STATE CONSTITUTIONAL LAW IN THE NEW DEAL PERIOD

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ABSTRACT: The 1930s is generally understood to be a period of constitutional revolution in the United States, with a restrictive conservative U.S. Supreme Court giving way to a latitudinarian liberal Court. The politics of judicial review and the substance of constitutional law in the states has rarely been considered. This Article begins to integrate the states into the broader story of American constitutional development in these pivotal years. Focusing on a sample of four state courts between 1925 and 1945, this Article argues that the U.S. Supreme Court and the struggle over federal constitutional law may have been more idiosyncratic and exceptional than typical of the constitutional politics of the period. Judicial review in the state courts and the elaboration of state-level constitutional law are characterized by continuity rather than transformation during this period. State courts were able to routinely use the power of judicial review to invalidate legislation across this time period, but they rarely found themselves obstructing the core policies being advanced by the other parts of the state governments.

There is little disagreement that American constitutional law was radically remade in the 1930s. The contemporary constitutional historian Edward Corwin called it a "revolution."[1] The constitutional theorist Bruce Ackerman called it the launching of a new constitutional regime.[2]

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1. EDWARD S. CORWIN, CONSTITUTIONAL REVOLUTION, LTD. (1941).
2. BRUCE ACKERMAN, 1 WE THE PEOPLE 62–63 (1993).

There may be lingering uncertainty as to how exactly the revolution came about, but there is little uncertainty about whether the shape of American constitutional law was very different in 1940 than it had been in 1930.[3] The old constitutional order came to an end during the presidency of Franklin D. Roosevelt, and a new constitutional order was born.

Such claims are sweeping, but they largely ignore a significant part of the American constitutional landscape—state constitutional law and the work of the state courts. The state constitutional experience has long been relatively ignored. While generations of scholars have lavished attention on the work of the U.S. Supreme Court, the exercise of judicial review by the state courts has gone mostly unexamined.[4]

Our understanding of American constitutionalism is enfeebled if we do not take into account the states. Donald Lutz once pointed out that the U.S. Constitution is an "incomplete [text] without the state constitutions."[5] The state constitutions provide essential background for fleshing out the political system that the U.S. Constitution helped to establish.[6] In contrast to the anemic history of constitution-making at the federal level, there has been a robust history of higher lawmaking at the state level.[7] State constitutions have been a locus for developing

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3. The argument largely revolves around whether internal or external explanations best account for the U.S. Supreme Court's reconstruction of American constitutional law in the 1930s. The internal account emphasizes the growing intellectual and practical problems of continuing to apply traditional doctrines in changing economic circumstances. BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 4–7 (1998) ("The story of the 1930s is in part the story of how this integrated body of jurisprudence disintegrated when the Court, in response to a particular statutory initiative, abandoned a doctrinal formulation that had become a central nexus of such integration."). The external account emphasizes the significance of political events in driving the Justices to overturn inherited doctrine. WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN 216 (1995) ("In the spring of 1937, though, in the midst of controversy over President Roosevelt's Court-packing message, the Court began to execute an astonishing about-face.").

4. For an important exception, see SCOTT D. GERBER, A DISTINCT JUDICIAL POWER (2011), describing the origins of state judicial review in the colonial and confederation period, and Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061 (2010), describing the emergence of state judicial review in the early republic.

5. Donald S. Lutz, *The United States Constitution as an Incomplete Text*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 23, 30 (1988). It might also be argued that state constitutions are incomplete without the Federal Constitution. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992).

6. *See, e.g.*, ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS (2009).

7. *See, e.g.*, JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION (2006); G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS (2000).

alternative constitutional traditions not fully represented in federal constitutional law.[8] They have been a place to contest federal understandings of the American constitutional tradition.[9] As Sanford Levinson has argued, it is a mistake to identify "American constitutional law" with the law of the U.S. Constitution.[10] "American constitutionalism" is broader than what the U.S. Supreme Court says about the U.S. Constitution.[11]

In this Article, I consider the exercise of state-level judicial review against the background of the federal experience. If the New Deal was a transformative experience in American constitutionalism broadly, we ought to see some evidence of it in state-level judicial review as well. The Great Depression undoubtedly put pressure on the state governments and on inherited assumptions of state constitutional law just as it did the federal. Likewise, conservatives struggled to retain power in the states in the midst of the sweeping societal changes of the 1930s just as they did in federal government. Did state courts likewise respond by striking down state laws at an unprecedented rate? Did state politicians find themselves hamstrung by state constitutional rules? Did state constitutional law have to go through a similar revolution in the 1930s? Surprisingly, the answer appears to be no. The experience of the U.S. Supreme Court in the New Deal period appears to be idiosyncratic and exceptional rather than typical of the politics of judicial review of the time. State courts made active use of the power of judicial review during the New Deal period, but judicial review in those courts was characterized more by continuity than transformation, more by deference than activism.

The Article proceeds in three parts. The first part briefly reviews the events of the 1930s in the U.S. Supreme Court. The second part considers the exercise of judicial review in a sample of state high courts from 1926 to 1945. The final part considers the main currents of state constitutional law in the New Deal period.

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8. *See, e.g.*, EMILY J. ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS (2013); Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629 (2010).

9. *See, e.g.*, Sean Beienburg, *Contesting the U.S. Constitution Through State Amendments: The 2011 and 2012 Elections*, 129 POL. SCI. Q. 55 (2014).

10. Sanford Levinson, *America's "Other Constitutions": The Importance of State Constitutions for Our Law and Politics*, 45 TULSA L. REV. 813 (2011).

11. *See, e.g.*, HOWARD GILLMAN, MARK A. GRABER & KEITH E. WHITTINGTON, AMERICAN CONSTITUTIONALISM: POWERS, RIGHTS, AND LIBERTIES (2015) (surveying American constitutional debates both in and outside of the U.S. Supreme Court).

I. THE REVOLUTION OF 1937

The 1930s proved to be a tumultuous time for the U.S. Supreme Court. In the 1920s, the Taft Court was riding high, developing a relatively conservative jurisprudence and aggressively exercising the power of judicial review to limit both Congress and the states. In the 1930s, the U.S. Supreme Court turned its attention squarely to the coordinate branches of the federal government and quickly found itself in a confrontation with the ascendant New Dealers. The reversal of fortune for the Court and the New Deal was sudden and complete. By the end of the 1930s, the Court had clearly signaled that there would no longer be any constitutional objections to the New Deal and generally retreated from the judicial activism of the early twentieth century. For nearly two decades, the Court largely refrained from striking down legislation, establishing a record of passivism that was virtually unprecedented since the Civil War.

After the brief interregnum of the Woodrow Wilson presidency, a newly reunified Republican Party returned to its familiar perch atop American politics. In the 1920 presidential election, Warren G. Harding nearly doubled the number of popular votes received by the Democratic nominee, James Cox. The Republicans held nearly seventy percent of the seats in the U.S. House of Representatives in the 67th Congress, elected in the same 1920 election. The GOP could not hold that large of an advantage across the 1920s, but they did retain comfortable control of the seats of power in the national government. Before the stock market crash of 1929, the Republicans held over sixty percent of the House seats and nearly sixty percent of the Senate seats. Their candidate, Herbert Hoover, had retained control of the White House for the party in a landslide. Those Republicans were not always conservative—Herbert Hoover himself hailed from the reformist Progressive wing of the party—but they held at bay the more liberal politicians and activists in the Democratic Party.

The U.S. Supreme Court of the 1920s reflected and embraced the more conservative governing philosophy. Chief Justice William Howard Taft had been a favorite of the conservative wing of the Republican Party, and he worked actively to shape the Court in his own image. As he explained to President Harding, it was more important to look "for conservatives rather than Republicans" when filling judicial vacancies.[12] Even so, Republican appointees dominated the Court in the 1920s. By the

12. Walter F. Murphy, *In His Own Image: Mr. Chief Justice Taft and Supreme Court Appointments*, 1961 SUP. CT. REV. 159, 171 (1961).

time Franklin Roosevelt was first inaugurated, only two of the nine Justices had been appointed by a Democratic president.[13] Of those nine, only two could be considered genuinely on the left of the spectrum of the constitutional views of the day.[14]

The conservative personnel on the Court translated into a conservative jurisprudence that in turn resulted in numerous invalidations of statutes. Between Woodrow Wilson's departure and Franklin Roosevelt's arrival, the U.S. Supreme Court struck down state laws at a rate that was twice as high as it had been during the first two decades of the twentieth century.[15] It similarly increased the pace of judicial invalidations of congressional statutes, tripling its annual average from the beginning of the century.[16]

President Franklin Roosevelt had the bad luck of not being able to fill any vacancies on the Supreme Court during his first term of office. The five-year gap between the last of Hoover's appointments and the first of Roosevelt's is long, but not unprecedented.[17] It had the consequence, however, of forcing Roosevelt to work with a Court that he had no part in shaping and that had largely been constituted by those that he framed as his political enemies. Despite the Progressive credentials of opponents like Herbert Hoover, Roosevelt painted his antagonists with a broad brush, denouncing those who stood against the New Deal as "economic royalists" who worked only to protect "a new despotism."[18]

Certainly the Justices and the President were often at loggerheads during his first term of office. The Court actually slowed its pace of invalidating state laws during those four years. Far more consequential, however, was the Court's unprecedented activity in striking down federal laws. The Court struck acts of Congress at a blistering pace, often on

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13. Justice Louis Brandeis and Justice James McReynolds were appointed by Woodrow Wilson.

14. Justice Brandeis and Justice Benjamin Cardozo would generally be placed on the left of the Court. Chief Justice Charles Evans Hughes, Justice Owen Roberts, and Justice Harlan Stone occupied a more centrist position, with the "Four Horsemen" on the right.

15. The number of cases invalidating state laws is drawn from CONG. RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 2337–512 (2014).

16. The number of cases invalidating federal laws is drawn from the Judicial Review of Congress dataset. The assembly of the database is described in Keith E. Whittington, *Judicial Review of Congress Before the Civil War*, 97 GEO. L.J. 1257, 1262–65 (2009).

17. *See* Keith E. Whittington, *The President's Nominee: Robert Bork and the Modern Judicial Confirmation Process*, BAKER CENTER J. OF APPLIED PUB. POL'Y 85, 86–88 (2012).

18. Franklin D. Roosevelt, "We Are Fighting to Save a Great and Precious Form of Government for Ourselves and the World"—Acceptance of the Renomination for the Presidency, Philadelphia, Pa. June 27, 1936, *in* 5 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 232 (1938).

narrowly divided votes. Moreover, those cases included key components of the legislative accomplishments of the New Deal. While the administration won some legal victories, they were more than overshadowed by the judicial dismantling of the National Industrial Recovery Act and the Agricultural Adjustment Act.

Famously, the President struck back at the Court after his reelection in 1936.[19] Despite his setbacks in the Court, Roosevelt declared in his annual message to Congress at the start of 1937 that the "vital need is not an alteration of our fundamental law, but an increasingly enlightened view with reference to it."[20] It was the Constitution's "interpretation" that created difficulties for the administration, not the Constitution itself. He promised that "means must be found" to bring the "judicial interpretation" of the Constitution in line with the needs of the nation and the preferences of the President.[21] Within a few weeks, the President proposed his plan to "reorganize" the federal judiciary in order to infuse "new blood" into the courts with an expectation that the newly appointed Justices would better "recognize and apply the essential concepts of justice in the light of the needs and the facts of an ever-changing world."[22] It was time for the Court to do its part to fulfill the wishes of the American people and "pull in unison with the other two" branches of government.[23] As the Senate debated the President's plan to refashion the Court, Justice Roberts switched sides. In March 1937, the Court upheld the National Labor Relations Act, launching a series of decisions that firmly indicated that the Court would no longer obstruct the New Deal. In line with the President's call for the courts to respect the "process of our democracy," after the switch in time the Justices dedicated themselves to adding their imprimatur to federal policies.[24] For the next decade, and more, the Court kept the judicial veto in its pocket. The exercise of judicial review for the New Deal Court primarily meant upholding federal laws against constitutional challenge. As Figure 1 illustrates, the sharp spike in cases in which the Supreme Court struck down provisions of federal statutes was followed by the practical

19. On the context of the Court-packing plan, see KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 61–65, 266–70 (2007).

20. Franklin D. Roosevelt, The Annual Message to the Congress. January 6, 1937, *in* 5 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra* note 18, at 639.

21. *Id.* at 639–40.

22. Franklin D. Roosevelt, The President Presents a Plan for the Reorganization of the Judicial Branch of the Government. Feb. 5, 1937, *in* 1937 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 51, 55, 59 (1941).

23. *Id.* at 124.

24. Roosevelt, *supra* note 20, at 642.

disappearance of such cases in subsequent years. Beginning in 1937, the Court instead saw a surge in the number of cases upholding federal statutes. As Figure 2 notes, the decline in Supreme Court nullification of state laws is not so dramatic after the revolution of 1937, but there too the Court became far more deferential to legislative policymaking.

Figure 1: Cases in the U.S. Supreme Court Reviewing Federal Laws, 1926–1945

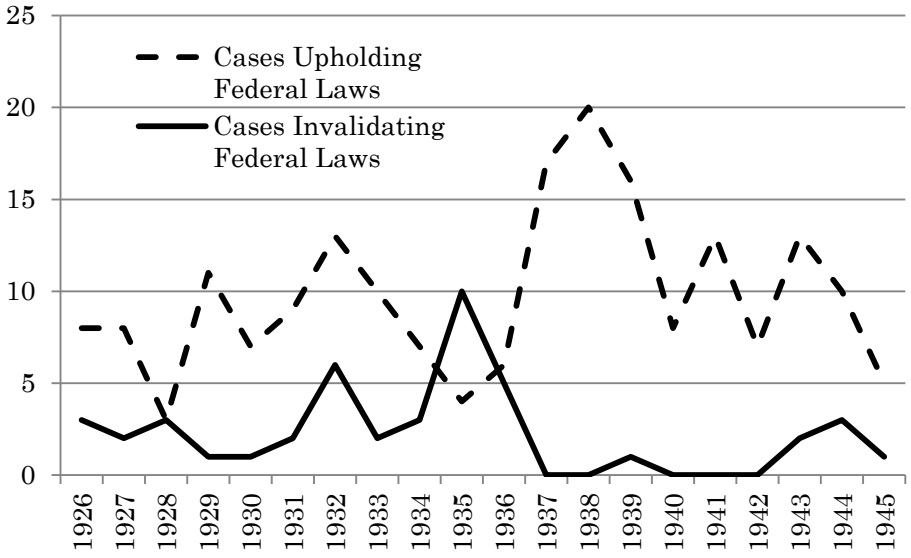
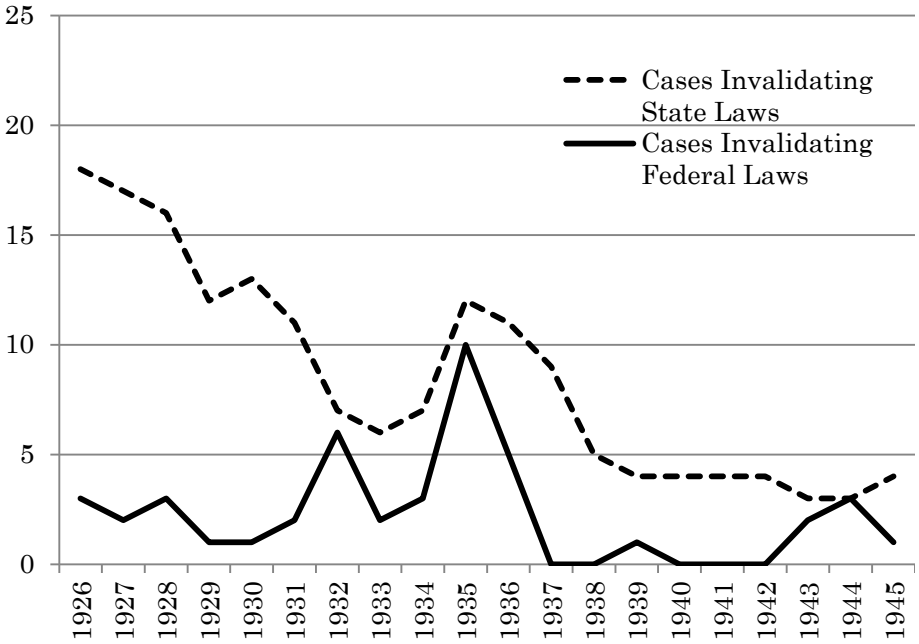


Figure 2: Cases in the U.S. Supreme Court Invalidating State and Federal Laws, 1926–1945



The shift in the exercise of judicial review was accompanied by a wide-ranging transformation of constitutional doctrine in the 1930s.[25] The Court announced a new approach to interpreting the Due Process Clause of the Fourteenth Amendment and its limitations of the police powers of the states, minimizing the importance of property rights and retreating to a more limited set of procedural concerns and explicit constitutional provisions.[26] The Court immediately shifted how it interpreted and applied the Interstate Commerce Clause in order to give broader scope to congressional authority to regulate economic actors, though the revision of commerce clause doctrine was not completed until

25. The revision of constitutional doctrine during the 1930s is reviewed in CORWIN, *supra* note 1; CUSHMAN, *supra* note 3; ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1941); LEUCHTENBURG, *supra* note 3; G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2000).

26. *See* United States v. Carolene Prods., 304 U.S. 144 (1938).

the 1940s.[27] The congressional spending power was henceforth to be read broadly.[28] The nondelegation doctrine, which had caused trouble for New Deal legislation during Roosevelt's first term, was pushed into the background as no longer a significant obstacle to congressional legislative decisions.[29] The Contract Clause, which had been a significant federal constraint on the state governments in the nineteenth century, was brushed aside as readily circumvented.[30]

In a series of contemporary lectures, Edward Corwin summarized the casualties of the constitutional revolution of 1937. The New Deal Court was busying itself with "dissolving concepts" that were central to the pre-1937 constitutional order. In doing so, the Court had altered its basic "approach to questions of constitutionality and in particular its outlook upon the underlying question of appropriate governmental function."[31] The changes wrought by the revolution could be classified under two headings. First, the Court had abandoned "the *laissez-faire* theory of governmental function."[32] The constitutional philosophy of George Sutherland and David Brewer, the "non-interference theory of governmental function" that had reigned supreme on the Court during the first decades of the twentieth century, had been overthrown by the constitutional vision of Harlan Stone and Louis Brandeis which believed that "[g]overnment could be and ought to be an instrument for improving social conditions."[33] Second, the Court reworked "the main structural elements of government" so as to make them more compatible with an active, interventionist government rather than buttresses of a *laissez-faire* social philosophy.[34] In short, the New Deal Court embraced "*the concentration of governmental power in the United States, first, in the hands of the National Government; secondly, in the hands of the National Executive*."[35] In line with these adjustments, the Court itself "seems deliberately bent on minimizing its constitutional function, not only in the field of congressional legislation, but more generally."[36] The "New

27. *See* Wickard v. Filburn, 317 U.S. 111 (1942); Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

28. Steward Mach. Co. v. Davis, 301 U.S. 548, 581 (1937).

29. *Compare* Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935) (striking down the National Industrial Recovery Act), *with* Yakus v. United States, 321 U.S. 414 (1944) (upholding the Emergency Price Control Act).

30. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 447–48 (1934).

31. CORWIN, *supra* note 1, at 80.

32. *Id.*

33. *Id.* at 88–90.

34. *Id.* at 95.

35. *Id.* at 96.

36. *Id.* at 109.

Court" had adopted an "attitude of self-abnegation" that would render the judicial review largely insignificant.[37]

Edward Corwin's account of the New Deal constitutional revolution provides a baseline against which to view judicial review in the states in the New Deal period. To what degree were state courts also dissolving these core constitutional concepts? To what extent did the economic and political forces that Edward Corwin saw at work at the federal level undercutting traditional constitutional rules and the U.S. Supreme Court's ability to articulate and apply them have similar effects in the states? Were state courts also forced to beat a hasty retreat in the face of increasingly activist state government officials and minimize their own role within the constitutional system?

II. THE EXERCISE OF JUDICIAL REVIEW IN A SAMPLE OF STATES

Studying judicial review in the states poses a variety of difficulties. The state courts, like the U.S. Supreme Court itself, do not keep a record of their exercise of the power of judicial review. Simply identifying the number of instances of judicial review over time is more complicated than, for example, identifying the number of instances of a presidential veto of legislation.[38] Beyond the challenges of mere record keeping, however, is the further uncertainty about what constitutes an exercise of judicial review in the first place. While canonical cases are relatively clear, there is a surprisingly large margin of cases that test the boundary of evaluating the constitutionality of government action and rendering a verdict on whether government officials have violated the constitutional rules. Of course, even the simple scale of judicial activity across fifty states (forty-eight in the New Deal period) poses challenges for the researcher.

The strategy adopted here is to take a sample of judicial review cases in the states from 1926 to 1945. The first issue is the choice of a range of years. The stock market crash of 1929 tipped the country rapidly into an economic crisis that persisted through the 1930s. The state governments

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37. CORWIN, *supra* note 1, at 110. Edward Corwin himself thought the degree of deference being shown by the New Deal Justices was in fact "less laudable" once one moved beyond the judicial supervision of the "projection of governmental power into the field of social and economic power," but he had little doubt that inherited notions of judicial protection of a broad "constitutional liberty" against democratically elected legislatures were being cast aside. *Id.* at 107, 110.

38. When it comes to state politics and government, however, even such basic information as the incidence of gubernatorial vetoes over time is not always readily accessible.

as well as the federal government struggled to deal with the fallout of the economic collapse, ranging from the fiscal challenges posed by declining tax revenue and increased government expenditures to the political pressure to address the needs of the growing ranks of the unemployed. Politicians on the left made significant political gains across the states. The constitutional revolution of 1937 significantly remade federal constitutional law, which had both direct and indirect consequences for state judicial review. Most directly, state courts could be expected to follow the U.S. Supreme Court's lead when applying federal constitutional law in its own cases. Less directly, state courts might take their cue from the U.S. Supreme Court when interpreting their own analogous state constitutional provisions. In either case, the loosening of constitutional rules by the U.S. Supreme Court could be expected to have a trickle-down effect in the state courts. Even so, the work of the New Deal Court took several years to consolidate. A two decade sample centered on the middle of the 1930s provides space enough to capture both pre-New Deal judicial review in the states and subsequent adjustments in the state practice in the New Deal period.

The second sampling issue is the choice of states. One option for thinking about state-level judicial review is to draw a random sample of cases from across the nation. The approach taken here is to focus on particular states, examining a larger set of cases within a given state. This Article will focus on four states: New Jersey, New Mexico, Virginia, and Wyoming. Together they reflect a representative cross-section of the states in the New Deal period. They reflect the several regions of the nation. They capture divergent political cultures. While they all leaned to Franklin Roosevelt in 1932 (as did the vast majority of states in a year in which FDR took nearly ninety percent of the electoral vote), they include the extremely supportive (Virginia), the relatively unsupportive (New Jersey), and those that hewed close to the national average (New Mexico and Wyoming). They also include a range for the percentage of the vote received by the Democratic gubernatorial candidate in the 1930 elections and for the proportion of the lower chamber of the state legislature held by Democrats in 1930, which offer different measures of political liberalism in the state at the onset of the Great Depression. From a socio-economic perspective, these states also capture national variation in the percentage of the population living in urban areas in 1930 (with New Jersey at the high end and New Mexico at the low end of the range) and in the proportion of manufacturing to farm output produced in the state in 1929 (again with New Jersey having a manufacturing-heavy economy and New Mexico at the other extreme in its dependence on agriculture). These four states also include two with elected judiciaries (New Mexico and Wyoming) and two with appointed judiciaries (New Jersey and

Virginia).[39] In short, these four states differed significantly from one another on a range of political, social, and economic variables, but reflect the range of conditions that states occupied in the New Deal period. On the whole, they should provide a fair representation of state politics in the period.

The third sampling issue is the identification of the court cases themselves. In order to identify cases of judicial review in the state courts, I borrow from the approach taken in the Judicial Review of Congress dataset.[40] In short, that dataset was constructed through a full-text electronic search of all U.S. Supreme Court cases for a number of terms associated with known cases of judicial review. All cases identified by that search were then read in order to identify the set that in fact involved the substantive review of the constitutionality of a federal statutory provision as it applied to the case before the Court. Since the goal of that dataset was to construct a comprehensive catalog of federal judicial review cases, the net was cast widely despite search inefficiencies.[41] Here the goal is not necessarily to create a complete inventory, so a small number of cases can be reasonably missed for the sake of a more efficient search process. An electronic keyword search in LexisNexis was performed for the high court in each state for 1926 to 1945.[42] The search returned cases in which variations on "constitution" appeared in either the headnotes, summary, or syllabus for the case and the words "legislature" and "statute" appeared somewhere in the full text of the record.[43] Each case was then read to determine whether the constitutionality of a statute or ordinance was substantively evaluated and decided.[44]

The result is a set of 229 cases in which the state high courts substantively reviewed the constitutionality of an application of

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39. For a time period in which political machines and party organizations could still be important, it is also worth noting that New Jersey had one of the strongest party organizations in the country in the early twentieth century while the other states reflected environments with less powerful party organizations. *See* DAVID R. MAYHEW, PLACING PARTIES IN AMERICAN POLITICS 209–10 (1986).

40. *See generally* Whittington, *supra* note 16.

41. In practice, fewer than fifteen percent of the cases captured by the electronic search process were actually relevant.

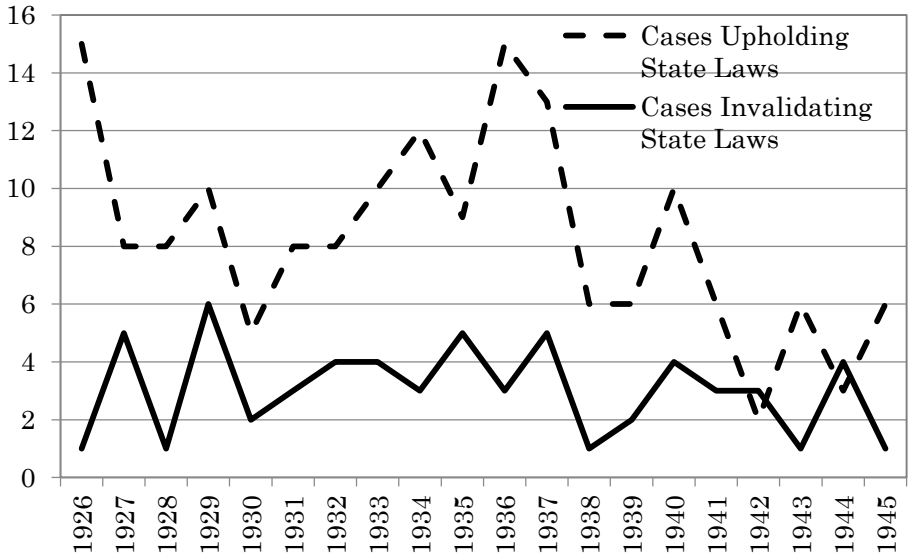
42. These were the New Jersey Court of Errors and Appeals, the New Mexico Supreme Court, the Virginia Supreme Court, and the Wyoming Supreme Court.

43. A variety of alternative specifications were tried, but they did not generate additional relevant cases in a restricted sample and so were not used.

44. While still returning many false positives, this search process was more efficient than the one previously used for federal cases. Just under forty percent of the cases captured by the electronic search process were relevant for the analysis.

legislation.[45] There are a substantial number of cases from each of the four states, but some state courts were more active in exercising the power of judicial review than others.[46] Across the whole set, these courts struck down statutory provisions in just over a quarter of the cases that they decided, which is almost precisely the rate at which the U.S. Supreme Court has invalidated statutes over the course of its history. Like the U.S. Supreme Court, the state high courts primarily exercise the power of judicial review so as to uphold legislation and validate the actions that other government officials have taken. The instances in which the courts obstruct the work of the other branches are not exactly rare; the courts routinely rule against the government when resolving constitutional disputes. Nonetheless, the government wins far more often than it loses when defending the constitutionality of its actions.

Figure 3: Cases in State Courts Reviewing State and Local Laws, 1926–1945



45. The focus on statutes does have the effect of minimizing cases involving the application of constitutional reviews primarily to judicial or executive branch officials. The bulk of constitutional criminal procedure cases, for example, fall outside the scope of this study.

46. The Virginia Supreme Court accounts for just over one-third of the total. The New Jersey Court of Errors and Appeals generated just less than one-fifth of the cases in the dataset.

The distinctive feature of the constitutional revolution of the New Deal is the transformation of the judicial role and the content of constitutional law over the course of the 1930s. Figure 3 tracks the exercise of judicial review in this sample of state cases across the New Deal period, from 1926 to 1945, separating cases invalidating statutes from those upholding statutes against constitutional challenge. While there is a slight inflection to the trajectory of cases declaring laws invalid, there is hardly evidence of a constitutional revolution at the state level. These state courts do not appear to have thrown themselves into unusual opposition to the actions of their governments as the Great Depression advanced, nor did they abandon their role as enforcers of constitutional rules in the later years of the New Deal period. In sharp contrast to the pattern of judicial review manifested in the U.S. Supreme Court, the exercise of judicial review in these state courts primarily displayed stability and continuity rather than volatility and disjuncture. Likewise, there was no comparable surge in cases upholding legislation against constitutional challenges as the Court displayed after the switch in 1937. In the case of the U.S. Supreme Court, doctrine needed to be rewritten, and constitutional doubts that had been previously sown needed to be relieved. At least in the short term, the constitutional revolution required the Court to continue to actively review the constitutionality of federal legislation, hearing cases precisely so that laws could be upheld. The state courts had no such need. There was no dramatic reconsideration of the judicial rule and the strictures of constitutional law. There was business as usual.

The judicial retreat in the face of democratic demands of elected officials was a core component of the New Deal revolution, but we might think that an expectation of general judicial deference is too sweeping. The New Deal struggle was, after all, over a set of specific constitutional commitments promoted by the Justices and particular policies being advanced by the New Dealers. Although the U.S. Supreme Court seemed to be "minimizing its constitutional function"[47] after 1937 (though as we have seen the Court was really just minimizing its role in striking down statutes, not its role in evaluating them), perhaps the critical component of the New Deal revolution was the Court's abandonment of a specific set of doctrines that hampered the economic policymaking of the government. Certainly, some commentators and Justices adopted that

47. CORWIN, *supra* note 1, at 109.

interpretation of the New Deal constitutional legacy as the Warren Court began once again to actively strike down legislation.[48]

Table 1: Distribution of Cases and Outcomes in State Courts

Type of Case	Percent of All Cases Decided	Rate of Invalidation
New Deal		
New Deal Salient	8%	16%
Non-New Deal	92%	27%
Subject Matter		
Procedural Due Process	13%	30%
Taxation	19%	23%
Spending/Debt	11%	33%
Structural	30%	32%
Economic	23%	15%
Personal Liberties	4%	25%

In order to evaluate the extent to which the state courts were adopting a more selective version of the New Deal revolution in their own actions, we might distinguish between the types of cases and range of issues that the courts were deciding. Table 1 offers two different perspectives on how these judicial review cases were distributed and the outcomes reached by the courts in those different cases. The narrower perspective focuses on cases that might be deemed particularly salient to the New Deal. There is, of course, no easy way to identify what types of state legislation might share the particular characteristics of the New Deal. The Great Depression itself put substantial pressure on all governments during this period, but the constitutional law emphasized by the U.S. Supreme Court in the 1930s caused particular problems for policies with distinctive and new structural features and objectives. I characterized legislation as being New Deal salient if it mirrored New Deal federal policies, actually involved constitutional challenges to federal policies in the state courts, or invoked the kind of state-level policies that the U.S. Supreme Court was attacking prior to 1937. These state courts considered constitutional challenges of, for example, price

48. *See, e.g.*, Alpheus Thomas Mason, *Judicial Activism: Old and New*, 55 VA. L. REV. 385 (1969) (emphasizing the difference between pre-1937 judicial activism and Warren-era activism and criticizing Felix Frankfurter's call for across-the-board judicial restraint).

fixing schemes,[49] worker compensation laws,[50] unemployment compensation,[51] and mortgage adjustment statutes.[52] As Table 1 indicates, however, such policies were a very small fraction of the judicial review cases considered by these courts during this period. Moreover, these policies generally fared better in the state courts than other types of statutes that faced constitutional challenges during these years. Rather than selectively obstructing these types of innovative policy responses to the economic crisis of the 1930s, the state courts tended to be deferential to the actions of elected officials in this domain and to rebuff constitutional challenges to them by various private actors.[53]

A somewhat broader perspective on the kinds of specific substantive constitutional disputes that were central to the battle over the U.S. Supreme Court in the 1930s considers the substantive orientation of the policies and cases considered by these state courts. Table 1 offers a second cut at the data, noting the distribution of cases across six broad substantive categories. Cases involving constitutional challenges focused on criminal justice or purely procedural matters are categorized as "procedural due process." Cases involving disputes over tax policies (regardless of the particular constitutional objection raised to those policies) are categorized simply as "taxation." Similarly, cases related to the disbursement of government resources and the acceptance (or waiver) of government liabilities are categorized together as "spending/debt." A wide array of questions about the structure of the state and local governments or the procedures and formalities of making public policy are characterized as "structural." Constitutional challenges focused on economic rights and the authority of the government to make economic regulations or restructure property rights are categorized together as "economic." Other types of individual rights and equal protection claims are grouped as "personal liberties." As always, broad categories necessarily do violence to details that might otherwise distinguish cases.

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49. *See, e.g.*, Arnold v. Bd. of Barber Exam'rs, 109 P.2d 779 (N.M. 1941).

50. *See, e.g.*, U.S. Cas. Co. v. Hyne, 189 A. 645 (N.J. 1937).

51. *See, e.g.*, Unemployment Comp. Comm'n v. Renner & Lester, 143 P.2d 181 (Wyo. 1943).

52. *See, e.g.*, Vanderbilt v. Brunton Piano Co., 169 A. 177 (N.J. 1933).

53. With so few cases involving statutes characterized as New Deal salient, and only a tiny number of those struck down by the courts, no strong conclusions can be drawn about possible temporal effects. Nonetheless, these cases do not evidence any particular change in judicial attitudes over time. Policies were upheld early in the New Deal period as well as late in the period, and likewise the very small number of invalidations occurred both early and late. There was no apparent need for the constitutional revolution of 1937 to convince these state judges to uphold these sorts of policies.

Similarly, there are some cases that sit on the margins of the categories, but they are relatively few.[54]

The distribution of cases reflects the degree to which the state constitutions were economic documents in the early twentieth century.[55] Cases involving the fiscal operation of the state, the regulation of economic actors, and the vindication of property rights dominate constitutional litigation. Matters of mere procedure and personal liberties receive relatively little attention from these state courts. Challenges to economic regulations are the second largest type of case in this sample. This might suggest that there were far more opportunities for conservative courts to obstruct progressive legislation than might be captured by the more narrow measure of New Deal salient cases.

If these state courts were generally sympathetic to economic rights claims and held a narrow view of the proper scope of the state police powers, then the conditions for something like the constitutional struggles that occupied the federal government in the 1930s might well be present in these states as well. These cases do not provide much support for that possibility, however. Although economic liberty cases were the second largest category of cases considered by these courts, those challenges had the lowest odds of success. These judges ruled against the exercise of government power in a mere fifteen percent of such cases, which hardly suggests serious constitutional obstructionism to the regulatory state.[56]

Moreover, the handful of economic policies that did fall victim to constitutional review do not paint a picture of reactionary courts that needed a constitutional revolution before falling in line with the preferences of democratic majorities. In 1929, the New Jersey Court of Errors and Appeals determined that the nearly three-decade-old General Eminent Domain Act provided an inadequate scheme for determining the compensation to property owners for private property taken for public

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54. For example, a challenge to the procedures used to revoke liquor licenses was characterized here as involving procedural due process rather than economic liberty. Floeck v. Bureau of Revenue, 100 P.2d 225 (N.M. 1940). But regulation on advertising by dentists was characterized as involving economic rather than personal liberty. State Dentists, Inc. v. Gifford, 191 S.E. 787 (Va. 1937).

55. *See also* Keith E. Whittington, *Some Dilemmas in Drawing the Public/Private Distinction in New Deal Era State Constitutional Law*, 74 MD. L. REV. (forthcoming 2015).

56. Overall tendencies might obscure changes over time. There is not much evidence that these state courts started off as obstructionists before beating a switch-in-time style retreat, however. Of these four states, only New Jersey might be plausibly described in those terms, with three of four economic challenges succeeding before 1933 and none succeeding afterwards. Even so, only one of those early cases (involving adjustment of mortgages under the Federal Contracts Clause) involved the kind of broad economic policy questions that might implicate New Deal disputes. *See Vanderbilt*, 169 A. 177.

use since it set the value of the property at the date of court filings rather than at the date the case was resolved (and fully anticipated that the legislature would "enact in a short time appropriate legislation" to remedy the situation).[57] Even more narrowly, the same court in 1933 struck down a statutory provision that purported to alter the rules of probate (in a manner that worked to the detriment of the beneficiaries) for cases that were already pending at the time of the passage of the statute. The court thought such retroactive alterations of property interests violated the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.[58] In 1944, the New Mexico Supreme Court struck down a 1921 statutory provision that singled out corporations that had been chartered under the territorial government for punishment (dissolution of their charters) that was not meted out to similarly situated corporations that had been chartered after statehood. The court declared such a legislative classification to be "unreasonable and arbitrary" and thus void under the Federal Constitution.[59] Such cases do not suggest the type of judicial activism on behalf of corporations that mobilized President Roosevelt and his allies.

Although some cases might suggest a broader conception of the rights of property than the New Deal Court would be willing to endorse, even they were not accompanied by a stream of rulings that might suggest courts that were prepared to be aggressively obstructionist to progressive legislation. The Wyoming Supreme Court in 1929 heard a complaint regarding a city ordinance that mandated that all barber shops close by 6:00 p.m. on weekdays. The court recognized that there "have been some differences of opinion in reference to the power of courts, in enforcing the Fourteenth Amendment, to inquire into the reasonableness of acts of the Legislature of a state," and partly for that reason sought to avoid having to rule directly on the constitutional question.[60] Instead, the court observed that general statutory authorizations of municipal regulations had traditionally been construed to preclude any city ordinance that might be "found to be unreasonable," "particularly so in regard to ordinances having relation to the liberty of the citizen or the rights of private property."[61] The state legislature must be understood to have only authorized the city to pass reasonable regulations of barbers, and the city was unable to demonstrate that "the closing regulation in question in the case at bar bears a real and substantial relation to the purpose of

57. Passaic Consol. Water Co. v. McCutcheon, 144 A. 571, 574 (N.J. 1929).
58. *In re* Braunstein's Will, 164 A. 431, 432–33 (N.J. 1933).
59. State v. Sunset Ditch Co., 145 P.2d 219, 223 (N.M. 1944).
60. State v. City of Laramie, 275 P. 106, 107 (Wyo. 1929).
61. *Id.* (citing Yick Wo v. Hopkins, 118 U.S. 356, 371 (1886)).

protecting the public from the spread of disease," in keeping with the public health justification for the exercise of the police power in this context.[62] Consistent with the decisions of a number of other courts that had evaluated closing hour requirements, the Wyoming court was unable to fit barbers within the range of exceptional cases that judges had identified as potentially justifying government intervention. Somewhat differently, the Virginia Supreme Court in 1937 ruled against the State in a case involving the application of a 1934 emergency statute that authorized a state commission to suspend payments of the debts of a home building and loan association.[63] The court found the moratorium to be a straightforward violation of federal and state constitutional prohibitions against impairing the obligations of contracts.[64] Even after the U.S. Supreme Court's *Blaisdell* decision,[65] the Virginia court concluded "no statute, so broad as that here under review, has been sustained" in any jurisdiction.[66] The Virginia legislature had neglected to include the kinds of limitations that courts elsewhere had found essential to the constitutionality of the moratory statutes. Not even a liberal construction of legislative powers could save such an act. That was the only time that the Virginia court ruled against the government in the nearly two dozen economic cases that it decided during these years. If these state courts were not exactly prostrate before legislative economic regulations, they do not evidence a "persistent effort . . . to judge the legislation of the New Deal by the measure of *laissez faire*."[67]

III. MAIN CURRENTS OF STATE CONSTITUTIONAL LAW IN THE NEW DEAL PERIOD

Looking at the constitutional revolution on the U.S. Supreme Court in the New Deal period, Edward Corwin thought it was characterized by the Justices "dissolving" a set of traditional constitutional concepts and their core assumptions about the proper purpose and scope of government.[68] The Court abandoned its commitment to a *laissez-faire* political philosophy—and an associated set of judicially enforced constitutional rights—while reworking central structural features of the

62. *Id.* at 108.
63. Citizens Mut. Bldg. Ass'n, Inc. v. Edwards, 189 S.E. 453 (Va. 1937).
64. *Id.* at 458.
65. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).
66. *Edwards*, 189 S.E. at 456.
67. JACKSON, *supra* note 25, at 38.
68. CORWIN, *supra* note 1, at 80.

government so as to facilitate a more interventionist state. Is there any analogous movement in state constitutional law? Are the state courts likewise finding themselves under pressure to rewrite the rules of constitutional law to facilitate more ambitious government?

As Table 1 indicates, the state courts were exercising judicial review across a range of constitutional issues. For purposes of considering the comparison with Edward Corwin's assessment of the U.S. Supreme Court, we might focus on four broad currents of state constitutional law during this period: due process and police powers, contracts, taxation/spending/debt, and structural. These lines of cases speak most directly to the questions of governmental organization and purpose that were central to the constitutional transformations at the national level. They also fail to show either a dramatic rewriting of the constitutional rules in the state courts or a set of judges systematically at odds with elected government officials.

Police powers jurisprudence under the Fourteenth Amendment of the U.S. Constitution and various state constitutional provisions was among the most contentious areas of constitutional law in the early twentieth century. The abandonment of efforts to judicially enforce implicit limits on the police power was a key element of the constitutional revolution of 1937, though a similar judicial task soon emerged under the guise of "preferred freedoms."[69] Robert Jackson crowed that in March of 1937 the Court had to confess that it had for years engaged in a "judicial strangling" of economic regulations by the "blunder" of adopting an expansive view of economic liberty and a restrictive view of the state police powers.[70]

The due process and police power cases in the states might be conveniently divided into two categories. The first category includes those that involve New Deal-like legislation. In such cases, the state courts repeatedly upheld legislative actions under both federal and state constitutional provisions. The New Jersey Court of Errors and Appeals pointed to the actions of the U.S. Supreme Court even prior to the New Deal Revolution as indicating the constitutionality of the challenged state

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69. *See, e.g.*, LEUCHTENBURG, *supra* note 3, at 163–79 (1995) (examining *West Coast Hotel* as the key moment in the revolution of 1937); Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 201–06 (1998) (questioning the centrality of *West Coast Hotel* as a turning point); Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POL. RES. Q. 623, 623 (1994) (tracing the shift from police powers jurisprudence to the protection of specific, favored individual rights); Alpheus Thomas Mason, *The Core of Free Government, 1938–40: Mr. Justice Stone and "Preferred Freedoms,"* 65 YALE L.J. 597, 601–04 (1956) (examining *Carolene Products* as a critical turning point).

70. JACKSON, *supra* note 25, at 207, 211.

statutes. In 1933, New Jersey enacted an "emergency law" to prevent "destructive and demoralizing" competition in the production, distribution, and sale of milk products.[71] Prices were henceforth to be set by a milk production board.[72] When a violator challenged the authority of the state to impose such regulations, the New Jersey Court of Errors and Appeals upheld the statute.[73] The New Jersey court leaned heavily on the U.S. Supreme Court's recent decision upholding a similar New York statute.[74] Although the Newark Milk Company tried to persuade the court to interpret the state constitution's due process clause more aggressively than the Supreme Court's interpretation of the Federal Due Process Clause, the court declined to do so.[75] For the state and federal constitutions alike, "these constitutional guaranties of the right of property and individual freedom of contract must yield to the common good and general welfare."[76] The milk regulation "is addressed to a legitimate end; and the measures taken are reasonable and appropriate to that end."[77] Similarly, the state court relied entirely on a recent ruling of the U.S. Supreme Court[78] to conclude that an analogous state statute requiring that retailers not sell branded goods below the price set by the manufacturer did not violate the property rights of the retailer.[79] When ruling on a constitutional challenge to the state's Unfair Competition Act in 1938, the Wyoming Supreme Court took notice of heightened interest in such cases given the "unrest now prevailing" and the "frequent queries whether courts are drifting merely with the tide or are rendering their decisions with that steadfast judgment as is their wont."[80] The court took

71. State Bd. of Milk Control v. Newark Milk Co., 179 A. 116, 119 (N.J. 1935).

72. *Id.*

73. *Id.* at 126–27.

74. Nebbia v. New York, 291 U.S. 502 (1934).

75. Likewise, the New Mexico Supreme Court thought that the "better reasoned decisions" regarding the limitations on the police power had appeared since 1937 and declined to strike down a statute that fixed prices for barber services. Arnold v. Bd. of Barber Exam'rs, 109 P.2d 778, 786 (N.M. 1941).

76. *State Bd. of Milk Control*, 179 A. at 124.

77. *Id.* A divided Virginia Supreme Court did the same with regard to a similar Virginia statute. R.J. Reynolds v. Milk Comm'n, 179 S.E. 507 (Va. 1935). The court promised that if the "Commission promulgates unreasonable, arbitrary, or foolish regulations the courts may be depended upon to declare them void," but no such arbitrary regulations were to be found in that case. *Id.* at 514. Three dissenters, however, argued that *Nebbia* should have little persuasive influence for the state court when construing its own state constitutional provisions, and insisted that constitutional guarantees that were so easily thrown over in the face of economic troubles "are not worth the ink that prints them." *Id.* at 521 (Holt, J., dissenting).

78. Old Dearborn Distrib. Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936).

79. Johnson & Johnson v. Weissbard, 191 A. 873, 874 (N.J. 1937).

80. State v. Langley, 84 P.2d 767, 769 (Wyo. 1938).

pains to emphasize that the traditional standard for evaluating whether the legislature had exceeded its police powers was whether the act had a valid purpose and had adopted "reasonable and not arbitrary" means to advancing that purpose.[81] In issuing a blanket requirement that businesses not sell goods below cost, the court thought the "legislature has not undertaken to compel merchants to do anything out of the ordinary, but only what is usual and customary."[82] Such a directive "cannot be considered arbitrary."[83]

The second category of due process cases involves a broader set of regulations. Such cases were wide ranging and often emerged even before the New Deal. The New Mexico court, for example, turned back a constitutional challenge to the 1927 amendments to the Dental Act. To the claim that the legislature's effort to restrict the provision of artificial teeth to licensed dentists attempted to prohibit "acts which are innocent in themselves" the court thought that it was self-evident that the state government could regulate activities to be performed on the human body that "require skill, adequate training, and understanding in their performance."[84] That court was similarly undisturbed by the City of Roswell's effort to prohibit the keeping of livestock from the populated areas of the city, regardless of the economic consequences to preexisting businesses,[85] and while upholding the regulation of dry cleaners the court recited its earlier declarations that legislative judgment is to be given "great weight" when developing regulations to advance public health.[86] The Wyoming court emphasized a similarly deferential standard across the period when upholding regulations ranging from the setting of the working hours of barbers[87] to insurance requirements for taxis.[88] Similarly, the Virginia high court echoed the U.S. Supreme Court in resolving to defer to the legislature "if the question of reasonableness is fairly debatable."[89] Whether imposing zoning restrictions on gas stations,[90] defining the necessary set of credentials for practicing law,[91] or

81. *Id.* at 771.
82. *Id.* at 777.
83. *Id.* at 778.
84. State v. Culdice, 275 P. 371, 372–73 (N.M. 1929).
85. Mitchell v. City of Roswell, 111 P.2d 41, 43–44, 46 (N.M. 1941).
86. State *ex rel.* N.M. Dry Cleaning Bd. v. Cauthen, 152 P.2d 255, 259 (N.M. 1944).
87. State *ex rel.* Newman v. Laramie, 275 P. 106, 108 (Wyo. 1929).
88. Pub. Serv. Comm'n v. Grimshaw, 53 P.2d 1, 6–7 (Wyo. 1935).
89. Martin v. City of Danville, 138 S.E. 629, 630 (Va. 1927).
90. *Id.* at 629.
91. Bryce v. Gillespie, 168 S.E. 653, 656 (Va. 1933).

limiting who can sell eyeglasses,[92] legislative bodies could expect to see their actions upheld by the Virginia court.

Cases involving claims that the state had impaired the obligation of contracts form a closely related category. Although the U.S. Supreme Court upheld a mortgage moratorium in Minnesota, Robert Jackson noted that the battle lines had been drawn in that case, with a near-majority of the Justices "asserting a power and duty in the judiciary to stop any governmental body—state or federal—from interfering with an economy of *laissez faire*" or restricting the "established privileges of property."[93] The loosening of the strictures of the Contracts Clause was central both to the specific policies favored by reformers and to the broader philosophy of governance advanced by the New Dealers. On occasion, the state lost in these courts on Contracts Clause claims, but such losses were not common. In New Jersey, the court invalidated the state's 1933 rule that allowed a judicial substitution of the "fair market value" of a property for the actual proceeds from a foreclosure sale when determining how much a debtor might still owe to a creditor on a mortgage.[94] The state law compels the creditor "to forfeit a part of the debt which his contract, valid and enforceable when made, gave him."[95] The statute did not seem to take the form of a targeted emergency measure, but the judges were skeptical of "the intimation that an emergency automatically lifts all constitutional restraints."[96] Similarly, the Virginia high court struck down a 1934 statutory provision that allowed a state commission to suspend payments by building and loan associations in order to preserve its capital stock, finding that no other state in responding to the "widespread economic disturbances of the last few years" had gone as far as the Virginia legislature had done in impairing a contractual obligation.[97] In a series of subsequent cases, however, the New Jersey courts resolved several additional challenges to state and local actions restricting the ability of creditors to collect on contracted debts without invalidating another statute. When considering the creation of a municipal finance commission that assumed responsibility for municipal debts, the court emphasized the priority of the police power to see to public necessities over the contractual interests of private individuals.[98] Similarly, the financial liabilities of banks and

92. Ritholz v. Commonwealth, 35 S.E.2d 210, 224 (Va. 1945).
93. JACKSON, *supra* note 25, at 78, 82.
94. Vanderbilt v. Brunton Piano Co., 169 A. 177 (N.J. 1933).
95. *Id.* at 178.
96. *Id.* at 180.
97. Citizens Mut. Bldg. Ass'n v. Edwards, 189 S.E. 453, 456–58 (Va. 1937).
98. Hourigan v. N. Bergen Twp., 172 A. 193, 196–97 (N.J. 1934).

other lending institutions were always subject to the overriding interest of the state's police powers in preserving the solvency of financial institutions and the continued availability of credit.[99] At the extremes (or at least what the judges perceived to be the extremes), the state courts were willing to strike down Depression-era statutes that were designed to benefit debtors at the expense of creditors, but they also drew on a variety of doctrinal resources to facilitate state efforts to shield debtors from their liabilities.

A substantial body of constitutional cases decided by these state courts addressed the fiscal operation of the government. Here too, the constitutional revolution was understood to endorse the "use by government of public funds for the *immediate* benefit of private persons in the realization of an *ulterior* public end."[100] State constitutions included far more and various restrictions on the fiscal operations of state and local governments than the Federal Constitution imposed on the national government. Nonetheless, similar underlying principles were at stake—to what degree did constitutional requirements restrict the ability of government officials to raise and disperse money, commit public resources, or relieve obligations to the public fisc. The more complex fiscal rules that could be found in state constitutional texts might have complicated the work of government officials and encouraged constitutional challenges to their efforts, but they rarely led state courts to stand in the way of the fiscal decisions of elected officials.

Constitutional challenges to decisions to tax, spend, and borrow took many forms. One class of such cases was closely akin to constitutional challenges to regulatory decisions under due process clauses, and met the same general fate. The Virginia court, for example, declared that it was a well settled principle that legislatures had "wide discretion in selecting the subjects of taxation," subject only to the limit that classifications for taxation could not be wholly arbitrary.[101] Taxation schemes did on rare occasions fail even such deferential standards, as happened with a New Mexico occupational tax that distinguished between retailers that sold their goods in small parcels and those that did not and another statute in

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99. *See, e.g.*, Newman v. Asbury Park & Ocean Grove Bank, 198 A. 286, 288–90 (N.J. 1938); Bucsi v. Longworth Bldg. & Loan Ass'n, 194 A. 857, 863–64 (N.J. 1937). In still other cases, the court leaned on the right of the state to alter remedies for enforcing contracts. *See, e.g.*, Henderson v. Weber, 35 A.2d 609, 611 (N.J. 1944); Lapp v. Belvedere, 184 A. 837, 840–41 (N.J. 1936).

100. CORWIN, *supra* note 1, at 79.

101. Commonwealth v. Bibee Grocery Co., 151 S.E. 293, 294 (Va. 1930) (quoting Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923)).

the same case that relieved only uncultivated lands from their tax burden.[102]

Other types of cases reflected the more idiosyncratic restrictions of individual state constitutions. Many state constitutions include bans on the donation of public funds to private corporations. Although such textual provisions might be sufficient to prevent the most blatant of appropriations, courts were forced to confront more marginal cases. Over the course of the Great Depression, railroad companies accumulated nearly thirty-five million dollars in delinquent taxes owed to the State of New Jersey.[103] The legislature responded by adopting a repayment plan that waived twenty-four million dollars in interest, or what the legislature characterized as "penalties."[104] The courts objected to the legislators depleting "the peoples' treasury" with such a fiscal giveaway to the railroads.[105] Other common constitutional provisions restricted how state and local governments could take on debt, challenging politicians to find creative ways of circumventing such limits. When the New Mexico town of Springer took a loan from the newly created Federal Reconstruction Finance Board in exchange for revenue bonds that drew on the income generated by the municipal waterworks, a taxpayer objected that the town had contracted a debt without the constitutionally required approval of the taxpaying electors. The New Mexico court demurred, observing that a "'debt' in the constitutional sense" includes only unconditional obligations on the municipality, not obligations on restricted sources of public funds.[106] Likewise, the Virginia court held that local taxpayers did not have to approve loans for the construction of school buildings, so long as the money was borrowed from the state government,[107] and counties did not have to receive approval from the voters before agreeing to serve as guarantors of bonds issued by utility districts, just so long as the county itself did not issue the bonds.[108]

Finally, a number of cases addressed themselves to primarily structural issues relating to how government is organized and power is

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102. Durand v. Middle Rio Grande Conservancy Dist., 123 P.2d 389 (N.M. 1941); Safeway Stores v. Vigil, 57 P.2d 287 (N.M. 1936).

103. Wilentz v. Hendrickson, 28 A.2d 199, 202 (N.J. 1944).

104. *Id.*

105. *Id.* at 204–05; *see also* Clovis v. Sw. Pub. Serv. Co., 161 P.2d 878 (N.M. 1945) (allowing an extended payment plan in the sale of utility properties to a private corporation); State v. Montoya, 255 P. 634 (N.M. 1927) (providing that the waiver of property taxes accrued before 1910 violates the constitutional prohibition on releasing obligations to the state).

106. Seward v. Bowers, 24 P.2d 253, 253 (N.M. 1933).

107. Bd. of Supervisors of King & Queen Cnty. v. Cox, 156 S.E. 755 (Va. 1931).

108. Bourne v. Bd. of Supervisors of Henrico Cnty., 172 S.E. 245 (Va. 1934).

distributed among governmental organs.[109] At the national level, Edward Corwin emphasized the necessity of the New Deal Court allowing the concentration of government power—with power flowing from the states to the national government and from the legislature to the executive—and the abandonment of old notions of structural limits on political power.[110] In the states during this period, the courts regularly heard constitutional challenges to how legislators delegated power to other government officials. But the state cases highlight the extent to which such questions were routinely raised by the kind of governmental activities that had become commonplace in the twentieth century and the extent to which state judges had reached an accommodation with the administrative state. Courts were likely to object when seemingly judicial tasks were delegated to executive officials, such as giving the police chief the authority to revoke driver's licenses[111] or city managers the authority to deny poolroom licenses.[112] Delegating rulemaking authority, however, was less problematic. The legislature could authorize railroad commissions to determine whether and where to require the construction of overhead crossings,[113] authorize alcohol control boards to develop rules governing the transportation of alcoholic beverages on state roads,[114] and empower courts to review proposed rules developed by conservation boards.[115]

There is good reason why the 1930s has been regarded as a watershed moment in the history of American constitutional law. The U.S. Supreme Court spent the first part of that decade battling the ascendant forces of the New Deal, and the latter part of that decade retreating in the face of the New Deal and rewriting constitutional law in order to accommodate the changes that were taking place in the rest of the government. That story of constitutional transformation is, however, radically incomplete if we do not take into account the developments in the states. This Article makes an initial exploration of the largely unexamined territory of the history of judicial review in the states. In the

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109. More particular still were questions about legislative invocation of emergency constitutional provisions. *See, e.g.*, Hutchens v. Jackson, 23 P.2d 325 (N.M. 1933) (providing that the legislature may invoke emergency powers).

110. CORWIN, *supra* note 1, at 96.

111. Thompson v. Smith, 154 S.E. 579 (Va. 1930).

112. Assaid v. City of Roanoke, 18 S.E.2d 287 (Va. 1942).

113. S. Ry. Co. v. Commonwealth, 167 S.E. 578 (Va. 1933).

114. Dickerson v. Commonwealth, 24 S.E.2d 550 (Va. 1943).

115. Gutierrez v. Middle Rio Grande Conservancy Dist., 282 P. 1 (N.M. 1929). Legislatures could not delegate such basic and unrestricted policy decisions as the specification of game animals, however. State *ex rel.* Sofeico v. Heffernan, 67 P.2d 240 (N.M. 1936).

tumultuous period of the Great Depression, the state courts continued to exercise judicial review on a regular basis, sometimes upholding laws, sometimes invalidating them. The state courts considered here did not do battle with their coordinate branches as the U.S. Supreme Court did, and they did not dramatically remake constitutional law as their governments struggled to deal with economic crisis. State courts were able to block laws at the margins of the politics of the period, but they rarely found themselves in opposition to the central policies that emerged from their respective legislatures.