Introduction

I. OVERVIEW

HISTORIAN OF SCIENCE Steven Shapin began a classic work with this sentence: "There was no such thing as the Scientific Revolution, and this is a book about it."[1] This book's theme might be put in similar terms. There was no Constitutional Revolution of 1937, and this is a book about it. As the book's subtitle suggests, the Hughes Court from its inception in 1930 was in large measure a Progressive court, committed in a wide range of areas to the vision of active government associated with the Progressive movement in thought and politics. The Court was not dominated by a deep formalism, though most of the justices, liberals and conservatives alike, had their moments of formalism – and not merely for strategic reasons when controlling precedent forced formalism on them. At one time or another, and cumulatively a great deal of the time, all of the justices incorporated ideas about good public policy in their interpretations of the Constitution and federal statutes.

Individual justices varied in their commitment to the Progressive vision, of course. And, when enough of them thought that the New Deal had pressed Progressivism too far too fast, they balked. The constitutional crisis of 1936–37 was real, and had real effects. But it was not a rearguard action by the Court's "reactionary" Four Horsemen to reinstate a government committed to laissez faire and limited national power. On one side there was concern that upholding the constitutionality of New Deal programs might inscribe in constitutional law doctrines that could be used to validate even greater transformations of the government's role in restricting markets. On the other side there was incredulity at striking down what the Court's liberals thought were relatively modest responses to economic crisis, and – especially among Progressive academics – annoyance at achieving less than everything they sought. And throughout the decade there

[1] Steven Shipan, *The Scientific Revolution* (Chicago, University of Chicago Press, 1996), p. 1.

were continuities, particularly with respect to what came to be understood as civil rights and civil liberties, though the underpinnings of the results changed somewhat.

When the crisis was resolved by Justice Willis Van Devanter's retirement and Hugo Black's appointment, no more than modest adjustments in legal doctrine were required. More important, by the end of Hughes's tenure we can glimpse the first hints of a new approach to government, which I describe here as interest-group pluralism. That new approach *did* transform constitutional law, but the transformation occurred in the decade after Hughes's retirement, not in 1937. In short: constitutional crisis in 1936–37, and its resolution but not a constitutional revolution – then.

II. INTERPRETING THE HUGHES COURT

EFFORTS TO UNDERSTAND the Hughes Court, beginning in the 1930s and continuing to today, have been pervaded by dichotomies: liberals or progressives faced conservatives or reactionaries; judges were formalists or realists; the events of 1936–37 are best understood through the lens of electoral politics (described as taking an "externalist" perspective) or through the lens of legal doctrine (an "internalist" perspective). More, each element in these dichotomies is thought to map roughly onto the others: liberal judges were realists who oriented themselves to electoral politics, while conservative judges were formalists who followed their views of what legal doctrine required, views that only coincidentally tracked their political inclinations. Sophisticated historians know that such sharp dichotomies and mappings are almost always inaccurate and seek to soften them by working with ideas that incorporate some of each, though in mixtures that tend to reproduce in hazier form the dichotomies themselves.[2]

Attaching political labels to the justices and their opinions is to some degree unavoidable – a shorthand that captures real distinctions. As the fluidity of the labels suggests – is "liberal" or "progressive" a better description of Louis Brandeis, "conservative" or "reactionary" a better description of George Sutherland, and what do we make of Owen Roberts? – the shorthand often needs to be expanded, and the expansion kept in mind even when the shorthand is employed.

All of the Hughes Court's members accepted the broad contours of Progressive thought as it developed over the early twentieth century and, importantly, as that body of thought was assimilated into their daily work. The justices were more or less ordinary lawyers doing a judge's work. They were what Oliver Wendell Holmes referred to both admiringly and with some archness, "jobbists." In Holmes's words, jobbists focused on their jobs, "contribut[ing] to the general welfare and when a man is on that, he will do it better … the more he puts his

[2] For a more extended discussion, see the Historiographical Essay at the end of this volume.

energy into the problem he has to solve."[3] The justices were not legal theorists systematically working out the implications of overarching legal theories. Yet, both contemporaneous and historians' assessments of their work are inevitably affected by what legal commentators and academics have to say about that work. Such observers impose more coherence upon the justices' work both individually and collectively, coming up with a "jurisprudence" they impute to the justices. These descriptions are not always inaccurate, of course, but they must be used cautiously. As men of practical affairs, as a common characterization had it, the justices typically did no more than glimpse, sometimes clearly but more often vaguely, a more systematic grounding for their work.

Progressivism is notoriously a slippery concept, at least when historians try to present it as a system of thought about governance. As described in Chapters 1 and 19, Progressive theorists argued that administrative agencies had a substantial role to play in governance because only such agencies could adapt to rapidly changing social conditions, for example. All the Hughes Court's members accepted that account. As the events of 1936–37 showed, they could vigorously disagree about precisely how far the modern state could go, but none was truly reactionary in seeking to roll back the national government's reach to what it had been in the nineteenth century. Chapter 23 describes the weakness of the commitments within the Progressive movement as a whole to what came to be known as civil rights and civil liberties but, for complex reasons detailed in Part II, the Hughes Court ended up supporting the more liberal strands in Progressivism on these issues. And, notably, that commitment was no stronger after 1937 than it had been before.

The formalist–realist dichotomy is at least as misleading as that between progressives and reactionaries and is similarly a product of academic reflection and theorizing. As described in Chapter 1 and elaborated throughout Chapters 2, 3, and 4, we can indeed observe the justices disagreeing over using what Charles Evans Hughes called "formulas" instead of attending directly to social reality and sound social policy. Again, though, the differences arise at the margins. Every judge sometimes disposed of cases by invoking a formula, and every judge sometimes disposed of cases by invoking policy. Even the most committed "realists" understood that formulas could sometimes serve as handy rules of thumb to reach a sensible result without going through the policy questions in detail, and even the most committed "formalists" understood that sometimes formulas had to be unpacked to see whether they could sensibly be invoked in the case at hand.[4]

[3] Oliver Wendell Holmes, Jr., to John C.H. Wu, Mar. 26, 1925, in *The Mind and Faith of Justice Holmes: His Speeches, Essays, Letters, and Judicial Opinions* (Max Lerner, ed., Boston, Little Brown, 1943), p. 426.

[4] Of the works on the Hughes Court, G. Edward White, *The Constitution and the New Deal* (Cambridge, Harvard University Press, 2000), comes closest to adopting the approach taken here. White's governing metaphor, that the justices were "pricking out the lines" separating the permissible from the impermissible, understates the degree to which there were differences over accepting the pricked-out borders as already defined by prior decisions rather than as being defined in the case at hand. Those differences are captured in but overstated by the distinction

Popular accounts of the events of 1936–37 focus almost exclusively on politics in the narrow sense. Their story is simple: responding to the threat to the Court posed by Franklin Roosevelt's Court-packing plan, Chief Justice Hughes and Justice Roberts switched their votes in key cases. That story dominated academic accounts as well, until law professor Barry Cushman offered an important revisionist account that emphasized internal – that is, doctrinal – factors that distinguished the post-switch cases from the earlier ones.[5] Earlier, political scientist Peter Irons had directed attention to the role government lawyers played in drafting and defending New Deal legislation, arguing that more effective lawyering also distinguished the later cases from the earlier ones.[6] Taken together Cushman and Irons went far toward displacing the prevailing externalist accounts. Not surprisingly, both the externalist and internalist accounts have difficulties when examined in detail, as Chapter 13 shows.[7]

And, to return to the question with which this Introduction began, was there a constitutional revolution in 1937? Cushman argues that there was not. The Court continued to apply pre-1937 doctrine until at least the end of Hughes's tenure. The real doctrinal change came in the early 1940s. Yet, the post-1937 cases do feel different, both in substance and, as Chapter 18 describes, in style. Interest-group pluralism seeped its way into the cases, most notably perhaps in the Court's interpretations of the National Labor Relations Act (Chapters 16, 36, and 37), even though it did not crystallize into a full-throated doctrine. The year 1937 was not a sharp inflection point, but it was the beginning of what in retrospect is clearly a transition to another era.

III. UNDERSTANDING JUDICIAL TIME

BY APRIL 1937 the Supreme Court had decided that minimum wage statutes and the National Labor Relations Act (NLRA) were constitutional. On April 26, the Court overturned the conviction of Angelo Herndon for conducting a meeting of the Communist Party, invoking freedom of speech. The next day Felix Frankfurter wrote his protégé Charles Wyzanski, "I should like to bet you 10 to 1 that for the rest of the term the Court will sustain everything that should be sustained and invalidate, as in the Herndon case, everything that will vindicate the Court as the unflagging guardian of our liberties!"[8] With the Term nearing its end and few important cases

between formalism and realism. The burden of Chapters 2, 3, and 4 below is to support the foregoing assertions.

[5] Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York, Oxford University Press, 1998).

[6] Peter H. Irons, *The New Deal Lawyers* (Princeton, Princeton University Press, 1982).

[7] For additional discussion of the internalist/externalist "debate," see the Historiographical Essay at the end of this volume.

[8] Felix Frankfurter to Charles Wyzanski, Apr. 27, 1937, Box F-12, Charles Wyzanski Papers, Harvard Law School. Historian Glenda Gilmore echoes Frankfurter's reaction: "The Herndon verdict reflects the influence of domestic and international politics on the court," referring to the Court-packing

unresolved, this was something of a sure bet. Frankfurter's letter is important, though, in showing that he thought the Court's "New Deal" decisions were of a piece with its civil liberties decisions.[9]

Franklin D. Roosevelt had a similar mindset. On "Black Monday," May 27, 1935, the Supreme Court held unconstitutional several statutes most observers associated with the New Deal. It also held unconstitutional Roosevelt's decision to remove William Humphrey from the Federal Trade Commission. Roosevelt saw all the decisions as an assault on the New Deal and, in the Humphrey case, on him personally.[10] Frankfurter and Roosevelt assumed that cases decided roughly contemporaneously are parts of packages that can be understood as in some sense unified.

The assumption that dates of decisions – time – matter pervades scholarship on the Supreme Court. Scholars and journalists examine the work of a single Term, contrasting it with what happened the year before and the year after.[11] Yet, the concept of time on which these analyses rest should be questioned. Writing about the presidency, political scientist Stephen Skowronek distinguishes between secular time – the ordinary calendar – in which regularly scheduled elections take place, and political time, the location of a president in relation to his predecessors and the "regime principles" they sought to implement. With his colleague Karen Orren, Skowronek also emphasizes what they call "intercurrence," the persistence of governing principles associated with one regime into a period fairly described as a new regime.[12] Suitably adapted, these ideas help us understand what can be called "judicial time," and through that concept we can see some features of the transition from pre-1937 to post-1937.

plan. Glenda Elizabeth Gilmore, *Defying Dixie: The Radical Roots of Civil Rights, 1919–1950* (New York, W.W. Norton, 2008), p. 195.

[9] For additional discussion of the letter, see Chapter 23 below.

[10] For a discussion, see Chapters 8 and 21 below.

[11] Two prominent approaches in political science use a time-horizon similar to the prevailing one. (1) A 1957 article by Robert Dahl concluded, "the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States." Dahl's article set in train an extraordinarily productive research project whose influence continued into the twenty-first century. Robert A. Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker" (1957) 6 *Journal of Public Law*: 279–95, p. 285. (2) Political scientists have described a "strategic" model of Supreme Court decision-making, in which (to simplify a far more subtle theory) justices take into account what Congress and the president might be able to do if they disagreed with the justices' preferred policy positions. A summary statement is in the standard account by Lee Epstein and Jack Knight, *The Choices Justice Make* (Washington, Congressional Quarterly, 1998), p. xiii: "[J]ustices are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of others, of the choices they expect other to make, and of the institutional context in which they act." The time-frames for both approaches are relatively narrow, although Dahl's can be adjusted to take into account periods that at least in retrospect appear to be transitional.

[12] Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to Bill Clinton* (Cambridge, Harvard University Press, 1997); Karen Orren and Stephen Skowronek, *The Search for American Political Development* (New York, Cambridge University Press, 2004).

Judicial time in the United States differs from secular and political time because of one central institutional factor – life tenure. Arrivals at and departures from the Court are controlled by chance (illness and death) and choice (an individual justice's calculation that after some point his life off the Court would be better than his life on it). No one can control chance, and choice occurs within a complex institutional and political framework. Among the elements in that framework are the justice's ability to get along with his colleagues, which is affected but not determined by the degree to which he finds their views congruent with his, the justice's sense of how important it is that he remain on the Court, and the living conditions the justice will face, including the income he will have, after leaving the Court.

Life tenure means that there is no necessary congruence, even over a reasonably extended period, between political and judicial time. Justice Willis Van Devanter's departure from the Court in the spring of 1937 is a dramatic example. Van Devanter had been thinking about retirement for several years, but delayed his departure in part because he agreed with some of his colleagues that he was making an important contribution to the Court's work after Franklin Roosevelt's election in 1932, and in part because he was concerned that the reduced salary he would receive on resignation would be inadequate.[13] Van Devanter announced his departure as the Court-packing battle was still going on in Congress, but it was determined primarily by judicial, not political, time.

Courts do their work by articulating doctrine in cases, and a second important element in judicial time can be called "doctrinal time."[14] Doctrine is worked out step by step, and a court needs an appropriate case for it to take the next step along the path to which it is committed. Sometimes a court can wrestle recalcitrant facts into a shape suitable for doctrinal development, but far more often it is at the mercy of the cases that litigants bring or, in the Supreme Court, at the mercy of the interaction between the cases and the discretion the Court has, most of the time, to decide which cases to hear.[15]

Doctrinal time will vary from area to area: A case falling in a doctrinal line developing in a roughly liberal line might arrive at the Court at the same time as a case falling in a different doctrinal line developing in a roughly conservative direction. Or, as the *Herndon* case illustrates, cases might move along similar doctrinal lines but be decided only coincidentally at the same time. Both *Herndon* and the NLRA cases were "liberal" decisions, but *Herndon* fitted easily within a doctrinal line on the Hughes Court that dated from years before the Court-packing plan was on the horizon while the NLRA cases

[13] For the details, see Chapters 1 and 14 below.

[14] The idea of doctrinal time is related to the idea of jurisprudential regimes developed in Mark J. Richards and Herbert M. Kritzer, "Jurisprudential Regimes in Supreme Court Decision Making" (2002) 96 *American Political Science Review*: 305–20.

[15] For an example of the Court reshaping a case, see the discussion of Colgate v. Harvey, 296 US 404 (1935), in Chapter 9 below.

reworked doctrines whose most recent articulation had come only a year earlier.[16]

One broad theme in the Hughes Court's work illustrates something akin to intercurrence. The Court inherited a suspicion of "class legislation," a term favored by its more conservative members, and "the Interests," a pejorative term associated with Progressives.[17] Over the course of Hughes's tenure, "the Interests" gradually came to be seen, on occasion and haltingly, as "interest groups," a term that had no negative connotations. The degree to which individual justices had become comfortable with the role of interest groups in the legislative process when they dealt with statutes in which interest-group influence could be discerned would affect how the justice would vote. Again, time mattered, as "the Interests" became transformed, bit by bit and at different rates for different judges, into "interest groups."

Working in judicial time, the Hughes Court was simultaneously progressive and reactionary. And, it was transformed in judicial time by new appointments, each of which shifted the vector of established doctrinal lines somewhat. That is why there was no constitutional revolution in 1937, and why it is possible to write a book about it.

[16] For another example, see the discussion of the *Humphrey's Executors* and *Jones* cases in Chapters 21 and 22 below.

[17] For a discussion of the conceptual framework early in Hughes's tenure, see Chapter 1 below.