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ARTICLE

THE CONSTITUTIONAL CONVENTION OF 1937: THE ORIGINAL MEANING OF THE NEW JURISPRUDENTIAL DEAL

*Kurt T. Lash**

INTRODUCTION

The story of the New Deal "switch in time that saved nine" is a familiar tale. Prior to 1937, the Supreme Court had broadly rejected both federal and state attempts to regulate the economy and provide for the welfare of workers. Federal legislation was struck down as beyond the federal commerce power.[1] State welfare regulations were invalidated under the doctrine of liberty of contract.[2] Tension between the Court and the political branches reached a breaking point during the Depression when the Court struck down critical aspects of Roosevelt's New Deal.[3] Finally, in 1937, a single justice changed his vote and a new majority of the Supreme Court initiated the modern tradition of judicial deference to economic and social welfare legislation.[4] Some aspects of the story are still debated,

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1. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

2. *See* Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936); Adkins v. Children's Hosp., 261 U.S. 525 (1923); Lochner v. New York, 198 U.S. 45 (1905).

3. On a single day in 1935 the Court struck down the Frazier-Lemke Act which provided mortgage relief to bankrupt farmers, denied the President power to replace members of independent regulatory agencies, and invalidated the National Industrial Recovery Act. *See* Louisville Bank v. Radford, 295 U.S. 555 (1935); Humphrey's Ex'r v. United States, 295 U.S. 602 (1935); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). The next year, the Court struck down the Agricultural Adjustment Act, the National Bituminous Coal Act, and New York's minimum wage statute. *See* United States v. Butler, 297 U.S. 1 (1936); Carter v. Carter Coal Co., 298 U.S. 238 (1936); Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936).

4. *See* W. Coast Hotel v. Parrish, 300 U.S. 379 (1937) (upholding state minimum wage law for women, and overruling *Adkins*); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

including whether the New Deal was a "constitutional moment"[5] and whether the Court's shift in doctrine was triggered by external political events or an internal evolution of doctrine.[6] Both the traditional story and the debates, however, focus on the pre-1937 doctrines which stood in the way of the New Deal and the abandonment of those doctrines (the switch in time) which allowed the New Deal to proceed.[7] The focus, in other words, is on the political agenda of Franklin Delano Roosevelt.

The New Deal Revolution, however, extended well beyond the political goals of the New Deal Democrats. The same Court which abandoned liberty of contract also launched the second most significant doctrinal innovation of the twentieth century: selective "incorporation" of the Bill of Rights into the Fourteenth Amendment.[8] Although the *Lochner* Court protected freedom of

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5. *Compare* Bruce Ackerman, We the People: Foundations (1991) [hereinafter Ackerman, Foundations] *and* Bruce Ackerman, We the People: Transformations (1998) [hereinafter Ackerman, Transformations] (arguing that the New Deal was a legitimate constitutional revolution) *with* Barry Cushman, Rethinking the New Deal Court: The Structure of a Constitutional Revolution (1998) (arguing that the New Deal revolution was more an evolutionary development of doctrine).

6. Externalists believe politics forced the change—that it was in fact a political decision, rather than a matter of constitutional interpretation. *See, e.g.*, Laura Kalman, The Strange Career of Legal Liberalism (1996); William E. Leuchtenburg, The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt (1995) [hereinafter Leuchtenburg, Supreme Court Reborn]. Internalists, on the other hand, argue the shift was jurisprudential and occurred gradually over time, reflecting an evolving understanding of the Constitution. *See, e.g.*, Cushman, *supra* note 5, at 4-5; Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. Pa. L. Rev. 1891 (1994). Internalist Barry Cushman points out the Court began as early as 1934 in *Nebbia v. New York* to abandon the public/private distinction which drove most of the commerce regulation jurisprudence (government may regulate only those businesses pressed with the public interest). *See* Cushman, *supra* note 5, at 154-55. Externalists, on the other hand, point out that *Nebbia* deployed the general framework of *Lochner* which required heightened judicial scrutiny, and therefore special justification, for government regulation of the economy. This approach was not abandoned until 1937. *See* Ackerman, Transformations, *supra* note 5, at 359-82. For a general discussion of the internalist/externalist debate, see Symposium, *Moments of Change: Transformation in American Constitutionalism*, 108 Yale L.J. 1917 (1999) [hereinafter Symposium, *Moments of Change*], which presents a number of articles representing both the externalist and internalist perspectives on the New Deal.

7. Barry Cushman, for example, argues that the real revolution occurred in 1934 when the Court abandoned the public/private distinction in *Nebbia*—a move that would allow for much of the New Deal agenda. *See* Cushman, *supra* note 5, at 7, 154-55. Bruce Ackerman emphasizes the importance of Justice Roberts switching his vote in 1937 but argues that, even after 1937, Roosevelt's victory was tenuous and was not assured until the unanimous votes in *United States v. Darby* and *Wickard v. Filburn*. *See* Ackerman, Transformations, *supra* note 5, at 373; *see also* Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941). Both Cushman and Ackerman assume the central issue in the New Deal revolution involves the moment when it became clear the Court no longer would pose a serious threat to New Deal legislation.

8. Whether the Fourteenth Amendment originally was intended to incorporate

speech and other rights along with liberty of contract, that Court expressly rejected any necessary relationship between fundamental rights and the specific texts of the Bill of Rights. The Court spoke of "absorbing" texts of the Bill of Rights into the Fourteenth Amendment for the first time in 1937, the same year the Court abandoned liberty of contract.[9]

Other legal "revolutions" of the New Deal period seem even farther removed from the political context of the New Deal. In 1938, the Court on its own initiative reversed the doctrine of *Swift v. Tyson* and restored state autonomy over its own common law.[10] *Erie Railroad Company v. Tompkins* had nothing to do with nationalism, redistribution, or any other part of the New Deal political agenda.[11] It too, however, was revolutionary.[12] Finally, one additional doctrinal innovation of the New Deal Revolution until now has gone entirely unnoticed. The New Deal Court not only abandoned liberty of contract, it also abandoned the parental rights jurisprudence of *Meyer v. Nebraska* and *Pierce v. Society of Sisters*.[13] As of 1937, parental autonomy disappeared from the list of liberties protected under the Due Process Clause[14] and did not reappear, despite numerous opportunities for the Court to invoke the right, until the 1960s, long after the New Deal.[15]

The Court's treatment of parental rights calls into question the standard reading of *Carolene Products* Footnote Four,[16] which traditionally is interpreted as the decision which bifurcates due

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some or all of the Bill of Rights has been the subject of an ongoing debate since the New Deal—a significant fact in itself which I address in this article. *See* discussion *infra* Part III. For general scholarship on the incorporation debate see sources cited *infra* notes 26, 28.

9. *See* Palko v. Connecticut, 302 U.S. 319 (1937). The first clearly articulated doctrine of incorporation, the Preferred Freedoms Doctrine, emerged in 1939. *See* Jones v. City of Opelika, 316 U.S. 584, 608 (1942). *See generally* discussion *infra* Part III.B.

10. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); Swift v. Tyson, 41 U.S. 1 (1842).

11. In a book written before he joined the Court, Robert Jackson wrote that the decision in *Erie* "was not impelled by 'supervening economic events,' nor was it a part of the program of any political party." Robert H. Jackson, The Struggle For Judicial Supremacy 273 (1941).

12. For a discussion regarding the importance of *Erie*, see Henry J. Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964). A number of aspects of the Court decision in *Erie* have been criticized. *See, e.g.*, John H. Ely, *The Irrepressible Myth of* Erie, 87 Harv. L. Rev. 693 (1974) [hereinafter Ely, *Irrepressible Myth*]; Jack Goldsmith & Steven Walt, Erie *and the Irrelevance of Legal Positivism*, 84 Va. L. Rev. 673 (1998). There is no doubt, however, that *Erie* was viewed at the time as a revolutionary decision. *See* Jackson, *supra* note 11, at 272 (referring to *Erie* as "[p]erhaps the most remarkable decision of this period and in some respects one of the most remarkable in the Court's history").

13. *See infra* Part II.F.

14. *See infra* notes 154-57 and accompanying text.

15. *See* Poe v. Ullman, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

16. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

process into economic and personal liberties.[17] Regarded as the harbinger of the Court's ultimate incorporation project, this approach links incorporation to the politically progressive themes of national government and post-*Lochner* personal freedom. The New Deal Court, however, treated the economic liberty of contract and the personal liberty of parental autonomy with equal disregard.[18] The political "bifurcation" explanation of Footnote Four cannot explain the disappearance of parental autonomy.

Viewing the New Deal through a purely political lens obscures both the variety and the nature of the jurisprudential changes which occurred during this period. The rejection of *Lochner*, the retreat from Tenth Amendment limits on the Commerce Clause, the rise of Incorporation Doctrine, the rejection of parental rights, and the new deference to state common law—all of these are aspects of a singular effort by the New Deal Court to restructure the theory of judicial review. From the perspective of the Supreme Court, the New Deal Revolution was not about embracing Rooseveltian Progressivism, it was about reestablishing the legitimacy of judicial review in the modern world.

The New Deal justices appointed by Roosevelt brought to the Court a simple mandate—they were to put an end to the "tortured construction" of the Constitution that prevented the enactment of New Deal legislation.[19] Just how this was to be accomplished was left to the justices themselves. Acting, in effect, as a constitutional convention, the New Deal Court had the responsibility to draft the

17. Ackerman, Transformations, *supra* note 5, at 369 (describing Footnote Four as distinguishing between "ordinary economic disputes" and matters involving political rights and "discreet and insular minorities"); *see also id.* at 370 (contending the Court's decision in *Erie* indicated that "the great sin of the Lochnerian era was the Court's effort to constitutionalize the categories of the common law"); *id.* at 372 (stating that *Erie* was silent on the issue of what were legitimate grounds for judicial review in the New Deal era).

18. It is not enough to say *Meyer* and *Pierce* were never reversed. Neither, of course, was *Lochner*. The abandonment of Lochnerian liberty of contract was clear from the Court's decisions in cases where liberty of contract previously would have played a central role, as in *West Coast Hotel v. Parrish*, and the absence of such liberty from the list of rights the Court subsequently asserted it would henceforth protect against political majorities. *See, e.g.*, West Coast Hotel v. Parrish, 300 U.S. 379 (1937); *Carolene Products*, 304 U.S. at 153. Finally, the Court's emphasis on textual rights in cases like *Palko*, *Carolene Products*, and *West Virginia Board of Education v. Barnette* clearly distinguished liberty of contract from the Court's post-1937 individual rights jurisprudence. *See infra* notes 109-11, 113-18, 211 and accompanying text. All of these same moves occurred in regard to parental rights. *See infra* notes 154-57 and accompanying text.

19. *Reorganization of the Federal Judiciary: Hearing on S. 1392 Before the Senate Comm. on the Judiciary*, 75th Cong. 43 (1937) (statement of the Honorable Robert H. Jackson, Assistant Attorney General of the United States) ("Judges who resort to a tortured construction of the Constitution may torture an amendment. You cannot amend a state of mind and mental attitude of hostility to exercise of governmental power . . . ."); *see infra* notes 75-85 and accompanying text.

charter for post-New Deal judicial review. Unanimously rejecting the common law method of *Lochner* and *Swift*,[20] the members of this New Deal Convention declared that judicial interference with the political process henceforth required, at the very least, some clear textual justification. The rejection of Lochnerian liberty of contract, the rise of textual incorporation theory, the disappearance of non-textual parental rights, and the rejection of federal court construction of state common law all reflect this same basic point.

The principles underlying this revolution in jurisprudence emphasized constitutional text and an interpretive method based upon the original meaning of the Constitution.[21] Federal power to regulate commerce was now linked to the "original" views of John Marshall.[22] Non-textual liberties like freedom of contract and parental rights were discarded and the newly articulated theory of textual incorporation replaced the common law method of *Lochner*.[23] Unwilling to embrace the logical end of textual incorporation theory (total incorporation), rough consensus emerged around the theory of "Preferred Freedoms," a theory which limited incorporation to those texts in the Bill of Rights of particular importance to the Founders.[24]

The New Deal Revolution constructed by the Supreme Court transcended politics. In its struggle to provide a principled account of post-*Lochner* judicial review, the Supreme Court altered the shape of judicial review and in doing so altered the shape of the Constitution.

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20. *Darby*, *Wickard* and *Erie* all were unanimous opinions.

21. Modern theories of originalism tend to distinguish "original meaning" from "original intent." *See, e.g.*, Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 105 (2001); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A Matter of Interpretation: Federal Courts and the Law (Amy Gutmann ed., 1997). There is a longstanding debate regarding the normative attractiveness and proper methodology of originalism. For proponents, see Scalia, *supra*; Keith E. Whittington, Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review (1999); Randy E. Barnett, *An Originalism For Nonoriginalists*, 45 Loy. L. Rev. 611 (1999) [hereinafter Barnett, *Originalism*]; and Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 Nw. U. L. Rev. 226, 233 (1988). *See also* Robert H. Bork, The Tempting of America: The Political Seduction of the Law 145 (1990). For critiques, see Ronald Dworkin, Law's Empire 359-69 (1986); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204 (1980); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885 (1985); and Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretevism and Neutral Principles*, 96 Harv. L. Rev. 781 (1983).

This paper will not address either the legitimacy or the methodology of original meaning analysis. My purpose is to explore jurisprudential choices of the New Deal Court. Whatever the appropriate role or methodology of originalism, the justices of the New Deal Convention expressly grounded much of the revolution upon text and what they claimed was the original meaning of the Constitution.

22. *See* Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941).

23. *See infra* Part II.C.

24. *See infra* Parts III.B, D-E.

With a modern Supreme Court more willing than any of its predecessors to question the legitimacy and scope of the New Deal, it is more critical than ever that we understand the nature and scope of the New Deal Revolution. Just as the records of the Philadelphia Convention play an important role in our understanding of the Founding, so should the records of the New Deal "Convention" of 1937 play a critical role in our understanding of the New Jurisprudential Deal.

Part I traces the evolution of individual rights under the Fourteenth Amendment in the period between 1868 and 1937. Although liberty of contract is associated with the *Lochner* Court, economic rights like labor and trade have their roots in mid-nineteenth century common law. There is evidence that the framers of the Fourteenth Amendment anticipated such liberties would be protected under the Privileges or Immunities Clause of the Fourteenth Amendment. Temporarily blocked by the Court's restricted reading of the Privileges or Immunities Clause in the *Slaughterhouse Cases*, however, economic liberties eventually were identified as common law rights protected under the Due Process Clause. Substantive Due Process rights during the *Lochner* period went beyond economic liberties, however, and included freedom of speech, press and parental autonomy. Following the methodology of *Lochner* and *Twining v. New Jersey*, the Court explained its efforts as identifying fundamental aspects of the common law. Under this approach, the fact that speech and press were listed in the text of the Bill of Rights was irrelevant to enforcement as a due process liberty.

Part II addresses the impact of the New Deal Revolution on the protection of individual rights. Roosevelt's appointees to the Supreme Court arrived with the task of constructing a revolution without the benefit of a constitutional amendment. Lacking a textual mandate, the Court embarked on a revolution of jurisprudence—the construction of a new and more legitimate approach to judicial review. The core principle of this jurisprudential revolution was the embrace of textual originalism. Regardless of its history as a common law right, liberty of contract was nowhere mentioned in the text of the Constitution and therefore could not be a legitimate ground for interfering in the political process. Similarly, the Tenth Amendment contained no express restrictions on the powers of Congress, but stood as "a mere truism" regarding the reserved powers of the States. No longer constrained by an unjustifiably broad reading of the Tenth Amendment, the Court returned interpretation of the commerce power to what it claimed was the original understanding of the Founders.

The New Deal's jurisprudential revolution went well beyond the transient political goals of the New Deal Democrats. At the same time the Court abandoned common law liberty of contract, it also

abandoned judicial construction of state common law in *Erie Railroad Company v. Tompkins*. De-coupling judicial review from the common law methodology of the nineteenth century had additional consequences. If the error of Lochnerian liberty of contract was its lack of textual foundation, then Lochnerian parental autonomy shared the same error. In order to survive the New Deal Revolution, decisions like *Meyer v. Nebraska* and *Pierce v. Society of Sisters* would have to be recharacterized to represent judicial protection of textual rights like religious freedom and equal protection under the law. As of 1937, parental rights disappeared from the due process jurisprudence of the New Deal Court.

In Part III, I explore the birth and evolution of the Incorporation Doctrine. Prior to 1937, there had been no reason to speak of incorporating the "texts" of the First Amendment because liberties like speech and press were protected as fundamental liberties under the common law. The fact that they were (or were not) mentioned in the Bill of Rights was irrelevant. The abandonment of common law methodology and the new emphasis on textual originalism required a new justification for the enforcement of individual rights, including those of speech and press. In the period between 1937 and 1947, the justices debated various approaches to post-*Lochner* judicial review. Justice Felix Frankfurter advocated a political process model in which the Court generally deferred to the political branches except in situations involving equal access to the levers of political reform. Adopted by a majority of the Court in the first years of the New Deal, Frankfurter's Political Process model was soon displaced by the Preferred Freedoms model in which some, but not all, of the texts of the Bill of Rights were incorporated into the Fourteenth Amendment. Choosing selective over total textual incorporation, however, raised a host of difficult issues for the New Deal Court. The famous incorporation debates between Justices Frankfurter and Black are, in fact, debates over the meaning of the New Deal. Both Frankfurter and Black understood the central purpose of the Revolution was to establish a principled method of constitutional interpretation in a world which had rejected the common law methodology of *Lochner*. In this new world, judicial review revolved around text and original meaning. Their disagreement over the nature of due process triggered the first serious investigation of the original meaning of the Fourteenth Amendment since the *Slaughterhouse Cases*.

In Part IV, I explore the implications of viewing the New Deal Revolution as a revolution in jurisprudence. First, whatever the political goals of the New Deal Democrats, they were not the stated goals of the New Deal Court. Instead of constitutionalizing Rooseveltian Progressivism, the Court self-consciously placed both *laissez-faire* capitalism and progressive redistributionism within the legitimate reach of the political process. Efforts to define the New

Deal Revolution in terms of progressive politics, thus, is at odds with the original intentions of the New Deal Court. Secondly, the New Deal emphasis on textual originalism conflicts with both the modern embrace of non-textual common law rights like privacy and parental autonomy, and with the increasing use of federalism principles as a substantive limit on the otherwise plenary powers of Congress. If one embraces the New Deal as a "constitutional moment," it appears one must reject both non-textual due process liberties and non-textual federalist restraints on federal power.

I. INDIVIDUAL RIGHTS PRIOR TO 1937

The *Lochner* Court embraced both freedom of contract and freedom of speech as liberties protected by the Due Process Clause of the Fourteenth Amendment.[25] Although the modern Court continues to protect freedom of speech as a Due Process liberty, most legal historians today believe that the Privileges or Immunities Clause was the intended vehicle for protecting individual rights against state action.[26] The Privileges or Immunities Clause, however, likely was intended to protect common law economic rights, as well as rights like freedom of speech and religion. Appreciating the common roots of economic liberties and modern incorporated rights is critical to understanding the dilemma faced by the New Deal Court. If enforcing liberty of contract was no less—and no more—legitimate than enforcing freedom of speech, then what interpretive methodology justifies enforcement of one and not the other?

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25. *See* Grosjean v. American Press Co., 297 U.S. 233 (1936); Near v. Minnesota, 283 U.S. 697 (1931); Gitlow v. New York, 268 U.S. 652 (1925); Lochner v. New York, 198 U.S. 45 (1905); Allgeyer v. Louisiana, 165 U.S. 578 (1897).

26. *See* Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction (1998) [hereinafter Amar, Bill of Rights]; Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights (1986) [hereinafter Curtis, No State]; Akhil Reed Amar, *Did the Fourteenth Amendment Incorporate the Bill of Rights Against States?*, 19 Harv. J.L. & Pub. Pol'y 443 (1996); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193 (1992); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 Yale L.J. 57 (1993) [hereinafter Aynes, *Misreading John Bingham*]. For additional arguments suggesting the significance of the Privileges or Immunities Clause, see John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 22-30 (1980); William Winslow Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. Chi. L. Rev. 1 (1954); and Philip B. Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last"?*, 1972 Wash. U. L.Q. 405. Justice Hugo Black also suggested a new look at the Privileges or Immunities Clause in *Adamson v. California*, 332 U.S. 46, 68-92 (1947) (Black, J., dissenting). Even if not all modern scholars are convinced about the original intent to incorporate the Bill of Rights by way of the Privileges or Immunities Clause, I am not aware of a single scholar who argues that the framers intended the *Due Process Clause* to be the vehicle for incorporation.

A. *The Origins of Economic Rights*

The Privileges or Immunities Clause declares that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[27] There is a growing body of literature suggesting that this phrase was intended to include some, if not all, of the first eight amendments to the Constitution.[28] Whether one is persuaded by this argument,[29] the same evidence suggests that privileges or immunities were understood to include more than just the first eight amendments.[30] Justice Bushrod Washington described the right to pursue a trade as a privilege and immunity protected by Article IV.[31] According to Justice Washington, whose opinion in *Corfield* was used throughout the Reconstruction debates in Congress,[32] privileges and immunities of citizenship included "[t]he right of a citizen in one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise."[33] The status of economic rights was particularly important to mid-nineteenth century Republicans. The slogan of the Republican Party in 1856 and 1860

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27. U.S. Const. amend. XIV, § 1. Although rendered close to a dead letter in the *Slaughterhouse Cases*, the Supreme Court recently has signaled a renewed interest in the Privileges or Immunities Clause. *See* Saenz v. Roe, 526 U.S. 489 (1999).

28. See sources cited *supra* note 26. For an opposing view see Raoul Berger, The Fourteenth Amendment and the Bill of Rights (1989) [hereinafter Berger, Fourteenth Amendment]; Raoul Berger, *Incorporation of the Bill of Rights: Akhil Amar's Wishing Well*, 62 U. Cin. L. Rev. 1, 3 (1993); Raoul Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 Ohio St. L.J. 435 (1981) [hereinafter Berger, *Nine-Lived Cat*]; Charles Fairman, *A Reply to Professor Crosskey*, 22 U. Chi. L. Rev. 144 (1954) [hereinafter Fairman, *Reply*]; Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 Stan. L. Rev. 5 (1949) [hereinafter Fairman, *Fourteenth Amendment*].

29. I believe the evidence does support such a conclusion. *See* Kurt T. Lash, *Power and the Subject of Religion*, 59 Ohio St. L.J. 1069 (1998) [hereinafter Lash, *Power and Religion*]; Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 Ariz. St. L.J. 1085 (1995); Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. U. L. Rev. 1106 (1994) [hereinafter Lash, *Free Exercise Clause*].

30. *See* Howard Gillman, The Constitution Besieged: The Rise and Demise of *Lochner* Era Police Powers Jurisprudence (1993); Alfred Alvins, *Freedom of Choice in Personal Service Occupations: Thirteenth Amendment Limitations on Antidiscrimination Legislation*, 49 Cornell L.Q. 228 (1964); Alfred Alvins, *The Right to Work and the Fourteenth Amendment: The Original Understanding*, 18 Lab. L.J. 15 (1967); Alan Meese, *Will, Judgment, and Economic Liberty: Mr. Justice Souter and the Mistranslation of the Due Process Clause*, 41 Wm. & Mary L. Rev. 3 (1999); Jeffrey Rosen, *Translating the Privileges or Immunities Clause*, 66 Geo. Wash. L. Rev. 1241 (1998).

31. *See* Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3230).

32. *See* Curtis, No State, *supra* note 26, at 73; Amar, Bill of Rights, *supra* note 26, at 178.

33. *Corfield*, 6 F. Cas. at 552.

demanded free speech, free soil, free labor and free men.[34] Following the Civil War, protecting economic rights was a major part of the Reconstruction agenda. The Civil Rights Act of 1866, widely regarded as the precursor to the Fourteenth Amendment, guaranteed to "citizens[] of every race and color... the same right... as is enjoyed by white citizens... to make and enforce contracts,... purchase [and]... sell... property, and to [receive the] full and equal benefit of all laws... for the security of person and property."[35] Finally, the same views were shared by those who played important roles in shaping the Fourteenth Amendment. John Bingham, framer of Section One of the Fourteenth Amendment, insisted that "[t]he equality of all to the right to... work and enjoy the product of their toil" was a privilege of United States citizenship.[36] Obviously, economic liberty—the right to earn bread by the sweat of your brow—had a special resonance to those who had opposed slavery.[37] Protection of these rights, however, was not limited to situations involving racial discrimination. The abridgment of civil rights that occurred under slavery extended to whites and blacks, a fact that eventually galvanized northern opposition to slavery.[38]

In the *Slaughterhouse Cases*, a majority of the Supreme Court rejected both incorporation of the Bill of Rights and protection of fundamental economic rights as privileges or immunities.[39] Dissenting, Justice Field argued that economic rights were among the privileges or immunities of United States citizens which states may not

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34. *See* Richard Sewell, Ballots for Freedom 284 (1976).

35. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (codified at 42 U.S.C. § 1982 (1994)).

36. Cong. Globe, 35th Cong., 2d Sess. 985 (1859) (statement of Rep. Bingham); *see also* Cong. Globe, 34th Cong., 3d Sess. 140 (1857) (statement of Rep. Bingham) (stating that equality "protects not only life and liberty, but also property, the product of labor.... [and] contemplates that no man shall be wrongfully deprived of the fruit of his toil any more than of his life"). Bingham also indicated that the Privileges or Immunities Clause included more than just the Bill of Rights. According to Bingham, "the privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are *chiefly* defined in the first eight amendments to the Constitution of the United States." Cong. Globe, 42 Cong., 1st Sess. app. 84 (1871) (statement of Rep. Bingham) (emphasis added). *But see* Michael Kent Curtis, *Two Textual Adventures: Thoughts on Reading Jeffrey Rosen's Paper*, 66 Geo. Wash. L. Rev. 1269, 1284, 1291 (1998) [hereinafter Curtis, *Thoughts*] (arguing that members of the thirty-ninth Congress expressed a variety of views regarding the right to contract and own property, and that more research needs to be done).

37. *See* Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), *in* Inaugural Addresses of the Presidents of the United States 142 (U.S. Gov't Printing Office 1989).

38. Michael Curtis points out that the Fourteenth Amendment was not just about racial discrimination, but also was intended to respond to the suppression of civil liberties of whites and blacks. *See* Curtis, *Thoughts*, *supra* note 36, at 1275.

39. *See* The Slaughterhouse Cases, 83 U.S. 36 (1872). Prior to the *Slaughterhouse Cases*, a lower federal court twice had ruled the Bill of Rights was protected under the Privileges or Immunities Clause. *See* United States v. Hall, 26 F. Cas. 79, 81-82 (C.C.S.D. Ala. 1871); United States v. Mall, 26 F. Cas. 1147 (C.C.S.D. Ala. 1871).

abridge.[40] Justice Bradley, in his dissent, argued that both Justice Washington's list in *Corfield*, and rights such as those listed in the First Amendment, were "privileges or immunities" of United States citizens.[41] In embracing *Corfield* and economic liberty, Field and Bradley anticipated Lochnerian freedom of contract.[42]

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40. *See The Slaughterhouse Cases*, 83 U.S. at 97 ("The privileges and immunities designated are those *which of right belong to the citizens of all free governments.* Clearly among these must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons."); *see also id.* at 106 ("There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor." (internal quotes omitted)).

41. Justice Bradley wrote:

> But others of the greatest consequence were enumerated, although they were only secured, in express terms, from invasion by the Federal government; such as the right of habeas corpus, the right of trial by jury, of free exercise of religious worship, the right of free speech and a free press, the right peaceably to assemble for the discussion of public measures, the right to be secure against unreasonable searches and seizures, and above all, and including almost all the rest, the right of *not being deprived of life, liberty, or property, without due process of law*. These, and still others are specified in the original Constitution, or in the early amendments of it, as among the privileges and immunities of citizens of the United States, or, what is still stronger for the force of the argument, the rights of all persons, whether citizens or not. But even if the Constitution were silent, the fundamental privileges and immunities of citizens, as such, would be no less real and no less inviolable than they now are. It was not necessary to say in words that the citizens of the United States should have and exercise all the privileges of citizens; the privilege of buying, selling, and enjoying property; the privilege of engaging in any lawful employment for a livelihood; the privilege of resorting to the laws for redress of injuries, and the like. Their very citizenship conferred these privileges, if they did not possess them before.

Id. at 118-19.

42. *See* James W. Ely, Jr., The Chief Justiceship of Melville W. Fuller, 1888-1910, at 64 (1995); Stanley Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Judicial Interpretation*, 2 Stan. L. Rev. 140, 172 n.63 (1949); Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 Ohio St. L.J. 1051, 1091-92 (2000).

Michael Curtis has tentatively argued against reading economic liberties into the Privileges or Immunities Clause. *See* Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the* Slaughterhouse Cases *Without Exhuming* Lochner*: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. Rev. 1, 3 (1996) [hereinafter Curtis, *Resurrecting the Privileges or Immunities Clause*]. First, Curtis argues that many of the framers of the Fourteenth Amendment did not want to totally destroy the independent character of the states, something which would be threatened by economic liberty protections á la *Lochner*. *See id.* at 101-02. Secondly, Curtis notes that the Equal Protection Clause most likely was intended to protect against invidious classifications like race, religion and ethnicity, but not against economic classifications. *See id.* at 82. Third, the Republicans intended to protect suspect classes like African Americans in the South. *See id.* at 37. Thus, according to Curtis, it would be ironic to interpret the meaning of the Privileges or Immunities Clause in a manner that advantages corporate power over the relatively weak individual. *Id.* at 99. Fourth, to whatever extent wealth-based classifications were thought inappropriate in 1868, that view was rejected with the passage of the

Judicial enforcement of common law economic rights fits comfortably within the common law approach to individual liberty that dominated nineteenth century jurisprudence.[43] Lochnerian concerns about class legislation were common in mid-nineteenth century America.[44] Laws taking property away from A and giving it

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Sixteenth Amendment which made room for the progressive income tax and wealth redistribution. *Id.* at 92. Finally, the framers of the Fourteenth Amendment likely would have agreed with progressives who later would characterize economic exploitation as a form of slavery. *See id.* at 99.

Acknowledging that these are merely tentative arguments, a brief response nevertheless is in order. First, Curtis seems to downplay the role free contract/free labor played in the passage of the Civil Rights Act and the adoption of the Fourteenth Amendment. As I point out above, there is clear textual and historical support for fundamental economic rights—at least the protection against unreasonable economic classifications. Secondly, there is no more reason to eschew "liberty of contract" for federalism reasons than there is to eschew incorporation of the Bill of Rights. Enforcement of either set of liberties would rework the relationship between the federal governments and the states. Indeed, the greater threat to the states in 1868 would have been protection of liberties like free speech, free press and equal protection. Including economic liberties would not have raised serious state concerns since broad state regulation of the economy remained years in the future. In other words, no one in 1868 would likely have viewed protection of liberty of contract as any more of a reworking of federalism than any other "incorporated" right.

In regard to Curtis's attempt to limit equal protection to certain suspect or invidious classifications, certainly race discrimination was a Republican target. But there is no reason to think Republicans would have viewed class warfare-based discrimination as non-invidious. *See* Rosen, *supra* note 30, at 1263. At the very least, Republicans believed the Equal Protection Clause would forbid unreasonable discrimination, and judicial review of economic legislation was as fair game as any other area of law used by the southern states to disadvantage blacks and suppress dissent.

As far as the "Progressive" impact of the Sixteenth Amendment is concerned, to date no one has undertaken to show that the original intent behind the Sixteenth Amendment was broad enough to invalidate Lochnerian economic rights. There is no textual reason to read the Sixteenth Amendment as changing anything outside the area of taxation. Nor am I aware of any scholarship suggesting that the drafters of the Sixteenth Amendment (or even later members of the New Deal Court) believed its impact extended to liberty of contract. In this regard, the Sixteenth is more like a "superstatute" than a transformative amendment. *See* Ackerman, Foundations, *supra* note 5, at 91.

Finally, regarding the "slavery" of economic exploitation: It is anachronistic to read later economic concerns as affecting public understanding of privileges or immunities in 1868. In the end, Curtis's arguments seem more pragmatic than historical. Indeed, he is willing to abandon originalist understanding of the Privileges or Immunities Clause if such an approach leads to *Lochner*. Curtis, *Thoughts*, *supra* note 36, at 1290-92. To a comprehensive originalist, however, whether such an account would lead to the restoration of *Lochner* depends on the constitutional status of the New Deal Revolution. Presumably, "The People" could have embraced liberty of contract in 1868, but rejected it in 1937.

43. *See* Bruce Ackerman, *Liberating Abstraction*, 59 U. Chi. L. Rev. 317, 340 (1992) [hereinafter Ackerman, *Liberating Abstraction*] ("Freedom of contract is deeply entrenched in the Free Labor and Abolitionist sources of the Reconstruction Amendments, with roots that run as deep as the Enlightenment and Commonwealth ideas that provide the interpretive context for the Founding Bill of Rights.").

44. *See* Rosen, *supra* note 30, at 1263.

to B were as unreasonable as laws regulating contract and property on the basis of race.[45] According to Thomas Cooley,

> [t]he general rule is that every person sui juris has a right to choose his own employment, and to devote his labor to any calling, or at his option to hire it out in the service of others. This is one of the first and highest of all civil rights, and any restrictions that discriminate against persons or classes are inadmissible.[46]

Although development of economic rights under the Privileges or Immunities Clause was cut off by the *Slaughterhouse Cases*,[47] those same common law rights eventually were embraced by the *Lochner* Court as aspects of liberty protected under the Due Process Clause. In *Allgeyer v. Louisiana*,[48] Justice Peckham declared:

> The liberty mentioned in [the Fourteenth Amendment] means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.[49]

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45. *See id.* (stating that "Reconstruction-era Republicans repeatedly invoked two different models of impermissible classification—a prohibition on class legislation and an anti-caste principle .... [R]egulation in the public interest was permissible, but ... redistributive regulations, which take property away from A and give it to B, were inherently suspect"); *see also* Jeffrey Rosen, *Class Legislation, Public Choice, and the Structural Constitution*, 21 Harv. J.L. & Pub. Pol'y 181, 183 (1997) (citing Gillman, *supra* note 30, at 33-45).

46. Thomas Cooley, The General Principles of Constitutional Law in the United States of America 231 (1880) (emphasis omitted); *see also* Allgeyer v. Louisiana, 165 U.S. 578, 591 (1897) ("In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property must be embraced the right to make all proper contracts in relation thereto.").

47. *See* The Slaughterhouse Cases, 83 U.S. 36 (1872).

48. 165 U.S. 578 (1897).

49. *Id.* at 589. Continuing, Peckham cited Justice Bradley's concurrence in *Butchers' Union Company v. Crescent City Company*:

> The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase "pursuit of happiness" in the Declaration of Independence, which commenced with the fundamental proposition that "all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness." This right is a large ingredient in the civil liberty of the citizen. Again, [at 111 U.S. 764] the learned justice said: "I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States." And again, [at 111 U.S. 765]: "But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty;

Having elevated the common law freedom of contract to protected liberty status in *Allgeyer*, Peckham and the Court vigorously enforced that right against state attempts to enact wage and hour legislation, the most (in)famous example being *Lochner v. New York*.[50] Although currently associated with a disfavored approach to judicial review, freedom of contract had plausible roots in the original meaning of the Fourteenth Amendment and was but one example of a number of individual liberties protected by the *Lochner* Court.

B. *Non-Economic Common Law Rights*

The *Lochner* Court did not limit liberty under the Fourteenth Amendment to economic rights. The same year the Court stuck down the minimum wage in *Adkins v. Children's Hospital*,[51] it also struck down a state law prohibiting schools from teaching German in *Meyer v. Nebraska*.[52] Although *Meyer* involved a religious school,[53] the Court did not base its decision on religious liberty. Instead, the Court invoked the right to acquire useful knowledge and the right of parents to control the education of their children[54]—rights derived in the same

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> for it takes from him the freedom of adopting and following the pursuit which he prefers; which, as already intimated, is a material part of the liberty of the citizen." It is true that these remarks were made in regard to questions of monopoly, but they well describe the rights which are covered by the word "liberty" as contained in the fourteenth amendment.

Id. at 589-90 (quoting Butchers' Union Co. v. Crescent City Co., 111 U.S. 746, 762, 764, 765 (1883) (Bradley, J., concurring)).

50. *See* Lochner v. New York, 198 U.S. 45, 53 (1905). The Court stated:

> The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution.... Under that provision no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right.

Id. (citation omitted)).

51. 261 U.S. 525 (1923). Felix Frankfurter represented the appellants.

52. 262 U.S. 390 (1923).

53. The school was Lutheran. *See id.* at 397.

54. *See id.* at 400. The Court stated: "Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment." *Id.* The Court further stated:

> The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. The Ordinance of 1787 declares, "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the States, including Nebraska, enforce this obligation by compulsory laws.... Evidently the Legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.

manner as liberty of contract.[55] Justice McReynolds for the majority explained that liberty under the Fourteenth Amendment

> denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[56]

This right had the same status as liberty of contract and was derived by the same principle which protected all "privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." To support his conclusion, McReynolds cited the *Slaughterhouse Cases*, *Allgeyer*, *Lochner*, *Twining* and *Adkins*.[57] *Meyer* became an important touchstone for the *Lochner* Court; later, when liberty of contract came under assault, the pro-*Lochner* dissenters cited *Meyer* in support of freedom of contract.[58]

Two years later, in *Pierce v. Society of Sisters*,[59] the Court relied on *Meyer* to strike down the state of Oregon's attempt to require a public school education. According to the Court, "[u]nder the doctrine of *Meyer v. Nebraska*, . . . we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."[60] As was true for freedom of contract, this liberty was derived not from the text but from "privileges long recognized at common law." Neither *Meyer* nor *Pierce* focused on religious liberty or ethnic discrimination, much less spoke of incorporating the Free Exercise Clause; *Pierce* did not mention religious liberty at all.[61]

Id. at 400-01.

55. *See id.* at 399.

56. *Id.*

57. *Id.*

58. *See, e.g.*, Nebbia v. New York, 291 U.S. 502, 547 (1934) (McReynolds, J., dissenting).

59. 268 U.S. 510 (1925). Justice McReynolds wrote the opinion for a unanimous Court.

60. *Id.* at 534-35.

61. The plaintiffs in *Pierce* were a Catholic parochial school and a secular military academy. *See id.* at 531-32.

C. *The Bill of Rights Under* Lochner

> [I]t is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. . . . If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.[62]
>
> —*Twining v. New Jersey* (1908)

The Doctrine of Incorporation as such did not exist prior to 1937. Cases involving freedom of speech, press and religion were decided according to the common law methodology of cases like *Allgeyer*, *Lochner* and *Twining*. Although the Court occasionally construed liberty under the Fourteenth Amendment to include a right expressly mentioned in the Bill of Rights, the Court went out of its way to separate considerations of due process from textual inclusion of the Bill. In *Twining* (1908), the Court turned aside a claim that provisions of the Bill of Rights were necessarily aspects of either the Privileges or Immunities or Due Process Clauses.[63] Even if the Court had protected aspects of the first eight Amendments, "it is not because those rights are enumerated in the first eight amendments, but because they are of such a nature that they are included in the conception of due process of law."[64] The definition of due process was to be "gradually ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they arise."[65]

The Court's common law approach to identifying "liberty" did not give any degree of priority to the textual provisions of the Bill of Rights. In 1897, the Court identified liberty of contract and just compensation as aspects of due process liberty—in that order.[66] In 1908, the *Twining* Court rejected the textual right against self-incrimination.[67] In 1923, the Court protected the non-textual liberty of contract in *Adkins*[68] and parental rights in *Meyer*.[69] In 1925, the Court relied upon *Twining* and *Meyer* to support its conclusion "that freedom of speech and of the press . . . are among the fundamental

62. Twining v. New Jersey, 211 U.S. 78, 99 (1908) (Moody, J.).

63. Twining v. New Jersey, 211 U.S. 78 (1908) (rejecting the right against self-incrimination as a fundamental due process right).

64. *Id.* at 99-100.

65. *Id.* at 100.

66. *See* Allgeyer v. Louisiana, 165 U.S. 578 (1897) (protecting liberty of contract); Chicago, Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226 (1897) (protecting the right to just compensation).

67. *See* Twining v. New Jersey, 211 U.S. 78 (1908).

68. Adkins v. Children's Hosp., 261 U.S. 525 (1923).

69. Meyer v. Nebraska, 262 U.S. 390 (1923).

personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[70] In 1932, the Court again relied upon the *Twining* formula and read the Due Process Clause to require a fair trial which, in this case, required the assistance of counsel.[71] In the 1936 case *Grosjean v. American Press Company*,[72] the Court cited *Allgeyer*—the seminal liberty of contract case—in support of its declaration that "freedom of speech and of the press are rights of the same fundamental character, safeguarded by the due process of law clause of the Fourteenth Amendment."[73]

At no time did the court refer to "incorporation," or, as would Justice Cardozo years later, to "a process of absorption."[74] Freedom of contract was not fundamentally different from freedom of speech; neither was absorbed. They were both identified as fundamental liberties at common law. What mattered was following the common law doctrinal approach of *Allgeyer* and *Twining*. Textual reference in the Bill was irrelevant.

II. THE NEW DEAL TRANSFORMATION

> They had become legislators, not jurists. They had taken into their own hands the right of self-government for which our colonial ancestors fought a long-drawn-out war against Great Britain; and while no British court can supersede an act of Parliament, the descendants of those who once fought Britain for legislative liberty have found that liberty deftly stolen from their hands.[75]

—The Nine Old Men (1937).

> [T]he immediate difficulty was with the Justices, not the Court or the Constitution.[76]

—Robert Jackson, The Struggle For Judicial Supremacy (1941).

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70. Gitlow v. New York, 268 U.S. 652, 666 (1925).

71. *See* Powell v. Alabama, 287 U.S. 45 (1932) (due process requires a fair trial, which in the capital punishment case before the state court, required assistance of counsel); *see id.* at 67-68 (stating that if some of the first eight Amendments are considered aspects of due process liberty "it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law" (quoting *Twining*, 211 U.S. at 99-100)).

72. 297 U.S. 233 (1936).

73. *Id.* at 244 ("The word 'liberty' contained in that amendment embraces not only the right of a person to be free from physical restraint, but the right to be free in the enjoyment of all his faculties as well." (citation omitted)).

74. *See* Palko v. Connecticut, 302 U.S. 319, 326 (1937).

75. Drew Pearson & Robert S. Allen, The Nine Old Men 72 (1937).

76. Jackson, *supra* note 11, at 180.

The Supreme Court's battles with Roosevelt and the New Deal are legendary. Prior to 1937, the Court occasionally had upheld government regulation of labor and the economy.[77] Key aspects of Roosevelt's first one hundred days legislation, however, were invalidated by the Court. On a single day in 1935,[78] in three unanimous opinions, the Court struck down the Frazier-Lemke Act which had provided mortgage relief to bankrupt farmers,[79] denied the President's power to replace members of independent regulatory agencies,[80] and invalidated the National Industrial Recovery Act.[81] The next year, the Court struck down the Agricultural Adjustment Act,[82] the Bituminous Coal Conservation Act,[83] and New York's minimum wage statute.[84] The Court's interference with key aspects of the New Deal infuriated the Democrats. According to Robert Jackson:

> [A]t the threshold of the New Deal the Court had established itself as a Supreme Censor of legislation. It expanded the concept of "due process," and tore it loose from its ancient connotations; it restricted the concept of the power to regulate interstate commerce, and cut down the significance which John Marshall had attributed to it. With these instruments it approved or disapproved each law, grudgingly giving consent to any departure from *laissez faire*, or to any serious interference with the power of property and employers. I do not mean to say that it never did give consent.... But this only emphasizes the fact that the Court, and not the legislature, became the final judge of what might be law....[85]

By 1937, Roosevelt had submitted his court packing plan,[86] and Congress itself was considering a number of constitutional amendments which would allow the New Deal to proceed. Proposed amendments fell along two main lines: those which sought to restructure the nature of judicial review (for example, by providing for a congressional override of judicial opinions),[87] and those which

77. *See* Nebbia v. New York, 291 U.S. 502 (1934); The Gold Clause Cases, 294 U.S. 240 (1935).

78. A day known as "Black Monday." *See* Oxford Companion to the Supreme Court 75 (1992).

79. *See* Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935).

80. *See* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

81. *See* Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

82. *See* United States v. Butler, 297 U.S. 1 (1936).

83. *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936).

84. *See* Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936).

85. Jackson, *supra* note 11, at 70.

86. Roosevelt proposed adding one justice for every Supreme Court justice over age seventy. *See* Franklin D. Roosevelt, The President Presents a Plan for the Reorganization of the Judicial Bench of the Government (Feb. 5, 1937), *in* 6 The Public Papers and Addresses of Franklin D. Roosevelt, 1937, at 51-66 (Samuel Rosenman ed., 1941) [hereinafter Roosevelt Public Papers]. For a general discussion of the court packing plan, see Ackerman, Transformations, *supra* note 5, at 317.

87. Senators Burton Wheeler and Homer Bone proposed the following

sought to increase the regulatory power of government (generally, by permitting regulation of labor and the economy).[88] Some proposals exempted judicial protection of liberties listed in the Bill of Rights.[89] Justice Roberts's switch in time, of course, effectively put an end to both the court packing plan and proposed constitutional amendments.[90]

The national debate regarding the nature and scope of the New Deal Revolution, however, did not end with the Court's decision in

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amendment:

> Section 1. In case the Supreme Court renders any judgment holding any Act of Congress or any provision of any such Act unconstitutional, the question with respect to the constitutionality of such Act or provision shall be promptly submitted to the Congress for its action at the earliest practicable date that the Congress is in session . . . ; but no action shall be taken by the Congress upon such question until an election shall have been held at which Members of the House of Representatives are regularly by law to be chosen. If such Act or provision is reenacted by two-thirds of each House of the Congress to which such Members are elected at such election, such Act or provision shall be deemed to be constitutional and effective from the date of such reenactment.

S.J. Res. 80, 75th Cong, 1st Sess. (1937). Wheeler later proposed exempting decisions involving the Bill of Rights from his amendment. *See Reorganization of the Federal Judiciary: Hearing Before the Committee on the Judiciary, United States Senate*, 75th Cong. 485, 500 (1937) (statement of Sen. Wheeler).

Presidential advisors Benjamin Cohen and Tommy Corcoran proposed a constitutional amendment which would have allowed Congress to overrule a constitutional decision of the Supreme Court by a two-thirds vote of each house or by a simple majority if an election had intervened. *See* Benjamin V. Cohen & Thomas G. Corcoran, Memorandum on Constitutional Problems, Cohen Papers, Library of Congress (1937) (on file with the *Fordham Law Review*); *see also* William Lasser, *Justice Roberts and the Constitutional Revolution of 1937—Was There a "Switch In Time"?*, 78 Tex. L. Rev. 1347 (2000) (reviewing Cushman, *supra* note 5).

88. Senator Henry Ashurst proposed an amendment to enable Congress "to regulate agriculture, commerce, industry, and labor." Ackerman, Transformations, *supra* note 5, at 338. Senator Edward Costigan proposed amendments which would enable Congress to legislate for the general welfare where states could not effectively do so; to enable Congress "to regulate hours and conditions of labor and to establish minimum wages in any employment and to regulate production, industry, business, trade, and commerce to prevent unfair methods and practices"; and to construe the Due Process Clauses of the Fifth and Fourteenth Amendments "to impose no limitations upon legislation by the Congress or by the several states with respect to any of the subjects referred to in section 1, except as to the methods or the procedure for the enforcement of such legislation." *See id.* at 339. Senator Williams Borah followed Costigans's amendment by proposing to add the following:

> No state shall make or enforce any law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble; and to petition the State or the Government for redress of grievances.

Id. at 339.

89. Senator Wheeler, for example, agreed that "[m]easures violating the human rights guaranteed in the first ten amendments . . . would be excepted, perhaps, in this amendment." Ackerman, Transformations, *supra* note 5, at 332.

90. The switch is generally regarded as having occurred with the Court's upholding of Washington State's minimum wage law in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

West Coast Hotel v. Parrish. It was transferred to the Court. Over the next several years, the justices struggled over various drafts of post-*Lochner* judicial review. Momentum would swing first toward restructuring the constitutional role of the Court. Under Felix Frankfurter's political process approach, judicial intervention was limited to ensuring the proper functioning of the democratic process. Ultimately, consensus formed around an approach to constitutional interpretation that emphasized the role of text and original intent in interpreting the Constitution. This jurisprudence of textual originalism explained the abandonment of *Lochner* and justified the Court's continued role as protector of individual liberties under the newly articulated Doctrine of Incorporation.

A. *Judicial Methodology and the New Deal Court*

Prior to 1937, majoritarian regulation of labor and the economy had been the exception. Afterward, it became the rule. According to Chief Justice Hughes, "[l]iberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."[91] Since the Court's decision in *Parrish*, not a single commercial regulatory law has been struck down as beyond Congress' commerce power. The Revolution involved more than the initiation of a winning streak, however. The New Deal Court abandoned an entire method of judicial review, and did so in a manner that sent shock waves across numerous lines of doctrine, including federal commerce power, taxing and spending, state police power, individual rights and federal common law.[92] The

91. *Id.* at 391.

92. Some scholars have argued that the New Deal Revolution was less a revolution and more a gradual evolution in doctrine—with roots prior to 1937. *See* Cushman, *supra* note 5, at 84, 154 (arguing that *Nebbia* set the stage for 1937 cases like *Parrish*). Professor Cushman, for example, maintains that *Nebbia* signaled the end of judicial obstruction, the Court having abandoned the public/private distinction marking the limits to government regulatory power. *See id.* Cushman's approach, however, focuses on the doctrinal innovations necessary to uphold critical aspects of the New Deal. This win/loss approach to determining when the revolution occurred downplays the role of judicial doctrine. The members of the Court, however, saw matters quite differently: what counted was the Court's interpretive method. See *supra* note 85 and accompanying text.

The problem was with the Court's methodology, not simply the win-loss record of New Deal programs. This is why cases decided in favor of the New Deal that nevertheless maintained the general pre-New Deal approach to judicial review did not generate much in the way of dissent. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); *see also* Ackerman, Transformations, *supra* note 5, at 363 (remarking on the "unrevolutionary" majority opinion in *Jones & Laughlin*). It was only with the abandonment of Lochnerian methodology that the dissenters came out with their guns blazing—they recognized a revolution in the making. *See, e.g., Parrish*, 300 U.S. at 400 (Sutherland, J., dissenting). For additional problems with Cushman's internalist perspective, see *supra* note 6.

dramatic upheaval called for an explanation.[93] Unable to justify the change as the result of a constitutional amendment, the Court embraced a new method of judicial review.

B. *Changed Circumstances Doctrine*

> We have been relegated to the horse-and-buggy definition of interstate commerce.[94]
>
> —Franklin D. Roosevelt (1935).

A common criticism of the Court prior to 1937, encouraged by Roosevelt,[95] was its failure to consider the current economic emergency in its interpretation of the Constitution.[96] The importance of considering prevailing circumstances in judicial construction of statutes had been pressed for decades by jurists like Louis Brandeis,[97] and some members of the pre-New Deal Court, who believed it should apply to constitutional interpretation as well. The idea was that the Constitution should adapt to changing circumstances. For example, in *Home Building & Loan Association v. Blaisdell*,[98] Chief Justice Hughes led a majority to uphold a state debtor relief statute against a claim that the law violated the Contract Clause. His opinion not only rejected the idea that the Constitution should be interpreted according to its original intent, it expressly found such intent to be irrelevant:[99]

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93. Roberts did not explain his vote in *Jones & Laughlin* or *Parrish*. Following Justice Roberts's death, Justice Frankfurter published a memorandum Roberts had sent to him which purported to explain why Roberts had voted to strike down the program in *Tipaldo* after having upheld the program in *Nebbia*. In the memorandum, Roberts explained that no one in *Tipaldo* had asked whether *Adkins* should be overruled. Felix Frankfurter, *Mr. Justice Roberts*, *in* Of Law and Men 204 (Philip Elman ed., 1956). Such a procedural nicety seems in conflict with Roberts's joining the decision in *Erie* to strike down almost one hundred years of case law despite not having been asked to do so by either litigant.

94. The Two Hundred and Ninth Press Conference (May 31, 1935), *in* 4 Roosevelt Public Papers, *supra* note 86, at 221, 221; *see also* Self-Government We Must and Shall Maintain—Address at Little Rock, Arkansas (June 10, 1936), *in* 5 Roosevelt Public Papers, *supra* note 86, at 195, 200 (stating that the Constitution "is intended to meet and to fit the amazing physical, economic and social requirements that confront us in this modern generation").

95. *See* Franklin D. Roosevelt, Presidential Address, Mar. 9, 1937, *reprinted in* Jackson, *supra* note 11, at 340.

96. *See, e.g.*, Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 Stud. Am. Pol. Dev. 191 (1997); G. Edward White, *The "Constitutional Revolution" as a Crisis in Adaptivity*, 48 Hastings L.J. 867 (1997).

97. *See* Muller v. Oregon, 208 U.S. 412 (1908). Future-Justice Louis Brandeis filed the brief in *Muller*.

98. 290 U.S. 398 (1934).

99. *See also* Whittington, *supra* note 21, at 291 n.114 (noting *Blaisdell*'s "emergency" doctrine and Hughes's break from original intent).

> It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—"We must never forget, that it is a *constitution* we are expounding[.]"
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> . . .
>
> The vast body of law which has been developed was unknown to the fathers, but it is believed to have preserved the essential content and the spirit of the Constitution. With a growing recognition of public needs and the relation of individual right to public security, the court has sought to prevent the perversion of the clause through its use as an instrument to throttle the capacity of the States to protect their fundamental interests."[100]

In the critical year of 1937, the revolution began with Chief Justice Hughes's opinion in *Parrish*. Repeating his analysis in *Blaisdell*, Hughes cited new "economic conditions" as justification for reversing *Adkins* and adopted the reasoning of Oliver Wendell Holmes.[101]

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100. *Blaisdell*, 290 U.S. at 442-44 (citation omitted). Although Hughes appeared to back away from the changed circumstances argument in *Schechter Poultry*, he returned to the same theme in *Parrish*. *See infra* note 102 and accompanying text.

Blaisdell has been described as representing the dawn of "living Constitution" jurisprudence. *See* Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 Yale L.J. 2165, 2186-87 [hereinafter Kalman, *Law, Politics*]; *see also* G. Edward White, The Constitution and the New Deal: A Reassessment 199 (2000). The approach in *Blaisdell*, however, was rejected by the New Deal Court. *See infra* Part II.C; *see also* David A. Pepper, Note, *Against Legalism: Rebutting An Anachronistic Account of 1937*, 82 Marq. L. Rev. 63, 146 (1998).

101. W. Coast Hotel v. Parrish, 300 U.S. 379, 396-97 (1937). According to Hughes:

> The statement of Mr. Justice Holmes in the *Adkins* case is pertinent: "This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as the minimum requirement of health and right living. It is safe to assume that women will not be employed at even the lowest wages allowed unless they earn them, or unless the employer's business can sustain the burden. In short the law in its character and operation is like hundreds of so-called police laws that have been upheld."

Id. at 396-97 (quoting Adkins v. Children's Hosp., 261 U.S. 525, 570 (1923)).

The dissenting opinions of Justice Holmes were regularly referred to throughout this period as representing the appropriate approach to interpreting the Constitution. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 122 (1942); United States v. Darby, 312 U.S. 100, 115-16 (1941); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79-80, 85 (1938); *Parrish*, 300 U.S. at 396; NLRB v. Jones & Laughlin Steel Co., 301 U.S. 1, 46 (1937); *see also* Benjamin Cardozo, *The Methods of History, Tradition and Sociology*, *in* Selected Writings of Benjamin Nathan Cardozo 138 (Margaret E. Hall ed.,

Moving beyond the moral skepticism that informed Justice Holmes's opinions, Hughes argued that the Constitution should not be read to interfere with the moral duty of legislatures to protect vulnerable workers from exploitation:

> 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 defenseless 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. It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land. While in the instant case no factual brief has been presented, there is no reason to doubt that the State of Washington has encountered the same social problem that is present elsewhere. 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.[102]

The majority opinion in *Parrish* triggered a forceful dissent. After obliquely accusing an unnamed justice of voting against his conscience,[103] Justice Sutherland launched a blistering attack on the majority's embrace of "changed circumstances" jurisprudence in

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Matthew Bender 1967) (1947) ("It is the dissenting opinion of Justice Holmes [in *Lochner*], which men will turn to in the future as the beginning of an era.").

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

103. *Id.* at 401-02 (Sutherland, J., dissenting). Justice Sutherland wrote:

> It has been pointed out many times, as in the *Adkins* case, that this judicial duty is one of gravity and delicacy; and that rational doubts must be resolved in favor of the constitutionality of the statute. But whose doubts, and by whom resolved? Undoubtedly it is the duty of a member of the court, in the process of reaching a right conclusion, to give due weight to the opposing views of his associates; but in the end, the question which he must answer is not whether such views seem sound to those who entertain them, but whether they convince him that the statute is constitutional or engender in his mind a rational doubt upon that issue. The oath which he takes as a judge is not a composite oath, but an individual one. And in passing upon the validity of a statute, he discharges a duty imposed upon *him*, which cannot be consummated justly by an automatic acceptance of the views of others which have neither convinced, nor created a reasonable doubt in, his mind. If upon a question so important he thus surrender his deliberate judgment, he stands forsworn. He cannot subordinate his convictions to that extent and keep faith with his oath or retain his judicial and moral independence.

Id. at 401-02.

which the Constitution changes shape to meet the needs of the current majority:

> It is urged that the question involved should now receive fresh consideration, among other reasons, because of "the economic conditions which have supervened;" but the meaning of the Constitution does not change with the ebb and flow of economic events. We frequently are told in more general words that the Constitution must be construed in the light of the present. If by that it is meant that the Constitution is made up of living words that apply to every new condition which they include, the statement is quite true. But to say, if that be intended, that the words of the Constitution mean today what they did not mean when written—that is, that they do not apply to a situation now to which they would have applied then—is to rob that instrument of the essential element which continues it in force as the people have made it until they, and not their official agents, have made it otherwise.[104]

Sutherland's dissent raises an important point. If past cases were to be reversed on the basis of "changed circumstances," and not because the former opinions were wrong, how was this any different than a decision to amend the Constitution? How could such a doctrine be reconciled with the people's right to decide when and how their constitution should be amended? If authority was placed with the Court to determine when the Constitution needed updating to meet modern circumstances, this seems but another version of the Judicial Supremacy opposed by New Deal appointees like Justice Jackson.[105] On the other hand, if the power to determine changed circumstances was placed in the legislature, this called into question the enforcement of any constitutional right against laws reasonably enacted for the

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104. *Id.* at 402-03. Sutherland's *Parrish* dissent echoes his earlier dissent from Hughes's opinion in *Blaisdell*:

> What a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.
>
> The whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent, of its framers and the people who adopted it. . . .
>
> . . . A candid consideration of the history and circumstances which led up to and accompanied the framing and adoption of this clause will demonstrate conclusively that it was framed and adopted with the specific and studied purpose of preventing legislation designed to relieve debtors especially in time of financial distress. Indeed, it is not probable that any other purpose was definitely in the minds of those who composed the framers' convention or the ratifying state conventions which followed, although the restriction has been given a wider application upon principles clearly stated by Chief Justice Marshall in the Dartmouth College Case.

Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 452-54 (1934) (Sutherland, J., dissenting) (citation omitted).

105. *See* Jackson, *supra* note 11.

public welfare. Either way, Hughes's vision struck at the very nature of judicial review and the role of the Court as an independent branch of government.

C. *Textualism*

Sutherland's complaint was never directly addressed by the Court and it is not clear what impact, if any, his arguments had on incoming members of the New Deal Court.[106] Nevertheless, by the next term (1937-1938), the Court had moved away from Hughes's break with text and original intent.[107]

The first hint came in December of 1937 in *Palko v. Connecticut*,[108] where the Court rejected a claim that liberty under the Fourteenth Amendment included all rights listed in the first eight amendments, including the Fifth Amendment protection against double jeopardy.[109] Writing for the Court, Justice Cardozo distinguished Lochnerian liberty of contract from other aspects of liberty protected by the Due Process Clause, such as freedom of speech, the press and the free exercise of religion. He wrote, "[i]n these and other situations immunities that are valid as against the federal government by force of the *specific pledges of particular amendments* have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states."[110]

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106. Justice Van Devanter retired June 2, 1937 and was replaced by Justice Black. Justice Sutherland retired on January 18, 1938 and was replaced by Justice Reed. Justice Butler, due to illness, did not participate in any case heard during the 1939 term; he died on November 16, 1939 and was replaced by Justice Murphy. Justice McReynolds retired February 1, 1941; he was briefly replaced by Justice Byrnes, who himself was replaced by Justice Rutledge in 1943. *See generally* Oxford Companion to Supreme Court, *supra* note 78.

107. *Palko*, *Carolene Products* and *Erie* all were decided during the same term in 1937-38.

108. 302 U.S. 319 (1937) (upholding criminal appeals by the prosecution against Fourteenth Amendment challenge).

109. *Id.* at 323. The court indicated:

> We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.

Id.

110. *Id.* at 324-25 (emphasis added). Interestingly, only eleven months earlier in *De Jonge*, the Court seemed to imply textual inclusion in the Bill of Rights could be construed as evidence *against* inclusion as a due process right. *See* De Jonge v. Oregon, 299 U.S. 353, 364 (1937). In *De Jonge*, the Court wrote:

> "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." The First Amendment of the Federal Constitution expressly guarantees that right against abridgment by Congress. But explicit mention there does not argue exclusion elsewhere. For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil

Cardozo's link between Fourteenth Amendment liberty and the "specific pledges of particular amendments" necessarily excludes Lochnerian liberty of contract. It also excluded non-textual liberties like the parental rights protected in *Pierce*. Rather than place *Pierce* in the same dustbin as *Lochner*, however, Cardozo characterized *Pierce* as a free exercise case.[111] This despite the fact that the Court in *Pierce* never mentioned religious freedom and based its decision instead on a parent's right to educate their child—a theory broad enough to protect the rights of a military school.[112]

The textualist link between Fourteenth Amendment liberty and the Bill of Rights came up again only a few months later, this time appearing in a footnote.[113] In *United States v. Carolene Products Company*,[114] the Court declared that henceforth "regulatory legislation affecting ordinary commercial transactions" is to be presumed constitutional.[115] Justice Stone then included a footnote which explained "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth."[116] Stone thus echoed *Palko*'s focus on the "specific pledges of particular amendments."[117]

By tying heightened protection of Fourteenth Amendment liberties to rights expressly mentioned in the text of the Constitution, the Court distinguished Lochnerian speech, press and religious liberties

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and political institutions—principles which the Fourteenth Amendment embodies in the general terms of its due process clause.

Id. at 364 (quoting United States v. Cruikshank, 92 U.S. 542, 552 (1875)).

111. The Court wrote:

> On the other hand, the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress, De Jonge v. Oregon; Herndon v. Lowry; or the like freedom of the press, Grosjean v. Amerian Press Co.; Near v. Minnesota; or the free exercise of religion, Hamilton v. Regents; cf. Grosjean v. American Press Co.; Pierce v. Society of Sisters.

Palko, 302 U.S. at 324. (complete citations omitted).

112. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) ("Under the doctrine of *Meyer v. Nebraska*, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." (citation omitted)).

113. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). Between *Palko* in December 1937 and *Carolene Products* in April 1938, the Court decided *Lovell v. Griffin*, 303 U.S. 444 (1938). In *Lovell*, the Court cited *Gitlow* and other free speech and free press cases for the proposition that speech and press are protected aspects of liberty under the Due Process Clause. *See id.* at 450. Unlike *Gitlow*, however, the Court cited neither *Lochner* nor *Allgeyer*—the cases once relied upon by the Court to justify protections of speech and press.

114. 304 U.S. 144 (1938).

115. *Id.* at 152-53.

116. *Id.* at 152 n.4.

117. Palko v. Connecticut, 302 U.S. 319, 324-25 (1937).

from Lochnerian liberty of contract and parental rights. As had Cardozo in *Palko*, Stone linked the parental rights cases of *Meyer* and *Pierce* to "specific prohibition[s]" in the Constitution by characterizing them as involving the rights of religious (*Pierce*) and ethnic (*Meyer*) minorities.[118]

Justice Oliver Wendell Holmes's prior dissent in which he had criticized the Court for protecting a right "not specially mentioned in the text that we have to construe"[119] became the intellectual lodestone for the New Deal rejection of *Lochner*. As Justice Douglas wrote for a unanimous Court in *Olsen v. Nebraska*:[120]

> In final analysis, the only constitutional prohibitions or restraints which respondents have suggested for the invalidation of this legislation are those notions of public policy embedded in earlier decisions of this Court but which, as Mr. Justice Holmes long admonished, should not be read into the Constitution. *Since they do not find expression in the Constitution*, we cannot give them continuing vitality as standards by which the constitutionality of the economic and social programs of the states is to be determined.[121]

The common law methodology which produced liberty of contract, the story now went, allowed the *Lochner* Court to write its personal predilections into the law.[122] According to Felix Frankfurter, the words "due process of law" and "equal protection of the laws,"

> are so unrestrained, either by their intrinsic meaning, or by their history, or by tradition, that they leave the individual Justice free, if, indeed, they do not actually compel him, to fill in the vacuum with his own controlling conceptions, which are bound to be determined by his experience, environment, imagination, his hopes and fears—his "idealized political picture of the existing social order."[123]

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118. *See Carolene Prods.*, 304 U.S. at 153 n.4 (complete citations omitted). The Court stated:

> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, *Pierce v. Society of Sisters*, or national, *Meyer v. Nebraska*, *Bartels v. Iowa*, *Farrington v. Tokushige*, or racial minorities, *Nixon v. Herndon*, *Nixon v. Condon*; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. (complete citations omitted).

119. Adkins v. Children's Hosp., 261 U.S. 525, 568 (1923) (Holmes, J., dissenting).

120. 313 U.S. 236 (1941).

121. *Id.* at 246-47 (emphasis added) (referring to Tyson & Brother v. Banton, 273 U.S. 418, 446 (1927), and *Adkins*, 261 U.S. at 570).

122. *See* Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587, 633 (1936) (Stone, J., dissenting).

123. Felix Frankfurter, *Mr. Justice Holmes's Constitutional Opinions*, *in* Felix Frankfurter on the Supreme Court: Extrajudicial Essays on the Court and the Constitution 117 (Philip B. Kurland ed., 1970) [hereinafter Frankfurter, *Holmes's Constitutional Opinions*]; *see also* Roosevelt's Address Celebrating the 150th

The problem with determining the "vague contours" of the Due Process Clause would play a central role in the debate between Frankfurter and Jackson regarding the New Deal charter of judicial review. Although he would part ways with Frankfurter on the Doctrine of Incorporation, Justice Jackson also believed that textual expression marked the boundary between judicial deference to the political branches and judicial enforcement of fundamental liberties. As he later wrote, "[m]uch of the vagueness of the due process clause disappears when the specific prohibitions of the First [Amendment] become its standard."[124]

Linking heightened judicial protection to textual expression in the Bill of Rights is a theme that appears throughout individual rights cases during this period.[125] Unlike cases prior to 1937, where textual

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Anniversary of the Philadelphia Convention, *in* 6 Roosevelt Public Papers, *supra* note 86, at 359, 366 ("Yet nearly every attempt to meet those demands for social and economic betterment has been jeopardized or actually forbidden by those who have sought to *read* into the Constitution language which the framers refused to *write* into the Constitution."). Historian Joseph Lash claims that Justice Frankfurter helped write this speech. *See* Joseph P. Lash, Dealers and Dreamers: A New Look at the New Deal 315 (1988).

124. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

125. For examples of such heightened protection, see *Jones v. Opelika*, 316 U.S. 584, 597 (1942) (Reed, J.) ("[C]areful as we may and should be to protect the freedoms safeguarded by the Bill of Rights, it is difficult to see in such enactments a shadow of prohibition of the exercise of religion or of abridgement of the freedom of speech or the press. It is prohibition and unjustifiable abridgement which are interdicted, not taxation."); *id.* at 610 (Stone, J., dissenting) ("[F]reedom of press and religion, explicitly guaranteed by the Constitution, must at least be entitled to the same freedom from burdensome taxation which it has been thought that the more general phraseology of the commerce clause has extended to interstate commerce."); *id.* at 624 (Black, J., dissenting) ("[C]ertainly our democratic form of government, functioning under the historic Bill of Rights, has a high responsibility to accommodate itself to the religious views of minorities, however unpopular and unorthodox those views may be. The First Amendment does not put the right freely to exercise religion in a subordinate position. We fear, however, that the opinions in these and in the *Gobitis* case do exactly that."); *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939) ("[T]his court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men."); *see also* Murdock v. Penn., 319 U.S. 105, 113 (1943) ("It is a license tax—a flat tax imposed on the exercise of a privilege granted by the Bill of Rights.").

The most famous example is from *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), where Justice Jackson expressly linked Due Process rights to the texts of the Bill of Rights:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.... The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness

expression in the Bill of Rights was irrelevant to the common law approach to defining "liberty," text now distinguished legitimate from illegitimate judicial review.

D. *Originalism and the Commerce Power*

Nowhere was Justice Hughes's "changed circumstances" doctrine more plausible than in the area of commerce. The fact that the New Deal Court declined to embrace such a doctrine even here is additional evidence that the New Deal Revolution, as envisioned by the Court, was not merely about adjusting the Constitution to meet an economic emergency. The Revolution involved adjusting the nature of, and justification for, judicial review.[126]

As was true for the individual rights cases, the New Deal Court experimented with different justifications for broadening government power to regulate the economy. Chief Justice Hughes would have focused on changed economic circumstances.[127] Other justices were not convinced the framers had so restricted government powers to regulate the economy. Robert Jackson, for example, believed the *Lochner* Court had "expanded the concept of 'due process,' and tore it loose from its ancient connotations; it restricted the concept of the power to regulate interstate commerce, and cut down the significance which John Marshall had attributed to it."[128] It would take several years for the Court to reach consensus on the principle underlying the expansion of federal regulatory power.

The New Deal Court's first commerce decisions claimed to follow the general framework of pre-1937 doctrine. When Chief Justice Hughes wrote for the majority to uphold the National Labor Relations Act in *NLRB v. Jones & Laughlin Steel Company*, his decision favorably cited the anti-New Deal case *Schechter Poultry*.[129] Perhaps because of its narrow holding, *Jones & Laughlin* did not

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> of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case.

Id. at 638-39.

126. *But see* Planned Parenthood v. Casey, 505 U.S. 833, 861-62 (1992). For a critique of *Casey*'s analysis of the New Deal, see Ackerman, Transformations, *supra* note 5, at 400.

127. *See supra* text accompanying note 102.

128. Jackson, *supra* note 11, at 70.

129. *See* NLRB v. Jones & Laughlin Steel Co., 301 U.S. 1, 34 (1937).

trigger the same kind of passionate dissent as had the dramatic abandonment of liberty of contract in *Parrish*.[130] Simply upholding particular aspects of the New Deal, however, was not enough for New Deal appointees like Robert Jackson, who believed the problem was a jurisprudential method which unjustifiably established the Supreme Court "as a Supreme Censor of legislation."[131] Within a few years, the Court had articulated a broader theory of judicial deference, and based its new jurisprudence on original intent.

In the 1941 case *United States v. Darby*,[132] a unanimous Court embraced the "now classic dissent of Mr. Justice Holmes," reversed *Hammer v. Daggenhart*, and upheld federal regulation of hours and wages.[133] Abandoning the "changed circumstances" rationale of now-retired Chief Justice Hughes,[134] the Court refused to read the Tenth Amendment beyond its specific terms and linked the new vision of commerce power to the intentions of the Founders:

> The [Tenth] amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers. See e.g., II Elliot's Debates, 123, 131; III id. 450, 464, 600; IV id. 140, 149; I Annals of Congress, 432, 761, 767-768; Story, Commentaries on the Constitution, §§ 1907-1908.[135]

Instead of justifying the expansion of government power as a response to changed circumstances or popular mandate, the Court insisted it had recovered the originally intended meaning of federal power:[136] "From the beginning and for many years the amendment has

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130. *See supra* notes 103-04 and accompanying text.

131. Jackson, *supra* note 11, at 70.

132. 312 U.S. 100 (1941) (upholding Fair Labor Standards Act's regulation of hours and wages, with Justice Stone writing for a unanimous Court).

133. *Id.* at 115. Holmes himself also advocated originalism in interpreting the Constitution. *See* Eisner v. Macomber, 252 U.S. 189, 197 (1920) (Holmes, J., dissenting) ("[T]he Sixteenth Amendment should be read in 'a sense most obvious to the common understanding at the time of its adoption.'" (citation omitted)); *see also* Hammer v. Daggenhart, 247 U.S. 251 (1918).

134. Hughes retired from the Court in 1941, and his vision of the New Deal Charter retired with him. No New Deal appointee would suggest following his "changed circumstances" rationale for the New Deal Revolution.

135. *Darby*, 312 U.S. at 124.

136. Bruce Ackerman might describe the Court's use of originalism as evidence of a "partial revolution" or a "revolution on a human scale." *See* Bruce Ackerman, *Revolution on a Human Scale*, 108 Yale L.J. 2279, 2282-83 (1999) [hereinafter Ackerman, *Human Scale*]. By this he means that revolutions rarely are promoted as total breaks with the past (the exceptions being total revolutions like Stalinist Russia). *Id.* at 2285-86. Generally, revolutionary leaders do not make a total break from the

been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. Martin v. Hunter's Lessee; McCulloch v. Maryland."[137] The next year, in *Wickard v. Filburn*, the Court continued the same theme,[138] stating: "At the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded. Gibbons v. Ogden. He made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from political rather than from judicial processes."[139]

Bruce Ackerman has labeled this attempt to justify the New Deal expansion of federal power on the intentions of the Founders a "myth of rediscovery."[140] It is at least arguable that the New Deal Court expanded the regulatory power of government beyond that envisioned at the Founding. My effort, however, is not to determine the correctness of the New Deal Court's understanding of the Founding,[141] but to understand the Revolution on its own terms. By

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past but attempt instead to ground the revolution in the ideals and legal forms of the past ("revolutions on a human scale"). In this way, Ackerman might try to distinguish the originalist rhetoric of the New Deal Revolution (the myth) from the substance of the New Deal (abandonment of liberty of contract).

In the case of the New Deal, however, originalism was not a cover for the New Deal, it was itself part of the substance of the New Deal. It was essential to the task of building a new and acceptable method of judicial review after *Lochner*. To distinguish this aspect of the revolution would be to leave out what the revolution was all about—the legitimate exercise of judicial review.

137. *Darby*, 312 U.S. at 124 (complete citations omitted).

138. In *Wickard*, Jackson repeated the analysis he deployed in his book. *See* Jackson, *supra* note 11, at 174 (criticizing the *Lochner* Court for having abandoned the original vision of John Marshall).

139. Wickard v. Filburn, 317 U.S. 111, 120 (1942) (complete citations omitted).

140. *See* Ackerman, Foundations, *supra* note 5, at 62.

141. A number of scholars have argued there are important differences between the New Deal and federal power as originally intended. *See, e.g.*, Ackerman, Foundations, *supra* note 5, at 62 ("The Founders created the least, not the most, nationalistic regime in our history."); Howard Gillman, *More on the Origins of the Fuller Court's Jurisprudence: Reexamining the Scope of Federal Power Over Commerce and Manufacturing in Nineteenth-Century Constitutional Law*, 49 Pol. Res. Q. 415 (1996); Stephen M. Griffin, *Constitutional Theory Transformed*, 108 Yale L.J. 2115, 2117-19 (1999) (discussing and rejecting what he calls the "Restoration Thesis"). The divergence of myth from reality raises important questions, particularly for those who believe the New Deal Court supervised a moment of legitimate constitutional revolution. If Professor Ackerman is correct and the New Deal was a legitimate constitutional moment, then an incorrect understanding of history should not stand in the way of the people's right to expand the delegated powers of government. Elsewhere I have argued that an incorrect understanding of the original meaning of the religion clauses should not undermine the people's right to constitutionalize a "new understanding or original intent" in 1868. An originalist who accepts the New Deal as a constitutional moment, but disagrees with the New Deal Court's analysis of the Founding might acknowledge the New Deal as a constitutional moment, agree with the New Deal Court that original intent should govern, but argue that what controls is the original intent of the people at the time of the New Deal. This would

invoking the original intent of the Commerce Clause, the Court retained its role as primary enforcer of constitutional norms.[142] This role was retained at the price of adhering more closely to the text—a text construed according to its original meaning. Judicial review in a post-*Lochner* world no longer would be based on common law norms of liberty or "implied restrictions," but on clear restrictions in the constitutional text.

E. *The New Deal and the Brooding Omnipresence:* Erie

The framers of the Fourteenth Amendment drafted its provisions against an assumed background of pre-existing natural rights.[143] The Fourteenth Amendment did not create so much as declare national rights already in existence and deserving the protection of the courts.[144] By the time of the New Deal, however, legal realism had undermined the idea that courts "discovered" preexisting background rights.

The same year that *Carolene Products* distinguished enforceable textual rights from mere common law liberties, the Court decided *Erie Railroad Company v. Tompkins*.[145] Just as the Court rejected common law liberties like liberty of contract, the Court in *Erie* now revoked its authority to discover common law rights enforceable against the states. "[W]hat has been termed the general law of the country," observed Justice Brandeis, "is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject."[146] Rejecting such a subjective basis for judicial review, Brandeis declared "[s]upervision over either the legislative or the judicial action of the States is in no case permissible

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constitute the last speaking of the sovereign on the subject of government power, and it should not be undermined by flawed judicial attempts to ground their decisions in the views of the Founders.

The one thing an originalist cannot do, however, is to embrace the substance of the change without the orignalist rationale offered by the New Deal Court. Originalist methodology was not mere window dressing; it was an indispensable aspect of the New Deal. Textual originalism is how the Court managed to accomplish the needed change without damaging the institution of the Court—something no one wanted or thought necessary.

142. The year after *Wickard*, the Court reversed *Gobitis* and handed down its decisions in *Murdock* and *Barnette*, thus ensuring the Court's continued role as primary guardian of textual liberties. *See infra* notes 206-11 and accompanying text.

143. *See* Amar, Bill of Rights, *supra* note 26, at 147; Curtis, No State, *supra* note 26, at 41; Lash, *Free Exercise Clause*, *supra* note 29, at 1138.

144. *See* Amar, Bill of Rights, *supra* note 26, at 147 ("[E]ven if the federal Bill of Rights did not, strictly speaking, bind the states of its own legislative force, was it not at least declaratory of certain fundamental common-law rights?").

145. 304 U.S. 64 (1938).

146. *Id.* at 78 (quoting Baltimore & Ohio R.R. Co. v. Bough, 149 U.S. 368, 401 (1893) (Field, J., dissenting)).

except as to matters by the Constitution specifically authorized or delegated to the United States."[147] He continued:

> 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," that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts "the parties are entitled to an independent judgment on matters of general law. . . ."[148]

Written at the dawn of the New Deal Revolution, *Erie* signaled that the Court's new direction went beyond a mere rejection of economic rights. Soon-to-be Justice Jackson wrote that the Court's decision in *Erie* was "[p]erhaps the most remarkable decision of this period and in some respects one of the most remarkable in the Court's history."[149] In his book, The Struggle for Judicial Supremacy, Jackson remarked:

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147. *Id.* at 79.

148. *Id.* (footnote omitted). Justice Brandeis continued:

> [T]he authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word.
>
> Thus the doctrine of *Swift v. Tyson* is, as Mr. Justice Holmes said, "an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."

Id. (citation omitted).

149. Jackson, *supra* note 11, at 272. Later in his book, Jackson distinguished the *Lochner* Court's enforcement of civil liberties:

> There is nothing covert or conflicting in the recent judgments of the Court on social legislation and on legislative repressions of civil rights. The presumption of validity which attaches in general to legislative acts is frankly reversed in the case of interferences with free speech and free assembly, and for a perfectly cogent reason. Ordinarily, legislation whose basis in economic wisdom is uncertain can be redressed by the processes of the ballot box or the pressures of opinion. But when the channels of opinion and of peaceful persuasion are corrupted or clogged, these political correctives can no longer be relied on, and the democratic system is threatened at its most vital point. In that event the Court, by intervening, restores the processes of democratic government; it does not disrupt them.

Id. at 284-85. In a footnote, Jackson cited as examples of the Courts enforcement of speech and assembly, *Lovell v. Griffin*, 303 U.S. 444 (1938), *Hague v. C.I.O.*, 307 U.S. 496 (1939), *Schneider v. New Jersey*, 308 U.S. 147 (1939), and *Thornhill v. Alabama*, 310 U.S. 88 (1940). Jackson, *supra* note 11, at 284 n.48. He then noted "compare, however, *Minersville School District v. Gobitis*." *Id.* This notation is surprising given that Jackson's "political process" reasoning seemed to track Frankfurter's political process approach in *Gobitis*, where the Court's upholding of compelled flag salutes was based on the contention that the place to dissent from such compulsion was at the polls. There was no reason to think the channels of democratic reform had been clogged. *See* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 599 (1940). In his opinion in *Barnette*, which reversed *Gobitis*, Jackson abandoned the "political process" reasoning of his earlier book, and instead embraced the textualist justification for substantive enforcement of the First Amendment. *See* discussion *infra* Part III.C.

> The significance of the overruling of [*Swift v. Tyson*] has probably not been fully appreciated. It was a change of a legal doctrine, the very existence of which was but little known outside of the legal profession. The change was not impelled by "supervening economic events," nor was it a part of the program of any political party. The change was made on the initiative of a majority of the Court itself, without even a demand by a litigant or argument of the point at the bar. It involved a volunteered confession that the federal judiciary almost from the foundation of our government has pursued a course clearly unconstitutional, has all these years been exercising a power not conferred by the Constitution, and in so doing has invaded rights reserved by the Constitution to the several states.[150]

Erie reflected a startling reversal of the assumptions that had originally led the Court to embrace free speech, press and religion as aspects of liberty under the Fourteenth Amendment.[151] Prior to the New Deal, the Court was authorized to enforce background common law norms against the conflicting policy choices of state or federal government. With legal realism having exploded the idea of liberties existing independent of and superior to the policy choices of government, judicial intervention was justified only when "specifically authorized" by constitutional text.

F. *Reconstructing the Parental Rights Cases:* Meyer *and* Pierce

The New Deal Court's treatment of Lochnerian parental rights is additional evidence that the Court was engaged in a broad restructuring of the nature of judicial review. Had the rejection of *Lochner* been based on modern economic theory, or simply on the need to make way for the New Deal, there would have been little reason to revisit the parental rights protections of *Meyer* and *Pierce*.[152] On the other hand, if *Lochner* represented one aspect of a broader, erroneous theory of judicial review, then the continued viability of *Meyer* and *Pierce* depended on whether they shared—or could be cleansed of—the errors of *Lochner*. As then-Professor Frankfurter wrote not long after *Meyer* and *Pierce* were decided:

> In rejoicing over [*Meyer*] and [*Pierce*], we must not forget that a heavy price has to be paid for these occasional services to liberalism. [*Lochner*], the invalidation of anti-trade union laws, the

150. Jackson, *supra* note 11, at 272-73 (footnote omitted).

151. Some scholars have argued that *Erie* mischaracterized the original meaning of *Swift v. Tyson*. *See, e.g.*, Ely, *Irrepressible Myth*, *supra* note 12; Jack Goldsmith & Steven Walt, Erie *and the Irrelevance of Legal Positivism*, 84 Va. L. Rev. 673 (1998). Even if this is the case, what the Court was rejecting was the common law methodology that had come to be associated with *Swift*.

152. At least not unless those rights directly interfered with the government's new power to regulate commerce. For an example of where the two conflicted, see *infra* notes 170-76 and accompanying text, discussing *Prince v. Massachusetts*.

> sanctification of the injunction in labor cases, the veto of minimum wage legislation, are not wiped out by [*Pierce*].[153]

In fact, the manner in which these cases were handled after 1937 indicates that the New Deal Court saw no difference between judicial enforcement of parental rights and enforcement of liberty of contract.

Prior to 1937, *Meyer* and *Pierce* often were cited in support of the Court's protection of common law rights like liberty of contract, parental rights and freedom of speech.[154] Beginning in 1937, however, the Court dropped the reference to non-textual common law liberties and redefined *Meyer* and *Pierce* as cases involving textual First Amendment rights or ethnic discrimination. In *Palko* in 1937, Justice Cardozo characterized *Pierce* as a free exercise case.[155] In Footnote Four of *Carolene Products* in 1938, Justice Stone described *Pierce* and *Meyer* as involving ethnic and religious discrimination.[156] In *Minersville School District v. Gobitis* in 1939, Justice Frankfurter described *Pierce* as a "Bill of Rights" case.[157]

Possibly, the Court intended to highlight heretofore "masked" First Amendment aspects of *Meyer* and *Pierce* without intending to call into question the Lochnerian "parental rights" component. After all, anti-Catholic animus almost certainly was behind the law passed in *Pierce*[158] and ethnic bias most likely played a role in *Meyer*.[159] If this were the case, however, we would expect the parental rights aspect to emerge in appropriate cases. Instead, even when presented a clear opportunity to speak in favor of parental rights, the Court remained pointedly silent.

In *Gobitis*, the Supreme Court denied parents the right to instruct their children not to salute the flag.[160] Writing for the majority, Justice Frankfurter cited *Pierce* as involving the Bill of Rights.[161] As the sole dissenter, Justice Stone argued that the law violated freedom of speech and freedom of religion, rights guaranteed by the Bill of Rights.[162] Stone cited *Pierce*, not in support of parental autonomy, but on behalf of the parents' right to seek a religious education for their

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153. Felix Frankfurter, *Can the Supreme Court Guarantee Toleration?*, *in* Frankfurter on the Supreme Court, *supra* note 123, at 174, 176.

154. *See supra* notes 58-60, 70 and accompanying text.

155. Palko v. Connecticut, 302 U.S. 319, 324 (1937).

156. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938). Stone made the same characterization of *Pierce* in his *Gobitis* dissent. *See* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 603 (1940) (Stone, J., dissenting).

157. *Gobitis*, 310 U.S. at 599.

158. The compulsory attendance law in *Pierce* was enacted in the context of a broad assault on Roman Catholic education. *See* Lash, *Free Exercise Clause*, *supra* note 29, at 1149-53.

159. The law was applied to a Lutheran school teaching the German language not long after World War I.

160. *Gobitis*, 310 U.S. at 599-60.

161. *Id.* at 599.

162. *Id.* at 607.

children.[163] Finally, Stone cites both *Meyer* and *Pierce* in support of judicial authority "to scrutinize legislation restricting the civil liberty of racial and religious minorities although no political process was affected."[164] Stone nowhere mentions the non-textual rights of parents to control the education of their children. Instead, his dissent is based solely on liberties expressed in text of the Bill of Rights and equal protection doctrine.[165]

A few years later, *West Virginia Board of Education v. Barnette*[166] reversed *Gobitis* and upheld the right of Jehovah's Witness children to refuse to salute the flag. Despite the obvious relationship to cases involving the parental right to direct the education of their children, Justice Jackson's endorsement of individual rights never mentioned, much less cited, *Meyer* and *Pierce*.[167] Instead, he justified heightened review because the case involved the specific prohibitions of the First Amendment, not merely a vague due process liberty.[168]

Perhaps the "loudest" silence[169] regarding parental rights occurred in the 1944 case, *Prince v. Massachusetts*.[170] In *Prince*, the majority upheld the application of a state child labor law against a Jehovah's Witness parent who wished to have her child assist her in selling religious literature.[171] The mother argued that the law violated her free exercise rights, as well as her parental rights protected under *Meyer*.[172] In response, the majority implied in a footnote that the

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163. *Id.* at 603.

164. *Id.* at 606.

165. *Id.* at 606-07. Justice Stone wrote:

> For this reason it would seem that legislation which operates to repress the religious freedom of small minorities, which is admittedly within the scope of the protection of the Bill of Rights, must at least be subject to the same judicial scrutiny as legislation which we have recently held to infringe the constitutional liberty of religious and racial minorities.

Id. at 607.

166. 319 U.S. 624 (1943).

167. In fact, only Frankfurter in dissent mentioned these cases. He cited *Pierce* for the proposition that the students were not forced to go to public schools; and he used the case as part of a slippery slope argument. *See id.* at 656, 661 ("And what of the larger issue of claiming immunity from obedience to a general civil regulation that has a reasonable relation to a public purpose within the general competence of the state?" (citation omitted)). Justice Jackson also pointedly ignored *Meyer* and *Pierce* in his book The Struggle for Judicial Supremacy. See Jackson, *supra* note 11, at 71.

168. *See Barnette*, 319 U.S. at 639.

169. There are other less dramatic silences as well. For example, in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), Justice Roberts cited *Schneider*, a post-New Deal free speech case, in support of his contention that all of the First Amendment is protected under the Due Process Clause. The pre-New Deal cases of *Meyer* and *Pierce* are not mentioned, despite Justice Cardozo's characterization in *Palko* (three years earlier) that these cases represented the Court's protection of religious liberty. *See supra* note 155 and accompanying text.

170. 321 U.S. 158 (1944).

171. *Id.* at 170.

172. *Id.* at 164.

parental rights claim added nothing to the religious freedom claim.[173] Next the Court conceded that *Meyer* and *Pierce* protected a form of family autonomy, but one that deserved no more than rational basis review[174]—no more protection than would be afforded a liberty of contract claim.[175] The dissenting opinions in *Prince*, both of which argued that the mother's religious freedom claim should be sustained, never cited *Pierce* and *Meyer*, much less invoked parental rights. Instead, Justice Murphy in his dissent obliterated Lochnerian parental rights by conceding that "the family itself is subject to reasonable regulation in the public interest."[176] The "silences" of *Prince* are but one example of how New Deal justices, when faced with the strongest incentive to breath life into Lochnerian parental rights, declined to so.

Years later, long after the New Deal, the parental rights aspect of *Meyer* and *Pierce* would be revived. At first, justices would acknowledge these cases no longer stood for parental autonomy.[177]

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173. *Id.* at 164 n.8 ("The due process claim, as made and perhaps necessarily, extends no further than that to freedom of religion, since in the circumstances all that is comprehended in the former is included in the latter.").

174. *Id* at 166-67 (citing the state's power to enact child labor laws and concluding: "It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction.").

175. *See* United States v. Carolene Prods. Co. 304 U.S. 144, 153-54 (1938).

176. *Prince*, 321 U.S. at 173 (Murphy, J., dissenting). Murphy continued:

> We are concerned solely with the reasonableness of this particular prohibition of religious activity by children.
>
> In dealing with the validity of statutes which directly or indirectly infringe religious freedom and the right of parents to encourage their children in the practice of a religious belief, we are not aided by any strong presumption of the constitutionality of such legislation. United States v. Carolene Products Co., 304 U.S. 144, 152 note 4. On the contrary, the human freedoms enumerated in the First Amendment and carried over into the Fourteenth Amendment are to be presumed to be invulnerable and any attempt to sweep away those freedoms is prima facie invalid.

Id.

177. In his dissent in *Poe v. Ullman*, Justice Harlan cites *Pierce* and *Meyer*—as well as *Allgeyer* (!) for the proposition that liberty means more than the rights listed in the text (he skips *Lochner*). Poe v. Ullman, 367 U.S. 497, 543-44 (1961) (Harlan, J., dissenting). Harlan concedes that this is not the post-New Deal understanding of *Pierce*:

> I consider this so, even though today those decisions would probably have gone by reference to the concepts of freedom of expression and conscience assured against state action by the Fourteenth Amendment, concepts that are derived from the explicit guarantees of the First Amendment against federal encroachment upon freedom of speech and belief. See West Virginia State Board of Education v. Barnette; Prince v. Commonwealth of Massachusetts. For it is the purposes of those guarantees and not their text, the reasons for their statement by the Framers and not the statement itself, see Palko v. Connecticut; United States v. Carolene Products Co., which have led to their present status in the compendious notion of "liberty" embraced in the Fourteenth Amendment.
>
> Each new claim to Constitutional protection must be considered against a

Later, the cases were cited as if the New Deal retooling had never occurred.[178] Today, it is not unusual to see *Meyer* and *Pierce* cited as evidence that the New Deal Court did not intend to abandon non-textual substantive due process altogether.[179] The opinions of the New Deal Court, however, indicate otherwise: future enforcement of fundamental rights would be limited to those expressly mentioned in the Bill of Rights. In this way, the vague contours of the Due Process Clause no longer would be used to enforce the subjective opinions of the Court, nor would judicial identification of common law rights cloak mere judicial preferences. To the extent that prior cases indicated otherwise, they must either be rejected (liberty of contract) or reformulated (parental rights) to fit the New Deal Court's embrace of textualism and the limits of legitimate judicial review.

III. INCORPORATION AND THE NEW DEAL DEBATES

Focusing on text for determining due process liberties accomplished a number of important goals. It explained the rejection of *Lochner* and the expansion of federal power without breaking faith with constitutional text (the Constitution, the New Dealers insisted, was not the problem) and without undermining the role of the Court as an independent branch of government (nor was the problem the Court as an institution).[180]

> background of Constitutional purposes, as they have been rationally perceived and historically developed.

Id. at 544 (complete citations omitted).

178. *Pierce* and *Meyer* appear again in 1965—in Justice Douglas's opinion in *Griswold*—only now they were described in Lochnerian terms as protecting the non-textual right of parents to control the education of their children. Griswold v. Connecticut, 381 U.S. 479, 482 (1965). Douglas, for example, cited the two cases as protecting non-textual, "penumbral" rights. *See id.* at 484. He wrote:

> The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.
>
> By *Pierce v. Society of Sisters* . . . the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyer v. Nebraska* . . . the same dignity is given the right to study the German language in a private school.

Id. at 482 (citations omitted). Justice Goldberg cited *Meyer* as representing rights beyond the first eight amendments protected under the Ninth Amendment, in this case rights of marital and family privacy. *Id.* at 488. Justice White noted that these rights were protected under the Fourteenth Amendment. *Id.* at 502.

179. *See, e.g.*, Laurence Tribe, American Constitutional Law 1318 (2d ed. 1988).

180. The pervasive view that the Court as an institution was not the problem can be seen by the negative response to Roosevelt's "Horse and Buggy" speech, which was delivered in the aftermath of the *Schechter Poultry* decision, and the criticism of his proposal to pack the Court. *See* Leuchtenburg, Supreme Court Reborn, *supra* note 6, at 157-61 (describing the impact of the court packing plan); William E. Leuchtenburg, *When the People Spoke, What Did They Say?: The Election of 1936 and the Ackerman Thesis*, 108 Yale L.J. 2077, 2081 (1999) (discussing the response to the "Horse and Buggy" speech).

Simply hewing more closely to the text, however, created a host of difficult interpretive issues. If text is what distinguishes *Lochner* from freedoms listed in the Bill of Rights, then what principled interpretive theory prevented total incorporation of the Bill of Rights?[181] Not only was a sudden expansion of judicial authority over textual rights politically unthinkable at the time, there were those on the Court who believed protection of all textual rights should be scaled back to reflect a more realist interpretation of the Court's role in a constitutional democracy. Consensus on one issue, textual originalism, triggered a prolonged debate regarding the future of incorporated rights.

A. *The Political Process Model*

Although sharply critical of the *Lochner* Court, Justice Jackson conceded that the pre-1937 Court had "rendered civil liberties decisions of substantial value" by protecting "pretty consistently the writ of habeas corpus (*Ex parte Milligan*), fair trial (*Powell v. Alabama*), the franchise (*Nixon v. Herdon*), freedom of the press (*Near v. Minnesota*), and free speech (*Fiske v. Kansas*)."[182] According to Jackson, these rights were essential to the proper functioning of the democratic process:

> There is nothing covert or conflicting in the recent judgments of the Court on social legislation and on legislative repressions of civil rights. The presumption of validity which attaches in general to legislative acts is frankly reversed in the case of interferences with free speech and free assembly, and for a perfectly cogent reason. Ordinarily, legislation whose basis in economic wisdom is uncertain can be redressed by the processes of the ballot box or the pressures of opinion. But when the channels of opinion and of peaceful persuasion are corrupted or clogged, these political correctives can no longer be relied on, and the democratic system is threatened at its most vital point. In that event the Court, by intervening, restores the processes of democratic government; it does not disrupt them.[183]

Jackson's approach mirrored that of *Carolene Products* Footnote Four, which listed interference with freedoms of speech, press and assembly as restrictions on political processes which call for heightened review.[184] Footnote Four also suggested "similar considerations" may call for heightened review of "statutes directed

181. At least, what theory prevented total incorporation of the first eight amendments?

182. Jackson, *supra* note 11, at 71; *accord Ex parte* Milligan, 71 U.S. 2 (1866); Powell v. Alabama, 287 U.S. 45 (1932); Nixon v. Herndon, 273 U.S. 536 (1927); Near v. Minnesota, 283 U.S. 697 (1931); Fiske v. Kansas, 274 U.S. 380 (1927).

183. Jackson, *supra* note 11, at 284-85; *see also* Ely, *supra* note 26, at 73-134.

184. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

at particular religious, or national, or racial minorities."[185] According to Justice Stone, "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[186]

The focus of the political process model was discrimination.[187] Heightened judicial scrutiny was reserved for those situations where political views or religious beliefs were denied equal access to the public marketplace or somehow reflected a failure in the ordinary process of political representation.[188] This equal protection approach

185. *Id.*

186. *Id.*

187. It is during this same period that discrimination against out-of-state commerce emerges as a key factor in dormant commerce clause jurisprudence. *See* S.C. State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 189 (1938).

188. *See* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (striking down, on equal protection grounds, a sterilization statute). *Skinner* represented how firmly a majority of the Court was opposed to recognizing non-textual due process rights. Given the context in which the decision was announced—the United States was at war with Nazi Germany—there could not have been a more tempting moment to announce that liberty included freedom from coerced eugenic experiments. Instead, the Court ignored the plaintiff's due process claims and, *on its own initiative*, based its decision on equal protection. *See id.* at 538. Indeed, Justice Douglas, for the majority, and Justice Stone, in his concurrence, presumed the constitutionality of *Buck v. Bell*, 274 U.S. 200, 207-08 (1927), which recognized the constitutionality of sterilizing feeble-minded individuals.

Justice Stone's concurrence in *Skinner* argued the case should have been decided on the basis of procedural due process, the plaintiff not having been provided a hearing. *See Skinner*, 316 U.S. at 544. He wrote:

> There are limits to the extent to which the presumption of constitutionality can be pressed, especially where the liberty of the person is concerned (see United States v. Carolene Products Co., 304 U.S. 144, 152, n.4) and where the presumption is resorted to only to dispense with a procedure which the ordinary dictates of prudence would seem to demand for the protection of the individual from arbitrary action.

Id.

In his concurrence, Justice Jackson agreed with the majority and Justice Stone that both equal protection and procedural due process had been violated. Jackson concurred, however, in order to express his view that even if the proper procedure had been provided, "[t]here are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority." *Id.* at 546. His concurrence foreshadowed his defense of individual liberty against the tyranny of the majority in *Barnette* but did not follow the textual limitations he traced in *Barnette*. *See infra* text accompanying note 211. Jackson's concurrence stood as a kind of halfway point between his embrace of political process in his book, The Struggle for Judicial Supremacy, and his ultimate adoption of the textual Preferred Freedoms model in *Murdock* and *Barnette*.

Finally, *Skinner* reflected the options available to the Court under the Equal Protection Clause, even as due process was limited to textual rights. Equal protection also had to be reformulated during the New Deal; aspects of *Lochner*, after all, were based on equal protection considerations as well as substantive due process. Both Justice Stone's Footnote Four, and Justice Frankfurter's political process model

was more deferential to the political process than the substantive protection of rights under *Lochner*. Laws generally affecting everyone's speech or activities were not suspect as long as "channels of opinion and of peaceful persuasion" remained open.[189]

The political process model provided a principled explanation for the Court's rejection of both *Lochner* and total incorporation. *Lochner* lacked the textual pedigree necessary to restrict the subjective preferences of the Court. Not all texts in the Bill, however, were essential to the proper functioning of the political process. Consider the Court's justification for protecting freedom of speech and press in the 1939 case *Schneider v. State*:[190]

> This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.
>
> In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.[191]

Understanding speech and religion as political process rights helps to explain how the Court could hand down its 1939 decision in *Gobitis*, only one month after protecting the free exercise rights of Jehovah's Witnesses in *Cantwell v. Connecticut*.[192] In *Gobitis*, the

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suggested limiting equal protection to classifications which threaten the proper functioning of the political process. This would allow the Court to continue enforcing non-textual freedoms like the right to vote under the rubric of equal protection. Just as a majority of the Court moved away from the political process limitation for due process, *Skinner* may indicate a similar move was occurring under equal protection doctrine. However, coming as it did in the midst of a war against Nazi Germany, and given the flux of judicial thinking during this period, it is hard to see *Skinner* as representing a stable consensus regarding the post-*Lochner* theory of equal protection.

189. Jackson, *supra* note 11, at 284-85.

190. 308 U.S. 147 (1939).

191. *Id.* at 161. In another 1939 case, *Coleman v. Miller*, 307 U.S. 433, 450 (1939), the Supreme Court ruled that determining the validity of a proposed constitutional amendment was a "political question," resolvable by the political branches, and not the Court.

192. 310 U.S. 296 (1940). In *Cantwell*, Justice Roberts wrote for a unanimous court, "[t]he fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment." *Id.* at 303. Interestingly, he cited *Schneider*, a 1939 case, as support and made no mention of the many pre-1937 cases which upheld the right to free speech and press. *See id.* In

Court had to decide whether local public school boards could require objecting children to salute the flag.[193] In an 8-1 decision, Justice Frankfurter rejected the claim that a coerced salute violated either freedom of speech or religious exercise. Absent a showing of intentional discrimination, Frankfurter ruled, the Court must defer to the greater competency of states and local school boards to determine what was necessary to advance the legitimate interest in national unity.[194] As much as *Gobitis* today might be considered to be a low point in judicial protection of individual rights,[195] at the time it was perfectly in keeping with one approach to the New Deal Revolution. If *Lochner* was rejected due to the need to defer to the policy making decisions of the political branches, then judicial interference is justified only to the extent necessary to keep open the channels of political reform.[196] Under this approach, laws which discriminated against religious or ethnic minorities tended to prevent the otherwise equal participation envisioned by the political process model. Absent intentional discrimination, however, the Court had no legitimate excuse to interfere.[197] According to Frankfurter, "[e]xcept where the transgression of constitutional liberty is too plain for argument,

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Cantwell, the Court ruled that a city had imposed a prior restraint on Jehovah's Witnesses' ability to disseminate their religious views. *See id.* The channels of persuasion having been closed, the case came within the reach of the political process model.

193. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940).

194. *Id.* at 595.

195. *But see* Employment Div. v. Smith, 494 U.S. 872, 879 (1990) (citing Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940)).

196. In the 1925 case, *Gitlow v. New York*, 268 U.S. 652 (1925), the Court interpreted the Fourteenth Amendment to include the right of free speech but deferred to the political process and legislative determinations regarding the danger of certain forms of speech. The Court wrote:

> By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight.... We cannot hold that the present statute is an arbitrary or unreasonable exercise of the police power of the State....

Id. at 668-70. Both *Gitlow* in 1925 and *Whitney v. California*, 274 U.S. 357, in 1927 were decided under the same "reasonableness" standard as liberty of contract. Thus, the political process model may have been closer to pre-1937 First Amendment jurisprudence than the substantive protection ultimately adopted in *Barnette*.

197. *Gobitis*, 310 U.S. at 594 ("The religious liberty which the Constitution protects has never excluded legislation of general scope not directed against doctrinal loyalties of particular sects."). In dissent, Stone argued there was reason to suspect discrimination:

> For this reason it would seem that legislation which operates to repress the religious freedom of small minorities, which is admittedly within the scope of the protection of the Bill of Rights, must at least be subject to the same judicial scrutiny as legislation which we have recently held to infringe the constitutional liberty of religious and racial minorities.

Id. at 607.

personal freedom is best maintained—so long as the remedial channels of the democratic process remain open and unobstructed."[198]

Frankfurter's argument tracked his rejection of *Lochner* and his belief that unduly vague constitutional provisions like "due process" and "liberty" could be filled with the personal policy choices of the justices.[199]

> When we come to the broad, undefined clauses of the Constitution we are in a decisively different realm of judicial action [than determining the meaning of "search and seizure"]. The scope of application is relatively unrestricted, and the room for play of individual judgment as to policy correspondingly wide. A few simple terms like "liberty" and "property," phrases like "regulate Commerce . . . among the several States" and "without due process of law" call for endless "interpretation." . . . The words of ["due process of law" and "equal protection of the laws"] are so unrestrained, either by their intrinsic meaning, or by their history, or by tradition, that they leave the individual Justice free, if, indeed, they do not actually compel him, to fill in the vacuum with his own controlling conceptions, which are bound to be determined by his experience, environment, imagination, his hopes and fears—his "idealized political picture of the existing social order." Should such power, affecting the intimate life of nation and States, be entrusted, ultimately, to five men?[200]

Meeting Frankfurter's objection would result in the first clearly articulated doctrine of incorporation: the Preferred Freedoms Doctrine.

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198. *Id.* at 599. Frankfurter developed this point further in his *Barnette* dissent:

> When Mr. Justice Holmes, speaking for this Court, wrote that "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts," . . . he went to the very essence of our constitutional system and the democratic conception of our society. He did not mean that for only some phases of civil government this Court was not to supplant legislatures and sit in judgment upon the right or wrong of a challenged measure. He was stating the comprehensive judicial duty and role of this Court in our constitutional scheme whenever legislation is sought to be nullified on any ground, namely, that responsibility for legislation lies with legislatures, answerable as they are directly to the people, and this Court's only and very narrow function is to determine whether within the broad grant of authority vested in legislatures they have exercised a judgment for which reasonable justification can be offered.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 649 (1943) (Frankfurter, J., dissenting) (citation omitted).

199. Frankfurter is generally associated with the Legal Process school of H.L.A. Hart and Alexander Bickel. *See* Kalman, *Law, Politics*, *supra* note 100, at 2208.

200. Frankfurter, *Holmes's Constitutional Opinions*, *supra* note 123, at 116-18 (quoting Roscoe Pound, *The Theory of Judicial Decision*, 36 Harv. L. Rev. 641, 651 (1923)).

B. *Preferred Freedoms Doctrine*

In the period between Frankfurter's 1939 opinion in *Gobitis* and its reversal in *Barnette* in 1943, the Court expressly embraced textual originalism under the Commerce Clause. That move would have implications for other areas of law. Although the Tenth Amendment did not expressly limit government regulation of commerce, the First Amendment was a clear restriction on government activity. Even if heightened review was not warranted by the former, it certainly was by the latter. Moreover, where original intent was irrelevant to a common law interpretation of freedom of speech and press, the original meaning of a specific text attained a new importance.[201] It was here that the political process model came into conflict with the interpretive moves the Court was making under the Commerce Clause, federal common law and incorporation. It is not surprising that soon after adopting textual originalism the Court revisited, and abandoned, the political process model of Justice Frankfurter when it came to the incorporated text of the First Amendment.

Justice Stone was the sole dissenter in *Gobitis*. In the First Amendment cases which followed, he continued his opposition to the mere relative protections of the political process model. Dissenting to the Court's decision to uphold a flat tax applied against the door-to-door sale of religious literature, Stone declared:

> The First Amendment is not confined to safeguarding freedom of speech and freedom of religion against discriminatory attempts to wipe them out. On the contrary, the Constitution, by virtue of the First and the Fourteenth Amendments, has put those freedoms in a preferred position. Their commands are not restricted to cases where the protected privilege is sought out for attack.[202]

This is the first appearance of the Preferred Freedoms Doctrine. By focusing on First Amendment freedoms, Stone placed an interpretive wedge between liberty of contract and the First Amendment (one textual, one not), and between the First Amendment and total incorporation (only some textual freedoms are "preferred"). Thus, like the political process model, this approach limits heightened judicial protection to certain critical rights listed in the First Amendment. Unlike the political process model, however, the Preferred Freedoms Doctrine extended to all First Amendment freedoms—including religious liberty—and called for substantive, not merely relative, protection.

Under the Preferred Freedoms model, equal treatment was not enough. According to Justice Black, "our democratic form of government, functioning under the historic Bill of Rights, has a high

201. Some scholars have argued that interpretation of a text necessarily leads to some form of originalism. *See, e.g.*, Barnett, *Originalism*, *supra* note 21.

202. Jones v. Opelika, 316 U.S. 584, 608 (1942) (Stone, C.J., dissenting).

responsibility to accommodate itself to the religious views of minorities, however unpopular and unorthodox those views may be."[203] Joined by Justices Murphy and Douglas, Black wrote "[s]ince we joined in the opinion in the *Gobitis* case, we think this is an appropriate occasion to state that we now believe that it also was wrongly decided.... The First Amendment does not put the right freely to exercise religion in a subordinate position."[204]

Only one year after *Jones v. Opelika* upheld a flat tax on the sale of religious literature, the Court reversed course and struck down the same kind of tax in *Murdock v. Pennsylvania*.[205] As Justice Douglas explained:

> A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution.... *The fact that the ordinance is "nondiscriminatory" is immaterial.* The protection afforded by the First Amendment is not so restricted. A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. *Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position.*[206]

After *Murdock*, the days of *Gobitis* clearly were numbered. Only one month later, on the fourteenth of June, Flag Day, Justice Jackson abandoned his earlier embrace of political process and authored the opinion reversing *Gobitis*. Justice Frankfurter's draft of the New Deal charter for judicial review had been rejected. Jackson's opinion in *Barnette*[207] dramatically highlighted the debate between Frankfurter and the advocates of the Preferred Freedoms Doctrine. Although recognized today as a great moment in constitutional liberty, at the time it was written, *Barnette* raised as many questions as it answered. Even if the Court was right to reject the political process model, Jackson failed to adequately explain the basis for its selective enforcement of the Bill of Rights.

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203. *Id.* at 624.
204. *Id.* at 623-24.
205. 319 U.S. 105 (1943).
206. *Id.* at 113-15 (emphasis added).
207. *See* discussion *infra* Part III.C.

C. West Virginia Board of Education v. Barnette[208]

In 1941, Jackson had embraced the political process model of First Amendment freedoms,[209] as had seven other members of the Court. By 1943, however, only Justice Roberts remained from the pre-New Deal Court and the country was embroiled in war. It was in this context—under circumstances generally calling for the greatest degree of deference to political necessities—that the Court reversed *Gobitis* and upheld the right of Jehovah's Witnesses to refuse to salute the flag. The fact that *Barnette* was handed down on Flag Day makes the case tantamount to a Declaration of Independence—the independence of the Court.

Barnette cannot be understood apart from the context of the Court's struggle to define judicial review in a New Deal world. Jackson's opinion is suffused with references to the recent upheaval in jurisprudence, the abandonment of *laissez-faire* economic doctrine, and the tremendously difficult task of reconstructing judicial review after *Lochner*:

> [T]he task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. These principles grew in soil which also produced a philosophy that the individual was the center of society, that his

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208. 319 U.S. 624 (1943). Professor Bruce Ackerman has suggested that the New Deal expansion of government power into previously "private areas" like property and contract autonomy justified not only textual incorporation, but also judicial protection of non-textual rights like privacy. *See* Ackerman, *Liberating Abstraction*, *supra* note 43; Bruce Ackerman, *Beyond* Carolene Products, 98 Harv. L. Rev. 713 (1985) [hereinafter Ackerman, *Carolene Products*]. Some aspects of Jackson's opinion can be read this way, particularly where he noted the need to "transplant these rights to a soil in which the *laissez-faire* concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls." *Barnette*, 319 U.S. at 640. Jackson had also previously signaled his willingness to enforce non-textual rights in his *Skinner* concurrence. *See supra* note 188 (discussing the significance of *Skinner*).

Other aspects of Jackson's opinion, however, cannot be read so expansively. Jackson insisted that the problems associated with the vague contours of the Due Process Clause disappear when limited to the specific provisions of the Bill of Rights. This would have been disingenuous in the extreme if Jackson believed legitimate judicial review included no such limitation. In the end, Jackson's opinion in *Barnette* was only one of many in which the Court identified textualism as the fundamental core of legitimate due process review. Any reading of the New Deal which leaves the door open to non-textual substantive due process rights must somehow explain the Court's recharacterization of *Meyer* and *Pierce* as Bill of Rights cases, the refusal to adopt total incorporation, and the abandonment of federal common law in *Erie*. Above all, such an approach conflicts with the Court's consistent embrace of textualism as the fundamental core of due process rights.

209. *See* Jackson, *supra* note 11, at 284-85.

> liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs. We must transplant these rights to a soil in which the *laissez-faire* concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls. These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment. But we act in these matters not by authority of our competence but by force of our commissions.[210]

In this one remarkable passage, Jackson acknowledged the constitutional upheaval of the New Deal—the changed conditions that deprived precedents of reliability and the difficulty of trying to translate the Bill of Rights into a post-New Deal world. There were no precedents to rely upon, no consensus regarding methods of interpretation. Having received a commission to reconstruct judicial review without the benefit of a textual amendment, the Court had indeed been cast upon its own judgment in a manner that disturbed self-confidence.

The most pressing problem involved how to define the method and scope of post-*Lochner* judicial review. Speech, press and religious liberty had all been protected under *Lochner*. If the majority proceeded to reject Frankfurter's draft of the New Deal charter and preserve judicial protection of the Bill of Rights, how could the Court enforce rights originally "discovered" by the *Lochner* Court without repeating the errors of *Lochner*? Jackson's first move was to return to the *Palko-Carolene Products* emphasis on text:

> In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the

210. *Barnette*, 319 U.S. at 639-40.

> State it is the more specific limiting principles of the First Amendment that finally govern this case.[211]

The political process model also had focused on the "specific limiting principles of the First Amendment."[212] Jackson had to justify removing these subjects from the non-discriminatory control of the political branches. In one of the most famous passages in constitutional law, Jackson rejected Frankfurter's deference to the political process and traced a textual originalist theory of post-*Lochner* judicial review:

> *The very purpose of a Bill of Rights* was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other *fundamental rights may not be submitted to vote; they depend on the outcome of no elections.*[213]

As stirring as this passage seems to us today, at the time it was written it was no more than a bald assertion, and a historically incorrect one to boot. Whatever was the original purpose of the original Bill of Rights, it was not intended to place particular rights beyond the reach of state majorities.[214] The Bill bound only the federal government and reserved power over subjects like speech and religion to the states.[215] Moreover, if inclusion in the Bill of Rights signaled an intent to remove a subject from the political process, this implied that all of the rights in the Bill were intended to be protected from state political majorities—a move Jackson knew full well the Court was unwilling to make. Even if Frankfurter's political process model had been rejected, the substantive protections of *Barnette* and the Preferred Freedoms model raised extremely difficult questions—questions that would have to be answered in future cases involving enforcement of the Bill of Rights against the states.

D. *Frankfurter's Challenge: The Problem With Selective Incorporation*

The debate over the political process and Preferred Freedoms models should not obscure the broad consensus among the members of the New Deal Court regarding the core principles of post-*Lochner* review. After 1937, judicial interference with the political process was

211. *Id.* at 639-40.
212. *Id.* at 639.
213. *Id.* at 638 (emphasis added).
214. *See* Barron v. Baltimore, 32 U.S. 242, 243 (1833).
215. For general discussions regarding the federalist nature of the original Bill of Rights, see Amar, Bill of Rights, *supra* note 26; Steven D. Smith, Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom (1995); Lash, *Power and Religion*, *supra* note 29.

justified solely on the basis of constitutional text. The embrace of text went hand and hand with the Court's rejection of common law methodology as a basis for interfering with state or federal law and the embrace of originalism as the measure of the commerce power.

The Court's next task was to identify the interpretive theory which would replace the common law approach of the *Lochner* Court. Simply invoking "textualism" was problematic; it left unexplained why inclusion in the texts of the Bill of Rights did not automatically lead to total incorporation.[216] The selective approach of *Twining*, originally deployed to distinguish the Court's common law methodology from textual incorporation, now was deployed by the New Deal Court in order to justify selective incorporation of only some text in the Bill of Rights. Although combining *Twining* with the Preferred Freedoms Doctrine explained the rejection of *Lochner* while avoiding the firestorm which would accompany total incorporation, this approach threatened to repeat the same errors of *Lochner*. Justice Frankfurter in particular accused the majority of having returned to the evil days of *Lochner*:

> In the past this Court has from time to time set its views of policy against that embodied in legislation by finding laws in conflict with what was called the "spirit of the Constitution." Such undefined destructive power was not conferred on this Court by the Constitution. Before a duly enacted law can be judicially nullified, it must be forbidden by some explicit restriction upon political authority in the Constitution. Equally inadmissible is the claim to strike down legislation because to us as individuals it seems opposed to the "plan and purpose" of the Constitution. That is too tempting a basis for finding in one's personal views the purposes of the Founders.[217]

Frankfurter believed that the problem with *Lochner* was the general counter-majoritarian nature of judicial review. Except for clearly unreasonable actions by the legislature, the proper role of the Court was limited to policing the political process.[218] Not only had *Lochner* interfered with reasonable social welfare legislation, it had compounded its error by constitutionalizing the subjective policy choices of the Court. To Frankfurter, the Preferred Freedoms model repeated both errors: it resulted in judicial invalidation of otherwise reasonable legislation, and it did so by way of subjective judicial selection of some liberties listed in the Bill of Rights.[219]

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216. Sudden total incorporation in the midst of Roosevelt's battles with the Court might well have been viewed as tantamount to institutional suicide.

217. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 666 (1943) (Frankfurter, J., dissenting).

218. *See, e.g., id.* at 646-71 (Frankfurter, J., dissenting); Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940).

219. According to Frankfurter's concurrence in *Adamson*:

> Indeed, the suggestion that the Fourteenth Amendment incorporates the

Frankfurter had a point.[220] At the time *Barnette* was decided, the Court's entire liberty jurisprudence, including its protection of speech, press and religion, rested on the same Lochnerian foundation. If the Court had rejected the foundation upon which stood *Gitlow* and *Near*, on what basis could those cases continue to stand? Indeed, how could the process of incorporation legitimately continue? Neither *Carolene Products* nor *Barnette* provided a principled solution to the riddle of incorporation. As much as those cases highlighted the importance of text, the Court could not logically claim that textual expression justifies heightened enforcement as long as it continued to reject total incorporation. Picking and choosing among rights to be incorporated

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first eight Amendments as such is not unambiguously urged. Even the boldest innovator would shrink from suggesting to more than half the States that they may no longer initiate prosecutions without indictment by grand jury, or that thereafter all the States of the Union must furnish a jury of twelve for every case involving a claim above twenty dollars.... It seems pretty late in the day to suggest that a phrase so laden with historic meaning should be given an improvised content consisting of some but not all of the provisions of the first eight Amendments, selected on an undefined basis, with improvisation of content for the provisions so selected.

Adamson v. California, 332 U.S. 46, 64-65, 67 (1947) (Frankfurter, J., concurring).

220. Justice Frankfurter further stated in *Barnette*:

> There is no warrant in the constitutional basis of this Court's authority for attributing different roles to it depending upon the nature of the challenge to the legislation. Our power does not vary according to the particular provision of the Bill of Rights which is invoked. The right not to have property taken without just compensation has, so far as the scope of judicial power is concerned, the same constitutional dignity as the right to be protected against unreasonable searches and seizures, and the latter has no less claim than freedom of the press or freedom of speech or religious freedom. In no instance is this Court the primary protector of the particular liberty that is invoked. This Court has recognized, what hardly could be denied, that all the provisions of the first ten Amendments are "specific" prohibitions, United States v. Carolene Products Co., 304 U.S. 144, 152, n.4. But each specific Amendment, in so far as embraced within the Fourteenth Amendment, must be equally respected, and the function of this Court does not differ in passing on the constitutionality of legislation challenged under different Amendments.
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> When Mr. Justice Holmes, speaking for this Court, wrote that "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts," Missouri, K. & T. Ry. Co. v. May, 194 U.S. 267, 270, he went to the very essence of our constitutional system and the democratic conception of our society. He did not mean that for only some phases of civil government this Court was not to supplant legislatures and sit in judgment upon the right or wrong of a challenged measure. He was stating the comprehensive judicial duty and role of this Court in our constitutional scheme whenever legislation is sought to be nullified on any ground, namely, that responsibility for legislation lies with legislatures, answerable as they are directly to the people, and this Court's only and very narrow function is to determine whether within the broad grant of authority vested in legislatures they have exercised a judgment for which reasonable justification can be offered.

Barnette, 319 U.S. at 648-49 (Frankfurter, J., dissenting).

seemed to repeat the very subjectivity that stained the *Lochner* Court. Again, according to Frankfurter:

> There is suggested merely a selective incorporation of the first eight Amendments into the Fourteenth Amendment. Some are in and some are out, but we are left in the dark as to which are in and which are out. Nor are we given the calculus for determining which go in and which stay out. If the basis of selection is merely that those provisions of the first eight Amendments are incorporated which commend themselves to individual justices as indispensable to the dignity and happiness of a free man, we are thrown back to a merely subjective test.[221]

The advocates of the Preferred Freedoms model invoked the Court's reasoning in *Twining* in order to justify its refusal to automatically incorporate all the freedoms listed in the Bill of Rights. But neither the *Twining* rule of selective enforcement nor the doctrine of Preferred Freedoms fit comfortably with the Court's move to textualism under the Due Process Clause. The *Twining* rule originally was a rule for protecting common law liberties in general and liberty of contract in particular. In retrospect, at least *Twining* had the virtue of plausibly tracking the original intent behind the Privileges or Immunities Clause.[222] Selective "text-only" incorporation, however, lacked either textual or historical warrant.[223] In *Barnette*, the Court had committed itself to textual incorporation without a coherent theory of why selective textual incorporation was consistent with the new jurisprudence of the New Deal Court.

E. *Justice Black's Response: Fourteenth Amendment Textual Originalism*

Roosevelt's first judicial appointment, Justice Hugo Black, replaced retiring Justice Van Devanter in 1937. One of his first decisions was to concur in *Carolene Products*, but not join the section containing Footnote Four.[224] Black joined Frankfurter in *Gobitis* but soon came to believe he had made a mistake.[225] Along with a majority of the Court, Black joined Jackson's rejection of the political process model in *Barnette*, and ultimately staked out his own unique vision of post-*Lochner* incorporated rights.[226]

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221. *Adamson*, 332 U.S. at 65 (Frankfurter, J., concurring).

222. *See supra* notes 26, 62-65 and accompanying text.

223. The Preferred Freedoms Doctrine, for example, provided neither a textual nor a historical reason for "preferring" the right to counsel over the right against double jeopardy.

224. I am not aware of any explanation for Black's decision not to join Footnote Four.

225. Jones v. Opelika, 316 U.S. 584, 623-24 (1942) (Black, Douglas, Murphy, JJ., dissenting).

226. *See Adamson*, 332 U.S. at 68-92 (Black, J., dissenting).

An advocate of total incorporation, Black believed that proceeding under the selective incorporation theory of *Twining* was in conflict with the original intent behind the adoption of the Fourteenth Amendment. Black wrote that his "study of the historical events that culminated in the Fourteenth Amendment" convinced him that "one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states."[227] In this way "[*Twining*] and the 'natural law' theory of the Constitution upon which it relies degrade the constitutional safeguards of the Bill of Rights."[228] According to Black, "[t]his historical purpose has never received full consideration or exposition in any opinion of this Court interpreting the Amendment."[229]

Black had an additional problem with the *Twining*/Preferred Freedoms Doctrine. By empowering the Court to select which provisions in the Bill of Rights were "fundamental," the *Twining* rule repeated, and indeed became an essential aspect of, the *Lochner* approach to due process. The natural law approach of *Twining* was "an incongruous excrescence on our Constitution."[230] Such an approach was "itself a violation of our Constitution, in that it subtly convey[ed] to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power."[231] Expressly invoking the New Deal Revolution, Black maintained that "the *Twining* decision rested on previous cases and broad hypotheses which have been undercut by intervening decisions of this Court."[232]

If the New Deal was in fact a constitutional revolution, Black's jurisprudence came closest to reconciling this revolution with the Fourteenth Amendment. For example, if the protections of the Due Process Clause turned on judicial discovery of "fundamentality," then Footnote Four's embrace of the specific provisions of the Bill of Rights was no more legitimate than the Court's embrace of liberty of contract. Black avoided this objection, however, by grounding incorporation not on subjective choices of the Court, but on the intentions of those who drafted and adopted the Fourteenth Amendment.[233]

An originalist account of the Fourteenth Amendment almost certainly would include common law liberties like free labor and

227. *Id.* at 71-72.
228. *Id.* at 70.
229. *Id.* at 72.
230. *Id.* at 75.
231. *Id.*
232. *Id.* at 70.
233. *See id.* at 92-123 (app. by Black, J.).

liberty of contract.[234] In the aftermath of the New Deal Revolution, however, the Court no longer was authorized to discover and enforce rights arising from the mists of the common law.[235] Yet by embracing (if recharacterizing) *Twining*, and rejecting the text as the final source of what constituted the "body of law," the Court was left in the position of determining the substantive content of liberty.[236] Black thus noted that "the *Twining* decision rested on previous cases and broad hypotheses which have been undercut by intervening decisions of this Court."[237] The New Deal Revolution acted as a constitutional screen, preserving those privileges or immunities expressly mentioned in the text, but screening out those discoverable only by way of common law.

Justice Black did not prevail. Over the years, Justice Black's position has been criticized as a flawed reading of Fourteenth Amendment history,[238] an unjustifiable insistence on incorporating all eight amendments,[239] and an erroneous rejection of judicial

234. *See supra* note 49 and accompanying text.

235. A related issue is the extent to which the Court could accomplish by way of the Equal Protection Clause what had been rejected under the Due Process Clause. Some scholars have argued that non-textual "privileges or immunities" may have been intended to receive some degree of equal protection. *See, e.g.*, Amar, Bill of Rights, *supra* note 26, at 171-74; John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385, 1387-88, 1392, 1396 (1992). Lochnerian liberty of contract itself contained an equal protection component. In fact, most due process rights can be described in equal protection terms. Non-textual liberties that could be described as involving equal protection concerns include abortion, assisted suicide, sexual orientation and disability. *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996) (state constitutional amendment banning homosexual anti-discrimination laws violates the equal protection clause); Planned Parenthood v. Casey, 505 U.S. 833 (1992) (plurality arguing that access to abortion facilitates women's equal participation in the marketplace); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (striking down ordinance requiring special use permit as applied against a home for the mentally retarded); Quill v. Vacco, 80 F.3d 716 (2d Cir. 1996), *rev'd*, 521 U.S. 793 (1997) (circuit court striking down ban on assisted suicide as violation of equal protection). The laws struck down in *Romer* and *Cleburne* failed to satisfy the lowest level of judicial scrutiny, "rational basis review." The rejection of *Lochner* would have included a rejection of this aspect of equal protection—thus the Court's suggestion in *Carolene Products* that equal protection would focus on political process considerations and protection of "discreet and insular minorities." *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938); *see also supra* note 188 (discussing *Skinner v. Oklahoma*).

236. Justice Black's critique of *Twining* as opening the door to *Lochner* II was prophetic.

237. Adamson v. California, 332 U.S. 46, 70 (1947) (Black, J., dissenting).

238. *See* Fairman, *Fourteenth Amendment*, *supra* note 28, at 171.

239. *See* Amar, Bill of Rights, *supra* note 26, at 174-75; *see also Adamson*, 332 U.S. at 62 (Frankfurter, J., concurring). Bruce Ackerman also would not limit incorporation to the specific provisions of the Bill of Rights, arguing that such narrow adherence to the text would be hyper-formalistic and would introduce a kind of mechanical jurisprudence generally derided by the legal academy. *See* Ackerman, *Carolene Products*, *supra* note 208, at 744. The point of the inquiry, of course, is to determine whether what Ackerman derides as a "mechanical jurisprudence" is what the Court had in mind.

identification of non-enumerated liberties.[240] In fact, it appears Justice Black, more than any other justice, understood that the New Jurisprudential Deal committed the Court to rethinking the original meaning of the Fourteenth Amendment—and reconciling these two dramatic moments of constitutional change. If the New Deal Court legitimately foreclosed judicial enforcement of common law privileges or immunities, Justice Black's "jot-for-jot" theory of incorporation stands as the most principled approach to judicial review proposed by the New Deal Supreme Court.

IV. IMPLICATIONS

A. *Distinguishing the New (Political) Deal from the New (Jurisprudential) Deal*

Viewing the New Deal in the light of the incorporation debates reveals a revolution in judicial methodology, one which extended far beyond the boundaries of commerce and liberty of contract. The New Jurisprudential Deal applied to all aspects of the Court's work, from the powers of Congress, to the autonomy of the states, to the limits of judicially enforceable individual liberty.

The broad impact of the revolution may be the necessary result of Court-driven constitutional reform.[241] The political process failed to produce a New Deal amendment.[242] If change was to come, it would be by way of constitutional interpretation. This was all the Court had, and to the New Deal appointees, all they needed.[243] But there are

240. Akhil Amar criticizes Justice Black's jot-for-jot incorporation approach as unduly restrictive, since it would exclude both important textual freedoms like the writ of habeas corpus and other non-textual liberties. *See* Amar, Bill of Rights, *supra* note 26, at 174-75. I believe that Black's theory leaves room for the incorporation of textual liberties like habeas corpus, but not non-textual liberties.

241. One reason why there is no New Deal amendment is because the New Deal Revolution did not involve a change in the text. Instead, it involved a change in the Court's approach to texts already in place. That may seem like a distinction without a difference, but there is a crucial difference between the two: the New Deal did not change the idea of enumerated power, nor did it add a power not already granted (as would, for example, judicial allowance for "laws respecting an establishment of religion"). U.S. Const. amend. I. The Court's refusal to defer on other rights continued to rely on texts already embedded in the Constitution. Finally, even though the New Deal seemed to amend the potential reach of the Privileges or Immunities Clause, it did so by linking that clause to other texts in the Constitution. It simply placed a rule of construction on the Clause limiting judicial interpretation to norms contained within the four corners of the Constitution.

242. Given the general consensus that some kind of constitutional reform was necessary, it seems likely that some kind of amendment would have been adopted had the Court not initiated the "switch in time." *See* Ackerman, Transformations, *supra* note 5, at 345-46, 348. On the other hand, the Court's revolution in jurisprudence tracks the general criticism at the time that the problem was the Court and not the Constitution.

243. *See* Jackson, *supra* note 11, at 180 ("[T]he immediate difficulty was with the

consequences to choosing this method of reform. An amendment can be limited to a particular problem, whether it is a broad restructuring of federal-state relationships (the Reconstruction Amendments) or a more surgical approach to a particular social issue (Prohibition).[244] Altering the methods of judicial review, however, necessarily will affect a broad range of doctrine.

Understanding the New Deal in reference to the political agenda of Franklin Roosevelt treats the Revolution as if it had produced a constitutional amendment. It views the Revolution as if it had removed old rights (contract) or added new ones (government welfare). A political focus, however, fails to account for aspects of the Revolution that had nothing to do with the political goals of the New Deal, the reversal of *Swift* and the restructuring of *Meyer* and *Pierce* being only two examples. Most of all, it ignores the account provided by the justices themselves. The political interpretation of the New Deal must treat the Court's own explanations (text and original intent) as, at best, window dressing or, at worst, dissembling. The jurisprudential approach, on the other hand, not only accounts for what the Court actually said, it also provides a more comprehensive explanation for what it actually did.

Although the jurisprudential model in some ways broadens our understanding of the Revolution, it also limits its scope. The New Political Deal of Franklin Roosevelt involved the political goals of his administration and contemporary views regarding the responsibilities of modern government. The jurisprudential reforms of the New Deal Court allowed the Democrats to pursue their experiments in social welfare legislation. There was no intent, however, to constitutionalize those experiments. Reading New Deal progressivism into the Constitution would have repeated the same error of *Lochner* and betrayed the patron saint of the New Deal, Oliver Wendell Holmes, who insisted "a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*."[245]

Reading the New Deal as expanding opportunities for the Court to intervene in the political process beyond those mandated by the text fundamentally mistakes what the New Jurisprudential Deal was all about.[246] After 1937, judicial interference with the political process

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Justices, not the Court or the Constitution.").

244. While some of the amendments proposed by New Deal Democrats would have restructured the nature of judicial review, others were limited to specific regulatory powers. *See supra* notes 87-88 and accompanying text.

245. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

246. *But see* Cass R. Sunstein, The Partial Constitution 138-39 (1993) (arguing that the "New Deal Constitution" enacted a constitutional right to minimum welfare entitlements). For a discussion regarding the substantial gap between the broad rights talk of the 1936 campaign and the actual programs enacted by the later New Deal, see William E. Forbath, *Constitutional Change and the Politics of History*, 108 Yale L.J.

was justified only on the basis of an express constitutional mandate or restriction. This core principle of the New Deal revolution informed the Court's reversal of *Swift v. Tyson*,[247] its deference to Congress regarding the amendment process[248] and the commerce power,[249] and its limitation of due process rights to those "specifically expressed" in the text of the Constitution.[250]

B. *Non-Textual Restrictions on Government Power*

The jurisprudential revolution described in this paper is in tension with a number of aspects of modern judicial review, including the expansion of substantive due process[251] and the deployment of non-textual federalism principles to restrict the powers of the federal government.[252]

1917, 1928 (1999) (describing how "social citizenship" legislation was thwarted by Southern Dixiecrats). Forbath concludes "[w]e have enshrined the vast expansion of national governmental power, but not the purpose for which it was expanded." *Id.* at 1929.

Bruce Ackerman, although generally declining to adopt any particular interpretive conclusions, nevertheless appears to believe the New Deal constitutionalized some form of Rooseveltian Social Welfare agenda. For example, he cites the Reagan revolution as an example of a failed constitutional moment; a failed attempt by President Reagan to "earn [the] authority from the People to repudiate *Darby* and replace it with the *laissez-faire* vision expressed by *Lochner* and *Hammer*." Ackerman, Transformations, *supra* note 5, at 376-77. This assumes, of course, that embracing some form of *laissez-faire* requires a constitutional amendment after the New Deal. The evidence, however, does not support any kind of constitutionalization of positive welfare rights or a constitutional requirement that the federal government "be all that it can be." The New Deal Revolution involved an interpretive methodology that had the effect of expanding the discretion of the legislature in areas not impinging on textual rights. There was no constitutional mandate controlling how Congress utilized its discretion.

Ackerman also apparently believes that Reagan's opposition to *Roe* was an attempt to change the Constitution, just as Roosevelt led popular opposition to the pre-New Deal Constitution. *See* Ackerman, Transformations, *supra* note 5, at 402. The more plausible account is that Reagan was attempting to enforce the New Deal Court's embrace of textual originalism. A good argument can be made that it was the *Roe* Court, if any, that had illegitimately altered the shape of the New Deal Constitution.

247. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); *see also* Swift v. Tyson, 41 U.S. 1 (1842).

248. *See* Coleman v. Miller, 307 U.S. 433 (1939).

249. *See* Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941); United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

250. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Palko v. Connecticut, 302 U.S. 319 (1937).

251. *See* Troxel v. Granville, 530 U.S. 57 (2000) (regarding parental rights); Planned Parenthood v. Casey, 505 U.S. 833 (1992) (regarding abortion).

252. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000); Printz v. United States, 521 U.S. 898 (1997); United States v. Lopez, 514 U.S. 549 (1995); New York v. United States, 505 U.S. 144 (1992). One might also include the expansive reading of the Eleventh Amendment in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

When the Court reinvigorated non-textual substantive due process in the 1960s, it characterized its efforts as reflecting an unbroken tradition extending back to *Meyer* and *Pierce*. According to the modern Court,[253] as well as most constitutional law texts and treatises,[254] non-textual substantive due process rights like privacy and parental autonomy are rooted in the parental autonomy cases of the 1920s. These accounts discreetly leave *Lochner* out of the picture. Even if the Court had abandoned Lochnerian liberty of contract, the story goes, the Court never intended to abandon the general approach to liberty represented by *Meyer* and *Pierce*.[255]

That this account has survived, despite the New Deal Court's abandonment of parental rights, and even despite the modern Court's early candor that it was resurrecting an abandoned interpretation,[256] is testament to the consequences of viewing the New Deal as a political, instead of a jurisprudential, revolution. Once one focuses on the actual words and actions of the New Deal Court, however, the modern account collapses. Holmes,[257] Roosevelt,[258] Cardozo,[259] Stone,[260] Frankfurter,[261] Jackson[262] and Black[263]—all emphasized the

253. *See, e.g.*, *Troxel*, 530 U.S. at 65-66.

254. *See, e.g.*, John E. Nowak & Ronald D. Rotunda, Constitutional Law 389 (1991) ("[T]here was no real break in the use of a subjective test for finding individual rights and liberties following the 1937 renouncement of substantive due process as a control over economic and social welfare legislation."); Tribe, *supra* note 179, at 1318-19.

255. *See Casey*, 505 U.S. at 848; *see also* Washington v. Glucksberg, 521 U.S. 702, 761-62 (1997) (Souter, J., concurring); Nowak & Rotunda, *supra* note 254, at 389.

256. *See* Poe v. Ullman, 367 U.S. 497, 544 (1961) (Harlan, J., dissenting); *supra* notes 178-79 and accompanying text.

257. *See* Adkins v. Children's Hosp., 261 U.S. 525, 568 (1923) (Holmes, J., dissenting).

258. *See* Franklin D. Roosevelt, The Constitution of the United States Was a Layman's Document, Not a Lawyer's Contract, Address on Constitution Day (Sept. 17, 1937), *in* 6 Roosevelt Public Papers, *supra* note 86, at 366 ("Yet nearly every attempt to meet those demands for social and economic betterment has been jeopardized or actually forbidden by those who have sought to *read* into the Constitution language which the framers refused to *write* into the Constitution.").

259. *See* Palko v. Connecticut, 302 U.S. 319, 324-25 (1937) ("In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty . . . .").

260. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.").

261. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 666 (1943) (Frankfurter, J., dissenting) ("Before a duly enacted law can be judicially nullified, it must be forbidden by some explicit restriction upon political authority in the Constitution.").

262. *See id.* at 639 ("Much of the vagueness of the due process clause disappears when the specific provisions of the First [Amendment] become its standard.").

263. Adamson v. California, 332 U.S. 46, 75 (1947) (Black, J., dissenting). Justice

role of text in distinguishing *Lochner* from legitimate interpretation of due process. To the New Deal Court, parental rights were no more legitimate than contract rights. *Meyer* and *Pierce* survived the refining fire of the New Deal only to the extent that they could be linked to "specific expressions" in the Constitution. If non-textual substantive due process survived the New Deal, it is because the Court's attempt to abandon this methodology was unjustified. This was not, however, their intent.[264]

But limiting the justification for judicial review is a two-edged sword. Even as it excised Lochnerian contract rights due to lack of textual mandate, the Supreme Court also abandoned state autonomy rationales for restricting the commerce power. The Tenth and Eleventh Amendments do not expressly restrict the powers of government.[265] The Tenth Amendment "states but a truism" that powers not granted are reserved to the states.[266] Eleventh Amendment state immunity doctrine is not based on the actual text of the amendment, but on an implied principle of state sovereignty—a principle articulated by the *Lochner* Era Court in the 1890 case, *Hans*

Black wrote:

> And I further contend that the "natural law" formula which the Court uses to reach its conclusion in this case should be abandoned as an incongruous excrescence on our Constitution. I believe that formula to be itself a violation of our Constitution, in that it subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power.

Id.

264. Ackerman acknowledges the tension between the non-textual right of privacy and the "specifics" language of *Carolene Products* Footnote Four but raises the possibility that non-textual rights may be a preferable way to synthesize the Constitution's protection of liberty under the Founding, Reconstruction and New Deal constitutions. Ackerman, Foundations, *supra* note 5, at 129-30. Ackerman does not, however, expressly resolve the issue. *Id.* at 159 ("[M]y aim here has been to begin a story, not to end it."). In We the People: Transformations, Ackerman suggests that the Reagan and Bush Administrations' attempt to overrule *Roe* was a failed "constitutional moment." Ackerman, Transformations, *supra* note 5, at 398-99. Ackerman thus both grants the right to privacy constitutional status and implies that the legitimacy of *Roe* and the right to privacy is intimately connected to the constitutional status of the New Deal. *Id.* at 402. Ackerman has not expressly repudiated the option of embracing the New Deal and Footnote Four, while rejecting the concept of non-textual fundamental liberties, though he may do so in the future. *See id.* at 403 ("My next volume ... will try to clarify the judicial challenges that lie ahead.").

265. *But see* Seminole Tribe v. Florida, 517 U.S. 44 (1996).

266. United States v. Darby, 312 U.S. 100, 124 (1941). There may still be limits on the commerce power even absent Tenth Amendment considerations. John Marshall, for example, indicated that Congress should not be allowed to use its enumerated powers as a pretext to regulate matters not entrusted to the national government. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819); *infra* note 278 (discussing the distinction between the New Deal Court's reading of Marshall and the actual views of Marshall); *cf.* Seminole Tribe, 517 U.S. at 72-73 ("[T]he Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.").

v. Louisiana.[267] The modern Supreme Court increasingly relies on the implied principles of federalism to restrict the powers of the federal government.[268] It is difficult to reconcile this approach, however, with the New Deal Court's rejection of implied restrictions on the powers of government.[269]

C. *Reconciling the Fourteenth Amendment with the New Deal*

Determining the original meaning of the New Deal Revolution is not the same thing as establishing its legitimacy. Even if I have accurately traced the intentions of the New Deal Court, their actions nevertheless may have amounted to an abuse of judicial power. If so, their efforts deserve more our derision than our continued fidelity. The work of Bruce Ackerman, as well as his critics, regarding the constitutional status of the New Deal are essential to our determining whether a legitimate constitutional revolution occurred. It is not my purpose to join that debate, only to note its importance.

The effort of this article is to determine what the New Deal Revolution was about in order to more fully appreciate what is at stake in current debates over the legitimacy of the Revolution. If the New Deal was a legitimate moment of constitutional change, then we must confront the only text we have, the opinions themselves, and grapple with the intentions of its Framers—the members of the New Deal Court. It appears their intent was to restructure the process of judicial review around the principles of textual originalism. Even if only a jurisprudential change, this had the effect of changing the shape of individual liberty. The Privileges or Immunities Clause was adopted against the background of a common law judicial methodology which likely included economic liberty. Removing that background amounted to removing an anticipated aspect of Fourteenth Amendment liberty. This is why determining the constitutional status of the New Deal is critical to understanding the modern scope of the Fourteenth Amendment.

Reconciling the original meaning of the New Deal Revolution with the original meaning of the Fourteenth Amendment leads to what seem like jarring results. Embracing the New Deal appears to entail rejecting non-textual substantive due process and the implied restrictions of federalism. Rejecting the New Deal leaves federalism in place, but also non-textual common law rights under the Privileges

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267. 134 U.S. 1 (1890).

268. *See, e.g.*, Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (striking down portion of the Americans with Disabilities Act applicable to the states).

269. One way to view the Court's moves in regard to the commerce power is to read that clause at a high level of abstraction. *See* Ackerman, *Liberating Abstraction*, *supra* note 43, at 318. Another way, of course, is to see the Court as reading the Tenth Amendment at the lowest and most specific level of abstraction. This approach is more in keeping with the Court's moves regarding the Due Process Clause.

or Immunities Clause.[270] This seems jarring because those who reject non-textual substantive due process generally question the legitimacy of the New Deal Revolution and embrace the implied restrictions of federalism.[271] On the other hand, those who favor a broad interpretation of substantive due process liberty generally embrace the (political) principles of the New Deal and reject federalism-based restrictions on the regulatory powers of government.[272] Under the account traced in this paper, however, retaining modern substantive due process requires, at the very least, delegitimizing critical aspects of the New Deal critique of *Lochner*.[273]

D. *Originalism and the New Deal*

Having rejected the common law as a basis for judicial intervention in the political process, it seems only natural that the Court would

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270. Some scholars have tentatively suggested that state and federal power to regulate the economy might have been in place *prior* to the New Deal due to the combined impact of the "progressive" amendments of the first decades of the twentieth century. For example, twentieth century amendments like the Sixteenth (progressive income tax), Seventeenth (election of Senators) and Nineteenth (women's vote) collectively contain themes of nationalism and economic redistribution—major themes of the New Deal. *See* Amar, Bill of Rights, *supra* note 26, at 300; *see also* Curtis, *Resurrecting the Privileges or Immunities Clause*, *supra* note 42, at 97. Although Professor Amar expressly declines to take a position, he suggests that these amendments in themselves might justify the Court's expansion of government power to enact economic and social welfare legislation. Amar, Bill of Rights, *supra* note 26, at 300. Not having investigated the public understanding of the intended scope of these amendments, I simply note that not even the most ardent supporters of the New Deal appointed to the Court suggested the revolution could be accomplished by way of the Sixteenth, Seventeenth or Nineteenth Amendments.

271. Chief Justice Rehnquist and Justice Scalia generally fall into this camp. *See* United States v. Morrison, 529 U.S. 598 (2000) (limiting the reach of the commerce power); Planned Parenthood v. Casey, 505 U.S. 833 (1992) (rejecting the asserted due process right to abortion). Justice Thomas has been the most vocal opponent of New Deal regulatory power. *See Morrison*, 529 U.S. at 627 (Thomas, J., concurring) (rejecting New Deal expansion of the commerce power). He is also generally suspicious of non-textual substantive due process rights. *See Casey*, 505 U.S. at 953 (joining Rehnquist's and Scalia's dissents). *But see* Troxel v. Granville, 530 U.S. 57 (2000) (Rehnquist and Thomas voting in favor of parental rights).

272. Justices Souter, Ginsberg and Breyer fit this type. *See Troxel*, 530 U.S. 57 (Souter, Ginsberg and Breyer voting in support of due process parental rights); *Morrison*, 529 U.S. at 628, 655 (Souter, Ginsberg and Breyer, JJ., dissenting); Printz v. United States, 521 U.S. 898, 939 (1997) (Souter, Ginsberg and Breyer, JJ., dissenting); *Casey*, 505 U.S. at 843 (Souter joining the plurality). Academic commentary generally reflects the same breakdown. *See, e.g.*, Ackerman, Transformations, *supra* note 5 at 390, 402 (implying that Republican efforts to roll back New Deal commerce power and opposition to abortion rights are both in conflict with the New Deal Constitution).

273. Some scholars appear to realize this. *See* 8 History of the Supreme Court of the United States: Troubled Beginnings of the Modern State, 1888-1910, at 12 (Owen M. Fiss ed., 1993) (suggesting the *Lochner* Court shares some affinity with the current Court's enforcement of privacy rights, and that the *Lochner* Court, in significant respects, has been unfairly maligned).

turn to originalism as an interpretive method. The Court had long referred to the original intentions of the Framers, even if not as an exclusive source of constitutional norms.[274] Moreover, given the critique of *Lochner* as unduly opening the door to judicial policymaking, it is not surprising that the New Deal Court declined Chief Justice Hughes's invitation to use Changed Circumstances Doctrine as a measure for judicial review.[275] The most viable alternative to originalism, political process theory, substantially undermined the very idea of an enforceable constitution.[276] To the extent that one views the "switch in time" as at least partially motivated by justices who wanted to preserve the independence of the Court, it makes sense that consensus formed around textual originalism and not the political process model.

The modern search for original meaning arose out of an effort by the Court to replace common law methodology with something that both the Court and the public could accept as a more legitimate ground for judicial review.[277] Originalism is a major theme of the New Deal Convention. It became the touchstone for interpretation of the Commerce Clause,[278] and it eventually dominated the debate over

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274. *See* Reynolds v. United States, 98 U.S. 145 (1878); Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); *see also* Eisner v. Macomber, 252 U.S. 189, 219-20 (1920) (Holmes, J., dissenting) ("[T]he Sixteenth Amendment should be read in 'a sense most obvious to the common understanding at the time of its adoption.'" (citation omitted)).

275. As Frankfurter described it, this would throw the Court back on a mere "subjective test." *See* Adamson v. California, 332 U.S. 46, 65 (1947) (Frankfurter, J., concurring).

276. Or, as Ackerman might put it, it would have moved us away from a dualist constitution and towards more of a monist parliamentarian system of government. *See* Ackerman, Foundations, *supra* note 5, at 13-17.

277. Textual originalism is not "strict constructionism," if by that is meant an interpretive method which restricts both the courts and the legislature. The textual originalism of the New Deal opened the door to the modern welfare state, and the rejection of the political process model preserved "judicial activism" on behalf of "preferred" textual rights. This is not a theory of limited government and judicial pacifism.

278. The Court embraced what it believed was Marshall's view of the commerce power. *See supra* notes 138-40 and accompanying text. The implication is that Marshall's view best represents the view of the Founders. Putting aside the issue of whether one can equate Marshall's interpretations with the Founders' intent, there is some question whether Marshall would have permitted the power of government to extend as far as did the New Deal Court. For example, Marshall's opinion in *McCulloch* contained a paragraph never quoted by the New Deal Court indicating that Congress could not use its enumerated powers as a pretext to regulate matters not delegated to the national government. *See McCulloch*, 17 U.S. at 423. Marshall wrote:

> [O]r should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.

Id.

If there is a distinction between the New Deal view of original intent, and

incorporation as Justices Frankfurter and Black sparred over the original meaning of the Fourteenth Amendment.[279] The first significant efforts to determine the original meaning of the Fourteenth Amendment came about as a result of the Court's struggle to reconcile incorporation with post-*Lochner* review.[280] In 1949, Charles Fairman, a protégé of Justice Frankfurter,[281] published the first major work on the original meaning of the Fourteenth Amendment,[282] the first in a long line of articles exploring the original understanding of the Reconstruction Amendments.[283] The forefathers of the modern search for original meaning are neither the Founders,[284] nor

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actual original intent, which should control? If the New Deal Court truly embraced originalism, then shouldn't the true views of the Founders trump the erroneous views of later Courts? If the New Deal Revolution was in fact a revolution in jurisprudence, then I believe the *actual* original intent should control. Enforcing the pretext paragraph does not necessarily call into question the basic structure of New Deal legislation, though it might limit the extension of the commerce power to commercial activities. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

279. *See* Adamson v. California, 332 U.S. 46 (1947)

280. *See* Richard L. Aynes, *The Bill of Rights, The Fourteenth Amendment, and the Seven Deadly Sins of Legal Scholarship*, 8 Wm. & Mary Bill Rts. J. 407, 433 (2000) (asserting that from the debate between Professor Fairman and Justice Black "came a better appreciation for the [Fourteenth] Amendment than perhaps had ever existed since its ratification"). In his article, Aynes notes how Fairman's antipathy to incorporation was due in part to his New Deal Philosophy—and opposition to *Lochner*. *Id.* at 424.

281. *See* Richard L. Aynes, *Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 Chi.-Kent L. Rev. 1197 (1995).

282. Fairman, *Fourteenth Amendment*, *supra* note 28.

283. *See* Crosskey, *supra* note 26; Morrison, *supra* note 42; *see also* Fairman, *Reply*, *supra* note 28. For more recent efforts, see Berger, Fourteenth Amendment, *supra* note 28; Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment 134 (1977); Curtis, No State, *supra* note 26; Raoul Berger, *Incorporation of the Bill of Rights: A Reply to Michael Curtis' Response*, 44 Ohio St. L.J. 1 (1983); Berger, *Nine-Lived Cat*, *supra* note 28; Michael Kent Curtis, *Further Adventures of the Nine Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights*, 43 Ohio St. L.J. 89 (1982); Michael Kent Curtis, *Still Further Adventures of the Nine-Lived Cat: A Rebuttal to Raoul Berger's Reply on Application of the Bill of Rights to the States*, 62 N.C. L. Rev. 517 (1984); Michael Kent Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 Wake Forest L. Rev. 45 (1980); Michael Kent Curtis, *The Fourteenth Amendment and the Bill of Rights*, 14 Conn. L. Rev. 237 (1982). The most recent work is Akhil Amar's, The Bill of Rights. Amar, Bill of Rights, *supra* note 26; *see also* John Raeburn Green, *The Bill of Rights, the Fourteenth Amendment and the Supreme Court*, 46 Mich. L. Rev. 869 (1948) (supporting Justice Black's theory of incorporation).

284. Opponents of originalism stress the failure to find support for that methodology in the writings of the "original" Founders. *See* Leonard W. Levy, Judgments: Essays on American Constitutional History 17-18 (1972); Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 3-22 (1996); Powell, *supra* note 21, at 902-03; Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. Chi. L. Rev. 1127, 1176-77 (1987). Original intent as a central focus of interpretation clearly has a more recent vintage. There was little reason to embrace originalism in a time when judges discovered law and did not make it. When the law was a brooding omnipresence waiting for an ever-clearer explication under

contemporary conservatives like Edwin Meese and Robert Bork,[285] but Justices Stone, Jackson, Frankfurter and Black.[286]

One could argue that the Court's use of originalism was merely rhetorical—a judicially constructed myth[287] intended to justify the Revolution, but distinguishable from the actual (political) substance of the Revolution. Revolutionaries, after all, often claim their goal is a restoration of first principles, a return to the glorious past.[288] Assuming that the Court acted in good faith, perhaps the rhetoric of originalism signaled that the Revolution remained in continuity with the ideals of the Founding, even as it constructed an entirely new understanding of the political responsibilities of government.[289]

This instrumentalist explanation for New Deal originalism confuses the political goals of Roosevelt with the jurisprudential goals of the Court. According to critics of the *Lochner* Court, the problem was not the Constitution, it was the erroneous interpretive method of Nine Old Men.[290] The mandate of the New Deal Court was to lead a revolution in jurisprudence, one that focused on what the Court was doing wrong and would ensure they not do it again. To dismiss the Court's embrace of originalism as mere rhetoric is to miss what the Revolution was all about—the task of building a new and legitimate method of judicial review. Textual originalism was more than a "cover" for the Revolution. It was the Revolution.[291]

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the common law, it made perfect sense to range beyond both text and original intent in framing the scope of "liberty." With the advent of the twentieth century, it became ever more difficult to justify the use of such wide-ranging judicial tools.

285. *See* Bork, *supra* note 21; Edwin Meese, III, *Interpreting the Constitution*, *in* Interpreting the Constitution: The Debate over Original Intent 13 (Jack N. Rakove ed., 1990).

286. And, perhaps, Justice Holmes. *See* Eisner v. Macomber, 252 U.S. 189, 219-20 (1920) (Holmes, J., dissenting).

287. Bruce Ackerman makes an argument along these lines when he describes the Court as having manufactured a "Myth of Rediscovery" which, since 1937, has become part of our professional narrative regarding the New Deal. *See* Ackerman, Foundations, *supra* note 5, at 47; Ackerman, Transformations, *supra* note 5, at 259; Hannah Arendt, On Revolution 183-84 (Greenwood Press 1982) (1963).

288. Most recently Ackerman has described the New Deal as a "revolution on a human scale" in which the revolutionary leaders do not make a total and violent break with the past but attempt instead to ground the revolution in the ideals and legal forms of the past. *See* Ackerman, *Human Scale*, *supra* note 136.

289. Ackerman, Transformations, *supra* note 5, at 259.

290. Pearson & Allen, *supra* note 75, at 70-71; Jackson, *supra* note 11, at 53; *see also* Franklin D. Roosevelt, Address of President Franklin D. Roosevelt (Mar. 9 1937), *in* Jackson, *supra* note 11, at 340. Roosevelt stated:

> And remember one thing more. Even if an amendment were passed, and even if in the years to come it were to be ratified, its meaning would depend upon the kind of Justices who would be sitting on the Supreme Court bench. An amendment like the rest of the Constitution is what the Justices say it is rather than what its framers or you might hope it is.

Id. at 350.

291. The instrumentalist account of the New Deal fits with the standard externalist account, in vogue for so many years, that the Court had bowed to political pressure,

The Court faced the profoundly difficult task of changing the direction of constitutional law without the mandate of an amendment and with the duty to provide principled explanations for the dramatic change. This was the task that disturbed the self-confidence of the Court. The solution, textual originalism, in many ways was a brilliant move of Marburian proportions: the Court rescued itself from political attack by declining power, but doing so in a manner that preserved the Court's essential role as an independent branch of government.[292] The political astuteness of the effort, however, cannot obscure the fact that the Court altered the substance of the Constitution and revolutionized the method of judicial review.

The Fourteenth Amendment and the New Deal generally are studied in isolation from each other.[293] If the above analysis is correct, one period cannot be fully understood without considering the impact of both periods. Given the recent advances in our historical understanding of the Founding,[294] Reconstruction[295] and the New

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thus making their opinions nothing more than window dressing. For the reasons given above, I think this approach cannot be reconciled either with what the justices actually said they were doing or with what they actually did. Internalist accounts which view the Revolution in terms of evolutionary development of doctrine similarly fail to engage either the debates of the New Deal Court, or what the Court actually did. Internalists generally minimize the revolutionary aspects of the New Deal and focus on pre-New Deal indicators of a gradual shift in jurisprudence. *See, e.g.*, Cushman, *supra* note 5, at 154 (arguing that the real "revolution" occurred in *Nebbia*).

292. Both *Marbury* and the New Deal Revolution involved a Court under attack from the executive branch. Both took place in a political context which included threats of impeachment for Supreme Court justices and congressional efforts to limit the jurisdiction of the Supreme Court. Both involved critical moments in time where the wrong move by the Court would likely have seriously damaged its future role as an independent branch of government. Both involved creative judicial actions which saved the day. Both actions involved a denial of judicial power in a manner that had the effect both establishing and preserving the basis for judicial review in the future. Both used dicta to establish the power of judicial review.

293. Some Fourteenth Amendment legal historians either ignore or dismiss the relevance of the New Deal to understanding the modern scope of Fourteenth Amendment liberty. *See supra* note 92 and accompanying text. This approach, of course, requires ignoring or downplaying the economic rights aspect of the Fourteenth Amendment. Scholarship regarding the meaning of the New Deal Revolution generally accepts the legitimacy of the incorporation project without questioning the original meaning of the Fourteenth Amendment. *See, e.g.*, Ackerman, *Liberating Abstraction*, *supra* note 43, at 331. The New Deal Court's focus on textual rights allowed it to distinguish non-textual Lochnerian contract rights. But reading the "texts" of the Bill of Rights into the Due Process Clause requires an additional theory of the Fourteenth Amendment—a theory conspicuously missing from the Court's jurisprudence in 1937. This is why defining post-*Lochner* individual liberties triggered the first serious judicial debates regarding the meaning of the Fourteenth Amendment since Reconstruction. *See supra* Part II. This is also why a modern understanding of the post-*Lochner* Constitution requires a comprehensive account of both Reconstruction and the New Deal.

294. *See, e.g.*, Ackerman, Foundations, *supra* note 5; Amar, Bill of Rights, *supra* note 26; Gordon Wood, The Creation of the American Republic (1969) [hereinafter Wood, Creation]; Gordon Wood, The Radicalism of the American Revolution (1993).

Deal,[296] the time seems right for a comprehensive originalist account of the Constitution.[297]

CONCLUSION: THE SUPREME COURT AS A CONSTITUTIONAL CONVENTION

In 1787, Congress authorized a convention to meet in Philadelphia for "the sole and express purpose of revising the Articles of Confederation."[298] The Philadelphia Convention ignored that mandate and drafted an entirely new Constitution. After debating various drafts, the Constitution ultimately submitted to the states for ratification disregarded prior rules for constitutional amendment[299] and violated the clear intentions (and instructions) of many who had agreed to a convention in the first place.[300] Such is the independence of constitutional conventions.[301]

The New Deal Revolution in many ways parallels the Philadelphia Convention. The immediate concern which generated calls for constitutional reform involved barriers to economic reform.[302] Distinguished politicians were appointed with the very public expectation they would restructure the constitutional rules in a

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I also have explored the original meaning of the First Amendment. *See* Lash, *Power and Religion*, *supra* note 29.

295. *See, e.g.*, Amar, Bill of Rights, *supra* note 26; Curtis, No State, *supra* note 26; Aynes, *Misreading John Bingham*, *supra* note 26; Harrison, *supra* note 235; *see also* Lash, *Free Exercise Clause*, *supra* note 29.

296. *See, e.g.*, Ackerman, Foundations, *supra* note 5; Ackerman, Transformations, *supra* note 5; Cushman, *supra* note 5.

297. Fourteenth Amendment scholars generally decline to address economic rights, much less the New Deal. *See, e.g., supra* note 42 (critiquing Michael Curtis's interpretation of the Fourteenth Amendment). New Deal scholars generally avoid the debate regarding the original meaning of the Fourteenth Amendment. *See supra* note 293. The lack of a comprehensive theory is probably explainable both as a matter of focus and an implicit judgment of irrelevance.

298. *Report of Proceedings in Congress, Wednesday, February 21, 1787, in* Documents Illustrative of the Formation of the Union of the American States, H.R. Doc. No. 69-398, at 46 (1927).

299. Submission of the Constitution to the states violated prior rules for amendment by ignoring the requirement of unanimous consent by the states for any amendments. *See* Ackerman, Transformations, *supra* note 5, at 51.

300. Delaware instructed its delegates to not agree to any proposal that violated the equal voting power it enjoyed under the Articles. *See* Ackerman, Transformations, *supra* note 5, at 35. This was violated not only by the method of ratification, but also by basing representation in the House on population.

301. If only to avoid a second such open-ended convention, Madison agreed to propose a Bill of Rights in the First Congress. *See* Kurt T. Lash, *Rejecting Conventional Wisdom: Federalist Ambivalence in the Framing and Implementation of Article V*, 38 Am. J. Legal Hist. 197, 221 (1994) [hereinafter Lash, *Rejecting Conventional Wisdom*].

302. All legislation required unanimous consent by the states, as did amending the Articles. This prevented Congress from responding to trade wars and the fiscal needs of a new country heavily in debt.

manner that would allow economic reform to proceed. As in Philadelphia, the New Deal Convention met the immediate needs of the country by way of constitutional reform which went far beyond the narrow range of economic concerns which triggered the convention. As in Philadelphia, hammering out the details of this reform required serious and extended debate.[303] Drafts were proposed and rejected.[304] Consensus emerged on some matters, others remained in deadlock. The ultimate draft reflects a mixture of consistent principle and uneasy compromise.

Whether the Court's efforts can be justified, either according to the principles of political morality or as a subtle recapitulation of Article V procedure, is a matter of ongoing dispute.[305] This article is an effort to see more clearly the text of the Revolution and to better understand the original intentions of the New Deal Convention. At least this way we can have a clearer picture of what the dispute is about.

Stalking the literature of constitutional conventions is the specter of the "run away convention."[306] According to the principles of popular

303. *See* Kalman, *Law, Politics*, *supra* note 100, at 2193-95.

304. Bruce Ackerman has argued that judicial opinions following fundamental moments of constitutional change go through "phases." In "Phase 1," the intended revolution in the constitutional status quo meets resistance when it is first interpreted by the Supreme Court. Justices educated under the prior regime resist the broader implications of the law and interpret it in an unduly restrictive manner. Ackerman calls this phase one of "particularistic synthesis." *See* Ackerman, Foundations, *supra* note 5, at 98. It is only later, in "Phase 2," that justices, now having professional experience in the new regime, gain the critical distance necessary to see the revolution for what it was and fully synthesize the new constitutional rules into previous constitutional moments. Ackerman refers to this second phase of judicial interpretation as "comprehensive synthesis." *Id.*

Whatever the merits of this approach in understanding prior moments of constitutional change (it does seem to explain the *Slaughterhouse Cases*), it is hard to see how it can account for what occurred under the New Deal Court. In this case, what Ackerman would call "particularistic" and "comprehensive" opinions were both written by justices educated in the same generation. Indeed, some of the broadest interpretations of the Revolution are found in the intitial opinions written by Chief Justice Hughes (the Changed Circumstances Doctrine), and Felix Frankfurter (the political process model). *See supra* Parts II.B, III.A. and accompanying text. It also seems anachronistic to credit opinions like *Barnette* with integrating the New Deal with the Fourteenth Amendment, when there was no consensus at that time regarding the *meaning* of the Fourteenth Amendment. *See supra* Parts III.B-E; *cf.* Ackerman, *Liberating Abstraction*, *supra* note 43, at 328-30 (discussing the significance of *Barnette*). Finally, even if the above objections could be overcome, there is a more fundamental reason why Ackerman's Phase 1 and 2 synthesis theory is inapplicable to the New Deal. Unlike prior moments, where the Court initially resisted the radical intentions of the reformers, in this case the Supreme Court *itself* was the reformer. The Court was not struggling to make sense of the Revolution—it was drafting the Revolution.

305. For a recent collection of modern arguments regarding the status of the New Deal, see Symposium, *Moments of Change*, *supra* note 6.

306. *See* Russell L. Caplan, Constitutional Brinkmanship: Amending the Constitution by National Convention (1988).

sovereignty, conventions stand as sovereign meetings of the People themselves and, as such, are not subject to outside limitations.[307] A convention called to consider a flag burning amendment may decide to propose amending the constitutional rules of criminal procedure. Nor are there limits to the length of time a convention may sit with the authority to propose fundamental constitutional change. In 1948, Israel convened a convention in order to propose a constitution for the new country.[308] It was called the Knesset.[309] It still sits. It is perhaps this inability to control the length or scope of a convention that has made it such a rare occurrence in American history.[310] Understanding the New Deal Court as a constitutional convention then is a sobering thought. Perhaps we are right to fiercely debate each new appointment to the Supreme Court. A convention was called in 1937. It still sits.

307. Ackerman, Foundations, *supra* note 5, at 195 (discussing the relationship between conventions and "acting outside the rules"); *see also* Wood, Creation, *supra* note 294, at 309.

308. Gary Jeffrey Jacobsohn, Apple of Gold: Constitutionalism in Israel and the United States (1993).

309. *Id.*

310. *See* Lash, *Rejecting Conventional Wisdom*, *supra* note 301, at 228-29.