The New Deal Constitutional Revolution: Law, Politics, or What?

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Scholars accounting for developments in legal doctrine can be divided roughly into two groups. **Externalists** describe developments outside the law and the courts to explain doctrinal change. They may point to changes in the political environment, new economic circumstances, or the ways in which new nonlegal ideas were assimilated by judges.¹ **Internalists**, in contrast, emphasize the role that reasoned distinctions among cases play in structuring doctrinal change (or, perhaps more precisely, doctrinal development). Doctrine evolves, according to internalists, as judges think through the implications of the principles articulated in earlier cases and elaborate those principles in light of the factual characteristics of later ones. It deals with constitutional law as “a mode of intellectual discourse having its own internal dynamic” (pp 4-5).

One might think that the time frame over which change is measured might affect the plausibility of externalist or internalist accounts.² Taking the long view, for example, the externalist

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¹ Cushman defines *externalist* more narrowly, as offering interpretations of decisions as “political response[s] to political pressures” (p 4).

² So too will the subject matter. The more often courts have dealt with a subject, the more plausible internalist accounts will be. When courts have to work with relatively thin materials, either doctrinal or originalist, the plausibility of externalist accounts will in-
might contend that it is extremely unlikely that legal doctrine would float free of large-scale changes in social relations, the economy, or politics. Taking the short view, the internalist might contend that it is equally unlikely that the arguments made and the precedents thought relevant to a particular case play no role in affecting that case’s outcome. Both of these polar positions have been challenged. Alan Watson, a leading scholar of comparative law, has argued that legal doctrine can indeed float freely, because political and economic elites generally are indifferent to doctrinal matters that concern only legal specialists. As a sympathetic reader of Watson’s work suggests, this claim might be true as to much private law, but may not be true about constitutional law, an area in which political elites could have great concern.

Barry Cushman’s book is accurately entitled Rethinking the New Deal Court because Cushman persuasively revitalizes internalist elements in accounting for the New Deal constitutional revolution—a change in the constitutional order normally thought to be a product of external events. Overall, Cushman offers a mixed internalist-externalist account. The book’s internalist element focuses on a complex set of doctrines that hung together in a reasonably coherent package. Cushman argues that such a package can unravel when something changes even one of its component doctrines, because each component has implications for the others. Such an unraveling occurred when the Court abandoned a distinction between private activities and public ones and, as a result, found unreasonable two important components of the doctrinal complex we now understand to be laissez faire constitutionalism, constitutionally protected freedom of contract and a restrictive reading of Congress’s power under the commerce clause. The externalist element in Cushman’s account identifies social forces that led to this shift. Cushman’s account thus fits nicely with the perspective Watson’s work suggests on constitutional change. It also raises interesting historiographical questions. I suggest in Section III that Cushman’s revisionist account can be understood as the reflection of the post-New Deal era in which we find ourselves.

crease. Before the New Deal, courts had extensively considered Cushman’s subjects, which include the commerce clause and the economic aspects of the due process clause. As a result, an internalist interpretation has a fair amount of material with which to work.

1 See generally Alan Watson, Society and Legal Change 8 (Scottish Academic 1977).

I. EXTERNALIST CONVENTIONAL WISDOM

The New Deal constitutional revolution has been thought to pose a challenge to the short-term internalist. Within the span of one year, constitutional doctrine seemed to change dramatically, to the point where constitutional scholars can write without difficulty of the "constitutional revolution of 1937." Historians have offered two simple externalist accounts of the change. One focuses narrowly on the "switch in time"—Justice Owen Roberts's dramatic change from voting to invalidate a state law regulating wages and hours in *Morehead v New York ex rel Tipaldo* in 1936 to voting to uphold such a law in *West Coast Hotel Co v Parrish* a year later. The switch in time occurred shortly after President Franklin D. Roosevelt had proposed his famous, or notorious, Court-packing plan, which if enacted would have authorized him to nominate up to six new Supreme Court justices. The externalist attributes Roberts's change to the Court-packing threat. A slightly more general (but still externalist) account adopts Mr. Dooley's observation that the Supreme Court follows the election returns (p 25). The justices, consciously or unconsciously, respond to short-term developments in politics, perhaps because at some level they know that their power ultimately depends on support from the elected branches. Franklin Roosevelt's repeated electoral victories sent a message to the justices, who eventually came into line.

Cushman opens his book with a critique of the "switch in time" and "election returns" stories. Ever since Felix Frankfurter published an insider's account of Roberts's thinking, the "switch in time" story has been plainly unsatisfactory. See, for example, Cass R. Sunstein, *The Partial Constitution* 40 (Harvard 1993) (using "The Revolution of 1937" as a chapter title); Louis Michael Seidman and Mark V. Tushnet, *Remnants of Belief: Contemporary Constitutional Issues* 48 (Oxford 1996) (referring more cautiously—and deliberately—to "the New Deal transformation").

See Peter F. Dunne, *Mr. Dooley's Opinions* 26 (R.H. Russel 1901).

See Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 336 (Oxford 1991) (making a slightly different but related point in suggesting that the courts can accomplish little without support from the elected branches).

See Felix Frankfurter, *Mr. Justice Roberts*, 104 U Pa L Rev 311 (1955). Roberts's memorandum provided a detailed account of his analysis of the issues presented in *Tipaldo* and *West Coast Hotel*, explaining why he believed that it was inappropriate to overrule the precedents in 1936 and appropriate to do so a year later. This is of course self-serving in light of the controversy over the "switch in time," and might be appropriately discounted on that ground. See note 40. Still, taking all the evidence into account, the simple "switch in time" story is unsatisfactory.
In 1936, well-established doctrine showed that wage and hours laws were unconstitutional, and Roberts believed that the Court could not overrule its precedents if litigants did not directly challenge them. As Roberts saw it, the litigants in *Tipaldo* did not ask the Court to overrule the governing precedents. Because they unsuccessfully attempted to distinguish the precedents, Roberts followed the decided cases. But a year later the litigants could be read to have fairly placed the precedents in question. Roberts, agreeing that the precedents were badly reasoned, then voted to overrule them.11 Cushman offers a detailed reconstruction of the decisional dynamics of *West Coast Hotel*, supporting Justice Roberts’s retrospective account (pp 91-104).

Cushman further argues that the justices had little to fear from the Court-packing plan, which attracted enormous opposition, garnered relatively little support, and appeared unlikely to succeed at the time the crucial decisions in 1937 were made.12 Cushman casts doubt on the “election returns” story by pointing out that the Court had not changed course after the 1934 elections, which were perhaps an even more forceful endorsement of New Deal programs than the 1936 elections (pp 26-27). In addition, he shows that the Court’s so-called capitulation to the New Deal was a complex series of decisions, in which some hard-line conservatives occasionally joined liberal decisions and sometimes indicated that their constitutional objections to New Deal legislation operated at the margins of the New Deal’s core programs (pp 22-23, 30).

A more sophisticated externalist would look to the economic crisis that occasioned the New Deal to account for the era’s constitutional revolution. A regime in which legislatures were barred from regulating wages, and more generally from adopting policies aimed at directing economic development, no longer seemed acceptable during the Depression.13 As the joint opinion in *Planned

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12 Here Cushman’s account is a bit overstated. William Leuchtenburg offers a more complete account, which makes it clear that the Court-packing plan was both viable and vulnerable throughout the relevant period. William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* 132-62 (Oxford 1995). Even on Leuchtenburg’s account, however, the key justices could reasonably have believed that they need not alter doctrine in response to the threat the Court-packing plan posed, taking into account the fact that the plan, if not sure to lose, was hardly a sure thing.

13 Cushman argues that the constitutionality of general regulation of hours was es-
Parenthood of Southeastern Pennsylvania v Casey put it, "the lesson . . . seemed unmistakable to most people by 1937, that the interpretation of contractual freedom protected in [existing constitutional doctrine] rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare." The externalist would add that political forces advanced doctrinal change more directly, as Roosevelt nominated new justices sympathetic to his political program and who would alter constitutional doctrine to accommodate the New Deal.

The most general externalist account operates on an even higher level. Here the constitutional revolution of 1937 and the New Deal are themselves relatively low-level events. The broadest externalist account focuses on the general transformation of the U.S. national economy, and of economies around the world, brought about by industrialization and economic expansion. The new economies, this account goes, elicited new forms of government regulation, and legal doctrine would necessarily accommodate government responses to economic transformation. The accommodation might take place over a short span of time, as in the New Deal constitutional revolution, or it might occur over a more extended period. But occur it would.

II. AN INTERNALIST ALTERNATIVE—WITH AN EXTERNALIST STREAK

Cushman rejects the simplest externalist accounts and offers instead an explanation of the New Deal revolution with important internalist elements. The doctrinal complex that shaped constitutional law before the New Deal constrained state and national governments' economic regulations by imposing two limits: a constitutionally protected freedom of contract and a restrictive reading of the national government's power to regulate commerce among the several states. Cushman argues that the doctrinal structure supporting these limits began to erode in the early 1930s with the Supreme Court's abandonment of the public-private distinction. This abandonment eliminated abstract no-

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established by Bunting v Oregon, 243 US 426 (1917). An economist would wonder how one could think it possible to regulate hours without simultaneously regulating wages, at least if the labor supply was not changed by the very fact of regulation.

15 Id at 861-62 (joint opinion by O'Connor, Kennedy, and Souter), citing West Coast Hotel, 300 US at 399.
tions of "freedom of contract" as a restraint on government power and transformed the limited power in Congress to regulate inter-state commerce into a general power to legislate on whatever matters Congress thought it appropriate to act. Ultimately, Cushman's account depends on externalist elements: He claims that changing economic realities undermined the premises upon which the pre-New Deal laissez faire constitutionalism relied.

Cushman does stress some nondoctrinal aspects of New Deal constitutional developments. Echoing arguments made both at the time and more recently by Peter Irons and Ronen Shamir, Cushman points out that while early New Deal legislation was constitutionally vulnerable in light of existing doctrine, courts might have upheld better written statutes that accomplished much the same ends (pp 37-38). Furthermore, the Department of Justice botched the constitutional defense of the early New Deal statutes, both by failing to develop a test-case strategy that would have presented the courts with cases in which the constitutional defense had the most force and by simple inadequate advocacy (pp 38-40, 133-34). Having learned their lesson, New Dealers soon wrote better statutes (especially the Wagner Act) (p 38) and did a better job of defending them (pp 133-35). These changes in turn made it easier for the courts to uphold the later round of statutes. But the different results are not attributable to large-scale changes in the political environment. They resulted instead from the exercise of better professional judgment by the New Deal's lawyers. In this sense, Cushman directs our attention to concerns better labeled internalist than externalist.

But Cushman offers a broader internalist argument. Before the New Deal, Cushman argues, constitutional doctrine had three strands: a republican fear that centralized power tended toward corruption and tyranny, resolved by diffusing power to preserve liberty; a posture of government neutrality among citizens defined by limiting government action to a public sphere in which public-regarding legislation, and only such legislation, could be enacted; and, most narrowly, a constitutional defense of private contracting in employment (p 6). This, Cushman argues, was an integrated structure whose components were related in ways that "gave the system the appearance of symmetry and internal coherence" (p 42). It was persuasive because, and so long as, its "constituent premises" were accurate "descriptive accounts of the underlying external reality they purported to govern" (p 42). But

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“economic development and integration” undermined the credibility of the descriptive claims (p 42). Individual decisions, arising almost at random, made it increasingly difficult for judges to defend the system of premises as internally consistent. Observers could no longer predict outcomes or attribute them to a defensible conceptual system. Inconsistent outcomes and unpredictable results made it easy for critics to charge the judges with acting “politically.” The internal coherence of the doctrinal complex disappeared as well, not simply because one or another element became incoherent but also because “revision of one premise often implied reassessment of another” (p 42).

A. Abandonment of the Public-Private Distinction

For Cushman, the so-called New Deal constitutional revolution was simply the extension of a doctrine the Court announced in the 1934 case of *Nebbia v New York*, which abandoned the public-private distinction. According to Cushman, the real doctrinal revolution occurred in 1942, when the Supreme Court in *Wickard v Filburn* completely abandoned the traditional limits it had held the Constitution imposed on Congress’s power to regulate interstate commerce. In the end, “a structurally interdependent system of thought gradually unraveled over the first forty years of the twentieth century, and ... after it had unraveled so far as to become completely unserviceable, it was abandoned by a generation of jurists with no stake in salvaging its remains” (p 43).

Cushman’s rich analysis starts with a careful exploration of the premises that *Nebbia* repudiated. Prior to *Nebbia*, constitutional doctrine had two clear elements that expressed the more general concerns over government power and liberty, constitutionally protected freedom of contract and restrictive understandings of state and government powers. The Granger Cases of the 1870s established that governments could regulate the operations of businesses “affected with a public interest.” This category was merely one example of a far more general distinction between the public and private spheres that “permeated” constitutional law (p 47). The distinction protected the public against factional politics, in which private interests sought to deploy public power to advance their self-interest. It helped ensure that legisla-

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18 *291 US 502, 536 (1934)* (upholding statute regulating milk prices).
19 *317 US 111 (1942)*.
20 *Id at 125*.
tion would serve "genuinely public purposes" (p 47). Regulation of businesses affected with a public interest was justified by the gross disparity in bargaining power between the suppliers and consumers in those industries.

By identifying certain businesses as affected with a public interest, constitutional doctrine allowed public regulation of such businesses while constraining efforts to interfere with what the doctrine described as private activity. Initially regulation dealt with the transactions such businesses had with their customers—prescribing price limitations, for example—but eventually the courts agreed that governments could regulate even the wages and hours of employees of businesses affected with a public interest, when such regulations advanced the public interest (p 54). Similarly, government could regulate the conditions of labor in all businesses, but again only when the regulations advanced a public interest such as health or safety. A core of wage-setting remained immune from regulation, because the state could not identify a reason for regulating wages that served the public interest. For example, the Court in *Lochner v New York* took seriously (but ultimately rejected) arguments that restricting the hours bakery workers could labor would promote public health either by ensuring that bakery products would be safe or by protecting bakery workers themselves against illness. But the Court dismissed out of hand the argument that the statute was justified as a "labor law pure and simple," that is, as an effort to alter the balance of economic power between employers and employees (pp 55-56).

As Cushman makes clear, defining the line that separated the public from the private was both central to the coherence of the Court's doctrinal structure and a pressure point at which external influences could affect the law. Cushman describes a variety of cases in which the Court found activities on the public side of the line and upheld regulation (pp 50-52, 58-60). He also shows the Court announcing a virtual constitutional ban on wage regulation in *Ribnik v McBride*, and then retracting within two years to a more flexible standard in *Tagg Bros & Moorhead v United States* (pp 73-75). Here Cushman's internalism may fail him at least briefly, for he describes Justice Brandeis's opinion in

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21 198 US 45 (1905).
22 Id at 57.
23 277 US 350, 357 (1928) (arguing that wage regulation was constitutionally impermissible "at least in the absence of a grave emergency").
24 280 US 420, 439 (1930) (permitting regulation of fees paid to "commission men" working at stockyards located in interstate commerce).
the later case as offering a "disingenuous characterization" of the underlying regulatory statute to reconcile the case (p 75). Yet, Cushman does not provide an account of Brandeis's or the Court's internalist interest in "soften[ing] Ribnik's stringency (p 75). Such an account would rely on legally sufficient differences between the cases. By saying that Brandeis's characterization of the differences was "disingenuous," Cushman rejects that path. His analysis therefore leaves the story incomplete.

What he does offer is a description of the steps the Court took that had the effect of undermining the public-private distinction. Working with the structure established in Wilson v New,25 the Court first eliminated the requirement that wage regulation be justified by some strong public interest. As to businesses affected with a public interest, the Court came to agree that minimum wage regulation "protected public health and morals," a traditional police power justification, by ensuring that workers received a living wage. Minimum wage regulation thereby "prevented [employers] from externalizing [the] cost [of sustaining their labor force] to the public through poor relief" (p 78). Cushman points out that nothing in these justifications was peculiar to businesses affected with a public interest. The second step came in Nebbia, which defined the category of businesses "affected with a public interest" out of existence. Justice Roberts's opinion for the Court in Nebbia said that the term "is the equivalent of 'subject to the exercise of the police power.'" The way was then clear to uphold all wage regulations, and eventually the entire New Deal legislative agenda. West Coast Hotel was inevitable after Nebbia, and solely for internal doctrinal reasons. It "hardly deserves to be called a 'constitutional revolution.' It was instead the final phase of a long and unevenly staged judicial withdrawal" (p 105).

B. Undermining of the Constitutionally Protected Freedom of Contract

Cushman's discussion shows that the doctrinal structure that the New Deal constitutional revolution is said to have destroyed was already eroding early in the decade of the 1930s. Cushman eventually provides an externalist account of this process, that changing economic conditions rendered implausible the

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25 243 US 332 (1917) (upholding as constitutional a federal statute that barred railroads from extending the work day pending a report from a national commission on labor relations in the industry).
27 291 US at 533.
bases of the doctrinal structure. In particular, falling wages and high unemployment undermined the assumption implicit in the Court's freedom of contract doctrine that workers had many job opportunities.

The key is Chief Justice Charles Evans Hughes's observation in *West Coast Hotel* that the nation was continuing to experience "unparalleled demands for relief which arose during the recent period of depression."\(^8\) We can begin by asking why the Court's earlier doctrinal structure treated regulations of wages and hours differently from regulations of prices. Cushman shows that the Court upheld a fair number of statutes setting wages, sometimes a maximum wage (or price) for a service, occasionally a minimum wage, all the time deploying the public-private distinction (pp 56-65).

This describes, but does not yet defend, the lines the Court drew. What reason was there in the doctrinal structure for maintaining an unregulable core of wage contracting? According to Cushman, the reason lay in the justices' ideology of free labor, the heart of which was workers' right to choose their jobs. When labor was indeed mobile because jobs were readily available, the free labor ideology could be understood to correspond with real economic conditions: "[L]ow levels of unemployment and steadily rising real wages probably persuaded judges that the disparities in bargaining power between employer and employee were not so great as to justify rate regulation" (p 90). Cushman argues nicely that the experience of high employment and growing wages during World War I reinforced free labor ideology. It is no surprise that the Court's strongest statement in support of freedom of contract in wage-setting came in *Adkins v Children's Hospital*,\(^29\) decided in 1923, when the justices might still have been influenced by their interpretation of the economic events associated with the War. As Justice George Sutherland wrote in *Adkins*, "We cannot close our eyes to the notorious fact that earnings everywhere in all occupations have greatly increased."\(^30\) But changed economic conditions made free labor ideology less plausible. Increasing unemployment through the 1920s and the economic collapse of the 1930s made free labor ideology unpersuasive because it no longer bore any reasonable resemblance to social experience: "The unprecedented levels and duration of unemployment experienced in the 1930s . . . made it more likely that judges could see the differ-

\(^8\) 300 US at 899.
\(^29\) 261 US 525 (1923).
\(^30\) Id at 560.
entials in bargaining power in the employment context . . . in the
same way they had always viewed such exaggerated differentials
between producers and consumers of certain other ‘indispensable’
goods and services” (pp 90-91).

Cushman describes how free labor ideology was part of the
doctrinal complex that included the public-private distinction in a
short section on the Supreme Court’s treatment of statutes pur-
porting to invalidate “yellow-dog” contracts that barred employ-
ees from joining labor unions. The Court held that such statutes
violated a constitutionally protected liberty of contract. Cushman
connects the Court’s decisions in these cases to his analysis of the
core New Deal cases in two ways. First, he points out that the
Court’s decisions suggested that legislatures could make such
contracts illegal in businesses affected with a public interest: “So
as the category of businesses affected with a public interest ex-
panded, the sphere of liberty protected by the Fifth Amendment
would accordingly contract” (p 112).

Perhaps more important, Cushman argues that the cases
posed an apparent conflict between the employer’s liberty of con-
tract and the workers’ (collective) freedom of association, which
the Court resolved by denying that unions were truly free asso-
ciations. The Court believed instead that unions, supported by
legislatures through statutory bans on yellow-dog contracts, co-
erced workers into joining. The claim that workers signed yellow-
dog contracts voluntarily was plausible, according to Cushman,
for the same economic reasons that supported laissez faire consti-
tutionalism more generally: Workers appeared to enjoy substan-
tial job opportunities in a nation faced with persistent labor
shortages, evidenced by rising wages and consistently improving
working conditions. When unemployment grew, the picture of the
world embodied in the Court’s yellow-dog contract decisions be-
came increasingly untenable and was eventually abandoned.
Wartime exigencies also embedded labor unions in the nation’s
regulatory system. Having become comfortable with unions and
uncomfortable with the unrealistic image of jobs looking for
workers, the Court came to confront directly the conflict between
liberty of contract and freedom of association; led by Chief Justice
Charles Evans Hughes, the Court struck the balance in favor of
association and unions. The tension between liberty of contract
and freedom of association operated in conjunction with the de-
mise of the public-private distinction to produce, through “doc-
trinal synergies” (p 131), a new structure of constitutional doc-
trine.
Cushman might have expanded his discussion by giving more attention to the rise of balancing as a judicial method, which replaced the more hard-edged deployment of crisply bounded analytical categories. In one sense, the constitutional issues after the New Deal remained the same as those before: What constraints did the Constitution place on legislatures seeking to respond to competing interests? But, as Cushman argues, the way the Court addressed those issues changed dramatically (pp 42-43). Before the New Deal, the Court thought that it could deploy the public-private distinction to generate results. After it, the Court treated the issues as calling for an open balancing of interests. Not only in outcome, but in method as well, the Constitution after the New Deal was very different from the one it superseded.

C. Expansion of Congress's Commerce Clause Powers

Cushman concludes by analyzing the second element in the New Deal constitutional revolution, the transformation of Congress's power to regulate interstate commerce from one limited by concerns for states' rights and economic liberty to a plenary one. Again he stresses that this transformation is not best understood as resulting from "political responses to political pressure" (p 139). Before the New Deal, limitations on congressional power were part of a coherent package of doctrines, along with restrictions on all legislative power in the name of economic liberty. The package of doctrines expressed an "integrated vision of civic liberty" (p 140) that relied on the diffusion of power to protect liberty. Cushman connects pre-New Deal doctrines dealing with restrictions on Congress's power to the "affected with a public interest" doctrine, demonstrating that "due process concepts informed commerce clause concepts" (p 140).

Cushman develops a novel, and persuasive, argument. Constitutional doctrine identified as businesses affected with a public interest those local enterprises that connected interstate business activities and allowed Congress to regulate such businesses because they were part of a channel of interstate commerce: "[T]he current of commerce came to be understood as a sequence of in-

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31 The major exposition of the historical transition from categories to balancing is Duncan Kennedy's soon-to-be-published work on classical legal thought, which has circulated widely in manuscript. Duncan Kennedy, The Rise & Fall of Classical Legal Thought (unpublished manuscript on file with U Chi L Rev) (1998). An early version of a portion of Kennedy's work was published as Duncan Kennedy, Toward a Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940, 3 Res L & Soc 3 (1980).
terstate business activities connected by intrastate business activities affected with a public interest” (p 146). In this way congressional power would be limited, but only as long as the category of “businesses affected with a public interest” was small. Nebbia, however, made it impossible to sustain a structure in which Congress’s power was limited: “With Nebbia, . . . the restraint that the public/private distinction had imposed upon the current of commerce image was removed” (p 155). Thereafter courts had to ask whether, in a practical or economic sense, a business affected the public interest.

This development opened the way to extensive congressional regulation, an opportunity Congress, the Department of Justice, and the Supreme Court seized in NLRB v Jones & Laughlin Steel Co. Vindicating the Department of Justice’s litigating strategy, Chief Justice Hughes’s opinion for the Court in Jones & Laughlin opened with a detailed recital of the economic reality of the company’s far-flung operations. The transformation of the “stream of commerce” theory in Jones & Laughlin from a formal doctrine to a practical one, Cushman argues, precisely parallels the deformalization of the public-private distinction in Nebbia. And yet the transformation was not itself that dramatic; the Court’s new perspective was only a modest adjustment of existing doctrine, a point Cushman nicely establishes by drawing on contemporaneous law review comments and legislative debates.

Wickard v Filburn, in contrast, was a truly revolutionary case, for it completely abandoned any effort to show that the activity Congress regulated was part of a stream of commerce in any realistic sense. Indeed, Cushman correctly argues, Wickard went even further. After struggling with the case over two Terms, Justice Jackson finally decided that he could not make a respectable argument that a farmer’s consumption of goods he himself produced really was part of a stream of commerce. Instead, Justice Jackson abandoned the game. Thereafter the Court would defer to congressional judgments about what substantially affected interstate commerce. Cushman quotes a memorandum from Justice Jackson to a law clerk: “The same people elect the state and the federal officers. . . . It does not seem likely that the people would send men to Washington to take away powers which they elect state officers to exercise” (p 221). The political process rather than the courts would determine the distribution of power between the state and nation after the New Deal.

301 US 1 (1937) (upholding the constitutionality of the National Labor Relations Act).
In the end, Cushman concludes, there was a New Deal constitutional revolution. It did not occur in 1937, however. Before 1942, "[t]he development of doctrine had remained slow, subtle, careful, lawyerly" (p 224). After 1942, the Court faced cases in which the existing "doctrinal apparatus was not sufficient to sustain the far-reaching regulation of production presented" (p 224). The constitutional revolution thus did not occur because the justices capitulated to the political pressures of the New Deal. Evoking Thomas Kuhn's argument that new scientific paradigms prevail less because of their inherent merit than because defenders of the older paradigms die off, Cushman says that the New Deal constitutional revolution occurred because Franklin Roosevelt appointed New Deal justices to the Court. Here too Cushman acknowledges an externalist element, with the Court following the election returns in the sense that sustained electoral victories produce new justices who regard validating the constitutional agenda of their political benefactors as entirely natural and not at all political.

III. WHY A NEW INTERNALIST ACCOUNT OF THE NEW DEAL REVOLUTION?

Cushman's work is full of detailed case analyses supporting his new internalist account of the New Deal revolution. Its only flaws may be a sometimes excessive habit of providing long quotations from opinions and briefs and an occasional lapse into caricature, treating all externalist accounts as if they were indistinguishable from the "switch in time" story. Yet Cushman's account is itself externalist to the extent that it relies on a changing economy to explain why the world view embodied in the pre-New Deal doctrinal structure became increasingly unrealistic—and therefore implausible. Cushman undoubtedly deepens our understanding of what happened to constitutional doctrine in the 1930s. In one sense his account makes unavailable many externalist accounts that have worked their way into textbooks and popular understanding. For that reason, it may be useful to con-

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33 Thomas S. Kuhn, The Structure of Scientific Revolutions 151 (Chicago 3d ed 1996). Cushman quotes Max Planck's observation, quoted by Kuhn, that "a new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it" (p 224), quoting Max Planck, Scientific Autobiography and Other Papers 33-34 (Philosophical Library 1949) (Frank Gaynor, trans).

34 A typical example, taken from a book pulled off the shelf of my office library, is the entry on the New Deal written by historian William M. Wiecek in The Oxford Companion to the Supreme Court of the United States 694 (Oxford 1992) (Kermit Hall, et al, eds) (calling the Court-packing plan "a tactical failure ... [but] strategically successful").
sider why externalist accounts were accepted, and why a new internalism has gained ground.

The first observation may be banal: Historians oriented primarily to the legal profession—for example, those of us who teach in law schools—have a professional interest in providing internalist accounts. For, after all, internalist accounts identify the only features of doctrinal development that lawyers writing statutes and litigating cases have any chance of manipulating. There is not much a lawyer can do to alter the unemployment rate, for example, even if changes in that rate are the “real” reason for doctrinal development. But lawyers can identify pressure points in a doctrinal structure, and—if external conditions are right—they may provide judges with the tools that allow them to change the doctrine.35

In this sense internalist accounts describe the mechanism by which external events effect doctrinal change. Historians need not be all that interested in identifying such mechanisms, however.36 For purposes of civic education, for example, historians may think it more important to teach the public that external events shape legal doctrine.

Further, historical interpretations and explanations have a role in guiding action. Sometimes we want to know why something happened in the past to help us understand what we can do about situations we currently face. We may respond to different ways of interpreting the past by choosing different directions today. We might even call true those interpretations that provide the greatest assistance in guiding our action.37

The externalist account of the New Deal constitutional revolution, which Cushman argues against, might nonetheless have been true—for a time—on the view just described. Certainly in the immediate aftermath of that revolution, and for several scholarly generations thereafter, political actors and scholars guided their actions by one of the common externalist accounts. Seeing the Court as an institution that follows election returns,

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35 Of course lawyers invoke changed circumstances and the like in an effort to persuade judges. But lawyers cannot actually change the circumstances, and lawyers’ references to changed circumstances will ring hollow unless the judges actually end up believing that things really have changed.

36 On the deepest philosophical level, I suppose, a historian who is a methodological individualist does need to have such a mechanism available. But not all historians are methodological individualists, and even those who do not have to go all the way down to these mechanisms in providing a historical account (so long as they are available when needed).

37 Although I claim no expertise in the matter, it is my sense that this describes at least one common version of the pragmatic theory of truth.
for example, they came to be less concerned about the proposition that judicial review meant that the Court would at least sometimes overturn the results arrived at by elected majorities. On a slightly more general level, they became comfortable with seeing the Court simply as one actor in the political arena, coordinating its actions with those occurring elsewhere. The New Deal Court, and later the Warren Court, could readily be understood as parts of the New Deal and Great Society political coalition.38

One might then ask whether, or why, Cushman’s more internalist account might make sense today. Here, too, there are internalist and externalist perspectives. The internalist perspective is usually identified with the subfield known as the philosophy of history, and asks what are the conditions for treating one account as more valid than another. The most modest position is that a better account is a more accurate one, in the sense that the alternative requires for its coherence some fact that simply is not true. So, for example, a narrow externalist account attributing the “switch in time” to the Court’s response to the Court-packing plan is impaired by the fact that Justice Roberts had changed his vote before the Court-packing plan was announced. But a broader externalist account, attributing the Court’s new constitutional doctrine to the influence of political developments associated more generally with the New Deal and the Democratic takeover of the national government, is consistent with the facts.

My own reading in the philosophy of history leads me to conclude that we are unlikely to be able to get much more from an internalist perspective. All historians have to get the facts right. Beyond that, however, it is unclear that we have uncontroversial criteria for selecting among interpretations predicated on accurate facts.39 Focusing on doctrinal history, at the most general level it seems quite unlikely that we could choose between a careful externalist account and an equally careful internalist one simply on the ground of factual accuracy.40


39 For a general discussion of the loose constraints factual accuracy places on historical interpretation, see Joyce Appleby, Lynn Hunt, and Margaret Jacob, Telling the Truth About History (W.W. Norton 1994). Cushman also notes the difficulty of either establishing or rejecting conclusively an externalist account (p 32).

40 For one thing, the records available to historians will inevitably produce gaps in the factual materials, allowing both externalists and internalists to construct accounts compatible with the known—and knowable—facts. For example, it will be rare for a historian to locate accurate accounts of a decisionmaker’s internal state of mind. There may be accounts by others of what the decisionmaker said, but the historian will have to assess the quality of the witnesses’ recollections, the interests they have in providing one rather than
Historians treat the subfield of historiography as providing the externalist perspective on these issues. For the historiographer, the interesting question is not whether a good externalist account of doctrinal development is better than a good internalist one, but rather why externalist or internalist accounts are attractive to different people, or at different times.

Looking at the interpretation of the New Deal constitutional revolution from a historiographical perspective, I find it intriguing that some version of an externalist account simply was the interpretation that prevailed from the New Deal until recently. One can almost hear historians saying to themselves, “Of course the reason for the constitutional revolution lies in the external political and social environment. It’s hardly an accident that we call it the New Deal constitutional revolution.” Externalist accounts made sense because they fit comfortably into a much larger intellectual universe.41 The first generations of legal realists developed a critique of doctrinalism that, once accepted, made internalist accounts of doctrinal development entirely implausible. According to the legal realist analysis, prior legal rules simply could not compel conclusions in novel cases, or even rule out radically inconsistent paths. Doctrinal development, the realists said, resulted from the choices individual judges made, and those choices were not significantly constrained by the legal materials they used. Historians who accepted the legal realist perspective would naturally look to something outside the law to account for doctrinal development.

another account, the decisionmaker’s interests in representing to the witnesses something about his or her internal state of mind, and much more. Personal recollections by the decisionmaker and even such things as contemporaneous diary entries must be questioned in the same way. Cushman may disagree, as he noted that “it seems a rather curious historical method to blithely dismiss the only direct evidence we have of the Court’s motivations on the unsubstantiated ground that the justices were either lying or deluding themselves” (p 32). In the end, there is little doubt in my mind, and I think in most historians’, that the historian chooses to construct an account based on and compatible with the available evidence while knowing that others could construct alternative accounts that are equally compatible with that evidence.

Historians may be attracted to externalist accounts in part because their training may make them more comfortable writing about politics, economics, and general intellectual trends than about doctrinal issues that are difficult to grasp without substantial legal training.

Cushman’s comments on the historiography of New Deal constitutionalism are generally compatible with mine, although he often uses an unjustifiable sneering tone in describing those he criticizes. For example, he describes a “view” according to which “the role of the judge is essentially that of a policy-making legislator—with the exception that the judge (or, more often, his law clerk) is inconvenienced by the professional requirement that he dream up some technical mumbo-jumbo to justify his decision” (p 33). He also caricatures externalist accounts, suggesting that they assume that Roberts “voted as he did in Parrish . . . because he was a spineless hypocrite who folded at the first hint of public
Beyond the influence of legal realism narrowly understood was the influence of materialism more generally. The historians who dominated the interpretation of New Deal history until recently were strongly influenced by the view that all human activity—including, notably, the ideas people have—ultimately was grounded in material reality. The Marxist tradition provided the clearest guidance, treating everything, including ideas, as a superstructure erected on the material base of the relations of production in the economy. Few influential historians were strong Marxists, but many, probably most, were materialist in the sense that they gave explanatory priority to economics, politics, and social life, at least when they were dealing with ideas, including legal doctrine.\(^{43}\)

Finally, there is a consideration specific to the generation of the New Deal. I can put it this way: The New Deal constitutional revolution consisted of establishing that the Constitution provided no basis for distinguishing between the domains of law and politics. So, for example, after the New Deal constitutional revolution it was no longer possible to say credibly that some policy, while undoubtedly wise, was unfortunately unconstitutional. New Deal jurisprudence provided the tools for demonstrating that all wise policies were constitutional.\(^{44}\) The success of the New Deal constitutional revolution in turn established that externalist accounts of constitutional development were correct—including, of course, externalist accounts of that revolution itself. Constitutional law's own claims that constitutional law was simply politics conducted in another sphere were hard for historians to deny. In short, externalist accounts of the New Deal constitutional revolution fit comfortably into the intellectual universe that the New Deal itself created.

The recent revisionism exemplified by Cushman's book, and its internalist focus, are now easy to understand. My claim is not "the "philosophy of history" point that the revisionist account is more accurate than earlier externalist ones were. Rather, my claim is the historiographical one. Externalist accounts of the pressure" (p 104).

\(^{44}\) It may be worth noting the post-modernist critique of materialist accounts, according to which those who offer such accounts overlook the fact that there is no such material thing as the economy or politics. Rather, according to the post-modernist critique, the so-called economy and the like are actually intellectual constructs, ideas rather than material reality. The post-modernist critique thereby dissolves the distinction between internalist and externalist accounts: All accounts are internalist, in the sense that all invoke only ideas—albeit different ideas operating in different intellectual domains.

\(^{44}\) It took the Warren Court to push New Deal jurisprudence further, to the point of providing the tools for establishing that all unwise policies were unconstitutional.
New Deal constitutional revolution seemed sensible and even inevitable during the New Deal era. That era has ended. This is not the place to offer an extended defense of the claim that the New Deal order has collapsed. I would be more comfortable in offering a historiographical perspective on the new internalism were I confident that I knew what would replace the New Deal regime. I doubt that anyone does, however. That we are in an era of transition seems undeniable, but we do not know, I believe, what the new constitutional order will look like. At the least, however, it is no longer so obviously true that there is no distinction between law and politics. That alone makes it possible to offer internalist accounts in which doctrinal development occurs in large measure because judges work out the logic of their principles.

IV. CONCLUSION

Cushman's book will almost certainly become the new standard account of the New Deal constitutional revolution. Although short-hand references to the "Revolution of 1937" will undoubtedly persist, no one can now seriously argue that constitutional doctrine changed dramatically overnight in 1937. The New Deal

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45 For example, prominent younger historians now find it easy to write essays for an important collection entitled The Rise and Fall of the New Deal Order. See Steve Fraser and Gary Gerstle, eds, The Rise and Fall of the New Deal Order, 1930-1980 (Princeton 1989).

46 Such a defense would include accounts of the demise of the New Deal political coalition, of the rise of a conservative alternative that has yet to achieve permanent political dominance, and, notably, of a new constitutional jurisprudence that reestablishes the distinction between law and politics. I am particularly fond of citing Chief Justice Burger's statement:

The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, and even unworkable, but those hard choices were consciously made . . . . With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

INS v Chadha, 462 US 919, 959 (1983). This is something that justices grounded in the New Deal tradition would have found it difficult to write (although it can be made compatible with New Deal jurisprudence). On a more mundane level, Chadha's formalism is widely understood to be inconsistent with the purposive constitutional interpretation associated with the legal realist, and New Deal, traditions.


48 It seems appropriate to note that internalist accounts can have a conservative political cast or a liberal one. Both conservatives and liberals find it important to insist on the distinction between law and politics because both groups think it important to preserve the possibility of disciplining the unruly domain of politics by the exercise of reason.
constitutional order was constructed over a period of at least a decade, and its foundation was laid even earlier in the Legal Realist challenge to the then-conventional wisdom. By demonstrating all this and more, Cushman ought to affect both historical understanding and constitutional theory. One can ask for little more from a study of constitutional history.

* For example, Cushman's work ought to force a rethinking, though not an abandonment, of Bruce Ackerman's influential account of a New Deal constitutional "moment." Bruce Ackerman, *We the People: Transformations* (Harvard 1998).