic efficiency. Indeed, the laboratories of democracy he invoked as a rationale for judicial deference towards the exercise of local police powers[119] presupposed the existence of a robust discussion of public ideas. Enhanced judicial protection of such speech, therefore, would increase the legitimacy of local governmental authority by encouraging open discussion of public matters,[120] thus reducing the need for close judicial examination of many forms of public regulation that did not involve the First Amendment. Thus, it would appear that it was Justice Brandeis's commitment to participatory democracy that underlay his conception of judicial review.

Justice Brandeis also understood that the express constitutional guarantee of freedom of expression and the application of the First Amendment to the states through the Due Process Clause of the Fourteenth Amendment provided additional support for heightened judicial protection of speech. According to White, this notion of incorporation, together with Justice Brandeis's conscious attempt to link expression to democratic citizenship, created by the end of the 1930s a "growing jurisprudential momentum for speech rights."[121] Indeed, during the 1930s, the Court applied the more speech-protective "clear and present danger" test in subversive speech cases rather than the "bad tendency" rule in vogue the pre-

[119] See, e.g., New State Ice Co. v. Liebmann, 285 U.S. 262, 310–11 (1932) (Brandeis, J., dissenting). "There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs." Id. at 311 (Brandeis, J., dissenting).

[120] See, e.g., *Whitney*, 274 U.S. at 375–77 (Brandeis, J., concurring).

[121] White, supra note 1, at 143.

vious decade,[122] and even invalidated a municipal ordinance intended to suppress the publication of stories presumed to constitute a nuisance.[123]

Rather than attribute these decisions to abrupt doctrinal changes resulting from the external pressures of New Deal politics, White emphasizes that the ultimate adoption of bifurcated judicial review only occurred after the Court more explicitly set forth the connection between the preferred constitutional status of First Amendment rights and democracy. This happened in a series of cases throughout the late 1930s and into the 1940s in which the Justices debated the nature of selective incorporation and, more overtly than had Justices Brandeis and Holmes before them, linked freedom of expression to democratic values.[124] In so doing, they relied extensively upon the explicit constitutional textual protection afforded to First Amendment rights. Consequently, the importance of non-fundamental constitutional rights such as economic liberty subsided, and by mid-century the present model of bifurcated judicial review was in place with its essential dichotomy between economic liberty and freedom of expression.[125]

Though White undoubtedly succeeds in demonstrating the virtual irrelevance of New Deal events in the transformation of First Amendment jurisprudence, two Supreme Court cases from the late 1930s suggest that, for some of the Justices, the theoretical separation of economic liberty from freedom of expression began earlier than White indicates. In *Grosjean v. American Press Co.*,[126] a

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[122] See, e.g., Herndon v. Lowry, 301 U.S. 242 (1937) (invalidating the conviction of a Communist party organizer under a Georgia law proscribing the incitement to insurrection as an unconstitutional infringement of free speech).

[123] See, e.g., Near v. Minnesota, 283 U.S. 697 (1931) (finding a Minnesota "gag" law an unconstitutional prior restraint).

[124] See, e.g., W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (prohibiting compulsory flag salute in public schools); Palko v. Connecticut, 302 U.S. 319, 326–27 (1937) (suggesting that the First Amendment is at the heart of other constitutional freedoms).

[125] Compare Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (applying the rational basis test to a local economic regulation), with *Barnette*, 319 U.S. at 639 (applying heightened scrutiny to compelled speech). For a more recent example of this dichotomy between economic liberty and freedom of expression, see Glickman v. Wileman Bros. & Elliot, Inc., 521 U.S. 457 (1997) (upholding a federal marketing order compelling the monetary contributions of fruit farmers as an incidental restriction upon their free speech rights).

[126] 297 U.S. 233 (1936).

unanimous Supreme Court invalidated a Louisiana license tax on the gross advertising receipts of the state's largest newspapers. Justice Sutherland, who wrote the opinion of the Court, reasoned that the tax, which exempted periodicals of relatively small circulation, discriminated against larger segments of the Louisiana press in contravention of the First Amendment.[127] Having ostensibly decided the case on First Amendment grounds, Justice Sutherland presumably found it unnecessary to reach the equal protection issue also presented before the Court.[128] Yet the opinion Justice Sutherland published was quite different from the one he circulated in draft form to the Justices. Indeed, within this draft, Justice Sutherland, who essentially believed the differential license tax abridged the economic liberty of large volume newspaper publishers, eschewed the First Amendment and instead based his entire decision upon the Equal Protection Clause of the Fourteenth Amendment.[129]

Justice Benjamin Cardozo, however, refused to join Justice Sutherland's proposed opinion. Though willing to sustain the authority of Louisiana to enact a differential license tax as a revenue measure, Justice Cardozo worried that the unequal operation of the law abridged the First Amendment interests of the state's largest newspapers and thus impinged upon the dissemination of ideas. Accordingly, he drafted a concurring opinion in which he asserted that the license tax violated freedom of the press.[130] Justice Cardozo

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[127] See id. at 244–45, 250–51.

[128] See id. at 251.

[129] Richard C. Cortner, The Kingfish and the Constitution 165 (1996); Andrew L. Kaufman, Cardozo 539–41 (1998); see Samuel R. Olken, The Business of Expression: Economic Liberty, Political Factions and the Forgotten First Amendment Legacy of Justice George Sutherlaud, 10 Wm. & Mary Bill Rts. J. (forthcoming 2002) (manuscript at 61–62, 70) (on file with author).

[130] Kaufman, supra note 129, at 539–41; see Benjamin Cardozo, Draft of *Grosjean* Concurring Opinion (1936) (transcription available in Cardozo Papers in the Special Kaufman Cardozo Collection of Harvard Law School Library [hereinafter Cardozo, *Grosjean* Draft Concurrence]. In his unpublished concurring opinion, Justice Cardozo explained the Equal Protection Clause permitted the state to impose a tax of general applicability on the business operations of newspapers. Moreover, he asserted that states could impose progressive taxes on some businesses and not others if the distinctions emanated from reasonable differences, and the taxes reflected the exercise of legitimate police powers. Id. at 5, 8–10. Instead, Justice Cardozo thought the license tax infringed upon the First Amendment interests of Louisiana's largest newspapers. Id. at 1–4 (equating the Louisiana license tax with Great Britain's

withdrew this concurring opinion only after Justice Sutherland and the other members of the Court agreed to adopt his First Amendment analysis as the basis of the decision.[131] Presumably, Justices Brandeis, Stone, and Owen Roberts, each of whom had previously expressed considerable deference toward the exercise of local powers of taxation,[132] viewed the case from Justice Cardozo's perspective, whereas Justice Sutherland and at least three other Justices probably regarded the dispute as one primarily involving economic liberty.[133] Aside from underscoring disagreement within the Court over the constitutional limits of economic regulation, the existence of Justice Cardozo's unpublished concurring opinion would seem to suggest that by the late 1930s some members of the Court had already severed economic claims from First Amendment ones in their evolving constitutional jurisprudence.

Similarly divergent perspectives surfaced in *Associated Press v. NLRB*,[134] when by a margin of a single vote the Supreme Court upheld the application of the National Labor Relations Act to the editorial department of a private news agency that had dismissed one of its editors, a prominent union leader. In his opinion for the Court, Justice Roberts characterized the federal labor law as a legitimate economic regulation of incidental effect upon the First

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discredited attempts, during the seventeenth and eighteenth centuries, to tax knowledge and limit the circulation of information). "Once admit the possibility of imposing upon the press a special system of taxation, and its freedom is a myth, except indeed by dint of governmental grace." Id. at 5; see id. at 5, 10. Professor Andrew Kaufman, of Harvard Law School, generously made available a copy of his transcription of this unpublished draft.

[131] Cortner, supra note 129, at 165; Kaufman, supra note 129, at 540–41.

[132] See, e.g., Stewart Dry Goods Co. v. Lewis, 294 U.S. 550, 566–80 (1935) (Cardozo, J., dissenting) (supporting the principle of graduated taxes for chain stores); Liggett Co. v. Lee, 288 U.S. 517, 545–47, 568–76 (1933) (Brandeis, J., dissenting) (arguing a Florida license tax on chain stores was a reasonable means of promoting public welfare). Justice Stone joined in both these dissenting opinions. See also Olken, supra note 129, at 62–66 (noting the Justices' relaxed standard of review in these cases). For Justice Roberts's views, see Great Atl. & Pac. Co. v. Grosjean, 301 U.S. 412 (1937) (Roberts, J.) (sustaining Louisiana's progressive taxation of chain stores); State Bd. of Tax Comm'rs v. Jackson, 283 U.S. 527 (1931) (Roberts, J.) (upholding the application of an Indiana graduated license tax to chain stores). But see *Liggett*, 288 U.S. at 518 (Roberts, J.) (asserting that a Florida progressive tax that imposed a larger burden on the common owner of chain stores within different counties of the state than on proprietors with multiple stores in a single county violated the Equal Protection Clause of the Fourteenth Amendment).

[133] Olken, supra note 129, at 61.

[134] 301 U.S. 103 (1937).

Amendment rights of the news agency.[135] Conversely, Justice Sutherland, this time writing in dissent, asserted that the act infringed upon the editorial autonomy of the press and thus violated the First Amendment.[136] As in *Grosjean*, this striking contrast in jurisprudential emphasis, at the very least, indicates a growing divergence between economic liberty and freedom of expression.

Nevertheless, as White explains with much precision and to considerable effect, the transformation in First Amendment jurisprudence was not complete until the Court consistently articulated enhanced protection for freedom of expression based upon the preferred constitutional position of such rights. Widespread application of selective incorporation theory to judicial review of free speech and press claims *after* the New Deal ultimately brought to fruition the ideal of democratic participation integral to modern First Amendment theory.

III. CONSTITUTIONAL TRANSFORMATION AND INTELLECTUAL CONTEXT

At the heart of White's book is the premise that changes in constitutional interpretation reflected the ascendant influence of modernity upon legal culture. With its emphasis upon human causation and rejection of passive behavior, modernism pervaded American intellectual thought during the early decades of the twentieth century.[137] Modernist faith in the power of individuals to alter society and effect reform impelled members of the legal profession to reconsider the relationship between sources of the law and the authority of legal interpreters. Consequently, a gradual

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[135] Id. at 132–33.

[136] Id. at 134–41 (Sutherland, J., dissenting); see also Olken, supra note 129, at 46–48, 83–109 (discussing *Associated Press* as evidence of the burgeoning dichotomy in constitutional jurisprudence between economic liberty and freedom of expression).

[137] White, supra note 1, at 5–6. White employs "the term modernity . . . to mean the actual world brought about by a combination of advanced industrial capitalism, increased participatory democracy, the weakening of a hierarchical class-based social order, and the emergence of science as an authoritative method of intellectual inquiry." Id. at 5. White uses the terms modernity and modernism interchangeably, as in "modernist consciousness" and the judicial attitude of modernism. Id.; see also Morton J. Horwitz, The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy 6, 169–212 (1992) (discussing the influence of modernism in the evolution of legal realism during the 1930s).

transformation occurred in which a more instrumental conception of law, based upon legal realism, supplanted legal formalism and its orthodox application of static legal principles. White argues that the early twentieth-century conflict among common law scholars over the nature and legitimacy of legal authority eventually informed public law debate over the extent to which jurists could adapt the Constitution to changing conditions within a democratic republic. By linking these jurisprudential crises of private and public law, White provides an essential perspective from which to understand the intellectual context in which the Supreme Court transformed its constitutional jurisprudence during the 1930s and 1940s.

A. The Jurisprudential Conflict Between Legal Formalism and Realism

As a prelude to his analysis of the crisis of constitutional adaptivity, White devotes a critical chapter to discussion of the comprehensive efforts of elite legal scholars to restate common law principles. Initiated in the 1920s under the auspices of the American Law Institute, the Restatement projects intended to correct problems in the traditional classification of legal doctrine exacerbated by the proliferation of judicial decisions at the outset of the twentieth century. A plethora of cases spawned a contradictory and confusing corpus of legal authority whose very complexity threatened the sanctity of an hierarchical, essentially taxonomic, system of classification devised during the late nineteenth century by Christopher Langdell, Dean of Harvard Law School and the leading proponent of the notion that law was a science comprised of fundamental rules primarily accessible to those specially trained in the common law tradition.[138] White identifies Langdell and his disciples as legal formalists who steadfastly distinguished between the authority of legal sources, which they regarded as a set of unchanging, essential legal principles, and the authority of legal interpreters.[139] Confronted with widespread uncertainty about substantive aspects of the law by the third decade of the twentieth century, many prominent attorneys and law professors sought to

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[138] White, Tort Law in America, supra note 24, at xvii–xviii, 26–34, 37–39, 56, 155.
[139] White, supra note 1, at 167–68, 174–75.

clarify common law doctrine through improved methods of classification. Yet, as White explains, because the initial Restatement format merely refined Langdellian epistemology and left intact its conceptual distinction between legal sources and their interpreters, the draft restatements proved similarly inept at describing legal doctrine.[140] Bereft of uniform definitions and consistent standards, the early Restatements of law demonstrated the practical limits of legal formalism.

Essentially, White views the impetus for the Restatement projects and the subsequent criticism lodged against them by legal realists as evidence of a brewing jurisprudential crisis over the nature and legitimacy of legal authority in the early decades of the twentieth century. In contrast to the formalists who drafted the first Restatements were legal realists such as Professors Jerome Frank and Thurman Arnold for whom law comprised "the aggregate of legal decisions made by human officials in a changing social context."[141] Insofar as they rejected the dichotomy between legal sources and their interpreters that underlay legal formalism, legal realists emphasized the behavioral aspects of judicial review.[142] Theirs was an instrumental conception of law in which factual circumstances rather than abstract theories guided the application of legal principles. Critical of the Restatement projects as naïve efforts to recast legal doctrine in terms that presupposed the existence of eternal and unchanging rules, legal realists preferred to examine the variants of judicial interpretation through the perspective of social context.[143] Shrewdly, White notes that although the legal realists were unable to formulate concrete alternatives to the Restatements of law, their behavioral criticisms of the Restatement methodology underscored the underlying conflict about the nature of judicial decisionmaking.[144]

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[140] White, supra note 1, at 178–81.

[141] White, supra note 1, at 189.

[142] See generally Jerome Frank, Courts on Trial: Myth and Reality in American Justice (1949) (expressing skepticism about the sanctity of judge-made law) [hereinafter, Frank, Courts on Trial]; Jerome Frank, Law and the Modern Mind (1930) (criticizing formal legal analysis from the perspective of legal realism). Frank explained that "legal rules are judge-made and therefore frequently mutable." Frank, Courts on Trial, supra, at 316.

[143] White, supra note 1, at 189–91.

[144] Id. at 193–96.

For White, the advent of modernity shaped the parameters of a jurisprudential crisis years before the New Deal. Disagreement over the continued validity of the distinction between sources of the law and legal interpretation reflected the contradictory strands of legal analysis that emerged in bold relief as the field of law struggled to adapt its mechanisms to modern conditions. In its evolution from an academic to a legal debate, the crisis revealed internal schisms over the legitimacy of legal authority and the nature of judicial review. Ultimately, the realist's critique of the Restatement projects pierced the veneer of formalism and introduced an instrumental conception of law. White's subtle account of the Restatement controversy is important because it demonstrates the ideological backdrop against which the transformation in constitutional jurisprudence occurred during the 1930s and 1940s.

B. Political Economy and the Crisis of Constitutional Adaptivity

Between the 1920s and 1940s, the Supreme Court significantly altered its constitutional jurisprudence of political economy. Though conventional historiography attributes much of the doctrinal shift in economic liberty cases to the influence of the New Deal and the external pressures it placed on the Court,[145] in recent years revised analysis of the Court's due process, police powers, and Commerce Clause decisions from this era reveals the historical irrelevance of the Court-packing plan and New Deal politics as catalysts of change.[146] In part, drawing upon the work of his colleague at Virginia, Barry Cushman, White emphasizes the evolutionary process in which the Court departed from the jurisprudential framework of guardian review in its application of constitutional provisions to problems of political economy.

Rather than examine the doctrinal origins of this constitutional development, White analyzes its ideological structure. He considers the conflict within the Court over constitutional adjudication as part of a larger debate about the nature of legal authority and judi-

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[145] See, e.g., 2 Bruce Ackerman, We the People: Transformations 279–368 (1998) (linking the shift in the Court's constitutional jurisprudence of political economy to the Court-packing plan and the external pressures of New Deal politics); McCloskey, supra note 6, at 117–20.

[146] See generally Cushman, supra note 21, (discussing doctrinal changes in early twentieth-century constitutional law).

cial review that fueled the controversy over the Restatement projects. Growing recognition by some of the Justices about the untenable distinction between the authority of legal sources and their interpreters coincided with changing social and economic conditions that altered perceptions about the role of government in private economic affairs. Accordingly, White concludes that during the 1930s, and into the next decade, "an interpretive revolution" occurred, precipitated by "a crisis in the meaning of constitutional adaptivity."[147]

Divergent views of constitutional interpretation enhanced the poignancy of this crisis. Throughout the latter half of the nineteenth and the early part of the twentieth centuries, an orthodox conception of judicial review dominated public law. Most Supreme Court Justices during this period, to one extent or another, regarded the Constitution as an edifice comprised of essential principles of fixed meaning.[148] Guardian review, therefore, required strict construction of constitutional provisions in order to protect individual liberty from the tyranny of democratic majorities.[149] White's use of this term is a particularly apt description of orthodox constitutional adjudication. Proponents of guardian review

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[147] White, supra note 1, at 204.

[148] See, e.g., West Coast Hotel Co. v. Parrish, 300 U.S. 379, 403 (1937) (Sutherland, J., dissenting). Ten years before he joined the Court, then-Senator Sutherland explained that "[a] written constitution means nothing unless it means stability and permanency" and analogized the Constitution to the foundation of a building. 47 Cong. Rec. 2793, 2794 (1911) (statement of Sen. Sutherland).

[149] See, e.g., Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 448–53 (1934) (Sutherland, J., dissenting) (asserting that the meaning of the Contract Clause and other constitutional limitations remains constant in order to preserve individual rights from the vagaries of democratic majorities). In 1913, in the context of criticizing a proposal for the recall of unpopular judicial opinions, then-Senator George Sutherland articulated the essence of guardian review:

> The demand for the recall of judicial decisions proceeds upon a theory which completely disregards the nature of the judicial function, which is not to register the changing opinions of the majority as to what the Constitution and law ought to be, but to interpret and declare the Constitution and law as they are, whether such interpretation satisfies the desires of many or of none at all.

George Sutherland, The Law and the People, Address Before the Pennsylvania Society 5 (Dec. 13, 1913) (N.Y., N.Y.) (transcript available in the Sutherland Papers at the Library of Congress), reprinted in S. Doc. No. 328 (1913). Elsewhere, Sutherland explained that "[t]he written constitution is the shelter and the bulwark of what might otherwise be a helpless minority." 47 Cong. Rec. 2793, 2800 (1911) (statement of Sen. Sutherland).

were devoted to the equal operation of the law and inherently skeptical of class legislation enacted at the behest of political factions that imposed differential economic burdens.[150] Ever vigilant in differentiating between public and private rights, they employed a largely inflexible categorical jurisprudence of police powers to assess the limits of public regulation of private economic affairs. Pursuant to this approach, they invalidated laws that bore only a tenuous relationship to the public welfare.[151]

Jurists who believed a formal distinction existed between the sources of law and its interpreters, however, often found it necessary to create judicial glosses of open-ended constitutional provisions in order to implement aspects of guardian review. Frequent invocation of liberty of contract, a substantive doctrine derived from a broad construction of the Due Process Clause of the Fourteenth Amendment,[152] exemplified the extent to which many Justices sought to apply traditional constitutional limitations to changing circumstances.[153] The irony of this approach, however, did not escape some members of the Court, such as Justice Oliver Wendell Holmes, who considered the indiscriminate use of liberty of contract and other judicial glosses detrimental to the legitimacy of guardian review in a constitutional democracy. In particular, Justice Holmes worried that judicial reliance upon such vague concepts in determining the scope of governmental authority fostered

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[150] See, e.g., Adkins v. Children's Hosp., 261 U.S. 525 (1923) (invalidating a minimum wage law for women as illegitimate class legislation).

[151] Olken, supra note 10, at 26–29. In a classic expression of the connection between guardian review and late nineteenth-century police powers jurisprudence, Justice Stephen Field remarked:

> If the courts could not . . . examine . . . the real character of the act, but must accept the declaration of the legislature as conclusive, the most valued rights of the citizen would be subject to the arbitrary control of a temporary majority . . . instead of being protected by the guarantees of the Constitution.

Powell v. Pennsylvania, 127 U.S. 678, 696–97 (1888) (Field, J., dissenting).

[152] See, e.g., The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 116 (1873) (Bradley, J., dissenting) ("This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed."); see also id. at 83–111 (Field, J., dissenting) (arguing a butcher's monopoly infringed upon liberty of contract in violation of the Due Process Clause of the Fourteenth Amendment).

[153] See White, supra note 1, at 217.

a perception that the Justices advanced their personal socioeconomic theories through the guise of constitutional interpretation.[154]

Though, as White explains, Justice Holmes never abandoned guardian review,[155] his observation about its potential for subjective application of constitutional principles anticipated criticism of the Court's "mechanical" jurisprudence of police powers.[156] Increasingly, commentators perceived adjudication as a behavioralist enterprise in which human beings made policy judgments in the application of legal precedent. Consequently, they questioned the traditional dichotomy between the sources of law and its interpreters integral to guardian review. Within this intellectual context emerged what White calls "the living Constitution" theory.[157] Ini-

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[154] See, e.g., *Adkins*, 261 U.S. at 568 (Holmes, J., dissenting); Lochner v. New York, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting). In *Lochner*, Justice Holmes commented that:

> [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

Id. at 75–76 (Holmes, J., dissenting). Justice Holmes asserted that the *Lochner* majority based its decision "upon an economic theory which a large part of the country does not entertain" and that "[t]he Fourteen[th] Amendment does not enact Mr. Herbert Spencer's Social Statics." Id. at 75 (Holmes, J., dissenting); see also White, Justice Oliver Wendell Holmes, supra note 24, at 326–28 (discussing Holmes's view of liberty of contract).

[155] White, supra note 1, at 221–22. In this regard, White's suggestion that Justice Holmes continued to subscribe to guardian review, despite his misgivings about it, in and of itself constitutes an important contribution to understanding Justice Holmes's role in the early twentieth-century constitutional transformation.

[156] See, e.g., Pound, supra note 36. Curiously, White omits much discussion of sociological jurisprudence and its connection to legal realism. Sociological jurisprudents such as Pound, Dean of Harvard Law School during the first decade of the twentieth century, were the first group of legal scholars to employ in their analysis of legal issues sociological principles and those from other social science disciplines. This interdisciplinary approach led to the inclusion of economic and sociological data in legal arguments. With its emphasis upon the contextual analysis of legal issues, sociological jurisprudence in many ways anticipated legal realism. See White, Tort Law in America, supra note 24, at 69–71, 74, 79, 82; see also *Adkins*, 261 U.S. at 526–35 (Appellant's Brief by Felix Frankfurter and Francis H. Stephens) (prime example of a legal brief whose inclusion of sociological and economic data bore the influence of sociological jurisprudence); Muller v. Oregon, 208 U.S. 412 (1908) (Appellant's Brief by Louis D. Brandeis) (same).

[157] White, supra note 1, at 221, 225–26, 233–34, 299, 356–57 n.25. For a study of the origins of the phrase "living Constitution," see Howard Gillman, The Collapse of

tially expressed in the late 1920s, this flexible mode of constitutional interpretation gained considerable momentum throughout the 1930s as the Supreme Court struggled to reconcile orthodox notions of judicial review with legal issues of political economy arising from the Depression. In contrast to guardian review, the living Constitution theory regarded constitutional adaptivity as "a process in which human interpreters altered the meaning of the Constitution to make it responsive to changed social conditions."[158]

Eventually, this instrumental view of constitutional adjudication supplanted the more anachronistic model of guardian review, yet as White demonstrates throughout his book, neither the New Deal nor the Court-packing plan precipitated this interpretive transition. From this perspective, White analyzes the pattern of change in the Court's jurisprudence of political economy as part of a gradual transformation in constitutional interpretation and thus refutes its common portrayal in conventional narratives of this period. Accordingly, White discusses at length three seminal decisions, each of which, to one extent or another, illustrates salient points of his thesis about evolving notions of constitutional adpativity and political economy.

1. The Contract Clause and Constitutional Adaptivity

Of the trio, perhaps the most intriguing is the Minnesota mortgage moratorium case. In *Home Building & Loan Association v. Blaisdell*,[159] a sharply divided Court upheld a law that extended temporarily the period in which a mortgagor could redeem foreclosed property. In sustaining the Minnesota Mortgage Moratorium Act[160] as a reasonable exercise of police powers during an economic emergency,[161] Chief Justice Charles Evans Hughes, writing for the majority, reasoned that the parties executed their mortgage contract subject to the state's authority to preserve the economic welfare of its citizens.[162] Rather than interpret literally the Contract Clause prohibition of state laws that impair the obli-

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Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building, 11 Stud. Am. Pol. Dev. 191 (1997).

[158] Id. at 210.

[159] 290 U.S. 398 (1934).

[160] Ch. 339, 1933 Minn. Laws 514.

[161] *Blaisdell*, 290 U.S. at 444–47.

[162] Id. at 443–44.

gation of contracts, Chief Justice Hughes balanced the public interest in general economic welfare with private contract rights[163] and ruled the mortgage moratorium only affected the mortgagee's contract remedy.[164]

In dissent, Justice Sutherland argued that the Minnesota statute was no different in effect from the post-Revolutionary war debtor relief legislation that modified contractual obligations and undermined the security of contract rights in the early republic.[165] Critical of Chief Justice Hughes's pragmatic analysis of a seemingly unambiguous constitutional provision, Justice Sutherland, though sympathetic to the plight of Depression-era mortgagors, steadfastly adhered to a strict construction of the Contract Clause and asserted that it did "not mean one thing at one time and an entirely different thing at another time."[166] Eschewing the constitutional relativism of those Justices in the majority, Justice Sutherland and his fellow dissenters instead invoked what they perceived were fundamental and unalterable constitutional principles intended to preserve the sanctity of private contract obligations from the tyranny of ephemeral democratic majorities.[167] As such, the dissent illustrated the orthodox model of guardian review that White carefully reconstructs throughout his book.

Though the opinions of Chief Justice Hughes and Justice Sutherland undoubtedly exemplify the crisis of constitutional adaptivity that confronted the Supreme Court during the 1930s, the *Blaisdell* decision itself represented less of a departure from traditional Con-

[163] Id. at 434–35, 437, 442. To this extent, Chief Justice Hughes explained: "The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while,—a government which retains adequate authority to secure the peace and good order of society." Id. at 435.

[164] Id. at 425, 445–47.

[165] Id. at 453–65 (Sutherland, J., dissenting). As Justice Sutherland explained, the "Constitution . . . was meant to foreclose state action impairing the obligation of contracts primarily and especially in respect of such action aimed at giving relief to debtors in time of emergency." Id. at 465 (Sutherland, J., dissenting).

[166] Id. at 449 (Sutherland, J., dissenting).

[167] Id. at 451–53 (Sutherland, J., dissenting). Justice Sutherland warned that "[i]f the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned." Id. at 483 (Sutherland, J., dissenting).

tract Clause jurisprudence than White indicates.[168] In many respects, the Court's opinion was a fairly narrow one, which notwithstanding the Chief Justice's conscious effort to apply the "living Constitution" theory to the changing economic conditions of Depression-era Minnesota,[169] nevertheless rested on precedent and the particular facts before the Court.[170]

From this perspective, White may place undue emphasis upon those portions of the opinion in which "Hughes borrowed from due process analysis."[171] One conclusion drawn from White's observation is that the Chief Justice essentially read into the Contract Clause an implicit limitation of its scope based upon the residual authority of the states to regulate private economic affairs pursuant to the legitimate exercise of local police powers.[172] While this is cer-

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[168] Samuel R. Olken, Charles Evans Hughes and the *Blaisdell* Decision: A Historical Study of Contract Clause Jurisprudence, 72 Or. L. Rev. 513, 515–16, 522, 551–52, 568, 599–602 (1993).

[169] *Blaisdell*, 290 U.S. at 426, 428, 435, 437–40, 442–44. Quite understandably, White reaches the conclusion that Chief Justice Hughes applied "living Constitution" theory in *Blaisdell* given the Chief Justice's repeated references to "a growing recognition of public needs." Id. at 442–43. Chief Justice Hughes also perceived:

> the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity.... [T]he question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.

Id. at 442.

For the extent to which this passage and other aspects of Chief Justice Hughes's opinion reflected the ideas of Justices Cardozo and Stone, see Olken, supra note 168, at 584–86, 589–91 (discussing their unpublished concurring opinions and memoranda about the case); White, supra note 1, at 211–15 (analyzing Chief Justice Hughes's *Blaisdell* opinion).

[170] The decision's emphasis upon the reasonableness of the mortgage moratorium derived from the temporary modification of the contract remedy and the mortgagee's continual payment of rent during the extension of the redemption period. The statute did not abrogate the mortgage contract; it only altered the foreclosure remedy pursuant to which the mortgagee could obtain relief arising from the mortgagors's default. See *Blaisdell*, 290 U.S. at 425, 445–48.

[171] White, supra note 1, at 212.

[172] See *Blaisdell*, 290 U.S. at 434–35, 437, 442–44. Chief Justice Hughes said: "The reservation of state power appropriate to such extraordinary conditions may be deemed to be as much a part of all contracts, as is the reservation of state power to

tainly true, White's implication that Chief Justice Hughes crafted a revolutionary opinion is somewhat misleading and does not appear to take into account either the pattern of Contract Clause jurisprudence that preceded this case nor Chief Justice Hughes's own inherent reluctance to break from precedent.

Indeed, throughout the nineteenth and into the early twentieth centuries, most Supreme Court Justices refrained from construing the Contract Clause as an absolute bar to public regulation of contract rights. Instead, the Court increasingly interpreted the meaning of the Contract Clause in an instrumental sense, cognizant of both the practical allocation of governmental authority within a federal system and the interplay between economic development and the security of contract interests.[173] During the initial phase of Contract Clause jurisprudence, members of the Court differentiated between the constitutional protection of vested contract rights and the permissible authority of states to modify contractual remedies. Pursuant to this distinction between contract rights and remedies, the Court set forth early inroads upon the scope of the Contract Clause.[174]

By mid-nineteenth century, the Justices often invoked the doctrine of reserved state powers in their analysis of Contract Clause issues.[175] Intended to reconcile public control over economic devel-

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protect the public interest . . . ." Id. at 439. Chief Justice Hughes also noted that the "principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court." Id. at 435.

[173] Olken, supra note 168, at 522–52.

[174] See, e.g., Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827) (upholding a New York law that provided prospective relief for debtors as one that merely affected contract remedies); Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823) (ruling that the Kentucky Occupying Claimants Laws unconstitutionally abridged contract rights); Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (finding that a state's revocation of a charter impaired vested contract rights in violation of the Contract Clause); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819) (invalidating an insolvency statute that retroactively excused the payment of an antecedent debt); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (invoking the Contract Clause to invalidate legislative revocation of a land grant); see also Olken, supra note 168, at 522–36 (discussing the rights-remedies distinction in early nineteenth-century Contract Clause jurisprudence).

[175] See, e.g., *Trs. of Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 675 (Story, J., concurring) (explaining that a state could not retroactively divest or otherwise interfere with the contract rights of a corporation in the absence of the state's reservation of such power in the act of incorporation). Interestingly, White notes this development in his

opment fostered by state charters of corporations and other forms of commercial enterprise,[176] this principle recognized the authority of local government to retain such powers as taxation[177] and eminent domain[178] in contracts executed between the state and private persons. Though limited to public contracts, this doctrine eventually spawned a more pervasive and broad qualification of the Contract Clause prevalent throughout the remainder of the nineteenth century and into the next one.

Confronted by a number of cases in which states sought to regulate both public and private contractual agreements for reasons of public health, safety, morals, or welfare, the Supreme Court began to apply the concept of inalienable police powers in its analysis of Contract Clause disputes. Initially, the Court ruled that states could not relinquish their authority to prescribe police power regulations to promote public health, safety, morals, or welfare in public grants of corporate franchises to private citizens.[179] Thereafter, it also applied this doctrine in ways that implicitly balanced the legitimate exercise of state police powers with the security of private rights.[180] In a few cases, the Court included economic prosperity within the purview of public welfare[181] and sustained lo-

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analysis of Justice Story's concurring opinion. White, The Marshall Court, supra note 24, at 660–62; see also Olken, supra note 168, at 536–41 (discussing the doctrine of reserved state powers as a limitation upon the scope of the Contract Clause).

[176] See, e.g., Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837) (narrowly construing a corporate charter and refusing to find an implied reservation of state powers).

[177] See, e.g., Providence Bank v. Billings, 29 U.S. (4 Pet.) 514 (1830) (noting that the absence of express immunity from taxation in a corporate charter would render a bank subject to taxation by the state).

[178] See, e.g., W. River Bridge Co. v. Dix, 47 U.S. (6 How.) 507 (1848) (upholding a state's reserved power of eminent domain).

[179] See, e.g., Stone v. Mississippi, 101 U.S. 814, 820 (1880) (permitting a state to proscribe a lottery pursuant to its inalienable police powers).

[180] See, e.g., Union Dry Goods Co. v. Ga. Pub. Serv. Corp., 248 U.S. 372, 374–75 (1919) (ruling that private utility contract rates were subject to state police powers); Hudson Water Co. v. McCarter, 209 U.S. 349, 355–57 (1908) (finding the public interest in conservation outweighed private contract rights); Manigault v. Springs, 199 U.S. 473, 480–81, 485–86 (1905) (noting the paramount public interest in improving swamp land over private contract rights); see also Olken, supra note 168, at 542–52 (discussing the concept of inalienable police powers).

[181] See, e.g., Chi., Burlington & Quincy Ry. Co. v. Ill. Drainage Comm'r, 200 U.S. 561 (1906) (finding the promotion of economic prosperity within the scope of inalienable police powers).

cal economic regulation of private contracts on this ground.[182] From this premise, the Court upheld the authority of local government to alter private contract rights and duties through the imposition of state police powers for the benefit of the public interest during an emergency.[183]

In *Blaisdell*, Chief Justice Hughes drew upon these inroads on the scope of the Contract Clause—especially the emergency cases—in sustaining the constitutionality of the Minnesota Mortgage Moratorium Act.[184] An inherently pragmatic jurist who preferred to stretch precedent rather than abandon or abruptly depart from it,[185] Chief Justice Hughes undoubtedly imbued his analysis of the Contract Clause in *Blaisdell* with modernist notions of constitutional adaptivity but ultimately produced an opinion more consistent with previous Contract Clause jurisprudence than White and other commentators believe. Though White is certainly correct that the Chief Justice's contextual references to changing economic conditions signaled a shift in the Court's jurisprudence of political economy from guardian review to the instrumentalism of the "living Constitution" theory, Chief Justice Hughes accomplished this task through an expansive interpretation of the public

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[182] See, e.g., Noble State Bank v. Haskell, 219 U.S. 104, amended by 219 U.S. 575 (1911) (upholding an Oklahoma bank regulation intended to protect the interests of depositors).

[183] See, e.g., Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922); Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921); Block v. Hirsh, 256 U.S. 135 (1921) (all upholding temporary laws that allowed tenants to stay in their apartments as holdover tenants upon the expiration of their leases, so long as they continued to pay reasonable rent, during a domestic emergency caused by the post-World War I shortage in affordable housing).

[184] Ch. 339, 1933 Minn. Law 514. Chief Justice Hughes explained: "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved." *Blaisdell*, 290 U.S. at 425. He also stated that "[w]hile emergency does not create power, emergency may furnish the occasion for the exercise of power." Id. at 426.

[185] A few years before he became Chief Justice of the Supreme Court, Hughes remarked that "[s]tability in judicial opinions is of no little importance in maintaining respect for the Court's work." Charles Evans Hughes, The Supreme Court of the United States 53 (1928) (publication of Hughes's six lectures at Columbia University in 1927); see also Samuel Hendel, Charles Evans Hughes and The Supreme Court 6, 65 (1951) (outlining Hughes's constitutional philosophy); Olken, supra note 168, at 552–68 (discussing Chief Justice Hughes's pragmatic constitutional jurisprudence).

welfare concept rather than through a radical reconstruction of Contract Clause principles.[186]

2. The Evolving Notion of Judicial Deference Throughout the 1930s

The second case White uses to illustrate the emergence of the "living Constitution theory" is *West Coast Hotel Co. v. Parrish*,[187] another decision in which a bare majority of the Court upheld a Washington minimum wage law for women. Often cited as the case that marked the Supreme Court's abrupt reversal of course in its jurisprudence of political economy, White offers a revised interpretation of this decision consistent with his overall thesis that the external pressures of New Deal politics were irrelevant in the transformation of the Court's constitutional thought. White argues that although the Court overruled *Adkins v. Children's Hospital*[188] and questioned the primacy of liberty of contract,[189] Chief Justice Hughes, who once again wrote the majority opinion, never entirely abandoned guardian review in his analysis of police powers. To this extent, White explains that Chief Justice Hughes found the *Adkins* precedent untenable because it failed to acknowledge the connection between improving women's wages and public welfare. Accordingly, the Chief Justice's references to changing economic conditions demonstrated his willingness to expand the concept of public welfare, which White implies was not necessarily tantamount to rational basis judicial review.[190] Thus, from White's perspective, *West Coast Hotel* was a transitional case in the Court's interpretive transformation rather than an example of modern economic due process.

Although 1937, the year in which the Court decided *West Coast Hotel*, did not mark the endpoint of the "revolution" in its constitutional jurisprudence of political economy, it nevertheless was a pivotal point along the way. Yet, in some respects, White's conclusion that Chief Justice Hughes's opinion demonstrated the

[186] Olken, supra note 168, at 515–16, 551–52, 577–602; see also Richard A. Maidment, Chief Justice Hughes and the Contract Clause: A Re-assessment, 8 J. Legal Hist. 316, 316–17, 324–25 (1987) (discussing the *Blaisdell* decision).

[187] 300 U.S. 379 (1937).

[188] 261 U.S. 525 (1923).

[189] See *W. Coast Hotel Co.*, 300 U.S. at 390–92, 397–400.

[190] White, supra note 1, at 218–25.

continued influence of guardian review obscures the extent to which he and other members of the Court's emerging majority began to adopt a more deferential approach in their assessment of the constitutional limits of public regulation of private economic affairs. Chief Justice Hughes's repeated references to the public interest in private contracts and changing economic conditions[191] evoked similar references he made three years earlier in *Blaisdell* and reflected a growing reluctance among some of these Justices to apply the rigid distinction between public and private economic interests characteristic of orthodox constitutionalism. In this sense, then, the Chief Justice's willingness to accept the legitimacy of the Washington state minimum wage law for women emanated from *Nebbia v. New York*[192] and other economic regulation cases from the early 1930s that collapsed the formal distinction between private and public rights.[193]

It also revealed a subtle change in due process methodology that had nothing to do with the Court-packing plan or New Deal reforms. Increased judicial deference to local economic regulation by the end of the 1930s came about in large part through the persistent efforts of Justices Brandeis, Cardozo and Stone, each of whom consistently expressed a notion of judicial review that emphasized the importance of factual context and a practical understanding of economic regnlation.[194] For example, in a series of cases that involved state taxation of intrastate businesses, this trio, in contrast to Justice Sutherland and other steadfast adherents of gnardian review, preferred to use a test of reasonableness to ascertain the constitutionality of license taxes.[195] Consequently, they balanced

[191] *W. Coast Hotel Co.*, 300 U.S. at 390–92, 398–400.

[192] 291 U.S. 502 (1934) (upholding a New York regulation of milk prices).

[193] See, e.g., O'Gorman & Young, Inc. v. Hartford Fire Ins. Co., 282 U.S. 251 (1931) (upholding state regulation of the insurance business).

[194] See, e.g., Stewart Dry Goods Co. v. Lewis, 294 U.S. 550, 569–77 (1935) (Cardozo, J., dissenting) (emphasizing judicial deference to local economic regulation); New State Ice Co. v. Liebmann, 285 U.S. 262, 280–311 (1932) (Brandeis, J., dissenting) (discussing the economic rationale for public regulation of the ice business) (Justice Stone joined in the dissent).

[195] See, e.g., *Stewart Dry Goods Co.*, 294 U.S. at 566–77 (Cardozo, J., dissenting) (admonishing the Court for unduly restricting the discretion of the Kentucky legislature in devising a progressive tax); Fox v. Standard Oil Co. of N.J., 294 U.S. 87, 97–102 (1935) (Cardozo, J.) (sustaining a West Virginia graduated tax on gas station chains); Liggett Co. v. Lee, 288 U.S. 517, 543–47, 568–76 (1933) (Brandeis, J.,

the public interest in raising revenue with the conditional privilege of doing business and frequently viewed such progressive, or graduated, taxes as legitimate public regulation of private economic rights.[196] Rather than insist that there be a close and substantial relationship between the tax scheme and the public welfare,[197] these Justices departed from the rigidly categorical constitutional jurisprudence of guardian review and instead afforded the states broad discretion to regulate private commercial enterprise through taxation.[198] In so doing, their approach anticipated the shift throughout the latter half of the 1930s that occurred in the Court's police powers jurisprudence.

Indeed, even though Chief Justice Hughes went to great lengths in *West Coast Hotel* to justify the Washington minimum wage law as a matter of public welfare, he actually expressed considerable

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dissenting); id. at 580–86 (Cardozo, J., dissenting) (both expressing deference toward local economic regulation); see also Olken, supra note 129, at 62–68 (discussing the conflicts within the Court's jurisprudence concerning the powers of state taxation).

[196] See, e.g., *Stewart Dry Goods Co.*, 294 U.S. at 566–77 (Cardozo, J., dissenting) (admonishing the Court for unduly restricting the discretion of the Kentucky legislature in devising a progressive tax); *Fox*, 294 U.S. at 97–102 (1935) (Cardozo, J.) (sustaining a West Virginia graduated tax on gas station chains); *Liggett*, 288 U.S. at543–47, 568–76 (Brandeis, J., dissenting); id. at 580–86 (Cardozo, J., dissenting) (both expressing deference toward local economic regulation).

[197] See, e.g., Great Atl. & Pac. Tea Co. v. Grosjean, 301 U.S. 412, 430–34 (1937) (Sutherland, J., dissenting) (finding arbitrary Louisiana's progressive chain store tax); Colgate v. Harvey, 296 U.S. 404, 422–25 (1935) (Sutherland, J.) (invalidating a Vermont income tax exemption on in-state loans); *Stewart Dry Goods Co.*, 294 U.S. at 555–60 (Roberts, J.) (finding a Kentucky graduated retail sales tax unconstitutionally arbitrary); *Liggett*, 288 U.S. at 533–35 (Roberts, J.) (invalidating a progressive Florida chain store tax); State Bd. of Tax Comm'rs v. Jackson, 283 U.S. 527, 543–52 (1931) (Sutherland, J., dissenting) (asserting that differences in tax classification must reflect significant distinctions between businesses); Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37–40 (1928) (Sutherland, J.) (invalidating a Kentucky mortgage recording tax under the Equal Protection Clause of the Fourteenth Amendment).

[198] See, e.g., Carmichael v. S. Coal & Coke Co., 301 U.S. 495, 509–12 (1937) (Stone, J.) (finding that an Alabama unemployment compensation law distinguished between employers on a rational basis); *Grosjean*, 301 U.S. at 419–27 (Roberts, J.) (upholding a Louisiana progressive tax on chain stores as a reasonable means of promoting economic competition); *Fox*, 294 U.S. at 97–102 (Cardozo, J.); *State Bd. of Tax Comm'rs*, 283 U.S. at 535–37 (Roberts, J.) (upholding an Indiana graduated license tax).

deference to the state.[199] While he may not have completely jettisoned guardian review, his recognition of the public interest in private contracts and refusal to construe liberty of contract as an absolute right suggests an inchoate attempt on his part to balance public and private interests much like Justices Brandeis, Stone, and Cardozo did in the state taxation cases of the period, whose significance constitutional historians often neglect.

3. *The Relative Importance of 1937*

In part, White asserts that the plethora of 5-4 decisions rendered by the Supreme Court throughout the 1930s indicates the gradual process by which the "living Constitution" theory supplanted guardian review.[200] Yet despite its internal schism over the appropriate constitutional limits of economic regulation, the fact remains that by the end of 1937 the Supreme Court had significantly turned the corner in transforming its jurisprudence of political economy. Not only had a slender majority of the Justices overruled *Adkins* and its iconic treatment of liberty of contract, but this same quintet[201] employed a much more deferential and pragmatic analysis of the Commerce Clause in upholding the application of the National Labor Relations Act to interstate businesses than had theretofore been the norm. Seen as a whole, the five Labor Board cases handed down on April 12, 1937,[202] together with two other deci-

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[199] *W. Coast Hotel Co.*, 300 U.S. at 391–92, 398–400. "The legislature was entitled to adopt measures to reduce the evils of the 'sweating system,' the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living." Id. at 398–99.

[200] White, supra note 1, at 215.

[201] The members of this emerging majority in political economy cases were Chief Justice Hughes and Associate Justices Brandeis, Cardozo, Roberts, and Stone. In dissent in most of these cases were Associate Justices Butler, McReynolds, Sutherland, and Van Devanter.

[202] Wash., Va. & Md. Coach Co. v. NLRB, 301 U.S. 142 (1937) (upholding application of the NLRA to an interstate transportation company); Associated Press v. NLRB, 301 U.S. 103 (1937) (sustaining the application of the NLRA to the editorial department of a private news agency); NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937) (upholding application of the NLRA to the clothing manufacturing industry); NLRB v. Fruehauf Trailer Co., 301 U.S. 49 (1937) (upholding application of the NLRA to the trailer manufacturing industry); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (sustaining the application of the NLRA to the production of steel). These cases limited the application of *Carter v. Carter Coal Co.*, 298 U.S. 238, 303–04, 308 (1936) (invoking the traditional distinction

sions sustaining provisions of the Social Security Act[203] and the Washington minimum wage case[204] suggest, at the very least, that 1937 was a trifle more significant than White otherwise indicates.

However, White's deliberate de-emphasis of 1937 is understandable, and even plausible, given the scope of his thesis and observation that the Court did not completely abandon the jurisprudential tenets of guardian review in the area of political economy until the early 1940s. In support of this point, White's most compelling evidence is *Wickard v. Filburn*[205] in which the Court, under the influence of Justice Robert Jackson, openly refused to question legislative findings about the aggregate effects of excessive production of wheat by individual farmers on interstate commerce[206] and consequently upheld a federal law that imposed limits on the amount of wheat grown by private farmers for their personal, non-commercial use.[207] In comparison to the Labor Board cases of 1937 or even to *United States v. Darby*,[208] the Court's deference toward the power of Congress to regulate interstate commerce was astonishing and therefore represented an inferential leap from previous Commerce Clause cases.[209] Yet one wonders whether Justice Jackson would have been so bold if Chief Justice Hughes, for example, had not asserted in 1937 the importance of adjudicating constitutional issues of interstate commerce from a practical perspective that focused on the effects of local activities upon the flow of interstate commerce[210] rather than formal distinc-

between manufacturing and commerce and finding that labor relations had an indirect and remote effect upon interstate commerce).

[203] See Helvering v. Davis, 301 U.S. 619 (1937); Steward Mach. Co. v. Davis, 301 U.S. 548 (1937) (both sustaining the Social Security Act of 1935). But see R.R. Ret. Bd. v. Alton, 295 U.S. 330 (1935) (invalidating a retirement pension for railroad workers).

[204] *W. Coast Hotel Co.*, 300 U.S. at 379 (1937).

[205] 317 U.S. 111 (1942).

[206] Id. at 128–29.

[207] Id. at 120–29.

[208] 312 U.S. 100 (1941) (upholding the application of the Fair Labor Standards Act to the wages and hours of employees engaged in the manufacturing activities of an interstate business). This case overruled *Hammer v. Dagenhart*, 247 U.S. 251 (1918), which had ruled that, as a matter of constitutional law, manufacturing preceded commerce. See id. at 272–73.

[209] Cushman, supra note 21, at 208–25; White, supra note 1, at 227–33.

[210] See, e.g., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41–42 (1937) ("[I]nterstate commerce itself is a practical conception . . . ."); see also Olken, supra

tions between manufacturing and commerce[211] and questions of causation prevalent in Commerce Clause cases before 1937.[212]

This is not to say that White is wrong in not placing more emphasis upon 1937 as a pivotal year in the Supreme Court's constitutional transformation. In fact, because he concentrates upon the intellectual and historical dimensions of this jurisprudential transition, relatively minor doctrinal points are less important than the arc of change he so artfully describes. To the extent that a complete change occurred in the Court's constitutional jurisprudence, a revolution occurred, and thus it makes more sense for White to focus upon the arc of change than on a particular year. Nevertheless, increased attention to some of the other decisions from 1937 as well as to the line of state taxation cases previously mentioned would enhance his general observations about the structure of this revolution in constitutional interpretation.

C. Intellectual Context and Judicial Influence

Notwithstanding the considerable attention White places on the intellectual context in which early twentieth-century constitutional interpretation evolved, he does not really discuss how some members of the Court came to adopt the "living Constitution" theory that proved instrumental in the Court's constitutional transformation. This is somewhat curious given his fascinating analysis of conventional misconceptions about early twentieth-century judicial behavior and the deification and demonization of certain Supreme Court Justices from this period.

More in-depth treatment of Chief Justice Hughes, for example, would provide an essential perspective from which to understand his efforts at modifying guardian review in the leading political economy cases of the 1930s. Brief discussion of Chief Justice Hughes's judicial pragmatism and his respect for stare decisis would support White's conclusions about *West Coast Hotel* and en-

note 129, at 96–100 (discussing the Court's evolving Commerce Clause jurisprudence).

[211] See, e.g., *Hammer*, 247 U.S. at 272–73, overruled by *Darby*, 312 U.S. at 116–17.

[212] See, e.g., Carter v. Carter Coal Co., 298 U.S. 238, 303–04 (1936). "The distinction between a direct and an indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about." Id. at 308.

rich his analysis of *Blaisdell.* Nor does White mention that the Chief Justice, along with Justices Stone and Cardozo, was a founding member of the American Law Institute,[213] the organization that sponsored the initial effort to restate common law principles. This seems a little puzzling given White's point that a transformation in constitutional jurisprudence occurred within the larger context of debates about the nature of legal sources and the legitimacy of judicial review that formed the backdrop of the American Law Institute's Restatement of Law projects and their reception in the legal community.

In particular, White's analysis of the emergence of the "living Constitution" theory in the jurisprudential framework of the Court would benefit from more discussion about the roles played by Justices Cardozo and Stone in this interpretive transformation. Justice Cardozo, for example, was instrumental in the Court's state taxation cases of the 1930s, consistently articulating a standard of reasonableness that a majority of the Court would eventually adopt in its approach toward other aspects of economic regulation.[214] A consistent and especially articulate proponent of the "living Constitution" theory, it was Justice Cardozo who ultimately supplied Chief Justice Hughes with the phrase "a growing recognition of public needs" that Chief Justice Hughes used to considerable effect in both the *Blaisdell* and *West Coast Hotel* majority opinions.[215] In particular, the Chief Justice borrowed heavily from Justice Cardozo's unpublished concurring opinion in *Blaisdell*, in which Justice Cardozo implored the Court to interpret the meaning of the

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[213] Cushman, supra note 21, at 154.

[214] See, e.g., Stewart Dry Goods Co. v. Lewis, 294 U.S. 550, 566–77 (1935) (Cardozo, J., dissenting) (admonishing the Court for unduly restricting the discretion of the Kentucky legislature in devising a progressive tax); Fox v. Standard Oil Co. of N.J., 294 U.S. 87, 97–102 (1935) (Cardozo, J.) (sustaining a West Virginia graduated tax on gas station chains because it "has a rational relation to the subject matter"); id. at 101 (expressing deference toward local economic regulation); Liggett Co. v. Lee, 288 U.S. 517, 580–86 (1933) (Cardozo, J., dissenting) (same).

[215] Olken, supra note 168, at 590. Compare Chief Justice Hughes's observation in *Blaisdell* about "a growing recognition of public needs," *Blaisdell*, 290 U.S. at 443–44, with this passage from Justice Cardozo's draft concurring opinion in that same case: "[T]here has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and the public welfare." Benjamin Cardozo, Unpublished Draft of *Blaisdell* Concurring Opinion, No. 370, at 1 (1933) [hereinafter Cardozo, *Blaisdell* Draft Concurrence].

Contract Clause in a flexible manner in light of changing economic conditions.[216] This and other aspècts of Justice Cardozo's significant contributions to the Court's shifting constitutional jurisprudence,[217] however, remain far in the background in White's narrative, even though they would bolster his premise about the manner in which the Supreme Court handled the crisis of constitutional adaptivity during the 1930s.

Another important Justice relegated, for the most part, into the background of White's reconstructed tale is Justice Harlan F. Stone who, like Justices Cardozo and Brandeis, played an integral role in the Court's evolving constitutional jurisprudence of political economy.[218] A former Dean of Columbia Law School, Justice Stone maintained close intellectual ties with Columbia historian Charles Allen Beard, upon whose historical insight Justice Stone relied in formulating his analysis of debtor relief legislation and economic regulation.[219] Though not himself a legal realist, Justice Stone cor-

[216] See Olken, supra note 168, at 590. Compare *Blaisdell*, 290 U.S. at 442 (discussing the need for governmental intervention to preserve private economic rights), with this passage from Justice Cardozo's unpublished concurring opinion: "[T]he question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends." Cardozo, *Blaisdell* Draft Concurrence, supra note 215, at 1. Chief Justice Hughes borrowed much of Justice Cardozo's "living Constitution" language as well. See id. at 1–4.

[217] See Cardozo, *Grosjean* Draft Concurrence, supra note 130.

[218] See Olken, supra note 168, at 578, 584–85, 590–91 (discussing contributions of Justice Stone to the Chief Justice's majority opinion); Memorandum from Justice Harlan F. Stone to Chief Justice Charles Evans Hughes 3 (Dec. 13, 1933) (available in the Stone Papers at the Library of Congress) [hereinafter Memorandum from Stone to Hughes]; Notes of Harlan F. Stone on *Blaisdell* (1933) (available in the Stone Papers at the Library of Congress) [hereinafter Notes of Justice Stone].

[219] Justice Stone imbued his analysis of the Minnesota mortgage moratorium case with "living Constitution" theory as seen below in an excerpt from his personal notes about the case:

> The framers of the Constitution undoubtedly had legislation of this type in mind. But the framers represented a class, and the Constitution itself was submitted only to conventions which were chosen by an electorate limited by heavy property qualifications. Our ideas of interests worthy of protection, and of the voice in government which various interests are to have, have undergone much change since 1789. It would be reducing the Constitution to the state of a penal law or an ordinary statute to hold that the intent of a handful of aristocrats in 1789 should be binding upon the society found in Minnesota today.

responded with some of the leading theorists whose ideas about the nature of legal authority probably influenced his conception of judicial review.[220] Together with Justices Brandeis and Cardozo he formed a solid bloc on the Court whose notions of constitutional adaptivity eventually prevailed. Perhaps the most cogent evidence of Justice Stone's influence is the extensive memorandum and draft concurring opinion that he submitted to Chief Justice Hughes during the Court's deliberations in *Blaisdell*. Justice Stone explained at length the economic context of the Minnesota mortgage moratorium and urged the Chief Justice to recognize the state's legitimate authority to exercise its police powers to preserve economic opportunity.[221] Moreover, as Hughes's successor as Chief Justice of the Supreme Court, he presided over the final stages of the Court's constitutional transformation.

Yet, aside from some in-depth analysis of Justice Stone's famous footnote in *Carolene Products*, White appears to neglect his contribution to the Court's interpretative transformation. Upon his unexpected death in 1946, Stone left a comprehensive record of his two decades on the Court in the boxes of papers he was not able to edit before he died. The papers that form his collection provide invaluable insight and information about Supreme Court adjudication to any student of early twentieth-century constitu-

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Memorandum from Stone to Hughes, supra note 218, at 4. For evidence of Justice Stone's consultation with Beard about some matters of constitutional history, see Alpheus Thomas Mason, Harlan Fiske Stone: Pillar of the Law 410–11, 553 (1956); see also Charles A. Beard, An Economic Interpretation of the Constitution of the United States 73–151 (Free Press 1986) (1913) (arguing the constitutional framers were part of an economic elite).

[220] Justice Stone, for example, corresponded with Columbia law professor Herman Oliphant, whose intense interest in the study of law as a science prompted him to undertake the initial, but ultimately unsuccessful, plan to create a law school at The John Hopkins University in Baltimore whose principal objective would have been to function as a legal research center. Correspondence between Oliphant and Justice Stone about this matter can be found in the Stone Papers at the Library of Congress. For brief references to the relationship between Oliphant and Stone, see Mason, supra note 219, at 128, 218, 240.

[221] Memorandum from Stone to Hughes, supra note 218, at 2–4; Notes of Justice Stone, supra note 218; Memorandum of Gertrude Jenkins, Secretary to Justice Stone, regarding *Blaisdell* (1933) (available in the Stone Papers at the Library of Congress) (indicating that Justice Stone thought *Blaisdell* was quite similar to the Rent Cases in that the mortgage moratorium exemplified the reasonable exercise of police powers during an economic emergency); see also Olken, supra note 168, at 584–85, 590–91 (discussing Justice Stone and *Blaisdell*).

tional history. Given the breadth of his intellectual interests and the diversity of his correspondents, there is much raw material in Justice Stone's papers from which one could reconstruct the extent to which he and perhaps some other members of the Hughes Court were influenced by modernity. Increased attention to Justice Stone, as well as to Justice Cardozo, might, therefore, fill in some of the details of White's account and enrich its perspective.

CONCLUSION

Perhaps the best standard to use in reviewing this book is one previously articulated by its author. In an essay published several years ago, G. Edward White observed:

> Revisionism is an art because the choice of a given methodological approach to the raw materials of history cannot insure the success or failure of an interpretive structure. Whether a given interpretation is rich or flat, seminal or conventional, coherent or tortured; whether it presses the limits of, or sets new limits for, intellectual discourses or whether it remains squarely, and prosaically, in the center of established orthodoxy; and finally, whether it inspires or bores other scholars—these are questions that cannot be solved methodologically. The "revisionist" historian, like the artist, may well be fated, in most cases, to choose the materials of his day; he may even research and write, as many artists can be said to paint, within the confines of a "school" of thought. But the impact of his scholarship will depend not only on the questions that his angle of vision suggests are appropriate to ask but how imaginatively and suggestively he answers them.[222]

Though volumes have been written about the Supreme Court and the New Deal, few combine the intellectual rigor and creative synthesis that distinguish White's fascinating study of early twentieth-century constitutional history. This is a book whose influence will endure and inspire future generations of constitutional historians.

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[222] G. Edward White, Intervention and Detachment, supra note 24, at 68–69.