

# Law & Crisis – Lessons to Be Learned From the New Deal

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## INTRODUCTION

This paper is about change, informal constitutional change to be precise. At the same time, it is also about crises, which function as catalysts for such change due the dynamics they trigger. This connection probably does not strike anyone as particularly original. Yet, most explanations for informal change rely on external, that is, primarily non-legal factors. This paper challenges this externalist account and it does so by attempting to make visible the mechanics of change or, in other words, the complex and at times subtle interactions between facts and doctrine that alter the meaning of the constitution over time in such ways that what was considered to be unconstitutional before the crisis then becomes constitutional with or after the crisis.

In order to substantiate my claim about informal constitutional change, I will revisit the Great Depression as *the* economic crisis of the 20<sup>th</sup> century and Roosevelt's New Deal as the political response to it. This particular time in U.S. history stands out for several reasons. Firstly, the Great Depression illustrates the dynamics crises trigger. Secondly, Roosevelt's political response clashed with the prevailing constitutional doctrine at that time and established a precedent, especially with regard to the Constitution's Commerce Clause and Due Process Clause. Thirdly, while the Court invalidated key legislation of the Roosevelt administration until 1936, in 1937 it upheld not only a Washington minimum wage law in *West Coast Hotel*,<sup>1</sup> but it also

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<sup>1</sup> *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

confirmed the National Labor Relations Act (NLRA) or Wagner Act in *Jones & Laughlin*.<sup>2</sup> It is this turn – also called the “switch in time that saved the nine”<sup>3</sup> – that has fascinated contemporaries and legal historians ever since.<sup>4</sup> Unsurprisingly, the underlying cause for this switch has long been and continues to be contested. While the externalist account focuses almost exclusively on policies, results, and outcomes,<sup>5</sup> the internalist account stresses the importance of legal doctrine and its continuity over time.<sup>6</sup>

Naturally, both accounts can point to certain developments and facts to support their view. The Great Depression and the New Deal era, for example, were without doubt highly politicized times, and Roosevelt clearly exerted immense political pressure on the Court.<sup>7</sup> At the same time, *West Coast Hotel* and *Jones & Laughlin* were not decided out of the blue. Thus, the Court could rely on doctrinal continuity to support its judgment. It is, however, doubtful whether each perspective can explain for itself the Court’s two decisions in 1937. In that sense, both accounts reflect a general trend in the scholarly literature on crisis that tends to overstate clear-cut solutions or explanations that are assumed to be either external or internal to the legal order.<sup>8</sup> In this paper, I

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<sup>2</sup> *NLRB v. Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937).

<sup>3</sup> The modification of the popular phrase ‘a stitch in time saves nine’ is frequently used to describe the swing vote of Justice Roberts in *West Coast Hotel*. The decision is, however, only half the story. It must be understood in context of the equally important issue of federal regulatory power vis-à-vis the states, which was addressed in *Jones & Laughlin*. Thus, I use the phrase “switch in time that saved the nine” to describe a certain period rather than a specific incident.

<sup>4</sup> The literature on this period is vast and ever-growing; the most important works include, but are not limited to Barry Chushman, *Rethinking the New Deal Court* (1998); G. Edward White, *The Constitution and the New Deal* (2000); William E. Leuchtenburg, *The Supreme Court Reborn – The Constitutional Revolution in the Age of Roosevelt* (1995).

<sup>5</sup> The most outspoken proponent of an externalist explanation is Leuchtenberg, *The Supreme Court Reborn*. Yet, other authors seemed to have taken this perspective as well, such as Bruce Ackerman, *We The People – Foundations* (1993), 49.

<sup>6</sup> For an internalist perspective based on doctrinal continuity see Chushman, *Rethinking*, and Daniel J Hulsebosch, *The New Deal Court – Emergence of a New Reason*, 90 *Columbia Law Review* (1990), 1973-2016. In addition, one could add White, *The Constitution and the New Deal*, to the internalists’ camp even though he relies not so much on doctrinal continuity, but on a change in the method of constitutional interpretation.

<sup>7</sup> See Burt Solomon, *FDR v. The Constitution* (2009), 7 et seq.

<sup>8</sup> This tendency is especially evident in the literature on how a legal order should react if the state or nations is under attack. Should the legal order be suspended – at least temporarily – to safeguard the nation’s survival and thus guarantee the constitutional blessings of its legal order in the long run? The answer to this

will propose a more balanced view of informal constitutional change that acknowledges both the impact of crisis and the relevance of law.

I will structure my argument as follows. In a first step, I will provide some general background information on the Great Depression, the New Deal (I.), the constitutional fate of early New Deal legislation and the Court's switch in 1937 (II.). Based on this introductory part I will turn to the externalist account and the legitimizing models that scholars have provided to justify this externalist and thus non-legal change of the constitutional order (III.). In the following parts, I will first present some challenges to the externalist account and second explain in more detail my own perspective on informal constitutional change, which transcends the rather construed categories of external and internal by focusing on how change in facts as a result of the Great Depression have influenced constitutional doctrine. In lieu of a conclusion, I will end this paper with an outlook on how its findings can have a broader impact on how we perceive and conceptualize not only crises, but also their impact on law.

## **I. THE GREAT DEPRESSION AND THE NEW DEAL**

The beginning of the Great Depression was marked by the New York stock market crash in 1929, during which the Dow Jones Industrial Average lost almost 25% of its value within two trading days.<sup>9</sup> What followed was one of the worst and longest economic downturns not only in U.S.

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question is firstly divided along the line of whether such suspension a suspension should take place at all and if whether it is part of the legal order or not. These three camps have been categorized by Gross and Aoláin as 'models of extra-legality', 'constitutional accommodation', and 'law for all seasons'; see Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (2006), 17 *et seq.* (constitutional accommodation), 86 *et seq.* (laws for all seasons), 110 *et seq.* (models of extra-legality). Such categories might be helpful to describe general tendencies, but they also tend to oversimplify the underlying legal questions.

<sup>9</sup> The first panic on 24 October 1929, which caused the Dow Jones Industrial Average to drop by 11% on the opening bell, was mitigated by the intervention of a consortium of bankers who invested \$20 million to buy plummeting stocks. A similar intervention had ended the 1907 panic and at first glance seemed to have similar results in 1929. By the end of the day, the Index had recovered almost all losses. The rally continued on Friday, October 25. But after the weekend, on what is know today as "Black Monday" and "Black Tuesday" the index dropped first from 298.97 to 260.64 points and again another 30.57 points on Tuesday

history but worldwide. It was not until 10 years later that the Great Depression was finally over. During that time, the U.S. saw a sharp decrease of profits and industrial production. Correspondingly, the unemployment rate jumped from 3% in 1929 to almost 25% in 1932 and even 37% among non-farm workers. The median household income dropped by 40%, and 34 million people were members of families that had no regular full-time wage earner. What intensified the shock was that it hit the United States after 10 years of seemingly unbound prosperity. The ‘roaring twenties’ were characterized by soaring stock markets, increased and later excessive borrowing and lending, and above all, the idealization of industrial and financial magnates.<sup>10</sup> Correspondingly and due to the improvement of real wages, it was also the era that witnessed the decline of the workers’ movement as evidenced by the dwindling influence of unions.<sup>11</sup> At the same time, free market ideology dominated the political process. President Coolidge, for instance, repeatedly rejected what he considered to be ‘intervening’ legislation by Congress, and the sustained economic growth seemed to prove him right. But when Roosevelt took office in 1933, the United States was a different country than the one Coolidge had governed.

Roosevelt was determined to counter the catastrophic economic situation and the devastating social circumstances of millions of people by a bundle of measures that all focused on state intervention. That such an approach was the right policy response rested on the assumption that the Great Depression was the result of a largely unregulated economy that led to

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resulting in a loss of nearly 25% in 2 days. It continued to fall until 13 November when it reached 198.60. In the following month the Index recovered and reached another peak of nearly 300 points on 14 April 1930 before a continuous fall until July 1932 when the Dow closed at 41.22. Between the then all-time peak on 3 September 1929 at 381.17 points and July 1932 the Dow Jones had thus lost almost 90% of its value. It was not until 1954 that the Dow Jones would reach 380 points again.

<sup>10</sup> See the description of Archibald Cox, *The Court and the Constitution* (1987), 145.

<sup>11</sup> From 1919 to 1929 the number of workers that participated in strikes dropped from 4 million (roughly 21% of the labor force) to 289,000 workers (1.2% of the labor force). At the same time the number of strikes fell from 3,600 to 900; see Robert Zieger, *American Workers, American Unions*, 6 (2<sup>nd</sup> ed., 1994).

overproduction and excessive competition.<sup>12</sup> Still, while there was general agreement about that cause and the necessity of state intervention, the administration had no overall grand economic theory or master plan.<sup>13</sup> Thus, the means of intervention varied depending on the specificities of the markets to be regulated and the evaluations of those who drafted the legislation.<sup>14</sup> There were, however, several recurrent themes, such as fair labor standards. For the New Dealers economic recovery was inseparable from establishing fair labor standards, especially minimum wages and the right to unionize, for two reasons: first to prevent cutthroat competition by creating a level playing field and second to encourage consumer spending due to higher wages. Thus, fair labor standards formed an essential part of major early New Deal legislation, such as the National Recovery Act (NIRA) the Bituminous Coal Conservation or Act.<sup>15</sup>

Even though these policies at their time were vehemently opposed and marked as un-American or socialist by some,<sup>16</sup> they were not exactly new and unheard of. Especially the progressive movement had promoted social legislation from the 1890s onwards to fight the most

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<sup>12</sup> Roosevelt, at least in the early days of the New Deal, was advised by a brain trust: three professors from Columbia University (Raymond Moley, Adolph Berle, Rexford Tugwell) who were united in the view that overproduction was the main cause for the Great Depression; see Noah Feldman, *Scorpions* (2010), 75.

<sup>13</sup> Most of Roosevelt's policies had their intellectual roots in the progressive movement of the early 20<sup>th</sup> century. This, however, does imply coherence, but rather describes the pool from which the Roosevelt administration took its ideas. Being primarily pragmatic they combined different ideas and programs. This approach, however, resulted in harsh critique of the New Deal as a patchwork of incoherent policies. Even insiders of the administration were willing to concede this; see Daniel T. Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (1998), 411 *et seq.*

<sup>14</sup> The Agricultural Adjustment Act (AAA, Pub.L. 73-10, 48 Stat. 31, 12 May 1933), for example, paid subsidies to farmers if they killed their livestock or refrained from planting their fields. The goal was to reduce production surplus and thus stabilize prices for agricultural products. The National Industrial Recovery Act (NIRA, 15 U.S.C. § 703) aimed at reducing competition by establishing executive agencies that were assigned with the task to draw up industrial codes of fair competition that could then be enacted by the President. These codes listed and prohibited what was considered disruptive competitive behavior. In addition, NIRA granted workers the right to bargain collectively, and allowed the agencies to fix daily and weekly maximum working hours and set wage rates as well as the overall price for the produced goods.

<sup>15</sup> 15 U.S.C. § 801. The major differences between the two acts concerned their regulatory hooks. While NIRA provided for mechanisms to impose such fair labor standards as binding regulation on all industries for which codes of fair competition had been passed, the Bituminous Coal Conservation Act utilized economic pressure. Instead of imposing binding regulation, it allowed companies to disregard the Bituminous Coal Code, which included among other things the fair labor standards. This choice, however, came with a high price because the act also introduced a tax of 15% on all sales of bituminous coal produced in the US. But if companies adhered to the code, they would be entitled to a 90% tax reduction.

<sup>16</sup> Feldman, *Scorpions* (2010), 107.

dreadful ramifications of industrialization like unsustainable wages, overlong working hours, child labor, and the exploitation of women. In addition, Congress had also introduced federal regulation as early as the 1880s in response to the transformative effects of the industrial revolution. Crucial for this development was the creation of a nationwide railroad network. Not only did it integrate the economies of the several states into a single national economy. It was also a prerequisite for the creation of large horizontally and vertically integrated industrial monopolies and trusts such as the Carnegie Steel Company. These conglomerates stretched territorially over several states and economically over a number of downstream as well as upstream markets. As a regulatory response, Congress enacted the Sherman Antitrust Act in 1890,<sup>17</sup> which aimed at protecting effective competition from cartels, monopolies, and trusts, and the 1887 Interstate Commerce Act<sup>18</sup> that marked the beginning of railroad regulation.<sup>19</sup>

The New Deal, however, differed from these early regulatory attempts in scope as well as in depth. In addition, starting with the *Lochner* Case in 1905,<sup>20</sup> a considerable number of social legislation had been blocked by the Supreme Court based on the Constitution's Due Process clauses of the 5<sup>th</sup> and 14<sup>th</sup> Amendment. Due process had evolved in such a way that it included not only a procedural, but also substantive guarantees such as the liberty of contract.<sup>21</sup> Social legislation that was invalidated on these grounds included maximum working hours for bakers and

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<sup>17</sup> 15 U.S.C. §§ 1-7

<sup>18</sup> Chapter 104, 24 Stat. 379.

<sup>19</sup> Of course, both laws were legally challenged; yet the Court upheld them in principle, but restricted their application, especially that of the Sherman Act; see *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895) that will be discussed below.

<sup>20</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>21</sup> *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) was the first case in which the Court held that the word liberty of the Due Process Clause also covers economic liberties and thus the freedom of contract. Holmes' general critique that "a constitution is not intended to embody a particular economic theory" in his dissent in *Lochner* thus concerned relatively recent doctrinal developments; see *Lochner*, 198, U.S. 76. Yet, when *West Coast Hotel* was decided, it was settled doctrine that liberty also meant liberty or freedom of contract. The question of disagreement was to which extent the government could legitimately restrict it; see below part V on 'Doctrinal Continuity: The Common Ground of *West Coast Hotel* and *Adkins*'

minimum wage provisions for women and children.<sup>22</sup> It is therefore hardly surprising that all New Deal legislation that addressed fair labor standards was met not only with considerable political and ideological resistance, but also with constitutional challenges that were, at least at first, largely successful.

## II. THE CONSTITUTIONAL FATE OF EARLY NEW DEAL LEGISLATION

Every major piece of early New Deal legislation was challenged in court. While not all of them were stamped ‘unconstitutional’, quite a few shared this fate. Among these laws were NIRA, enacted in the summer of 1933 with a 2-year sunset-provision, and the Bituminous Coal Conservation Act. The former was struck down by the Court in *Schechter Poultry* in 1935,<sup>23</sup> shortly before it would have expired anyway, and the latter in *Carter Coal* in 1936.<sup>24</sup> It was, however, not the Due Process Clause, but the Commerce Clause that governed these cases.

According to the Commerce Clause, Congress may only “regulate Commerce ... among the several states.” ‘Among’ was translated as meaning ‘interstate’ in contrast to ‘intrastate’ and

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<sup>22</sup> The jurisprudence of the Court seems to be incoherent. In *Holden v. Hardy*, 169 U.S. 366 (1898) the Supreme Court upheld a Utah State law that regulated working hours for miners and in *Atkin v. Kansas*, 191 U.S. 207 (1903) it maintained a Kansas State law that made it a criminal offence for a public contractor to require employees to work for more than 8 hours per day. Yet, in *Lochner* the Court struck down a New York law that restricted the working hours in the baking industry. In *Muller v. Oregon*, 208 U.S. 412 (1908), however, it sustained an Oregon statute that restricted working hours of women, but it held unconstitutional a minimum wage law for women in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923). The categories that help explaining these decisions are ‘health laws’ v. ‘labor laws’ and ‘private contracts’ v. ‘contracts or business vested with a public interest’. In *Holden* the Court accepted the State’s contention that overlong working hours underground had a negative effect on the workers’ health, whereas in *Lochner* it considered the claim that the New York law was enacted to protect the health of the employees in the baking industry as pretense. Yet, in *Muller* due to Brandeis remarkable brief that provided data from hundreds of sources to establish the link between women’s health and overlong working hours the Court sustained the law. Justice Brewer, writing the opinion for an unanimous Court, referred explicitly to this data as the underlying reason for upholding the statute; *id.*, at 420. Based on this decision, one could have expected that the Court would uphold the minimum wage law in *Adkins*. Yet, in that case the 5 vote majority distinguished between the working modalities and the core substance of a contract lies beyond the regulatory power of the state: the price. Thus *Adkins* is also based on the distinction between what is private and what is public, which is central for *Atkin*: because the law regulated the contract of public contractor the relationship between him and his employees had been vested with a public interest as well.

<sup>23</sup> *Schechter Poultry Corp v. New York*, 195 U.S. 495, at 528 (1935).

<sup>24</sup> *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

‘commerce’ as excluding everything related to manufacturing and production. This construction of the Commerce Clause almost inevitably prevented broad federal regulation of economic behavior. Yet, exactly such scope of application was necessary for NIRA and the Bituminous Coal Conservation Act in order to be efficient. Federal regulation would have had to apply to all companies of a certain industry and all labor relations in order to achieve its policy objectives. In an attempt to establish a link between interstate commerce and the measures introduced by these acts, NIRA declared the existence of a “national emergency [...], which burdens interstate and foreign commerce”, whereas the title of the Bituminous Coal Conservation Act simply stated the promotion of interstate commerce as one of its purposes. The Court, however, rejected this argument based on its distinction between interstate commerce and intrastate production and manufacturing.

It was, however, not only the Commerce Clause but also the Due Process Clause that constituted a major constitutional obstacle to fair labor standards. Neither *Schechter* nor *Carter Coal* addressed this issue, yet the Court turned to it in *Morehead*, a case that was decided just two weeks after *Carter Coal* and that concerned a New York minimum wage law for women.<sup>25</sup> Based on its 1923 decision in *Adkins*, in which the court invalidated a federal minimum wage law for women and children for Washington DC,<sup>26</sup> the Court also struck down the New York law. Thus, when another minimum wage law – this time it was a Washington State law that was passed in 1913 – reached the Supreme Court in 1936 in *West Coast Hotel* and when the National Labor Relations Act (NLRA) was challenged on Commerce Clause grounds in *Jones & Laughlin* (also called the Wagner Act cases), it seemed almost inevitably that the Court would invalidate these as well.

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<sup>25</sup> *Morehead v. New York*, 298 U.S. 587 (1936).

<sup>26</sup> *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

The Washington State minimum wage law, even though designed somewhat differently from the one that was under scrutiny in *Adkins*,<sup>27</sup> was still a minimum wage law. Similarly, the NLRA aimed at implementing policies that were closely related to those of NIRA and the Bituminous Coal Conservation Act. Its main objective was to encourage “the practice and procedure of collective bargaining”.<sup>28</sup> The rationale behind it was not philanthropy, but economic recovery and stimulus. It aimed at raising wages in order to strengthen the purchasing power of consumers that had sharply declined since 1929 due to considerably lower wages. In view of Senator Wagner, who sponsored the act, the most efficient way to achieve this goal was to organize and structure the process of collective bargaining. In order to succeed, however, the act, just as the Bituminous Coal Conservation Act or NIRA before, had to apply to all labor relations. It was precisely this all-embracing and comprehensive approach that the Court had rejected in *Schechter Poultry* and *Carter Coal*. It therefore came as a big surprise when the Court overruled *Adkins* by upholding the minimum wage law in *West Coast Hotel* and sustained the NLRA in *Jones & Laughlin*. As the law had not changed, the only possible explanation seemed to be external, that is: non-legal.

### III. THE EXTERNALIST ACCOUNT

Given the strained relationship between Roosevelt and the Supreme Court,<sup>29</sup> the externalist account seems, at least at first glance, persuasive. That Roosevelt was the first President since Lincoln to criticize the Court in public<sup>30</sup> is only one example for the pressure he and his

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<sup>27</sup> Chief Justice Hughes emphasized the difference in his opinion for the majority. While the Court in *Adkins* criticized that the act under scrutiny did not “take appropriate account of the value of the services rendered,” minimum wages under the Washington State law are “fixed after full consideration by representatives of employers, employees and the public”; *West Coast Hotel*, 300 U.S. 396 (1937).

<sup>28</sup> Section 1, paragraph 5, 29 U.S.C. § 151.

<sup>29</sup> Feldman, *Scorpions*, 102 et seq.; Solomon, *FDR v. The Constitution*, 7 et seq.

<sup>30</sup> Two weeks before his inaugural address in 1937 President said in Congress: “Means must be found to adapt our legal forms and juridical interpretation to the actual present national needs.” Even though he didn’t mention the Court explicitly, his message was clear. Likewise, during the inaugural address itself he indirectly criticized the Court when saying that “[t]he Constitution of 1787 did not make our democracy impotent.”; see also Solomon, *FDR v. The Constitution*, 5.

administration exerted on the Court. In their view, by adhering to what Roosevelt had called a horse-and-buggy definition of interstate commerce,<sup>31</sup> it prevented the necessary measures to overcome the Great Depression. Furthermore, Roosevelt considered his 1936 landslide victory at the polls a popular endorsement of the New Deal. From his perspective, the Court, by continuously invalidating New Deal laws and policies, stood against the will of the people.

Roosevelt and his closest advisors designed a seemingly simple solution. On 5 February 1937 the President announced his court-packing plan to the wider public.<sup>32</sup> As the number of Supreme Court Justice was not determined by the Constitution itself, it could be changed by federal legislation. Thus, the court-packing plan was to introduce legislation that would have allowed the President to appoint a new Justice for any Justice on the bench who did not resign within six weeks of his or her 70th birthday. As six out of nine Justices were already older than 70, the bill, if it had passed Congress, would have enabled FDR to add six new Justices at once – the maximum number of appointments the bill allowed. The timing was certainly no coincidence, seeing as the Court had scheduled oral hearings concerning the constitutionality of the NLRA (also called the Wagner Act cases) for the following week. Thus, when the Court upheld the Washington State minimum wage law in *West Coast Hotel* on 29 March 1937 and the NLRA in *Jones & Laughlin*, the answer as to why the Court decided the way it did seemed to be evident: the Court had bowed to political pressure.<sup>33</sup> “[T]he reformist President’s threat of packing the Court provoked the conservative Justices to consider the wisdom of continued resistance.”<sup>34</sup>

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<sup>31</sup> Press Conference, 31 May 1935 in reaction to the Court’s decision in *Butler v. U.S.* in which the Court held the AAA unconstitutional.

<sup>32</sup> Solomon, *FDR v. The Constitution*, 7 *et seq.* and 84 *et seq.* for a detailed account of how the plan was devised and made public; see also Cushman, *Rethinking*, 11 *et seq.*

<sup>33</sup> Feldman, *Scorpions*, 117.

<sup>34</sup> Ackerman, *We The People - Foundations*, 49.

It is thus hardly surprising that proponents of the externalist account describe these two decisions as a judicial ‘revolution’. Granted, the term revolution can simply mean change, including wide-reaching or fundamental change. Yet, the term revolution is also used in a stronger sense of the word, especially in the context of social and political order. It then means a (possibly violent) overthrow of an order or system, implying that the change brought about by revolution is external to that order or system. Put differently, using the notion of revolution suggests change not from within, but from without. From such an externalist perspective, it only seems natural to legitimize the judicial ‘revolution’ of 1937 by referring to the one power within a democracy that is free to change the order without adhering to the rules for change (e.g. constitutional amendments): the people. This argument can draw for support on Roosevelt’s success in the 1936 presidential election, in which he won 46 out of 48 States. Externalists have argued that it provided overwhelming popular support for the New Deal and the Court too had to accept that the sovereign, that is ‘the people’, had given the government new marching orders. This popular endorsement not only legitimized or justified the informal constitutional changes. If taken seriously it even required it. True, a constitutional convention or some other form of formal ratification of this ‘new’ Constitution by the people did not take place. But the popular support for Roosevelt’s politics is said to have had the same effect because it was not ordinary support that any President could receive for popular policies. Due to its exceptional dimension, the 1936 election amounted to a “constitutional moment”, thus a moment that legitimized higher-lawmaking.<sup>35</sup>

#### **IV. CHALLENGES TO THE EXTERNALIST ACCOUNT**

This account of a judicial revolution leading to and legitimizing external informal change can, however, be challenged. Once we take a closer look at certain assumptions that it is based on, the overall argument loses its initial persuasiveness. My critique addresses three different aspects of

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<sup>35</sup> *Id.*, 6 *et seq.*; see especially on higher lawmaking 266 *et seq.*

the external account: first, the question of causality; second, the attempt to legitimize the alleged revolution as a moment of higher-lawmaking; and third, its preoccupation with policies and case outcomes instead of doctrine and reasoning. In short, the externalist account oversimplifies the process of legal interpretation and ignores details that do not fit its narrative.

### **1. Causality**

Contemporary observers were convinced that the court-packing plan led to Justice Roberts's infamous "switch in time that saved the nine".<sup>36</sup> The timeline of events, however, calls this perspective into question. Roosevelt announced the plan on 5 February 1937, *West Coast Hotel* was officially decided on 29 March 1937. Yet, the Justices or at least eight out of nine had already voted on the case on 19 December 1936. The only reason why it was not decided earlier was the fact that Justice Stone could not attend that meeting. But based on his decision record, his vote to uphold the act was without doubt. Chief Justice Hughes therefore thought it more appropriate to do so by a 5:4 rather than a 4:4 vote.<sup>37</sup> He waited until Stone had returned to the Court at the beginning of February 1937 and then delayed the decision for another few weeks in an attempt to prevent precisely what afterwards nevertheless happened: that contemporaries and later generations would interpret the decision as a response to political pressure and therefore as the caving-in of the Court.

It is, of course, possible that some or even all Justices heard about the plan before it was decided. But even if they did, than probably only in the form of rumors. The Court was officially informed about the plan merely hours before it was announced to the public. And even if members of the Court received a reliable tip-off, the question remains whether this actually caused Justice Roberts to join those who had still been in the minority in *Morehead* in order to then constitute the

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<sup>36</sup> Leuchtenburg, *The Supreme Court Reborn*.

<sup>37</sup> See Chushman, *Rethinking*, 18.

new majority in *West Coast Hotel*. As Cushman has pointed out, there had been several attempts to politically influence the Court before, yet none of them seemed to have been successful.<sup>38</sup> Thus, the available evidence that political pressure caused the ‘switch in time’ is circumstantial at best.<sup>39</sup>

## 2. Higher Lawmaking – Some Numbers

To be sure, the 1936 election represented a powerful symbol of public support for Roosevelt’s victory, and he indeed won 46 out of 48 states. But the overall participation in the election amounted only to 61% of the voting age population (VAP). Thus, voter turnout was lower than in the presidential elections of 1940, 1952, 1960, and 1964. In addition, all presidential elections between 1840 and 1908 had a higher overall participation rate than the election of 1936.<sup>40</sup> Furthermore, in the 1936 election, the popular vote for Roosevelt amounted to only 60,80% in a two party system. In other words, the constitutional moment had the support of 37,08% of the VAP. President Hoover, in contrast, was elected in 1928 by a popular vote of 58,21% based on a VAP turnout of 56,9%, which means he held the support of 33.12% of the voting age population – only 3,96% less than Roosevelt.<sup>41</sup> Numbers, of course, have their shortcomings: they cannot convey the complexity of social and political processes. But numbers still matter – and they put the idea that the 1936 election amounted to a constitutional moment that legitimized higher lawmaking into perspective.

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<sup>38</sup> *Id.*, 12.

<sup>39</sup> Even new research based on empirical data does not answer the question why Roberts sided with what today is perceived as the liberals faction of the Court (Justices Stone, Brandeis, Cardozo, and – at least with regard to Due Process jurisprudence – Chief Justice Hughes). According to Ho and Quinn their analysis based on modern measurement method reveals that Roberts switch was not gradual, but abrupt or sudden and, what is more, only temporary. The difference in voting patterns become most obvious in 1936; see Daniel E. Ho, Kevin M. Quinn, *Did the Switch in Time Save the Nine?* (available at [www.law.yale.edu/documents/pdf/LEO/Ho.Quinn.Paper.pdf](http://www.law.yale.edu/documents/pdf/LEO/Ho.Quinn.Paper.pdf), last visited 3/20/2012). This could, of course, confirm the theory that Roberts was influenced by Roosevelt’s landslide victory. Yet, the analysis seems to reinforce the political and thus policy perspective that divides voting pattern of Supreme Court Justices along very simple and even simplistic categories such as ‘liberals’ and ‘conservatives’.

<sup>40</sup> All numbers on voter turnout taken from <http://www.presidency.ucsb.edu/data/turnout.php>

<sup>41</sup> All numbers for the 1928 and the 1936 election (other than voter turnout) are taken from [www.uselectionatlas.org](http://www.uselectionatlas.org)

### 3. Policies and Outcomes vs. Interpretation and Reasoning

It is, of course true, that *Lochner* and *Adkins* invalidated social legislation, whereas *West Coast Hotel* upheld it. Similarly, *Schechter Poultry* and *Carter* denied Congress the competence to regulate local production and manufacturing, while *Jones & Laughlin* sustained a law that aimed at implementing identical policy objectives. Still, by focusing only on the eventual outcome, the externalist account oversimplifies the process of interpretation and application of law. It puts too much emphasis on political belief structures as an evaluative framework for judicial decisions and overlooks details that do not fit into this framework.

In the following I will complicate this account. I will do so by first illustrating the doctrinal developments that link *West Coast Hotel* and *Jones & Laughlin* to earlier decisions.<sup>42</sup> Yet, such developments alone cannot explain the difference in outcome. Instead, we must link these doctrinal developments to the Great Depression that called into question the distinctions between the public and the private as well as the national and the local. One possible link could be provided by the notion of necessity in case of a national emergency – not as a formal legal concept, but as an interpretive argument. In fact, the Roosevelt administration tried to make this claim in its efforts to defend NIRA’s constitutionality. It referred to the “unusually exigent situation” and argued that only Congress could effectively address the causes of the 1933 breakdown of interstate commerce because it required “prompt and uniform action.” It was therefore deemed indispensable that “Congress must have power to deal with activities and

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<sup>42</sup> In this part, my argument relies, to a large extent, on the idea of Cushman who, however, relies predominantly on the relationship and interaction of doctrinal categories. Thus, the transformative changes at the beginning of the 20<sup>th</sup> century unraveled a set of coherent constitutional doctrine. By the time of the Great Depression and the New Deal constitutional doctrine was already in flux; for a summary of his arguments see *id.*, *Rethinking*, 41 *et seq.* Even though my own analysis is based on a similar perspective on doctrinal continuity, I want to highlight the importance of facts – not just the selection of test cases, but how they shaped the experiences at least of some of the Justices, especially Chief Justice Hughes.

practices which, because of their widespread character and effect, contribute substantially to the impairment of interstate commerce as a whole.”<sup>43</sup>

The Court, however, rejected this reasoning in *Schechter Poultry* and never returned to it, at least not in the context of the Commerce Clause. Thus, the interaction between crisis and constitutional interpretation and application was more subtle and complex. Tracing, on the one hand, the path of doctrinal continuity and, on the other hand, the changes in social and economic realities as a result of the Great Depression reveals the importance of facts for the process of the interpretation and application of law – and shows how crises as times of great change can influence the interpretation and application of law.

#### **V. DOCTRINAL CONTINUITY: THE COMMON GROUND OF WEST COAST HOTEL AND ADKINS**

Common legal wisdom perceives *Lochner* as the starting point of *laissez faire* Due Process Clause jurisprudence, which transformed *laissez faire* from an economic agenda into an underlying principle of constitutional construction. *West Coast Hotel* marks the endpoint of this period. It might therefore seem unconvincing to assume that a close doctrinal connection exists between the two cases in a way comparable to *Lochner* and *Adkins*. Still, I suggest that both cases, *Adkins* and *West Coast Hotel*, have a common basis in *Lochner*. The crucial difference is: from that basis on, they developed along different paths.

All three cases rest on two assumptions: first, that the freedom of contract is protected by the Due Process Clause, and second, that it is not an absolute, but a qualified right. Even the majority in *Adkins* conceded that “[t]here is, of course, no such thing as absolute freedom of

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<sup>43</sup> *Schechter Poultry*, 195 U.S. 495 (1935). Similarly, Roosevelt himself stressed the importance of immediate action in his 1933 inaugural address by highlighting “an unprecedented demand and need for undelayed action” in times of “national emergency”; Franklin D. Roosevelt, Inaugural Address, 4 March 1933, paras. 20 & 22.

contract.”<sup>44</sup> The point of departure, however, lies further down the road. The general standard that *Lochner* proclaimed referred to “fair, reasonable and appropriate exercise of the police power of the State” against “unreasonable, unnecessary and arbitrary interference with the right of the individual ... to enter into ... contracts.”<sup>45</sup> For the *Lochner* Court, labor laws constituted such unreasonable, unnecessary, and arbitrary interference whereas health laws belonged to the states’ police powers. The crucial point was thus whether restricting working hours for bakers to 60 hours a week could be considered a health law. The answer of the one vote majority in *Lochner* was “no”.<sup>46</sup>

In *West Coast Hotel* the Court applied a similar standard: “Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.”<sup>47</sup> Still, the application of this standard yielded a different result. The Court agreed that Congress could establish institutions to determine minimum wages for children and women to “protect [them] from conditions of labor which have a pernicious effect on their health and morals.”<sup>48</sup> The major difference between the two cases was thus not doctrine, but the question of how closely the issues of labor and health were interrelated. And even though the *Lochner* Court probably would have decided *West Coast Hotel* differently, the latter can be understood as resting on the same doctrinal basis.

*Adkins* also built on *Lochner*, but added the crucial notion of rule and exception.

“[F]reedom of contract is ... the general rule and restraint the exception; and the exercise of

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<sup>44</sup> *Adkins*, 261 U.S. 546 (1923).

<sup>45</sup> *Lochner*, 198 U.S. 56 (1905).

<sup>46</sup> This distinguishes *Lochner* from *Holden v. Hardy*, 169 U.S. 366 (1898), in which the Court had accepted that long hours underground and the working conditions in mines have a negative effect on the workers’ health. It also constitutes the difference to Harlan’s dissent, which argued that the statute in question was designated as a health law and it is not for the Court to second-guess the legislatures finding in absence of clear evidence to the contrary; *Lochner*, 198 U.S. 66 *et seq.* (1905).

<sup>47</sup> *West Coast Hotel*, 300 U.S. 392 (1937).

<sup>48</sup> This was the proclaimed objective of Washington State minimum wage law (see *West Coast Hotel, id.*, 386) that, in contrast to *Lochner*, had not been questioned by the Court

legislative authority to abridge it can be justified only by the existence of exceptional circumstances.”<sup>49</sup> Statutes fixing maximum working hours were thus only constitutional in exceptional circumstances, that is, if longer working hours in a particular industry “were injurious to the health of the employee.”<sup>50</sup> The issue in *Adkins* was, however, not maximum working hours. Instead it concerned what the Court perceived to be “the heart of the contract, that is, the amount of wages to be paid and received”<sup>51</sup>, which lay beyond the limited regulatory authority of the legislature. The simple difference between *Adkins* and *West Coast Hotel* was that the Court’s majority was no longer convinced that in principle a difference existed between maximum hours and minimum wage, and thus referred to the criticism that had already been voiced by the dissenters in *Adkins*.<sup>52</sup>

## **VI. COMMERCE CLAUSE DOCTRINE IN FLUX**

### ***1. Introduction***

Determining the scope of application of the Commerce Clause had always been difficult, just as doctrine had already been in flux before the New Deal. The Court had, of course, developed tests to specify the meaning of the Commerce Clause, among them “direct effect”, “stream of commerce”, and the distinction between local or intra-state and national or interstate. But all these criteria can be combined in a seemingly endless fashion and each combination gives the application a certain twist, which is then reflected in different outcomes.

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<sup>49</sup> *Adkins*, 261 U.S. 546.

<sup>50</sup> *Id.*, 261 U.S. 548.

<sup>51</sup> *Id.*, 261 U.S. 554.

<sup>52</sup> Chief Justice Taft and Justice Holmes held the difference to be unsustainable. Whereas Taft argued that “a restriction as to one is not greater in essence than the other” (*id.*, 261 U.S. 564), Holmes asserted that the distinction between maximum working hours and minimum wages were one of degree rather than principle and he could “perceive no differences in the kind or degree of interference with liberty” (*id.*, 261 U.S. 569).

The doctrine of direct effect, for instance, was first introduced in *E.C. Knight*, not so much as an independent category, but as an explanatory device to exclude manufacturing monopolies from the application of the Sherman Act.<sup>53</sup> Production monopolies, even if they covered 98% of the whole industry as in *E.C. Knight*, were still considered production and therefore local and not part of interstate commerce. As local activities, their impact on interstate commerce could only be indirect. Thus, the indirect effect follows necessarily from the assumption that the activity is local.<sup>54</sup> Yet, this seemingly formalistic vision of the local/national distinction did not endure.<sup>55</sup> Quite on the contrary, in the *Schreveport Rate* cases it emerged as an independent category that enabled the federal government to also regulate intrastate commerce if it had a direct effect on interstate commerce.<sup>56</sup> This turn, however, opened the analysis to empirical considerations – an aspect I will return to later. Thus, if the federal government could

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<sup>53</sup> *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895).

<sup>54</sup> The language of the Court is not particularly clear. Still, the following two passages read together reveal the position of the Court, that is, because the activity in question concerned only manufacturing and production its affects on interstate commerce can only be indirect:

*“Doubtless the power to control the manufacture of a given thing involves, in a certain sense, the control of its disposition, but this is a secondary, and not the primary, sense, and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it.”*

*“Contracts, combinations, or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result, however inevitable, and whatever its extent [...]”*

*Id.*, 156 U.S. 12 and 16.

<sup>55</sup> For a more detailed account on the formalist-realist divide see Cushman, Formalism and Realism in Commerce Clause Jurisprudence, 67 *University Chicago Law Review* 1089, 1094 *et seq.* (2000)

<sup>56</sup> *Houston E. & W. T. Ry. Co. v. United States*, 234 U.S. 342 (1914). In the opinion for the majority Justice Hughes held that the Congressional power to regulate interstate commerce included matters that were purely intrastate if the latter had a close and substantial effect on the former. “Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule”; *id.*, 351-2. The case arose due to discriminatory freight charges between intra- and interstate destinations that posed a general economic problem and was not limited to the cases decided. Due to massive competition in interstate transport, the freight charges were very low, whereas on local lines with less or no competition customers were charged comparably high rates. This effected especially the intrastate transportation of agricultural products that were destined for interstate commerce. Thus the Interstate Commerce Commission intervened and banned this discriminatory pricing.

demonstrate that a direct link existed between the activity to be regulated on the one hand and interstate commerce on the other hand, then the Commerce Clause conferred the power to do so. In other words: the direct effects doctrine went from originally being a matter of principle to becoming a matter of degree or, to put differently: it evolved from being a predominantly normative concept into a factual one.

A similar tendency can be observed with regard to the “current of commerce” concept. The basic idea was that everything within this current was subject to Congress’ regulatory power. Still, the concept lacked precision because it seemed very difficult for the Court, as for everyone else, to determine where the current started and where it ended. This evaluation depended to a large extent on the facts of the case, but also on broader developments over time, such as the transformation of the U.S. economy from largely independent state economies into a single national one during the industrial revolution. Thus, railroads, which were exceptionally relevant as the “carriers of interstate commerce”, were considered to be part of the stream even if they were only transporting goods within a state as long as the goods were designated for interstate commerce and the continuity of shipment was not broken.<sup>57</sup> Furthermore, in 1922 the Court held that stockyards were part of the current as well, thereby upholding the 1921 Packers and Stockyards Act because stockyards “are but a throat through which the current flows.”<sup>58</sup> Thus, similarly to direct effects doctrine, determining the stream of commerce was governed by facts, rather than legal principles.<sup>59</sup>

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<sup>57</sup> *Texas & New Orleans R. Co. v. Sabine Tram Co.*, 227 U.S. 111 (1913)

<sup>58</sup> *Stafford v. Wallace*, 258 U.S. 495, 515 (1922); see Cushman, Rethinking, 144 *et seq.*, describing the doctrinal interdependencies between the development of stream of commerce doctrine and the category “business affected with a public interest”.

<sup>59</sup> Chief Justice Taft expressively stated in *Stafford v. Wallace*, *id.*, 519 that the Supreme Court when it embraced the current of commerce doctrine in *Swift v. United States*, 196 U.S. 375 (1905) it did so as

*the result of the natural development of interstate commerce under modern conditions. ... This court declined to ... take [the stream of commerce] out of complete national regulation by a nice and technical inquiry into the non-interstate character of some of its*

## **2. From *Schechter Poultry* to *Jones & Laughlin***

In order to evaluate the developments that let from *Schechter Poultry* in 1935 to *Jones & Laughlin* in 1937, we must first challenge the result-focused dichotomy of ‘striking down New Deal legislation’ versus ‘sustaining New Deal legislation’. That matters might be more complicated than the outcomes suggest, is already illustrated if we turn to the majorities by which the cases were decided. *Jones & Laughlin* (sustaining) was decided by a 5:4 majority, *Carter* (invalidating) by 6:3. But the judgment in *Schechter Poultry* – even though it invalidated New Deal legislation like *Carter* – was unanimously. Six Justices – among them Justices that were unlikely to agree on a lot of issues, like Justice Brandeis on the one hand and Justices Van Devanter, McReynolds and Butler on the other – joined Chief Justice Hughes in his opinion. And even the concurrence by Justice Cordozo, joined by Justice Stone, did not add a new perspective to the Commerce Clause aspects of the case. Quite on the contrary: there was consensus among all Justices.<sup>60</sup>

The simple explanation is that, against the doctrinal background of that time and the way the case was presented by the government, NIRA was plainly unconstitutional. As already pointed out, when the government defended NIRA’s constitutionality, it relied predominantly on arguments of necessity, which it merged with a factual approach to direct effects doctrine. The

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*necessary incidents and facilities when considered alone and without reference to their association with the movement of which they were an essential but subordinate part.*

<sup>60</sup> Even though Cardozo concurred the main difference concerned the question of how much of the power that a statute delegates to the President, he could again delegate to largely independent agencies that had not been set up by the statute itself. But with regard to the commerce clause Justice Cardozo held that

*“little can be added to the opinion of the court. ... Activities local in their immediacy do not become interstate and national because of distant repercussions. What is near and what is distant may at times be uncertain. There is no penumbra of uncertainty obscuring judgment here. To find immediacy or directness here is to find it almost everywhere.”*

*Schechter Poultry*, 195, U.S. 554 (Cardozo concurring) [internal references omitted].

Court rejected this proposition in unison: first, out of principal, because economic crises do not enlarge constitutional powers, and second, because the government could not demonstrate the specific connection between overproduction and excessive competition on the one hand and their direct effect on interstate commerce on the other hand – and how fair labor standards would remedy the problem. Thus, the Court was united, but only in this case.

Only a year later *Carter Coal* revealed the fundamental doctrinal differences that divided the nine Justices: Did the direct effects doctrine and, arguably, the current of commerce concept constitute matters of degree or matters of principle? The “Four Horseman” took an *E.C. Knight*-like stance by holding that what is local cannot have a direct effect, whereas the remaining five Justices agreed, at least on an abstract level, that whether or not some economic activity had direct effect on interstate commerce was also determined by the circumstances of the case. Still, there existed a reason why Hughes, instead of upholding the Bituminous Coal Conservation Act, concurred with the ‘Four Horsemen’, and this reason was: statutory limitations.

Even though the facts of *Carter Coal* lent themselves more favorably towards arguing that the economic activity of the Carter Coal Company had indeed a direct effect on interstate commerce, the act itself did not contain any language that limited its application to such situations. The NLRA that was under scrutiny in *Jones v. Laughlin*, however, had added such a restriction.<sup>61</sup> Therefore Chief Justice Hughes regarded the statute to be within the limitations on Congressional power as established by the Commerce Clause. “The *critical words* [...], prescribing the limits of the Board’s authority in dealing with the labor practices, *are “affecting*

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<sup>61</sup> The NLRA’s application was limited to conditions “affecting commerce”. Commerce was defined by the statute as “trade, traffic, commerce, transportation, or communication among the several States...” (§ 2 (6)) and “affecting commerce “ as “in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce” (§ 2 (7)).

commerce”.<sup>62</sup> Thus, despite the fact that the NLRA established the National Labor Relations Board (NLRB), granted workers the right to unionize, defined unfair labor practices, and empowered the Board to prevent such practices – in other words: despite the fact that the NLRA regulated manufacturing and production – the new majority sustained it. It did so because it understood direct effect to be not a matter of principle, but a matter of degree only.

### 3. *Facts and Doctrine*

By shifting the focus to a case-by-case analysis, the Court had to determine direct effects on a factual rather than normative basis. The government had obviously failed to convince those Justices who were receptive to such an understanding in *Schechter Poultry* by arguing that unfair competition practices in general burdened interstate commerce substantially, especially due to the unusually exigent situation. Abandoning this general line of argument, the regulatory hook for the NLRA was industrial strife. According to the government’s reasoning it could burden interstate commerce tremendously, which in turn meant that it had a direct effect on it. As Congress had the power to remedy the causes of industrial strife, it could guarantee the right to unionize, minimum wages and maximum working hours. Instead of relying on broad and generalized statements, the government decided to base the same policy objectives that had governed NIRA on a very specific claim, which it backed up with reference to experience, surveys, and facts.<sup>63</sup>

*“Before this statute [NLRA] was enacted **experience** had shown that industrial strife was a recurrent burden upon the interstate commerce of the nation. ... [I]n many individual instances such strife eventuated in conspiracies to restrain commerce or imposed such substantial burdens upon it that penalties or injunctions were applied under the Sherman Act. These facts are clearly shown by a **survey** of the results of individual disputes, the **statistics** with regard to the total number of such disputes, and repeated federal activities in connection with industrial strife.”<sup>64</sup>*

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<sup>62</sup> *Jones & Laughlin*, 301 U.S. 1 (1937) 31 [emphasis added]

<sup>63</sup> Thus, one can observe a striking similarity to the strategy pursued by Brandeis, now Supreme Court Justice himself, when he defended the Oregon statute in *Muller v. Oregon*, 208 U.S. 412 (1908) that restricted working hours of women; see *supra* note 22.

<sup>64</sup> *Jones & Laughlin*, 301 U.S. 1 [emphases added].

However, in *Carter Coal* Chief Justice Hughes who was the swing vote in *Jones & Laughlin* had rejected this argument as pretence. He agreed that Congress had “the power to protect ... commerce from injury whatever may be the source of the dangers” and thus Congress had “the authority to maintain the orderly conduct of interstate commerce and to provide for the peaceful settlement of disputes which threaten it.” Yet, he was convinced that Congress had used this specific protective power as a “pretext for the exertion of power to regulate activities and relations within the States which affect interstate commerce only indirectly.”<sup>65</sup>

Thus, the question arises why Hughes changed his mind in *Jones & Laughlin*. Based on his reasoning it is safe to assume that the NLRA’s statutory limitation to cases that “affected commerce” played an important role, especially since the Bituminous Coal Conservation Act did not contain comparable language. Still, this restriction did not establish that industrial strife actually had a direct effect on commerce. What had to be established was a connection, first between industrial strife and the right to unionize and second between these two and interstate commerce. That denying the right to choose representatives for the purpose of bargaining collectively results in industrial strife seems evident. Hughes even considered this to be “such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances.”<sup>66</sup> Still, this link does not explain the direct effect on interstate commerce. What consequences might one strike in one factory have on interstate commerce as a whole? The answer, I argue, was not only given by abstract statistics and numbers, but by immediate experience. That a strike in one factory did indeed have a direct effect on interstate commerce became obvious just six weeks before the Court heard oral arguments in the Wagner Act cases.

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<sup>65</sup> *Carter Coal*, 298 U.S. 317.

<sup>66</sup> *Jones & Laughlin*, 301 U.S. 42.

On 30 December 1936, employees of General Motors started what came to be known as the Flint Sit-Down Strike – one of the most epic confrontations in American labor history.<sup>67</sup> It is hardly surprising that the issue of workers’ rights, especially the right to unionize and bargain collectively, after having attracted very little attention during the period of sustained economic growth in the 1920s, returned with full force during the Great Depression. In 1936, however, the situation escalated in such a way that this period has been described as “industrial warfare”.<sup>68</sup> Given the tensions in the steel industry, the big strike would have been likely to happen there. Yet, things developed differently. Prior to 30 December 1936 tensions had already been on the rise in Flint, a city just 60 miles north of Detroit where GM operated six major production facilities. GM had always been an open shop company that did not recognize any union as the exclusive representative of its workers or, in fact, any union at all.

When workers went on strike on 30 December, the UAW (United Automobile Workers) made two decisive moves. The first one was to declare that it would only settle the strike for a general agreement concerning all GM facilities and the second and probably most important one: it changed strike tactics. Until then, workers who went on strike usually walked out. They left the factory and tried to block it from the outside. Yet, large companies not only had their own police forces. In most cases they also controlled the local police as they controlled the local towns in which the facilities were located. It was therefore not too difficult to break strikes by bringing in replacement workers and keep production going. The situation in Flint was no different – at least not with regard to the influence of GM on local police and Flint public officials in general. Due to the change in tactics, however, employees had occupied two central production plants and were able to resist all attempts by GM, aided and embedded by the local police, to regain control. The

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<sup>67</sup> Robert H. Zieger, *American Workers, American Unions* (2<sup>nd</sup> ed., 1994), 47.

<sup>68</sup> William E. Leuchtenburg, *Franklin D. Roosevelt and the New Deal* (1963), 239.

success of the strike was closely connected to the fact that Frank Murphy, then the governor of Michigan, rejected GM's call to bring in the US National Guard, at least to evict the strikers. The overall effect of the Flint Sit-Down Strike on GM in general was tremendous. It paralyzed the whole company thereby "idling 112,000 of the corporation's 150,000 employees."<sup>69</sup> The "most significant American labor conflict in the twentieth century"<sup>70</sup> ended on 11 February 1937 with an agreement between GM and the UAW in which GM recognized the union as the sole bargaining agent for its employees. It was also the second day of oral hearings in the Wagner Act cases.

As long as one accepts that "direct effect" is a factual and not a normative concept, the Flint Sit-Down Strike illustrates how close and substantial the issue of industrial strife is related to interstate commerce, especially when industrial conglomerates that extend over several states and integrate several markets are affected. Strike in a central facility could stop the overall production, which in turn would lead to a shortage in goods nationwide. Until the Flint Sit-Down Strike such reasoning would have been largely virtual and only theoretical. The six weeks in Flint made them real. Based on this experience, it seems almost natural to assume that a strike at Jones & Laughlin Steel Corporation, a highly integrated steel company that employed at that time more than 500,000 workers in ore and coal mines, the manufacturing of coke and steel, and in the transport of its products, would have a direct effect on interstate commerce.<sup>71</sup> To use the words of Chief Justice Hughes:

*"In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. ... When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how*

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<sup>69</sup> Paul F. Taylor, *The ABC-Clío Companion to The American Labor Movement* (1993), 53-4.

<sup>70</sup> Sidney Fine, *Sit-down: the General Motors Strike of 1936-1937* (1969), 341.

<sup>71</sup> According to the court records at Jones & Laughlin Steel Corporation "33,000 men mine ore, 44,000 men mine coal, 4,000 men quarry limestone, 16,000 men manufacture coke, 343,000 men manufacture steel, and 83,000 men transport its product;" *Jones & Laughlin*, 301 U.S. 27.

*can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?”<sup>72</sup>*

It is unlikely that Hughes would have evoked the evils of industrial war if the NLRA had been passed against the factual background of the 1920s.

Just as the factual situation had arguably influenced the decision in *Jones & Laughlin*, it was also of importance when deciding *West Coast Hotel*. Even though it explicitly overruled *Adkins*, and even though it seems unlikely that the *Lochner* Court would have upheld it, the doctrinal differences between these two cases, as demonstrated above, were not that fundamental.<sup>73</sup> The core question in all cases was: what constitutes a reasonable exercise of the states’ police power? That this question and the underlying issue of unequal bargaining power might have been answered differently at times when real wages were rising considerably, as in the 1920s, compared to harsh economic times, as during the Great Depression, is hardly surprising. Still, *West Coast Hotel*, like *Jones & Laughlin*, was a 5:4 decision. What separated the majority from the minority, it seems, was among other things the relevance of “facts”. For the dissenters, the term reasonableness had a fixed meaning. It was determined not by the circumstances of the case, but by the imperatives of their ideals. In his dissent for the Court’s new minority, Justice Sutherland simply referred to *Adkins* and *Morehead*. That the Court in these cases had struck down similar laws appears to have settled the matter for him once and for all. Changing economic conditions were altogether irrelevant. “[T]he meaning of the Constitution does not change with the ebb and flow of economic events.”<sup>74</sup>

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<sup>72</sup> *Id.*, 42.

<sup>73</sup> See above ‘Doctrinal Continuity: The Common Ground of *West Coast Hotel* and *Adkins*’, page 15 *et seq.*

<sup>74</sup> *West Coast Hotel*, 300 U.S. 402 [internal quotation marks omitted].

Most lawyers would probably agree with this statement, at least on a more general or abstract level. Yet, the interpretation and application of law is not abstract or only very rarely so. To give meaning to law is a complicated process that is influenced by many factors. In contrast to the ‘Four Horsemen’, the majority in *West Coast Hotel* was convinced that circumstances matter. Thus, Chief Justice Hughes could have attacked the dissenters reasoning in the same way as he did in *Jones & Laughlin*. Rejecting the idea that a link exists between what is reasonable and what happens in the real world is tantamount to deciding the issue of reasonable exercise of state police power in an intellectual vacuum. For the majority of the Court, the answer to what was reasonable was not carved into stone. Instead it had to be determined in light of “[t]he economic conditions which have supervened”.<sup>75</sup>

#### **CRISIS AND LAW – SOME CONCLUDING THOUGHTS**

The central aim of this paper was to reveal the mechanics of informal change by exemplifying the subtle and complex interaction between crisis on the hand and the interpretation and application of law on the other hand. This perspective on law in times of crisis is based on the assumption that the interpretation of law is best understood as a process,<sup>76</sup> a notion that not only implies interaction and change, but that also transcends the dichotomy of change from within and change from without. As a social process, the interpretation of law is influenced by events that occur outside the confined boundaries of law. The internal and external are not separated but intertwined. To be sure, changes in law do not only take place in moments of crisis. But such moments act as catalysts of change since they bring with them the urgency to adapt and respond to transformations of the larger social, political, and economic environment. In that sense, times of crisis are always times of change, just in fast motion.

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<sup>75</sup> *Id.*, 390 .

<sup>76</sup> See similarly E.W. Thomas, *The Judicial Process* (2005), 217 *et seq* to whom “‘the law’ is essentially a process’.

Still, not every change constitutes a crisis, which brings me to an important issue that I have not yet discussed. This paper has looked at informal changes in law as a result of crises, but what is missing so far is a description of the characteristics of crises. At this point I think it is necessary to insert a short note on the relationship between crisis and exception. I do so because in the literature on national security threats, which evolved in the years following the 9/11 terrorist attacks, both terms are frequently used, but not seldom rather incoherently so, at times even seeming to suggest that crisis and exception are synonymous.<sup>77</sup> One reason for that might be the ambiguous meaning of exception in the context of crises. In what follows, I will roughly sketch out the different ways in which the notion of exception has so far been conceived.

Within the legal realm, the notion of exception cannot be understood without the notion of rule. As such, rule and exception describe the relationship between two legal norms. Because the legal consequences of a rule are not always considered appropriate in certain situations that are, however, covered by the rule, an exception is added to this rule. In that sense, exceptions are legal norms that override a general norm. To give an example: the prohibition of the use of force in Public International Law constitutes the general norm, whereas the right to self-defense constitutes the exception. From this perspective, however, a crisis does not necessarily have anything to do with exception. Crises might lead to new laws that add an exception to the general rule, but there is no necessary connection between the two.

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<sup>77</sup> I am not arguing that all or the majority of authors who have written on crisis and exception within the broader discussion on national security threats are suggesting that these two terms are synonymous. What is more, those who do are not necessarily stating it clearly, but rather suggesting it. This, however, supports my overall argument of a general lack of analytical clarity in many, yet not all of these scholarly works. Crises are conceived as exceptional circumstances. But why they are exceptional remains unclear; see for example Aoláin/Gross, *Law in Times of Crisis*, 23 describing the appointment of a dictator during the Roman Republic as “a radical constitutional move undertaken in exceptional times of crisis [...]” or John A. Ferejohn & Pasquale Pasquino, *The law of the exception – A typology of emergency powers*, *Int J Constitutional Law* (2004), 210 who describe what exceptional circumstances are (220), but later on use the term crisis when referring to situations they consider to be exception (227 & 229).

Yet, the term exception is not only used to describe the relationship between two legal norms, but also to characterize how a certain situation is perceived: as uncommon, unusual, or atypical. It is in this context in which the notion of exception is merged with crisis: crisis as exceptional circumstances. Such an understanding of crisis not only causes analytical and conceptual confusion. It also runs the risk of triggering a quasi-automatic process of thought and reasoning that justifies legal exceptions. Rather crudely and certainly bluntly put, the general line of argument runs as follows: A certain situation that is perceived as a moment of crisis is often also perceived as an exceptional moment in time (or exception, or as exceptional circumstances). This works the other way around as well: What is perceived as unusual, not normal, thus exceptional, is then perceived as a moment of crisis. It is at this moment that the idea of necessity usually enters the discussion. Necessity demands that something needs to be done, but at the same time, it also serves as part of legal reasoning: necessity justifies not just action within the given legal framework, but also action outside the given legal framework. A look at different legal concepts confirms this: The idea of necessity is central to all concepts that either temporarily alter or suspend the legal order in times perceived as existential threats precisely in order to be able to sustain that order in the long run.<sup>78</sup> Examples of these are the U.S. concept of emergency powers, the Roman and other constitutional dictatorships, British martial law, the French *état de siège*, or, most radically, Schmitt's state of exception.<sup>79</sup> Thus, defining crisis as exceptional circumstances already implies having an analytical framework in place for their evaluation and narrows our perspective on crisis and its impact on law to these concepts. Precisely because the notion of exception immediately conjures such powerful images of "state of emergency", "suspension of the

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<sup>78</sup> See Giorgio Agamben, *The State of Exception* (2005), 12 for whom necessity is the underlying concept of all models that aim at suspending the legal order in part or in its entirety.

<sup>79</sup> All of these concepts were theorized and described extensively at the time they were developed and later on. For a comprehensive overview based on their distinction between 'models of accommodation', 'law for all seasons' and 'models of extra-legality' see Aoláin/Gross, *Law in Times of Crisis*, 15-170; see also Bernard Manin, *The Emergency Paradigm and the New Terrorism: What if the End of Terrorism Was Not in Sight?* (available at [as.nyu.edu/docs/IO/2792/emerg.pdf](http://as.nyu.edu/docs/IO/2792/emerg.pdf), last visited February 13, 2012); Karin Loevy, *An Introduction to the Theory of Crisis Containment: The Problem of Emergency and its Paradigmatic Solutions*, 27 *REAL – Yearbook of Research on English and American Literature*, 3 (2011).

legal order in order to save it” and the like, it can lead us to assume that informal changes in law tend to be the result of radical breaks in time and thus the result of external rather than internal or doctrinal factors; in other words it can introduce a significant bias into the analysis that could distract us from paying enough attention to development over time. In that sense, the externalist account and the interpretative path laid out by the concept of exception are very similar.

To sum up, then, because of the potential interpretative bias and lack of conceptual clarity that a discussion of crisis as exception (and vice versa) brings with it when analyzing how informal changes in law take place, I propose to refrain from using the term exception in such an analysis. Saying how crises should not be understood, however, does not mean that one gets around having to specify why we perceive certain moments in time as crises. In what follows, I thus propose an account of crisis, one that I hope can provide an answer to this question, and at which center lie the notions of experience, adaptation processes, and expectations.

Expectations are crucial for the decisions we make. They rest on our assumptions and belief structures, which in turn have been shaped by experience. Crises are therefore events that question our expectations and assumptions and thus the very basis of our decision-making. It is hardly surprising that crises are usually perceived as situations of great uncertainty. Yet, the future in times of crisis is as uncertain as in times of perceived calm and tranquility; it must be. The difference in perception is, however, explained by our expectations. In times of perceived calm, the future seems manageable because we build certain expectations about future developments, which rest on our experiences. Crises are developments that run counter to these experiences in such a fundamental way that they challenge or even shatter our expectations. Without expectations, however, the future seems more uncertain. Thus, I propose that disappointed expectations are essential for an understanding of why certain moments in time are called crises. To be sure, expectations are constantly being disappointed in everyday life, yet the majority of

such situations would not qualify as crisis. This is where the other crucial notion of adaptation comes in. Adaptation explains why not all disappointed expectations turn into crises. As long as an individual, a society, or a system can adapt to the changes that run counter to its expectations, we can hardly speak of a crisis. Thus, crises could be described as moments in which expectations conflict with a changed reality and in which, due to the inability to adapt to these changes, cannot be rebuilt instantly, but only over time. The time it takes to adapt constitutes a crisis.

A theory of crisis and law must therefore determine the relevance of expectations for law in general and the process of interpretation in particular. It must address the place that expectations have within law, and the consequences that arise if these expectations shatter as a result of changes in the 'real world'. There might be no easy answer to this problem. As the example of New Deal legislation demonstrated, changes in the larger environment can affect the interpretation of law, but they do not necessarily have to, as evidenced most clearly by the 'Four Horsemen' who opposed all New Deal legislation. But if we embrace a process-based model of legal interpretation in contrast to a more result-focused understanding, and acknowledge that facts matter in this process, then crisis, defined as a moment of change that requires us to reassess and rebuild disappointed expectations, influence the interpretation of law. It can do so in different ways. By identifying the impact of crisis on *West Coast Hotel* and *Jones & Laughlin*, I only highlighted one of them.