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...A Rendezvous with Kreplach: Putting the New Deal Court in Context

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The Supreme Court of the New Deal era continues to captivate lawyers and historians. Constitutional jurisprudence changed rapidly during the period. Moreover, some of the most significant changes seemed – whatever the reality – to result from pressure imposed in 1937 by President Franklin Roosevelt's plan to pack the Court. The structure of constitutional law that emerged within a few years of Roosevelt's death remains intact in significant respects today.

The New Deal period therefore presents significant issues of continuing interest: How does constitutional law change, over the short and long runs? To what extent are Supreme Court justices' decisions influenced not only by their own ideological orientations but also by political pressures of the type that are ordinarily imposed on the other branches of government – and to what extent should their decisions be influenced by such pressures?

Professor G. Edward White, one of our most distinguished legal historians, has contributed to this discourse with his thoughtful book, *The Constitution and the New Deal*. Some readers may be perplexed to find that substantial portions of the book do not deal with the Constitution, that much of it does not concern the New Deal, and that only relatively small portions of it address constitutional issues that were particularly salient during the New Deal. But the book is very much about setting a context, and part of White's point is that the importance of the New Deal as an engine driving constitutional change has been considerably overstated.

As White explains, the conventional account of early twentieth-century constitutional history characterizes the New Deal "as the source of a new era of constitutional law

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and constitutional interpretation, in which the Constitution was adapted to facilitate a new realm of American governance" marked by affirmative roles for state and federal governments as regulators of the economy and distributors of economic benefits (p. 3). This new era envisioned a new role for judges. Applying what White calls "bifurcated review," they accord considerable leeway to the political branches in exercising their regulatory and distributive functions, but at the same time carefully scrutinize laws and policies that might infringe on rights and liberties "deemed foundational to a democratic modern society" (pp. 3-4). In the conventional account, Roosevelt's landslide victory in 1936 and the Court-packing plan of the following year are perceived as instrumental in causing dramatic constitutional change (p. 14). Thus, in one modern version of the conventional account, Bruce Ackerman presents "a radical discontinuity between the decades that preceded the New Deal and the New Deal itself," which "helps highlight the New Deal's transformative character" (p. 27).

White contends that the causal relationship of doctrinal changes in constitutional law to the New Deal "was far more complicated, and attenuated, than existing scholarship has suggested" (p. 4). In some areas change was under way long before the New Deal period, and was not resolved until later. And the Court's development of bifurcated review also occurred over a far longer period than has usually been supposed (p. 4). Furthermore, events of the early twentieth century have been seen so much through the perspective of the New Deal that juridical perspectives that were perfectly respectable in the earlier time have since been pilloried, as have the justices who advocated them (pp. 14-15, 269-70, 288-91).

To a large extent, I agree with White. We should do away with the oft-used term "constitutional revolution of 1937." Perhaps the transformation in constitutional law that occurred during the 1930s and 1940s constituted a revolution; as White recognizes (p. 199), it was broad, deep, and, in historical terms, rapid. And in 1937, in the shadow of Roosevelt's re-election and the Court-packing plan, the Court did issue several significant decisions that were key parts of that transformation. But they were far from the whole story, they had significant antecedents that long preceded the Court-packing plan, and there is no persuasive evidence that they were caused by the politics surrounding Roosevelt's initiative.[1]

I agree, moreover, with White's principal historiographic conclusion: The persistence of belief that political factors must have caused the Court's 1937 decisions is a puzzle to which a crucial key is the widely held belief among many academics that justices are basically political actors responding to ordinary political forces. White is correct, for example, that Laura Kalman's intellectual presuppositions prevent her from "giv[ing] much credence to a theory of constitutional change that appears to minimize the deeply behavioral character of judging and the apparently inevitable tendency of constitutional law to become subsumed in politics" (p. 31). From the perspective of scholars like Kalman and William Leuchtenburg, "to emphasize the role of established legal ideas and doctrines as causative factors is to invite the revival of an older, unreflective caricature of judging as an apolitical process" (p. 31).

In considering White's stance and contribution, it might help to bear in mind the attempts by Kalman and others to distinguish between

1 This is a theme that Barry Cushman and I have both pursued, Cushman most notably in Rethinking the New Deal Court: The Structure of a Constitutional Revolution (1998), and I in *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. Pa. L. Rev. 1891 (1994).

"internalists, who point to doctrinal, intellectual causes in explaining constitutional change during the New Deal, and externalists, who stress political reasons."[2] (Kalman places me in the internalist camp.) To my mind, the dichotomy is a false one. On the one hand, if we want to understand constitutional change we must pay attention to doctrinal constraints; to assume that constitutional law is nothing but a reflection of the various political, intellectual, and social forces swirling through society would ignore the reality that at any given moment the justices' plausible options are significantly constrained by the web woven by prior decisions. On the other hand, it would be equally unrealistic to ignore those forces and treat the Court as if it were hermetically sealed from the outside world. Indeed, the chief generator of constitutional change is probably created by the closest interface the Court has with the external, political world – the appointment of new justices.

White helps bridge the gap between internalist and externalist explanations. Put another way, he pays attention, appropriately, to both internal and external forces. He treats doctrine seriously, and indeed much of the book concerns doctrinal changes in constitutional and non-constitutional law in the first half of the twentieth century. At the same time, he places those changes in the broad social context of modernism, "a distinctive consciousness that has shaped the responses of Americans to their encounters with modern life" (p. 5). As White uses the term, modernism is reflected in "an attitude that elevates human agency, as distinguished from potent external forces, to a position of causal primacy in the universe, and thus takes for granted that humans are capable of controlling their environment and shaping their collective destinies" (p. 5).

After outlining the conventional account and its modernist underpinnings, White begins by examining three areas that, as he says, "lie somewhere on the periphery of the conventional narrative's focus" (p. 12) – the constitutional law of foreign affairs, administrative law, and free speech. He does so, he says, because by showing that the law in all of these areas changed substantially and relatively gradually before the New Deal era or the Court-packing crisis, he "hope[s] to engender an attitude of skepticism toward the conventional account's treatment of its central areas of concern" (p. 12). In terms used by his colleague Barry Cushman, his aim is "to create sufficient intellectual space" for an alternative account.[3]

Foreign Affairs. It is noteworthy, as White emphasizes, that George Sutherland, perhaps the most theoretically astute member of the Court's conservative foursome in the crisis years, took advanced ground early on (long before joining the Court) in advocating plenary federal power and broad executive discretion in foreign affairs. But Sutherland himself carefully distinguished the foreign and domestic contexts, and on the Court he rigorously adhered to the distinction.[4] Sutherland was able to write his theory into law in the international context, but neither in his hands nor in those of any of his colleagues did this theory provide a basis for overcoming limitations on powers of the federal government, or of the executive, in the domestic context.

Administrative Law. What White calls the conventional account associates orthodox constitutional objections to the growth of agency government with resistance to the expansion of government more generally. Key to this account is the sequence of three decisions in 1935 and 1936 that struck down federal statutes in part on the ground that they constituted

2 *Law, Politics, and the New Deals*, 108 Yale L.J. 2165, 2165 (1999).

3 Barry Cushman, *supra* note 1, at 5.

4 See p. 71, noting Sutherland's adherence to the distinction in the *Carter Coal* and *Curtiss-Wright* cases.

excessive delegations of legislative power to agencies, uncurbed by judicial-like procedures.[5] And the passage of the Administrative Procedure Act in 1946 reflected the triumph of a newer model, with relatively slight restraints on agency action. At least the first parts of this conventional account seem sound to me: To a large extent, those who generally resisted expanded governmental power also resisted delegation of legislative power, but the increasing appeal of the agency form in an environment that demanded increased governmental activity swamped the objections. Nevertheless, White appears correct in arguing that the orthodox constitutional objections to the agency form played a significant role, and a far greater one than is often acknowledged, in shaping the administrative law that eventually emerged.[6] Thus, embedded in our modern administrative law there may be more than is commonly supposed of the thinking of early twentieth-century analysts of the emergence of agencies. That is an interesting point, though its force in helping to explain the constitutional transformation that centered on the New Deal era strikes me as rather small.

Free Speech. White examines the development of free speech jurisprudence together with the emergence of the system of bifurcated review, under which the Court explicitly defers much more to the political branches in some contexts than in others. He contrasts bifurcated review with an older model he calls "guardian review," under which judges stood "as guardians and appliers of a realm of pre-political, essentialist constitutional principles" (p. 4). White draws two conclusions that he says are "perhaps unexpected." First, he says, "[t]he New Deal and the Court-packing crisis had very little causal connection to the emergence of free speech" (p. 163). I would not have thought this conclusion unexpected. On the contrary, free speech issues were sufficiently removed from the focus of attention of the New Deal that the contrary conclusion might have been surprising – except to the extent that it can be said that the increased stature of free speech rights was a result of the infusion of Roosevelt appointees on the Court beginning in 1937, a factor that White does not analyze closely. White is correct in arguing that free speech rights had come to be treated as having significant constitutional and cultural weight before the 1930s, and that "Court majorities had shown evidence of developing a speech-protective jurisprudence between 1931 and early 1937" (p. 163). Nevertheless, it seems highly likely that personnel changes accounted for a good deal of the change in the Court's decisions.[7]

White's second conclusion relates to the oft-discussed footnote 4 in Justice Stone's opinion for the Court in *United States v. Carolene Products Co*.[8] White says that "the emergence of free

5 Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Carter v. Carter Coal Co., 298 U.S. 236 (1936).

6 White points to the requirements that agencies publish their decisions; that administrative officials cannot combine prosecutorial and adjudicatory functions; and that affected persons must have an opportunity to comment on prospective decisions or an opportunity to challenge them judicially.

7 Note, for instance, the ideological breakdown in a trio of cases from the spring of 1931. Stromberg v. California, 283 U.S. 359 (McReynolds and Butler, JJ., dissenting from pro-speech decision); Near v. Minnesota, 283 U.S. 697 (Hoover's two appointees, Hughes and Roberts, providing crucial votes for a pro-speech decision over dissents of the conservative four); United States v. Macintosh, 283 U.S. 605 (Roberts joining conservative four to reject freedom of conscience claim). White does briefly consider the impact of personnel changes on the switch between Minersville School Dist. v. Gobitis, 310 U.S. 586, 606 (1940), and West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 648 (1943).

8 304 U.S. 144 (1938). Stone wrote for the Court but, as White points out, only a minority of the justices subscribed to the portion of the opinion including the footnote. Justice Cardozo, who was

speech bore a significant connection to the famous footnote in *Carolene Products* and, more fundamentally, to the substitution of bifurcated review for guardian review as the approved stance for judges in twentieth-century constitutional cases" (p. 163). He shows nicely that heightened review emerged in the context of free speech and associated rights, and only later figured prominently in the context of the protection of minorities, and that free speech cases provided the bulk of support for the footnote. But as for his causal claim – that "it was crucial to the development of bifurcated constitutional review" that free speech rights had already come to be regarded as liberties with significant constitutional and cultural weight (p. 163) – I am less sure. If White's point is that free speech cases, which happened to provide most of the precedential support for the footnote, also – and more importantly – supplied one of the critical footings for the development of deferential review, the proposition is certainly an interesting one and perhaps it is right. One may well speculate, though, that bifurcated review would have developed soon enough in the context of racial discrimination even if the First Amendment were not part of the Constitution at all. To the extent, if any, that he means that free speech cases were important for the development of bifurcated review because they provided support for the footnote, I am dubious. Though it has become a canonical vehicle for discourse about appropriate standards of review, I suspect that the *Carolene* footnote actually had very little generative significance.[9]

White does not discuss the origin of the footnote.[10] Stone's clerk, Louis Lusky, drafted what eventually became the last two paragraphs. Hughes expressed concern about the

mortally ill, and Justice Reed, who presumably was recused, did not participate in the case; Black concurred in the opinion except for this portion of it; Butler concurred in the judgment in a separate opinion; and McReynolds dissented.

9 In the years shortly after it was issued, the footnote was cited principally in separate opinions, rather than in opinions for the Court. But see Thornhill v. Alabama, 310 U.S. 88, 95 (1940) ("Abridgment 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."); American Federation of Labor v. Swing, 312 U.S. 321, 325 (1941) (citing the footnote in a string of cases for the proposition that, "as we have frequently indicated," the right to free discussion "is to be guarded with a jealous eye"). Most of the citations were for narrow, often uncontested points, and most remained within the free speech context. *See* Minersville School Dist. v. Gobitis, 310 U.S. 586, 606 (1940) (Stone, J., dissenting) ("prejudice against discrete and insular minorities"); Skinner v. Oklahoma, 316 U.S. 535, 544 (1942) (Stone, C.J., concurring) ("limits to the extent to which the presumption of constitutionality can be pressed, especially where the liberty of the person is concerned"); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 648 (1943) (Frankfurter, J., dissenting) ("This Court has recognized, what hardly could be denied, that all the provisions of the first ten Amendments are 'specific' prohibitions ..."); Prince v. Massachusetts, 321 U.S. 158, 173 (1944) (Jackson, J., dissenting) ("strong presumption of the constitutionality" of statutes does not apply in favor of statutes that "directly or indirectly infringe religious freedom and the right of parents to encourage their children in the practice of a religious belief"); Yakus v. United States, 321 U.S. 414, 466 & n.13 (1944) (Rutledge, J., dissenting) (citing the portion of *Carolene* including the footnote, along with another case, for "the general presumption of validity which attaches to legislation"). The first extensive discussion of the footnote in a Supreme Court opinion was in Justice Frankfurter's concurrence in Kovacs v. Cooper, 336 U.S. 77, 90-92 (1949) (saying that the footnote "stirred inquiry" regarding degree of scrutiny for legislation touching on Bill of Rights and Fourteenth Amendment, but that it "merely rephrased and expanded what was said in *Herndon* v. *Lowry*, [301 U.S. 242 (1937)] and elsewhere").

10 See, e.g., J.M. Balkin, The Footnote, 83 Nw. U. L. Rev. 275, 302 n.65 (1988).

talk of "different considerations" and different standards of review applying in different circumstances. The difference, he said, was not one in the test but in the nature of the right invoked. Stone, in an attempt to accommodate this concern (which he seems to have misunderstood) tacked on the first paragraph of the footnote, which speaks of "narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution." Interestingly, it is only the argument in this paragraph, and not those in the other two, that White says "was a common part of the discourse of constitutional jurisprudence in 1938" (p. 163).

I must confess that in reading White's chapters on foreign affairs, administrative law, and free speech, I thought of the story told me by my old colleague Leo Katz about the boy who had an irrational fear of kreplach, a Jewish dumpling that makes many mouths water. His mother, determined to overcome the problem, showed him the ingredients. "See," she said, "this is just meat and dough." The boy watched with equanimity as his mother folded one corner of the dough over the meat, and then a second and a third. Then the mother folded over the final corner. The boy's face turned red. "Kreplach!" he screamed, and ran in terror from the room.

Three folds make an interesting exercise, but they only bring us to the periphery of the problem; until the fourth fold, the meat and dough just aren't kreplach. Similarly, it is very well to show that in various doctrinal areas that lie "somewhere on the periphery" of the issues that were most pressing during the crisis of the 1930s, the law had already changed gradually and substantially, and White does a fine job of showing that it had. But this is not particularly surprising, and as long as one loiters on the edges of the central topic – government's power to regulate economic relations – it is hard to get much of a handle on the question that is of chief interest: Why did the Court make (or at least give the appearance of making) such a dramatic shift on that issue after Roosevelt issued his plan? To answer that question, one must delve into the cases actually dealing with economic regulation.

White moves tentatively towards the heart of the matter in a chapter on a topic that still seems far removed from economic regulation: the formation of the American Law Institute and the launching of its Restatement project in the 1920s. Drawing on but adjusting Langdellian orthodoxies of the late nineteenth century, the ALI "separate[d] the essentialist authority of the black letter principles being compiled by authors of Restatement volumes from the expertise-based authority of the compilers" (p. 181). The premise that such a separation was possible exposed the ALI to modernist-inspired criticism from the Legal Realists, who contended that the whole project was incoherent and that it failed to recognize the importance of human agency in the development of law. To a typical Realist, "science" in law "was contextual rather than conceptual, behavioral rather than taxonomic" (p. 191).

The same debate, as White shows, played out in the constitutional context and accounts in large part for the commitment of many scholars to the view that the Court-packing crisis played a critical role in leading to the constitutional transformation of the 1930s and 1940s. The conventional account, taking the Realist perspective, accepts a "behavioralist view of judges as constitutional interpreters" and "rejects, as antiquated or misguided, any conception ... that treats the authority of the Constitution's text as separate from the authority of those given the power to interpret it" (p. 200). This account is, he says, a "triumphalist narrative" (p. 237), for in the 1930s "the proposition that judges, in their role as constitutional interpreters, made law

in the legislative sense ... worked its way from the status of critique to something approaching orthodoxy" (pp. 234-35). Thus, in an interesting and useful twist, White sees the Court-packing crisis not as a cause of revolution but "as a product of a constitutional revolution, one whose revolutionary character was far deeper and wider than any 'switch in time'" (p. 235).

The argument is a valuable one, but I believe White takes it too far, and in two directions. First, even before the 1930s, the role of judicial ideology in determining constitutional law was well understood. And second, the justices who actually effected the constitutional transformation of that era did not view prior law as placing no constraints on them.

There probably never was a time when the impact of ideology on the justices' shaping of constitutional law was not well understood, at least by attentive observers. Consider two statements that have become clichés, both dating to the first decade of the twentieth century. "[N]o matther whether th' constitution follows th' flag or not," Mr. Dooley told his friend Hennessy in 1901, "th' supreme coort follows th' iliction returns."[11] And six years later, the Republican Governor of New York, Charles Evans Hughes, declared, "We are under a Constitution, but the Constitution is what the judges say it is ... ."[12] Nominations to the Supreme Court in the years surrounding the Civil War frequently aroused fierce, ideological opposition.[13] By the early years of the twentieth century, as the great issues that had divided the nation receded, the process had generally become more routine – but not always. Mahlon Pitney in 1912, and Hughes and John J. Parker in 1930, faced significant, ideologically based, opposition from the left – in Parker's case, enough to defeat his nomination, based on the perception that he was racist and anti-labor. Opposition to nominees was not limited to insurgents. The 1916 battle over Louis Brandeis (barely mentioned by White, and only in another context) was, with the possible exception of the one over Robert Bork in 1987, the hottest and most ideological nomination contest of the century. The resistance to Brandeis came from the right, was deeply ideological, and was led by pillars of the legal establishment – including Elihu Root, William Howard Taft, and five other former presidents of the American Bar Association.[14] And conservative justices like Taft and James McReynolds constantly worried about the impact of more liberal judges.[15]

But to say that ideology matters is not to say that it is all that matters. Indeed, the most genuinely realistic view, while recognizing that a justice is not completely constrained by text and precedent, does not fail to recognize that these factors do have considerable force. Whatever some commentators of the what-the-judge-had-for-breakfast school might say, the justices themselves have never treated doctrine as if it counted for naught. Thus, I believe White goes too far in saying that "the Supreme Court justices themselves ... concluded that there was no intelligible distinction between

11 Finley Peter Dunne, Mr. Dooley's Opinions 26 (1901).

12 Charles E. Hughes, Addresses of Charles Evans Hughes 185 (1908) (speech of May 3, 1907).

13 I discuss this in Richard D. Friedman, *The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond*, 5 Cardozo L. Rev. 1 (1983).

14 See generally A.L. Todd, Justice on Trial: The Case of Louis D. Brandeis (1968).

15 Note, for example, McReynolds' characterization of Brandeis as "consciously boring from within." Alpheus Thomas Mason, Harlan Fiske Stone: Pillar of the Law 258 (1956). In his declining years, Taft was determined to stay on the Court as long as possible "to prevent the Bolsheviki from getting control." Alpheus Thomas Mason, William Howard Taft: Chief Justice 294 (1965). Anticipating his departure from the Court, he wrote Butler in 1929, "With Van and Mac and Sutherland and you and Sanford, there will be five to steady the boat ... ." *Id.* at 296.

the authority of legal sources and that of their designated interpreters" (p. 233).

Consider first Holmes's famous dissent in *Lochner v. New York*.[16] White discusses the dissent in some detail in a chapter attempting to recast the history of substantive due process cases that makes some interesting points but that, in my opinion, does not substantially undercut the conventional account. *Lochner* was, of course, decided long before the 1930s, but White correctly points out that it was a critical symbol for later judges who shared Holmes's modernist perspective (pp. 245, 267). And yet Holmes suggested that the Fourteenth Amendment could invalidate legislation if "a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by our traditions and our law." This passage reflects the existence of a distinction between source of law and interpreter, and in large part for that reason White treats the dissent as a largely conventional "guardian review" opinion (pp. 245-46). But I believe this treatment reflects the malleability of White's concept of guardian review.[17] What is most distinctive about Holmes's dissent is its frank recognition of the breadth of legislative power, a conception that was consistent in his mind with the existence of some unalterable principles of law. And so it was in the minds of his successors. Notably, White does not suggest that any of the justices who later turned the Holmes dissent into a manifesto for their modernist approach ever expressed any difficulty with this passage.

Consider next the following statement by Justice Roberts, one of the most notorious articulations of that distinction between source and interpreter but – surprisingly, especially given that he analyzes numerous texts at length – one that White never addresses:

> It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. ... When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, 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. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with,

16 198 U.S. 45 (1905).

17 White makes the interesting point that the term "substantive due process" is a latter-day creation, and I believe he is right that by the 1950s narratives of the rise and fall of substantive due process "had taken on the elements of a morality play" (p. 264). But his attempt to cast the issues in terms of "guardian review" may obscure the fundamental truth in the conventional account: At the time of *Lochner* the Court tended to be dominated by justices who regarded *laissez-faire* as the natural order of economic relationships, and regarded it as proper for them to be aggressive in striking down attempts to interfere with that order. By the 1930s justices who did not regard *laissez-faire* as holding a privileged constitutional status, and who believed they should be deferential to governmental attempts to regulate the economy, had gained the upper hand. Thus, even if it is true in some sense that the judges who decided *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), conceptualized the case "as a boundary-pricking police power case, identical in form to *Lochner*" (p. 265), that is a truth without much substantive content. And White's rather mystifying comment that "[b]y 1937, when the *Parrish* case was decided, the state of the Court's liberty of contract jurisprudence remained relatively unchanged from that when *Lochner* was decided" (p. 253) can be accepted only by concentrating on the form of the opinions and not on the sea change in substance reflected in *Nebbia v. New York*, 291 U.S. 502 (1934).

> or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.

Roberts included this passage in one of his most rightward-looking opinions, *United States v. Butler*.[18] But it must be remembered that he was a key player in the constitutional transformation. In *Home Building & Loan Association v. Blaisdell*,[19] which White appropriately uses to show the clash of modes of interpreting the Constitution, Roberts had provided the critical vote favoring Hughes's modernist opinion over George Sutherland's traditionalist one.[20] He had written the distinctly modernist *Nebbia v. New York*,[21] a critical decision that rejected the doctrine that there was a "closed class or category of businesses affected with a public interest" that could be subjected to price regulation.[22] He joined the liberal majority in all the great cases during the climactic spring of 1937, and signed on with no more apparent hesitation than any other member of the Court to the pair of cases that consolidated the development of Commerce Clause doctrine, *United States v. Darby*[23] and *Wickard v. Filburn*.[24] Thus, the *Butler* passage, in which he expresses quite clearly a separation between the sources of law and its expositors, must be regarded not as the ravings of a traditionalist detached from reality but as a reflection of the ambivalence and tension felt by a real judge respecting the force of doctrine even as he helped to reshape it.

Consider finally Justice Jackson, the author of *Wickard*. Drawing on work by Cushman, White invests that decision with great significance. It is true that *Wickard*, by holding that Congress could regulate the amount of wheat consumed on the farm, pushed Congress's power to regulate commerce quite far – though not unreasonably, in my view. It is also true that Jackson, a judge who reveled in second thoughts,[25] mused about taking the position that "the commerce clause is what the Congress says it is" (p. 231). But the opinion he actually wrote for the Court said and did no such thing. He reviewed the course of precedent with respect, did not try to detach the scope of federal powers from the language of the Commerce Clause, and applied a flexible doctrinal

18 297 U.S. 1, 62-63 (1936).

19 290 U.S. 238 (1934).

20 White says, "Upholding the Minnesota [mortgage moratorium] statute challenged in *Blaisdell* could only mean that the Contracts Clause of the Constitution did not mean in 1934 what it had meant for the past 150 years" (pp. 212-13). Incidentally, Hughes signed on to Roberts' opinion in *Butler*, including the passage quoted above.

21 291 U.S. 502 (1934).

22 Rather, he said, "[t]he phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good." *Id*. at 536. Moreover, he recognized broad legislative discretion in determining whether such control was justified. *Id*. at 537, 539. In describing the advent of judicial modernism, White gives much more prominence to *West Coast Hotel Co*. than to *Nebbia*, but it seems to me that – though the political impact of *Parrish* was greater, in part because it dealt with a minimum wage law and in part because it was decided during the Court-packing crisis – the opinion in *Parrish* had rather little to do but stand on *Nebbia*'s shoulders. For example, White says that after *Parrish*, "liberty of contract had ceased to be a fixed principle of republican government" and that "police power cases would no longer be considered against a backdrop of essentialist spheres and boundary lines" (p. 223). But these points – which had strong antecedents – had been made clear by *Nebbia*.

23 312 U.S. 100 (1941).

24 317 U.S. 111 (1942).

25 *See, e.g.*, McGrath v. Kristensen, 340 U.S. 162, 176-78 (1950) (concurring).

test that had strong roots in opinions dating to the early part of the century.[26] Although for the following half-century the Court never held that Congress had overextended its reach under the Clause, even during that era Congress, legislatures, and courts always felt the need to establish a relationship between the activities being regulated and interstate commerce. Moreover, a doctrine of extreme judicial self-abnegation, which is what the Commerce Clause cases culminating in *Wickard* established, hardly reflects an attitude that the expositors of the law are fully in control of it. On the contrary, by according Congress quite a free hand, these cases narrowly confined the power of the courts, and that is probably a large part of the reason this doctrine remained remarkably stable for more than fifty years.

White says that one of his aims is to "complicate" the conventional account of constitutional change in the New Deal era (p. 12), and he has succeeded. He lends considerable weight to those who resist the seductive political account of the great constitutional transformation. He argues forcefully that the conventional account "has been an exercise in 'winners' history'" (p. 308), and he presents the interesting hypothesis that, though the New Deal represents "the midpoint of a crisis in early twentieth-century American jurisprudence," it "had its own parochial flavor and its own discrete constitutional issues, which can be seen as distinct from, and not in themselves more significant than, the constitutional issues that were central to the 1920s or to the 1950s" (p. 310). And yet to gain a fuller understanding of the sea change that occurred in the years surrounding 1937, one must complicate the account even more. It is not enough to consider the political, intellectual, and even doctrinal context in which the Court worked. One must also delve deeply into each of the significant cases, attempting to determine the combination of doctrine, politics, ideology, temperament, and idiosyncrasy that led each of the nine men who constituted the Court to act in the way he did.

26 *See* 317 U.S. at 125 ("But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce ..."). Compare, e.g., Southern Railway v. United States, 222 U.S. 20, 26 (1911) (per Van Devanter, J.) ("a real or substantial relation or connection"); Houston, E. & W.T.R. Co. v. United States, 234 U.S. 342, 355 (1914) (per Hughes, J.) (Congress' "control over the interstate carrier in all matters having such a close and substantial relation to interstate commerce that it is necessary or appropriate to exercise the control for the effective government of that commerce"). White says that Hughes' opinion in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), "employed traditional Commerce Clause formulas contextually to sustain a relatively broad application of federal commerce powers" (p. 228). In a sense that is true – as it was also true of *Darby* and *Wickard* – because the "close and substantial" test applied by the *Jones & Laughlin* Court, 301 U.S. at 37, was already a familiar one. White's suggestion that until *Darby* the Court's Commerce Clause jurisprudence adhered to "categorical formulas" (p. 228) seems to fly in the face of Hughes' insistence in *Jones & Laughlin* (in contrast to the position taken a year earlier in *Carter*) that "[t]he question is necessarily one of degree." 301 U.S. at 37.