The conference papers contributed by Professor Gillman and Professor Feldman are richly suggestive and provide much food for thought. Each takes as his starting point the notion of "jurisprudential regimes" in constitutional law, and seeks to illuminate the ways in which such regimes are related to the political contexts in which they operate. The ideas explored in each of these essays deserve a much fuller consideration than I can hope to provide in this brief comment. I would like, however, to take a moment to consider some of the issues of characterization and causal efficacy that each of these scholars raises.

Professor Gillman argues that "[t]he influence of regime politics ensures that federal judges, especially at the top of the judicial hierarchy, will have concerns and preferences that are usually in sync with other national power holders." This synchronization of preferences is "accomplished," according to Professor Gillman, "within a self-consciously partisan appointment process," in which "party leaders in the White House and Senate" seek nominees whose "decision-making bias"—"the general political and ideological predispositions that they bring to their institutional responsibilities"—will conform to those of other members of the "national governing coalition." Professor Gillman claims not only that national governing coalitions attempt to place on the Court Justices who will promote their party’s ideological agenda, but that the history of unenumerated rights jurisprudence demonstrates that they have been successful in doing so. It is this latter claim that most interests me, and it is this claim that I propose to evaluate through a brief examination of the decisions of what Professor Gillman calls "the laissez-faire Court."
If, in fact, the nomination and confirmation processes of the various national governing coalitions successfully accomplished their design to place sympathetic partners on the Court, one would expect to see strong similarities among the voting patterns of Justices affiliated with the same political party. One would also expect to see such similarities among Justices appointed by the same president, or perhaps even among different presidents of the same party. In the area of unenumerated rights, however, this does not appear to have been the case. One might consider a number of hypotheses to explain this phenomenon. It may be that in some instances the relevant ideological preferences and concerns of the national governing coalition find expression at such a level of generality that they dictate no determinate answer to particular constitutional questions that come before the Court. It may be that constitutional issues that will become salient during a Justice’s tenure will not yet have appeared on the radar screen of the national governing coalition at the time of the Justice’s nomination and confirmation. It may be that the members of the national governing coalition are of more than one mind on particular constitutional issues. It may be that the ideological concerns and preferences of the national governing coalition contain latent internal tensions that are exposed in the context of a particular constitutional setting, and necessitate a selection from among the coalition’s competing values and preferences. It may be that Justices of the Supreme Court are not subject to the conventions and mechanisms of party discipline applicable to members of the legislative branch. It may be that Justices of the Supreme Court do not think of themselves as members of a national governing coalition when they are engaged in the enterprise of constitutional adjudication, or at least that they do not think of themselves this way all of the time. This list is intended to be suggestive rather than exhaustive—there may of course be other explanations as well—and these explanations are not mutually exclusive, but may operate in some combination. But whatever the explanation, the phenomenon to which I refer becomes readily apparent from a brief sampling of the better-known unenumerated rights decisions of the so-called “laissez-faire Court.”

Consider first Professor Gillman’s principal example of unenumerated rights jurisprudence on the “laissez-faire Court,” Meyer v. Nebraska. Professor Gillman suggests that the decision in Meyer to invalidate a Nebraska statute prohibiting the teaching of modern foreign languages in grammar school, and elaborating in dicta a subsequent non-justiciable private right, was a sign of the Court’s willingness to engage in unenumerated rights adjudication.

---

4 See, e.g., John C. Jeffries, Jr., Lewis F. Powell, Jr. and the Art of Judicial Selection, 112 Harv. L. Rev. 597, 598 (1999) (noting that Justice Powell was not asked a single question about abortion or affirmative action at his confirmation hearing).

5 262 U.S. 390 (1923).
ries of unenumerated rights protected by the Due Process Clause, was in keeping with the "libertarian" commitments of the Republican party of the 1920s. The vote in Meyer was 7-2. The opinion was written by Justice McReynolds, a Democrat and an appointee of Woodrow Wilson. It was joined by the Republican Justice McKenna, a McKinley appointee; Justice Van Devanter, a Republican and a Taft appointee; Justice Brandeis, another Wilson appointee; Chief Justice Taft and Justice Sanford, Republicans appointed by President Harding; and Justice Butler, a Democratic Harding appointment. In dissent were Justice Holmes, a Republican Roosevelt appointee, and the Republican Justice Sutherland, a former Senator and a confidante of Warren Harding, who had appointed Sutherland to the Court. One would be hard-pressed to produce any account of the Republican governing coalition that did not at the very least include both Taft and Sutherland. How, then, are we to account for the divergence of their votes? Should we conclude that Sutherland was flouting the "libertarian" commitments of his party, or perhaps that he was embracing the nativist commitments it expressed in the Immigration Act of 1924? Were Taft and Van Devanter embracing the party's "libertarian" preferences, or rejecting its nativist concerns? It would appear that a self-respecting Republican Justice could take either position and still be both "in sync" and, to some extent, out of sync, with the concerns and preferences of the national governing coalition. And where that is the case, one has to wonder whether the fact that these Justices were Republicans, or that they were nominated and confirmed by Republican political officials, can provide us with much assistance in predicting or explaining their behavior on the bench.

Among the unenumerated rights listed by Justice McReynolds in Meyer, of course, was "the right of the individual to contract." Consider, then, a "liberty of contract" decision handed down the same year that Meyer was rendered, Adkins v. Children's Hospital. Here the vote was 5-3 to invalidate the District of Columbia's minimum wage law for women, though Justice Brandeis almost certainly would have

6 Gillman, supra note 1, at 111.
7 See JOEL FRANCIS PASCHAL, MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE 105-08, 112-14 (1951).
8 Id. at 218-19; see also MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 17-55 (2004).
9 For the present, I leave to one side the question of whether it is even possible to generate a persuasive account of the Taft Court's jurisprudence as "libertarian" in character. For a discussion of some of the challenges that such an effort would encounter, see, for example, Barry Cushman, Lost Fidelities, 41 WM. & MARY L. REV. 95, 100-02 (1999); Barry Cushman, The Secret Lives of the Four Horsemen, 83 VA. L. REV. 559 (1997).
10 Gillman, supra note 1, at 108.
12 261 U.S. 525 (1923).
joined the dissenters had he not recused himself. The majority opinion was written by the Republican Sutherland, and was joined by Democrats McReynolds and Butler, as well as by Republicans McKenna and Van Devanter. The dissenters were all Republicans: Holmes, the Harding appointee Sanford, and Chief Justice Taft, who as President had appointed Van Devanter. Party affiliation or sponsorship provide virtually no predictive or explanatory power here, either.

The same might be said of the liberty of contract decisions more generally. The majority opinion in *Lochner v. New York*, for example, was written by the Democrat Rufus Peckham, a Cleveland appointee. Peckham's opinion was joined by Chief Justice Fuller, another Democrat and Cleveland appointee; by Justice Brewer and Justice Brown, both Republicans and Harrison appointees; and by Justice McKenna, a Republican and a McKinley appointee. The dissenters were the Republican Justice Harlan, a Hayes appointee; the Democrat Justice White, a Cleveland appointee; and the Republican Justices Day and Holmes, each Roosevelt appointees. Similarly, a series of liberty of contract cases decided by the Fuller Court saw the challenged statutes sustained by seven-man majorities comprised of both Democrats and Republicans, with the Republican Brewer repeatedly joining the Democrat Peckham in dissent.14

Consider next *Adair v. United States*, decided only three years after *Lochner*. *Adair* invalidated on liberty of contract grounds a provision of the 1898 Erdman Act prohibiting interstate common carriers from discriminating against employees because of their union membership.16 The majority opinion was written by Justice Harlan, and was joined by fellow Republicans Brewer and Day (Moody did not participate), and by Democrats Peckham and White. Republicans Holmes and McKenna dissented. In *Coppage v. Kansas*, decided in 1915, the Court declared that the state's anti-yellow dog contract statute unconstitutionally interfered with liberty of contract. There the majority opinion was written by Republican Taft appointee Mahlon Pitney, and was joined by fellow Republicans Van Devanter and McKenna, as well as by Democrats White and Joseph Lamar. This

---

13 198 U.S. 45 (1905).
15 208 U.S. 161 (1908).
16 Id. at 168-69.
17 226 U.S. 1 (1915).
time the dissenters were again Republicans—Holmes, Day, and Hughes, a Taft appointee. *Bunting v. Oregon,*\(^{18}\) which Chief Justice Taft and many others viewed as overruling *Lochner sub silentio* in 1917, upheld an Oregon maximum hours law applicable to workers in mills, factories, and manufacturing establishments against the charge that it unconstitutionally abridged freedom of contract. The opinion was written by Republican Justice McKenna and joined by Republicans Holmes, Day, and Pitney, as well as by Democrat and Wilson appointee John Clarke. In dissent were the Republican Van Devanter and the Democrats White and McReynolds.

In 1917, the Court also upheld workmen’s compensation statutes in the face of claims that they deprived employers of liberty of contract. The Court’s opinion sustaining the New York statute in *New York Central Railroad Co. v. White*\(^{19}\) was unanimous. That same year, in *Mountain Timber Co. v. Washington,*\(^{20}\) the Washington statute was sustained by a sharply divided Court. In the majority were the Republican Pitney, the Republican Holmes, Wilson appointee Brandeis, the Democrat Clarke, and the Republican Day; in dissent were the Democrat White, the Republican McKenna, the Republican Van Devanter, and the Democrat McReynolds. *Wilson v. New,*\(^{21}\) also decided in 1917, upheld the Adamson Act’s regulation of the wages of railway employees over the objection that it deprived the railroads of their rights to contract. The majority opinion was written by the Democrat White, who dissented in *Lochner, Bunting,* and *Mountain Timber,* and was joined by Brandeis, the Republican Holmes, and the Democrat Clarke. The Republican Justice McKenna, who had dissented in *Adair,* joined *Coppage,* written *Bunting,* dissented in *Mountain Timber,* and would join *Adkins,* concurred in *Wilson.* In dissent now were the Republican Van Devanter; the Democrat McReynolds; the Republican Day, who had dissented in *Lochner,* joined *Adair,* dissented in *Coppage,* joined *Bunting* and *Mountain Timber* (and would soon write *Hammer v. Dagenhart*\(^{22}\)); and the Republican Pitney, who had written *Coppage* and *Mountain Timber,* and joined *Bunting.*

In none of these cases would knowledge of the party affiliation of the Justice or of the President who nominated him get us very far in either predicting or explaining the voting pattern observed or the result obtained. It is only at the more granular level of individual intellectual biography that we can hope to shed greater light on this seem-
Professor Gillman argues that “when we think about the Lochner era, it may be more useful to think a little less about the specific jurisprudence and life histories of the individual Justices and more about the attitudes of the post-Reconstruction Republican Party about how courts fit into their general agenda.” With respect to the unenumerated rights decisions of the so-called “Lochner era,” I would suggest that precisely the opposite is the case.

* * *

Professor Feldman is interested in the salient characteristics of the political and constitutional regimes of “republican democracy” and “pluralist democracy,” and the manner in which the Supreme Court “adjust[ed] to the transition” from the former to the latter. In characterizing the constitutional regime of “republican democracy,” Professor Feldman follows the lead of Professor Gillman and, implicitly, those whose work anticipated and paved the way for Professor Gillman’s analysis of economic substantive due process. That analysis

---

23 For my own effort to do so with respect to the crucial swing vote of Justice McKenna, see Barry Cushman, Some Varieties and Vicissitudes of Lochnerism, 85 B.U. L. REV. 881, 926-41 (2005).


25 The approach I suggest may strike Professor Gillman and others as “internalist” rather than “externalist” in character. To the extent that Professor Gillman views the “internal vs. external” debate as “unnecessarily dichotomous,” however, I believe that he misapprehends the character of the debate. To my knowledge, no one does “doubt the influence of external political considerations on the broad contours of constitutional decision-making.” Gillman, supra note 1, at 115 n.40. The debate between internalists and externalists has not been over whether law and politics are causally related, but instead over how they are causally related in particular instances. For an instructive overview of the issues, see G. Edward White, Constitutional Change and the New Deal: The Internalist/Externalist Debate, 110 AM. HIST. REV. 1094 (2005).


28 See generally OWEN M. FISS, 8 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910, at 156, 160 (1993) (examining the Court’s efforts to limit legislative redistribution through the requirement that laws be “universal” or “neutral” in their application); WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991) (surveying the development of labor law, especially the judiciary’s role in shaping the strategies of the labor movement); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 19-31 (1992) (exploring the evolution of the “neutral state” by looking at the development of the power of taxation and the police power); Michael Les Benedict, Laissez-Faire and Liberty: A Re-
holds that a central feature of economic substantive due process was its insistence that government not enact "special," "partial," "unequal," or "class" legislation, "legislation that could not be considered as public-regarding because it benefited certain interest groups or took from A to give to B." While I agree with this assessment as a general matter, I find that Professor Feldman draws from it particular inferences that strike me as difficult to defend. For example, Professor Feldman argues that, before the decisions in the Labor Board Cases of 1937, "the Court had consistently deemed any statute that benefited unions to be impermissible class legislation furthering a partial or private interest rather than the common good." How, one wonders, are we to reconcile this claim with the Court's unanimous 1930 decision upholding the Railway Labor Act's provisions protecting the right of employees to select representatives "without interference, influence, or coercion exercised" by their employers? Moreover, if, as Professor Feldman contends, the Four Horsemen remained unreconstructed adherents to such a principle of "republican democracy," how do we account for their unanimous support

Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism, 3 LAW & HIST. REV. 293, 298, 304–31 (1985) (arguing that laissez-faire constitutionalism was part of "a long heritage of protection for liberty" and that it was partially based on the classical understanding of the laws of economics); William E. Forbath, The Ambiguities of Free Labor: Labor and the Law in the Gilded Age, 1985 WIS. L. REV. 767 (1985) (examining the struggle in the post-Civil War era over which interpretation of free labor would prevail); Charles W. McCurdy, Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897, 61 J. AM. HIST. 970 (1975) (charting Justice Field's efforts to distinguish between regulation and confiscation in cases dealing with the scope of the police power); Stephen A. Siegel, Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Rate Regulation, 70 VA. L. REV. 187, 189–92 (1984) (noting the importance of the property-privilege distinction in Lochner era cases); Aviam Soifer, The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921, 5 LAW & HIST. REV. 249, 278 (1987) (discussing the relationship between paternalism and redistribution in laissez-faire constitutionalism); Cass R. Sunstein, Lochner's Legacy, 87 COLUM. L. REV. 873, 878–89 (1987) (noting the Court's concern during the Lochner era that class legislation was selfish, partisan, interest group legislation).


30 See generally Cushman, supra note 23. As I make clear in that piece, however, I do not believe that what Professor Gillman calls the "principle of neutrality" can offer a complete positive account of the content of economic substantive due process. Nor do I share Professor Gillman's interesting view that constitutional liberty was simply "the residuum of a government of limited powers." Howard Gillman, Reconnecting the Modern Court to the Historical Evolution of Capitalism, in THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS 235, 249 (Howard Gillman & Cornell Clayton eds., 1999). I find more persuasive the view that ideas about rights helped to shape conceptions of the scope of legitimate government power. See, e.g., Charles W. McCurdy, The 'Liberty of Contract' Regime in American Law, in THE STATE AND FREEDOM OF CONTRACT (Harry N. Scheiber ed., 1998).

Feldman, supra note 26, at 73.


Feldman, supra note 26, at 50.
for the 1934 amendments to the Act, requiring carriers to engage in collective bargaining exclusively with the representatives designated by their employees? Similarly, why, if Professor Feldman is correct, did each of the Horsemen join the 1937 opinion upholding application of the National Labor Relations Act to a company providing interstate bus service? If, as some have suggested, maximum hours statutes worked to benefit unionized employees by reducing competition from their non-unionized counterparts, how can we reconcile Professor Feldman’s claim with the Court’s decision upholding Oregon’s maximum hours law in Bunting v. Oregon, or with other decisions upholding statutes regulating working hours? “Meanwhile,” Professor Feldman maintains, “courts had consistently concluded that statutes promoting business or commerce promoted the common good.” Professor Feldman does not cite particular examples of such instances, but one wonders how this description might be reconciled with, for example, cases in which courts of the period held that state or local governments had exceeded their constitutional authority by

56 See, e.g., BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 113-21 (1980) (arguing that the New York law in Lochner probably operated to marginalize immigrant workers in small, non-unionized bakeries); Bernstein, supra note 29, at 23-24 (suggesting that the bake shop law in Lochner “was arguably special interest legislation that benefited established, unionized German-American bakers at the expense of more recent immigrants.”); David E. Bernstein, Lochner’s Legacy’s Legacy, 82 TEX. L. REV. 1, 50 n.264 (2003) (maintaining that Lochner’s supporters took the view “that the law was a sop to the bakers’ union, which illegitimately sought to monopolize the labor market for bakers by forcing all bakeries to abide by union work rules.”); Sidney G. Tarrow, Lochner v. New York: A Political Analysis, 5 LAB. HIST. 277, 287-90 (1964) (describing the origins of the statute in the journeymen bakers’ union movement); Editorial, A Check to Union Tyranny, THE NATION, May 4, 1905, at 346-47 (viewing maximum-hour legislation as attempts by unions to “delimit the competition of non-unionists”); Editorial, Fussy Legislation, N.Y. TIMES, Apr. 19, 1905, at 10 (suggesting that maximum-hour legislation was passed in response to the demands of labor leaders).
57 See, e.g., United States v. Brooklyn E. Dist. Terminal, 249 U.S. 296 (1919) (holding terminal subject to federal Hours of Service Act); Chi. & Alton R.R. v. United States, 247 U.S. 197 (1918) (affirming a penalty for violation of the federal Hours of Service Act); Atchison, Topeka & Santa Fe Ry. Co. v. United States, 244 U.S. 336 (1917) (same); Wilson v. New, 243 U.S. 382 (1917) (upholding maximum hours law for railway workers); Mo., Kan. & Tex. Ry. Co. of Tex. v. United States, 231 U.S. 112 (1913) (affirming a penalty imposed for violation of federal Hours of Service Act); Balt. & Ohio R.R. v. Interstate Commerce Comm’n, 221 U.S. 612 (1911) (upholding the federal Hours of Service Act); Cantwell v. Missouri, 199 U.S. 602 (1905) (per curiam) (upholding maximum hours law for miners); Holden v. Hardy, 169 U.S. 366 (1898) (same).
58 Feldman, supra note 26, at 73.
subsidiary of "private" enterprises with public funds. Professor Feldman's generalizations, offered categorically as accurate descriptions of pre-1937 jurisprudence, simply cannot capture the complex texture of the period's constitutional law. Nor, for that matter, can Professor Feldman's conventional use of the political labels "conservative," "progressive-liberal," and "centrist" to describe the Justices convey much more than a rather vague and too often misleading impression of their positions on particular constitutional issues.

---

39 See, e.g., Cole v. La Grange, 119 U.S. 1 (1885) (invalidating bonds issued to finance private iron and steel manufacturing enterprise); Parkersburg v. Brown, 106 U.S. 487 (1883) (invalidating the issuance of municipal bonds to finance private manufacturing enterprises); Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655 (1874) (invalidating issuance of municipal bonds to attract and finance the construction by a private company of a factory to manufacture iron bridges); Dodge v. Mission Twp., 107 F. 827 (8th Cir. 1901) (invalidating statute authorizing townships and cities to subscribe for stock in and to issue bonds to support private sugar factories); English v. People, 96 Ill. 566 (1880) (invalidating tax to support private manufacturing company); Bissell v. City of Kankakee, 64 Ill. 249 (1872) (invalidating bonds issued to finance private manufacturer of linen fabrics); Hanson v. Vernon, 27 Iowa 28 (1869) (invalidating tax subsidies to support railroad construction); Central Branch Union Pac. R.R. v. Smith, 23 Kan. 745 (1880) (invalidating bonds issued to finance private manufacturing company); Griffith v. Osawkee Twp., 14 Kan. 418 (1875) (holding that bonds issued to help farmers purchase seed and grain were not for a public purpose); Commercial Nat'l Bank of Cleveland v. City of Iola, 9 Kan. 689 (1873) (holding that issuance of municipal bonds to aid in construction of a factory was not for a public purpose); Allen v. Inhabitants of Jay, 60 Me. 127 (1871) (holding that construction of a box factory is not a public purpose, and therefore could not be supported by public finance); Lowell v. City of Boston, 111 Mass. 454 (1873) (holding statute authorizing issuance of municipal bonds to finance loans to landowners whose property had been destroyed by fire to be an invalid authorization of taxation for a private purpose); Michigan Sugar Co. v. Auditor Gen., 124 Mich. 674 (1900) (invalidating statute authorizing payment of bounties to manufacturers of sugar from beets grown in the state as providing unusual taxation for a private purpose); Detroit & Howell R.R. Co. v. Salem Twp. Bd., 20 Mich. 452 (1870) (holding that taxation to aid in the construction of a railroad was not for a public purpose); William Deering & Co. v. Petersen, 75 Minn. 118 (1898) (invalidating statute appropriating funds to be loaned to farmers for the private purpose of buying seed grain); Deal v. Mississippi County, 107 Mo. 464 (1891) (invalidating statute providing for the payment of bounties to persons planting and cultivating private prairie land with forest trees); Weimer v. Village of Douglas, 64 N.Y. 91 (1880) (invalidating bonds issued to finance private manufacturing corporation); Whiting v. Sheboygan & Fond du Lac R.R., 25 Wis. 167 (1870) (invalidating tax subsidies to support railroad construction).

40 Feldman, supra note 26, at 63.

41 For a litany of instances in which one or more of the Four Horsemen voted contrary to type, see Cushman, The Secret Lives of the Four Horsemen, supra note 9, passim. For instances in which Justice Holmes and/or Justice Brandeis voted to invalidate economic regulation, see, for example, Thompson v. Consol. Gas Utilis., 300 U.S. 55 (1937) (Brandeis); Treigle v. Acme Homestead Ass'n, 297 U.S. 189 (1936) (Brandeis); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935) (Brandeis); W.B. Worthen Co. v. Kavanaugh, 295 U.S. 56 (1935) (Brandeis); W.B. Worthen Co. v. Thomas, 292 U.S. 426 (1934) (Brandeis); Smith v. Cahoon, 283 U.S. 553 (1931) (Holmes and Brandeis); Deal v. Mississippi County, 107 Mo. 464 (1891) (invalidating statute providing for the payment of bounties to persons planting and cultivating private prairie land with forest trees); Weimer v. Village of Douglas, 64 N.Y. 91 (1880) (invalidating bonds issued to finance private manufacturing corporation); Whiting v. Sheboygan & Fond du Lac R.R., 25 Wis. 167 (1870) (invalidating tax subsidies to support railroad construction).
It seems that Professor Feldman's monolithic characterization of the period's constitutional law leads him to overstate the doctrinal discontinuities of the New Deal era not only with respect to the constitutional law of collective bargaining, but with respect to the issue of unemployment compensation as well. Before the Court upheld provisions of the Social Security Act providing for unemployment benefits in *Steward Machine Co. v. Davis*, Professor Feldman contends, "the Justices likely would have held that a provision benefiting the unemployed amounted to class legislation favoring only partial or private interests." I am not certain what leads Professor Feldman to believe this. The Supreme Court, and courts generally, had consistently held that the relief of poverty was a public purpose on which public funds could be spent. *Steward Machine* did not actually concern objections that unemployment compensation was by its nature class legislation or unconstitutionally redistributive, but instead addressed principally federalism objections to the federal portions of the program of cooperative federalism. The class legislation objections were considered instead in cases challenging the constitutionality of conforming state programs of unemployment compensation. The New York statute was upheld in *W.H.H. Chamberlin, Inc. v. Andrews* on November 23, 1936, approximately ten weeks before the unveiling of the Court-packing plan to which Professor Feldman attributes so much causal weight. The Alabama statute was upheld by a vote of 5-4 on May 24, 1937, in *Carmichael v. Southern Coal & Coke Co.* Here, however, the vote count is deceptive. Dissenting separately from Justice


* 301 U.S. 548 (1937).

* See Kelly v. Pittsburgh, 104 U.S. 78, 81 (1881) ("[T]he support of the poor...[is a] public purpose[,] in which the whole community ha[s] an interest, and for which, by common consent, property owners everywhere in this country are taxed."); Thomas C. Grey, The *Malthusian Constitution*, 41 U. MIA. L. REV. 21, 42-44 (1986) (noting the "unbroken consensus of American constitutional history in favor of public duties to the poor").

* 299 U.S. 515 (1936) (per curiam). The decision affirmed a decision of the New York Court of Appeals by an equally divided Court, with the seriously ill and therefore absent Justice Stone not participating.
* 301 U.S. 495 (1937).
McReynolds, Justices Sutherland, Van Devanter, and Butler did detail the ways in which the Alabama statute transgressed limitations imposed by the Due Process and Equal Protection Clauses. But they also offered what amounted to an advisory opinion that the Wisconsin unemployment compensation law, enacted in 1931, was constitutional. It was eminently possible, they said in effect, to accommodate a scheme of unemployment compensation within the constitutional regime of “republican democracy.”

Similarly, Professor Feldman regards the Court’s decision in *West Coast Hotel v. Parrish*, upholding Washington’s minimum wage law for women, as a significant departure in constitutional law that signaled the end of the constitutional regime of “republican democracy.” In this I believe he is mistaken. First, as I will argue in more detail below, I believe that this assessment is inconsistent with the voting behavior of Hughes and Roberts in subsequent cases involving Fifth and Fourteenth Amendment limitations on economic regulation. Second, as Professor Feldman himself recognizes, Hughes took pains throughout his opinion in *West Coast Hotel* to show how the minimum wage could be reconciled with a jurisprudence committed to state neutrality. And in this view Hughes and his colleagues in the majority were hardly alone. Chief Justice Taft, Justice Sanford, and Justice Holmes had taken the same position in *Adkins* in 1923, and Justice Brandeis would have joined them had he not recused himself. Four of the Justices had taken that position when *Stettler v. O’Hara* was affirmed by an equally divided Court in 1917; had Justice Brandeis not recused himself, there would have been five votes to uphold the minimum wage as early as 1917. After Justice Stone replaced Justice McKenna in 1925, there were presumably five members of the Taft Court who believed that *Adkins* had been wrongly decided, notwithstanding two *per curiam* decisions in which the Court invalidated minimum wage statutes on the authority of the *Adkins* precedent. There were thus a number of junctures during the con-

---

47 *Id.* at 527-31.
48 300 U.S. 379 (1937).
49 For a detailed analysis of Hughes’ opinion in this regard, see Cushman, supra note 35, at 85-92.
50 243 U.S. 629 (1917) (per curiam).
51 See Donham v. West-Nelson Mfg. Co., 273 U.S. 657 (1927) (per curiam) (Taft, Holmes, Sanford, and Stone concurring silently in decision invalidating Arkansas minimum wage statute, with Justice Brandeis as the lone dissenter); Murphy v. Sardell, 269 U.S. 530 (1925) (per curiam) (Taft, Sanford, and Stone concurring silently in decision invalidating Arizona minimum wage statute, with Brandeis dissenting and Holmes concurring on the ground that he considered himself bound by the authority of *Adkins*). Similarly, there were probably five members of the Hughes Court who consistently believed that *Adkins* had been wrongly decided, notwithstanding the decision in *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936). See Cushman, supra note 35, at 92-104; Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311, 313-14 Oct. 2006] REGIME THEORY AND UNENUMERATED RIGHTS 273
stitutional regime of "republican democracy" at which a decision upholding the minimum wage might have been rendered, despite the fact that Justices supporting such a decision were strongly committed to the existence of various Fifth and Fourteenth Amendment constraints on governmental power to regulate the economy. No revolutionary understanding of "the public interest" was a prerequisite to such a development.55

Because Professor Feldman regards these decisions as constituting such significant departures that they herald the birth of a new constitutional regime, he seeks some causal explanation for their emergence. He goes looking in the usual places—popular opinion, the 1936 election, and President Roosevelt's Court-packing plan. Elsewhere I have detailed at length reasons for doubting the causal efficacy of each of these, so I will here confine myself to a few brief observations. First, Professor Feldman contends that popular reaction to the Court's decisions demonstrated to the Justices "that their politics contravened the desires of a vast American majority."54 For example, he points out that a group of students at Iowa State University responded to the Butler decision by hanging the six Justices of the majority in effigy.55 While the Justices may have found this event distasteful, they may also have thought that a contemporaneous Gallup poll showing 59% of respondents opposed the Agricultural Adjustment Act was more reflective of public opinion.56 The polls similarly help to shed light on the meaning of the results of the 1936 election. A glance at those election results might lead one to believe that the American people wholeheartedly endorsed every aspect of the Roosevelt program, and were therefore annoyed by Court decisions declaring portions of that program unconstitutional.57 Yet when one examines the polls on an issue-by-issue, program-by-program basis, a far more complex picture emerges. While there was strong support for constitutionally unproblematic programs of federal spending to alle-

(1955) (noting that Justice Roberts was prepared to overrule 
Adkins, but "silently agreed with the Court" because "a majority could not be had for overruling it.").

55 Feldman, supra note 26, at 72.

56 However, a wide variety of contemporary commentators believed that the revolutionary understanding of the concept of "businesses affected with a public interest" set out in Justice Roberts' opinion in Nebbia v. New York, 291 U.S. 502, 531 (1934) made the demise of Adkins virtually inevitable. See Cushman, Lost Fidelities, supra note 9, at 121–23 & n.129 (noting the widespread speculation of legal commentators that Adkins would be overruled).

54 Feldman, supra note 26, at 69.

57 Id. at 68.

56 1 GEORGE H. GALLUP, THE GALLUP POLL: PUBLIC OPINION 1935–1971, at 9 (1972). The poll was reported in the Washington Post the day before the Butler opinion was released. See Washington Post, Jan. 5, 1936, at B4.

57 For reasons to doubt that the election results influenced the Court's disposition of cases in early 1937, see CUSHMAN, supra note 35, at 25–32.
viate conditions of poverty, for example, the support of the American people for the expansion of federal regulatory power in general was at best tepid and highly variable. Meanwhile, polls taken between 1935 and 1937 showed both popular support for the Court and consistent opposition to proposals to clip its wings. Between February and May of 1937, Gallup published six polls asking respondents whether they favored congressional enactment of Roosevelt's proposal to reorganize the Supreme Court. In none of those polls did a majority support the Court-packing plan.

Despite the significant obstacles that the President's proposal faced both in popular opinion and in Congress, Professor Feldman believes that it played a significant role in influencing the Court's decisions in 1937. Particularly curious is his view that the Court-packing plan influenced Justice Roberts' vote in *West Coast Hotel*. Professor Feldman recognizes that Roberts cast his vote before the public announcement of the plan, but discounts the importance of this chronology because "administration leaks had created a buzz in Washington by the end of January 1937: Roosevelt was preparing a major announcement about the Court." It has long been recognized that Justice Roberts cast his vote in *West Coast Hotel* at the conference held December 19, 1936. It is difficult to understand how a buzz created by the end of January of 1937 could have influenced a vote cast in mid-December of 1936. Of course, there had been talk of packing the Court long before January of 1937. Rumors of such a presidential plan had circulated as early as January of 1934. As the *Literary Digest* reported, "In the intimate circle the idea of reconstituting the Supreme Court has been considered... In the conversation within the Roosevelt circle, a court of fifteen, instead of the present nine, has been mentioned." Indeed, more than one hundred bills to restrict federal judicial power were introduced in Congress during 1935 and in early 1936. Some would have increased the size of the Court; some would have required a super-majority of the Justices or a unanimous Court to invalidate federal legislation; some would have

---

58 See Barry Cushman, *Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s*, 50 BUFF. L. REV. 7, 48-60, 64-66 (2002) (noting the results of numerous polls showing support for federal relief programs).
59 Id. at 33-39, 60-62.
60 Id. at 67-68.
61 See generally CUSHMAN, supra note 35, at 13-25.
62 Feldman, supra note 26, at 76-77.
63 Frankfurter, supra note 51, at 314-15; MERLO J. PUSEY, 2 CHARLES EVANS HUGHES 757 (1951).
stripped the Court of the power of judicial review altogether. Yet throughout 1935 and 1936, the Court invalidated a slew of state and federal regulatory statutes, seemingly uninfluenced by mounting congressional and presidential criticism.

In the face of these political pressures, Professor Feldman argues, the "dominant elites retreated in 1937," and "economic regulation became subject to mere rational basis review" of the sort sketched in Carolene Products. "[J]udicial deference to economic and social welfare statutes," Professor Feldman concludes, was "the quintessence of the Court's 1937 switch." Professor Feldman's argument is thus a reprise of the conventional narrative, in which Roberts and, to a lesser extent, perhaps, Hughes, abandoned their earlier positions concerning Fifth and Fourteenth Amendment limitations on government's power to impose economic regulation and acquiesced in the birth of a new constitutional regime.

One of the challenges confronting this view is that it is very difficult to reconcile with the subsequent behavior of Hughes and Roberts in cases raising such issues under the Fifth and Fourteenth Amendments. To be sure, they cast the decisive votes in West Coast Hotel. But those votes hardly signaled their rejection of constitutional constraints on economic regulation, nor their embrace of what Professor Feldman characterizes as "pluralist democracy." The Justices simply agreed, as had several of their predecessors during the regime of "republican democracy," that Washington's minimum wage law for women satisfied the requirements of due process. For even after the decision in West Coast Hotel, Chief Justice Hughes and Justice Roberts continued to demand that federal and state economic regulation comply with precisely the sorts of Fifth and Fourteenth Amendment limitations on which they had insisted in 1935 and 1936.

---


68 Feldman, supra note 26, at 87.

69 Id. at 82.
Consider just a few examples. First, on May 24, 1937—nearly two months after the announcement of the decision in *West Coast Hotel*—Chief Justice Hughes joined the Four Horsemen in a 5-4 decision invalidating on equal protection grounds a Georgia regulation that treated stock insurance companies less favorably than mutuals. It is not readily apparent how this decision can be reconciled with a commitment to "pluralist democracy." Second, in 1939, Hughes and Roberts dissented from an opinion upholding a federal scheme of milk price regulation in the Boston and New York metropolitan areas. The dissenting Justices contended that the regulation in question discriminated in favor of larger distributors and against their smaller competitors, thereby denying the latter due process. Their dissent echoed the position they had taken three years earlier in *Mayflower Farms, Inc. v. Ten Eyck*, where they had joined the majority opinion invalidating a comparable New York milk price regulation that favored dealers who had entered the market earlier over their newer competitors. Again, it is not clear how this position manifests a devotion to "pluralist democracy."

Third, in 1940, Roberts dissented from an opinion upholding a Kentucky statute giving more favorable tax treatment to deposits in Kentucky banks than to those in out-of-state banks. In the 1935 case of *Colgate v. Harvey*, Roberts had joined the majority opinion invalidating a comparable Vermont tax statute that treated interest income from money loaned outside the state less favorably than such income from in-state loans. The *Colgate* majority had held that the statute violated the Equal Protection and Privileges or Immunities Clauses of the Fourteenth Amendment, and Roberts believed that the same was true of the Kentucky statute upheld in 1940. He therefore dissented when *Colgate* was overruled in 1940. Fourth, later in 1940, Hughes and Roberts stood by a unanimous decision of the Court rendered on February 1, 1937—and authored by Justice Brandeis—which invalidated a proration order of the Texas Railroad Commission on the ground that it deprived certain gas producers of their property without due process, advantaging some gas producers at the expense of others. In *Railroad Commission of Texas v. Rowan and Nichols Oil Co.*, 79

---

72 Id. at 583–87.
73 297 U.S. 266 (1936).
75 296 U.S. 404 (1935).
76 Madden, 309 U.S. at 93–94.
77 Id.
79 310 U.S. 573 (1940).
Hughes and Roberts maintained that another proration order of the Commission similarly violated the Due Process Clause—but this time they did so in dissent.\textsuperscript{80} One can understand how the positions of the majority in these cases might be characterized as informed by a commitment to the tenets of "pluralist democracy." But again, one searches for an explanation reconciling the dissenting positions of Hughes and Roberts with such tenets.

One could continue to elaborate upon these and other examples, but as I have done so in detail elsewhere, I will not belabor the point here.\textsuperscript{81} Suffice it to say that during and after 1937, and indeed throughout the remainders of their judicial careers, Hughes and Roberts continued to adhere to the positions on Fifth and Fourteenth Amendment limits on economic regulation that they had articulated earlier in the 1930s. After President Roosevelt had replaced the retiring Justices Van Devanter and Sutherland with Justices Black and Reed by early 1938, there would be a solid majority of Justices embracing positions on issues of economic regulation more deferential than those subscribed to by Hughes and Roberts. The collective position of the Court shifted on these issues not because of changes in the minds of its incumbent Justices, but because of changes in the institution's judicial personnel. The appointments process was not simply the mechanism through which the shift from one constitutional "regime" to another was "solidified\textsuperscript{82}". It was the mechanism through which this particular jurisprudential transformation was achieved.\textsuperscript{83}

\* \* \*

\textsuperscript{80} Id. at 585.

\textsuperscript{81} See Cushman, supra note 23, at 982–98 (discussing, inter alia, United States v. Willow River Power Co., 324 U.S. 499, 511–15 (1945); United States v. Commodore Park, Inc., 324 U.S. 386, 393 (1945); Charleston Fed. Sav. & Loan Ass'n v. Alderson, 324 U.S. 182, 192–93 (1945); United States v. Lowden, 308 U.S. 225 (1939); and United States v. Carolene Prods. Co., 304 U.S. 144 (1938)). Professor Feldman offers a version of the conventional reading of Carolene Products, which does not address the qualifications to the deferential standard made explicit in Justice Stone's opinion, nor the various meanings attached to the concept of rational basis review by the participating Justices. See Cushman, supra note 23, at 992–97 for a survey of the views of the Justices toward standards of review for economic legislation.

\textsuperscript{82} Feldman, supra note 26, at 77.

\textsuperscript{83} Indeed, the appointments of Hughes and Roberts by President Hoover were themselves critical factors in some of the constitutional transformations of the Depression Decade. See CUSHMAN, supra note 35, at 225. As Max Planck wrote of developments in scientific thought, "a new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it." MAX PLANCK, SCIENTIFIC AUTOBIOGRAPHY AND OTHER PAPERS 33–34 (F. Gaynor trans., 1949).
In the very interesting contributions of these two practitioners of political science, one detects a common impulse to describe the constitutional landscape and the mechanisms by which it is transformed from a considerable altitude, at a rather capacious level of generality. Yet the closer one moves to the ground, the less descriptive power these generalities appear to possess. One infers that Professor Gillman and Professor Feldman believe that characterization at the levels of generality they have selected provides us with something the value of which exceeds that which is sacrificed in terms of particularity, contingency, nuance, and, in some instances, descriptive accuracy. I am not confident that I have been able to form a clear idea of what exactly that something is, and I am left wondering whether constitutional historians generally might regard the eager embrace of this trade-off with some puzzlement.