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West Coast Hotel's Place in American Constitutional History

INTRODUCTION

This year marks the seventy-fifth anniversary of *West Coast Hotel Co. v. Parrish*,[1] which for many years has been part of one of the central narratives of twentieth-century American constitutional history. In that narrative, *West Coast Hotel* represents the Supreme Court's abandonment of a constitutional jurisprudence featuring aggressive scrutiny of legislation that regulated economic activity or redistributed economic benefits. Prior to *West Coast Hotel*, successive Court majorities treated state and federal minimum-wage legislation as interfering with the "liberty" of employers and employees to bargain for the terms of employee services. In *West Coast Hotel*, the Court upheld minimum-wage legislation in the face of this "liberty of contract" argument, and, according to the traditional narrative, the change in the Court's posture was triggered by the introduction of a plan by the Roosevelt Administration to alter the membership of the Court.[2]

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1. 300 U.S. 379 (1937).

2. The dominance of this view of *West Coast Hotel* can be seen in comments in encyclopedia entries. *See, e.g.*, Stanley I. Kutler, West Coast Hotel Co. v. Parrish, *in* 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 2045 (Leonard W. Levy, Kenneth L. Karst & Dennis J. Mahoney eds., 1st ed. 1986) ("[The] decision . . . signaled a seismic shift in judicial philosophy toward acceptance of the validity of social and economic legislation. . . . [It] reflected a new, favorable judicial attitude toward the New Deal, thus defusing Franklin D. Roosevelt's court-packing proposal."); C. Herman Pritchett, *The Chambermaid's Revenge*, *in* HISTORIC U.S. COURT CASES 1690-1990: AN ENCYCLOPEDIA 279 (John W. Johnson ed.,

This Essay seeks to show that the conventional narrative is misleading and distorts the significance of *West Coast Hotel*. It also seeks to show that *West Coast Hotel*'s significance comes from its position in a different narrative, one featuring clashing views on the issue of constitutional adaptivity: how the general provisions of the Constitution are adapted to new controversies and whether the meaning of those provisions can be said to change in the process. In that narrative the interpretive postures of "originalism" and "living Constitution" jurisprudence make their appearance, serving to tie *West Coast Hotel* to contemporary debates about constitutional interpretation.

I. *WEST COAST HOTEL* AND THE "COURT-PACKING/CONSTITUTIONAL REVOLUTION" NARRATIVE

In the June 1936 decision *Morehead v. New York ex rel. Tipaldo*, a five-to-four majority of the Court declared a New York minimum-wage statute unconstitutional.[3] The Roosevelt Administration responded in February 1937 by proposing legislation that would have given an incumbent President the power to name a new Justice to the Court each time a sitting Justice who reached the age of seventy declined to retire.[4] Meanwhile, the Supreme Court of Washington upheld a state minimum-wage statute, and the U.S. Supreme Court took that decision under review, hearing arguments in the fall of 1936. When the Washington State case—*West Coast Hotel Co. v. Parrish*—was eventually decided on March 29, 1937, the Court upheld the statute, distinguishing[5] *Tipaldo* and overruling[6] *Adkins v. Children's Hospital*,[7] an earlier decision in which it declared a minimum-wage law of the District of Columbia unconstitutional. Justice Owen Roberts, who had been with the majority that invalidated the New York statute in *Tipaldo*, joined the majority in *West Coast Hotel* to provide the fifth vote sustaining the Washington State legislation.

1992) ("Parrish's case . . . signaled the surrender of the Court to President Roosevelt's New Deal.").

3. 298 U.S. 587, 609 (1936).

4. The proposal was part of a larger bill to reorganize the federal judiciary. For the substance of the Roosevelt Administration's proposal, see 81 CONG. REC. 876, 877-81 (1937).

5. *See West Coast Hotel*, 300 U.S. at 382.

6. *See id.* at 400.

7. 261 U.S. 525 (1923), *overruled by West Coast Hotel*, 300 U.S. 379.

Contemporary commentators observing the sequence of events thought they knew what had happened. The constitutional historian William Leuchtenburg characterizes their reaction:

> At the time, no one doubted that the Court, and more particularly Mr. Justice Roberts, had crossed over. . . . [Chief Justice Charles Evans] Hughes read the opinion in [*West Coast Hotel*] with an unmistakable note of exaltation in his voice, for by being able to show that he had won Roberts to his side . . . he had gone a long way toward defeating the Court-packing scheme. . . . Within days after the decision was handed down, Washington insiders were regaling one another with a saucy sentence that encapsulated the new legislative situation: "A switch in time saved nine."[8]

For Leuchtenburg and many other scholars, *West Coast Hotel* represented the beginning of a "Constitutional Revolution" in which the Court abandoned searching scrutiny of social and economic legislation in favor of a more deferential stance. As Leuchtenburg puts it,

> [t]he Court's shift in [*West Coast Hotel*] proved to be the first of many. . . . [N]ever again did the Supreme Court strike down a New Deal law, and from 1937 to the present, it has not overturned a single piece of significant national or state socioeconomic legislation. Many commentators believe that the Court has forever abandoned its power of judicial review in this field. Hence, they speak of "the Constitutional Revolution of 1937."[9]

Leuchtenburg's commentary, written in 1995, illustrates that one of the first explanations offered by contemporaries for the outcome in *West Coast Hotel* had become orthodoxy in twentieth-century constitutional history. According to that narrative, President Roosevelt's "Court-packing" plan pressured the Court into modifying its approach toward "socioeconomic legislation," and the resultant deferential approach engendered a "Constitutional Revolution."

8. WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 177 (1995).

9. *Id.* at 178.

The "Court-packing/constitutional revolution" narrative grew in prominence because it resonated with mid- and late-twentieth-century commentators on the Court. First, it pictured a Court that was highly immersed in politics. Aware that its reluctance to approve "popular" legislation would endanger the Court's traditional composition, the Justices "switched" their votes to "save" the institution. Second, the narrative implicitly characterized constitutional review of state legislation as ideological. By deriving a doctrine of liberty of contract from the Due Process Clauses of the Fifth and Fourteenth Amendments, the Court had privileged a particular "free market" view of labor relations; by deferring to state redistributive and regulatory legislation, *West Coast Hotel* and its progeny privileged an alternative view. Either way, a Justice's stance reflected a political judgment. Thus, the "Court-packing/constitutional revolution" explanation of *West Coast Hotel* recognized the Justices as a species of political actors, a view that resonated with behaviorist theories of judicial decisionmaking that were in currency among twentieth-century commentators.[10]

As a result of that resonance, *West Coast Hotel* became one of the lodestones of the "Court-packing/constitutional revolution" narrative, which remained entrenched among American constitutional commentators for nearly sixty years after the decision. But beginning in the 1990s, that narrative began to fall apart.

10. For example, in a 1942 article, political scientist C. Herman Pritchett characterized "[t]he essential nature of the task of a Supreme Court Justice" as "not unlike that of a Congressman." C. Herman Pritchett, *The Voting Behavior of the Supreme Court, 1941-42*, 4 J. POL. 491, 491 (1942). According to Pritchett, both were "confronted periodically with important issues of public policy" and "must formulate a conclusion and register [a] vote" on such issues. *Id.* For a general discussion of judicial behavioralism in early-twentieth-century commentary, see NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 114-35 (1995); and G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 171-97 (2000). Behaviorist interpretations of the Court's response to the Court-packing plan continue to appear in twenty-first-century sources. *See, e.g.*, JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT (2010) (providing a narrative history of the confrontation between President Roosevelt and the Court); *see also* Daniel Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 LEGAL ANALYSIS 69 (2010) (using econometric techniques to quantify Justice Roberts's temporary leftward shift).

II. PROBLEMS WITH THE "COURT-PACKING/CONSTITUTIONAL REVOLUTION" NARRATIVE

Problems with the narrative emerged when scholars began taking a closer look at its causal underpinnings. In order for the decision in *West Coast Hotel* to represent a "switch" in response to the introduction of the Court-packing plan, it was necessary to establish that Justice Roberts had decided to treat that case differently from *Tipaldo* after hearing of the Court-packing proposal, which was first introduced in February 1937. But internal evidence from Court papers revealed that the Justices' conference on *West Coast Hotel* had taken place on December 19, 1936, and that Justice Roberts had voted at that conference to sustain the Washington statute.[11] Moreover, although not all the Justices were present at that conference, it was known that the absent Justice, Harlan Fiske Stone, would vote to sustain the state law.[12] When Justice Stone returned to the Court in early February, he cast his vote, and Chief Justice Hughes began drafting an opinion. Once the Court-packing plan was announced, Chief Justice Hughes waited to release his opinion until late March, for he did not want to convey the impression that the Court was reacting to the plan.[13]

The stated rationale for President Roosevelt's Court-packing plan was an asserted relationship between the age of the Justices on the Court and the Court's workload.[14] In a letter to the Senate committee considering the plan, Chief Justice Hughes demonstrated that the Court was not behind in its docket, but it was clear that the Justices were tending to remain on the Court longer, sometimes into their seventies.[15] One reason for the lengthening tenure of the Justices was that the benefits for retired Justices were inadequate. Shortly after the Court-packing plan was announced, a bill to enable the Justices to retire at full pay, which the House had declined to act on in 1935, was reintroduced and passed.[16] This action made it easier for Justices Willis

11. See BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 18 (1998), which cites both an unpublished memorandum by Justice Roberts of November 9, 1945, quoted in Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311, 314-15 (1955), and JOSEPH ALSOP & TURNER CATLEDGE, THE 168 DAYS, at 140 (1938).

12. *See* CUSHMAN, *supra* note 11, at 18.

13. *See id*.

14. *See id.* at 11.

15. *See id*. at 11, 17-18.

16. *See* Act of Mar. 1, 1937, ch. 21, 50 Stat. 24 (codified as amended at 28 U.S.C. §§ 294, 375 (2006)); *see also* CUSHMAN, *supra* note 11, at 15 (describing the reintroduction and quick passage of the bill).

Van Devanter and George Sutherland, both of whom were contemplating retirement, to leave the Court. But both were reluctant to do so after the Court-packing plan was announced, out of a concern that they would be regarded as having succumbed to pressure.[17]

Thus, the causal assumptions underlying the conventional narrative of Court-packing did not hold up under close scrutiny; neither did the assumption that Justice Roberts's "switch" was a response to external events. In a memorandum published after his death, Justice Roberts provided an explanation for why he voted differently in *West Coast Hotel* and *Tipaldo*. He explained that he believed that the Court should have revisited *Adkins v. Children's Hospital* in *Tipaldo*, the District of Columbia minimum-wage case, with an eye toward overruling *Adkins*. However, the New York Attorney General argued that overruling that precedent was not necessary to sustain the New York statute, and the Court felt that taking up *Adkins* would be inappropriate.[18] Justice Roberts therefore decided to invalidate the New York statute on the basis of *Adkins* and to wait for a case where the Court was required to squarely reconsider *Adkins*. *West Coast Hotel* was that case because the Washington State statute had been passed before *Adkins* and was nearly identical to the District of Columbia statute at issue in *Tipaldo*.[19]

Although commentators have not always regarded Justice Roberts's explanation for his differing votes in *Tipaldo* and *West Coast Hotel* as legally satisfying,[20] it does establish that his "switch" had nothing to do with the introduction of the Court-packing plan. Justice Roberts had already "switched" his vote before the plan was introduced, and his switch was based on internal doctrinal reasons, whether coherent or not.[21]

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17. *See* CUSHMAN, *supra* note 11, at 20.

18. *See* Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587, 604-05 (1936) ("The petition for the writ sought review upon the ground that this case is distinguishable from [*Adkins*]. . . . This court confines itself to the ground upon which the writ was asked or granted.").

19. For a full discussion of Justice Roberts's posture in *Tipaldo*, see CUSHMAN, *supra* note 11, at 92-104.

20. Cushman summarizes a variety of the critical reactions to Justice Roberts's position in *Tipaldo*. *See id.* at 98-99.

21. As Cushman puts it,

> [t]he fact that between 1936 and 1938 Roberts might have changed his approach [on technical questions of appellate procedure] is not what scholars mean when they refer to "the Constitutional Revolution of 1937" or the "switch in time." The question is whether Roberts' vote in *Tipaldo* signified his concurrence with the *Adkins* precedent. The technical reasons offered in his memorandum . . . confirm that it did not.

Id. at 97.

The final difficulty with the Court-packing narrative is that it gives a false impression of the Court's approach to judicial review in *West Coast Hotel*. For example, Leuchtenburg states that "[m]any commentators believe that the Court . . . forever abandoned its power of judicial review" of national or state socioeconomic legislation.[22] By describing that stance as triggering a "Constitutional Revolution,"[23] Leuchtenburg appears to associate *West Coast Hotel* with rational basis review of legislation affecting "ordinary commercial transactions," where the Court presumes such legislation is constitutional.[24]

But none of the opinions in *West Coast Hotel* adopted rational basis review. Instead, the Justices treated the case as a garden-variety, early-twentieth-century case involving the police power and due process, similar to *Lochner v. New York*.[25] As Chief Justice William Howard Taft put it in his dissent in *Adkins*, the Justices in those cases "laboriously engaged in pricking out" a boundary of the police power "beyond which its exercise becomes an invasion of the guaranty of liberty under the Fifth and Fourteenth Amendments."[26] Judicial "boundary pricking" was not rational basis review; it was a posture in which the Justices, adopting the equivalent of what would later be called heightened scrutiny,[27] sought to place a case on one side of the line between an appropriate exercise of the police power and an impermissible invasion of private "liberties." Liberty-of-contract analysis was one example of that approach, and both the majority and the dissenting Justices adopted it in *West Coast Hotel*. The majority's "boundary pricking" analysis emphasized that the statute specifically referred to female workers, and it also underscored the State's power to protect the health of female employees.[28] The dissent

22. LEUCHTENBURG, *supra* note 8, at 178.

23. *Id.*

24. *Cf.* United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) ("[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests on some rational basis."). *Carolene Products* was the first decision in which the Court adopted a "presumption of constitutionality" for such legislation. For more detail, see G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1, 68-69 (2005).

25. 198 U.S. 45 (1905).

26. Adkins v. Children's Hosp., 261 U.S. 525, 562 (1923) (Taft, C.J., dissenting).

27. For more detail, see White, *supra* note 24, at 44-46, 57-59. In "boundary pricking" cases, the Court did not use the language of heightened scrutiny, assuming that it would undertake searching review of any legislation challenged on constitutional grounds. Jurisprudence involving different levels of scrutiny is a post-*Carolene Products* phenomenon. For more detail, see *id*. at 71-76.

28. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 394 (1937).

emphasized the liberty to bargain for employment services that the Court recognized in *Adkins*.[29]

III. "BOUNDARY PRICKING" IN THE *WEST COAST HOTEL* OPINIONS

Both the majority and the dissenting opinions in *West Coast Hotel Co. v. Parrish* focused their attention on "pricking" the boundary between legitimate exercises of the police power and impermissible invasions of private liberties. Chief Justice Hughes, writing for the majority, conceded that "liberty" in the Due Process Clauses had previously been interpreted as protecting "freedom of contract," but he noted that "the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people."[30] He then sketched a rationale for the statute in *West Coast Hotel*:

> What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? . . . The legislature of the State was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances.[31]

In contrast, Justice Sutherland, writing for the four dissenters, noted that "freedom of contract was the general rule and restraint the exception."[32] He elaborated that "minimum wage legislation such as that [involved in *West Coast Hotel*] does not deal with any business charged with a public interest, or with public work, or with a temporary emergency, . . . or with the protection of persons under a legal disability, or with the prevention of fraud."[33] The statute under review in *West Coast Hotel*, Justice Sutherland concluded, was "simply and exclusively, a law fixing wages for adult women who are legally as capable of contracting for themselves as men."[34] In Justice Sutherland's view, sex difference "affords no reasonable ground for making a restriction applicable to

29. *See id*. at 405-06 (Sutherland, J., dissenting).

30. *Id.* at 391 (majority opinion).

31. *Id*. at 398.

32. *Id.* at 406 (Sutherland, J., dissenting).

33. *Id.* at 407.

34. *Id.*

the wage contracts of all working women . . . . Certainly a suggestion that the bargaining ability of the average woman is not equal to that of the average man would lack substance."[35]

The passages above suggest that both the majority and dissenting Justices viewed *West Coast Hotel* as requiring the conventional balancing of liberty-of-contract interests against the power of the State to protect women against their own bargaining weaknesses; the Justices differed on where to draw the boundary line. Under this reading, *West Coast Hotel* is part of a long line of police power/due process decisions, stretching back to the *Lochner* era, where different majorities of the Court found that liberty-of-contract principles sometimes provided a basis to invalidate police power statutes and sometimes yielded to one or another of the rationales for exercising the police power. As evidence of this continuity, Chief Justice Hughes's opinion quoted one of those latter cases, *Muller v. Oregon*,[36] in which the Court concluded that an Oregon statute limiting the working hours of women was an appropriate exercise of the police power to "protect[] women against oppression despite her possession of contractual rights."[37] Thus, the methodology adopted by all the Justices in *West Coast Hotel* was that which the Court had employed in police power/due process cases for the previous three decades. In that respect, *West Coast Hotel* was neither a path-breaking nor a remarkable case.

IV. *WEST COAST HOTEL* AND CONSTITUTIONAL ADAPTIVITY

As an early-twentieth-century police power/due process case in which the Justices primarily disagreed over the location of the particular boundary between public power and private rights, *West Coast Hotel* does not merit landmark status. But there is a dimension to *West Coast Hotel* that enables it to be placed in another narrative of early-twentieth-century constitutional history, one with contemporary significance. That narrative features a clash between two opposing theories of constitutional interpretation, now typically referred to as originalism and living Constitution jurisprudence. Although those theories are conventionally thought to center on the appropriate sources of constitutional interpretation, at bottom they are about something else: the capacity of the Constitution to adapt to new conditions, or the question whether the meaning of constitutional provisions can be said to change over time.

35. *Id.* at 413.

36. 208 U.S. 412 (1908).

37. *West Coast Hotel*, 300 U.S. at 394 (majority opinion) (citing *Muller*, 208 U.S. at 422).

In the same paragraph in which he argued that the Washington Supreme Court's decision to sustain the minimum-wage statute "demands . . . a reexamination of the *Adkins* case," Chief Justice Hughes listed, among the reasons for reexamining *Adkins*, "the economic conditions which have supervened, . . . in the light of which the reasonableness of the exercise of the protective power of the State must be considered."[38] Those conditions, the Chief Justice believed, "make it not only appropriate, but we think imperative, that in deciding the present case the subject should receive fresh consideration."[39]

Chief Justice Hughes's argument about current economic conditions demanding "fresh consideration" of the statute in *West Coast Hotel* was noteworthy because the statute had been enacted in 1913. He appeared to be saying that the "reasonableness" of the exercise of Washington's police power should not simply be determined by considering conditions at the time of the statute's passage, but also of the supervening economic conditions that arose between 1913 and 1937.

Justice Sutherland pounced on this language in his dissent. He wrote: "It is urged that the question involved should now receive fresh consideration, among other reasons, because of 'the economic conditions which have supervened'; but the meaning of the Constitution does not change with the ebb and flow of economic events."[40]

Elsewhere, in advancing reasons for viewing the Washington statute as a reasonable exercise of the State's police power, Chief Justice Hughes wrote:

> There is an additional and compelling consideration which recent economic experience has brought into a strong light. . . . We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. . . . [T]here is no reason to doubt that the State of Washington has encountered the same social problem that is present elsewhere. The community is not bound to provide what is in effect a subsidy for unconscionable employers.[41]

In effect, the Chief Justice was arguing that judges could consider "the unparalleled demands for relief" that had arisen in the 1930s, even though the

38. *Id.* at 390.

39. *Id.*

40. *Id.* at 402 (Sutherland, J., dissenting).

41. *Id.* at 399 (majority opinion).

inquiry was whether the Washington statute constituted a reasonable exercise of the police power in 1913. Justice Sutherland understood Chief Justice Hughes to be suggesting "that the words of the Constitution mean today what they did not mean when written."[42] Such an effort was, in his judgment, "to rob [the Constitution] of the essential element which continues it in force,"[43] its binding character over time.

"We frequently are told," Justice Sutherland noted, "that the Constitution must be construed in the light of the present."[44] But he interpreted that statement to mean that "the Constitution is made up of living words that apply to every new condition which they include."[45] That interpretation was not the same thing as saying that the meaning of the Constitution changed with time. In taking this position, Justice Sutherland was associating himself with a traditional view of constitutional interpretation that dated back at least to the Marshall Court. The traditional view assumed that the provisions of the Constitution embodied foundational principles of governance in America that were to be reasserted over time. New cases were exercises in the application of those principles, not in the reframing of them.[46]

There were two components to the traditional view. One was that the Constitution, as a document intended to "endure" that contained provisions couched in general terms, was intended to be "adapted to the various *crises* of human affairs."[47] As Justice Sutherland explained, the Constitution's words were "living" in the sense of "apply[ing] to every new condition which they include,"[48] i.e., new cases coming out of new social contexts. But this adaptation was limited to conditions that the language of the Constitution "included." Applying constitutional provisions to new situations, Justice Sutherland thought, gave judges an opportunity to reassert the Constitution's first principles.[49] Constitutional adaptivity was an exercise in which the meaning of the Constitution was reaffirmed rather than changed.[50]

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42. *Id*. at 403 (Sutherland, J., dissenting).

43. *Id*.

44. *Id.* at 402.

45. *Id.* at 402-03.

46. That is what Chief Justice John Marshall meant when he stated that the Constitution is "a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

47. *See id*.

48. *West Coast Hotel*, 300 U.S. at 403 (Sutherland, J., dissenting).

49. That was the same attitude that Chief Justice Marshall maintained. For more detail, see G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835, at 8-9 (The

The other component of the traditional view was that judges had no authority to depart from the language of the Constitution in deciding cases. They could only decide cases in accordance with the law, including constitutional provisions. Thus it was inappropriate for a judge to "say," as Justice Sutherland put it, "that the words of the Constitution mean today what they did not mean when written," or that "they do not apply to a situation now to which they would have applied then."[51] The application of the Constitution to new cases and new situations needed to be faithful to what in today's parlance would be the "original understanding" of those provisions.

It was perhaps ironic that Justice Sutherland advanced that view of constitutional interpretation in a police power/due process case where one of the constitutional principles he applied was that of liberty of contract. As Chief Justice Hughes correctly noted in *West Coast Hotel*, "The Constitution does not speak of freedom of contract."[52] Liberty of contract was a judicial gloss on "liberty" in the Due Process Clauses.[53] Thus, *West Coast Hotel* was perhaps an odd instance for advancing a theory that the meaning of constitutional provisions does not change, since it was late-nineteenth- and early-twentieth-century judges who supplied the liberty-of-contract gloss, not the Framers of those Clauses.

Still, even if liberty of contract's status as a foundational constitutional principle was shaky, the principle at least made reference to the constitutional text. In contrast, the *West Coast Hotel* majority's references to "economic conditions which have supervened,"[54] "unparalleled demands for relief,"[55] and community "subsid[ies] for unconscionable employers"[56] appeared to be well outside what Justice Sutherland believed were the parameters of judicial interpretation of constitutional provisions. Instead, they seemed consistent with the Chief Justice's view of constitutional meaning. Discussing "liberty," Chief Justice Hughes wrote:

Oliver Wendell Holmes Devise, History of the Supreme Court of the United States, vols. 3-4, 1988).

50. For more detail on the persistence of this view in the early twentieth century, see WHITE, *supra* note 10, at 206-11.

51. *West Coast Hotel*, 300 U.S. at 403 (Sutherland, J., dissenting).

52. *Id.* at 391 (majority opinion).

53. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); *id.* amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

54. *West Coast Hotel*, 300 U.S. at 390 (majority opinion).

55. *Id.* at 399.

56. *Id.*

> [T]he Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization . . . . Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.[57]

Chief Justice Hughes's conception seemed to allow judges to explore the "connotation" of liberty in "each of its phases."[58] When subject to "regulation which is reasonable in relation to its subject and is adopted in the interests of the community," judges could explore the historical context of regulatory efforts to determine whether they were consistent with the current meaning of liberty.[59] Taking notice of supervening economic conditions and unparalleled demands for relief was an appropriate form of exploration. The reasonableness of restrictions on liberty could be gleaned from such inquiries.

Under this approach to constitutional interpretation, the meaning of "liberty" in the Due Process Clauses could change over time. When the Court decided *West Coast Hotel*, some Americans may have believed that autonomous individuals bargained for the terms of their employment, that such negotiation was an exercise of free will, and that the State had no business interfering with employment relationships. Others may have believed that employers who took advantage of their superior bargaining power were "unconscionable" and should not be subsidized by the community at large. If the "interests of the community" were relevant in police power/due process cases, judges might conclude that regulations of employment bargaining were regarded as "arbitrary" at some times and "reasonable" at others. If so, the meaning of liberty in the Due Process Clauses would turn on the shifting attitudes of legislators and their constituents.

By the time the Court decided *West Coast Hotel*, three decades of judicial pricking of the boundary between public power and private rights had resulted in a far-from-uniform understanding of the meaning of "liberty" in police power cases. However, Justice Sutherland feared that Chief Justice Hughes's argument, that the Court could examine economic data from the 1930s to determine the constitutionality of a statute passed in 1913, would open the door to contextual readings of the Constitution and thereby rob it of any finite meaning. Thus, at stake in *West Coast Hotel* was the question of what counted

57. *Id.* at 391.

58. *Id.*

59. *Id.*

in constitutional interpretation: reaffirming foundational constitutional principles or taking judicial notice of altered social and economic conditions. The Chief Justice suggested that the former approach would prevent the Constitution from adapting to new contexts; Justice Sutherland suggested that the latter approach overstepped interpretive boundaries and ran the risk of undermining the Constitution's status as a foundational document.

Neither opinion in *West Coast Hotel* used the terms "originalism" or "living Constitution" to describe their approaches to constitutional interpretation. But it is now clear how the case, along with *Home Building & Loan Ass'n v. Blaisdell*,[60] was one of the first illustrations in American constitutional history of those clashing approaches.[61] In *Blaisdell*, the Court permitted the state of Minnesota to alter the terms of mortgage agreements in light of an "economic emergency,"[62] notwithstanding traditional understandings of the Contracts Clause. Likewise, in *West Coast Hotel*, a traditional interpretation of a constitutional provision—the meaning of "liberty" in the Due Process Clauses—stood in the way of achieving some perceived social good. In both cases Chief Justice Hughes, writing for the majority, conceded that he took changing social and economic conditions into account to interpret the Constitution, and Justice Sutherland, in dissent, found that stance illegitimate.

West Coast Hotel is one of the early landmark cases of another narrative of twentieth- and twenty-first-century constitutional history, one characterized by a debate about whether the Constitution adapts to change or remains an embodiment of foundational principles. In that narrative, Chief Justice Hughes's exploration of the changing context of judicial decisionmaking represents living Constitutionalism, and Justice Sutherland's insistence that "the words of the Constitution mean today what they . . . mean[t] when written"[63] is an example of originalism. The former approach has been criticized as leading to unconstrained judicial interpretation,[64] while the latter has been accused of freezing the meaning of constitutional provisions in time.[65] Taken together, however, the opposing approaches frame the central problem

60. 290 U.S. 398 (1934).

61. For more detail on the emergence of living Constitution jurisprudence in the second decade of the twentieth century, the contrast between that view of constitutional interpretation and the traditional view, and the appearance of a living Constitution approach to constitutional adaptivity in *Blaisdell*, see WHITE, *supra* note 49, at 204-15.

62. *Blaisdell*, 290 U.S. at 422-23.

63. *West Coast Hotel*, 300 U.S. at 403 (Sutherland, J., dissenting).

64. *See, e.g.*, Diarmuid F. O'Scannlain, *Today's Senate Confirmation Battles and the Role of the Federal Judiciary*, 27 HARV. J.L. & PUB. POL'Y 169, 179 (2003).

65. *See, e.g.*, Robert W. Gordon, *The Struggle over the Past*, 44 CLEV. ST. L. REV. 123, 132 (1996).

of constitutional interpretation in America: how judges can preserve the vitality of an authoritative document whose provisions were mostly drafted in the eighteenth and nineteenth centuries.

CONCLUSION

Ultimately, the narrative in which *West Coast Hotel* prominently figures is about the meaning of constitutional adaptivity. Why should the placement of *West Coast Hotel* in that particular narrative matter? One reason is simply to set the historical record straight by clearing away an erroneous and potentially distracting perception of the case's significance in twentieth-century American constitutional history. But there is another, arguably more compelling reason.

Adapting the Constitution's provisions to new cases—the products of new circumstances—remains a central task of the Court. In addition, the Constitution remains a document whose provisions have primarily been drafted and ratified in epochs in the relatively distant past. So the fashioning of an interpretive theory that best satisfies the conception of an "enduring" Constitution that "adapts" itself to the "various *crises* of human affairs" would seem to be at the heart of constitutional adjudication. Originalism and living Constitution jurisprudence represent competing contemporary efforts to fashion such a theory, and *West Coast Hotel* represents the sort of case that can throw those theories into sharp relief. That it is how *West Coast Hotel* should best be understood.

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