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Understanding Changed Readings: Fidelity and Theory

Lawrence Lessig*

In this article, Professor Lessig proposes a theory to explain how new readings of the Constitution may maintain fidelity with past understandings of the document's meaning and purpose. After defining schematically some terminology for this exercise in "fidelity theory," the author proposes a general typology of four justifications for changed constitutional readings: amendment, synthesis, fact translation, and structural translation. Describing this last justification as so far overlooked, he illustrates, by way of four historical case studies, how structural translation results from a pragmatic institutional response by judges to subtle changes in interpretive context—changes both in what Professor Lessig calls the "uncontested" or background discourses of the larger society and, through what he labels the "Erie effect," shifts in law's understanding of its own genesis and nature. In the face of such change, Professor Lessig argues, legal actors maintain interpretive fidelity only by adapting old readings to new social reality. In Part II of the article, Professor Lessig describes the fact and structural translations he argues underlie the signal constitutional change of modern times, the New Deal. He considers and rejects the notions that the New Deal was unconstitutional, that it restored first principles that had been lost, that the New Deal was itself a constitutional "amendment," and that it flowed logically from the collapse of laissez-faire theory. Rather, he argues, the New Deal represents translation, both of fact—economic discourse—and of structure—understandings of the political basis of law. The effects of such contextual changes, Professor Lessig contends, are both unavoidable and consistent with fidelity.

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INTRODUCTION

Readings of the Constitution change. This is the brute fact of constitutional history and constitutional interpretation. At one time, the Constitution is read to say one thing. At another, the same text is read to say something else. No theory that ignored these changes, or that presumed that constitutional interpretation could go on without these changes, could be a theory of our Constitution. Change is at its core.

Are these changed readings always changes of infidelity? Everyone, whether originalist or not, agrees that they are not. We all have the intuition that some changes are consistent with ideals of fidelity, even if some also are not. What we lack is not the sense that change is justifiable, but rather any clear sense of just when, or why.¹

This is an essay about such change. It is an attempt, within what we could call fidelity theory,² to understand just how these changes should count within a practice of interpretive fidelity. It is the claim that many (perhaps most) changed readings are consistent with an account of interpretive fidelity. It is a rejection of the view that changed readings mean that "meanings are fluid,"³ and fidelity is bunk.

Begin with some examples to suggest the problem:

1. The Necessary and Proper Clause of Article I gives Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Exe-

1. The same point is troubled in Sanford Levinson, *Accounting for Constitutional Change*, (or, *How Many Times Has the United States Constitution Been Amended?*) (A) <26; (B); 26; (C) >26; (D) *All of the Above*), 8 CONST. COMMENTARY 409 (1991) (discussing the difference between amendment and interpretation as ways of classifying changed readings).

2. I will develop the principle of fidelity below. Suffice it here to say that fidelity is the aim to preserve meaning, intent, or purpose from a distant interpretive context within our own. Fidelity theory describes the conditions under which that achievement is possible.

3. Morton J. Horwitz, *The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 116 (1993) ("The central problem of modern constitutionalism is how to reconcile the idea of fundamental law with the modernist insight that meanings are fluid and historically changing.").

cution the foregoing Powers.”⁴ Imagine that a court had to give meaning to the phrase “necessary and proper”—*McCulloch v. Maryland*,⁵ of course, says that no court need give it meaning, but imagine, *contra McCulloch*, that a court had to decide whether a particular measure was “necessary and proper.” How would a court decide?

Start with the word “proper”: Here’s a perfectly ordinary argument for a modern American court to make:

To decide whether a particular measure adopted by the legislature is “proper” within the meaning of the Necessary and Proper Clause, we must recur to the values of the Framers. Their view of propriety—the collection of values which underlay their understanding of proper government—must determine whether a measure is proper. It is not for a court to look to the current views of propriety to update the Constitution’s meaning. What is “proper” in the sense in which the Constitution speaks is just what was viewed as proper when the Framers used that word.

It is perfectly ordinary for a court to ignore changing values of propriety when applying this old text in this context. So why, then, is the following not equally an accepted argument within current legal discourse?

To decide whether a measure adopted by the legislature is “necessary” within the meaning of the Necessary and Proper Clause, we must recur to the facts as understood by the Framers. Their view of nature—their collection of opinions about the nature of the world and how the world functions—must determine a measure’s necessity. It is not for a court to invoke modern science to update the Constitution’s meaning. What is “necessary” in the constitutional sense is simply what was viewed as necessary when the Framers used that word.

It is perfectly absurd for a court to ignore changing views of necessity when applying this old text in this context. But why, we might ask, must a court recognize changing understandings of the facts but ignore changing understandings of values?⁶ Why is a changed reading tracking facts permitted, but a changed reading tracking values not?

2. In *County of Riverside v. McLaughlin*,⁷ the Supreme Court revisited the question of how long police could hold a warrantless arrestee without presenting him to a magistrate. *Gerstein v. Pugh* had decided that the presentation must be made “promptly.”⁸ The question in *Riverside* was how “promptly” was prompt enough. Five members of the Court held that forty-eight hours was

4. U.S. CONST. art.I, § 8, cl. 18.

5. 17 U.S. (4 Wheat.) 316, 355 (1819) (giving Congress great deference in interpreting “necessary and proper”).

6. Compare Thurman Arnold’s similar point:

The principles of Washington’s farewell address are still sources of wisdom when cures for social ills are sought. The methods of Washington’s physician, however, are no longer studied. Political and legal science only look to the past. Other sciences are concerned with the present, and filled with hope and expectation for the future.

THURMAN W. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 1 (1935).

7. 500 U.S. 44 (1991).

8. 420 U.S. 103, 114, 125 (1975).

presumptively prompt enough.⁹ Justice Scalia disagreed. In his view, "no more than 24 hours [was] needed."¹⁰

What, in Justice Scalia's view, makes forty-eight hours "unreasonable" under a clause of the Constitution proscribing "unreasonable searches and seizures"?¹¹ To see the point, distinguish between legitimate reasons for a delay and the length of any delay, given legitimate reasons. In Justice Scalia's view, the only legitimate reasons for a delay are those recognized by the common law at the time of the founding.¹² Thus, a delay due to the time it takes to carry an arrestee to a magistrate is a delay for a legitimate reason, while a delay due to the police continuing an investigation of the arrestee is not.¹³ The Fourth Amendment, Justice Scalia said, constitutionalized these common law values, and regardless of society's current values, these original values the Court cannot change.

But assume a delay is due to legitimate reasons—assume, say, the delay is due to the time it takes to carry the arrestee from his farm to the magistrate's chambers. How long may that delay be? If it took the constables of the Framers' era six hours to cover the thirty miles (because covering it on horse), does that mean the police today may, consistent with the Constitution, take six hours to cover the same thirty miles?

Obviously (why?) not. While the common law settles "what reasons are legitimate?" current technology determines the length of a legitimate delay. As Justice Scalia said in classically Scalia style,

[H]ow much time, given the functions the officer is permitted to complete beforehand, constitutes "as soon as he reasonably can" . . . is obviously a function not of the common law but of helicopters and telephones. But what those delay-legitimizing functions are—whether, for example, they include further investigation of the alleged crime[—]is assuredly governed by the common law¹⁴

Why is it permissible to change the reading of the Fourth Amendment because of changes in technology, yet not permissible to change the reading of the Fourth Amendment because of changes in what is deemed reasonable? What justifies the difference in treatment?

3. In a remarkable decision just a few Terms ago, the Court considered whether a constitutionally permissible "frisk" under the Court's *Terry* doctrine could extend to a search for the purposes of discovering contraband on a suspect's person.¹⁵ Said the Court, it cannot. *Terry* justified a search to determine whether a suspect was carrying a weapon; the intrusion was justified by the

9. *McLaughlin*, 500 U.S. at 55.

10. *Id.* at 68 (Scalia, J., dissenting).

11. U.S. CONST. amend. IV.

12. *McLaughlin*, 500 U.S. at 60-62 (Scalia, J., dissenting).

13. *Id.* at 61.

14. *Id.* at 62 n.1 (quoting 1 RICHARD BURN, *THE JUSTICE OF THE PEACE, AND PARISH OFFICER* 276-77 (1837)) (emphasis omitted from BURN).

15. *Minnesota v. Dickerson*, 113 S. Ct. 2130 (1993).

potential harm to the police officer.¹⁶ If contraband was discovered in the course of this justified frisk, it could properly be seized. But once the police conclude that the suspect is carrying no weapon, the justification for the frisk terminates, and contraband later discovered is improperly discovered.

In a startling concurrence, Justice Scalia confessed that he was not quite sure. Not that he questioned Court's conclusion, given the premise that a *Terry* frisk was legitimate. Rather, Justice Scalia was unsure whether *Terry* itself was right.¹⁷ As he said, it is

a fundamental principle of constitutional adjudication that the terms in the Constitution must be given the meaning ascribed to them at the time of their ratification. Thus . . . the Fourth Amendment . . . "is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted." . . . The purpose of the provision . . . is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted—even if a later, less virtuous age should become accustomed to considering all sorts of intrusion "reasonable."¹⁸

It was not clear, Justice Scalia worried, that *Terry* met this standard, for *Terry* "made no serious attempt to determine compliance with traditional standards, but rather, according to the style of this Court at the time, simply adjudged that such a search was 'reasonable' by current estimations."¹⁹ While the common law would have permitted a stop, Justice Scalia "frankly doubt[ed] . . . whether the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere suspicion of being armed and dangerous, to such indignity."²⁰ And because Justice Scalia does not belong to the "original-meaning-is-irrelevant, good-policy-is-constitutional-law school of jurisprudence,"²¹ he would have "adhere[d] to [this] original meaning" had *Terry* been properly challenged.²²

But if the Founders would not have suffered "the indignity" of a frisk, would that mean that *Terry* must be wrong? Said Justice Scalia, no. For it is possible that "it is only since that time that concealed weapons capable of harming the interrogator quickly and from beyond arm's reach have become common—which might alter the judgment of what is 'reasonable' under the

16. *Terry v. Ohio*, 392 U.S. 1, 29-30 (1968) (finding a police officer's search for weapons reasonable where the officer only patted down the outer garments of the suspect until he felt a gun, which he removed).

17. Justice Scalia's concurrence will be startling only to those who mistake him for a knee-jerk conservative. For other "surprising" Scalia opinions, see *Burns v. Reed*, 500 U.S. 478, 496-506 (1991) (Scalia, J., concurring in the judgment and dissenting in part) (arguing for the adoption of the common law tradition of no absolute immunity for officials seeking search warrants); *County of Riverside v. McLaughlin*, 500 U.S. 44, 59-71 (1991) (Scalia J., dissenting); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 680-87 (1989) (Scalia, J., dissenting) (arguing that urine testing constituted an invasion of privacy); *Arizona v. Hicks*, 480 U.S. 321 (1986) (Scalia, J.) (holding that officer must have probable cause to believe item is evidence of a crime to justify its seizure under the plain view doctrine).

18. *Dickerson*, 113 S. Ct at 2139 (1993) (Scalia, J., concurring) (quoting *Carroll v. United States*, 267 U.S. 132, 149 (1925)) (citations omitted).

19. *Id.*

20. *Id.* at 2140.

21. *Id.* at 2141.

22. *Id.*

original standard.”²³ *Terry* did not discuss “technological change,” and hence the question remained open for Justice Scalia.

Again, though, why can a court update for technology but not for virtue? Why is it obvious that technology should matter, but that we live in a “less virtuous age [when] all sort of intrusion [is considered] reasonable” should not?

In each example, there is a change in the context of interpretation that many would agree should justify a changed reading, consistent with the demands of interpretive fidelity (“necessity,” helicopters and telephones, handguns). In each, there is also a change in the context of interpretation that many would argue could not justify a changed reading, consistent with those same demands (“proper,” reasons for a delay, dignity). Fidelity needs to distinguish, but what distinguishes these two types of changes is not clear. We have plenty of intuitions, but no satisfactory account.

This article is an attempt to provide such an account. I begin with a typology of justifications for changed readings. There are four. Three should be quite familiar; the fourth is something new. I use this array to understand a confusion in modern legal thought about the most dramatic set of changed readings in recent constitutional history, the New Deal. Most have assumed that unless one could show either (1) that the readings of the Constitution for the forty years before the New Deal had been wrong, or (2) that some political act sufficed to authorize this judicial transformation, then (3) the changed readings of the New Deal would remain unjustified. Given the choices, a few pick (2), most follow (1), and the balance (conservatives or cynics) choose (3).

Bruce Ackerman’s account is the most ambitious example of option (2).²⁴ In Ackerman’s view, (a) the New Deal radically changed the Constitution; (b) change is justified by constitutional amendment; (c) therefore, an amendment must justify the New Deal; and high school history to one side, indeed, (d) there was a constitutional amendment, or the functional equivalent of a constitutional amendment, in the late 1930s sufficient to justify the changes of the New Deal. By understanding the nature of this amendment, Ackerman says, we can understand the New Deal as justified.²⁵

What lies latent in all three views, I suggest, is one common idea—the notion that change *requires* amendment. It is this assumption that I challenge directly in the account below. As I argue, we have long recognized cases where, in the face of changes in context, the proper act of fidelity is a changed reading of the constitutional text—constitutional change, that is, without constitutional amendment. As others have before, I will call this a justification of *translation*, and below, I develop this notion to distinguish two very different kinds of justifications from translation.²⁶

23. *Id.* at 2140.

24. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) [hereinafter ACKERMAN, *WE THE PEOPLE*]; see Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989) [hereinafter Ackerman, *Politics/Law*].

25. See generally ACKERMAN, *WE THE PEOPLE*, *supra* note 24.

26. The idea of using the metaphor of “translation” for understanding the practice of interpretive fidelity was introduced most famously by Paul Brest, *The Misconceived Quest for the Original Under-*

Once these two aspects of translation are distinguished, I will then argue that the New Deal changes are best understood as the interaction of these two kinds of justification from translation. The more familiar of the two relies on changes in the economic and social structure of the nation, an account relatively common in New Deal lore.²⁷ The less familiar relies upon changes in the nature of law itself—in an account modeled upon (odd as this may now sound) *Erie R.R. v. Tompkins*.²⁸ Rather than a rediscovery of the Constitution of Chief Justice Marshall, or an amendment of the Constitution of *Lochner*,²⁹ or a constitutional putsch, I suggest that we can see the New Deal as justified in just the way *Erie* may be justified—both by very old (and I would say unshakable) arguments of constitutional fidelity.

I should be clear, however, about what this theory is not, and what it cannot be. This is not a theory of stare decisis. The question I want to ask is what changed readings are consistent with the constraint of fidelity. As I will understand (so as to ignore) stare decisis, stare decisis is a subsequent constraint on the range of possible changed readings, imposed for reasons independent of fidelity—for example, for stability or judicial prudence or, in some cases, rule of law.³⁰ So understood, a changed reading may be permissible under a principle of fidelity, but nonetheless impermissible under the constraint of stare decisis. My concern is with the first constraint—the justified changed readings that stare decisis selects among.

Finally, what this essay cannot be: I offer here a theory for understanding changed readings, as such changes are allowed by changes in context, in particular contexts covering the late nineteenth and early twentieth centuries. To describe these changes in context will require something of an account of history, an account that will of necessity be incomplete. For a richer (read: better) account of the history, you should turn to the history of those whose theories I attack—Bruce Ackerman, Morton Horwitz, and others. I do not pretend to do the history necessary to sustain this theoretical account. My hope instead is to provide a theory to better explain these other histories.

I. JUSTIFYING CHANGED READINGS

I begin with some terminology. By “interpretive fidelity,” I mean any practice aimed at preserving something semiotic from the past, whether one calls that something meaning, or intent, or purpose.³¹ For the purposes of what fol-

standing, 60 B.U. L. REV. 204, 205 (1980). For an account of its origin and scope, see Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1171 n.32 (1993); see also JAMES BOYD WHITE, *JUSTICE AS TRANSLATION* (1990). For an exhaustive account of translation's closest cousin, see WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994).

27. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 308-15 (2d ed. 1988).

28. 304 U.S. 64 (1938).

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

30. On the relationship between stare decisis and the rule of law, see RUTI TEITEL, *TRANSITIONAL JUSTICE* ch. 2 (forthcoming 1995) (manuscript on file with the *Stanford Law Review*).

31. I will not attempt to distinguish among these different notions. The argument of this article applies regardless of which of these one selects. I will also not attempt to define “meaning.” Instead, use the label “meaning” to stand in for any particular theory of meaning one wants.

lows, it does not matter which of these one tracks. I will simply speak about tracking meaning, though I do not purport to say fully just what meaning is. It is enough to say something about how meaning is made, or better, it is enough to offer something of a heuristic to help us think about how meaning is made.

In my account, there are four moving parts to a practice of interpretive fidelity.³² Meaning is one. Think of the balance like this: Meaning is a function of the text read (the second moving part), and the context against which the text is read (the third). By "text," I mean any artifact created at least in part to convey meaning; by "context," I mean just the collection of understandings within which such texts make sense. This essay is a text; the understandings that go with its placement in a law review are part of its context. Honking a horn is a text; the celebration of a local team's victory could be its context. In each case, text and context together permit a range of meaning; as either text or context changes, so may the product change as well.

Text and context make meaning. How does meaning fit with fidelity? Fidelity is the aim to preserve meaning. How depends. In ordinary conversation, one selects a text to convey, in that context, the meaning one wants to convey. If one wants to convey the same meaning in two different contexts, then one may have to select two different texts. If in a room of Germans one wants to say, "thank you," one selects the text, "*Ich danke Ihnen*"; if one then moves to another room filled with French, one selects the text, "*Je vous remercie*."

In law, meanings get made through the application of legal texts in individual cases. The cases are the contexts; a statute, for example, is the text. A statute says, "No dogs in the park," and its meaning gets made as it is applied by, for example, a court, to individual cases presented. Unlike ordinary conversation, however, a court cannot select a new legal text in every new context. Instead, the legal texts remain the same across contexts. What changes across contexts is the *application*, or as I will call it, the *reading* of the legal text in context. What the lawyer or court does is find a *reading* a legal text in a new context, so as to preserve the meaning of an earlier reading of the legal text in an earlier context.

A *reading*, then, is the fourth moving part in this practice of interpretive fidelity. The interpreter of fidelity tracks the meaning of different readings in context. We can represent the point schematically like this.

32. This contextualized understanding of meaning resembles the notion of "pragmatic hermeneutics" discussed in James T. Kloppenberg, *The Theory and Practice of American Legal History*, 106 HARV. L. REV. 1332, 1336 (1993) (reviewing MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992)). As Kloppenberg suggests, pragmatic hermeneutics is grounded in the efforts of scholars such as Quentin Skinner. *Id.* at 1335 (citing QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT* (1978)); see also STANLEY FISH, *DOING WHAT COMES NATURALLY* 1-3 (1989) (criticizing the conception of meaning in RUTH KEMPSON, *PRE-SUPPOSITION AND THE DELIMITATION OF SEMANTICS* 60 (1975)).

FIGURE A

As I said above, readings change. But the figure should make plain why this is so. If meaning is a function of text in context, then it should be clear that in at least some cases, a changed reading could be consistent with fidelity. For some changed readings simply accommodate changes in context, by aiming to find a reading in the new context that has the same meaning as a different reading had in a different context.

So again, the interpreter of fidelity tries to preserve meaning across contexts (C_1 , C_2) by selecting a reading (R_1 , R_2) of a legal text (T) that, in context, has the same meaning (M) as an earlier or original reading. If the meaning of these readings across contexts is preserved, or the same, then fidelity has been secured.

Thus, from the fact that a reading has changed, one cannot conclude that meaning has changed (again, the change could be an accommodation). Likewise, from the fact that a reading has not changed, one cannot conclude that meaning has stayed the same (for again, the changed context could change the meaning of the old reading in the new context). To know whether meaning has changed, then, one must track both changes in text and changes in context.

Much more could be said qualifying and defining these initial sketches, but I want to pass over precision just now, to move to examples that illustrate the utility of speaking in this way.

A. *Easy Cases*

My objective is to give an account of how changed readings may be justified. If meaning is a function of text and context, then we can describe the possibilities with the following matrix:

FIGURE B

	Unchanged text	Changed text
Unchanged context	[1] No changed reading	[2] Changed readings: amendment and synthesis
Changed context	[3] Changed readings: fact and structural translation	[4] Changed readings: mixed translation and synthesis

As the matrix suggests, from the perspective of fidelity, some cases are easy. Consider first box 1: If meaning is a function of a reading in context, and if a reading depends upon a legal text and its context, and if neither the legal text nor context has changed,³³ then neither may readings change, if meaning is to be preserved. Or at least, neither may readings change *because of the demands of interpretive fidelity*. For on the account presented here, readings change to accommodate changes in the legal text or context; here no change is justified.

Box 2 is a second easy case—the case of a changed text within an unchanged context. When a legal text changes—say, because of an amendment—and the context remains the same, then the meaning of that text in context will, and should, change. And if meaning should change, then a changed reading that tracks the changed text raises few problems of justification.³⁴ *Brushaber v. Union Pacific R.R.*³⁵ changed the reading of the taxing power offered in *Pollack v. Farmers' Loan & Trust Co.*³⁶ It did so because in the years between *Pollack* and *Brushaber*, Congress had proposed, and the states had ratified, the Sixteenth Amendment. If the Sixteenth Amendment was properly ratified,³⁷ then the changed reading in *Brushaber*

33. Of course, "change" is not self-defining (indeed, this is the whole point of this article), but includes only "relevant" change, which itself requires an interpretive judgment. Nothing in the mechanics I present should suggest that this process is at all mechanical. What will be "relevant" is a contextualized, local judgment.

34. But few is not none. During the early 19th century, and then again in the late 19th and early 20th centuries, significant debate raged over whether there were limits to the possible legitimate amendments to the Constitution, beyond those specifically articulated in the text itself. See JOHN R. VILE, *THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT* 86, 157-82 (1992).

35. 240 U.S. 1 (1916).

36. 157 U.S. 429 (1895).

37. Ever since its ratification, a persistent number of constitutional lunatics have gone to jail asserting that the 16th Amendment was not properly ratified. See, e.g., *Coleman v. Commissioner*, 791 F.2d 68, 69 (7th Cir. 1986) (noting that while the government may not punish individuals for their

was legitimate. The legitimacy of the changed reading turns on the pedigree of the change in the constitutional text.³⁸

A third easy case is suggested by *some* of the cases within box 3—changes in context while the text remains the same. (I emphasize “some” since, as I will describe below, there are two importantly different ways in which “context” may change, and whether the case is easy depends on which.) As I have defined it, context is an amalgam of understandings and facts and theory and whatever else may be relevant to the meaning of a particular text. But we can begin with perhaps the simplest change in context: an alteration of the facts of a particular case. Unlike texts, (sometimes) facts change without the plan of anyone. When they so change, the effect on meaning will (ordinarily)³⁹ be unsought. In such cases, a changed reading could restore the original meaning in spite of these changed facts.

Here’s a simple example. Imagine a statute that requires: “Drivers who speed shall be found negligent.” If in one case a driver exceeds the speed limit by ten miles per hour, then the proper reading of this statute in this context is that the driver is speeding and thus negligent. If in a second case the driver drives ten miles per hour under the speed limit, then the proper reading of this statute in this context is that the driver is not speeding and (*ceteris paribus*) therefore not negligent. Different readings track different facts, or again, readings may change to track differences in facts while preserving the meaning of the text read.

We can expand this category of “facts” beyond facts that apply to a particular case at hand and observe the same point. There was no television when the First Amendment protected “the Press.”⁴⁰ Nonetheless, a changed reading of the First Amendment that includes television within its scope could be a reading of fidelity. “Disks” are not “papers,” yet a changed reading of the Fourth Amendment’s “papers”⁴¹ that would cover disks could be a reading of fidelity. In each case, something like the “facts” from an original context change, and readings that ignored these changes could change the meaning of

convictions about the illegitimacy of the 16th Amendment, it may punish their consequent failure to pay taxes).

38. I realize that speaking of a change in text as inducing a “changed reading” is not the traditional way of understanding changed reading. But I speak about it this way more for what this way of speaking suggests about the two other examples of changed readings than out of any need to insist on this definition of “changed reading.” When § 2 of the Sherman Act is changed, we can say either that the text of the Act has changed or that the reading of the Act has changed in response to the textual change. Both statements make sense of what has happened. The intuition that no sharp line separates saying the “Act has changed” and the “reading of the text has changed” comes in part from the complexity of the notion of the statute itself. See, e.g., Richard A. Posner, *Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. CHI. L. REV. 433, 435 (1992) (noting that the ability to read a statute presupposes a vast linguistic, cultural, and conceptual apparatus). When the Sherman Act is changed, is a new act created, or is an old act amended? The same ambiguity haunts the question of whether a reading is different when a text has changed.

39. Guido Calabresi discusses the counterexample, where workers’ compensation statutes are enacted with damage amounts that are intended to change in real value over time, because, for example, of inflation. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 40 (1982).

40. U.S. CONST. amend. I.

41. U.S. CONST. amend. IV.

the text read. Likewise, a reading of the original text to accommodate those changes in facts can be seen as a change of fidelity.⁴²

Facts come in many forms, and no simple line divides the facts of a particular case from facts affecting broad classes of cases.⁴³ For our purposes, however, the difference is not important. Whether conceived broadly or narrowly, all "facts" are background to the particular text read, and a change in any could in principle constitute a change in the context of the text read.⁴⁴ What is important here is not to draw a line between changes that count and changes that don't; instead, what is important is to identify what *kinds of argument* rely upon changes in context.

In what follows, whenever the interpreter points to a change in the background to justify a changed reading in the foreground, I will say that she relies on an argument of translation. Arguments of translation will fall into two classes. Whenever she relies upon the most narrow class of such background changes—what we would ordinarily call "the facts"—I will call it an argument of fact translation. When she points more broadly, to understandings underlying the dispute in a particular case, I will call it an argument of structural translation. The scope of this second class of argument is no doubt yet unclear, but is the focus of Part I.C below.

Why "translation"? A literary translator's practice is to construct a second text in a second (or "target") language to mirror the meaning of a first text in the first (or "source") language—again, to construct the text, "*Je vous remercie*," in the context of a room of French speakers to mirror the meaning of, "*Ich danke Ihnen*," in a room of Germans. This is the practice of the translator in law as well. She constructs a *reading* in the second context to preserve the meaning of a *reading* within the first, where, again, the context within which both readings are made includes a legal text and a context background to that text. If we conceive of these different interpretive contexts

42. See, for example, the discussion of the Mann Act in *United States v. Wolf*, 787 F.2d 1094, 1101 (7th Cir. 1986) ("[I]t was not the intention of the Framers of the Act to freeze the meaning of 'immoral' as of 1910, when the Act was passed."); see also Lessig, *supra* note 26, at 1189-1211 (discussing methods "to preserve original meaning, not just in the original context but as applied in the current context"); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 194 (1986) (discussing the difficulty of deciding whether the Mann Act's term "immoral practice" should refer to the values of the time when the Act was passed); Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 381 (discussing how, in certain contexts, failing to reinterpret a statute in light of current realities can frustrate the statute's intent).

43. Some define these as adjudicative and legislative facts, but no bright line divides facts in the narrow sense from facts in the broad sense. See e.g., JOHN MONAHAN & LAURENS WALKER, *SOCIAL SCIENCE IN LAW* 129-277 (2d ed. 1990) (exploring and criticizing the common distinction between legislative and adjudicative facts). For an intriguing discussion about how the Supreme Court should deal with legislative claims requiring a resolution of questions of fact, see Henry Wolf Bickel, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6, 23 (1924) (proposing that the Court establish rules to postpone review until the parties can resolve factual disputes extrajudicially).

44. See Emmet T. Flood, *Fact Construction and Judgment in Constitutional Adjudication*, 100 YALE L.J. 1795, 1805-08 (1991) (arguing that historical facts are not only objects of interpretation but also conditions of interpretation which constitute the discursive tradition of which the interpreter is necessarily a part).

as just different languages, then we can link the practice of the legal interpreter to the practice of the translator: Both seek a text in a second interpretive context that preserves the meaning of another text in an original interpretive context.⁴⁵

Amendment (changed text) and fact translation (changed context) are the extreme (hence easy) cases of justified changed readings. Each marks the boundary of two other, middle cases—what I will call “synthesis” and “structural translation.” Consider now the contours of these two middle (and more interesting) cases of justified changed reading, before considering how they connect with the cases represented in box 4 of the matrix above—cases of mixed synthesis and translation.

B. *Justifying Changed Readings: Synthesis*

Some amendments change constitutional text directly: The Twenty-First Amendment directly repealed the Eighteenth; the Twelfth Amendment directly changed the method for electing a president described in Article II. But often the effect of an amendment is indirect, felt beyond the text it modifies, imposing, in Dworkin’s sense, a “gravitational force” on other parts of the text read.⁴⁶ This is the effect tracked by the changed reading I call synthesis. But we must be clear about the source of this indirect effect to understand its significance.

Here is one relatively uncontentious way in which this gravitational pull can matter: All texts are read against a background of interpretive principles, or rules for reading, some of which we can call canons of construction.⁴⁷ Some of these canons direct how a particular text is to be read along side other parts of the same text: An interpretive tradition might, for example, have a principle of holism in interpretation. “Holism” means that how one part of a text is read may affect how a second part of the same text is read as well. So too with a canon against redundancy: If a text must be read to avoid a reading that makes any part redundant, then by adding to a text, one might create a different reading in a different part of the same text, to avoid rendering the first part redundant. Any change so justified is a change of synthesis.⁴⁸

The intuition is simple enough. Consider a somewhat stylized example to isolate some of its moving parts. Imagine a statute entitled the Federal Bank Regulation Act. The first two sections of this statute provide:

45. I develop this point further in Lessig, *supra* note 26, at 1189-1211.

46. RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 111 (1978).

47. See, e.g., Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989) (discussing different interpretive functions served by the canons of construction).

48. This is, no doubt, a narrow conception of “synthesis,” one focused less on substantive synthesis than on interpretive synthesis. A broader principle of synthesis would examine the interaction of the substance of different constitutional principles, for example, how the ideals of the 14th Amendment should be read against the ideals of the 1st Amendment. See, e.g., Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 151-55 (1992) (arguing that the adoption of the 14th Amendment affected the kinds of speech courts were willing to protect under the 1st Amendment).

- (1) There shall be an agency established for the purpose of advancing regulation of any bank in which the federal government has an interest, within the reach of the federal commerce power.
- (2) The President shall appoint five commissioners to this agency, who shall serve at his pleasure.

Anyone reading this text so far would have quite a clear idea of what was being regulated, and at least some idea of the structure of the entity regulating it. Now imagine the following section 3:

- (3) For the purpose of coordinating conservation programs, the Administrator of the Environmental Protection Agency shall appoint three subcommissioners to this agency, who shall serve at his pleasure.

Upon reading this section, our reading of the earlier sections begins to change. Suddenly we are left wondering what sort of bank the statute regulates. If we think the statute is regulating financial institutions, we wonder what "conservation" programs are, and what place the head of the EPA has in financial regulation. Imagine that the statute ended with the following section 4:

- (4) For purposes of this statute, a "bank" shall not include any land presently regulated by the South Florida Coastal Commission.

The point once made is easily remarked: As the statute is read, if we must find a meaning that is consistent across the statute,⁴⁹ then later parts of the statute modify the meaning of earlier parts. Later parts, that is, must be synthesized with earlier parts, and this synthesis can change the reading of what went before.

The example is a special case that suggests a more general point. For imagine a statute that has been modified over time, with later sections added years after the earlier. In this case, later additions really can change the meaning of earlier texts, as the effect of the later additions, along with then existing canons of construction, yield meanings of the earlier sections that are different from the meanings those sections once had.⁵⁰ Here, through synthesis, the later transforms the earlier.

Synthesis thus describes how later texts come to affect the meaning of earlier texts.⁵¹ Within a tradition of written constitutions, a question of synthesis gets raised with every amendment. A tradition could choose to ignore this

49. See, e.g., Sunstein, *supra* note 47, at 454 (noting that "the idea that the language of a particular provision will be taken in the context of the statute as a whole and will not be interpreted so as to do violence to the statutory structure" is a central canon of statutory construction).

50. For an excellent discussion of the phenomenon of modification of canons of construction, see Nancy Eisenhauer, *Implied Causes of Action Under Federal Statutes: The Air Carriers Access Act of 1986*, 59 U. CHI. L. REV. 1183, 1190-94 (1992) (discussing the "context canon").

51. Within law, the notion of synthesis has been most concretely developed in Ronald Dworkin's chain novel. RONALD DWORIN, *LAW'S EMPIRE* 228-32 (1986). The phenomenon, however, is not limited to law. Consider T.S. Eliot on art: "When a new work of art is created . . . something . . . happens simultaneously to all the works of art which preceded it." T.S. ELIOT, *Tradition and the Individual Talent*, in *SELECTED ESSAYS* 3, 5 (rev. ed. 1950); see also SABINA LOVIBOND, *REALISM & IMAGINATION IN ETHICS* 142 (1983) (discussing Jorge Luis Borges' comment, "Every writer creates his own precursors. His work modifies our conception of the past, as it will modify the future." JORGE LUIS BORGES, *Kafka and His Precursors*, in *LABYRINTHS* 236, 236 (1981)).

synthetic effect—it could choose, that is, to treat each clause of the Constitution as a Constitution on its own.⁵² But our constitutional tradition has not so chosen. This idea has been pointed to by a wide range of jurists—from Justices Stevens and Ginsburg to Judge Posner⁵³—and is best presented by the case of *Bolling v. Sharpe*.⁵⁴

Bolling raised the question whether the principle of *Brown v. Board of Education*⁵⁵ would apply in the District of Columbia. *Brown* rested upon the Equal Protection Clause of the Fourteenth Amendment. By its terms, that clause applies only to states. Thus, when the Supreme Court decided *Brown*, striking all de jure state segregation, it confronted an embarrassing textual gap: Would *Brown* extend to de jure segregation in the District of Columbia as well? *Bolling* held that it did.⁵⁶ In a decision that has since been understood to stand for the proposition that there is an “equal protection component to the Due Process Clause,”⁵⁷ the Court held that the federal government, like the state governments, could not segregate public schools.

What is significant about the actual opinion, however, is not that the Court found an “equal protection component” to the Due Process Clause. No such “component” was ever “found.” As Justice Souter has explained,

Bolling is so often described as a case which held that due process has an equal protection component. In point of fact, that description of *Bolling* came later

52. This is the method John Ely calls “clause-bound” interpretivism. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 12 (1980). The term describes well some of the central tensions within our own constitutional tradition, and no doubt an argument is required to show that synthesis should be a practice of our own tradition. Whether it should be depends in part on what practice one conceives the Constitution to constitute. For example, imagine receiving three letters in the mail, each referring to the very same subject. In order to apply interpretive synthesis to all three, we must treat the three as if they were written by the same person. Likewise, in order to maintain the consistency of our political system, we apply the same assumption to our Constitution. To put it another way, the chain-novel product of eight generations—the Constitution—as the writings of a single political author—the American people.

53. Justice Ginsburg commented on a paper by Michael Perry as follows:

There are originalists who treat each alteration in our Constitution as hermetically sealed. But are there not many others prepared to interpret the document in light of its layered history, its sedimentary quality?

...

Consider this simple example. The 1868, but not the 1787, Constitution guaranteed equal protection. Would Perry’s originalist say that the equal protection guarantee, because it is lodged in the 14th amendment, applies only to the states, not to the federal government? If one reads equal protection into the 5th amendment, so that the document is kept coherent or harmonious, can she no longer be accommodated in the originalist camp?

Ruth Bader Ginsburg, Comments on “‘Interpreting’ the Constitution,” Remarks Before the AEI Conference on “How Does the Constitution Establish Justice?” 4, 5 (Sept. 11-12, 1987) (copy on file with the *Stanford Law Review*); see also John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. CHI. L. REV. 13, 21-24 (1992) (arguing that the meaning of prior constitutional amendments is inevitably altered by the adoption of later amendments). Judge Posner expresses the same view. RICHARD A. POSNER, *OVERCOMING LAW* 227-28 (forthcoming 1995).

54. 347 U.S. 497 (1954).

55. 347 U.S. 483 (1954).

56. *Bolling*, 347 U.S. at 500 (“In view of our decision that the Constitution prohibits the states from maintaining segregated public schools. It would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.”).

57. Stevens, *supra* note 53, at 20 (stating that in *Bolling*, “the Court unanimously found what is now known as the equal protection component of the Due Process Clause embedded in the word ‘liberty’ as it is used in the Fifth Amendment”).

. . . What the Court did in *Bolling* was not simply to say, look, all along there was an equal protection component in due process. They said something very different. They went through a kind of fairness analysis and ultimately I have always read *Bolling* as coming down to this question. We are going to apply to segregation in the Washington, D.C. schools the old kind of . . . substantive due process analysis that even the conservatives accept. We are going to say is there, at the present time, a legitimate governmental object which is being served by this particular restriction, that is, the restriction on total freedom to attend schools in an integrated basis? The most interesting thing about *Bolling* is that the Court said, no, that is not a legitimate governmental objective.⁵⁸

But if not some equal protection component to the Due Process Clause, what would explain why it was no longer a "legitimate governmental objective" to segregate on the basis of race? Justice Souter's explanation is an account of synthesis: The pursuit of inequality, we can understand him to be saying, can no longer be understood to be a legitimate federal interest, because the best reading of the Constitution as amended now limits the range of permissible governmental ends. Federal powers can no longer be used to advance interests of racial inequality, since the middle republic, born after the Civil War, has removed these interests from the list of legitimate governmental ends. Before the Fourteenth Amendment, this reading would have been incorrect; and after the Fourteenth Amendment, if it is correct, it is correct not because it follows directly from the changed text, but instead because of the effect I have called synthesis.

One could well argue that this particular application of synthesis is weak, or wrong, or obvious. My aim here is not to defend it. My aim is to describe. And what *Bolling* describes is a changed reading that cannot turn on a changed text directly, but instead must turn on implications drawn indirectly from a changed text.⁵⁹ This is the form of the argument from synthesis.

C. *Justifying Changed Readings: Structural Translation*

I said at the start that we should distinguish four moving parts in this practice of interpretive fidelity: The interpreter of fidelity seeks *readings* of legal *texts* in the current interpretive *context* that preserve the *meaning* of an earlier reading in an earlier context. I have so far defined reading and text; I have promised not to define meaning. I want now to be a bit more precise about context.

Central to the argument of this essay is a distinction between two aspects of an interpretive context—a distinction well known outside of law, though nonetheless not easily described. It is the distinction between aspects of an interpretive context that at any one time are contested, or up for grabs, or political, and

58. *Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States: Hearings before the Committee on the Judiciary, United States Senate, 100th Cong., 2d Sess. 305 (1990)* (statement of Judge Souter). The same point is made by Justice Stevens. See Stevens, *supra* note 53, at 21-23.

59. For another example of such change, see David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1742-44 (1991) (arguing that the meaning of the 1st Amendment has changed as other parts of the Constitution have changed).

aspects that are at the same time taken for granted, uncontested, given. These are imprecise words, and to some extent, full precision is impossible. But we can begin to understand what these imprecisions aim at in the following account.

In any context, legal or not, within any discourse, whether cultural or scientific or social, some things are argued about; most things are not. Some things are up for grabs; others are taken for granted. We argue about what law applies; we don't argue about what law is. We argue about how a text should be read; we don't argue about whether reading is possible. We argue about whether I should wear a tie; not about whether I should wear a dress. Not that we couldn't argue about these matters—obviously, we could. Not even that we never argue about (at least some of) these matters—there are, after all, costume parties. And not that there is not a “we” for whom these matters are up for grabs—deconstructionists dazzle with the problem of reading. But caveats notwithstanding, in each of these cases—and more generally, always—there is the normal against which exceptions get drawn. There is a space within which disagreement occurs, and a border that is not crossed. Disagreeing with someone about abortion makes you an opponent; disagreeing with someone about whether children should be tortured makes you an alien.⁶⁰

The argument of this article hangs upon being able to speak about this distinction between those things argued about and those taken for granted—between that part contested and that part uncontested, between what everyone knows or that which we “can't help [but] believ[e],”⁶¹ and what can be doubted or can be thought otherwise.⁶² However known, however clear, however

60. It is tempting to think that what distinguishes contested from uncontested discourses is something in the nature of the discourse itself—that, for example, value discourse is essentially contested, while fact discourse is not. In my view, no such line is possible. Values, no less than facts (indeed, I think far more than facts) are suitable for uncontested discourse, and they function, just as facts do, to constrain contested discourse. For example, discourse about whether one should torture children for sport is a fundamentally uncontested discourse of morality.

61. Letter from Oliver Wendell Holmes, Jr., to Harold J. Laski (Jan. 11, 1929), in 2 HOLMES-LASKI LETTERS 1124, 1124 (Mark DeWolfe Howe ed., 1953).

62. Cf. LOVIBOND, *supra* note 51, at 108 (arguing that uncertainty in any field of study “take[s] place against the background of a stable world-picture, or total theory, by reference to which we determine the truth or falsity of what is dubious”). Germans would call this uncontested the *stille Selbstverständlichkeiten*, see ALEXANDER BLANKENAGEL, TRADITION UND VERFASSUNG 93-97 (1987)—understandings by all that go without saying in a particular linguistic exchange. Social or political scientists or theorists would call it “hegemony”—a term more manageable than *stille Selbstverständlichkeiten*, but nonetheless a term perhaps “better left at home.” William A. Gamson, David Croteau, William Hoynes & Theodore Sasson, *Media Images and the Social Construction of Reality*, 18 ANN. REV. SOCIOLOGY 373, 381 (1992). As Gamson et al. describe the uncontested for the purposes of media regulation:

We would do better to abandon the term [hegemony] while saving an important distinction between two separate realms of . . . discourse.

One realm is uncontested. The social constructions here rarely appear as such to the reader and may be largely unconscious on the part of the image producer as well. They appear as transparent descriptions of reality, not as interpretations, and are apparently devoid of political content. Journalists feel no need to get different points of view for balance when they deal with images in this realm. When they conflate democracy with capitalism or matter-of-factly state that the United States is attempting to nurture and spread democracy abroad, they express images from this realm.

Id. at 382.

shown, however understood, there is a part of the background of understandings or beliefs or practices not directly challenged in a particular dispute; presuppositions taken for granted by both sides to a dispute, against which any dispute proceeds; a world of uncontested understandings that define what appears natural or necessary or true in any particular context. This uncontested is not simply the "context" of a particular dispute, for some aspects of an interpretive context are plainly contested: Debates about abortion funding, for example, proceed within a context in which abortion itself is contested; both contests, however, proceed within a context in which equality is said to be a constitutional ideal, and in which the Constitution is taken as foundational. This uncontested is instead a part of the context that has a constitutive and constraining effect on any dispute within the context, in ways we need yet to explore.

For ease of explication, I will simply name this distinction by saying that within any interpretive context, some discourses are "contested" while others are "uncontested." But I must be quick to offer three qualifications and make one plea.

First, the qualifications. Obviously, to call a discourse "uncontested" is not to say that no one can contest it: "Contestable," as I will use the term, is individual; "contested" is social. An individual may contest what the ordinary person in a community does not: That two plus two equals four is uncontested, even if a child says the sum should be five; that women are equal citizens is uncontested, even though some argue for a more traditional role; that women at one time were not equal citizens is uncontested, even though Mill⁶³ or Wollstonecraft⁶⁴ argued that they were or should be. Something is "uncontested" within a particular interpretive context because of what others in that context believe and do. In particular, it is uncontested when one person's questions about it do not raise questions in the minds of others.

Second, to call a discourse "uncontested" is not to say that its object is something necessary or natural or fixed, or the product of something other than human agency. I happily grant that the full range of this background reality may be socially constructed, or, in the crits' slogan, that "it's all politics."⁶⁵ Social and political structures may all be the product of human agency, which means simply that at some time, under some condition, things that now seem natural could be made to seem otherwise. But this does not mean that everything could be made otherwise just now. The world may be socially constructed, but it is also differentially plastic.

Third, to say that a discourse is "uncontested" is not to say that it is obvious to all that it is uncontested, or even that all recognize it as a discourse. For the most part, that which constitutes the uncontested remains invisible. The effect of an uncontested discourse is felt not so much because it is recognized as an

63. JOHN STUART MILL, *THE SUBJECTION OF WOMEN* 1 (New York, D. Appleton and Co. 1869).

64. MARY WOLLSTONECRAFT, *A VINDICATION OF THE RIGHTS OF WOMAN, WITH STRICTURES ON POLITICAL AND MORAL SUBJECTS* ix (Alfred A. Knopf, Inc. 1992) (1792).

65. ROBERTO MANGABEIRA UNGER, *SOCIAL THEORY: ITS SITUATION AND ITS TASK* 10 (1987).

uncontested discourse and given authority based on that recognition. The effect instead comes from being unnoticed. What is crucially difficult about this whole way of speaking is that it is a discourse about ghosts. To talk about the effect of the uncontested is to talk about something that is nowhere apparent from the debate or its context. Yet it is something, I suggest, that has an extremely important effect on reading texts over time.

Thus, to say that a discourse is uncontested is not to say that no one questions it, or that it is incontestable for everyone, or that it has always been or always will be uncontested, or that it is recognized and acknowledged as uncontested. It is instead simply to pick out an ordinary point of view at a particular time. It is to refer to a fundamentally social understanding⁶⁶ that operates to define and constrain discourse within that context.

Now obviously, this way of speaking is impossibly difficult. Always, the attempt to characterize certain views as taken for granted or uncontested will be met with the charge of naivete or oversimplification. Always, it will be possible to find people who disagree with what I claim is taken for granted; always, it will be possible to point to a subtlety that any characterization will miss. But my plea, then, is this: We cannot deny the place of what I have labeled the uncontested. When Justice Bradley writes,

The civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life,⁶⁷

we cannot deny that he is just speaking from a different world. The difference between his world and ours is not explained by saying they were sexists, and we (we?) are not. The difference is more fundamental. What the argument that follows needs is just a way to point to these more fundamental differences, and a way to speak about them changing. I confess that pointing is not explaining, but my point here is not to explain the source or nature of these uncontested discourses: It is to understand their effect. To see this effect, one must pass over these quibbles of qualification.

If we can settle enough to agree to allow the distinction that these labels purport to sketch to proceed, then I can remark what is essential to what will follow. For however difficult the "uncontested" is to define, what is certain is that the uncontested changes. What was uncontested at one time becomes contested at another; what is contested now may become uncontested later. The status—contested or uncontested—of these contested or uncontested dis-

66. The notion of a social understanding is developed in ELLIOT ARONSON, *THE SOCIAL ANIMAL* 1-13, 415-43 (7th ed. 1995). My definition of a contested concept differs from Gallie's notion of "essentially contested concepts." W.B. Gallie, *Essentially Contested Concepts*, 56 *PROC. ARISTOTELIAN Soc'y* 167, 169 (1956) (arguing that certain concepts will be endlessly contested). In my view, an "essentially contested concept" could become uncontested at a particular time, a distinction Gallie does not address.

67. *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141 (1872).

courses changes, and what structural translation asks is how such changes should matter to interpretive fidelity.

That change occurs cannot be denied.⁶⁸ How change happens is more complicated—sometimes quickly, sometimes slowly, sometimes by decree, sometimes by consensus. Think of uncontested discourses as the banks of a river within which contested discourses flow. As the banks shift (as the uncontested shifts), so too will the movement of the water change (so too will the contested discourses shift). These shifts can be dramatic—a canal, for example—or evolutionary—erosion. The question for structural translation is how these shifts will be accommodated within norms of interpretive fidelity.

Ultimately, my argument about structural translation rests upon an empirical claim about what courts or judges actually do in the face of this shift in the invisible, uncontested discourses that stand behind any discourse in law. In the face of this empirical claim, the role of theory will be to help explain why they do what they do, and to help understand whether what they do can be justified. The argument ultimately, then, will be about an institutional response to these shifts in discourses.

Why should we expect the shifts to matter? Here economics as metaphor may help. We can view this shift in the contours of permissible discourse as a change in the price of various rhetorical moves. As what one questions falls more on the uncontested end of a continuum, the marginal cost of that question increases. At some point, we could say that cost becomes infinite, as what one says functions more to undermine the credibility of the person speaking than it does to advance the argument made. Think about one who begins by arguing that the minimum wage is bad policy and ends by arguing that this is because minimum wages undermine the dominance of the master race; or one who begins by arguing that the jury wrongfully convicted her client and ends by arguing that this is because the jurors, along with the judge, along with the President of the United States, are all in a conspiracy to discredit her; or again, one who begins an argument challenging the jurisdiction of a federal court over a local school board and ends by claiming that the Fourteenth Amendment was not actually ratified. In each case, something recognizable as argument transforms into something else, as it moves from the center of the channel of the contestable to the shores of the incontestable. At some stage, the person commits a form of rhetorical self immolation, when the question finally and clearly grounds itself upon the domain of uncontested discourse.

If there is such a thing as rhetorical self immolation, and if it is a function of what is taken for granted within a particular interpretive context, then as what is taken for granted shifts, a court may have to accommodate this shift, not just to preserve fidelity, but also to preserve its own institutional integrity.⁶⁹ Or so the arguments below will suggest.

68. Thurman Arnold viewed much of the New Deal legislation as reflecting a change in uncontested reality. ARNOLD, *supra* note 6, at 105-27 (describing how institutional failure led to partisan debate over what was once taken for granted).

69. Few cases reveal as explicitly the self-conscious consideration by the Court of precisely this issue than *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2814-15 (1991) (joint opinion).

1. *Changes: homosexuality.*

Compare two possible discourses about homosexuality: The first questions whether homosexuality is immoral, and the second whether homosexuality is a pathology. One may argue today about whether homosexuality is "immoral"; one may not argue about whether it is a "pathology."⁷⁰ Things have not always been this way. At one time, there was no argument about whether homosexuality was immoral—it was. And at one time (not the same time), there was no argument about whether homosexuality was a pathology—it was. Both of these uncontested discourses have changed, and today, rather than two uncontested discourses, there is just one, and this one just the opposite of what it was at one time before. Now, that is, homosexuality is not a psychological pathology. Serious and reasonable people might argue that homosexuality is wrong or immoral, but it would no longer be an "argument" if one tried to prove it was pathology.

Law's perspective on this change in the discourse about homosexuality's pathology is particularly interesting, for it provides a clear, if perhaps too simple, example of the more general phenomenon that I label structural translation. The government's exclusion of homosexuals from entry into the United States will provide a focus for the example—a precursor, in ways that will become plain, to the current "don't ask, don't tell" exclusion of gays from the military.

Early in this century, Congress statutorily barred homosexuals from entry into the United States,⁷¹ an exclusion based partly on the view that homosexuality was pathological. As described by Judge Aguilar in a decision that will be the focus of this Part,

Homosexuals were first considered to be statutorily excluded from entry . . . by the Immigration Act of 1917, which prohibited the entry of "persons of constitutional psychopathic inferiority" certified by a physician to be "mentally . . . defective." In 1952, the McCarran-Walter Act repealed the Immigration Act of 1917, and homosexuals were excluded from entry as persons with "psychopathic personality." In 1965, the Immigration and Nationality Act was amended to provide for exclusion of homosexuals as persons afflicted with a "sexual deviation." Thus, the current provision of the Immigration and Nationality Act . . . provides: "(a) . . . the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States: . . . [a]liens afflicted with a psychopathic personality, or sexual deviation, or a mental defect"⁷²

70. This is distinct from the question of whether there is some biological basis for homosexuality. There can be a biological basis for something that is not pathology, for example, left-handedness. As will be clearer below, when I say that one cannot argue about whether homosexuality is a pathology, I am not denying that there are those who would so argue. My point is that within medicine, broadly conceived, one could not make such an argument.

71. Immigration Act, ch. 29, 39 Stat. 874 (1917), *repealed by* McCarran-Walter Act, § 403, 66 Stat. 163, 279 (1952). For a useful history of the exclusion of homosexuals by use of the immigration laws, see Sana Loue, *Homosexuality and Immigration Law: A Reexamination*, 18 J. PSYCHIATRY & L. 109 (1990).

72. Lesbian/Gay Freedom Day Cmte., Inc. v. INS, 541 F. Supp. 569, 571-72 (N.D. Cal. 1982) (citations omitted), *aff'd sub nom.* Hill v. INS, 714 F.2d 1470 (9th Cir. 1983).

No doubt intolerance, bigotry, fear, and religion all played some role in these statutory enactments.⁷³ But for the purposes of the discussion below, it is enough that science too played a critical role. As Judge Aguilar concluded, while Congress specifically intended in enacting the statute to exclude homosexuals, "the congressional decision . . . [wa]s [also] based upon the premise that homosexuality [wa]s a medical illness."⁷⁴ Not because of science (or at least I don't need to claim so here) but aided by science, these other motives were given a sanction to interfere with the lives of those not then within science's favor.⁷⁵

The Supreme Court first reviewed the exclusion in 1967, in a challenge brought by Clive Boutilier, a resident alien who self identified as a homosexual when applying for United States citizenship.⁷⁶ Based upon this admission, the Public Health Service (PHS), a board of licensed doctors given the authority to determine Boutilier's status, certified that Boutilier had a "psychopathic personality" and that he was a "sexual deviate."⁷⁷ As a consequence, the INS denied Boutilier citizenship and instituted deportation proceedings against him. Boutilier challenged the statute on vagueness grounds, claiming that he could not reasonably know that because he was a homosexual, he had a psychopathic personality.⁷⁸ In a 6-3 decision, the Court rejected his claim. Jumping beyond the statutory language into the legislative history of the Act, the Court found "beyond the shadow of a doubt" that Congress intended the phrase "psychopathic personality" to include homosexuals.⁷⁹ Given this clear intent, the Court reasoned, a vagueness challenge would not lie.⁸⁰

My interest in this case has nothing to do with the vagueness doctrine per se. Instead, it is to remark the then dominant and uncontested view that homosexuality was a disease.⁸¹ Indeed, the prevalence of the view is captured well

73. But see Jorge L. Carro, *From Constitutional Psychopathic Inferiority to AIDS: What is in the Future for Homosexual Aliens?*, 7 YALE L. & POL'Y REV. 201, 219 (1989) ("Congressional intent, however, was premised on existing medical knowledge; nothing indicates that Congress sought to exclude homosexuals on grounds of moral or religious principles.").

74. *Lesbian/Gay Freedom*, 541 F. Supp. at 579; see also *Boutilier v. INS*, 387 U.S. 118, 120 (1967) ("[B]eyond a shadow of a doubt . . . Congress intended the phrase 'psychopathic personality' to include homosexuals.").

75. Some, however, perceived the scientific characterization as an enlightened advance over the previous, moralistic view. See RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSES* 9 (1981) (stating that in the first half of the century, public homosexuals preferred to be considered sick rather than criminal).

76. *Boutilier*, 387 U.S. at 118-20.

77. *Id.* at 120.

78. *Id.* at 123. For a far more complete and lucid discussion of the statutory interpretive problems raised by this case, see William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 609-12 (1990).

79. *Boutilier*, 387 U.S. at 120.

80. *Id.*

81. Homosexuality was not always considered pathological. See generally MICHAEL CRAFT, *TEN STUDIES INTO PSYCHOPATHIC PERSONALITY* 11-13 (1965). But the dominant view within the psychiatric community was that homosexuality was pathological. See, e.g., BAYER, *supra* note 75, at 30, 38-39; IRVING BIEBER, HARVEY J. DAIN, PAUL R. DINCE, MARVIN G. DIELLICH, HENRY G. GRAND, RALPH H. GUNDLACH, MALVINA W. KREMER, ALFRED H. RIFKIN, CORNELIA B. WILBUR & TOBY B. BIEBER, *HOMOSEXUALITY: A PSYCHOANALYTIC STUDY* 18 (1962); see also CLIFFORD ALLEN, *A TEXTBOOK OF PSYCHOSEXUAL DISORDERS* 166 (1962) (assuming that homosexuality is either a psychological disease, a

in Justice Douglas' dissent. Justice Douglas argued that the statute should be struck on vagueness grounds, but not because there was something backwards or even questionable about the assumption that homosexuality was a disease. Indeed, Justice Douglas quite willingly embraced, if not relied upon, this "fact." Said Justice Douglas, "[homosexuals] are the products 'of heredity, of glandular dysfunction, [or] of environmental circumstances.' The homosexual is one, who by some freak, is the product of an arrested development"⁸² What this, from the Court's most liberal justice, suggests is that in 1967 at least, it went without saying that homosexuality was pathology.⁸³

Within the scientific community, however, and in particular, within the American Psychiatric Association (APA), this view was soon to change. In 1970, the APA held its annual meeting in San Francisco, and for the first time gay and lesbian activists directed their protests against the organization.⁸⁴ By the time of the next annual meeting, the activists' protests began to take effect.⁸⁵ In 1972, the APA organized its first open panel on the lifestyles of nonpatient homosexuals.⁸⁶ The discussion continued the following year, this time focused on exposing "the extent to which heterosexual biases had colored the work of psychiatrists."⁸⁷ In 1973, the board and membership of the APA approved a change in the psychiatric status of homosexuality, thereby ending its classification as a psychopathic condition.⁸⁸

As the protests suggest, this question of the status of homosexuality, while at first uncontested, quickly became quite contested⁸⁹ and, we could say, political. Not political in the sense that nonmedical considerations were its exclusive guide,⁹⁰ but in the sense that the APA made its ultimate judgment under

genetic problem, or an endocrine disorder); W. Patterson Brown, *The Homosexual Male: Treatment in an Outpatient Clinic*, in *THE PATHOLOGY AND TREATMENT OF SEXUAL DEVIATION: A METHODOLOGICAL APPROACH* 196 (Ismond Rosen ed., 1964). Of course, not everyone shared the dominant view, and many prominent psychologists and scientists argued against it, insisting that homosexuality was a "normal variant of human sexuality." BAYER, *supra* note 75, at 41. Alfred Kinsey, for example, thought that homosexuality was learned behavior. See *id.* at 45.

82. *Boutillier*, 387 U.S. at 127 (Douglas, J., dissenting) (quoting D.K. Henderson, *Psychopathic Constitution and Criminal Behavior*, in *MENTAL ABNORMALITY AND CRIME* 105, 114 (L. Radzinowicz & J.W.C. Turner eds., 1944)).

83. This, of course, does not prove that no one questioned whether homosexuality was a disease, but merely that the legal system had not yet recognized the dissenters.

84. BAYER, *supra* note 75, at 102 ("Guerrilla theater tactics and more straightforward shouting matches characterized their presence.").

85. See Robert Lloyd Goldstein, *Clinical Judgment and Value Judgment: Moral Foundations of Psychiatric and Legal Determinations of the Status of Homosexuality*, in *ETHICAL PRACTICE IN PSYCHIATRY AND THE LAW* 293 (Richard A. Posner & Robert Weinstock eds., 1990) (summarizing the APA's transformed position and nomenclature and the ensuing conflict).

86. Remarkably, the APA did not know of any homosexual psychiatrist who could chair the panel; instead, Dr. Kent Robinson agreed to lead the discussion. BAYER, *supra* note 75, at 104.

87. *Id.* at 112.

88. *Id.* at 137; see also Mary Jane G. Gross, *Changing Attitudes Toward Homosexuality—Or Are They?*, 16 *PERSPS. PSYCHIATRIC CARE* 70, 74 (1978) (offering authority that homosexuality is not a disease).

89. See Loue, *supra* note 71, at 109 (noting the change in the APA's position); Stephen A. Mitchell, *Psychodynamics, Homosexuality, and the Question of Pathology*, 41 *PSYCHIATRY* 254, 254-55 (1978) (discussing different theories of the origin of homosexuality).

90. See BAYER, *supra* note 75, at 189 ("To assert, however, that the decision of December 1973 represented nothing more than a capitulation in the face of force involves a great distortion. Though it is

standards not themselves fully agreed upon. Indeed, as a reflection of this disagreement, the ultimate decision was made by ballot: In December 1973, 58 percent of practicing psychiatrists voted to remove homosexuality from the list of psychopathic conditions.⁹¹ A fundamentally contested discourse resolved itself, at least for the moment, against the uncontested position taken for the past forty years.

Once the APA changed its classification, the discourse about the pathological status of homosexuality soon receded into the background.⁹² Soon, a new taken-for-granted view about homosexuality was dominant: the view that homosexuality was not pathological. Following this view, in 1979, the Surgeon General determined that "homosexuality per se will no longer be considered a 'mental disease or defect.'"⁹³

This change by the Surgeon General caused great trouble for the INS. For because of the Surgeon General's determination, the Public Health Service concluded that it could no longer certify homosexuals as "sexual deviates,"⁹⁴ which meant that the INS no longer had the predicate it needed to exclude homosexuals. In response, the INS simply decided to ignore the issue, and it no longer refused admission to the United States on the grounds of homosexuality alone.⁹⁵

The (Carter) Justice Department was not satisfied with this decision. Fixed upon the legislative history of the Immigration and Nationality Act,⁹⁶ it decided that the INS had a duty to exclude homosexuals, whether or not the PHS would certify them as psychopathic.⁹⁷ Under Justice Department guidance, the INS was ordered to adopt the first "don't ask, don't tell" policy: While the INS

difficult to determine the precise proportion of psychiatrists who have adopted the nonpathological view, it is clear that the numbers are substantial."). But see Goldstein, *supra* note 85, at 297-98 (noting opponents' "doubts as to the scientific validity" of the APA decision and noting that the profession garnered "a considerable amount of ridicule for attempting to resolve a scientific dispute by recourse to a democratic vote"); Thomas T. Lewis, *The Semantics of Psychiatric Labels*, 35 ET CETERA 175, 178 (1978) ("[The APA's] attitudinal change was clearly a product of changing moral views within the larger society, not a result of new research data.").

91. BAYER, *supra* note 75, at 148.

92. The change did not, of course, occur immediately. Some tried to get the decision reversed in the following years. They failed.

93. Lesbian/Gay Freedom Day Cmte., Inc. v. INS, 541 F. Supp. 569, 572 (N.D. Cal. 1982) (citations omitted), *aff'd sub nom.* Hill v. INS, 714 F.2d 1470 (9th Cir. 1983). As described by Samuel Silvers, "Surgeon General Julius Richmond . . . gave two reasons for his decision. First, the PHS wished to conform its practices to current medical views . . . such as those of the American Psychiatric Association Second, the Surgeon General noted that homosexuality was not a matter for determination 'through a medical diagnostic procedure.'" Samuel M. Silvers, *The Exclusion and Expulsion of Homosexual Aliens*, 15 COLUM. HUM. RTS. L. REV. 295, 297 (1984) (quoting 56 INTERPRETER RELEASES 387, 398 (1979)).

94. Silvers, *supra* note 93, at 297.

95. *Id.* at 298.

96. Pub. L. No. 95-83, § 307(q), 91 Stat. 383, 394 (1977) (codified as amended in scattered sections of 8 U.S.C.).

97. See Peter N. Fowler & Leonard Graff, *Gay Aliens and Immigration*, in *HOMOSEXUALITY: DISCRIMINATION, CRIMINOLOGY AND THE LAW* 93, 98 (Wayne R. Dynes & Stephen Donaldson eds., 1992) (citing Memorandum from John M. Herman, Assistant Attorney General, to David L. Crossland, Acting Commissioner, INS (Dec. 10, 1979)); Silvers, *supra* note 93, at 298 (describing how the Justice Department suggested to the INS that it "promulgate a uniform policy for investigating suspected homosexual aliens on a non-medical basis").

would not ask, self-identified homosexuals were to be excluded on the basis of a signed statement alone, without the certification of the PHS.⁹⁸

It was this policy that gave rise to Judge Aguilar's decision referred to above. By 1982, an important foundation to the Immigration Act's exclusion had eroded, and importantly for our purposes, this erosion had an effect on the law. No longer could the government trade on the credibility of science to advance its exclusionary policies against gays and lesbians. And as Judge Aguilar read the statute, this shift in science was fatal to the government's policy of exclusion. Finding that the statute incorporated this newly uncontested discourse in science, Judge Aguilar concluded that the statute no longer allowed the exclusion of homosexuals.⁹⁹ The INS could no longer exclude homosexuals on the basis of their psychopathic personality, because, in fact, they had no psychopathic personality. As the background discourse in science changed, it constrained law differently. Now if the government was to continue its exclusion, it would have to continue such exclusion grounded on naked preferences alone.¹⁰⁰ Science would no longer support the exclusion of homosexuals.

Thus a shift from one uncontested discourse to another allows a changed reading of the statute. And note what should be obvious: Had the same question resolved by Judge Aguilar been raised in 1974, when the discourse about pathology was still fundamentally contested, a court could well have decided the matter differently. It could have reasonably decided that in the face of a contested medical discourse, the law should remain fixed upon the last uncontested medical discourse. The point is just this: that while an uncontested extralegal discourse may constrain a court, a contested extralegal discourse a court may reasonably ignore.

2. *Changes: economic theory and due process.*

Captured as we are with the notion that law and economics is a relatively new discourse, we are quick to believe that before this century, economics had little to do with law. We are likely, that is, to view law before economics as the formalists would have us view it—drawing its substance from material wholly

98. As described by Judge Aguilar:

The Guidelines and Procedures provide that an arriving alien will not be asked any questions regarding his or her sexual preference. However, if an alien "makes an unambiguous oral or written admission of homosexuality" . . . the alien may be examined privately by an immigration official, and will be asked to sign a statement to the effect that he or she is a homosexual. . . . The unambiguous admission forms the evidentiary basis for the exclusion hearing.

Lesbian/Gay Freedom Day Cmte., Inc. v. INS, 541 F. Supp. 569, 573 (N.D. Cal. 1982), *aff'd sub nom.* Hill v. INS, 714 F.2d 1470 (9th Cir. 1983).

99. *Id.* at 585.

100. See generally Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689-90 (1984) (critiquing the theoretical prohibition of naked preferences, defined as "the distribution of resources and opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power," in six clauses of the Constitution: Commerce, Privileges and Immunities, Equal Protection, Due Process, Contract, and Eminent Domain).

internal to itself.¹⁰¹ But this view is as much the result of a change in economics as it is the result of historical naiveté. For while we see economics as a discipline relatively remote from the ordinary stuff of law, during most of the nineteenth century, as Herbert Hovenkamp argues, the language of economics was very much the language of the lawyer: Because economics had not yet specialized, its lessons were well within the ken of the ordinary lawyer or judge.¹⁰² "Economics" (in this form) had an effect on legal thought.

For most of the nineteenth century, the economics that had this effect was a doctrine called "classicism." Classicism described "a unified theory of political economy [with] implications for both public and private law."¹⁰³ Central to classicism was the aim to develop "rules for evaluating a legal regime's justness or fairness without regard to how its wealth happened to be distributed."¹⁰⁴ This was not because distribution in some abstract sense was irrelevant, but because in the tradition against which classicism argued, rewards from the state had been given on the basis of political favor, rather than according to the public good. The evil against which classicism argued was favoritism, and a regime of favoritism was certain to weaken "the body politic as a whole"¹⁰⁵ and likely to benefit "the rich and the politically powerful."¹⁰⁶ The aim, then, was to increase aggregate wealth, while ignoring how wealth was to be distributed. Fighting privilege, special charter, or monopoly was the cry of the Progressives, beginning most fervently with Andrew Jackson, and supported "by society's disfavored classes."¹⁰⁷ Thus, though in part a theory of economics, classicism "was not merely an economic philosophy. It was also a model for statecraft . . ."¹⁰⁸

As economics advanced, however, classicism was transformed, and more importantly for our purposes, as classicism was transformed, legal doctrines that rested upon classicism (however implicitly) were transformed as well.¹⁰⁹ Hovenkamp's work focuses on a range of examples where the battle over (what we would call) economic theory had a significant effect on the development of the law. Most revealing among his accounts is the evolution of the law of competition, which Hovenkamp argues responded directly to changing economic theories.¹¹⁰ In what follows, however, I want to focus on just one exam-

101. See, e.g., HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836-1937*, at 173 (1991) (defining formalism as "law without a policy").

102. *Id.* at 97 (describing 19th century American judges' exposure to political economics).

103. *Id.* at 1.

104. *Id.* at 3.

105. *Id.*

106. *Id.* at 4.

107. *Id.*

108. *Id.* at 2.

109. For descriptions of the changing economic theory and how it affected intellectual life, see III JOSEPH DORFMAN, *THE ECONOMIC MIND IN AMERICAN CIVILIZATION, 1865-1918* (1949); ELLEN FRANKEL PAUL, *MORAL REVOLUTION AND ECONOMIC SCIENCE: THE DEMISE OF LAISSEZ-FAIRE IN NINETEENTH-CENTURY BRITISH POLITICAL ECONOMY* 219-79 (1979). For a useful economic history, see PHYLLIS DEANE, *THE EVOLUTION OF ECONOMIC IDEAS* (1978).

110. A full account of Hovenkamp's argument is beyond the scope of this article. He makes his argument most completely in HOVENKAMP, *supra* note 101, at 268-95. For a general account of the effect of the "marginalist revolution," see Herbert Hovenkamp, *The Marginalist Revolution in Legal*

ple of how changing economic theory could matter to constitutional law—in particular, how changing economic theory could matter to a theory of substantive due process.

The transformation in the Supreme Court's interpretation of the Fourteenth Amendment's Due Process Clause, at least as it pertained to economic and social issues, is well known. From the end of the nineteenth century and into the twentieth, courts used both state and federal due process doctrine as a shield against regulatory intervention into the economy. *Lochner v. New York*,¹¹¹ the standard bearer of this position, represented the Court's most extreme resistance to redistributive, progressive, or democratic politics.

Soon thereafter, however, the Court retreated from its hostility to economic regulation. First in *Muller v. Oregon*,¹¹² then in *Home Building & Loan Association v. Blaisdell*¹¹³ and *Nebbia v. New York*,¹¹⁴ the Court abandoned the substantive due process activism it had embraced in *Lochner*. Finally, in its 1937 *West Coast Hotel* decision,¹¹⁵ the Court completed its retreat; the Fourteenth Amendment no longer barred state intervention in economic affairs.

What accounts for the changes in the Court's reading? In Part II, I offer a more complete account of this change. But here we can outline how such a change could hang (in part) on changes in a particular economic theory. Hovenkamp's account of the "wage-fund theory" provides a simple example that suggests the more general point.

One well-known (yet now forgotten) theory that reinforced the dominant antiregulation view at the turn of the century was the wage-fund theory of economics.¹¹⁶ Growing out of classical economics, the wage-fund theory held that for a given amount of capital, there was a fixed and natural proportion that could be expended on labor.¹¹⁷ Like the farmer who can eat only a given proportion of the grain that he grows, an economy could feed its labor only a fixed proportion of the capital that it produced.¹¹⁸ Any attempt to exceed that

Thought, 46 VAND. L. REV. 305, 346 (1993). Other accounts of the evolution of competition law can be found in WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA* (1965); Albert M. Kales, *Coercive and Competitive Methods in Trade and Labor Disputes*, 8 CORNELL L.Q. 1 (1922); James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law*, 135 U. PA. L. REV. 495 (1987). For a somewhat different account, see William H. Page, *Ideological Conflict and the Origins of Antitrust Policy*, 66 TUL. L. REV. 1, 40-66 (1991).

111. 198 U.S. 45 (1905).

112. 208 U.S. 412 (1908) (upholding a statute establishing a maximum workday for women).

113. 290 U.S. 398 (1934) (upholding a statute permitting state courts to extend the period of redemption from mortgage foreclosure sales).

114. 291 U.S. 502 (1934) (upholding a statutory minimum for milk prices).

115. *West Coast Hotel Corp. v. Parrish*, 300 U.S. 379 (1937) (upholding a minimum wage statute applying to women).

116. See Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 299 (1985); Hovenkamp, *supra* note 110, at 345-46.

117. Hovenkamp, *supra* note 110, at 345.

118. Wage-fund theory was conceived from "simple agrarian analogies." *Id.*

amount would reduce not just the income to capital, but also, and importantly, the net income *to labor* as well.¹¹⁹

Against the background of this theory, how would one evaluate legislation designed to increase wages to labor? According to the wage-fund theory, such legislation would not just be inefficient or bad politics or special interest dealing. Such legislation would be *self-defeating*.

The implications of the wage-fund doctrine cannot be overstated. Any forced wealth transfer from capitalists to laborers would upset the equilibrium and spell disaster for the laborer. For those who believed in the wage-fund doctrine, labor unions, minimum wage laws, and graduated income taxes were all bad. More important, the true believer could think that they were bad because they were contrary to the laborer's own best interests.¹²⁰

Against this background, we can see how the Fourteenth Amendment inquiry into rationality would proceed. The standard test for the constitutionality of economic legislation under substantive due process analysis is whether the challenged regulation is rational.¹²¹ Whether a regulation is rational turns on the facts, and what counts as "the facts" turns on the theory that animates inquiry into the facts. Under the wage-fund theory, it was possible for judges to believe that wage and hours legislation was self-defeating—that it would not even benefit those who were its sponsors, that it was fundamentally irrational. It is this last implication of the wage-fund theory that explains why "even liberal American political economists were not generally supportive of wage and hour legislation until after the turn of the century."¹²²

As neoclassicism took hold, however, and as the marginalism of Alfred Marshall became dominant, the underpinnings to this economic theory were soon eroded.¹²³ By the turn of the century, most understood that the wage-fund theory was premised upon an economic mistake, the details of which we need not pursue to make the point I want to make here.¹²⁴ For the critical point is this: Once the theory began to come apart as theory, its prescriptions could no longer be treated as a neutral and apparently scientific justification for striking economic legislation. Without a firm theoretical foundation in economics, it was no longer a "fact" that economic regulation was "irrational." Fact had been transformed into just one more theory, and the marginal rhetorical value of mere theory was much less than the marginal rhetorical value of "fact." Contestation within the underlying economic discourse destroyed the role that economics could play in limiting legislative authority. In the constitutional for-

119. HOVENKAMP, *supra* note 101, at 195 (discussing A.L. PERRY, *ELEMENTS OF POLITICAL ECONOMY* 122 (New York, Arthur Latham Scribner 1866)).

120. *Id.* at 195-96.

121. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

122. HOVENKAMP, *supra* note 101, at 197.

123. See DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* 174 (1991) (discussing Marshall's marginalism theory); see also Hovenkamp, *supra* note 110, at 314 (describing marginalism as "hold[ing] that the rate of wages is a function of the marginal contribution that the laborer makes").

124. Wage-fund theory presumed that the value of labor or capital was determined by the cost of producing both; marginalism revealed that value is determined by the marginal contribution of the last laborer or last unit of capital entering the market. Hovenkamp, *supra* note 110, at 314-15.

mulation, if legislation had to be "irrational" to be struck, then as economics changed, it became more and more difficult to demonstrate irrationality.

Justice Holmes perhaps best captures the sense of this change. As a judge, he believed himself bound to uphold progressive legislation; as a political theorist, he thought it idiotic.¹²⁵ But his political views rested upon what he thought was just one contested economic theory. Thus, in his words, the *Lochner* decision rested on "an economic theory which a large part of the country does not entertain."¹²⁶ Once society considered these views as mere theory, they became contestable; and once contestable, they belonged in the domain of politics rather than law. We can read constitutional law to respond to this radical shift in theory by backing away from what it had previously relied upon as indisputable, background truth. Once this became contested, the law had no choice but to ignore what before it had relied upon as fact.

3. *Changes: social science and equal protection.*

I turn now to another, perhaps better known, example of changed readings in law tracking changed discourses outside of law. This too is an example drawn from the Fourteenth Amendment—this time the Supreme Court's changed reading of the Equal Protection Clause in *Brown v. Board of Education*.¹²⁷ It too is an example of a change that tracks changes in a discourse considered scientific, though no example may better reveal the contingency that can hide under such claims of scientific necessity.

Brown overruled *Plessy v. Ferguson*'s¹²⁸ reading of the Equal Protection Clause. Part of the context of *Plessy* were views about social science which, because of the time and because of views of science, were views that people did not feel free to accept or reject, or more precisely, did not feel entitled to accept or reject, so long as they continued to accept other views about science as well. Instead, tied to the sale of science in general was this set of "scientific" views in particular.¹²⁹

These views would matter to how the Fourteenth Amendment would be read, for they would matter in a court's evaluation of what was a possible—or related to this, to what was a *reasonable*—burden for society to bear. As Hovenkamp puts it, "No responsible judge would have believed that the Fourteenth Amendment required the state to do something manifestly unreasonable

125. See, e.g., Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 812-14 (1989).

126. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (overturning a statute setting maximum working hours for bakers). Hovenkamp notes, "*Lochner* was supported by American classical political economists, although by 1905 classical political economy was rapidly losing ground to institutional economics and marginal utility theory." HOVENKAMP, *supra* note 101, at 182. Benedict suggests that it is ambiguous whether Justice Holmes' dissent in *Lochner* was limited to economic legislation, since Justice Holmes invokes Spencer, who argued against violations of laissez-faire based on principles of justice rather than on principles of economics. Benedict, *supra* note 116, at 304-05. But see note 282 *infra*.

127. 347 U.S. 483 (1954).

128. 163 U.S. 537 (1896).

129. For a useful history of the influence of social science during at least part of the 19th century, see THOMAS L. HASKELL, *THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE* (1977).

or grossly injurious to the public health or welfare."¹³⁰ But to understand what would be "manifestly unreasonable" or "grossly injurious" depends on the facts, which in turn depend upon "the use of sophisticated social science."¹³¹

At the time *Plessy* was decided, science supported the racist status quo. Science, for example, told judges that interracial sex produces degenerate children—certainly one of the more extreme perversions of science from this period. "If members of a society believe[d this] . . . then they may [have been] willing to sacrifice a great deal to avoid the consequences of interracial marriages."¹³² Early Darwinism was another example: "The genetic determinism that dominated social science in the last part of the nineteenth century created a situation in which strict racial segregation appeared to be socially prudent."¹³³ By relying upon these beliefs, or upon beliefs supported by such claims, much of the legally enforced segregation of the late nineteenth century could, in the eyes of nineteenth century judges, be justified.

Eventually, science turned against these racist views, and by the turn of the century, emerging arguments slowly drew these earlier and uncontested views into contest. Genetic determinism became contested by an emerging perspective called "environmentalism," the notion that social differences were products of society, not genetic difference. As environmentalism grew, the support genetic determinism could give to law and to law's support of racial segregation began to wane.¹³⁴ The marginal cost of racist speech in science increased, and the marginal value of science to racist law declined.

These changing prices of theoretical rhetoric mattered to the Constitution of the time. Not that science drove legal racism; rather, science supported, and was supported by, legal racism. The causation ran in both directions. Science made legal racism reasonable; law made scientific racism respectable.¹³⁵ But once scientific racism was contested, the support that it could lend to the law disappeared. The more views of scientific racism became open to doubt, the less courts could rely upon them, whether implicitly or explicitly, in supporting practices of segregation.

By the time the Court decided *Brown*, then, the ground underlying this racist science had been broken, and the Court had to confront the resulting gap. In his argument to the Court, Thurgood Marshall put it in the following way:

[T]he only way that this Court can decide this case [against us] is that there must be some reason which gives the states the right to make a classification [in regard to Negroes] that they can make in regard to nothing else . . . and we submit the only way to arrive at this decision is to find that for some reason Negroes are inferior to all other human beings. Nobody will stand in the Court and urge that . . . [But then there would have to be some reason] why, of all

130. Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 DUKE L.J. 624, 664.

131. *Id.*

132. *Id.*

133. *Id.*; see also *id.* at 653 ("The immediate effect of Darwin's work was . . . to confirm and strengthen long-established ideas about black inferiority.").

134. *Id.* at 627-28.

135. *Id.* at 625.

the multitudinous groups of people in this country, you have to single out Negroes and give them this separate treatment.

It can't be because of slavery in the past, because there are very few groups in this country that haven't had slavery. . . . It can't be color because there are Negroes as white as the drifted snow The only thing [it] can be is an inherent determination that the people who were formerly in slavery, regardless of anything else, shall be kept as near that stage as is possible.¹³⁶

Marshall asks the Court what kind of reason the Court could give for upholding segregation, and no question could have better captured the background shift that Hovenkamp remarks. For in 1952, the question was embarrassing in a way that it would not have been in 1895. Had the same question been asked of the justices in *Plessy*, it would have had a fundamentally different meaning. In *Plessy*, and through much of the first third of this century, the justices, in enforcing segregation, would themselves be *saying* little. Instead, they would be reflecting what was taken for granted (at least by all like them). But by *Brown*, these views about nature's segregation were no longer natural, and as Marshall's question made plain, if the Court were to continue segregation, it would be constructing the inequality that Marshall complained of, not simply reflecting what was taken to be nature's own inequalities. If social science no longer uncontestedly supported segregation, then there was nothing except blind adherence to precedent that would support affirming the implications of *Plessy*. Stripped of science, *Plessy* could stand for nothing more than the "social meaning of . . . inferiority."¹³⁷

A changing discourse in social science, then, had an effect on a parallel discourse in law.¹³⁸ But how does it have this effect? So far, it sounds like law is just epiphenomenal upon science's reality, as if it had no autonomy from science.

The argument is not that law simply tracks science. My point instead is that law is *vulnerable* to changes in science. When a discourse in science becomes contested, when no view can be said to be dominant, or when no view is treated as dominant, then science is no longer useful in law. What before could function within law as taken for granted now becomes political. Courts are, vis-à-vis uncontested discourses in science, fact takers, but when it appears as if science is itself in fundamental disagreement, courts work to take no side at all.

A pedestrian analogy from law may help make the point: When science appears as part of an uncontested discourse, law can rely upon it in just the way a court deciding a motion for summary judgment can rely upon uncontested facts in the record. But once it appears that the science is contested, then, like a court deciding a summary judgment motion, it is not for the court to resolve the scientific conflict. The response instead is for the court is to abstain from resolving the conflict at all, by deciding what it can while remaining agnostic

136. 49A LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 522-23 (Philip B. Kurland & Gerhard Casper eds., 1975).

137. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 427 (1960).

138. Hovenkamp, *supra* note 130, at 627.

about the underlying factual dispute. At times, law can resolve a question even though there are factual disputes, just as summary judgment can be granted even though some factual matters (not "material") remain in dispute. But more often the contest renders the summary judgment impossible, leaving to a jury ultimate resolution of the dispute.

4. *Changes: law and the Erie effect.*

Each example so far has involved changes in discourses outside the law: The homosexual immigration cases turned on changes in medicine, the due process example turned on changes in economics, and the equal protection example turned on changes in social science. Each is an introduction to the central example within law for the argument that follows. This is the change effected by the Court in *Erie R.R. v. Tompkins*¹³⁹ and the understanding of fidelity that this change suggests.

For ninety-six years before its decision in *Erie*, the Supreme Court had allowed federal courts a certain common law practice: Under the influence of *Swift v. Tyson*,¹⁴⁰ federal courts were permitted to ignore the decisions of state courts on some matters of state common law, and instead allowed to announce their own conception of common law, all this under the name of what came to be known as general federal common law. While first applying to commercial law only, over the years, resting upon the language used in *Swift* by Justice Story, this practice came to encompass some twenty-eight areas of common law jurisprudence.¹⁴¹

On a purely formal level, *Swift* rested upon an interpretation of the word "laws" in section 34 of the Rules of Decision Act of 1789.¹⁴² Section 34 provided that "the laws of the several states, except where the constitution, treaties

139. 304 U.S. 64 (1938) (declaring that the common law of the forum state should determine the law to be applied in diversity cases). It was apparently not obvious, even to the parties in the case, that *Erie* would bring such influential change. The briefs neither raised nor pursued the question of *Swift*'s continued viability, although most of the oral argument focused on this question. For an exceptional account of the *Erie* case, see TONY FREYER, HARMONY & DISSONANCE: THE *SWIFT* & *ERIE* CASES IN AMERICAN FEDERALISM 122-42 (1981). We should understand, though, that however unexpected, *Erie* was an extraordinarily significant case at the time of its decision. See Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 693 (1989) (calling the day *Erie* was decided the birthdate of the Legal Process movement, because of the decision's reconceptualization of the common law) (citing John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 694-706 (1974)).

140. 41 U.S. (16 Pet.) 1 (1842) (holding that federal courts may declare a common mercantile law).

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

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

or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States"¹⁴³ The question for Justice Story was whether "laws" included common as well as statutory law, or statutory law alone. As he argued,

In order to maintain the argument [that "laws" includes state common law] it is essential . . . to hold, that the word "laws," in this section, includes within the scope of its meaning, the decisions of the local tribunals. In the ordinary use of language, it will hardly be contended, that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not, of themselves, laws.¹⁴⁴

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

It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts . . . and especially to questions of general commercial law, *where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case* The law respecting negotiable instruments may be truly declared in the languages of Cicero, adopted by Lord Mansfield . . . to be in a great measure, not the law of a single country only, but of the commercial world.¹⁴⁵

Justice Story's argument hangs upon what could be called either a naturalistic or scientific conception of the common law.¹⁴⁶ According to this conception, what judges do when they pronounce on matters of common law is to *find* rather than *make* the common law, in just the sense that a forensic investigator when investigating a crime finds rather than makes the facts that help explain the crime (or at least one hopes). An investigator searches for facts on the premise that the facts are "out there," and that a relatively orderly or scientific method can uncover them. Likewise, under the *Swift* doctrine, a federal common law judge located the common law independently of any particular state's law, according to a similarly orderly and scientific method. From this perspective, both the investigative and legal processes reveal truth. In Justice Story's words: "It becomes necessary for us, therefore . . . to express our own opinion of the *true* result of the commercial law upon the question now before us."¹⁴⁷

Understood in this forensic way, there is little troubling about allowing federal judges to make their own findings of common law. Federal judges are as

143. Rules of Decision Act § 34, 1 Stat. at 92.

144. *Swift*, 41 U.S. at 17.

145. *Id.* at 18 (emphasis added).

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

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

competent as state judges in this scientific search for facts.¹⁴⁸ Thus, in the same way that it created no affront to state sovereignty to permit federal agents investigating a railroad accident to make findings independent of state investigators, nineteenth century naturalists found it unproblematic for federal common law judges to make findings about the common law independent of state common law judges.

Behind this conception of the common law are really two separate ideas. One is the notion that the source of the common law is something other than state or federal law—for example, natural law. The second is the idea that the search for common law truth was a kind of scientific enterprise. The first, while born of rhetoric such as Justice Story's, really does not reach its maturity until much later in the century.¹⁴⁹ It is then that the Court begins to recognize a growing gap in regulatory power, as neither the states nor the federal government are found competent to legislate on matters of general common law.¹⁵⁰ Because of the common law's special status, it was not within the domain of the states to regulate; and because of the federal government's limited powers, the common law was not within the range of federal power. The common law became, then, this self-sustaining body of normative authority, living through the articulations of the federal judiciary alone.¹⁵¹

But this independence would not have survived without the support of a growing rhetoric of scientism—again, as jurists toward the end of the century would call it, a search for the truth about the content of the common law.¹⁵² Science became the premise for common law studies. By the late 1800s, it was

148. *But cf.* Posner, *supra* note 53, at 79-86 (comparing legal authority, which is politically authoritative and hierarchical, with scientific authority, which is jointly determined by the entire scientific community, and thus more reliable). *Swift* may suggest that these differences are indeed modern.

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

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

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

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

common to find jurists describing the ultimately scientific nature of the common law itself¹⁵³ and claiming quite explicitly that this law was found by common law judges, not made.¹⁵⁴ This was the premise of the substantive due process limitations expounded by Judge Cooley,¹⁵⁵ and it became the premise of a whole generation of legal education.¹⁵⁶ Law was, in this view, a science, where jurists, like scientists, were seeking truth, and where this search for juristic truth could be separated from political ends.¹⁵⁷

We are likely to resist this description of jurists of the nineteenth century, in part because we misunderstand what they meant by "science." The essence of nineteenth century "science" was Baconian empiricism—the view that this natural order of common law can be systematized and arranged according to gen-

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

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

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

156. On the rise of American legal education, see WILLIAM C. CHASE, *THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT* (1982); LAPIANA, *supra* note 153; ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1983).

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

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

eral principles,¹⁵⁸ and that these general principles could be tested by reference to the actual data of this science, common law decisions.¹⁵⁹ Science under this conception is more like stamp collecting than like physics, as the practice of judges *qua* scientists was simply to bring order and structure to the various strands of legal discourse. As described by Mayes, "To make any branch of knowledge a science . . . it is only necessary that it be reduced to a system, arranged in a regular order."¹⁶⁰

It was these two ideas—the common law's special source and the special nature of its discovery—that together were becoming dominant by the late 1800s. But just as their dominance was assured, dissent was beginning to find its way into the discourse.¹⁶¹ As the century drew to a close, the relatively uncontested discourse about the nature of the common law became drawn into question. *Swift* began to draw the fire of many,¹⁶² most furiously on pragmatic grounds,¹⁶³ but most famously on philosophical grounds as well.¹⁶⁴ Against *Swift*'s naturalism, or what had become understood to be *Swift*'s naturalism, Justice Holmes wrote in 1917, "The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign."¹⁶⁵

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

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

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

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

160. Mayes, *supra* note 153, at 352.

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

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

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

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

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

it is enforced in a State . . . is not the common law generally but the law of that State existing by the authority of that State¹⁶⁶

In Justice Holmes' conception, in the emerging language of the time, the common law flowed not from a *fact* of science but (at least in part) from a *choice* of politics, where "politics" is simply that which now appears fundamentally contestable, up for grabs.¹⁶⁷ In Justice Holmes' view, the rhetoric of the common law was masking a fundamentally political reality about what law was. Common law lawfinding was common law lawmaking, and if so, then the question *who* was entitled to make that choice mattered. For if what a judge was doing when he decided an open question of common law was making law rather than finding law, and if these matters were predominantly matters of state common law, then it now seemed both as if *federal* courts were exercising the power of *state* legislatures, and as if *federal courts* were exercising the power of *state legislatures*.¹⁶⁸ Under Justice Holmes' view of the common law, federal courts were doubly exceeding constitutional limits.¹⁶⁹

What separates Justices Story and Holmes is a way of speaking about law—really an idea of philosophy, nowhere enacted by a legislature, not regulated by the Constitution, unratified by ordinary citizens, unchanged by the actions of democrats. As it became more and more contested, common lawmaking began to appear more and more political. Under one conception, in one language, the (just shy) 100-year-old practice was perfectly constitutional (since it in no way implied that federal courts were making state law); under the other conception, the practice was unconstitutional usurpation (since it plainly implied that federal courts were making state law). Change one idea in philosophy, transform in some small way a bit of legal language, and this century-old doctrine of *Swift* quickly falls away.

By 1937, this idea in philosophy, this naturalistic conception of law, this language that underlay *Swift*, had become fundamentally contested. What before had seemed plainly permissible was seen by the *Erie* Court to rest upon

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

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

168. As Dobie concluded,

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

Dobie, *supra* note 164, at 238-39.

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

a "fallacy": "The fallacy underlying the rule declared in *Swift v. Tyson* is made clear by Mr. Justice Holmes. The doctrine rests upon the assumption that there is 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.'"¹⁷⁰ "If," Justice Holmes wrote, "there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the courts of the United States might be right in using their independent judgment as to what it was."¹⁷¹ But there was no such body of law. Said Justice Brandeis (again echoing Justice Holmes), "*Law in the sense in which courts speak of it today does not exist without some definite authority behind it.*"¹⁷² The language had changed ("courts speak") in part, perhaps, because our view of reality had changed,¹⁷³ and in part because our view of law had changed. Whatever the view of law in Justice Story's time, whatever its language, today law is not conceived of except as the expression of a political will.¹⁷⁴

We should pause to remark the extraordinary nature of this change, for its nature is central to all that follows: Premised upon a change in philosophy and upon its effect on a legal culture, the Court declared a practice with a ninety-six year pedigree unconstitutional. A way of speaking and, therefore, a way of understanding and, therefore, law itself had changed—not through the deliberation of anyone, not through the democratic ratification of any legal body, but through a transformation in legal discourse.¹⁷⁵ One discourse died, and another replaced it, and it is from this contestation in the discourse about law that *Erie* got its sanction.¹⁷⁶

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

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

172. *Erie*, 304 U.S. at 79.

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

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

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

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

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

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

Consider now another *Erie*-effect example, tied to the rise of “unitarianism” in the law of the American presidency.¹⁷⁷ Images of *Lochner* notwithstanding, the turn of the century was filled with progressive economic regulation in a wide range of areas. Beginning with the Interstate Commerce Commission’s railroad regulation, the federal government grew rapidly in its efforts to professionalize regulation in many areas of American life.¹⁷⁸

Behind much of this increased regulation lay a growing adherence to scientism and professionalism in administrative law. Born in the work of political scientists such as Ernst Freund, Frank Goodnow, and William Willoughby and of politicians such as Woodrow Wilson, this movement believed that much of the “political” in administration could be removed and replaced by a nonpolitical, expert-based bureaucracy, thereby improving the activist regulatory state.¹⁷⁹ If political scientists could replace politicians, the thought went, truth could guide administration.¹⁸⁰

No statute better captures the spirit of the times than the Federal Trade Commission (FTC) Act.¹⁸¹ Passed in 1914, the FTC Act established an independent agency to regulate federal trade and to assure fair and efficient competition. The statute created a board of five commissioners nominated by the president and confirmed by the Senate, removable only by the president, and only for cause.

id. at 95-96; see also CARTER, *supra* note 153, at 120. Justice Holmes’ attack on naturalism was part of the emerging pragmatism of American philosophy. See Grey, *supra* note 125, at 788.

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

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

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

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

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

In 1933, President Roosevelt tried to remove one of the commissioners, William E. Humphrey, from this board. Humphrey refused; the President fired him; Humphrey stayed on and sued for his salary. One year after his death, his case reached the Supreme Court.¹⁸²

In a striking blow (one among many) to the Roosevelt administration, the Court upheld the statute against the claim that the President had a constitutional right to remove any executive officer for any reason or no reason at all. The President thought his authority followed from a decision nine years earlier—*Myers v. United States*¹⁸³—where the Court had found that Congress could not condition the president's right to remove an executive officer by requiring Senate approval of the removal. The Court, however, distinguished *Myers* on the ground that Myers was a "purely executive" officer, while Humphrey was an officer whose office partook in part of legislative and in balance of judicial functions. The Court viewed Humphrey as an "expert" exercising a technical, rather than political, expertise.¹⁸⁴ As an administrative officer, Humphrey's job was to obey the law, not the president. It followed that the president had no constitutional right to control Humphrey in his duties insofar as those duties related to the policies of the FTC. The statute, not the president, determined FTC policy.

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

Over time, however, the *Humphrey's* conception of administrative agencies, dominant at the birth of the modern administrative state, slowly got drawn into doubt. By the 1980s, skepticism had grown strong.¹⁸⁵ In 1981, President Reagan came to office with the commitment to bring the national bureaucracy under control. Fifty years of experience had taught politicians and political scientists alike of the limits to agency regulation, and skepticism about the "independence" of independent agencies had become dominant. Reagan appointed federal judges who shared this skeptical view and who also believed that the president has a much stronger constitutional right to control the executive and administrative branches than most scholars and jurists up to that point believed.

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

183. 272 U.S. 52 (1926).

184. *Humphrey's Executor*, 295 U.S. at 625-26. As the opinion states:

Thus, the language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the Congressional intent to create a body of experts who shall gain experience by length of service—a body which shall be independent of executive authority, *except in its selection*, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government.

Id. at 625-26.

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

Soon into the Reagan presidency, the administration began litigating the President's line. One front in this war was a constitutional attack on the status of the independent agencies. And while not directly raising or deciding this constitutional issue, we can catch an extremely important glimpse of this battle in a decision by a three-judge panel of the District of Columbia District Court,¹⁸⁶ written (it is said) by then-Judge Antonin Scalia, in a case that eventually reached the Supreme Court under the name of *Bowsher v. Synar*.¹⁸⁷

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

These cases reflect considerable shifts over the course of time, not only in the Supreme Court's resolutions of particular issues relating to the removal power, but more importantly in the constitutional premises underlying those resolutions. It is not clear, moreover, that these shifts are at an end. Justice Sutherland's decision in *Humphrey's Executor*, handed down the same day as *A.L.A. Schechter Poultry Corp. v. United States*, is stamped with some of the political science preconceptions characteristic of its era and not of the present day. . . . It is not as obvious today as it seemed in the 1930s that there can be such things as genuinely "independent" regulatory agencies, bodies of impartial experts whose independence from the President does not entail correspondingly greater dependence upon the committees of Congress to which they are then immediately accountable; or, indeed, that the decisions of such agencies so clearly involve scientific judgment rather than political choice that it is even theoretically desirable to insulate them from the democratic process.¹⁸⁸

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

Thus the first part of what I have called the *Erie* effect—a fundamental change in the nature of how some activity in law is perceived within law; something that before seemed nonpolitical now seems political. And what follows for Justice Scalia is just what followed for Justice Brandeis after noting the political nature of the common law. In both cases, the change requires a reconsideration of the institutional allocation of authority involved in this activity. In

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

187. *Bowsher v. Synar*, 478 U.S. 714 (1986).

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

both cases, the intuition is to shift the decision now viewed as political away from a body now seen as inappropriate for a political decision. In *Erie*, that body was the (unelected) federal judiciary; for the modern unitarians, that body is an agency outside the president's control. In *Erie*, better to put common lawmaking power exclusively within the control of the states; for modern unitarians, better to assure that administrative lawmaking is within the control of (the politically accountable) president.¹⁸⁹

A second example of the *Erie* effect is more intriguing but perhaps less well understood. This is the change announced by the Court through a series of decisions beginning with *Chevron U.S.A., Inc. v. NRDC*,¹⁹⁰ under which federal courts are defer to the interpretation of an ambiguous federal statute by an administrative agency charged with implementing that federal statute. As I will suggest, this *Erie*-effect shift in authority from courts to administrative agencies reflects the contestation of a very important background notion—that courts are the final arbiter of the meaning of the law.

Judicial deference to administrative agency expertise has a long history, but one which is also quite checkered and, at times, confused. This is in part because there have really been two traditions.¹⁹¹ Always, there has been strong authority for what we could call the *Marbury* view of administrative law—that it was “emphatically, the province and duty of judicial department, to say what the law is.”¹⁹² Under this view, no deference in interpretation is called for: Interpretation is just lawfinding, and courts rather than bureaucrats are given the power to find federal law.

But there has also always been strong authority for what we could call the expertise view of administrative law—that interpretive judgments importantly embrace complex judgments of expertise outside the ken of federal courts, and that in interpreting agency law, courts should be respectful of this special knowledge.¹⁹³ Under this view, strong deference is called for.

Before *Chevron*, precisely which of these two views would prevail was never quite clear. But *Chevron* tilted the balance decisively in the direction of deference, and the decade since *Chevron* has confirmed this shift.¹⁹⁴ Now,

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

190. 467 U.S. 837 (1984).

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

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

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

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

when a statutory provision is ambiguous, or more precisely, when Congress has not "spoken to this precise question," a federal court must defer to an agency interpretation of the ambiguous provision, even if it is a changed interpretation from the agency's earlier reading, and even if the court is convinced that the agency's is the not the "best" or most faithful reading of the statute.¹⁹⁵

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

Consider the question in *Erie*-effect terms. The activity that was drawn into question (step one of the *Erie* effect) was "interpretation." Under the *Marbury* conception of interpretation, interpretation was just lawfinding. A court simply read the statute to find what Congress had meant. The same for agencies. Since just lawfinding, when adopting interpretive rules, unlike legislative rules, agencies were not subject to the requirements of notice and comment.¹⁹⁶ Again, all the agency was doing was saying in more detail what Congress had said before.

But increasingly, this view of interpretation has become quite outdated, even within law.¹⁹⁷ With any legal text, and, a fortiori, with an "ambiguous" text, courts could no longer treat readings as passive. Especially when reading an ambiguous statute, a court could not pretend to be engaging in lawfinding, since there is no law there to find. Instead, as the Court recently put it, the act of interpretation in a context where a text is ambiguous is "*interpretive lawmaking*"¹⁹⁸—the rhetoric of *Erie* applied to the practice of interpretation.

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

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

Judges . . . are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the

195. *Chevron*, 467 U.S. at 843-45.

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

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

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

limitations of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones¹⁹⁹

If interpretation is now viewed as lawmaking, then someone other than federal courts should be making this federal law. Thus is the second step of the *Erie* effect complete: The (now understood) "nature" of interpretation leads us to worry about who, within our political system, is doing the interpretation, and leads us to shift interpretive authority to the more politically accountable institutional actor.²⁰⁰

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

5. *Changes: the response of fidelity.*

A common structure links all of the examples above: In each, between two interpretive contexts, what I have called an uncontested discourse changed; this change yielded a shift in what is "ordinary" or "normal" in that context. In one case—the immigration example—where the shift was from one uncontested discourse to another, this yielded a changed reading that tracked the substance of the changed discourse. In the balance of the examples, the effect was more indirect. In both the due process and equal protection examples, changing an underlying discourse changed the mix of juridical versus legislative judgments,

199. 467 U.S. at 865-66.

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

as what was viewed as uncontested became contested. And finally, in the *Erie*-effect examples, a change in the understanding of the nature of some component of the legal sphere (whether the common law or administrative independence or interpretation) lead to a reconsideration of the balance between judicial and administrative functions. In each case, a changing background uncontested discourse transformed the foreground legal practice.

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

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

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

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

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

Such a practice may be possible, even if epistemologically or hermeneutically extraordinarily difficult. But crucially, for both fidelity theory in general and originalism in particular, it has never been the practice of any court, and

this for good reason. If fidelity or originalism meant deciding a case just as an original court would have decided it—accounting both for choices made and the uncontested background against which they were made—then in each of the examples from the introduction, no changed reading should be recognized by a court under any of the possibilities sketched. Changes in what is viewed as “necessary” could not matter to such a court; changes in the technology required to carry someone to a magistrate should not matter; and changes in the dangerousness of weapons carried by suspects could not matter to one asking whether the Fourth Amendment allows the police to frisk suspects stopped in the street.

No originalism has ever gone this far.²⁰¹ Every form of originalism makes a choice about which of the changes in context—within the contested and uncontested discourses of a particular interpretive context—will be accommodated in the current interpretation. Some changes are always accounted. The question is just which.

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

But the author did not choose or argue over or resolve any conflicts about matters within an uncontested discourse. By definition, these were matters that the actual contest took for granted. Over these matters, and unlike matters within the contested realm, *there was no actual agreement*.²⁰² Thus, to change a reading because of a change in these background presuppositions is not the same kind of disregard that is involved when a court changes a reading by ignoring choices made within the contested domain. Changed readings that track changes in uncontested background discourses to actual political choices are not, therefore, changes that ignore choices that the authors made.

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

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

202. Cf. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (1960) (discussing “blanket assent” to boilerplate clauses).

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

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

Second, there is a limit on how much a court can affirm when what it affirms is part of an essentially contested discourse. Courts within our tradition function by hiding their will; their authority is transitive, drawn from an authority outside themselves. When a court can point to a clear legal authority supporting one outcome over another, or when a court can rely upon understandings taken for granted by all to support one outcome over another, it will. But when there is no clear legal authority, when understandings are fundamentally contested, there is nothing behind which the court's will can hide. Less cynically, there is no authority from which the court can draw authority of its own. When reasonable people may differ, then the court's choice *seems* political; when reasonable people may not differ, then the court's choice does not *seem* political. Obviously, in both cases, at some level, the court's choice is political, but what is significant is not what is, but what it appears. Courts cannot act where their actions fundamentally appear political. Or alternatively, fidelity is pursued by courts *subject to* the constraints of uncontested discourses, which means, subject to the constraint that decisions not appear to be simply the will of a court versus the will of the legislature.²⁰³

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

It is this second constraint that explains the *Erie* effect. For the predicate of an *Erie*-effect change is that something that before appeared unproblematic now seems political. This shift is just the shift of uncontested discourses, and what the dynamic of the *Erie* effect reveals is the reallocation of institutional authority required by these shifting uncontested discourses. Fidelity is pursued subject to the *Erie* effect.

Both limits, then—the constraint of an uncontested discourse and the constraint of the *Erie* effect—function as limits of pragmatic necessity on the practice of fidelity engaged in by a court. Both, then, explain something of the pattern of cases that I have discussed under the label of structural translation. And while it is beyond the scope of this article to resolve finally what fidelity here should mean,²⁰⁴ it is enough here simply to note these two different justifications for structural translation—fidelity and pragmatic necessity—and to note the uncontested truth that some such justification is needed, since readings have, and do, and will always change to accommodate changes in this background discourse.

D. *Justifying Changed Readings: Summary*

I have outlined four types of justified changed readings, falling into two general classes.²⁰⁵ The first class we can call justifications of transformation; the second, justifications of translation. Justifications of transformation rest ultimately upon the actions of democrats changing a normative text's meaning; justifications of preservation rest ultimately upon the actions of juricrats, preserving a normative text's meaning in light of a changing interpretive contexts.²⁰⁶ Justifications of transformation seek fidelity to what the people (or their representatives) have just said; justifications of translation seek fidelity to what the people have said before.

Justifications of transformation come in two types. The first tracks textual amendment directly; the second tracks amendments indirectly, through the interpretive practice of synthesis. Justifications of translation also come in two types. The first, fact translation, follows changes in facts presupposed by an

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

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

205. See table accompanying note 33 *supra*.

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

earlier reading; the second, structural translation, follows changes in underlying uncontested discourses which were treated as "facts" by an earlier reading.

By separating out these distinct forms of justification, I do not mean to suggest that they function independently. Indeed, it is the distinctive challenge of American constitutionalism both to read a text that has been *added to* over time, and to read a text that has been added to *over time*. A reader, that is, must not only synthesize the various constitutional principles embodied in this multigenerational text, but she must also understand how to read that text across vastly different interpretive contexts. She must, that is, both synthesize and translate, often at the same time.

This is the practice referred to in box 4 of the table above,²⁰⁷ and a device of Dworkin's, the chain novel, may make the point more plain.²⁰⁸ The chain novel is the paradigm multigenerational text: Each chapter is added by a different author, each addition bringing something new to the old, each aiming to make the text the best it can be. As new chapters are added, something about the meaning of what went before can change. For the reader of the novel tries to understand the story as a whole, and what is said later colors what was said before.

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

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

II. APPLICATIONS: UNDERSTANDING THE NEW DEAL

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

207. See fig. B box 4 accompanying note 33 *supra*.

208. See DWORKIN, *supra* note 51, at 228-32.

All agree that the New Deal marked a fairly radical set of changes in the Supreme Court's reading of the Constitution. For our purposes, we can isolate essentially two themes—those changes related to the demise of substantive due process (no longer would substantive due process limit as severely the power of state and federal governments to regulate) and those related to the rise of federal commerce power (no longer would federal commerce power be as limited). Both changes occurred roughly at the same time, though the change in substantive due process was more gradual than the change in the commerce power. Its change was quite dramatic, coming in a clear shift in 1937, in the face of President Roosevelt's Court-packing plan, known today as the "switch in time that saved nine."²⁰⁹

Views about the change that both shifts mark can be ordered into four groups:

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

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

A. *The New Deal As Unconstitutional*

Constitutional conservatives, or laissez-faire libertarians, typically populate the first of these positions.²¹⁰ Richard Epstein is a useful example. Epstein has attacked the New Deal changes in a wide range of areas.²¹¹ His attack on the

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

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

211. E.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) [hereinafter EPSTEIN, *TAKINGS*] (calling the New Deal inconsistent with principles of limited government and arguing that the original Constitution would not support many 20th century reforms, such as zoning, rent control, and progressive taxation); Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1357-58 (1983) (proposing that New Deal labor laws be replaced by a common law regime of tort and contract); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1443-54 (1987) [hereinafter Epstein, *The Commerce Power*] (criticizing the New Deal's expansive construction of the Commerce Clause as lacking a textual basis). Epstein's position is criticized in Walter Dean Burnham, *The Constitution, Capitalism, and the Need for Rationalized Regulation*, in *HOW CAPITALISTIC IS THE CONSTITUTION?* 75, 93-95 (Robert A. Goldwin & William Schambra eds., 1982); see also Colloquy, *Proceedings*

Court's Commerce Clause cases is representative. Says Epstein, "I think that the expansive construction of the clause accepted by the New Deal Supreme Court is wrong, and clearly so, and that a host of other interpretations are more consistent with both the text and the structure of our constitutional government."²¹²

What interests me here is Epstein's method—a method not uncommon among constitutional jurists, but distinctive nonetheless. In Epstein's analysis, if the New Deal change is not "driven by any textual necessity," then it must be the result of political "forces."²¹³ Context apparently cannot count. In his central attack on the change in the commerce power, he acknowledges that the most commonplace justification of the New Deal change relies on the change in the national economy as a predicate to the expanded commerce power. Yet he refers just twice to these changes²¹⁴ and never once attempts to justify an interpretive method that may ignore them—as his does. Instead, he takes it as given that applying the Constitution in the same way is to preserve the meaning of the Constitution. So understood, it is enough for his argument to consist of a careful reading of a century of Supreme Court cases, with no substantial account of the worlds within which these questions get raised.

This is one way to read a constitutional text. But it is not the only way, or even so clearly the right way that Epstein can simply omit any argument for it. More significantly, it is not Epstein's way of reading the Takings Clause. For here Epstein has no trouble defending a changing scope of property interests

of the Conference on Takings and the Constitution, 41 U. MIAMI L. REV. 49 (1986) (containing criticism of TAKINGS).

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

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

214. *Id.* at 1396-97, 1444. Epstein's most serious consideration of the issue is as follows: [T]here is no reason to distinguish the commerce of the eighteenth and nineteenth centuries from that of the twentieth. Business in one state has always had profound economic effects upon the fortunes of other states. The pre-Civil War battles between North and South over the tariff show just how much the fate of each state has always depended upon national economic policies. There was no economic revolution during the Progressive Era or the New Deal that justifies the convenient escape of saying that it is only the nature of business and trade that has changed, not the appropriate construction of the commerce clause. The intimate interdependence between trade and national economic conditions was as clear to the Phoenicians and the Romans as it is to ourselves.

Id. at 1396-97 (footnotes omitted). Compare: A recent *New York Times* article describes how failures in the baggage handling system—caused by smudges in the baggage tickets—at Denver's new airport had the potential to cripple air travel for the whole nation by "delaying flights from coast to coast." Allen R. Myerson, *Automation Off Course in Denver*, N.Y. TIMES, Mar. 18, 1994, at C1, C2. It is a formalism in the extreme to suggest that there is no difference between this manifest economic integration and that of the Phoenicians.

(changing in response to changing economic theory and social reality, and to the problem of "novel institutions in changed social circumstances"²¹⁵) to justify an ever-expanding scope for takings protection.²¹⁶ There is little doubt that the resulting scope of protection covers far more than the original scope of takings protection,²¹⁷ without any change in the "textual necessity" of the Fifth Amendment. Yet if his method is valid for rights, one at least expects an argument about why it is invalid for powers.²¹⁸

At the least, this inconsistency in methodology counsels that we put off for the moment the ultimate resolution of Epstein's case. Until we resolve whether another reading—one that does not require rejecting fifty years of Supreme Court jurisprudence²¹⁹—is possible, we should defer constitutional condemnation. A principle of charity in interpretation counsels that we ask first whether there is a way to understand the Constitution that makes most sense of what its interpreters have done. Can we see most of what the Constitution's interpreters have done as correct? Only after answering this question in the negative have we earned the right to conclude that this interpretive history makes no sense of constitutional fidelity. Or at least that will be my strategy here.

B. *The New Deal As Restoration*

By far the dominant view about the New Deal transformation is this: The changes effected by the New Deal were certainly significant; relative to the Constitution as interpreted for the fifty years before, they were certainly on the level of a constitutional amendment. But, this view asserts, it was the Constitution of the prior fifty years that was in error, not the Constitution given us by the New Deal. Instead, the New Deal restored the original Constitution, after a period of constitutional usurpation by an activist conservative Court. As an act of constitutional restoration, the changed readings of the New Deal Court are justified.²²⁰

215. EPSTEIN, TAKINGS, *supra* note 211, at 28.

216. *Id.* at 24-31.

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

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

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

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

As with any argument from restoration, the argument turns on there being a close relationship between the restored and the original Constitution, and this turns on showing that the Framers' original Constitution would have yielded the vast array of power claimed by the New Deal. To sustain this argument, the restorationists point to the last opinions of Chief Justice Marshall interpreting congressional power—in particular, to *McCulloch v. Maryland*,²²¹ reserving to Congress broad discretion in determining the scope of its implied legislative authority, and *Gibbons v. Ogden*,²²² described by Justice Jackson as setting out “the federal commerce power with a breadth never yet exceeded.”²²³

Read out of context, there can be no doubt that the powers the New Dealers claimed do get sanction from these late Marshall opinions. For read out of context, these opinions clearly establish a formula for testing federal power that would sanction the federal power claimed by the New Deal. *Gibbons* gives Congress the power to regulate commerce that “affect[s]” more than one state,²²⁴ and as the New Dealers quite convincingly argued, by the 1930s, there could be no doubt that the commerce Congress sought to regulate was commerce affecting more than one state. And even if it were not “commerce” that Congress was regulating—if it were, for example, “manufacturing” and therefore not within the terms of the Commerce Clause—then *McCulloch* still assured to Congress the power to regulate “manufacturing” under the Necessary and Proper Clause, so long as regulating manufacturing was a means that was “appropriate” and “plainly adapted to [the] end” of regulating “commerce.”²²⁵ Finally, whether something “affects” more than one state, or whether a means is “appropriate” to a congressional end, were questions these Marshall cases reserved to Congress' judgment. These three points easily yield the Constitution that the New Dealers sought.

But only by a lawyer's trick, for however much the plain language of these opinions might support the New Deal, there can be no doubt that Chief Justice Marshall and the Framers he spoke for would never have sanctioned the extent of federal power that the New Deal allowed.²²⁶ For the tests Chief Justice Marshall outlined in the early nineteenth century were designed for a world where the resulting powers would not have obliterated exclusive state regulative authority (as they would in the early twentieth century). Had the tests done that then, there can be little doubt that Chief Justice Marshall would not have adopted them. What Chief Justice Marshall gave us were readings of congressional power within a particular context of social and economic facts, and the meaning of these opinions is conditioned by these original contexts.

221. 17 U.S. (4 Wheat.) 316 (1819).

222. 22 U.S. (9 Wheat.) 1 (1824).

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

224. 22 U.S. (9 Wheat.) at 192.

225. 17 U.S. (4 Wheat.) at 421.

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

Moreover, not only did the New Dealers use these opinions out of context, but they also used them only partially. Essential to the Framers' understanding of the Court's review of commerce cases was the presupposition that the Court could continue to divine the *purpose* of a regulation and thus divide regulations between those with illicit and those with licit purposes.²²⁷ But one crucial dimension to the New Deal change is the death of this very confidence in the ability of a court to divine the legislative purpose of commercial or economic regulation.²²⁸ Whereas all agreed in *Gibbons* that the motives and purposes of state regulation would have to be evaluated when addressing the scope of congressional power,²²⁹ the New Deal Court claimed that "motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the Courts are given no control."²³⁰ The same is true with *McCulloch*: It required that the Court employ a kind of pretext analysis to assure that the use of the Necessary and Proper Clause not be allowed to subvert state interests.²³¹ But since the New Deal, this part of the *McCulloch* test has been all but forgotten.

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

Just from the perspective of theory, we might again want to resist this as a solution. We might, that is, want first to determine whether there is a theoretically more conservative solution to the change of 1937, one that does not require the rejection of as much of our past as does either the restoration theory or the conservatives' theory.

C. *The New Deal As Amendment*

Bruce Ackerman takes a more charitable approach. For he too aims to understand the New Deal change in a way that legitimates most of our constitutional past. Although he agrees that the transformations of the New Deal were

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

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

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

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

231. 17 U.S. (4 Wheat.) at 423 ("Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government . . .").

significant enough to require a constitutional amendment,²³² he rejects both the conservative and restorationist views. Instead, Ackerman points to political change during the New Deal that he views as sufficient to amend the Constitution.²³³

We can understand Ackerman's argument like this: Ours, Ackerman suggests, is a dualist Constitution—a Constitution in which ordinary lawmaking occurs within the terms set by extraordinary moments of higher lawmaking.²³⁴ A "moment" of higher lawmaking is the product of a sustained and self-conscious political act by "the People," seeking to transform the then existing constitutional regime.²³⁵ At least three such moments of higher lawmaking have defined our past—the Founding, Reconstruction, and the New Deal.²³⁶ Each marks a moment of dramatic constitutional change, which, according to Ackerman, amended the Constitution in a fundamental way.²³⁷ For the reader focused on fidelity, the question is whether each change was justified.

Conventional wisdom finds no problem justifying the first two moments—they were, after all, self-conscious amendments of the then existing constitutional text, through the addition of another bit of constitutional text; they followed processes understood as processes of amendment. But justification is not so easy with the New Deal change, for no bit of text was added through an enactment by the people, and no self-conscious act of amendment appears (at least on the surface) of the constitutional past.²³⁸

Not a problem, says Ackerman, for conventional wisdom is just wrong—wrong to be so secure about the legitimacy of the first two moments and wrong to be so doubtful about the legitimacy of the third.²³⁹ In the conventional account, an amendment proceeds through (1) a formal and technical procedure that thereby (2) assures that a highly engaged polity effects constitutional change. But conventional wisdom notwithstanding, the first two constitutional moments were, Ackerman argues, technically illegal,²⁴⁰ while the third, no

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

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

234. *Id.* at 6.

235. *Id.* at 6-7.

236. *Id.* at 40.

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

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

239. *Id.* at 44.

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

doubt itself also technically illegal,²⁴¹ manifested all the requisite popular engagement necessary to qualify as a legitimate amendment to the Constitution.²⁴² Thus, *all three moments* were legally problematic, yet because all three were also engaged democratic processes, all three deserve constitutional recognition and legitimacy.²⁴³

The problem with this ingenious account is that unlike moments one and two, there is nothing at all *like* a constitutional amendment in moment three. Moment one bore a Constitution; moment two, three snippets of constitutional text that, however flawed, at least seem like constitutional amendments. But from moment three we have nothing enacted by "We the People" through any procedure, however flawed. Rather than a popularly ratified (in at least some way) text, we have a series of transformative opinions by the Supreme Court, validating actions by Congress and the states that before had been held unconstitutional. It is these opinions, Ackerman argues, that we should recognize as the amending texts,²⁴⁴ and these that we should use in the process of synthesis that must follow any endogenous constitutional system.²⁴⁵

But something doesn't fit. Before we consider whether a procedurally flawed *amendment* is nonetheless an amendment, don't we need something even minimally recognizable as an amendment? Doesn't there have to be something recognizable as a text, offered as a change to the Constitution, not because such is essential to the very notion of a constitutional amendment,²⁴⁶ but because such is essential to the notion of an amendment within our constitutional tradition?

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

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

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

243. *Id.* at 1069-70.

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

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

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

What is driving Ackerman here, I suggest, is a narrow conception of the range of possible justifications for changed readings. While it is not as narrow as Epstein's (for Ackerman does believe there are justifications beyond "textual necessity" to support changed readings of the Constitution—synthesis, for example²⁴⁷), at synthesis Ackerman apparently draws the line. Consider just one passage in his discussion of the possible justifications for *Brown* to suggest this narrow view of the possible justifications for changed readings:

The question Warren's dictum raises is whether we can locate an analogous constitutional transformation between 1896 and 1954 that makes it equally appropriate for Warren to reject the binding force of *Plessy*. Did We the People speak in a new way in the first half of the twentieth century which decisively undercuts *Plessy*'s interpretation of the Constitution?²⁴⁸

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

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

D. *The New Deal As Changed Concepts*

Before we consider an argument from translation, we should consider what I believe is its closest cousin, Cass Sunstein's understanding of the New Deal change. Sunstein argues that the New Dealers recognized a fundamental conceptual error about the nature of the common law, a mistake perpetuated by late nineteenth century jurists.²⁴⁹ Until the New Deal, the dominant judicial rhetoric was that property and contract were, as Sunstein puts it, "natural" and "prepolitical."²⁵⁰ As a result, the Court privileged contract and property above legislation that sought to "redistribute" these seemingly natural assets.²⁵¹

Slowly, however, Sunstein claims, the Court came to see the "baseline" problem in this earlier view: that contract and property themselves were redistributions from what otherwise would be a prepolitical or natural distribution; that therefore the results of a regime of "contract and property" were just one kind of effective redistribution; and that the Progressives were not trying to substitute redistribution for nature, but instead wanted to substitute one type of

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

248. Ackerman, *Politics/Law*, *supra* note 24, at 530.

249. Sunstein, *supra* note 232, at 423.

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

251. *Id.*

redistribution for another.²⁵² Once the New Dealers understood the baseline problem—pushed most forcefully, for example, by people like Robert Hale²⁵³—the New Deal revolution followed in turn.²⁵⁴

There is much in this account that I believe true and valuable. But it lacks an account of fidelity—a theory that helps explain *why* the response of the New Deal to the change in ideas that he remarks was a proper or faithful response. In Sunstein's account, "ideas" are changing in the foreground of New Deal thought. At one time, the New Dealers had one baseline concept; at another time, a different one. At one time, "common law and existing distributions" were entitled to extraordinary protection from democratic politics; at another time, they were not.²⁵⁵ At one time, the government's "failure to impose a minimum wage" was not conceived as a "subsidy for unconscionable employers"; at another time, it was.²⁵⁶ The problem with the pre-New Deal Court's ideology was "conceptual"; the "basic idea [of laissez-faire] a myth."²⁵⁷ The New Deal, "and especially the legal revolution of 1937, should be understood above all as a rejection of these conceptions of neutrality and action. The rejection was self-conscious and explicit. The conceptual break consisted in the insistence that current rights of ownership, and other rights, were a product of law."²⁵⁸

The problem with all this is that it moves too directly. It treats all "ideas" as contested and suggests that what the Court did in the New Deal was simply pick the contested set it liked best. But the dynamic, I suggest, is less direct. What the New Deal Court did *not* do is latch onto any emerging contested theory of legal reality as a way of trumping an earlier contested theory of legal reality. What it did instead was respond to the fact that these earlier understandings had become contested, and it responded, in *Erie*-effect ways,²⁵⁹ by retreating from judgments that it unself-consciously had made before. Again, one set of ideas did not triumph over another; rather, ideas once presumed now became contested, and once they were contested, the Court had no choice but to retreat from the arena of contest.

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

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

254.

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

. . .

The initial problem with laissez-faire was therefore conceptual. The basic idea was a myth.

SUNSTEIN, *supra* note 252, at 55.

255. SUNSTEIN, *supra* note 252, at 51.

256. CASS R. SUNSTEIN, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 880-81 (1987).

257. SUNSTEIN, *supra* note 252, at 55.

258. *Id.* at 41.

259. See text following note 176 *supra*.

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

E. *The New Deal As Translation*

Rather than unjustified, rather than restoration, rather than amendment, and rather than mistake, I suggest that an argument of translation—both of fact and structural translation—best justifies the changes of the New Deal. Two types of changes are at the core of this argument—first, and more familiar, changes in the economic and social reality that law regulated (the predicate to the restorationist's argument); second, and less familiar, changes in law's understanding of itself (an *Erie* effect).²⁶⁰ Only together do these changes suggest the fidelity in the radicalness of the New Deal changes.

There are two parts to the puzzle that must be explained. The first is the change in substantive due process limitations on economic and social regulation. Rising slowly through the nineteenth century, by the beginning of the twentieth, substantive due process had become firmly established as a limitation on the power of (primarily) state governments to regulate economic and social affairs. In its purest form, represented by *Lochner v. New York*,²⁶¹ it stood for the proposition that legislation must be in the public good to survive constitutional review; special interest or class legislation was unconstitutional.²⁶² And while unevenly enforced by state and federal courts over the period, the notion became a dominant view of the proper role of government among constitutional jurists.

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

The second part of the puzzle is the change in the scope of federal power, especially as articulated through the Commerce Clause. From an odd beginning in the late nineteenth century through the mid-1930s, the Court struggled to find ways to limit the growth of federal commerce power, by finding implied, formal limitations on its scope. Thus, "manufacturing" was held not to

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

261. 198 U.S. 45 (1905).

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

be "commerce" within the meaning of that term;²⁶³ regulations that "indirectly" affected interstate commerce were held to be outside the commerce power;²⁶⁴ and only local actions "inten[ded]" to affect interstate commerce were to be considered interferences with interstate commerce.²⁶⁵

In 1937, this enterprise of implied limits on the commerce power came to an end. Beginning with *NLRB v. Jones & McLaughlin Steel Corp.*,²⁶⁶ the Court ceased its practice of commerce power formalism and yielded back to Congress the judgment whether a certain activity was within the scope of the commerce power. This abdication has gone unchecked in the fifty years since. In no case has the Supreme Court struck down a statute as falling without the commerce power, save in those cases where the commerce power interacted with Tenth Amendment limitations.²⁶⁷

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

1. *Changes: economic reality.*

Throughout the period beginning with the Industrial Revolution and culminating in the collapse of 1929, the economic substructure of the nation underwent a radical transformation. The extent of this change cannot easily be overstated: Between the end of the Civil War and the 1929 collapse, the total value of manufactured products increased nearly twenty times;²⁶⁸ railroad track mileage went from under 40,000 miles nationwide to over 260,000;²⁶⁹ the urban population increased from 16.1 percent to 49.1 percent.²⁷⁰ Between 1860

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

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

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

266. 301 U.S. 1, 3 (1937) (prescribing deferential review of congressional definitions of interstate commerce).

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

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

269. *Id.* at 260 fig. 17-1.

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

and 1919, the value added by American manufacturers had increased more than thirty-three-fold.²⁷¹

None could deny the significance of this change. None could deny that the nation was no more the world of yeomen farmers and small town merchants idolized by Jefferson and the early Republicans.²⁷² And none should deny that through a simple application of fact translation, this change in the level of economic activity had the potential to increase the scope of governmental power, both on the state and federal level. The scope of *federal* power would increase, since federal power reached "commerce . . . among the several States,"²⁷³ as well as means "appropriate" or "plainly adapted"²⁷⁴ to the end of regulating commerce, and a greater range of activity now fell within the scope of those two powers. The scope of *state* power would increase, since state power, even under a strong substantive due process regime, touched activities "affected with a public interest,"²⁷⁵ and economic and social integration would mean that more activities would be so affected. In both cases, the passive change of increased social and economic integration would easily warrant increased federal and state power, a warrant supplied by a straightforward argument of fact translation.

Focus first on the effects of integration at the state level. As I have suggested, the Due Process Clause of the Fourteenth Amendment was understood to limit the permissible scope of state regulation. *Lochner*-era scholars offered easy formulations, even as their content became increasingly obscure: State regulation was to advance the common good of the state as a whole, and not the particular good of some over others.²⁷⁶ Thus "police power" regulation was permissible; "class" legislation, or special interest legislation, was not. Thus did the *Lochner* Court understand due process as well,²⁷⁷ as had many earlier courts for perhaps worthier causes.²⁷⁸

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

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

273. U.S. CONST. art. I, § 8, cl. 3.

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

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

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

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

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

In the late nineteenth century, the bite of the substantive due process restriction on state regulatory power was much less than its bark. Progressives initially established a relatively broad scope for state regulatory power by arguing that a great deal of activity affected the public interest and therefore properly fell within the states' police power. *Munn v. Illinois*²⁷⁹ was an early victory for this "interdependence" school. In *Munn*, proponents of state regulation successfully demonstrated that fourteen grain elevators in the Chicago area were "clothed with a public interest" sufficient to allow state regulation,²⁸⁰ even though grain elevators would not have been so considered under the common law. It did not matter, Justice Waite wrote, that no exact precedent existed

for a statute precisely like this. It is conceded that the business is one of recent origin . . . [but it presents] a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress.²⁸¹

This progressive victory, however, was short-lived. Proponents of substantive due process were more successful after *Munn*, though the courts were never wholly uniform in their results. From 1870 through *Lochner* in 1905, we can observe a recurring battle between, on the one hand, claims for increased regulatory authority grounded in an ever increasing range of activity "affected with a public interest" and, on the other, efforts to limit that regulatory authority by claiming that it was exercised solely for the benefit of one class against another. As *Munn* suggests, progressives were successful to the extent that they could demonstrate clearly the integrated (and hence police) effects. Conversely, as Michel Les Benedict suggests, proponents of substantive due process were successful to the extent that they could clearly demonstrate partiality in purportedly public interest legislation.²⁸²

Rather than a history of substantive due process victories, then, the middle republic is best understood as a period when this balance gets repeatedly restruct. But the punchline is well known: With the rise of the New Deal, the balance tilts firmly in favor of state regulation; the "class legislation" limitation disappears, and state legislatures are permitted an essentially unlimited scope of

279. 94 U.S. 113 (1876).

280. *Id.* at 132.

281. *Id.* at 133.

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

regulatory power (at least within the domains of economic and (some) social legislation).

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

The first great success came in *Muller v. Oregon*, where the Court carved an exception for women in the substantive due process bar on maximum hours legislation.²⁸³ The foundation for the exception was laid by Louis Brandeis, in his "Brandeis brief" for the Court. With two pages of legal argument and 110 pages of economic and sociological data, the brief sought to convince the Court of a plausible link between the special protection of women and a general or public purpose.²⁸⁴ Convince it did, whether because of the economics or because of the Court's special favor for women. Either way, the brief was enough to induce the Court to suspend its search for bad motives and allow state interference with these private choices.

The real break in substantive due process cases, however, came not with *Muller*, but rather midway into the collapse of the Depression. As Laurence Tribe describes, "the Great Depression conclusively established for many Americans the interdependence of economic factors,"²⁸⁵ and this interdependence animates the balance of the cases orchestrating the collapse of substantive due process, in particular, *Nebbia v. New York*,²⁸⁶ *Home Building & Loan Association v. Blaisdell*,²⁸⁷ and finally, *West Coast Hotel Corp. v. Parrish*.²⁸⁸

Begin with *Blaisdell*. Here again, progressives attacked with a barrage of economic facts. At issue was the constitutionality of a Minnesota debtor relief statute. Under the Supreme Court's contract and due process cases, the statute should have been struck, for under these earlier cases, what Minnesota was doing was benefiting some (debtors) to the burden of others (creditors) in a way that did not benefit all overall.²⁸⁹

To simplify matters, we can understand these earlier cases to rest upon two presuppositions: first, that the contract and due process clauses limited states to regulation within the police power, and second, that debtors' relief legislation

283. 208 U.S. 412 (1908).

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

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

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

287. 290 U.S. 398 (1934).

288. 300 U.S. 379 (1937).

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

could never be within the police power. So understood, affirming the Minnesota Supreme Court's judgment upholding the statute meant rejecting one of these presuppositions. The question is which.

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

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

Here is what the Court said:

Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved [in contracts of this sort], and that those of the state itself were touched only remotely, *it has later been found* that the fundamental interests of the state are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.²⁹⁰

What the Court points to here is not the change of a normative presuppositions (such as that the state may only regulate within the police power) or a later change in public opinion about the proper scope of government (such as that the state or federal government should regulate beyond this police power), but later *discovery* ("been found") about the interrelationship of the underlying economy and state resources. The Court's confession is not of a change in popular will or of a change in substantive constitutional mandate, but of a change in underlying economic reality. In light of a later discovery, it was no longer *true* that this legislation was not and could not ever be within the police power. Too much had happened to allow the Court credibly to deny economic interdependence.²⁹¹

Justice Sutherland's bitter dissent only strengthens the point.²⁹² The dissent begins with a point with which the translator fully agrees: that the *meaning* of the Constitution does not change through time, even though its *applications* may change.²⁹³ But the dissent then proceeds to ignore this very distinction

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

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

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

293. *Id.* at 449.

between meaning and application by equating the *intended application* in the original context with the *Constitution's meaning*. As the dissent rightly notes, the very *purpose* of the Contracts Clause was to avoid legislation of precisely this kind—debtors' relief legislation. But from this premise, the dissent concludes that such legislation must be, if anything is, proscribed by the Clause.²⁹⁴ No such conclusion need follow. If a statute forbids a hospital's employment of people with "highly contagious diseases," even if it was passed in a context where AIDS was considered a highly contagious disease, and even if it was passed for the purpose of proscribing the employment of people with AIDS, once we learn that AIDS is not highly contagious, it would *change the meaning* of the statute to *apply it in the same way*. For if it were applied to AIDS, it would be applied to someone "without a highly contagious disease."²⁹⁵

In the same way, even if the Founders meant to proscribe debtors' relief legislation because private contracts were not *then* affected by a public interest, the Court could well conclude that such proscription remains only so long as such contracts in fact remain unaffected by a public interest. But this is just what the Depression throws into doubt: For after the Depression, the Court had to recognize that it was at least plausible, as state legislatures claimed, that the cost of economic failure was borne more fully by the community as a whole, and that therefore *some* contracts relating to that failure were affected with a public interest even though *before* they were not.²⁹⁶ If so, permitting their regulation now would not be a change of its meaning then. This was Justice Cardozo's point, made in an unpublished concurring opinion:

To hold [the law constitutional] may be inconsistent with things that men said in 1787 when expounding to compatriots the newly written constitution. They did not see the changes in the relation between states and nation or in the play of social forces that lay hidden in the womb of time. It may be inconsistent with things that they believed or took for granted. Their beliefs to be significant must be adjusted to the world they knew. It is not in my judgment inconsistent with what they would say today, nor with what today they would believe, if they were called upon to interpret . . . the constitution that they framed for the needs of an expanding future.²⁹⁷

It is consistent, Justice Cardozo argues, with the constraints of fidelity to allow regulation now where originally the Framers would not, because of a

294. *Id.* at 453-66.

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

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

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

change in the significance of the activity regulated and in the integration of the economy within which the activity occurs.

The same account of the death of substantive due process (at least for economic rights) is revealed more explicitly in another of the Court's transformative cases, *West Coast Hotel Corp. v. Parrish*.²⁹⁸ At issue in *Parrish* was Washington State's minimum wage law for women, which again would likely have been struck under the Court's earlier case of *Adkins v. Children's Hospital*.²⁹⁹ *Adkins*, like *Blaisdell*, rested on the presupposition that these were contracts not affected with a public interest. But again, the Court concluded that the effect of these contracts was not confined to private interests but reached a level of public interest—not merely out of public concern for the well-being of low-wage workers, but also out of fear that those receiving subminimum wage would become a burden on the state. As the Court explained:

There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless [sic] against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. . . . The community is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest.³⁰⁰

Again, the Court is not pointing to the "unparalleled" political action that occurred during the recent Depression, demanding in some relevant manner that the Court change its tune. Rather than amendment, the Court points to the *facts learned* during the recent Depression, to facts the court can take "judicial notice" of, to facts that reveal the public interest affected by this legislation, which under traditional police power notions preserves the state power to regulate.³⁰¹ Once again, it is not *amendment* that is required to justify this changed

298. 300 U.S. 379 (1937). *Nebbia v. New York*, 291 U.S. 502 (1934), decided the same year as *Blaisdell*, was another major step in the transformation. See IRONS, *supra* note 220, at 142.

299. 261 U.S. 525, 554 (1923) (striking down a minimum wage law for women as an impairment of the freedom to contract).

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

301. Compare Justice Stone in a later dissent:

In the years which have intervened since the *Adkins* case we have had opportunity to learn that a wage is not always the resultant of free bargaining between employers and employees; that it may be one forced upon employees by their economic necessities and upon employers by the most ruthless of their competitors. We have had opportunity to perceive more clearly that a wage insufficient to support the worker does not visit its consequences upon him alone; that it may affect profoundly the entire economic structure of society and . . . that it casts on every taxpayer, and on government itself, the burden of solving the problems of poverty, subsistence, health, and morals of large numbers in the community.

Moorehead v. New York *ex rel.* Tipaldo, 298 U.S. 587, 639 (1936) (Stone, J., dissenting), *overruled in part* by *Olsen v. Nebraska*, 313 U.S. 236, 246-47 (1940).

reading, it is the recognition of a different economic significance to the facts, whether different because previously mistakenly conceived, or because the world itself had become different.

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

This, then, is the first part of an argument from translation justifying the Court's changed readings following the New Deal. The critical move lies in the contestation of the governing paradigm of laissez-faire independence: (1) Facts change—the amount of economic activity, the interrelationships among this activity, and the effect of an unregulated economy on minimal levels of “human welfare”—and (2) the continued viability of a doctrine premised upon those facts is drawn into question. Whether because one believes that the Depression and emerging economics *proved* that the economy was interdependent in a way that before it was thought not to be, or because one believes the Depression and emerging economics *made plausible* progressives' claims that the economy was interdependent in a way that before it was thought not to be, government would get more room to regulate.³⁰²

2. *Changes: judicial authority.*

Standing alone, however, fact translation justifies frighteningly little. Even if the vastly integrated economy brought the whole of economic and social life within the reach of governmental regulation, these changes would not yet justify the Court's ultimate and extreme deference to the political branches after 1937. For to allow the regulation of all social and economic activity would be

302. It is worthwhile to note that these two factors alone seem to have been considered sufficient justification by Justices O'Connor, Kennedy, and Souter in their joint opinion in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1991) (joint opinion). As the three justices described the *Lochner*-to-*Parrish* shift:

[Since *Lochner*], the Depression had come and, with it, the lesson that seemed unmistakable to most people by 1937, that the interpretation of contractual freedom protected in *Adkins* rested on *fundamentally false factual assumptions* about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare. . . . The facts upon which the earlier case had premised a constitutional resolution of social controversy had proved to be untrue, and history's demonstration of their untruth not only justified but required the new choice of constitutional principle that *West Coast Hotel* announced.

Id. at 2812 (citations omitted) (emphasis added). One should note (confess?), however, that if factual contestability justified the Court's doctrinal shift in *Parrish*, then *Roe*, too, could fall victim to changes in the underlying facts. See *Roe v. Wade*, 410 U.S. 113 (1973).

to establish a government fundamentally different from the government established by the Founders.

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

To reckon with this abdication requires an account quite different from the sort offered so far. Like the *Erie* effect, the core of this account is a change in law's understanding of itself—a change in the dominant view of what courts were doing when limiting regulation within the social and economic spheres. This change ended the judiciary's ability to control or even identify the line between permissible and impermissible state and federal regulation, and hence forced the Court to retreat from its invasive limitations on government's power. As in *Erie*, self-consciousness about what courts were now (seen to be) doing undermined the ability of courts to continue what they had been doing before.

Background. In describing the predicate of the change remarked in *Erie*, I outlined the development of what we can call nineteenth century formalism or conceptualism.³⁰³ This attitude or psychology of judging affected far more than the development of the common law. Indeed, what this "phonograph" theory of judicial construction—where "the judge is merely an oral medium through which the preexisting legal principles are given expression"³⁰⁴—meant was that judging could proceed as if the judges were not themselves responsible for the political choices inherent in their product. This was no mere accident. As described by Nelson,

What the judges whom subsequent scholars have called formalists had in common was not any single well-developed style or method, but an aversion to explicit analysis of policy. It is, of course, impossible to know whether any particular judge totally ignored issues of policy in reaching a decision in any given case. But even if they did take policy considerations into account, most late nineteenth-century judges did "not like to discuss questions of policy," for "views of policy [were] taught by experience of the interests of life," and "those interests [were] fields of battle." Americans had just come from those fields and had no desire to return. Thus, most American judges sought to clothe their decisions in the language of formal "logical deduction" and to reason either from "general propositions" about the essential meaning of republicanism or from the immutable records of the English common law. They sought to make "legal reasoning seem like mathematics" and to convince themselves that if men differed over a question of law, "it meant simply that one side or the other were not doing their sums right, and if they would take more trouble, agreement would inevitably come."³⁰⁵

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

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

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

The language of the conceptualists or formalists helped construct the view that what the judges did was not politics, but law, and to the extent that the Court succeeded in establishing such a language, it succeeded in increasing its own power—in particular, its power to resist progressive legislation. For the more a Court can speak formalistically—which means both that a Court does speak formalistically and is permitted by the legal culture to speak formalistically—the more activist the Court can be.³⁰⁶

As I described above, this view of the common law as the product of discovery rather than choice ultimately collapsed. And that very same skepticism about the common law was to have the very same effect on the activism of the pre-New Deal Court.³⁰⁷ Just as the Court could no longer be seen to be “finding” the common law, courts could no longer be seen to be “discovering” neutral and inherent limitations on legislative action under the Due Process and Commerce Clauses of the federal Constitution.³⁰⁸ As with the common law, so too here the act of judging came to appear more like *will* and less like *judgment*. Thus, for the *same reason* that the possibility of a general federal common law collapsed, so too did the possibility of a general judicial policing of legislative action collapse as well. After this skepticism took hold, judges could no longer speak as if they could stand neutral in these unavoidably contestable disputes.

Yet while the *Erie* and New Deal changes brought the same effect, the substance of the change of each was different. We can track the substance of the New Deal change in two stages. The first is the failure of the nineteenth century formalist language to capture the reality it purported to regulate. The

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

307. Sunstein has also made this link:

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

SUNSTEIN, *supra* note 252, at 55.

308. Nevertheless, it is interesting to note that the Court’s de facto power to regulate still hangs upon its distance from overtly political questions. As Ariens remarks,

The Court’s power to invalidate state and federal legislative action has always been based on the assumption that the Court exercises judgment rather than will. Although the legislative and executive branches were intended to be political branches and were allowed, within their constitutional power, to impose their will in law, the judiciary was to stand athwart the political process, to exercise judgement in deciding cases, and to ensure the supremacy of the Constitution.

Ariens, *supra* note 209, at 621.

second is the absence of any substitute language that would succeed in regulating this reality without confronting the same *Erie*-effect problem—without, that is, apparently resting on fundamentally political judgments. If—and here is the *Erie* punchline—no language could be found that could escape this appearance of a political nature, then there was no way for federal courts to continue their policing of legislative power.³⁰⁹ If policing legislative power appeared fundamentally political, then federal courts would have to leave that policing to political bodies.

Initial failures of fit. The first act in this two-step drama is a failure we have already reviewed: It is the failure of the nineteenth century categories of legal thought to track the economic reality that they were said to reflect. As the economic substructure became increasingly complex, the formal and implied categories defining the limits on Congress' and the states' power failed to reflect the economic reality that they purported to describe. As Justice Stone said, describing the Court's "direct/indirect" test under the Dormant Commerce Clause, such terms were "labels to describe a result rather than any trustworthy formula by which it is reached."³¹⁰ Although such limitations were originally designed to constrain the scope of legislative power by tracking plausible economic differences, by the late 1930s they offered little more than an empty shell, devoid of a link to economic reality.

The failure was most dramatic in the Commerce Clause cases. As I have described above, the Court's technique for limiting Congress' power was to find formal limitations on the power-granting clauses.³¹¹ Against these formal limits, the New Deal lawyers tried to shift the focus to the economic effect, and thereby show the Court that its language failed to describe the reality it purported to regulate.³¹² In other areas, the Court showed some degree of realism—early on in *Muller*, and then in *Blaisdell*, *Nebbia*, and finally in *Parrish*,

309. The political nature of judging is not, of course, unique to the American system. For a discussion of the "revolt against formalism" in the United States and Europe, see MAURO CAPPELLETTI, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* 9-10 (1989). As Cappelletti argues:

Needless to say, all of these revolts thus led to the discovery that the role of the judge is in fact much more difficult and complex, and that judges are much more accountable for their activities than traditional doctrines had suggested. Choice means discretion, even though not necessarily arbitrariness; it means evaluating and balancing; it means giving consideration to the choice's practical and moral results; and it means employment of not only the arguments of abstract logic, but those of economics and politics, ethics, sociology, and psychology.

Id. at 10.

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

311. See notes 263-265 *supra* and accompanying text.

312. This effort was not limited to economic issues. As Cushman notes, Perhaps the most potent cause [of courts' assumption of the role of expert] was the influence of a little group of people who combined accurate legal knowledge with an insight into modern social conditions and who conceived the idea of presenting to the court the actual evidence to prove that legislative regulation of social and economic conditions was vitally necessary and for that reason constitutionally legitimate.

Cushman, *supra* note 277, at 754. According to Cushman, the group's most prominent members were Justices Brandeis and Frankfurter before their appointments to the Court and Josephine Goldmark, publication secretary of the National Consumers' League. *Id.*

indicating its willingness, at least in areas of substantive due process, to look beyond formal categories of public interest to see whether legislatures indeed had a plausible basis that would justify regulation. To then-Professor Frankfurter, the *Muller* case was "epoch-making"—like the cases following it, signaling "a shift in the point of emphasis, a modification of the factors that seem relevant, a different statement of the issues involved, and a difference in the techniques by which they are to be solved."³¹³

The New Dealers therefore pushed economic arguments—arguing the facts about the interstate effect of the economic activities that they were regulating.³¹⁴ Whether because of the special emergency faced by the nation just after the Depression,³¹⁵ or simply because of the facts demonstrating an interstate effect,³¹⁶ the New Dealers tried get the Court to see that the facts did not fit the formalists' account. The facts showed that much more than before was effectively interstate commerce. If so, then on the New Dealers' side stood an apparently unbeatable argument: "The Constitution does not provide that Congress may regulate commerce among the several states only when such commerce is ten percent of the whole, but not when it becomes ninety percent."³¹⁷

But the argument was not unbeatable. No doubt the Old Court (by which I mean those who resisted the New Dealers' arguments) saw the failure of its own language—it could not help but be (rhetorically) embarrassed when it claimed that employment within the Carter Coal Company, a major producer of coal, still did not affect interstate commerce.³¹⁸ What drove the Old Court to its resistance was not blindness, but rather its focus on a second dimension of its interpretive responsibility.

In the Old Court's view, the Constitution embraced two competing goals:³¹⁹ one to empower the federal government over a range of national eco-

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

314. See, e.g., IRONS, *supra* note 220, at 70. In the "Hot Oil" case, *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935),

a brief of 195 pages, with a 200-page appendix, told the story of the petroleum industry. The brief was voluminously documented to prove that the industry was interstate and that the quantity of oil produced determined the amount moved in interstate commerce . . . propositions which would be familiar to any freshman in economics but which, it was assumed, had to be proved to the Supreme Court.

Stern, *supra* note 220, at 657.

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

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

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

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

319. In this regard it is useful to remember that the one dimension along which the conservatives prevailed, and which has not been drawn into doubt since, is the corporatist, central planning elements of the New Deal. See IRONS, *supra* note 220, at 19-23; Barry D. Karl, *The Constitution and Central Planning: The Third New Deal Revisited*, 1988 SUP. CT. REV. 163, 183-95. The Supreme Court's resistance to corporatism was a crucial dimension of its rejection of the NIRA in *Schechter*. *Id.* at 197.

conomic activity; the other to reserve (in the language of the Tenth Amendment) to the states a domain over some kinds of economic activity. The New Dealers acknowledged only one. And whether correct as an original matter or not, what drove the Old Court was its fidelity to this second goal. Thus it felt bound to construct a language that could divide federal from state power, and could preserve for the states a domain of regulatory authority. And so construct it did.³²⁰ No doubt the lines were grounded in economic fictions. But in the Old Court's view, there were fictions on both sides of this argument. If it was fiction that "manufacturing" was intrastate commerce alone, it was no less fiction that the Framers constructed a division of power between the states and federal government that would leave to the states no residual exclusive legislative authority. The choice, in the Old Court's view, was not between fiction and reality, but between two fictions, and the Old Court chose the fiction it believed would better respect the design of the Framers.³²¹

Final failures: of neoformalism. To the political and legal culture, however, in the face of ever-increasing devastation caused by the Depression, the Court's fictions came to seem more and more grotesque.³²² Some therefore tried their hands at crafting better categories to divide federal from state regulation. Justice Cardozo is the best example of this (brief) neoformalist push. In response to the failure of the nineteenth century categories, he sketched what he believed would be a workable formula for controlling congressional power.³²³ As Judge Posner describes his view,

Every economic activity, however local, affects interstate commerce because of the chain of substitutions that connects all activities in a national economy. But Cardozo recognized that to infer from this that Congress could regulate all

In fact, many associated American corporatism with communism and fascism and saw the Supreme Court as a shield against these movements. ARNOLD, *supra* note 6, at 118. The strength of the Court's resistance is measured by an extraordinary incident recounted by Irons:

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

IRONS, *supra* note 220, at 104.

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

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

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

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

local activity would wreck the balance between state and federal regulatory power that the Constitution had struck in empowering Congress to regulate interstate and foreign—not all—commerce. He thought a line should be drawn that would, however crudely, balance the competing values of nationalism and localism.³²⁴

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

First, unlike nineteenth century formalism, under which the Court had to determine whether something was "commerce" or not, or whether regulation was "direct" or not, or whether an effect was "intended" or not—both judgments of the sort courts make all the time—neoformalism required a kind of judgment beyond the ordinary ken of the courts. Were the Court to continue its federalism vigilance along the lines suggested by Justice Cardozo, it would have had to make judgments about actual economic effects. But just how, within the confines of Article III review, these judgments could be made for a whole economy was not very clear.³²⁵ These were judges, not economists, and judges fifty years before Dworkin's Hercules.³²⁶ They lacked the capacity, in part, to police any line between federal and state regulation, based solely on its economic effect.

Capacity limitations are not enough, however, to explain the retreat of the New Deal Court: From the fact that the Court could not make power-limiting judgments well, it does not follow that the court should not make power-limiting judgments at all. Indeed, during the early 1930s, a number of proposals were made to shift some part of the factfinding, or legislative factfinding, function required for judicial review to a body of experts who could make the economic judgments necessary for neoformalism to function.³²⁷

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

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

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

326. Hercules lives in DWORKIN, *supra* note 51 *passim*.

327. See Biklé, *supra* note 43, at 12.

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

By the mid-1930s, these structures of thought were to collapse, falling victim to an obvious shock, the Depression.³²⁸ Quite apart from its economic effects, the Depression marked "one of the greatest intellectual and moral upheavals in western history."³²⁹ For noninterventionists in particular, its magnitude and duration simply could not be explained. If noninterventionism was correct, then devastation like the Depression just could not happen. When it did happen, something in the pre-New Deal conceptual scheme had to give. We could compare the effect to the effect on young, upwardly mobile communists (Yumcies?) in Khrushchev's Soviet Union learning of their country's murderous Stalinist past.³³⁰ In both cases, elites were confronted with facts that could not be true if what they had so far taken for granted was true. But the facts were impossible to ignore, and their effect was to dislodge ideas that had been taken for granted. "With amazing speed," the dominance of the ideals of noninterventionism disappeared.³³¹

This is not to say that another uncontested discourse took its place. The shift was not from one uncontested discourse to another uncontested discourse. It was instead a shift from an uncontested discourse to one that was now fundamentally contested. A whole way of thinking had been shaken by the impact of these events, and the result was a form of intellectual anarchy. Whereas under the old way of speaking, the Court's practice seemed to follow plainly or invisibly

328. As described by Robert Stern,

[A]t least 13 million persons were unemployed; the average wages of those still employed in 25 selected industries had dropped to \$16.13 per week in February 1933; wages received in mining, manufacturing, construction, and transportation had declined from 17 to 6.8 billion dollars. Prices had fallen 37 per cent and industrial production had been cut almost in half. Insolvencies were mounting and the banks were closed. The amount of revenue freight carried by Class I railroads, a fair measure of the quantity of interstate commerce, had declined 51 per cent.

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

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

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

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

331. ARNOLD, *supra* note 6, at 265.

bly from the words of the Constitution, after the extent of the Depression was realized, nothing seemed to follow one way or the other. The point is captured well by Thurman Arnold, writing in the midst of this change.

Twenty years ago no one worried about socialism, because it was thought to be impossible; just as water running up hill is impossible. Automatic economic laws prevented it. Today we see before us both fascism and communism in actual operation with their governments growing in power. Economic law no longer prevents such types of control. The only bulwark against change is the Constitution. But with the disappearance of the economic certainties, the actual words of the Constitution no longer appear like a bulwark.³³²

The effect of this intellectual anarchy was the first step of the *Erie* effect, as applied to the New Deal. Before the Depression, economic certainties could function invisibly to support a discourse limiting governmental power. Given these certainties, this discourse made sense. But once certainties were dislodged, limitations that before followed naturally now appeared contested and fundamentally political. This changing background discourse, rendering political judgments that before did not seem political, in turn led to the second step of the *Erie* effect: If these judgments about the constitutional limits on legislative power were now seen to be political, or essentially political, given the theoretical anarchy of the time, then they would also appear to be judgments that should not be made by a Court. As their nature changed, proper institutional allocation changed as well. The sense is captured well in the sentiments echoed much later by Justice Frankfurter in *New York v. United States*:

Any implied limitation upon the supremacy of the federal power to [tax states] brings fiscal and political factors into play. The problem cannot escape issues that do not lend themselves to judgment by criteria and methods of reasoning that are within the professional training and special competence of judges. Indeed the claim . . . raises questions not wholly unlike provisions of the Constitution, such as the [Republican Guarantee Clause], which this Court has deemed not within its duty to adjudicate.³³³

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

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

332. *Id.* at 231.

333. 326 U.S. 572, 581-82 (1946). Note (for good reasons beyond the scope of this article) that the Court treated individual rights differently. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

step of the *Erie* effect was to loosen the constitutional constraints on federal action.³³⁴

Ackerman too believes the constraints on government shifted in the New Deal period. But while I argue that the constraints were loosened because the presuppositional discourses were rendered political, Ackerman believes the constraints were "repudiated."³³⁵ For him, repudiation is a political act. If there was a fundamental repudiation of *laissez-faire*, and if *laissez-faire* was fundamental to the now departed political age, then this repudiation must have risen to the level of a constitutional amendment. Thus must Ackerman search for the evidence of a constitutional amendment to justify *laissez-faire*'s rejection.

Ackerman is driven to this kind of solution because within his account, the only constraint on the interpreter is the constraint of positive law. Thus he needs to conclude that the *Lochner*-era cases differed from modern decisions largely because "the Constitution they were interpreting was importantly different from the transformed Constitution left to us by the New Deal."³³⁶ Thus, he implies, if constraints properly changed, it must be because positive law properly changed.

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

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

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

335. ACKERMAN, *WE THE PEOPLE*, *supra* note 24, at 66.

336. *Id.*

noninterventionism. What destroyed the dominance of laissez-faire was not an American Bolshevik Party; what destroyed its dominance was the Depression.

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

Ackerman does not disagree about the nature of these background changes; he just ignores their effect. As he explained in a 1973 article, the Old Court's resistance to the New Deal was "solidly rooted" in dominant patterns of legal thought.³³⁷ Central to these patterns of thought were principles of "laissez-faire philosophy . . . [whose] clear articulation would serve as a bulwark against the forces for change . . ."³³⁸ And it was "[b]ecause of this legal culture [that] judges could, without a sense of arbitrariness of impropriety, strike down," for example, "a minimum-wage law on the ground that it deprived the women of Washington, D.C. of the right to work for less than \$16.50 a week."³³⁹ But "[t]he Depression . . . discredited laissez-faire individualism" and "no alternative social theory had emerged . . ."³⁴⁰ Thus were the foundations for this "bulwark" against change eroded, yet this erosion is absent from Ackerman's positive account. It is central to my own.

The argument from translation to support the New Deal change, then, comes to this: Through an application of fact translation, the increased economic and social integration justifies an increased scope for federal and state power. But on its face, this increase appears to have gone too far, at least relative to the balance struck by the Framers' design. To the extent that these increases have gone too far, it becomes necessary to ask what justifies the Court's deference in the face of this expansion. It is here that the *Erie* effect has play. For what explains and, I suggest, justifies the Court's unwillingness to intervene to limit the democratic branches is a constraint on what the Court, in context, can credibly say. To understand these constraints, one must look to the particular structure of discourse within which the Court must speak. Where this discourse is fundamentally contested, there will be little that a court can say to resist the will of democratic actors. Where it is not fundamentally contested, there will be more that a court can say to resist a democratic will. What is important, however, is that whether this discourse is contested or not is itself changing and contingent. Judicial deference, then, is a proper response to a

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

338. *Id.* at 120.

339. *Id.* at 121.

340. *Id.* at 125.

context within which the grounds of activism are no longer taken for granted. Such was the premise, I have argued, for the Court's New Deal retreat.

CONCLUSION

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

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

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