

NLWJC - KAGAN

STAFF & OFFICE - D.C. CIRCUIT

BOX 005 - FOLDER 003 DC

Elena Kagan Law Review 7 [8]

FOIA MARKER

This is not a textual record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

Collection/Record Group: Clinton Presidential Records

Subgroup/Office of Origin: Counsel Office

Series/Staff Member: Sarah Wilson

Subseries:

OA/ID Number: 14686

FolderID:

Folder Title:

Elena Kagan Law Review 7 [8]

Stack:

V

Row:

13

Section:

2

Shelf:

11

Position:

1

vis-a-vis uncontested discourses in science, fact takers, but when it appears as if science is itself in fundamental disagreement, courts work to take no side at all.

A pedestrian analogy from law may help make the point: When science appears as part of an uncontested discourse, law can rely upon it in just the way a court deciding a motion for summary judgment can rely upon uncontested facts in the record. But once it appears that the science is contested, then, like a court deciding a summary judgment motion, it is not for the court to resolve the scientific conflict. The response instead is for the court is to abstain from resolving the conflict at all, by deciding what it can while remaining agnostic [*426] about the underlying factual dispute. At times, law can resolve a question even though there are factual disputes, just as summary judgment can be granted even though some factual matters (not "material") remain in dispute. But more often the contest renders the summary judgment impossible, leaving to a jury ultimate resolution of the dispute.

4. Changes: law and the Erie effect.

Each example so far has involved changes in discourses outside the law: The homosexual immigration cases turned on changes in medicine, the due process example turned on changes in economics, and the equal protection example turned on changes in social science. Each is an introduction to the central example within law for the argument that follows. This is the change effected by the Court in Erie R.R. v. Tompkins n139 and the understanding of fidelity that this change suggests.

-Footnotes-

n139 304 U.S. 64 (1938) (declaring that the common law of the forum state should determine the law to be applied in diversity cases). It was apparently not obvious, even to the parties in the case, that Erie would bring such influential change. The briefs neither raised nor pursued the question of Swift's continued viability, although most of the oral argument focused on this question. For an exceptional account of the Erie case, see TONY FREYER, HARMONY & DISSONANCE: THE SWIFT & ERIE CASES IN AMERICAN FEDERALISM 122-42 (1981). We should understand, though, that however unexpected, Erie was an extraordinarily significant case at the time of its decision. See Akhil Reed Amar, Law Story, 102 HARV. L. REV. 688, 693 (1989) (calling the day Erie was decided the birthdate of the Legal Process movement, because of the decision's reconceptualization of the common law) (citing John Hart Ely, The Irrepressible Myth of Erie, 87 HARV. L. REV. 693, 694-706 (1974)).

-End Footnotes-

For ninety-six years before its decision in Erie, the Supreme Court had allowed federal courts a certain common law practice: Under the influence of Swift v. Tyson, n140 federal courts were permitted to ignore the decisions of state courts on some matters of state common law, and instead allowed to announce their own conception of common law, all this under the name of what came to be known as general federal common law. While first applying to commercial law only, over the years, resting upon the language used in Swift by Justice Story, this practice came to encompass some twenty-eight areas of common law jurisprudence. n141

-Footnotes-

n140 41 U.S. (16 Pet.) 1 (1842) (holding that federal courts may declare a common mercantile law).

n141 JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION: A STUDY IN POLITICAL AND LEGAL THOUGHT 183-84 (1971); see also FREYER, supra note 139, at 45-56 (describing the development of a federal common law under Swift); Larry Kramer, The Lawmaking Power of the Federal Courts, 12 PACE L. REV. 263, 281-83 (1992) (arguing that 19th century judges saw common law adjudication as deriving a set of rules from fundamental principles, rather than as constructing positive law).

-End Footnotes-

On a purely formal level, Swift rested upon an interpretation of the word "laws" in section 34 of the Rules of Decision Act of 1789. n142 Section 34 provided that "the laws of the several states, except where the constitution, treaties [*427] or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States" n143 The question for Justice Story was whether "laws" included common as well as statutory law, or statutory law alone. As he argued,

In order to maintain the argument [that "laws" includes state common law] it is essential . . . to hold, that the word "laws," in this section, includes within the scope of its meaning, the decisions of the local tribunals. In the ordinary use of language, it will hardly be contended, that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not, of themselves, laws. n144

-Footnotes-

n142 Ch. 20, @ 34, 1 Stat. 73, 92 (1789) (current version at 28 U.S.C. @ 1652 (1988)). James McClellan argues that the Erie Court based its reinterpretation of this section, at least in part, on the historical work of Charles Warren. MCCLELLAN, supra note 141, at 185-87; see Charles Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 HARV. L. REV. 49, 85-86 (1923) (arguing that @ 34 could have been construed to include the common law, as well as the statutory law, of the states).

n143 Rules of Decision Act @ 34, 1 Stat. at 92.

n144 Swift, 41 U.S. at 17.

-End Footnotes-

What made it make sense to read "laws" so narrowly? Justice Story himself provides a clue. In resolving the question he had posed, he observed:

It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts . . . and especially to questions of

general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case The law respecting negotiable instruments may be truly declared in the languages of Cicero, adopted by Lord Mansfield . . . to be in a great measure, not the law of a single country only, but of the commercial world. n145

-Footnotes-

n145 Id. at 18 (emphasis added).

-End Footnotes-

Justice Story's argument hangs upon what could be called either a naturalistic or scientific conception of the common law. n146 According to this conception, what judges do when they pronounce on matters of common law is to find rather than make the common law, in just the sense that a forensic investigator when investigating a crime finds rather than makes the facts that help explain the crime (or at least one hopes). An investigator searches for facts on the premise that the facts are "out there," and that a relatively orderly or scientific method can uncover them. Likewise, under the Swift doctrine, a federal common law judge located the common law independently of any particular state's law, according to a similarly orderly and scientific method. From this perspective, both the investigative and legal processes reveal truth. In Justice Story's words: "It becomes necessary for us, therefore . . . to express our own opinion of the true result of the commercial law upon the question now before us." n147

-Footnotes-

n146 See, e.g., HORWITZ, supra note 32, at 1-9 (noting that 18th century jurists viewed the common law as a determinate body of legal doctrine to be discovered, not made).

n147 Swift, 41 U.S. at 18 (emphasis added).

-End Footnotes-

Understood in this forensic way, there is little troubling about allowing federal judges to make their own findings of common law. Federal judges are as [*428] competent as state judges in this scientific search for facts. n148 Thus, in the same way that it created no affront to state sovereignty to permit federal agents investigating a railroad accident to make findings independent of state investigators, nineteenth century naturalists found it unproblematic for federal common law judges to make findings about the common law independent of state common law judges.

-Footnotes-

n148 But cf. Posner, supra note 53, at 79-86 (comparing legal authority, which is politically authoritative and hierarchical, with scientific authority, which is jointly determined by the entire scientific community, and thus more

reliable). Swift may suggest that these differences are indeed modern.

- - - - -End Footnotes- - - - -

Behind this conception of the common law are really two separate ideas. One is the notion that the source of the common law is something other than state or federal law -- for example, natural law. The second is the idea that the search for common law truth was a kind of scientific enterprise. The first, while born of rhetoric such as Justice Story's, really does not reach its maturity until much later in the century. n149 It is then that the Court begins to recognize a growing gap in regulatory power, as neither the states nor the federal government are found competent to legislate on matters of general common law. n150 Because of the common law's special status, it was not within the domain of the states to regulate; and because of the federal government's limited powers, the common law was not within the range of federal power. The common law became, then, this self-sustaining body of normative authority, living through the articulations of the federal judiciary alone. n151

- - - - -Footnotes- - - - -

n149 Note that the question I am asking relates to the period through the end of the century. There is good reason to doubt that the conception of the common law that I claim reigned in the late 19th century was actually the conception of the common law at the Founding. The lawmaking nature of common law lawfinding was certainly salient in *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812); see also *Green v. Lessee of Neal*, 31 U.S. 289, 298 (1832).

n150 See, e.g., HOVENKAMP, *supra* note 101, at 149-50 (citing rate discrimination as an example of where the common law was seen neither as state nor federal terrain, but applicable by any court); BENJAMIN R. TWISS, *LAWYERS AND THE CONSTITUTION* 212 (1942) (discussing the 19th century Court's difficulty in defining the scope of federal power to supplant state regulation of corporations).

n151 James Carter's view of the "common law as custom" supports the conclusion that the common law was distinct from state and federal legislation. See note 153 *infra* and accompanying text. For the Supreme Court's recognition of the distinction, see *Western Union Tel. Co. v. Call Publishing Co.*, 181 U.S. 92, 101 (1901) (holding that a state court could apply its common law to an interstate rate, because "[t]he common law includes those principles . . . which do not rest for their authority upon any express and positive declaration of the will of the legislature") (quoting 1 JAMES KENT, *COMMENTARIES* *4715).

- - - - -End Footnotes- - - - -

But this independence would not have survived without the support of a growing rhetoric of scientism -- again, as jurists toward the end of the century would call it, a search for the truth about the content of the common law. n152 Science became the premise for common law studies. By the late 1800s, it was [*429] common to find jurists describing the ultimately scientific nature of the common law itself n153 and claiming quite explicitly that this law was found by common law judges, not made. n154 This was the premise of the substantive due process limitations expounded by Judge Cooley, n155 and it became the premise of a whole generation of legal education. n156 Law was, in this view, a science, where jurists, like scientists, were seeking truth, and where this search for

juristic truth could be separated from political ends. n157

-----Footnotes-----

n152 This scientific idea includes both the notion of universality and a practice of deducing truth from general first principles. See, e.g., JOSEPH STORY, *Codification of the Common Law*, in *THE MISCELLANEOUS WRITINGS OF JOSEPH STORY* 698, 702 (William W. Story ed., Boston, Charles C. Little & James Brown 1852); John Pickering, *A Lecture on the Alleged Uncertainty of the Law*, 12 AM. JURIST & L. MAG. 285, 309-11 (1834). For the idea that the common law rested on the law of God and nature, see Lord Coke's classic exposition in *Calvin's Case*, 7 Coke's. Rep. 1, 12-13 (1608). For further discussion of Lord Coke's views, see Kramer, *supra* note 141, at 271. But see JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW: THE CARPENTIER LECTURES* 279-82 (1909) (arguing that tradition is a minor source of noncontract law, and that judges' rules have probably created custom more than the other way around).

n153 See, e.g., FREDERICK POLLOCK, *The Science of Case-Law*, in *ESSAYS IN JURISPRUDENCE AND ETHICS* 237, 238 (London, MacMillan 1882) ("The object of legal science . . . is [like natural science] to predict events."). In the emerging view, common law was science because it reflected custom; courts simply found the particular custom at issue. See, e.g., JAMES COOLIDGE CARTER, *LAW: ITS ORIGIN GROWTH AND FUNCTION* 120-23 (1907) (arguing that law is custom above which no government stands); JAMES C. CARTER, *THE PROVINCES OF THE WRITTEN AND THE UNWRITTEN LAW* 31-44 (New York, Banks & Brothers 1889) (arguing that legal fundamentals are based on custom and therefore cannot be changed); see also HORWITZ, *supra* note 32, at 119-20 (describing Carter's attack on the codification movement); WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* 140, 143 (1994) (describing Carter's and others' views); TWISS, *supra* note 150, at 176-79 (describing Carter's views). But see GRAY, *supra* note 152, at 282-301 (attacking Carter). For a more naturalistic view that the common law was the consequence of deductive reasoning from first principles originating in nature or God, see SIR WILLIAM JONES, *AN ESSAY ON THE LAW OF BAILMENTS* 4-10 (London, Milliken & Son 1833) (tracing the law of bailments from first principles of natural reason); see also LAPIANA, *supra*, at 31-44 (discussing the "science of principles" in 19th century jurisprudence); WILLIAM E. NELSON, *THE ROOTS OF AMERICAN BUREAUCRACY, 1830-1900*, at 144 (1982) (describing how 19th century judges often used principles of human rights as an initial point of reference); Daniel Mayes, *Whether Law is a Science?*, 9 AM. JURIST & L. MAG. 349, 354 (1833) ("Knowledge of the law is knowledge of things divine and human.").

n154 See, e.g., GRAY, *supra* note 152, at 93 (describing the theory as "a proposition with which most Common-Law lawyers would agree"). But see *id.* at 97-99 (arguing that the true law is undiscovered and undiscoverable).

n155 THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* (7th ed. 1903); see also Kenneth J. Vandeveld, *A History of Prima Facie Tort: The Origins of a General Theory of Intentional Tort*, 19 HOFSTRA L. REV. 447, 496 (1990) (describing Cooley's "positivist formalism").

n156 On the rise of American legal education, see WILLIAM C. CHASE, *THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT* (1982); LAPIANA, *supra* note 153; ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM*

THE 1850S TO THE 1980S (1983).

n157 KENT, supra note 151, at *471-72 (describing the gradual adoption of the common law in the courts of justice without legislative interference); see also HORWITZ, supra note 32, at 10 ("Beginning with the first volume of James Kent's Commentaries, published in 1826, the treatise tradition continued for the next century to propound the orthodox view that law is a science and that legal reasoning is inherently different from political reasoning."); NELSON, supra note 153, at 144 (describing how common law judges avoided policy questions).

Some believed that unless the common law proceeded scientifically, it would lead to judicial tyranny. LAPIANA, supra note 153, at 35 ("If law were not a science (that is, 'if the subjects of law, -- the nature of man, the situation, wants, interests, feelings, and habits of society, -- cannot be classified upon general resemblances' then the judge's opinion 'is absolutely law.'") (quoting Mayes, supra note 153, at 352-53); see also CARTER, supra note 153, at 43 ("If courts really made the law, they would have and feel the freedom of legislators."); Mayes, supra note 153, at 352-53 ("But if law is not a science . . . then the opinion of the judge is something more than evidence, it is absolutely law [H]e is not the interpreter, but the maker, of the law; and in him resides that despotic power, which some political writers imagine must be committed to some body of magistracy.").

- - - - -End Footnotes- - - - -

We are likely to resist this description of jurists of the nineteenth century, in part because we misunderstand what they meant by "science." The essence of nineteenth century "science" was Baconian empiricism -- the view that this natural order of common law can be systematized and arranged according to general [*430] principles, n158 and that these general principles could be tested by reference to the actual data of this science, common law decisions. n159 Science under this conception is more like stamp collecting than like physics, as the practice of judges qua scientists was simply to bring order and structure to the various strands of legal discourse. As described by Mayes, "To make any branch of knowledge a science . . . it is only necessary that it be reduced to a system, arranged in a regular order." n160

- - - - -Footnotes- - - - -

n158 See Mayes, supra note 153, at 349; see also LAPIANA, supra note 153, at 29 (identifying various scientific creeds associated with "Baconianism"); Benedict, supra note 116, at 298-99 (showing how the "laws" of economics provided the "scientific" background for laissez-faire common law decisions); Customs and Origin of Customary Law, 4 AM. JURIST & L. MAG. 28, 33 (1830) ("The scientific study of jurisprudence then, in our view of the matter, is the consideration of its origin and purposes . . . so as to determine whether any particular case is within the scope of its authority").

n159 See, e.g., LAPIANA, supra note 153, at 58. In reply to a criticism by Williston of an aspect of his theory of contracts, Langdell said "the only way to show the truth of his position was 'to show how the proposition . . . is to be established in a court of justice.'" Id. (quoting Christopher Columbus Langdell, Mutual Promises as Consideration for Each Other, 14 HARV. L. REV. 456, 503 (1901)).

n160 Mayes, supra note 153, at 352.

- - - - -End Footnotes- - - - -

It was these two ideas -- the common law's special source and the special nature of its discovery -- that together were becoming dominant by the late 1800s. But just as their dominance was assured, dissent was beginning to find its way into the discourse. n161 As the century drew to a close, the relatively uncontested discourse about the nature of the common law became drawn into question. Swift began to draw the fire of many, n162 most furiously on pragmatic grounds, n163 but most famously on philosophical grounds as well. n164 Against Swift's naturalism, or what had become understood to be Swift's naturalism, Justice Holmes wrote in 1917, "The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign." n165

- - - - -Footnotes- - - - -

n161 See, e.g., GRAY, supra note 152, at 234-40 (describing the mounting criticism of the notion that law is discovery).

n162 See FREYER, supra note 139, at 89-92 (describing the attacks on the Swift doctrine).

n163 See, e.g., id. at 86 (noting that critics of Swift argued that lawyers exploited the Swift doctrine because it fostered forum shopping). Another reason Swift eventually failed was that it did not actually lead to unification in general federal common law, in part because the codification movement undercut its scope.

n164 See, e.g., CHASE, supra note 156, at 16-17 (describing the gradual acceptance of Justice Holmes' position); FREYER, supra note 139, at 93-96 (describing scholarly attacks on Swift jurisprudence); LAPIANA, supra note 153, at 152-56 (describing the mainstream acceptance of the positivist approach to law); Armistead M. Dobie, Some Implications of Swift v. Tyson, 16 VA. L. REV. 223, 241 (1930) (recommending solutions to Swift's problems of federal common law).

n165 Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

- - - - -End Footnotes- - - - -

Eleven years later, his attack was trained directly on Swift:

It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court concerned. If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as [*431] it is enforced in a State . . . is not the common law generally but the law of that State existing by the authority of that State n166

In Justice Holmes' conception, in the emerging language of the time, the common law flowed not from a fact of science but (at least in part) from a choice of politics, where "politics" is simply that which now appears fundamentally contestable, up for grabs. n167 In Justice Holmes' view, the rhetoric of the common law was masking a fundamentally political reality about what law was. Common law lawfinding was common law lawmaking, and if so, then the question who was entitled to make that choice mattered. For if what a judge was doing when he decided an open question of common law was making law rather than finding law, and if these matters were predominantly matters of state common law, then it now seemed both as if federal courts were exercising the power of state legislatures, and as if federal courts were exercising the power of state legislatures. n168 Under Justice Holmes' view of the common law, federal courts were doubly exceeding constitutional limits. n169

- - - - -Footnotes- - - - -

n166 Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

n167 See Grey, supra note 125, at 793 (describing Justice Holmes' view as holding that "legal principles are to be derived from 'accurately measured social desires,' . . . approximated . . . by 'conformity to the wishes of the dominant power' in the community.") (quoting OLIVER WENDELL HOLMES, The Path of the Law, in COLLECTED LEGAL PAPERS 161, 173 (1920); OLIVER WENDELL HOLMES, THE COMMON LAW 5 (Mark DeWolfe Howe ed., 1963)).

n168 As Dobie concluded, Did the fathers of this Constitution ever contemplate that the federal courts should have power to declare the unwritten law of the states in suits touching merely the private rights of persons when such rights and such suits were not in any field entrusted to the federal government and in no way involved the statutes, treaties, Constitution, or even the powers or activities of the United States as such? An emphatic negative . . . seems to be amply indicated. Dobie, supra note 164, at 238-39.

n169 Erie never explicitly identified which part of the Constitution it relied on in overturning Swift. See Philip B. Kurland, Mr. Justice Frankfurter, the Supreme Court and the Erie Doctrine in Diversity Cases, 67 YALE L.J. 187, 204 (1957) (claiming that Erie's constitutional basis is unclear). Some commentators subsequently argued that under Article III, Congress has the power to specify rules of decision, even where Article I does not give it substantive power. But see Alfred Hill, The Erie Doctrine and the Constitution, 53 NW. U. L. REV. 427, 445-47 (1958) (claiming that the Necessary and Proper Clause does not authorize Congress to supersede all substantive state law in diversity cases).

- - - - -End Footnotes- - - - -

What separates Justices Story and Holmes is a way of speaking about law -- really an idea of philosophy, nowhere enacted by a legislature, not regulated by the Constitution, unratified by ordinary citizens, unchanged by the actions of democrats. As it became more and more contested, common lawmaking began to appear more and more political. Under one conception, in one language, the (just shy) 100-year-old practice was perfectly constitutional (since it in no

way implied that federal courts were making state law); under the other conception, the practice was unconstitutional usurpation (since it plainly implied that federal courts were making state law). Change one idea in philosophy, transform in some small way a bit of legal language, and this century-old doctrine of Swift quickly falls away.

By 1937, this idea in philosophy, this naturalistic conception of law, this language that underlay Swift, had become fundamentally contested. What before had seemed plainly permissible was seen by the Erie Court to rest upon [*432] a "fallacy": "The fallacy underlying the rule declared in Swift v. Tyson is made clear by Mr. Justice Holmes. The doctrine rests upon the assumption that there is 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.'" n170 "If," Justice Holmes wrote, "there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the courts of the United States might be right in using their independent judgment as to what it was." n171 But there was no such body of law. Said Justice Brandeis (again echoing Justice Holmes), "Law in the sense in which courts speak of it today does not exist without some definite authority behind it." n172 The language had changed ("courts speak") in part, perhaps, because our view of reality had changed, n173 and in part because our view of law had changed. Whatever the view of law in Justice Story's time, whatever its language, today law is not conceived of except as the expression of a political will. n174

-Footnotes-

n170 Erie R.R. v. Tompkins, 304 U.S. 64, 79 (1938) quoting Black & White Taxicab, 276 U.S. at 533 (Holmes, J., dissenting) (citations omitted).

n171 Black & White Taxicab, 276 U.S. at 533 (Holmes, J., dissenting).

n172 Erie, 304 U.S. at 79.

n173 This is another way of saying that our view of reality is itself language-contingent, and that how we speak in one domain affects other domains as well.

n174 Alfred Hill makes the same point about the change represented by Erie in Hill, supra note 169, at 1032, 1050; see also Edward S. Stimson, Swift v. Tyson -- What Remains? What Is (State?) Law?, 24 CORNELL L.Q. 54, 65 (1938). On Erie's consequence for federal common law, see Henry J. Friendly, In Praise of Erie -- And of the New Federal Common Law, 39 N.Y.U. L. REV. 338, 407 (1964).

-End Footnotes-

We should pause to remark the extraordinary nature of this change, for its nature is central to all that follows: Premised upon a change in philosophy and upon its effect on a legal culture, the Court declared a practice with a ninety-six year pedigree unconstitutional. A way of speaking and, therefore, a way of understanding and, therefore, law itself had changed -- not through the deliberation of anyone, not through the democratic ratification of any legal body, but through a transformation in legal discourse. n175 One discourse died, and another replaced it, and it is from this contestation in the discourse about law that Erie got its sanction. n176

-Footnotes-

n175 MARY P. MACK, JEREMY BENTHAM: AN ODYSSEY OF IDEAS, 1748-1792, at 264 (1962) ("Bentham would have agreed with Justice Holmes."). Of course, the change was not total. Certainly there were people in 1880 who spoke as Justice Holmes did, just as there were people in 1937 who spoke as Justice Story did, or more tellingly, as the legal naturalist James Carter did. The question is not whether a view was represented; the question is whether the view was normal. Meaning is always contested, but contest notwithstanding, the point instead is just that there was a shift in the balance of the contest -- in some cases (homosexuality) from one contested view to another, and in other cases (economics, social science, legal theory), from an uncontested discourse to a contested discourse. As this shift occurs, some arguments within these discourses become more difficult to make, while others become easier.

n176 These changes in background discourse have been explained by many scholars and many schools of thought. While even an adequate intellectual history of this shift is beyond the scope of this article, I note several of the major developments. Justice Story's naturalism was challenged initially by three major schools of thought: positivism, historicism, and Holmsian pragmatism. See generally FREYER, supra note 139, at 95-97. Positivism defined law as merely the command of a sovereign; under this account, common law judges were simply continuing the sovereign's lawmaking. Historicism, or "common law as custom," saw common law as the reflection of the customs of the time and place; under this account, Justice Story's universalist notion of a general federal common law made little sense. See id. at 95-96; see also CARTER, supra note 153, at 120. Justice Holmes' attack on naturalism was part of the emerging pragmatism of American philosophy. See Grey, supra note 125, at 788.

-End Footnotes-

[*433] There is a pattern to the change in Erie that I believe is common to some of the most significant transformations of twentieth century constitutional law -- most notably, the New Deal. The pattern I will call the "Erie effect." Let me outline its form and then (very briefly) suggest two other examples of the same effect.

The Erie effect has two parts: First, the nature of some activity within law gets drawn into question -- contested, in the terms used above -- which, second, draws into question the established allocation of institutional authority among judicial and political institutions over that activity. In Erie, the activity drawn into question was common lawmaking; the allocation drawn into question was that between federal and state courts. The result of the two steps was that a practice (common lawmaking) that had been within the domain of federal courts got reallocated to state courts.

Consider now another Erie-effect example, tied to the rise of "unitarianism" in the law of the American presidency. n177 Images of Lochner notwithstanding, the turn of the century was filled with progressive economic regulation in a wide range of areas. Beginning with the Interstate Commerce Commission's railroad regulation, the federal government grew rapidly in its efforts to professionalize regulation in many areas of American life. n178

-Footnotes-

n177 Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994) (discussing at length the unitary executive theory).

n178 On the growth of the administrative sector, see THEODORE J. LOWI, *THE END OF LIBERALISM: IDEOLOGY, POLICY AND THE CRISIS OF PUBLIC AUTHORITY* (2d ed. 1979); DWIGHT WALDO, *THE ADMINISTRATIVE STATE: A STUDY OF THE POLITICAL THEORY OF AMERICAN PUBLIC ADMINISTRATION* (1948); James Q. Wilson, *The rise of the bureaucratic state*, 41 PUB. INTEREST 77 (1975).

- - - - -End Footnotes- - - - -

Behind much of this increased regulation lay a growing adherence to scientism and professionalism in administrative law. Born in the work of political scientists such as Ernst Freund, Frank Goodnow, and William Willoughby and of politicians such as Woodrow Wilson, this movement believed that much of the "political" in administration could be removed and replaced by a nonpolitical, expert-based bureaucracy, thereby improving the activist regulatory state. n179 If political scientists could replace politicians, the thought went, truth could guide administration. n180

- - - - -Footnotes- - - - -

n179 See, e.g., FRANK J. GOODNOW, *POLITICS AND ADMINISTRATION: A STUDY IN GOVERNMENT* (1900); see also Robert E. Cushman, Book Review, 24 AM. POL. SCI. REV. 746 (1930); Ernest Freund, Book Review, 1 AM. POL. SCI. REV. 136 (1906) (reviewing *POLITICS AND ADMINISTRATION*).

n180 See JORDAN A. SCHWARZ, *THE NEW DEALERS: POWER POLITICS IN THE AGE OF ROOSEVELT* 35, 45 (1st Vintage Books ed. 1994).

- - - - -End Footnotes- - - - -

No statute better captures the spirit of the times than the Federal Trade Commission (FTC) Act. n181 Passed in 1914, the FTC Act established an independent agency to regulate federal trade and to assure fair and efficient competition. The statute created a board of five commissioners nominated by the president and confirmed by the Senate, removable only by the president, and only for cause.

- - - - -Footnotes- - - - -

n181 Pub. L. No. 63-203, ch. 311, 38 Stat. 717 (1914) (current version at 15 U.S.C. §§ 41-50 (1988 & Supp. V 1993)).

- - - - -End Footnotes- - - - -

[*434] In 1933, President Roosevelt tried to remove one of the commissioners, William E. Humphrey, from this board. Humphrey refused; the President fired him; Humphrey stayed on and sued for his salary. One year after his death, his case reached the Supreme Court. n182

- - - - -Footnotes- - - - -

n182 Humphrey's Executor v. United States, 295 U.S. 602 (1935).

- - - - -End Footnotes- - - - -

In a striking blow (one among many) to the Roosevelt administration, the Court upheld the statute against the claim that the President had a constitutional right to remove any executive officer for any reason or no reason at all. The President thought his authority followed from a decision nine years earlier -- Myers v. United States n183 -- where the Court had found that Congress could not condition the president's right to remove an executive officer by requiring Senate approval of the removal. The Court, however, distinguished Myers on the ground that Myers was a "purely executive" officer, while Humphrey was an officer whose office partook in part of legislative and in balance of judicial functions. The Court viewed Humphrey as an "expert" exercising a technical, rather than political, expertise. n184 As an administrative officer, Humphrey's job was to obey the law, not the president. It followed that the president had no constitutional right to control Humphrey in his duties insofar as those duties related to the policies of the FTC. The statute, not the president, determined FTC policy.

- - - - -Footnotes- - - - -

n183 272 U.S. 52 (1926).

n184 Humphrey's Executor, 295 U.S. at 625-26. As the opinion states: Thus, the language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the Congressional intent to create a body of experts who shall gain experience by length of service -- a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government. Id. at 625-26.

- - - - -End Footnotes- - - - -

And so was the modern administrative state born. Under the Humphrey's view, Congress had the power to set up agencies that could exercise their expertise to regulate broad areas of economic life, insulated in part from the review of the president, to assure that they followed not the will of the president, but "the policy of the law."

Over time, however, the Humphrey's conception of administrative agencies, dominant at the birth of the modern administrative state, slowly got drawn into doubt. By the 1980s, skepticism had grown strong. n185 In 1981, President Reagan came to office with the commitment to bring the national bureaucracy under control. Fifty years of experience had taught politicians and political scientists alike of the limits to agency regulation, and skepticism about the "independence" of independent agencies had become dominant. Reagan appointed federal judges who shared this skeptical view and who also believed that the president has a much stronger constitutional right to control the executive and administrative branches than most scholars and jurists up to that point believed.

-Footnotes-

n185 See, e.g., JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT (1978); Richard B. Stewart, The Reformation of American Administrative Law, 88 HARV. L. REV. 1667 (1975); Cass R. Sunstein, Constitutionalism After the New Deal, 101 HARV. L. REV. 421 (1987).

-End Footnotes-

[*435] Soon into the Reagan presidency, the administration began litigating the President's line. One front in this war was a constitutional attack on the status of the independent agencies. And while not directly raising or deciding this constitutional issue, we can catch an extremely important glimpse of this battle in a decision by a three-judge panel of the District of Columbia District Court, n186 written (it is said) by then-Judge Antonin Scalia, in a case that eventually reached the Supreme Court under the name of Bowsheer v. Synar. n187

-Footnotes-

n186 Synar v. United States, 626 F. Supp. 1374, 1398 (D.D.C.) (per curiam), aff'd sub nom. Bowsheer v. Synar, 478 U.S. 714 (1986).

n187 Bowsheer v. Synar, 478 U.S. 714 (1986).

-End Footnotes-

In striking down the Gramm-Rudman-Hollings statute, Justice Scalia reflected for the Court upon the general state of separation of powers jurisprudence, in a way that I believe is extremely revealing and precisely right. Of separation of powers cases, then-Judge Scalia said,

These cases reflect considerable shifts over the course of time, not only in the Supreme Court's resolutions of particular issues relating to the removal power, but more importantly in the constitutional premises underlying those resolutions. It is not clear, moreover, that these shifts are at an end. Justice Sutherland's decision in Humphrey's Executor, handed down the same day as A.L.A. Schecter Poultry Corp. v. United States, is stamped with some of the political science preconceptions characteristic of its era and not of the present day. . . . It is not as obvious today as it seemed in the 1930s that there can be such things as genuinely "independent" regulatory agencies, bodies of impartial experts whose independence from the President does not entail correspondingly greater dependence upon the committees of Congress to which they are then immediately accountable; or, indeed, that the decisions of such agencies so clearly involve scientific judgment rather than political choice that it is even theoretically desirable to insulate them from the democratic process. n188

-Footnotes-

n188 Synar, 626 F. Supp. at 1398 (emphasis added).

-End Footnotes-

What Justice Scalia remarks here is a view about the very nature of executive lawmaking, and his rhetoric could easily have been the rhetoric of Justice Brandeis in Erie. At its core, the argument is that administrative action, to echo Erie, "in the sense in which it is spoken of today," cannot be understood in the neutral, scientific, apolitical sense in which it was understood by the founders of the administrative state. It is instead now seen by all to be essentially "political" -- involving an essentially "political choice." Agency action is now seen to be political in just the sense in which common law judging came to be seen as political -- what before seemed to be neutral and scientific now was seen to be something else. The nature of administrative lawmaking was now understood to be different from what its nature was before.

Thus the first part of what I have called the Erie effect -- a fundamental change in the nature of how some activity in law is perceived within law; something that before seemed nonpolitical now seems political. And what follows for Justice Scalia is just what followed for Justice Brandeis after noting the political nature of the common law. In both cases, the change requires a reconsideration of the institutional allocation of authority involved in this activity. In [*436] both cases, the intuition is to shift the decision now viewed as political away from a body now seen as inappropriate for a political decision. In Erie, that body was the (unelected) federal judiciary; for the modern unitarians, that body is an agency outside the president's control. In Erie, better to put common lawmaking power exclusively within the control of the states; for modern unitarians, better to assure that administrative lawmaking is within the control of (the politically accountable) president. n189

-Footnotes-

n189 Of course, given the political nature of agency action, nothing mandates the particular choice of the unitarian to vest power in the president. Others, noting the same point, argue forcefully that Congress should have greater control over agencies through, for example, legislative vetoes, see, e.g., INS v. Chadha, 462 U.S. 919, 967 (1983) (White, J., dissenting), or through increased agency independence. See Abner S. Greene, Checks and Balances in an Era of Presidential Lawmaking, 61 U. CHI. L. REV. 123, 125-26 (1994) (arguing that presidential interference with congressional mandates can be reduced by stronger independent agencies). But whether one is an executivephile or -phobe, the Erie-effect pattern is the same: In both cases, recognition of the political nature of a judgment requires a shift of authority to the institution with the best democratic pedigree.

-End Footnotes-

A second example of the Erie effect is more intriguing but perhaps less well understood. This is the change announced by the Court through a series of decisions beginning with Chevron U.S.A., Inc. v. NRDC, n190 under which federal courts are defer to the interpretation of an ambiguous federal statute by an administrative agency charged with implementing that federal statute. As I will suggest, this Erie-effect shift in authority from courts to administrative agencies reflects the contestation of a very important background notion -- that courts are the final arbiter of the meaning of the law.

-Footnotes-

n190 467 U.S. 837 (1984).

- - - - -End Footnotes- - - - -

Judicial deference to administrative agency expertise has a long history, but one which is also quite checkered and, at times, confused. This is in part because there have really been two traditions. n191 Always, there has been strong authority for what we could call the Marbury view of administrative law -- that it was "emphatically, the province and duty of judicial department, to say what the law is." n192 Under this view, no deference in interpretation is called for: Interpretation is just lawfinding, and courts rather than bureaucrats are given the power to find federal law.

- - - - -Footnotes- - - - -

n191 See Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 49 (2d Cir. 1976) (Friendly, J.) (describing "two lines of Supreme Court decisions on this subject which are analytically in conflict").

n192 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

- - - - -End Footnotes- - - - -

But there has also always been strong authority for what we could call the expertise view of administrative law -- that interpretive judgments importantly embrace complex judgments of expertise outside the ken of federal courts, and that in interpreting agency law, courts should be respectful of this special knowledge. n193 Under this view, strong deference is called for.

- - - - -Footnotes- - - - -

n193 See Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 DUKE L.J. 511.

- - - - -End Footnotes- - - - -

Before Chevron, precisely which of these two views would prevail was never quite clear. But Chevron tilted the balance decisively in the direction of deference, and the decade since Chevron has confirmed this shift. n194 Now, [*437] when a statutory provision is ambiguous, or more precisely, when Congress has not "spoken to this precise question," a federal court must defer to an agency interpretation of the ambiguous provision, even if it is a changed interpretation from the agency's earlier reading, and even if the court is convinced that the agency's is the not the "best" or most faithful reading of the statute. n195

- - - - -Footnotes- - - - -

n194 See, e.g., Clark Byse, Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron's Step Two, 2 ADMIN. L.J. 255, 255 (1988) (noting that by 1988, lower federal courts had cited Chevron over 600 times).

n195 Chevron, 467 U.S. at 843-45.

- - - - -End Footnotes- - - - -

What explains this shift? What justifications could there be for a court to avoid judgments about a statute's meaning in a case properly presenting a question of statutory interpretation?

Consider the question in Erie-effect terms. The activity that was drawn into question (step one of the Erie effect) was "interpretation." Under the Marbury conception of interpretation, interpretation was just lawfinding. A court simply read the statute to find what Congress had meant. The same for agencies. Since just lawfinding, when adopting interpretive rules, unlike legislative rules, agencies were not subject to the requirements of notice and comment. n196 Again, all the agency was doing was saying in more detail what Congress had said before.

-Footnotes-

n196 See Administrative Procedure Act, @ 4(c), 5 U.S.C. @ 553(d)(2) (1988).

-End Footnotes-

But increasingly, this view of interpretation has become quite outdated, even within law. n197 With any legal text, and, a fortiori, with an "ambiguous" text, courts could no longer treat readings as passive. Especially when reading an ambiguous statute, a court could not pretend to be engaging in lawfinding, since there is no law there to find. Instead, as the Court recently put it, the act of interpretation in a context where a text is ambiguous is "interpretive lawmaking" n198 -- the rhetoric of Erie applied to the practice of interpretation.

-Footnotes-

n197 No note could capture this point. For a flavor, compare Sanford Levinson, Law as Literature, in INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER 155 (Sanford Levinson & Steven Mailloux eds., 1988) (arguing that literary theory demonstrates the radical indeterminacy of legal texts) with Gerald Graff, Keep off the Grass, Drop Dead, and Other Indeterminacies: A Response to Sanford Levinson, in INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER, supra, at 175, 177 (arguing from literary theory that "meaning is not a substance but an activity and has the determinacy of activity rather than of a physical object").

n198 Martin v. OSHRC, 499 U.S. 144, 151 (1991) (holding that an agency should defer to the reasonable interpretation of the promulgator of an ambiguous regulation).

-End Footnotes-

Consistent, then, with the first step of the Erie effect, the ordinary view of "interpretation" underwent a significant transformation in the years since the enactment of the Administrative Procedure Act. This transformation invites the second step of the Erie effect: What if one comes to view legal interpretation, at least of ambiguous statutes, less as lawfinding, and more as lawmaking? What if the act of coming to understand what Congress meant becomes as much an act of saying what Congress should mean? Who should make such a

judgment?

In Chevron itself, the answer was quite plain. Said Justice Stevens,

Judges . . . are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the [*438] limitations of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices -- resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges -- who have no constituency -- have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones n199

- - - - -Footnotes- - - - -

n199 467 U.S. at 865-66.

- - - - -End Footnotes- - - - -

If interpretation is now viewed as lawmaking, then someone other than federal courts should be making this federal law. Thus is the second step of the Erie effect complete: The (now understood) "nature" of interpretation leads us to worry about who, within our political system, is doing the interpretation, and leads us to shift interpretive authority to the more politically accountable institutional actor. n200

- - - - -Footnotes- - - - -

n200 See, e.g., Public Citizen v. Burke, 843 F.2d 1473, 1477 (D.C. Cir. 1988) (Silberman, J.) ("Deference is required also because the Executive Branch, populated by political appointees, is thought to have greater legitimacy than the non-political Judiciary in resolving statutory ambiguities, in light of policy concerns."); see also Jerry L. Mashaw, Prodelegation: Why Administrators Should Make Political Decisions, 1. J.L. ECON. & ORG. 81, 95-99 (outlining the political responsibilities of administrative agencies); Kenneth Starr, Judicial Review in the Post-Chevron Era, 3 YALE J. ON REG. 283, 308 (1986) (arguing that Chevron shifts policymaking responsibility from courts to "democratically accountable officials" in agencies).

- - - - -End Footnotes- - - - -

In all three cases -- Erie itself, modern unitarianism, and Chevron -- a common pattern emerges. In each, a change in the nature of a discourse presupposed by an earlier legal practice forces a reconsideration of the nature of that practice. In particular, it forces a reconsideration of the allocation of institutional authority between at least two institutional actors. The lesson from all three is that when a practice becomes, or appears, contested, or again, more political, that practice is allocated to the more politically responsible institution. This is the Erie effect.

5. Changes: the response of fidelity.

A common structure links all of the examples above: In each, between two interpretive contexts, what I have called an uncontested discourse changed; this change yielded a shift in what is "ordinary" or "normal" in that context. In one case -- the immigration example -- where the shift was from one uncontested discourse to another, this yielded a changed reading that tracked the substance of the changed discourse. In the balance of the examples, the effect was more indirect. In both the due process and equal protection examples, changing an underlying discourse changed the mix of juridical versus legislative judgments, [*439] as what was viewed as uncontested became contested. And finally, in the Erie-effect examples, a change in the understanding of the nature of some component of the legal sphere (whether the common law or administrative independence or interpretation) lead to a reconsideration of the balance between judicial and administrative functions. In each case, a changing background uncontested discourse transformed the foreground legal practice.

Together, these cases remark a special, if overlooked, class of interpretative change. Contexts may change, but there is a fundamental difference between changes in the contested facts of an interpretive context and changes in the mix of uncontested and contested spheres within an interpretive context. What I have suggested here is that we track the effect of changes in these uncontested discourses. For while judges may have the strength to resist changing contested facts, I suggest that they apparently haven't the institutional strength to resist changing uncontested discourses; nor do they have the strength to resist democratic authority when the grounds upon which such resistance could be founded are themselves contested. The shift, then, in these uncontested discourses will fundamentally affect the scope of the judicial role and therefore the possibility of judicial accommodation to changing interpretive contexts.

From the cases so far, then, we could describe a three-part rule for cases of structural translation:

- (1) Where a foundational discourse is uncontested, a court may rely (even if implicitly) upon that discourse in its judgment, even if that discourse has changed from the discourse under which a law was originally enacted. Courts, that is, decide matters of fidelity subject to the constraints of uncontested discourses.
- (2) Where a discourse is contested, a court will strive to remain agnostic about judgments within this discourse, even if the discourse was uncontested at the time the law was enacted. Since agnostic, this will mean that legislatures receive greater deference within domains of contested discourses.
- (3) Where a discourse is rendered contested, if possible, judgments within

that contested sphere will be shifted to those with the strongest political pedigree.

I offer this three-part rule as a description of the courts' actual practice. But even if it is a correct description, we might still ask, what justifies this rule as an application of interpretive fidelity? Why isn't the response to a changing uncontested discourse simply to stick with the original discourse? Why doesn't fidelity demand as much?

We could imagine a practice of interpretive fidelity that attempted to preserve original readings in the face of changed uncontested discourses. That is, we could imagine a practice that attempted to decide cases based upon original views of uncontested matters, regardless of how those views have evolved. This would be a practice that decided cases as if they were being decided in the original world.

Such a practice may be possible, even if epistemologically or hermeneutically extraordinarily difficult. But crucially, for both fidelity theory in general and originalism in particular, it has never been the practice of any court, and [*440] this for good reason. If fidelity or originalism meant deciding a case just as an original court would have decided it -- accounting both for choices made and the uncontested background against which they were made -- then in each of the examples from the introduction, no changed reading should be recognized by a court under any of the possibilities sketched. Changes in what is viewed as "necessary" could not matter to such a court; changes in the technology required to carry someone to a magistrate should not matter; and changes in the dangerousness of weapons carried by suspects could not matter to one asking whether the Fourth Amendment allows the police to frisk suspects stopped in the street.

No originalism has ever gone this far. n201 Every form of originalism makes a choice about which of the changes in context -- within the contested and uncontested discourses of a particular interpretive context -- will be accommodated in the current interpretation. Some changes are always accounted. The question is just which.

-----Footnotes-----

n201 Except at times, perhaps, Justice Black's. See *McGautha v. California*, 402 U.S. 183, 226 (1971) (Black, J., concurring) (maintaining that judges lack the authority to update the meaning of the Constitution to "keep it abreast of modern ideas").

-----End Footnotes-----

It is not my concern here to draw the line finally. But I do want to sketch two arguments in support of the practice that these examples reveal. One argument for this practice of structural translation is grounded in notions of fidelity. It goes something like this: At a minimum, fidelity requires that an interpreter respect the choices that an author made when she made them. Those choices are most plain when they are presented, say, in the text agreed upon; a bit less plain when they were argued over when drawing up the text. Both the text and this area of actual contest are aspects of the contested discourse. Both, a fidelitist would argue, must be respected in later contexts.

But the author did not choose or argue over or resolve any conflicts about matters within an uncontested discourse. By definition, these were matters that the actual contest took for granted. Over these matters, and unlike matters within the contested realm, there was no actual agreement. n202 Thus, to change a reading because of a change in these background presuppositions is not the same kind of disregard that is involved when a court changes a reading by ignoring choices made within the contested domain. Changed readings that track changes in uncontested background discourses to actual political choices are not, therefore, changes that ignore choices that the authors made.

-Footnotes-

n202 Cf. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960) (discussing "blanket assent" to boilerplate clauses).

-End Footnotes-

For the fidelitist, then, there could be a difference between changes due to changes in the background uncontested discourse and changes due to changes in views about matters actually contested. While there would be strong reason to follow choices self-consciously made, there would be less reason to follow presumptions never really chosen. An interpreter of fidelity then would have less of a constraint in adjusting a reading to accommodate changes in uncontested discourses than the constraint on adjusting a reading to accommodate changes in contested discourses.

[*441] This first justification for the practice of structural translation, then, turns on a conception of the fidelitist's role -- she is, the argument would go, to follow choices made but accommodate for changes not considered. A second justification for the practice of structural translation turns less upon the commands of fidelity and more upon institutional constraints.

Fundamental to the account I am offering here is that fact that the translation I am discussing is a practice engaged in by courts. Within this legal culture, there are two different limits that this court-centered focus reveals. First, there is a limit on how much a court can resist what is taken for granted by all. The easiest example was the first from the introduction, where in deciding what is "necessary," a court must apply the "facts" as we find them. As an institution, a court cannot resist "reality" as it appears to all -- or what is the same thing, a court cannot resist the facts of an uncontested discourse. Fidelity is pursued by courts subject to the constraints of an uncontested discourse.

Second, there is a limit on how much a court can affirm when what it affirms is part of an essentially contested discourse. Courts within our tradition function by hiding their will; their authority is transitive, drawn from an authority outside themselves. When a court can point to a clear legal authority supporting one outcome over another, or when a court can rely upon understandings taken for granted by all to support one outcome over another, it will. But when there is no clear legal authority, when understandings are fundamentally contested, there is nothing behind which the court's will can hide. Less cynically, there is no authority from which the court can draw authority of its own. When reasonable people may differ, then the court's choice seems political; when reasonable people may not differ, then the court's choice does not seem political. Obviously, in both cases, at some level, the

court's choice is political, but what is significant is not what is, but what it appears. Courts cannot act where their actions fundamentally appear political. Or alternatively, fidelity is pursued by courts subject to the constraints of uncontested discourses, which means, subject to the constraint that decisions not appear to be simply the will of a court versus the will of the legislature. n203

-Footnotes-

n203 Once one sees the matter in this way, one can link a wide range of legal material to the same point -- that the Court retreats where its judgments seem unguided by the law. At its extreme is the political question doctrine, which, as articulated in *Baker v. Carr*, 369 U.S. 186 (1962), excludes from judicial review cases where there is a "lack of judicially discoverable and manageable standards for resolving [a case] or the impossibility of deciding [a case] without an initial policy determination of a kind clearly for nonjudicial discretion." *Id.* at 217. But this same anxiety explains much more than the political question doctrine. Justice Frankfurter identified the same point when arguing for a less activist role for the Court in protecting states against federal taxes. *New York v. United States*, 326 U.S. 572, 581 (1946) ("Any implied limitation . . . brings fiscal and political factors into play. The problem cannot escape issues that do not lend themselves to judgment by criteria and methods of reasoning that are within the professional training and special competence of judges."). And Justice Blackmun identified the same point when arguing that the Court could not successfully protect the federalism interests of states. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985) ("Any rule of state immunity . . . inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes."). In all three cases, what drives the Court to retreat is the fact that in some sense, there is little the Court could say to demonstrate why it would decide the case one way or the other. Or at least, there is little the Court could say to make a reader believe the decision was something other than politics.

The point also reveals something of the strength of Justice O'Connor's techniques for advancing the interests of federalism. For as the Court repeatedly has seen, one fundamental problem with judicially enforced interests of federalism is that any such enforcement cannot help but seem political. Justice O'Connor's techniques avoid this problem by adopting rules that can be applied without seeming political. In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), for example, she erects a clear statement principle that has the effect of protecting federalism values at relatively low institutional cost to the Court -- for again, the Court can enforce this test without appearing to select among political values. See *id.* at 460-61. The same can be said for her test in *New York v. United States*, 112 S. Ct. 2408 (1992), and *South Dakota v. Dole*, 483 U.S. 203 (1987). In each case, she offers a usable test for protecting federalism interests -- usable in just the sense that it does not fall afoul of the Erie effect. See *New York*, 112 S. Ct. at 2418-19; *Dole*, 483 U.S. at 212, 215-18 (O'Connor, J., dissenting).

-End Footnotes-

[*442] It is this second constraint that explains the Erie effect. For the predicate of an Erie-effect change is that something that before appeared unproblematic now seems political. This shift is just the shift of

uncontested discourses, and what the dynamic of the Erie effect reveals is the reallocation of institutional authority required by these shifting uncontested discourses. Fidelity is pursued subject to the Erie effect.

Both limits, then -- the constraint of an uncontested discourse and the constraint of the Erie effect -- function as limits of pragmatic necessity on the practice of fidelity engaged in by a court. Both, then, explain something of the pattern of cases that I have discussed under the label of structural translation. And while it is beyond the scope of this article to resolve finally what fidelity here should mean, n204 it is enough here simply to note these two different justifications for structural translation -- fidelity and pragmatic necessity -- and to note the uncontested truth that some such justification is needed, since readings have, and do, and will always change to accommodate changes in this background discourse.

-Footnotes-

n204 I have elsewhere tried to work out in (much too much) detail how fidelity as translation can make sense of fidelity in changing readings that result from changes in context. See generally Lessig, supra note 26.

-End Footnotes-

D. Justifying Changed Readings: Summary

I have outlined four types of justified changed readings, falling into two general classes. n205 The first class we can call justifications of transformation; the second, justifications of translation. Justifications of transformation rest ultimately upon the actions of democrats changing a normative text's meaning; justifications of preservation rest ultimately upon the actions of juricrats, preserving a normative text's meaning in light of a changing interpretive contexts. n206 Justifications of transformation seek fidelity to what the people (or their representatives) have just said; justifications of translation seek fidelity to what the people have said before.

-Footnotes-

n205 See table accompanying note 33 supra.

n206 Since both justifications look ultimately to democratic action to validate their changed readings, both are vulnerable to the charge that the validating democratic act itself is illegitimate.

-End Footnotes-

Justifications of transformation come in two types. The first tracks textual amendment directly; the second tracks amendments indirectly, through the interpretive practice of synthesis. Justifications of translation also come in two types. The first, fact translation, follows changes in facts presupposed by an [*443] earlier reading; the second, structural translation, follows changes in underlying uncontested discourses which were treated as "facts" by an earlier reading.

By separating out these distinct forms of justification, I do not mean to suggest that they function independently. Indeed, it is the distinctive

challenge of American constitutionalism both to read a text that has been added to over time, and to read a text that has been added to over time. A reader, that is, must not only synthesize the various constitutional principles embodied in this multigenerational text, but she must also understand how to read that text across vastly different interpretive contexts. She must, that is, both synthesize and translate, often at the same time.

This is the practice referred to in box 4 of the table above, n207 and a device of Dworkin's, the chain novel, may make the point more plain. n208 The chain novel is the paradigm multigenerational text: Each chapter is added by a different author, each addition bringing something new to the old, each aiming to make the text the best it can be. As new chapters are added, something about the meaning of what went before can change. For the reader of the novel tries to understand the story as a whole, and what is said later colors what was said before.

- - - - -Footnotes- - - - -

n207 See fig. B box 4 accompanying note 33 supra.

n208 See DWORKIN, supra note 51, at 228-32.

- - - - -End Footnotes- - - - -

Now imagine that each chapter's author speaks a different language. Or better, that each chapter is added by a different generation. Now not only must the author (or reader) engage in an act of synthesis, to construct all that has gone before. Now she must first recover what was said before, through an act of translation, before she can add to what was said before. She must, that is, first carry the old text into the new context (translate) and then synthesize the translated text with what is to be added.

Both synthesis and translation, then, yield different readings of what went before, but the reasons for these differences are quite distinct. Synthesis comes to understand differently what went before because what is added is added in part to change what happened before -- to carry the story forward, to develop a character, to sharpen a plot, to save the day. Translation yields different readings of what went before only to make what went before understandable to the reader today. Its aim is not to change the past, but to recover it, as if (for we can always act as if) we can recover without changing.

II. APPLICATIONS: UNDERSTANDING THE NEW DEAL

In what follows, I use the catalog of justifications for changed readings outlined above to understand the changed readings of the New Deal. I begin by outlining the now dominant views about the status of the New Deal changes, focusing in particular on Bruce Ackerman's view, and end by suggesting an alternative account using the trope of translation. We give up the least of our constitutional tradition, I will argue, and learn the most about constitutional interpretation, by seeing the New Deal changes as in important part justified by a form of translation.

[*444] All agree that the New Deal marked a fairly radical set of changes in the Supreme Court's reading of the Constitution. For our purposes, we can isolate essentially two themes -- those changes related to the demise of

substantive due process (no longer would substantive due process limit as severely the power of state and federal governments to regulate) and those related to the rise of federal commerce power (no longer would federal commerce power be as limited). Both changes occurred roughly at the same time, though the change in substantive due process was more gradual than the change in the commerce power. Its change was quite dramatic, coming in a clear shift in 1937, in the face of President Roosevelt's Court-packing plan, known today as the "switch in time that saved nine." n209

-Footnotes-

n209 As Michael Ariens has recently reminded us, the "switch" argument does not explain the shifts in due process jurisprudence. Michael Ariens, A Thrice-Told Tale, or Felix the Cat, 107 HARV. L. REV. 620, 658-59 (1994) (citing GERALD GUNTHER, CONSTITUTIONAL LAW 457 (12th ed. 1991)).

-End Footnotes-

- Views about the change that both shifts mark can be ordered into four groups:
- (1) Those who consider the change unjustified -- requiring but receiving no validating constitutional amendment.
 - (2) Those who consider the change valid, agreeing that it would require a constitutional amendment, but excusing the lack of an amendment by arguing that the post-New Deal Constitution rediscovered the original Constitution, thus correcting the misguided period in between.
 - (3) Those who consider the change valid, agreeing that it would require a constitutional amendment, but arguing that the political changes of the time did, in effect, constitute a constitutional amendment.
 - (4) Those who consider the change valid, not because it required an amendment, or because political changes in effect provided one, but because the new context allowed a change of translation.

Which view best accounts for the New Deal transformation? Consider briefly each in turn.

A. The New Deal As Unconstitutional

Constitutional conservatives, or laissez-faire libertarians, typically populate the first of these positions. n210 Richard Epstein is a useful example. Epstein has attacked the New Deal changes in a wide range of areas. n211 His attack on the [*445] Court's Commerce Clause cases is representative. Says Epstein, "I think that the expansive construction of the clause accepted by the New Deal Supreme Court is wrong, and clearly so, and that a host of other interpretations are more consistent with both the text and the structure of our constitutional government." n212

-Footnotes-

n210 See, e.g., BERNARD SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 7, 126-55 (1980) (noting the inconsistency in the decisions of the New Deal Court and criticizing contemporary judicial doctrine that prevents review of restrictive economic regulation).

n211 E.g., RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) [hereinafter EPSTEIN, TAKINGS] (calling the New Deal

inconsistent with principles of limited government and arguing that the original Constitution would not support many 20th century reforms, such as zoning, rent control, and progressive taxation); Richard A. Epstein, A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation, 92 YALE L.J. 1357, 1357-58 (1983) (proposing that New Deal labor laws be replaced by a common law regime of tort and contract); Richard A. Epstein, The Proper Scope of the Commerce Power, 73 VA. L. REV. 1387, 1443-54 (1987) [hereinafter Epstein, The Commerce Power] (criticizing the New Deal's expansive construction of the Commerce Clause as lacking a textual basis). Epstein's position is criticized in Walter Dean Burnham, The Constitution, Capitalism, and the Need for Rationalized Regulation, in HOW CAPITALISTIC IS THE CONSTITUTION? 75, 93-95 (Robert A. Goldwin & William Schambra eds., 1982); see also Colloquy, Proceedings of the Conference on Takings and the Constitution, 41 U. MIAMI L. REV. 49 (1986) (containing criticism of TAKINGS).

n212 Epstein, The Commerce Power, supra note 211, at 1388; cf. Gary Lawson, The Rise and Rise of the Administrative State, 107 HARV. L. REV. 1231, 1231 (1994) ("The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.") (footnote omitted).

- - - - -End Footnotes- - - - -

What interests me here is Epstein's method -- a method not uncommon among constitutional jurists, but distinctive nonetheless. In Epstein's analysis, if the New Deal change is not "driven by any textual necessity," then it must be the result of political "forces." n213 Context apparently cannot count. In his central attack on the change in the commerce power, he acknowledges that the most commonplace justification of the New Deal change relies on the change in the national economy as a predicate to the expanded commerce power. Yet he refers just twice to these changes n214 and never once attempts to justify an interpretive method that may ignore them -- as his does. Instead, he takes it as given that applying the Constitution in the same way is to preserve the meaning of the Constitution. So understood, it is enough for his argument to consist of a careful reading of a century of Supreme Court cases, with no substantial account of the worlds within which these questions get raised.

- - - - -Footnotes- - - - -

n213 Epstein, The Commerce Power, supra note 211, at 1443. To say that the changes were driven by political forces means either that the Court was simply responding to pressure from the political branches or that it was adopting different political views about the scope of the federal government's power. In either case, the sense is that the Court is changing its views in ways ordinarily requiring amendment, rather than in ways responsive to the demands of fidelity. Thus when Epstein says that the change "depended upon a radical reorientation of judicial views toward the role of government that in the end overwhelmed the relatively clean lines of the commerce clause," id. at 1452, he is describing a political act, an act which I believe he considers improper.

n214 Id. at 1396-97, 1444. Epstein's most serious consideration of the issue is as follows:
[T]here is no reason to distinguish the commerce of the eighteenth and nineteenth centuries from that of the twentieth. Business in one state has always had profound economic effects upon the fortunes of other states. The

pre-Civil War battles between North and South over the tariff show just how much the fate of each state has always depended upon national economic policies. There was no economic revolution during the Progressive Era or the New Deal that justifies the convenient escape of saying that it is only the nature of business and trade that has changed, not the appropriate construction of the commerce clause. The intimate interdependence between trade and national economic conditions was as clear to the Phoenicians and the Romans as it is to ourselves. Id. at 1396-97 (footnotes omitted). Compare: A recent New York Times article describes how failures in the baggage handling system -- caused by smudges in the baggage tickets -- at Denver's new airport had the potential to cripple air travel for the whole nation by "delaying flights from coast to coast." Allen R. Myerson, Automation Off Course in Denver, N.Y. TIMES, Mar. 18, 1994, at C1, C2. It is a formalism in the extreme to suggest that there is no difference between this manifest economic integration and that of the Phoenicians.

- - - - -End Footnotes- - - - -

This is one way to read a constitutional text. But it is not the only way, or even so clearly the right way that Epstein can simply omit any argument for it. More significantly, it is not Epstein's way of reading the Takings Clause. For here Epstein has no trouble defending a changing scope of property interests [*446] (changing in response to changing economic theory and social reality, and to the problem of "novel institutions in changed social circumstances" n215) to justify an ever-expanding scope for takings protection. n216 There is little doubt that the resulting scope of protection covers far more than the original scope of takings protection, n217 without any change in the "textual necessity" of the Fifth Amendment. Yet if his method is valid for rights, one at least expects an argument about why it is invalid for powers. n218

- - - - -Footnotes- - - - -

n215 EPSTEIN, TAKINGS, supra note 211, at 28.

n216 Id. at 24-31.

n217 See Stephen A. Siegel, Understanding the Lochner Era: Lessons from the Controversy Over Railroad and Utility Rate Regulation, 70 VA. L. REV. 187, 217 (1983) (describing the expansion of the Takings Clause).

n218 Cf. Bruce Ackerman, Liberating Abstraction, 59 U. CHI. L. REV. 317, 318 (1992) (noting an asymmetry in the Supreme Court's treatment of abstract powers and particular rights).

- - - - -End Footnotes- - - - -

At the least, this inconsistency in methodology counsels that we put off for the moment the ultimate resolution of Epstein's case. Until we resolve whether another reading -- one that does not require rejecting fifty years of Supreme Court jurisprudence n219 -- is possible, we should defer constitutional condemnation. A principle of charity in interpretation counsels that we ask first whether there is a way to understand the Constitution that makes most sense of what its interpreters have done. Can we see most of what the Constitution's interpreters have done as correct? Only after answering this question in the negative have we earned the right to conclude that this interpretive history makes no sense of constitutional fidelity. Or at least

that will be my strategy here.

-Footnotes-

n219 See EPSTEIN, TAKINGS, supra note 211, at 281 ("It will be said that my position invalidates much of the twentieth-century legislation, and so it does.").

-End Footnotes-

B. The New Deal As Restoration

By far the dominant view about the New Deal transformation is this: The changes effected by the New Deal were certainly significant; relative to the Constitution as interpreted for the fifty years before, they were certainly on the level of a constitutional amendment. But, this view asserts, it was the Constitution of the prior fifty years that was in error, not the Constitution given us by the New Deal. Instead, the New Deal restored the original Constitution, after a period of constitutional usurpation by an activist conservative Court. As an act of constitutional restoration, the changed readings of the New Deal Court are justified. n220

-Footnotes-

n220 See, e.g., TRIBE, supra note 27, at 308-09 (suggesting that in 1937, the Supreme Court acceded to political pressures and returned to Chief Justice Marshall's original interpretation of the Commerce Clause); Horwitz, supra note 3, at 56 ("The victorious New Deal majority sought to portray its triumph not as constitutional revolution, but as constitutional restoration."); Mary Cornelia Porter, That Commerce Shall Be Free: A New Look at the Old Laissez-Faire Court, 1976 SUP. CT. REV. 135, 140 ("[T]he Court returned in the early 1940s to the principles of the Granger Cases."); Stephen A. Siegel, Lochner Era Jurisprudence and the American Constitutional Tradition, 70 N.C. L. REV. 1, 3 (1991) (discussing other scholars' view of the Lochner era as a deviant period). This justification was also advanced by many in the New Deal administrations. See PETER H. IRONS, THE NEW DEAL LAWYERS 137-38 (1982) (historical account); Robert L. Stern, That Commerce Which Concerns More States Than One, 47 HARV. L. REV. 1335, 1348-49 (1934) (contemporary argument).

-End Footnotes-

[*447] As with any argument from restoration, the argument turns on there being a close relationship between the restored and the original Constitution, and this turns on showing that the Framers' original Constitution would have yielded the vast array of power claimed by the New Deal. To sustain this argument, the restorationists point to the last opinions of Chief Justice Marshall interpreting congressional power -- in particular, to McCulloch v. Maryland, n221 reserving to Congress broad discretion in determining the scope of its implied legislative authority, and Gibbons v. Ogden, n222 described by Justice Jackson as setting out "the federal commerce power with a breadth never yet exceeded." n223

-Footnotes-

n221 17 U.S. (4 Wheat.) 316 (1819).

n222 22 U.S. (9 Wheat.) 1 (1824).

n223 Wickard v. Filburn, 317 U.S. 111, 120 (1942).

- - - - -End Footnotes- - - - -

Read out of context, there can be no doubt that the powers the New Dealers claimed do get sanction from these late Marshall opinions. For read out of context, these opinions clearly establish a formula for testing federal power that would sanction the federal power claimed by the New Deal. Gibbons gives Congress the power to regulate commerce that "affect[s]" more than one state, n224 and as the New Dealers quite convincingly argued, by the 1930s, there could be no doubt that the commerce Congress sought to regulate was commerce affecting more than one state. And even if it were not "commerce" that Congress was regulating -- if it were, for example, "manufacturing" and therefore not within the terms of the Commerce Clause -- then McCulloch still assured to Congress the power to regulate "manufacturing" under the Necessary and Proper Clause, so long as regulating manufacturing was a means that was "appropriate" and "plainly adapted to [the] end" of regulating "commerce." n225 Finally, whether something "affects" more than one state, or whether a means is "appropriate" to a congressional end, were questions these Marshall cases reserved to Congress' judgment. These three points easily yield the Constitution that the New Dealers sought.

- - - - -Footnotes- - - - -

n224 22 U.S. (9 Wheat.) at 192.

n225 17 U.S. (4 Wheat.) at 421.

- - - - -End Footnotes- - - - -

But only by a lawyer's trick, for however much the plain language of these opinions might support the New Deal, there can be no doubt that Chief Justice Marshall and the Framers he spoke for would never have sanctioned the extent of federal power that the New Deal allowed. n226 For the tests Chief Justice Marshall outlined in the early nineteenth century were designed for a world where the resulting powers would not have obliterated exclusive state regulative authority (as they would in the early twentieth century). Had the tests done that then, there can be little doubt that Chief Justice Marshall would not have adopted them. What Chief Justice Marshall gave us were readings of congressional power within a particular context of social and economic facts, and the meaning of these opinions is conditioned by these original contexts.

- - - - -Footnotes- - - - -

n226 Here I agree with the odd alliance of Bruce Ackerman and Richard Epstein, in Epstein's classic style, that to the argument that the New Deal is just Gibbons, the only response is simply, "No way." Epstein, *The Commerce Power*, supra note 211, at 1408; see ACKERMAN, *WE THE PEOPLE*, supra note 24, at 62; Ackerman, supra note 218, at 323-35.

- - - - -End Footnotes- - - - -

[*448] Moreover, not only did the New Dealers use these opinions out of context, but they also used them only partially. Essential to the Framers' understanding of the Court's review of commerce cases was the presupposition that the Court could continue to divine the purpose of a regulation and thus divide regulations between those with illicit and those with licit purposes. n227 But one crucial dimension to the New Deal change is the death of this very confidence in the ability of a court to divine the legislative purpose of commercial or economic regulation. n228 Whereas all agreed in *Gibbons* that the motives and purposes of state regulation would have to be evaluated when addressing the scope of congressional power, n229 the New Deal Court claimed that "motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the Courts are given no control." n230 The same is true with *McCulloch*: It required that the Court employ a kind of pretext analysis to assure that the use of the Necessary and Proper Clause not be allowed to subvert state interests. n231 But since the New Deal, this part of the *McCulloch* test has been all but forgotten.

- - - - -Footnotes- - - - -

n227 *Gibbons*, 22 U.S. (9 Wheat.) at 220.

n228 Epstein makes a related and equally true point: "It has been said that modern constitutional law represents the triumph of 'formalism' over 'realism.' If this is true, then Chief Justice Marshall was the great formalist, not the precursor of the modern realists." Epstein, *The Commerce Power*, supra note 211, at 1406 (footnotes omitted).

n229 See, e.g., 22 U.S. (9 Wheat.) at 197; *id.* at 232-34 (Johnson, J., concurring).

n230 *United States v. Darby*, 312 U.S. 100, 115 (1941).

n231 17 U.S. (4 Wheat.) at 423 ("Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government . . .").

- - - - -End Footnotes- - - - -

The restorationist's argument hangs upon a partial reading of these early cases taken out of context -- or in other words, a misreading of these earlier cases. This is reason enough for doubting that Chief Justice Marshall gave us Roosevelt's Constitution. But there is a second reason for hesitating, as well. For the restoration thesis too violates the principle of interpretive charity. While it does not require us to reject all that has happened since 1937 (as the conservatives would), it does require us to view as just wrong much that happened in the middle republic (roughly 1870-1937). Like the conservatives, it requires us to reject one-third of our constitutional past, even if the third that must be rejected is a less important third.

Just from the perspective of theory, we might again want to resist this as a solution. We might, that is, want first to determine whether there is a

theoretically more conservative solution to the change of 1937, one that does not require the rejection of as much of our past as does either the restoration theory or the conservatives' theory.

C. The New Deal As Amendment

Bruce Ackerman takes a more charitable approach. For he too aims to understand the New Deal change in a way that legitimates most of our constitutional past. Although he agrees that the transformations of the New Deal were [*449] significant enough to require a constitutional amendment, n232 he rejects both the conservative and restorationist views. Instead, Ackerman points to political change during the New Deal that he views as sufficient to amend the Constitution. n233

-Footnotes-

n232 See ACKERMAN, WE THE PEOPLE, supra note 24, at 119-21; see also Cass R. Sunstein, Constitutionalism After the New Deal, 101 HARV. L. REV. 421, 447-48 & n.114 (1987) (discussing Ackerman's amendment theory). The New Dealers themselves discussed and rejected an amendment to the Constitution. See IRONS, supra note 220, at 274-75.

n233 Most of the debate about Ackerman's position has focused on his amendment argument. A second, distinct part of his argument relies on synthesis to make sense of the change (the functional amendment) of the New Deal in light of the Constitution that preceded it. This second argument is independent of the first, and, in my view, quite strong. ACKERMAN, WE THE PEOPLE, supra note 24, at 10, 86-103, 113-30, 140-62, 268.

-End Footnotes-

We can understand Ackerman's argument like this: Ours, Ackerman suggests, is a dualist Constitution -- a Constitution in which ordinary lawmaking occurs within the terms set by extraordinary moments of higher lawmaking. n234 A "moment" of higher lawmaking is the product of a sustained and self-conscious political act by "the People," seeking to transform the then existing constitutional regime. n235 At least three such moments of higher lawmaking have defined our past -- the Founding, Reconstruction, and the New Deal. n236 Each marks a moment of dramatic constitutional change, which, according to Ackerman, amended the Constitution in a fundamental way. n237 For the reader focused on fidelity, the question is whether each change was justified.

-Footnotes-

n234 Id. at 6.

n235 Id. at 6-7.

n236 Id. at 40.

n237 For a discussion of the functional amendments effected by each "moment," see id. at 40-50.

-End Footnotes-

Conventional wisdom finds no problem justifying the first two moments -- they were, after all, self-conscious amendments of the then existing constitutional text, through the addition of another bit of constitutional text; they followed processes understood as processes of amendment. But justification is not so easy with the New Deal change, for no bit of text was added through an enactment by the people, and no self-conscious act of amendment appears (at least on the surface) of the constitutional past. n238

-Footnotes-

n238 Id. at 43 ("[I]n contrast to the first two turning points . . . [n]either the substantive [n]or procedural aspects of the New Deal . . . [are] a tale of constitutional creation.").

-End Footnotes-

Not a problem, says Ackerman, for conventional wisdom is just wrong -- wrong to be so secure about the legitimacy of the first two moments and wrong to be so doubtful about the legitimacy of the third. n239 In the conventional account, an amendment proceeds through (1) a formal and technical procedure that thereby (2) assures that a highly engaged polity effects constitutional change. But conventional wisdom notwithstanding, the first two constitutional moments were, Ackerman argues, technically illegal, n240 while the third, no [*450] doubt itself also technically illegal, n241 manifested all the requisite popular engagement necessary to qualify as a legitimate amendment to the Constitution. n242 Thus, all three moments were legally problematic, yet because all three were also engaged democratic processes, all three deserve constitutional recognition and legitimacy. n243

-Footnotes-

n239 Id. at 44.

n240 Contrary to the requirements of the Articles of Confederation, the Framers adopted the Constitution -- a clear amendment of the Articles -- without unanimity. Id. at 41. Moreover, the Civil War amendments were also adopted with a questionable method of reckoning state ratification. Id. at 44-45. In sum, no single rule of reckoning could show that all three amendments were ratified. Id.

n241 See id. at 44 (contending that the New Dealers, like Reconstruction Republicans, disregarded the path for constitutional revision set by their predecessors).

n242 Bruce A. Ackerman, The Storrs Lectures: Discovering the Constitution, 93 YALE L.J. 1013, 1056 (1984) ("Rather than a confession of legal sin . . . the Court's capitulation [to the New Deal was] the final point in the process of structural amendment. It is the moment at which the judges recognized that a new constitutional principle had indeed been ratified by the People . . .").

n243 Id. at 1069-70.

-End Footnotes-

The problem with this ingenious account is that unlike moments one and two, there is nothing at all like a constitutional amendment in moment three. Moment one bore a Constitution; moment two, three snippets of constitutional text that, however flawed, at least seem like constitutional amendments. But from moment three we have nothing enacted by "We the People" through any procedure, however flawed. Rather than a popularly ratified (in at least some way) text, we have a series of transformative opinions by the Supreme Court, validating actions by Congress and the states that before had been held unconstitutional. It is these opinions, Ackerman argues, that we should recognize as the amending texts, n244 and these that we should use in the process of synthesis that must follow any endogenous constitutional system. n245

-Footnotes-

n244 ACKERMAN, WE THE PEOPLE, supra note 24, at 119-20.

n245 Id. at 140-62 (arguing that to explain the Court's New Deal decisions, we must synthesize New Deal, Reconstruction, and Founding readings).

-End Footnotes-

But something doesn't fit. Before we consider whether a procedurally flawed amendment is nonetheless an amendment, don't we need something even minimally recognizable as an amendment? Doesn't there have to be something recognizable as a text, offered as a change to the Constitution, not because such is essential to the very notion of a constitutional amendment, n246 but because such is essential to the notion of an amendment within our constitutional tradition?

-Footnotes-

n246 Under the constitution of the Weimar Republic, for example, statutes that passed Parliament with a sufficiently large majority were considered amendments to the constitution if found inconsistent with the constitution, even if the statute made no reference to the constitution at all. See DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 7 (1994).

-End Footnotes-

I don't want to be misunderstood. I do not mean to say that of necessity, an amendment requires text, for that would be wrong as a matter of constitutional theory and of historical (or cross-cultural) experience. Moreover, I fully agree with Ackerman's theoretical commitment -- as he says, if we are to provide a theory of constitutional interpretation, that theory must explain most of the actual practice of constitutional interpretation. And if to generate a theory we need to indulge a (relatively small) interpretive fiction, then we should be happy to indulge. Greater fictions have been indulged for lesser causes. But before we embrace a fiction so gross (in the sense of large, of course), we should at least understand its source.

[*451] What is driving Ackerman here, I suggest, is a narrow conception of the range of possible justifications for changed readings. While it is not as narrow as Epstein's (for Ackerman does believe there are justifications beyond "textual necessity" to support changed readings of the Constitution -- synthesis, for example n247), at synthesis Ackerman apparently draws the line.

Consider just one passage in his discussion of the possible justifications for Brown to suggest this narrow view of the possible justifications for changed readings:

The question Warren's dictum raises is whether we can locate an analogous constitutional transformation between 1896 and 1954 that makes it equally appropriate for Warren to reject the binding force of Plessy. Did We the People speak in a new way in the first half of the twentieth century which decisively undercuts Plessy's interpretation of the Constitution? n248

-Footnotes-

n247 See ACKERMAN, WE THE PEOPLE, supra note 24, at 4-5.

n248 Ackerman, Politics/Law, supra note 24, at 530.

-End Footnotes-

Here and, I suggest, throughout Ackerman's account is the thought that a necessary condition of a justified changed reading is that somewhere we can say "we the people [have spoken] in a new way." Without this newspeak, Ackerman presumes, nothing new can be yielded from the constitutional text. But this, I believe, is just a mistake: No doubt a constitutional amendment would be a sufficient justification for a constitutional change. But we have seen enough (I hope) to suggest that it is certainly not necessary.

Again, however, it is enough for now simply to flag this limiting assumption in Ackerman's work and to ask, before we take the leap of believing there is such a thing as the New Deal amendment, whether another account wouldn't do just as well.

D. The New Deal As Changed Concepts

Before we consider an argument from translation, we should consider what I believe is its closest cousin, Cass Sunstein's understanding of the New Deal change. Sunstein argues that the New Dealers recognized a fundamental conceptual error about the nature of the common law, a mistake perpetuated by late nineteenth century jurists. n249 Until the New Deal, the dominant judicial rhetoric was that property and contract were, as Sunstein puts it, "natural" and "prepolitical." n250 As a result, the Court privileged contract and property above legislation that sought to "redistribute" these seemingly natural assets. n251

-Footnotes-

n249 Sunstein, supra note 232, at 423.

n250 See id. (suggesting that the New Dealers saw the common law as "neither natural nor prepolitical").

n251 Id.

-End Footnotes-

Slowly, however, Sunstein claims, the Court came to see the "baseline" problem in this earlier view: that contract and property themselves were redistributions from what otherwise would be a prepolitical or natural distribution; that therefore the results of a regime of "contract and property" were just one kind of effective redistribution; and that the Progressives were not trying to substitute redistribution for nature, but instead wanted to substitute one type of [*452] redistribution for another. n252 Once the New Dealers understood the baseline problem -- pushed most forcefully, for example, by people like Robert Hale n253 -- the New Deal revolution followed in turn. n254

- - - - -Footnotes- - - - -

n252 CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 50-51 (1993).

n253 See, e.g., Robert L. Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 POL. SCI. Q. 470 (1923). See generally DUNCAN KENNEDY, SEXY DRESSING ETC.: ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY 90-94 (1993) (discussing Hale and the baseline issue).

n254

We should understand the revolution of 1937 as the vindication of the New Deal in the Supreme Court. The vindication was based above all on the understanding that the common law and existing distributions of resources would be entitled to no extraordinary protection from democratic politics. . . . A pivotal point was that ownership rights, and everything that accompanied them, had been created by the legal system.

. . .

The initial problem with laissez-faire was therefore conceptual. The basic idea was a myth. SUNSTEIN, supra note 252, at 55.

- - - - -End Footnotes- - - - -

There is much in this account that I believe true and valuable. But it lacks an account of fidelity -- a theory that helps explain why the response of the New Deal to the change in ideas that he remarks was a proper or faithful response. In Sunstein's account, "ideas" are changing in the foreground of New Deal thought. At one time, the New Dealers had one baseline concept; at another time, a different one. At one time, "common law and existing distributions" were entitled to extraordinary protection from democratic politics; at another time, they were not. n255 At one time, the government's "failure to impose a minimum wage" was not conceived as a "subsidy for unconscionable employers"; at another time, it was. n256 The problem with the pre-New Deal Court's ideology was "conceptual"; the "basic idea [of laissez-faire] a myth." n257 The New Deal, "and especially the legal revolution of 1937, should be understood above all as a rejection of these conceptions of neutrality and action. The rejection was self-conscious and explicit. The conceptual break consisted in the insistence that current rights of ownership, and other rights, were a product of law." n258

- - - - -Footnotes- - - - -

n255 SUNSTEIN, supra note 252, at 51.

n256 Cass R. Sunstein, Lochner's Legacy, 87 COLUM. L. REV. 873, 880-81 (1987).

n257 SUNSTEIN, supra note 252, at 55.

n258 Id. at 41.

- - - - -End Footnotes- - - - -

The problem with all this is that it moves too directly. It treats all "ideas" as contested and suggests that what the Court did in the New Deal was simply pick the contested set it liked best. But the dynamic, I suggest, is less direct. What the New Deal Court did not do is latch onto any emerging contested theory of legal reality as a way of trumping an earlier contested theory of legal reality. What it did instead was respond to the fact that these earlier understandings had become contested, and it responded, in Erie-effect ways, n259 by retreating from judgments that it unself-consciously had made before. Again, one set of ideas did not triumph over another; rather, ideas once presumed now became contested, and once they were contested, the Court had no choice but to retreat from the arena of contest.

- - - - -Footnotes- - - - -

n259 See text following note 176 supra.

- - - - -End Footnotes- - - - -

[*453] What Sunstein's work misses, then, is the distinction between ideas becoming dominant and ideas becoming contested. His argument depends upon showing that Realist ideas had become dominant; my argument (as I will suggest below) depends only upon showing that the Realist ideas were sufficient to make the intellectual context of the New Deal fundamentally contested. By suggesting that the mere dominance of a newly emerging but contested discourse suffices to justify changed readings, Sunstein offers none of the tools necessary for justifying a regime that respected the New Deal changes, rather a regime that simply surrendered to them.

E. The New Deal As Translation

Rather than unjustified, rather than restoration, rather than amendment, and rather than mistake, I suggest that an argument of translation -- both of fact and structural translation -- best justifies the changes of the New Deal. Two types of changes are at the core of this argument -- first, and more familiar, changes in the economic and social reality that law regulated (the predicate to the restorationist's argument); second, and less familiar, changes in law's understanding of itself (an Erie effect). n260 Only together do these changes suggest the fidelity in the radicalness of the New Deal changes.

- - - - -Footnotes- - - - -

n260 The link between Erie and the New Deal changes is suggested by Amar, supra note 139, at 695.

- - - - -End Footnotes- - - - -

There are two parts to the puzzle that must be explained. The first is the change in substantive due process limitations on economic and social regulation. Rising slowly through the nineteenth century, by the beginning of the twentieth, substantive due process had become firmly established as a limitation on the power of (primarily) state governments to regulate economic and social affairs. In its purest form, represented by *Lochner v. New York*, n261 it stood for the proposition that legislation must be in the public good to survive constitutional review; special interest or class legislation was unconstitutional. n262 And while unevenly enforced by state and federal courts over the period, the notion became a dominant view of the proper role of government among constitutional jurists.

- - - - -Footnotes- - - - -

n261 198 U.S. 45 (1905).

n262 *TRIBE*, supra note 27, at 571; Sunstein, supra note 256, at 877-79. This idea dates back to *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), where Justice Chase opined that a law that "takes property from A., and gives it to B. . . . is against all reason and justice." *Id.* at 388.

- - - - -End Footnotes- - - - -

By the end of the New Deal, this *Lochner* limitation was effectively gone. By the mid-1930s, due process no longer functioned as a limitation on the power of state to regulate economic and social life. Instead, a public purpose was presumed, even where it seemed plain that a special interest was dominant.

The second part of the puzzle is the change in the scope of federal power, especially as articulated through the Commerce Clause. From an odd beginning in the late nineteenth century through the mid-1930s, the Court struggled to find ways to limit the growth of federal commerce power, by finding implied, formal limitations on its scope. Thus, "manufacturing" was held not to [*454] be "commerce" within the meaning of that term; n263 regulations that "indirectly" affected interstate commerce were held to be outside the commerce power; n264 and only local actions "inten[ded]" to affect interstate commerce were to be considered interferences with interstate commerce. n265

- - - - -Footnotes- - - - -

n263 E.g., *United States v. E.C. Knight Co.*, 156 U.S. 1, 16 (1895) (holding that an attempt to monopolize manufacture did not constitute an attempt to monopolize commerce).

n264 E.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546 (1935) ("[W]here the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power.").

n265 See, e.g., *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295, 297-98 (1925) (holding that inadvertent interference with interstate commerce is indirect, but that intentional monopolization in violation of the Sherman Act is within congressional control).

-----End Footnotes-----

In 1937, this enterprise of implied limits on the commerce power came to an end. Beginning with *NLRB v. Jones & McLaughlin Steel Corp.*, n266 the Court ceased its practice of commerce power formalism and yielded back to Congress the judgment whether a certain activity was within the scope of the commerce power. This abdication has gone unchecked in the fifty years since. In no case has the Supreme Court struck down a statute as falling without the commerce power, save in those cases where the commerce power interacted with Tenth Amendment limitations. n267

-----Footnotes-----

n266 301 U.S. 1, 3 (1937) (prescribing deferential review of congressional definitions of interstate commerce).

n267 E.g., *National League of Cities v. Usery*, 426 U.S. 833, 844-45 (1976) (denying Congress' power to regulate states' integral, traditional governmental functions), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985).

-----End Footnotes-----

In the balance of this article, I outline the argument of translation that would explain both of these changes. Like Ackerman's, my account starts from the presumption that most of the constitutional past was correct. Against his account, I ask which story, amendment or translation, makes most sense of the changes that occurred and the self-conscious understanding of those changes while they occurred. As I have hinted, one part of my account relies upon an argument of fact translation; the second, upon an argument of structural translation. I begin with the fact-translation argument.

1. Changes: economic reality.

Throughout the period beginning with the Industrial Revolution and culminating in the collapse of 1929, the economic substructure of the nation underwent a radical transformation. The extent of this change cannot easily be overstated: Between the end of the Civil War and the 1929 collapse, the total value of manufactured products increased nearly twenty times; n268 railroad track mileage went from under 40,000 miles nationwide to over 260,000; n269 the urban population increased from 16.1 percent to 49.1 percent. n270 Between 1860 [*455] and 1919, the value added by American manufacturers had increased more than thirty-three-fold. n271

-----Footnotes-----

n268 HARRY N. SCHREIBER, HAROLD G. VATTER & HAROLD UNDERWOOD FAULKNER, *AMERICAN ECONOMIC HISTORY* 222 fig. 15-1, 335 tbl. 21-1 (9th ed. 1976).

n269 Id. at 260 fig. 17-1.

n270 Id. at 243 tbl. 16-1 (spanning 1860-1930).

n271 Id. at 165 tbl. 11-1, 224 tbl. 15-2; see also CARL N. DEGLER, THE AGE OF THE ECONOMIC REVOLUTION: 1876-1900 (2d ed. 1977) (collecting accounts of economic, demographic, and social changes); BEN MADDOW, A SUNDAY BETWEEN WARS: THE COURSE OF AMERICAN LIFE FROM 1865 TO 1917, at 45-158 (1979) (same).

- - - - -End Footnotes- - - - -

None could deny the significance of this change. None could deny that the nation was no more the world of yeomen farmers and small town merchants idolized by Jefferson and the early Republicans. n272 And none should deny that through a simple application of fact translation, this change in the level of economic activity had the potential to increase the scope of governmental power, both on the state and federal level. The scope of federal power would increase, since federal power reached "commerce . . . among the several States," n273 as well as means "appropriate" or "plainly adapted" n274 to the end of regulating commerce, and a greater range of activity now fell within the scope of those two powers. The scope of state power would increase, since state power, even under a strong substantive due process regime, touched activities "affected with a public interest," n275 and economic and social integration would mean that more activities would be so affected. In both cases, the passive change of increased social and economic integration would easily warrant increased federal and state power, a warrant supplied by a straightforward argument of fact translation.

- - - - -Footnotes- - - - -

n272 Cf. Gerhard Casper, Executive-Congressional Separation of Power During the Presidency of Thomas Jefferson, 47 STAN. L. REV. 473, 475-76 (1994) (describing Jefferson's commitment to limiting government functions to reflect the republican ideal).

n273 U.S. CONST. art. I, @ 8, cl. 3.

n274 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

n275 For a skeptical view of the constraints of this formulation, see HOVENKAMP, supra note 101, at 199-200.

- - - - -End Footnotes- - - - -

Focus first on the effects of integration at the state level. As I have suggested, the Due Process Clause of the Fourteenth Amendment was understood to limit the permissible scope of state regulation. Lochner-era scholars offered easy formulations, even as their content became increasingly obscure: State regulation was to advance the common good of the state as a whole, and not the particular good of some over others. n276 Thus "police power" regulation was permissible; "class" legislation, or special interest legislation, was not. Thus did the Lochner Court understand due process as well, n277 as had many earlier courts for perhaps worthier causes. n278

- - - - -Footnotes- - - - -

n276 See Benedict, supra note 116, at 305-31 (chronicling the development of due process as a restraint on legislative power); cf. Siegel, supra note 220, at 6-23 (demonstrating that the Lochner-era limits on state regulation masked a diversity of opinion).

n277 See, e.g., Robert Eugene Cushman, *The Social and Economic Interpretation of the Fourteenth Amendment*, 20 MICH. L. REV. 737, 738 (1922) (providing a view of due process contemporary with *Lochner*-era decisions).

n278 See, e.g., NELSON, *supra* note 153, at 135 (describing one court's use of the 14th Amendment to curtail excessive criminal punishments targeted at Chinese convicts, such as regulations requiring hair in prison to be a particular length); *id.* at 153 ("Maryland courts questioned the constitutionality of an act providing that 'no Black Republicans . . . shall be appointed to any office within the jurisdiction of the Baltimore Board of Police.'" (citing *Mayor & City Council of Baltimore v. State ex rel. Board of Police*, 15 Md. 376, 484 (1860))).

- - - - -End Footnotes- - - - -

[*456] In the late nineteenth century, the bite of the substantive due process restriction on state regulatory power was much less than its bark. Progressives initially established a relatively broad scope for state regulatory power by arguing that a great deal of activity affected the public interest and therefore properly fell within the states' police power. *Munn v. Illinois* n279 was an early victory for this "interdependence" school. In *Munn*, proponents of state regulation successfully demonstrated that fourteen grain elevators in the Chicago area were "clothed with a public interest" sufficient to allow state regulation, n280 even though grain elevators would not have been so considered under the common law. It did not matter, Justice Waite wrote, that no exact precedent existed

for a statute precisely like this. It is conceded that the business is one of recent origin . . . [but it presents] a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. n281

- - - - -Footnotes- - - - -

- n279 94 U.S. 113 (1876).
- n280 *Id.* at 132.
- n281 *Id.* at 133.

- - - - -End Footnotes- - - - -

This progressive victory, however, was short-lived. Proponents of substantive due process were more successful after *Munn*, though the courts were never wholly uniform in their results. From 1870 through *Lochner* in 1905, we can observe a recurring battle between, on the one hand, claims for increased regulatory authority grounded in an ever increasing range of activity "affected with a public interest" and, on the other, efforts to limit that regulatory authority by claiming that it was exercised solely for the benefit of one class against another. As *Munn* suggests, progressives were successful to the extent that they could demonstrate clearly the integrated (and hence police) effects. Conversely, as Michel Les Benedict suggests, proponents of substantive due process were successful to the extent that they could clearly demonstrate partiality in purportedly public interest legislation. n282

-Footnotes-

n282 See Benedict, supra note 116, at 331. Laissez-faire, in the sense of an ideology minimizing governmental regulation, was not the dominant political ideology during the period. See, e.g., id. at 303 ("Those who urged the government to adhere to the 'let-alone principle' certainly did not perceive their ideas to be in the saddle."); Porter, supra note 220, at 157. And as Benedict points out, Justice Holmes' dissent in Lochner itself reveals that the objection to such legislation was not economic. Benedict, supra note 116, at 305 (arguing that Justice Holmes objected to the Court's embrace of Spencer's social theory, not an economic theory). I agree with Benedict that this dimension of rights talk is crucial to understanding the laissez-faire resistance. Cf. SCHREIBER ET AL., supra note 268, at 576 (describing the lack of laissez-faire in the states in this period). But it is a mistake, I suggest, to make too much of the point. Certainly there are strong currents of both social and economic theory within the laissez-faire tradition, indeed, within Justice Holmes' dissent itself. For Justice Holmes did say, "This case is decided upon an economic theory which a large part of the country does not entertain." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (emphasis added).

-End Footnotes-

Rather than a history of substantive due process victories, then, the middle republic is best understood as a period when this balance gets repeatedly restructed. But the punchline is well known: With the rise of the New Deal, the balance tilts firmly in favor of state regulation; the "class legislation" limitation disappears, and state legislatures are permitted an essentially unlimited scope of [*457] regulatory power (at least within the domains of economic and (some) social legislation).

A complete account of this collapse reaches beyond economic justifications alone. But for now, focus on the dimension of substantive due process' collapse that is tied to the change in economic integration. For in this change we will identify a pattern that will persist throughout the New Deal -- an increasing reliance on arguments based in the facts to persuade the Court to alter its jurisprudential course. Against the claim that legislation served no public interest, that is, progressives marshaled facts of economic and social science.

The first great success came in *Muller v. Oregon*, where the Court carved an exception for women in the substantive due process bar on maximum hours legislation. n283 The foundation for the exception was laid by Louis Brandeis, in his "Brandeis brief" for the Court. With two pages of legal argument and 110 pages of economic and sociological data, the brief sought to convince the Court of a plausible link between the special protection of women and a general or public purpose. n284 Convince it did, whether because of the economics or because of the Court's special favor for women. Either way, the brief was enough to induce the Court to suspend its search for bad motives and allow state interference with these private choices.

-Footnotes-

n283 208 U.S. 412 (1908).

n284 Horwitz, supra note 3, at 52; David Ziskind, The Use of Economic Data in Labor Cases, 6 U. CHI. L. REV. 607, 607 (1939). For a critique contemporary with Muller, see Thomas Reed Powell, The Judiciality of Minimum Wage Legislation, 37 HARV. L. REV. 545 (1924).

- - - - -End Footnotes- - - - -

The real break in substantive due process cases, however, came not with Muller, but rather midway into the collapse of the Depression. As Laurence Tribe describes, "the Great Depression conclusively established for many Americans the interdependence of economic factors," n285 and this interdependence animates the balance of the cases orchestrating the collapse of substantive due process, in particular, Nebbia v. New York, n286 Home Building & Loan Association v. Blaisdell, n287 and finally, West Coast Hotel Corp. v. Parrish. n288

- - - - -Footnotes- - - - -

n285 TRIBE, supra note 27, at 308; see also Robert L. Stern, The Commerce Clause and the National Economy, 1933-46, 59 HARV. L. REV. 645 (1946) (describing the response of the Roosevelt administration to the new economic reality); Stern, supra note 220, at 1335-37, 1344-48 (same).

n286 Nebbia v. New York, 291 U.S. 502 (1934).

n287 290 U.S. 398 (1934).

n288 300 U.S. 379 (1937).

- - - - -End Footnotes- - - - -

Begin with Blaisdell. Here again, progressives attacked with a barrage of economic facts. At issue was the constitutionality of a Minnesota debtor relief statute. Under the Supreme Court's contract and due process cases, the statute should have been struck, for under these earlier cases, what Minnesota was doing was benefiting some (debtors) to the burden of others (creditors) in a way that did not benefit all overall. n289

- - - - -Footnotes- - - - -

n289 See, e.g., Bronson v. Kinzie, 42 U.S. (1 How.) 311 (1843); Howard v. Bugbee, 65 U.S. (24 How.) 461 (1860); Barnitz v. Beverly, 163 U.S. 118 (1896). All three cases hold that debtor mortgage relief statutes are unconstitutional impediments to contract.

- - - - -End Footnotes- - - - -

To simplify matters, we can understand these earlier cases to rest upon two presuppositions: first, that the contract and due process clauses limited states to regulation within the police power, and second, that debtors' relief legislation [*458] could never be within the police power. So understood, affirming the Minnesota Supreme Court's judgment upholding the statute meant rejecting one of these presuppositions. The question is which.

If Ackerman's understanding of the New Deal change were correct -- if the New Deal was a change in the normative presuppositions to our constitutional structure through an amendment -- then it is the first presupposition that should be seen to have changed, and this two years before Ackerman's ratifying amendment of 1936. That is, if the New Deal needed, and was, an amendment, then the substance of that amendment must have been that the contract and due process clause no longer limited states to regulations within the police power, at least so far as that amendment related to due process limitations on state and federal legislation.

But there may be more sense to be found in what the Supreme Court actually said. For the opinion does not even remotely assert that the state is now free to do whatever it wishes. Rather, for the Court, what had changed was the view that debtors' relief legislation like that enacted in Minnesota could never be within the police power. Put most contentiously -- a fact about the scope of integration had changed.

Here is what the Court said:

Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved [in contracts of this sort], and that those of the state itself were touched only remotely, it has later been found that the fundamental interests of the state are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends. n290

- - - - -Footnotes- - - - -

n290 Blaisdell, 290 U.S. at 442 (emphasis added).

- - - - -End Footnotes- - - - -

What the Court points to here is not the change of a normative presuppositions (such as that the state may only regulate within the police power) or a later change in public opinion about the proper scope of government (such as that the state or federal government should regulate beyond this police power), but later discovery ("been found") about the interrelationship of the underlying economy and state resources. The Court's confession is not of a change in popular will or of a change in substantive constitutional mandate, but of a change in underlying economic reality. In light of a later discovery, it was no longer true that this legislation was not and could not ever be within the police power. Too much had happened to allow the Court credibly to deny economic interdependence. n291

- - - - -Footnotes- - - - -

n291 See, e.g., HOVENKAMP, supra note 101, at 356 ("The time seemed ready for much more regulatory theory of political economy and of state policy toward business.").

- - - - -End Footnotes- - - - -

Justice Sutherland's bitter dissent only strengthens the point. n292 The dissent begins with a point with which the translator fully agrees: that the meaning of the Constitution does not change through time, even though its applications may change. n293 But the dissent then proceeds to ignore this very distinction [*459] between meaning and application by equating the intended application in the original context with the Constitution's meaning. As the dissent rightly notes, the very purpose of the Contracts Clause was to avoid legislation of precisely this kind -- debtors' relief legislation. But from this premise, the dissent concludes that such legislation must be, if anything is, proscribed by the Clause. n294 No such conclusion need follow. If a statute forbids a hospital's employment of people with "highly contagious diseases," even if it was passed in a context where AIDS was considered a highly contagious disease, and even if it was passed for the purpose of proscribing the employment of people with AIDS, once we learn that AIDS is not highly contagious, it would change the meaning of the statute to apply it in the same way. For if it were applied to AIDS, it would be applied to someone "without a highly contagious disease." n295

- - - - -Footnotes- - - - -

n292 Blaisdell, 290 U.S. at 448 (Sutherland, J., dissenting).

n293 Id. at 449.

n294 Id. at 453-66.

n295 According to Brian Bix, Michael Moore advances a similar proposition in his theory of metaphysical realism. Brian Bix, Michael Moore's Realist Approach to Law, 140 U. PA. L. REV. 1293, 1300 (1992) (discussing Michael S. Moore, A Natural Law Theory of Interpretation, 58 S. CAL. L. REV. 277 (1985)). Moore uses death to illustrate that "any attempt to apply an old term in new circumstances must be characterized as a change in that term's meaning." Id. (citing Moore, supra, at 293). Moore goes on to argue for a statutory interpretive approach that incorporates both linguistic and contextual change. Id. at 1301 (citing Moore, supra, at 293-94, 297-300, 308-09, 322-28, 382).

- - - - -End Footnotes- - - - -

In the same way, even if the Founders meant to proscribe debtors' relief legislation because private contracts were not then affected by a public interest, the Court could well conclude that such proscription remains only so long as such contracts in fact remain unaffected by a public interest. But this is just what the Depression throws into doubt: For after the Depression, the Court had to recognize that it was at least plausible, as state legislatures claimed, that the cost of economic failure was borne more fully by the community as a whole, and that therefore some contracts relating to that failure were affected with a public interest even though before they were not. n296 If so, permitting their regulation now would not be a change of its meaning then. This was Justice Cardozo's point, made in an unpublished concurring opinion:

To hold [the law constitutional] may be inconsistent with things that men said in 1787 when expounding to compatriots the newly written constitution. They did not see the changes in the relation between states and nation or in the play of social forces that lay hidden in the womb of time. It may be inconsistent with things that they believed or took for granted. Their beliefs to be

significant must be adjusted to the world they knew. It is not in my judgment inconsistent with what they would say today, nor with what today they would believe, if they were called upon to interpret . . . the constitution that they framed for the needs of an expanding future. n297

-Footnotes-

n296 For evidence that Blaisdell and Nebbia were understood at the time as a signal that the Court acknowledged this increased economic integration, see IRONS, supra note 220, at 38-39.

n297 Benjamin N. Cardozo, Unpublished Concurrence in Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934), excerpted in PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 349, 351 (3d ed. 1992).

-End Footnotes-

It is consistent, Justice Cardozo argues, with the constraints of fidelity to allow regulation now where originally the Framers would not, because of a [*460] change in the significance of the activity regulated and in the integration of the economy within which the activity occurs.

The same account of the death of substantive due process (at least for economic rights) is revealed more explicitly in another of the Court's transformative cases, West Coast Hotel Corp. v. Parrish. n298 At issue in Parrish was Washington State's minimum wage law for women, which again would likely have been struck under the Court's earlier case of Adkins v. Children's Hospital. n299 Adkins, like Blaisdell, rested on the presupposition that these were contracts not affected with a public interest. But again, the Court concluded that the effect of these contracts was not confined to private interests but reached a level of public interest -- not merely out of public concern for the well-being of low-wage workers, but also out of fear that those receiving subminimum wage would become a burden on the state. As the Court explained:

There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless [sic] against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. . . . The community is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest. n300

-Footnotes-

n298 300 U.S. 379 (1937). *Nebbia v. New York*, 291 U.S. 502 (1934), decided the same year as *Blaisdell*, was another major step in the transformation. See *IRONS*, supra note 220, at 142.

n299 261 U.S. 525, 554 (1923) (striking down a minimum wage law for women as an impairment of the freedom to contract).

n300 *Parrish*, 300 U.S. at 399-400.

- - - - -End Footnotes- - - - -

Again, the Court is not pointing to the "unparalleled" political action that occurred during the recent Depression, demanding in some relevant manner that the Court change its tune. Rather than amendment, the Court points to the facts learned during the recent Depression, to facts the court can take "judicial notice" of, to facts that reveal the public interest affected by this legislation, which under traditional police power notions preserves the state power to regulate. n301 Once again, it is not amendment that is required to justify this changed [*461] reading, it is the recognition of a different economic significance to the facts, whether different because previously mistakenly conceived, or because the world itself had become different.

- - - - -Footnotes- - - - -

n301 Compare Justice Stone in a later dissent: In the years which have intervened since the *Adkins* case we have had opportunity to learn that a wage is not always the resultant of free bargaining between employers and employees; that it may be one forced upon employees by their economic necessities and upon employers by the most ruthless of their competitors. We have had opportunity to perceive more clearly that a wage insufficient to support the worker does not visit its consequences upon him alone; that it may affect profoundly the entire economic structure of society and . . . that it casts on every taxpayer, and on government itself, the burden of solving the problems of poverty, subsistence, health, and morals of large numbers in the community. *Moorehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 639 (1936) (Stone, J., dissenting), overruled in part by *Olsen v. Nebraska*, 313 U.S. 236, 246-47 (1940).

- - - - -End Footnotes- - - - -

Both *Parrish* and *Blaisdell* suggest an understanding of the death of substantive due process, at least with respect to economic rights, different from that suggested by Ackerman's structural amendment and closer to the understanding suggested by the model of fact translation. The earlier view depended upon a credible claim that these economic institutions were actually independent. The Depression made it plausible that aspects of the economy previously thought independent were actually dependent. What justified the states' increased regulation was that it became plausible to believe a newly recognized fact of an increasingly interdependent economic system. Once this fact could plausibly be said to have changed, so too did the conclusion that the state cannot regulate these contracts change, and so too then the readings that forbade state regulation of this economic activity.

This, then, is the first part of an argument from translation justifying the Court's changed readings following the New Deal. The critical move lies in the contestation of the governing paradigm of laissez-faire independence: (1) Facts change -- the amount of economic activity, the interrelationships among this activity, and the effect of an unregulated economy on minimal levels of "human welfare" -- and (2) the continued viability of a doctrine premised upon those facts is drawn into question. Whether because one believes that the Depression and emerging economics proved that the economy was interdependent in a way that before it was thought not to be, or because one believes the Depression and emerging economics made plausible progressives' claims that the economy was interdependent in a way that before it was thought not to be, government would get more room to regulate. n302

- - - - -Footnotes- - - - -

n302 It is worthwhile to note that these two factors alone seem to have been considered sufficient justification by Justices O'Connor, Kennedy, and Souter in their joint opinion in Planned Parenthood v. Casey, 112 S. Ct. 2791 (1991) (joint opinion). As the three justices described the Lochner-to-Parrish shift: [Since Lochner], the Depression had come and, with it, the lesson that seemed unmistakable to most people by 1937, that the interpretation of contractual freedom protected in Adkins rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare. . . . The facts upon which the earlier case had premised a constitutional resolution of social controversy had proved to be untrue, and history's demonstration of their untruth not only justified but required the new choice of constitutional principle that West Coast Hotel announced. Id. at 2812 (citations omitted) (emphasis added). One should note (confess?), however, that if factual contestability justified the Court's doctrinal shift in Parrish, then Roe, too, could fall victim to changes in the underlying facts. See Roe v. Wade, 410 U.S. 113 (1973).

- - - - -End Footnotes- - - - -

2. Changes: judicial authority.

Standing alone, however, fact translation justifies frighteningly little. Even if the vastly integrated economy brought the whole of economic and social life within the reach of governmental regulation, these changes would not yet justify the Court's ultimate and extreme deference to the political branches after 1937. For to allow the regulation of all social and economic activity would be [*462] to establish a government fundamentally different from the government established by the Founders.

How can the Court's deference be reconciled with ideals of fidelity? How can this fundamentally different result be consistent with principles of fealty to the Founders' design?

To reckon with this abdication requires an account quite different from the sort offered so far. Like the Erie effect, the core of this account is a change in law's understanding of itself -- a change in the dominant view of what courts were doing when limiting regulation within the social and economic spheres. This change ended the judiciary's ability to control or even identify the line between permissible and impermissible state and federal regulation, and hence forced the Court to retreat from its invasive limitations on government's

power. As in Erie, self-consciousness about what courts were now (seen to be) doing undermined the ability of courts to continue what they had been doing before.

Background. In describing the predicate of the change remarked in Erie, I outlined the development of what we can call nineteenth century formalism or conceptualism. n303 This attitude or psychology of judging affected far more than the development of the common law. Indeed, what this "phonograph" theory of judicial construction -- where "the judge is merely an oral medium through which the preexisting legal principles are given expression" n304 -- meant was that judging could proceed as if the judges were not themselves responsible for the political choices inherent in their product. This was no mere accident. As described by Nelson,

What the judges whom subsequent scholars have called formalists had in common was not any single well-developed style or method, but an aversion to explicit analysis of policy. It is, of course, impossible to know whether any particular judge totally ignored issues of policy in reaching a decision in any given case. But even if they did take policy considerations into account, most late nineteenth-century judges did "not like to discuss questions of policy," for "views of policy [were] taught by experience of the interests of life," and "those interests [were] fields of battle." Americans had just come from those fields and had no desire to return. Thus, most American judges sought to clothe their decisions in the language of formal "logical deduction" and to reason either from "general propositions" about the essential meaning of republicanism or from the immutable records of the English common law. They sought to make "legal reasoning seem like mathematics" and to convince themselves that if men differed over a question of law, "it meant simply that one side or the other were not doing their sums right, and if they would take more trouble, agreement would inevitably come." n305

- - - - -Footnotes- - - - -

n303 See notes 158-159 supra and accompanying text; see also Hovenkamp, supra note 130, at 626 ("In this context [formalism] refers to a legal system enamored with the internal consistency of its own rules and generally unconcerned about their effect. In short, legal formalism is law divorced from policymaking.") (footnotes omitted).

n304 Cushman, supra note 277, at 744 (discussing Morris R. Cohen, The Process of Judicial Legislation, 48 AM. L. REV. 161, 164 (setting out Cohen's "phonograph" theory)).

n305 NELSON, supra note 153, at 144 (footnotes omitted).

- - - - -End Footnotes- - - - -

[*463] The language of the conceptualists or formalists helped construct the view that what the judges did was not politics, but law, and to the extent that the Court succeeded in establishing such a language, it succeeded in increasing its own power -- in particular, its power to resist progressive legislation. For the more a Court can speak formalistically -- which means both that a Court does speak formalistically and is permitted by the legal culture to speak formalistically -- the more activist the Court can be. n306

-Footnotes-

n306 Compare, for example, the activism possible under "free speech" jurisprudence with the passivism under "due process" jurisprudence. The difference between these two branches of constitutional law is simply that the former has an extremely well articulated set of formal rules that guide judges in carrying into effect 1st Amendment values, while the latter does not. Formalism here is empowering. Cf. Fredrick Schauer, Formalism, 97 YALE L.J. 509 (1988). The point is not limited to the American context. For an extraordinary account of pre-Realist legal thought alive and well in France, see ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE 93-116 (1992). Two points can be drawn from Stone's account. First, an extremely narrow legal academy allows for this fundamental law/politics division to be maintained, and second, to the extent it is maintained, it results in a much stronger constitutional court.

-End Footnotes-

As I described above, this view of the common law as the product of discovery rather than choice ultimately collapsed. And that very same skepticism about the common law was to have the very same effect on the activism of the pre-New Deal Court. n307 Just as the Court could no longer be seen to be "finding" the common law, courts could no longer be seen to be "discovering" neutral and inherent limitations on legislative action under the Due Process and Commerce Clauses of the federal Constitution. n308 As with the common law, so too here the act of judging came to appear more like will and less like judgment. Thus, for the same reason that the possibility of a general federal common law collapsed, so too did the possibility of a general judicial policing of legislative action collapse as well. After this skepticism took hold, judges could no longer speak as if they could stand neutral in these unavoidably contestable disputes.

-Footnotes-

n307 Sunstein has also made this link: By 1938, the time of Erie, both the jurisprudential premise and the political aspiration of Swift had been drawn into sharp question. During the depression, some states undertook to remedy the situation, but others did not; some revised the common law, but others did not. It seemed increasingly difficult to treat the common law as natural rather than as a conspicuous set of social choices. . . It is no accident that Erie repudiated Swift within two years of West Coast Hotel. SUNSTEIN, supra note 252, at 55.

n308 Nevertheless, it is interesting to note that the Court's de facto power to regulate still hangs upon its distance from overtly political questions. As Ariens remarks, The Court's power to invalidate state and federal legislative action has always been based on the assumption that the Court exercises judgment rather than will. Although the legislative and executive branches were intended to be political branches and were allowed, within their constitutional power, to impose their will in law, the judiciary was to stand athwart the political process, to exercise judgement in deciding cases, and to ensure the supremacy of the Constitution.

Ariens, supra note 209, at 621.

-End Footnotes-

Yet while the Erie and New Deal changes brought the same effect, the substance of the change of each was different. We can track the substance of the New Deal change in two stages. The first is the failure of the nineteenth century formalist language to capture the reality it purported to regulate. The [*464] second is the absence of any substitute language that would succeed in regulating this reality without confronting the same Erie-effect problem -- without, that is, apparently resting on fundamentally political judgments. If -- and here is the Erie punchline -- no language could be found that could escape this appearance of a political nature, then there was no way for federal courts to continue their policing of legislative power. n309 If policing legislative power appeared fundamentally political, then federal courts would have to leave that policing to political bodies.

-Footnotes-

n309 The political nature of judging is not, of course, unique to the American system. For a discussion of the "revolt against formalism" in the United States and Europe, see MAURO CAPPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE 9-10 (1989). As Cappelletti argues: Needless to say, all of these revolts thus led to the discovery that the role of the judge is in fact much more difficult and complex, and that judges are much more accountable for their activities than traditional doctrines had suggested. Choice means discretion, even though not necessarily arbitrariness; it means evaluating and balancing; it means giving consideration to the choice's practical and moral results; and it means employment of not only the arguments of abstract logic, but those of economics and politics, ethics, sociology, and psychology. Id. at 10.

-End Footnotes-

Initial failures of fit. The first act in this two-step drama is a failure we have already reviewed: It is the failure of the nineteenth century categories of legal thought to track the economic reality that they were said to reflect. As the economic substructure became increasingly complex, the formal and implied categories defining the limits on Congress' and the states' power failed to reflect the economic reality that they purported to describe. As Justice Stone said, describing the Court's "direct/indirect" test under the Dormant Commerce Clause, such terms were "labels to describe a result rather than any trustworthy formula by which it is reached." n310 Although such limitations were originally designed to constrain the scope of legislative power by tracking plausible economic differences, by the late 1930s they offered little more than an empty shell, devoid of a link to economic reality.

-Footnotes-

n310 Di Santo v. Pennsylvania, 273 U.S. 34, 44 (1927) (Stone, J. dissenting). Justice Stone also complained that this "traditional test of the limit of state action . . . [was] too mechanical, too uncertain in its application, and too remote from actualities to be of value." Id.

-End Footnotes-

The failure was most dramatic in the Commerce Clause cases. As I have described above, the Court's technique for limiting Congress' power was to find formal limitations on the power-granting clauses. n311 Against these formal limits, the New Deal lawyers tried to shift the focus to the economic effect, and thereby show the Court that its language failed to describe the reality it purported to regulate. n312 In other areas, the Court showed some degree of realism -- early on in Muller, and then in Blaisdell, Nebbia, and finally in Parrish, [*465] indicating its willingness, at least in areas of substantive due process, to look beyond formal categories of public interest to see whether legislatures indeed had a plausible basis that would justify regulation. To then-Professor Frankfurter, the Muller case was "epoch-making" -- like the cases following it, signaling "a shift in the point of emphasis, a modification of the factors that seem relevant, a different statement of the issues involved, and a difference in the techniques by which they are to be solved." n313

-Footnotes-

n311 See notes 263-265 supra and accompanying text.

n312 This effort was not limited to economic issues. As Cushman notes, Perhaps the most potent cause [of courts' assumption of the role of expert] was the influence of a little group of people who combined accurate legal knowledge with an insight into modern social conditions and who conceived the idea of presenting to the court the actual evidence to prove that legislative regulation of social and economic conditions was vitally necessary and for that reason constitutionally legitimate. Cushman, supra note 277, at 754. According to Cushman, the group's most prominent members were Justices Brandeis and Frankfurter before their appointments to the Court and Josephine Goldmark, publication secretary of the National Consumers' League. Id.

n313 Felix Frankfurter, Hours of Labor and Realism in Constitutional Law, 29 HARV. L. REV. 353, 362 (1916).

-End Footnotes-

The New Dealers therefore pushed economic arguments -- arguing the facts about the interstate effect of the economic activities that they were regulating. n314 Whether because of the special emergency faced by the nation just after the Depression, n315 or simply because of the facts demonstrating an interstate effect, n316 the New Dealers tried get the Court to see that the facts did not fit the formalists' account. The facts showed that much more than before was effectively interstate commerce. If so, then on the New Dealers' side stood an apparently unbeatable argument: "The Constitution does not provide that Congress may regulate commerce among the several states only when such commerce is ten percent of the whole, but not when it becomes ninety per cent." n317

-Footnotes-

n314 See, e.g., IRONS, supra note 220, at 70. In the "Hot Oil" case, Panama Refining Co. v. Ryan, 293 U.S. 388 (1935), a brief of 195 pages, with a 200-page appendix, told the story of the

petroleum industry. The brief was voluminously documented to prove that the industry was interstate and that the quantity of oil produced determined the amount moved in interstate commerce . . . propositions which would be familiar to any freshman in economics but which, it was assumed, had to be proved to the Supreme Court.

Stern, supra note 220, at 657.

n315 The "emergency doctrine" grew out of World War I cases, such as Wilson v. New, 243 U.S. 332, 348 (1917) (noting that "although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the assertion of a living power already enjoyed"). See IRONS, supra note 220, at 26, 52-53, 115.

n316 See IRONS, supra note 220, at 91 (describing government lawyers' use of economics to demonstrate an interstate effect in the Schechter case).

n317 Stern, supra note 220 at, 1365. For a similar view from the turn of the century, see FRANK J. GOODNOW, SOCIAL REFORM AND THE CONSTITUTION 36, 114-16 (1911).

- - - - -End Footnotes- - - - -

But the argument was not unbeatable. No doubt the Old Court (by which I mean those who resisted the New Dealers' arguments) saw the failure of its own language -- it could not help but be (rhetorically) embarrassed when it claimed that employment within the Carter Coal Company, a major producer of coal, still did not affect interstate commerce. n318 What drove the Old Court to its resistance was not blindness, but rather its focus on a second dimension of its interpretive responsibility.

- - - - -Footnotes- - - - -

n318 Carter v. Carter Coal Co., 298 U.S. 238 (1936).

- - - - -End Footnotes- - - - -

In the Old Court's view, the Constitution embraced two competing goals: n319 one to empower the federal government over a range of national economic [*466] activity; the other to reserve (in the language of the Tenth Amendment) to the states a domain over some kinds of economic activity. The New Dealers acknowledged only one. And whether correct as an original matter or not, what drove the Old Court was its fidelity to this second goal. Thus it felt bound to construct a language that could divide federal from state power, and could preserve for the states a domain of regulatory authority. And so construct it did. n320 No doubt the lines were grounded in economic fictions. But in the Old Court's view, there were fictions on both sides of this argument. If it was fiction that "manufacturing" was intrastate commerce alone, it was no less fiction that the Framers constructed a division of power between the states and federal government that would leave to the states no residual exclusive legislative authority. The choice, in the Old Court's view, was not between fiction and reality, but between two fictions, and the Old Court chose the fiction it believed would better respect the design of the Framers. n321

- - - - -Footnotes- - - - -

n319 In this regard it is useful to remember that the one dimension along which the conservatives prevailed, and which has not been drawn into doubt since, is the corporatist, central planning elements of the New Deal. See IRONS, supra note 220, at 19-23; Barry D. Karl, The Constitution and Central Planning: The Third New Deal Revisited, 1988 SUP. CT. REV. 163, 183-95. The Supreme Court's resistance to corporatism was a crucial dimension of its rejection of the NIRA in Schechter. Id. at 197. In fact, many associated American corporatism with communism and fascism and saw the Supreme Court as a shield against these movements. ARNOLD, supra note 6, at 118. The strength of the Court's resistance is measured by an extraordinary incident recounted by Irons:

Before [administration lawyer] Tommy Corcoran could depart, a Supreme Court page tapped him on the shoulder and said that Justice Brandeis would like to see him in the Justices' robing room. Brandeis wanted Corcoran to convey a message to the White House: "This is the end of this business of centralization, and I want you to go back and tell the President that we're not going to let this government centralize everything. It's come to an end." IRONS, supra note 220, at 104.

n320 That the Court was constructing a formal language that would help it limit congressional power in the name of fidelity to the original design should be plain from a comparison of the language of the Marshall opinions, Gibbons and McCulloch, with the limitations imposed, for example, in United States v. E.C. Knight Co., 156 U.S. 1, 12-16 (1895) (holding that manufacturing is not commerce and thus is not regulable by Congress). Even if manufacturing was not commerce, the Knight Court gives no good reason why manufacturing could not be regulated under the Necessary and Proper Clause, as McCulloch would plainly have allowed.

n321 See, e.g., Carter Coal, 298 U.S. at 251-52 (emphasizing "the insistence of the Framers of the Constitution upon the maintenance of the principle of the duality of government"); Stern, supra note 220, at 1344 (discussing the dualist view of the Framers).

- - - - -End Footnotes- - - - -

Final failures: of neoformalism. To the political and legal culture, however, in the face of ever-increasing devastation caused by the Depression, the Court's fictions came to seem more and more grotesque. n322 Some therefore tried their hands at crafting better categories to divide federal from state regulation. Justice Cardozo is the best example of this (brief) neoformalist push. In response to the failure of the nineteenth century categories, he sketched what he believed would be a workable formula for controlling congressional power. n323 As Judge Posner describes his view,

Every economic activity, however local, affects interstate commerce because of the chain of substitutions that connects all activities in a national economy. But Cardozo recognized that to infer from this that Congress could regulate all [*467] local activity would wreck the balance between state and federal regulatory power that the Constitution had struck in empowering Congress to regulate interstate and foreign -- not all -- commerce. He thought a line should be drawn that would, however crudely, balance the competing values of nationalism and localism. n324

- - - - -Footnotes- - - - -

n322 Cf. Bikle, supra note 43, at 12 ("[A] substantial part of the criticism which [Lochner] aroused was due to the Court's undertaking to decide for the country the controlling questions of fact on the basis of a priori reasoning."); Frankfurter, supra note 313, at 370 (noting that with respect to Lochner, "common understanding has ceased to be the reliance in matters calling for essentially scientific determination").

n323 Carter Coal, 298 U.S. at 327-28 (Cardozo, J., concurring in part and dissenting in part); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring).

n324 RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 122 (1990).

- - - - -End Footnotes- - - - -

But Justice Cardozo's neoformalist project had a very short life, and its failure makes plain the Erie-effect nature of the second step of the New Deal. Two factors account for its failure.

First, unlike nineteenth century formalism, under which the Court had to determine whether something was "commerce" or not, or whether regulation was "direct" or not, or whether an effect was "intended" or not -- both judgments of the sort courts make all the time -- neoformalism required a kind of judgment beyond the ordinary ken of the courts. Were the Court to continue its federalism vigilance along the lines suggested by Justice Cardozo, it would have had to make judgments about actual economic effects. But just how, within the confines of Article III review, these judgments could be made for a whole economy was not very clear. n325 These were judges, not economists, and judges fifty years before Dworkin's Hercules. n326 They lacked the capacity, in part, to police any line between federal and state regulation, based solely on its economic effect.

- - - - -Footnotes- - - - -

n325 There is a close analogy here to what David Strauss describes as the problem of "structuralism" in 1st Amendment law. Strauss identifies two approaches to free expression, one based on the rights of the speaker, the other more structural or systemic, based "not on the value of the speech to the speaker, but on the value of the speech to the overall system of free expression." David A. Strauss, Rights and the System of Freedom of Expression, 1993 U. CHI. LEGAL F. 197, 198. Current 1st Amendment doctrine, Strauss argues, is well suited to consider the former but not the latter, since to advance the latter requires a kind of strategic judgment that individual cases cannot easily provide. Id. at 207. The dominance of theories such as marginalism pose similar problems for regulation of the economic sphere. The optimal economic regulation is a strategic one, not well captured by individual-rights-based institutions.

n326 Hercules lives in DWORKIN, supra note 51 passim.

- - - - -End Footnotes- - - - -

Capacity limitations are not enough, however, to explain the retreat of the New Deal Court: From the fact that the Court could not make power-limiting

judgments well, it does not follow that the court should not make power-limiting judgments at all. Indeed, during the early 1930s, a number of proposals were made to shift some part of the factfinding, or legislative factfinding, function required for judicial review to a body of experts who could make the economic judgments necessary for neoformalism to function. n327

-Footnotes-

n327 See Bikle, supra note 43, at 12.

-End Footnotes-

But this possibility simply raises the second and more fundamental reason why neoformalism would fail. A body of experts would not have worked, or more precisely, could not have worked. It could not have worked for reasons tied to what I consider to be the essence of the New Deal problem -- that is, the unavoidable perception that judgments, whether of experts or judges, limiting legislative power would be perceived to be "political." To see why is to understand the final step in the argument for understanding the New Deal as translation.

[*468] More than mere formalism, the pre-New Deal way of talking about law and the limitations the Constitution placed upon the power of government depended upon a certain set of taken-for-granted notions about the proper role of government. These we can call the ideals of noninterventionism -- "rugged individualism" and laissez-faire. The pre-New Deal way of talking depended upon these not in some ordered or logical manner: Judges didn't work at each step to link their foreground judgments to first principles located somewhere in the background. Instead, this way of talking depended upon these ideals just as any background uncontested discourse grounds contested discourses in the foreground -- as (practically) invisible constraints on what could be said. To an older generation, these ideas formed the structure within which the limitations of the Constitution were found.

By the mid-1930s, these structures of thought were to collapse, falling victim to an obvious shock, the Depression. n328 Quite apart from its economic effects, the Depression marked "one of the greatest intellectual and moral upheavals in western history." n329 For noninterventionists in particular, its magnitude and duration simply could not be explained. If noninterventionism was correct, then devastation like the Depression just could not happen. When it did happen, something in the pre-New Deal conceptual scheme had to give. We could compare the effect to the effect on young, upwardly mobile communists (Yumcies?) in Khrushchev's Soviet Union learning of their country's murderous Stalinist past. n330 In both cases, elites were confronted with facts that could not be true if what they had so far taken for granted was true. But the facts were impossible to ignore, and their effect was to dislodge ideas that had been taken for granted. "With amazing speed," the dominance of the ideals of noninterventionism disappeared. n331

-Footnotes-

n328 As described by Robert Stern, [A]t least 13 million persons were unemployed; the average wages of those still employed in 25 selected industries had dropped to \$ 16.13 per week in February 1933; wages received in mining, manufacturing, construction, and

transportation had declined from 17 to 6.8 billion dollars. Prices had fallen 37 per cent and industrial production had been cut almost in half. Insolvencies were mounting and the banks were closed. The amount of revenue freight carried by Class I railroads, a fair measure of the quantity of interstate commerce, had declined 51 per cent.

Stern, supra note 285, at 653 (footnotes omitted). See generally SCHREIBER ET AL., supra note 268, at 353-63 (describing the impact of the Depression); SCHWARZ, supra note 180, at 70 (same).

n329 Calvin Woodard, Reality and Social Reform: The Transition from Laissez-Faire to the Welfare State, 72 YALE L.J. 286, 288 (1962), quoted in Benedict, supra note 116, at 296.

A full account of this transformation could plausibly stretch from the beginning of the industrial revolution, through the "muckraking" of the turn of the century, see DAVID MARK CHALMERS, THE MUCKRAKER YEARS (1974), and the ideological effects of the First World War.

n330 See HEDRICK SMITH, THE NEW RUSSIANS 54-56 (1990).

n331 ARNOLD, supra note 6, at 265.

- - - - -End Footnotes- - - - -

This is not to say that another uncontested discourse took its place. The shift was not from one uncontested discourse to another uncontested discourse. It was instead a shift from an uncontested discourse to one that was now fundamentally contested. A whole way of thinking had been shaken by the impact of these events, and the result was a form of intellectual anarchy. Whereas under the old way of speaking, the Court's practice seemed to follow plainly or invisibly [*469] from the words of the Constitution, after the extent of the Depression was realized, nothing seemed to follow one way or the other. The point is captured well by Thurman Arnold, writing in the midst of this change.

Twenty years ago no one worried about socialism, because it was thought to be impossible; just as water running up hill is impossible. Automatic economic laws prevented it. Today we see before us both fascism and communism in actual operation with their governments growing in power. Economic law no longer prevents such types of control. The only bulwark against change is the Constitution. But with the disappearance of the economic certainties, the actual words of the Constitution no longer appear like a bulwark. n332

- - - - -Footnotes- - - - -

n332 Id. at 231.

- - - - -End Footnotes- - - - -

The effect of this intellectual anarchy was the first step of the Erie effect, as applied to the New Deal. Before the Depression, economic certainties could function invisibly to support a discourse limiting governmental power. Given these certainties, this discourse made sense. But once certainties were dislodged, limitations that before followed naturally now appeared contested and fundamentally political. This changing background discourse, rendering

political judgments that before did not seem political, in turn led to the second step of the Erie effect: If these judgments about the constitutional limits on legislative power were now seen to be political, or essentially political, given the theoretical anarchy of the time, then they would also appear to be judgments that should not be made by a Court. As their nature changed, proper institutional allocation changed as well. The sense is captured well in the sentiments echoed much later by Justice Frankfurter in *New York v. United States*:

Any implied limitation upon the supremacy of the federal power to [tax states] brings fiscal and political factors into play. The problem cannot escape issues that do not lend themselves to judgment by criteria and methods of reasoning that are within the professional training and special competence of judges. Indeed the claim . . . raises questions not wholly unlike provisions of the Constitution, such as the [Republican Guarantee Clause], which this Court has deemed not within its duty to adjudicate. n333

-Footnotes-

n333 326 U.S. 572, 581-82 (1946). Note (for good reasons beyond the scope of this article) that the Court treated individual rights differently. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

-End Footnotes-

After the Depression, no one -- and especially not a court -- could rely upon limitations resting upon the certainties of noninterventionism to resist efforts to aid those now in need.

In this way, then, did the New Deal revolution turn on an Erie-effect shift in a background uncontested discourse. The transformation in this discourse -- from uncontested to contested -- tightened the constraints within which courts could operate. Uncertainty meant more was open to legislative judgment. And more being open to judgment meant granting the political branches more deference within fundamentally contested contexts. Thus the effect of this second [*470] step of the Erie effect was to loosen the constitutional constraints on federal action. n334

-Footnotes-

n334 In an important analysis of the emergence of the preemption doctrine, however, Stephen Gardbaum points out that the loosening of the constitutional constraints was not unidirectional. Indeed, at just the time the Court was expanding the Commerce Power, it was also, through the preemption doctrine, imposing something like a clear statement rule on Congress' exercise of the power. Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 801-07 (1994). Thus, Gardbaum argues, during the period when the Commerce Power was restricted, preemption was relatively "automatic." *Id.* at 802. But when the Court liberalized the Commerce Power, it simultaneously imposed an intent requirement in the federal preemption test. *Id.* at 807. This technique for restraining federal power is a precursor to Justice O'Connor's own method of protecting federalism interests, see note 203 *supra*, and affords the Court a test it can apply without paying the political costs of drawing a line between intra- and interstate commerce.

- - - - -End Footnotes- - - - -

Ackerman too believes the constraints on government shifted in the New Deal period. But while I argue that the constraints were loosened because the presuppositional discourses were rendered political, Ackerman believes the constraints were "repudiated." n335 For him, repudiation is a political act. If there was a fundamental repudiation of laissez-faire, and if laissez-faire was fundamental to the now departed political age, then this repudiation must have risen to the level of a constitutional amendment. Thus must Ackerman search for the evidence of a constitutional amendment to justify laissez-faire's rejection.

- - - - -Footnotes- - - - -

n335 ACKERMAN, WE THE PEOPLE, supra note 24, at 66.

- - - - -End Footnotes- - - - -

Ackerman is driven to this kind of solution because within his account, the only constraint on the interpreter is the constraint of positive law. Thus he needs to conclude that the Lochner-era cases differed from modern decisions largely because "the Constitution they were interpreting was importantly different from the transformed Constitution left to us by the New Deal." n336 Thus, he implies, if constraints properly changed, it must be because positive law properly changed.

- - - - -Footnotes- - - - -

n336 Id.

- - - - -End Footnotes- - - - -

But it has been the point of this article to suggest just how constraints on legal discourse come both from positive law and from what is taken for granted, uncontested, hegemonic, or in short, treated as true in a particular legal culture. If these latter constraints change, then so too may the range of permissible readings of fidelity change. Thus could we look either to positive law or to these uncontested discourses to locate the source of the New Deal change.

It has been my suggestion that we look beyond positive law to locate the source of the changes that justify the New Deal transformation. For the force of laissez-faire within the pre-New Deal legal order came not directly from its presence in some positive command of the Constitution. Its power came from its place within an uncontested background of political and social discourse. What changed its effect, then, was not its repudiation, in the sense that a political party is voted out of office. What changed its effect was its repudiation as part of a dominant uncontested discourse. And while a dominant, taken-for-granted discourse can in principle be changed by a self-conscious political act, we need not locate such a self-conscious act to understand the demise of [*471] noninterventionism. What destroyed the dominance of laissez-faire was not an American Bolshevik Party; what destroyed its dominance was the Depression.

Once the Depression dislodged old ways of thinking, the Court had no choice but to yield to the legislative process a wider ranger of deference. It had no choice since the foundation that once supported the Court's attempt to constrain legislative action had been, for the time, damaged. In the intellectual anarchy of the post-Depression era, any constraint that the Court now imposed would simply appear to reflect the independent political will of the Court. Gone was the invisible support of an uncontested background of thought, and with it, the support necessary for the Court to resist the actions of the democratic branches.

Ackerman does not disagree about the nature of these background changes; he just ignores their effect. As he explained in a 1973 article, the Old Court's resistance to the New Deal was "solidly rooted" in dominant patterns of legal thought. n337 Central to these patterns of thought were principles of "laissez-faire philosophy . . . [whose] clear articulation would serve as a bulwark against the forces for change" n338 And it was "[b]ecause of this legal culture [that] judges could, without a sense of arbitrariness of impropriety, strike down," for example, "a minimum-wage law on the ground that it deprived the women of Washington, D.C. of the right to work for less than \$ 16.50 a week." n339 But "[t]he Depression . . . discredited laissez-faire individualism" and "no alternative social theory had emerged" n340 Thus were the foundations for this "bulwark" against change eroded, yet this erosion is absent from Ackerman's positive account. It is central to my own.

- - - - -Footnotes- - - - -

n337 Bruce A. Ackerman, Law and the Modern Mind by Jerome Frank, DAEDALUS, Winter 1973, at 119, 121.

n338 Id. at 120.

n339 Id. at 121.

n340 Id. at 125.

- - - - -End Footnotes- - - - -

The argument from translation to support the New Deal change, then, comes to this: Through an application of fact translation, the increased economic and social integration justifies an increased scope for federal and state power. But on its face, this increase appears to have gone too far, at least relative to the balance struck by the Framers' design. To the extent that these increases have gone too far, it becomes necessary to ask what justifies the Court's deference in the face of this expansion. It is here that the Erie effect has play. For what explains and, I suggest, justifies the Court's unwillingness to intervene to limit the democratic branches is a constraint on what the Court, in context, can credibly say. To understand these constraints, one must look to the particular structure of discourse within which the Court must speak. Where this discourse is fundamentally contested, there will be little that a court can say to resist the will of democratic actors. Where it is not fundamentally contested, there will be more that a court can say to resist a democratic will. What is important, however, is that whether this discourse is contested or not is itself changing and contingent. Judicial deference, then, is a proper response to a [*472] context within which the grounds of activism are no longer taken for granted. Such was the premise, I

have argued, for the Court's New Deal retreat.

CONCLUSION

Modern constitutional law cannot escape the fact that the Constitution appeared to change in 1937, yet no formal justification for that change is apparent. Restorationists claim the change was a return to lost principle; conservatives complain it was itself a loss of principle; Ackerman proclaims that we should nonetheless understand the substance of the democratic action from that period as functionally equivalent to an amendment.

I have argued that we have been ignoring a central piece to this interpretive puzzle. We have focused too much on text and, what is in a crucial way similar, the contested context, and ignored the distinctive effect of the context more background -- what I have called the context taken for granted, or uncontested. This uncontested context has a critical effect on interpretation; when it changes, it has an effect on the range of readings of fealty in an unchanged text. An account of fidelity must then reckon with these changes in this uncontested context, if it is to preserve the meaning of the text read.

It has been my argument that such an account explains some of the most significant changes in twentieth century constitutionalism. In particular, I suggest, it explains much of the change of the New Deal without appeal to something new that "We the People" have said -- that is, without Ackerman's amendment. Addressed to the conventional conundrum surrounding the New Deal shift, Ackerman's amendment may be ingenious, compelling, and even profound. But for the fidelitist, I suggest, it is also unnecessary.