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# The Fourth Revolution

Robert C. Power\*

## I. Introduction

A small and secretive group of reactionary elderly men threatens national security interests and obstructs the President of the United States in his efforts to end a nationwide economic crisis. The group, generally known by the apocalyptic allusion "Four Horsemen," has wrested effective control of the national government from Congress and the President. In resistance, an equally secretive group of progressive young men plots to restructure the government to defeat the Four Horsemen. They fail miserably, and a key leader dies under mysterious circumstances. Then, in a twist worthy of O'Henry, the Four Horsemen fade away as it becomes evident that their power was limited and transitory. In a rather short period, the political branches of the United States government regain trust, confidence, and authority.

It could be the latest Robert Ludlum or John Grisham novel, but instead it is the basic plot of William E. Leuchtenburg's *The Supreme Court Reborn*,<sup>1</sup> an engaging and fact-filled collection of essays about the constitutional shift of the 1930s. Many books discuss this topic,<sup>2</sup> and Professor Leuchtenburg does not really plow much new ground,<sup>3</sup> at least in terms of legal

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\* Professor, Widener University School of Law; J.D., Northwestern University; A.B., Brown University. I would like to thank Alexander M. Meiklejohn and Margaret V. Sachs, who read an earlier version of this essay, and Emily Field Van Tassel, who lent me her copy of *The Supreme Court Reborn* as soon as it arrived.

1. WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* (1995). Professor Leuchtenburg is the William Rand Kenan Professor of History at the University of North Carolina Chapel Hill and visiting professor of legal history at Duke Law School.

2. There are too many to mention. For a good bibliographic essay, see 1 ALFRED H. KELLY ET AL., *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* A85-A90 (7th ed. 1991).

3. Most of the nine essays in *The Supreme Court Reborn* were re-edited from lectures or articles. Each essay begins with a brief note describing previous versions. See LEUCHTENBURG, *supra* note 1, at 3, 26, 52, 82, 132, 163, 180, 213, 237. The preface also indicates

analysis. Nevertheless, this is a splendid piece of work that should be consulted by scholars, used in the classroom, and read by anyone who is interested in the Court or the Constitution. This review summarizes the book and then turns to three somewhat interrelated topics: (1) the significance of the constitutional changes of the 1930s, (2) their role in legal education, and (3) the place of works such as *The Supreme Court Reborn* in the ongoing discourse over storytelling and narrative in legal scholarship. The book is a fine example of how effective storytelling can allow the insights and techniques of one discipline — here history — to illuminate another — law

## II. Leuchtenburg's Stories

The nine essays in this book center on the Supreme Court's surprising and significant transformation in 1937. An obstacle to the New Deal in 1935 and 1936, the Court was a partner in its reforms by March of 1937. The essays tell a three-part story that underscores Leuchtenburg's theme that the transformation was so dramatic as to be a rebirth. The three essays in the first part, which one might call "the Bad Old Court," relate the stories of *Buck v. Bell*,<sup>4</sup> *Railroad Retirement Board v. Alton Railroad Co.*,<sup>5</sup> and *Humphrey's Executor v. United States*,<sup>6</sup> all pre-1937 cases in which reactionary forces prevailed. The second part shifts from legal to political history. The focus of these two essays is President Roosevelt's development of the Court-packing plan and Congress's reaction to that plan. The third part — "the Good New Court" or "FDR Triumphant" — mixes the methods of the first two parts. The first of its essays, the Perry Mason-sounding *The Case of the Wenatchee Chambermaid*, returns to the style of the book's first part to relate the story of *West Coast Hotel Co. v. Parrish*.<sup>7</sup> Chapter seven then returns to political history to tell of Justice Black's appointment to the Court. The final two essays more generally evaluate the modern Court's actions. The first gives a general overview of the Court's changes during the 1930s, while the second is broader in time and scope, addressing the incorporation doctrine from the enactment of the Fourteenth Amendment through its nearly complete implementation in the 1960s. The essays tie together remarkably well, and much of this coherence is a result of Leuchtenburg's storytelling

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the extent of Leuchtenburg's work on the New Deal era. See *id.* at vii-ix.

4. 274 U.S. 200 (1927).

5. 295 U.S. 330 (1935).

6. 295 U.S. 602 (1935).

7. 300 U.S. 379 (1937).

ability and his willingness to trim verbiage — skills which undoubtedly relate to one another.<sup>8</sup>

### A. *The Bad Old Court*

The Bad Old Court was the Court of the 1920s and the early 1930s, dominated by the Four Horsemen — Pierce Butler, James McReynolds, George Sutherland, and Willis Van Devanter. To prevail, of course, these four justices had to convince at least one of their brethren to join their decisions, which usually protected entrenched property interests against governmental social or economic legislation based on their broad interpretation of constitutional rights. In some contexts, however, government was allied with repressive interests. In such instances, the Four Horsemen tended to support governmental action, sometimes joined by unlikely confederates. *Buck v Bell* was one of the latter cases — one in which these reactionary justices were joined by putatively liberal justices in support of repressive state action.<sup>9</sup>

Leuchtenburg's case study of *Buck* traces the eugenics movement to remind readers that Virginia's policy of sterilizing retarded persons was only a small part of a major social movement.<sup>10</sup> It also provides depressing data about the compulsory sterilizations of the period, noting both the high volume of such operations and their connection to similar policies in Nazi Germany.<sup>11</sup> Justice Holmes's majority opinion trivialized the due process

8. Some additional tailoring would help in places. On a minor level, most of these essays originally stood alone and, as a result, contain repetitive material. Because the essays were modified for inclusion in this book, it would have seemed logical to edit out some of the repetitive material. On a different level, chapter nine, *The Birth of America's Second Bill of Rights*, is a disappointment, as addressed below. It does not fit well with the rest of the essays, and its placement deprives the book of an effective conclusion. The irony here is that this essay could have been neatly balanced with the opening essay on *Buck v. Bell* because both topics involve claims of individual, rather than economic, rights. Leuchtenburg effectively addresses the shift from close to deferential review of economic regulations, but only hints at the more gradual, but equally important, shift in the other direction for individual rights. This essay could have provided a good exposition of this point, but it fails to include a discussion of *Buck* or to provide much explanation for the relationship between the two shifts.

9. See *Buck v. Bell*, 274 U.S. 200 (1927) (upholding Virginia law providing for compulsory sterilization of institutionalized, mentally impaired persons). The Four Horsemen did not always vote together. Justice Butler, in fact, dissented in *Buck*. *Id.* at 208 (Butler, J., dissenting). However, the rest of the Court, including Justices Holmes, Brandeis, and Stone, unanimously ruled that a woman has no constitutional protection against state-ordered sterilization. *Id.* at 205-08.

10. LEUCHTENBURG, *supra* note 1, at 5-9.

11. *Id.* at 15-17

and equal protection objections to compulsory sterilizations.<sup>12</sup> More importantly, the Court did not merely acquiesce by suggesting that the Virginia law was constitutional but represented an unwise policy, which would have been consistent with a deferential jurisprudence. Leuchtenburg quotes Walter Berns's statement that Holmes gave the movement "a constitutional blessing and an epigrammatic battle cry"<sup>13</sup> Leuchtenburg further notes that although Holmes regularly voted to uphold state regulatory action, he did so with particular pleasure in this case; the opinion is "an expression of his own deeply felt convictions."<sup>14</sup> Thus, *Buck* disproves the notion that the Court of this period was rights oriented in any principled way

By contrast, *The Supreme Court Reborn* portrays Justice Owen Roberts to be a man without any deeply felt convictions. Chapter two, *Mr Justice Roberts and the Railroaders*, discusses the Court's invalidation of the Railroad Retirement Act of 1934.<sup>15</sup> Roberts joined the Four Horsemen in *Alton*,<sup>16</sup> essentially to declare labor relations immune from federal governmental interference. Although *Alton* is not one of the central cases of what has become the New Deal canon,<sup>17</sup> it provides a particularly apt example of Leuchtenburg's theme about this Court. The majority "viewed the statute

12. See *Buck*, 274 U.S. at 207 (characterizing due process challenge as attack only on substantive law and characterizing claim of freedom from sterilization as "strange"); *id.* at 208 (describing equal protection challenge as "the usual last resort of constitutional arguments").

13. LEUCHTENBURG, *supra* note 1, at 15 (quoting Walter Berns, *Buck v Bell: Due Process of Law?*, 6 W. POL. Q. 762, 762 (1953)). That cry, of course, is "[t]hree generations of imbeciles are enough." *Buck*, 274 U.S. at 207

14. LEUCHTENBURG, *supra* note 1, at 18.

15. Railroad Retirement Act, ch. 868, 48 Stat. 1283 (1934) (invalidated by Railroad Retirement Bd. v. Alton R.R. Co., 295 U.S. 330, 362 (1935)).

16. Railroad Retirement Bd. v. Alton R.R. Co., 295 U.S. 330 (1935) (declaring unconstitutional compulsory retirement and pension plan, established by Railroad Retirement Act of 1934, as applied to carriers covered by Interstate Commerce Act).

17. Most casebooks include one or two mid-1930s commerce clause decisions. Usually included are *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), some note materials on the shift, and some combination of *Wickard v. Filburn*, 317 U.S. 111 (1942), *United States v. Darby*, 312 U.S. 100 (1941), and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). See, e.g., JEROME A. BARRON ET AL., *CONSTITUTIONAL LAW: PRINCIPLES AND POLICY* 95-106 (4th ed. 1992); DAAN BRAVEMAN ET AL., *CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS IN OUR FEDERAL SYSTEM* 345-59 (2d ed. 1991) (omitting *Wickard*); GERALD GUNTHER, *CONSTITUTIONAL LAW* 115-36 (12th ed. 1991); WILLIAM B. LOCKHART ET AL., *CONSTITUTIONAL LAW* 94-112 (7th ed. 1991); GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 167-94 (2d ed. 1991). The usual treatments of the spending power and due process, see *infra* notes 42-46, are less overtly historical.

from the perspective of someone seated in a railway [board room], "<sup>18</sup> which was, in fact, where Roberts had sat prior to joining the Court."<sup>19</sup> The opinion revealed "contempt both for the legislators who had created this monstrosity and for the attorneys who sought to persuade the Court that it was a legitimate exercise of the powers of Congress."<sup>20</sup> The majority found that this type of retirement system required redistribution of wealth, which made it a violation of due process, but then went on, unnecessarily, to declare such legislation *not* a regulation of interstate commerce.<sup>21</sup> Although other cases were more directly devastating to the New Deal, as a matter of logic, *Alton* was particularly troublesome because it repudiated the underlying methodology of the planned social security system and separately indicated that congressional authority over unquestionably interstate businesses was lacking in matters not directly involved in interstate transportation. The dissenters recognized the need for a strong response if effective national regulation were to survive the Four Horsemen.<sup>22</sup>

Before turning to President Roosevelt's response, Leuchtenburg deviates slightly by telling one more story of the Bad Old Court — its rejection of President Roosevelt's dismissal of the Federal Trade Commission's William E. Humphrey.<sup>23</sup> The heroes and villains of that story are more ambiguous than those of the earlier case studies, perhaps because nobody today remembers Commissioner Humphrey and because the decision remains "good law."<sup>24</sup> Leuchtenburg reveals that Humphrey was a sharply partisan

18. LEUCHTENBURG, *supra* note 1, at 36.

19. Justice Roberts had served as counsel for the Pennsylvania Railroad. FRED RODELL, *NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955*, at 31 (1955); G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 211 (expanded ed. 1988). Still, it would be unfair to characterize Roberts as a representative of "corporate America," as is sometimes implied by critical commentaries. Roberts worked in a variety of public and private legal positions, capped by his work as a special prosecutor in the Teapot Dome oil scandals of the Harding administration. *David Burner, Owen J. Roberts*, in 3 *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS* 2253, 2254-55 (Leon Friedman & Fred L. Israel eds., 1969).

20. LEUCHTENBURG, *supra* note 1, at 37.

21. *See id.* at 35-37 (discussing *Alton*).

22. Leuchtenburg addresses Chief Justice Hughes's dissent at length. *Id.* at 39-42. The essay then effectively summarizes the largely antagonistic media responses to the decision, emphasizing speculation about Justice Roberts's presidential ambitions. *Id.* at 42-48. It concludes by discussing the administration's reaction and foreshadowing the Court-packing plan. *Id.* at 49-51.

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

24. Leuchtenburg does err when he suggests that this case has drawn little attention.

republican opponent of business regulation and that the Court's assumption that there was no good cause for his firing was largely a fiction caused by Roosevelt's ill-advised choice to use a simple, nonexplanatory letter of dismissal.<sup>25</sup> The Court's decision was unanimous and, coming as it did on May 27, 1935 — during the administration's worst year in the Court and on the same day as other notable anti-New Deal decisions,<sup>26</sup> represented a serious obstacle to the New Deal. The President reacted strongly "The *Humphrey* ruling went far to persuade the President that, sooner or later, he would have to take bold action against a Court that, from personal animus, was determined to embarrass him and to destroy his program."<sup>27</sup> Roosevelt's anger over the *Humphrey* decision may have influenced his choice of methods to change the Court's direction.<sup>28</sup>

### B. The President's Response

The centerpiece of this book consists of Leuchtenburg's two essays on the Court-packing plan. The first of these essays is a richly detailed recitation of the steps leading up to the 1937 proposal to increase the number of Supreme Court justices. This essay reveals the extent of Roosevelt's disdain for the Court — disdain that predated his election in 1932.<sup>29</sup> Most of the essay, however, concerns the period that began with the January 1935 invalidation of the "hot oil" laws in *Panama Refining Co. v. Ryan*<sup>30</sup> and

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See LEUCHTENBURG, *supra* note 1, at 52. The case remains a major discussion point of administrative law courses and theory, particularly because the theory of the unitary executive has become popular. *Humphrey's Executor's* acknowledgment of independent agencies remains one of the major obstacles to that theory's success. See *Synar v. United States*, 626 F. Supp. 1374, 1396-1402 (D.D.C.) (addressing *Humphrey's Executor*), *aff'd sub nom.*, *Bowsher v. Synar*, 478 U.S. 714, 724-25 (1986) (same).

25. LEUCHTENBURG, *supra* note 1, at 53-55, 59, 68. The conventional wisdom was that the Court would uphold the firing as an aspect of the President's executive power; this notion was based on the Court's strong opinion recognizing such authority with respect to local postmasters. See *Myers v. United States*, 272 U.S. 52 (1926); see also LEUCHTENBURG, *supra* note 1, at 64-69. Under this view, there was no need for the President to justify the firing or otherwise to comply with the statutory standards for dismissal. The conflict between *Myers* and *Humphrey's Executor* remains an issue today.

26. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking down National Industrial Recovery Act); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (striking down Frazier-Lemke Act).

27. LEUCHTENBURG, *supra* note 1, at 79.

28. See *id.* at 78-81 (discussing *Humphrey's Executor* as impetus for Roosevelt's Court-packing plan).

29. *Id.* at 83.

30. 293 U.S. 388 (1935).

ended in February 1937, when the Court-packing plan was announced. The May 27, 1935 trio of adverse Supreme Court decisions apparently served as the catalyst for the plan. Several days after these decisions, President Roosevelt met with reporters to discuss the Court's failings, emphasizing that "[w]e have been relegated to the horse-and-buggy definition of interstate commerce."<sup>31</sup> Attorney General Homer S. Cummings and other officials began considering various means of solving the administration's problem with the Court. They kicked around various proposals to amend the Constitution, from expanding federal authority in various respects, to ending life tenure for justices, to cutting back on Supreme Court jurisdiction.<sup>32</sup> This discussion alternates with a parallel discussion of Court opinions issued during this period that were hostile to economic regulation.<sup>33</sup> The plan eventually chosen — adding another member to the Court for each justice over seventy years old who chose not to retire — was a fairly late player in the game.<sup>34</sup> Its two-pronged genius was that it could be enacted through simple legislation rather than a constitutional amendment, and it did not directly challenge the justices on the merits of any particular constitutional interpretation. Rather, it could be presented as a docket-management reform. Leuchtenburg details the final drafting process by Justice Department and White House advisors and concludes the first essay on Court-packing with the President's deliberate decision to announce the plan on February 5, 1937 — several days before the Court was scheduled to hear oral arguments on the constitutionality of the National Labor Relations Act.<sup>35</sup> That choice was portentous, for the fate of the Court-packing plan and the New Deal was ultimately tied to the Court's unexpected approval of that Act in all of its applications.<sup>36</sup>

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31. LEUCHTENBURG, *supra* note 1, at 90 (quoting 4 FRANKLIN D. ROOSEVELT, *The Two Hundred Ninth Press Conference, May 31, 1935*, in *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: THE COURT DISAPPROVES*, 1935, at 200, 221 (Samuel I. Rosenman ed., 1938)); see also Franklyn Waltman, Jr., *Roosevelt Sees Social Setback of 50 Years in Court Decision; Calls on People to Face Crisis*, WASH. POST, June 1, 1935, at 1.

32. They were not alone. Congress was also considering Court-curbing bills at this time. See LEUCHTENBURG, *supra* note 1, at 102-03.

33. See *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (invalidating New York's minimum wage law for women and children); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (invalidating Bituminous Coal Conservation Act of 1935); *United States v. Butler*, 297 U.S. 1 (1936) (invalidating Agricultural Adjustment Act's processing tax).

34. See LEUCHTENBURG, *supra* note 1, at 117-22 (discussing development of Court-packing plan).

35. *Id.* at 122-27, 129-30.

36. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). Four other cases



Leuchtenburg's second essay on the Court-packing plan weaves together the various responses to the plan by members of Congress, the public, the media, and the Court. From the outset, strong opposition existed, some of it unexpected, but Roosevelt remained optimistic about the plan's chances. Three events combined to change things. First, the Court issued decisions favorable to New Deal initiatives.<sup>37</sup> Justice Roberts joined the majority in each case, isolating the Four Horsemen in dissent. Second, in May, Justice Van Devanter announced his resignation.<sup>38</sup> These events gave the progressive forces a practical victory on the underlying controversies over federal and state regulatory powers, which lessened the willingness of many members of Congress to take the political risks of supporting the Court-packing plan. Third, Senate Majority Leader Joe Robinson of Arkansas, who had been expected to be the first Roosevelt appointee to the Court, died suddenly one week after the beginning of the debate over the Court-packing plan.<sup>39</sup> The death of the popular Robinson lessened Senate confidence in the "replacement" justices and strengthened the position of democratic party opponents of the plan, which they quietly shelved by recommitment to the Judiciary Committee.<sup>40</sup> Leuchtenburg concludes the essay with a series of observations about the harmful effects of the Court-packing plan on Roosevelt's relations with Congress and other tangible costs of this odd constitutional revolution.<sup>41</sup>

### C. *The Good New Court*

The final group of essays emulates the first group by addressing specific events that illustrate a larger theme. It begins with the story of *West Coast Hotel Co. v. Parrish*, which presaged the New Deal's newfound success in the Supreme Court. *Parrish* provides a prime example of the Court's shift. Less than a year previously, in *Morehead v. New York ex rel. Tiplado*,<sup>42</sup> the Court had struck down a minimum wage law from New York.<sup>43</sup> In *Parrish*, how-

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decided the same day upheld the Wagner Act's application to a variety of sizes and types of business enterprises. See *Washington, Va. & Md. Coach Co. v. NLRB*, 301 U.S. 142 (1937); *Associated Press v. NLRB*, 301 U.S. 103 (1937); *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937); *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49 (1937).

37. This began with *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), continued a few weeks later with the NLRB cases, see *supra* note 36, and reached its natural conclusion six weeks later in *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937).

38. LEUCHTENBURG, *supra* note 1, at 143-44.

39. *Id.* at 150-52.

40. See *id.* at 144-53.

41. *Id.* at 156-62.

42. 298 U.S. 587 (1936).

43. *Morehead v. New York ex rel. Tiplado*, 298 U.S. 587, 609-18 (1936).

ever, the Court upheld Washington's minimum wage for chambermaids, overruling *Morehead* and admitting that much of its existing jurisprudence was based upon a crabbed notion of the state police power.<sup>44</sup> Leuchtenburg notes that although many contemporary observers failed to appreciate the significance of *Parrish*, the Four Horsemen, in dissent, recognized the sea change that the decision represented.<sup>45</sup> The chapter concludes with reflections on the practical impact of the Court's action and musings about the role of a chambermaid in changing American history.<sup>46</sup>

*A Klansman Joins the Court* is Leuchtenburg's essay on the appointment of Justice Hugo Black to replace Justice Van Devanter. Leuchtenburg ably organizes the multitudinous materials on Black to reveal the extent and the depth of animosity that the nomination produced.<sup>47</sup> This animosity ranged from widespread disrespect for Black's intelligence to concerns about his temperament and rumors that he was anti-Catholic, as well as the fact that he had Ku Klux Klan connections. It is easy now to look back bemusedly on the Black affair and note how wrong his detractors turned out to be about his

44. *Parrish*, 300 U.S. at 395-400 (directly overruling *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) by concluding that it was inconsistent with precedent and series of later cases that more accurately described nature of state regulatory power). Assembling language and applications from a variety of cases, the Court flatly repudiated the notion that the Constitution provides any special freedom of contract. See *id.* at 391-98. Rather, the applicable protection is "liberty," as recognized in the due process clauses, and "regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process." *Id.* at 391.

45. See LEUCHTENBURG, *supra* note 1, at 173-75. Leuchtenburg properly sets the scene in detail. His description begins:

The author of *Adkins* surveyed the chamber silently, almost diffidently, then picked up the sheaf of papers in front of him and began to read. Sensing his day had passed, Sutherland — who, with his pince-nez, high collar, goatee, and hair parted in the middle, seemed never to have left the nineteenth century — appeared barely able to bring himself to carry out his futile assignment. He started off speaking in a curiously toneless murmur, and even those near the dais had trouble at first catching his words.

*Id.* at 173. The entire description underscores the notion that the Four Horsemen knew this was the case that destroyed their hold on the Court. By this point, of course, all members of the Court were probably aware that *Parrish* was just the first of a series of New Deal victories, but the public remained in suspense for several more weeks.

46. *Id.* at 178-79.

47. See *id.* at 184-99. There are, of course, a variety of books and many law review articles about Justice Black. The most recent one to have received substantial praise is ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* (1994). See also GERALD T. DUNNE, *HUGO BLACK AND THE JUDICIAL REVOLUTION* (1977); JOHN P. FRANK, *MR. JUSTICE BLACK: THE MAN AND HIS OPINIONS* (1977); HUGO BLACK AND THE SUPREME COURT: A SYMPOSIUM (Stephen P. Strickland ed., 1967); JAMES F. SIMON, *THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA* (1989).

approach to constitutional questions and yet recognize that a person with his background probably would not be appointed today<sup>48</sup> Still, this essay is essentially an engaging, nonanalytical walk through the nomination process.<sup>49</sup> The key to its significance lies in its final topic — why President Roosevelt chose Black. It "was a symbolic and defiant act" that "afforded the President another opportunity to express his contempt for the illusion that the Court was a body that lived on Mount Olympus."<sup>50</sup> Black's appointment set the pattern for what soon became the Roosevelt Court.

Many of the earlier essays' topics are restated in summary form in Leuchtenburg's penultimate essay, *The Constitutional Revolution of 1937*<sup>51</sup> Its first few pages summarize the legislative initiatives of the New Deal, the Court's initial hostility, and its 1937 decisions that began the transformation.<sup>52</sup> The bulk of the chapter discusses the cases that nailed down the new view of federal authority. Some of the cases are the old warhorses of constitutional law courses, such as *United States v. Darby*<sup>53</sup> and *Wickard v*

48. Leuchtenburg notes the irony of Justice Black's role in expanding civil liberties given his Klan background. See LEUCHTENBURG, *supra* note 1, at 202-04. Leuchtenburg does not take the opportunity of contrasting Roosevelt's action to the modern practice of naming "stealth" or noncontroversial centrists to the Court, nearly perfected by Presidents Bush and Clinton. This may be because this essay began as a lecture in 1973, long before the practice began.

49. Leuchtenburg reminds his readers of an odd turn of events that accompanied the Black nomination. At the outset, supporters of the nomination apparently anticipated that Black would receive the traditional senatorial courtesy of immediate confirmation. This attempt to end run the usual confirmation process was frustrated by Vice President John Nance Garner, who kept asking for objections from the floor until he received some, which forced the matter to committee consideration under Senate rules. *Id.* at 184. Despite substantial controversy over the Klan connection and Black's intellectual and personal qualifications, the nomination moved quickly through committee, and Black was confirmed less than a week after he had been named. See *id.* at 184-90. It seems unlikely that even a universally respected member of the Senate could be confirmed to the Supreme Court so quickly today.

50. *Id.* at 210-11.

51. The last essay concerns the development of the incorporation doctrine, which occurred mostly from the 1940s through the 1960s. Although the need for judicial activism in the area of rights is foreshadowed in some of the earlier chapters, this essay seems tacked on and detracts from the overall theme of the book. It is, however, a wholly competent and exceptionally readable account of the development of the incorporation doctrine. It addresses in sufficient detail most of the key cases, and it identifies the underlying premises of judicial activism concerning fundamental rights. As such, it would make a good reading assignment on incorporation in a basic constitutional law or criminal procedure course. However, it does not fit well with the rest of this book, which is about the dramatic shift of constitutional interpretation that occurred in a very short period in the 1930s.

52. See LEUCHTENBURG, *supra* note 1, at 213-20.

53. 312 U.S. 100 (1941) (upholding constitutionality of Fair Labor Standards Act of

*Filburn*,<sup>54</sup> but a number of less well-known cases are intriguingly discussed as well. These include *Mulford v Smith*,<sup>55</sup> which acknowledged federal control over agriculture because of its effects on interstate commerce,<sup>56</sup> *Kirschbaum v Walling*,<sup>57</sup> which recognized the interstate commerce aspects of seemingly local businesses,<sup>58</sup> and *Osborn v Ozlin*,<sup>59</sup> which reinvigorated deference to state economic policies.<sup>60</sup> The Court was also more expansive in its treatment of governmental powers outside the realm of constitutional interpretation, as illustrated in the four *Morgan*<sup>61</sup> cases, which reveal a shift over time to Court deference to administrative agency decisions.<sup>62</sup> Leuchtenburg's essay propounds the unexceptional notion that these changes were revolutionary, and he is generally and genuinely praising of the Court's actions. He does, however, recognize the potential mischief of an unduly deferential Court and the need for stability in constitutional interpretation.<sup>63</sup> The structure of the book prevents Leuchtenburg from including a conclusion that brings everything together.<sup>64</sup> This essay may be the best option given what

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1938).

54. 317 U.S. 111 (1942) (upholding Agricultural Adjustment Act of 1938 as within commerce power of Congress).

55. 307 U.S. 38 (1939).

56. *Mulford v Smith*, 307 U.S. 38, 47-48 (1939).

57. 316 U.S. 517 (1942).

58. *Kirschbaum v Walling*, 316 U.S. 517, 523-28 (1942).

59. 310 U.S. 53 (1940).

60. *Osborn v Ozlin*, 310 U.S. 53, 62 (1940).

61. The *Morgan* litigation represents the *Jarndyce v. Jarndyce* of administrative law. See CHARLES DICKENS, *BLEAK HOUSE* (1853). The case began with a Department of Agriculture rate-making proceeding in 1930 concerning the Kansas City Stockyards. It turned into four Supreme Court decisions, each reversing what one suspects was an increasingly irritated district judge. *Morgan v United States*, 298 U.S. 468 (1936) (*Morgan I*); *Morgan v. United States*, 304 U.S. 1 (1937) (*Morgan II*); *United States v Morgan*, 307 U.S. 183 (1939) (*Morgan III*); *United States v Morgan*, 313 U.S. 409 (1941) (*Morgan IV*). The cases concerned the scope and methodology of administrative adjudications and suggest the Court's shift from a formal to a practical response to the nature of government administration. See ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* § 8.5.1 (1993) (discussing four *Morgan* cases).

62. LEUCHTENBURG, *supra* note 1, at 227

63. *Id.* at 231-36.

64. The biggest flaw in this book is its failure to address, in a coherent fashion, the relationship between the switch to greater deference in the economic sphere and the switch to less deference in the area of individual rights. This failure is problematic, for the tools are certainly there, as the opening (*Buck v. Bell*) and closing (incorporation) essays concern individual rights. Leuchtenburg could have discussed whether these reverse shifts were justified, as he apparently believes, or why they occurred at roughly the same period, which

we now know to be a continuing tradition of constantly changing constitutional law

### III. The Significance of 1937

In my constitutional law class, I tell my students that there were four American revolutions. The first was the 1776 war that they vaguely recall from high school. Second, a bloodless, but still revolutionary movement followed that ultimately produced the Constitution of 1787. The Civil War, which "interpreted" the Constitution to prohibit voluntary withdrawals from the Union and resulted in three key constitutional amendments, was an obvious third revolution. Finally, the 1937 transformation of the Court was the fourth revolution, and we still live under its regime.<sup>65</sup>

Constitutional law casebooks regularly revisit the fourth revolution. It marks, of course, the switch from the narrow, cabined notion of the federal commerce power<sup>66</sup> to the nearly all-encompassing notion embodied in modern cases such as *Heart of Atlanta Motel, Inc. v. United States*<sup>67</sup> and *Perez v. United States*.<sup>68</sup> We see it again in the substantive due process materials,

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is less obvious. He may have felt that attempting to resolve these matters would be outside his realm of telling history. Regardless, his insistence on just telling the story is one of this book's strengths. See *infra* part V.

65. There are some concerns that we may be at the brink of a counterrevolution in this regard. The main support is the Court's recent decision striking down the Gun-Free School Zones Act on commerce clause grounds. *United States v. Lopez*, 115 S. Ct. 1624 (1995). The fact that four justices voted to uphold state authority to impose term limits on congressional representatives from that state, see *United States Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1913-14 (1995) (Thomas, J., dissenting), may also indicate a shift. See generally Aaron Epstein, *States' Rights Gaining Ground with Supreme Court*, PHILADELPHIA INQUIRER, May 28, 1995, at D2 (noting that advocates of enhanced states' rights are only one vote away from reshaping federal-state relationship); Linda Greenhouse, *Blowing the Dust off the Constitution that Was*, N.Y. TIMES, May 28, 1995, at 4-1 (summarizing Court's recent steps toward return to states' rights); Linda Greenhouse, *Focus on Federal Power*, N.Y. TIMES, May 24, 1995, at A1 (noting emergence of Court's debate over extent of federal power under Constitution). As suggested in this section, however, I do not expect any such shift to gut or even to narrow, in important respects, the scope of congressional power.

66. The taxing and spending powers see the same transition. For example, compare *United States v. Butler*, 297 U.S. 1, 78 (1936) (striking down processing tax of Agriculture Adjustment Act of 1933, with Four Horsemen and Justice Butler joining in majority) to *Steward Mach. Co. v. Davis*, 301 U.S. 548, 598 (1937) (upholding social security unemployment compensation, with only Four Horsemen dissenting).

67. 379 U.S. 241, 261 (1964) (upholding public accommodations provisions of 1964 Civil Rights Act).

68. 402 U.S. 146, 156 (1971) (upholding commerce clause jurisdiction over "local" loansharking).

as the result in *Adkins v Children's Hospital*<sup>69</sup> transforms into the opposite result of *West Coast Hotel Co. v Parrish*.<sup>70</sup> Those of us who teach administrative law also see evidence of the fourth revolution as our classes discuss the evolution from specific delegations in the National Industrial Recovery Act cases of 1935 to the compliant "search for intelligible principles" of more recent cases.<sup>71</sup> It is commonplace, if not trite, to suggest that we would be living in a different nation today without the Court's shift of 1937, but such observation is nonetheless accurate. Those who are distressed with the nation's present condition may suppose that the Court's shift was a mistake. The currently fashionable federal bashing over regulation, for example, seems premised on a notion that state governments are more efficient than the federal government and that state regulations are more responsive to public needs. Further, the movement to reform welfare programs reveals a belief that President Johnson's "great society" was, despite its intent, a blueprint for depriving the underclass of ambition and principle. For those who believe that the Supreme Court led us into such horrible missteps (and election returns suggest that they number in the millions), the Four Horsemen are not the cardboard villains of constitutional histories, but rather the romantic heroes of a lost war.

Even if the critics of federal regulation and public welfare programs are essentially correct as a matter of policy,<sup>72</sup> however, the Four Horsemen were wrong as a matter of *constitutional* law. Whatever had been the intent or expectation of the framers (whomever we precisely mean by that term), the nation's economy changed over time from primarily local, to primarily

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69. 261 U.S. 525, 554 (1923) (striking down District of Columbia's minimum wage for women).

70. 300 U.S. 379, 400 (1937) (overruling *Adkins v Children's Hospital* by upholding Washington's minimum wage law).

71. Early cases include *A.L.A. Schechter Poultry Corp. v United States*, 295 U.S. 495, 542 (1935) (striking down fair competition codes of National Industrial Recovery Act as unconstitutional delegation of legislative power to president) and *Panama Refining Co. v Ryan*, 293 U.S. 388, 430 (1935) (invalidating portion of National Industrial Recovery Act as excessive delegation of legislative power to executive branch). Modern cases include *Mistretta v United States*, 488 U.S. 361, 374 (1989) (upholding Congress's delegation of authority to United States Sentencing Commission) and *Morrison v Olson*, 487 U.S. 654, 677 (1988) (upholding Congress's authority under Ethics in Government Act to place appointment authority for independent counsel outside executive branch).

72. I disagree with most of the criticism, believing instead that regulation on a nationwide basis is required in many areas and that welfare programs are a necessary and worthwhile cost of an essentially free market economy. This section assumes, however, that the critics are correct and that Congress and the states have been too expansive in using their powers.

regional, to primarily national. As a result of these changes, most business regulation became, as a practical matter, regulation of interstate commerce, and neither Congress nor the Court needs to engage in legal fictions to permit national regulation of virtually any commercial activity<sup>73</sup> For different reasons, the scope of the spending power, which underlies most entitlement programs, cannot reasonably be narrowed to prohibit social spending. The broad scope of this power dates from the earliest days of the nation.<sup>74</sup> Of equal importance to the new conservative textualists, the opened language of the spending clause plainly gives Congress powers beyond those enumerated in the remaining paragraphs of Article I, Section 8.<sup>75</sup> The

73. See *supra* note 65 (discussing *United States v. Lopez*, in which Court struck down, on commerce clause grounds, Congress's criminal ban on gun possession in vicinity of school). Although the majority and concurring opinions question the propriety of the nearly unlimited commerce clause power of existing case law, their fundamental rationale is that Congress never articulated a connection between the prohibited action — gun possession near a school — and interstate commerce. *United States v. Lopez*, 115 S. Ct. 1642, 1631-32 (1995). That deficiency can be remedied for virtually any type of business regulation, perhaps even for guns in school zones, see *id.* at 1632 n.4, and pass muster under principles such as cumulative effects on interstate commerce, see *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942) (concluding that individual effects on commerce can be added together for all similarly situated persons to create substantial effect), or ripple effects on interstate transactions, see *Perez v. United States*, 402 U.S. 146, 154 (1971) (concluding that intrastate activities may affect interstate commerce).

74. The Louisiana Purchase would seem to be an early example. See *THE READER'S COMPANION TO AMERICAN HISTORY* 681-82 (Eric Foner & John A. Garaty eds., 1991) (noting that critics found no constitutional authority for purchasing territory, but that President Jefferson took uncharacteristically broad view on question). In *Massachusetts v. Mellon*, 262 U.S. 447 (1923), the Court upheld Congress's allocation of funds for maternal and infant health. *Id.* at 480. It concluded that no unenumerated power of regulation had been exercised because the state acceptance of funds was voluntary and that general welfare spending is permissible under Article I of the Constitution. *Id.*, see also Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754-83 (1985) (addressing federal statutes providing public benefits in post-Civil War era, most of which appear to be constitutionally permissible only as spending for general welfare purposes).

75. Although the precise meaning of the Taxing and Spending Clause has always been controversial, those who are committed to textual interpretation must take cognizance of the fact that taxes are to be used to "provide for the general welfare," U.S. CONST. art. I, § 8, cl. 1, among other uses. If the language limiting federal authority is to be followed, as textualists insist, then this language, which imposes a limitation of means (spending as opposed to regulation) along with a general description of ends (general welfare), should also be followed, which results in a very wide range of objectives for congressional spending. The only more restrictive interpretation conceivable — that the phrase should be interpreted to allow spending only in support of powers enumerated elsewhere in the Constitution — should be untenable to textualists as surplusage, given that the Necessary and Proper Clause

only effective limitation crafted to date flowed from the tortured logic of the commerce power limitation enunciated in *United States v. Butler*.<sup>76</sup> This limitation necessarily disappeared along with the artificial notion of a rigid line between interstate and intrastate commerce.

To the extent that the post-1937 Court is criticized for ignoring the preferred position of liberty of contract via its substantive due process jurisprudence, that criticism is equally myopic. The period of judicial hostility to state regulation of business practices was short and unjustified by reference to the United States Constitution.<sup>77</sup> Largely a creation of romantic nineteenth-century notions of individualism, this view never formed a part of the basis for our national government and cannot be justified under any credible interpretive methods.<sup>78</sup> More significantly for the people who purport to oppose federal intervention, supporting aggressive use of the due process, or other, clauses by federal courts against state regulation is really sleeping with the enemy. If state authority is truly superior to federal authority, it is plainly wrong-headed for the federal courts to obstruct decisions made by democratically elected state legislatures.

What really seems to bother the new conservative movement is that Congress has overused or misused its powers, many of which it shares with the states for all practical purposes. The 1937 shift did not mandate misuse. Rather, it simply transferred most of the keys of government from the federal judiciary to the political branches. The cases of the Good New Court do not say that "more federal regulation is good" or even that "more regulation is good." Instead, the cases allocate from the judicial branch to other entities the critical decision-making power. Those entities, by and large, are Congress — by way of a more realistic interpretation of the com-

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also allows such spending by necessary implication. In any event, even the Four Horsemen rejected the more restrictive view in *United States v. Butler*, 297 U.S. 1, 64-65 (1936).

76. 297 U.S. 1 (1936).

77. See, for example, FRANK R. STRONG, *SUBSTANTIVE DUE PROCESS OF LAW* 79-113 (1986) and sources cited therein. See also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 565-68 (2d ed. 1988). Of course, this lack of a federal constitutional protection does not rule out the possibility that state constitutions may be interpreted to limit business regulation at the state level, either through specific provisions or more demanding notions of general protections, such as state due process or equal protection guarantees.

78. There are credible historical and legal arguments to support varying degrees of judicial protection of private property and contractual freedom under the due process, takings, contracts, and privileges and immunities clauses, but none of these arguments prevents the national government from regulating for consumer protection or from spending to help the less fortunate. Such limitations would, at most, exclude some techniques or subjects, but would not prohibit close federal involvement in the economy or society.



merce power, administrative agencies — by way of a pragmatic notion of legislative delegation, and state legislatures — by way of a greatly reduced substantive due process protection.

This reallocation is by far the most important thing that the Roosevelt Court accomplished. The view that it meant "bigger" government conflates cause and effect. Government expanded because the Court interpreted the Constitution to allow the people to make that choice, and the people took it.<sup>79</sup> It now appears that the people are inclined to make a different choice, at least in some areas. They can do so only because the Supreme Court decided in 1937 to give them the powers both to make that choice and to change their minds.

#### *IV Teaching the Shift*

The foregoing discussion indicates that the Constitution, at least as currently interpreted, makes few judgments about what the federal or state governments should do. Rather, it assigns decision-making authority among the branches of the national government, the states, and the people. This idea is the underlying premise of most basic law school courses in constitutional law. Most law students, however, do not fully grasp this concept until some years after they take the course, if even then,<sup>80</sup> which may be a good thing. For example, it might suck the blood from a philosophical discussion of the value of artistic freedom in a diverse society to note flatly that the First Amendment merely establishes that decisions about the content of communications are allocated to individuals rather than to the federal or state government. Yet the realization would also clarify several things. First, it would clarify the notion that those who defend a person's right to communicate something unpleasant — pornography or violent entertainment, for example — do not necessarily endorse the message. Most law students see this

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79. It is no coincidence that Congress and many states chose to increase business regulation and expand public benefit programs during the Depression and World War II. The fact that public policies have shifted in the ensuing 50 years should come as no surprise, but it is likely that they will shift again and that a new national emergency will someday result in an increase in national legislation. The present Court, unlike the Bad Old Court, is likely to uphold such legislation.

80. My favorite law school course was offered at Yale Law School by Professor Charles L. Black, Jr. Its description was: "Constitutional Law Revisited. 3 units. This course will give its members a chance to take a second look at constitutional law, this time after considerable law training. No attempt will be made to avoid covering cases, problems, or doctrines already considered in Constitutional Law I. On the contrary " YALE LAW SCHOOL, BULLETIN OF YALE UNIVERSITY, Aug. 20, 1985, at 48. I suspect that most constitutional law professors would love to teach this course.

easily enough, although the idea is too often lost on society in general. Second, this "jurisdictional" notion of what the First Amendment does makes it possible to recognize that vocal demonstrations in opposition to such unpleasant speech, or even to generally accepted speech that is distasteful to the demonstrators alone, is *equally* protected by the First Amendment. Thus, expression that criticizes, or even calls for privately boycotting, books, movies, or political speech is itself protected speech rather than the censorship that it is often condemned to be by those who do not really understand the way the First Amendment works. Law students, as well as laypersons, find it difficult to grasp this point. Therefore, a central objective of the constitutional law course is to communicate this notion of the way the Constitution works.

Close attention to the shift of 1937 and use of materials such as *The Supreme Court Reborn* can help us to teach and understand this aspect of constitutional law. It is too easy to fall into the trap of teaching the course as the casebooks lay it out for us — some introduction on judicial review, then congressional powers (highlighting the commerce clause), then limitations on state powers as a result of national power (emphasizing the dormant commerce clause because it is doctrinal, rather than preemption, which is necessarily case-by-case),<sup>81</sup> then separation of powers.<sup>82</sup> If the class is not bored to death by the time we finish with these topics, we serve dessert —

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81. Dormant commerce clause analysis fits the traditional case method's emphasis on building up a body of principles through close examination of the facts of a series of cases. Those principles should resolve future cases without requiring a complete re-examination of the earlier cases. For example, in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), the court was able to pare down "the general rule that emerges" from the dormant commerce clause to a fairly straightforward test three sentences long. See *id.* at 142. By contrast, preemption cases are governed by one overriding rule — congressional intention. Although the Court has developed some techniques for identifying congressional intent, see, e.g., *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 203-04 (1983), most preemption cases turn into an exhaustive, and usually exhausting, examination of the particulars of the statutory scheme(s) at issue. See, e.g., *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 513-31 (1992); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137-45 (1990); *Pacific Gas & Elec. Co.*, 461 U.S. at 205-23.

82. See *supra* note 17 (listing multiple constitutional law casebooks that all follow this structure to substantial degree). Not all casebooks follow this format, however. For example, one textbook devotes roughly its first third to an historical survey before breaking the rest of the text down into chapters that resemble the traditional approach. See PAUL BREST & SANFORD LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* (3d ed. 1992). Another text is somewhat less experimental, but it largely reverses the tradition, beginning with equal protection and moving toward judicial review. See DANIEL A. FARBER ET AL., *CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY* (1993).

fundamental rights, equal protection, and maybe a little First Amendment. In fact, boring the class may be the whole point. Only future constitutional law professors can make it to the second half of the course with any appetite for more constitutional law, so perhaps we have somehow chosen to reproduce by saving the "good parts" for our own kind.

The fact that we keep returning to the mid-1930s as a crucial period in several of these doctrines is regularly noted, both in print<sup>83</sup> and in class. However, the class reference is rarely more than a sarcastic comment about the fickle Mr. Justice Roberts, a wink at the frailty of precedent, and a sigh about the Bad Old Court. Why do the casebooks fail to do a better and more thorough analysis of this pivotal event? Perhaps it is because these cases are dry, often dealing with details of business regulation and standards of judicial review. We are like our students in wanting to proceed to the good parts, so too often we exacerbate the problem and treat these immensely important issues and this vital period as just some "stuff" we have to get through.

We can mitigate the problem by teaching more American history with our constitutional law. *The Supreme Court Reborn* provides us with the underlying concept, a set of materials, and a central mystery with a number of discussion points. The underlying concept, of course, is that the 1937 shift marked a sea change in constitutional law and that the individual cases were just part of a larger, more coherent pattern. The book clearly establishes that it certainly was not mere coincidence that led to deferential review under several different constitutional provisions and, at the same time, avoids oversimplistic explanations such as "legal realism allows judges to be inconsistent."<sup>84</sup> Confrontations are the key to constitutional development.

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83. Each of the casebooks mentioned in note 17, *supra*, takes note of this event in a similar fashion. See BARRON ET AL., *supra* note 17, at 95-97 (entitled *The New Deal Confrontation*); BRAVEMEN ET AL., *supra* note 17, at 349-51 (discussing notes about plan and shift, and citing to Leuchtenburg's essay about Court-packing plan); GUNTHER, *supra* note 17, at 122-24 (placing notes on Court-packing plan among standard cases); LOCKHART ET AL., *supra* note 17, at 94-100 (entitled *Background for Constitutional Struggle: The New Deal vs. The Great Depression and Background for a Judicial Reversal of Position*); STONE ET AL., *supra* note 17, at 178-81 (citing to earlier version of Leuchtenburg's essay about Court-packing plan and including notes between cases on constitutional themes, attack on Court, and Roberts switch).

84. This is essentially what we do when we wink at the shift and make some simple cause-and-effect assertion. This confrontation about fundamental aspects of our governmental system deserves more respect. There are a number of potential causes to discuss, and there are probably an equal number of subsidiary questions to address, the separation of powers aspects of the Court-packing plan being only the most obvious.

The year 1937 brought the most direct confrontation in our history between the judiciary and the political branches, and it was the judiciary that blinked.<sup>85</sup> The struggle took place on several fronts, prompted by disputes between real parties. Leuchtenburg's discussion of *Alton*, for example, is particularly useful for explaining the stakes of these constitutional squabbles to individuals and, by extension, to millions of workers. The *Parrish* essay serves the same purpose and, by discussing the series of state regulation cases that preceded it, brings home how suddenly and sharply the Court reversed itself on substantive due process. The *Buck v Bell* essay provides disturbing facts that make that decision even colder, if that is possible. The essays on Court packing and the nomination of Justice Black place the Court and its action in the context of the period's politics and explore the constitutional relevance of a change in personnel.<sup>86</sup>

Perhaps the most intriguing aspect of the topic and this set of materials is that the questions multiply and do not permit short answers. Given what happened over this period, one major question to ponder is something like: "Justice Roberts — was he pushed, did he jump, or did he just fall?" However, this question merely describes one whole series of questions. Just a few of the related questions are: (1) What would have happened if the Court-packing plan had succeeded? (2) Would Justice Van Devanter have retired if Roberts had held firm? (3) Would the existence of a Justice Robin-

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85. One of the subtexts of the constitutional law course that students often find intriguing is Chief Justice Marshall's ability to confront the political branches in ways that gave them no opportunity to respond. This is, of course, most obvious with respect to the assertion in *Marbury v Madison*, 5 U.S. (1 Cranch) 137 (1803) of the power to review the actions of the executive branch and Congress, without affording those branches an opportunity to ignore any judicial order. A similar potential legal confrontation of this order was avoided in *Dred Scott v Sandford*, 60 U.S. (19 How.) 393 (1857) by the Court's ill-advised attempt to take the slavery issue out of the authority of any branch of the national government. This attempt to prevent confrontations about slavery within the federal government unfortunately contributed to the need to settle the matter through war. In the mid-1930s, however, the political branches went beyond the usual practice by repeatedly passing regulatory legislation that challenged the Court's doctrines and by threatening to change the make-up of the Court if it persisted in its views. Coincidentally or not, Justice Roberts changed his mind, and that was enough to change the doctrines.

86. The most obvious change was Justice Black's replacement of Justice Van Devanter. However, the death of Senate Majority Leader Robinson was also important because if he had lived, the Court-packing plan might well have passed, and his appointment to the Court might have kept Hugo Black in the Senate. If the Court-packing plan had been in force in the 1980s, the elderly Court of that era would have been larger or very different. In either event, President Reagan would have been able to name additional justices in the early 1980s for Justices Brennan, Marshall, and Blackmun, who instead were replaced in the 1990s by Presidents Bush and Clinton.

son have meant a moderately conservative Court for the next few years, delaying (or possibly even preventing) some of the key doctrinal changes of the late 1930s? (4) Would his appointment have meant that there never would have been a Justice Black? Put simply, Leuchtenburg's theme and his various stories can reinvigorate the part of the basic constitutional law course that needs it the most, and it can do so without trivializing either the law or the history

### V Telling Stories

*The Supreme Court Reborn* also raises questions about storytelling in legal scholarship. Recent years have witnessed an extraordinary increase in the use of storytelling and narrative in legal scholarship and, perhaps more tellingly, an extraordinary increase in discussion of the use of storytelling and narrative in legal scholarship.

The stories in *The Supreme Court Reborn* differ from most contemporary examples of storytelling. The book is largely about actual people who differ greatly from the author, while most of the new legal narratives are autobiographical or use fictitious characters (or use fictitious characters to reveal autobiographical facts). Moreover, most modern narratives are by and about those who have been underrepresented in our nation's power centers, usually by reason of race, gender, or social class. Narratives about the underrepresented perform a valuable function in helping to reveal to generally upper-class academics a side of life and of the law's impact on that group that is usually hidden from them. To the best of my knowledge, however, there has never been a book or a law review article that tells the story of growing up as the first-born son of a Wall Street securities lawyer, and if I ever find one, I will not want to read it.<sup>87</sup> The reason is obvious — "I Was a Yuppie Securities Lawyer" will not tell the upper class anything that it does not know already, and it will not tell the rest of society anything new either because such yuppies and their fathers already write most of the laws, opinions, newspaper stories, and television scripts in our society

Despite their value in providing perspectives, however, some of these legal inherent in anything autobiographical in nature. It is not an accident that autobiography is sometimes thought of as a subspecies of fiction rather than of history

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<sup>87</sup> There is a long tradition of books about poor white males succeeding through hard work — the Horatio Alger genre. A modern example would be Dallas Cowboy Coach Barry Switzer's autobiography, *Bootlegger's Boy*, which recounts his difficult rise. BARRY SWITZER & BUD SHRAKE, *BOOTLEGGERS' BOY* (1990). The newer narratives, in a sense, expand this tradition to include women and persons of color.

Leuchtenburg's stories avoid these problems. The most obvious reason is that his book is not autobiographical. Had it been about the influences of Supreme Court doctrine on the lives of history professors, it would probably be as bad as any "Yuppie Securities" autobiography would be. But Leuchtenburg honors a norm of historical scholarship — getting inside historical situations without writing about himself.<sup>88</sup> At the same time, he honors one of the chief norms of the new legal narratives by writing about those who are not powerful. Both Elsie Parrish, "the Wenatchee Chambermaid," and Carrie Buck were essentially powerless. The essays tell us facts about these people that the Court's opinions ignored, and this approach ironically emphasizes the impact of the legal system on their lives. Elsie Parrish was one of many thousands of people who had a demanding job and could not support herself on subpar wages.<sup>89</sup> She sought the legal minimum wage only

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88. Federal appeals judge Michael Boudin argues that "[h]istorians prize objectivity and honesty. The discipline [of law] teaches argument, not objective narration." Michael Boudin, *The Master Craftsman*, 47 STAN. L. REV. 363, 381 (1995) (reviewing GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* (1994)). See generally *id.* at 380-86 (contrasting historical and legal writing).

Judge Boudin may be overconfident in the ability of historians to view "facts" objectively. Historians have to deal with the challenge of finding the "right" mixture of fairness and subjectivity and are therefore well aware that what they write is not indisputable fact. See, e.g., EDWARD H. CARR, *WHAT IS HISTORY?* 13 (First Vintage Books ed. 1967) (noting that historians' "facts" are judgments, not facts (quoting GEOFFREY BARRACLOUGH, *HISTORY IN A CHANGING WORLD* 14 (1955))); JOHN HIGHAM ET AL., *HISTORY: THE DEVELOPMENT OF HISTORICAL STUDIES IN THE UNITED STATES* 89 (1965) (noting that history is written by winners from inevitably biased vantage points). The conventional wisdom of every era rewrites the history that it tells. Frances Fitzgerald's study of secondary school history texts traces the change from an orthodoxy about American virtue and melting pots to a newer one that acknowledges unpleasant truths about our nation's past but tends toward an uncritical celebration of diversity, a central "truth" of this era. FRANCES FITZGERALD, *AMERICA REVISED: HISTORY SCHOOLBOOKS IN THE TWENTIETH CENTURY* (1st ed. 1979).

The conflict over the objective-subjective balance in history has seen various schools and dominant theories. As Higham explains, "historical theory in America has moved within a circle of confidence and doubt." HIGHAM ET AL., *supra*, at 90. The dominant strains of the post-World War II period have confidence in the value of historical knowledge and the need "to get close" to the period under study. Historians must be able "to participate subjectively in whatever past they wish to understand." *Id.* at 143; see also CARR, *supra*, at 26-27 (noting that historians need to understand values and culture that they portray).

In this sense, historians tend to be more open than legal scholars about the potential influence of personal outlook. History texts tend to have names like "The March of American Progress." Constitutional law casebooks, which all seem to imply that their course is the march of American progress, are almost all called "Constitutional Law." See *supra* note 17 (listing names of constitutional law textbooks).

89. See LEUCHTENBURG, *supra* note 1, at 164.

after she quit, the implication being that she would have been fired had she sought the increase earlier.<sup>90</sup> Carrie Buck was treated as less than a person based on bad science and worse law.<sup>91</sup> Leuchtenburg also writes about people such as William Humphrey and Hugo Black, who were hardly dispossessed members of society. However, those who read only the Supreme Court opinion do not know the real story behind President Roosevelt's firing of Humphrey. As far as the Court intimates, he was just a republican member of the Federal Trade Commission whom President Roosevelt wanted to replace. Knowing Humphrey's background and what would today be called his "management style" does not make him more sympathetic, but it, at least, would put Roosevelt's action into context.<sup>92</sup> The Black nomination story is different. Although the story is very well known, Leuchtenburg still manages to make it fresh, largely through his skill at shaping a narrative and his heavy reliance on primary sources and facts rather than conclusory statements.<sup>93</sup>

This last point denotes a difference between legal and historical narratives. All too often, stories in legal scholarship seem to state conclusions rather than facts.<sup>94</sup> Historians and social scientists are more inclined to find

90. *See id.* at 178-79.

91. *See id.* at 5-11.

92. The fact that Humphrey was such a partisan figure makes the fact that the Court unanimously invalidated his firing even more striking. *See id.* at 70-78. It is apparent that even those justices most deferential to executive authority also believed strongly in the independence of agencies, such as the Federal Trade Commission, from the President and the consequent need to enforce strictly the limitations on the President's power to remove commissioners from office. The fact that Humphrey died before the case was resolved, rendering the dispute ultimately to be about backpay, however, may, to some degree, undercut this conclusion. *See id.* at 62-64.

93. The book is full of sections that lay out facts simply but in dense detail. Two that are particularly noteworthy are Leuchtenburg's discussion of the eugenics movement, *id.* at 5-9, and his contrapuntal discussions about the Court's decisions hostile to the New Deal and the Roosevelt administration's machinations to get around the problem, *id.* at 85-108. The fact that Leuchtenburg has an "agenda" in both of these sections is neither inappropriate nor detracts from their impact. A reader must just remember what is obvious from the work as a whole — that Leuchtenburg supports the Court's switch of 1937.

94. Higham describes the New History Movement's attempt to come closer to reality by using specific details rather than generalizations that merely abstract from experience. *See* HIGHAM ET AL., *supra* note 88, at 106-10. A statement such as "we were poor" really says very little; "our house had no floor" says a good bit more (as does the B.C. comic strip of July 11, 1995 — "My alibi in school used to be: 'a cockroach ate my homework.'") Johnny Hart, B.C., Creators Syndicate, Inc. (1995)). Legal scholars tend toward generalizations for some reason, perhaps because of our traditional reliance on appellate opinions, which are almost always conclusory and which reduce facts to a few findings.

the facts in primary sources and then reorganize them for the reader. To be sure, there is manipulation and argument in what they do as well, but they usually provide enough specifics that readers have a basis upon which to accept or reject their arguments.

Other aspects of Leuchtenburg's success in telling constitutional law stories are suggested by another recent book, *Constitutional Law as Fiction*.<sup>95</sup> The underlying theme of this book is that law is based on fictional stories rather than on actual "facts," and cases are "restatements" of events intended to create a particular legend. The legend then becomes the legal understanding of the case — the "facts" that future generations learn and themselves pass along.<sup>96</sup> The author, law professor Lewis H. LaRue, criticizes the way in which we tell stories and presents his own counter-theory, using as an example Norman Maclean's *Young Men and Fire*.<sup>97</sup> Although LaRue finds several lessons for lawyers, as well as other writers, in this book, two stand out — increasing accuracy in detail and using foreshadowing.<sup>98</sup>

Leuchtenburg's stories meet LaRue's injunction by paying close attention to detail and by employing structures that foreshadow their conclusions. The stories about cases are filled with details that he found in lower court records and testimony; the political stories are filled with quotations from memos, interviews, and contemporary newspaper accounts. Most modern readers will be appalled by the eugenics movement and what happened to Carrie Buck, but by providing so many details, Leuchtenburg makes it

95. L.H. LARUE, *CONSTITUTIONAL LAW AS FICTION: NARRATIVE IN THE RHETORIC OF AUTHORITY* (1995).

96. LaRue's book identifies several examples of such judicial mythmaking. One example is the history of religion in the United States, which was falsely told by Justice Black in *Everson v. Board of Educ.*, 330 U.S. 1 (1947). See LARUE, *supra* note 95, at 16-27. This history becomes Justice Powell's erroneous history of religion in *Edwards v. Aguillard*, 482 U.S. 578 (1987). See LARUE, *supra* note 95, at 32-33. Two of the basic fictional constitutional law stories that LaRue identifies are the story of constitutional limits, which is first told in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and the story of our nation's inevitable growth, which is suggested by *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). See LARUE, *supra* note 95, at 42-92.

97. NORMAN MACLEAN, *YOUNG MEN AND FIRE* (1992) (relating true story of Mann Gulch Fire).

98. The last 25 pages of *Constitutional Law as Fiction* are LaRue's attempt to show lawyers how to tell stories, drawing on Maclean's *Young Men and Fire*. See LARUE, *supra* note 95, at 129-53. His emphasis on accuracy in detail is implicit in much of this section and relates to the need to give factual specificity — a workable image — to the pertinent questions. *Id.* at 146. He sees foreshadowing as a valuable means to increase dramatic tension. *Id.* at 132, 135-36.



possible for us to evaluate *Buck v Bell* in the context of its time and to appreciate the societal changes and enhanced scientific knowledge that have made its holding anachronistic. Further, by ordering the chapters and structuring the individual essays so as to underscore the "fall of the old and rise of the new," *The Supreme Court Reborn* enhances the overriding story of a Court and a nation in peaceful constitutional revolution.<sup>99</sup> In Leuchtenburg's words, "no event has had more momentous consequences" than the attempt to pack the Court.<sup>100</sup>

Ironically, but perhaps logically, the least convincing — the most skim-mable — portions of *The Supreme Court Reborn* are the summaries of the Court's opinion holdings. Whether this irony results because Leuchtenburg is not a lawyer or because we have been spoiled by case summaries written by people who write such things for a living does not matter. LaRue tells us to write about what is "strange or wonderful,"<sup>101</sup> and Supreme Court opinions are rarely strange or wonderful to lawyers. Leuchtenburg's stories, however, are strange and wonderful to us and provide a richness to constitutional law study.

Good legal history is as much history as it is law. Because the root of "history" is "story," perhaps we lawyers should recognize that we have a lot to learn from the professional storytellers when we try to rely on their art.

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99. A good example of effective foreshadowing is the final sentence of the essay on Justice Roberts and *Alton*: "From that day forward, neither Roosevelt nor his aides would rest until they had found a way to overcome the obstacle to their plans presented by the Court." LEUCHTENBURG, *supra* note 1, at 51. Leuchtenburg's alternating between Court decisions and administrative plotting in the first Court-packing essay is also particularly effective stagecraft. This discussion is paced somewhat like a suspense movie. If Stephen Sondheim were to rework it for the theater, the opposing groups would be singing songs attesting to their ability to win the "rumble," much like the Jets and Sharks in his *WEST SIDE STORY* (United Artists 1961) (music by Leonard Bernstein).

100. LEUCHTENBURG, *supra* note 1, at 162.

101. LARUE, *supra* note 95, at 150 (quoting from MACLEAN, *supra* note 97).

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