

Introduction

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To students of American history in general, and of the Supreme Court in particular, the constitutional crisis of 1937 is a key event in deciphering much of the history of the twentieth century. A jurisprudential mindset that had been in place since the 1880s ran head-on into a political tidal wave whose elements had been building up since the 1890s. The conservative emphasis on property rights, epitomized on the high court by the so-called Four Horsemen, stymied efforts to reform a society wracked not only by the Great Depression but also by the deleterious effects that the industrialization of the nation had on its working classes. The proposal by Franklin D. Roosevelt to pack the Court, while it failed to pass in Congress, nonetheless broke the logjam, and the Court abandoned all efforts to block economic regulation for the next half-century. Roosevelt's comment that he lost the battle but won the war is now accepted wisdom in examining the events of six decades ago.

The articles in this issue (most of them originally delivered as the 1996 Supreme Court Historical Society Lecture Series), however, point up a far more nuanced interpretation. Moreover, they elongate the period of examination backward to cover the development of the jurisprudence that led up to the conflict, and forward to see the results of the battle. While the conservative bloc on the Court is normally seen as out of touch with the reality of

a Depression-ridden America, the jurisprudence men like James C. McReynolds, George Sutherland, Pierce Butler and Willis Van Devanter espoused was not in and of itself wrong. The program put forward in the New Deal, while certainly humane and compassionate, had its own problems, not the least of which was the often sloppy draftsmanship which made laws like the National Industrial Recovery Act the target not only of the Four Horsemen but of the liberal bloc as well.

What is perhaps the most fascinating aspect of the confrontation is the overtly political activities of some of the Justices. By this I do not mean simply the conservative judicial activism that openly fought reform measures that impinged on property rights. Rather, led by Chief Justice Charles Evans Hughes, the Justices fought back to protect the integrity of the Court as an institution. The letter the Chief Justice sent to Congress through Senator Burton K. Wheeler, is of prime interest to two of our contributors, and they take far different views on its importance in determining the final outcome of the President's plan. Our readers will have to judge which one makes the more compelling case. We at the **Journal** are happy to present a symposium that once again demonstrates the drama and continuing vitality of Supreme Court history.

Dawn of the Conservative Era

Paul Kens

Introduction

When I was working on this project, a friend who is neither a lawyer nor a historian, asked what I was doing. I told her I was working on a lecture entitled “The Dawn of the Conservative Era” and that it was about the conservative Court at the turn of the century. Her response came as a surprise. She thought I was going to talk about today’s Court as it approached the turn of the twenty-first century.

I suppose my friend was not far off in the way she interpreted my description. But I am going to talk about another dawn of another conservative era. It was a time between 1890 and 1937, often called the laissez-faire era. And it produced a body of legal doctrine often referred to as laissez-faire constitutionalism. The term laissez-faire, of course refers to the economic theory. It was an economic theory predicated on the free market and the idea that prosperity could best be achieved in a system where individuals were left free to pursue their own self-interest. It placed its faith in Adam Smith’s **Wealth of Nations** and the idea that the “invisible hand of the market” would ensure the economy would operate smoothly and efficiently.

To proponents of laissez-faire theory this was more than a preferred policy. It was a matter of natural law and of natural rights. Of these natural rights, two stood out. First was the natural right of property. The other, called “the natural right of free exchange,” was the natural, self-evident, and inalienable right of all people to employ their own efforts for the gratification of their own wants, either directly or through exchange.¹

Inspired by these beliefs, Adam Smith’s American successors, the laissez-faire economists, polished and advanced the principle that government should not interfere in economic matters.² Edward Atkinson, an economist tied to the laissez-faire tradition, argued that: “Government’s efforts to solve economic problems, no matter how sincere, had the opposite effect. They upset the economic balance, destroyed the incentive for labor, and sapped the spirit of enterprise and productive energies of the nation.”³ Their ideas began to take hold of economic thinking in the middle 1800s. They were reinforced by the growth of the philosophy of Social Darwinism, and together they created a legacy that formed a theoretical basis for opposition to government regulation.

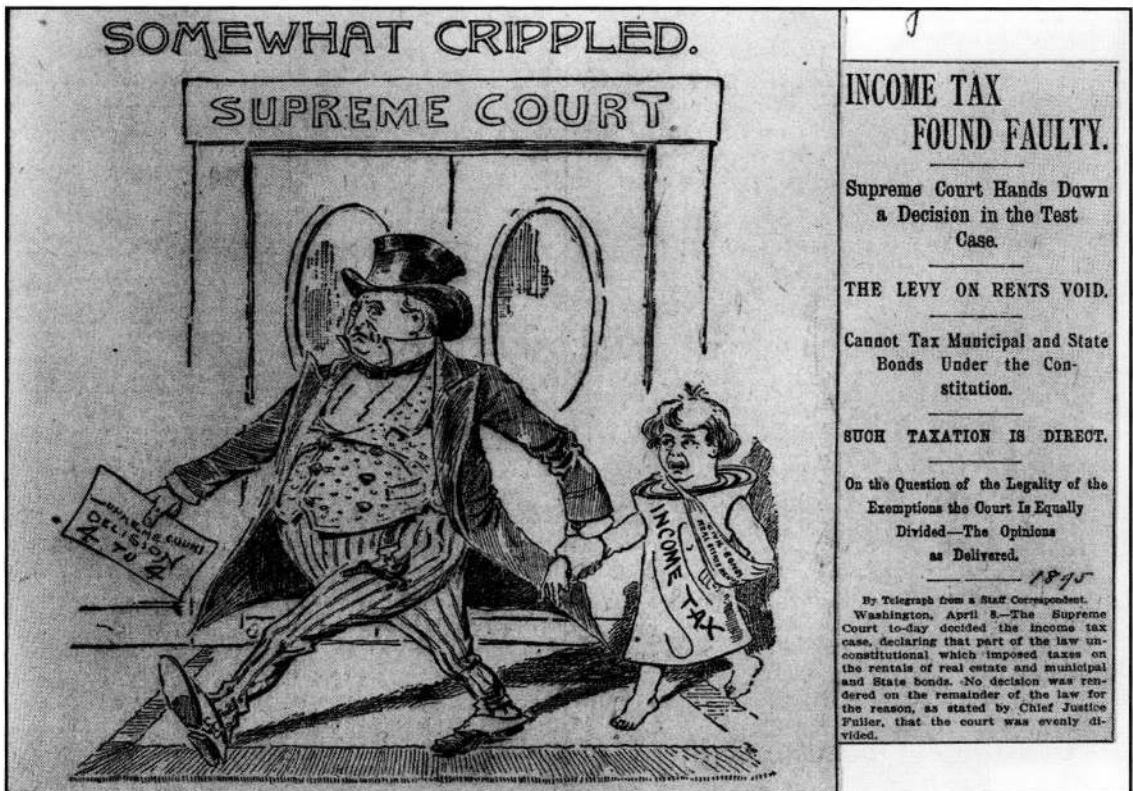
Under laissez-faire theory, property and free

exchange were natural rights. But were they protected by or incorporated into the Constitution? Certainly the Constitution includes protections for property. The Article I, section 10 guarantee that no state shall pass any law impairing the obligation of contract provides some protection both for property and for free exchange. But that provision primarily protects the sanctity of existing contracts, not an inalienable right to be free from government interference. The Constitution also guarantees, in the Fifth and Fourteenth Amendments, that property shall not be taken without due process of law. Finally, the Fifth Amendment guarantees that property shall not be taken for public use without just compensation. All of these provisions give some protection to property. But they do not go so far as to prohibit regulation or make any sweeping limitation on government involvement in economic matters.

Nevertheless, according to the traditional version of constitutional history, judges of the late nineteenth and early twentieth centuries did interpret the Con-

stitution in a way that provided sweeping limitations on government involvement in economic matters. This version of history saw such Justices as Stephen J. Field, David J. Brewer, and Rufus W. Peckham laying the foundation for the conservative era. When faced with a tough question about the validity of economic regulation, it saw them turning to Adam Smith's **Wealth of Nations** rather than the Constitution. In this version of history, the Four Horsemen, Justices George Sutherland, James C. McReynolds, Pierce Butler, and Willis Van Devanter, carried this work into the 1930s. Inspired by laissez-faire economics, these men pursued a policy of emphasizing protection of property. According to this traditional version of history, the legal doctrine that developed during this era was the product of a deliberate campaign to attach laissez-faire theory to the Constitution.⁴

Had I been asked to prepare this article just a few years ago, this would have been its theoretical base. I would have had the fairly straightforward task of filling in the details of the cases. But mod-



In three 1895 cases the Court signalled its attachment to laissez-faire ideals by overruling the progressive income tax, giving sanction to the federal labor injunction, and reducing the potency of the Sherman Antitrust Act. The initial decision in the first case, *Pollock v. Farmers' Loan and Trust Company*, held that tax on real estate income was unconstitutional, but split 4-4 (Justice Howell Jackson not voting due to illness) on the legality of taxing other forms of income. A re-argument the following month led to a 5-4 decision invalidating the entire tax.

ern scholars have made it more of a challenge. Some people, including some of today's best legal historians, are now telling us that there was no conservative era. Actually, the most careful and deliberate among them avoid the word "conservative" and tell us there was no laissez-faire era. The traditional image of laissez-faire constitutionalism, they say, is little more than a myth. It is a myth created by the Court's progressive era critics and perpetuated by historians who followed. Rather than laissez-faire, they say, judicial doctrine of the late nineteenth and early twentieth centuries was inspired by uniquely American ideas popular even before the Civil War—ideas linked to Jacksonian democracy and free labor theory.⁵

As a group, these revisionist historians seem to have settled on two points to prove their proposition. First, they observe that judicial doctrine of the conservative era actually allowed plenty of room for the state and federal governments to regulate economic matters. Second, they maintain that, rather than following an economic theory, the cases of the era demonstrate a Jacksonian-like commitment to liberty.

Presented with this revisionist view, I would like to do several things. I would like to begin with a survey of the traditional view of the laissez-faire era. Then I will turn to the revisionist view with the hope of explaining it and exploring what we have to learn from it. Finally, I would like to explain why, despite the revisionists' admirable work, I would still conclude that the constitutional doctrine of the era did reflect an attachment to laissez-faire, and suggest why this is important today.

The Traditional History

Any summary of the traditional story of laissez-faire constitutionalism has to take into account that the Supreme Court took two separate but related approaches toward limiting government interference in economic matters. One approach limited the federal government's authority to enact regulations. The other approach limited the power of state governments.

The Supreme Court sent a strong message about how it viewed the role of the federal government with three cases decided in 1895. In this trio of cases the Court overruled the progressive income tax, gave sanction to the federal labor injunction, and reduced the potency of the Sherman Antitrust Act. In the decades that followed, these cases came to symbolize the Court's attachment to laissez-faire ideals.

Pollock v. Farmers' Loan and Trust Company was the case overruling the progressive income tax.⁶ On April 15 of each year most of us are probably wishing that *Pollock* was still good law. We pay an income tax today because the Sixteenth Amendment, ratified in 1913, invalidated the Court's decision.

Chief Justice Melville W. Fuller wrote the majority opinion in *Pollock*. The opinion itself hinged on a rather dull and fine point of law rather than a sweeping statement of constitutional liberty. Fuller held that the income tax was a "direct tax" and thus violated the Article I, section 2 requirement that direct taxes be apportioned among the states according to population.⁷ But the Chief Justice's technical approach to the case could not hide the heated debate over the income tax.

The starting point for that debate was what conservatives saw as the real purpose of the tax—redistribution of the wealth. Certainly, that was one effect of the income tax plan. It was a progressive tax that fell only on a small percentage of the population—the wealthiest two percent. This aspect of the tax was too much for Justice Field, who wrote an impassioned concurring opinion. For Field, it was illegitimate for the government to pursue any policy of redistribution. It threatened prosperity and it threatened freedom of the market. But more specifically in this case he viewed the tax as discriminatory "class legislation" that failed to respect the sanctity of private property.⁸ Thus the progressive income tax ran contrary to one of the most important aspects of laissez-faire thinking, the right of property.

An implicit part of this right of property was the idea that government had the duty to protect private property. Justice Brewer made this clear in an earlier case. Dissenting in the 1892 case *Budd v. New York*, Brewer maintained that "liberty to the individual and protection to him and his property is both the limitation and duty of government."⁹ William Graham Sumner, the era's most candid advocate of laissez-faire, captured this aspect of the right of property even more bluntly. The only legitimate function of government, according to Sumner, was "to protect the property of men, and the honor of women."¹⁰

Protection of property was also the main concern in the second of the 1895 cases, *In Re Debs*.¹¹ The *Debs* case grew out of the Pullman strike of 1894. The strike began when the Pullman Company reduced wages between seventeen and forty per cent. At first, only the Pullman workers struck. But the

strike against the railroad car manufacturer soon exploded into a general strike against the nation's railroads. In an effort to bring the strike to a halt, Attorney General Richard Olney obtained a federal injunction against continuing the strike. The injunction ordered Eugene Debs, president of the American Railway Union, to stop interfering with the operation of the railroad. Debs ignored the order and was convicted of contempt of court.¹² In a unanimous opinion—the Supreme Court upheld Debs' conviction and thereby lent its sanction to the concept of a federal labor injunction.

Justice Brewer wrote the majority opinion. He based his opinion on the Commerce Clause and the federal government's duty to deliver the mail. These provisions, he ruled, justified the use of the federal courts to quell the strike. But Brewer ended his opinion with a comment that revealed his primary interest lay in preserving public order and protecting property. "[I]t is a lesson which cannot be learned too soon or too thoroughly," he said, that in our government the redress of wrongs must be through the courts or the ballot box. Pullman workers may have been treated unjustly but, in Brewer's words, they had no right to seek "the cooperation of a mob, with its accompanying violence."¹³

No person who wants to live in an orderly and peaceful society could fault Brewer for wanting to put an end to a strike that cost twenty lives and untold property damage. What is interesting, however, is how the episode of the Pullman strike fit into Brewer's thinking about property rights.

For Brewer, violence was not necessary to make a strike illegitimate. A year earlier, addressing the New York Bar Association, he told an audience that any strike, be it violent or peaceful, was an illegitimate means of settling labor grievances. Strikes, he said, destroyed the freedom of the individual worker to sell his labor. Even worse, the collective action of a group of employees amounted to usurping control over the employer's property.¹⁴

The violence of the Pullman strike was not completely irrelevant to Brewer, however. To him and others who subscribed to laissez-faire thinking, it affirmed their warnings of the threat of radicalism. Brewer had earlier stated as much when he warned that "the black flag of anarchism, flaunting destruction to property," hung like a cloud over American society, and the "Red Flag of socialism" loomed in every state and federal regulation.¹⁵ Field echoed this fear in his opinion in *Pollock*. "The present assault on capital is but the beginning," he warned,

"[I]t will be but the stepping stone to others more sweeping, till our political contests will become a war of the poor against the rich; a war constantly growing in intensity and bitterness."¹⁶

Certainly there was some cause for concern in the mid 1890s. The violence of the Pullman strike was not an isolated event. The Haymarket riots were even more violent, as was the Homestead strike. It was a time of economic depression—a time when thousands of unemployed workers, calling themselves Coxey's Army, marched on the nation's capital.

Radical theories of government did have some following in the United States at the time. Edward Bellamy's novel **Looking Backward** inspired a short-lived utopian movement in the 1890s. Marxists, like Daniel DeLeon, had some followers in the American labor movement. Eugene Debs himself ran a reasonably strong presidential campaign under the banner of the Social Democratic Party.

Laissez-faire thinkers liked to present themselves as the only logical alternative to radicalism—the mainstay of the American heritage. But they were not the only logical alternative to radicalism. As the century progressed, many respected economists and political leaders began to believe that laissez-faire, and its theory of the negative state, had outlived its usefulness. These people were not radicals by any stretch of the imagination. They were mainstream reformers, people like Theodore Roosevelt, who thought that changes in the social and economic order brought on by the Industrial Revolution could be solved only by people acting in concert through the organ of government.

As if in direct response to Justice Brewer's implication that the red flag of socialism loomed in every state and local regulation, economist Richard T. Ely pointed out what many of these reformers thought was the fallacy of laissez-faire. "Regulation is not the same as collectivization," he said. And those who describe it as such "have never grasped the fundamental idea of modern democracy; which is that government is not something apart from us and outside of us, but we ourselves."¹⁷

Mainstream reformers, not radicals, inspired most of the regulatory legislation of the era. On the federal level, their first success was creation of the Interstate Commerce Commission in 1887. The ICC, which was the first federal administrative agency, was intended to protect consumers and shippers from discriminatory rates and provide a uniform system for regulating railroad rates and services. A



Reformer Jacob Coxe led an “army” of unemployed workers (above) from Ohio to Washington to publicize the plight of the poor during the economic depression of the 1890s. Hard times also fueled the Haymarket riots and the Homestead and Pullman strikes. Fear of violence prompted the Supreme Court to use the Sherman Antitrust Act to control dissatisfied workers by banning strikes instead of using it to control monopolistic business practices.

second success at the federal level was the Sherman Antitrust Act, which was intended to control monopolistic practices by declaring “trusts” and “conspiracies in restraint of trade” to be illegal.

This kind of mainstream reform, and specifically the Sherman Antitrust Act, was the subject of the third of the 1895 cases, *United States v. E.C. Knight*.¹⁸ The *E.C. Knight* case began when the American Sugar Refining Company purchased E.C. Knight, a small refinery. Because the purchase gave the American Sugar Refining Company ninety-eight percent of the U.S. market, the Justice Department filed suit under the Sherman Antitrust Act asking for an injunction to cancel the transaction.

Chief Justice Fuller wrote the majority opinion. The purchase would give the American Sugar Company the ability to control the price of sugar in the country.¹⁹ Nevertheless, Fuller concluded that Congress did not have the power to prevent the company from acquiring E.C. Knight. His opinion did not invalidate the Sherman Act. But it had even more far-reaching implications for the advocates of reform. The Chief Justice based his decision on a narrow interpretation of the federal government’s power un-

der the Commerce Clause. The power to regulate interstate commerce, he said, meant only that the federal government could regulate the transportation of goods across state lines. It did not allow Congress to regulate the manufacture of goods. Since the *E.C. Knight* transaction involved manufacture rather than transportation, federal regulation of the purchase was not allowed.

Where the *Pollock* and *Debs* cases reflected the Court’s attachment to the natural right of property, the *E.C. Knight* case was important in that it reflected the Court’s attachment to the second fundamental principle of laissez-faire thinking—the right of free exchange. Modern Commerce Clause doctrine tends to give Congress the power to regulate any activity that has a tangential effect on interstate commerce.²⁰ By contrast, the Fuller Court’s reasoning that the commerce power applied only to the transportation of goods across state lines reflected a much narrower view of the federal power. And, although the Court turned to different legal tests, throughout the laissez-faire era it continued to follow a policy that substantially limited the federal government’s authority to enact economic regulations.

The *Pollock, Debs, and E. C. Knight* cases all involve questions of the federal government's power. At the same time these cases were decided, the Court was also embarking on a path that would narrow the range of subjects state governments could regulate. The vehicles for this judicial oversight of state regulation were the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Arguments that this Civil War Amendment protected businesses from government regulation passed through several stages before settling on the theory of liberty of contract in the late 1800s. It began to take shape in 1873 when, dissenting in the *Slaughter-House Cases*, Justice Field and Justice Joseph P. Bradley proposed the idea that the Fourteenth Amendment guaranteed a right, derived from natural law, to pursue a lawful trade or calling.²¹ Although controversial at the time, the right to pursue a lawful trade or calling was an idea that could be easily linked to the goals of the antislavery and free labor movements. Field, however, had something else in mind. For him the right to pursue a trade or calling was just one aspect of a theory that linked laissez-faire economics to the Constitution. He made this abundantly clear eleven years after the *Slaughter-House Cases*. Concurring in *Butcher's Union v. Crescent City*, Field quoted directly from Adam Smith's **Wealth of Nations**:

The patrimony of the poor man lies in the strength and dexterity of his own hands, and to hinder him from employing this strength and dexterity in what manner he thinks proper. . . is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him.

Then, melding the concepts of due process of law, equal protection, and privileges and immunities of citizens, Field reasoned that the Fourteenth Amendment guaranteed the right to pursue a calling.²²

Field's idea that the Fourteenth Amendment protected economic liberty eventually developed into liberty of contract, the doctrine that came to symbolize the Court's attachment to laissez-faire theory. The theory of liberty of contract grows out of the Fourteenth Amendment guarantee that no state shall "deprive any person of life, liberty, or property, without due process of law." Among the liberties guaranteed by the Due Process Clause, according to this theory, is the natural right of two or more people to

enter into any agreement they might choose—without government interference.

Of course, this freedom could not be absolute. Even the most ardent advocate agreed that liberty of contract could be restricted by legitimate government actions. This proper range of governmental function, although not well defined, was described with the phrase "the police powers of the states." Thus, the doctrine that developed put the Court in a position of balancing individual liberty on one hand and the legitimate power of government on the other.

Reformers of the era thought the Supreme Court was wrong on both sides of the scale. When they looked to the Constitution for any mention of liberty of contract, they found none. The Court, they argued, had created a constitutional right out of thin air. Then, looking on the other side of the scale, reformers thought the Court came to define the legitimate powers of government in excessively narrow terms.

The most famous liberty of contract case—the case that has come to be thought of as synonymous with the laissez-faire era, is, of course, *Lochner v. New York*.²³ *Lochner* was a 1905 case in which a 5-4 majority of the Court overruled a New York law that limited bakers to working ten hours per day or sixty hours per week. Writing for the majority, Justice Rufus Peckham ruled that the bakeshop law "necessarily interfered" with the right of contract between an employer and an employee. To Peckham, the limitation on bakers' hours was merely an arbitrary interference with the right of the worker to sell his labor in a manner that was best for his own self-interest and the support of his family.

Justice Peckham's concern for the workers' rights, sincere though it might have been, must have rung hollow to supporters of the bakeshop law. Even today, many people understand that individuals who were common laborers at the turn of the century had little free will to speak of when it came to the terms and conditions under which they were employed. One radio commentator recently described the era as "a time when farmers, wage earners, and merchants saw themselves as indentured servants to giant corporations." That description might be a little simplified and overdramatic. But there is no doubt that cases like *Lochner* symbolized to reformers of the time how the laissez-faire model had lost touch with reality.

For reformers, the *Lochner* decision ignored the reality that disparities in bargaining power between employer and employee rendered any true liberty of contract nothing more than a dream. Justice Henry

B. Brown had recognized this characteristic of labor relations nine years earlier in *Holden v. Hardy*, a case that upheld a shorter hours law for miners. "Employers and employees often do not negotiate on equal footing," Brown wrote. "Proprietors lay down the rules and laborers are practically constrained to obey them."²⁴ Chief Justice Charles Evans Hughes recognized the same aspect of employer-employee relations thirty-two years later in *West Coast Hotel v. Parrish*, the case overruling *Lochner*.²⁵ Nevertheless, in those thirty-two years between *Lochner* and *West Coast Hotel v. Parrish*—the laissez-faire era—liberty of contract doctrine depended upon the fiction that the labor contract was freely negotiated.

There was another unreality in Justice Peckham's *Lochner* opinion. It lay in the assumption that laborers who contracted for more hours of work produced a better life for themselves and their families. This might have been true if workers were commonly paid by the hour, as many are today. But bakeshop workers at the turn of the century were usually paid by the week, or sometimes paid by the day. Pay of twelve dollars per week was typical, and a seventy-two hour week was not unusual.²⁶ With that in mind it is easy to see that many laborers who agreed to work longer hours did little to help themselves or their family. To reformers then, *Lochner* represented the Court's unrealistic attachment to a particular theory of liberty—a theory of liberty that did not actually exist in the real world of turn-of-the-century business relations.

But that was not all. Reformers also thought the Court had lost touch with reality when it turned its attention to the other side of the balancing scale—weighing legitimate powers of the states. Justice Peckham held that, if the New York statute could be upheld at all, it could only be upheld as a law protecting the health of bakeshop workers. Concluding that it was not hazardous, Peckham took judicial notice of "the common understanding that baking has never been regarded as an unhealthy trade."²⁷ This "common understanding" ignored bakers' complaints that they were more likely than others to suffer from lung disease. It also completely ignored existing scientific evidence that this was possible.²⁸ And while that scientific evidence was mixed, Peckham's assumption contradicted the opinion of the New York Assembly and seven of the twelve judges who had previously heard the case.

It must have been bad enough to reformers that the Court seemed to ignore factual realities. An even more important point, however, was that to reformers

the Court's focus on health and safety ignored the realities of the contemporary debate about the proper role of government. Reformers certainly were interested in the health and safety of workers. But economic regulations like the Bakeshop Act reflected even more important goals of reform. Reformers were also interested in promoting fairness. They wanted government to intervene in economic matters in order to assure a fair distribution of the benefits of progress, and they wanted to use government to curb the power of aggregate wealth.

By saying that the bakeshop act could be valid only if it protected the public health and safety, Justice Peckham took these considerations out of the equation. His opinion in *Lochner* skewed public debate by making reform's most important goals incompatible with the legitimate function of government, and thus irrelevant.

Dissenting in *Lochner*, Justice Oliver Wendell Holmes, Jr., laid bare the underlying premise behind liberty of contract thinking. "This case is decided upon an economic theory which a large part of the country does not entertain," he wrote. Holmes was, of course, referring to laissez-faire.²⁹ And most reformers of his time thought Holmes had directly hit the mark.

So did most later historians and legal scholars. That is, so did most historians and legal scholars until very recently.

The Revisionist History

The trend in today's scholarship maintains Holmes was wrong—that the legal doctrine of the era was not driven by laissez-faire economic thinking at all. Collectively, these modern scholars find two interrelated reasons to reach this conclusion. They note that the so-called laissez-faire doctrine left plenty of room for government regulation. And they argue that rather than being rooted in laissez-faire, the doctrine of the era demonstrated a deep commitment to liberty. I would like to consider these arguments one at a time.

With respect to the first point, revisionist scholars have taken pains to demonstrate that even those Justices who have traditionally been portrayed as the standard bearers of laissez-faire constitutionalism saw a role for the state in governing economic matters. And they can find cases demonstrating that Field or Brewer supported some measures that favored laborers or restricted business.³⁰ They make a good point. But it is easy to find numerous examples

of these same Justices vigorously opposing legislation they viewed as interfering with entrepreneurial liberty. Any discussion could thus break down into a battle of the briefs, with each side offering cases to support its theory. The key to understanding these cases, however, lies in the way the Court or a particular Justice defined the police power of the states. It also lies in understanding the historical development of police power jurisprudence.

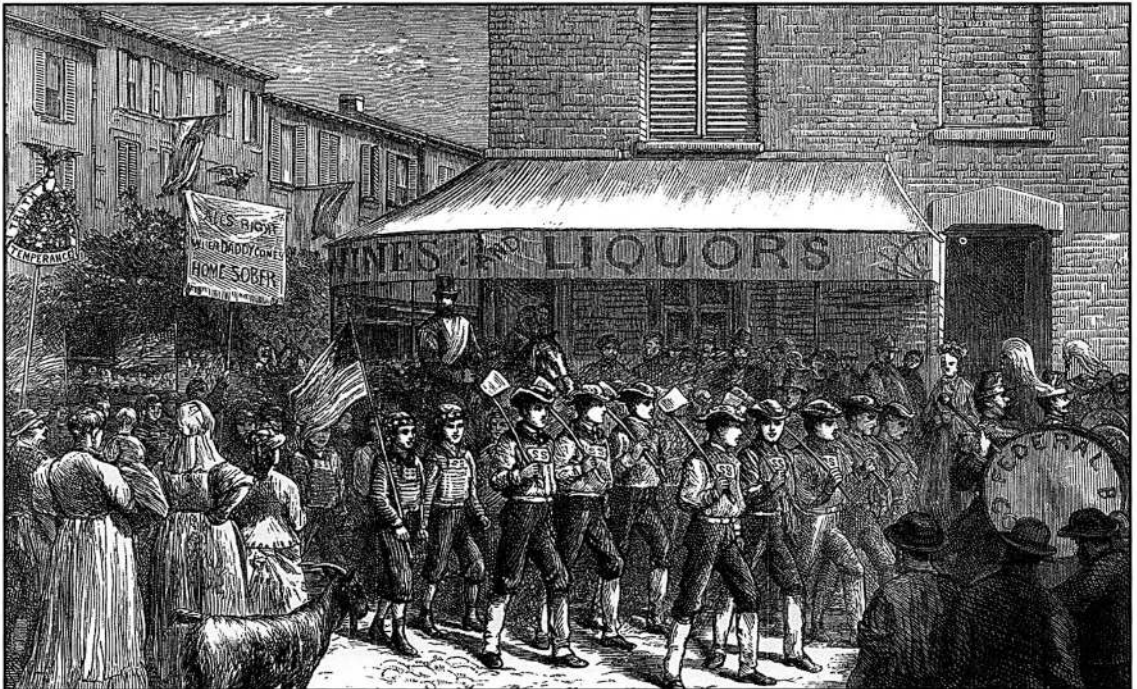
Prior to the Civil War, this term “police power” did not imply any limit on the power of government at all. It simply was used to distinguish the powers possessed by state governments from those powers granted to the federal government. Early attempts to further define the police power of the states did not yield much detail. Chief Justice Roger B. Taney, for example, defined the police power as “nothing more or less than the power of government inherent in every sovereignty—the power to govern men and things.”³¹ It was not until after the Civil War that the term took on a restrictive meaning—defining the limits of state authority. Even then the term had an all-encompassing and sweeping meaning. In *Munn v. Illinois*, for example, Chief Justice Morrison Waite said the police power gave states authority to provide for the general welfare.³²

Dissenting in the same case, Field worried that Waite’s idea of state authority was too broad. Field preferred a definition of police power he had expressed in the 1884 case *Butchers Union v. Crescent City*. There he maintained that states only have the power to “prescribe regulations affecting the health, the good order, the morals, the peace, and the safety of society.”³³

Morals, health and safety, and peace and good order: combined, these three categories represented fairly expansive boundaries for state authority. But boundaries they were nevertheless. And while they may have left plenty of room for state regulation, they also left plenty of play for judges to overrule legislation they thought unduly interfered with economic liberty.

Field and other judges who subscribed to laissez-faire sometimes used the words “general welfare” when they described the police power. But when we look at the cases, both before and after *Lochner*, it becomes clear that those judges upheld only regulatory legislation that fell within the morals, health and safety, and peace and good order test. A look at Field’s record in the late 1800s will demonstrate what they meant.

Justice Field’s record regarding the public mor-



Justice Stephen J. Field was perhaps the most ardent legislator of morality and Victorian values on the Court. He consistently favored state laws that upheld Sunday closings and restrictions on gambling. He drew the line, however, when a law regulating the sale of alcoholic beverages led to the confiscation and destruction of private property. Above is a temperance procession in Philadelphia during the centennial celebrations in 1876.

als category of the police power was the most clear-cut. He believed the state had a right and a duty to promote Victorian morality. From his earliest days, he had voted to uphold Sunday-closing laws.³⁴ He consistently upheld laws to control gambling and lotteries.³⁵ In *Crowley v. Christensen* Field followed his long-established pattern of upholding laws regulating the sale of alcoholic beverages.³⁶ Yet in an earlier case, Field had reservations when the Court upheld a Kansas law that declared all bars and breweries to be common nuisances and authorized officials to seize them and destroy all the liquor and property located on the premises. Field was so worried about the destruction of private property that he wrote a separate opinion saying the Kansas law had “crossed the line which separates regulation from confiscation.”³⁷

Field’s record with respect to the health and safety category of the police power was more complex. He recognized undeniably that states had the authority to protect their citizens from disease and hazards. When California assessed landowners to pay for swamp reclamation projects, for example, Field found the state’s desire to “drain malarious districts” to be a legitimate health and safety concern.³⁸ However, in other cases where the state appeared to be interested in protecting public health and safety, Field ruled against the legislation. He reasoned, for example, that a state law requiring inspection of cattle at the border was a burden on interstate commerce, and that a law prohibiting the sale of oleomargarine was not a health law at all.³⁹ Thus, health and safety proved to be a concept that allowed Field flexibility in applying his police power doctrine.

By peace and good order Field meant laws that provided for the settlement of disputes and laws intended to smooth the flow of commerce. As with the health and safety component, this concept of peace and good order provided a good deal of flexibility. He upheld an Illinois law that required railroads to assume the cost of constructing crossing facilities and maintaining flagmen along their routes.⁴⁰ There he could see the need to protect public safety and to smooth the flow of commerce. But he could see no similar goal in a Nebraska law requiring railroads to erect grain elevators along their lines, and thus found the law unconstitutional.⁴¹

All of these cases involved a subtle interplay between the nature of the police power and the intensity of the individual right that was supposed to have been violated. Although the outcome of vari-

ous cases was sometimes confusing, the elements of Field’s police power jurisprudence were unmistakable. First, it was clear that the concept of police power jurisprudence was for Field not just a description of government authority but also a limit on government power. Second, he took a skeptical view of any law that confiscated property or interfered with the right of property. Third, he required that regulations conform with his particular view of liberty. For Field this vision of liberty included the right to pursue a lawful calling. Later, for Justices Peckham, Sutherland, McReynolds, Butler, and Van Devanter, it became liberty of contract. For both Field and those later Justices, however, this notion of liberty was clearly based on the laissez-faire precept of a natural right of free exchange.

Perhaps even more importantly, Field and other conservative Justices insisted that the power to determine whether a statute fell within the boundaries of the police power or violated an individual right rested with the courts, not with the legislature. And they placed the burden on the state to show that its law was legitimate. This aspect of conservative police power jurisprudence becomes obvious by comparing the opinions in the 1888 case *Powell v. Pennsylvania* with the opinions in *Lochner* in 1905.

Powell v. Pennsylvania involved a law prohibiting the sale and manufacture of oleomargarine. Charged with selling two cases of oleomargarine, Powell maintained in his defense that oleomargarine was not a threat to public health. The statute, he argued, was therefore not a lawful exercise of the police power. The Court rejected Powell’s argument and upheld the statute.

John Marshall Harlan wrote the majority opinion. Interestingly, Harlan was willing to admit the statute interfered with Powell’s entrepreneurial liberty. And he described that liberty in essentially laissez-faire terms as “the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property.”⁴² But Harlan was not willing to declare the Pennsylvania law unconstitutional. In Harlan’s view the Court should defer to the legislature’s judgment of whether a statute would protect the public health. “Every possible presumption . . . is in favor of the validity of a statute,” he wrote, “and this continues until the contrary is shown beyond a reasonable doubt.”⁴³ The prohibition of oleomargarine may have seemed ridiculous to him. It certainly must be surprising to most of us—a generation eating “I Can’t Believe It’s Not Butter-Light.” But in Harlan’s opinion, questions of fact and of

public policy belonged to the legislature.

Field, champion of laissez-faire constitutionalism could not have disagreed more. In his eye, all the state had done was to prohibit the manufacture of a healthy and nutritious article of food designed to take the place of butter.⁴⁴ In doing so, the state had violated Powells' right to pursue a lawful calling. Field was, of course, willing to admit that the state had the power to pass regulations to protect public health. But he maintained that the state bore the burden of proving that its regulations had a reasonable relationship to this legitimate end. A mere declaration by the state that a statute relates to health, he said, is not enough.

Seventeen years later, in *Lochner*, the burden was shifted. The opinions were turned completely around. Justice Harlan was still alive and still maintaining that, when the validity of a statute is questioned, the burden of proof is on those who assert it to be unconstitutional. But Harlan was now writing in dissent. Justice Field had died, but Justice Peckham wrote for the majority. As if standing in for Field he reasoned that "The mere assertion that a subject relates in a remote degree to public health does not necessarily render the enactment valid. The law must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate."⁴⁵

With this shift in the burden of proof—with this assumption against the validity of economic regulation—the installation of laissez-faire constitutionalism was complete.

By making the point that even those Justices most closely associated with laissez-faire saw a place for the state to regulate economic matters, revisionist historians force us to reconsider common assumptions about the laissez-faire era. The police power cases do show that the policy to which Field and conservative Justices of the era subscribed was not pure laissez-faire policy. The conservative doctrine of the time was more complex than that. But the cases also demonstrate that these Justices did subscribe to a doctrine that was compatible with and inspired by the goals of laissez-faire. Furthermore, the morals, health and safety, and peace and good order test ruled out much of what reformers wanted from government and much of what competing theories of political economics thought was government's proper role: (1) It rejected the idea that government should be used to balance disparities in bargaining power. (2) It rejected the idea that government power should be used to assure fairness

and mitigate the excesses caused by industrialization. (3) And, it denied government any redistributive function.

This takes me to the revisionists' second point, that the cases of the era do not reflect laissez-faire philosophy but rather a commitment to liberty. There is no doubt that we find in the cases and opinions commonly associated with laissez-faire a genuine commitment to liberty. The theory of laissez-faire is, after all, a theory founded on a certain kind of economic liberty. The question in the cases is not one of liberty or no liberty, but rather it is a question of what kind of liberty and for whom.

Still, some of today's scholars maintain that the cases of the era do not reflect the laissez-faire ideal of liberty, but rather a vision of liberty linked to the pre-Civil War ideals of Jacksonian democracy and free labor. Once again, there is a certain amount of accuracy in this claim.⁴⁶ But it can also be misleading.

Let me look just at Jacksonian democracy to make the point. Laissez-faire constitutionalism is founded on a desire to be free from government interference. A similar antigovernment theme permeated Jacksonian democracy. But focusing on the antigovernment theme oversimplifies the Jacksonian ideal. The reason for this is that while government neutrality was the central theme of laissez-faire constitutionalism, it was only one of a hierarchy of Jacksonian ideals.⁴⁷

Of these ideals, individual liberty sat at the top. But to Jacksonians, liberty did not mean merely freedom from government intervention. It carried with it a vision of self-sufficiency, a vision that also feared oppression at the hands of an economic elite.

This fear of oppression at the hands of an economic elite led to the second in the hierarchy of Jacksonian values—opposition to special privilege. The Jacksonians expressed their disdain for special privilege by attacking what they called "moneyed interests." This does not mean that Jacksonians opposed property rights. They were not even opposed to wealth if it was accumulated by hard work and prudence. What they were opposed to was artificial wealth. That is wealth acquired from influence or power. In the Jacksonian picture of society, the source of this artificial wealth was usually government. Jacksonians saw government as an instrument doling out special privileges to an influential elite. Jacksonians feared special privilege because it tended to concentrate power and thus warp the natural working of a democratic society. In the Jack-



Justice John Marshall Harlan wrote in *Powell v. Pennsylvania* that the Court should defer to the state's decision that oleomargarine was a threat to public health and should be banned. Justice Field's dissent foreshadowed *Lochner* in its insistence that the burden was on the state to prove that oleomargarine was not a healthy butter substitute in order to outlaw its manufacture. At left is a 1893 stereograph of men making oleomargarine in a Chicago factory.

sonian mind, special privilege created a vicious cycle that threatened the liberty of common individuals.

A desire for limited government was the third tenant of Jacksonian democracy. But it is important to understand that the Jacksonian distrust of government stemmed from its fear of special privilege.

With this in mind, it is easy to see that the Jacksonian idea of limited government, while sounding similar, was quite different from the laissez-faire idea of limited government. Jacksonians did not fear government regulation. They didn't even think in terms of their liberty being threatened by government regulation. The Jacksonians' ultimate goal was to limit the threat that moneyed interests posed to their liberty. They saw government as the hand that fed these moneyed interests. And they wanted to limit government, as one observer put it, "in order to starve that monster in its cradle."⁴⁸

Laissez-faire constitutionalism did employ anti-government themes with rhetoric similar to Jacksonian democracy. The two do share a concern for liberty in the broadest sense of the word. But laissez-faire constitutionalism turned the Jacksonian ideals on their head. Where the Jacksonians opposed economic privilege, the laissez-faire emphasis on protection of property and liberty of contract tended

to protect economic privilege. Where Jacksonians wanted to purify the workings of democracy, the comments of Field in the *Pollock* case and of Brewer in the *Debs* case demonstrated that laissez-faire feared the workings of democracy. Where Jacksonians tended to be egalitarian, the outcome of laissez-faire constitutionalism tended to be elitist.

Although I have tried to disprove the revisionists' ultimate point that there was no "laissez-faire era," I do not mean to say that the revisionists' efforts were in vain. Their arguments force us to dig a little deeper as we try to understand what we mean by liberty and what our predecessors meant by liberty. Their efforts force us to consider that the instrument of government can be used not only to restrict liberty, but also to promote liberty.

Conclusion

I would like to conclude with a comment on why this debate about the roots of the conservative era is significant today. As we appear to be moving into a new conservative era, there may be something to learn from the old. The debate among historians about the roots of the laissez-faire era shows us one thing for certain. The development of the constitutional doctrine of that time involved a struggle to

capture the meaning of liberty and to define the boundaries of the right of property. If the lessons of that history tell us anything, it is not to be overly impressed when someone asserts that "property was among the most important concerns shared by those who gathered to write the Constitution."⁴⁹ Rather than jumping to conclusions, we should ask ourselves what do we mean by liberty, and to what extent and in what way is protection of property actually written into the Constitution?

Today's theory of property rights is slightly different from the old. It manifests itself only slightly in Commerce Clause cases. *United States v. Lopez* (1995) signaled that the majority of today's Court is willing to take a closer look at the federal government's power to regulate under the Commerce Clause and that at least some Justices may be interested in turning the clock back to the Commerce Clause jurisprudence of the laissez-faire era.⁵⁰ But *Lopez*, which overruled a law creating gun-free school zones, did not involve an economic regulation per se. The new property rights doctrine is more evident in another theory, which is to the modern day what liberty of contract was to the laissez-faire era.

Where the old theory of property rights turned to the Fourteenth Amendment and maintained that economic regulations violate an individual's liberty of contract, the new theory turns to the Takings Clause of the Fifth Amendment. Proponents of this new thinking maintain that any economic regulations can constitute a taking of an individual's property and thus must comply with the Fifth Amendment's requirements that the government can take individual property only for public use and that the owner receive just compensation.⁵¹ Although based on different provisions of the Constitution, in many significant ways the new theory and the old are the same. Both would make the right of free exchange, or something like it, a constitutional right. And both envision a system in which government's only legitimate function is to provide an atmosphere in which economic individualism can flourish. Richard Epstein, the most influential advocate of the new theory, makes the link clear when he describes the limits of government power. The sole function of the police power, Epstein explains, is to protect individual liberty and private property.⁵² Furthermore, according to Epstein, the government should bear the burden of proving its regulations are a rational means to accomplish this legitimate end.⁵³

If Rip Van Winkle had been a constitutional law-

yer who fell asleep in 1896 and woke up today, he might have thought he was reading the words of Field, Brewer, or Peckham; and he might never have known that he had been sleeping for 100 years. He might never have known that liberty of contract had been adopted and then rejected by the Supreme Court and that most of the doctrine of the conservative era had been subsequently overruled.

It seems clear that when we study the roots of the old conservative era we are simultaneously inquiring into the roots of the new economic conservatism. And in the same way we should be asking ourselves whether the new Takings Clause theory reflects age-old American traditions, or whether—in Holmes' words—it is based upon an economic theory that a large part of the country does not entertain.

Endnotes

¹ See, Arthur Latham Perry, *Elements of Political Economy* (New York: Charles Scribner's Sons, 1873) p. 134.

² *Ibid.*, pp. 129-32; Francis Wayland, *Elements of Political Economy* (Boston: Kendex and Lincoln, 1845) pp. 155-57.

³ Edward Atkinson, *Industrial Progress of the Nation* (New York: Arno Press, 1973, reprint of 1890 edition) pp. 239-49; Wayland, *Elements of Political Economy*, pp. 118-21, 151-52.

⁴ See, Howard J. Graham, *Everyman's Constitution* (Madison, WI: State Historical Soc., 1968) pp. 124-28; Carl Brent Swisher, *American Constitutional Development* (Boston: Houghton Mifflin Company, 1943) p. 341; Robert Green McCloskey, *American Conservatism in the Age of Enterprise* (Cambridge: Harvard University Press, 1951) pp. 75, 103.

⁵ Charles W. McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897," *Journal of American History* 61 (1975) 970-1005; Charles W. McCurdy, "The Roots of 'Liberty of Contract' Reconsidered: Major Premises in the Law of Employment, 1867-1937," *Yearbook of the Supreme Court Historical Society* (1984) 20-33; Michael Les Benedict, "Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism," 3 *Law and History Review* 293 (1985); Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham, NC: Duke University Press, 1993); David M. Gold, *The Shaping of Nineteenth-Century Law: John Appleton and Responsible Individualism* (Westport, CT: Greenwood Press, 1990).

⁶ *Pollock v. Farmers' Loan and Trust Company*, 157 U.S. 429 (1985), on rehearing 158 U.S. 601 (1895).

⁷ *Pollock*, 157 U.S. at 429.

⁸ *Pollock*, 157 U.S. at 596, Field separate opinion.

⁹ *Budd v. New York*, 143 U.S. 517, 551 (1892), Brewer, dissenting.

¹⁰ William Graham Sumner, *What Social Classes Owe to Each Other* (Caldwell, ID: Caxton Printers, 1952, reprint of 1883 edition) p. 88.

¹¹ *In Re Debs*, 158 U.S. 564 (1895).

¹² For background see, Owen M. Fiss, *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: Volume VIII, Troubled Beginnings of the Modern State, 1888-1910* (New York: Macmillan Publishing Co., 1993) pp. 53-74.

¹³ *Debs*, at 598-599.

¹⁴ Fiss, **Troubled Beginnings**, p. 55.

¹⁵ *Ibid.*, p. 56.

¹⁶ *Pollock*, 157 U.S. at 607, Field, separate opinion.

¹⁷ Richard T. Ely, **An Introduction to Political Economy** (New York: Hunt & Eaton, 1891) p. 89.

¹⁸ *United States v. E.C. Knight*, 156 U.S. 1 (1895).

¹⁹ See, *ibid.*, at 18, Harlan, dissenting.

²⁰ *United States v. Lopez*, _ U.S._, 115 S. Ct. 1624 (1995), which overruled a federal law creating gun-free school zones, may reflect a change in directions regarding the Commerce Clause.

²¹ *Slaughter-House Cases*, 83 U.S. (16 Wall) 36, 83, (1873).

²² *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 755-757 (1884), Field, concurring, (quoting from Adam Smith's **Wealth of Nations**, Bk. I Chap. 10).

²³ *Lochner v. New York*, 198 U.S. 45 (1905).

²⁴ *Holden v. Hardy*, 169 U.S. 366, 397 (1898).

²⁵ *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

²⁶ For background, see Paul Kens, **Judicial Power and Reform Politics: The Anatomy of *Lochner v. New York*** (Lawrence, KS: University Press of Kansas, 1990) pp. 6-13.

²⁷ *Lochner*, at 59.

²⁸ See *Lochner*, at 72, Harlan, dissenting.

²⁹ *Lochner*, at 75, Holmes, dissenting.

³⁰ See Charles W. McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897," *Journal of American History* 61 (1975) 970-1005; Michael J. Brodhead, **David J. Brewer: The Life of a Supreme Court Justice, 1837-1910** (Carbondale, IL: Southern Illinois University Press, 1994).

³¹ *Thurlow v. Commonwealth of Massachusetts*, 46 U.S. (5 How.) 504, 583 (1847).

³² *Munn v. Illinois*, 94 U.S. 113 (1877).

³³ *Butchers Union v. Crescent City*, at 754, Field concurring.

³⁴ *Ex Parte Bird*, 19 Cal. 130 (1861).

³⁵ See, *Boyde v. Alabama*, 94 U.S. 645 (1877).

³⁶ *Crowley v. Christensen*, 137 U.S. 86, 91 (1890).

³⁷ *Mugler v. Kansas*, 123 U.S. 623, 678 (1887), Field, separate opinion.

³⁸ *Hager v. Reclamation District*, 111 U.S. 701, 704 (1884).

³⁹ *Minnesota v. Barber*, 136 U.S. 313 (1880); *Powell v. Pennsylvania*, 127 U.S. 678, 687 (1888).

⁴⁰ *Chicago, Burlington and Quincy Railroad Co. v. Chicago*, 166 U.S. 226 (1897).

⁴¹ *Missouri Pacific Railroad Co. v. Nebraska*, 164 U.S. 403 (1896).

⁴² *Powell v. Pennsylvania*, 127 U.S. 678, 684 (1888).

⁴³ *Powell v. Pennsylvania*, at 684.

⁴⁴ *Powell v. Pennsylvania*, at 689, Field dissenting.

⁴⁵ *Lochner*, at 57-58.

⁴⁶ See note 5 *supra*.

⁴⁷ For analysis of Jacksonian ideals see, Harry L. Watson, **Liberty and Power: The Politics of Jacksonian America** (New York: Hill and Wang, 1990) pp. 149-50; Lawrence Frederick Kohl, **The Politics of Individualism: Parties and the American Character in the Jacksonian Era** (New York: Oxford University Press, 1989); Arthur M. Schlesinger, Jr., **The Age of Jackson** (Boston: Little, Brown and Company, 1945); Marvin Meyers, **The Jacksonian Persuasion: Politics and Belief** (Stanford, CA: Stanford University Press, 1957), and Donald B. Cole, **The Presidency of Andrew Jackson** (Lawrence, KS: University Press of Kansas, 1993).

⁴⁸ Watson, **Liberty and Power**, p. 170.

⁴⁹ Note, "Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered," 103 *Harvard Law Review* 1363 (1990); see also Bernard Siegan, "The Constitution and the Protection of Capitalism," in Robert A. Goldwin and William A. Schambra, eds., **How Capitalistic is the Constitution?** (Washington, DC: American Enterprise Institute for Public Policy Research, 1982).

⁵⁰ *United States v. Lopez*, _U.S._, 115 S. Ct. 1624 (1995).

⁵¹ See, Richard Epstein, **Takings: Private Property and the Power of Eminent Domain** (Cambridge, MA: Harvard University Press, 1985); *Hodel v. Irving*, 481 U.S. 704 (1987); *First Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

⁵² Epstein, **Takings**, pp. 112-13.

⁵³ *Ibid.*, p. 128.

The Court in the Progressive Era

Benno C. Schmidt, Jr.

Introduction: "The Times Are Out of Joint"¹

From the turn of the twentieth century to the New Deal, America experienced drastic and fundamental changes exceeding that of any previous period of American history. It was a time when the authority of the Supreme Court was thrown into heated controversy and, ultimately, repudiation. It was a time of ferment in politics and legal theory. It was a time of greatness, when some of the most brilliant jurists in our history sat on the Supreme Court and shared the national stage with vivid and extraordinary Presidents, legislators, captains of industry and finance, labor leaders, and radicals. On the Court it was the age of Oliver Wendell Holmes, Jr., and Louis D. Brandeis, of Charles Evans Hughes, William Howard Taft, John Marshall Harlan, and the bizarre, formidable James C. McReynolds. In the White House, two Roosevelts would bracket a period of unparalleled change in the powers, style, and persuasion of the presidency. Across the docket of the Supreme Court would march a cast of characters never matched before or since for drama, diversity, and sheer weight of significance: in addition to all the Presidents, Eugene W. Debs, John D. Rockefeller, J.P. Morgan, Andrew Carnegie, John L. Lewis, and

Samuel Gompers, to mention only a few. The economic, political, and racial conflicts of the new era are reflected in dozens of cases whose names will ever summon up momentous episodes in our constitutional history. Some of these cases have come to stand for entire superstructures of constitutional ideology: *Lochner v. New York*,² *Hammer v. Dagenhart*,³ *Abrams v. United States*,⁴ *West Coast Hotel v. Parrish*.⁵

Most significantly in terms of the history of the Supreme Court, it was a time when aggressive attitudes of judicial review joined with unyielding constitutional doctrines to set the stage for the Court's momentous collision with the New Deal. The Court's decisions in two areas especially opened it to political reprisal and ultimate repudiation. First, a number of decisions protecting freedom of contract limited the power of legislatures at any level to regulate working conditions, wages and prices, and business entry. Second, the Court sought to define a core of state power that was beyond Congress's legislative reach. The Court's decisions in both these areas opened it to bitter criticism at the time. The verdict of history has been even more harsh. Since 1937, it has been axiomatic that both lines of cases are entirely repudiated. The accepted wisdom is that the Supreme Court blundered into an institutional

fiasco with its defense of economic liberty principles and reserved state power from the turn of the century to the New Deal.

And yet within this history of judicial assertion and repudiation lies an acute paradox. The Court's repudiated activism in defense of economic liberties and reserved state powers also generated decisions that laid the foundation for the modern constitutional jurisprudence of civil liberties and civil rights, a mission for the Supreme Court that has gathered momentum and honor in the decades since. The paradox lies in the striking similarity of the institutional posture of judicial review in both the repudiated and the honored areas of the Court's work and the many parallels of doctrine in the two areas.

In every era of the history of the United States, controversies about judicial review—the proper role of the Supreme Court in finding meaning in the Constitution and applying that meaning to government action—put new questions in new circumstances before judges, politicians, and the rest of us. These questions inescapably call for the exercise of judgment on subtle and wrenching issues of public policy. No matter how deeply rooted the power of judicial review has become since *Marbury v. Madison*⁶ was decided in 1803, to apply the actual law of the Constitution to the novel issues of any historical period poses problems of substantial first impression. Every era must make its own fateful choices. With respect to judicial review and the role of the Supreme Court, every generation of Americans faces its own rendezvous with destiny.

Though no era escapes these choices, some periods of American history are more riven with conflict about judicial review than others. These tend to be times when social and political change is more drastic than gradual, when questions of constitutional interpretation intersect with the issues of greatest public concern and anxiety. The first third of the twentieth century was such a time.

Not surprisingly, this era of conflict and change has given rise to a variety of historical perspectives and legal interpretations to account for it. The perceived lessons of this period have been put to work in the interest of various causes of later days. Some of these interpretations, including some influential ones, are quite shrill in their denunciation of the Court in this period. And the controversy about the lessons of this period show no signs of abating. Only last year, in *Seminole Tribe v. Florida*,⁷ the landmark ruling on the Eleventh Amendment, Justice David Souter in dissent likened the majority's reasoning to

the substance and style of the Supreme Court in the first decades of this century, a time he described as “[t]he nadir of the Court's competence.”⁸ In response, the Chief Justice derided this point of view as “a theory cobbled together from law review articles.”⁹

In considering the Supreme Court in the Progressive Era we venture into an era whose continuing significance for the understanding and practice of the Constitution and judicial review is only equaled by the controversy it has elicited.

The Progressive Era, which roughly coincided with the first two decades of this century, was the time when modern America virtually exploded from the republican, agrarian past of the nineteenth century. The population of the country grew from 60 million in 1890 to 92 million in 1910.¹⁰ Almost half of this growth was due to immigration. In the last three decades of the nineteenth century, 10 million immigrants came to America. Between 1900 and 1915, 15 million more were added. The country was moving to the city. By 1920, for the first time, over half the population was urban. Manufacturing outstripped agriculture. A revolution in transportation, especially the vast extensions of the railroads, created a national market economy. The frontier and the opportunity of struggling people to strike out for agrarian opportunity—a precious concept in nineteenth-century republican political theory—was closed. For the first time, industrialization was the working experience of most Americans.

The threat of unemployment hung over the vast new working class created by industrialization. Depression and downturns posed serious hazards for a nation of factory hands, clerks, and commodities growers. Business people faced bankruptcies in the alarming and repeated economic cycles of boom and bust. And employment itself was, for many Americans, an exhausting, dangerous, and depressing affair. Most Americans worked between fifty-four and sixty hours per week. Many worked seventy-two hours or more. Child labor was widespread and growing, a shocking affront to the Progressive Era's growing humanitarianism. Workers in many industries were exposed to severe safety and health hazards. It was a time of huge fortunes and growing inequality. One percent of Americans owned forty-seven percent of the nation's wealth and received fifteen percent of the national income.

The economic, social, and political effects of these changes were magnified by a profound tendency to concentration and collectivization. Many

industries followed the path of consolidation and integration, crushing or enveloping smaller and more traditional competitors in the process, and giving rise to the great "trusts" that dominated the Progressive Era's political and legal concerns until World War I. Until then antitrust issues loomed even larger in political perspectives on the Supreme Court than did the constitutional doctrines of freedom of contract and limited federal regulatory power that later put the Court on a collision course with the New Deal.

The movement toward concentration and collectivization was not limited to business. The last two decades of the nineteenth century saw the growth of unions as major sources of power and agitation. Labor unrest and violence hung like a pall over the 1890s after the violence of the Homestead strike in 1892, the great Pullman strike of 1894, and many lesser, but equally bitter, labor conflicts.¹¹

Farmers joined populist cooperatives to try to free themselves from, or bargain more effectively against, the concentrated power of providers of money, transportation, equipment, financing for crops, and the distant buyers of the fruits of their labor. These

cooperatives broadened into the political movement of Populism, at its roots an agrarian movement but one that spoke to the growing number of radicals everywhere disillusioned with the emerging concentration of wealth and power that marked industrial America at around the turn of the century.¹²

Court and Constitution

At the turn of the century, the Supreme Court inherited a powerful and reasonably coherent body of constitutional principle and political theory. It pressed doctrines of public law rooted in nineteenth century perceptions and realities into a twentieth century in which these theories collided with momentous changes in American society.¹³

In the tumultuous last two decades of the nineteenth century, the Court was increasingly concerned with excesses of democratic politics and the potential for abuses of individual economic freedoms by majority politics. In that day, the Court was mainly concerned with protecting free and open competition, with guarding against political attempts that sought



America's population grew from 60 million in 1890 to 92 million in 1910, thanks partly to a large influx of immigrants. The nation became increasingly less rural, with urban dwellers outnumbering rural Americans by 1920. Above is a Chicago street scene circa 1910.

to inject favoritism and advantage into the natural equality of economic relations, and with maintaining public order against the increasing public agitation that marked radical politics and conflicts between unions and industry.¹⁴ These concerns carried into the Progressive Era and were joined by a concern to preserve the essential balance of federalism by imposing some limits on the reach of congressional power to regulate activities taking place within the states.

Much, though not all, of the Court's work from the end of the nineteenth century through the Progressive era and into the 1920s was flatly repudiated by the New Deal and the constitutional revolution that attended it. Since then, the Court's constitutional enterprise of protecting economic liberty, limiting state and federal regulatory power over the workplace, and policing the perceived excesses of labor unions has been seen as a colossal mistake.

The most extreme charge leveled against the Court is that it acted out of class bias to benefit wealthy capitalists and augment the power of employers against labor.¹⁵ A more sophisticated criticism, which has had backing from some influential critics, is that a majority of the Court was committed to *laissez-faire* principles, that is, to the view that government should follow a hands-off policy and let the marketplace take its natural course.¹⁶ Some critics have thought that the Justices were persuaded by crude notions of Social Darwinism that, in the struggle for economic domination, the best outcome for society was a harsh natural law of survival of the fittest.¹⁷ Others have contended that the Court failed to understand that industrialization, economic dependency, and class conflict required basic changes in constitutional principles.¹⁸ All these theories have to account for the many decisions in which the Court countenanced economic regulation and upheld efforts to protect the health and safety of workers. They also have to account for the Court's energies in antitrust enforcement.

Whatever the merits of these and other criticisms, it is undeniable that the Court marched down doctrinal paths that put it into ultimately futile and self-defeating opposition to twin political movements that came to dominate the twentieth century. The first of these was the determination of the political branches to broadly regulate working conditions, labor relations, and the conduct of business. Second was the momentum toward centralization of such authority in the federal government.

It is also undeniable that in its opposition to the

political branches, the Court's relied on constitutional principles that were in question—lacked roots in explicit constitutional directives, seemed blind to marketplace realities, and offered no firm doctrinal basis for distinguishing judicial from legislative questions.

But there were legitimate and principled concerns that informed the Court's efforts, even in the most unsatisfactory and thoroughly repudiated of its decisions. And the Court had considerable historical warrant for its efforts, if not in the authoritative text of the Constitution, then at least in nineteenth century political theory and a large body of state and federal judicial decisions. It was, on the whole, more the Court's failure to change received wisdom and doctrine during the Progressive Era, rather than an aggressive striking out in new directions, that led to the debacle of the Court's futile resistance to the New Deal.

In assessing the Court's work in this period, we must take account of the fact that the Court did not speak with one voice. A number of the most significant decisions carried by the narrowest margins. A tradition of powerful dissents, mostly by Holmes and Brandeis, came to enjoy unquestioning authority among Progressive politicians of both parties, within the academy, and among much of the elite of the legal profession. In many instances, the most cogent and eloquent criticisms of the Court came from within itself.

The Court's divisions were reflected in a second way, as well. In the most significant and controversial areas of the Court's resistance to the political branches, there were parallel lines of decisions that affirmed legislative authority. The Court was by no means consistent in its opposition to economic regulation and congressional power.

The large number of decisions affirming such legislative powers encouraged the political branches to further exercises, and this paradoxically drew the Court deeper into conflict. It is instructive to contrast the Court's back-and-forth performance in the freedom of contract and dual federalism cases with the Warren Court's attack on racial discrimination, when the Court again found itself in deep conflict with the political branches in many of the states, but where the Court spoke with one, consistent voice and where Congress was not arrayed in opposition.

The Supreme Court that spanned the turn of the century was presided over by Chief Justice Melville W. Fuller, who served from 1888 to 1910. He was not a strong leader. But the Court over which he

presided included some of the most powerful figures in its history: Justice Stephen J. Field, Justice Harlan, Justice David J. Brewer, Justice Rufus W. Peckham, Edward Douglass White, who would succeed Fuller as Chief Justice, from 1910 to 1921, and the great (though not as yet so recognized at the time) Oliver Wendell Holmes, Jr.¹⁹

The Fuller Court met the agitation and progressive reform of the day with a series of momentous decisions that protected business and contract relations from legislative interference, that limited federal power to reach activities deemed the domain of the states, and that countered the power of labor unions.

In terms of the politics of the 1890s, the most significant of the Fuller Court's decisions limiting government power was the 1895 decision in *Pollock v. Farmers' Loan & Trust Co.*,²⁰ which invalidated the first modern federal income tax. The repudiation of this decision became a major rallying cry for William Jennings Bryan and the Democrats in the presidential campaigns of 1896 and 1900.²¹ Antipathy to the Court's decision was widespread and by 1913, the Sixteenth Amendment, overruling *Pollock* and providing a clear constitutional basis for the income tax, was adopted without much controversy or partisan wrangling. It was the first constitutional amendment since Reconstruction and one of four constitutional amendments passed during the Progressive Era's extraordinary level of political activism. The others provided for the direct election of Senators, prohibition, and—most important—women's suffrage. The Constitution was in flux not only in the decisions of the Supreme Court.

In terms of institutional difficulties and longer-lasting political turbulence, even more problematic than the income tax case were the Fuller Court's decisions protecting freedom of contract and rights of property from legislative regulation. The efforts of the Court to fashion substantive limits on government power out of the broad language of the Due Process Clause caused continuing conflict with the political branches, criticism from the profession, and bitter division within the Court itself. And, of course, so it remains today, although the locus of controversy is no longer freedom of contract or property rights, but rather issues of sexual autonomy and reproductive freedom.

The apogee of freedom of contract was, of course, the Supreme Court's famous 1905 decision in *Lochner v. New York*. *Lochner* owns the dubious distinction of being the most disparaged decision in

the entire history of the Supreme Court. In most historical and constitutional writing and teachings with which I am familiar, the decision is lampooned, treated not as a failure of doctrine but as an institutional aberration, a case where the Court kicked over the traces—and did something not only wrong, but not even remotely judicial. Opinion since the 1930s is virtually universal that *Lochner* was a gross usurpation of legislative prerogatives, a decision that threatened the very legitimacy of judicial review by setting the Court against the democratic branches without doctrinal justification or institutional competence.

Against such weight of universal condemnation, it seems only fair to let Justice Rufus W. Peckham, the author of the majority opinion, speak for himself. *Lochner* dealt with a New York statute that prohibited the employment of bakery employees for more than ten hours a day or sixty hours a week. Justice Peckham's opinion for the Court was straightforward.

The statute necessarily interferes with the right of contract between the employer and employees. . . . The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment . . . The right to purchase or to sell labor is part of the liberty protected by this amendment. . . .²²

On the other hand Peckham recognized the authority of states to regulate contracts, "somewhat vaguely termed police powers," which "relate to the safety, health, morals, and general welfare of the public."²³

But, he went on, there must be limits to such power; otherwise, "[t]he Fourteenth Amendment would have no efficacy and the legislatures of the states would have unbounded power. . . ."²⁴ Thus, the question necessarily arises:

is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? . . .

The question whether this act is valid as a labor law, pure and simple, may be dismissed

in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action. They are in no sense wards of the State. Viewed in the light of a purely labor law, with no reference whatever to the question of health we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker.²⁵

In this simple, decisive paragraph, Peckham and the *Lochner* majority put the Supreme Court into flat, unequivocal opposition to one of the most powerful imperatives of Progressive Era politics.

On the question whether the New York law should be upheld in the interest of bakers' health, Peckham clearly recognized the state's power to regulate working conditions for legitimate health reasons. Indeed, in a part of the opinion often overlooked, the Court upheld regulations in the New York law requiring inspections of bakeries, requiring proper washrooms, drainage, plumbing, and painting. But maximum hours regulation went too far:

The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor. . . .

It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of

unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? . . .²⁶

Peckham plainly thought that accepting a health justification in *Lochner* was tantamount to accepting unlimited legislative power over employment contracts, and equally clearly he found the notion of such unlimited legislative hegemony deeply obnoxious to principles of constitutional liberty. "We do not believe in the soundness of the views which uphold this law. Statutes. . . limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual."²⁷ Peckham not only rejected the claimed health justification, he insisted it was a ruse:

It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives.

It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being men, *sui juris*), in a private business, not dangerous in any degree to morals or in any real and substantial degree, to the health of the employees. Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.²⁸

Peckham was entirely open and clear in his awareness that the *Lochner* doctrine was in opposition to a growing trend of legislation: "This interference on the part of the legislatures of the several States with the ordinary trades and occupations of the people seems to be on the increase. . . ."²⁹

It is worth noting that three dissenters accepted Peckham's statement of doctrine, differing only on the question of whether the health of workers was indeed a legitimate justification for the New York law. Justices Harlan, White, and Day insisted that

ample evidence existed that working conditions for bakers raised serious health concerns justifying a ceiling on hours of work: "It must be remembered that this statute does not apply to all kinds of business. It applies only to work in bakery and confectionery establishments, in which, as all know, the air constantly breathed by workmen is not as pure and healthful as that to be found in some other establishments or out of doors."³⁰ Moreover, they asserted that the legislature's view must be accepted by the Court unless "plainly, palpably, beyond all question" there was no health justification conceivable.³¹

Harlan's dissent closed with a prescient statement that the *Lochner* decision "will, in my opinion, involve consequences of a far-reaching and mischievous character; for such a decision would seriously cripple the inherent power of the States to care for the lives, health and well-being of their citizens."³²

Holmes alone offered a flat repudiation of both the doctrinal and institutional premises of all his

Brethren:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.³³

After referring to many ancient and modern examples of well-accepted laws which "we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract,"³⁴ Holmes followed with the slashing dismissal more often quoted in Progressive Era criticism of the Court than any other: "The Fourteenth Amendment does not enact Mr.



The Progressive Era Court rejected the constitutional legitimacy of legislation to ameliorate unequal bargaining power, to prevent employers from imposing harsh burdens on laborers, or to regulate working conditions in the interest of broad humanitarian concerns. Above, Socialists rallied in Union Square in 1912, calling for improved working conditions through unionism.

Herbert Spencer's Social Statistics." He continued:

[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. . . .

Every opinion tends to become a law. I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first installment of a general regulation of the hours of work.

The *Lochner* Court was committed to the principle that freedom of contract should only be limited in the interest of health, safety, or the prevention of fraud, and that the interest must be direct and substantial. The majority rejected the constitutional legitimacy of legislation to ameliorate unequal bargaining power, to prevent employers from imposing harsh burdens on necessitous laborers, or to regulate working conditions in the interest of broad humanitarian or social concerns. Beyond that, the *Lochner* majority wholly rejected the argument that only Holmes was willing to embrace: that the political process is inevitably, and appropriately, about the efforts of special interests to favor their causes, to achieve through legislation what they cannot in the marketplace, and to redistribute wealth and power to their selfish advantage. To the *Lochner* majority, the fundamental principle of liberty was to prevent legislative interference, except for specific, narrow regulatory purposes, with a presumed equality of liberty in the key relationships of the marketplace governed by private contract: wages, prices, working conditions, business entry, the reciprocal right to quit employment or be fired, who should be hired and under what conditions, and so on.

Other important decisions defined the limits and the reach of the freedom of contract regime. In 1898, *Holden v. Hardy*³⁶ upheld maximum hours legislation for Utah mine workers on grounds that safety and health in such a setting were appropriate legislative concerns. And three years after *Lochner*, in 1908, *Muller v. Oregon*²¹ upheld a state maximum hours law for women workers, Justice Brewer's opinion emphasizing that "woman's physical structure" placed her "at a disadvantage in the struggle for subsistence" and that "as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest."³⁷ Thus did a willingness to indulge paternalistic legislation respecting women prevail over freedom of contract.

The decisions of the ensuing two decades saw the futility of *Lochner*'s refusal to countenance a health justification for maximum hours legislation, but the other principle of *Lochner*—that legislation could not limit freedom of contract to redress unequal bargaining power or to promote the interests of one side of the bargain—retained its bite. In 1917, in *Bunting v. Oregon*,³⁸ the Court upheld an Oregon statute that set ten hours as the maximum for manufacturing work but permitted workers to work an additional three hours provided they were paid time-and-a-half of their regular wage. In support of the statute, Felix Frankfurter, who took over the case for Brandeis after the latter's Court appointment in 1916, presented a mountain of evidence about the baleful effects on health and safety of working long hours, and his sociological advocacy won the day. The opinion upholding the statute was written by Justice Joseph McKenna, who twelve years before had been with the majority in *Lochner*. Two Justices appointed after *Lochner* and *Muller*, Willis Van Devanter and McReynolds, joined Chief Justice White in dissent. The constitutionality of hours legislation was settled.

But the other branch of *Lochner* remained vital. In 1908 and 1915 the Court struck down a federal statute and a Kansas statute forbidding "yellow dog" contracts, that is, contracts that required employees not to join unions. In the first of these decisions, *Adair v. United States*, Justice Harlan, who had dissented in *Lochner*, wrote for the Court's majority:

it is not within the function of government [to] compel any person in the course of his business [to] retain the personal services of another. . . . The right of a person to sell his

labor upon such terms as he deems proper [is] the same as the right of the purchaser of labor to prescribe the conditions. [T]he employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract.³⁹

In the second decision, *Coppage v. Kansas*, the Court addressed directly the argument of unequal bargaining power:

No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts, and not merely to that between employer and employee. [I]t is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.⁴⁰

The victory of sociological jurisprudence in sustaining hours legislation did not extend to legislative efforts to regulate wages. In 1923, the Court in *Adkins v. Children's Hospital* struck down the statute prescribing minimum wages for women workers, with the majority, in an opinion by Justice George Sutherland, emphasizing that freedom of contract was "the general rule, and restraint the exception."⁴¹ Noting the passage of the Nineteenth Amendment since *Muller*, Justice Sutherland emphasized that liberty of contract was not less for women than for men. Taft, Edward T. Sanford, and Holmes dissented, while Brandeis recused himself. By this time, President Warren G. Harding's appointments of Sutherland and Pierce Butler, both unyielding exponents of laissez-faire conservatism, had firmed up the Court's commitment to freedom of contract.⁴²

Similar reasoning led the Court to strike down most legislative efforts to regulate the price of goods or services. As a typical decision (*Williams v. Standard Oil Co.*) put it:

[A] state legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property involved is

affected with a public interest. . . .⁴³

This meant that price regulation could only reach a narrow class of businesses traditionally subject to regulation, such as public utilities. Legislative barriers to business entry or the conferral of legislative monopolies also were usually invalidated.

Taken together, the freedom of contract decisions of the first three decades of this century encountered a formidable and growing array of political and professional criticism. In the 1890s, William Jennings Bryan and the Democrats had excoriated the income tax decision and "government by injunction," as they termed the Court's excessive use of injunction to break strikes and harass labor unions. It was natural for radicals and populists to see these decisions as solicitous to employers and hostile to workers, unions, and the poor. And as the Supreme Court in *Lochner* joined the large number of state courts that had struck down legislation regulating the workplace, the Court itself became the centerpiece of criticism of laissez-faire principles and Social Darwinism. Some critics went so far as to charge the Justices with being the self-conscious protection of big business, property rights, and vested interests. It was claimed that the Justices were mainly corporate lawyers who read into the Constitution laissez-faire conceptions drawn from class bias and self-interest.⁴⁴ This criticism tied into much larger tendencies in historical interpretation and legal theory. In 1913, Charles Beard published his influential **An Economic Interpretation of the Constitution of the United States**, which took the radical position that the Constitution itself was the work of propertied classes aiming to protect their material interests against the political power of the have-nots. At the same time, the concepts of legal realism were taking hold in influential segments of the academy. The realists insisted that results were all that mattered, that legal doctrines were pliable, if not empty, formulations designed to disguise naked policy preferences behind a facade of neutral-sounding rhetoric. A typical expression of this type of criticism came from a fed-up Thomas Reed Powell after the *Adkins* decision in 1923 struck down the women's minimum wage: "[M]inimum wage legislation is now unconstitutional, because it chanced. . . to come before a particular Supreme Court bench. . . Literary interpretation of the Constitution has nothing whatever to do with it. . ." The decision, he insisted, rested on nothing more than the individual Justice's "personal views of desirable governmental policy."⁴⁵

Less radical than the realists, but still extremely damaging to the authority of the Justices, was a chorus of critics who charged the Court with blindness to factual realities of the emerging industrial economy and to the vulnerability and dependency of workers. Roscoe Pound's call for "sociological jurisprudence" and Felix Frankfurter's emphasis on the need for "realism" in constitutional law admonished judges to supplant their customary, inherited assumptions with actual investigation of modern industrial conditions. As Pound saw it, judges were wedded to the "utterly hollow" fallacy that employers and employees enjoyed equality of contractual rights because they relied on a "mechanical jurisprudence" of logical conception rooted in the natu-

ral law notions of the eighteenth century. He urged judges to inform their academic theories of equality with knowledge of practical conditions of inequality. Pound expressly denied the realists' claim that judges simply project their biases into the law ("[W]hen a doctrine is announced with equal vigor and held with equal tenacity by courts of Pennsylvania and of Arkansas, of New York and California, of Illinois and of West Virginia, of Massachusetts and of Missouri, we may not dispose of it so readily"). Instead, they were rooted in "an individualist conception of justice which exaggerates private right at the expense of public right."⁴⁶

That Oliver Wendell Holmes, Jr., should have emerged as the champion of these progressive crit-



Perhaps the worst consequence of industrialization was the rise of child labor. In 1900, one child in six between the ages of ten and sixteen was a full-time worker. Despite progressive reforms, the number of child workers had increased by 1910, particularly in the South. The Supreme Court played a supporting role in moving the focus of child labor reform to Congress.

ics of the Court's freedom of contract decisions surely ranks as one of the greatest ironies in our constitutional history. Holmes regarded most Progressive Era economic legislation as he did the antitrust laws ("a humbug founded upon economic ignorance and incompetence"),⁴⁷ as simply a futile effort to redress inevitable inequalities and hardships in the struggle for existence.⁴⁸ He had no interest in and little patience with investigation of the empirical realities of the industrial workplace. "I hate facts" was one of his oft-repeated quips in response to the earnest efforts of Brandeis and Frankfurter to lead him into the enlightenment of sociological jurisprudence. Holmes offered neither a factual nor doctrinal critique of the freedom of contract decisions. His position was more fundamental. Politics was simply the struggle among contending interests for self-advantage and dominance, and courts had no business imposing substantive limits on political outcomes. Notions of fairness, neutrality, and equality were, to Holmes, beside the point.⁴⁹ Holmes' extraordinary critical powers, his uncanny ability to distill complex arguments in a phrase, and his institutional posture of judicial abnegation left him both alone on the Court and the hero of Progressives outside.

The Child Labor Decision and Dual Federalism: Another Path to Repudiation

Of all the hardships that marked the industrial revolution in America, the dislocation of the agrarian economy, and the massing of immigrants and rural-born Americans in new urban centers, none more clearly challenged humanitarian values than child labor. The spread of the factory system, with its reliance on simple, repetitive processes, the attraction of cheap labor, and the poverty of many families swept huge numbers of children into employment in the mills and factories of America.⁵⁰

In 1900, one child in six between the ages of ten and sixteen was a full-time worker—1,750,000 in all. By 1910, after a decade of progressive agitation and reform aimed at child labor at the state level, the number had actually increased to 2 million. Although child labor was common in the North after the Civil War, reformers had succeeded by 1900 in enacting child labor regulations in most of the northern states. The South, however, was in this, as in so many other respects, another matter.

The Civil War, which had accelerated industrial expansion in the North, left the South in ruins, and

the effort to build new economic foundations was pursued there in an atmosphere of desperation and sacrifice that was extremely unfriendly to labor regulations. Child labor was one of the foundation elements of the New South. It was, as C. Vann Woodward put it, "an entrenched interest, a growing evil that had become a normal feature of the textile industry and the foundation of fortunes." As Woodward pointed out: "in 1900, three out of ten workers in the mills of the South were children under sixteen." More than half of these were children between ten and thirteen. There were quite a few under ten who were not even counted. The economic stakes were vast. One president of the American Cotton Manufacturer's Association estimated that adoption of an age limit of fourteen would close every mill in North Carolina because seventy-five percent of the spinners in that state were fourteen or younger.⁵¹

The abolition of child labor was the central humanitarian and moral impulse of the Progressive Era, as widely endorsed as antitrust in the structural economic realm. Although most of the states strengthened their child labor laws during this period, several southern states held back, and the competitive advantage of these states in interstate commerce was widely perceived to be both an injustice and a retarding influence on further progressive reform. As Progressives digested the alarming revelation of the 1910 census that child labor had actually grown between 1900 and 1910, and as Woodrow Wilson's victory in the presidential election of 1912 gave new impetus to Progressive impulses, the movement to deal with child labor became a rallying cry in Congress.

The Supreme Court played a supporting role in moving the focus of child labor reform to Congress. For in a series of important decisions the Court had upheld congressional power to regulate or prohibit the passage in interstate commerce of various things or activities Congress deemed noxious, even where the obvious legislative purpose was to control local activity. In 1903, in *Champion v. Ames*, the Court upheld a federal statute barring lottery tickets from interstate commerce, referring to lotteries as a "pestilence" and noting that a state's capacity to prohibit lotteries could be undermined by the permissiveness of neighboring states. "We should hesitate long," wrote Justice Harlan for the Court, "before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power com-

petent to that end."⁵² *Champion* was decided 5-4. Chief Justice Fuller for the dissenters sounded the alarm that would haunt federalism-minded Justices for the next forty years: "[The decision] is a long step in the direction of wiping out all traces of state lines, and the creation of a centralized government."⁵³

In 1911, in *Hipolite Egg Co. v. United States*,⁵⁴ the Court upheld the Pure Food and Drug Act of 1906, one of the signal legislative achievements of the Progressive Era, which regulated adulterated and harmful food and drugs shipped in interstate commerce, whether or not the material had come to rest in the state of destination. "Illicit articles" that traveled in interstate commerce were subject to federal control, a unanimous Court held, although the opinion was altogether vague on what counted as an "illicit article." Then in 1913, the Court in *Hoke v. United States*⁵⁵ upheld the Mann Act, another example of Progressive moralistic and humanitarian concern, which punished the transportation in interstate commerce of women "for the purpose of prostitution or debauchery, or for any other immoral purpose."

Hoke resolved doubts in the minds of reformers about the constitutionality of federal social legislation, and indeed the decision marked a turning point in the Progressive Era, causing the leaders of various social justice movements to turn their efforts to Congress.

In the 1916 presidential election, both party platforms, and both candidates—Woodrow Wilson and Charles Evans Hughes—called for strong federal legislation to end child labor. The result was the Keating-Owen Law, passed overwhelmingly by Congress in the summer of 1916, with only congressmen from four southern states arrayed against it. It was signed by President Wilson, as he said, "with real emotion. . . . because I know, how long the struggle has been to secure legislation of this sort and what it is going to mean to the health and the vigor of the country, and also the happiness of those whom it affects."⁵⁶ The law prohibited the shipment in interstate commerce of the products of mines where persons sixteen years old or younger had worked, and of all other factories where persons fourteen and under had been employed or where children between fourteen and sixteen had worked longer than eight hours a day.

The Child Labor Act was in many respects the high point of the Progressive Era. No legislation evoked more widespread public approval, engaged more of the various elements of progressivism, en-

joyed broader bipartisan support, harmonized more with existing state legislation for the same purposes, or more clearly reflected the need for federal action because of the effects of interstate competition.

And it was this enactment that the Supreme Court found unconstitutional in *Hammer v. Dagenhart* in 1918.⁵⁷ Justice William R. Day, a Theodore Roosevelt appointee, spoke for a bare majority of five in concluding that Congress had no power through the Commerce Clause to regulate "matters entrusted to local authority." The earlier decisions were said to be different because in each of them "the use of interstate transportation was necessary to the accomplishment of harmful results." The Child Labor law, by contrast, "aims to standardize the ages at which children may be employed in mining and manufacturing within the states. The goods shipped are of themselves harmless."⁵⁸ Day concluded with a direct echo of Fuller's dissent in *Champion*:

If Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and their own system of government be practically destroyed.⁵⁹

In dissent, for himself and Justices Brandeis, John H. Clarke, and McKenna, Justice Holmes issued a bitter and prophetic statement about the Court's function in reviewing federal legislation. No one could deny, Holmes argued, that Congress was acting under an express and unqualified power—to regulate or prohibit the carriage of certain goods in interstate commerce. It was not the business of judges to question Congress's judgment that transportation of certain things caused or advanced some evil.

He continued:

If there is any matter upon which civilized countries have agreed far more unanimously that they have with regard to intoxicants and some other matters over which this country is now emotionally aroused it is the evil of premature child labor. I should have thought that if we were to introduce our own moral conception where, in my opinion, they do not belong, this was preeminently a case for upholding the exercise of all its powers by the United States.

. . . .

It is not for the Court to pronounce when prohibition is necessary. . . to say that it is permissible as against strong drink but not so against the products of ruined lives.⁶⁰

The decision in *Hammer v. Dagenhart* stunned most of the country. The Court had only twice before struck down significant federal legislation by 5-4 votes. In one of those, the 1895 *Pollock* decision striking down the first federal income tax, Justice White had uttered in dissent a prophetic warning about judicial intervention that rested upon "the casting vote of a single judge":

If the permanency of Supreme Court decisions is to depend upon the personal opinion of those who, from time to time, may make up its membership, it will inevitably become a theatre of political strife, and its actions will be without coherence and consistency.⁶¹

Ironically, Chief Justice White was one of the five Justices in the *Hammer* majority. The concept of dual federalism, the notion that there are reserved state powers over local matters that limit Congress's legislative power over interstate commerce, remained entrenched in the Supreme Court's jurisprudence for nearly twenty years.

It took the galvanizing national assertions of the New Deal to level this conception of reserved state powers and to legitimate the unfettered police power of Congress to regulate or prohibit pretty much anything and everything under the Commerce Clause. And one of the great achievements of the New Deal, largely unnoticed in the controversy over larger issues, was the prohibition of child labor in the National Industrial Recovery Act and the Fair Labor Standards Act.

Antitrust: The Court Aligns Itself with the Political Branches

Of all the cases that came before the Supreme Court in the Progressive Era, the great antitrust decisions evoked the greatest political and popular interest at the time. Nothing so agitated and unified Progressive politicians as the concentration of corporate size and economic power in what came to be known as "the trusts." The Court's construction of the Sherman Act of 1890, and its response to the antitrust efforts of the Roosevelt, Taft, and Wilson

Administrations, was viewed at the time as the most significant judicial action with respect to the American economy. The Justices themselves seem to have focused more energy on antitrust than any other matter on their agenda. Later decades have not invested the Court's work in antitrust with the significance given to the freedom of contract decisions and to decisions limiting Congress's powers to regulate matters deemed within the control of the states. From the standpoint of lasting significance, this is understandable. It was these areas of constitutional interpretation that brought the Court into collision with the New Deal and caused the Court's historic realignment in 1937. And yet the antitrust decisions of the Progressive Era are of large historical significance, both because of their importance at the time and because of the light they shed on the Court's work in other areas.

The Court's first encounter with the Sherman Act was not propitious. In the *E.C. Knight*⁶² decision of 1895, the Court held that a move by the American Sugar Refining Company to acquire the few remaining sugar refineries in America to give it control over ninety-eight percent of the market was not reached by the Sherman Act. Construing the Act as coextensive with the commerce power, the Court, in an opinion by Chief Justice Fuller, held that Congress's power to regulate extended only to transportation of goods across state lines and did not encompass activities taking place within states such as manufacturing and production. Although this decision seems fairly astonishing today, it drew only one dissent, a passionate outcry from Harlan.

Because *E.C. Knight* was handed down within a few months of the income tax decision and the *Debs*⁶³ decision upholding an aggressive use of the labor injunction, commentators have tended to see it as one of a trio of decisions by an extremely activist Court protecting big business and the rich. But, at least as to *E.C. Knight*, this view is unpersuasive.⁶⁴ For the Court itself almost immediately reinvigorated the Sherman Act and thereby made possible the antitrust campaign of Theodore Roosevelt. And, as Owen Fiss has pointed out in his excellent history of the Fuller Court, the Justice whose appointment was decisive in this turnaround was none other than Rufus W. Peckham. Peckham's vigorous commitment to economic liberty, as illustrated by *Lochner*, was of a piece with his commitment to protect a free and open marketplace from dominance and abuse by "combinations of capital."

Peckham put bite back into the Sherman Act in

three critical decisions in three years: the *Trans-Missouri*⁶⁵ decision of 1897, the *Joint Traffic*⁶⁶ decision of 1898, and the *Addyston Pipe*⁶⁷ decision of 1899. The first two cases involved price-fixing contracts among various railroads, and thus they clearly fell within the commerce power under the rationale of *E.C. Knight*. The question was whether the railroads' right of freedom of contract protected their capacity to enter into agreements to fix prices. Such contracts had long been an open and usual practice, and the railroads argued that fixing common rates was essential to avoid "ruinous competition." In an opinion that was a classic defense of what he called "the general law of competition," Peckham wrote for a majority of five that the Sherman Act banned absolutely any price-fixing contracts by railroads. If competition was ruinous, so be it.

In *Addyston Pipe*, Peckham was able to gather a unanimous Court to his view that the Sherman Act prohibited price-fixing agreements covering interstate sales by manufacturers of cast iron pipe. He reasoned that the manufacturers' liberty of contract over interstate contracts was absolutely limited by Congress's power over interstate commerce, and that Congress had acted in the Sherman Act to preserve competition. The rule against price-fixing was not limited only to public carriers.

These three decisions emboldened the Roosevelt Administration to launch its first major antitrust initiative, the effort to scuttle the merger engineered by J.P. Morgan and James J. Hill of the Great Northern and Northern Pacific, two railroads that competed on parallel lines from the Midwest to the West Coast. The *Northern Securities*⁶⁸ decision of 1904 sustained this highly publicized effort of "trust-busting." But the decision was by the slimmest 5-4 margin, and it produced a passionate dissent by Roosevelt's newest appointee, Holmes. The rest of the Justices got tangled in the question of whether the creation of a holding company to acquire both railroads should be treated as simply a sham transaction to eliminate competition, comparable to a straight price-fixing agreement, or whether the issue should be seen as the right to create and own a new entity. A bare majority took the former view. Holmes, on the other hand, viewed the whole antitrust enterprise as absurd. He saw industrial concentration, and indeed monopolization, as efficient and inevitable, and considered legislative intervention to preserve competition futile. His dissent is supposed to have caused Roosevelt to utter one of the most famous of all presidential complaints about a Justice of the Court: "I could carve

out of a banana a judge with more backbone than that."

Success in *Northern Securities* led the Roosevelt Administration to embark on two even greater anti-trust efforts, to break up the Standard Oil and American Tobacco companies. When these cases finally made their way to the Supreme Court in 1911, the *Harvard Law Review* noted that public attention was concentrated on the Court "to a greater extent than ever before in its history." *Harper's Weekly* wrote: "For months the financial markets have virtually stood still awaiting their settlement."⁶⁹

The problem for the Court was to determine the meaning of restraint of trade amounting to monopoly. The answer offered by Chief Justice White for the Court was the famous "rule of reason," under which not all restraints of trade restrictive of competition were deemed to violate the Sherman Act, but rather only those "undue restraints" that suggested an "intent to do wrong to the general public. . . thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy."⁷⁰ Under this test, the Court deemed Standard Oil to have engaged in practices designed to dominate the oil industry, exclude others from trade, and create a monopoly. It was ordered to divest itself of its subsidiaries and to make no agreements with them that would unreasonably restrain trade. The Court ruled that the American Tobacco Company was also an illegal combination and forced it into dissolution.⁷¹ Despite this victory for trust-busting, many Progressives were offended by the "rule of reason," on the ground that the Court had interpolated into the Sherman Act words of qualification that Congress had not seen fit to include, and had thereby watered down the Act's protection of competition from "restraints of trade." However, from an institutional perspective, the ambivalent reaction to the *Standard Oil* and *American Tobacco* decisions produced a serious political engagement on the meaning and scope of antitrust that in retrospect seems highly desirable.

Antitrust questions dominated the three-way presidential campaign of 1912, and the victory of Woodrow Wilson, heavily influenced on antitrust matters by Brandeis, set in motion a legislative program aimed at creating explicit statutory prohibitions on the methods by which monopolies were achieved. It was an effort to protect competition, not to regulate monopolies. The results were two landmark statutes: the Clayton Act of 1914 and the



Of all the cases that came before the Supreme Court in the Progressive Era, the great antitrust decisions evoked the greatest political and popular interest. This cartoon reflects Progressives' fears that the concentration of economic power in the hands of a few large corporations—in this case Standard Oil—corrupted the political landscape.

Federal Trade Commission Act of the same year. Important antitrust cases continued to make their way to the Supreme Court, but the country's apprehension that antitrust policy was largely in the hands of the Justices to shape at will was alleviated. The political branches were seen as in control of this vital area of national policy, and the Court was not perceived as a barrier to the exercise of political power over industrial concentration.

The centrality of antitrust concerns in the politics of the Progressive Era explains the two most bizarre judicial appointments ever made consecutively by a President. If ever in the history of the Supreme Court successive appointments by one President have seemed to embrace dialectical opposites, Woodrow Wilson's appointments of James C. McReynolds in 1914 and Louis D. Brandeis in 1916 are the ones. McReynolds was a crude anti-Semite; Brandeis was the first Jew to sit on the Supreme Court. McReynolds would become the most rigid and doctrinaire apostle of laissez-faire conservatism in constitutional history, the most recalcitrant of the "Four Horsemen of Reaction," who helped to scuttle New Deal legislation in the early 1930s. Brandeis was the greatest Progressive of his day, on or off the Court. McReynolds was an almost invariable foe of civil liberties and civil rights for blacks. Brandeis

was perhaps the driving force of his time for the development of civil liberties, especially freedom of expression and rights of personal privacy. What brought these opposites together in Wilson's esteem, although he came to regret the McReynolds appointment, was antitrust fervor. McReynolds' aggressive individualism and Brandeis's progressive concern for personal dignity and industrial democracy coalesced around antitrust law, and this was the litmus test of the day for Wilson. Thus, the most difficult and divisive person ever to sit on the Supreme Court and the most intellectually gifted and broadly influential Justice in the Court's history took their seats in strange, rather Wilsonian, juxtaposition.

Looking Ahead: Civil Rights and Civil Liberties

It was the freedom of contract decisions such as *Lochner*, *Coppage*, and *Adair*, and the conception of limited federal power under the Commerce Clause expressed in *Hammer*, that put the Supreme Court on a collision course with the New Deal. These decisions have understandably dominated discussions of the Supreme Court in the first third of the twentieth century, both at the time and since. But there were other important constitutional developments in this

period, ones that in the light of history cast the Court not in the light of a futile force trying to hold back the twentieth century, but as the very opposite: a Court that laid prescient foundations for the modern judicial role as guardian of civil rights and civil liberties. And there are deep doctrinal and institutional affinities between the historically censured and the historically approved lines of cases.

The Supreme Court's race relations decisions between 1910 and 1921 constitute one of the Progressive Era's most notable, and in some ways surprising, constitutional developments. Each of the Civil War amendments was given unprecedented application. For the first time, in the *Grandfather Clause Cases*⁷² (1915), the Supreme Court applied the Fifteenth Amendment and what was left of the federal civil rights statutes to strike down state laws calculated to deny blacks the right to vote. For the first time, in *Bailey v. Alabama*⁷³ (1911) and *United States v. Reynolds*⁷⁴ (1914), the Court used the Thirteenth Amendment to strike down state laws that supported peonage by treating breach of labor contracts as criminal fraud and by encouraging indigent defendants to avoid the chain gang by having employers pay their fines in return for commitments to involuntary servitude. For the first time, in *Buchanan v. Warley*⁷⁵ (1917), it found in the Fourteenth Amendment constitutional limits on the spread of laws requiring racial separation in residential areas of cities and towns, and also for the first time, in *McCabe v. Atchison, Topeka & Santa Fe Railway*⁷⁶ (1914), it put some teeth in the equality side of the separate-but-equal doctrine by striking down an Oklahoma law that said that railroads need not provide luxury car accommodations for blacks on account of low demand.⁷⁷

To be sure, only with respect to peonage could the Supreme Court be said to have attacked the legal structure of racism in any fundamental way. After these decisions, blacks in the South remained segregated and stigmatized by Jim Crow laws, disfranchised by invidiously administered literacy tests and poll taxes, and victimized by a criminal process from whose juries and other positions of power they were wholly excluded. But if the White and Taft Courts did not stem the newly aggressive and self-confident ideology of racism inundating America in the Progressive Era, neither Court put its power and prestige behind racism as had the Waite and Fuller Courts that preceded them. And, at critical points, they resisted. These principled countercurrents were more symbols of hope than effective bulwarks against the

racial prejudice that permeated American law. But the decisions taken together mark the first time that the Supreme Court opened itself in more than a passing way to the promises of racial justice in the Civil War amendments.

The Progressive Era also saw the Court's first encounter with freedom of expression. World War I generated the cases that provoked the Supreme Court for the first time since the First Amendment was ratified in 1791 to consider the meaning of freedom of expression. The cases, not surprisingly, involved antiwar dissent and agitation. The war set off a major period of political repression against critics of American policy.

In the first three cases, *Schenck v. United States*,⁷⁸ *Frohwerk v. United States*,⁷⁹ and *Debs v. United States*,⁸⁰ (1919), following the lead of Justice Holmes, the Supreme Court looked not to the common law of seditious libel for justification in punishing speech but rather to traditional principles of legal responsibility for attempted crimes. In English and American common law, an unsuccessful attempt to commit a crime could be punished if the attempt came dangerously close to success, while preparations for crime—in themselves harmless—could not be punished. With his gift of great utterance, Holmes distilled these doctrinal nuances into the rule that expression could be punished only if it created a clear and present danger of bringing about illegal action, such as draft resistance or curtailment of weapons production. Given his corrosive skepticism and his Darwinian sense of struggle and flux, the clear and present danger rule became in Holmes' hands a fair protection for expression. But in the hands of judges and juries more passionate or anxious, measuring protection for expression by the likelihood of illegal action proved evanescent and unpredictable.

There were other problems with the clear-and-present-danger rule. It took no account of the value of a particular expression, but considered only its tendency to cause harmful acts. Because the test was circumstantial, legislative declarations that certain types of speech were dangerous put the courts in the awkward position of having to second-guess the legislature's factual assessments of risk in order to protect the expression. This problem became clear to Holmes in *Abrams v. United States*⁸¹ (1919), in which a statute punishing speech that urged curtailment of war production was used to impose draconian sanctions on a group of radical Russian immigrants who had inveighed against manufacture of war ma-

terial that was to be used in Russia. Dissenting in this case, Holmes, with Brandeis joining, uttered one of the greatest statements of political tolerance:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct 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, and the truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.⁸²

In the 1920s, building upon the *Abrams* dissent, Holmes and Brandeis, in one dissenting opinion and one concurring opinion in *Gitlow v. New York*⁸³ and *Whitney v. California*,⁸⁴ eloquently strengthened the clear-and-present-danger rule as a limitation on legislative power to prohibit political speech. Just as their dissents in the freedom of contract and dual federalism cases came to enjoy legitimacy within the academy and in progressive political circles, so also Holmes' and Brandeis' dissents in the early free speech cases laid the groundwork for authoritative doctrinal development in the 1930s.

The same Justices who repudiated the freedom of contract and dual federalism decisions of the Progressive Era during the New Deal likewise led the way to strong doctrines limiting legislative power in the interest of freedom of expression. Thus, even as judicial review shriveled to virtually nothing in review of regulations of the economy, it found a vigorous avenue to activism in civil liberties and civil rights. But the widespread professional and even political support for the Court's aggressive protection of civil rights and civil liberties has never managed to quiet the concern that the Court has embraced a dual conception of judicial review and a divided conception of the institutional relationship between the Court and the political branches.

Conclusion

Critical perspectives on the Supreme Court's record from the late nineteenth century through the 1920s have been much enriched by recent scholarship. Initially, most contemporaneous critics offered an explanation for the Court's role that stressed the Court's alleged laissez-faire, pro-business prefer-

ences. After the Court's collision with the New Deal and subsequent retreat, this view became even more pronounced. Moreover, the judicial repudiation of freedom of contract and dual federalism in the 1940s and 1950s was so total as virtually to hold the earlier opinions in professional contempt. The result has been the presentation of a complex and controversial chapter in our constitutional history in an overly simple, almost caricatured, fashion.

Recent scholarship has challenged this view. Most impressively, a group of historians has emphasized the roots of freedom of contract principles in abolitionist thinking, in the Jacksonian Era's commitment to equal rights in the marketplace and antipathy toward monopolies and special privileges, and in the early Republican party ideology captured in its motto: Free Soil, Free Labor, Free Men.⁸⁵ The great constitutional theorists of economic liberty, such as Thomas Cooley, have been reread and found to be not so much probusiness or antilabor as committed to the notion of government neutrality in the natural equilibrium of the marketplace. Moreover, several scholars have stressed persuasively the connection between freedom of contract notions and antitrust. They have considered the significance of the fact that several of the Justices most committed to strong, even radical antitrust enforcement, such as Harlan, McReynolds, and Peckham, were also the leading exponents of freedom of contract and economic liberty. This can hardly be accounted for by a preference for business, by Social Darwinism, or by laissez-faire convictions. Finally, recent scholars have pointed anew to the deep eighteenth and nineteenth century roots of the concept of limited government as the essential foundation of federalism, and approached the Court's unsuccessful efforts to delineate some boundaries to national legislative power as, at the least, the modern expression of an honorable, disinterested constitutional tradition.

Still, none of this valuable and insightful new scholarship seeks to justify the Court's freedom of contract and dual federalism decisions. If new thinking has deepened our understanding of the Court's record in the Progressive Era, and if the harshest and most simpleminded criticisms of the Justices have been vitiated, the fact remains that the doctrines enunciated in decisions such as *Lochner* and *Hammer* enlist no credible admirers to this day.

The Supreme Court in the Progressive Era and in the 1920s failed to understand the depth and the momentum of the political will to regulate labor

relations and the workplace. It failed to appreciate that Congress must have the power to deal with serious problems that can only be dealt with at the national level. It did not foresee the New Deal. For these reasons, among others, the Court's performance in this period will continue to be regarded as an object lesson in the dangerous and undemocratic character of judicial review, at least in the hands of backward-looking jurists in a time of fundamental change.

Endnotes

¹ W.H. Taft to O.W. Holmes, Jr. Aug. 3, 1912, quoted in Bickel & Schmidt, *The Judiciary and Responsible Government, 1910-1921* (1984) p.6.

² *Lochner v. New York*, 198 U.S. 45 (1905). A full account of the background of *Lochner* is P. Kens, *Judicial Power and Reform Politics: The Anatomy of Lochner v. New York* (1990).

³ 247 U.S. 251 (1918).

⁴ 250 U.S. 616 (1919).

⁵ 300 U.S. 379 (1937).

⁶ 5 U.S. (1 Cranch) 137 (1803).

⁷ *U.S.* 116 S. Ct. 1114 (1996).

⁸ *Id.* at 1176.

⁹ *Id.* at 1129-30.

¹⁰ See generally, Bickel & Schmidt *Judiciary*, p. 9 *et seq.* For good discussions of the Progressive Era, see, R. Hofstadter, *The Age of Reform* (1955); H.U. Faulkner, *The Quest for Social Justice* (1931).

¹¹ Labor conflict is discussed in O. Fiss, *Troubled Beginnings of the Modern State, 1888-1910* (1993).

¹² See generally L. Goodwyn, *The Populist Moment: A Short History of the Agrarian Revolt in America* (1978).

¹³ Insightful discussions of the constitutional ideology of the late nineteenth century can be found in H. Gillman, *The Constitution Besieged* (1993), and in J. May, "Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis," 50 *Ohio State L.J.* 257 (1989). A good account of changes in social thought in the Progressive Era is M. White, *Social Thought in America* (1947).

¹⁴ Fiss, p. *Troubled Beginnings*, 53 *et seq.*

¹⁵ See, for example, A.H. Kelly and W.A. Harbison, *The American Constitution: Its Origins and Development* (1948); A. Paul, *Conservative Crisis and the Rule of Law* (1960); B.R. Twiss, *Lawyers and the Constitution* (1942).

¹⁶ See, for example, L. Beth, *The Development of the American Constitution, 1877-1917* (1971).

¹⁷ R. Hofstadter, *Social Darwinism in American Thought* (1955) p. 46 *et seq.*

¹⁸ D. Montgomery, *Beyond Equality: Labor and the Radical Republicans, 1862-1872* (1967). A particularly thoughtful statement of this view, published in 1911 in the midst of this period, is F. Goodnow, *Social Reform and the Constitution* (1911).

¹⁹ Accounts of the personality and intellectual character of the Justices of this era can be found in Fiss, *Troubled* and Bickel & Schmidt, *Judiciary*.

²⁰ 157 U.S. 429 (1895).

²¹ See Fiss, *Troubled*, 3 *et seq.*

²² 198 U.S. at 53.

²³ *Id.*

²⁴ 198 U.S. at 57.

²⁵ *Id.*

²⁶ 198 U.S. 57-59.

²⁷ 198 U.S. at 61.

²⁸ 198 U.S. at 64.

²⁹ 198 U.S. at 63.

³⁰ 198 U.S. at 70.

³¹ 198 U.S. at 72.

³² 198 U.S. at 73.

³³ 198 U.S. at 75.

³⁴ *Id.*

³⁵ 198 U.S. at 75-76.

³⁶ 169 U.S. 366 (1898).

³⁷ 208 U.S. 412, 421 (1908).

³⁸ 243 U.S. 426 (1917).

³⁹ 208 U.S. 161, 174 (1908).

⁴⁰ 236 U.S. 1, 17 (1915).

⁴¹ 261 U.S. 525, 546 (1923).

⁴² See, Bickel & Schmidt, *Judiciary*, pp. 4-5.

⁴³ 278 U.S. 235, 239 (1929).

⁴⁴ A.H. Kelly and W.A. Harbison, *The American Constitution*, p. 498 *et seq.* This and similar expressions are reviewed in Gillman 4 *et seq.*

⁴⁵ T.R. Powell, "The Judiciality of Minimum-Wage Legislation," 37 *Harv. L.R.* 545, 573 (1924). This and other reactions are discussed in Gillman, *The Constitution Besieged*, p. 175 *et seq.*

⁴⁶ Pound's and Frankfurter's many writings on these themes are insightfully discussed in Gillman, *The Constitution Besieged*, p. 136-137.

⁴⁷ Holmes-Pollack Letters, vol. 1, 163.

⁴⁸ Holmes wrote to Harold Laski:

On the economic side I am mighty skeptical of hours of labor and minimum wage regulations, but it may be that a somewhat monotonous standardized mode of life is coming. Of course it only means shifting the burden to a different point of incidence, if I be right, as I think I be, that every community rests on the death of men. If the people who can't get the minimum are to be supported you take out of one pocket to put into the other. I think the courageous thing to say to the crowd, though perhaps the Brandeis school don't believe it, is, you now have all there is—and you'd better face it instead of trying to lift yourselves by the slack of your own breeches. But all our present teaching is hate and envy for those who have any luxury, as social wrongdoers. *Holmes-Laski Letters*, vol. 1, pp. 51-52.

⁴⁹ See generally, Gilmore, *The Ages of American Law* (1977).

⁵⁰ An excellent account of child labor in the Progressive Era is S. Wood, *Constitutional Politics in the Progressive Era: Child Labor and the Law* (1968).

⁵¹ C. Vann Woodward, *Origins of the New South* p. 416, quoted in Wood, *Constitutional Politics*, pp. 7-8.

⁵² 188 U.S. 321, 357-58 (1903).

⁵³ 188 U.S. at 371

⁵⁴ 220 U.S. 45 (1911).

⁵⁵ 227 U.S. 308 (1913).

⁵⁶ Quoted in Wood 77.

⁵⁷ 247 U.S. 251 (1918).

⁵⁸ 247 U.S. at 272.

⁵⁹ 247 U.S. at 276.

⁶⁰ 247 U.S. at 280.

⁶¹ 157 U.S. at 651.

⁶² 156 U.S. 1 (1895).

⁶³ *In re Debs*, 158 U.S. 564 (1895).

⁶⁴ See generally, Fiss, **Troubled**, p.107 *et seq.*

⁶⁵ 166 U.S. 290 (1897).

⁶⁶ 171 U.S. 505 (1898).

⁶⁷ 175 U.S. 211 (1899).

⁶⁸ 193 U.S. 197 (1904).

⁶⁹ Quoted in Bickel & Schmidt, **Judiciary**, p. 97.

⁷⁰ 221 U.S. 1, 58 (1911).

⁷¹ 221 U.S. 106 (1911).

⁷² 238 U.S. 347 (1915).

⁷³ 219 U.S. 219 (1911).

⁷⁴ 235 U.S. 133 (1914).

⁷⁵ 245 U.S. 60 (1917).

⁷⁶ 235 U.S. 151 (1914).

⁷⁷ These decisions are discussed in Bickel & Schmidt, **Judiciary**, 725 *et seq.*

⁷⁸ 249 U.S. 47 (1919).

⁷⁹ 249 U.S. 204 (1919).

⁸⁰ 249 U.S. 211 (1919).

⁸¹ 250 U.S. 616 (1919).

⁸² 250 U.S. at 630.

⁸³ 268 U.S. 652 (1925).

⁸⁴ 274 U.S. 357 (1927).

⁸⁵ For excellent discussions of this recent scholarship, see Gillman, **The Constitution Besieged**, and Fiss, **Troubled Beginnings of the Modern State, 1888-1910**. Reference is made to the important work of Eric Foner, Charles McCurdy, Alan Jones, William Nelson, David Gold, William Forbath, and David Montgomery. To this insightful group should be added Owen Fiss and James May.

A Return to the Four Horsemen

Hadley Arkes

Under the laws of the United States, in 1934 Mr. Jacob Maged, of Jersey City, became the most unlikely of public enemies. The hapless Maged, an immigrant, was forty-nine and running his own tailor shop. He had been warned once by inspectors from the government, but the second time, in April 1934, the authorities decided to make an example of him. Maged was prosecuted and sent to jail for three months, leaving a wife and four daughters to struggle with the business and pay his \$100 fine. And his crime? Knowingly, deliberately, Maged had charged thirty-five cents to press a suit for a customer, even though the code of the National Recovery Act (NRA) had pegged the price at forty cents. Maged, with his broken English, could not believe that anyone could “tell me how to run my business”—or that he could become a criminal by charging less than the other stores. He was not what we would call today a highly “credentialed” man. He could not charge high fees for billable hours. As one reporter put it, in an account of the case, Maged apparently grasped the point that the key to making a living lay in his own human capital. “His observation had led him to believe that the only reason one man gets more business than another is that he gives more value for the money.” For acting on that maxim under the re-

gime of the NRA, Maged was converted into a public villain (or in General Hugh Johnson’s official term, a “chiseler”). Mr. Abraham Traube, the president of the Cleaners and Dryers Board of Trade, and a director of the code authority for that industry, explained the case to the press: “We think that this is the only way to enforce the NRA. If we did the same thing in New York City we would soon get the whole industry in line.”¹ Jacob Maged could become a criminal only under a rare set of laws, in which people in the business of dry cleaning could use the powers of law to impose penalties on their own competitors, who dared to lower their prices.

Pressing pants or drilling for oil—there was no difference. What was reflected here was the experiment of the New Deal with corporatism. The case of Maged became part of a record compiled by Senator William Borah, in 1934, when he began to look into the problems of small businesses under the National Recovery Administration (NRA). Borah’s inquiry brought forth a torrent of letters from businessmen throughout the country, and they make, altogether, a fetching, pathetic collection. The letters can be found today in a container among the Borah papers in the Library of Congress.² One businessman was willing to take the time to lay out,

over several single-spaced pages, the economics of the ice business in St. Louis. Or another, in Mississippi, would try to set forth some rather rudimentary considerations on pricing and location in a dry cleaning store. Those considerations, he thought, would have been evident to anyone with a modicum of common sense. But they were treated as matters majestically beyond the recognition of the federal government. Taken together, these documents may form a kind of "people's history" of the New Deal. And what they seem to describe is a government making war on the most ordinary people, like Jacob Maged.

The story jars us today, it may strike us as bizarre, precisely because it did not become routine. It did not become part of a practice woven into our daily lives, mainly because it was resisted by the Supreme Court. The intricate code of wages and prices, covering establishments from burlesque houses to funeral parlors, was swept away when the

Court struck down the NRA in 1935, in the celebrated case of the Schechter Poultry Corporation. The oral argument in the chamber of the Supreme Court is rarely a scene of high comedy, but the transcript of the *Schechter* case offered persistent notes of laughter in that sedate chamber as the lawyers for the government sought, earnestly, to explain the deep-dish theories behind these regulations of the NRA. People may not recall today that, in the codes governing the poultry business, the NRA incorporated a theory, cast along these lines: if customers for poultry would be allowed to select only the healthy chickens, that would leave, by the end, an aggregation of the scrawnier and more sickly chickens. For the sake of divesting himself of the lot, the owner of the chickens was likely to deal with the jobbers or wholesalers by selling the chickens at vanishingly low prices. But that in turn, as the theory went, would undercut the prices for poultry, depress the price of poultry in the market, undercut the income of farmers



Jacob Maged, a Jersey City tailor, was imprisoned for violating the National Recovery Act after he was convicted for pressing pants for thirty-five cents, five cents cheaper than the minimum dictated by government. He is pictured here with his wife after his release in April 1934.

and their families, and deepen in turn the Depression that engulfed the nation.³ But, of course, this arrangement of dealing with jobbers is not altogether startling to those savvy people on farms, who must often take risks of this kind with perishables and move as many of their goods as they can before they settle for the prices they can get for the remnants. And yet the planners of the New Deal thought they found here a problem that worsened the Depression, and they contrived this solution, which might have been devised by the legendary Wise Men of Chelm (in Sholem Aleichem's village of idiots). It was called the provision on "straight killing": the price of poultry would be sustained simply by requiring that even the wholesalers, even the people buying large numbers of chickens, would not be permitted to pick and choose among the chickens. A buyer may need a ten-pound chicken, but he would be obliged to take the chicken nearest the door of the chickenhouse, or of the crate on the truck. As Mr. Joseph Heller and his colleagues noted in their brief for the Schechters, the government described the provisions on "straight killing" as a remedy to the "evil" of "selective buying." As Heller aptly remarked, selective buying was an "evil" because it "permit[ted] the customer to buy what he chooses, leaving in the possession of the slaughterer inferior poultry required to be sold at a lower price. So much for the 'evil.'"⁴

It fell to Heller to lead the Justices of the Supreme Court through the maze of such theories that constituted the National Recovery Act. And in response, Justices James C. McReynolds and George Sutherland kept asking those simple questions, reflecting the world that the rest of us continued to inhabit.

MR. JUSTICE McREYNOLDS: I want to see whether I understand [the arrangement] correctly. . . . [T]hese chickens are brought into New York by the carload, and then they are taken out and put in coops? [Mr. Heller, arguing for the Schecter company, says yes, and he further informs the Justice that there are thirty to forty chickens in a coop.] And if he undertakes to sell them [from the coop] he must have straight-killing?

MR. HELLER: He must have straight-killing. In other words, the customer is not permitted to select the ones he wants. He must put his hand in the coop when he buys from the slaughterhouse and take the first chicken that comes to hand. He has to take that.

[Laughter—recorded in the chamber]

MR. JUSTICE McREYNOLDS: Irrespective of the quality of the chicken?

[More laughter in the courtroom.]

. . . Suppose it is a sick chicken? [he goes on to ask, and he is told that a buyer was free to reject a sick chicken.] Now can he break up those coops and sell them, half a dozen chickens to one man, and half a dozen to another man?

MR. HELLER: He cannot. He can sell a whole coop, or one half of a coop. . . . That is all. And when he sells five, or six, or two, or three, he cannot permit the purchaser any selection of the chickens in the coop.

MR. JUSTICE STONE [intervenes to ask]: Do you mean that there can be a selection if he buys one-half the coop?

MR. HELLER: No. You just break the box into two halves.

[Laughter in the courtroom.]

[Then,] MR. JUSTICE SUTHERLAND [asks]: Well, suppose, however, that all the chickens have gone over to one end of the coop?⁵

[More laughter in the courtroom.]

One thing I never learned in my reading about the New Deal was that when the clever young lawyers for the government sought to expound, in open court, the theories they were wrapping into the law, their account of the law elicited the giggling of the urbane. But these parts of the New Deal have usually been screened from the popular histories of the period, and the laugh track has been programmed now to follow predictably in response to a rather different set of lines. I encountered the familiar, predictable laugh, not too long ago, in a meeting with colleagues in the study of constitutional law. One colleague, counting on the sure laugh, cited again that line, often quoted, from Justice Owen J. Roberts in the case of *United States v. Butler* (1936).⁶ That was the case in which the Court struck down the Agricultural Adjustment Administration as a centerpiece of the New Deal. In the course of writing for

the Court, Roberts offered his now-famous observation that, when an act of Congress is challenged on constitutional grounds, “the judicial branch of the Government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.”⁷

That passage has been much derided for its innocence, or for its reflection of a mechanistic jurisprudence. And as it was invoked again, on this occasion, it inspired the usual round of derisive mirth. But of course the derision inspired by the line was meant to spill over to affect the jurisprudence in which that sentence was immured: to laugh at Roberts’ line in the *Butler* case was to confirm again our recognition that there was something laughable, or preposterous, about the decision that contained that line. And the deeper implication was that there was something unserious, something laughably wrong, with the jurisprudence that resisted the New Deal. After the chuckling subsided, I asked my friend whether he would in fact reach today a decision in the *Butler* case different from the decision that

Roberts and his colleagues explained in that case. He replied, in what seemed to be an instant reflex, that there was no serious question—that he would certainly reject that decision, as he would reject all of the other decisions that resisted the New Deal. The conversation moved on, and as it turned onto other paths, I took advantage of one phase in the discussion to pose this problem to my friends and colleagues. I asked them to imagine a scheme of regulation, in our current politics, that took this form:

The Supreme Court has declared that the Congress and the States may favor childbirth over abortion, even while the Court had held to its decision in *Roe v. Wade*, in articulating a constitutional freedom to choose abortion. And so Congress decides to act upon this doctrine, to favor childbirth over abortion. It enacts a tax that will apply to all clinics in which abortions are performed. The proceeds of the tax will be donated to offices of “Birth-right,” or organizations that offer counsel to women to bring their unborn children to birth,



The Schechter brothers, poultry dealers who contested the National Recovery Act’s restrictions on selling chickens, are pictured above in the office of their attorney, Joseph Heller, celebrating their victory before the Supreme Court.

rather than have abortions. At the same time, the taxes placed on the clinics will raise the price of doing business, and those expenses may have to be passed on to the clients of the clinics in the form of higher prices. Either way, the tax will raise the cost of abortions, and offer a further discouragement to the election of these procedures of abortion.

As the second strand of the policy, the legislation offers to *remit* or remove the tax: The tax will be waived if the abortion clinics agree, “voluntarily,” to accept certain federal regulations that are designed to promote “responsible” abortions, that is, abortions that are sensitive to a variety of concerns in medical treatment and respect for the family: The clinics would accept a ban on abortions late in pregnancy (*i.e.*, beyond the first trimester). They will not perform abortions based on any estimate that a child is afflicted by Down’s Syndrome, or any other disability. They will not perform abortions on account of the sex of the child (*e.g.*, if the parents discover that the child will be a girl, and the family had really been hoping for a boy). No abortion may be performed without the consent of the father, or, in the case of a pregnant minor, the consent of her parents. A strenuous effort must also be made to establish the “informed consent” of the pregnant woman: The woman must be informed about the current stage of development of her child in the womb, and what is known about the condition of the child at that stage (*e.g.*, that the heartbeat may be heard with a simple stethoscope between eighteen and twenty weeks, or that the child is squinting and sucking its thumb at only nine or ten weeks). The clinic may also be obliged to inform the pregnant woman that, in the teaching of all textbooks in embryology and gynecology, human life begins with conception; that there is no serious doubt that the being within her womb is alive (else, there would be no need for this “surgery”) and that the being is of the species *homo sapiens* (*i.e.*, that it is “human” and nothing other than human from its first moments).

Under the terms of this regulation, a clinic would “agree” to be in business on terms that call into question the very legitimacy of the service that forms its

business. The reactions to this policy would not be so hard to fathom, or to anticipate with some precision. First, the argument would be made that the legislation offered a false account of itself as a measure on taxation: its purpose was not to raise revenue, but to manipulate the burdens of taxation for the sake of encouraging a certain set of outcomes, evidently regarded by the legislators as desirable. But they were also outcomes that the legislators were not free to legislate directly or explicitly: by the decisions of the courts, the Congress had to respect the private right to choose an abortion. And yet, without challenging overtly that right to choose an abortion, the Congress would be legislating in a practical way to restrain and confine that freedom to choose abortion. Through the guise of taxing, Congress would be legislating in a field in which it bore no clear authority to legislate.

Beyond that, the argument would run, this legislation could not claim that broad latitude of tolerance that judges are inclined to give to “regulations of business.” This was not merely the regulation of a business. The regulation did affect the ways in which people make their money when they offer to the public the “service” of abortions. But the purpose of the legislation was not to regulate a business, or the ways in which people make their livings. The purpose of the legislation was to strike at the very activity that forms the “business.” Beyond that, the aim of the law was to strike at the personal freedom of people to choose the kinds of surgeries that bring forth these clinics. And, of course, this “business” could not be constrained or restricted without restricting that underlying personal freedom that gives rise to the business.

The fact that the underlying freedom in this case happens to be the freedom to choose an abortion is a fact that helps alert us these days that the regulation of business touches liberties that many people regard as fundamental. But in that respect, the issue of abortion helps make us conscious of a dimension of civil liberties that has eluded the sympathy and recognition of civil libertarians since the New Deal. When it became “progressive” for judges to accept a wide range of regulation of business, from rent controls to licensing, civil libertarians were willing to detach themselves quite serenely from the possibilities that these regulations could be affecting personal liberties, or at least the kinds of personal liberties that matter.

Thanks, we might say, to the heightened awareness of the “right to an abortion,” it becomes easier

for us to recognize at once the serious restrictions of personal freedom that may come disguised in the form of “administration” or “regulations of business.” But beyond that layer of concealment, there would be, in this case, a further deception about the transfer of authority: through the instrument of taxes, the Congress may take on itself the power to legislate in a field (e.g., the practice of abortion) in which its authority to legislate is far from clear. And then, through the remission of taxes, it may induce people to accept the authority of Congress to prescribe, in exacting detail, the regulations that govern the practice of abortion throughout the country. But as Justice Joseph P. Story used to teach, it is one of the axioms of the law that what may not be done directly, may not be done indirectly.⁸ If the federal government could not legislate directly on the matter of abortion, then it could not legislate properly by indirection, through the manipulation of taxes. Nor may the government supply to itself the authority withheld by the Constitution merely by resorting to the brazen device of assigning and removing burdensome taxes—by inducing its citizens to buy back their own freedom.

These objections, these judgments of principle, could be set down clearly if we were faced with this hypothetical case in the regulation of abortions. But if these lines of principle are clear to us today, they should have been equally clear when they were inspired in the 1930s, in the cases arising from the New Deal. For what I had described here, in the scheme of regulation on abortion, was simply another version of the scheme that the Court had encountered when it struck down the Agricultural Adjustment Act (AAA). And the reasons that I set forth, in recounting the constitutional defects in this scheme, were essentially the reasons put forth by Justice Owen J. Roberts that day, in *United States v. Butler*.

If one were to take the scheme as described here, and translate it back into the terms of the AAA, it merely fills in the same form with the problems of agriculture. The aim of the policy was to preserve or enhance the income, or the purchasing power, of farmers and their families, by the simple expedient of propping up the prices received by farmers. For the sake of raising prices, farmers would be induced to cut back in production. To compensate farmers for the income lost in this way, the federal government would offer payments or subsidies. Those payments would be supported, in turn, by a special tax on processors. In the *Butler* case, the government

presented a claim for taxes to the Hoosac Mills Corporation in North Adams, Massachusetts, for the processing of cotton. The aim of the policy was to preserve a “parity” with the purchasing power of farmers during that golden age of 1909-14. The price of cotton in this period was about 12.40 cents per pound. It was calculated by the Department of Agriculture that the farmer would need, in current dollars, a return of 12.77 cents per pound to buy what could be bought, in that earlier period, with an income of 12.40 cents per pound. The market rate on cotton in 1933 was 8.7 cents, and so the difference was 4.07 cents per pound. That figure offered the guide for the tax that would be placed on processors, per pound of cotton, to make up for the disparities in income. And it would offer a guide, also, for what the Secretary of Agriculture would pay to farmers in compensation for cutting back on the production of cotton.⁹

But then the tax could be rescinded: if the processors were sufficiently public-spirited, if they were willing, that is, to pay farmers the higher prices that were stipulated in the federal regulations, then the burdensome taxes could be lifted. The compliant businessmen would be delivered from the burden of the special tax, and so they might be freer to offer a lower price, against the processors who were compelled to absorb in their prices the cost of the added taxes. As Justice Roberts observed, it was “a scheme for purchasing with federal funds submission to federal regulation” of a subject that might be quite beyond the reach of the federal government.¹⁰ The scheme was no longer new to the Court: the Justices had confronted a similar scheme of regulation in the *Schechter* case, and so the imaginations of the Justices had already been flexed. Justice Roberts could produce then some hypotheticals of his own, which were quite precise and quite devastating in their aptness:

Assume that too many shoes are being manufactured throughout the nation; that the market is saturated, the price depressed, the factories running half-time, the employe[e]s suffering. Upon the principle of the statute in question Congress might authorize the Secretary of Commerce to enter into contracts with shoe manufacturers providing that each shall reduce his output and that the United States will pay him a fixed sum proportioned to such reduction, the money to make the payments to be raised by a tax on

all retail shoe dealers or their customers.

Suppose that there are too many garment workers in the large cities; that this results in dislocation of the economic balance. Upon the principle contended for an excise might be laid on the manufacture of all garments manufactured and the proceeds paid to those manufacturers who agree to remove their plants to cities having not more than a hundred thousand population. Thus, through the asserted power of taxation, the federal government, against the will of individual states, might completely redistribute the industrial population.

A possible result of sustaining the claimed federal power would be that every business group which thought itself under-privileged might demand that a tax be laid on its vendors or vendees, the proceeds to be appropriated to the redress of its deficiency of income.¹¹

As the Court recognized, one of the radical novelties in this legislation was the willingness to install "a rule of factions," a regime in which interest groups would be licensed to make laws binding on their competitors. Under this legislation, the world would be arranged in an intricate scheme of antagonistic interests, and some of those interests would be taxed and coerced, explicitly, for the purpose of delivering benefits to their adversaries. Processors would be set against farmers, retailers against manufacturers, workers against consumers. It was the rule of factions, or "partial legislation" with a vengeance, the classic definition of corruption that came down from Aristotle's *Politics*: political authority, the authority over the whole, would be used to serve the interests of a part (a ruling class, or a favored set of interests). And the scheme of corruption was brought to a point of refinement when the power over the whole could be used to transfer benefits from one clientele or group at the expense of another.

Perhaps we do not see the matter in our own day as it was seen in the 1930s, when Justices were more alert to this form of "class legislation." And so it may be necessary to clothe the case, as I did, in the more familiar terms of a case on abortion. When we do that—when the case is wrapped in forms that are more familiar to our own day—the scheme of regulation proclaims itself instantly as bizarre. It is

not the jurisprudence or the reasoning of Roberts that seems strange or unrecognizable. But rather, it is the scheme of the New Deal that seems now strange, out of place, something not drawn from the world we know.

Over the years we would hear often of "the switch in time that saved nine"—the supposed turning of the Court toward an accommodation with the New Deal, beginning in 1937. And after that turn, as the story runs, the Court began to recede, to give way. The string of programs, resisted by the Court, now began to come back, in another chain of decisions, and one by one confirmed. The powers of the federal government under the Commerce Clause were detached from those tests and limitations that cabined the use of those powers in the past. With that detachment came a loss of constitutional discipline, and the Commerce Clause could be used as the most transparent device for extending the reach of the federal government. As the old saw used to go, "If a window washer out on a ledge can see a railroad track, and if there ever runs on that track a train that travels in interstate commerce, then the federal government can conceivably cover that window washer in its stipulation of minimum wages."

Yet our historians have also produced a notable filtering of the historical record. And what has been screened out of the popular histories is the fact that the main decisions of the Court, in resisting the New Deal, were never dislodged. For the most part, the resistance by the Justices *held*. That the scheme of regulation in the *Butler* case seems bizarre is a telling sign that this scheme did become a familiar part of our lives, woven into the fabric of our daily experience. But that is to say, the judgment in the *Butler* case held, and indeed if we were confronted with a case along similar lines, we would probably find ourselves arguing precisely along the path marked out by Justice Roberts and his colleagues.

The resistance of the Court is usually ascribed to the so-called "Four Horsemen," those four supposedly cantankerous judges—McReynolds, Willis Van Devanter, Sutherland, and Pierce Butler. But what is curiously overlooked is that, for the most part, Sutherland and the conservative Justices managed to carry their other colleagues with them. The most significant decisions, in resisting the New Deal, were carried through by a unanimous Court. The judgment of the Court was not offset by a single dissent-

ing vote in the celebrated *Schechter* case. There was not a single dissent in *Louisville Bank v. Radford* (1935), which struck down the Frazier-Lemke Act, to relieve the debts of farmers. Nor was there a dissent in *Humphrey's Executor v. United States*, which restrained the power of the President to remove members of the independent regulatory commissions. Some of these decisions, overturning the most radical legislation of the period, were joined by the Justices who would stand in the pantheon of liberal jurisprudence: Justice Louis D. Brandeis wrote for a unanimous court in *Louisville Bank v. Radford*,¹² a decision declaring unconstitutional an act of legislation that sought to prevent the foreclosure of farms, in effect, by dispossessing the creditors. In *Panama Refining Co. v. Ryan* (1935),¹³ the so-called "hot oil" case, only the loss of Justice Benjamin N. Cardozo's vote broke the unanimity of the Justices.

And what has been lost in the screening is this recognition: that the world we inhabit does not resemble the world described by the planners of the New Deal, that it resembles more closely the world that George Sutherland and his colleagues sought to preserve for us. But in the curious manipulation of historical memories, we find many writers and jurists still invoking the ringing phrases, say, from Justice Brandeis, while apparently forgetting the causes, or the reasoning, to which those phrases were appended. Anyone who has studied our constitutional law will instantly recognize that widely quoted passage in which Justice Brandeis scolds his colleagues for their stodginess in resisting the novel schemes of regulation produced within the states. It was the height of the Depression, and Brandeis enjoined his colleagues to have the boldness to consider something new, to let their imaginations encompass what may yet be unfamiliar:

Some people assert that our present plight is due, in part, to the limitations set by courts upon experimentation in the fields of social and economic science . . . Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. . . . [But] if we would guide by the light of reason, we must let our

minds be bold.¹⁴

This passage is often quoted, but almost no one mentions any longer the cause to which Brandeis sought to recruit our sentiments with this soaring rhetoric. This sounding of the charge was made in a dissenting opinion in the case of *New State Ice Co. v. Liebmann* in 1932. The opinion for the majority was written by Justice Sutherland, in striking down a system of permits in Oklahoma that restrained people from entering the ice business. Brandeis was marshalling his eloquence here in an effort to defend a system of regulation that cast up barriers, and burdens of justification, for anyone who sought to open a new business in competition with an older, established firm.

As Brandeis noted, the introduction in the United States of the system of certificates of "public convenience and necessity marked the growing conviction that under certain circumstances free competition might be harmful to the community and that, when it was so, absolute freedom to enter the business of one's choice should be denied."¹⁵ Wherein was that harm? Years earlier Brandeis had become identified with the so-called Brandeis Brief, a new style of annexing to his legal argument an array of facts, which supposedly set forth, with precision, the nature of the social problem he was addressing.¹⁶ Years later, social scientists would look again at that supposed breakthrough in connecting law to the science of sociology, and they would find in Brandeis' efforts the hand of a rank amateur.¹⁷ It was not merely that Brandeis showed no particular competence in statistics. It was rather that he amassed facts, as though the assembly of facts was an accomplishment in itself, or as though the facts generated their own conclusions. The mass of statistics formed a thickly embellished screen, and what was concealed behind the screen was a prosaic shallowness, amplified at times to a stunning mediocrity.¹⁸ His assembly of facts, charting the dangers of unrestricted competition, constituted, in truth, a collection without meaning. Brandeis "explained" that

[i]n small towns and rural communities the duplication of plants, and in larger communities the duplication of delivery service, is wasteful and ultimately burdensome to consumers. At the same time the relative ease and cheapness with which an ice plant may be constructed exposes the industry to



Breaking into the ice business was hardly child's play in the 1930s because the system for obtaining permits favored existing businesses. Justice George Sutherland wrote the majority opinion striking down the regulations in the 1932 *New State Ice Co. v. Liebmann*, but it was Justice Louis D. Brandeis' dissent that is remembered for its eloquence even while the cause for which he marshaled that eloquence has been forgotten.

destructive and frequently ruinous competition. Competition in the industry tends to be destructive because ice plants have a determinate capacity, and inflexible fixed charges and operating costs, and because in a market of limited area the volume of sales is not readily expanded. Thus, the erection of a new plant in a locality already adequately served often causes managers to go to extremes in cutting prices in order to secure business.¹⁹

Competition threatened to be ruinous for the curious reason that it was apparently easy to enter this business. And yet the business was supposedly plagued at the same time with "inflexible fixed charges and operating costs." But whether those charges and costs were truly inflexible was a matter that could be tested—and illuminated—by the strains of competition. In spite of the fact that the producers were hemmed in with costs that were "inflexible," some of them apparently found a means of doing what Brandeis described, tellingly, as "go[ing] to

extremes" and "cutting prices in order to secure business."

Brandeis noted, gravely, that "[I]ack of ice, in hot seasons results in constant waste and danger to health. It compels the purchase of food in small quantities at higher prices. The intimate relation of food preservation to health, and infant mortality, has long been recognized."²⁰ Anyone who was likely to receive this news as a revelation might well have been impressed anew by the array of facts that documented these propositions. His powers of inference might have led him to suppose, on his own, that poorer people were in even greater danger of running out of ice, or that people in the hinterlands of Oklahoma were less likely to have electricity and refrigerators and more likely to need ice. But anyone merely engaging his suppositions in that way would not have had the ground of firmness that comes, say, from figures offered, with authority, from the National Association of Ice Industries, or the *Electrical Refrigerating News*. By drawing on these authoritative sources, Brandeis was able to report, with his usual precision, that "in 1919 the per capita consumption

of ice was 712 pounds; in 1929, 1,157 pounds," and that an estimated "965,000 household refrigerators were sold in 1931, of which only 10,146 were sold in Oklahoma."²¹ But if poor people were less likely to afford electricity, if they needed ice for their health, why would it not follow that poor people would be notably better off if the presence of competition served to make ice more plentiful at a lower price?

For Brandeis, this venture in regulation reflected the character of a new age of administration. The moral authority of the government would be derived ever more from a command of technical facts about the workings of a modern society. And if it handsomely served the public good to avoid waste and ruinous competition in the ice business, why should the same benign effects not be extended to other businesses? Indeed, the prospect elicited his deepest enthusiasm: long before Oklahoma began to try its hand at novelties in regulation, certificates of necessity had been used to regulate railroads and public utilities. In Oklahoma, the scheme of certificates, or licenses, had been applied first to cotton gins. In 1917, this arrangement had been followed in the provision of new telephone or telegraph lines. In 1923, it was applied to motor carriers.²² And in 1925, the year in which the controls were placed on the ice business, the same scheme of regulation was extended to "power, heat, light, gas, electric or water companies proposing to do business in any locality already possessing one such utility."²³

Justice Sutherland had been quite willing to concede to the states an ample range of discretion in regulating services, such as gas and electricity, that had to be virtual monopolies under the conditions of the time. In fact, it is a point curiously passed by in histories of the Court: the so-called *laissez-faire* Justices had always shown a willingness to defer to legislatures, national or local, if their measures bore any plausible relation to the public health or safety. But as Sutherland pointed out, the regulations in Oklahoma shifted the premises of personal freedom that were bound up with a regime of constitutional freedom: it was no longer presumed that people were free to engage in a legitimate calling, *unless* they threatened harm to their workers or the community. It seemed to be presumed now that people were not generally free to engage in any legitimate calling, *unless they received an explicit permission from the authorities.*²⁴

In this view, as Sutherland remarked, "engagement in the business is a privilege to be exercised only in virtue of a public grant, and not a common

right to be exercised independently."²⁵ Sutherland bore no illusion that there were any principles that could establish the proper price in nature for a pair of pants, or the number of vendors that would be "right" or "necessary" in any community to distribute ice. Since no one could plausibly claim to know such things, it seemed plain to Sutherland that these theories of competition had to be the most arrant form of nonsense. And therefore any regulations of law based on these theories had to be the most arbitrary restrictions of personal freedom.

Brandeis' indulgence for these schemes would make sense only on the faith that knowledge of the social planner was in principle obtainable. In any event, it was clear that Brandeis looked upon these schemes as signs of the most hopeful inventiveness and vitality. Sutherland, rooted more firmly in the world, could look past the romantic phrases and not be distracted by Brandeis' summoning lines. Stripped of its pretension, there was nothing in the least novel or experimental in this legislation in Oklahoma. It was, as Sutherland said, all too familiar:

Stated succinctly, a private corporation here seeks to prevent a competitor from entering the business of making and selling ice. It claims to be endowed with state authority to achieve this exclusion. . . . The control here asserted does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it. There is no difference in principle between this case and the attempt of the dairyman under state authority to prevent another from keeping cows and selling milk on the ground that there are enough dairymen in the business; or to prevent a shoemaker from making or selling shoes because shoemakers already in that occupation can make and sell all the shoes that are needed.²⁶

II

The "Four Horsemen," they were called derisively, the Justices who resisted the New Deal in the 1930s. But the name also suggests a deeper meaning, the sense of a revelation or uncovering, and that meaning might reveal itself more readily today as we look back, with more detachment on the pointed-

ness of the writing that these men left us, and the force of their arguments. Still, as the "Four Horsemen" their character was stamped for me by the historians, and fixed especially by that tart sketch of them written by T.R. Powell. I read it when I was twenty, quoted in Arthur Schlesinger, Jr.'s *The Politics of Upheaval*, and so sharply etched was it for me that, thirty years later, I could nearly bring it all back from memory:

The four stalwarts [wrote Powell] differ among themselves in temperament. I think that Mr. Justice Butler knows just what he is up to and that he is playing God or Lucifer to keep the world from going the way he does not want it to. Sutherland seems to me a naive, doctrinaire person who really does not know the world as it is. His incompetence in economic reasoning is amazing when one contrasts it with the excellence of his historical and legal. . . . Mr. Justice McReynolds is a tempestuous cad, and Mr. Justice Van Devanter an old dodo.²⁷

Among the Four Horsemen, Sutherland was offered at least a slight concession to his intellect, though it must be discounted by the fact that the estimate was offered by a mind notably less powerful than his own. But along with the subtle defamation came a further screening of the historical record. The story line about the "reactionary" does not make a place for the Senator from Utah who was a leader in the cause of votes for women. He had introduced into the Senate the Susan B. Anthony Amendment, and in one notable speech, in 1915, he had made an artful case for suffrage, in terms that avoided the extravagant rhetoric on both sides, but offered also a kind of natural law argument for women's suffrage. His account was quite sober in measuring, on principled grounds, the case for suffrage and his argument could be seen, in its spare clarity, in passages of this kind:

[T]o deprive [women] of the right to participate in the government is to make an arbitrary division of the citizenship of the country upon the sole ground that one class is made up of men, and should therefore rule, and the other class is made up of women, who should, therefore, be ruled. To say, and to prove if it were capable of proof, that such a division will not materially affect the government is

not enough. I suppose if we were to provide arbitrarily that all male citizens except those who were blessed with red hair should possess the franchise that things would go on pretty much as usual, but I can imagine that the disfranchised contingent would very speedily and very emphatically register their dissent from the program. If we were to draw a line north and south through the state of Pennsylvania and provide that citizens east of the line should vote and those west of the line should not, we would have a condition to my mind not less arbitrary than is presented by the line which has been drawn separating the voters and non-voters only because of a difference in sex.²⁸

But to this account, he would deepen the argument by drawing on this further reservoir of understanding:

In the beginning [he said] God created us man and woman—made us necessary to one another—so imperiously complementary of one another—wove our mutual dependence so deeply and so firmly in the warp and woof of our very existence that we not only would not if we could, but we could not if we would, separate the thousand strong yet tender threads by which our common destinies are interlaced and bound together for weal or woe for all time to come. . . .²⁹

Eight years later, the same man was writing as a Justice of the Supreme Court, and in his first, notable opinion, he delivered the judgment of the Court in striking down a law on minimum wages for women in the District of Columbia. The same man, the same principles—and the same argument. But in one phase of his career, he is apparently regarded as a man in advance of his times, and in the other phase he is regarded as a hopeless reactionary. In the flourish of that opinion he was moved to say this:

[T]he ancient inequality of the sexes, otherwise than physical, . . . has continued "with diminishing intensity." In view of the great—not to say revolutionary—changes which have taken place . . . in the contractual, political and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences

have now come almost, if not quite, to the vanishing point. In this aspect of the matter, while the physical differences must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account, we cannot accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances.³⁰

His principles had not altered in the slightest. But as those principles were applied in this case, he found himself moving to the rescue of Ms. Willie Lyons. For the law in the District had the effect of depriving Ms. Lyons of her job as the operator of an elevator in the Congress Hall Hotel. That was a job in which her employers would have been pleased to retain her, and for her own part, Ms. Lyons testified that she

could find no other job as appealing or satisfying, in its setting, conditions, or terms of compensation. The pay, for Ms. Lyons, was \$35 per month plus meals. But under the policy prescribed in the District of Columbia, her employers were prevented from employing any woman in that position for anything less than \$71.50 per month. And yet, the law, in its liberal aims, cast its protections here only over women. Men, however, were not "protected" by the law, which meant that any man was free to accept the job as the operator of an elevator at the going market rate—which happened to be about \$35 per month. In other words, the law, in its liberal tenderness, in its concern to protect women, had brought about a situation in which women were being replaced, in their jobs, by men.

But for the man who introduced the Anthony Amendment, this law was affected by the same paternalism he had resisted when he had taken a leading place in the cause of votes for women. In his



Although Justice George Sutherland has been painted as a "hopeless reactionary," his record as a politician showed him to be a champion of rights for women. As a Senator from Utah he introduced the Susan B. Anthony Amendment, and in 1915 he made a brilliant speech in favor of suffrage for women.

reading, the law carried the implication that a competent woman was not fit to manage her own affairs, or give her own consent to an arrangement she regarded as quite suitable for her. Years later, at the death of Sutherland, Attorney General Frances Biddle would recall this opinion in the *Adkins* case. He would take that opinion as the mark of a courtly man, whose mind had been romantically moored in the nineteenth century, a kindly man, to be sure, but a man surprisingly blind to the “industrial evils” of his time. And yet Attorney General Biddle was evidently moored, romantically, in the super-stitions of his own day, about the New Deal and the redemptive powers of “social legislation.” The abstract notion of “industrial evils” simply made no contact with the circumstances of Ms. Willie Lyons. In what way did her work at the Congress Hall Hotel, operating an elevator, in a setting she found congenial, with a compensation she found quite satisfactory, constitute an “industrial evil”? And what could have made Biddle think that the “evil” was aptly remedied through the device of replacing Ms. Lyons, in her job, with a man?

It was curious that Sutherland’s friend, Chief Justice William H. Taft, would sound, in dissent, an accusation oft hurled at the so-called conservative Justices. “[It] is not the function of this Court,” he announced, in portentous tones, “to hold congressional acts invalid simply because they are passed to carry out economic views which the Court believes to be unwise or unsound.”³¹

The phrase would become familiar to the point of a cliché: the Justices were striking down laws because they did not accord with their “predilections,” as though the Justices were moved by nothing more than their personal “tastes” or inclinations. In the first place, it was a distortion even beyond caricature to look at the reasoning produced by Sutherland, and reduce that reasoning to the plane of mere personal taste, as though everything Sutherland said could be reduced to the summary proposition, “I don’t like it.” But beyond that, there was nothing distinctly “economic” or “empirical” in the reasoning brought forth in these cases. Sutherland affected no theory of wages or employment, or anything else resembling an economic theory. In fact, the reader would find nothing in Sutherland’s argument that conjectured in any way about the “effects” produced by these controls on wages and prices. Sutherland did not presume to predict whether the policy would work well or badly. It would be truer to say that his arguments were “jural” in nature; they ran back to the very postulates of law and jurisprudence, to the

axioms of law that did not depend for their validity on whether they would promote prosperity or induce malaise.

Most notably, Sutherland’s argument kept running back to the root issue of “determinism” and morality: if we assumed, for example, that race or class or gender exerted a kind of “deterministic” control on the moral conduct of any person, then no person, strictly speaking, could be held responsible for his own acts. Nor could he merit praise. In fact, on the premises of determinism, there could be no casting of moral judgments—there could be no plausible sense of right and wrong—and no ground for the judgments of fault in the law. As Sutherland and his Brethren saw it, the law fixing a minimum wage for women was simply layered with assumptions of determinism, mainly a determinism by gender and class. By its very terms, the legislation for the District of Columbia proclaimed the purpose of setting the schedule of wages that could sustain, among women, an appropriate standard of living, the standard that could “maintain them in good health and . . . protect their morals.”³² To expose what was problematic or dubious in this scheme did not require any resort to “economic reasoning.” It was enough for Sutherland to lay out the variations in the scale of wages, as a reflection of the understanding held by the framers of the act, and the remarkably precise things they claimed to know about the wages that were necessary to preserve “health and morals” among different descriptions of women. He could remark then upon the awkward pretension of claiming to know that it required a wage of \$16.50 per week to preserve the health and morals of a woman employed in the serving of food, while a wage of \$9 per week might be sufficient to preserve the moral character of beginners in a laundry.³³ Was there really a correlation between morality and income? Could we assume that all people with diminished incomes had diminished characters—that they were less to be trusted, that they were less affected by claims of duty or honesty? Of course, to raise these questions was virtually to answer them, for the questions merely drew, to a point of explicitness, the rather crude notions of economic “determinism” that lay behind this statute. As Sutherland observed, “The relation between earnings and morals is not capable of standardization. It cannot be shown that well-paid women safeguard their morals more carefully than those who are poorly paid. Morality rests upon other considerations than wages.” But there was also an assumption of a kind of determinism by gender: the law assumed that, if

we merely knew the sex of the worker, we would know what that worker needed to support herself, whether she was living by herself, or whether her earnings were needed mainly as a supplement to the income of a family. As Sutherland remarked, "The cooperative economies of the family group are not taken into account"; nor was the fact that the woman might have independent means.³⁴

But this "determinism" by sex and wage was not the only determinism at work here. There also seemed to be a *class* determinism: it seemed to be assumed that anyone who fell into a class called "employer" had the capacity to pay the wage that was stipulated by the board. It would not apparently matter in the least whether the establishment in question was a large corporation or a marginal, small business, with one or two workers. As Sutherland observed then, the law swept in a categorical way while taking no account of the vast differences among the needs of employees and the capacities of employers.

The law is not confined to the great and powerful employers but embraces those whose bargaining power may be as weak as that of the employee. It takes no account of periods of stress and business depression, of crippling losses, which may leave the employer himself without adequate means of livelihood.³⁵

It was simply assumed in the law that all employers had roughly the same capacities, and that it was better for any employer not to offer a job than to offer a job at a wage that could not sustain a person living on her own. Sutherland argued that there was a "moral requirement implicit in every contract of employment, *viz.*, that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence. . . ." But that was radically different from the assumption that every job, every position, can command a wage sufficient to sustain a person or a family. "Certainly," said Sutherland, "the employer by paying a fair equivalent for the service rendered, though not sufficient to support the employee, has neither caused nor contributed to her poverty. On the contrary, to the extent of what he pays he has relieved it."

Sutherland went on then to ask, in one of the cleverest turns of reasoning, if we would be willing to apply the same assumptions to other kinds of jobs.

In principle, there can be no difference between the case of selling labor and the case of selling goods. If one goes to the butcher, the baker or grocer to buy food, he is morally entitled to obtain the worth of his money but he is not entitled to more. If what he gets is worth what he pays he is not justified in demanding more simply because he needs more; . . . Should a statute undertake to vest in a commission power to determine the quantity of food necessary for individual support and require the shopkeeper, if he sell[s] to the individual at all, to furnish that quantity at not more than a fixed maximum, it would undoubtedly fall before the constitutional test. The fallacy of any argument in support of the validity of such a statute would be quickly exposed. The argument in support of that now being considered is equally fallacious, though the weakness of it may not be so plain.³⁶

Sutherland managed to glimpse here the future that dared not yet speak its name. The celebrated "switch in time that saved nine" occurred in 1937, in a case in which the Court sustained a statute on minimum wages and overruled Sutherland's decision in the *Adkins* case. With that move, the Court would also break down the inhibitions that might hold back a variety of measures that put controls on wages, prices, and rents. The wrong of those measures at the root was fully explained by Sutherland that day in 1923. The holding in *Adkins* was overturned, but nothing in our cases since 1937 has managed to refute the reasoning that Sutherland set forth so clearly in the *Adkins* case. In part, the measures of wage-price controls have often come to combat themselves. They produce manifest injustices, shortages of goods, and the pain they inflict is often enough to induce their repeal. As for the minimum wage, it has been repealed in successive waves, by the experience of inflation. Still, there is a constituency that preserves its appetite for minimum wages, just as there is a group that preserves its stake in rent controls. And so, at certain intervals, we re-enact the minimum wage, and we hear, sounded again, all of the fallacies that Sutherland and his colleagues had refuted. Economists can bring forth reams of empirical studies to show, once again, that these measures do not work; and yet no mere empirical evidence seems enough to dislodge these policies. In the face of the accumulated lessons from experience, there are people who are still willing to say, "But rent control

has not been tried yet with the inventiveness, and with the subtle arts, that may be summoned in a community as uncommon as Berkeley.” And over the last couple of years, we have found some economists claiming that a rise in the minimum wage will produce, in the aggregate, a net gain. They do not contest—as they cannot contest—the testimony offered by employers, that they would not be able to hire or retain workers at a higher minimum wage. The economists claim, rather, that an increase in wages will beget an increase in demand, and demand in turn will beget more employment. Whether the argument, in this form, is right or wrong, the problem is that it bears all of the defects that are usually displayed by a utilitarian ethic. Even if it were the case that a rise in minimum wage would produce a net gain in employment, nothing in those aggregate figures would provide a ground for abridging the freedom of Willie Lyons to keep the job that she deeply wished to keep at the Congress Hall Hotel. The cardinal virtue in the kind of teaching offered by Sutherland is that it put the liberty of the person quite well beyond the tinkering, and the calculations, of this utilitarian morality. Sutherland was in a position then to explain why these controls on prices and wages were *in principle wrong* even if they should happen, on some occasion, to “work.”

III

The most grievous change produced by the “switch in time” was that it removed the teaching of Sutherland and his colleagues from the education of lawyers and judges. The policies themselves have proved, as I say, to be nuisances, but they may also be sporadic and they often generate their own correctives. The other enduring change, produced by the turning of the Court, has been far more momentous and far harder to undo: the expanded reach of the federal government under the Commerce Clause has produced by now a disfiguring of our economy and the conditions of justice.

On this problem, there had been a breakwall, a clear barrier, and its breach should have signalled a warning to all members of the political class. Yet that barrier seemed to escape the notice of conservatives as well as liberals. Through the nineteenth century and in the classic cases under the Commerce Clause, there was no need to speculate on the ways in which any local business could “affect” the currents of interstate commerce. There was no need to trot out clever arguments to show

that, though the stock market was on Wall Street, its transactions were felt across the borders of the states. There was no need for that kind of exercise, because the political class in the nineteenth century understood as the impediments to commerce mainly the barriers that were cast up by law, the impediments that were enacted explicitly into law in the separate states. The landmark case of *Gibbons v. Ogden* involved a monopoly that had been granted, by the state of New York, for all boats moved by fire or steam through the waters of New York. That monopoly had created an impediment to the operation of other boats, which had been licensed under an act of Congress to engage in the coasting trade and travel a route that connected New York and New Jersey.³⁷ In *Cohens v. Virginia* (1821), the case arose out of a law in Virginia that barred the sale of lottery tickets—in this case, tickets emanating from the District of Columbia.³⁸ A survey of the cases would reveal that all of the famous cases in the nineteenth century fit this pattern.

The trouble arose gradually as Congress was drawn, step by step—and not implausibly—into a chain of measures that moved beyond this clear test. There was, behind this movement, the motor of a moral concern. There was an earnest interest in dealing with the interstate movement of unsafe food or drugs, or of alcohol and prostitution. The Congress was drawn by a plausible interest in backing up the authority of the states as the states sought to address serious moral issues, but could not of course control the movement of goods and persons across the borders. In that spirit, Congress had been willing to provide a support to Mississippi in the 1830s, when that state had sought to ban the import of slaves. But these plausible motives could generate along the way their conceptual confusions. The agility of the Justices, and the contours of the Commerce Clause, were open to testing, then, in a telling way, by Ms. Effie Hoke, a woman who had not exactly made her impression on the world through reflections philosophic. Ms. Hoke had been convicted under a statute of 1910 for persuading or inducing a woman “to go in interstate commerce . . . for the purpose of prostitution.” But she managed to reach a vulnerable place in the rationale of the law when she made the simple point that neither she nor her protegee had been engaging in prostitution while *they were travelling* in interstate commerce. The Congress had not claimed, after all, the authority to legislate directly against prostitution in any of the states. The congressional statute sought to deal only

with that transportation that seemed to be an annex, or support, to the ongoing business of prostitution.

But Justice McKenna thought the plaintiff was being precious or overly clever in claiming a "right" to transportation, as though the activity were unaffected by the purpose that animated the travel. That argument, as he said, "urges a right exercised in morality to sustain a right to be exercised in immorality."³⁹

I will leave to another time—and to my book on George Sutherland—the task of starting to unravel this puzzle of the Commerce Clause. Justice Sutherland understood that the Commerce Clause did not pretend to be an econometric model for the flow of transactions in a modern economy. That clause provided a rough formula, rather, for the limiting of federal power. Sutherland's understanding of the Commerce Clause was a construction of political economy: it was an understanding of the way the economy might be viewed, or conceived, within a constitutional framework. As Sutherland pointed out, judges had long come to recognize that the most local of businesses in the United States might not escape the currents produced by markets that were growing more and more international. One of the savviest opinions, in this vein, was written in 1888 by Justice Lucius Q.C. Lamar in *Kidd v. Pearson*.⁴⁰ Lamar had taken note of the tendency to express dubiety, even in his own day, about the distinction between manufacturing and commerce. After all, manufacturing must be affected by commerce, because the sense of what to produce, and at what price, must all be formed in anticipation of a market. And that market may well extend beyond the state, or even the nation. As Lamar asked, is there a single business "that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest and the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago?" In that construal, every business would be affected by interstate commerce, and if the authority of the national government followed the reach of commerce,

the result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry.⁴¹

For Sutherland it was evident—as it had to be evident to any student of the American Founders—that the Commerce Clause was meant to mark off new, vital powers of the federal government, but also *limited* powers in a limited government. The national government would clearly have as much power as its mandate required to break down local barriers to the exchange of persons and goods. But it was also understood that the Commerce Clause could not provide a virtual license for the displacing of local government in regulating all varieties of business, manufacturing, and exchange.

That the distinction between manufacturing and commerce was problematic, that even the most local business was affected by currents in the world economy, was long evident. But the rough distinctions had the function at least of discouraging a critical overreaching by the national government, and once the restraint was removed, the test of "commerce" could no longer cabin the federal power. One of the original Labor Board cases, in 1937, involved a firm in Richmond that manufactured men's clothing. The company produced less than one half of one percent of the men's clothing produced in the United States. There was no evidence that the alleged discrimination against members of the union had brought the company to the threshold of a strike or the stoppage of production. If the reach of the law was to be measured in proportion to the "effect" on interstate commerce, then the "effect" in this case had to be reckoned as trivial or null.⁴²

But the law was cast in a form that was virtually indifferent to questions of scale. It could apply to the Jones & Laughlin Corporation, to a clothing factory, or even to a cattle ranch. Justice McReynolds raised, then, the questions that were still apt to rise, the questions that had not been dissolved by anything in the opinion written for the majority by Chief Justice Hughes. McReynolds wrote:

If a man raises cattle and regularly delivers them to a carrier for interstate shipment, may Congress prescribe the conditions under which he may employ or discharge helpers on the ranch? . . . May a mill owner be prohibited from closing his factory or discontinuing his business because so to do would stop the flow of products to and from his plant in interstate commerce? May employees in a factory be restrained from quitting work in a body because this will close

the factory and thereby stop the flow of commerce? May arson of a factory be made a Federal offense whenever this would interfere with such flow? If the business cannot continue with the existing wage scale, may Congress command a reduction?⁴³

These questions might have seemed ludicrous, or they might have yielded obvious answers before the rendering of this decision, in the *Jones & Laughlin* case. But McReynolds had not offered here a “parade of horrors,” a string of speculations bringing forth the most implausible cases. The questions he posed offered fair implications that could be drawn from the logic, or the doctrine, that was advanced by the Administration and accepted by the Court, as the ground of judgment in the case. Beyond that, McReynolds was not offering any speculations of his own, for the “theory” behind the law had been expressed in a remarkable preamble. That preamble proffered a justification for imposing, on private employers and their workers, a regime of unions, but the reasons it set forth had been exposed as morally empty by the Justices at the turn of the century. The argument reduced to these claims: the refusal, on the part of employers, to retain workers who were members of unions would lead to “strikes and other forms of industrial strife or unrest.” That unrest, in turn, would have the effect of “burdening or obstructing commerce.” This claim of conflict and disruption was enlarged with a few subsidiary claims, even more problematic as factual claims: the absence of unions would have the effect of “causing diminution of employment and wages” (something we know now to be patently untrue, as it should have been known to be untrue even then). That state of affairs in turn was said to diminish the flow of goods by diminishing the purchasing power of workers.⁴⁴ The legislation stipulated, then, as its ground of fact, propositions that were at best problematic, and very likely false most of the time.

But even apart from the arbitrary assertion of fact, the moral premise of the law had been open for years to the same decisive challenge: to say that people are moved to violence and disruption is not to establish that they are justified in their resort to violence. And by extension, therefore, their willingness to engage in violence could not establish a moral ground for appeasing these people, in order to satisfy their demands and avert their tendencies to violence. That much had been clear

to onlookers with even a faint sense of the rudiments of moral reasoning.

None of the so-called conservative or laissez-faire Justices had questioned the right of workers, as free men, to form into unions, or engage in any legitimate association. That question was never at issue here. The framers of the legislation sought to carry the day with rationales that evaded the main question—the grounds on which the federal government could reach the most private and local of establishments and impose a regime of unions. But in evading the question with formulas that were really off the main point, the Administration was opening itself to the most devastating critique through the simple device of showing that those formulas, or rationales, were substantively empty.

McReynolds is not remembered for a nimble wit, and yet the empty formulas put forth in this case as surrogates for jural reasoning were targets perfectly framed. At a distance of more than fifty years, with the partisan fires dampened, it may be possible to look at his dissenting opinion with more detachment and find in that opinion arguments that were exacting, apt—and unanswerable. The whole, elaborate construction of the law was built, after all, on this predicate: that the absence of unions posed a danger to interstate commerce through the threats of strikes and violence. The onset of a strike, and its attendant disruptions, was the “evil” for which this legislation would be justified as a “remedy.” And yet the law also sought to bar any interference with the “right” to strike. “Thus,” said McReynolds, “the Act exempts from its ambit the very evil which counsel insist may result from discontent caused by a discharge of an association member, but permits coercion of a non-member to join one.”⁴⁵

This ammunition was supplied by the drafters of the act themselves; for the refutation fell precisely into place as soon as the framers earnestly contended that it was *the avoidance of strikes* that defined the “public good.” If that were the end of the legislation, or the “good” it sought, there was no need to address that end in the most indirect way by dealing with all of the remote contingencies that *might* lead to a strike. As McReynolds remarked, that end could be addressed most directly by barring the strike itself. And the case for this position could only be deepened if the Justices accepted the theory of a “continuous stream of commerce,” for in that event, as McReynolds pointed out, the government could be

warranted in suppressing *any* strike that could act, even in a tangential way, to affect the stream of commerce.

From every angle, the rationale served up here under the Commerce Clause could justify the extension of the federal power to the smallest, most prosaic enterprises. That point was confirmed with a dramatic finality—and to our enduring disbelief—five years later in the improbable case of *Wickard v. Filburn*. On that notable occasion, the government was sustained when it sought to punish Mr. Roscoe Filburn, a farmer in Ohio for the misdemeanor of setting aside a portion of his wheat for the consumption of his own family. In a line that would resound over the years in the law reports, Justice Robert H. Jackson would “explain”:

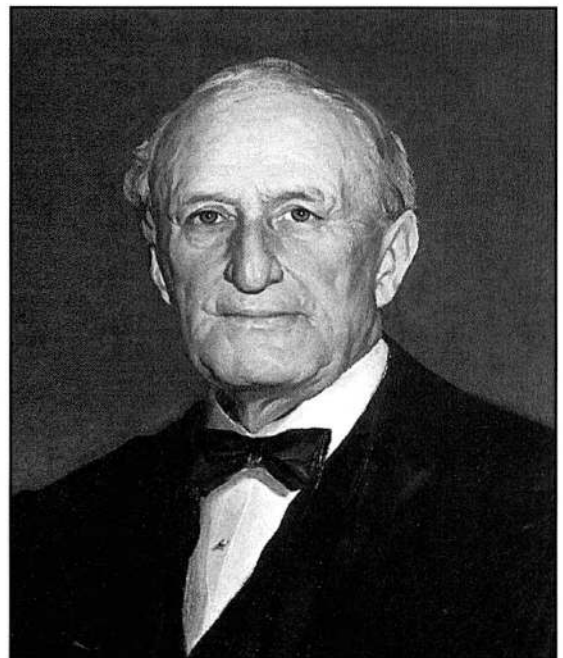
That appellee’s own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.⁴⁶

That passage would be cited by the Supreme Court when it had to explain how the Civil Rights Act of 1964 would reach Ollie’s Barbecue in Birmingham, Alabama. Drawing on the same doctrines established in these cases, Professor Laurence Tribe testified before a Senate committee in 1992 and argued that the Congress could legislate, under the Commerce Clause, to guarantee the right to an abortion. Once again, the Commerce Clause was capacious enough to cover all. The decision on abortion was once heralded as the most private of decisions, a decision that could not even be shared with the father of the child. But now apparently the interest of the whole community was engaged in the freedom of any particular woman to gain access to an abortion clinic. It was previously thought that states violated the Commerce Clause when they *impeded* the flow of traffic; but now it was alleged that the laws of the state could offend the Constitution if they might *encourage* movement on the highways. As Tribe argued:

[L]ocal or statewide restrictions on reproductive freedom would likely force many women to travel from States that have chosen to erect legal barriers to contraception or to abortion, to States or foreign nations where safe and legal procedures are available. Indeed, the years preceding *Roe* and

Doe saw precisely such a massive interstate migration, as hundreds of thousands of women travelled from restrictive States to those where abortions were more freely performed. In 1972, for example, almost 80 per cent of all legal abortions in this country took place in just two States: New York and California.⁴⁷

The state of New Hampshire permits a cluster of “factory outlets” near the border of Massachusetts, and the result is a clogging of the highways on Sundays. Could the federal government now intervene to “correct” these decisions on the placement of retail stores? Of course, it never seemed to occur to the partisans of the Freedom of Choice Act that the formulas of the Commerce Clause would work in a strikingly different direction if one came to the problem with a set of assumptions, quite different from theirs, about the “persons” who were the victims in these cases and the bearers of rights. If one supposed for just a moment that the victim might be the child who was dismembered or poisoned in these surgeries, the Commerce Clause could be used even more persuasively on the side of the unborn child. Even if we stick to the non-moral formulas of the Commerce Clause, it could be contended, after all, that an abortion threatens to interfere most emphatically with the right of the fetus to travel in interstate commerce! But with the arguments that became familiar in the Civil Rights cases, the en-



gement of the Commerce Clause would become even deeper: it was postulated, for example, that discrimination against black people would discourage blacks from travelling between the states, and from that point the inference was drawn that the shortfall in traffic would diminish the orders for meat, linens, silverware—in short, that it would have a vast, depressing effect on commerce. In contrast, we need not depend so wholly on speculation when it comes to abortion, for we know fairly precisely the number of abortions that are performed each year. And by the application of the same form of reasoning, the argument would flow here even more powerfully: with about 1.3 to 1.5 million abortions each year, it is manifestly the case that the current volume of abortions is having a vast, depressing effect on the demand for bassinets, baby food, toys, first cars, college educations, and weddings. And that says nothing of the production and revenue lost from a cohort of over a million new taxpayers who would start to come on the scene, in waves, eighteen years hence.

Even liberal commentators on the law have treated with a certain mirth the reigning fictions of the Commerce Clause. Conservative critics have railed against these doctrines and marshalled their best arguments, but without much effect so far. And yet the recent experience of our jurisprudence suggests that even doctrines long settled for judges may be overturned in a fortnight when they suddenly seem to collide with the “right to an abortion,” which seems to be regarded more and more as a touchstone. We might find ourselves producing the most pronounced turnabout on this matter, not by summoning more arguments against the use of the Commerce Clause, but by showing how the doctrines of the New Deal would work even more powerfully to curb, or even deny, the right to an abortion. With only the slightest alterations—indeed, with only the filling in of the blanks—Justice Jackson’s argument would have a rather unsettling application to that woman, in the isolation of her privacy, who is contemplating an abortion. Jackson’s argument then could unfold itself in this way:



In his dissent in the *Jones & Laughlin* case, Justice James C. McReynolds (left) took one step further the reasoning that unions are necessary for the public good because they prevent strikes and violence. If strikes are undesirable, he argued, then why not ban them entirely? Pictured above are Jones & Laughlin steel mills in Pittsburgh operating at night.

That your own abortion by itself seems to affect only you, is not enough to remove you from the scope of the federal regulation. For when your own abortion is joined with those of others, and when those others begin to number over a million each year, it becomes evident that you are contributing to a stream of activity, and to a pattern that becomes unmistakable in the large: the destruction of life on a sobering scale; the removal, from the population, of a massive cohort that would add each year, in the future, one and a half million new taxpayers, new workers, new people to fuel the economy and support our social services.

But then surely this implication could not have gone unnoticed all this time: for surely it must have been apparent long ago that nothing in the jurisprudence of the New Deal would have supported our “new” jurisprudence of privacy and abortion, the jurisprudence that began with *Griswold v. Connecticut* and with *Roe v. Wade*. Justice Hugo L. Black, the first Roosevelt appointee, dissented in the *Griswold* case on contraception. Black was forever reluctant to interfere with the judgments of legislators, elected by the people, unless he could act on some mandate, made explicit in the Constitution or the Bill of Rights. For Black and the jurisprudence he described there would have been no question about the competence of a state legislature to decide on just when the community could cast the protections of the law around unborn children.

The jurisprudence of privacy and abortion could be advanced only by invoking standards of justice that do not depend on the votes of majorities. They must appeal, in short, to the “logic” of natural rights. But the notion of natural rights carried also the awareness of moral truths. The professors of the new liberal jurisprudence would install the logic of natural rights, as a kind of lever in the hand of judges, but at the same time they would preserve the freedom to reject the existence of moral truths. Once again, Professor Tribe is the representative figure: he would strike down the judgments of majorities in the name of a higher good, but he would claim that propositions about right and wrong rest on nothing more in the end than convictions “powerfully held.”⁴⁸

To establish the new jurisprudence of privacy and abortion, the heirs of liberalism have had to throw over the heritage of the liberal Justices of the 1930s.

That much has been clear to them. But what seems to go remarkably unrecognized, or unacknowledged, is the fact that the current liberal project in jurisprudence requires, as its jural ground, the arguments of those Justices, like Sutherland and McReynolds, who resisted the New Deal. The clues should have been impossible to miss: the proponents of a “right to an abortion” have found the ground of that right in a supposed “right of privacy,” which was established, in their construal, over four or five cases, and the two leading cases in the series were *Meyer v. Nebraska* (1923)⁴⁹ and *Pierce v. Society of Sisters* (1925).⁵⁰ Both decisions were written by the cantankerous Justice McReynolds.

But this is not to say, of course, that Sutherland and McReynolds were bound to approve of “the right to an abortion.” Nor does it suggest that an understanding of “natural rights” would entail, or even support, the right to abortion, or any of the other claims spun out of *Griswold v. Connecticut*. Those who know my own work will know that I have made already a rather strenuous effort to show that a more demanding moral sense would reject all of those claims.⁵¹ It is simply that the argument for a “right to abortion” requires an appeal to what may be called at least the “logic of natural rights”: It requires an appeal to an understanding of rights that does not depend on the positive law of the Constitution or on the opinions of the majority reflected in legislatures. And that kind of an understanding cannot be drawn, as I say, from Justice Black and the jurisprudence of the New Deal. It requires at least the ground of the jurisprudence supplied by the Justices who were resisting the New Deal. But if that connection is ever brought to the point of recognition—if the Four Horsemen were suddenly seen as the architects of the jural structure that produced the rights of privacy and abortion—then we should not be surprised to see reputations dramatically rehabilitated overnight. We might awake one day to discover that Sutherland, McReynolds, Butler, and Van Devanter were being celebrated, even lionized, in the law schools.

I would celebrate them myself, but beginning, as they would have begun, in a sober way: they were, altogether, not a flashy crew, but without vast pretensions they managed to produce a brand of jural reasoning that was tough-minded, not squishy. They were not overly schooled, and yet they showed depths of learning. They probably could not have told us whether they were natural lawyers or positivists, but they showed us how a Court that was not overflowing with genius nevertheless managed to do a de-

cent jurisprudence of natural rights. In my own reading, our law would be more rightly ordered if it were ordered again to their understanding: it would not be so pervasively dependent on the kinds of fictions—like the fictions of the Commerce Clause—that the urbane cannot take seriously, even though they dutifully mouth the words. The law would be measured by an understanding that sees the world as it is, and yet an understanding that depends on a far more rigorous moral sense, and even a faithfulness to the understanding of the Framers. In short, we would have, in my judgment, a wiser jurisprudence and a more just law.

I must add that I take all of this as a serious prospect, since I am no more an historicist than Sutherland and his colleagues. That is, I take seriously the notion that these writings may be understood, and may persuade people, even across the generations. The judges left us a collection of savvy, urbane writings, forming a handbook of lessons on preserving a regime of law. They would not have done that without the conviction that any reader, in another generation, could read those opinions and learn the lessons they sought to teach. Of course, any working lawyer could probably tell us that we do not read Sutherland and McReynolds as often today for the simple reason that they lost in some of those signal cases on unions and the minimum wage. Lawyers and judges would be more likely to read them if their opinions were installed once again as the law. But then, we know that everything is connected: those opinions could be installed again, quite persuasively, as the reigning doctrines in our law, if we could induce lawyers and judges to begin reading them seriously again.

What they might find, to their mild surprise, are writings that are not only urbane, engaging, and luminous, but that accord more surely with the world as they know it. When we think back to the saga of Jacob Maged in Jersey City, or to the schemes of price controls and subsidies under the NRA, or to the system of permits in Oklahoma, it should be clear to us that the world we inhabit is not the world as it was envisaged by the Progressives of the 1930s or the planners of the New Deal. The world we inhabit is the one that Sutherland, McReynolds, and their colleagues preserved for us, and we must take seriously the notion that they preserved it: that is, these cases offered serious measures, enacted into law, with the purpose of altering, radically, the system of personal freedom and the relations of persons to their government. I, for one, take seriously the pos-

sibility that, if these decisions had gone the other way, they would have been confirmed, and deepened, in practice. As Lincoln used to say, talented and ambitious men would not have been wanting. There was a rich field of constituencies, ready to be formed and protected with special regimens and monopolies under the law, and careers to be made by political men who were sensitive to the opportunities cast up by these new modes of directing the economy through political management. I take seriously then the notion that the world we know was preserved for us because Sutherland, McReynolds and their colleagues made a decision, at a particular time, that it *should* be preserved. But more than that, they took care to explain the reasons, with a dash of imagination and wit, and those reasons ran back to the first principles of this constitutional order. The Justices reminded us then of the reasons that commanded our respect and that explained why this constitutional order merited our efforts to preserve it. In that handiwork of the judicial craft, they left us the thread of connection, both striking and melancholy, between their day and ours: we are the beneficiaries, who continue to inhabit the world that Sutherland and his colleagues preserved for us, but as the recipients of gifts tendered long ago, we no longer remember the reasons.

Endnotes

¹ See *The New York Times*, April 21, 1934, and the *Washington Post* editorial page, April 22, 1934.

² See the Borah Papers, Library of Congress, Container #139, Folders on Small Business under the NRA, 1933-34.

³ See the brief for the government, pp. 44-45, reprinted in *Landmark Briefs and Arguments of the Supreme Court of the United States*, ed. Philip B. Kurland and Gerhard Casper (Arlington, VA: University Publications of America, 1975), pp. 597-784, at 654-55. The brief set forth this theory quite solemnly as though it described facts quite as settled as the laws of nature: "The picked-over and rejected poultry had to be sold later at sacrifice prices and this poultry, when resold by the retailer at a cheap price, forced the market down and tended to break the general price structure."

⁴ *Ibid.*

⁵ Oral argument in the *Schechter* case, printed in *ibid.*, pp. 836-37.

⁶ 297 U.S. 1.

⁷ *Ibid.*, at 62.

⁸ See *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837) at 617: "Can the legislature have power to do that indirectly, which it cannot do directly?"

⁹ See *U.S. v. Butler*, *supra*, note 6, 26-27 [oral argument of George Wharton Pepper], and 54-56.

¹⁰ See *ibid.*, at 72.

¹¹ *Ibid.*, at 76.

¹² 295 U.S. 555 (1935).

- ¹³. 293 U.S. 388.
- ¹⁴. *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), at 310-311 (dissenting opinion).
- ¹⁵. *Ibid.*, at 282.
- ¹⁶. See the mention of his brief, for example, in *Muller v. Oregon*, 208 U.S. 412, at 419-20n. (1908), and the reprinting of the brief in **Landmark Briefs and Arguments of the Supreme Court of the United States**, ed. Philip B. Kurland and Gerhard Casper (Arlington, VA: University Publications of America, 1975), Vol. 16, pp. 63-178.
- ¹⁷. See, for example, David P. Bryden, "Brandeis's Facts," 1 *Constitutional Commentary* (Summer 1984), 281-326.
- ¹⁸. Professor Thomas McCraw, of the Business School at Harvard, has held back decorously from drawing harsh judgments, but his own, recent analysis of Brandeis brings out rather sharply the features that marked Brandeis' understanding of economics and business; and that understanding, concentrated in this portrait, reveals its mediocrity. See McCraw's chapter, "Brandeis and the Origins of the FTC," in his **Prophets of Regulation** (Cambridge: Harvard University Press, 1984), pp. 80-142. See also his section on Brandeis in **Regulation in Perspective** (Cambridge: Harvard University Press, 1981), pp. 25-55.
- ¹⁹. *New State Ice Co. v. Liebmann*, *supra*, note 14, at 292.
- ²⁰. *Ibid.*, n. 10, p. 288.
- ²¹. *Ibid.*, p. 290, notes 16 and 17.
- ²². *Ibid.*, at 282.
- ²³. *Ibid.*, at 299-300.
- ²⁴. For a fuller statement of this argument, see Arkes, "Who's the Laissez-fairest of Them All?," *Policy Review* (Spring 1992), pp. 78-85.
- ²⁵. *New State Ice Co. v. Liebmann*, *supra*, note 14, at 273.
- ²⁶. *Ibid.*, at 278-79.
- ²⁷. Quoted in Arthur Schlesinger, Jr., **The Politics of Upheaval** (Boston: Houghton Mifflin, 1960), p. 457. [The quote comes from a letter of Powell's to J.N. Ulman, Jan. 27, 1937, in the Powell Papers.]
- ²⁸. Speech of George Sutherland at the Woman Suffrage Meeting, Belasco Theatre, Sunday, December 13, 1915, pp. 3-4. Sutherland papers, Library of Congress.
- ²⁹. *Ibid.*, p. 7.
- ³⁰. *Adkins v. Lyons* 261 U.S. 525, at 553 (1923).
- ³¹. *Ibid.*, at 562.
- ³². *Ibid.*, at 540.
- ³³. *Ibid.*, at 556.
- ³⁴. *Ibid.*, at 555-556.
- ³⁵. *Ibid.*, at 557.
- ³⁶. *Ibid.*, at 558-59.
- ³⁷. 22 U.S. 1, at 1-2 (1824).
- ³⁸. 19 U.S. 264 (1821).
- ³⁹. *Hoke v. United States*, 227 U.S. 308, at 321 (1913).
- ⁴⁰. 128 U.S. 1.
- ⁴¹. Justice Lamar, in *Kidd v. Pearson*, cited by Sutherland in *Carter v. Carter Coal Co.*, 298 U.S. 238, at 299.
- ⁴². See *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, at 87, and see also 88-93, for more details of the case.
- ⁴³. *Ibid.*, 97-98.
- ⁴⁴. See the preamble, reprinted in the text of Chief Justice Hughes' opinion in *ibid.*, at 23n.
- ⁴⁵. *Ibid.*, at 100.
- ⁴⁶. *Ibid.*, at 127-8.
- ⁴⁷. See Tribe's statement in, "The Freedom of Choice Act of 1991," Hearings of the Committee on Labor and Human Resources, U.S. Senate (May 13, 1992), pp. 31-36, at 31.
- ⁴⁸. See Laurence Tribe, **Constitutional Choices** (Cambridge: Harvard University Press, 1985), pp. 5, 6, 8.
- ⁴⁹. 262 U.S. 390.
- ⁵⁰. 268 U.S. 510.
- ⁵¹. See my **First Things** (Princeton: Princeton University Press, 1986), Chs. XV-XVI.

The Nine Justices Respond to the 1937 Crisis

William E. Leuchtenburg*

At about one o'clock on the afternoon of February 5, 1937, a curious drama unfolded in the ornate chamber of the Supreme Court of the United States, then at the start of only its second full year in its marble palace. Many times over the past seventeen months the courtroom had been filled to capacity with long lines stretching far down the corridor of hundreds of would-be spectators doomed to disappointment. On this day, however, the room was half empty, for the Justices were hearing argument on a case of no enduring significance. Only in retrospect would it be clear that this obscure litigation provided the setting, from the perspective of the Justices, for the beginning of the most momentous crisis in the entire history of the Supreme Court.

As a New Jersey lawyer made his presentation, the clerk of the Court slipped behind the Chief Justice of the United States, Charles Evans Hughes, and laid a set of mimeographed pages in front of him. Hughes was such a stickler for propriety that it was said that, to maintain precise time allotment during argument, he had once interrupted counsel in the middle of the word "if." But on this occasion he shifted his attention away long enough to run his eyes over the document, and, after asking the attorney a question, returned to perusing it. When he completed his reading, he seemed restless. Looking

exceptionally solemn, he passed the papers on to Justice Willis Van Devanter, who quickly took in what they contained and grimaced. At the lectern, the New Jersey lawyer, bewildered by what was going on but sensing tension on the dais, paused in his oration.

His confusion soon became worse, for from behind the draperies popped out a towheaded page, who set what appeared to be the same sheaf before each of the other Justices. Though he tried to be as unobtrusive as a ball boy at Forest Hills, no one could recall such a trespass in the midst of argument ever having happened before. Benjamin N. Cardozo quickly skimmed the first sentences, then set the document aside, but George Sutherland, stroking his fine beard, read it all the way to the end, as did Harlan Fiske Stone. The broad-shouldered Pierce Butler hunched forward to study the handout closely, then let out a quiet laugh, in which he was joined by Owen J. Roberts, who had riffled through it but had stopped abruptly to scrutinize one paragraph intently while he rubbed his chin. Louis D. Brandeis, as soon as he realized what the document was about, turned on his desk lamp to give it full attention. In the courtroom, spectators could see his crown of white hair silhouetted in the light. After he was done, he settled back thoughtfully, then, after some reflection, pored

over it again, now and then scratching his ear. On concluding his second reading, he turned toward Van Devanter, who, at one point, waved his arm as if to indicate he had no patience with such nonsense.¹

At the end of argument, the nine Justices rose and vanished behind the curtains without the New Jersey lawyer or anyone else in the courtroom comprehending what had just transpired. As the authors of the first contemporary account wrote:

A tiny incident it would have been anywhere else, but that strange chamber, so like the interior of a classical icebox decorated by an insane upholsterer, has a routine which seems to have been fixed at the moment of the creation of the world. The justices' brief inattention was as striking as a small noise in a very large, very silent empty space.²

It was in this impromptu fashion that the Jus-

tices first learned of an extraordinary message from President Franklin D. Roosevelt that only minutes before had been read on the Senate floor. Alerted to what had happened, a Court attendant had raced across the plaza to the Capitol to obtain copies of a state paper that seemed too important to withhold from the Justices until the close of argument. In that communication, the President recommended legislation providing that when a federal judge at the age of seventy and a half did not resign or retire, a President be empowered to name an additional judge. Though Roosevelt, contrary to what is often said, never called the Court "the nine old men," that was the title of a best seller and the Court was, in fact, the most elderly in history. Since there were six Justices over seventy, the President would be able to add that many appointees to the Supreme Court, and scores more to the lower federal courts.

Under the best of circumstances, the Justices would have been shocked by such a proposal, but the rationale FDR offered added greatly to their dis-



The Justices learned of Franklin D. Roosevelt's Court-enlargement plan when a Court attendant distributed copies of the announcement to them during oral argument. The Court initially remained silent on the subject, but, as this Berryman cartoon shows, the public suspected immediately that the plan was a way of packing the Court with Justices favorable to the President's New Deal programs.

comfort. Instead of basing his recommendation on the hostility of the Court to New Deal experiments, he maintained that his scheme was justifiable because the federal courts had failed to keep abreast of their dockets, a situation, he said, that “brings forward the question of aged or infirm judges—a subject of delicacy and yet one which requires frank discussion.” He went on: “In exceptional cases, of course, judges, like other men, retain to an advanced age full mental and physical vigor. Those not so fortunate are often unable to perceive their own infirmities.”³ As the Justices first read the message on that afternoon, those words must have stung. The President of the United States was saying both that they were behind in their work, and hence failing to dispense justice, and that they were too old for their jobs. Moreover, the plan would have an impact on more than the six men directly affected. If Congress adopted the legislation, its action would be understood to be a vote of no confidence in the present membership of the Court, a disgrace with no precedent in the history of the republic.

All of Washington watched to see how the Justices would respond. When the Court convened on the following Monday, they showed signs of the jitters. Brandeis emerged through the curtain ahead of cue, then jumped back—like an untried actor with stage nerves on opening night—and the Chief Justice released the orders of the Court in the wrong sequence and thirty minutes late. “Veterans around court said they never saw such irregular day,” the Scripps-Howard columnist Raymond Clapper noted in his diary. “Potter, press room clerk, said, ‘My God, the Court is punch drunk.’”⁴

In the days immediately following the President’s electrifying message, the Justices maintained a public posture of stony silence. Reporters invaded Justice Sutherland’s office to seek comments from him and from Justice Roberts, but neither would say a word. When NBC informed Hughes that its facilities were “available for any member of the Supreme Court to discuss the proposal made by the President today,” the Chief Justice’s office wired back that “he thanks you but he does not care to take advantage of it.” A young, then little-known, CBS executive in Manhattan tried a subtler approach. He phoned Hughes’ office for an interview, but would not divulge the topic. Hughes, though, knew well enough what CBS had in mind. “I gave your message to the Chief Justice,” Hughes’ secretary informed Edward R. Murrow. “He does not wish to put you to the inconvenience of coming to Washington if the matter

about which you wish to see him is one which he could not in any event consider.” To wall off the Justices from being badgered, the Court marshal, on the day after the President’s announcement, issued an order barring the press from going through the bronze doors to the private offices save by authorized appointment.⁵

Neither the Justices’ determined silence nor the marshal’s order deterred one newsreel outfit. On February 13, it announced: “Roosevelt’s plan to change the Supreme Court has become the greatest public issue since slavery. Pathe News brings you this exclusive statement on the Supreme Court itself by Chief Justice Hughes.” There then came a long sentence from Hughes that was altogether unexceptionable, followed by comments about Court-packing from men on the street. In fact, the Chief Justice had said nothing about FDR’s proposal; the sentence was lifted from a speech he had delivered six years earlier on the occasion of the unveiling of a bust of Roger B. Taney in Frederick, Maryland. Outraged by this deceitful contrivance, Hughes turned to the FBI for help, and, under pressure from J. Edgar Hoover, Pathe News withdrew the offending reel. “It was a pleasure to be of assistance to you in this connection,” Hoover told the Chief Justice, “and if at any time the Bureau can be of any service, please do not hesitate to call upon me.” Hughes responded: “You came to my aid in a most prompt and efficient manner and I warmly appreciate your action.”⁶

The public silence of the Justices made it difficult for the country to know what they thought of the bill. Long before Roosevelt was elected, a conservative foursome had made clear its disapproval of liberal legislation, and these Four Horsemen—Pierce Butler, James C. McReynolds, George Sutherland, and Willis Van Devanter—could safely be counted among the fierce opponents. In the early years of the New Deal, they were in a minority but in the spring of 1935, Roberts had joined them and he had remained with them through the final decision of 1936, which struck down the New York state minimum wage law for women. Roberts, too, though young enough not to be immediately affected by the measure, rejected it as a blatant effort at Court-packing. A prominent Republican noted in his diary:

When the men were upstairs after dinner, Owen Roberts was very interesting on the subject of the Supreme Court. . . . Owen had asked me before dinner whether I did not

consider it pretty foul for [James M.] Landis just after his election as Dean of the [Harvard] Law School to be taking such an active part in pushing the President's proposal. I said that the lack of good taste was unpleasant but that what troubled me most was the fact that I did not believe any man could be really intelligent and really honest also if he supported the proposal. Owen agreed that such a conclusion was inescapable.

On some rulings, notably the decision invalidating FDR's farm program, these five had found an ally in Chief Justice Hughes, who, it has been said, "with his religion of the Court's prestige, detested and feared" Roosevelt's scheme.⁷

The White House circle had much higher hopes of the remaining three. Again and again in 1936, Brandeis, Cardozo, and Stone had registered dissents from decisions by the Court. Especially vitriolic had been Harlan Fiske Stone. In the farm law case, he had assailed Roberts' "tortured construction of the Constitution," and in the minimum wage case he had accused the majority of indulging "personal economic predilections." Nonetheless, all three of the so-called liberal Justices, though in varying degrees, disliked FDR's proposal.

In presenting the plan, Roosevelt had been particularly sensitive to the need not to alienate Brandeis and his many followers, who had admired his career as a progressive and who remembered the shabby effort to deny him a seat on the Court in 1916, in part because he was a Jew. Consequently, Tommy Corcoran, who was a Brandeis protégé, got authorization from the President to give the seventy-nine-year-old Justice advance warning. Corcoran told a New Deal official sometime afterward:

I crashed the sacred robing room—he walked with me in the hall—while the balance of the Court filed by not knowing of the bombshell that was awaiting them. Brandeis asked me to thank the President for letting him know but said he was unalterably opposed to the President's action and that he was making a great mistake.⁸

The Justice's disapproval rested on a number of considerations. Brandeis, the Washington correspondent Marquis Childs remembered, "was convinced that there was no problem if we'd only wait a little longer. He was convinced that with death and resig-

nation the nature of the Court would change, and that this [plan] was very wrong, that it threatened a very important institution to which he'd given so much of his life. . . . This was a very wrong and grievous thing to do." In like manner, Robert H. Jackson later said of Brandeis: "He would have no hands laid upon the institution from the outside. It mattered not that the outside hands would in the main uphold his views and would rebuke those with whom he had long and often disagreed. Brandeis valued its independence of decision even more than rightness of decision."⁹

Brandeis, and even more his wife, Alice, let friends know that he abhorred the plan with its obnoxious stress on the shortcomings of the elderly. In one conversation, the Harvard historian Arthur M. Schlesinger, Sr., recalled, Brandeis "expressed the view that the conservative mentality is a product of genes rather than of years, that in fact age, with its accompaniment of financial security, tends to emancipate judges from the economic pressures and illiberal predilections which may have conditioned their previous thinking." Despite the attempt to reassure him, he resented FDR's emphasis as a personal assault, for he was the oldest man on the Bench. "He is not so bitter against the President, himself, as he is against those who sold him the idea," reported the columnists Drew Pearson and Robert Allen. "Brandeis thinks the President was sold a bad bill of goods."¹⁰

Cardozo, too, deplored the proposal, though he acknowledged that Roosevelt had not acted without reason. One day, on watching with pleasure a young friend turning a somersault in his apartment, he remarked, "It might be helpful if you would come down and teach some of my colleagues to do that in their judicial decisions." He went on to say that one objection to FDR's plan was that fifteen Justices would be too many. There were days, he said, when he believed nine were too many. But he divulged to his clerk that he was "too old and too much of a judge" to approve of the plan. Furthermore, Cardozo "shares the hurt of Brandeis, his dear friend," one journalist reported. "Off the record and not for transmission," Cardozo confided, "I am with you altogether in opposition and amazement." He added, "These are exciting days for aged judges," and then, "I must try to prove my judicial quality by not writing all I feel."¹¹

Both in his attitude and in his behavior, Stone had by far the most complex response of any of the Justices. Administration officials noised it about that

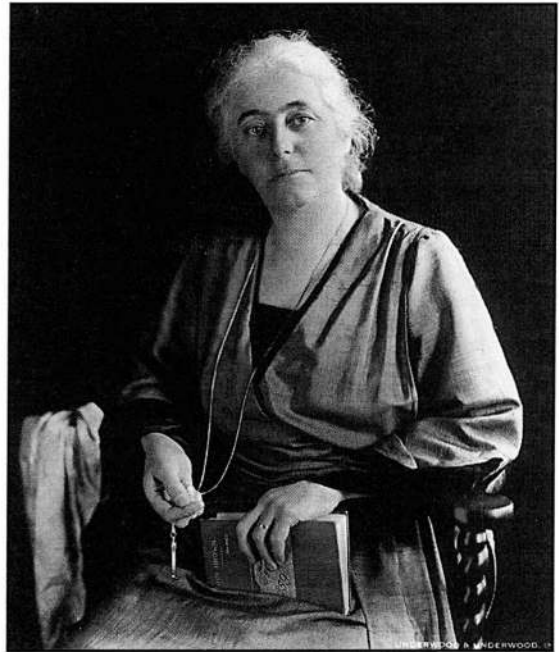
when the plan went through, Hughes would resign and the President would then appoint Stone to the Chief Justiceship, a rumor that opponents of the bill suspected was designed either to soften up Stone or to insinuate that he favored the scheme. In a fire-side chat in March, Roosevelt further fostered that speculation by twice quoting Stone's 1936 dissents in support of the proposition that "the Court has been acting not as a judicial body, but as a policy-making body." Stone, said a writer in a national magazine, "makes no secret of the fact that he thinks the court is getting 'just what it asked for.'" In late February, the Justice wrote one of his sons:

I am not unmindful of the fact that the Court itself must bear in some measure the responsibility for this and other radical proposals. A large part of the people, including some of the most intelligent, feel that something must be done to overcome the unnecessary narrowness of some recent decisions. . . . Many feel that the process by amendment is too slow and uncertain to solve a problem which they regard as immediate and pressing.

When Assistant Attorney General Robert H. Jackson testified on behalf of the bill before the Senate Judiciary Committee, Stone called it "a powerful exposition," which had "too much truth in it for the comfort of those responsible for the Court's action in recent years."¹²

Stone rejected the plan, however, in part because he resented the old age-crowded dockets rationale as unfair and false. "The truth is that the Court doesn't need any speeding up and the members of it, young and old, are as able to do their work as any group of judges in the world," he maintained. In late February, Stone, who had been ill, informed Felix Frankfurter, "I have done my usual stint of work this recess without any feeling of undue fatigue, and in fact, now that I have gotten it going, I think my intellectual apparatus will work as well as usual, and ought to keep running for sometime past seventy, although what I shall do with it after then is perhaps a question."¹³

Furthermore, Stone did not share FDR's sense of crisis. "I do not think the country is likely to go to pot in the next two years whether any of the desired legislation is passed," he said. Stone's biting dissents had led commentators to refer to him as a "liberal" judge well disposed toward the New Deal



Justice Louis D. Brandeis and his wife, Alice (above), let friends know that they abhorred the plan because it stressed the shortcomings of the elderly. Mrs. Brandeis asked the daughter of Democratic Senator Burton K. Wheeler to inform him that she agreed with his opposition to the proposal.

when, in fact, he was a New England Republican, a former Coolidge official who disfavored much of what FDR was doing and was "liberal" only in the sense that he believed that the Constitution left legislatures wide discretion. He continued:

If nothing is done, by the end of that time I am convinced that much of the questions which agitate us now will have disappeared and people will wonder that there was much agitation to make over the court in order to get quick action on matters which will ultimately come about without undue pressure.

Stone could be so detached because he knew something of great importance that he could not divulge even to his sons—that one of the Justices had already switched. In mid-March, he summed up his position in reply to a letter from Frankfurter: "It gives me a grain of comfort in these trying days but, after all, one cannot take much satisfaction in saying 'I told you so,' when the initial folly he tried to avoid is overtaken by another."¹⁴

Though, like the other Justices, Stone professed to have taken a vow of silence, he did not keep it very well. In mid-February, he told the political sci-

entist E. S. Corwin, "In the present posture of affairs I think that the less I say the better," but in the very next sentence offered his views. Only a day later, after an intimate dinner with the Stones, Gifford Pinchot recorded in his diary: "Very interesting talk about proposed legislation, in the course of which he expressed himself with amazing frankness. He is emphatically opposed." He was especially unrestrained with Irving Brant, head of the editorial page of the St. Louis *Star-Times*, who, Stone, believed, "writes about the Constitution and Court matters with more grasp and understanding than any other editorial writer in the country." In late February, he informed Brant:

If the change should be made I fear that there would be a loss of efficiency in the work of the Court. The intimate conference . . . would be increasingly difficult with increasing size. It would be a serious loss to the continuity and thoroughness of the work if every member of the Court did not participate in a case, as has been the practice of the Court throughout its life.

Subsequently, he wrote Brant, "It would be a disaster to increase the number of the Court over its present number, and I very much hope that it will not occur."¹⁵

Whatever Stone divulged, Brant passed on right away either to the President or to Tommy Corcoran. At one point Brant reported to Roosevelt:

All members of the court are opposed to having fifteen members because it would destroy intimacy of contact and interchange of thought in conference. The liberals believe nine is preferable if all are able and willing to do their share of opinion-writing. Eleven would make opinion-writing easier but would injure the work of the court in conference. I think the preference for nine is definite. The chief fear of the liberals is that the prestige of the court will be damaged if the transition to liberal control is forcible.

In the opening paragraph of his letter, Brant cautioned the President against trying to figure out his source, since "deductions as to origin would be misleading," but fifteen years later Brant recorded for posterity that the term "liberals" was a camouflage for the reality that he was, in fact, conveying the views of Jus-

tice Stone.¹⁶

Early in March, Congressman Emanuel Celler, a high-ranking member of the House Judiciary Committee who had usually been someone Roosevelt could count on, told a national radio audience that there was no need for FDR's plan because within the next year two Justices would resign. He had gotten that information, he said, from "a distinguished jurist of highest authority—he shall be nameless." His source, too, was Harlan Fiske Stone, who had no hard evidence on which to base such an assertion but was subtly undermining the President while doing nothing overt to impede his ultimate path to the Chief Justiceship.¹⁷

Stone was not the only Justice to disregard the vow of silence. On February 8, Hughes departed from precedent by permitting himself to be drawn into denying that he would recommend compulsory retirement of judges at seventy-five or that he approved of enlarging the Court to eleven. Considerably more indiscreet was Justice Sutherland. When Senator Josiah Bailey of North Carolina denounced the President's plan in a radio address, Sutherland wrote him:

I am unable to refrain from breaking the silence which is supposed to enshroud the judiciary to tell you how deeply your words have moved me. I am quite sincere in saying that in my judgment there has never been a better speech, more timely made, or in which logic, fine sentiment and eloquence have been more beautifully blended.¹⁸

In the spring, Sutherland had his say again in writing one of the witnesses before the Senate Judiciary Committee, Henry Bates, Dean of the University of Michigan Law School:

The world is passing through an uncomfortable experience and in many respects will have to retrace its steps with painful effort. The tendency of many governments is in the direction of destroying individual initiative, self-reliance, and other cardinal virtues which I was always taught were necessary to develop a real democracy. The notion that the individual is not to have the full reward of what he does well, and is not to bear the responsibility for what he does badly, apparently, is becoming part of our present philosophy of government.

In like manner, he wrote Senator Tom Connally about a speech the Senator had given to the Texas legislature:

What you say about the necessity of preserving the dual form of government I think touches the most vital point in the whole controversy. If the powers of the states are once broken down, either by surrender on the part of the states or invasion by the federal government, the United States which the framers and makers of the Constitution understood they were creating will have disappeared.¹⁹

Neither Sutherland nor Hughes, though, could match McReynolds. Justice McReynolds went so far as to suggest to Herbert Hoover's Washington agent that the former President could undermine FDR's scheme by contacting a San Francisco lawyer who had been pointing out to Catholic members of the U.S. Senate that the Court in the past had rendered decisions furthering the interests of the Church. The press was unaware of these behind-the-scenes maneuverings, but on March 16 McReynolds injected himself into the fight in a curiously public fashion when he went to the annual reunion of his fraternity at a Washington hotel. Guessing that the Justice might be speaking at the affair, one of his fraternity brothers, an Associated Press reporter, saw to it that he had a pencil in the pocket of his dinner jacket as he set out for the Carlton. The banquet committee welcomed both him and another journalist who was not a member but who had been sent there by his editor on a hunch, and McReynolds, before the speaking began, posed for cameramen. He must have known that any remarks he made would go beyond the room.²⁰

McReynolds had spoken at the reunion in past years mostly about fraternity matters, but this time, to the surprise of the brothers, he indicated he might say something about the Court question, and lawyers and others in the room egged him on. To this gathering of about 125 people, McReynolds, his voice rising to a high pitch, said: "The evidence of good sportsmanship is that a man who has had a chance to present a fair case to a fair tribunal must be a good sport and accept the outcome." The President of the United States, he implied, was a bad sport. He went on to remark that in his years as a Justice he had tried to safeguard "the poorest darky in the Georgia backwoods as well as the man of wealth in a man-

sion on Fifth Avenue."²¹

McReynolds's outburst invited objections on more than one ground. His "sportsmanship" gibe appeared to reduce the work of the Court affecting the welfare of millions to the dimensions of an athletic contest and also to insinuate that any criticism of the Court as an institution was improper. His use of the demeaning term "darky" exposed a vein of racism in a man who was notorious in Court circles for his prejudices. His claim to be a champion of the rights of blacks astonished those who recalled that he had a wretched record on civil liberties and as recently as the *Scottsboro* case had voted to deny the rights of black defendants. His admonition to "accept the outcome" serenely clashed with his own behavior on the Bench, where more than once he had furiously harangued his Brethren when a decision had not gone his way. "Just what is good sportsmanship, Mr. Justice" asked Senate Majority Leader Joseph T. Robinson of Arkansas in a nationwide radio address. "Nowhere in the Supreme Court decisions, nowhere in legal literature does a judge stand more emphatically condemned by his own testimony as a poor sportsman." By far the greatest part of the blame, though, fell on McReynolds for speaking at all. His speech was said to have been the first by a Justice on a political issue since Chief Justice Salmon P. Chase toured the South in the aftermath of the Civil War.²²

McReynolds drew a barrage of criticism. The NAACP denounced the Justice for using the word "darky," and Congressman Celler called him an "oxcart lawyer" and "one of the worst offenders on the Court." But the most vivid comments were voiced by two Senators who would one day be Supreme Court Justices. On the Senate floor, Hugo L. Black, with no foreknowledge that before the year was out he would be on the highest Bench, pointed out that the Court, in three different cases, had reached exactly opposite conclusions about whether regulation of labor conditions was constitutional. His voice dripping with sarcasm, he went on, "Woe be unto the man who questions the infallibility of that ruling that the climate is less healthful in Oregon than in New York." Senator Robinson interrupted him with the sardonic remark, "Anyone who questions that is not a good sportsman." "Yes," Black responded. "He's not a good sportsman. He can't trust the umpire." Senator Sherman Minton of Indiana carried objection to the metaphor a step farther. The Court, he said, was not an umpire, as McReynolds indicated, but one part of a team, and if he were quar-



At the annual reunion of his fraternity at a Washington hotel, Justice James C. McReynolds accused the President of being a bad sport for not accepting the Court's rulings on his New Deal programs: "The evidence of good sportsmanship is that a man who has had a chance to present a fair case to a fair tribunal must be a good sport and accept the outcome." McReynolds himself was a much better sport on the golf course than on the Bench, where he made no effort to hide his disdain for some of his Brethren.

terback on a team with players who were missing their assignments, he would send in "some good fresh substitutes."²³

McReynolds's indiscretion, coming at a time when the opposition felt badly in need of help, encouraged Senate opponents to think that they might be able to persuade other Justices to speak out. With Democrats outnumbering Republicans four to one in the House and only sixteen Republicans left in the Senate, the President, who had carried his party to a landslide triumph just five months before, appeared very likely to prevail unless some dramatic developments occurred. To offset FDR's advantage, Senators approached the Chief Justice and at least two other Justices to urge them to appear before the Senate Judiciary Committee the following week when the foes of Court-packing would present their arguments for the first time. None of the Justices would agree to do so, however, and as the week drew to a close, the Roosevelt Administration could breathe easier, for, if press reports were accurate, it would no longer have to worry about any participation by the Justices in the Court fight.

That weekend, though, events took a very differ-

ent turn. On Saturday, March 20, Alice Brandeis drove to Alexandria to see the new baby born to Elizabeth Colman, daughter of Democratic Senator Burton K. Wheeler. A prominent liberal, Wheeler had run for Vice President on a Progressive ticket in 1924 headed by Robert M. La Follette with a plank hostile to the Supreme Court, but either out of conviction or because he had had a falling out with Roosevelt over patronage, or both, Wheeler had taken a conspicuous stand against FDR's proposal. As Mrs. Brandeis was departing, she said, "Tell your father I think he's right." When that sentence was relayed to Wheeler, who was scheduled to lead off the testimony against the bill on Monday and wanted to begin "with a resounding bang," he concluded that he might be being tipped off that Brandeis was willing to aid the opposition. So he arranged an appointment with the Justice that very day.²⁴

Wheeler approached Brandeis with considerable trepidation, but Brandeis quickly let the Senator know he had no cause for concern. Brandeis refused to testify against the bill, but he went on to say, "You call up the Chief Justice and he'll give you a letter." He did not know him, Wheeler responded. The Senator

may also have wondered whether Hughes remembered that he had opposed his appointment, saying, "When Democrats vote to place upon the Supreme Court of this Nation a man, no matter how honest he may be, no matter how brilliant he may be, who holds the economic views of Mr. Hughes, they are voting against every tradition of the Democratic party." "Well, the Chief Justice knows you," Brandeis retorted, "and knows what you are doing." Even this reassurance did not persuade Wheeler, so Brandeis picked up the phone himself and called Hughes. The Chief Justice told Wheeler to come right over.²⁵

When he got to Hughes' place, Wheeler explained that he wanted a letter that Brandeis had told him he would be given and that he needed it by Monday morning. "It is now five-thirty," the Chief Justice said, checking his watch. "The library is closed, my secretary is gone. I won't have to call Brandeis or Stone and I won't have to call some other Justices, but I will have to call some." He promised, however, to get it written in time. Hughes was better than his word. On Sunday afternoon, he phoned Wheeler to come back. When the Senator did, the Chief Justice handed him the letter, saying jocularly, "The baby is born."²⁶

It is a nice story, and some, perhaps most, of Wheeler's yarn is no doubt true, but Hughes has offered a different version of the origin of his letter, at least part of which is buttressed by documentary evidence. A few days before Wheeler was set to testify, Hughes recalled, the Montana Senator came to see him, along with William H. King of Utah, a conservative Democrat who abhorred Court-packing, and Republican Warren Austin of Vermont, to ask him to testify before the Senate Judiciary Committee. Hughes remembered: "I was entirely willing to do so for the purpose of giving the facts as to the work of the Court." But given "the delicacy of the situation," he thought it "inadvisable" to appear alone and told his visitors that at least one other Justice should go with him, "preferably Justice Brandeis—because of his standing as a Democrat and his reputation as a liberal judge." When he consulted Brandeis, however, he found that the Justice "strongly opposed" having any Justice go before the committee but agreed that it would be all right for Hughes to write a letter on "the state of the work of the Court."

On the morning of March 19, Hughes then phoned two of his callers. He first spoke to Senator King to say:

I find that there is a strong feeling that the

Court should not come into this controversy in any direct or even indirect way, and I feel that it would be better in these circumstances that I should not appear. That is a deliberate conclusion after my consultations—and for your own ear. . . . Now if the committee should desire information as to the work of the Court . . . , and will address a communication to the Court, . . . of course we will be glad to give the facts.

An hour later, he repeated on the phone to Senator Wheeler what he had said to King, including his pledge to answer a written communication directed to the Court. Hence, fully two days before Mrs. Brandeis stopped by in Alexandria, Wheeler knew very well that Hughes could be counted on for a letter.²⁷

No one in the White House or anywhere else in Washington officialdom was aware that any of this had taken place, so when Senator Wheeler began the presentation for the opposition the next morning, nothing but a routine statement was foreseen, and as he rambled on for some minutes about what friendly feelings he held toward the President for all his faults, it appeared as though that expectation was being fulfilled. After a time, however, he switched emphasis to express shock at the allegation by Homer Cummings that the elderly Justices, including the saintly Brandeis, were behind in their work and remiss in their duties. "It was only after the Attorney General . . . came before this committee . . . and repeated the charges . . .," Wheeler continued, "that I went to the only source in this country that could know exactly what the facts were . . . to see if it was possible to refute the reflection that had been made upon the Court and upon the integrity of those individuals who constitute that Court." He paused for histrionic effect and gazed about the Caucus Room, then slowly eased out of his inside coat pocket a document and announced, "I have here now a letter by the Chief Justice of the Supreme Court, Mr. Charles Evans Hughes, dated March 21, 1937, written by him and approved by Mr. Justice Brandeis and Mr. Justice Van Devanter. Let us see what these gentlemen say about it." With these words, said one reporter, "a loud ripple of excitement ran through the hearing room, more crowded today than ever before."²⁸

As Wheeler began to read aloud the communication, "with the scrawled blue signature, 'Charles Evans Hughes,'" noted another correspondent, "the echoing white marble walls heard no other sounds

than the edged voice of the lean-cheeked liberal." "The Supreme Court is fully abreast of its work," Hughes started out. Indeed, the Court had just heard argument on cases it had accepted only four weeks earlier. "There is no congestion of cases upon our calendar," he insisted, and "[t]his gratifying condition has obtained for several years." In testifying earlier in March, Cummings had equated the task for each Justice of going through the records of the cases to reading *Gone With the Wind* before breakfast each morning. The Chief Justice, without mentioning the Attorney General by name, said, "The total is imposing but the suggested conclusion is hasty and rests on an illusory basis."²⁹

Again without acknowledging that he was doing so, he rebutted one after another of Cummings's claims. It must "be remembered," he stated pointedly, "that Justices who have been dealing with such matters. . . have the aid of a long and varied experience in separating the chaff from the wheat." Most petitions were "wholly without merit and ought never to have been made," he maintained. "I think that it is the view of the members of the Court that if any error is made in dealing with these applications it is on the side of liberality." An increase in judges, he declared, would foster inefficiency—"more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide." The administration had suggested that an enlarged tribunal could hear cases in divisions, but, Hughes declared, that notion was "impracticable." Furthermore, since the Constitution stipulated "one Supreme Court," it did not "appear to authorize two or more Supreme Courts or two or more parts of a supreme court functioning in effect as separate courts." Because of "the shortness of time," he had "not been able to consult with the members of the Court generally," but the two senior Justices, Brandeis and Van Devanter, endorsed his statement, and he was "confident that it is in accord with the views of the justices." In short, Hughes left the impression that he was speaking for the entire Bench.³⁰

Hughes' letter has engendered no little criticism. Washington observers characterized it as the first advisory opinion since the Monroe administration, only the second since the Court under Chief Justice John Jay had refused to comply with a request from President George Washington. In his book *The Supreme Court of the United States* Hughes had forcefully maintained that a fundamental principle was that the Court "has confined itself to its judicial duty of deciding actual cases," dismissing the depar-

ture in the Monroe years with the remark that "it is safe to say that nothing of the sort could happen today." The Chief Justice's letter, it was now said, provided a strong precedent for Chief Executives in the future to seek counsel from the Court, especially since Hughes had addressed himself to a question not even in the bill: the proposal that the Court might divide up some of its work.³¹

Politicians, publicists, and legal scholars joined in the condemnation. A former Ohio Congressman accused Hughes of "sub rosa judicial log rolling," adding, "If a police court judge did this, he would be called to order. Justice Hughes is seeking to influence Congress in a matter pending before Congress when he would commit a congressman for contempt of court who would seek to influence him in a similar matter." The Chief Justice, *The New Republic* charged, "throws all judicial discretion to the wind" in "an advisory opinion run riot—a declaration of judicial policy for the future morally binding at least three judges to the effect that the Court will neither permit a division of its work nor will it allow Congress to do so. It violates every tradition of our judicial process." Moreover, "the idea that even a majority of the cases are of sufficient public importance to require all the Court to sit at once is obviously absurd, as can be ascertained from a reading of the reports." From Harvard Law School, Felix Frankfurter wrote Brandeis, "As for the Chief—I have long written him down as a Jesuit—I deplored his letter and certainly its form," and told the President:

That was a characteristic Hughes performance—part and parcel of that pretended withdrawal from considerations of policy, while trying to shape them, which is the core of the mischief of which the majority have so long been guilty. That Brandeis should have been persuaded to allow the Chief to use his name is a source of sadness to me that I need hardly dwell on to you.

Months later, he was still seething. To the most highly venerated lawyer in New York he wrote:

[T]he less you say about his letter to Senator Wheeler the better, because it is indefensible on several scores: it was disingenuous in saying there wasn't time to consult other colleagues, and it grossly violated the settled practice of the Court against giving advisory

opinions. . . . (I talked pretty plainly to Brandeis about this.)³²

Hughes' failure to consult all of his colleagues has aroused at least as much opprobrium as his alleged advisory opinion. Hughes later claimed that shortly after his letter was read he met with his Brethren and voiced the hope that they approved of what he had done. He wrote:

Several Justices at once spoke up, saying that they did, and the others seemed to me to acquiesce. No Justice, either then or later, expressed to me a contrary view, nor throughout the period when the bill was before the Senate did I hear that any of the Justices were in any way dissatisfied with my action.

But in a widely discussed article published by *Harper's* in the spring of 1938, Marquis Childs declared:

Perhaps the nearest approach to a quarrel within the Court came as a result of Chief Justice Hughes' letter. . . . The fact is that certain justices did not approve the course of their Chief. . . . In the indignation of the moment a quarrel might well have been engendered. It was avoided by the forbearance of those who felt the Chief Justice's action had been unwarranted.

It did not take long for Washington to discern that Childs' informant was none other than Stone.³³

Stone himself, who first learned of Hughes' composition when he read it in a newspaper, later said, with respect to the Chief Justice's stated objection to dividing the work of the Court: "The fact is that I did not then, and do not now, approve of such an extra-official expression on a constitutional question by the Court or its members. Justice Cardozo, with whom I discussed the matter, was of the same view." In a letter calculatedly written to establish a historical record, Stone went on to assert:

There was no reason of which I am aware why all the members of the Court should not have been consulted in connection with the preparation of a document which purported to state "the views of the Justices." . . . Although the Court was then in recess, all its members were in the city. They could have been brought to-

gether for a conference on an hour's telephone notice, or less. Throughout the recess Justices Sutherland, Cardozo, and myself were in our homes, which are within five minutes' walk of the residence of the Chief Justice.³⁴

The Chief Justice's biographer, in a rare lapse into criticism in a generally sycophantic book, wrote, "Considering the delicacy of the issue, Hughes' action with the approval of only two of his eight colleagues was certainly a tactical error." Stone's combative biographer has rejoined: "But was it? If the Chief Justice had consulted all his colleagues, they would have been divided. In that case, there might have been no letter, or at least a very different one."³⁵

Yet however questionable some of Hughes' performance may have been, his letter, as *The New York Times* reported, struck "with an authority and suddenness which took administration forces by surprise and sent them scurrying." Wheeler later remembered: "The letter had a sensational effect. The newsreels photographed it, newspaper reporters clamored for copies, and it was all I could do to keep it from being snatched from my hands when the session was recessed." Senator Wheeler, reported the Washington correspondent of the country's foremost Republican newspaper, the *New York Herald Tribune*, had in essence "made the Chief Justice of the United States and his two senior colleagues the first witnesses against the court plan."³⁶

Hughes' intervention inevitably put both his high office and his persona at the service of the opponents, but no less important was his adroit enlistment of the liberal icon, Louis D. Brandeis. Hughes' letter sent a signal to liberals that their hero, Brandeis, was aligned against the proposal. Immediately afterward, the Protestant reformer John Haynes Holmes, a vocal critic of the legislation, wrote Rabbi Stephen Wise, "It has been a matter of real grief to me that you are not on my side in this Supreme Court controversy, but I am finding infinite comfort this morning that Brandeis is on my side!!!!!!!!!!!!!!!!!" "The placing of Hughes and Brandeis in the forefront of opposition to the President's proposal," a journalist said, "was quickly recognized as the first ten-strike the opponents of the plan have scored."³⁷

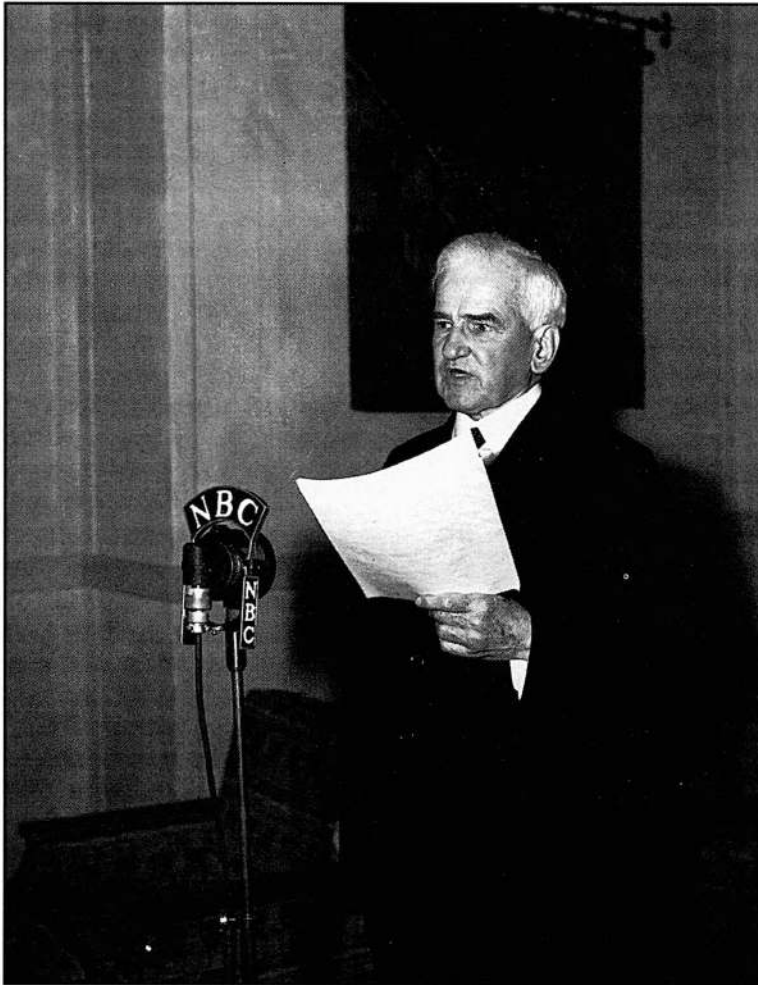
Hughes' letter implied an alliance of two branches of government against the third, with the Supreme Court now in league with the opposition in Congress against the President. As the Democratic national chairman, James A. Farley, later acknowl-

edged, the communication had a “staggering” impact. Summing up sentiment in Washington and in the nation, the publisher Frank Knox, who had been the Republican vice presidential candidate in 1936, wrote another prominent GOP figure, “I think Chief Justice Hughes’ statement today is a solar plexus blow for FDR.”³⁸

On the evening of Wheeler’s testimony, Roosevelt summoned the prestige of the Court to his side of the fray, but only after a fashion and not without considerable resistance. Knowing better than to suppose that any of the sitting Justices would speak out in favor of his plan, he had sought the next best thing—the only living former Justice. John Hessin Clarke, seventy-nine, had been appointed to the Court by Woodrow Wilson in 1916 to succeed Charles Evans Hughes, who was running against Wilson for President, but Clarke had resigned in 1922, in part in order to be free to campaign for Wilson’s dream of a League of Nations, in part because he could not stomach any longer being on the

same Bench with McReynolds. An ardent admirer of FDR’s, he was to write later that year, “I am cordially in favor of almost everything that he has done.” He added, “If I had been consulted, . . . I should have modified the form of his attack on the Supreme Court.” But, he went on, “There can be no doubt that from the beginning of our government to this day the Court has been very far from that sacrosanct attitude toward public, and particularly party, affairs which some of the President’s critics would have us believe it has been, and is.”³⁹

Yet when Roosevelt asked him to make a public commitment to the proposal, Clarke demurred. It would not be proper for him to rebuke the Court for its recent decisions, “however unsound and unwise I might think them to be,” he wired the President. Nor could he laud the achievements of the New Deal, “much as I should like to do so.” He maintained, “For me to do either or both of these would obviously give such a partisan character to my talk as to destroy its usefulness.” Moreover, it would be



Retired Justice John Hessin Clarke, age seventy-nine, delivered an uninspired radio address on March 22 defending the constitutionality of FDR’s Court-enlargement program. He had agreed to make it only after the President pressured him, and the former Justice failed to endorse the plan.

awkward for him to emphasize the necessity for younger judges more open to new ideas, though in fact he had long believed that. Roosevelt, however, persisted, and, reluctantly, Clarke agreed to deliver a radio address from KSFJ San Diego.⁴⁰

Clarke's talk, sent out over a national network of seventy-six stations on the night of March 22, did little to advance FDR's cause. Clarke confined himself to saying that the President's proposal was constitutional, a contention that even some of the opposition accepted. To be sure, Roosevelt expressed pleasure, as well he might, for the former Justice's performance lent some of the aura of the Court to the administration. But a contemporary newspaper report termed "the much-heralded speech" a "pronounced 'dud,'" and a political scientist critical of the Court characterized it as "a dreary recital." Even a generation afterward, Felix Frankfurter remembered it as "not very good." It paled in comparison to what the Court itself had in store for Roosevelt.⁴¹

Exactly one week after Hughes' letter was read to the Senate Judiciary Committee, the Chief Justice and the Supreme Court struck even more effectively against FDR's proposal. In a decision that astonished the country, the Court, in a 5-4 ruling in the *West Coast Hotel v. Parrish* case, validated a state of Washington minimum wage law for women no different in principle, and more loosely drafted, than the New York statute it had found unconstitutional only nine months before. In several other decisions on that same day, the Court took an expansive view of governmental power.⁴² The critical difference on the minimum wage rulings was the switch of one Justice, Roberts, who abandoned his allies of 1935 and 1936, the Four Horsemen. Almost everyone assumed that the change reflected the pressure of the Court-packing controversy. "We are told that the Supreme Court's about-face was not due to outside clamor," scoffed a writer in the *New Yorker*. "It seems that the new building has a soundproof room, to which Justices may retire to change their minds."⁴³ Only subsequently did it become accepted that though the principal decision followed the President's message, the vote on the case had been taken earlier.⁴⁴

If, however, the *Parrish* ruling was in no way a response to FDR's message, something not evident to most people in 1937, observers discerned the fine hand of Charles Evans Hughes in the timing and the grouping of the decisions of March 29. Two days later, the nationally syndicated columnist Paul Mallon wrote:

Those who know their certioraries will tell you Chief Justice Hughes has done as neat a job of rebutting President Roosevelt as ever was performed by a judge on an executive.

The flock of Supreme Court rulings which came over the bench all at once Monday could have been joined together by natural circumstances, but no legal authority believes they were. The remarkable executive talents of Mr. Hughes are seen by all to be behind the comprehensive grouping. . . . The plain purport was to point the way in which New Dealing could be done for the farmer and the laborer without packing the Court or amending the Constitution.

One decision showed labor that the Court would sanction forcing exclusive collective bargaining on a railroad, while another told farmers that mortgage legislation was valid. In addition, labor could rejoice in the Washington minimum wage ruling and farmers in a decision legitimating the fixing of milk prices. "In a single day," he wrote, "the Court seemed to cover the range of New Deal ambitions."⁴⁵

Two weeks later, the Court handed down its decisions on the Wagner Act. Despite Roberts' so-called somersault, almost no one thought that the government would win in all five cases, certainly not the one involving a small Virginia clothing firm. But offering a generous view of the commerce power, the Court, again with Roberts joining in a 5-4 majority, upheld federal power over labor relations in every one of the rulings.⁴⁶ "The new interpretation of interstate commerce completely astounded the legal branch of the New Order," Mallon wrote. Tommy Corcoran "had been telling friends all he hoped for was two justices." He did not imagine he could get five to validate the Wagner Act. That evening, Homer Cummings began the daily entry in his diary, "Today an amazing thing happened."⁴⁷

Once again, observers saw the hidden hand of Charles Evans Hughes and had no doubt that the Court, in order to preserve itself as an institution, had yielded to the President. Mallon reported, "If you ask the average well informed authority on the Supreme Court the 'why' of its decision in the Wagner labor cases, you will be informed: 'Chief Justice Hughes wanted to save the court.'" On the day following the rulings, the historian Charles Beard wrote Irving Brant: "F.D. sure did scare the old boys," and the Philadelphia *Record* declared, "In both the minimum wage and Wagner Act decisions, 'the Consti-

tution' shifted color like a piece of litmus paper when Mr. Justice Roberts shifted overnight from constitutional acid to constitutional alkali." The *Record* concluded:

Lloyd George put over the British New Deal of 1909 by threatening to pack the House of Lords.

Mr. Roosevelt has won another major battle for our own New Deal by a similar threat against our own House of Lords—the Supreme Court.⁴⁸

Felix Frankfurter, who many years later would tell an interviewer that Roberts had been "outrageously misrepresented by the scribblers and the dons" and would publish a mischievous article denying Roberts had switched in the minimum wage cases that would lead a generation of historians astray, held a very different view at the time. Two days after the *Parrish* decision was handed down, Frankfurter wrote Brandeis from Harvard Law School that though he was, of course, gratified that the Court had, after more than two decades, finally seen the light, "the manner and circumstances of the over-ruling make last Monday one of the few, real black days in my life. Something precious—a deep old devotion—died within me to a considerable extent, namely, my confidence in the integrity of the Court's process." Several of the Justices, including Hughes, were to blame for this "terrible performance," but "above all" Roberts, who was guilty of "a shameless, political response to the present row. If he had a decent, disclosable change of mind it would have been ordinary manliness to have avowed it in a brief memorandum." Frankfurter expostulated:

I am a teacher of the young, and I know what they think, the cynicism that this breeds in them and in millions throughout the land. Certainly I cannot gainsay their interpretation. Let Hughes or Roberts come up here and defend their performance when the case will come under scrutiny, as soon it will, before my Fed. Jr. seminar.⁴⁹

The NLRB decisions reinforced Frankfurter's belief that the Court was executing a flip-flop. In late April, he commented: "I have no idea about the outcome of the Court bill, but whatever the outcome the President will win because he has already won. After all, he got the Wagner Act sustained to an ex-

tremity that no one in his wildest fancy thought possible six months ago." Some time later, he wrote a British friend with regard to the "somersaults" of the spring: "They make it very difficult for anyone to suggest that lawyers without resort to unscrupulous causistry can reconcile the decisions of the Court in 1936 with those in 1937."⁵⁰

The rulings in May validating the Social Security Act reinforced the impressions both of the Court's motivations and of the nature of its actions. Irving Brant pointed out one aspect of the Social Security decisions that some other commentators overlooked. In his opinion, Cardozo disclosed that he and three other Justices—Brandeis, Roberts, and Stone—had voted to throw out the appeals because the litigants had no standing. Hughes had joined the Four Horsemen to bring the matter up. Brant observed:

Their purpose was plain enough. They wanted to use the decisions as an argument against President Roosevelt's court reorganization plan. Even the extreme reactionaries preferred a decision unfavorable to themselves, rather than no decision. The fact that Chief Justice Hughes stood with them suggests that he was equally politically minded.

In an editorial entitled "Revolutionary Decision," a Maine newspaper noted that, in four respects, the Social Security rulings were radical departures from the past. They offered a liberal interpretation of the General Welfare Clause, limited the Due Process Clause as a deterrent, and greatly enlarged the scope of the taxing power at a time when the commerce power had also been expanded. "Most important of all perhaps," it said, "the Supreme Court itself has surrendered a surprising portion of its own power."⁵¹

Many of FDR's most determined opponents agreed and were heartsick. On the day after the April 12 rulings, one conservative, Carl T. Keller, wrote another:

My interest in the Supreme Court has sunk to absolute zero. One or both of those old duds, Roberts and Hughes, was bluffed or bullied into that ridiculous decision of yesterday. I don't give a nickel now whether they increase the Supreme Court to 15 or 500. It has my supreme contempt, except, of course, the four courageous fellows who still have an idea that this is a federated government.

He added with an anti-Semitic slur at Brandeis and Cardozo that was all too common: "I don't blame the two Orientals excessively because they naturally haven't any traditional feeling for this form of government anyway." To another correspondent he confided that he had given money to the struggle against Roosevelt's plan, which he now regretted "after yesterday's exhibition of cowardice and scuttle on the part of the Supreme Court." In the same spirit, a Georgia attorney said disgustedly, "I join the plaintive lament of Mr. Justice McReynolds in the gold contract cases, 'The constitution is gone!'"⁵²

Yet if FDR's critics deplored what they regarded as Hughes' capitulation, they had to admit that the three decision days undercut much of Roosevelt's justification for the Court-packing bill. His Majesty's ambassador at Washington, Ronald Lindsay, reported to Foreign Secretary Anthony Eden:

The President's supporters have been saying for weeks past, "Just wait until the Court has

also outlawed the Wagner Act, and then see if we are not right in claiming that the present personnel of the Court is a hindrance to all industrial and labour legislation." Now, owing to Mr. Justice Roberts' apparent conversion . . . , it appears that Congress can . . . put through a great deal of advanced social legislation.

The venerable Virginia Senator, Carter Glass, wrote his colleague Harry Byrd, "After yesterday's 4-5 decision on the Wagner Labor Board Act, I wonder if the President thinks Brandeis, 80, and Hughes, 75, still need wet nurses!"⁵³

Roosevelt and his followers, though, concluded that they could not rely on Roberts' "conversion" and hence resolved that the fight must go on. The Tennessee editor and historian George Fort Milton told Homer Cummings, "It would be quite an unsafe thing to depend on the continuance of the present Robertsonian attachment as an anchor. . . . Logi-



Senator Robert Wagner of New York was photographed in a jubilant mood on April 12 after the Court declared his labor relations act constitutional in five separate applications of the act. The ruling took most observers by surprise, and was seen as a calculated effort by Chief Justice Charles Evans Hughes to yield to the President and save the Court.

cally, Roberts' shift demonstrates so clearly the correctness of the Administration's position that the Constitution is all right; all that was wrong was an uncontemporarily-minded majority of the Court." Similarly, Senator Theodore Green of Rhode Island declared: "Again we learn that the Constitution is what Mr. Justice Roberts says it is. So what we need is not amendments to the Constitution, but a sufficient number of judges to construe it broadly, lest one man's mistaken opinion may decide the fate of a nation." Still another of FDR's supporters reasoned, "If enlightenment is such a good thing, why not have more of it?" It would require still another initiative from the Court to forestall FDR's plan.⁵⁴

From the beginning of the Court fight, opponents reckoned that the best way to defeat the bill would be for one or more of the Justices to resign, thereby conceding to FDR but preventing his drastic remedy from being incorporated in the statute books. On the very day of the President's message, a rumor swept Washington that the Supreme Court would resign *en masse*. If that happened, Roosevelt, it was said, would ask Stone and Cardozo to accept reappointment. Chief Justice Hughes, it was noted, would become seventy-five in April, and since he was on record as disapproving of overaged judges, New Dealers reckoned that, to be faithful to his views, he would have no choice save to step down. On the following afternoon, the Justices conferred at length, and, the United Press reported, engaged in a pointed discussion of the resignation matter.⁵⁵

Herbert Hoover, insistent on playing a conspicuous role in the fight against the plan, to the dismay of Senate Republicans who recognized that Hoover was anathema and that their best hope lay in a non-partisan effort, instructed his agent in Washington to carry out a bizarre plot. He wanted Justice Brandeis to submit his resignation before the end of February and then deliver a radio address denouncing Court-packing. To implement that notion, his agent called on Justice McReynolds. It is hard to imagine a more inappropriate choice, for McReynolds was a vicious anti-Semite who loathed the presence of Brandeis on the Bench. McReynolds responded that he understood that Brandeis strongly opposed the plan, but, Hoover was informed, "his relations with Brandeis are not such as to warrant him in even intimating that he should retire and make the radio address you desire." McReynolds advised the agent instead to speak to the Chief Justice.

Hoover's agent then went to see Hughes, who

would not fall in with the scheme, especially since, the agent reported, Brandeis was "in better health now than when Mr. Hughes assumed a seat on the Bench, which is the case with every member now serving." The former President was told:

The Chief Justice said there had been occasions in the past when the Court, finding one of the jurists infirm or failing, had suggested his retirement, but this condition does not now exist. As you undoubtedly realized the matter was one of extreme delicacy, and he was unwilling to approach Mr. Brandeis concerning it. He intimated that should the latter initiate a discussion of his personal plans it might be possible to consider the course to be followed. He pointed out, however, as illustrating the delicacy of the matter that it was like talking with a man regarding the woman he proposed to marry.⁵⁶

The notion that the Court fight could be brought to an end by a well-timed resignation would not die, however, and curiously the agitation came primarily not from critics of the Court but from its defenders. By March 1, the chairmen of the House and Senate Judiciary Committees, both covert opponents of FDR's proposal, had put through a bill to safeguard the pensions of Supreme Court Justices who chose to retire. From one point of view this was legislation that had the best interests of the Court at heart, but from another standpoint the aged Justices were being told that if they did not jump, they would be pushed.

For a number of weeks, as the tension built, no Justice took advantage of the law, but early on the morning of May 18 one of the Four Horsemen, Willis Van Devanter, dispatched a messenger to the White House with a letter announcing his imminent retirement. He sent it some ninety minutes before the Senate Judiciary Committee was scheduled to vote on the Court bill, a roll call that would go against the President. Few thought that the juxtaposition was coincidental. In his nationally syndicated column, Raymond Clapper wrote: "If Van Devanter didn't time his announcement to put Roosevelt in a hole, then he doesn't read his newspapers. He didn't even give Roosevelt a chance to make the announcement, as courtesy would suggest." In like manner, the veteran White House correspondent Arthur Krock commented: "That timing may have been accidental. But this is a political community; Justice Van Devanter

was long in politics, and he is being given credit for excellent strategy.”⁵⁷

Administration partisans regarded Van Devanter's action as yet more evidence that the judiciary was up to its ears in politics and looked for whom to blame. “It hardly seems possible that this is a mere coincidence,” stated a Farmer-Labor Congressman from Minnesota. “In my opinion, it is just another attempt on the part of the Court to save to itself its lease on the great power it now exercises to invalidate congressional legislation.” Some speculated that the timing of the retirement of the aged Justice was the work of a member of the Judiciary Committee, Senator William Borah of Idaho, who lived in the same apartment house on Connecticut Avenue. Borah and Van Devanter had been powerful figures in adjacent mountain states since before the turn of the century, and *Time* reported, “When they meet in the elevator, they say ‘Hello Bill’ and ‘Hello Willis.’” Borah insisted that he had “made no effort to persuade anyone to get off the Supreme bench. I think I have a fair amount of nerve, but I would not undertake such a job as that.” Borah's response slid past the main contention, which was not that he had forced his neighbor off the Court but rather that, knowing of Van Devanter's desire to leave, he had connived with the Justice on the appropriate moment for him to do so.⁵⁸

Most Washington observers, though, targeted not Borah but the Chief Justice as the architect of Van Devanter's scheme. “That is a beautiful little controversy between the President and the C.J.,” the editor of the Boston *Herald* wrote William Allen White. “Don't you suppose that Charles the Baptist persuaded Van Devanter to withdraw? Aren't the honors with the Chief Justice to date, rather than with the President?” Both friends and foes expressed admiration for Hughes' agility. Secretary of the Interior, Harold Ickes, who noted in his diary that Tommy Corcoran had told him that the retirement “had been engineered by Chief Justice Hughes, Senator Wheeler, and Van Devanter, with Justice Brandeis helping,” conceded it was “a clever move,” and the British ambassador wrote Anthony Eden that though the timing of the two developments might have been coincidental, “I rather prefer myself to see here the shadow of a very majestic figure moving behind the scenes; and indeed the country is fortunate in having at this moment as its Chief Justice a man who adds profound political wisdom to his eminent legal attainments.”⁵⁹

It would tie up this tale in a neat knot if one could

say that as a result of this series of developments, the nine Justices doomed FDR's Court-packing plan. But Truth is rarely so tidy and never puts itself at the convenience of historians. In a talk sponsored by the Supreme Court Historical Society several years ago, I pointed out that, even after all this had happened, Roosevelt persisted in a modified version of the original legislation and almost carried it through.⁶⁰ The ultimate demise did not come until weeks after the Term of Court had ended and the Justices had left Washington, with the melodramatic death of Senator Robinson in an apartment not far from the Supreme Court Chamber.

Yet if it would be too much to conclude that the Court brought about the defeat of FDR's plan, it is accurate to say that this set of interventions by the Justices under Hughes' leadership—the quiet circulation to Senators, editors, and other influential people of the news of their hostility to the proposal, the backstage machinations, Hughes' letter, the turnaround decisions, Van Devanter's exquisitely timed retirement—greatly altered the topography of the struggle. Week by week, Democratic Senators and Representatives fell away from the President. Upon Van Devanter's retirement, Washington rumormongers intimated that other Justices would soon step down, and Democratic Congressman William Colmer of Mississippi wrote a constituent: “I have just learned that Justice Van Devanter has resigned, and there is an unconfirmed report to the effect that Justice Sutherland has done likewise. If this be true my first blush reaction is that the problem is settled.” One commentator wrote that the developments of May 18 “had killed the President's Court Bill as dead as salt mackerel,” while another thought that “the events of one day” had left the plan “deader than the well-known smelt.”⁶¹ By the end of May, Roosevelt knew beyond doubt that he would have to compromise. Never again would it be possible for him to push his original recommendation and never again would the notion of Court-packing have the momentum it had once enjoyed.

No one knew this better than the men in the President's circle. In late May, Secretary Ickes recorded in his diary a conversation with Tommy Corcoran: “He admitted that Chief Justice Hughes has played a bad hand perfectly while we have played a good hand badly,” and one of the original members of FDR's Brain Trust, Rex Tugwell, later reflected:

[T]o those who regarded the Court as the protector of the privileged, the Chief Justice was

the very symbol of all they detested. But what those who calculated the probable outcome of the struggle often missed was that under the heavy disguise there operated one of the shrewdest of political intelligences. And these underestimators included Franklin. Hughes was a match even for the experienced tactician in the White House—and not only in experience but in wiliness as well. The combination of Hughes and Wheeler would prove too much for Franklin.

Still more pointed was the conclusion of Robert H. Jackson, who, like Black and Minton, would one day be appointed to the Supreme Court and who in 1937 had offered the best crafted defense of Court-packing. Sometime afterward, Jackson, who thought Hughes' conduct of himself during the struggle "masterly," told Roosevelt, "The old man put it over on you." The President did not deny it.⁶²

**This essay had its origin in a lecture delivered in the Supreme Court Chamber on October 10, 1996, under the sponsorship of the Supreme Court Historical Society with Justice Anthony Kennedy as chair. Since I had recently published a book on this subject, I resolved to retell the story not, as is usually done, from the perspective of the President or Congress but from that of the Justices.*

Endnotes

- ¹ *News-Week* (February 13, 1937), p. 8; *Time*, February 15, 1937, p. 16; *Detroit News*, February 6, 1937; *St. Louis Post-Dispatch*, February 5, 1937; *The New York Times*, February 6, 1937; *New York Herald Tribune*, February 6, 1937; James MacGregor Burns, **Roosevelt: The Lion and the Fox** (New York: Harcourt, Brace, 1956) pp. 294-95.
- ² Joseph Alsop and Turner Catledge, **The 168 Days** (Garden City, NY: Doubleday Doran, 1938) p. 135.
- ³ Samuel I. Rosenman, ed., **The Public Papers and Addresses of Franklin D. Roosevelt** (13 vols., New York: Random House, Macmillan, Harper, 1938-50) VI: 53-54.
- ⁴ *New York Herald Tribune*, March 14, 1937; Raymond Clapper MS. Diary, Clapper MSS, Library of Congress, February 8, 1937.
- ⁵ Leonard Baker, **Back to Back: The Duel Between FDR and the Supreme Court** (New York: Macmillan, 1967) p. 36; W. W. M. [Mischler], Memorandum for the Chief Justice, n.d.; Mischler to E. R. Murrow, March 3, 1937, Charles Evans Hughes MSS, Library of Congress, Box 122; *The New York Times*, February 7, 1937.
- ⁶ Pathe News Release, February 13, 1937; Courtland Smith to J. Edgar Hoover, February 15, 1937; Hoover to Charles Evans Hughes, February 17, 1937; Hughes to Hoover, February 18, 1937, all in Hughes MSS, Box 121.
- ⁷ George Creel, "If the Court Pleases," *Collier's* (May 8, 1937),

p. 26; William R. Castle MS. Diary, March 29, 1937, Castle MSS, Houghton Library, Harvard University, Cambridge, MA; Alsop and Catledge, **168 Days**, p. 137. Opponents of the plan concluded that Roosevelt had gone out of his way to aim it at the Chief Justice, because he was the only one affected by the provision that the scheme applied to any Justice who had served "at least ten years, continuously or otherwise," for Hughes had earlier been on the Bench from 1910 to 1916. "Roosevelt Wants Right-of-Way," *Business Week* (February 13, 1937), p. 14.

⁸ Robert E. Sherwood, **Roosevelt and Hopkins: An Intimate History** (New York: Harper, 1948) p. 90.

⁹ Marquis Childs Columbia Oral History Collection, pp. 67-68; Robert H. Jackson, Address to the Brandeis Memorial Colony dinner, June 23, 1943, in Alan Westin, **An Autobiography of the Supreme Court: Off-the-Bench Commentary by the Justices** (New York: Macmillan, 1963) p. 236.

¹⁰ Arthur M. Schlesinger, Sr., **In retrospect: The History of a Historian** (New York: Harcourt, Brace and World, 1963) p. 125. Drew Pearson and Robert Allen, "Washington Merry-Go-Round," *Cleveland Press*, May 22, 1937. See, too, Creel, "If the Court Please," p. 26. At tea at the Brandeises on the Sunday following the President's message, Gifford Pinchot noted: "Louis looks decidedly older than last year, and Mrs. Brandeis made a remark . . . that makes it perfectly clear that Louis is not for Franklin's plan for reorganizing the Supreme Court." Gifford Pinchot MS. Diary, February 7, 1937, Pinchot MSS, Library of Congress, Box 3322.

¹¹ Baker, **Back to Back**, pp. 163-64; interview with Joseph L. Rauh, April 24, 1969, cited in Colin Braham, "A Presidential Blunder: FDR's 'Court-Packing' Plan Reassessed," typescript essay, University of Surrey, p. 9n; Creel, "If the Court Please," p. 26.

¹² John Francis Neylan to Hiram Johnson, March 23, 1937; Johnson to Neylan, March 26, 1937, Johnson MSS, Bancroft Library, University of California, Berkeley, CA; **Public Papers**, VI: 125-26; Creel, "If the Court Please," p. 26; Harlan Fiske Stone to Marshall Stone, February 25, 1937, Stone MSS, Library of Congress, Box 2; Alpheus Thomas Mason, **Harlan Fiske Stone: Pillar of the Law** (New York: Viking, 1956) pp. 446-47. Stone was willing to countenance a constitutional amendment stipulating mandatory retirement of Justices at seventy-five. Mason, **Stone**, p. 446. See also Harlan Fiske Stone to Felix Frankfurter, March 10, 1937, Frankfurter MSS, Library of Congress, Box 105.

¹³ Harlan Fiske Stone to Marshall Stone and all, February 20, 1937, Stone MSS, Box 2; Harlan Fiske Stone to Felix Frankfurter, February 25, 1937, Frankfurter MSS, Box 105.

¹⁴ Harlan Fiske Stone to Marshall Stone and all, February 20, 1937, Stone MSS, Box 2; Harlan Fiske Stone to Felix Frankfurter, March 19, 1937, Frankfurter MSS, Box 105.

¹⁵ Harlan Fiske Stone to E. S. Corwin, February 18, 1937, Corwin MSS, Princeton University, Princeton, NJ, Category I, Carton I, Professional Correspondence, Alphabetical File; Gifford Pinchot MS. Diary, February 19, 1937, Pinchot MSS, Box 3322; Mason, **Stone**, p. 454; Harlan Fiske Stone to Irving Brant, February 26, April 20, 1937, Stone MSS, Box 7. For a few days, Stone approached letting his opposition be publicly known, but as soon as he saw a draft of his views in writing, he backed away. Mason, **Stone**, pp. 449-50. The California Republican, Senator Hiram Johnson, wrote a confidant about Justice Stone: "I wish he could be persuaded to take the stand. He could blow the whole thing to pieces if he wished." Hiram Johnson to John Francis Neylan, March 26, 1937, Johnson MSS.

¹⁶ Mason, **Stone**, p. 454; Irving Brant to FDR, April 7, 1937; Brant notation, September 16, 1951, Stone MSS, Box 7.

¹⁷ Baker, **Back to Back**, pp. 169-70.

¹⁸ *New York Herald Tribune*, February 9, 1937; George Sutherland to Josiah W. Bailey, February 22, 1937, Sutherland MSS,

Library of Congress, Box 6.

¹⁹ George Sutherland to Henry M. Bates, April 21, 1937; Sutherland to Tom Connally, June 5, 1937, Sutherland MSS, Box 6.

²⁰ Baker, **Back to Back**, p. 165; *Literary Digest* (March 27, 1937) p. 4; *News-Week* (March 27, 1937) p. 11.

²¹ *Detroit News*, March 17, 1937; *Washington Post*, March 17, 1937. Some accounts substituted "backwoodsman" for "darky" or made no reference to this remark. *The New York Times*, March 17, 1937; *News-Week*, March 27, 1937, p. 11..

²² *Powell v. Alabama*, 287 U.S. 45 (1932); *Baltimore Sun*, July 15, 1937, clipping, Joseph T. Robinson Scrapbooks, University of Arkansas, Fayetteville, AR; Benjamin Ginsburg to the editor, March 19, 1937, *Washington Post*, March 22, 1937; *Washington Post*, March 17, 1937.

²³ *Washington Post*, March 18-20, 1937; *New York Herald Tribune*, March 18, 1937. See also Harold L. Ickes to Charles Michelson, March 17, 1937, Ickes MSS, Library of Congress, Box 205.

²⁴ Burton K. Wheeler, **Yankee From the West** (Garden City, NY: Doubleday & Co., Inc., 1962) p. 327; Burton K. Wheeler, "My Years with Roosevelt," in Rita James Simon, ed., **As We Saw the Thirties** (Urbana: University of Illinois Press, 1967) pp. 203-04.

²⁵ *Ibid*; Mason, **Stone**, p. 450; **Congressional Record**, 71st Cong., 2d Sess., p. 3517. Sometimes likened to Jove, Hughes was a formidable presence, and, incidentally, the last bearded Justice for more than half a century.

²⁶ Wheeler, **Yankee**, p. 329; Merlo J. Pusey, **Charles Evans Hughes** (New York: Columbia University Press, 1963) p. 755.

²⁷ David J. Danelski and Joseph S. Tulchin, eds., **The Autobiographical Notes of Charles Evans Hughes** (Cambridge, MA: Harvard University Press, 1973) pp. 304-05; Memorandum of telephone conversation of Chief Justice Hughes with Senator William H. King at his residence, Friday, March 19, 1937, at 8:45 a.m.; telephone conversation of Chief Justice Hughes with Senator Burton K. Wheeler at his office in the Senate Office Building, Friday, March 19, 1937, at 9:50 a.m., Charles Evans Hughes MSS, Box 6. There is yet another version. "A member of the American Bar Association Committee was responsible for urging Senator Wheeler, who was most reluctant to do so, to call on Chief Justice Hughes," a prominent attorney contended. Sylvester C. Smith, Jr., Review of Leonard Baker, **Back to Back**, in *American Bar Association Journal*, LIV (April 1968), 390.

²⁸ **Reorganization of the Federal Judiciary**, Hearings before the Senate Judiciary Committee (75th Cong.) p. 487; Wheeler, "My Years," p. 206; *New York Herald Tribune*, March 23, 1937.

²⁹ *Washington Post*, March 23, 1937; *The New York Times*, March 23, 1937; **Reorganization**, pp. 488-90.

³⁰ **Reorganization**, pp. 491-92. Wheeler himself asserted subsequently, "It should be borne in mind that, although the members of the Supreme Court may have differed on a great many things, they are unanimous with reference to the letter of the Chief Justice; at least, that is my understanding of the matter." **Congressional Record**, 75th Cong., 1st Sess., p. 2815.

³¹ Arthur Krock, "In Washington," *The New York Times*, March 24, 1937; Charles Evans Hughes, **The Supreme Court of the United States** (New York: Columbia University Press, 1928) pp. 30-31.

³² Stephen M. Young, quoted in *Cleveland Press*, March 30, 1937; "The Chief Justice's Letter," *New Republic* (April 7, 1937) p. 254; Felix Frankfurter to Louis Brandeis, March 31, 1937, Frankfurter MSS, Box 28; Felix Frankfurter to FDR, March 30, 1937; Frankfurter to C. C. Burlingham, June 9, 1937, in Max Freedman, ed., **Roosevelt and Frankfurter: Their Correspondence 1928-1945** (Boston: Little, Brown, 1967) pp. 392, 402.

³³ Danelski and Tulchin, **Autobiographical Notes**, p. 305n; Mar-

quis Childs, "The Supreme Court To-Day," *Harper's Monthly Magazine*, CLXXVI (May 1938) pp. 587-88. When Childs' article appeared, the columnist Raymond Clapper phoned a series of Justices, none of whom would comment. He then took a chance and called Hughes, who came to the phone. Clapper noted in his diary: "He said: 'I am in a rather delicate position if I say it is accurate but I will point out to you one thing that is inaccurate. At end of piece is something about letter I wrote to Wheeler during court fight. And brethren supposed to have been indignant at some statements I made. If any of them have anything on their chests, they have concealed it very well.'" Raymond Clapper MS. Diary, May 10, 1938.

³⁴ Mason, **Stone**, pp. 451-52.

³⁵ Pusey, **Hughes**, p. 756; Mason, **Stone**, p. 451.

³⁶ *The New York Times*, March 23, 1937; Wheeler, "My Years," p. 206; *New York Herald Tribune*, March 23, 1937.

³⁷ John Haynes Holmes to Stephen Wise, March 23, 1937, Wise MSS, American Jewish Historical Society, Waltham, MA, Box 180 (courtesy of Monty Penkower); *Detroit News*, March 24, 1937.

³⁸ James A. Farley, **Jim Farley's Story: The Roosevelt Years** (New York: McGraw-Hill, 1948) p. 78; Frank Knox to Ogden Mills, March 22, 1937, Mills MSS, Library of Congress, Box 51.

³⁹ Hoyt Landon Warner, **The Life of Mr. Justice Clarke** (Cleveland: Western Reserve University Press, 1959) pp. 195-96; John H. Clarke to George Foster Peabody, October 12, 1937, Peabody MSS, Library of Congress, Box 50.

⁴⁰ John H. Clarke to FDR, March 13, 1937, Clarke MSS, Western Reserve Historical Society, Cleveland, OH; Warner, **Life**, p. 195.

⁴¹ John H. Clarke, Address, March 22, 1937, Clarke MSS; FDR to John H. Clarke, March 23, 1937, Clarke MSS; *Detroit News*, March 28, 1937; Alpheus Thomas Mason, "Politics and the Supreme Court," *University of Pennsylvania Law Review*, 85 (May 1937), 659, 671; Felix Frankfurter to Alexander Bickel, October 8, 1964, Frankfurter MSS, Box 24. One of FDR's harshest critics told Clarke at length how "disappointed" he was in his address, since virtually everyone acknowledged the constitutionality of the scheme; hence, the former Justice was guilty of "irrelevant pleading from futility." He then went on to say, contradictorily, that the President's plan lay "under the heavy shadow of the presumption of unconstitutionality." John Spargo to John H. Clarke, March 24, 1937, Spargo MSS, University of Vermont, Burlington, VT. For additional denunciations of Clarke, see William F. Maag, Jr., to John Bassett Moore, March 27, 1937, Moore to Maag, March 29, 1937, John Bassett Moore MSS, Library of Congress, Box 3. The fierce hostility of Maag, general manager of the *Youngstown Vindicator*, to the plan led Clarke to ask that his name be removed from the masthead of the editorial page, where he was listed as president of the company.

⁴² *West Coast Hotel Company v. Parrish*, 300 U.S. 379 (1937); *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936); *Wright v. Vinton Branch*, 300 U.S. 440 (1937); *Sonzinsky v. United States*, 300 U.S. 506 (1937); *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515 (1937); *Highland Farms Dairy v. Agnew*, 300 U.S. 608 (1937).

⁴³ Howard Brubaker, "Of All Things," *New Yorker* (April 10, 1937) p. 34.

⁴⁴ Some journalists deduced remarkably early that the Court plan was not responsible for Roberts' switch. In a column written only three days after the minimum wage decision, David Lawrence reckoned that Roberts had reached his conclusion in December 1936, prior to FDR's Court-packing message. David Lawrence, "Minimum Wage Edits," April 1, 1937, copy in Joseph Pulitzer MSS, Library of Congress, Box 76. In May, the *Washington Post's* Supreme Court correspondent also engaged in accurate specula-

tion that Roberts had changed sides on the minimum wage issue before FDR's message. Franklyn Waltman in *Washington Post*, May 30, 1937.

⁴⁵. Paul Mallon, "Purely Confidential," *Detroit News*, March 31, 1937; **Public Papers**, V, 191-92.

⁴⁶. *NLRB v. Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937); *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49 (1937); *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937); *Washington, Virginia & Maryland Coach Co. v. NLRB*, 301 U.S. 142 (1937); *Associated Press v. NLRB*, 301 U.S. 103 (1937); Robert F. Wagner, "Movietone Statement on National Labor Relations Law—April 12, 1937," Wagner MSS, Georgetown University, Washington, DC, Speech Files, Box 103, Folder 38.

⁴⁷. Paul Mallon, "Purely Confidential," *Detroit News*, April 13, 1937; Homer Cummings MS. Diary, April 12, 1937, Cummings MSS, University of Virginia, Charlottesville, VA. The Washington correspondent of a Detroit newspaper commented: "It is no exaggeration to say that, up to the time of the court's sharp reversal two weeks ago of its previous position respecting minimum wage legislation, almost no one expected the Wagner Act to be approved as applied to the Jones & Laughlin Steel Corp., and much less as applied to the smaller Fruehauf Trailer Co. and Friedman-Marks Clothing Co." *Detroit News*, April 14, 1937.

⁴⁸. Paul Mallon, "Purely Confidential," *Detroit News*, April 14, 1937; Charles Beard to Irving Brant, April 13, 1937, Brant MSS, Library of Congress, Box 2; "Congratulations, Mr. President," *Philadelphia Record*, April 13, 1937, clipping, W. Jett Lauck MSS, University of Virginia, Charlottesville, VA, Box 357. See also M. M. Logan to Samuel Wilson, April 13, 1937, Wilson MSS, University of Kentucky, Lexington, KY; J. F. T. O'Connor MS. Diary, April 12, 1937, O'Connor MSS, Bancroft Library, University of California, Berkeley, CA; address by Lewis Schwellenbach to Labor's Non-Partisan League, Minneapolis, April 19, 1937, Schwellenbach MSS, Library of Congress, Box 1. "The logic of history is chronologic," Corwin stated. "One cannot be blind to the possible future significance of the simple fact that February 5, 1937, came before April 12." Quoted in Gerald Garvey, "Edward S. Corwin in the Campaign of History: The Struggle for National Power in the 1930's," *George Washington Law Review*, XXXIV (1965), 219, 230. Another scholar has written of Hughes' effort to distinguish the Wagner Act rulings from earlier opinions detrimental to labor, "By what tortuous alchemy these cases may all be reconciled is difficult to discern." Samuel Hendel, **Charles Evans Hughes and the Supreme Court** (New York: King's Crown Press, 1951) p. 260. After lunch at the Senate restaurant on April 12, one of the leading Western liberals entered in his diary: "I accused Wheeler of influencing the justices. Of course, he denied the soft impeachment but he admitted he had had some very frank talks with Hughes and Brandeis and that Senator Vandenberg had approached Justice Roberts." Edward Keating MS. Diary, April 12, 1937, Keating MSS, Western Historical Collections, University of Colorado, Boulder, CO. Though FDR's Court message clearly had no effect on Roberts's vote in *Parrish*, it arguably did influence the disposition of the Court in the Wagner Act decisions and subsequent rulings.

⁴⁹. Felix Frankfurter Columbia Oral History Collection, p. 175; Frankfurter, "Mr. Justice Roberts," *University of Pennsylvania Law Review*, CIV (1955), 311-49; John W. Chambers, "The Big Switch: Justice Roberts and the Minimum-Wage Cases," *Labor History*, X (Winter 1969), 44-73; Richard D. Friedman, "A Reaffirmation: The Authenticity of the Roberts Memorandum, Or Felix the Non-Forger," *University of Pennsylvania Law Review*, CXLII (1994), 1985-95; Frankfurter to Louis Brandeis, March 31, 1937, Frankfurter MSS, Box 28.

⁵⁰. Felix Frankfurter to Charles C. Burlingham, April 29, 1937, in

Grenville Clark MSS, Dartmouth College, Hanover, NH, Series VII, Box 2; Frankfurter to Sir Maurice Sheldon Amos, December 11, 1937, Frankfurter MSS, Box 20.

⁵¹. "Inside the Court," *St. Louis Star-Times*, clipping, Harlan Fiske Stone MSS, Box 7; "Revolutionary Decision," Waterville (ME) *Sentinel*, May 27, 1937, clipping, Abraham Epstein MSS, School of Industrial and Labor Relations, Cornell University, Ithaca, NY. See also Thomas Amlie to Mr. and Mrs. E. J. Klema, July 6, 1937, Amlie MSS, State Historical Society of Wisconsin, Madison, WI, Box 39.

⁵². Carl T. Keller to Albert G. Keller, April 13, 1937, Sumner-Keller MSS, Yale University, New Haven, CT, Box 21; Carl T. Keller to J. G. Phelps Stokes, April 13, 1937, Richmond Pearson Hobson MSS, Library of Congress, Box 91; Millard Reese to Marion Smith, April 21, 1937, Grenville Clark MSS, Series VII, Box 4.

⁵³. R. C. Lindsay to Anthony Eden, April 14, 1937, No. 321E, F.O. 371, 20668 (A2942/542/45), Public Records Office, London; Carter Glass to Harry F. Byrd, April 13, 1937, Byrd MSS, University of Virginia, Charlottesville, VA.

⁵⁴. George Fort Milton to Homer Cummings, April 14, 1937, Milton MSS, Library of Congress, Box 20; Statement of Theodore Francis Green, April 12, 1937, Green MSS, Library of Congress, Box 32; Augustus L. and Alice B. Richards to Augustine Lonergan, April 13, 1937, Richards MSS, Cornell University, Ithaca, NY. Two days after the Wagner Act rulings, a North Carolina Congressman wrote Roosevelt, "Don't let the opposition to your Court plan lull you to sleep by saying . . . that the recent decisions . . . remove the necessity of adding new Justices to the Court." John H. Kerr to FDR, April 14, 1937, Kerr MSS, Southern Historical Collection, University of North Carolina, Chapel Hill, NC, Box 9. See also James C. Duram, "The Labor Union Journals and the Constitutional Issues of the New Deal: The Case for Court Restriction," *Labor History*, 15 (Spring 1974), 232.

⁵⁵. *New York Herald Tribune*, February 6, 1937; William F. Swindler, **Court and Constitution in the Twentieth Century: The New Legality 1932-1968** (Indianapolis: Bobbs-Merrill, 1970) p. 66. These dispatches and rumors induced a number of citizens to write individual Justices imploring them not to resign. A petition from Poughkeepsie bearing many signatures begged one of the Four Horsemen, George Sutherland, not to leave the Bench, and a Pennsylvania Congressman wrote him, "I pray you that you stand your ground in the present great crisis." He heard from a woman in New York City: "All we ask is *please don't resign*. Fear is rampant among thinking Americans who realize that you men are the last bulwark between us and Dictatorship. . . . Many a prayer is being offered daily in behalf of the nine glorious old men who are protecting our liberty." Martha I. Young et al. to George Sutherland, March, 1937; Rep. Joseph Gray to Sutherland, March 3, 1937; Isabel N. Atterbury to Sutherland, March 5, 1937, all in George Sutherland MSS, Box 6.

⁵⁶. Arthur Vandenberg MS. Diary, February 6, 1937, Vandenberg MSS, Clement Library, University of Michigan, Ann Arbor, MI; John Callan O'Laughlin to Herbert Hoover, February 22, 1937, O'Laughlin MSS, Herbert Hoover Archives, Stanford, CA. On the day that Roosevelt's plan appeared in the morning papers, Amos Pinchot wrote his friend Justice Brandeis: "Let me urge you never to think of retiring. You have a kind of eternal youth that has no relation to the year in which you happen to have been born." Amos Pinchot to Louis Brandeis, February 6, 1937, Brandeis MSS, University of Louisville Law School, Louisville, KY, G14, Folder 1.

⁵⁷. Willis Van Devanter to FDR, May 18, 1937, Van Devanter MSS, Library of Congress, Vol. 54; Clapper, "In the Capital," *Cleveland Press*, May 19, 1937.

⁵⁸. Statement, Henry G. Teigan, May 18, 1937, Teigan MSS, Min-

nesota Historical Society, St. Paul, MI, Box 16; *Time* (May 31, 1937) p. 17; William E. Borah to A. A. Lewis, August 11, 1937, Borah MSS, Library of Congress, Box 44.

⁵⁹. Frank Buxton to William Allen White, June 8, 1937, White MSS, Library of Congress, Box 189; Harold L. Ickes, **The Secret Diary of Harold L. Ickes** (3 vols., New York: Simon and Schuster, 1953-54) II: 153; R. C. Lindsay to Anthony Eden, May 28, 1937, No. 477, F.O. 371, 20668 (A4108/542/45). White replied to the *Herald* editor: "I think you are dead right in your surmise that Hughes led the fight in the Court. Hughes is a good fighter. I knew him nearly forty years ago when combat was his middle name. He never lies down and you may be assured that he didn't propose to take a licking lying down in this case." White to Buxton, June 12, 1937, White MSS, Box 189.

⁶⁰. William E. Leuchtenburg, "FDR's Court-Packing Plan: A Second Life, A Second Death," *Duke Law Journal*, (June-September 1985), 673-89. (Revised version in *Supreme Court Historical Society Yearbook 1988*, pp. 78-90.)

⁶¹. Saginaw (Mich.) *Daily News*, April 13, 1937, clipping, Prentiss Brown Scrapbooks, Brown MSS, privately held, St. Ignace, MI;

William M. Colmer to J. C. Allred, May 18, 1937, Colmer MSS, University of Southern Mississippi, Hattiesburg, MS, Box 113; *The New York Times*, May 23, 1937; "All In One Day," *Cleveland Press*, May 19, 1937. "I think its fate in the Senate is quite doubtful, with the advantage at this moment in favor of the President's opponents," Senator William McAdoo of California, who supported the plan, conceded on the day of Van Devanter's retirement and the Judiciary Committee vote. McAdoo to William Neblett, May 18, 1937, McAdoo MSS, Library of Congress, Box 435. Sutherland did, indeed, step down at the beginning of 1938. The Prentiss Brown papers have subsequently been moved to the Michigan Historical Collections, University of Michigan, Ann Arbor, MI.

⁶². Ickes, **Secret Diary**, II: 145; Rexford G. Tugwell, **The Democratic Roosevelt: A Biography of Franklin D. Roosevelt** (Garden City, NY: Doubleday, 1957) p. 387; Eugene C. Gerhart, **America's Advocate: Robert H. Jackson** (Indianapolis: Bobbs-Merrill, 1958) p. 117. The Hughes letter, Robert Jackson said later, "pretty much turned the tide." Robert Jackson Columbia Oral History Collection.

Chief Justice Hughes' Letter on Court-Packing

Richard D. Friedman

After one of the great landslides in American presidential history, Franklin D. Roosevelt took the oath of office for the second time on January 20, 1937. As he had four years before, Chief Justice Charles Evans Hughes, like Roosevelt a former governor of New York, administered the oath. Torrents of rain drenched the inauguration, and Hughes' damp whiskers waved in the biting wind.¹ When the skullcapped Chief Justice reached the promise to defend the Constitution, he "spoke slowly and with special emphasis."² The President responded in kind, though he felt like saying, as he later told his aide Sam Rosenman:³

Yes, but it's the Constitution as *I* understand it, flexible enough to meet any new problem of democracy—not the kind of Constitution your Court has raised up as barrier to progress and democracy.

Roosevelt's emphasis in pronouncing the oath was not lost on the crowd; some thought he repeated it "as if it had been an accusation." Nor, Rosenman was sure, was there any doubt that Hughes, sitting just behind the rostrum, understood the President's emphasis when he declared in his address that the

people "will insist that *every* agency of popular government use effective instruments to carry out their will."⁴ Though the Supreme Court had upheld some of the responses to the Depression attempted by the New Deal and the states, several of its decisions, particularly those invalidating New Deal programs, had frustrated the President immensely.

The atmosphere was warmer, as well as dryer, as the Roosevelts hosted members of the Court for dinner and a musical program on February 2. Hughes was in a jovial mood, and when he and Justice Willis Van Devanter sat down next to the President after the ladies retired, they seemed very convivial. Roosevelt appeared to be having so fine a time that Senator William Borah of Idaho was reminded of the "Roman Emperor who looked around his dinner table and began to laugh when he thought of how many of those heads would be rolling on the morrow."⁵ Borah could not know how close to the truth he was. Attorney General Homer Cummings, indeed, whispered uncomfortably to Rosenman that he felt too much "like a conspirator." Rosenman agreed, for they were keepers of the best guarded secret in Washington.⁶

Roosevelt himself lacked the gall to reveal the secret before the judiciary dinner, but he wanted it



Charles Evans Hughes swore in Franklin D. Roosevelt when the President (addressing the public) took the oath of office for the second time on January 20, 1937. As the skullcapped Chief Justice (seated at center) reached the promise to defend the Constitution, he “spoke slowly and with special emphasis,” and the President responded in kind.

known before the following week, when arguments were scheduled for the cases testing the validity of the National Labor Relations Act. Therefore, he made his announcement on Friday, February 5, 1937, first to a meeting of Cabinet and congressional leaders and then in a press conference to the world at large.⁷ Tom Corcoran, predicting that Justice Louis D. Brandeis “sure won’t like it,” got Roosevelt’s permission to break the news earlier that morning to “old Isaiah.” The Justice’s reaction when “Tommy the Cork” caught up to him in the robing room was as forecast.⁸ His Brethren received the news on the Bench about an hour later. The lawyer appearing before them paused for a moment, disconcerted, when he realized his argument was no longer receiving the Court’s full attention.⁹

The message read by the Justices was a copy of the one Roosevelt had just sent Congress. Claiming the need for a more efficient judiciary, Roosevelt proposed a sweeping plan to reform the entire federal judicial system—including the Supreme Court. Purportedly aimed at ridding the Court of superannuated members, the bill would allow the

President to appoint an extra Justice, up to a maximum of six, for each one who remained on the Court six months past his seventieth birthday. “Several weeks,” recorded Merlo Pusey soon afterwards, “were required to strip . . . the bill of its camouflage.” This seems not to have been entirely the case. “Too clever, too damned clever,” remarked a pro-Administration newspaper immediately after the message, and *The New York Times* reported that “Congress instantly recognized its outstanding feature and purpose.”¹⁰

The purpose of that feature, of course, was very simply to pack the Court, to add enough new members to force it into submission. The supposed reform purpose appealed to Roosevelt’s sense of misdirection. The ironic fact that it was the application to the Supreme Court of a plan proposed two decades earlier for the lower courts by the then-Attorney General, James C. McReynolds, appealed to his puckish sense of humor. That its impact was on the stature of the Court, rather than on the substance of the Constitution, very likely appealed to the jealousy and distrust he had long borne against

the legal profession. When Cummings presented him with the result of the Justice Department's research, Roosevelt regarded it as "the answer to a maiden's prayer."¹¹

In this case the maiden went into battle heavily armed, with the largest majorities in Congress ever enjoyed by any President. "Yes, I will fight it," said Carter Glass of Virginia. "But what's the use? I think Congress will do anything in the world the President tells them to do."¹² At the start, indeed, this strength alone seemed sufficient to carry Roosevelt through; the balance of initial congressional response was decidedly in favor of the plan, and the leadership expressed confidence that it would pass.¹³ For weeks after the President's message, many even thought his scheme would be enacted before the end of March.¹⁴

But the reaction in the country at large, numerous surveys showed, was generally hostile. A poll of newspapers that had supported Roosevelt against Alf Landon in 1936 indicated that most opposed the Court plan. Similarly, a Gallup poll showed that one-third of those who had voted for Roosevelt opposed the plan, while only one Landon voter in ten supported it. The legal profession in particular reacted strongly, a majority of American Bar Association members polled opposing the plan in every state and by a six to one vote overall. Soon congressional opponents drew on this reservoir of hostility, and before February was over Democratic defections led them to believe that they had "some chance" of stopping the bill. Roosevelt seemed to have the numbers to win a vote, but his opponents seemed to have enough, at least in the Senate, to put off that vote for many weeks.¹⁵

Roosevelt's subterfuge about the age of the Justices was a major factor in arousing public suspicion.¹⁶ He himself later admitted his error in presentation of the plan and quickly took a more direct approach.¹⁷ On March 4, sensing that his campaign was bogging down, he took advantage of a Democratic victory dinner at the Mayflower Hotel to shift the battle to firmer ground. Unabashedly he laid his first emphasis on party loyalty. Then, reciting a litany of national problems, he urged that each one must be confronted "NOW," and that only with a favorable Court could the New Deal do so successfully. "It will take courage," he concluded, adapting a line from Brandeis' dissent in *New State Ice Co. v. Liebmann*, "to let our minds be bold." The "NOW" speech was one of Roosevelt's most famous—Secretary of the Interior Harold Ickes thought it "by all odds, the greatest he has ever made."

Administration operatives, however, were disappointed in their search for a change in the nature of the battle; reaction to the speech in Congress was divided along the lines already laid. And indeed, it could hardly be otherwise. The spurious concern about age and the state of the Court's docket had drawn some attention, but from the start the focus of the debate was on the basic question of whether it was wise to pack the Court for ideological reasons.¹⁸ The Administration might still cling to its first ground, but no message from Olympus was necessary to clarify the true nature of the debate.

Confirmation, if any were needed, was given strikingly to Roosevelt himself on March 9, when he told the nation in a fireside chat, "We have . . . reached the point as a nation where we must take action to save the Constitution from the Court and the Court from itself." As a clincher, he quoted a passage that was found "most arresting" by both newspaper columnists and the public at large.¹⁹ "We are under a Constitution, but the Constitution is what the judges say it is," was the line, uttered first in a 1907 speech by the then-governor of New York, Charles Evans Hughes.

Three decades later, however, that former governor had not yet entered the fray. His inactivity was not due to indifference; the bill, he said privately a few weeks later, "would destroy the Court as an institution." Nor was it due to a lack of opportunities. NBC and Edward R. Murrow of CBS both offered Hughes facilities for responding to Roosevelt, but he rejected them. Herbert Hoover—an outspoken opponent of the plan, unlike the majority of Republicans, who thought they would be most effective if "meek as skimmed milk"—sent an emissary to Hughes asking him to suggest that Brandeis retire and speak out against the plan. The Chief Justice proved unwilling to discuss the proposal with his colleague. What Hoover suggested, he said, was "comparable to talking with a man regarding the woman he proposed to marry." And when, before the crisis was resolved, Brandeis actually offered to retire, Hughes, though fully aware of the potential blow to Roosevelt's scheme, urged him to stay. Very simply, Hughes did not regard his role as that of a general leading one of the opposing armies in a great political battle; rather, he was Chief Justice and thus, in his own words, "as disinterested in this matter—from a political standpoint—as anyone in the United States." He would only concern himself with his official function, and as to that he merely said, "If they want me to preside over a convention, I can do

it."²⁰

Soon Hughes had an opportunity to play a part in the battle consistent with his sense of judicial propriety. The day after Roosevelt's fireside chat, the Senate Judiciary Committee began hearings on the bill. The Administration was anxious that the hearings be finished quickly, but with Henry Fountain Ashurst of Arizona presiding that hope was doomed. Not only did Ashurst love the limelight,²¹ but he was the Senate's chief apostle of inconsistency as "one of life's great virtues." Praised by a constituent for his stand on the President's bill, he replied, "Which stand?" The question was not purely rhetorical. Having condemned Court-packing the previous year, he turned face after February 5 and introduced the President's bill. His enthusiasm was suspect, however, for he resisted all pressure for speed, leisurely conducting the committee through seven weeks of hearings before beginning an extended executive session.²²

The Administration took less than two weeks to present its case, and then it was the turn of the opposition forces. Senator Burton K. Wheeler, the liberal Democrat from Montana, was scheduled to lead off their testimony on Monday, March 22. For some time he and his allies had been trying to bring the Court in on their side of the fight. On March 18 Wheeler, accompanied by Senators Warren Austin, a Republican on the Judiciary Committee, and William King, one of the panel's senior Democrats, called on Hughes to ask him to testify against the bill. The Chief Justice received the delegation "with his usual Jovian affability"²³ and expressed willingness to appear. He would not do so, however, unless accompanied by Brandeis, the senior and most revered member of the Court's liberal wing. The Senators left in jubilation, assuming that Hughes would testify with Brandeis and Van Devanter, as he had two years before against a bill aimed at changing the Court's appellate procedure. This time, however, Hughes found that Brandeis stood fast against an appearance in which the Justices would "testify on a matter affecting their own integrity."²⁴ Hughes thereupon suggested that he might, in response to a request from the committee, write a letter stating the facts of the court's work. That idea Brandeis accepted and so, Hughes found, did Van Devanter.²⁵

On Friday morning, therefore, Hughes called Senator King at his home to tell him that there was a strong feeling that the Court should not enter the controversy "in any direct or even indirect way." But, he continued, with a characteristic emphasis, if the

committee should desire information on the work of the Court, "of course we will be glad to give the facts." He would give them "in writing an answer to specific inquiries, if the committee desires facts." "The material is all there," he added, indicating that it was a matter of public record anyway.²⁶

After his conversation with King, Hughes reached Wheeler at his office and gave him the same message. Either the Senator did not understand or he lost his nerve—perhaps because he had vociferously opposed Hughes' confirmation²⁷—and he did not act on the Chief Justice's offer. But the next day, responding to what he hopefully regarded as a tip-off from his friend Brandeis, he called on the aged Justice. Brandeis prodded the reluctant Wheeler to ring Hughes, leading the Senator by the hand to the phone and holding him there while he made the call himself. Told that Wheeler would like to see him, Hughes responded cordially and suggested that the Senator come over immediately.²⁸

And so, late that afternoon Wheeler called on the Chief Justice at his large house on R Street. Once more Hughes gave him a warm reception. When was the letter needed, he asked. Monday morning, replied Wheeler. Why so soon? "They've circulated a story that I will not testify after all," Wheeler explained. "If I put it off Monday, they'll say I never will take the stand."²⁹ Wheeler might, of course, have begun his testimony without the letter, as he had planned. It would have the most impact, though, if presented at the beginning of the opposition testimony; besides, he "wanted the drama of the moment of presenting the letter to be his."³⁰

Hughes comprehended. Gone was his insistence that the request for information be from the committee itself and that it be in the form of specific written questions. Looking at his watch, he said, "It is now five-thirty. The library is closed, my secretary is gone. . . . Can you come by early Monday morning?" Certainly, answered Wheeler, but then Hughes asked whether he was free Sunday afternoon. Wheeler was, and so the next day Hughes called him up and asked him to drop over.³¹

"The baby is born," the Chief Justice said with apparent solemnity, handing Wheeler a long typewritten letter as his visitor walked in. "Does that answer your question?" Hughes asked after the Senator read through it. "Yes, it does," responded Wheeler happily. "It certainly does."³²

And it certainly did. The letter, thought two veteran journalists, was "a masterpiece of exposition."³³ Roosevelt's original line of attack, the

alleged inefficiency of the Court, had struck a chord on which Hughes, the exemplar of efficiency, was particularly sensitive. He responded with his favorite weapon, the facts.³⁴ When the Court rose for the current recess, he pointed out, it had heard cases for which *certiorari* was granted only four weeks before; for several Terms the Court had been able to adjourn after disposing of all cases ready to be heard. Of course, the Court itself through exercise of the *certiorari* power determined just how heavy its docket

would be, but Hughes thought his Brethren believed "that if any error is being made in dealing with these applications it is on the side of liberality." This view was not universally held, but even Attorney General Cummings had admitted before February that many cases reaching the Supreme Court did not possess sufficient merit to warrant substantive consideration. Moreover, Stone, the Justice who most vigorously criticized Hughes' emphasis on efficiency in the conduct of the Court, wrote at about the time of



Senator Burton K. Wheeler, a liberal Democrat from Montana (above, left), led the opposition to the Court-packing bill. He was accompanied by Senator Warren Austin (left), a Vermont Republican, and William King (above), a senior Democrat from Utah, both members of the Judiciary Committee, on his visit to persuade Chief Justice Hughes to testify against FDR's proposal. Hughes initially accepted, but after consulting Justice Brandeis, he decided that it was improper for the Court to publicly testify on a subject concerning its integrity. A second visit by Wheeler, this time to Hughes' home, persuaded the Chief Justice to write a letter to the committee expressing his views on the lack of necessity for additional Justices.

Hughes' letter that the Court had "made the mistake of being over-generous" in granting the applications.³⁵

Not only was the addition of new Justices unnecessary for efficiency, wrote Hughes, it would positively hamper the Court's operation. Despite his confidence that he could "preside over a convention," he had made clear, in lectures on the Court that he delivered before becoming Chief Justice, his belief that the Court should not be expanded:

Everyone who has worked in a group knows the necessity of limiting size to obtain efficiency. And this is peculiarly true of a judicial body. It is too much to say that the Supreme Court could not do its work if two more members were added, but I think that the consensus of competent opinion is that it is now large enough.³⁶

Now, in the letter to Wheeler, Hughes merely confirmed this earlier view: "There would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide."

The suggestion had been made that this problem could be solved by dividing the Court into panels for most cases, but Hughes responded to such a suggestion in the Supreme Court lectures, when he had said, "Happily, suggestions for an increased number and for two divisions of the Court have not been favored because of their impracticality in view of the character of the Court's most important function."³⁷

But the letter to Wheeler went a step beyond. "The Constitution," he added, "does not appear to authorize" a division of the Supreme Court into panels. The passage is mystifying, because it was arguably, as *The New Republic* claimed, blatantly improper as "an advisory opinion run riot."³⁸

From the beginning of the Republic the Supreme Court had held it improper to advise on constitutional questions outside the context of a properly presented case. If Hughes' comment seemed tame because it clearly could not be authoritative, it also appeared to be a more flagrant impropriety because it was written by one Justice outside the ordinary procedures of the Court. Commenting in his Supreme Court lectures on an advisory opinion given by the Justices in response to a question propounded by President James Monroe, Hughes had said

This, of course, was extra-official, but it is safe to say that nothing of the sort could happen today. . . . [I]t is only with the light afforded by a real contest that opinions on questions of the highest importance can safely be rendered.³⁹

Not only did Hughes, it seems, offer an advisory opinion in his letter to Wheeler, but Brandeis and Van Devanter, both of whom were extremely meticulous about judicial procedure,⁴⁰ both approved the message after going over it carefully.⁴¹ One Justice, perhaps, might not notice that in the haste of composition a single sentence inadvertently seemed to offer a constitutional opinion, but not all three. One Justice, perhaps, might not mind breaching the bounds of judicial propriety to protect the Court, but probably not all three.

Compounding the mystery is the consideration that the apparent advisory opinion was not in fact necessary for the letter. The practical problem raised by Hughes—that "a decision by a part of the court would be unsatisfactory"—was enough to dispose of the divided-Court proposal. If more weight were needed, it could have been given by a passing—and perfectly appropriate—reference to the serious constitutional question posed by the suggestion. The impact of the letter, one can be virtually certain, would not have been diminished.

Perhaps, however, this all takes the matter too seriously. It may well be that Hughes was, in fact, trying only to express the point that the constitutionality of separate panels was in serious doubt. By saying that the Constitution "does not appear to authorize" the suggestion, he may simply have been pointing to the fact that no textual authority appears in the document; an unresolved question was therefore presented. Instead of elaborating on the point or making it stand alone, either of which he might have done had the constitutional point been clear, he also pointed out the practical objections. Perhaps, then, the explanation of the mysterious passage is simply that Hughes' words seemed more definite than his intention.

This mystery makes more intriguing another one associated with the letter. "On account of the shortness of time," Hughes said before closing,

I have not been able to consult with the members of the Court generally with respect to the foregoing statement, but I am confident that it is in accord with the views of the

justices. I should say, however, that I have been able to consult with Mr. Justice Van Devanter and Mr. Justice Brandeis, and I am at liberty to say that the statement is approved by them.

The apology is intriguing, for the shortness of time arose from no necessity but from the political considerations stated by Wheeler. Hughes was Chief Justice and, if propriety demanded that the other Justices be consulted, it was for him and not the Senator to determine the timing of the message. Moreover, his plea that time was lacking is belied by the fact that he prepared the letter for Sunday afternoon rather than for the Monday morning deadline set by Wheeler. And, finally, it is clear that Hughes simply overstated the difficulty of contacting his colleagues. All could have been reached by telephone; as Stone later pointed out, all were in town and several lived within a few minutes' walk of Hughes' house. "[T]he Chief Justice," said Stone a few weeks later, "knows well that he can find out what I think any time by asking—sometimes he finds out without asking."⁴²

Perhaps it was Hughes' confidence that he did in fact know what the other Justices were thinking that led him to write the letter without consulting them. At least he was correct on the major issues, for all the Justices were hostile to the packing plan. Nevertheless, Hughes expressed more confidence than he was entitled to, for the Brethren certainly were not unanimous in approving his statement on the constitutionality of separate panels. When Hughes brought up the letter at the next conference of the Court, several Justices expressed approval and no dissent was heard.⁴³ But Justice Stone, for one, held his tongue only because with the message already public he saw no reason to make a fight. And Benjamin N. Cardozo, at least, felt the same way.⁴⁴ That this portion of the letter was of so little significance to the whole, however, precludes the supposition that Hughes disingenuously withheld the text from his colleagues so that he could sneak the controversial passage through.

More likely, it seems, Hughes declined to circulate the letter because he was afraid that, for the speed needed in this case, even nine Justices were too many. Hughes was always eager—and certainly more eager than Stone and Cardozo—to conclude a case and move on.⁴⁵ Very likely, he wanted simply to avoid the days of delay that might ensue if all the associates offered their specific suggestions.

Certainly he was right in believing that, since the letter was not the exercise of an official function, there was no technical requirement for the entire Court to approve it. Certainly, too, he had a point when he said, as he indicated to Wheeler the concurrence of Brandeis and Van Devanter, that "they are the Court";⁴⁶ though the agreement of Van Devanter might have been expected, that of the liberals' leader shook the President's forces badly.⁴⁷ Nevertheless, it was the "widespread impression of unanimity . . . that did so much to give the Hughes letter its force,"⁴⁸ and Hughes could not be confident—and indeed on the split-panel point was mistaken—in giving that impression. Merlo Pusey was incorrect in saying that Hughes committed "a tactical error" by releasing the letter without consulting all his colleagues.⁴⁹ The tactical criteria were speed and the impression of unanimity, and Hughes achieved both.

Whether Hughes acted properly in failing to consult his colleagues is another matter. In my view, he did not, because his rush was determined by political factors.⁵⁰ In his eagerness to contribute to the defeat of the Court-packing plan consistently with his standards of judicial propriety, Hughes clouded those standards somewhat.

The transgression was relatively trivial, however. Even in the letter, the only public comment he made during the Court-packing battle that related more than tangentially to Roosevelt's plan,⁵¹ Hughes refrained from taking an active political role. "It was good tactics," thought Harold Ickes, for Hughes to concentrate on the inefficiency argument.⁵² But it was not tactics at all, Hughes indicated in the letter, only a fitting regard for "the appropriate attitude of the Court in relation to questions of policy." For Hughes it would have been a gross impropriety to enter a political debate deciding what should be the function of the Court in American government. No matter how strong his feelings were on that score, his proper role was limited to advice on how the Court might best exercise whatever function the people gave it.

Writing the letter must have given Hughes an emotional release, for as Wheeler began to leave Hughes asked him to sit down instead. According to Wheeler's later recollection, the Chief Justice was in a chatty mood. The bill would destroy the Court, he said. Moreover, the crisis might have been avoided had there been a better Attorney General, one in whom the President, the Court, and the people had more confidence. In comments more justly

applicable to ousted Solicitor General J. Crawford Biggs than to Homer Cummings, who was in fact one of Roosevelt's closest advisors, Hughes complained that not only were the laws badly drafted, but the government's cases were badly presented to the Court: "We've had to be not only the Court but we've had to do the work that should have been done by the Attorney General." He could have brought down Wall Street lawyers, Hughes continued, who would have been able to correct some of the abuses in the nation's business life in a professional manner. Rambling on, he told Wheeler about how Roosevelt had approached him to ask for a co-operative relationship with the Court. Finally seeing his guest off, the Chief Justice said, "I hope you'll see that this gets wide publicity." Stifling a laugh, Wheeler assured him, "You don't need to worry about that."⁵³

The rest, after all, was Wheeler's job. Hughes was home working as usual the next day when the Senator read the letter to the Judiciary Committee.⁵⁴ Given a grandiloquent introduction by Ashurst, who suspected from the smug look on Mrs. Wheeler's face that her husband was about to "blow us out of the water,"⁵⁵ Wheeler began very slowly, in a roundabout fashion. Finally warming up to the subject, he said that, after hearing the Administration testimony, "I went to the only source in the country that could know exactly what the facts were and that better than anyone else." Wheeler, milking the drama to the last drop, paused and glanced around the hearing room, and the buzzing stopped for the first time in weeks. Senators leaned forward silently, expectantly, as their colleague continued:

And I have here now a letter by the Chief Justice of the Supreme Court, Mr. Charles Evans Hughes, dated March 21, 1937, written by him and approved by Mr. Justice Brandeis and Mr. Justice Van Devanter. Let us see what these gentlemen say about it.⁵⁶

"You could have heard a comma drop in the caucus room while I read the letter aloud," wrote Wheeler later. The reporters all wanted copies when the session recessed, "and it was all I could do to keep it from being snatched from my hands."⁵⁷

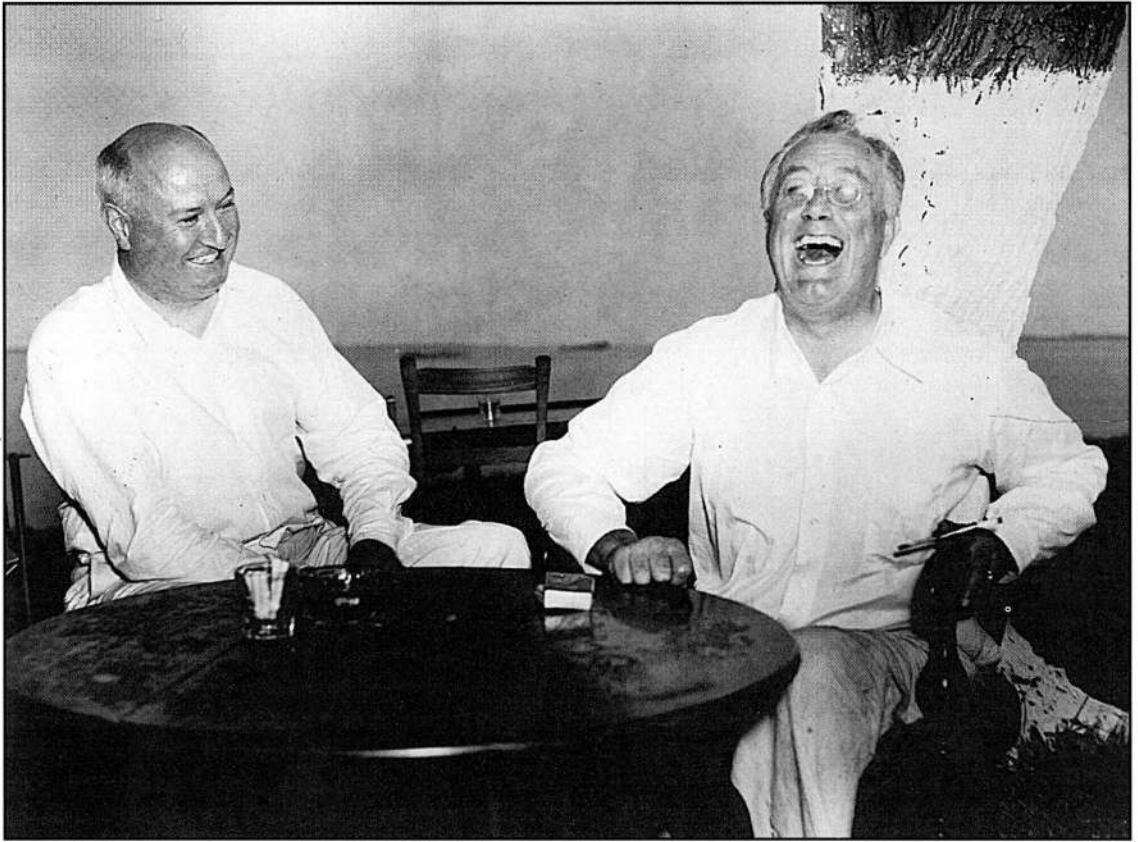
The next morning, of course, those reporters made Hughes' letter the top news story of the day. The message, reported *The New York Times*, came with "an authority and suddenness which took administration forces by surprise and sent them scurrying to strengthen their defenses." There could

be no doubt of the letter's dramatic force, but beginning a few years later a myth grew up that, as even so acute an observer as Robert H. Jackson thought, it "turned the tide in the struggle." Hughes, not given to making boastful claims, himself thought that the letter "had a devastating effect," and others have taken a similar view.⁵⁸ In reality, however, the letter had little real impact on the Court-packing fight.

From simple reason, one would expect this to be so. True, Hughes' letter did "show up for good and all as utterly hollow the smooth propositions with which the President had offered his bill," for it demonstrated with force, clarity, and detail that the Court was keeping abreast of its work. But, as Hughes had told King, none of the facts were hard to find. Court aides had given reporters the basic information on the very day of the President's message. Even more significantly, Solicitor General Stanley F. Reed, in his annual report to Congress filed in January—before he knew what the President was planning—had affirmed that there was no congestion in the Supreme Court calendar.⁵⁹ Moreover, it was clear weeks before March 22, even to those who had not realized it on February 5, that the true point at issue was not the technical one of judicial efficiency. "We abandoned this ground some time ago," noted Ickes on March 26.⁶⁰ A letter, even one written by a Chief Justice, concentrating on the state of a Court's docket could not be expected to have a crucial effect on a monumental debate that had long since focused on ideological and constitutional issues.

This logical supposition is supported by assessing the strength of the Court-packing proposal through the course of the battle. No clear turning point in the struggle is discernible around the time of Hughes' letter. Well before March 22, mounting opposition had slowed down the President's drive; well after, that drive was still expected to reach eventual success. Nobody, reported Arthur Krock well along in the Judiciary Committee hearings, thought the testimony had changed any votes.⁶¹ After the first flurry of excitement, indeed, Hughes' letter was hardly ever mentioned.

A long series of blows defeated Roosevelt's scheme. On March 29, exactly a week after Wheeler read the letter, the Court upheld a state minimum wage law by a 5-4 vote, though it had invalidated another one the previous year. In April it upheld the National Labor Relations Act, again by a 5-4 vote, and in May it turned back challenges to the Social Security Act, in part by another 5-4 margin. Though



Franklin D. Roosevelt and James A. Farley (left), Postmaster General and Chairman of the Democratic National Committee, shared a joke at the Jefferson Island Club on the Chesapeake Bay, where the President had invited all 407 Democratic Congressmen for a weekend of fun. The three-day event was successful in that FDR used his charm to rally support for a revised Court bill.

reality was more complex than appearance,⁶² these cases gave a definite impression of a politically motivated change in the Court's jurisprudence. "A switch in time saves nine" became the enduring quip. On May 18, Justice Van Devanter announced that he would retire when the Term ended, and so further undercut the argument that Court-packing was necessary to assure a liberal course of decisions. On the same day, the Senate Judiciary Committee voted against the proposal, and it followed the vote up on June 14 with a blisteringly hostile report against the plan.

But the President still had deep reservoirs of strength, loyalty, and affection to call on, and he replenished these by throwing a three-day picnic for congressional Democrats on Jefferson Island in the Chesapeake Bay. With Roosevelt using all his powers of charm and geniality, even upon the Democratic authors of the vituperative committee report, the event was a great success. Democrats' inclination to uphold their leader remained strong, as indicated by

the reaction when a compromise bill was introduced on July 2. Allowing the appointment of only one co-Justice a year, and making the trigger age seventy-five instead of seventy, the new bill was conceded to have enough support for a comfortable passage in the Senate if it ever reached a vote. That was a big if, however. By the time floor debate began on the new bill on July 6, its opponents had overcome their initial discouragement and decided that a filibuster rather than a frontal assault was their soundest strategy.⁶³

The tactic had some effect, and after a week of debate the bill had clearly lost several votes.⁶⁴ On July 14, however, occurred the critical event: exhausted by the battle and by a Washington heat wave, Senator Joseph Robinson, the Senate majority leader, died of a heart attack. Only later would opposition leaders concede that they had been beaten "right up to the time of Senator Robinson's death." Roosevelt had pledged Robinson the first open seat on the Court, and loyalty to him among his Senate

colleagues had enabled him to get pledges for the bill from a majority of them.⁶⁵ Moreover, the prospect of an appointment of Robinson, who would not have reliably entrenched a liberal majority on the Court, strengthened the attractiveness of Court-packing for liberals. As Robert Allen wrote some days later,

Had he lived, the chances are that Robinson could have put through the [compromise] bill. . . . It would have been a long and vicious fight, but the advantage was definitely with the Administration.⁶⁶

On Robinson's death, however, the situation changed "in a matter of hours." Several Senators who had given him personal pledges switched sides immediately.⁶⁷ Within days Roosevelt had to acknowledge that Court-packing was dead.

It seems to be only in later years, when simple explanations were sought for the death of Court-packing, that so much emphasis was put on Hughes' letter to Wheeler. It was significant that Republican Senator Arthur Vandenberg, in an article written shortly after the struggle was completed and listing the statements most crucial for victory, did not mention the letter at all.⁶⁸ The letter may be compared to a bolt of lightning that misses, or rather (to anthropomorphize it) shies away, from the mark; sharp, dramatic, and forceful, it could hardly be ignored and would certainly be remembered, but in truth it did not have a very profound effect.

Endnotes

¹ Joseph Alsop & Turner Catledge, *The 168 Days* (1938), p. 42.
² *The Secret Diary of Harold L. Ickes* (1955), p. 52.
³ Samuel I. Rosenman, *Working with Roosevelt* (1952), p. 144.
⁴ *The New York Times* Jan. 21, 1937, p. 15 (emphasis not lost); Rosenman, *Roosevelt*, p. 144 (Hughes understood); Alsop & Catledge, *168 Days* p. 42 (accusation).
⁵ William F. Swindler, *Court and Constitution in the Twentieth Century: The Old Legality, 1889-1932 & The New Legality, 1932-1968* (1969-70), p. 62, citing Donald R. Richberg, *My Hero* (1954), p. 222.
⁶ Rosenman, *Roosevelt*, p. 154.
⁷ Leonard Baker, *Back to Back: The Duel Between FDR and the Supreme Court* (1967), pp. 3-16, 34-35.
⁸ Swindler, *New Legality*, pp. 62-63; see also Baker, *Back to Back*, p. 135.
⁹ Alsop & Catledge, *168 Days*, p. 135.
¹⁰ Merlo J. Pusey, *The Supreme Court Crisis* (1937), p. 22 (several weeks); Alpheus T. Mason, *Harlan Fiske Stone: Pillar of the Law* (1956), p. 444 (too clever); *The New York Times*, Feb. 6, 1937, p. 1 (instantly recognized).

¹¹ Columbia University Oral History Collection, *Reminiscences of Joseph Proskauer*, p. 26 (jealousy & distrust); Alsop & Catledge, *168 Days*, pp. 35-36 (McReynolds' plan; puckish humour; maiden's prayer).

¹² *Lit. Dig.* (Feb. 13, 1937), p. 7.

¹³ *The New York Times*, Feb. 6, 1937, p. 1, Feb. 7, p. 1.

¹⁴ 'T.R.B.', 'Washington Notes', 90 *New Repub.* (1937), p. 137.

¹⁵ *The New York Times*, Feb. 18, 1937, p. 2 (Roosevelt newspapers), Feb. 25, p. 1 (some chance), Mar. 3, p. 2 (Gallup poll), Mar. 15, p. 5 (ABA poll). For other survey results see 2 *Ickes Diary*, p. 74; 'The Fortune Quarterly Survey', 16 *Fortune* (Jul. 1937), pp. 96-97; 95 *Rev. of Revs.* (May 1937), p. 13; Baker, *Back to Back*, pp. 46-47.

¹⁶ Baker, *Back to Back*, p. 54.

¹⁷ Franklin D. Roosevelt, *Introduction*, to 6 Samuel Rosenman, ed., *The Public Papers and Addresses of Franklin D. Roosevelt* (1941) lxx ("I made one major mistake when I first presented the plan. I did not place enough emphasis upon the real mischief—the kind of decisions which, as a studied and continued policy, had been coming down from the Supreme Court.")

¹⁸ 'T.R.B.', 'Washington Notes', 90 *New Repub.*, p. 137 (bogging down); Pusey, *Crisis*, pp. 22-23 (bogging down); *The New York Times*, Mar. 5, 1937, pp. 1 (party loyalty), 14 (courage to be bold), Mar. 6, p. 1 (division of reaction); 2 *Ickes Diary*, p. 89 (great speech); *Lit. Dig.*, Feb. 27, 1937, p. 3 (focus of debate).

¹⁹ Edward S. Corwin, *Constitutional Revolution, Ltd.* (1941), p. 64 (most arresting); *The New York Times*, Mar. 10, 1937, pp. 1, 15 (report of speech).

²⁰ Burton K. Wheeler, *Yankee from the West* (1962), p. 329 (bill would destroy Court; Hughes disinterested); Baker, *Back to Back*, pp. 36 (NBC, CBS), 93-94 (Hoover incident); 2 *Ickes Diary*, p. 93 (skimmed milk); Paul Freund, "Charles Evans Hughes as Chief Justice," 81 *Harvard L. R.* 4, 29 (1967) (Brandeis incident); Merlo J. Pusey, 2 *Charles Evans Hughes* (1951), p. 753.

²¹ 2 *Ickes Diary*, p. 135.

²² Alsop & Catledge, *168 Days*, p. 194.

²³ *Ibid.*, p. 125.

²⁴ Swindler, *New Legality*, p. 71.

²⁵ David J. Danelski & Joseph S. Tulchin, eds., *The Autobiographical Notes of Charles Evans Hughes* (1973), p. 305.

²⁶ Charles Evans Hughes Papers, Library of Congress, vol. 6: memoranda of telephone conversations with King and Wheeler, March 19, 1937 (apparently taken contemporaneously by Hughes' secretary); see also Hughes, *Notes*, p. 305. Hughes may already have directed one journalist to the public information on the Court's work; see Papers of Felix Frankfurter (Harvard Law School Library), vol. 91: Pusey to Frankfurter, July 23, 1939.

²⁷ Wheeler, *Yankee*, p. 328.

²⁸ Wheeler gave several different accounts of this incident. See *ibid.*, pp. 327-9; Baker, *Back to Back*, pp. 154-5; Alpheus T. Mason, *Brandeis: A Free Man's Life* (1946), p. 626, *Stone*, p. 450.

²⁹ Wheeler, *Yankee*, p. 329.

³⁰ Baker, *Back to Back*, p. 155.

³¹ Wheeler, *Yankee*, p. 329; see also Alsop & Catledge, *168 Days*, p. 126.

³² Wheeler, *Yankee*, p. 329; Baker, *Back to Back*, p. 156.

³³ Alsop & Catledge, *168 Days*, p. 127. The text of the letter is printed in *The New York Times*, March 23, 1937, pp. 1, 19.

³⁴ Mark Sullivan captured a good deal of Hughes' nature in his tart comment that Hughes "believed in God but believed equally that God was on the side of the facts." 3 *Our Times* (1930) p. 54.

³⁵ *The New York Times*, March 23, 1937, p. 22 (Cummings); Mason, *Stone*, p. 448.

³⁶ Charles E. Hughes, *The Supreme Court of the United States* (1928), p. 238.

³⁷ *Ibid.*

³⁸ "The Chief Justice's Letter," 90 *New Republic* (1937), p. 254.

³⁹ Hughes, *Supreme Court*, pp. 31-32.

⁴⁰ Freund, "Hughes," 16.

⁴¹ Hughes, *Notes*, p. 305.

⁴² Baker, *Back to Back*, p. 159; Mason, *Stone*, pp. 452-3. See also Frankfurter to C.C. Burlingham, June 9, 1937, in M. Freedman, ed., *Roosevelt and Frankfurter: Their Correspondence, 1928-1945* (1967), p. 402.

⁴³ Hughes, *Notes*, p. 305.

⁴⁴ Frankfurter Papers, vol. 105: Stone to Frankfurter, Dec. 21, 1939; Baker, *Back to Back*, p. 160.

⁴⁵ Stone and Cardozo chafed at the speed of deliberation. So too did Felix Frankfurter when he first joined the Court in 1939.

⁴⁶ Freund, "Hughes," pp. 27-29.

⁴⁷ See "Chief Justice's Letter," 90 *New Republic* (1937), p. 254 ("It is deeply regrettable, we feel, to see Mr. Justice Brandeis concurring with him."); Frankfurter Papers, vol. 28: draft of letter by Frankfurter to Brandeis, not sent.

⁴⁸ Baker, *Back to Back*, p. 159.

⁴⁹ Pusey, 2 *Hughes*, p. 756.

⁵⁰ Frankfurter wrote to Roosevelt on March 30 that Hughes' letter was a "pretended withdrawal from considerations of policy while trying to shape them." Freedman, ed., *Roosevelt-Frankfurter Correspondence*, p. 392.

⁵¹ In his annual informal address to the American Law Institute on May 6, he reported as usual on the state of the Court's business, emphasizing some points that had been in the letter to Wheeler—that the Court was up to date, that it was liberal in the grant of *certiorari*, and that the unitary method of deciding cases was optimal—but did not specifically refer to the Court plan. When, in a different vein, he delivered an address at his grandson's graduation from Amherst College in June, listeners regarded some of his remarks as thinly veiled comments on the plan. "We come to you with youthful hearts," he declared, "with spiritual arteries not yet hardened. . . . Sometimes crusaders have more fervor than wisdom."

⁵² 2 *Ickes Diary*, p. 103.

⁵³ Wheeler, *Yankee*, pp. 329-330.

⁵⁴ *The New York Times*, March 23, 1937, p. 19.

⁵⁵ Wheeler, *Yankee*, p. 330.

⁵⁶ Baker, *Back to Back*, pp. 157-8.

⁵⁷ Wheeler, *Yankee*, pp. 332-3.

⁵⁸ *The New York Times*, March 23, 1937, p. 14 (authority and suddenness); Jackson, Book Review, 1B (turned tide); Hughes, *Notes*, p. 306 (devastating effect). See also *The New York Times*, June 3, 1941, p. 19; Pusey, 2 *Hughes*, p. 766; Mason, *Brandeis*, p. 627; Freund, "Hughes," 28. cf. William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* 141 (1995) ("Hughes's unanticipated contribution not only effectively rebutted the President's crowded dockets argument, but also suggested that henceforth Roosevelt, in pushing his proposal, would encounter not just the wily Wheeler but the formidable figure of the Chief Justice.")

⁵⁹ Alsop & Catledge, *168 Days*, p. 127 (hollow propositions); *The New York Times*, Feb. 6, 1937, p. 1 (Court aides); Pusey, *Crisis*, p. 13 (Reed). After the President's message, however, Reed wrote a letter to Ashurst supporting it. "I wrote that?" Reed asked cheerily when reminded of this letter four decades later. "I must have been trying to get on." Reed interview. Reed, in the witty words of one intimate, adapting the jargon of American law schools, "didn't spot the moral issue" in 1937. Confidential interview.

⁶⁰ 2 *Ickes Diary*, pp. 1-3.

⁶¹ *The New York Times*, Apr. 8, 1937, p. 22. See also the assessments at *ibid.*, March 28, § IV, p. 3, Apr. 13, p. 1, by Krock and Turner Catledge, two of the most respected *Times* reporters.

⁶² See my article, "Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation," 142 *U. Penn. L. Rev.* 1891 (1994).

⁶³ Alsop & Catledge, *168 Days*, p. 216; *The New York Times*, July 3, 1937, p. 1, July 4, p. 1. For a vivid description of the Jefferson Island picnic, see William E. Leuchtenburg, "FDR's Court Packing Plan: A Second Life, A Second Death," 1985 *Duke L.J.* 673, 677-80.

⁶⁴ *The New York Times*, July 14, 1937, p. 1, July 15, p. 13.

⁶⁵ *Ibid.*, July 23, 1937, p. 2.

⁶⁶ Robert Allen, "Roosevelt's Defeat," 145 *Nation*, at 123. Alsop and Catledge took a somewhat different view: "Whether or not the fight would have been lost anyway will never be decided. . . . [I]t appears by hindsight that even Robinson could not have held his majority together, but without Robinson all hope was certainly gone." *168 Days*, at 267-68.

⁶⁷ *The New York Times*, July 23, 1937, p. 2; see also Baker, *Back to Back*, p. 254.

⁶⁸ Arthur Vandenberg, "The Biography of an Undelivered Speech," 210 *Saturday Evening Post* (October 9, 1937), 32.

The New Deal Court in the 1940s: Its Constitutional Legacy

David P. Currie

Earlier lectures in this series have traced the origins of the New Deal crisis in turn-of-the-century decisions like *United States v. E.C. Knight Co.*¹ and *Lochner v. New York*,² which limited federal and state regulatory authority; the development of these ideas through the Progressive era and the days of Chief Justice Howard Taft; the frustration of the New Deal by the “Four Horsemen” (Justices Willis Van Devanter, James C. McReynolds, George Sutherland, and Pierce Butler) and their occasional allies in such cases as *Schechter Poultry Corp. v. United States*³ and *Morehead v. New York ex rel. Tipaldo*;⁴ the 1937 judicial revolution, highlighted by *West Coast Hotel Co. v. Parrish*⁵ and *Labor Board v. Jones & Laughlin Steel Corp.*,⁶ which gave the New Deal a green light; and the impact of President Franklin D. Roosevelt’s Court-packing proposal in precipitating the change.

My task is to discuss the immediate aftermath. What happened after the New Deal revolution? Did the Court live happily ever after? Or did new issues come along to divide the Justices once again? We know they did.

What were the new issues? How did the Court react to them? And how were its reactions shaped by the events of the 1930s?

The revolution of 1937 was one of the six major

turning points in our constitutional history. The first, characterized by the Declaration of Independence, the Revolutionary War, and the Articles of Confederation, was the establishment of a new nation. The second was the strengthening of the central government through adoption of the Philadelphia Constitution and its sympathetic interpretation by the Supreme Court under Chief Justice John Marshall. The third was the Civil War and the consequent adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments, which significantly restricted state power. The fourth was judicial transformation of the Fourteenth Amendment from an instrument designed to promote racial equality into a tool for suppressing the welfare state. The fifth—the subject of this series—was the abandonment both of substantive due process and of established limitations on federal authority. For those were the principal issues in the New Deal crisis: laissez-faire and federalism; economic due process; and the scope of congressional authority. The sixth, heralded by the *Carolene Products* footnote, was an increased insistence on civil rights and liberties, partly discussed in this paper.

In terms of constitutional jurisprudence, 1937 was the end of an era. After *West Coast Hotel* the

Court was no longer concerned with the economic reasonableness of laws; after *Jones & Laughlin* it no longer questioned Congress's authority over the national economy.

In terms of judicial personnel, 1937 marked the beginning of the end of an era. Justice Van Devanter left the Court that year. By 1941 all four Horsemen were gone: Sutherland left in 1938, Butler in 1939, McReynolds in 1941. It was symbolic of the changing times that when it came time for Roosevelt to appoint a new Chief Justice in 1941 he picked Justice Harlan Fiske Stone, who, with his articulate opposition to the nullifying decisions of the 1930s—culminating in his electric dissent in *United States v. Butler*⁷—best personified the Court's new approach. The only other member of the 1937 Court who remained in 1941 was Owen J. Roberts, whose famous change of heart had made the revolution possible.

President Roosevelt had the rare opportunity to appoint seven new Justices within five years. Understandably, they were carefully selected to be sympathetic to his program: Hugo L. Black in 1937, Stanley F. Reed in 1938, Felix Frankfurter and William O. Douglas in 1939, Frank Murphy in 1940, James F. Byrnes, Jr., and Robert H. Jackson in 1941. Wiley Rutledge replaced Byrnes when the latter went to work for Roosevelt in 1943.

Thus by 1941 the Court, appropriately ensconced in its new building, boasted a new Chief Justice, seven new members, and a new approach to constitutional interpretation. A new era had indeed begun. The *Washington Post* cheerily predicted "virtual unanimity" on the Court "for years to come." But it was not to be.

On the old questions of the 1930s the *Post* was correct. The new Court carried the principles of 1937 to new extremes. *Wickard v. Filburn*,⁸ in 1942, held that Congress could limit the wheat a farmer planted for his own use because if he didn't grow wheat he would have to buy it, and it might come from another state. The second *Carolene Products* decision,⁹ in 1944, upheld a ban on a healthful and nutritious product because of a risk of deception that could have been eliminated by labeling—a statute my former colleague Geoffrey Miller has called "an utterly unprincipled example of special interest legislation."¹⁰

Both decisions were unanimous. Like the 1937 decisions they extended, both were permissive. And the Court was less intrusive in other areas as well. As early as 1934, in *Home Building & Loan Ass'n v. Blaisdell*,¹¹ it had watered down the Contract Clause,

allowing the states in the teeth of text and history to impair the obligation of contract so long as they did so reasonably. Intergovernmental immunities, which went back all the way to *McCulloch v. Maryland*,¹² faded significantly in the late 1930s and early 1940s.¹³ So did geographical limitations on state power to tax, regulate, and adjudicate—as in the famous cases of *Pacific Employers* and *International Shoe*.¹⁴ So did the separation-of-powers concerns that had informed the doctrine limiting delegation of authority to executive or independent agencies,¹⁵ and even—for a time—the restrictive force of the Commerce Clause as a limitation on state authority.¹⁶

The chief architect of most of these changes was Justice (or Chief Justice) Stone. And it was Stone who had warned in his *Butler* dissent that, while legislative and executive abuses were subject to judicial control, "the only check upon our own exercise of power is our own sense of self-restraint." Thus in a sense the New Deal revolution was about judicial restraint: the Court had been too aggressive in striking down laws; it should be more modest in its assertion of judicial power. And in many fields it was more modest after 1937. Indeed, on the basis of the decisions so far discussed it is possible to argue that in the New Deal revolution the Court went from one extreme to the other: it was so intimidated by the response to its overreaching that it was no longer capable of doing its job.

In other fields, however, the Court was as aggressive as ever. In the 1930s, as the Justices limited state and federal authority to enact social and economic legislation, they were equally vigorous in protecting civil rights, civil liberties, and the rights of the accused. *Nixon v. Condon*¹⁷ held the state responsible for the exclusion of blacks from a primary election it had authorized a political party to conduct. *Powell v. Alabama*¹⁸ required the states to provide counsel in capital cases; *Mooney v. Holohan*¹⁹ and *Brown v. Mississippi*²⁰ forbade them to use perjured testimony or coerced confessions. A raft of decisions, beginning with *Stromberg v. California*²¹ and *Near v. Minnesota*,²² greatly expanded freedom of speech and of the press.

The interesting fact is that this activism in the field of civil rights and liberties did not stop in 1937. Though the Court withdrew from enforcing a number of restrictions it had earlier found in the Constitution—including not only economic due process and the positive and negative limits of the Commerce Clause but even the Full Faith and Contract Clauses—it went right on vigorously enforcing

ing other limitations without visible deference to other governmental bodies.

*Missouri ex rel Gaines v. Canada*²³ (1938) for the first time enforced the requirement that racially separate schools be equal. *Smith v. Allwright*²⁴ (1944) invalidated a white primary run by a political party without delegation of authority from the state. A series of decisions involving Jehovah's Witnesses gave new force to expressive and religious freedoms: *Lovell v. City of Griffin*²⁵ recognized the right to speak on public streets without a permit, *Schneider v. State*²⁶ the right to distribute handbills, *Martin v. City of Struthers*²⁷ the right to spread opinions door to door. *Cantwell v. Connecticut*²⁸ established that expression could not be prohibited because it was offensive, *Thornhill v. Alabama*²⁹ that picketing was a form of protected speech.

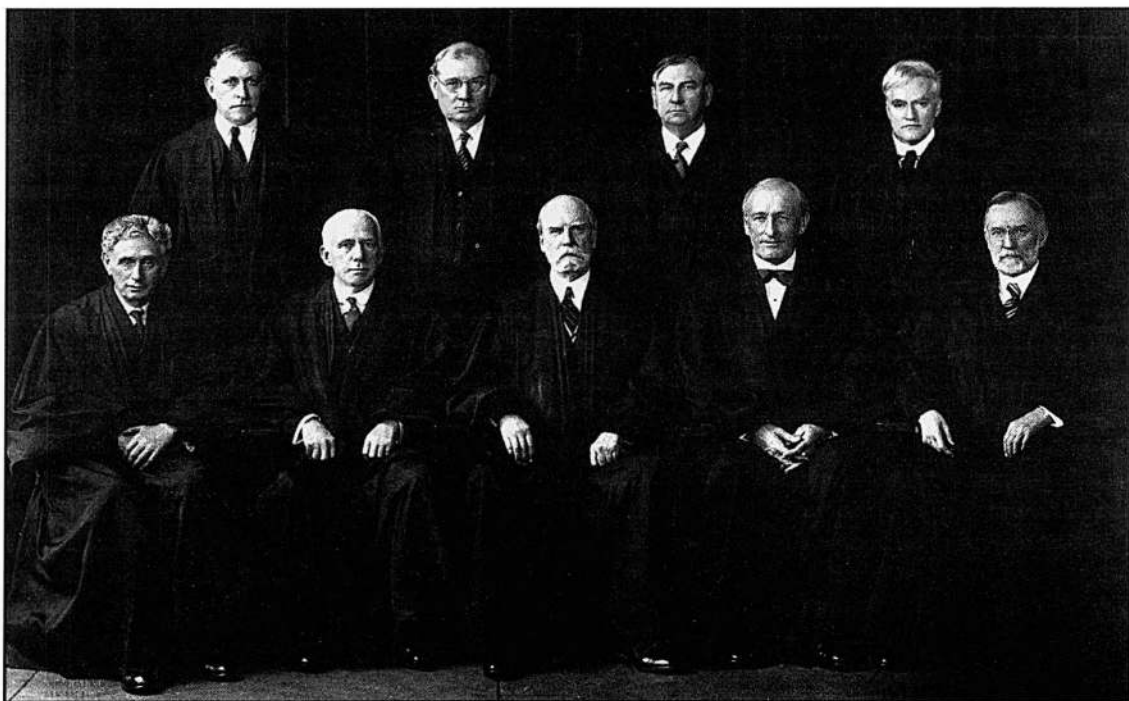
One of the rare cases the Witnesses lost during this period was *Minersville School District v. Gobitis*,³⁰ where the Court held that a state could constitutionally require school children to salute the flag. It was no accident that *Gobitis* was Justice Frankfurter's first major opinion for the Court; it was no accident that the decision was not unanimous.

Justice Stone, the apostle of judicial restraint in

Butler, dissented alone. The government's interest, he said, was insufficient to justify such a significant restriction of freedom. If this was the constitutional test, Stone was right that the decision was monstrous. The decision raised in sharpest form the question of how aggressive the Court should be in enforcing First Amendment freedoms.

It was obvious from even the most superficial comparison of cases that the Court had become less deferential to other branches in speech cases than in matters of economic due process. Justice Frank Murphy had acknowledged and attempted to explain this differential treatment in his opinion for the Court in *Thornhill*:

Abridgement of freedom of speech and of the press . . . impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government. . . . Mere legislative preference for one rather than another means for combatting substantive evils . . . may well prove an inadequate foundation on which to rest regulations which . . . diminish the effective exercise of rights so



The members of the Supreme Court are pictured above as they were seated from 1932 until the revolution of 1937. Seated from the left are Louis D. Brandeis, Willis Van Devanter, Chief Justice Charles Evans Hughes, James C. McReynolds, and George Sutherland. Standing from the left are Owen J. Roberts, Pierce Butler, Harlan Fiske Stone, and Benjamin N. Cardozo. Justice Van Devanter was the first of this group to retire, on June 2, 1937, announcing his departure during the height of the Court-packing controversy. He was succeeded by Hugo L. Black.



When Justice Harlan Fiske Stone was promoted to the center chair on July 3, 1941, the composition of the Court had further changed. Stanley F. Reed had succeeded Sutherland, Felix Frankfurter had succeeded Cardozo, William O. Douglas had succeeded Brandeis, Frank Murphy had succeeded Butler, and James F. Byrnes, Jr., had succeeded McReynolds. Robert H. Jackson took Stone's previous seat on July 11.

necessary to the maintenance of democratic institutions.³¹

This explanation of the purposes of freedom of speech goes back to the debates on the Sedition Act,³² and it was picked up by the German Constitutional Court in the 1950s in its first major decision interpreting the freedom of expression provision of the new German constitution, quoting (in English) Cardozo's observation that free speech was "the matrix, the indispensable condition of nearly every other form of freedom."³³

Thus *Thornhill* explicitly acknowledged that the Court was more aggressive in scrutinizing freedom of expression claims than some other constitutional arguments; and thus *Thornhill* stands as one of the Court's earliest statements of the position that some constitutional provisions are more equal than others—that, as was later said, some of them occupied a preferred position.

But *Thornhill* was neither the first nor the most comprehensive statement of that position. Two years earlier, in 1938, Justice Stone had suggested in his famous *Carolene Products* footnote that there might be less reason for judicial restraint in cases involving a "specific prohibition of the Constitution, such

as those of the first ten amendments," or "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," or legislation directed at "discrete and insular minorities."³⁴

It was no surprise that this passage was cited in *Thornhill*.³⁵ Freedom of expression fits into two of Stone's favored categories: it is protected (at least as to federal action) by a specific prohibition of the Bill of Rights; and (as Murphy explained in *Thornhill*) it is essential to the democratic political process.

As a matter of prediction, Stone's footnote in *Carolene Products* was remarkably clairvoyant; in declaring that the Court would be most attentive to specific Bill of Rights provisions, the rights of minorities, and the integrity of the political process he set the Court's agenda for the next fifty years. Indeed, *Carolene Products* signaled the sixth great turning point in American constitutional history—a development that came to full fruition in the second half of Earl Warren's tenure as Chief Justice, when the Court reached new heights in the protection of those interests Justice Stone had identified way back in 1938.

On the merits, Stone's declaration raises a serious question of legitimacy: by what warrant may the



Thornhill v. Alabama, the 1940 decision finding picketing as a form of protected speech, included one of the first statements that some constitutional provisions occupy a preferred position and are more aggressively scrutinized by the Court. Above, workers exercised their right to picket a Chicago realty company in 1941.

Supreme Court pick and choose which constitutional provisions to enforce? Under Article VI every provision is the supreme law of the land.

Political theory might sustain Stone's distinctions in part. Deference to legislative decisions depends upon faith in the integrity of the legislative and electoral machinery, and even truly representative legislatures can least be trusted to deal fairly with a powerless minority. The extraordinary success of such single-issue groups as the farm lobby has led some observers to question whether Stone's formulation is wholly accurate, but there is more than a grain of truth in his perceptions. The trouble is that the Framers of the Constitution did not trust the legislative or executive branches to respect any constitutional limitations. That is why they put those limitations in the Constitution, and that is why they provided implicitly for judicial review. As Hamilton said in *The Federalist*, it makes no sense to appoint the rabbit to guard the cabbages. The question remains:

what legal justification can there be for enforcing some constitutional provisions and not others?

The question of the appropriate degree of deference to other branches of government in freedom of expression cases arose again in *West Virginia State Board of Education v. Barnette*³⁶ in 1943. This case was a reprise of the flag-salute controversy, and it produced a different result. Black, Douglas, and Murphy shifted their position, joining Stone and the newly appointed Jackson and Rutledge in a 6-3 decision holding the practice unconstitutional. Jackson reaffirmed that the Court was giving stricter scrutiny to claims that expressive or religious freedoms had been infringed:

The right of a State to regulate . . . a public utility may well include, so far as the due process test is concerned, power to impose all of the restraints which a legislature may have a "rational basis" for adopting. But freedoms

of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.³⁷

Justice Frankfurter wrote an impassioned dissent, insisting that the Court was unfaithful to the basic principle of the New Deal revolution, which in his view was judicial restraint:

The admonition that judicial self-restraint alone limits arbitrary exercise of our authority [as Stone had said in *Butler*] is relevant every time we are asked to nullify legislation. . . . Our power does not vary according to the particular provision of the Bill of Rights which is invoked. . . . Whenever legislation is sought to be nullified on any ground, . . . this Court's only and very narrow function is to determine whether within the broad grant of authority vested in legislatures they have exercised a judgment for which reasonable justification can be offered.³⁸

This was a direct challenge to Stone's footnote in *Carolene Products*: in Frankfurter's view there was no justification for different levels of scrutiny for different constitutional provisions. Judicial restraint, in the sense of deference to reasonable legislative judgment, was appropriate across the board.

Indeed, as Frankfurter was quick to point out, the apparent inconsistency in *Barnette* was heightened by the fact that for Justice Jackson the case involved the same provision that the Court had refused to take seriously in economic cases like *Carolene Products*. For the First Amendment applied only to Congress; only the Due Process Clause of the Fourteenth Amendment, as Jackson acknowledged, made its strictures applicable to state action, which was in issue in the flag-salute cases. As Justice Brandeis said in *Whitney v. California*,³⁹ he had not thought due process ensured the substantive reasonableness of the laws; but since the Court believed it did, he thought it ought to protect those liberties he considered important—like freedom of expression—as well as the economic interests then so dear to the majority of the Court.

Justice Frankfurter made the most of this point. "The Constitution," he argued, "does not give us

greater veto power when dealing with one phase of 'liberty' than with another."⁴⁰ Jackson's response:

Much of the vagueness of the due process clause disappears when the specific prohibitions of the First [Amendment] become its standard.⁴¹

This was a reference to another of the categories of heightened scrutiny that Justice Stone had identified in *Carolene Products*. But standards for determining when legislation offends the First Amendment are not all that clear either. More important, Jackson didn't say why it mattered; whether constitutional provisions are vague or not, it is the Court's job to interpret and enforce them.

A few months before *Barnette*, in striking down the application of a tax law to the sale of religious literature in *Murdock v. Pennsylvania*,⁴² Justice Douglas for a bare majority had attempted to explain why the same tax could constitutionally be applied to ordinary businesses. The Constitution, he said, placed freedom of speech, press, and religion in a "preferred position."⁴³

It is not clear that in using this phrase Douglas meant to say that the Court should give less deference to legislative judgment in cases involving First Amendment freedoms; he seemed to be saying the Constitution imposed different substantive standards that permitted taxation of business and not of religion. But "preferred position" soon became a shorthand expression for the principle of strict scrutiny announced in *Carolene Products*, *Thornhill*, and *Barnette*. It cropped up again in Justice Reed's opinion for three Justices in *Kovacs v. Cooper* in 1949, where a divided Court sustained a ban on "loud and raucous" loudspeakers in public places.⁴⁴

Justice Frankfurter thought Reed had used the term to establish a presumption that laws restricting expression were unconstitutional, and he attacked it. Yet Frankfurter conceded that even Justice Holmes, who was famous for judicial restraint, had been less deferential in speech cases than in those involving economic due process. Surprisingly, Frankfurter concluded that in so doing Holmes had been right:

Those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with a momentum

for respect lacking when appeal is made to liberties which derive mainly from shifting economic arrangements.⁴⁵

Thus Justice Frankfurter threw in the towel. Despite the force of his original position in *Barnette*, as Professor Gerald Gunther has written, "Frankfurter too recognized a hierarchy of values, with freedom of speech high on the list." Thus in the end even Frankfurter acknowledged that some constitutional rights were more equal than others. However appealing this position may be in political theory, it remains difficult to square with the text or history of the Constitution.

Justice Frankfurter remained more deferential than many of his Brethren in political and speech cases until his retirement in 1962. Perhaps the most extreme example of his reticence was the 1946 case of *Colegrove v. Green*,⁴⁶ where he argued for three of the seven participating Justices that the courts could not intervene in controversies over legislative apportionment at all, though they plainly fell within Stone's understandable category of cases requiring heightened scrutiny to protect the integrity of the political process.

Stone himself died after *Colegrove* was argued and before it was decided. Someone must know how he would have voted. I like to think he would have joined Justice Black, who said the Court must enforce the Constitution.

For despite *Carolene Products* and *Gobitis*, Justice Frankfurter's principal adversary on questions of the intensity of judicial review was not Chief Justice Stone, who not infrequently sided with him in matters of freedom of speech,⁴⁷ but former Alabama Senator Hugo L. Black, with whom he served for twenty-three years. The tension between the views of Black and Frankfurter on judicial review was the central feature of the Court's constitutional jurisprudence during that entire period.

Black was as unwilling as Frankfurter to invoke economic due process or to deny Congress authority over the national economy, but he displayed no visible deference to other branches in matters of religion or expression. The contrast was evident as early as *Bridges v. California*⁴⁸ in 1941, and it continued through the *Communist Party* case⁴⁹ two decades later. As *Colegrove* demonstrates, their dispute was not confined to speech cases. Both Justices were quick to protect the rights of discrete and insular minorities.⁵⁰ But in

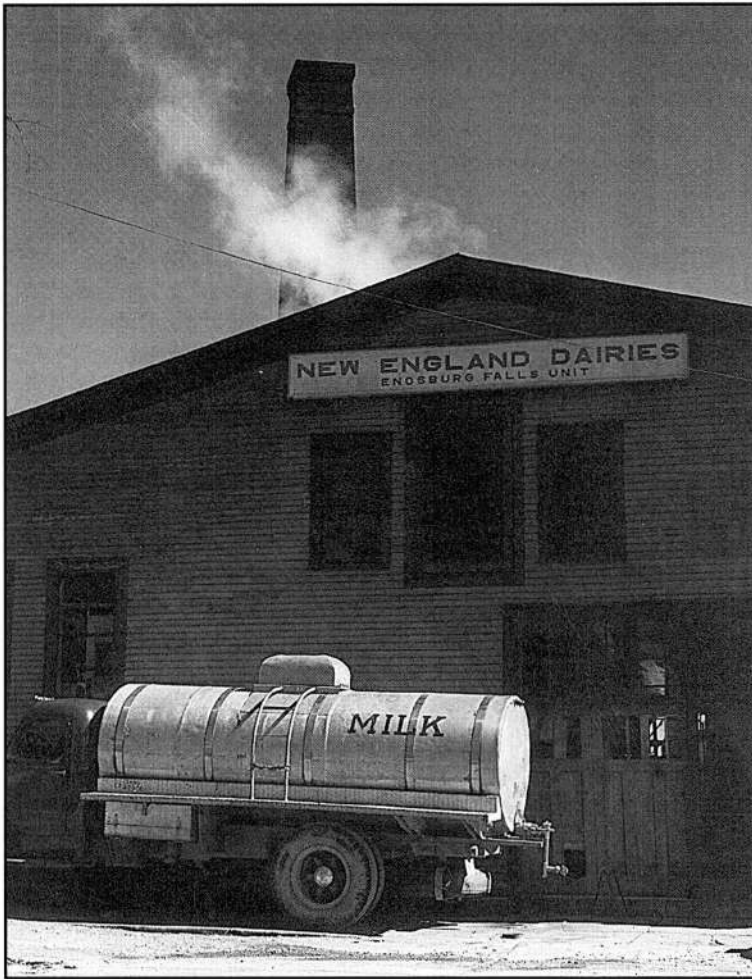
other respects Black was much less reluctant than Frankfurter to substitute his judgment as to the meaning of the Constitution for that of another branch of government.

For Justice Black the defining moment came in the 1947 case of *Adamson v. California*,⁵¹ where the Court, with Frankfurter concurring, reaffirmed the conclusion of *Twining v. New Jersey*,⁵² that a state prosecutor might comment on a defendant's refusal to testify in a criminal case. Black took the occasion to argue in a detailed dissent (as he had already suggested in *Betts v. Brady*)⁵³ for a broad interpretation of the Fourteenth Amendment: as the principal sponsor of that amendment had told the Senate, it made the entire Bill of Rights—including the privilege against self-incrimination, which was involved in *Adamson*—applicable to the individual states.⁵⁴ This aggressive interpretation brands Justice Black as an outspoken activist, and in the construction and application of the incorporated provisions he exhibited little in the way of judicial restraint.

But there was a restrictive side to Black's *Adamson* opinion too, and it was anything but activist. The majority's freewheeling approach to determining which rights were sufficiently fundamental to be made applicable to the states by the Due Process Clause, Black wrote, not only "[d]egrade[s] the constitutional safeguards of the Bill of Rights" but also "appropriate[s] for this Court a broad power which we are not authorized by the Constitution to exercise."⁵⁵ He went on to attack not only the deferential *Twining v. New Jersey* but also the notoriously aggressive decision in *Lochner v. New York*, where the Court had found a law limiting the hours a baker might work an infringement of the "liberty of contract" secured by the due process clause.⁵⁶ To Justice Black it was just as bad to invent constitutional limitations as to ignore them.

That he meant it is shown by his 1949 opinion for the Court in *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*,⁵⁷ upholding a right-to-work law against substantive due-process objections:

This Court beginning at least as early as 1934 . . . has steadily rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases [striking down laws restricting agreements not to join a union]. In doing so it has consciously returned



Justice Harlan Fiske Stone's celebrated footnote to his 1938 *Carolene Products* opinion declared that the Court would be most attentive to specific Bill of Rights provisions, the rights of minorities, and the integrity of the political process. The author considers it the sixth great turning point in American constitutional history because Stone's words set the agenda for the next fifty years of constitutional interpretation. The case involved the government's right to bar companies from shipping certain types of skimmed milk across state lines.

closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.⁵⁸

Justice Black reaffirmed this position near the end of his career in *Griswold v. Connecticut* (1965), where the Court held a state could not forbid the use of contraceptives.⁵⁹ Finding nothing in the Constitution to prevent it from doing so, Black dissented.⁶⁰

In other words, for Justice Black the trouble with *Lochner v. New York* and related decisions of the New Deal period was not that the Court was insufficiently deferential to other branches of government, but that substantive due process—

that classic contradiction in terms—had no place in the Constitution.

The difference in outlook between Justices Frankfurter and Black pointed to a basic ambiguity in the New Deal revolution: was the problem that the Court was not deferential enough to legislative and executive bodies, or that it was simply wrong in interpreting the Constitution?

Justice Stone had suggested the former in emphasizing judicial self-restraint in his dissent in *United States v. Butler*. Other decisions of the late 1930s (including *West Coast Hotel*), however, contained ringing endorsements of the reasonableness of the contested legislation. The same ambiguity appears in opinions of the early 1940s. In the second *Carolene Products* case, for example, Chief Justice Stone uttered a classic statement of deferential review, insisting that economic regulation would survive due-process scrutiny absent a "clear and convincing" showing that it had "no rational

basis.”⁶¹ Yet in the 1941 decision of *Olsen v. Nebraska*, upholding a state’s power to regulate employment-agency fees, Justice Douglas suggested (as Black would later suggest in *Lincoln Labor Union*) that substantive due process was dead altogether:

[T]he only constitutional . . . restraints which respondents have suggested for the invalidation of this legislation are those notions of public policy embedded in earlier decisions of this Court but which, as Mr. Justice Holmes long admonished, should not be read into the Constitution.⁶²

This ambiguity produced the gulf that separated Black and Frankfurter—allies in their support of the constitutionality of the New Deal in the 1930s—when they were confronted by the civil-liberties and political-process cases of the 1940s. Black had a narrow conception of substantive due process; Frankfurter had a narrow conception of judicial review.

Both were convinced that *Lochner* and its progeny were a disaster and determined to prevent their recurrence. To Frankfurter that meant restraint in enforcing all constitutional provisions. To Black it meant that the Court must not make up limitations the Constitution did not contain; he saw no reason to be reticent about enforcing the limitations that it did.

Indeed, if one accepts Justice Black’s plausible argument that the Fourteenth Amendment incorporates the entire Bill of Rights, one also has an answer to Frankfurter’s charge of inconsistency in *Barnette*. For on this hypothesis freedom of expression is not just another aspect of the questionable doctrine of substantive due process but a separate, specific right that the First Amendment expressly recognizes and the Fourteenth makes applicable to the states. Thus in Black’s view *Barnette* did not require the Court to employ two levels of scrutiny in applying a single provision or—as Stone seemed to argue in *Carolene Products*—to take some constitutional provisions more seriously than others. Black’s reason for enforcing freedom of speech and not economic due process was that the former is protected by the Constitution, and the latter is not.

What is in the Constitution, of course, is subject to legitimate dispute. Moreover, not even Justice Black seems to have been entirely consistent

in his approach to judicial review. One decision in particular stands out as atypical of Justice Black during the 1940s: the famous decision in *Korematsu v. United States*, upholding the exclusion of American citizens of Japanese descent from the West Coast during the Second World War.⁶³

It is not surprising that one area in which the New Deal Court exercised considerable restraint was in reviewing military actions during World War II—from military trials in *Ex parte Quirin*⁶⁴ and *In re Yamashita*⁶⁵ to Selective Service in *Falbo v. United States*⁶⁶ and restrictions on Japanese-Americans in *Hirabayashi*⁶⁷ and *Korematsu*. Only after the war (or as it was winding down) did the Court find fault with martial law in *Hawaii*⁶⁸ and with actual internment of the Nisei⁶⁹ and assert the right to review draft classifications,⁷⁰ and in so doing it left itself an escape route by invoking statutory rather than constitutional grounds. It had done much the same thing in the Civil War, striking down test oaths⁷¹ and the military trial of civilians⁷² only after the fighting was over; it is much easier to be brave once the wolf is home in bed. The end of hostilities lessens the risk of executive disobedience on grounds of national security, which one may view as the ultimate extraconstitutional check on abuse of judicial authority.

Thus it is understandable in terms of self-preservation that the Court was extremely deferential in scrutinizing the curfew and exclusion provisions directed at Japanese-Americans, especially so soon after the intimidation it had experienced in peacetime when it tried to obstruct the New Deal. Chief Justice Stone said expressly in *Hirabayashi* that he was employing a lenient standard of review: it was enough that there was a “rational basis” for the decision to impose a curfew.⁷³ That was consistent with recent decisions respecting economic due process, but not with the speech cases—and not with Stone’s own suggestion in *Carolene Products* that little deference was called for in protecting the rights of “discrete and insular minorities.”

Justice Black picked up this suggestion in *Korematsu*, where he purported to reject the rational-basis standard: “All legal restraints which curtail the civil rights of a single racial group are immediately suspect. . . . Courts must subject them to the most rigid scrutiny.”⁷⁴

Having enunciated a strict standard of scrutiny, Black proceeded to apply it to uphold the

exclusion of all Japanese-Americans from the West Coast because some of them might be dangerous—an egregiously overinclusive measure that was not followed with Italian- or German-Americans, nor even with Japanese-Americans in Hawaii, where they were more numerous. The means chosen were far too poorly tailored to the compelling end of preventing sabotage to survive modern notions of strict scrutiny. Thus the *Korematsu* opinion was uncharacteristically deferential for the Court of the 1940s in the area of race relations and uncharacteristically deferential for Justice Black, who seldom deferred to anyone in interpreting the Constitution.

At the same time, however, the *Korematsu* opinion was uncharacteristically assertive in another respect; for there Justice Black unblinkingly announced for the Court that the United States was forbidden, absent compelling need, to discriminate on racial grounds.

The difficulty is that there is no provision to this effect in the Constitution. The Equal Protection Clause, which forbids race discrimination, applies only to the states—as the Chief Justice had just pointed out in *Hirabayashi*.⁷⁵ Substantive due process, which might conceivably embrace such a principle (though it would make the Equal Protection Clause redundant), had been decisively rejected—not only by Black but by the entire Court.

Thus arguably Justice Black in *Korematsu* was faithful to neither half of his *Adamson* principle: unwontedly deferential in enforcing those rights he perceived in the Constitution, he was unwontedly aggressive in discovering rights that very likely were not there.

Thus neither Black nor Frankfurter, nor the Court as an institution, was wholly consistent in terms of the proper role of the courts in enforcing the Constitution. But the Court of the 1940s was characterized by emergence of a basic debate on that fundamental question, and Black and Frankfurter were the leading exponents of the two competing views.⁷⁶

It is often said that the quarrel between Black and Frankfurter was over activism versus judicial restraint. It is more useful to view it as a contest between two forms of restraint: a refusal to invent limitations not found in the Constitution and a reluctance to enforce the Constitution itself.

Justice Black's views were not to prevail until Frankfurter retired in 1962. Not long afterward the Court departed from Black's idea of restraint

as well, returning to the freewheeling notion of the Four Horsemen that any interference with a right five Justices thought fundamental was unconstitutional—a position that both Black and Frankfurter (and indeed the entire Court of the 1940s) had vigorously opposed. For in terms of judicial philosophy, though obviously not of politics, *Griswold v. Connecticut* and *Roe v. Wade*⁷⁷ are the direct descendants of *Dred Scott*⁷⁸ and of *Lochner v. New York*.

Justice Byron R. White warned against such an approach in *Bowers v. Hardwick*⁷⁹ in 1986, refusing to extend *Roe* to recognize a right to engage in homosexual relations:

The Court is most vulnerable and comes closest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.⁸⁰

There is much wisdom in this statement. It makes two arguments, not one: not only the obvious point that in a democracy it is inappropriate for judges to make up limitations not found in the Constitution, but also the equally essential, subtler point that if the Court yields to the temptation to do so, it endangers its ability to enforce the Constitution itself.

Justice White's fears are borne out by experience. It is a commonplace that in the aftermath of *Dred Scott* (that notorious "self-inflicted wound") the Court for a decade was afraid to do its job; the consequence of the excesses of the Four Horsemen was a threat to tamper with the Court itself that might forever have destroyed its independence and effectiveness if it had not beaten a hasty and embarrassing retreat.

Justice White's admonition was a welcome reminder of the lesson of the New Deal: a Court that does not respect the limitations on its own authority is asking for trouble. The Court of the 1940s divided as to how to implement this lesson—whether by a strict refusal to go beyond the Constitution, as Black insisted, or by a general reluctance to enforce the Constitution itself, as Justice Frankfurter urged. But every Justice of the time accepted the lesson itself in the interest both of democratic legitimacy and of protecting the Court's ability to enforce the Constitution.

The lesson was summed up by a former President of the French Conseil Constitutionnel, Rob-

ert Badinter, who said he kept a sign on his desk to remind him of the limited though important nature of the judicial function:

Toute loi anticonstitutionnelle est mauvaise; mais toute loi mauvaise n'est pas nécessairement anticonstitutionnelle.⁸¹

And that, I submit, was the central lesson of the New Deal.⁸²

Endnotes

- ¹ 156 US 1 (1895).
- ² 198 US 45 (1905).
- ³ 295 US 495 (1935).
- ⁴ 298 US 587 (1936).
- ⁵ 300 US 379 (1937).
- ⁶ 301 US 1 (1937).
- ⁷ 297 US 178 (1936).
- ⁸ 317 US 111 (1942).
- ⁹ *Carolene Products Co. v. United States*, 323 US 18 (1944).
- ¹⁰ Miller, "The True Story of *Carolene Products*," 1987 *Sup Ct Rev* 397, 398.
- ¹¹ 290 US 398 (1934).
- ¹² 4 Wheat. (17 US) 316 (1819).
- ¹³ *E.g., Helvering v. Gerhardt*, 304 US 405 (1938) (government salaries), *James v. Dravo Contracting Co.*, 302 US 134 (1937) (government contractors).
- ¹⁴ *Pacific Employers Ins. Co. v. Industrial Accident Comm.*, 306 US 493 (1939); *International Shoe Co. v. Washington*, 326 US 310 (1945). See also, *New York ex rel Cohn v. Graves*, 300 US 308 (1937) (tax on income from out-of-state property).
- ¹⁵ See, e.g., *Yakus v. United States*, 321 US 414 (1944); *Lichter v. United States*, 334 US 742 (1948).
- ¹⁶ *South Carolina Highway Dept. v. Barnwell Bros.*, 303 US 177 (1938). But see *Southern Pacific Co. v. Arizona*, 325 US 761 (1945).
- ¹⁷ 286 US 73 (1932).
- ¹⁸ 287 US 45 (1932).
- ¹⁹ 294 US 103 (1935).
- ²⁰ 297 US 278 (1936).
- ²¹ 283 US 359 (1931).
- ²² 283 US 697 (1931).
- ²³ 305 US 337 (1938).
- ²⁴ 321 US 649 (1944).
- ²⁵ 303 US 444 (1938).
- ²⁶ 308 US 147 (1939).
- ²⁷ 319 US 141 (1943).
- ²⁸ 310 US 296 (1940).
- ²⁹ 310 US 88 (1940).
- ³⁰ 310 US 586 (1940).
- ³¹ 310 US at 95-96.
- ³² "It was striking at the root of free republican Government," said Representative George Nicholas of Virginia, "to restrict the use of speaking and writing; . . . to restrict the press, would be to destroy the elective principle, by taking away the information necessary to election." 8 *Annals of Congress* 2104, 2144 (1798). Representative Albert Gallatin of Pennsylvania added: "If you put the press under any restraint in respect to the measures of members of Government; if you thus deprive the people of the means of obtaining information of their conduct, you in fact render their right of electing nugatory." *Id.* at 2110.
- ³³ 7 BVerfGE 198, 208 (1958) (*Lüth*) (quoting *Palko v. Connecticut*, 302 US 319, 327 (1937)).
- ³⁴ *United States v. Carolene Products Co.*, 304 US 144, 152-53 n4 (1938).
- ³⁵ 310 US at 95.
- ³⁶ 319 US 624 (1943).
- ³⁷ *Id.* at 639.
- ³⁸ *Id.* at 648-49.
- ³⁹ 274 US 357, 373 (1927) (concurring opinion).
- ⁴⁰ 319 US at 648-49. There was another difference between the two flag cases beyond the intensity of review. As Philip Kurland emphasized in his groundbreaking study of the religion provisions, it is not inconsistent to say the free-exercise clause contains no exemption for religious believers but that freedom of speech bars requiring *anybody* to salute the flag. P. Kurland, *Religion and the Law of Church and State and the Supreme Court* (Chicago: Aldine, 1962) pp. 37-49.
- ⁴¹ 319 US at 639.
- ⁴² 319 US 105 (1943).
- ⁴³ *Id.* at 115.
- ⁴⁴ 336 US 77, 88 & n14 (1949).
- ⁴⁵ *Id.* at 95-96.
- ⁴⁶ 328 US 549 (1946).
- ⁴⁷ *E.g., Bridges v. California*, 314 US 252 (1941).
- ⁴⁸ *Id.*
- ⁴⁹ *Communist Party v. Subversive Activities Control Board*, 367 US 1 (1961).
- ⁵⁰ *E.g., Terry v. Adams*, 345 US 461 (1953) (white primary); *Shelley v. Kraemer*, 334 US 1 (1948) (racially restrictive covenant).
- ⁵¹ 332 US 46 (1947).
- ⁵² 211 US 78 (1908).
- ⁵³ 316 US 455, 474 (1942).
- ⁵⁴ 332 US at 68-123.
- ⁵⁵ *Id.* at 70. See also *id.* at 69, 91-92.
- ⁵⁶ 198 US 45 (1905).
- ⁵⁷ 335 US 525 (1949).
- ⁵⁸ *Id.* at 536.
- ⁵⁹ 381 US 479 (1965).
- ⁶⁰ *Id.* at 507-27.
- ⁶¹ *Carolene Products Co. v. United States*, 323 US 18, 31-32 (1944).
- ⁶² 313 US 236, 246-47 (1941).
- ⁶³ 323 US 214 (1944).
- ⁶⁴ 317 US 1 (1942).
- ⁶⁵ 327 US 1 (1946).
- ⁶⁶ 320 US 549 (1944).
- ⁶⁷ *Hirabayashi v. United States*, 320 US 81 (1943).
- ⁶⁸ *Duncan v. Kahanamoku*, 327 US 304 (1946).
- ⁶⁹ *Ex parte Endo*, 323 US 283 (1944).
- ⁷⁰ *Estep v. United States*, 327 US 114 (1946).
- ⁷¹ *Cummings v. Missouri*, 4 Wall. (71 US) 277 (1867); *Ex parte Garland*, 4 Wall. (71 US) 333 (1867).
- ⁷² *Ex parte Milligan*, 4 Wall. (71 US) 2 (1866).
- ⁷³ 320 US at 92-102.
- ⁷⁴ 323 US at 216.
- ⁷⁵ 320 US at 100.
- ⁷⁶ It may be appropriate to add that Stone's *Carolene Products* footnote represents a third view: aggressive enforcement of selective constitutional provisions. To state the proposition this way is pretty well to place it beyond the pale. It may

be better to argue that Stone's calculus can be justified on Justice Black's grounds: the rights Justice Stone would enforce vigorously, unlike substantive due process, are actually protected by the Constitution.

⁷⁷ 410 US 113 (1973).

⁷⁸ *Scott v. Sandford*, 19 How. (60 US) 393, 450 (1857).

⁷⁹ 478 US 186 (1986).

⁸⁰ *Id.* at 194.

⁸¹ Every unconstitutional law is bad, but not every bad law is necessarily unconstitutional.

⁸² There is arguably a second lesson, which is less reassuring: the Court can also get in trouble if it enforces the Constitution itself. After all, the Constitution *did* limit the powers of Congress; Roosevelt's Court-packing scheme was at least as much a reaction to the unanimous decision in

Schechter Poultry Co. v. United States (striking down the insupportable National Industrial Recovery Act) as it was to the unjustifiable invalidation of minimum-wage laws in *Morehead v. New York ex rel. Tipaldo*.

When and how self-preservation justifies nonenforcement of the Constitution is a difficult question. It is not clear the Constitution would be better respected today if the Court had gone down in flames enforcing states' rights during the 1930s, and it is the Court's duty to maximize obedience to the Constitution. With the possible exceptions of the war cases and *Colegrove v. Green*, however, the Court of the 1940s was not unduly reluctant to enforce the Constitution as it understood it; serious questions of this nature were much more conspicuous in the later days of school desegregation and miscegenation, witch hunting, and the Vietnam War.

Politics, the Court, and the Constitution: A Bibliographical Essay on the Pre- and Post-New Deal Supreme Court

John B. Taylor

To survey the literature of the pre- and post-New Deal Supreme Court, as conceived in this series of essays, is to examine historical, political, and legal scholarship covering more than six decades of Supreme Court history. That literature is vast, and the principal difficulty is not to discover the sources, or even to organize them, but to make choices about inclusion and exclusion and, because of constraints of time and space, to reconcile oneself to the necessity of omitting many useful works for reasons that are to some extent arbitrary. I have limited the discussion to books and journal articles that are likely to be available in good academic (or, in some cases, law) libraries; newspaper accounts, articles in popular magazines, and unpublished sources such as dissertations and collections of papers and manuscripts are not included. Fortunately, a reader wishing to pursue topics covered here can start with a few of the sources listed and, with little effort or by sheer serendipity, quickly locate many more, both published and unpublished, for most of these works have extensive notes or bibliographies and many have helpful bibliographical essays. General bibliographies are also available, such as Stephen M. Millett, comp., **A Selected Bibliography of American Constitutional History** (Santa Barbara, CA: Clio Books, 1975). D. Grier Stephenson, Jr., comp., **The Su-**

preme Court and the American Republic (New York: Garland Publishing, 1981), has brief annotations; Kermit L. Hall, comp., **A Comprehensive Bibliography of American Constitutional and Legal History, 1896-1979**, 5 vol. (Millwood, NY: Kraus International Publications, 1984) is an exhaustive but unannotated compilation of references grouped by subject. Fenton S. Martin and Robert U. Goehlert, comps., **The U.S. Supreme Court: A Bibliography** (Washington, D.C.: Congressional Quarterly, 1990), is an unannotated bibliography on topics about the Supreme Court, including works on and by the Justices, which also lists other bibliographies.

General Works

Since our topic spans several decades and focuses on a momentous event (the Court-packing crisis of 1937), general works on the Court and on American constitutional history have much to offer with respect to many of the specific topics mentioned hereafter. Leonard W. Levy, Kenneth L. Karst, and Dennis J. Mahoney, eds., **Encyclopedia of the American Constitution**, 4 vols. plus Supplement (New York: Macmillan, 1986, 1991) contains articles on Justices, judicial decisions, doctrinal concepts, and historical perspectives. A

useful selection from these articles, focusing on short periods of constitutional history and on the Court under each of its Chief Justices, is the same editors' **American Constitutional History** (New York: Macmillan, 1989). Alfred H. Kelly, Winfred A. Harbison, and Herman Belz, **The American Constitution: Its Origins and Development**, 7th ed. (New York: W. W. Norton, 1991) is a richly descriptive and analytical narrative that seeks to balance the conflicting impulses of the liberal nationalist and decentralized individualist themes in American constitutional development, while Melvin I. Urofsky, **A March of Liberty: A Constitutional History of the United States** (New York: Alfred A. Knopf, 1988) is a clearly written and succinct discussion of the events, issues, and trends of American constitutional history, with attention to developments in the law beyond the realm of constitutional interpretation and to law and policy at the state as well as national level. Charles Warren, **The Supreme Court in United States History** (Boston: Little, Brown, 1922, 1926) is a classic history of the Court up to 1918 that pays considerable attention to public reaction to its decisions. The **Oliver Wendell Holmes Devise History of the Supreme Court of the United States** (New York: Macmillan) is an exhaustive, ongoing, multivolume work. Relevant to this topic are Owen M. Fiss, **Troubled Beginnings of the Modern State, 1888-1910** (1993), and Alexander M. Bickel and Benno C. Schmidt, Jr., **The Judiciary and Responsible Government, 1910-21** (1984). David P. Currie, **The Constitution in the Supreme Court: The First Hundred Years, 1789-1888**, and **The Constitution in the Supreme Court: The Second Century, 1888-1986** (Chicago: University of Chicago Press, 1985, 1990) is a history of and commentary upon the Supreme Court and its work, written from the perspective of a lawyer interested in methods of constitutional analysis and the quality of the performance of its judicial practitioners. Robert G. McCloskey, **The American Supreme Court** (Chicago: University of Chicago Press, 1960; 2d ed., revised and updated by Sanford Levinson, 1994) is the classic brief history of the Court and characterization of its role. A slightly earlier work is Fred Rodell, **Nine Men: A Political History of the Supreme Court from 1790 to 1955** (New York: Random House, 1955), and a valuable recent addition is Bernard Schwartz, **A History of the Supreme Court** (New York: Oxford University Press, 1993).

Some general works focus on more recent eras, such as William F. Swindler, **Court and Constitu-**

tion in the Twentieth Century, vol.1 **The Old Legality 1889-1932**, vol. 2 **The New Legality 1932-1968**, and supplementary volume **A Modern Interpretation** (Indianapolis, IN: Bobbs-Merrill, 1969, 1970, 1974). His narrative constitutional history is set against the context of social and political developments and is attentive to the influence of Congress as well as the Court on constitutional interpretation. Swindler characterizes the old legality as an era in which Congress and, to a lesser extent, the executive were ideologically in advance of the judiciary, and the new legality as an era in which the Court—especially under Earl Warren—was in the lead. Kermit L. Hall, ed., **The Oxford Companion to the Supreme Court of the United States** (New York: Oxford University Press, 1992) contains concise biographies and essays on concepts, doctrines, issues, cases, and historical context. The entry "History of the Court" contains sections on Reconstruction, Federalism, and Economic Rights and on The Depression and the Rise of Legal Liberalism." Paul Murphy, **The Constitution in Crisis Times, 1918-1969** (New York: Harper & Row, 1972) provides an historian's perspective on the Court's evolution from protector of property rights to protector of a very different set of personal rights and considers the impact of the Depression and New Deal on civil rights and liberties. Alpheus Thomas Mason provides an important survey of the Court under six of its Chief Justices in **The Supreme Court from Taft to Burger**, 3d ed. (Baton Rouge: Louisiana State University Press, 1979). Mason finds Taft in effect legislating on behalf of conservatism, Hughes leading a camouflaged retreat, and Stone laying the groundwork for the protection of non-economic rights while struggling to hold his Court together.

As Mason's focus on Chief Justices suggests, certain members of the Court played key roles in these events, and judicial biographies are a rich source of information. Works on individual justices will be mentioned at various points, but we should first note the general sources. Leon Friedman and Fred L. Israel, eds., **The Justices of the United States Supreme Court 1789-1995: Their Lives and Major Opinions**, 5 vols. (New York: Chelsea House, 1969-1978, 1995) provides biographies of Justices, with focus on their Court tenure, and texts of representative opinions they wrote in Supreme Court cases. Clare Cushman, ed., **The Supreme Court Justices: Illustrated Biographies, 1789-1995**, 2d ed. (Washington, D.C.: Congressional Quarterly, 1995) provides succinct portraits of the lives of the Jus-



Some condemned the Supreme Court as intransigent in its hostility to FDR's New Deal programs. Others, such as this cartoonist, believed that the governmental regulations threatened the Constitution and menaced the American public.

tices, with attention to activities prior to joining the Court; Melvin I. Urofsky, ed., **The Supreme Court Justices: A Biographical Dictionary** (New York: Garland Publishing, 1994) presents essays focusing on Court service. All of these works list other biographical references, as does Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, **The Supreme Court Compendium: Data, Decisions, and Developments**, 2d ed. (Washington, D.C.: Congressional Quarterly, 1996).

The Era of Laissez-Faire

The story of the pre-New Deal Supreme Court begins with the rise of what progressive historians have traditionally viewed as the conservative jurisprudence of the late nineteenth and early twentieth centuries. Richard Hofstadter, **Social Darwinism in American Thought**, rev. ed. (New York: George

Braziller, 1959), describes the ideological context in which these developments occurred, and Robert Green McCloskey, **American Conservatism in the Age of Enterprise** (Cambridge, MA: Harvard University Press, 1951; reprint, New York: Harper & Row, 1964), studies the infusion of laissez-faire into constitutional law through the opinions of Justice Stephen J. Field. That process is examined in greater detail by Benjamin R. Twiss in **Lawyers and the Constitution: How Laissez-Faire Came to the Supreme Court** (Princeton, NJ: Princeton University Press, 1942). Twiss examines the role of leading lawyers, representing business clients, in metamorphosing the ideology of laissez-faire into legal terms and constitutional doctrines, which receptive judges turned into the law of the land. Twiss's work is complemented by Lee Epstein, **Conservatives in Court** (Knoxville: University of Tennessee Press, 1985), which contains a chapter on the

activities of conservative interest groups in bringing litigation to the Court between 1900 and 1940. Arnold M. Paul, in **Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895** (Ithaca, NY: Cornell University Press for the American Historical Association, 1960), argues that in the 1890s alone the judiciary revolutionized American constitutionalism with a massive intervention in policy making on behalf of property rights and social order. A classic article on the rise of substantive due process is Edward S. Corwin, "The Supreme Court and the Fourteenth Amendment," 7 *Michigan Law Review* 643 (1909).

The threats against which conservative interests sought protection came in the form of the labor union movement and, more especially, state regulatory legislation enacted under the police power on behalf of consumers and workers. Useful descriptions of this movement for reform include Samuel P. Hays, **The Response to Industrialism, 1885-1914**, 2d ed. (Chicago: University of Chicago Press, 1957, 1995), Robert H. Wiebe, **The Search for Order, 1877-1920** (New York: Hill and Wang, 1967; Westport, CT: Greenwood Press, 1980), Richard Hofstadter, **The Age of Reform: From Bryan to F.D.R.** (New York: Alfred A. Knopf, 1955), and Eric F. Goldman, **Rendezvous with Destiny: A History of Modern American Reform** (New York: Vintage Books, 1952, 1956). While the regulatory movement began even earlier, Alan F. Westin, "Populism and the Supreme Court," 1980 *Yearbook of the Supreme Court Historical Society* 62, argues that the Court's role as defender of corporate capitalism in the 1890s contributed to the rise of radical popular movements for reform.

The Lochner Case

The case which has long been the focal point for every interpretation of this era is *Lochner v. New York*, 198 U.S. 45 (1905). In fact, this case has so dominated scholarly interpretation that Stephen A. Siegel, "Lochner Era Jurisprudence and the American Constitutional Tradition," 70 *North Carolina Law Review* 1 (1991), considers the *Lochner* era to extend from far before 1905 until far after, in three phases: 1870-1900, 1900-1920, and 1920-1937. Paul Kens, in **Judicial Power and Reform Politics: The Anatomy of Lochner v. New York** (Lawrence: University of Kansas Press, 1990), has produced a detailed study of the famous case, including an assessment of conditions in the baking industry—which the Court presumed to understand—the labor reform

movement, the ideology and politics of the era, the constitutional doctrines of the decision, and their repudiation and contemporary reappearance. *Lochner* exemplifies the Court's application of the doctrine of liberty of contract. In "The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921," 5 *Law and History Review* 249 (1987), Aviam Soifer argues that in seeking to preserve the ideal of the autonomous individual by rooting out governmental paternalism, the Justices made themselves the ultimate guardians of values—their own—in a most paternalistic fashion. Another irony of paternalism is that legislation on behalf of women fared somewhat better than that on behalf of men, at least until passage of the Nineteenth Amendment and the decision in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923). Writing from the perspective of efforts to protect women workers, Judith A. Baer in **The Chains of Protection: The Judicial Response to Women's Labor Legislation** (Westport, CT: Greenwood Press, 1978) in early chapters discusses the evolution of issues of freedom of contract and the regulatory authority of government through the decision in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); later chapters focus on the more recent movement for equal rights for women.

The Revisionist View

The conventional characterization of *Lochner* has been as the most notorious but all-too-typical example of judicial overreaching. In recent years, however, scholars like Michael Les Benedict, "Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism," 3 *Law and History Review* 293 (1985), have advanced a revisionist interpretation of the decision, the jurisprudence of substantive due process, and the motivations of leading jurists. In **David J. Brewer: The Life of a Supreme Court Justice 1837-1910** (Carbondale: Southern Illinois University Press, 1994) Michael J. Brodhead maintains that Brewer was not simply an apostle of laissez-faire and Social Darwinism but a more complex figure who distrusted concentrated corporate as well as governmental and union power and was generally sympathetic to the reform movements of his day. The conservative reputation of Brewer and of the turn-of-the-century judiciary more generally, Brodhead argues, is based on an unrepresentative sample of opinions, and those decisions that were conservative stemmed not merely

from ideology but from legal principle and precedent as well. Joseph Gordon Hylton, "David Josiah Brewer: A Conservative Justice Reconsidered," 1994 *Journal of Supreme Court History* 45, makes much the same argument. See also Robert E. Gamer, "Justice Brewer and Substantive Due Process: A Conservative Court Revisited," 18 *Vanderbilt Law Review* 615 (1965) and Francis Bergan, "Mr. Justice Brewer," 25 *Albany Law Review* 191 (1961). Melvin I. Urofsky, "Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era," 1983 *Yearbook of the Supreme Court Historical Society* 53, supports this view by arguing that *Lochner* and a relatively small number of like cases were not typical of Supreme Court decision making in the Progressive Era, and that the Court generally upheld exercises of the police power to protect the interests of workers. Only in 1918 did the Court veer to the right and adopt the more conservative outlook of the next two decades, he maintains. Urofsky reports similar findings at the state court level in "State Courts and Protective Legislation During the Progressive Era: A Reevaluation," 72 *Journal of American History* 63 (1985).

Revisionist scholars suggest a variety of nonideological explanations for the judicial decision making of this era. Mary Cornelia Porter, "That Commerce Shall Be Free: A New Look at the Old Laissez-Faire Court," 1976 *Supreme Court Review* 135, agrees that decisions in the late nineteenth and early twentieth centuries were far from uniformly probusiness and antiregulatory and claims that where the Court used substantive due process against the states it was to achieve uniform national commercial rules indispensable for investment and economic growth. In her view, if the Court sinned, it was not in overturning the regulations of the states but in usurping the regulatory role of Congress. Charles W. McCurdy, "The Roots of 'Liberty of Contract' Reconsidered: Major Premises in the Law of Employment, 1867-1937," 1984 *Yearbook of the Supreme Court Historical Society* 20, delves into the jurisprudential underpinnings of the concept of liberty of contract and finds a distinction between the status of legislation designed to protect public health and safety (favored) and that designed to enhance the bargaining position of workers (disfavored). For a perspective on *Lochner* as a labor union case, see Sidney G. Tarrow, "*Lochner v. New York*: A Political Analysis," 5 *Labor History* 277 (1964). Howard Gillman, **The Constitution Besieged: The Rise and Demise of *Lochner* Era Police Powers**

Jurisprudence (Durham, NC: Duke University Press, 1993), argues that from the founding there was a constitutional tradition which permitted general welfare legislation but prohibited class or special interest legislation. *Lochner*-era judges were not simply writing reactionary policy preferences into the law, he maintains, but still operating in that tradition at a time when changing socioeconomic conditions made it no longer neutral but in fact biased towards the affluent class. John E. Semonche, **Charting the Future: The Supreme Court Responds to a Changing Society, 1890-1920** (Westport, CT: Greenwood Press, 1978), maintains that the Court during these years was not simply a bastion of laissez-faire dogma but rather functioned pragmatically to adapt the law to the requirements of an industrializing society; it set up some notorious obstacles to governmental power, but they were relatively few. Loren P. Beth, **The Development of the American Constitution, 1877-1917** (New York: Harper & Row, 1971), does not see a monolithic defense of business in the Court's decisions, but rather a pragmatic and inconsistent course of decision making as it dealt with novel socioeconomic developments. In "Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897," 61 *Journal of American History* 970 (1975), Charles W. McCurdy presents a reconsideration of the development of substantive due process jurisprudence, spearheaded by Justice Stephen J. Field. It was not merely orthodox Social Darwinism invoked on behalf of the rich, he argues, but a coherent attempt to balance the internally contradictory positions of many interests that favored governmental promotion of business but opposed governmental regulation. The jurisprudence, says McCurdy, ultimately failed not because it was one-sided in its own time, but because it was not adaptable to rapidly changing socioeconomic circumstances. The problem of adaptation is considered in D. Grier Stephenson, Jr., "The Supreme Court and Constitutional Change: *Lochner v. New York* Revisited," 21 *Villanova Law Review* 217 (1976). Among the obstacles Stephenson finds are differences within both the business and labor communities as to the desirability of regulation, the difficulty of weighing evidence of reasonableness, and the need for tentativeness in responding to changing socioeconomic conditions. The difference between *Lochner* and the many cases in which regulations were upheld, Stephenson concludes, is that the New York statute went much further. Unlike

miners, bakers did not seem to be especially in need of protection; approval of this statute would thus have countenanced a wholesale shift away from laissez-faire and towards pervasive regulation.

Paul Kens has challenged the revisionist interpretation in two articles "Lochner v. New York: Rehabilitated and Revised, but Still Reviled," 1995 *Journal of Supreme Court History* 31, and "The Source of a Myth: Police Powers of the States and Laissez-Faire Constitutionalism, 1900-1937," 35 *American Journal of Legal History* 70 (1991). Many regulations may have been upheld, Kens argues, but the Court held to the principle that the state's power to intervene in economic and social affairs was narrowly limited, and the legislation that passed muster had to be on its terms. For Kens, the progressive indictment of the evils of the Court's overreaching in *Lochner* remains valid.

The New Deal Era

However the period prior to World War I may be interpreted, by the 1920s the Court was laying the groundwork for its confrontation with Franklin D. Roosevelt. As Alpheus Thomas Mason recounts in **William Howard Taft: Chief Justice** (New York: Simon and Schuster, 1965), the Social Darwinist Chief Justice was a crusader for efficient judicial administration and property rights and a vigorous opponent of governmental programs of economic regulation and social service. Jeffrey B. Morris, "What Heaven Must Be Like: William Howard Taft as Chief Justice, 1921-30," 1983 *Yearbook of the Supreme Court Historical Society* 80, focuses on Taft as judicial administrator and his efforts to mass the Court in favor of conservative outcomes. The crisis of conservative control engendered by the Depression was felt first in the political branches; in **The Interregnum of Despair: Hoover, Congress, and the Depression** (Urbana: University of Illinois Press, 1970) Jordan A. Schwarz examines the initial governmental response, with an emphasis on activity in Congress. In **The Crisis of the Old Order, 1919-1933** (Boston: Houghton, Mifflin, 1957, 1988) the first volume of his trilogy **The Age of Roosevelt**, Arthur M. Schlesinger, Jr., analyzes the collapse of the conservative regime and the bankruptcy of its ideology. The following volumes—**The Coming of the New Deal** (1959, 1988) and **The Politics of Upheaval** (1960, 1988)—carry the story of Franklin D. Roosevelt's election, New Deal legislative program, and adverse Supreme Court reaction

through 1936, not reaching the Court-packing crisis of 1937. The domestic battles through Roosevelt's second term are brought into sharp focus in William E. Leuchtenburg, **Franklin D. Roosevelt and the New Deal, 1932-1940** (New York: Harper & Row, 1963), and Leuchtenburg's edited volume, **Franklin D. Roosevelt: A Profile** (New York: Hill and Wang, 1967), presents a collection of essays on Roosevelt by eminent contributors. I. Scott Messinger provides insight into the extent of the efforts of New Deal publicists to build support for their liberal policies in "Legitimizing Liberalism: The New Deal Image-makers and Oliver Wendell Holmes, Jr.," 1995 *Journal of Supreme Court History* 57, where he argues that one of their tactics was to liberalize the image of the already popular and respected jurist.

As noted by Joseph L. Rauh, Jr., who was Justice Benjamin N. Cardozo's law clerk at the time, the Court was sharply divided into two competing blocs in 1936. His "A Personalized View of the Court-Packing Episode," 1990 *Journal of Supreme Court History* 93, also gives a brief account of the whole affair. The intellectual leader of the conservative bloc was Justice George Sutherland. In **Mr. Justice Sutherland: A Man Against the State** (Princeton, NJ: Princeton University Press, 1951; reprint, New York: Greenwood Press, 1969), Joel Paschal paints a balanced portrait of a defender of individual freedom and limited government who suffered from a parochially Social Darwinistic outlook and an incomprehension of social and economic reality. Gary C. Leedes, in "Justice George Sutherland and the Status Quo: A Biographical and Review Essay," 1995 *Journal of Supreme Court History* 137, summarizes Sutherland's basic principles (essentially individualism and laissez-faire), examines the social, political, and intellectual influences that helped to shape them, and identifies four fundamental flaws in his jurisprudence that led him to become an intransigent and inflexible defender of an ideal whose time had gone. A much more sympathetic characterization of Sutherland is Hadley Arkes' biography, **The Return of George Sutherland: Restoring a Jurisprudence of Natural Rights** (Princeton, NJ: Princeton University Press, 1994). Arkes' revisionist interpretation argues that we fail to realize that much of the world we know is the product of his vision rather than that of his judicial adversaries, because the "constitutional revolution" of 1937 in fact overturned relatively little of the Court's work. Sutherland's opinion in *Adkins*, overruled but not refuted in *West Coast Hotel*, was both good law and

good policy, Arkes asserts. The leader of the liberal minority on the Court at this time was Justice Harlan Fiske Stone. Alpheus Thomas Mason's groundbreaking biography, **Harlan Fiske Stone: Pillar of the Law** (New York: Viking Press, 1956; reprint, Hamden, CT: Archon Books, 1968), based on extensive, authorized use of Stone's private and Court papers, provides a wealth of information about the inner workings of the Court during Stone's tenure (1925-1946). Mason gives full attention to the development of the constitutional struggle prior to 1937 and to the Court's search for a redefined role thereafter.

The Court-Packing Episode

Robert H. Jackson was an assistant attorney general during the Court-packing battle and moved rapidly to Solicitor General, Attorney General, and, by 1941, Supreme Court Justice. In **The Struggle for Judicial Supremacy** (New York: Alfred A. Knopf, 1941; reprint, New York: Octagon Books, 1979) he characterizes the events of the 1930s as one more chapter in the ongoing conflict between popular government and judicial supremacy. Jackson presents a Roosevelt partisan's view of the intransigence of the Court in striking down New Deal measures and of the President's bold response in trying to pack the Court. Two useful overviews of that effort and its fate in Congress are Joseph Alsop and Turner Catledge, **The 168 Days** (Garden City, NY: Doubleday, Doran & Co., 1938), a contemporary account written first-hand from interviews with the principals, and Leonard Baker, **Back to Back: The Duel Between FDR and the Supreme Court** (New York: Macmillan, 1967), written from the perspective of three decades. In his published lectures, **The Supreme Court: Vehicle of Revealed Truth or Power Group, 1930-1937** (Boston: Boston University Press, 1953), Alpheus Thomas Mason tells the story of the Court-packing episode in his customary style, weaving together apt quotations from a wide variety of sources. In the process, he paints an unflattering portrait of Chief Justice Hughes. Alfred Haines Cope and Fred Krinsky, eds., **Franklin D. Roosevelt and the Supreme Court** (Boston: D.C. Heath, 1952) is a collection of primary and secondary source materials; a conspicuous omission is the text of Chief Justice Hughes's letter to the Senate Judiciary Committee, which may be found in "Reorganization of the Federal Judiciary," *Hearings before the Senate Judiciary*

Committee, 75th Congress, 1st Session, Part III, 488-92.

Attacks on the President's policies and plan were legion. Howard Lee McBain could not have been surprised by the Court-packing plan, for earlier, in "The Constitution and the New Deal," 25 *Yale Review* 114 (1935), he had attacked the New Deal and portrayed FDR as intent on undercutting constitutional values, if possible without constitutional amendment. When Roosevelt's plan was announced, Merlo J. Pusey, who would be Chief Justice Hughes's authorized biographer, rushed into print with **The Supreme Court Crisis** (New York: Macmillan, 1937; reprint, New York: DaCapo Press, 1973), a diatribe evidently intended to help ensure the defeat of the proposal. Other critics were more evenhanded. Grenville Clark, "The Supreme Court Issue," 26 *Yale Review* 669 (1937), found Court-packing ethically unacceptable but recommended constitutional amendments to expand the powers of Congress and restrict the power of the federal judiciary to invalidate state legislation. In "Politics and the Supreme Court: President Roosevelt's Proposal," 85 *University of Pennsylvania Law Review* 659 (1937) Alpheus Thomas Mason decried both wrongheaded judicial policy making and political tampering with judicial independence and called for a constitutional amendment to allow Congress to override by a two-thirds vote any judicial invalidation of an act of Congress.

Roosevelt considered several alternative strategies for overcoming judicial resistance before settling on the Court-packing plan. Insights into his thinking can be found in Max Freedman, ed., **Roosevelt and Frankfurter: Their Correspondence 1928-1945** (Boston: Little, Brown in association with the Atlantic Monthly Press, 1967), which contains a chapter devoted to correspondence on this issue, and Harold L. Ickes, **The Secret Diary of Harold L. Ickes**, 3 vol. (New York: Simon & Schuster, 1953-54). Ickes, Secretary of the Interior in the Roosevelt administration, kept extensive diaries, which include an insider's impressions of the New Deal and the confrontation with the Court, with commentaries on many of the principal players. In "Court Packing: The Drafting Recalled," 1990 *Journal of Supreme Court History* 99, Warner W. Gardner, the Justice Department staff attorney who did the research on various strategies, discusses that effort and recalls that changing the size of the Court was the only feasible alternative that was surely constitutional.

Chief Justice Hughes, opposing the plan, did plant a seed of doubt as to its constitutionality, but the real problem was that it was not feasible politically. Congress killed the bill, even as the Court was reversing its field in major cases because of the changed votes of Chief Justice Hughes and Justice Roberts. In his chapter "Senate Realignment: The Court Controversy," in **Congressional Conservatism and the New Deal** (Lexington: University of Kentucky Press, 1967), James T. Patterson tells the story of the defeat of the Court-packing plan from the perspective of the party and ideological lineups in Congress, where the small conservative coalition generally opposed to the New Deal rapidly expanded with respect to this issue. Marian C. McKenna's "Prelude to Tyranny: Wheeler, F.D.R., and the 1937 Court Fight," 62 *Pacific Historical Review* 405 (1993)—which is not as sensationalist as the title suggests—focuses on the role of Senator Burton K. Wheeler (D., MT) as leader of the opposition to the Court-packing plan, and in a chapter entitled "Saving the Supreme Court," Wheeler (with Paul F. Healy) recounts his own version of the story in his autobiography, **Yankee From the West** (Garden City, NY: Doubleday, 1962).

Many commentators have offered explanations and evaluations of the failure of Roosevelt's plan. Gregory A. Caldeira, "Public Opinion and the U.S. Supreme Court: FDR's Court-packing Plan," 81 *American Political Science Review* 1139 (1987), analyzes the impact on public opinion of various events during the course of consideration of Roosevelt's plan and concludes that the decision in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), and the announcement of Justice Van Devanter's resignation significantly reduced public support for the plan. In "The President and the Court: Reinterpreting the Court-packing Episode of 1937," 103 *Political Science Quarterly* 267 (1988), Michael Nelson attributes the failure of the Court-packing plan to FDR's overconfidence born of the 1936 election and to an uncharacteristic failure of political skill. Roosevelt would have been better off attacking the Court during the 1936 campaign before broaching his plan, Nelson argues; having failed to lay the groundwork, he would have been better off waiting for a judicial self-reversal or the opportunity to make new appointments. Rodney J. Morrison, "Franklin D. Roosevelt and the Supreme Court: An Example of the Use of Probability Theory in Political History," 16 *History and Theory* 137 (1977), disputes the conclusion of

Arthur Schlesinger, Jr., in **The Politics of Upheaval**, that Roosevelt had no choice but to attempt the Court-packing plan because he had no prospect of making a normal appointment. Morrison argues that probability theory, applied to the record of turnover on the Court, reveals that the likelihood of a new appointment was high, and he points to Justice Van Devanter's resignation a few months later. One wonders, however, if Van Devanter (and others soon to follow) would have resigned if the switch in time had not occurred—a reversal that Roosevelt could not have reasonably anticipated. Morrison's probabilities may be correct, but Schlesinger seems accurately to portray the situation as it appeared to FDR. David E. Kyvig, in "The Road Not Taken: FDR, the Supreme Court, and Constitutional Amendment," 104 *Political Science Quarterly* 463 (1989), explores the complex reasons why Roosevelt decided against constitutional amendment as the solution to Supreme Court opposition to the New Deal. Kyvig suggests that FDR had the political support to get an amendment adopted and observes that the welfare state would be on a firmer footing today if he had done so. In "Rooseveltian Ideas and the 1937 Court Fight: A Neglected Factor," 33 *Historian* 578 (1971), Torbjorn Sirevag asks why, after the Court switch and the Van Devanter resignation, FDR continued to push his Court-packing plan aggressively, thereby alienating the Congress. Sirevag's answer is that the Court had failed to honor what Roosevelt saw as the moral imperative of cooperation among the three branches. The irony of FDR's persistence, he notes, is that it undermined the theretofore remarkable cooperation between the executive and the Congress. James MacGregor Burns, in his major biography **Roosevelt: The Lion and the Fox** (New York: Harcourt, Brace & World, 1956), also focuses on the conversion of FDR's battle with the Court into a struggle with his former allies in Congress.

The Switch in Time

The Court's abrupt shift in 1937 has caused many to conclude that Roosevelt lost the Court-packing battle but won the war of constitutional interpretation. Chief Justice Hughes and Justice Roberts clearly changed their votes on some issues; much commentary has focused on the extent of, and motivations for, their changes of conviction. Roberts was often accused of knuckling under to political pressure from Roosevelt in *West Coast Hotel*, but we now

know that the Court had reached its decision in that case before the Court-packing plan was announced, and Felix Frankfurter, "Mr. Justice Roberts," 104 *University of Pennsylvania Law Review* 311 (1955), reported a memorandum from Roberts to the effect that he had not voted to overrule *Adkins* in *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936), only because of a technicality. See also Merlo J. Pusey, "Justice Roberts' 1937 Turnaround," 1983 *Yearbook of the Supreme Court Historical Society* 102. Michael S. Ariens, "A Thrice-Told Tale, or Felix the Cat," 107 *Harvard Law Review* 620 (1994), suggests that Frankfurter may have fabricated the Roberts memorandum, a charge strongly rebutted in Richard D. Friedman, "A Reaffirmation: The Authenticity of the Roberts Memorandum, or Felix the Non-Forger," 142 *University of Pennsylvania Law Review* 1985 (1994). John W. Chambers, "The Big Switch: Justice Roberts and the Minimum-Wage Cases," 10 *Labor History* 44 (1969), does not question the authenticity of the memorandum but is skeptical of Roberts' explanation of his vote in *West Coast Hotel*. Robert L. Stern, "The Court-Packing Plan and the Commerce Clause," 1988 *Yearbook of the Supreme Court Historical Society* 91 (1988), agrees that Roberts did not switch his vote on the minimum wage because of the Court-packing plan, but concludes that we will never know for sure whether that affected his vote in *Jones & Laughlin*

and other Labor Board cases. In his biography **A Search for a Judicial Philosophy: Mr. Justice Roberts and the Constitutional Revolution of 1937** (Port Washington, NY: Kennikat Press, 1971), Charles A. Leonard finds Roberts' motivation enigmatic (he left no written record) but tends to believe that he was engaged in an honest search for good law and was not merely responding to political pressures.

The shift of Chief Justice Hughes, who testified against the Court-packing plan and wrote the majority opinions in *West Coast Hotel* and *Jones & Laughlin*, has received even more attention. In **Charles Evans Hughes**, 2 vol. (New York: Macmillan, 1952; reprint, New York: Garland Publishing, 1979), Merlo J. Pusey, the admiring authorized biographer, sees Hughes and his opinions in major New Deal cases as the sensible center between judges who would petrify the Constitution and politicians who would flout it. Hughes's opinions in commerce power cases were consistent throughout, Pusey maintains, only changing in emphasis as Congress learned to draft legislation that met constitutional requirements. Hughes claimed not to want to write an autobiography—i.e., an apologia—but he wrote extensive autobiographical notes and turned them over to Pusey. They were later published by David J. Danelski and Joseph S. Tulchin, eds., **The Autobiographical Notes of Charles Evans Hughes**



This Berryman cartoon pokes fun at FDR's grand ambitions both in trying to revive the national economy through government programs such as those sponsored by the Public Works Administration (PWA), which funded building construction, and in enlarging the Court to include more Justices.

(Cambridge, MA: Harvard University Press, 1973). In them, Hughes defended the consistency of his views and asserted that the Court-packing plan had had no effect on the decision making of any of the Justices. See also Alpheus Thomas Mason's "Charles Evans Hughes: An Appeal to the Bar of History," 6 *Vanderbilt Law Review* 1 (1952). Samuel Hendel, **Charles Evans Hughes and the Supreme Court** (New York: King's Crown Press, Columbia University, 1951), sees Hughes's opinions before and after the switch of 1937 as essentially consistent, but also notes his penchant for distinguishing cases where logic called for overruling, out of concern for stability or expediency. Paul A. Freund, "Charles Evans Hughes as Chief Justice," 81 *Harvard Law Review* 4 (1967), admires Hughes's handling of contentious personalities and issues within the Court and his ability to foster evolution in the law while avoiding outright overrulings. Freund considers Hughes's stewardship of the Court to be on a par with that of Marshall. Alpheus Thomas Mason, **The Supreme Court: Palladium of Freedom** (Ann Arbor: University of Michigan Press, 1962), examines the evolution and maneuverings of the Hughes Court and argues that the Chief Justice was motivated by expediency in shifting his ground and camouflaged the shift to preserve the appearance of judicial stability. F. D. G. Ribble, "The Constitutional Doctrines of Chief Justice Hughes," 41 *Columbia Law Review* 1190 (1941) maintains that Hughes did not commit an about-face but made adjustments in the balance between national and state power. Concerned with consistency, he typically preferred distinguishing to overruling apparently contrary cases, Ribble concedes, suggesting that in 1937 he may have treated earlier cases gently in order to facilitate Justice Roberts' switch—the crucial fifth vote.

Constitutional Revolution

Whatever their motivations, Hughes and Roberts did set the Court on a new course. With respect to substantive due process, that meant that it no longer struck down regulations of business as unreasonable. The Court needed a justification for revising its jurisprudence in this area, and in "The New Deal Court: Emergence of a New Reason," 90 *Columbia Law Review* 1973 (1990), Daniel J. Hulsebosch examines the two rationales at hand—the emergency power doctrine and the posture of judicial self-restraint—and analyzes the reasons why the Court rejected the former and resorted to the latter. In the area of the

commerce power, the Court now abandoned dual federalism and (even if Hughes did not admit it) the distinction between direct and indirect effects in order to uphold national legislation, starting with the National Labor Relations Act (Wagner Act). Ironically, the Wagner Act was, according to Irving Bernstein, in **Turbulent Years: A History of the American Worker, 1933-1941** (Boston: Houghton Mifflin, 1970), passed in 1935 partly because many Senators, although believing it unconstitutional, voted for it to appease labor and let the Supreme Court take the blame for its demise. The Court, of course, upheld the act in *Jones & Laughlin*, and Bernstein examines the ensuing revolution in labor law. Without slighting the framework of constitutional doctrine, Richard C. Cortner, in **The Wagner Act Cases** (Knoxville: University of Tennessee Press, 1964), adopts the perspective of judicial decision making as a matter of discretionary choice among competing interest group claims and policy options. He examines the shifting course of labor relations decisions in the early twentieth century, culminating in *Jones & Laughlin* and other key labor cases of 1937. Cortner drew heavily on this work for a subsequent, more focused case study, **The Jones & Laughlin Case** (New York: Alfred A. Knopf, 1970). In "Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941," 62 *Minnesota Law Review* 265 (1978), Karl E. Klare maintains that the effect of *Jones & Laughlin* and subsequent Wagner Act cases was to deradicalize labor and bring it into the legal and political mainstream. However revolutionary these decisions were in other ways, he notes, they preserved private contract as the legal basis for the ordering of labor relations. Paul R. Benson, Jr., **The Supreme Court and the Commerce Clause, 1937-1970** (New York: Dunellen, 1970), analyzes the commerce power cases from 1937 on that spelled the end of dual federalism and those that advanced the cause of civil rights. A broader-ranging survey of the work of the reoriented Court in its first decade is contained in a symposium, "Ten Years of the Supreme Court, 1937-1947," consisting of six articles published in two groups: David Fellman, "Federalism," Oliver P. Field, "Separation and Delegation of Powers," and Vincent M. Barnett, Jr., "The Power to Regulate Commerce," 41 *American Political Science Review* 1142, 1161, 1170 (1947) and Robert J. Harris, "Due Process of Law," Robert E. Cushman, "Civil Liberties," and C. Herman Pritchett, "The Roosevelt Court: Votes and Values," 42 *American Political Science Review* 32,

42, 53 (1948). Writing for the general reader, Bernard Schwartz provides a longer perspective in **The Supreme Court: Constitutional Revolution in Retrospect** (New York: Ronald Press, 1957), a survey and evaluation of the work of the Court in the twenty years following 1937, set against a background of the history of the Court. Writing in 1951, Robert L. Stern, in "The Problems of Yesteryear—Commerce and Due Process," 4 *Vanderbilt Law Review* 446 (1951) reprinted in **Essays in Constitutional Law**, ed. Robert G. McCloskey (New York: Alfred A. Knopf, 1957), surveyed a large number of cases decided after 1937 and concluded that the once-burning issues were no longer a matter of controversy.

Many commentators analyze the Court's commerce power decisions in light of the principles of John Marshall. In two publications right before the switch, **The Commerce Power versus States' Rights** (Princeton, NJ: Princeton University Press, 1936) and "The Schechter Case—Landmark, Or What?" 13 *New York University Law Quarterly Review* 151 (1936), Edward S. Corwin decried the Court's departure from the wise principles of John Marshall with respect to the scope of the commerce power, the notion of state sovereignty, and the role of the Court in adapting the Constitution to the requirements of changing times. Robert L. Stern, a Justice Department official who participated in most of the major commerce power cases of this era, gives a comprehensive insider's account of the litigation in "The Commerce Clause and the National Economy, 1933-1946," 59 *Harvard Law Review* 645 and 883 (1946), and finds a return to the true doctrines of John Marshall. John R. Schmidhauser, **The Supreme Court As Final Arbiter in Federal-State Relations, 1789-1957** (Chapel Hill: University of North Carolina Press, 1958; reprint, Westport, CT: Greenwood Press, 1973), analyzes the Supreme Court's concern for, and effect on, issues of federalism throughout the period under study. After 1937, Schmidhauser concludes, the Court adopted both Chief Justice Marshall's broad view of national power and Chief Justice Roger B. Taney's deference to state power. Richard A. Epstein, however, argues in "The Mistakes of 1937," 11 *George Mason University Law Review* 5 (1988) that the *Jones & Laughlin* decision was inconsistent with, rather than a return to, the principles of John Marshall in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), extending the reach of the commerce power much further than Mar-

shall envisioned. Another mistake identified by Epstein is *West Coast Hotel*, which he believes should be overruled. (This volume contains the proceedings of a Federalist Society symposium entitled *Constitutional Protections of Economic Activity: How They Promote Individual Freedom*.)

The Traditional View

The traditional interpretation has been that starting in 1937 the Court accomplished fundamental doctrinal changes, and Edward S. Corwin coined a phrase in the title of his **Constitutional Revolution, Ltd.** (Claremont, CA: Claremont Colleges, 1941; reprint, Westport, CT: Greenwood Press, 1977), in which he analyzed the revolution of 1937 and its consequences for policy, the role and functions of the major branches of government, and the very idea of constitutional liberty. The revolutionary impulse started with Roosevelt's New Deal, and Cass R. Sunstein, "The Beard Thesis and Franklin Roosevelt," 56 *George Washington Law Review* 114 (1987), credits FDR with being among the most important framers of the modern Constitution, as the New Deal marks a fundamental reformulation of the Madisonian vision of moderating democratic desires and protecting against popular demands for the redistribution of wealth. This article appears as part of a symposium on the Constitution as an economic document. In his broad-ranging reinterpretation of American constitutional history and thought, "Constitutional Politics / Constitutional Law," 99 *Yale Law Journal* 453 (1989), Bruce Ackerman sees the New Deal and its judicial affirmation as one of three higher law making episodes in American history, the other two being the Founding and Reconstruction. In this view, the judicial reversal of 1937 was not a mere return to Marshallian verities, but a new creative foray that must be synthesized with the previous two. Michael E. Parrish, "The Great Depression, the New Deal, and the American Legal Order," 59 *Washington Law Review* 723 (1984), sees a real judicial revolution in 1937 and also identifies four other fundamental changes in the American legal order flowing from the New Deal: the elevation of the presidency to political pre-eminence, the modification of federalism through fiscal and administrative centralization, the ascendance of state capitalism through bureaucratic regulation and management, and the reorientation of legal education and the legal profession towards public and administrative law. His article is part of a symposium on the New Deal.

Focusing on the judicial component of the revolution in "Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation," 142 *University of Pennsylvania Law Review* 1891 (1994), Richard D. Friedman sees the transformation of constitutional law during the Hughes era as more incremental than sudden, occurring not just in the switch of 1937 but in three distinct phases. First came some liberalization during the early 1930s, largely attributable to the replacement of Taft and Edward Sanford by Hughes and Roberts. Second, Hughes and Roberts contributed the votes to secure liberal victories in three key cases in 1937. Friedman finds Hughes' votes consistent with his earlier views and not the product of political pressures; he considers the case of Roberts less clear but sees only a modest shift, plausibly explained by factors other than political pressures. Finally, Friedman notes, the years after 1937 saw significant further liberalization, possible only because of new Roosevelt appointees.

The Revisionist Interpretation

The view that the Court fundamentally altered its jurisprudence, particularly in the initial cases of 1937, has been challenged in recent years. In *The New Deal Lawyers* (Princeton, NJ: Princeton University Press, 1982) Peter H. Irons provides in-depth case studies and analysis of the strategies and tactics of government lawyers in drafting the National Industrial Recovery Act, the first Agricultural Adjustment Act, and the National Labor Relations Act, and in defending them in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), *United States v. Butler*, 297 U.S. 1 (1936), and *Jones & Laughlin*. The differing outcomes, Irons suggests, were due at least in part to the superior performance of the lawyers working on the labor issue. This study gave new impetus to the contention that the essential difference between the decisions of 1935-36 and those of 1937 was only that the government's position was inept in the former instances and competent in the latter—a view rejected by Michael E. Parrish in "The Hughes Court, the Great Depression, and the Historians," 40 *Historian* 286 (1978).

The major challenge to the conventional view of judicial revolution in 1937, with respect to both the extent of the shift and the explanation for it, comes from Barry Cushman. In "Rethinking the New Deal Court," 80 *Virginia Law Review* 201 (1994),

Cushman provides a bibliography of conventional interpretations of the Court-packing episode—shaped by New Deal supporters and never seriously revised, he maintains—and offers an alternative interpretation. He makes the case that the shift in the minimum wage, Labor Board, and Social Security cases was not simply the result of external political forces—the Court-packing plan or the election of 1936—but was rather the product of factors internal to the judicial process. The first round of the New Deal battle was characterized by sloppy draftsmanship of statutes and flawed selection and argumentation of test cases, whereas the statutes of the second round were competently drafted and the cases carefully selected and argued. Further, Cushman asserts here and elsewhere that the Justices should be given credit for deciding cases on the basis of an intellectual environment of constitutional doctrines, premises, and principles that they consciously and conscientiously create, evolve, and modify as required to perform their judicial function. For example, Cushman argues in "A Stream of Legal Consciousness: The Current of Commerce Doctrine from *Swift* to *Jones & Laughlin*," 61 *Fordham Law Review* 105 (1992), that Hughes could easily have upheld the Wagner Act on the basis of the current of commerce doctrine, but that, with an assist from Cardozo, he took the bolder—but not revolutionary—step of deducing from the Court's various exceptions to the local/national dichotomy a general principle: that when intrastate activities collectively burden interstate commerce, Congress may act. In this view, Hughes' opinion is a natural evolution of doctrine, and the real commerce power revolution did not come until *United States v. Darby*, 312 U.S. 100 (1941) and *Wickard v. Filburn*, 317 U.S. 111 (1942), when Roosevelt's new appointees had taken over the Court. See also Barry Cushman, "Doctrinal Synergies and Liberal Dilemmas: The Case of the Yellow-Dog Contract," 1992 *Supreme Court Review* 235. Cushman's views are generally supported in Eben Moglen, "Toward a New Deal Legal History," 80 *Virginia Law Review* 263 (1994), and Edward A. Purcell, Jr., "Rethinking Constitutional Change," 80 *Virginia Law Review* 277 (1994).

Concluding Perspectives on Constitutional Revolution

Cushman's downplaying of the judicial revolution of 1937 is rejected by the scholar who has studied this entire episode most thoroughly, William E.

Leuchtenburg. **The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt** (New York: Oxford University Press, 1995), is a collection of essays, all but one a careful revision of an earlier article or lecture, in which this major historian of the Roosevelt era draws on extensive archival research in the papers and diaries of participants to provide an especially rich chronicle of the development of the Court-packing plan in preference to many alternative strategies, the defeat of the plan in Congress, and the revolution in Court decision making that began in 1937. Anyone wishing to explore fully Franklin D. Roosevelt's confrontation with the Supreme Court should start here.

Many sources later, such an explorer might consider three final perspectives. Richard A. Maidment, **The Judicial Response to the New Deal** (Manchester, UK: Manchester University Press, 1991, distributed in the U.S. by St. Martin's Press), argues that the Court blocked many New Deal measures not because of policy differences but because the judicial function, as then understood, made it improper

for judges to respond to change as rapidly as politicians would have liked (and could themselves). The Justices really did decide cases on the basis of rules, and the Court needed time to adapt rules whose usefulness was coming to an end. Justices such as George Sutherland and James C. McReynolds were not very good at that. They were not ideological or policy partisans, Maidment concludes; they were just not good judges. Maidment's reassuring view of the judicial process is unlikely to satisfy Philip Bobbitt, who remarks in **Constitutional Fate: Theory of the Constitution** (New York: Oxford University Press, 1982), that the battle of 1937 was essentially a crisis of perception and that the real crisis came thereafter, in the form of public disillusionment over realization that law is judge-made. Finally, William Lasser views the matter from an institutional perspective in **The Limits of Judicial Power: The Supreme Court in American Politics** (Chapel Hill: University of North Carolina Press, 1988). In his chapter on "The Supreme Court and the New Deal," Lasser interweaves the conflicts of policy,



The reasons why Chief Justice Charles Evans Hughes voted to secure three liberal victories for key cases in 1937 have been the subject of much discussion. Scholar Richard D. Friedman finds Hughes' votes consistent with his earlier views and not the product of political pressures. Hughes is pictured above with his wife, Antoinette.

electoral politics, and constitutionality among the three branches in the 1930s. In sum, he argues that the Court polarized the issues by rendering decisions supportive of the conservative wing of the Republican Party, causing Roosevelt and the Democrats to move to the left. Roosevelt won a landslide victory and attacked the Court, but the public rallied to its defense. The Court retreated, shifted its emphasis to other kinds of issues, and, Lasser concludes, emerged as a far more influential policy maker after 1937 than it had been before.

The Roosevelt Court

Franklin D. Roosevelt, who had had no Supreme Court appointments during his first term, elevated Stone to the chief justiceship and made eight other appointments from 1937 to 1943. For candid personal impressions of these men by an astute observer, see John Braeman's "Thomas Reed Powell on the Roosevelt Court," 5 *Constitutional Commentary* 143 (1988), which reports the eminent constitutional commentator's private opinions of the members of the Roosevelt Court, expressed in a letter to Charles Beard. C. Herman Pritchett adopts a very different approach in **The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947** (New York: Macmillan, 1948), a groundbreaking political and statistical study of judicial behavior. As Jeffrey D. Hockett observes in **New Deal Justice: The Constitutional Jurisprudence of Hugo L. Black, Felix Frankfurter, and Robert H. Jackson** (Lanham, MD: Rowman & Littlefield, 1996), the New Deal Justices, and the New Deal coalition generally, displayed consensus only as to the evils of the old system. Hockett contrasts the conflicting jurisprudential styles of his three subjects with reference to their differing ideological backgrounds. Robert Harrison, "The Breakup of the Roosevelt Supreme Court: The Contribution of History and Biography," 2 *Law and History Review* 165 (1984), also points out that while the Roosevelt appointees agreed on how to correct the mistakes of the Old Court, the New Court soon became even more divided and contentious, with far more nonunanimous decisions and dissenting votes. He suggests that the appointees were often politically ambitious and, while abhorring the policy making of the Old Court, were result-oriented themselves but not in agreement, so that Frankfurter, Jackson, and Reed often found themselves pitted against Black, Douglas, Murphy, and Rutledge. In "The

Roosevelt Court: The Liberals Conquer (1937-1941) and Divide (1941-1946)," 23 *Santa Clara Law Review* 491 (1983), Russell W. Galloway, Jr., provides statistics on the voting patterns and rates of dissent for the 1936 through 1945 Terms of the Court, documenting the overall move to the left but also the fragmentation of the Roosevelt appointees into two blocs. Galloway demonstrates the greater consensus of the conservative-dominated Court of the early 1930s in "The Court That Challenged the New Deal," 24 *Santa Clara Law Review* 65 (1984). Focusing on the Justice who made the revolution possible and then was left behind, Charles A. Leonard charts the fractures in the Roosevelt Court as it divided into camps led by Justices Black and Frankfurter in "A Revolution Runs Wild: Mr. Justice Roberts' Last Four Years on the Supreme Court," 1980 *Yearbook of the Supreme Court Historical Society* 55. In "Fighting Justices: Hugo L. Black, William O. Douglas, and Supreme Court Conflict," 38 *American Journal of Legal History* 1 (1994), Howard Ball and Phillip J. Cooper analyze the types, arenas, and tactics of conflict within the Court, with illustrations drawn from battles among Justices Black, Douglas, Frankfurter, Jackson, and others. See also Ball and Cooper's **Of Power and Right: Hugo Black, William O. Douglas, and America's Constitutional Revolution** (New York: Oxford University Press, 1992), a joint biography of the two Justices, so close and yet so different, with analysis of the many issues they faced together on the Court.

Many other biographies also inform our understanding of the Roosevelt Court and its members, and works on Justice Black are especially numerous. Howard Ball's **The Vision and the Dream of Justice Hugo L. Black** (University: University of Alabama Press, 1975), interprets Black's decision making as an attempt to preserve constitutional democracy from the threats of governmental invasion of liberty, judicial tampering with the Constitution, and private activities disruptive of an orderly society. In **Mr. Justice Black: Absolutist on the Court** (Charlottesville: University Press of Virginia, 1980) James J. Magee examines Black's rejection of the balancing of interests and assesses the degree to which the Justice lived up to his precepts of absolutism and literalism. In an early assessment, **Hugo L. Black: A Study in the Judicial Process** (Baltimore, MD: The Johns Hopkins University Press, 1950), Charlotte Williams saw Black as upholding exercises of governmental power that aid the common man and

striking down those that disadvantage him. She also found that Black unashamedly wrote his personal feelings into law—a practice against which he would later rail in cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1965). Tony Freyer, **Hugo L. Black and the Dilemma of American Liberalism** (Glenville, IL: Scott, Foresman/Little, Brown Higher Education, 1990), provides keen analysis of Black's jurisprudence, and Hugo L. Black speaks for himself in **A Constitutional Faith** (New York: Alfred A. Knopf, 1968).

Comparative studies offer a broader perspective. Tinsley E. Yarbrough's **Mr. Justice Black and His Critics** (Durham, NC: Duke University Press, 1988) analyzes both Black's jurisprudence and the views of his principal judicial and scholarly critics, Justices Frankfurter and Harlan and several academics. Yarbrough concludes that Black was largely successful in constructing a workable balance between democratic power and constitutional restraint. The contrasts between Black and Frankfurter have attracted many scholars. Wallace Mendelson, **Justices Black and Frankfurter: Conflict in the Court** (Chicago: University of Chicago Press, 1961), prefers Frankfurter's restraint in support of the principle of the diffusion of the power to govern to Black's activism in support of his ideals, which Mendelson finds leading to *ad hoc* decision making. In **Constitutional Faiths: Felix Frankfurter, Hugo Black, and the Process of Judicial Decision Making** (Ithaca, NY: Cornell University Press, 1984) Mark Silverstein rejects the standard opposition of judicial activism and judicial restraint and argues that Black and Frankfurter were liberals who agreed on goals, including judicial restraint, but differed substantially on means. Silverstein finds that Black was more skeptical of governmental power, including judicial, and looked for formal restraints, whereas Frankfurter believed in the administrative state, including its judicial component, and relied on self-restraint. The judicial careers of these two Roosevelt appointees did not follow the expected trajectories, and in **The Antagonists: Hugo Black, Felix Frankfurter and Civil Liberties in Modern America** (New York: Simon and Schuster, 1989) James F. Simon analyzes the contest in which the politician from Alabama triumphed over the professor from Harvard for intellectual leadership of the Court in the post-New Deal era.

Frankfurter's own biographers focus on this

failure. Melvin I. Urofsky's **Felix Frankfurter: Judicial Restraint and Individual Liberties** (Boston: Twayne Publishers, 1991) concludes that his advocacy of judicial restraint was appropriate when federalism and economic regulation were the issues of the day, but was found wanting when the problems of protecting individual liberty became paramount. Frankfurter's personality also contributed to his failing influence, Urofsky finds, but he was nevertheless an important figure in the evolution of the doctrines and role of the Court. H. N. Hirsch adopts the more controversial approach of psychobiography in **The Enigma of Felix Frankfurter** (New York: Basic Books, 1981). He interprets the paradoxes of Frankfurter—a manner characterized by both charm and vitriol, a libertarian reputation but a deference to repressive exercises of legislative power, leadership in all other endeavors but ineffectiveness on the Court—in terms of the dictates of a narcissistic personality.

Other useful portraits of members of the Roosevelt Court include J. Woodford Howard, Jr. **Mr. Justice Murphy: A Political Biography** (Princeton, NJ: Princeton University Press, 1968); Sidney Fine, **Frank Murphy: The Washington Years** (Ann Arbor: University of Michigan Press, 1984); James F. Simon, **Independent Journey: The Life of William O. Douglas** (New York: Harper and Row, 1980); and Stephen L. Wasby, ed., "He Shall Not Pass This Way Again:" **The Legacy of Justice William O. Douglas** (Pittsburgh, PA: University of Pittsburgh Press, 1990). Eugene C. Gerhart's **America's Advocate: Robert H. Jackson** (Indianapolis, IN: Bobbs-Merrill, 1958) is uncritical and does not treat Jackson's Court years in depth, but it does include a chapter on his feud with Hugo L. Black.

Preferred Freedoms

If William Lasser is correct in his assertion that the Court emerged from the crisis of 1937 more powerful than before, it is largely because it adopted a role of leadership on behalf of noneconomic civil liberties and rights. The rationale for the Court's new approach was announced quietly by Justice Stone in the subsequently famous Footnote Four to his majority opinion in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), in which he suggested that the Court would adopt a more rigorous standard of constitutionality with respect to legislation impinging on individual liberties, particularly where the normal correctives of the political

process were unavailing. Louis Lusky, who as Stone's law clerk drafted the note, discusses its origins in "Footnote Redux: A Carolene Products Reminiscence," 82 *Columbia Law Review* 1093 (1982). Lusky emphasizes the significant contribution of Chief Justice Hughes to the idea of preferred freedoms and points out what he considers to have been subsequent misconceptions. Lusky also discusses the provenance of the note in "Minority Rights and the Public Interest," 52 *Yale Law Journal* 1 (1942). For Bruce A. Ackerman, "Beyond *Carolene Products*," 98 *Harvard Law Review* 713 (1985), the significance of the note is that it offered the Court a way to re-establish the legitimacy of judicial review (the same problem it had faced at the beginning of the Reconstruction era, after *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857)) by suggesting that the need to correct the defectiveness of the political process trumped the alleged illegitimacy of judicial negation of the will of the majority. But the more this corrective process succeeds, Ackerman warns, the weaker will the *Carolene Products* rationale for judicial review become. Averting to his larger scheme of American constitutional history in **We the People** (Cambridge, MA: Belknap Press of Harvard University Press, 1991), Ackerman further interprets Footnote Four as an attempt to relate the New Deal—or third American republic—to the first two (the Founding, Reconstruction). For J. M. Balkin, "The Footnote," 83 *Northwestern University Law Review* 275 (1988/89), the note served a more immediate need as a means of avoiding the judicial deference to legislative judgment adopted a year earlier in *West Coast Hotel* and seemingly seconded in *Carolene Products* itself, which upheld a congressional ban on the shipment of "filled milk." Although only one Roosevelt appointee (Black) participated in the decision of *Carolene Products*, and he seems to have played no role in the genesis of the footnote, Martin Shapiro calls the shift announced there blatantly political. Its effect, he argues in "The Constitution and Economic Rights" in **Essays on the Constitution of the United States**, ed. M. Judd Harmon (Port Washington, NY: Kennikat Press, 1978), was to allow the Court to abandon the New Deal's enemy, the business community, and embrace the underdog elements of the New Deal political coalition.

Justice Stone's initiative led to what many see as a double standard: judicial activism on behalf of civil and political rights but judicial restraint in the face

of regulations limiting economic rights. In "Activism and Restraint: The Evolution of Harlan Fiske Stone's Judicial Philosophy," 70 *Tulane Law Review* 137 (1995), Miriam Galston challenges the common view that Stone was fundamentally an advocate of judicial restraint who made an exception when it came to threats to political and civil liberties. Prior to joining the Court he was a supporter of activism on behalf of both economic and political and civil liberties, she argues, but then adopted a posture of restraint with respect to the former because of pragmatic concerns about the impact of the law in a world of rapid social change. Since this evolution occurred without reference to the confrontation between FDR and the Court, Galston regards the case of Stone as an appropriate vehicle for study of the double standard. Samuel J. Konefsky, **Chief Justice Stone and the Supreme Court** (New York: Macmillan, 1945), also saw Stone's decision making as grounded in the fullest possible factual understanding of issues, and Stone had high praise for Konefsky's interpretation. Another contemporary discussion of the relation between judicial self-restraint and protection of the integrity of the political process in Stone's jurisprudence is Noel T. Dowling's "The Methods of Mr. Justice Stone in Constitutional Cases," 41 *Columbia Law Review* 1160 (1941). Robert G. McCloskey's chapters on the Stone and Vinson years in **The Modern Supreme Court** (Cambridge, MA: Harvard University Press, 1972; reprint available from Books on Demand, Ann Arbor, MI), show the Court groping for a redefined sense of its role as it struggled to reconcile new activism in the field of civil rights and liberties with the overwhelming post-1937 consensus on the virtues of self-restraint. For a balanced assessment of the double standard in American constitutional law today, see Henry J. Abraham and Barbara A. Perry, **Freedom and the Court: Civil Rights and Liberties in the United States**, 6th ed. (New York: Oxford University Press, 1994).

Although noneconomic civil liberties became the main focus only after 1937, John Braeman argues in **Before the Civil Rights Revolution: The Old Court and Individual Rights** (New York: Greenwood Press, 1988) that the Court prior to 1937 went much further in protecting civil rights and liberties than has been generally recognized—ironically, by means of an application of substantive due process. Paul L. Murphy discusses the earlier period in two books, **World War I and the Origin of Civil Liberties in the United States** (New York:

W.W. Norton, 1979) and **The Meaning of Freedom of Speech: First Amendment Freedoms from Wilson to FDR** (Westport, CT: Greenwood Publishing Co., 1972). Peter Irons gives FDR's policies a lukewarm review at best in "Politics and Principle: An Assessment of the Roosevelt Record on Civil Rights and Liberties," 59 *Washington Law Review* 693 (1984), but as Geoffrey D. Berman reports in "A New Deal for Free Speech: Free Speech and the Labor Movement in the 1930s," 80 *Virginia Law Review* 291 (1994), a revolution in the law of civil liberties was brewing in the field of labor relations. Jerold S. Auerbach, **Labor and Liberty: The LaFollette Committee and the New Deal** (Indianapolis, IN: Bobbs-Merrill, 1966), explores the evolution of concern for civil liberties in the New Deal era by examining the work of the Senate subcommittee that investigated restrictions of civil liberties that hampered union organization and collective bargaining. Joseph Tanenhaus also assesses these developments in two articles: "Picketing as Free Speech: Early Stages in the Growth of the New Law of Picketing," 14 *University of Pittsburgh Law Review* 397 (1953) and "Picketing—Free Speech: The Growth of the New Law of Picketing from 1940 to 1952," 38 *Cornell Law Quarterly* 1 (1952). Harvard Sitkoff, **A New Deal for Blacks: The Emergence of Civil Rights as a National Issue, Volume I: The Depression Decade** (New York: Oxford University Press, 1978), chronicles the ways in which events of the 1930s laid the groundwork for advances in the field of civil rights.

Incorporation of the Bill of Rights

As civil liberties cases came to the fore, one of the issues that contributed to the splintering of the post-New Deal Court was the application of the Bill of Rights to the states through incorporation of its provisions into the Due Process Clause of the Fourteenth Amendment. Eight members of the Court accepted Justice Cardozo's theory of selective incorporation in *Palko v. Connecticut*, 302 U.S. 319 (1937), but a decade later a very different group of Justices engaged in an intramural debate in *Adamson v. California*, 332 U.S. 46 (1947). Justice Black, joined by Justice Douglas, advanced his theory of total incorporation on the basis of historical investigation, which convinced him that the framers of the Fourteenth Amendment had intended it to apply the entire Bill of Rights to the states. Justices

Frank Murphy and Wiley Rutledge held out for total incorporation plus other rights not specifically mentioned in the first eight amendments, while Justice Frankfurter abjured incorporation in favor of a concept of fundamental fairness based on the independent meaning of the Due Process Clause. Charles Fairman wrote an article, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding," 2 *Stanford Law Review* 5 (1949), powerfully challenging Black's theory on the basis of a different reading of the historical evidence, and a major scholarly debate ensued. A recent rebuttal of Fairman is Michael Kent Curtis, **No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights** (Durham, NC: Duke University Press, 1986). As Roald Y. Mykkeltvedt points out in **The Nationalization of the Bill of Rights: Fourteenth Amendment Due Process and the Procedural Rights** (Port Washington, NY: Associated Faculty Press, 1983), uncertainty about the relationship between the Fourteenth Amendment and the Bill of Rights left the Court free to develop that relationship as it saw fit. While consensus as to the proper relationship continued to elude the Justices, the result of their votes has been the application of most of the Bill of Rights to the states. For a judicious assessment of this enduring controversy, see Richard C. Cortner, **The Supreme Court and the Second Bill of Rights: The Fourteenth Amendment and the Nationalization of Civil Liberties** (Madison, WI: University of Wisconsin Press, 1981).

The Revival of Property Rights

Particularly after Earl Warren assumed the chief justiceship in 1953, the Court applied the Bill of Rights and the Equal Protection Clause in ways that revolutionized race and gender relations, legislative apportionment, the treatment of criminal offenders, and the relation between church and state, and created a right of privacy with profound consequences for issues of sexual behavior, abortion, and medical care of the grievously ill. While these momentous developments are beyond the scope of this essay, the even more recent revival of the issue of property rights deserves mention as a coda to the story of the earlier conflict. Jennifer Nedelsky argues in **Private Property and the Limits of American Constitutionalism** (Chicago: University of Chicago Press, 1990) that from 1787 to 1937 there was a consensus that a focus on property rights as a limit on govern-

mental power was the defining principle of American constitutionalism, and that the problem since 1937 has been to develop an alternative principle for the era of the regulatory welfare state. As James W. Ely, Jr., reports in a brief but useful overview, "The Enigmatic Place of Property Rights in Modern Constitutional Thought" in **The Bill of Rights in Modern America: After 200 Years**, ed. David J. Bodenhamer and James W. Ely, Jr. (Bloomington: Indiana University Press, 1993), the proponents of a dissenting political and legal movement now assert, however, that economic rights should still be the keystone of the constitutional arch. The most prominent advocate of the revival of economic rights is Richard A. Epstein, who makes the case in **Takings: Private Property and the Power of Eminent Domain** (Cambridge, MA: Harvard University Press, 1985). Moving from a private law background to a public law focus, Epstein defends a constitutional regime of limited government and private property, exemplified by his understanding of the Takings Clause. He argues that a wide range of regulatory measures that affect the value of property are takings in the constitutional sense, for which just compensation is required. From this perspective, much of the regulatory-welfare state ushered in by the New Deal is unconstitutional after all. Another principal spokesman is Bernard H. Siegan. In **Economic Liberties and the Constitution** (Chicago: University of Chicago Press, 1980) Siegan decries the abandonment of judicial protection of economic liberties and argues that a return to judicial review of economic regulation, while not restoring laissez-faire, would protect vital individual rights and benefit society as a whole. Other themes of the movement are evident in the titles of Epstein's "Toward a Revitalization of the Contract Clause," 51 *University of Chicago Law Review* 703 (1984) and Siegan's "Rehabilitating *Lochner*," 22 *San Diego Law Review* 453 (1985). Siegan argues for the superiority of the free market, as does the anonymous author of the Note "Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered," 103 *Harvard Law Review* 1363 (1990), who advocates the protection of economic rights through a revival of economic substantive due process or its functional equivalent because governmental regulation of the economy is inefficient and harmful. Economic performance is also important for Richard A. Posner, "The Constitution as an Economic Document," 56 *George Washington Law Review* 4 (1987). Proponents of a revival of the *Lochner*

brand of economic substantive due process can find further justification in the work of Martin Shapiro, who argues in "The Supreme Court's 'Return' to Economic Regulation," 1 *Studies in American Political Development* 91 (1986), that the Supreme Court did not abandon substantive due process in 1937 but, still using the touchstone of reasonableness, merely shifted from the protection of the traditional forms of property of business to the protection of new forms of property of a new class of favored groups, chiefly the underdogs.

Thirty-five years ago, Robert G. McCloskey anticipated the current campaign in "Economic Due Process and the Supreme Court: An Exhumation and Reburial," 1962 *Supreme Court Review* 34. While unconvinced that the Court had evolved a satisfactory rationale for a double standard in the protection of political and civil as opposed to economic rights, McCloskey concluded that the doctrine of economic due process should be allowed to rest in peace. The Court had taken on but not resolved difficult problems in so many new areas, he argued, and aroused so much hostility in the process, that prudence counseled against taking on any more. Writing in 1962, he commented that the Court had spent twenty-five years assuming new tasks and could easily spend another twenty-five years in working through their resolution. By that calculation, it is no surprise that the current campaign emerged strongly in the mid-1980s, but whether or not the Court should take up its cause is still a matter of much dispute. In "Liberty and the Public Ingredient of Private Property," 55 *Review of Politics* 85 (1993), Paul Kens rebuts the argument that support for the revival can be found in the intent of the Framers or the jurisprudence of Marshall and Taney; its roots lie in the laissez-faire era of the early twentieth century, he asserts, and it ignores the public component of the concept of property that the framers, Marshall, and Taney all recognized. Michael J. Phillips, "Another Look at Economic Substantive Due Process," 1987 *Wisconsin Law Review* 265 (1987), reviews the economic substantive due process of the *Lochner* era, the noneconomic substantive due process that arose in the Warren era, and the arguments for a modern revival of economic substantive due process, which he rejects. Bernard Schwartz is critical of the Epstein and Siegan articles in **The New Right and the Constitution** (Boston, MA: Northeastern University Press, 1990), and other commentators conclude that modern Takings Clause jurisprudence should not be sullied by substantive due process, for example

Edward J. Sullivan, "Substantive Due Process Resurrected Through the Takings Clause: *Nollan, Dolan, and Ehrlich*, 25 *Environmental Law* 155 (1995), Lawrence Berger, "Public Use, Substantive Due Process and Takings—An Integration," 74 *Nebraska Law Review* 843 (1995), and Glen E. Summers, "Private Property Without *Lochner*: Toward a Takings Jurisprudence Uncorrupted by Substantive Due Process," 142 *University of Pennsylvania Law Review* 837 (1993). Another notable strain of criticism proceeds from the premise that the best defense is a good offense. In **Property and the Politics of Entitlement** (Philadelphia: Temple University Press, 1990) a combination of legal analysis, policy analysis, and political theory, John Brigham assesses the double standard for rights, relates economic need to equal protection, and concludes that constitutional property must be a civil liberty conceived much more broadly and democratically than in the past.

These new issues are variants of old ones. Valuable historical perspective is provided by David A. Schultz, who examines the new movement in the context of a survey of the philosophy and law of property rights in American history in **Property, Power, and American Democracy** (New Brunswick, NJ: Transaction Publishers, 1992), and by three volumes edited by Ellen Frankel Paul and Howard Dickman: **Liberty, Property, and the Foundations of the American Constitution** (Albany: State University of New York Press, 1989), **Liberty, Property, and Government: Constitutional Interpretation Before the New Deal** (Albany: State University of New York Press, 1989), and **Liberty, Property, and the Future of Constitutional Development** (Albany: State University of New York Press, 1990).

The Role of the Court

The arguments about property rights and governmental power are clearly not over, and neither are the arguments about the role of the Court. While the literature on that subject merits an essay of its own, mention of a few items may bring this essay to an appropriate conclusion. In "The 'Imperial Judiciary' in Historical Perspective," 1984 *Yearbook of the Supreme Court Historical Society* 61, William M. Wiecek sets the Court-packing battle of 1937 in the context of other prominent political challenges to the judiciary, both before and since. Robert J. Steamer, **The Supreme Court in Crisis: A History of**

Conflict (Amherst: University of Massachusetts Press, 1971), maintains that periodic crises between the Court and the political branches are inevitable and beneficial. While critical of several of the Court's decisions on New Deal measures, Dean Alfange also suggests in **The Supreme Court and the National Will** (Garden City, NY: Doubleday, Doran & Co., 1937) that the Court had performed a service to constitutional government by forcing a national debate on hastily enacted policies and checking the other two branches when they had ceased to check each other. John B. Taylor points out in "The Supreme Court and Political Eras: A Perspective on Judicial Power in a Democratic Polity," 54 *Review of Politics* 345 (1992) that the Court's behavior in the 1930s was atypical. Judicial review has not normally been directed at the legislation of a "new" political regime by an "old" Court; it has most often been exercised within stable political eras rather than across them. Carl B. Swisher, **The Growth of Constitutional Power in the United States** (Chicago: University of Chicago Press, 1946), views the role of the Supreme Court as interpreting the Constitution in a fashion that is consistent with current conceptions of the public welfare, and checking government when it seeks to go beyond what prevailing public values will tolerate. In **The Supreme Court and Constitutional Democracy** (Ithaca, NY: Cornell University Press, 1984), however, John Agresto argues that with its shift from negative to positive activism in the modern era, it is the Court that is dangerously unchecked. The Justices should not exercise the power of constitutional interpretation exclusively, Agresto maintains, but should share it with the people and their elected representatives. That, of course, is precisely what Franklin D. Roosevelt felt about the Court's negative activism in the 1930s. In "The Activist Legacy of the New Deal Court," 59 *Washington Law Review* 751 (1984), Raoul Berger complains that the judicial activism on behalf of economic policy practiced by the Old Court was replaced by an equally undesirable and constitutionally insupportable activism on behalf of social policy, especially under the Warren Court. Christopher Wolfe finds a regrettable contrast in **The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law** (New York: Basic Books, 1986; rev. ed., Lanham, MD: Rowman & Littlefield, 1994). The Justices who around 1890 sought to protect property rights did not understand that they were fundamentally altering the character of judicial review by giving it a

legislative cast, Wolfe believes, whereas the Justices who after 1937 did not abandon activism but shifted it to the field of civil rights and liberties had a clear understanding of the legislative character of their decision making. Rightly so, believes Michael J. Perry, who defends the legitimacy of noninterpretive review—extra-constitutional judicial policy making—in the field of human rights, especially free speech and equality, in **The Constitution, the Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary** (New Haven, CT: Yale University Press, 1982). Robert H. Bork defends a contrary doctrine of interpretive review—the jurisprudence of the original understanding of the Constitution—in **The Tempting of America: The Political Seduction of the Law** (New York: Free Press, 1990), while John Hart Ely stakes out an intermediate position in **Democracy and Distrust: A Theory of Judicial Review** (Cambridge, MA: Harvard University Press, 1980). Perry does not discuss his theory in the realm of economic rights, although perforce it applies there, too. James A. Dorn and Henry G. Manne would be activists in that

realm as well. In presenting their edited volume **Economic Liberties and the Judiciary** (Fairfax, VA: George Mason University Press, 1987), they reject both liberal judicial activism on behalf of the regulatory state and conservative judicial self-restraint, favoring instead a libertarian judicial activism on behalf of not only civil and political rights but economic rights as well.

The call for libertarian activism on behalf of economic rights brings us to a place eerily like the one where we started in the late nineteenth century. History will not simply repeat itself, however, for the slate cannot be wiped clean. The perpetual conflict of politics, policy, and institutional prerogatives will play out in new and different ways. Alexander Hamilton, a vigorous proponent of both the power of government and the security of property, extolled the virtues of vibrations of power in our constitutional system. One feels them still.

**This essay has been prepared with the assistance of a Faculty Enhancement Grant and a Computer Software Grant from Washington College.*

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Cover: Chief Justice Charles Evans Hughes swearing in Franklin D. Roosevelt for his second term. Several of the Associate Justices can be seen on the right.
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