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INTRODUCTION: FIDELITY, ECONOMIC LIBERTY, AND 1937*

In 1937 and the years immediately following, the Supreme Court profoundly and permanently transformed constitutional jurisprudence. In several decisions, the Court demonstrated that it was no longer willing to interpret the Due Process Clause of the Fourteenth Amendment to prevent governmental regulation of economic activities. By doing so, the Court switched from its earlier view, under which it vigorously protected economic liberties from state interference, and signaled it would uphold the government's regulation of economic liberties if it passed a relaxed—some would argue perfunctory—standard of review.

The decisions of 1937 did not signal the death of “substantive due process” as a doctrine that the Court would use to invalidate police power regulations. To the contrary, on numerous occasions subsequent to 1937, the Court invalidated legislation that interfered with noneconomic, personal liberties on notions of “substantive due process” or its derivative. Indeed, although *West Coast Hotel Co. v. Parrish*¹ memorialized the Court's disenchantment with using the Fourteenth Amendment to strike down legislation interfering with economic liberties, the Court signaled that it would treat personal liberties differently just one year later. Writing for the majority in *United States v. Carolene Products Co.*,² Justice Stone confirmed that “regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests on some rational basis”³ In the most famous footnote to be found in the U.S. Reports, Justice Stone laid the foundation for the Court's use of the Fourteenth Amendment to invalidate legislation impinging upon fundamental constitutional values.

Accordingly, since the 1937 transformation, the Court has used the doctrine of “substantive due process” or its derivative to protect

* This Symposium is the product of a conference held on February 27, 1999, at the William and Mary School of Law in Williamsburg, Virginia.

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

2. 304 U.S. 144 (1938).

3. *Id.* at 152.

personal liberties, while offering little protection to economic liberties. The central issue raised in this symposium on *Fidelity, Economic Liberty, and 1937* is whether this distinction between economic liberties and personal liberties—that the Due Process Clause protects one and not the other—is faithful to the Constitution.

A comprehensive study of this question gives rise to a host of concomitant issues. For instance, does the Court's jurisprudence distinguishing economic from noneconomic liberties allow the individual Justices to choose arbitrarily which rights are worthy of protection and which are not? What is meant by "fidelity" to the Constitution? If fidelity is our guiding principle, through what interpretive lens should constitutional provisions be viewed? Can Professor Lessig's translation theory justify the Court's searching review of the regulations of personal liberties? Does Professor Ackerman's theory of constitutional moments better explain the bifurcated treatment of liberties? Is fidelity assured only by examination of the Constitution's text, structure, and history, and if so, are conventional views of these sources myopic? What are we to make of so-called *Lochner*-Era jurisprudence, and what prompted the transformation of 1937, if indeed there was one?

The Institute of Bill of Rights Law and the *William and Mary Law Review* invited several prominent scholars to discuss these and related issues.⁴ The works that follow advance the conversation about fidelity and economic liberty, and call on all sides to defend their accounts of this intriguing and pivotal jurisprudential dilemma.

Eds.

4. Professor Lawrence Lessig attended the conference and contributed to the discussion, but was unable to contribute to this Symposium.