

## Book Reviews

### THE COURT-PACKING CONTROVERSY

**SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT.** By Jeff Shesol.<sup>1</sup> New York: W.W. Norton & Company, 2010. Pp. x + 640. \$27.95

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#### I. INTRODUCTION

As *National Federation of Independent Business v. Sebelius*<sup>3</sup> awaited a Supreme Court decision, some observers reflected on the Court-packing crisis that had roiled the nation seventy-five years earlier.<sup>4</sup> In 1937 the Court had performed an apparent about face, upholding laws under the Commerce and the Tax and Spend Clauses that, in the view of most, it would have struck down in 1936. According to the conventional view, Justice Owen Roberts had “switched in time” to preserve judicial review from the threat of President Roosevelt and his plan to add six new Justices to the Court.

The *Sebelius* Court had seemed poised to strike down national economic legislation—in fact, a landmark federal law—for the first time since 1937.<sup>5</sup> And the Court came close to doing so. Five Justices declared that the Affordable Care Act exceeded

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3. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (upholding most provisions of the Affordable Care Act).

4. *E.g.* Adam Liptak, *Health Care Act Offers Roberts a Signature Case*, N.Y. TIMES, March 11, 2012, [www.nytimes.com/2012/03/12/us/health-care-act-offers-roberts-a-signature-case.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/03/12/us/health-care-act-offers-roberts-a-signature-case.html?pagewanted=all&_r=0) (comparing *Sebelius* to the 1936 cases that provoked the Court-packing proposal).

5. *Id.* (noting a “consensus among scholars” before the decision that Chief Justice Roberts was “unlikely to add the fifth vote . . . to uphold the law”). In fact, Chief Justice Roberts did provide the “fifth vote” to sustain the law under the Tax and Spend Clause.

Congress' powers to regulate interstate commerce. But a bare five to four majority upheld most of the law under the Tax and Spend Clause.<sup>6</sup>

*Sebelius* seems likely to spur renewed attention to the 1937 Court-packing crisis. And a longstanding scholarly controversy exists about what happened then. "Internalist" historians, according to Laura Kalman, "point to doctrinal, intellectual causes" for doctrinal change in the 1930's.<sup>7</sup> "Externalist" historians, on the other hand, cite "political reasons," including the Court-packing threat and Roosevelt's landslide reelection in November 1936.<sup>8</sup> In philosophical terms, internalists are supposedly legalists who view law as autonomous from politics; externalists are said to be legal realists.<sup>9</sup>

Jeff Shesol's history, *Supreme Power: Franklin Roosevelt vs. the Supreme Court*, does not consider the contemporary echoes of 1937. But Shesol, a former Clinton White House speechwriter, surely recognized the parallels between then and now. Today, as in 1937, times are hard, the Supreme Court is conservative, and a Democratic President—elected on a platform of change—advances controversial legislation.<sup>10</sup>

Shesol provides a riveting, almost blow by blow account of the Court-packing controversy. And although he alludes to internalism only briefly—and not by name—Shesol seriously undermines the internalist view of 1937. *Supreme Power* may mark a decisive turn in this decades old debate.

Internalism and externalism face quite different intellectual challenges. The case for externalism seems straightforward. In 1937 Justice Roberts altered his most fundamental views in three different areas of constitutional law—commerce, tax and spend and substantive due process. He did so at the precise moment President Roosevelt threatened to pack the Court, an action that gravely threatened judicial review. With Roberts' switching sides, a five to four majority on the Court to strike down New

6. See *Sebelius*, 132 S. Ct. at 2593–2602.

7. Laura Kalman, *Law, Politics and the New Deal(s)*, 108 YALE L.J. 2165, 2166 (1999).

8. *Id.* at 2166–67.

9. *Id.* at 2169. The supposed philosophical dimensions of the historical debate are discussed *infra* in Parts V. A–B.

10. See Richard A. Posner, *1937, 2010*, 241 NEW REPUBLIC 36 (Mar. 1, 2010) (reviewing JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* (2010)) (comparing the Obama and Roosevelt administrations).

Deal legislation and state labor laws became a five to four majority to uphold those laws.

What happened can be compared to a shooting. A previously healthy victim falls to the ground, bleeding, at the very moment someone fired a gun in the victim's direction. Even without an autopsy, the case for an external cause of the collapse—the gunshot—seems strong. Yet internalists have to argue that a cause “internal” to the victim explains the event.

Alluding to this challenge, Barry Cushman, a leading internalist, acknowledges that non-political explanations of 1937 require some “intellectual space” to appear plausible—some gaps between political pressure and Roberts' votes.<sup>11</sup> Internalists argue, for example, that Roberts could not have feared for the Court because Roosevelt's proposal was certain to fail.<sup>12</sup> Internalists also claim that Roberts cast a critical vote in a minimum wage case before Roosevelt had proposed Court-packing.<sup>13</sup> In effect, they argue that Roosevelt fired blanks and, in any event, the victim collapsed before the gun went off.

Two other arguments feature prominently in internalism. One claims that an integrated legal “fabric” or “edifice” linked questions of federal power under the Constitution to questions about substantive due process—and that Roberts' majority opinion in *Nebbia v. New York*,<sup>14</sup> a 1934 substantive due process decision, revealed the fabric unraveling three years before the Court-packing proposal.<sup>15</sup> On this view, Roberts changed his mind about one thing—the fabric—and not three different things (commerce, tax and spend, substantive due process).

A related argument takes a longer view, citing developments in economics and social thought. G. Edward White, for example, argues that the “edifice of [constitutional] doctrine . . . collapse[d] of its own weight” because a new “modernist epistemology” had undermined it.<sup>16</sup> This new understanding of the world, according to White, made pre-1937 constitutional doctrine “incoherent.”<sup>17</sup> Thus, what caused the constitutional

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11. BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 5 (1998).

12. *See id.* at 13–17 (discussing opposition to the plan).

13. *Id.* at 45.

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

15. *See CUSHMAN, supra* note 11, at 80–81.

16. G. Edward White, *Constitutional Change and the New Deal: The Internalist/Externalist Debate*, 110 *AM. HIST. REV.* 1094, 1108–09 (2005).

17. *Id.* at 1109.

revolution predated 1937 and was not political in nature. Furthermore, these long-term developments made a constitutional revolution inevitable. Viewed over the long-term, then, what an individual Justice did in a single case hardly mattered—and Justice Roberts was not responsible for the constitutional revolution.

*Supreme Power* largely destroys the “intellectual space” that internalism requires. Contrary to internalist claims, Shesol demonstrates that Court-packing legislation seemed likely to pass. Shesol also shows that when Roberts cast his supposedly pivotal vote on substantive due process, in December 1936, the entire nation was focused on the threat Roosevelt posed to the Court. Other writers reach similar conclusions, but none so convincingly or with such devastating effect as Shesol.

*Supreme Power* bears on other internalist arguments indirectly, but in important ways. It shows, for example, that some brilliant contemporary observers attached little significance to the *Nebbia* decision in 1934—and that virtually no one considered *Nebbia* significant after Justice Roberts joined majorities in 1936 to strike down New Deal measures and invalidate a state minimum wage law. If contemporaries are capable of understanding constitutional law, this alone casts doubt on internalists’ claims.

Shesol also undercuts long-view internalism in an almost aesthetic way. The long view shifts attention away from singular events to the hypothesized deep currents of intellectual and economic history. *Supreme Power* counters with a detailed recreation of the legal and political world of 1937. Shesol conveys the sheer contingency of events brilliantly—how things might have turned out differently. Experiencing the world of 1937, many readers will decide that long-view internalism simply misses the point.

Part II of this review examines how Shesol’s account bears on internalists’ claims.

Going beyond Shesol’s arguments, Part III analyzes the internalist idea of a “fabric” of constitutional law. I argue that this concept is conceptually flawed and leads internalists to ignore or downplay facts inconsistent with their views. Indeed, the “fabric” idea rules out the very constitutional position that Justice Roberts (and many others) actually took in 1936—namely, that *states* should have greater latitude to regulate the economy, but the federal government should not. I also argue that

Roberts' vote to strike down a minimum wage law in 1936 (rather than, as usually thought, his vote to uphold such a law in 1937) may well have been influenced by political considerations—in particular, by Roberts' aspirations for the 1936 Republican presidential nomination.

Part IV considers *Supreme Power* on its own terms. I argue that despite the book's overall excellence, it overlooks the importance of political principles and the threat Roosevelt actually posed to judicial review. Shesol made these mistakes, I suggest, because a 1997 political crisis during the Clinton administration influenced his understanding of the 1937 Court-packing crisis.

Part V argues that the very idea of an internalist-externalist debate, one supposedly driven by a philosophical disagreement about law, is mistaken. I distinguish "strong" forms of internalism and externalism from "weak" forms, and consider the different ways that legal philosophy might influence a historical debate. In light of that discussion, I examine the views of leading figures in the controversy and evaluate Shesol's claim—a surprising one, given the rest of his account—that it must be "impossible" to know what motivated Justice Roberts.

Part VI considers how Shesol's book, along with changing views of judicial review and doctrinal upheavals, could affect the future course of historical debate. Among other possibilities, internalism may fracture, I argue, as some internalists adopt positions contrary to current internalist claims. I also examine how the Court itself has treated the events of 1937—a treatment at odds with the very idea of an internalism versus externalism debate.

## II. INTERNALISM AND SUPREME POWER

### A. CHRONOLOGY AND POLITICAL PROSPECTS

Regarding the events, *Supreme Power* demonstrates that key internalist claims are mistaken—and sometimes blatantly wrong.

1. *December 17, 1936*—President Roosevelt announced the Court-packing plan on February 5, 1937.<sup>18</sup> Internalists argue that

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18. *Id.* at 11.

Justice Roberts changed his mind about the Constitution before then.<sup>19</sup>

On December 17, 1936 the Justices conferred about *West Coast Hotel v. Parrish*, a minimum wage case.<sup>20</sup> Just six months earlier, in *Morehead v. New York ex rel. Tipaldo*,<sup>21</sup> Roberts had joined four conservative Justices in an opinion that invalidated a state minimum wage law and endorsed a *Lochner*<sup>22</sup> era view of substantive due process. At the *Parrish* conference in December, however, Roberts joined the *Tipaldo* dissenters. The result was a 5–4 majority upholding the minimum wage law and upending *Lochner*. Since the conference predated the Court-packing proposal, internalists conclude that doctrine, rather than politics, motivated Justice Roberts.

Shesol demonstrates, however, that Court-packing—and other possible severe limitations on the Court—were in the forefront of national discussion as the Justices conferred about *Parrish*. “By 1935,” Shesol writes,

[a]ny time an important New Deal case was pending, newspapers reported (based on leaks, rumors or just plain surmise) that Roosevelt, if displeased by the decision, might pack the Court. White House officials never denied it (p. 96).

Worried in 1935 about the Court invalidating a measure that voided gold clauses in contracts—and thereby bringing about a financial collapse—“Roosevelt leaned, increasingly, toward ‘outright defiance’” (p. 99). In advance of the decision, he circulated a speech announcing that defiance “among a small circle of officials” (p. 99).<sup>23</sup> After the Court upheld the gold clause measure, the *New York Times* ran excerpts from Roosevelt’s draft—excerpts the president himself may have leaked (p. 105).

Later in 1935, after the Justices invalidated the National Recovery Act, the *Times* published a compendium of proposals to limit judicial review. Shesol summarizes them:

There were [constitutional] amendments to permit Congress to regulate wages, hours, labor conditions and industrial

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19. Kalman, *supra* note 7, at 2174.

20. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); CUSHMAN, *supra* note 11, at 18.

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

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

23. I know of no evidence that the Justices saw the draft before deciding. However, it would not be surprising if they had.

production levels; to require at least a two-thirds vote of the Court's members in order to overturn a federal law; to expand the list of industries "affected with a public interest"; to mandate that the justices deliver advisory opinions on pending legislation; to remove social and economic policy from the Court's jurisdiction; and more (p. 145).

In September 1935, *Collier's* magazine reported on Roosevelt's views (p. 115). A "trial balloon" launched by Roosevelt himself, the story indicated that "the President will have no other alternative than to go to the country with a Constitutional amendment" if the Court continued striking down New Deal measures (p. 156). After the Court invalidated the Agricultural Adjustment Act, on January 6, 1936, members of Congress were "frustrated by Roosevelt's reluctance to act against" the Court and produced a "cascade" of proposals, including Court-packing, abolishing judicial review, automatically impeaching Justices, and supermajority voting requirements in constitutional cases (p. 195–96).

Following the *Tipaldo* decision, commentators described the Supreme Court's intransigence as the most important issue facing the nation (p. 224). FDR, however, refrained from comment (p. 224). Not wanting to jeopardize his reelection, he said nothing about it during the 1936 reelection campaign (p. 215).

Immediately after the election, however, it was widely assumed that Roosevelt would act. "[M]any New Dealers," Shesol writes, "had come to view . . . [a constitutional amendment limiting the Court] as a foregone conclusion" (p. 250). On November 6, 1936 a Washington newspaper columnist observed that "[a]ll . . . [the] talk about packing the Court, stripping it of its powers of review, tinkering with the Constitution, would disappear if men like Hughes and Roberts would relent" (p. 243). The *Washington Daily News* described the Court as "No Longer Untouchable" and, according to Shesol, "[e]ven foreign observers saw action against the Supreme Court as inevitable" (p. 245).

In December, an article appeared in *Colliers* by a journalist known for his close ties to Roosevelt—an article that ended by observing that "Congress *can enlarge the Supreme Court*, increasing the number of Justices from nine to twelve or fifteen" (p. 255). Though the magazine cover date was December 26, the issue reached newsstands "in mid-December," Shesol writes (p.

255). Possibly, then, the Justices saw it before the conference in *Parrish*.

In short, as the Justices considered *Parrish* the nation was focused on Roosevelt's probable move against the Court. The Justices surely knew a major threat loomed. In light of Shesol's account, claims that political considerations could not have influenced Roberts' vote in *Parrish*—because that vote predated the Court-packing plan—seem far-fetched.

2. *The Threat*—A related internalist argument is that the Justices knew all along Congress would defeat Court-packing. According to Cushman, “[t]he justices had ample reason to be confident that constitutional capitulation was not necessary” because “it was doubtful that even a compromise [Court-packing] bill could survive both a Senate filibuster and the House Judiciary Committee.”<sup>24</sup> *Supreme Power* demonstrates, however, that this argument is wrong as well.<sup>25</sup>

Shesol shows that contemporaries expected Roosevelt to prevail. On February 6, Shesol notes, newspapers “forecast . . . the bill's fast track to passage” (p. 305).<sup>26</sup> And opposition leaders expected to lose. Senator Carter Glass said that he did not “imagine for a moment that [opposition] . . . will do any good” because, in his view, Roosevelt could get “Congress to commit suicide” (p. 312). Senator Harry Byrd said that the Court's defenders would fight the President even though they could not “lick” the proposal (p. 324). The bill's opponents “were, for the most part, realists,” Shesol concludes, who “did not expect to defeat the Court bill” but “sought instead to weaken, modify or possibly supplant it—to force the President to accept a compromise,” which probably would involve some number of conservative Justices resigning from the bench (p. 342). On

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24. CUSHMAN, *supra* note 11, at 25.

25. Richard Friedman, who agrees with some of Cushman's arguments, differs on this point; according to Friedman “the plan, in one form or another, still had plenty of life” when the Court decided critical 1937 cases. Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891, 1972–73 (1994); see also Daniel A. Farber, *Who Killed Lochner?*, 90 GEO. L.J. 985, 1000 (2002) (reviewing G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000)) (observing that “[t]he President, the Senate majority leader, and a number of informed observers at the time could count votes . . . and they obviously did not consider the plan a lost cause”).

26. Believing that Roosevelt's references to “aged and infirm judges” constituted a major error, see discussion *infra* Part IV.B.1, Shesol thinks the predication of quick passage “already felt out of date” because there “clearly” would be a “fight” over Court-packing (p. 306). That is a far cry, however, from claiming that the proposal was sure to fail.



February 24 Justice McReynolds' clerk wrote his parents that the Justice "seems to think the bill may go through" (p. 340).<sup>27</sup>

Although opposition to the plan grew during February, Shesol records that the "odds" against opponents were "steadily lengthening" after Roosevelt's March 9 fireside chat (p. 388). In mid-March, Senator Hiram Johnson, a leading opponent, informed his son that the bill probably would pass with ease (p. 386). Robert Jackson, then an administration official, observed at the end of March that "there is no question . . . the President's plan will go through" (p. 401). As late as May—after the Senate Judiciary Committee had rejected the proposal, after Justice Van Devanter had resigned, and after the Court had upheld a state minimum wage law, the National Labor Relations Act and the Social Security Act—it remained "perfectly reasonable," Shesol concludes, to believe that a compromise version of the plan would be enacted creating fewer than six vacancies on the Court (p. 458–59). In July, an even more watered down compromise appeared possible, and an opposition leader offered to guarantee the resignation of two additional Justices if Roosevelt would abandon the proposal (p. 481). Roosevelt refused, and only the untimely death of Speaker Joseph Robinson—who would have been appointed to a Supreme Court vacancy—doomed the President's efforts (pp. 458–60, 475–78, 481 & 493–98).<sup>28</sup>

In short, Justice Roberts had every reason to fear for judicial review—and internalist claims to the contrary are plainly wrong.

#### B. *NEBBIA* AND THE CONSTITUTIONAL FABRIC

1. *A Doctrinal Fabric*—If political pressure did not cause the change of constitutional course, what did? Leading internalists such as Barry Cushman and G. Edward White begin by positing an "interdependent *web* of constitutional thought"<sup>29</sup> (Cushman) or an "edifice of [constitutional] doctrine" (White) during the early twentieth century.<sup>30</sup> This "web" or "edifice" encompassed a wide swath of constitutional law, including limitations on federal power and substantive due process.

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27. The clerk agreed (p. 340).

28. These passages describe compromise proposals, Robinson's death, and Roosevelt's acknowledgement that he had lost.

29. CUSHMAN, *supra* note 11, at 6.

30. White, *supra* note 16, at 1108.

Internalists trace what they consider a visible erosion of the old doctrinal edifice in pre-1937 caselaw. Like the slow collapse of a physical structure, doctrinal disintegration unfolded gradually. But the decisive event, they contend, was Justice Roberts' majority opinion in *Nebbia*, the 1934 substantive due process decision recognizing that a broad range of private transactions "affected . . . the public interest" and therefore should be subject to government regulation.<sup>31</sup> Barry Cushman explains:

[T]he highly integrated body of jurisprudence referred to as laissez-faire constitutionalism was an interwoven fabric of constitutional doctrine. Within that body the distinction between public and private enterprise performed a critical integrative function. When the Court abandoned the old public/private distinction in *Nebbia*, then, it pulled a particularly important thread from that fabric. . . . [and] it was only a matter of time before that fabric would begin to unravel.<sup>32</sup>

Relying on *Nebbia*, internalists argue that Roberts changed his mind about substantive due process in 1935, and that he was therefore disposed to uphold minimum wage legislation in 1936 and 1937—his 1936 vote in *Tipaldo* to strike down a minimum wage notwithstanding.<sup>33</sup> This point is debatable, and I consider it below.<sup>34</sup> If internalists are right, however, Roberts voted in *Parrish* in accord with pre-existing constitutional views; there was no "switch" for political pressure to explain.

2. *The View From 1937*—Shesol does not offer detailed analyses of cases on a par with Cushman's or White's. Instead, *Supreme Power* briefly describes Supreme Court decisions and the contemporary reaction to them. In doing this, however, Shesol sheds important light on internalist claims about the "fabric," *Nebbia*, and doctrinal change.

To begin with, *Supreme Power* demonstrates that knowledgeable contemporaries—including Felix Frankfurter, Robert Jackson and Justice Stone—did not consider *Nebbia* a major constitutional departure in 1934, and believed it

31. See *Nebbia v. New York*, 291 U.S. 502, 533–37 (1934).

32. Cushman, *supra* note 11, at 7 (footnotes omitted). G. Edward White accepts this explanation, as far it goes, and attempts to explain why the doctrinal fabric unraveled. G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 203–05 (2000).

33. See *id.* at 45–46.

34. See discussion *infra* Part III.E.

portended little about future decisions (p. 72).<sup>35</sup> Others did see *Nebbia* as a constitutional turning point—but changed their minds over the next two years as the Court (and Justice Roberts) struck down the Agricultural Adjustment Act, the Bituminous Coal Act, and a state minimum wage law. In 1937, there were virtually no internalists.

Contemporaries and internalists interpret the same Supreme Court opinions. Yet figures such as Stone, Jackson, and Frankfurter did not see the doctrinal development that internalists do. Internalists claim that *Nebbia* shredded the fabric of constitutional law—even though no one, apparently including *Nebbia*'s author, Justice Roberts—realized for three years that the fabric had torn.

(a) *The Decisions*—On the internalist view, one would suspect that *Nebbia* had launched a series of decisions—or at least votes by Roberts—questioning established doctrine. The opposite is true, however. *Nebbia* was followed by decisions that suggested the old fabric of law not only remained intact, but that Roberts considered it indestructible.

*Home Building & Loan Ass'n v. Blaisdell*,<sup>36</sup> decided January 8, 1934, preceded *Nebbia*. In *Blaisdell*, the Court rejected a Contracts Clause challenge and upheld a state law establishing a limited moratorium on mortgage foreclosures.<sup>37</sup> Hughes wrote the majority opinion, which Roberts joined. The four conservative Justices dissented.

*Nebbia* followed on March 5, 1934.

Later that term, on May 6, the Court adopted a restrictive reading of the Commerce Clause in *Railroad Retirement Board v. Alton Railroad Co.*<sup>38</sup> *Alton* invalidated a federal law that required interstate carriers to provide pension and retirement plans for their employees; Roberts wrote the majority opinion.<sup>39</sup> *Alton* was followed on May 27, 1934 by the unanimous decision in *Schechter Poultry Corp. v. United States*, striking down the National Industrial Recovery Act as beyond the federal government's power to regulate commerce.<sup>40</sup> On January 7, 1935, an 8 to 1 majority, in *Panama Refining Co. v. Ryan* invalidated

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35. See discussion *infra* Part II.B.2.(b).

36. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

37. *Id.* at 447.

38. *R.R. Ret. Bd. V. Alton R. Co.*, 295 U.S. 330 (1935).

39. *Id.* at 374.

40. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

Congress' delegation of authority to the President to regulate so-called "hot oil"; Cardozo alone dissented.<sup>41</sup>

The Court never seemed more confident in established doctrine than during the following term. On January 6, 1936, *United States v. Butler* invalidated the Agricultural Adjustment Act, finding the enactment beyond the federal power to tax and spend.<sup>42</sup> Roberts began the majority opinion by announcing a broad interpretation of the Tax and Spend Clause, one apparently friendly to the exercise of federal power, but he ended by citing "the entire plan of our government" to explain why the federal government was powerless to pay farmers not to grow crops.<sup>43</sup> On May 18, 1936 *Carter v. Carter Coal Co.* invalidated the Bituminous Coal Act.<sup>44</sup> The majority opinion, joined by Roberts, unequivocally declared manufacturing, mining and agriculture beyond the reach of the federal commerce power—perhaps the narrowest view of the Commerce Clause that the Court has ever taken.<sup>45</sup> Then, on June 1, *Tipaldo* struck down New York's minimum wage law as a violation of substantive due process.<sup>46</sup> Here, Roberts joined a majority opinion that explicitly reaffirmed *Adkins v. New York*, a 1923 decision that embodied the *Lochner* approach and struck down a minimum wage law.<sup>47</sup>

*Carter Coal*, *Butler* and *Tipaldo* did not just strike down legislation. Each strongly reaffirmed, even extended, existing restrictive doctrines and constitutional limitations. Internalists argue that *Nebbia* unraveled existing doctrine but Justice Roberts, the author of *Nebbia*, seemed to disagree.

Immediately after the 1936 election signs of change appeared at the Court. Observers noticed that "the atmosphere in the courtroom had changed dramatically since the election," Shesol writes, with conservative justices showing "less overt hostility" to government attorneys (p. 243). The Court also handed down a number of decisions sustaining social and economic legislation, including a state unemployment insurance

41. *Carter v. Carter Coal Co.*, 293 U.S. 388 (1935).

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

43. *Id.* at 74.

44. *Carter*, 298 U.S. at 238.

45. *See id.* at 298 ("As used in the Constitution, the word 'commerce' is the equivalent of the phrase 'intercourse for the purposes of trade,' and includes transportation, purchase, sale, and exchange of commodities between the citizens of the different states.").

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

47. *Id.* at 374.

plan (by a divided 4–4 vote, with Roberts evidentially joining Hughes, Cardozo and Brandeis to uphold the plan)<sup>48</sup> and state fair trade laws (unanimously) (p. 244).<sup>49</sup> In late December the Court recognized sweeping Presidential authority over foreign affairs (by a 7–1 vote).<sup>50</sup> In early January, it sustained (unanimously) a federal ban on the importation of prison-made goods into states that prohibited their sale.<sup>51</sup> The Justices also unanimously upheld a federal tax on silver speculation, even though the tax had an obviously regulatory purpose (p. 265).<sup>52</sup> The *Washington Daily News*, for one, speculated that the Court might be “mend[ing] its opinions” to avoid a cataclysmic battle with the President (p. 265).<sup>53</sup>

(b) *What Contemporaries Thought—Supreme Power* describes the reaction to Supreme Court decisions as they came down. After the 1934 *Blaisdell* decision, for example, the Speaker of the House predicted that the Court would sustain every business code under the National Industrial Recovery Act—a prediction promptly proved wrong by *Schechter* (p. 70). In an even bigger misjudgment of *Blaisdell*, the *New York Times* guessed that the Court would sustain all New Deal legislation because the Justices had embraced Roosevelt’s theory of a “living” Constitution (p. 70). After *Nebbia*, Edwin Corwin—a leading political scientist—opined that “[l]aissez faire . . . was in full retreat” and that the Court would probably uphold the National Industrial Recovery Act (p. 72).

Justice Stone disagreed. He considered *Nebbia* “no more than a partial victory” because “Roberts stopped short of

48. *W.H.H. Chamberlin, Inc. v. Andrews*, 299 U.S. 515 (1936).

49. *Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*, 299 U.S. 183 (1936).

50. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

51. *Kentucky Whip & Collar Co. v. Ill. Cent. R.R. Co.*, 299 U.S. 334 (1937).

52. *United States v. Hudson*, 299 U.S. 498 (1937).

53. William G. Ross calls these (and some other) post-election cases “forgotten” decisions, noting that “many [contemporary] observers regarded them as the herald of a judicial transformation” William G. Ross, *When Did the “Switch in Time” Actually Occur?: Re-Discovering the Supreme Court’s “Forgotten” Decisions of 1936-1937*, 37 ARIZ. ST. L.J. 1153, 1155 (2005).

After demonstrating that the Court’s decisions changed immediately following the 1936 reelection—and observing that the new decisions would blunt Roosevelt’s move against the Court—Ross concludes that the “forgotten” decisions somehow weaken the case for a politically motivated “switch.” *Id.* at 1157. Among other things, Ross accepts internalist claims that the Court-packing proposal “was widely regarded as doomed[.]” *Id.* at 1219. At times, however, Ross acknowledges the obvious, at one point writing:

The election of 1936, therefore, may have provided the occasion for a judicial revolution, even if it was not the cause. Or, to the extent that it was the immediate cause, it was not the sole cause.

*Id.* at 1211–12.

creating sweeping new doctrine” and had left “a path for a possible retreat” through “case-by-case” review (p. 72).<sup>54</sup> He also characterized Roberts’ approach in *Nebbia* as “not . . . novel” (p. 125). Shesol’s own judgment is that *Blaisdell* and *Nebbia* “gave states more room to regulate” but “offered no indication of the Court’s next move” (p. 218–19).<sup>55</sup>

Post-*Nebbia* cases made a strong impression on contemporaries. To many observers, *Alton* indicated that Roberts had joined the conservative Justices once and for all (p. 125). Shesol notes that the opinion “reject[ed] the very idea of a relationship between retirement security and interstate commerce” (p. 118).

*Schechter* came next. Frankfurter had urged Roosevelt not to take the case to the Supreme Court because the “fundamental situation” on the Court had “not changed” (p. 132). Despite *Nebbia*, then, Frankfurter expected the Court to strike down the law—as it did, unanimously. Indeed, immediately after the Court announced its decision, Justice Brandeis pointedly told two administration aides that the day’s opinions<sup>56</sup> had “change[d] everything” (p. 136). “The President . . . has been living in a fool’s paradise,” Brandeis said. “I want you to go back and tell the President that we’re not going to let this government centralize everything,” he added, “[i]t’s come to an end” (p. 37). His remarks suggest that the Court was drawing a constitutional line in the sand around old constitutional doctrine—after *Nebbia*.

In 1935, Robert Jackson said the Court had discarded the fundamental idea that “it is an awesome thing” to invalidate a democratically enacted law; *Nebbia*, decided the year before, apparently did not alter that conclusion (p. 171). In 1937, Roosevelt, Frankfurter and leading Justice Department attorneys all expected the Court to strike down the National Industrial Recovery Act and the Social Security Act (p. 243).

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54. The quoted language is Shesol’s, not Justice Stone’s.

55. At another point, Shesol described *Nebbia* as “more a reaffirmation than a doctrinal revolution” but added that “Robert’s abandonment of the restrictive ‘public interest’ test . . . was momentous” (p. 71).

56. On the same day, the Court also handed down a decision that limited the President’s power to discharge executive officials, *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935), and one that struck down a federal mortgage moratorium measure, *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935). (p. 134) *Humphrey’s Executor* especially angered Roosevelt, who thought the Justices had decided against him out of spite (p. 143).

Shesol cites no one who regarded *Nebbia* as portending much of anything after *Butler*, *Carter Coal* and *Tipaldo*.

The reaction to *Carter Coal* and *Butler* generally followed political lines. *Tipaldo*, however, produced a “wave of national revulsion” across the board (p. 222). Shesol reports that 334 out of 344 newspaper editorials condemned the decision; even some conservative newspapers contemplated a constitutional amendment to sanction anti-sweatshop legislation (p. 222). At the Republican convention that summer, the delegates split over *Tipaldo* (p. 226). But the nominee, Alf Landon, announced that Republicans would seek a constitutional amendment should the Court strike down other minimum wage laws (pp. 228–29). Earlier, there had been a move to nominate Justice Roberts as the Republican candidate, but that possibility vanished because he joined the *Tipaldo* majority (p. 231).

According to Shesol, “[r]arely had judges in the majority felt so embattled and misunderstood” (p. 230). Because of Roberts’ well known desire for approval—and perhaps also because of the demise of his presidential hopes—Shesol suggests that Roberts may have been affected most of all (p. 231).<sup>57</sup> In any event, that summer he and Hughes had an intense, hours-long discussion—it is not known about what—at Roberts’s estate (p. 232–33).

Reaction to the “switch in time” opinions was almost as uniform as the reaction to *Tipaldo*. Felix Frankfurter, who later became a proponent of internalism, described Roberts’ “somersault” in *Parrish* as “a shameless, political response to the present now” (p. 412). Writing to Roosevelt, Frankfurter remarked that “with the shift by Roberts [on the minimum wage], even a blind man ought to see that the Court is in politics” (p. 412). After the Court upheld the National Labor Relations Act, Frankfurter telegraphed Roosevelt and said that he felt “like finding some honest profession to enter” (pp. 434–35). When the Court sustained the Social Security Act, Frankfurter deplored “the political somersaults (for such they are) of the Chief and Roberts” (p. 455).

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57. Roberts said later that he “never had the notion” of being a Presidential candidate (p. 231). Shesol notes, however, that Roberts never publically discouraged efforts to secure him the nomination (p. 231). Shesol also quotes a later remark by Roberts:

However strong a man’s mentality and character, if he has this ambition in his mind it may tinge or color what he does (p. 231).

Frankfurter was not alone. Asked by Attorney General Cummings how Roberts could vote to strike down the minimum wage in *Tipaldo* and to uphold it in *Parrish*, Justice “Stone said he had not the remotest idea . . . he could not understand it” (p. 427). Senator—later, Justice—Sherman Minton asserted that Roberts had changed his vote only because “the chief justice was talking politics to him. There is no other explanation” (p. 484). Remarkably, the *Parrish* dissent (which Shesol quotes) took a similar view (p. 408). In an obvious allusion to Roberts, the dissenters wrote:

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.<sup>58</sup>

Like the liberals Stone, Frankfurter, and Jackson, conservative Justices did not understand Roberts’ change of mind in doctrinal terms.

The phrase “switch in time that saved the nine” appeared in connection with the Court’s next constitutional turnabout. A year after *Carter Coal* had declared manufacturing beyond the reach of the Commerce Clause, *NLRB v. Jones & Laughlin Steel Corp.*<sup>59</sup> sustained federal labor regulations in manufacturing plants and upheld the National Labor Relations Act. The “switch in time” idea “caught on,” Shesol explains, “because it captured what virtually everyone on both sides of the fight believed: that the Supreme Court, seeking to save itself from being packed, had simply surrendered” (p. 434). Even the “most implacable” opponents of Court-packing, Shesol notes, under-

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58. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 401–02 (1937).

59. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).



stood *Jones & Laughlin* in this way (p. 434). Hiram Johnson, for example, observed that

This would not have happened three months ago before the agitation about the Supreme Court . . . I think they . . . [Hughes and Roberts] voted right this time, but . . . [i]n my opinion they permitted themselves to be bludgeoned into voting to sustain the Act. I don't think the Court, from the standpoint of its personnel, at least a portion of it, is worth fighting for, and if it were not for the immensely bigger thing at stake, I would not be engaged in this contest (p. 434).<sup>60</sup>

Thus, almost no one in 1937 thought that doctrine explained Roberts' votes—not Justice Stone, not Administration lawyers, not Felix Frankfurter, not newspapers or commentators, and not the dissenters in *Parrish*. And how can internalism be right about the law today, if those who understood constitutional doctrine best in 1937 thought it was wrong?

### C. THE VIEW FROM AFAR

Another argumentative strand in internalism sees long term historical forces behind the constitutional revolution of the 1930's. G. Edward White, for example, considers it “fundamentally, an interpretive revolution,”<sup>61</sup> in which a “modernist epistemology” that had emerged during the early twentieth century caught up with the law.<sup>62</sup> Until the 1930's, according to White, the Court had utilized “guardian review,”<sup>63</sup> based on the idea that “preordained boundaries” existed “between public power and private rights and between the nation and the states.”<sup>64</sup> Constitutional law “guarded” these boundaries. In the 1930's, however, guardian review collapsed:

[O]ver the first three decades of the twentieth century, there had been a sea change in attitudes toward the role of the judge in constitutional interpretation. That attitudinal change was connected to a larger epistemological shift. As the defining features of modernity—mature industrial capitalism,

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60. A few days after the Senate Judiciary Committee rejected the Court-packing proposal, the Supreme Court upheld the Social Security Act in opinions that, according to Shesol, “took an even more expansive view of the federal taxing and spending power and the general welfare clause than the most optimistic government attorneys had thought possible” (pp. 453–54). The “New Deal's victory was complete,” observed the *Washington Post* (p. 454).

61. WHITE, *supra* note 32, at 234.

62. White, *supra* note 16, at 1109–10.

63. *Id.* at 233.

64. *Id.*

a broadened base of political participation, the collapse of rigid status distinctions, and the secularization of higher learning brought about by the growing influence of scientific methods of inquiry as techniques for acquiring and using knowledge—transformed the experience of Americans in the late nineteenth and twentieth centuries, new theories of causal attribution became influential. . . . Modernist epistemology was premised on the belief that humans, by using techniques of scientific inquiry, could intervene to affect their destiny and help shape their future.<sup>65</sup>

The result of these larger developments, in White's view, "was a constitutional revolution, one in which Supreme Court justices . . . concluded that there was no intelligible distinction between the authority of legal sources [such as the Constitution] and that of their designated interpreters [the judges themselves]."<sup>66</sup> In this way, "[t]he shock waves of modernity" produced "widespread . . . acceptance of the proposition that judges made law in constitutional interpretations as well as in common law decisions."<sup>67</sup> By undermining the strict separation between judging and lawmaking, the new epistemology brought an end to "guardian review."<sup>68</sup>

*Supreme Power* does not directly address such arguments. But it manages to undercut them. Accounts like White's make day-to-day events seem like flotsam carried along on deep historical currents. Shesol, on the other hand, recreates the world of the mid-1930's in detail. Doing so, he describes numerous events, even petty personal slights, that could have changed the outcome. What results is a sense of contingency that holds readers in suspense even though they know what happens. By contrast, the long view encompasses things that most readers will have never heard of, but involves no suspense at all. Readers of *Supreme Power* see what the long view obscures—and few will conclude that the world Shesol recreates did not really matter.

If deep historical currents determined events, it would make no difference had Roberts said, "I'm going to violate my oath to save the Court from Franklin Roosevelt." Historical currents, which Roberts could not alter, would remain controlling. Did politics influence Roberts? On the long view, the question

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65. White, *supra* note 16, at 1109.

66. WHITE, *supra* note 32, at 233.

67. *Id.* at 235.

68. *Id.*

approaches insignificance: what had to happen would have happened no matter what Roberts did.

Yet the answers actually matter a great deal. If Roberts had not “switched” in 1937, the Court probably would have been packed. Opponents rightly feared for judicial review if that occurred. Modernist epistemology could have triumphed—assume White is correct about that—but at the cost of judicial review. Nor did modernist epistemology mandate *Brown v. Board of Education*, *Reynolds v. Sims*, or *Roe v. Wade*, decisions that a weak Court would not have handed down and certainly could not have enforced.

Indeed, a plausible corollary of modernist epistemology is that judicial review *should* end. The classic defense of judicial review rests on a distinction between judging and lawmaking—the very distinction modern epistemology eliminates, according to White. Even if modern epistemology was predestined to triumph, then, judicial review was not predestined to survive—and Justice Roberts’ switch quite possibly saved it.

### III. AN UNRAVELING FABRIC—AND PARRISH

The concept of a constitutional fabric—which is critical to internalism—has other problems, besides those suggested by *Supreme Power*.

First, although internalism supposedly takes legal doctrines seriously, the “fabric” idea licenses internalists to ignore pivotal decisions (other than *Nebbia*). Second, the “integrated fabric” posits an unbreakable doctrinal link between substantive due process and constitutional limits on federal power. Yet nothing in the Constitution connects the two. Moreover, evidence suggests that if Roberts wanted to *weaken* substantive due process constraints before 1937, he also wanted to *strengthen* constitutional restraints on the national government—a combination of positions that “fabric” theory deems impossible. Third, internalists disregard earlier and later decisions demonstrating that the “fabric,” if it exists at all, is actually two sided—and that judges can choose which one to show.

#### A. IGNORING DOCTRINE: BUTLER AND CARTER COAL

Internalists attach enormous weight to Justice Roberts’ words in *Nebbia*, not just to the case result. But their interest in doctrinal language is selective. For internalists, language in contemporaneous commerce and tax and spend cases seemingly

does not count in the same way. In practice, internalists take judicial language seriously only when doing so comports with the hypothesized “fabric” of law.

Consider *Butler*, the decision that struck down the Agricultural Adjustment Act. The opinion of the Court, which Roberts wrote, began by endorsing a broad reading of the words “general welfare” in the Tax and Spend Clause—an endorsement internalists surely would have deemed highly significant if Roberts had not immediately proceeded to invalidate the law as an unconstitutional encroachment on “the reserved rights of the states.”<sup>69</sup> The Act aimed “to regulate and control agricultural production,” that being “an unconstitutional end,” according to Roberts, “beyond the powers delegated to the federal government.”<sup>70</sup>

But if Roberts’ broad understanding of “general welfare” in *Butler* means little for his views about federal power, why should his declaration that “all businesses are affected with the public interest” in *Nebbia* say everything about his understanding, not only of substantive due process, but of federal power, the Commerce Clause, and the Court’s role? Making matters worse (for internalists), in *Butler* Roberts cited *Adkins v. Children’s Hospital*<sup>71</sup>—the 1923 decision striking down a minimum wage law that the Court would reaffirm in *Tipaldo*—and implied that he shared *Adkins*’ understanding of the Court’s role in constitutional adjudication.<sup>72</sup>

Or consider *Carter Coal*. Roberts joined an opinion of the Court that categorically barred the federal government from regulating manufacturing, agriculture and mining—a result anticipated by *Butler* and described in *Carter Coal* as “fundamental . . . [and] essential to the maintenance of our constitutional system.”<sup>73</sup> Yet in *Jones & Laughlin*, a year later, Roberts and Court sustained a federal regulation of labor relations in manufacturing.<sup>74</sup> Why does the language in *Carter Coal* count for less than language in *Nebbia*?

69. *United States v. Butler*, 297 U.S. 1, 68 (1936).

70. *Id.*

71. *Adkins v. Children’s Hosp. of the Dist. of Columbia*, 261 U.S. 525 (1923).

72. *Butler*, 297 U.S. at 63 n.9. Justice Roberts’ footnote begins with the “Compare” signal, and cites to a page where the *Adkins* describes a role for the Court in constitutional matters very like the one Roberts invokes in *Butler*. *Id.*; see also *Adkins*, 261 U.S. at 544.

73. *Carter v. Carter Coal Co.*, 298 U.S. 238, 307 (1936) (distinguishing between direct and indirect effects on interstate commerce).

74. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

## B. A COAT OF MANY COLORS

For internalists, the answer is an integrated fabric of constitutional law. Using this non-doctrinal construct, internalists privilege judicial statements that comport with their view, while ignoring or downplaying the more numerous statements that do not. The “integrated fabric” of internalists is a coat of many colors: it lets you see what you please.

Nothing in the fabric concept counterbalances its apparent arbitrariness. Because of the fabric, when Roberts changed his mind about substantive due process in *Nebbia* in 1934, he supposedly changed his mind about limits on federal power, too. But if the two areas of law are truly linked, then *Butler* and *Carter Coal*—commerce and tax and spend cases—also indicate a strengthening of Justice Roberts’ attachment to *Lochner*-era substantive due process doctrines in 1936. But internalists do not draw that conclusion. Instead, they assume that the old constitutional fabric could only weaken during the 1930’s, never strengthen. To assume that, however, is to simply assume that internalism must be correct.

There is a closely related possibility, involving a “long view” conception of history. Constitutional law obviously changed between 1932 and 1937, and one might plausibly assume that gradual processes were at work. Knowing the outcome, as later historians do, one might distinguish decisions that moved constitutional law toward its ultimate destination from decisions that did not. Only the former—*Nebbia*, for example—would be said to reflect operative historical currents.

This variant of internalism is not Justice-centered. It might even accept the possibility that Justice Roberts *was* embracing the old constitutional edifice in *Carter Coal* and *Butler*. His doing so would not matter, however: sooner or later, historical currents would have to carry constitutional law to its historic destination.

This view is extraordinarily problematic. It wrongly assumes that processes of legal change must be gradual and continuous rather than abrupt—an assumption that itself virtually rules out a political switch by Roberts. It also wrongly assumes that constitutional doctrine had to end up where it eventually did. It hardly was inevitable, after all, that Justice Roberts would change his mind; the four conservative Justices never did. Again, President Roosevelt might have died in 1937 rather than in 1944—surely nothing in the constitutional fabric had a bearing

on his life expectancy—and a more conservative successor could have appointed conservative Justices upon becoming President.

#### C. A TORN FABRIC: SUBSTANTIVE DUE PROCESS AND FEDERAL POWER

For internalists, Roberts *could not* have combined a stringent view of the constitutional limits on federal power with a relaxed view of substantive due process. The fabric precluded it. Judging by his actions and words, however—and accepting an internalist-like reading of *Nebbia*—during the mid-1930's Roberts did exactly that. Roberts authored *Nebbia in 1934*. But he endorsed narrow interpretations of the Commerce Clause the next year, in *Alton* and *Schechter*. The following term Roberts joined the *Carter Coal* opinion, with its categorical rule against federal regulation of manufacturing. And Roberts' own opinion in *Butler* recognized an impregnable zone of reserved state power that the national government could never invade.<sup>75</sup>

Apart from the fabric idea, nothing in this combination of positions seems problematic. The parallel political view—one that favored economic intervention by *states* and severe limits on *federal* economic regulation—had wide support. That is why *Tipaldo* produced far more public opposition than *Carter Coal*. Many feared that a powerful federal government would become a dictatorship. The distinction between state and national power relates to the Constitution, not the economy—yet internalists, ironically, slight the possibility that constitutional views could override general views about economic regulation.

In short, the theory of the “fabric” is belied by Roberts’—and others’—actual views.

#### D. THE FABRIC IN PERSPECTIVE

Internalists argue that during the mid-1930's one constitutional structure was in the process of succeeding another. G. Edward White explicitly portrays these structures as offshoots of larger societal and cultural developments—and, in particular, of a new, “modernist” way of understanding the world.<sup>76</sup> But whether explicit or not, internalist arguments generally suppose that more than constitutional doctrine was involved. For White, *how* judges thought about law was

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75. See *United States v. Butler*, 297 U.S. 1, 68–78 (1936).

76. See White, *supra* note 16, at 1108–10.

transformed—a process so deep that it lay beyond the control of individual jurists.<sup>77</sup>

Lending plausibility to these claims are the obvious, persistent patterns in constitutional law over the past four decades. Judges with an expansive view of federal power under the Commerce Clause, for example, generally also take an expansive view of non-economic, substantive due process rights. On the other side, judges concerned about the position of states in the federal system generally take a less expansive view of non-economic substantive due process rights—if they recognize any substantive due process rights at all. The constitutional text does not account for these patterns, and it makes sense to suppose that deeper, extra-constitutional concepts—perhaps embedded in webs, edifices, or structures—might do so.

These clusters of competing constitutional views co-exist at the same time, however. They may explain or illuminate patterns of doctrinal division. But it would be implausible to believe that a conceptual dynamic internal to the structures—or a deep historical dynamic outside of them—determines which cluster of competing views will prevail. Even if fundamentally opposed structures of constitutional law existed in the 1930's, then, neither one *had to triumph*.

Internalists argue that a new constitutional structure became necessary to deal with modern economic, social and cultural life.<sup>78</sup> Strikingly, Roosevelt believed the same thing—that a “living constitution” was needed to accommodate the modern world (p. 517–18). Seen in this light, internalism takes Roosevelt's view of the living Constitution and turns it into historical dogma. But Roosevelt's position was disputed in the 1930's, both for legal reasons (the Constitution doesn't change with the times) and economic ones (New Deal programs won't work). It remains disputed today. Nor do these views become less controvertible as historical claims by internalists than as political and legal arguments.

Suppose, for example, that political conservatives win the next three presidential elections, and appoint “conservative” Justices. These Justices, in turn, invigorate Commerce Clause restrictions on the federal government and eliminate substantive due process rights, such as the right to abortion. How convincing would a G. Edward White-like analysis be—one that argued

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77. *Id.* at 1110.

78. *Id.* at 1108.

deep cultural changes altered *how* judges thought about the Constitution and thereby made doctrinal shifts inevitable?

Current patterns in constitutional law undercut internalism—or at least G. Edward White’s version—in another way. White argues that modernist epistemology led Justices to abandon the idea of policing of sharply defined constitutional boundaries, a practice he calls “guardian review.”<sup>79</sup> In fact, however, the Justices never stopped policing constitutional boundaries; they merely changed the constitutional boundaries that they policed. All but abandoning the boundary line surrounding federal authority, the Court moved to the boundary between government authority (in non-economic matters) and individuals’ rights. But as “guardian review” shifted from the Commerce Clause to the Fifth, Sixth and Fourteenth Amendments, the Court’s conceptual toolbox remained the same.

Even in the area of the Commerce Clause, *Sebelius* shows that the old tools remain viable. Not only did a majority in that case find the Affordable Care Act outside the commerce power, but four Justices—Scalia, Kennedy, Thomas and Alito—seemed to call for something like guardian review in Commerce Clause cases. The Constitution’s “[s]tructural protections—notably the restraints imposed by federalism and separation of powers” might seem “less romantic,” they wrote, “than the provisions of the Bill of Rights or the Civil War Amendments.”<sup>80</sup> But those protections, including federalism restraints, were in fact the “most important” constitutional protections of freedom and, for that reason, “were embodied in the original Constitution and not left to later amendment.”<sup>81</sup> That suggests the possibility of the same type of review in Commerce Clause and Bill of Rights cases—without any sign of an antecedent epistemological revolution.

The specifics of White’s argument aside, no deeper-than-doctrine changes in constitutional thinking seem to have occurred during the mid-1930’s. The Justices knew how to be deferential before 1937, in both federalism and substantive due process cases—when they wanted to be. *Hammer v. Dagenhart*—the 1918 case that struck down a federal ban on the shipment of

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79. WHITE, *supra* note 32, at 4.

80. *Nat’l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2676 (2012) (Scalia, J. dissenting).

81. *Id.* at 2676–77.



products made by child labor—seemed remarkable precisely because in earlier cases the Court had interpreted the Commerce Clause to empower Congress to ban all manner of products and persons crossing state lines.<sup>82</sup> *Hammer* suggested that the Justices' level of deference would vary depending on their policy preferences.<sup>83</sup> More remarkably, a few days before deciding *Lochner* in 1905, the Court upheld a mandatory vaccination statute against a substantive due process challenge in *Jacobson v. Massachusetts*.<sup>84</sup> Handed down thirty years before *Nebbia*, *Jacobson* was an extraordinarily deferential substantive due process decision, with the Court suggesting that whether vaccination actually worked was constitutionally irrelevant; it was enough, it seemed, if the legislature thought it worked.<sup>85</sup>

In sum, a doctrinal revolution surely occurred during the 1930's. But it involved no obvious signs of a deeper revolution in thought. Nor would competing constitutional fabrics during the 1930's—assuming they existed—preclude a political explanation of the constitutional revolution.

#### E. TIPALDO AND PARRISH

The question why Roberts joined the majority in *Tipaldo*—and then, less than a year later, voted to uphold minimum wage legislation in *Parrish*—looms large for internalists. It is sometimes treated as the decisive question in the entire internalist-externalist debate.

Felix Frankfurter took this approach in an influential 1955 memorial tribute to Roberts.<sup>86</sup> There, Frankfurter revealed that Roberts, after retiring, wrote a memorandum explaining his votes in *Tipaldo* and *Parrish*.<sup>87</sup> According to this memorandum, the challengers in *Tipaldo* never asked the Court to overrule *Adkins* (the 1923 decision striking down a minimum wage), but

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82. *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

83. *See id.* at 275 (“That there should be limitations upon the right to employ children in mines and factories in the interest of their own and the public welfare, all will admit.”).

84. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

85. *Id.* at 36 (rejecting any suggestion that the Court should “go over the whole ground gone over by the legislature”). Justice Holmes' famous dissent in *Lochner* cited *Jacobson* immediately after noting that “[t]he 14th Amendment does not enact Mr. Herbert Spencer's Social Statics.” *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

86. Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311 (1955).

87. *Id.* at 314.

instead tried to distinguish *Adkins*.<sup>88</sup> Roberts, however, found *Tipaldo* indistinguishable from *Adkins* and—*Adkins* being unchallenged—voted to strike down the law in *Tipaldo*.<sup>89</sup> In *Parrish*, on the other hand, the Court was asked to overrule *Adkins*, Roberts wrote.<sup>90</sup> And with that question before the Court, Roberts agreed *Adkins* should be overruled.<sup>91</sup> On this account, no “switch” whatever occurred between *Tipaldo* and *Parrish*.

Modern internalists and externalists both see the problem with Roberts’ explanation: in fact, no litigant in *Parrish* had asked the Court to overrule *Adkins*.<sup>92</sup> Roberts misremembered. From their common starting point, however, externalists and internalists proceed in opposite directions. Indeed, what a writer says about Roberts’ votes in the two cases provides an excellent indication of where that writer stands on the internalist-externalist continuum.

Michael Ariens is an externalist. He believes that Roberts was poised to strike down the statute in *Parrish*, just as he did in *Tipaldo*; politics changed Roberts’ vote, in Ariens’ view.<sup>93</sup>

Internalists, by contrast, hold that Roberts’ *Nebbia* opinion reflected his modern view of substantive due process. Since minimum wage laws are easily constitutional on that view, Roberts’ *Tipaldo* vote constitutes the anomaly demanding an explanation—not his vote in *Parrish*. Richard Friedman argues, for example, that *Parrish* was “really a corollary of *Nebbia*.”<sup>94</sup> Friedman notes that the *Tipaldo* majority opinion highlighted the absence of any request to overrule *Adkins*, and concludes that language was necessary to keep Roberts’ vote.<sup>95</sup> Thus, Friedman credits Roberts’ explanation of his *Tipaldo* vote, even though he rejects Roberts’ attempt to distinguish *Tipaldo* and *Parrish*.<sup>96</sup> For Friedman, in *Parrish* Roberts changed his mind only about whether to *reach the question* of overruling *Adkins*.<sup>97</sup>

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88. *Id.*

89. *Id.* at 314–15.

90. *Id.* at 315.

91. *Id.*

92. See discussion *infra* this Part.

93. Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 641 (1994).

94. Friedman, *supra* note 25, at 1938.

95. *Id.* at 1941.

96. *Id.* at 1942.

97. *Id.* at 1951–52.

Friedman offers two interesting theories to explain why Roberts would do so. Recalling the wide public condemnation of *Tipaldo*, he suggests that it was “[t]he [public] reaction to *Tipaldo* itself, rather than . . . the election of 1936 or . . . the Court-packing battle of 1937” that prompted Roberts to reach the issue in *Parrish*.<sup>98</sup> Friedman prefaced this analysis, however, by observing that no “political explanation” might be required at all.<sup>99</sup> “The ‘beginning of wisdom’ in attempting to understand Roberts,” he wrote

is to avoid the assumption that, absent political pressure, he would act in a way that most observers would regard as consistent. He surprised even his colleagues and perhaps even himself, and followed his own strange, sometimes unfathomable light.<sup>100</sup>

Barry Cushman, a strong internalist, notes Friedman’s “speculat[ion]” that a “public outcry following the *Tipaldo* decision might have prompted Roberts to face squarely the question of *Adkins*’ continued vitality.”<sup>101</sup> Cushman, however, offers a more legal account. “It may have been,” he writes,

Roberts thought that striking down a minimum wage statute on such a narrow, technical ground twice in less than one year was simply taking the niceties of appellate procedure too seriously, especially when the effect was to reaffirm a precedent he had no stake in preserving.<sup>102</sup>

Thus, where Friedman saw public opinion influencing Roberts—albeit not the opinion expressed in the 1936 election—Cushman saw Roberts ruminating about how far to take the “niceties of appellate procedure.” Cushman is the more thoroughgoing internalist.

According to Friedman and Cushman—and to Roberts himself—in *Tipaldo* he would have voted to overrule *Adkins* had he reached that question. Yet the *Tipaldo* opinion, which Roberts joined, reconsidered and reaffirmed *Adkins*.<sup>103</sup> How can that square with the claim that Roberts had joined the majority

98. *Id.* at 1952.

99. *Id.* Friedman also suggested that Roberts’ “mercurial nature may be a sufficient explanation of his conduct.” *Id.* at 1896.

100. *Id.* at 1953 (internal references omitted).

101. CUSHMAN, *supra* note 11, at 97. Cushman also observes that “[b]y 1937, the prohibition against minimum wage legislation was about all that was left of economic substantive due process.” *Id.* at 105.

102. *Id.* at 97.

103. *Morehead v. New York ex rel Tipaldo*, 298 U.S. 587, 601–03 (1936).

in *Tipaldo* because the viability of *Adkins* was not before the Court?

In his memorandum, Roberts explained that Justice Butler's initial draft of the *Tipaldo* opinion had not endorsed *Adkins*.<sup>104</sup> Butler added that only after a draft dissent circulated attacking the earlier case.<sup>105</sup> "My proper course," Roberts continued,

would have been to concur specially . . . [on the ground that *Adkins*' validity was not before the Court]. I did not do so. But at conference . . . I said that I did not propose to . . . reexamine the *Adkins* case until a case should come to the Court requiring that this should be done.<sup>106</sup>

However, Roberts did not explain his failure "to concur specially."

*Tipaldo* was handed down at the end of term, and Cushman suggests Roberts perhaps lacked the "energy" and "inclination" to extend what was already "the most fractious and exhausting term of Hughes' tenure."<sup>107</sup> More generally, Friedman notes that "Roberts did his best not to stick out," never wrote a concurring opinion, and only twice "silently concur[red]" (neither joining the majority opinion nor writing his own) during Hughes' entire tenure as Chief Justice.<sup>108</sup>

Thus, Frankfurter, Friedman, and Cushman all conclude that neither election results nor the Court-packing plan influenced Roberts. Yet they reach this conclusion for utterly different, and sometimes inconsistent, reasons. Frankfurter believes that *Tipaldo* and *Parrish* were different procedurally; Friedman and Cushman do not. Frankfurter declared that Roberts' "character" made it inconceivable—in fact, "ludicrous"—to think that politics had influenced the Justice.<sup>109</sup> But Friedman thinks Roberts was "mercurial" and "unfathomable" and quite possibly *was* influenced by the public reaction to *Tipaldo*. For his part, Cushman saw no need to consider Roberts' character at all, only his legal attitude toward procedural niceties. Thus Roberts was steadfast, or he was mercurial, or his character made no difference; the conclusion

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104. Frankfurter, *supra* note 86, at 314.

105. *Id.* at 315.

106. *Id.* (reproducing Roberts' memorandum).

107. CUSHMAN, *supra* note 11, at 103.

108. Friedman, *supra* note 25, at 1945; *but see* CUSHMAN, *supra* note 11, at 263 n.58 (questioning Friedman's characterization of Roberts).

109. Frankfurter, *supra* note 86, at 313.

remains the same for internalists—he did not “switch” in *Parrish*.

There is another possibility, however. In the running for the 1936 Republican presidential nomination, Roberts might have preferred to take no position in *Tipaldo* on an issue like the minimum wage—an issue that, as noted earlier, would divide delegates to the 1936 Republican convention.<sup>110</sup> Once the *Tipaldo* majority had endorsed *Adkins*, however, it became difficult for Roberts to remain neutral. Doing so would open a visible split between him and the four conservative Justices—exactly what Roberts might have wished to avoid. And with seven Justices now addressing the *Adkins* issue—Hughes alone did not, since he found *Tipaldo* distinguishable—it would have seemed odd for Roberts to avoid the question. In short, Roberts preferred that the Court take no stand on *Adkins* before the election. But when the other Justices did so, Roberts may have voted mindfully to uphold *Adkins*. And if that happened, politics in fact swayed Roberts’ vote in a minimum wage case. But it was his *Tipaldo* vote—with Roberts perhaps misjudging the effects on his chances for the nomination—and not his vote in *Parrish*.

#### IV. SUPREME POWER

##### A. PRINCIPLES

Contemporaries viewed the Court-packing controversy as a historic battle, pitting individuals against principles or fundamental political forces. Roosevelt and his supporters thought that conservative Supreme Court Justices were at war with modern times and with proper constitutional principles. Opponents of the plan saw a president undermining judicial independence, perhaps as part of a design to become a dictator.

Shesol’s subtitle, “Franklin Roosevelt versus the Supreme Court,” subtly departs from this model. It posits an individual, Roosevelt, in a struggle. But Roosevelt’s adversary was an institution, the Court, and not a political principle or historic force. Moreover, neither Roosevelt nor the Court gets portrayed as a villain in *Supreme Power*. In fact, no large political principles or forces operate at all in Shesol’s book—nothing a hero could defend or a villain endanger. Principles that contemporaries saw in play—judicial independence, liberty,

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110. See discussion *supra* Part II.B.2(b).

democratic governance, economic justice—get mentioned as Shesol recounts what was said. But *Supreme Power* treats them only as words. He assesses their political impact, but ignores how Court-packing might actually have affected liberty, democracy or justice.

Shesol's treatment of Court-packing opponents reflects this approach. He attributes their opposition to narrow political calculations or petty grievances against Roosevelt. Senator Bertram Wheeler, for example, was a Montana progressive who led congressional opposition to Court-packing (p. 317). Wheeler was "forever in feuds," Shesol explains, and "there was no one he resented more than Franklin Roosevelt" (p. 318). An early supporter of Roosevelt in 1932, Wheeler was "never wholeheartedly for . . . [the president]" after failing to obtain the Vice Presidential nomination that year (p. 319). "[D]etermined to pull Roosevelt down," Wheeler seized on Court-packing as a way to do that (p. 321). And what Wheeler "resented most" (p. 321) was the idea of Roosevelt in the forefront:

"Who does Roosevelt think he is?" Wheeler barked at a White House aide. "He used to be just one of the barons"—like Wheeler himself, or Huey Long. Now, Wheeler said, Roosevelt was "like a king trying to reduce the barons" (p. 321).

For Shesol, this observation reflected only jealousy—not genuine concern about concentrated executive power.

Other opponents receive similar treatment. Newspaper publisher "Frank Gannett was a man of principle," Shesol writes (p. 364). But instead of analyzing his principles, Shesol notes that Gannett "aligned himself with a cast of characters who could be reasonably described . . . as '100% racketeers and opportunists . . . [with] nothing but self-interest at stake'" (p. 364). Senator Hiram Johnson's opposition was "at once personal, political, and ideological", Shesol writes (p. 316). But *Supreme Power* explores only the personal and political sources of opposition, ignoring the "ideological."

In one instance, Shesol does connect the opposition to deeply held beliefs—racist beliefs. Shesol explains that Southerners Democrats "perceived, correctly . . . that FDR was trying to shake up southern political alignments . . . and . . . bring blacks and whites together in shared support for his programs, his principles, and himself" (p. 314). These Southerners feared that a packed Court "would end segregation" (p. 315). Shesol's

analysis is astute and seems correct. But he does not treat non-racist views about juridical independence or excessive executive power in the same way—as motives for political action. Nor does he explain why Southern arguments about liberty and judicial independence appealed to non-racists.

Shesol's approach is encapsulated in a newspaper column written by Pearson and Allen and quoted in *Supreme Power*:

[B]ehind the opposition of almost every liberal or Democratic Senator fighting Roosevelt . . . is some hidden factor other than conviction. Conviction, principle, and saving the country are what he [the liberal] talks about. But these high-sounding phrases are camouflage. There is always something underneath (p. 352).

Shesol adds that “to be fair, some Democratic senators opposed the Court bill out of conviction”—but goes on to mention only Wheeler in this connection, noting that “in Wheeler's case, there was plenty underneath” (p. 353).

Discounting principle as he does, Shesol finds the Senate Judiciary hearings on court-packing remarkable. He writes:

On the whole, the hearings were perhaps surprisingly substantive, drawing deeply on the debates of the Constitutional Convention, landmark cases, legal doctrines, British common law, even the practice of judicial review in France and Argentina (p. 420).

Yet Shesol's brief account of the hearings ignores the “substance.” He dismisses as fanciful any idea that court packing was a harbinger of dictatorship (p. 418). Instead, Shesol focuses on Southern concerns about school desegregation (p. 419).

With political principle slighted, only self-interest is left to motivate opponents. But even if Pearson and Allen were right about liberal and Democratic opponents, presumably some Republicans—and lawyers, law professors, commentators, newspapers and ordinary citizens—opposed Court packing out of genuine commitment to principle. *Supreme Power* largely ignores such figures, few of whom could have a personal grudge against Roosevelt. Nor does political ambition or animus explain why two-thirds of the newspapers that had supported Roosevelt's reelection in 1936 opposed Court-packing only a few months later—a fact Shesol himself reports (p. 301).

*Supreme Power* treats principles as a medium of political maneuvering, nothing more. The book's great failing is that it overlooks the stakes for the Court and the country. This

obscures, in turn, how political tactics affected the outcome, since those tactics were designed precisely to appeal to principles.

#### B. PRESIDENTS

*Supreme Power* lacks a hero, but it has an unmistakable star—Franklin Roosevelt. Depicting Roosevelt’s opponents as opportunists, Shesol well might have portrayed Roosevelt as the avatar of high principle. But in *Supreme Power*, Roosevelt is neither right nor wrong.

He does emerge in very favorable light, however. First, Roosevelt attracts the sympathy that naturally attaches to the central figures in a narrative. Events revolve around him, and readers see things from the President’s vantage point. Shesol’s focus on political maneuvering only enhances this effect. *Supreme Power* describes a kind of political boxing match, and it places readers in Roosevelt’s corner.

Second, although Shesol generally does not assess the arguments being made, he paraphrases and sometimes quotes them. And Roosevelt gets quoted earlier and more often than opponents. Moreover, Roosevelt truly believed in a living Constitution, whose meaning changed with the times. His words were eloquent and seemed deeply felt.

Third, Roosevelt does not emerge from the book as the menacing near dictator that opponents feared. The President lost the Court-packing battle, after all, and he accepted the result. Beyond that, many readers will respond more sympathetically to Roosevelt’s concerns about the Depression and human suffering than to opponents’ political and economic abstractions—particularly when Shesol takes those abstractions lightly or links them to Southern racism.

Finally, *Supreme Power* does not ascribe the same kind of motives to Roosevelt that it does to critics. Instead, Roosevelt is concerned about the country as its President—the closest things to being right that one finds in *Supreme Power*. Presidential advisors and aides benefit from similar treatment. Opponents act out of political calculation and pique, but Shesol never speculates about the motives of presidential staffers and supporters—as if no one calculates before supporting presidents or gain personally from doing so.

1. *February 5, 1937*—Predictably, then, Shesol focuses on what FDR *said* when he unveiled the Court-packing proposal on



February 5, 1937. The problem, Roosevelt informed the nation, was “aged or infirm judges—a subject of delicacy and yet one which requires frank discussion” (p. 294). Federal court dockets were “overcrowded” and younger judges could speed the courts’ work (p. 294). Observing that the Supreme Court declined to hear many cases, Roosevelt implied that advanced age kept justices from keeping up. To remedy the situation, he proposed adding an additional judge to federal courts whenever an incumbent judge failed to retire at age seventy. On the Supreme Court, the result would have been fifteen justices—and six vacancies for Roosevelt to fill with his own appointees.

The references to age were a critical mistake, Shesol believes. Roosevelt had received criticism during the reelection campaign for not discussing his intentions toward the Court (p. 302). “That might not have mattered,” Shesol writes,

had Roosevelt, on February 5, gone before the nation, described, in plain language, the dangers of a conservative Court, and presented his plan as the best and most moderate means of reform (p. 302).

References to age opened Roosevelt to the charge that he was engaged in a subterfuge. *The Washington Post* commented that Roosevelt’s ostensible concern for efficiency had not hidden the “real objective” which was “mak[ing] the Supreme Court amenable to his will” (p. 302). Before the end of February Roosevelt himself acknowledged the error, saying

I made one major mistake when I first presented the plan. I did not place enough emphasis upon the real mischief—the kinds of decisions which, as a studied and continued policy, had been coming down from the Supreme Court (p. 368).

To which Shesol adds:

It had taken him [Roosevelt] three weeks to admit this mistake—three crucial, costly weeks—ample time for his credibility to be battered, enemies emboldened, and goals put at risk. And so, in the final days of February, he resolved to do what he should have done from the start: to take the fight directly to the Court and put the real issue before the American people (p. 368).

With its support from Roosevelt himself, this view cannot be taken lightly. Yet it seems difficult to accept at face value.<sup>111</sup>

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111. Despite his reference to a “major mistake,” Roosevelt reiterated a need for “new blood” on the bench in August, 1937 (p. 517) (noting that observers were

For one thing, Roosevelt did express a desire to change the Court's constitutional decisions on February 5. He said:

Modern complexities call . . . for a constant infusion of new blood in the courts . . . . Little by little, new facts become blurred through old glasses fitted, as it were, for the needs of another generation; older men, assuming that the scene is the same as it was in the past, cease to explore or inquire into the present or the future . . . .

A constant and systematic addition of younger blood will vitalize the courts and better equip them to recognize and apply the essential concepts of justice in the light of the needs and facts of an ever-changing world (pp. 295–96).

This left no doubt about what everyone knew already—that Roosevelt wanted Justices who would reach different constitutional results. Shesol himself observes that the infirm judge argument “fooled no one” (p. 302). Roosevelt's purpose was so transparent that reporters “broke up in laughter” at the words “aged and infirm judges”—to the President's delight” (p. 294).

True, newspapers like the *Post* saw duplicity and “deeper, darker aims” (p. 302). William Allen White likened FDR's “trick” to the tactics of a European dictator (p. 302). A later White House memo even alluded to the apparent “political trickery” in Roosevelt's February 5 remarks (p. 302). Yet Shesol's “plain language” strategy—that is, avowing that Court packing was designed to change Supreme Court decisions—seems unlikely to have made much difference. In effect, Shesol argues that Roosevelt should have made explicit the very “deeper darker aim” that newspapers denounced. And throughout February political insiders continued to believe that the Court-packing plan would become law (p. 300). If the February 5 speech represented a tactical mistake, Shesol probably overstates its effects.<sup>112</sup>

Having ruled out principled opposition to Court-packing, and treating the President as the prime mover of events, Shesol almost had to trace the opposition to something Roosevelt *said*,

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“incredulous” at Roosevelt's doing so). A month later Roosevelt observed that the Court had “overruled” itself after his “message . . . on the rejuvenation of the judiciary” (p. 518).

112. For a similar analysis, see BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 218 (2009) (observing that “Roosevelt's initial message on the plan was not nearly as disingenuous as critics complained.”).

for no other possibility existed. The irony is that, in an account that gives no weight to principles, Shesol argues that Roosevelt erred by not launching a principled debate.

Shesol's discussion of Chief Justice Hughes' famous letter to the Senate Judiciary Committee reflects the same general approach. Noting that the Court was "fully abreast of its work," Hughes' letter, according to Shesol, "destroy[ed] the myth of the Court's incapacity" (p. 393).

The letter electrified the hearing room (p. 394). Hughes described the letter's effect as "devastating"; Robert Jackson thought it "pretty much turned the tide" (p. 400).<sup>113</sup> Yet the impact of Hughes' letter did not mean Roosevelt's reference to "aged and infirm judges" had doomed Court-packing. More likely, Senators were struck by the drama of a Chief Justice taking a public stand against the President—a riveting development, no matter what the Chief Justice said (p. 394). And, by then, everyone acknowledged that constitutional decisions were the issue; according to Shesol, Roosevelt had shifted his ground months earlier.<sup>114</sup> FDR later described Hughes as "the best politician in the country" (p. 400).

Roosevelt's invocation of "aged and infirm judges" had been a kind of code—which is why reporters laughed when they heard it. Coming from FDR, "aged and infirm" meant "the Court must be packed to change its decisions." And the Chief Justice's letter arguably employed the same code. Coming from Hughes, the "Justices are current with their work" meant "do not pack the Court." To be sure, the nature of the code eased Hughes' task: Chief Justices are supposed to address judicial efficiency. Yet as "the best politician in the country," Hughes very likely would have found a way of defending his Court no matter what Roosevelt had said.

2. *Judicial Review*—In a way that Shesol overlooks, Roosevelt's "judicial efficiency" rationale might have been a favor to the Court. If Congress and the President pack the Court because they oppose its decisions, future presidents and legislatures likely will feel free to follow suit. But if the Court gets packed for reasons of efficiency, a different political precedent—arguably, at least—gets created. The Court's

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113. Shesol notes that "Jackson still thought 'there is no question that the President's plan will go through'—as well he might" (p. 401).

114. Shesol himself notes that Hughes' letter "laid waste to an abandoned fortress" because the President had moved away from the judicial inefficiency argument (p. 401).

traditional role can co-exist with an efficiency rationale for Court-packing. But a “wrong decision” rationale gravely threatens judicial review.

Roosevelt’s opponents feared exactly that. The *Chicago Daily Tribune*, for example, asked what would happen if a future President with the power to pack the Court held “a fanatical belief in racial and religious intolerance” (p. 303). Shesol, however, remains unimpressed. He writes:

But how was this supreme power to be exercised? How was the Court to be controlled, its decisions predetermined? . . . . H.L. Mencken wrote that if the plan passed, “the court will become as ductile as a gob of chewing gum, changing shape from day to day and even from hour to hour as this or that wizard edges his way to the President’s ear.” William Mitchell, attorney general under Hoover, charged that anyone willing to accept a Supreme Court seat under these circumstances would “know they must listen to their master’s voice.” And if, in the end, Roosevelt’s justices failed to obey him, he would simply pack the Court again – and again, and again—until “in time,” as the White House memo put it, mocking the notion, “all our children will be drafted to serve as justices” (p. 303–4).

Here, Shesol broaches a pivotal idea by quoting an administration memo that mocks it.

Fears for judicial review were well founded, however. Had Roosevelt succeeded, why would future Presidents and Congresses tolerate Supreme Court decisions that they strongly opposed—decisions such as those ending racial segregation, recognizing a right to abortion, protecting flag burning, or invalidating a bipartisan effort to balance the federal budget? The plan’s defeat frequently gets cited as a precedent *against* overriding unpopular Court decisions through legislation or constitutional amendment. Had the plan been enacted, it presumably would have become a political precedent the other way. Had that happened, the Justices’ mental calendar might forever read, “February 5, 1937.”

Shesol’s argument to the contrary is brief. He acknowledges that Roosevelt would have filled vacancies with “reliable liberals” and “expected” them to be in “basic sympathy with his belief in a living Constitution” (p. 304). That did not mean, Shesol writes, that newly appointed Justices “would remain reflexively loyal” or the President would have “some means of influencing . . . justices after appointing them” (p. 304).

Underscoring the point, Shesol notes that previous Presidents “complained—bitterly and with cause—of ‘betrayal’ at the hands of their own appointees”—but he does not mention that the performance of many other Justices confirmed Presidential expectations (p. 304). “FDR knew,” Shesol concludes, that once a man had put on the judicial robes he could not be constrained or controlled” (p. 304).

This analysis overlooks what actually happened. FDR said afterwards he had “lost the battle . . . but . . . won the war” because the Court-packing proposal marked “a turning point” in the Court’s approach to the Constitution (p. 522). Soon populated with Roosevelt appointees, the Court would not strike down another exercise of federal power under the Commerce Clause until 1994. Substantive due process doctrines underwent an equally dramatic shift, while the Tax and Spend Clause has remained a reliable source of federal legislative power since 1937. With all that happening after Court-packing’s *defeat*, one can only imagine how deferential the Court might have become if the proposal succeeded. Some Justices even cite the events of 1937 as a cautionary tale counseling deference to the political branches.<sup>115</sup>

What Shesol treats as a modest expectation—namely, that Justices share Roosevelt’s conception of a “living Constitution”—was anything but that. Because the conception of a living Constitution affected *every* commerce, tax and spend, and substantive due process decision, Shesol claims that the President was not dictating particular case outcomes. Both logically and legally, however, Shesol is mistaken. Suppose a future president threatens to pack the Court unless the Justices adopt “originalism” and abandon any idea of a “living Constitution.” When the Justices fail to comply, Congress expands the Court to fifteen members and the President appoints originalists to fill the six newly created seats. Together with some Justices already serving, the new members form a majority that overrules abortion rights, returns to the commerce clause jurisprudence of 1936, and declares Social Security, Medicare, and the Affordable Health Care Act unconstitutional. Would Shesol see no threat to the Court in any of this because the President only wanted to change the Court’s philosophy, not dictate individual case results? And what if a liberal president is

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115. See discussion *infra*, Part VI.D.2.

then elected, and proposes adding yet more new seats in order to change the Court's prevailing philosophy back again?

Discounting the risks of Court-packing is important to Shesol's overall approach. Had he acknowledged the real danger to the Court, ambition, pique, and racism would no longer completely explain the opposition; Roosevelt's adversaries also would be defending judicial independence. Speeches on both sides would become more than mere words. Nor would it be enough that Roosevelt was sincere and eloquent: the question would arise whether he was right.

Internalists do not argue that the Court had nothing to lose in 1937. Instead, they claim that the Court in fact lost nothing because Justice Roberts never yielded to political pressure. For his part, Shesol demonstrates the unrealism of internalism about important events. Yet Shesol's claim that the Court had nothing to lose is just as unrealistic.

### C. THE VIEW FROM 1997

Shesol served as a speechwriter in the Clinton administration, and distinctive features of *Supreme Power* appear to jibe with that role. Regarding presidents as prime political movers, attributing petty motives and jealousies to White House critics, overestimating the importance of political rhetoric—each seems a natural part of a presidential speechwriter's outlook. Beyond that, however, *Supreme Power* may reflect the distinctive perspective of a speechwriter in the *Clinton Administration*.

The Court-packing controversy appears very different at first glance from the mid-1990's scandal over President Clinton's involvement with a White House intern. Yet significant parallels exist. Both percolated during an administration's first term and erupted shortly after the president's reelection. Both involved courts, albeit in different ways. Both presidents lost their court battle and were politically weakened, significantly limiting what they accomplished afterwards. Both controversies defined a Democratic president's second term.

Although the Roosevelt Administration became a political benchmark for later Democratic presidents, we do not know if Shesol viewed the Clinton Administration through a New Deal lens. However, Shesol seems to have done the reverse, using Clinton Administration scandals as a template for understanding the Court-packing controversy. In important ways, Shesol's

portrayal of 1937 echoes the views of Clinton supporters about 1997.

Clinton supporters viewed the intern scandal as a political invention of right wing opponents pursuing personal and political vendettas against the President—and hiding behind the facade of a concern for law.<sup>116</sup> Given that view, Clinton's aides likely regarded the real questions as purely tactical ones. Finally, Clinton himself transformed a possibly minor scandal into a political cataclysm with his early, misleading statements.<sup>117</sup> The parallels with Shesol's account of 1937 are obvious.<sup>118</sup>

It is striking how Shesol goes wrong at exactly the points where Court-packing and the Clinton scandals differ. Clinton's early statements (denying involvement with the intern) loomed large in his difficulties—and Shesol exaggerates the significance of Roosevelt's initial statements.<sup>119</sup> Clinton supporters saw no issues of principle at stake, and Shesol entirely misses issues of principle in 1937. The Clinton controversy manifestly was about Clinton himself. The Court-packing controversy, on the other hand, concerned the Supreme Court. Yet Shesol treats it as being about Roosevelt.

With the political landscape of 1997 in his sights, Shesol missed some of his 1937 targets. Yet *Supreme Power* offers a powerful account yielding very significant insights. And the book's hits are related to its misses. Shesol renders the events of 1937 with enormous care—as important in their own right, not props in an allegory about law—precisely because of their powerful personal resonance. Regarding 1997 as an affront, Shesol records every detail of 1937 as if it mattered.

## V. THE HISTORICAL DEBATE REVISITED

The words “internalism” and “externalism” suggest a historical dispute driven by philosophical differences about the nature of law. But why does the historical disagreement involve

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116. See generally MICHAEL ISIKOFF, UNCOVERING CLINTON: A REPORTER'S STORY, vii (2000) (describing the view of “Clinton's most sophisticated defenders.”).

117. See *id.* at 331–33, 350–52 (describing the deposition and 60 Minutes interview where he denied having sexual relations with Monica Lewinski).

118. Having served in an administration that suffered enormous damage from the President's extramarital relationships, it is suggestive that Shesol describes Missey LeHand as Roosevelt's “influential secretary” (p. 17) and his “assistant” (p. 94), but never mentions FDR's intimate relationship with her.

119. See *id.* at 344–49 (discussing political and legal ramifications considered by Clinton and aide when the Lewinski story broke).

anything more than a set of conflicting conclusions about events? How can a debate about what happened in 1937 turn on general views about law?

This Part argues that an internalist, concept-driven characterization of the historical debate—like the internalist, doctrine-driven account of 1937—is, as a matter of fact, wrong.

#### A. VARIETIES OF INTERNALISM AND EXTERNALISM

On an *internalist* version of the historical debate, as I will call it, two competing conceptions of law are in conflict. The philosophy of legalism, which views law as autonomous from politics, underlies internalism.<sup>120</sup> Legal realism supposedly undergirds externalism.<sup>121</sup>

Other views of the debate exist, however. According to what might be called *debate externalism*, political or other non-philosophical agendas motivate historians in the controversy. And according to what might be termed *debate agnosticism*, “internalism” and “externalism” represent analytically unhelpful categories, with no more relevance to the issues than current religious views might have to a dispute about events in the Middle Ages.

To understand the debate, it will be helpful to understand the varying strength of internalist or externalist views of 1937. The “strongest” views hold that the nature of law shaped events. Politics did not drive constitutional change in 1937, a strong internalist might say, because law by nature is autonomous from politics. For a strong externalist, on the other hand, politics had to drive legal change in 1937 because law is inherently political.

There is a range of “strong” views. Only the very strongest would hold that Justice Roberts *necessarily* acted for legal or political reasons. And no one consistently advances such a view. No internalist argues, for example, that legal institutions *never* can become politicized—a position belied by both logic and history. Law may be generally autonomous, but it can be corrupted at times. Court-packing opponents feared precisely that; they believed Roosevelt’s plan would transform an autonomous body of constitutional law into a politicized one.

The strongest possible externalist account—politics decisively shapes law—might not be utterly implausible. But it

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120. 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 291 (1998).

121. *Id.*



would be completely unhelpful. Even if law is unavoidably political, Justice Roberts need not have “switched” in 1937 because he feared Roosevelt or because of worries about judicial review. In fact, on a strong legal realist view law would remain political no matter what Roberts did: law would be no less political had Roberts voted with the conservatives Justices in 1937.

Weaker variants of internalism and externalism are more plausible. A internalist might believe, for instance, that it was unlikely politics motivated Justice Roberts because law is generally autonomous from politics. An externalist might hold that the political content of legal decisions varies—but that the political content is usually high in constitutional cases.

*Debate* internalism and externalism may arise from someone’s internalist or externalist view of events. If the nature of law influenced events, someone who misunderstands the nature of law will necessarily misunderstand what happened. Thus, a strong legalist will hold that externalists err about events as a consequence of their mistaken view of law. A strong legal realist will believe the same thing about internalists.

Views of the events and views of the debate do not always correspond, however. For example, a strong *event externalist* might suppose that a mistaken philosophy of legalism explains internalists’ errors regarding the events. The result would be an externalist view of events combined with an internalist view of the historical debate—internalist because it posits a debate driven by philosophical differences about law. On the other hand, an externalist about events may well favor a political or agenda driven explanation for historians’ conclusions. The result would an externalist account of both the events and the historical debate, seeing worldly agendas as the driving force in both.

Or consider a historian who regards the nature of law as irrelevant for an understanding of the events. This historian might find philosophy irrelevant to the historical debate, as well as to the events, and shun the terms “internalist” and “externalist.” But another possibility exists. Suppose the historian concludes that politics influenced Justice Roberts. He or she might also conclude that historians who reach a different conclusion were led astray by their views about the nature of law or by their political agendas, which distorted their assessment of the historical evidence. Such views, which do not rely on the

nature of law to establish what happened in 1937, may be called “*weak debate internalism*” and “*weak debate externalism*,” respectively.

Weak debate internalism and weak debate externalism both feature prominently in the literature, but for different reasons. Consider the situation of a relatively strong event internalist. No one, as just noted, considers it absolutely impossible for politics to have influenced Roberts. Thus, even relatively strong internalists will examine what happened, producing a narrative about singular, unique events. Having done that, however, internalists will be inclined to rest their conclusions on that narrative, not on their general views about law. An example is Cushman’s claim that the Justices had no reason to fear Court-packing.<sup>122</sup>

When making particular historical arguments, a strong internalist like Cushman is in the same position as an historian who deems the nature of law irrelevant. Thus, in addition to some relatively strong internalist arguments about events, Cushman makes weak internalist arguments about the debate.<sup>123</sup> That is, he argues not only that externalists *must be wrong* because of the nature of law influenced events, but also that externalists misinterpret the facts because legal realism blinds them to what actually happened.<sup>124</sup> Thus, a relatively strong internalist about events may describe the debate in weak internalist terms.

A different consideration explains the frequency of weak externalist arguments about the debate. It is not that strong externalists, like strong internalists, make arguments independent of their philosophy of law. Rather—and despite the very idea of an internalist versus externalist debate—there simply are no strong externalists. No one argues that Roberts’ switch was probably political because politics usually influences judges.

In fact, so-called “externalists” in the debate have no need to appeal to the general nature of law. These historians focus on singular events, arguing that Roberts responded to an almost unprecedented threat to judicial review. In that argument, the nature of law and its general relationship to politics are irrelevant. Internalists, on the other hand, invoke the nature of

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122. See *supra* note 24 and accompanying text.

123. See discussion *infra*, Part V.B.1.

124. See *supra* note 11, at 5.

law because events—Roberts' votes in 1936 and 1937 and political circumstances after the 1936 election—run counter to their conclusions. Internalists therefore posit a separate legal realm to make their case, a realm where ordinary legal processes were supposedly at work. Externalists, on the other hand, need not posit hidden realms to make their case.

There is a related point. If strong event externalists existed, they would cite worldly agendas and motives, on the part of Justices as well as others. But that is the very analysis that political figures, newspapers and lawyers routinely engaged in during the 1930's. And one need not subscribe to any philosophy of law, or even know that such philosophies exist, to form the idea that Justice Roberts "switched" at a time of maximum political pressure. Unless, of course, debate internalists are right and the common sense of observers in 1937 was not common sense at all, but the reflection of a pervasive, yet mistaken, philosophy of law.

#### B. REPRESENTATIVE VIEWS

1. *Strong and Weak Internalism*—Felix Frankfurter is perhaps the strongest internalist on record. In his 1955 tribute to Roberts, described earlier, Frankfurter argued it was "ludicrous" to believe political developments had influenced the Justice.<sup>125</sup> In ruling out that possibility, Frankfurter cited Roberts' personal and judicial character—as if only a corrupt judge would have saved the Court from packing.<sup>126</sup> Frankfurter's unstated premise was that judges operate in a legal realm entirely insulated from politics, making it an anathema for a judge to take politics into account.

This argument from "character" was not likely to fare well in the culture of the 1960's. Nor had anyone had ever accused Roberts of switching for corrupt reasons. If Roberts did respond to political pressure, it had been to save the Court—even though those who believe Roberts did switch do not portray him as heroic.

Forty years later, Cushman voiced a relatively strong internalist characterization of the debate, one that echoed elements of Frankfurter's tribute. Cushman wrote:

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125. See *supra* note 109 and accompanying text.

126. See Frankfurter, *supra* note 86, at 313.

To embrace the thoroughgoing externalist account . . . is to deny the constitutional jurisprudence of the period any status as a mode of intellectual discourse having its own internal dynamic. It is to dismiss the efforts of the lawyers defending the constitutionality of New Deal initiatives as irrelevant and redundant, to deprive Hughes and Roberts of a substantial measure of intellectual integrity and personal dignity, and to suggest that sophisticated legal thinkers casually discard a jurisprudential worldview formed over the course of a long lifetime simply because it becomes momentarily politically inconvenient.<sup>127</sup>

This came close to suggesting that, because of the nature of law and the character of the Justices, internalism must be right and externalism wrong. Cushman certainly claimed that externalism is implausible on its face.<sup>128</sup> He even hinted that externalism offers a choice that one *should* reject out of respect for law and lawyers—that externalism is “wrong” in almost a moral sense.<sup>129</sup> On this view, it is externalists, not Justice Roberts, who contaminate law with politics.

As noted in the previous section, modern internalists usually do not go so far. Instead, they embrace what I have called weak debate internalism, claiming that externalists misconstrue events because of their overly politicized view of law. White argues, for example, that externalists go wrong because of their erroneous “starting assumptions about constitutional interpretation, the relationship of judging to politics, and the nature of constitutional change.”<sup>130</sup> At another point, Cushman himself describes externalism as the “conventional wisdom” that arose “at a point in American history when the field of constitutional commentary was dominated by scholars inclined to predominantly political explanations of judicial behavior.”<sup>131</sup>

2. *Weak Externalism*—Externalist accounts of the debate are all of the weak variety, as noted earlier. Michael Ariens traces the origins of modern internalism to Frankfurter’s 1955 tribute.<sup>132</sup> Ariens demonstrates convincingly that until 1955 legal writers largely took it for granted that Roberts had “switched”

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127. CUSHMAN, *supra* note 11, at 4–5.

128. *See id.* at 5 (“there is good reason to doubt that it offers an *accurate* account.”).

129. *See id.* at 4–5.

130. WHITE, *supra* note 32, at 16.

131. CUSHMAN, *supra* note 11, at 4.

132. Ariens, *supra* note 93, at 623.

for political reasons.<sup>133</sup> But Frankfurter's "revised history of the constitutional crisis" soon "became the accepted history in legal academia"<sup>134</sup> as figures such as Bernard Schwartz, Herbert Wechsler, Benjamin Kaplan, and David Currie—as well as authors of leading casebooks—embraced the idea of a constitutional revolution driven by law, not politics.<sup>135</sup>

Cushman cited historians' commitments to legal realism as the source of error; Ariens points to worldly considerations. He argues that Frankfurter's purpose—and the motive behind internalism generally—is "to preserve the role of the Court as a principled decisionmaker, a need that was particularly acute because of *Brown v. Board of Education*], which raised the issue of the Court's authority in a manner reminiscent of the crisis of a generation before."<sup>136</sup> Though offering worldly reasons for internalists' errors, Ariens never suggests that the nature of law supports an externalist account.

William E. Leuchtenburg, perhaps the leading externalist, takes an even "weaker" position on the debate than Ariens. Leuchtenburg generally does not refer to "internalists" or "externalists" at all. Reviewing various historical arguments—for example, the claim that constitutional law continued on a course fixed in *Nebbia*, or that poor draftsmanship and appellate advocacy explain the government's pre-1937 Supreme Court defeats—Leuchtenburg rebutted each separately.<sup>137</sup> He neither grouped them together under an "internalist" rubric nor attempted to explain, as Ariens did, what prompted historians to endorse mistaken positions.

3. *Internalism-Externalism Hybrids*—Combining internalist and externalist elements, hybrid theories emerged in the 1980s. These theories took two forms: conceptual and empirical. Bruce Ackerman, for example, created a conceptual version.<sup>138</sup> Ackerman agreed with externalists that political developments had produced profound constitutional change.<sup>139</sup> Ackerman conceptualized these political developments, however, as the

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133. *Id.* at 631–34.

134. *Id.* at 652. Ariens provides numerous examples, *id.* at 652–68, casting doubt on Cushman's description of externalism as the "conventional wisdom."

135. *Id.* at 652–55.

136. *Id.* at 625.

137. WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* (1995).

138. Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *YALE L.J.* 453 (1989).

139. *Id.* at 510–11.

equivalent of a prolonged, constitutional convention; they transcended their political origins and became legal and constitutional in nature.<sup>140</sup> By expanding the concepts of “legal” and “constitutional” in this way, Ackerman joined an externalist account of cause with an internalist characterization of change.

Daniel Farber later offered an empirically based hybrid. He identified three causes for constitutional change during the 1930’s: an altered “Zeitgeist” (internalist); political pressure from Roosevelt (externalist); and the appointment of relatively liberal Justices by President Hoover during the 1920’s—when conservative appointments by Hoover would have guaranteed a conservative majority in 1937 no matter what Roberts did.<sup>141</sup> Judicial appointments themselves represent a kind of hybrid. They are internalist, because they involve nothing out of the ordinary legally; they are externalist, because they reflect decisions by political branches and are not doctrinal.

Farber, like Ackerman, accepts internalism and externalism as analytical starting points. However, both believe that a full account must combine elements of both positions. A fair inference from their view is that an internalist-externalist debate may once have been appropriate, but we are now in a position to choose the best of each side, putting an end to that stage of the debate.

4. *A Permanent Debate*—Cushman’s comment about a “thoroughgoing externalist account,” quoted earlier, suggests a variation on the idea of an internalist-externalist debate. In this version, internalism and externalism represent choices that are not entirely a function of the historical evidence. Elaborating on the idea, Cushman wrote:

The conventional wisdom [externalism] is . . . long overdue for some serious scrutiny, for two reasons. First, there is good reason to doubt that it offers an *accurate* account. The nature of the external account and the evidence available preclude it from being *conclusively* disproved in its entirety. There is no utterly irrefutable smoking gun: both the conventional wisdom and its critique [internalism] necessarily rest on circumstantial evidence. Nevertheless, there is ample evidence to suggest that the external account is not nearly as compelling as has conventionally been thought, that it certainly has been overstated, and that it may very well be just

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140. *Id.* at 510–15.

141. Farber, *supra* note 25, at 1006.

plain wrong. Second, the conventional account . . . requires reexamination because it is certainly not a *complete* account, insofar as it neglects serious exploration of the internal dimensions of the phenomenon.<sup>142</sup>

Here, Cushman suggests that neither internalism nor externalism may lend itself to some conclusive factual or conceptual demonstration. Apparently, then, historians enjoy a degree of freedom to choose between the two views—a fortunate circumstance for internalists, it may be noted, given how little of their political analysis survives *Supreme Power*. Cushman himself finds internalism superior because it pays attention to the “internal” dimensions of the problem—almost an aesthetic criterion.

Laura Kalman, an externalist regarding events and an apparent internalist about the debate (who cites philosophical differences when examining historians’ differences)—wrote even more explicitly than Cushman about the possibility of choice for historians. She wrote:

I do not go as far . . . as Cushman in maintaining that no “reductionist” model [externalism] is sufficient to explain the New Deal Justices’ behavior. The model that so irritates him may indeed account for the Justices’ actions. But Cushman has made a convincing case that the reductionist model is not the only explanation. Cushman has given us a story that will resonate with those who believe judges are not identical to politicians and will enrich their understanding of judicial motivation. By taking New Deal constitutional jurisprudence on its own terms and making sense of it, he has demonstrated that legal history can indeed be a genre of intellectual history. I simply continue to be interested in legal history as political, economic, and social history also.<sup>143</sup>

Kalman then managed to impart an externalist spin to debate internalism and the idea of choice. Observing that writers trained in law tended to become internalists while those trained in political history became externalists, she linked the occupational divide to the conceptual divisions among historians; Kalman wrote that she favored the view of political historians,

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142. CUSHMAN, *supra* note 11, at 5.

143. Kalman, *supra* note 7, at 2190; *but cf.* Mark Tushnet, *The New Deal Constitutional Revolution: Law, Politics, or What?*, 66 U. CHI. L. REV. 1061, 1075 (reviewing BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998)) (noting that “[h]istorians oriented primarily to the legal profession . . . have a professional interest in providing internalist accounts”).

since she was one, but suggested that lawyers might become internalists with just as much reason.<sup>144</sup>

Mark Tushnet went even further.<sup>145</sup> What Kalman considered relative to a scholarly discipline, Tushnet deemed relative to an era—the era when a historian was writing. Tushnet argued that the truth value of internalism and externalism depends on the understanding of law’s relation to politics that prevails at any particular moment.<sup>146</sup> Historians do not select the position that pleases them; rather, internalism is literally true at some moments when history is written and false at others.<sup>147</sup> This position is both more abstract than internalism (since it suggests that prevailing concepts literally determine what is true) and more concrete than externalism (since those prevailing concepts are a function of time and place).

All such relativistic views mislead, I believe. Consider again the analogy to a gunshot fired at the precise moment someone collapses to the ground. True, the shot might have missed and the victim could have collapsed from internal causes, such as ruptured blood vessel. Yet it seems wrong to claim that analysts are free to choose between the internal (blood vessel) or external (bullet) accounts depending on their own individual preferences or training. Nor does the prevailing view of ballistics and heart disease at any given time really answer the question of whether a bullet penetrated the victim.

Without an autopsy, the evidence might remain “circumstantial” and neither theory, in Cushman’s term, would be “conclusively” rebutted. Yet the two accounts are hardly equal. If the victim fell precisely when the gun was fired, the gunshot becomes the presumptive cause. And Roberts did switch precisely when Roosevelt threatened the Court. It would be different if Cushman’s claims about timing of Roberts’ switch and the supposed likelihood that Congress would reject Court-packing were right. *Supreme Power*, however, refutes those claims.

Justice Roberts’ switch in 1937 was remarkable, and it astounded contemporaries who lived through it—those who opposed Court-packing and those who supported it alike. Confident their eyes and ears had not deceived them, they would

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144. See Kalman, *supra* note 7, at 2206.

145. Tushnet, *supra* note 92, at 1078–79.

146. See *id.* at 1076.

147. See *id.* at 1078.



be amazed to learn that later historians did not see what they had—or that later historians for some reason could choose what to believe about what happened.

### C. SUPREME POWER REDUX

1. *Shesol's Conclusions*—Shesol alludes to the internalist-externalist debate only briefly, and without using those terms. “Most” contemporaries, he writes, considered it “self-evident” that political reasons produced the Court’s switch (p. 522). “Decades later, however, a number of historians, legal scholars, and others would question the claim” (p. 522). Shesol quotes Chief Justice Rehnquist’s assertion that Roosevelt “won . . . the way the Constitution envisions such wars being won—by the gradual process of changing the federal judiciary through the appointment process”—a view that overlooks the fact that the “switch” occurred before Roosevelt had appointed any Justices (p. 523). In a footnote, Shesol also cites articles by Kalman, White, Leuchtenburg and Ackerman, among others (p. 601, note to p. 523).

Shesol—who is anything but an internalist about events—remarkably belongs to the “both views are right” or “neither view can be established definitively” camp of debate internalism. Some writers, he notes

place greater weight on the doctrinal changes that preceded the Court fight and doubt that the events of 1936 and 1937 had much (or anything) to do with the shift in doctrine. At its core, this is not a debate about the timing of the transformation. It is an argument about the nature of the judicial process, and what makes judges decide as they do (p. 523).

Thus, whatever the problems with an internalist account of *events*, the historical debate concerns “the nature of the judicial process” and why judges “decide as they do”—a debate about legal *philosophy*. Shesol continues:

After the *Parrish* decision, *The New Yorker* ridiculed the notion that “the Supreme Court’s about-face was not due to outside clamor. It seems that the new building has a soundproof room, to which the Justices retire to change their minds.” Still the myth of the Court as a “vehicle of revealed truth” . . . incapable of doing that which the law and the facts did not require, had and still has resilience. To acknowledge that external events play a role in decisions is frightening to many, for it suggests that the judicial system is, in the end, not

one of laws but of men—and thus vulnerable to the prejudices and whims and base instincts of men.

But this is a false dichotomy—that a nation is governed either by law or by men, rather than a dialectic between the two. It is one of the many unhelpful antitheses that prevailed at the time and persist to this day, among them the idea that the Court is either a purely legal institution or a political body . . . that legal doctrines are either preordained by the Constitution or are artificial constructs . . . [or] that justices are either impervious to social, political, and cultural influences or utterly at their mercy. The reality . . . is more complex (p. 523).

In this “more complex” reality, the justices “were not merely judges; they were . . . politically minded and socially aware men” (p. 523). They were simultaneously “imbued with an ethic of impartiality”; “capable of change: growth, regression, and inconsistency”; and, “to different degrees, open to influence by legal briefs, oral arguments, pressure from their peers, and, not least, national events” (pp. 523–24). In a footnote, Shesol praises Kalman—whose relativistic view is described above—for providing “[t]he strongest argument for collapsing these false categories” (p. 601 note to p. 523). And he concludes:

It is, in the end, impossible to know what sways a judge. Even the judges themselves do not always know whether their decisions are driven, in the main, by doctrine or emotion, by the dictates of law or politics or conscience. “Who knows what causes a judge to decide as he does?” Roberts once shrugged, reflecting on *Parrish*. “Maybe,” he joked, “the breakfast he had has something to do with it” (p. 524).

Thus, Shesol sees no room in the history of events for an internalist account. Unlike Cushman, however, Shesol thinks that makes no difference: the nature of law still makes it impossible to determine why Roberts voted as he did. Shesol thereby severs the connection between historical events and conclusions. No matter how precisely Roberts’ switch coincided with political pressure, it must remain “impossible to know what sway[ed]” him. Yet Shesol never really explains why that remains “impossible”—and the entire rest of his book undercuts his argument.

Like Kalman—whose “collapsing” of dichotomies Shesol endorses—Shesol combines externalism about events with internalism about the debate. In fact, he is both a stronger externalist and a stronger internalist than Kalman. Kalman

struggled visibly with conflicting historical views. Shesol effortlessly rejects the supposed “false” dichotomy between law and politics. On his view, the two are inextricably mixed—even when it looks for all the world as if you can tell them apart. It almost makes one wonder why Shesol bothered to write his book.

2. *Supreme Power in History*—Shesol invariably identifies a hidden motive for the actions of Court-packing opponents. The same is not true of Roosevelt, however. Although *Supreme Power* does not explicitly portray Roosevelt as right, it never questions his motives. And, as we have just seen, Shesol does not ascribe motives to the Justices either, declaring it impossible to do so.

More generally, the actors in *Supreme Power* either work for Roosevelt, oppose him, or write about him. But the Justices once again receive different treatment. Like the President, the Justices move through the book in their own orbit.

*Supreme Power* tells the story of how those two orbits became aligned—with each other and, in the case of the Justices, with the modern world. Regarding the latter, Shesol’s ultimate conclusion—that the Court “at long last . . . reconciled itself to the twentieth century”—echoes Roosevelt’s idea of a “living” Constitution (p. 520). It also happens to echo Roosevelt’s remarks on February 5 about bringing the Court into the modern age.

The development, Shesol implies, was both preordained and necessary. *Supreme Power* quotes a magazine writer’s comment that when Chief Justice Hughes voted to uphold New Deal measures he “had the acumen to recognize the inevitable” (p. 522). It also quotes Justice Roberts’ later remark that “it is difficult to see how the Court could have resisted the popular urge . . . for what in effect was a unified economy” (p. 522). Shesol does not mean that Hughes or Roberts consciously decided to accommodate the President, popular will, or economic reality; to the contrary, he observes that it “can never be known” whether Hughes “saw himself as responding to the dictates of the cases at hand, or was acting to save the Court or country” (p. 522).<sup>148</sup> Rather, the doctrinal switch simply had to happen—exactly as long-view internalists claim (p. 520).

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148. Shesol also observed that:

even though the *Parrish* decision preceded the launch of the Court plan, a credible case can be made that Roberts and Hughes were influenced by the

Even events that seemed to stand in the way actually promoted the doctrinal shift, according to Shesol. Did the Court strike down New Deal measures? That only helped, Shesol says, because it “required FDR to answer a serious and sustained constitutional critique” (p. 521). As a result, Roosevelt’s “reforms, most people agreed, stood on more solid ground” (p. 521). Did Court-packing critics pursue petty vendettas against Roosevelt? Grudgingly, Shesol allows that even Roosevelt’s opponents contributed to the happy outcome. “[W]hatever the motives of Roosevelt’s critics,” he writes,

it must be acknowledged that they provoked a debate about the constitutional principles of the New Deal—a debate that arguably needed to take place and that the congressional opposition was too enfeebled to lead (p. 520).<sup>149</sup>

Like Shesol’s depiction of events, these historical views may reflect his experiences as a speechwriter for President Clinton. Shesol surely witnessed small-bore politics at the White House. Presidential speeches, on the other hand, articulate grand themes and large principles. How to reconcile the two political realities? Describing 1937, Shesol treated political principles as purely rhetorical. Did that exhaust his views, however, about the relationship between high political ideals and not-so-high political maneuvering?

Roosevelt had framed the fundamental political and legal issue in the Court-packing dispute as whether the Supreme Court would join the modern world. For Shesol, precisely that was the fundamental historical question as well. *Supreme Power* does not portray Roosevelt as right or wrong about the political-legal issue. Yet the President was right about something more

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criticism of *Tipaldo*; or by rising popular exasperation with the Court; or the indignation of the legal journals; or the scale of Roosevelt’s reelection, which surprised the justices; or, through 1936, the mounting threat—or certainty—that either FDR or Congress was about to take serious action to curb the Court. If any of this had an effect on the decision, it can never be measured; nor would it suggest that either justice changed his basic beliefs in the face of events. It may, however, have made each more likely to examine his beliefs and then act on them—to take a bold step, to confront a tough choice and no longer avoid it (p. 415).

In the next paragraph, however, Shesol commented that “one need not speculate wildly to posit that some of these events, to some degree, weighed on the minds of Roberts and Hughes and placed a finger on their internal scales” (p. 415).

149. Shesol did not explain, however, why the debate “arguably needed to take place.” Nor is clear why Shesol considers the “congressional opposition . . . enfeebled”—when members of Congress actually led the opposition.

profound, in Shesol's account—Roosevelt was right about the very direction of history.

The historical dimension of events ennobled everyone in Shesol's eyes, even—as just noted—petty critics of the President. Yet Roosevelt played a unique role. I noted earlier that Shesol treats Roosevelt as the prime mover of events—a feature of the book that I described as a narrative device. But it was more than that, too. Other actors played roles in the historical drama; Roosevelt spoke for History itself.

Thus, Shesol views presidents—at least some presidents, some of the time—as extraordinary political actors. Co-existing with their small bore political life—the world of tactics depicted in *Supreme Power*—is this special historical role, in which presidents embody and virtually personify the march of history. And when presidents are extraordinary political actors, their words must become more than ordinary political rhetoric.

This may explain another apparent anomaly in the book. Shesol attached enormous significance to Roosevelt's February 5 speech, which focused on elderly judges more than on constitutional interpretation. Treating the speech as a purely tactical mistake, Shesol seemed to greatly overstate its importance. Even more puzzling, Shesol suggested that Roosevelt should have frankly described his intention to change the course of constitutional decision-making—the very “deeper, darker aim” that newspapers would denounce after the speech. And this treatment of the speech seemed inconsistent with Shesol's treatment of principles throughout the rest of the book. But Shesol's deepest objection, it now appears, may have had nothing to do with tactics. On February 5 Roosevelt lost a chance to speak for History—and Shesol, the White House speechwriter, regrets it.

Two observations seem in order. First, this historical dimension almost certainly was missing in the Clinton scandal of the 1990's—the scandal that, I argued earlier, supplied Shesol with a template for understanding the events of 1937. In the Court-packing controversy, Shesol perhaps discovered an alternate version of the narrative that played itself out in the Clinton White House—a version that, unlike the 1997 variant, had real historical meaning.

Second, none of this detracts from the value of Shesol's account. Only superficially resembling long view internalism, Shesol's deep sense of history led him to faithfully and minutely

describe events. At times, *Supreme Power* even reads like a Greek tragedy. The book ends with Shesol's observation that while Roosevelt won the war over the Constitution, he "never regained his squandered mandate"<sup>150</sup>—a phrase that describes the tragedy of Clinton's Administration at least as well as it does Roosevelt's (p. 524).

## VI. THE FUTURE

A number of considerations suggest that the internalism-externalism debate is about to become transformed, or even disappear. This Part explores some possibilities.

### A. FIRST POSSIBILITY: INTERNALISM IS REFUTED, AND THE DEBATE ENDS

The debate might end because *Supreme Power* refutes critical parts of internalism.

This outcome seems unlikely, however. If debate externalists are correct—and I believe they are—an agenda related to the Court motivates internalism. Thus, facts probably will not drive internalists from the field. Indeed, a version of events like Shesol's enjoyed almost universal acceptance until Frankfurter's 1955 tribute, yet internalism emerged and flourished.

### B. SECOND POSSIBILITY: NOTHING IS LEFT TO SAY

Frankfurter's emphasis on the "character" of Justice Roberts in 1955 was not accidental. In the 1930's, Frankfurter had repeatedly denounced Roberts as political.<sup>151</sup> Without mentioning those earlier statements in his tribute, Frankfurter now declared it a mistake to assess Roberts based on the Justice's public actions. "Before I came on the Court," Frankfurter wrote

I had been a close student of its opinions. But not until I became a colleague, and even then only after some time, did I come to realize how little the opinions of Roberts, J. revealed

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150. Recall that, for Shesol, Roosevelt's tragic blunder was not the Court-packing plan or what others saw as an assault on judicial independence; rather it was the content of his February 5 speech.

151. See discussion *supra* Part II.B.2.(b).

the man and therefore the qualities he brought to the work of the Court.<sup>152</sup>

Far from arguing that published opinions and public actions refute the charge of political influence—the claim internalists make—Frankfurter implied the exact opposite. Indeed, he anticipated Shesol’s “it is impossible to know what motivates a judge” argument—with the caveat that a close, longtime colleague on the bench *can* know what motivates a judge.<sup>153</sup> In this respect, Shesol (rather than Barry Cushman) is Frankfurter’s true intellectual heir.

Most of Frankfurter’s tribute reads like a eulogy, not a contribution to legal history. But Frankfurter did reprint Roberts’ memorandum and argue that *Nebbia* prefigured Roberts’ vote on the minimum wage.<sup>154</sup> (Frankfurter said nothing about Roberts’ 1936 and 1937 votes in commerce or tax and spend cases). Since existence of the memorandum had not been public before, this portion of the tribute did not strictly conflict with Frankfurter’s claim that the publically known Owen Roberts was not the real person or judge. Still, Frankfurter’s reliance on the memorandum appears at odds with his other claim. Could a short memorandum, written years later, really put outside observers in the same position to judge Roberts as a longtime colleague on the bench?

Had Frankfurter not mentioned the memorandum, readers probably would have understood his tribute as a simple eulogy. And the internalist-externalist debate might never have begun. Almost no one disputes claims made in eulogies. Nor is it easy to imagine a decades-long debate about Roberts’ character or about Frankfurter’s suggestion that only a long-time colleague can assess another Justice’s work. But Frankfurter did reproduce the memorandum, and the memorandum made disputable claims about *Tipaldo* and *Parrish*. And some of those claims proved mistaken—as have other important internalist claims about events.

Like Frankfurter, internalists strive to create what Cushman called “intellectual space” for internalism in the history of the mid-1930’s. *Supreme Power* demonstrates the error of doing so, however: the critical facts support externalism. Yet *Supreme*

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152. Frankfurter, *supra* note 86, at 311.

153. *See id.* at 317 (“Few speculations are more treacherous than diagnosis of motives [behind] . . . the position taken by Justices in Supreme Court decisions.”).

154. *Id.* at 314–15.

*Power* also shows a way out of this internalist dilemma. Shesol faithfully described events, yet he concluded that the reason for Justice Roberts' change of mind remains unknowable and that nothing objectionable happened in 1937. Shesol thereby accomplished what Frankfurter perhaps had aimed at in 1955.

One may believe that Shesol's conclusions are misleading or wrong. But, as just noted, a sustained debate over "what is knowable about Justices' motivation" seems unlikely to arise. And with only philosophical issues remaining, the internalist-externalist debate may well fade away. When internalists claim that the historical debate centers on philosophical differences, therefore, they may be making their best argument. Everyone can announce their different conclusions, and nothing else remains to be said.

If debate externalism is correct, this may represent the most likely outcome. Internalists and debate externalists alike have assumed that an internalist account requires factual assertions about 1937. But *Supreme Power* and much of Frankfurter's tribute demonstrate that the most viable non-political portraits of 1937 must be abstract. Internalism may not need facts, and it seems to fare much better without them.

#### C. THIRD POSSIBILITY: THE DEBATE IS MOOTED BY CHANGING CONCEPTIONS OF THE COURT

Internalists like White and Cushman entertain a very broad sense of "legal." White considers cultural change the key to a legal revolution. And Cushman's "integrated legal fabric" is an academic, not a doctrinal, construct. Mark Tushnet even describes Cushman's as "a mixed-internalist-externalist account" because it "identifies social forces that led to [the constitutional] shift" in the fabric.<sup>155</sup> Internalists view law as autonomous from politics—but apparently not from much else.

Towards the middle of the internalist-externalist spectrum, Richard Friedman takes seriously the possibility that Roberts reached the merits in *Parrish* because of political considerations—in particular, because the negative public

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155. Tushnet, *supra* note 143, at 1062. Tushnet, like Cushman, considers the "integrated fabric" a legal entity, a claim that seems questionable. The "integrated fabric" has no doctrinal status; nor does it aspire to any. It results from historians' efforts to understand the Court, not from anyone's efforts to understand the Constitution. And it supposes that law develops for reasons independent of judges' conscious deliberation. Why is such a view any more "legal" than, say, the claims of legal realism?



reaction to *Tipaldo*.<sup>156</sup> Regarding the Commerce Clause, Friedman goes still farther, saying that he “suspect[s] Roberts had a conscientious change of mind, at least the substance of which, if not the timing, can be understood independent of political factors.”<sup>157</sup>

Yet further along the internalist-externalist spectrum, Farber accepts Friedman’s claim that the public reaction to *Tipaldo* may have influenced Roberts’ decision to reach the merits in *Parrish*.<sup>158</sup> However, Farber also notes “Roberts’s later statement that he was ‘fully conscious’ of the ‘threat to the existing Court’”—the very threat that Cushman says never existed.<sup>159</sup> Farber characterizes his own position as partly externalist because “it admits the possible short-term effect of the Court-packing plan in influencing a key voter [Roberts].”<sup>160</sup>

All these accounts clash, however, with Frankfurter’s arguments about politics, morality and character. Frankfurter would hardly accept cultural change as a defense of a Justice’s “morality.” Nor would a Justice qualify as “moral” if political factors had influenced a decision to switch positions—not even if later historians considered the switch inevitable.<sup>161</sup>

The idea of an unraveling legal fabric would not have appealed to Frankfurter either. For one thing, it draws on the objectionable idea of inevitability. With the old legal fabric unraveling, Cushman appears to say, Justices had no choice but to wear the only other legal garment in their closet.<sup>162</sup> Frankfurter, on the other hand, presupposed that individual judges made law—not that a fabric of law made the judge.<sup>163</sup>

Frankfurter himself employed a “fabric” metaphor, but one with very different implications. “Owen J. Roberts contributed his good and honest share,” Frankfurter wrote, “to that coral-

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156. Friedman, *supra* note 25, at 1951.

157. *Id.* at 1982-83. Friedman also argued that Roberts’ vote in *Jones & Laughlin* “probably reflected a change—but a legitimate change—in his views.” *Id.* at 1973. To support the idea that politics did not motivate Roberts, Friedman relies on Cushman’s argument about an interrelated constitutional fabric and his claim that the 1936 election did not influence Roberts.

158. Farber, *supra* note 25, at 1001.

159. *Id.* at 1000.

160. *Id.* at 1006.

161. See Frankfurter, *supra* note 86, at 314 (“That the Supreme Court should not be amenable to the forces of publicity to which the Executive and the Congress are subjected is essential to the functioning of the Court.”).

162. See CUSHMAN, *supra* note 11, at 7.

163. See Frankfurter, *supra* note 86, at 316-17 (discussing Roberts’ opinion in *Nebbia* and its role in deciding *Parrish*).

reef fabric which is law.”<sup>164</sup> Unlike the “integrated fabric,” however, Frankfurter’s “coral-reef fabric” was not manufactured according to a discernible academic pattern. Nor was it something a judge fit into. More to the point, a coral-fabric cannot “unravel”—it is more substantial than that—a coral reef cannot easily be replaced by another one as if the earth was simply changing its clothes.

The gap between Frankfurter and later writers suggests that the law-politics boundary has shifted since 1955. What counted as too political—or, at least, too non-legal—for Frankfurter may have come to appear acceptably legal since. And with a larger admixture of politics acceptable in law, the gap between externalism and internalism should shrink. On Shesol’s view—which regards law versus politics as a “false dichotomy”—no boundary at all exists.

The law-politics boundary in fact has become more porous since 1955, I believe. Yet that development has not damped down the debate. Instead, internalism experienced a revival during the 1990’s with White’s and Cushman’s work. And public discussion of the Court—particularly in connection with the confirmation of Justices—continues to posit a sharp line between law and politics.<sup>165</sup> At least in the near future, it appears, changing views about law and politics are unlikely to mute the internalism-externalism debate.

Paradoxically, these changing conceptions might even intensify the debate. A confident legalist, without doubts about law’s autonomy, might readily admit that politics motivated Roberts. Roberts’ switch would constitute a rare anomaly. On the other hand, someone insecure in their legalism might hesitate to admit even a single breach of the law-politics boundary—because one breach might signal a general collapse. Perhaps Frankfurter fell into this category, and his reassurances about Justice Roberts were directed at himself as much as his audience.

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164. Frankfurter. *supra* note 86, at 317.

165. See, e.g., Charles W. Rhodes, *Navigating the Path of the Supreme Appointment*, 38 FLA. ST. U. L. REV. 537, 542–43 (2011) (theorizing that the public requires the Court to have a “greater separation from ordinary politics”).

D. FOURTH POSSIBILITY: UPHEAVALS IN CONSTITUTIONAL  
LAW TRANSFORM THE DEBATE

1. *A Non-Doctrinal Debate*—The historical debate over 1937 has some striking similarities with the controversy over Court-packing. Many Court-packing opponents shared Roosevelt's hope that the Court would change direction; they objected only to that happening in a blatantly political way. Somewhat similarly, internalists do not object to the Court's change of direction in 1937—indeed, they sometimes portray it as inevitable—but object only to the idea that politics caused it. For that matter, long-view internalists echo Roosevelt's claim that modern conditions required changes in constitutional law—even as they deny that Roosevelt's political insistence on that very point made any difference.<sup>166</sup> Obvious parallels also exist between Court-packing supporters and externalists—with the former hoping, and the latter believing, that politics could change the Court's direction.

2. *Commerce*—Liberal opponents of Court-packing may have shared many of Roosevelt's views; conservative opponents did not. And in the historical debate about 1937 only the “liberal” side seems represented. No writer cited in this review, for example, shows any sympathy for the conservative Justices of 1937.

Constitutional law today exhibits a pronounced liberal-conservative split. And one might expect the historical debate to become transformed if that debate becomes implicated in—or even relevant to—current doctrinal disputes. The Justices who voted to strike down the Affordable Care Act in *Sebelius*, for example, might well view 1937 differently from either internalists and externalists in the current debate.

In a few cases, Justices themselves have invoked 1937 to defend or criticize a result. In particular, Justices have done so when dissenting from a decision that the federal government lacked power to act under the Commerce Clause. In these cases, “liberals” invoked 1937—yet their views did not conform to the “internalism versus externalism” template.

The first opinion of this kind was Justice Brennan's dissent in *National League of Cities v. Usery*, a 1976 decision (since

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166. See, e.g., White, *supra* note 16, at 1110.

overruled) that limited congressional power under the Commerce Clause to regulate states.<sup>167</sup> Brennan wrote:

The only analysis even remotely resembling that adopted today is found in a line of opinions dealing with the Commerce Clause and the Tenth Amendment that ultimately provoked a constitutional crisis for the Court in the 1930's . . . . It may have been the eventual abandonment of that overly restrictive construction of the commerce power that spelled defeat for the Court-packing plan, and preserved the integrity of this institution . . . . My Brethren's approach to this case is not far different from the dissenting opinions in the cases that averted the crisis.<sup>168</sup>

By “preserved the integrity of this institution” Brennan may have meant only that judicial review survived and the Court remained an “integral” part of our constitutional system. More likely, I believe, he also meant that the Court had compromised its integrity before 1937 by substituting the Justices' own political judgments for those of the political branches. Many observers in the 1930's—including Frankfurter—held that view, believing that conservative Justices were invalidating New Deal measures because they disagreed with them *politically*. This kind of political influence, however, does not register in the internalism-externalism debate.

Dissenting in a 1994 case, *United States v. Lopez*,<sup>169</sup> Justice Souter sounded similar themes. *Lopez* invalidated a federal regulation of private (non-state) activity as beyond the federal commerce power, the first time the Court had done so since 1936.<sup>170</sup> Souter wrote:

The practice of deferring to rationally based legislative judgments “is a paradigm of judicial restraint.” In judicial review under the Commerce Clause, it reflects our respect for the institutional competence of the Congress . . . and our appreciation of the legitimacy that comes from Congress's political accountability in dealing with matters open to a wide range of possible choices.

It was not ever thus, however . . . . The modern respect for the competence and primacy of Congress in matters affecting commerce developed only after one of this Court's most

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167. *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

168. *Usery*, 426 U.S. at 867–68.

169. *United States v. Lopez*, 514 U.S. 549 (1995).

170. *Id.*

chastening experiences, when it perforce repudiated an earlier and untenably expansive conception of judicial review in derogation of congressional commerce power.<sup>171</sup>

Six years later, *United States v. Morrison* struck down the federal Violence Against Women Act on Commerce Clause grounds.<sup>172</sup> Again in dissent, Souter wrote about 1937 more explicitly:

Since adherence to these formalistically contrived confines of commerce power in large measure provoked the judicial crisis of 1937, one might reasonably have doubted that Members of this Court would ever again toy with a return to the days before [*Jones & Laughlin*] . . . which brought the earlier and nearly disastrous experiment to an end.

Why is the majority tempted to reject the lesson so painfully learned in 1937?<sup>173</sup>

Like Justice Brennan, Souter came close to saying that the Court had switched because of the Court-packing plan. How else could the Court have painfully learned a lesson *in 1937*?

Justice Ginsburg alluded to the same points in her 2012 *Sebelius* opinion, though less explicitly. Dissenting on the Commerce Clause issue, Ginsburg traced modern Commerce Clause jurisprudence to 1937<sup>174</sup> and, using the same word as Justice Souter, characterized *Schechter* and *Carter Coal* as “untenable.”<sup>175</sup> She also cited Souter’s *Morrison* dissent and the reference to a “nearly disastrous experiment.”<sup>176</sup> Finally, Ginsburg observed that the Court had “[f]ail[ed] to learn from this history[.]”<sup>177</sup> Ginsburg’s opinion was artfully ambiguous, however. For example, *Carter Coal* might have been “untenable” only doctrinally, and not—as Souter and Brennan had suggested—in an institutional sense, implicating the Court’s position in our constitutional system. Ginsburg’s reference to a “nearly disastrous experiment,” however, indicates that she shared Brennan’s and Souter’s view.

Like externalists, Brennan, Souter and Ginsburg suggest that Court-packing prompted the 1937 switch. Yet the usual

171. *Id.* at 604 (Souter, J., dissenting) (internal citations omitted).

172. *United States v. Morrison*, 529 U.S. 598 (2000).

173. *Id.* at 642–43 (Souter, J., dissenting).

174. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2609 (2012) (Ginsburg, J., concurring in part and dissenting in part).

175. *Id.* at 2622.

176. *Id.* (quoting *Morrison*, 521 U.S. at 642 (Souter, J., dissenting)).

177. *Sebelius*, 132 S. Ct. at 2622 (Ginsburg, J., concurring in part and dissenting in part).

internalist claim—that externalists overlook the internal life of law—would be extraordinary applied to a Justice. Moreover, these Justices viewed constitutional decisions of the 1930’s as legally correct (e.g., *Jones & Laughlin*) or incorrect (e.g., *Carter Coal*). Since internalists do not incorporate the idea of “legally correct” in their analyses, that makes the Justices more “legalist” even than internalists. In short, these Justices strongly suggest that politics produced the constitutional switch in 1937—and also that the switch should have occurred, because the Court had been wrong. Thus, Brennan, Souter, and Ginsburg simultaneously qualify as internalists and as externalists—and also as neither. The idea of an internalist-externalist debate simply fails to capture their views.

3. *Casey*—The “switch in time” also received attention in *Planned Parenthood of Southeastern Pennsylvania vs. Casey*, the 1992 decision that reaffirmed a constitutional right to abortion.<sup>178</sup> Substantive due process was at issue in *Casey*,<sup>179</sup> making *Parrish* the relevant 1937 case. And Justices on both sides of the abortion question thought *Parrish* had correctly overruled *Lochner*.<sup>180</sup> What divided them was *why* the Court was right to abandon *Lochner* in 1937.

Justices Kennedy, O’Connor, and Souter, who provided three of the five votes to uphold abortion rights, authored a joint opinion. Alluding to political pressure surrounding the abortion issue, they declared that “to overrule [*Roe*] under fire in the absence of the most compelling reason . . . would subvert the Court’s legitimacy beyond any serious question.”<sup>181</sup> That was because

The Court must take care to speak and act in ways that allow people to accept its decisions . . . as grounded truly in principle, not as compromises with social and political pressures . . . . [T]he Court’s legitimacy depends on [that] . . . .<sup>182</sup>

And *Parrish* rightly overruled *Lochner* because

the Depression had come and, with it, the lesson that seemed

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178. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

179. *Id.* at 846.

180. *Compare id.* at 861–62, *with id.* at 957 (Rehnquist, C.J., concurring in part and dissenting in part).

181. *Id.* at 867.

182. *Id.* at 865–66.

unmistakable to most people by 1937, that the interpretation of contractual freedom protected in *Adkins* rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare . . . . [H]istory's demonstration of their untruth not only justified but required the new choice of constitutional principle . . . .<sup>183</sup>

Dissenting, Chief Justice Rehnquist argued that political opposition to a constitutional decision was simply irrelevant. The Court had decided *Parrish* when the Court-packing plan was under consideration, Rehnquist noted, thus:

[i]t is difficult to imagine a situation in which the Court would face more intense opposition to a prior ruling than it did at that time, and, under the general principle proclaimed in the joint opinion, the Court seemingly should have responded to this opposition by stubbornly refusing to reexamine the *Lochner* rationale, lest it lose legitimacy by appearing to “overrule under fire.”<sup>184</sup>

Justice Scalia's opinion put the point more sharply, arguing that the joint opinion had adopted “not a principle of law . . . but a principle of *Realpolitik*—and a wrong one at that.”<sup>185</sup> Justice Scalia also observed that *Parrish*

produced the famous ‘switch in time’ from the Court's erroneous (and widely opposed) constitutional opposition to the social measures of the New Deal<sup>186</sup>

—the only use of the phrase “switch in time” that I can find in any Supreme Court opinion.

For the authors of the joint opinion, however:

it was true that [in the mid-1930's] the Court lost something by its misperception, or its lack of prescience, and the Court-packing crisis only magnified the loss; but the clear demonstration that the facts of economic life were different from those previously assumed warranted the repudiation of the old law.<sup>187</sup>

The *Casey* joint opinion, like the Commerce Clause dissents noted above, includes views that call to mind long-view internalism. Internalists focus on changes in epistemology and

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183. *Id.* at 861–62.

184. *Id.* at 960 (Rehnquist, C.J., concurring in part and dissenting in part).

185. *Id.* at 997–98 (Scalia, J., concurring in part and dissenting in part).

186. *Id.* at 998.

187. *Id.* at 862.

economics; the joint opinion cited a changed understanding of basic economic facts. In *Lopez*, Justice Souter even linked changes in substantive due process doctrine during the mid-1930's to changed views of the commerce power, partly echoing internalist claims about a doctrinal fabric.<sup>188</sup> Yet the joint opinion's *express* concern with the Court's legitimacy and its conclusion that the Court-packing crisis damaged that legitimacy—predictably—distinguish it from internalism. Once again, the idea of an internalist-externalist debate fails to capture the position of actual Justices on the Court.

4. *The Next Upheaval*—Suppose Justice Thomas' view that Commerce Clause jurisprudence took a wrong turn in 1937 comes to command a majority of the Court—a development *Sebelius* makes at least conceivable.<sup>189</sup> Thomas might argue that *Jones & Laughlin* deserved no deference as a precedent because political pressure, in the form of the Court-packing proposal, produced the decision. One can even imagine Thomas adopting themes from the *Casey* joint opinion, arguing that the legitimacy of the Court had suffered because of the “switch in time” and that the damage ought to be undone.<sup>190</sup> Justices on the other side—those favoring an expansive interpretation of the commerce power—might also look to the *Casey* joint opinion, arguing that no new understanding of the facts had undermined *Jones & Laughlin*. Or they might shift ground, emphasizing that *Jones & Laughlin* was correct as decided while avoiding references to the “lessons” of 1937 or to “avert[ing] . . . the crisis”—in short, they could produce an opinion more like Chief Justice Rehnquist's in *Casey*.

How might all this affect the historical debate? The year 1937 would become a critical battleground, one with doctrinal—not merely academic—implications. But exactly what would happen in the debate remains unclear. Justice Thomas, a constitutional originalist, might end up both a legalist about law

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188. Justice Souter observed that “[i]t was not merely coincidental . . . that sea changes in the Court's conceptions of its authority under the Due Process and Commerce Clauses occurred virtually together.” *United States v. Lopez*, 514 U.S. 549, 606 (1995) (Souter, J., dissenting). What linked them, Souter argued, was “exacting judicial scrutiny of a legislature's choice of economic ends and of the legislative means selected to reach them.” *Id.*

189. See *United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring) (arguing that the Court should “replace its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding”).

190. In the perhaps less likely event that a new majority decided to revive *Lochner*, an analogous argument would exist—namely, that *Parrish* resulted from political pressure.



generally and, as just noted, an externalist about 1937—a combination of positions that standard views of the internalist-externalist debate seemingly rule out. The minority Justices on the commerce question in *Sebelius* might abandon the externalist elements in Justices Brennan’s and Souter’s Commerce Clause dissents—or they might not. Today, internalists embrace the idea that Roosevelt’s appointments after *Jones & Laughlin* advanced the constitutional revolution.<sup>191</sup> But internalists favoring an expansive interpretation of the commerce power might object to a series of Supreme Court appointments by future presidents that solidified Justice Thomas’ approach. These internalists of the future might conclude that appointments-based doctrinal change qualifies as political, not legal, after all—the view of many when President Grant’s appointments (changing the outcome of the *Legal Tender Cases*) supposedly constituted “Court-packing.”<sup>192</sup>

In short, some internalists would become externalists, and some externalists might become internalists. Legalism about law generally would come to differ from internalism about 1937; indeed, the most stringent legalists, like Justice Thomas, might become the strongest externalists. Judicial appointments might change from a component of legal change to a threat to the integrity of law.

Doctrinal upheaval in the commerce area would also detract from the plausibility of long-view internalism. A strong consensus regarding the commerce power held sway during the mid-twentieth century, and internalists seemed to infer that the consensus view was somehow required—required by modern economics, modern epistemology, or modern history. If the Court overturns that supposedly inevitable consensus, however, the sense of inevitability may disappear along with the consensus. Instead, it will become clear that the Court could have chosen different doctrine at other times as well—including in 1937. For if five Justices can supposedly defy the modern world in *Sebelius*, why could not five do so in *Jones & Laughlin* too? Regarding the Commerce Clause, some perhaps will argue that the *Sebelius* majority failed to understand the modern economy or reverted to pre-modern understandings of law or of the world. Whatever the merits in such arguments, however,

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191. See, e.g., CUSHMAN, *supra* note 11, at 175.

192. See, e.g., Charles Fairman, *Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases*, 54 HARV. L. REV. 1128, 1130–31 (1941) (describing contemporary reaction to Grant’s appointments).

they represent the opposite of internalist claims that economics or epistemology mandated doctrinal change in 1937. These hypothetical arguments place the majority in 2012 at odds with the modern world—not in tune with it. Exactly the same thing could have happened in 1937, too.

#### VII. CONCLUSION: AGAINST INTERNALISM

Contemporaries thought that Justice Roberts switched for political reasons; internalists argue otherwise. But internalists also, and subtly, change the question. In fact, many internalist claims only make sense as responses to a question other than, “did Roberts switch for political reasons?”

One such other question is, “what had to happen, besides political pressure, for Justice Roberts to vote as he did in 1937?” Another is, “if Roberts did not switch in 1937, would the Court have done so later?” Since many of the same factors bear on Roberts’ switch and on the likelihood of a future change, the questions are related.

Daniel Farber argues, for example, that if President Hoover had named conservatives Justices during the 1920’s, rather than liberals like Brandeis and Stone, the Court would have continued invalidating New Deal legislation no matter how Roberts voted in 1937.<sup>193</sup> Farber’s point enhances our understanding—but it does not make it less likely that Roberts switched for political reasons. Again, what Farber calls changes in the “Zeitgeist”<sup>194</sup>—White, Cushman, and the *Casey* joint opinion use different terms for the same thing—surely contribute to a full picture of what happened. But those cultural and economic changes in no way mitigate against the conclusion that political pressure prompted Roberts to switch in 1937. Roberts could not have changed constitutional law without other Justices’ votes—and their votes would not have been cast for an outcome that seemed culturally bizarre—but those things hardly means Roberts’ switch was non-political.

The second question—“if Roberts did not switch in 1937, would the Court have done so later”—is speculative, but worth asking. “Long view” internalism is best regarded as an answer to it. But if Roberts did switch for political reasons, a strong likelihood that the Court would have done so later—even if we

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193. See Farber, *supra* note 25, at 986–87.

194. *Id.* at 985.

could somehow know that—would not change what Roberts had done. In any event, if Roberts had not switched when he did, Court-packing might well have been enacted. A packed Court surely would have embraced the constitutional doctrines that, according to long view internalists, the Supreme Court was destined to adopt by economics, epistemology, or History. But as noted earlier, judicial review might well have faded away as a result.

Internalism, and the idea of an internalism-externalism debate, represent remarkable inventions. Internalism supposes that political knowledge in the ordinary sense—what almost everyone in 1937 thought they knew—rests on a philosophical error. This error is said to arise from legal realism, a philosophy inconsistent with the autonomy of law from politics. Thus, those who deny and those who accept the obvious are said to be engaged in philosophical debate.

The idea of a debate about legal philosophy understandably appeals to internalists. In some ways, it parallels their claim that conceptual developments account for constitutional revolution of the mid-1930's. It is also true, however, that internalists lose in factual debates about the events of 1937. Shesol's book offers the latest, and perhaps most compelling, demonstration.

Beyond that, the very idea of a philosophically driven debate is wrong. For one thing, internalists and externalists offer the same *kinds* of arguments about developments—both make legal and political claims. And both produce singular historical narratives. Nor does anyone rely on the kinds of arguments that might transform a historical debate into a philosophical one: that is, no one argues that the nature of law determined what happened. In the terminology introduced earlier, there are no strong internalists or externalists.

Weak internalists, it is true, do argue that legal realism blinds externalists to the truth. But weak internalists are mistaken. Since externalists accurately describe events, the question of what misled them never arises. Nor does the concept of an internalist-externalist debate capture the views actual Justices have expressed about 1937—which is anomalous, since internalists supposedly take law seriously.

Other anomalies, even ironies, surround internalism. Internalists ignore or downplay pivotal 1936 Supreme Court decisions, like *Carter Coal* and *Butler*—but they accuse opponents of overlooking the significance of legal doctrine.

Defending law's autonomy, internalists argue that legal change is predetermined by economics, epistemology, or History—by anything, it seems, except electoral politics or other considerations that could detract from the standing of the Supreme Court. Internalists claim that a new mode of thinking about the world unraveled the pre-1937 fabric of constitutional law. But their own historical writing exhibits the very formalism that they claim disappeared in the 1930's. Some internalists argue—mistakenly, I believe—that the practice of “guardian review” ended with the constitutional revolution of 1937. Yet internalism resembles nothing so much as “guardian review” in historical guise, attempting to defend the boundary between law and politics.

Philosophical idealists at the turn of the 20<sup>th</sup> century claimed that the world of the senses was illusory, and only ideas were real. To show that our senses could not be believed, they often cited the example of a straight wooden stick that, when placed in water, would appear bent. One day a philosopher brought a beaker of water to a philosophy lecture, and it contained a bent-looking stick. Asked to describe what was before their eyes, idealists in the audience said they said that they were seeing a straight stick that looked bent because it was in water. The philosopher then removed the stick, which was in fact bent. Audience members had made a mistake that only idealist philosophers would make.

In many ways, internalists resemble the philosophers in that audience. Seeing something right before their eyes, internalists claim to see something else—almost positing a world beyond the senses. But internalists are worse off than idealists, since they cannot cite anything like the laws of refraction to explain why appearances might deceive.

Unlike a stick, of course, the constitutional revolution of 1937 cannot be removed from a beaker and exhibited before our eyes. Shesol, however, comes as close to doing so as anyone can. After *Supreme Power*, an internalist will be like someone who, after the bent stick has been removed from water, continues to insist that it is straight—or who, like Shesol, describes the bent stick accurately but insists that we cannot believe our eyes.