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ARTICLES

SWITCHING TIME AND OTHER THOUGHT EXPERIMENTS: THE HUGHES COURT AND CONSTITUTIONAL TRANSFORMATION

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THOUGHT EXPERIMENT I: SWITCHING THE TIME OF THE COURT-PACKING BATTLE

For the most part, the Supreme Court's decisions in 1932 and 1933 disappointed liberals. The two swing Justices, Chief Justice Charles Evans Hughes and Justice Owen J. Roberts, seemed to have sided more with the Court's four conservatives than with its three liberals. Between early 1934 and early 1935, however, the Court issued three thunderbolt decisions, all by five-to-four votes on the liberal side and with either Hughes or Roberts writing for the majority over the dissent of the conservative foursome: in January 1934, *Home Building & Loan Ass'n v. Blaisdell*¹ severely limited the extent to which the Contracts Clause of Article I,

¹ 290 U.S. 398 (1934) (holding that a state statute extending the redemption period for mortgaged property in limited circumstances did not violate the Contracts Clause). For a discussion of *Blaisdell*, see *infra* part I.D.1.

Section 10 of the Constitution forbids state debtor protection legislation; in March, *Nebbia v. New York*² stated in expansive terms the power of the state to regulate prices and in narrow terms the restraint imposed on the states by substantive due process; and in February 1935, the *Gold Clause Cases* refused to allow preexisting contractual provisions to obstruct the New Deal's daring changes in monetary policy.³

Suppose that shortly before the *Blaisdell* decision—rather than in 1937—President Franklin Roosevelt unveiled a plan to pack the Court with six additional members, and that the debate over the plan lasted until after the *Gold Clause* decisions. Would it not have been obvious that the votes of Hughes and Roberts in these three cases resulted from the political pressure created by the plan and, with respect to the *Gold Clause Cases*, by the thumping Democratic victory in the 1934 elections?

INTRODUCTION

If, as Lincoln said, "we cannot escape history,"⁴ then we certainly cannot escape the 1930s. Despite occasional expressions of impatience,⁵ scholars of the American Constitution continue to be intrigued by, and to study with great energy, the events that culminated in the so-called "switch in time" of 1937.⁶ And with

² 291 U.S. 502 (1934) (holding constitutional a regulation fixing milk prices). For a discussion of *Nebbia*, see *infra* part I.D.2.

³ The *Gold Clause Cases* comprise a set of four decisions: *Norman v. Baltimore & O.R.R. and United States v. Bankers Trust Co.*, 294 U.S. 240 (1935); *Nortz v. United States*, 294 U.S. 317 (1935); and *Perry v. United States*, 294 U.S. 330 (1935). The *Gold Clause Cases* are discussed *infra* part I.D.3.

⁴ Abraham Lincoln, Annual Message to Congress (Dec. 1, 1862), in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 666, 688 (Roy P. Baster ed., 1946) (emphasis omitted). I am twisting somewhat. Lincoln was looking prospectively: "We of this Congress and this administration, will be remembered in spite of ourselves." *Id.* I am looking retrospectively.

⁵ See, e.g., John H. Schlegel, *The Line Between History and Casenote*, 22 LAW & SOC'Y REV. 969, 975 (1988) ("[T]he print spilled on Justice Roberts's 'switch in time,' a matter of great import to frankfurterians, has . . . needlessly polluted our rivers and streams.").

⁶ See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 48-50 (1991) (comparing "switch[es] in time" occurring as conservative responses to Reconstruction Republicans with those occurring in reaction to New Deal Democrats); Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 649-51 (1994) (arguing, inter alia, that Roberts's account of his conduct in the 1937 cases is not persuasive); Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 204-08 (1994) [hereinafter Cushman, *New Deal Court*] (arguing against the view that constitutional developments of the 1930s should be regarded as a response to political pressures, and emphasizing the legal-intellectual dimensions of the

good reason. The climactic events of 1937, including Franklin Roosevelt's attempt to pack the Supreme Court, were part of one of the great constitutional crises in our history.

Moreover, the crisis accompanied one of the great transformations in constitutional law, a transformation that is commonly referred to by such terms as the "constitutional revolution of 1937."⁷ The old constitutionalism that prevailed when Charles Evans Hughes became Chief Justice in 1930 and that underlay the crisis provides an abiding reminder of the darker side of an activist Supreme Court—the danger that the Court, by invoking its view of the Constitution to invalidate legislation, might thwart the fundamental processes of democracy. By the time Hughes retired in 1941, the framework of constitutional law that has prevailed in the last half century had emerged. The famous footnote four of Justice Stone's 1938 opinion in *United States v. Carolene Products Co.*⁸ was one of the first attempts to articulate that framework, which is

phenomenon); Barry Cushman, *A Stream of Legal Consciousness: The Current of Commerce Doctrine From Swift to Jones & Laughlin*, 61 *FORDHAM L. REV.* 105, 106 (1992) [hereinafter Cushman, *Stream of Legal Consciousness*] (discussing the idea that the shift in Commerce Clause jurisprudence occurred principally in 1941-42, not 1937).

⁷ Morton J. Horwitz provides a significant example:

[T]he only constitutional revolution prior to the Warren Court was the New Deal Revolution of 1937, which fundamentally altered the relationship between the federal government and the states and between the government and the economy. Prior to 1937, there had been great continuity in American constitutional history. The first sharp break occurred in 1937 with the New Deal Court.

Morton J. Horwitz, *The Warren Court and the Pursuit of Justice*, 50 *WASH. & LEE L. REV.* 5, 5 (1993); see also EDWARD S. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 223-24 (1978) (discussing the "Constitutional Revolution of 1937"); ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 174-79 (1960) (discussing the "1937 judicial revolution"); J.M. Balkin, *The Footnote*, 83 *NW. U. L. REV.* 275, 296 (1989) (same); William W. Justice, *The Two Faces of Judicial Activism* 61 *GEO. WASH. L. REV.* 1, 5 (1992) ("Posterity, for the most part, has endorsed the constitutional revolution of 1937 . . ."); Michael E. Smith, *The Special Place of Religion in the Constitution*, 1983 *SUP. CT. REV.* 83, 86 (noting that "[r]eligion had no special constitutional place until after the constitutional revolution of 1937"). But see David E. Engdahl, *What's In a Name? The Constitutionality of Multiple "Supreme" Courts*, 66 *IND. L.J.* 457, 510 n.250 (1991) ("I was amused by the title of a 1987 AALS seminar panel, 'Was the Revolution of 1937 a Mistake?' I should rather have asked, was the 'revolution' of 1937 a fact? It was not, as the 'revolution' came slowly by slips of reason over the years that followed.").

⁸ 304 U.S. 144, 152 n.4 (1938) (suggesting, notwithstanding a general presumption of constitutionality of legislation, "more exacting judicial scrutiny" of certain types of legislation, such as that restricting political processes or reflecting "prejudice against discrete and insular minorities").

tolerant of economic and social regulation yet is generally more protective than the old constitutionalism of the less powerful segments of society.

Although the issues raised by the constitutional history of the 1930s are vast, one narrow riddle lies at their heart and is the focus of this Article: Why did the Supreme Court achieve the constitutional transformation, and so quickly? My conclusions are as follows.

The predominant factor in explaining the constitutional transformation is changes in the Court's personnel. Although the "Nine Old Men" of the mid-1930s are often remembered as the paradigm of a conservative Court,⁹ the Court of the 1920s was actually far more conservative. In Part I of this Article, I will argue that the Court was made substantially more liberal by Herbert Hoover's two appointments of 1930—Hughes to replace William Howard Taft and Roberts to replace Edward T. Sanford. These appointments created the ideological alignment that prevailed until after the Court-packing crisis of 1937. Under that alignment, I contend in Part I, the Court achieved significant aspects of the constitutional transformation well before the crisis. This Part will pay more attention than do most accounts to decisions of the early 1930s.

After the crisis had passed, a steady stream of Roosevelt appointees made the Court far more liberal, and thus helped achieve some significant aspects of the transformation that, I argue in Part III, would not have occurred with the pre-1937 Court.

Personnel changes cannot, however, account for the great decisions of the spring of 1937, which played a critical role in defeating Roosevelt's attempt to pack the Court. At the height of the Court-packing battle, the Court, by identical five-to-four votes, upheld a state minimum wage law, the National Labor Relations Act (NLRA), and the Social Security Act. Each of these decisions pointed hard in the opposite direction from—and, with respect to the first two, seemed in conflict with—decisions made by the Court, with the same membership, only the previous year. The critical

⁹ See, e.g., Douglas Laycock, *Constitutional Theory Matters*, 65 TEX. L. REV. 767, 770 (1987) (comparing constitutional theory of the civil libertarians of the Warren Court with that of the Nine Old Men); Barbara B. Woodhouse, "Who Owns the Child?": *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1107 (1992) (saying that the Court's invalidation of Roosevelt's programs turned public opinion "against the 'Nine Old Men' and their conservative vision of the Constitution").

votes in creating the shift belonged to the two Justices in the middle—Roberts and, to a lesser extent, Hughes. In Part II, therefore, I focus on the great decisions of 1936 and 1937, and in particular on the roles of Roberts and Hughes. To what extent was their conduct in 1936 and 1937 substantively consistent? To the extent it was not, did they have a conscientious, albeit well-timed, change of view? If they did, to what extent was it affected by the political environment? Or did they simply alter their votes in a manipulative response to political pressure? Or does some other explanation account for their conduct?

I believe I can demonstrate, to quite a high degree of confidence, that Hughes's votes were not affected by political pressure. Hughes, I believe, voted in 1937 as he would have absent the Court-packing battle, Roosevelt's landslide reelection victory of November 1936, or public hostility to the Court's earlier conservative decisions.

As to Roberts, one cannot be as confident. His 1937 votes in the minimum wage and *Social Security* cases were consistent with, though not absolutely preordained by, views he had expressed before. His votes in the NLRA cases of 1937 are hard to square logically with his vote the prior year in *Carter v. Carter Coal Co.*,¹⁰ but Roberts's views on the scope of national powers seem to have been in transition even before the Court-packing crisis. The evidence does not support the view that Roberts's votes were affected by the Court-packing battle itself. The changing political environment may, however, have had an impact on Roberts's willingness to confront the minimum wage issue and on his substantive views on the scope of congressional power. It is difficult to be sure, however; Roberts was sometimes motivated by reasoning of his own, and his mercurial nature may be a sufficient explanation of his conduct.

The point probably transcends Roberts. Even after trying to understand a judge's conduct across cases as best we can, some judicial movement will likely appear to us to be a random walk. To some extent, this may be because judges are affected by factors of the "what the judge ate for breakfast" type that rationally should have nothing to do with decision-making.¹¹ But to some extent, if

¹⁰ 298 U.S. 238 (1936); see *infra* part II.C.2 (discussing Roberts's conduct in *Carter Coal* and the NLRA cases).

¹¹ The origins of this aphorism are uncertain, but it seems to have emerged from the era of the Hughes Court. See Joseph L. Rauh, Jr., *Lawyers and the Legislation of the Early New Deal*, 96 HARV. L. REV. 947, 950 (1983) (attributing similar remarks to

the judge's mind is at all complex, his jurisprudential framework has aspects that are difficult to detect from the outside; the judge may be acting perfectly rationally within that framework even though we do not understand it and cannot explain it. The consequence of this argument may appear ironic: if we should expect a certain amount of (apparently) random behavior as a matter of course, then we need not resort in the first instance to a political explanation for such behavior.

One other factor, intangible and inestimable, must be considered in accounting for the constitutional transformation of the 1930s: the passage of time, with the accompanying accumulation of cases. The Court expanded the perimeters of congressional power over commerce step by step. Even liberal Justices took a far more cautious view of that power in 1935 than they did in 1941. If the 1941 Court saw further, that might have been because it was standing on the shoulders of decisions made in 1937 and intervening years.¹²

In short, the picture I will present in this Article is of a less sudden, discontinuous shift, and one less affected by immediate political factors, than may be connoted by the phrase "constitutional revolution of 1937." Some liberal outcomes were possible even in the 1920s, became far more probable after 1930, and virtually inevitable by 1941;¹³ other liberal outcomes that could scarcely be

Thomas Reed Powell in his constitutional law classes of the era); Charles M. Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231, 236 & n.16 (1990) (searching for origins of the expression and emphasizing its reductionist use by opponents of the Legal Realists). Remarkably, when Merlo Pusey asked Roberts himself to account for his conduct in the minimum wage cases, Roberts's "initial, semifacetious reply," as Pusey characterized it, was: "Who knows what causes a judge to decide as he does? Maybe the breakfast he had has something to do with it." Merlo J. Pusey, *Justice Roberts' 1937 Turnaround*, 1983 Y.B. SUP. CT. HIST. SOC'Y 102, 106.

¹² See generally ROBERT K. MERTON, *ON THE SHOULDERS OF GIANTS* (1965) (tracing the history of the celebrated remark attributed to Newton: "If I have seen farther, it is by standing on the shoulders of giants.").

¹³ This is the pattern of the cases involving the constitutionality of price regulation. For example, *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389 (1914), a price regulation case decided in favor of the state, was closely confined, but not overruled, by *Tyson & Brother v. Banton*, 273 U.S. 418, 434 (1927). See *infra* note 40 (discussing *German Alliance* and *Tyson & Brother*). Shortly after Hughes and Roberts joined the Court, *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251 (1931), discussed *infra* text accompanying notes 39-44, expanded the pricing power further along the *German Alliance* line, and *Nebbia v. New York*, discussed *infra* part I.D.2, expanded that power much further yet. Both *O'Gorman* and *Nebbia* were five-to-four decisions. Shortly before Hughes left the Court, *Olsen v. Nebraska*, 313 U.S.

imagined in 1930 became achievable by the early 1940s.¹⁴ The shift may have been incremental, a repeated altering of probabilities, but it was both rapid and momentous.

I. PRELUDE TO CRISIS

A. *The New Court*

In the spring of 1930, Felix Frankfurter summarized the prior decade of constitutional adjudication:

Since 1920, the Court has invalidated more legislation than in fifty years preceding. Views that were antiquated twenty-five years ago have been resurrected in decisions nullifying minimum-wage laws for women in industry,¹⁵ a standard-weight-bread law to protect buyers from short weights and honest bakers from unfair competition,¹⁶ a law fixing the resale price of theater tickets by ticket scalpers in New York,¹⁷ laws controlling exploitation of the unemployed by employment agencies¹⁸ and many tax laws.¹⁹ . . .

236 (1941), discussed *infra* notes 415, 421, relied on *Nebbia* in unanimously reversing one of the restrictive Taft era decisions on price regulation. I will not try to define "liberal" for purposes of this Article, other than to say that if an outcome seems in accord with the outlook of *Carolene Products* and its footnote four—or if it is favored by Brandeis, Stone or Cardozo, and opposed by McReynolds—it is liberal.

¹⁴ I have in mind particularly the results in *United States v. Darby*, 312 U.S. 100 (1941), discussed *infra* text accompanying notes 384-88, 394, 423, 433, 444-46, and *Wickard v. Filburn*, 317 U.S. 111 (1942), discussed *infra* text accompanying notes 395, 445-46.

¹⁵ See *Adkins v. Children's Hospital*, 261 U.S. 525, 562 (1923) (holding such a statute to be an unconstitutional interference with liberty of contract).

¹⁶ See *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 517 (1924) (holding such a statute to violate the Fourteenth Amendment because it was neither necessary nor effective in protecting buyers against fraud by short weights).

¹⁷ See *Tyson & Brother v. Banton*, 273 U.S. 418, 429 (1927) (holding that such a law contravened the Fourteenth Amendment because entertainments were not "clothed with a public interest," notwithstanding that an admission fee was charged).

¹⁸ See *Ribnik v. McBride*, 277 U.S. 350, 357 (1928) (holding unconstitutional statutory regulation of an employment agency's fees).

¹⁹ See, e.g., *Farmers Loan & Trust Co. v. Minnesota*, 280 U.S. 204, 210 (1930) (ruling that a state tax on a testamentary transfer by a nondomiciliary of bonds issued by the state and its municipalities, but not kept within the state's jurisdiction, violated the Fourteenth Amendment); *New Jersey Bell Tel. Co. v. State Bd. of Taxes & Assessments*, 280 U.S. 338, 349 (1930) (holding violative of Commerce Clause a tax deemed to be in part on gross receipts from interstate commerce); *Safe Deposit & Trust Co. v. Virginia*, 280 U.S. 83, 93 (1929) (holding that when a Virginian domiciliary transferred securities in revocable trust to a bank in Maryland where they were held for the benefit of his minor sons, also Virginian domiciliaries, the securities were beyond the jurisdiction of Virginia and could not be taxed by it consistently with the Fourteenth Amendment); *infra* note 57 (discussing *Quaker City Cab Co. v.*

Merely as a matter of arithmetic, this is an impressive mortality rate.²⁰

Even as Frankfurter wrote, however, the Court was undergoing a great change. One involved the departure of the Chief Justice who had presided over this carnage since 1921, William Howard Taft. Although in his first years on the Court Taft showed some signs of the progressivism that had marked his early political career,²¹ by 1929 he was not only very conservative but, it appears, somewhat paranoid. Although aware of his illness and declining powers, he was determined to "stay on the Court in order to prevent the Bolsheviki from getting control."²² At times he expressed more hope: "We have a dissenting minority of three in the Court. I think we can hold our six to steady the Court."²³ The difficulty, though, was that Taft feared the man in the White House and believed new appointments would more likely strengthen the progressive dissenters than the majority: "The truth is . . . that Hoover is a Progressive just as Stone is, and just as Brandeis is and just as Holmes is. . . . My feeling with respect to the Court is that if a number of us die, Hoover would put in some rather extreme destroyers of the Constitution."²⁴ And so it was essential that the members of the prevailing bloc remain on the Court as long as possible. In September 1929, he wrote Justice Pierce Butler:

With Van and Mac and Sutherland and you and Sanford, there will be five to steady the boat, and while the appointment of Stone to be Chief Justice would give a great advantage to the minority, there would be a good deal of difficulty in working through reversals of present positions, even if I either had to retire or were gathered to my fathers, so that we must not give up at once.²⁵

On February 3, 1930, near death, Taft did have to retire.²⁶

Pennsylvania, 277 U.S. 389 (1928)).

²⁰ ALPHEUS T. MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 292-93 (1965) (quoting Felix Frankfurter, *The United States Supreme Court Molding the Constitution*, CURRENT HIST., May 1930, at 239) (internal quotation marks omitted) (footnotes added).

²¹ See, for example, his dissent in *Adkins v. Children's Hospital*, 261 U.S. 525, 562 (1923).

²² 2 HENRY F. PRINGLE, THE LIFE AND TIMES OF WILLIAM HOWARD TAFT 967 (1939) (quoting letter from Taft).

²³ MASON, *supra* note 20, at 294 (quoting letter from Taft).

²⁴ *Id.* at 295.

²⁵ *Id.* at 296-97.

²⁶ Actually, to be perfectly accurate, he had to resign. The difference is significant: not until 1937 were Justices given the privilege of retiring and retaining

And barely a month later, on March 8, the same day that Taft was gathered to both his fathers and mothers, Justice Sanford—usually, though not always, a member of Taft's majority²⁷—died as well. Thus, suddenly, Taft's fears had been realized because only four boat steadiers remained: Willis Van Devanter, James C. McReynolds, George Sutherland, and Pierce Butler. The ranks of the progressives on the Court—Louis D. Brandeis, Harlan F. Stone, and the aged Oliver Wendell Holmes, Jr.—had not been depleted at all. The conservatives still had the upper hand, but how strong that was depended on whom Herbert Hoover nominated to replace Taft and Sanford.

*THOUGHT EXPERIMENT II: SWITCHING THE TIME OF THE EARLY
PERSONNEL CHANGES*

Suppose that both Taft and Sanford had lived and remained on the Court five years longer, not departing until the spring of 1935, when Taft was seventy-seven and Sanford not quite seventy. Would their continued presence on the Court have made a substantial difference?

This thought experiment is rather easy to resolve, and in the affirmative. The departure of Taft and Sanford, and their replacement by President Hoover's two appointees, made constitutional law substantially more liberal—and well before 1937.

For the Chief Justiceship, Hoover nominated Charles Evans Hughes, former Governor of New York, Associate Justice of the Supreme Court, and Secretary of State, nearly successful Republican presidential candidate in 1916, and one of the leading lawyers of the era. Hughes had been a fighting progressive governor and a notably progressive Associate Justice.²⁸ But to progressive Senators irate over the Court's recent record, Hughes's roster of corporate clients seemed to be a sure sign that he would continue in Taft's path. The nomination encountered a surprising degree of resistance before being approved, by a fifty-two to twenty-six vote, on February 13.

their salaries, and the consequent financial pressure kept Justice Van Devanter on the Court longer than he would otherwise have been. Van Devanter's retirement in 1937 greatly contributed to the defeat of Roosevelt's Court-packing plan. See *infra* text preceding note 411. An earlier retirement might have averted the crisis altogether.

²⁷ Of the cases mentioned *supra* notes 15-19, to which Frankfurter referred in his 1930 article, Sanford dissented in *Adkins* (as did Taft) and *Tyson*, but he (as well as Taft) formed part of the majority in *Jay Burns*, *Ribnik*, and all of the tax cases.

²⁸ See Note, *Governor on the Bench: Charles Evans Hughes as Associate Justice*, 89 HARV. L. REV. 961, 996-97 (1976) (noting Hughes's progressiveness as governor and as Justice).

Hughes took the Court's center seat on February 24.

To replace Sanford, Hoover first nominated Judge John J. Parker of North Carolina, but this time progressive opposition prevailed, fanned by the perception that Parker was antilabor and antiblack. The nomination was defeated on May 7 by a forty-one to thirty-nine vote. Hoover's next nominee, Owen J. Roberts of Pennsylvania, the former Teapot Dome prosecutor, was perceived—incorrectly, it now appears²⁹—as more progressive than Parker. Roberts sailed through the Senate to a unanimous confirmation on May 20, and he took his seat on June 2, the last day of the Court's Term.

After the accession of Roberts, there was only one change in the Court's personnel before the climactic cases of 1937, and it did not significantly alter the ideological composition of the Court: In January 1932, nearing his ninety-first birthday, Justice Holmes resigned, and in March he was replaced by Benjamin N. Cardozo, who like Holmes voted consistently with Brandeis and Stone in closely divided cases.

Thus, the ideological lineup for the critical years was set by the appointments of 1930. The bloc of four on the right—the so-called Four Horsemen—confronted a bloc of three on the left. To prevail in an ideologically charged case, the conservatives needed one of the two votes of the newest Justices, but they did not need both.

Hughes's impact became apparent immediately, even before Roberts joined the Court. In two controversial state tax cases he joined the Four Horsemen against the liberals,³⁰ demonstrating a

²⁹ See Richard D. Friedman, *Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations*, 95 YALE L.J. 1283, 1311-13 (1986) (arguing that Parker was generally more reliably liberal than Roberts, and that the Court-packing crisis might have been averted had Parker been confirmed).

³⁰ See *Baldwin v. Missouri*, 281 U.S. 586, 594 (1930) (holding violative of the Fourteenth Amendment a Missouri tax on testamentary transfers by an Illinois resident to her son, also an Illinois resident, of cash deposits, promissory notes, and federal bonds physically located in Missouri); *Missouri ex rel. Mo. Ins. Co. v. Gehner*, 281 U.S. 313, 322 (1930) (Hughes concurring separately, on the basis that the case was governed by a recent precedent, in a decision holding unconstitutional a state tax on net worth of insurance companies that allowed a deduction for legal reserves, but reduced the deduction to take into account ownership of United States bonds). Holmes's dissent in *Baldwin* included this well known statement:

I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable.

conservatism concerning the proper subjects of taxation that—though it began to ease substantially, well before the events of 1936 and 1937³¹—continued throughout his tenure.³² But in probably the most significant case of the Term, *Texas & New Orleans Railroad v. Brotherhood of Railway and Steamship Clerks*,³³ Hughes wrote for the Court upholding the Railway Labor Act. Rather surprisingly, the Court was unanimous, an outcome perhaps aided by a honeymoon effect and almost certainly by the fact that McReynolds did not participate in the decision.

The Act, by according railroad employees the right to organize, seemed to fly in the face of precedents guaranteeing employers a constitutional right to demand “yellow dog” contracts from their workers, which barred the employees as a condition of employment from joining unions. As an Associate Justice, Hughes had dissented from one of these cases,³⁴ decided under the freedom of contract doctrine, and later he joined in overruling them.³⁵ But for now he simply slipped them. The Act did not interfere with the right to discharge employees, he insisted, but rather prohibited “the interference with the right of employees to have representatives of their own choosing.”³⁶ Noted a conservative commentator: “This is hardly an adequate answer to the carrier’s argument. It is difficult

281 U.S. at 595 (Holmes, J., dissenting).

³¹ See *Wheeling Steel Corp. v. Fox*, 298 U.S. 193, 205, 213-16 (1936) (upholding a state tax on intangible property owned by a corporation that conducted its affairs principally in the taxing state, notwithstanding that the corporation was incorporated elsewhere); *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932), discussed *infra* note 100 and accompanying text; *Educational Films Corp. v. Ward*, 282 U.S. 379 (1931), discussed *infra* notes 50-51 and accompanying text.

³² See, e.g., *McGoldrick v. Berwind-White Coal Mining*, 309 U.S. 33, 54 (1940) (dissenting from approval of use tax collected by state from retailers on mail order business they conducted across state lines); *Graves v. Elliott*, 307 U.S. 383, 387 (1939) (dissenting from holding that New York could constitutionally tax the relinquishment at death by a New York domiciliary of a power to revoke a trust in intangibles held by a Colorado trustee); *Newark Fire Ins. Co. v. State Bd. of Tax Appeals*, 307 U.S. 313, 319-21 (1939) (all the Justices but McReynolds deciding against a taxpayer corporation with Hughes joining the conservative wing of the majority in applying, rather than casting aside, the “business situs” doctrine).

³³ 281 U.S. 548 (1930). For an extended discussion of this case, substantially in accord with the conclusions stated here, see Barry Cushman, *Doctrinal Synergies and Liberal Dilemmas: The Case of the Yellow Dog Contract*, 1992 SUP. CT. REV. 261-68.

³⁴ See *Coppage v. Kansas*, 236 U.S. 1 (1915); see also *Adair v. United States*, 208 U.S. 161, 172 (1908) (holding that Congress could not ban yellow dog contracts).

³⁵ See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 186-87 (1941) (upholding a provision of the NLRA banning yellow dog contracts); see also *infra* note 355 (discussing *Texas & New Orleans Railroad*).

³⁶ *Texas & N.O. R.R.*, 281 U.S. at 571.

to see how [the statute] can be regarded as other than an interference with the employer's freedom to hire and fire."³⁷ Hughes's statement, indeed, was a totally hollow one, but it was significant because of its unstated premise that employees had rights that took precedence against contractual ones. Therefore, in Hughes's view, the employer had no complaint against a law preventing him from reaching an unjust contractual result. The decision was rightfully characterized as "a very considerable extension of the constitutional boundaries within which social legislation has heretofore been confined."³⁸

B. *The 1930 Term*

With both Hughes and Roberts on the Court for the full 1930 Term, the Court's new orientation—delicately balanced between the conservative and liberal blocs, but decidedly more liberal than the earlier Court—became readily apparent. A summary statistic gives some idea of the Court's stance. Seven times during the Term the Court decided cases so charged ideologically that the four conservative lined up against the three liberals. In four of those cases, the liberals prevailed, having won the support of both Hughes and Roberts. Highlights of this first full Term of the Hughes Court are worth reviewing in some detail, for the Court set a basic pattern that would continue until its membership changed substantially once again: some liberal victories, including some very significant ones, that would have been impossible with the old Court, and some defeats that would have been inevitable. In the 1930 Term, that pattern was manifest in three key constitutional areas—regulation, taxation, and civil liberties.

³⁷ Edward Berman, *The Supreme Court Interprets the Railway Labor Act*, 20 AM. ECON. REV. 619, 631 (1930).

³⁸ *Id.* at 639. Another immediate impact of Hughes's accession as Chief Justice was the virtual cessation of grants of certiorari in Federal Employers' Liability cases. See Felix Frankfurter & James M. Landis, *The Business of the Supreme Court at October Term, 1929*, 44 HARV. L. REV. 1, 14-15 (1930) (noting that certiorari had not been granted in a single petition after Hughes took office as Chief Justice). Such grants, which had been a significant source of the Court's business, were almost always on the petition of the employer rather than of the employee. See Felix Frankfurter & James M. Landis, *The Business of the Supreme Court at October Term, 1928*, 43 HARV. L. REV. 33, 51-53 & n.40 (1929).

1. Regulation

The most important regulatory case of the Term was *O'Gorman & Young, Inc. v. Hartford Fire Insurance Co.*,³⁹ which signaled the new Court's attitude with respect to the constitutional validity of price regulation. In the teeth of many cases invalidating price regulation in various industries, New Jersey had regulated the commissions paid by fire insurers to their agents. A challenge to this regulation was argued before the Court in April 1930 but then held over for reargument in the new Term, presumably because the Justices were equally divided. Roberts now provided the critical fifth vote for the liberals. Writing for the majority, Brandeis concluded that the business of insurance brokerage was "so far affected with a public interest," and the agents' commissions so closely related to the rates paid by insureds, that the regulation was valid.⁴⁰ Brandeis found support for his argument in the fact that agents' commissions for life insurance had long been subject to legislative limitation—and he cited in particular New York legislation drafted by Hughes a quarter century earlier.⁴¹ Quoting one of the keystone opinions of the Taft Court, the decision in *Adkins v. Children's Hospital*⁴² invalidating a statute that provided minimum wages for women, the four dissenters proclaimed that "[f]reedom of contract is . . . the general rule and restraint the exception."⁴³ The majority, however, ignored *Adkins* and this supposed rule, instead relying on the "presumption of constitutionality" favoring legislation in general.⁴⁴

³⁹ 282 U.S. 251 (1931).

⁴⁰ *Id.* at 257. The four conservative dissenters, in a joint opinion, conceded that under *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389 (1914), a state might set the rates for fire insurance policies themselves. See *O'Gorman*, 282 U.S. at 266. But, they pointed out, the Court had declared that *German Alliance* "marks the extreme limit to which this court thus far has gone in sustaining price-fixing legislation." *Id.* (quoting *Tyson & Brother v. Banton*, 273 U.S. 418, 434 (1927)). The public's interest, they said, was with insurance rates; it had "no direct, immediate interest" in agency commissions, any more than in any other expense that an insurer might incur. *Id.* at 267.

⁴¹ See 282 U.S. at 257 & n.2. For Hughes's role in drafting New York's life insurance legislation, see, for example, Mark J. Roe, *Foundations of Corporate Finance: The 1906 Pacification of the Insurance Industry*, 93 COLUM. L. REV. 639, 657, 661-63 (1993).

⁴² 261 U.S. 525 (1923).

⁴³ *O'Gorman*, 282 U.S. at 267 (quoting *Adkins*, 261 U.S. at 545).

⁴⁴ *Id.* at 257-58.

The same day *O'Gorman* was decided, however, Roberts provided the fifth vote for the conservatives in another case held over from the prior Term, *United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad*.⁴⁵ There, using the narrow conception of Congress's commerce power expressed in *United States v. E.C. Knight Co.*,⁴⁶ the Court held a contract between the stockholders and reorganization managers of an insolvent railroad to be beyond the reach of the Interstate Commerce Commission.⁴⁷ And later in the Term, Hughes again delivered a regulatory decision that, like his Railway Labor Act opinion the prior year, was surprising in its unanimity—but this time on the conservative side of the line. *Smith v. Cahoon*⁴⁸ virtually dismantled Florida's very detailed system for regulating all motor vehicles for hire. Hughes objected in particular that the state had essentially demanded that private carriers constitute themselves as common carriers.⁴⁹

2. Taxation

In contrast to the previous Term, the Court began to introduce some flexibility into the doctrine of intergovernmental tax immunity. In *Educational Films Corp. of America v. Ward*,⁵⁰ over the dissent of all four conservatives, the Court virtually nullified recent holdings by the Taft Court.⁵¹ In response, Thomas Reed Powell of Harvard Law School wrote *An Imaginary Judicial Opinion*,⁵² satirizing the Court's unwillingness to acknowledge its about-face.⁵³

⁴⁵ 282 U.S. 311 (1931). Hughes did not participate in this case, which pitted John Lord O'Brian, for the government, against John W. Davis. *See id.* at 331.

⁴⁶ 156 U.S. 1 (1895).

⁴⁷ *See Chicago, M., St. P. & Pac. R.R.*, 282 U.S. at 327-28.

⁴⁸ 283 U.S. 553 (1931).

⁴⁹ *See id.* at 563 ("It is true that the statute does not in express terms demand that a private carrier shall constitute itself a common carrier, but the statute purports to subject all the carriers which are within the terms of its definition to the same obligations.").

⁵⁰ 282 U.S. 379 (1931).

⁵¹ *Ward* involved a New York tax imposed on domestic corporations for the privilege of doing business in the state, but measured by the corporation's income. Stone held for the majority that this tax could be applied to a corporation that had received royalty income on copyrights. *See id.* at 394. In contrast, the Court had held in *Long v. Rockwood*, 277 U.S. 142, 147-48 (1928), that, patents being federal instrumentalities, a state could not tax the royalties on them, and in *Macallen Co. v. Massachusetts*, 279 U.S. 620, 634 (1929), that a state franchise tax measured in part by net income that included interest on federal bonds was likewise unconstitutional.

⁵² 44 HARV. L. REV. 889 (1931).

⁵³ *See also Willcutts v. Bunn*, 282 U.S. 216 (1931) (Hughes, C.J.) (allowing by

Soon after, the Court confronted another limitation on the state's ability to tax, the Equal Protection Clause of the Fourteenth Amendment. Many states, eager "to increase revenue and at the same time lend a helping hand to the small storekeeper,"⁵⁴ had imposed a license tax meant to inhibit the growth of chain stores. Typically, every store in the state was liable for the tax, the amount of which rose steeply as the number of stores in the chain increased. The public eagerly awaited⁵⁵ the Court's decision in an Indiana case, *State Board of Tax Commissioners v. Jackson*.⁵⁶ Contending that the tax was unconstitutional, Sutherland had precedent on his side,⁵⁷ but one vote too few. Roberts held for the majority that chain stores were sufficiently different from independent ones in organization, management, and type of business transacted that the state could reasonably treat them as different subjects of taxation.⁵⁸

Liberal success in tax cases was not uniform in the 1930 Term,⁵⁹ but clearly the Hughes Court was already far more receptive than was its predecessor to expansive uses of the state taxing power.

unanimous decision a federal tax on the income derived from sale of tax-exempt state bonds).

⁵⁴ D.E. Wolf, *The Supreme Court in a New Phase*, 34 CURRENT HIST. 590, 591 (1931).

⁵⁵ See *Chain Store Taxation*, N.Y. TIMES, May 20, 1931, at 24.

⁵⁶ 283 U.S. 527 (1931).

⁵⁷ See *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 402 (1928) (holding that a Pennsylvania statute, imposing gross receipts tax on corporations operating cabs but not on unincorporated individuals operating cabs, violated the Equal Protection Clause; Owen J. Roberts argued for the taxpayer).

⁵⁸ See *Jackson*, 283 U.S. at 541.

⁵⁹ Continuing a line he had helped establish the prior Term, Hughes reinforced the Court's resistance to concluding that an intangible asset could have a situs for tax purposes in more than one state. See *Beidler v. South Carolina Tax Comm'n*, 282 U.S. 1 (1931). Roberts and Stone, as well as the conservatives, joined Hughes's opinion, Stone apparently grudgingly. See Letter from Justice Stone to Felix Frankfurter, Professor, Harvard Law School (Jan. 5, 1932), in 105 FRANKFURTER PAPERS (Library of Congress) (writing that in his dissent in *First National Bank of Boston v. Maine*, 284 U.S. 312 (1932), a more extreme case in the same line, Stone had "said my say"). In *Beidler*, Holmes and Brandeis explicitly noted the reluctant nature of their acquiescence. See 282 U.S. at 10. Later in the Term, in *Coolidge v. Long*, 282 U.S. 582 (1931), Hughes cast one of his rare votes to the right of Roberts. That vote helped form a five-member majority holding that Massachusetts could not, under a statute passed after the execution of an irrevocable trust, tax the grantees' subsequent taking of possession upon the death of the grantors. See *id.* at 605-06.

3. Civil Liberties

Probably the most memorable cases of the 1930 Term, each decided in May 1931, involved civil liberties. In one, *Stromberg v. California*,⁶⁰ all the Justices but McReynolds and Butler joined Hughes in holding unconstitutional a portion of California's criminal syndicalism statute that outlawed the display of a red flag as a symbol of opposition to organized government. More significant than the result was the methodology. Drawing on prior dicta and intimations, the Court explicitly established that "the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech."⁶¹ *Stromberg* is thus an early and important case of incorporation (a term not used by the Hughes Court in this context) within the Fourteenth Amendment—and therefore of applicability against the states—of a guarantee protected by the Bill of Rights. On the merits, Hughes concluded that the statute was unconstitutionally vague.⁶² His language echoed that of Brandeis's famous minority opinion in *Whitney v. California*,⁶³ and marked a decisive turning from the subversive advocacy decisions of the 1920s, which almost uniformly supported repressive treatment of radical speakers.⁶⁴

Two weeks later, this time over the dissent of all four conservatives, Hughes wrote again for the Court in *Near v. Minnesota*,⁶⁵ one of the great landmarks in First Amendment jurisprudence. A Minnesota statute allowing the prohibition as a public nuisance of any "malicious, scandalous and defamatory newspaper"⁶⁶ had been invoked against a reckless publication, innocuously named *The Saturday Press*, that clearly fit within the statutory language.⁶⁷ The Court was unanimous that freedom of the press, like freedom of speech, was protected by the Fourteenth Amendment. But Hughes

⁶⁰ 283 U.S. 359 (1931).

⁶¹ *Id.* at 368; see DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986*, at 252 (1990) (arguing that the Court's precedents did not address this proposition as clearly as Hughes suggested they did).

⁶² See *Stromberg*, 283 U.S. at 369.

⁶³ 274 U.S. 357 (1927).

⁶⁴ See Daniel Hildebrand, *Free Speech and Constitutional Transformation*, 10 CONST. COMMENTARY 133, 142 (1993).

⁶⁵ 283 U.S. 697 (1931).

⁶⁶ *Id.* at 701-02.

⁶⁷ *The Saturday Press's* commentary included the observation that "Practically every . . . snake-faced gangster and embryonic yegg in the Twin Cities is a JEW." *Id.* at 725 n.1. For an engaging account of the background and decision of the *Near* case, see FRED W. FRIENDLY, *MINNESOTA RAG* 123-62 (1981).

wrote for a bare majority in holding that the injunction was an unconstitutional "previous restraint"—that is, one imposed prior to publication, as opposed to punishment inflicted afterwards—of that freedom.⁶⁸ *Near* was disappointing in its failure to state a persuasive rationale for what has come to be called prior restraint doctrine,⁶⁹ perhaps because it was "an easy case that should have gone the other way under contemporary doctrine."⁷⁰ But there can be no doubt about the durability and importance of the doctrine it established.⁷¹

On the Monday between *Stromberg* and *Near*, Roberts's vote gave the conservatives a five-to-four victory in *United States v. Macintosh*,⁷² which held that the government could properly deny citizenship to an alien who promised willingness to bear arms for the United States only if he felt that the war was morally justified.⁷³ Joined by the three liberals, Hughes wrote a devastating dissent.

Macintosh was a far less significant defeat for the liberals than *Stromberg* and *Near* were victories. Certainly it did not dampen the euphoria that liberal observers felt about the 1930 Term. Articles extolling the "liberal Supreme Court" appeared in the popular press.⁷⁴ "Just about the biggest Washington news of the decade," was the Scripps-Howard chain's assessment of the Court's perceived shift across the ideological divide;⁷⁵ "the Old Guard is overthrown," enthused another critic.⁷⁶ Even Justice Stone quietly celebrated.

⁶⁸ *Near*, 283 U.S. at 721.

⁶⁹ See, e.g., Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 54 & n.6 (1984) (arguing that *Near* puts too much emphasis on the supposed harms caused by prior restraints in contrast to those caused by subsequent punishment, including criminal punishment); cf. Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 12 (1981) ("[Hughes's] forceful essay on the evils of prior restraint, combined with the Court's action invalidating an injunction, has had the effect of turning prior restraint into a functional rather than merely a technical or historical concept. . . . 'Prior restraint' has taken on a broader, some would say incoherent, meaning.").

⁷⁰ Hildebrand, *supra* note 64, at 145. As Butler argued in dissent, "It is fanciful to suggest similarity between the granting or enforcement of the decree authorized by this statute to prevent further publication of malicious, scandalous and defamatory articles and the previous restraint upon the press by licensors as referred to by Blackstone" 283 U.S. at 736.

⁷¹ See, e.g., Redish, *supra* note 69, at 53.

⁷² 283 U.S. 605 (1931).

⁷³ See *id.* at 623-26.

⁷⁴ See, e.g., Oliver McKee, Jr., *A Liberal Supreme Court: The Position of Chief Justice Hughes*, 159 OUTLOOK & INDEPENDENT 171 (1931).

⁷⁵ *The Supreme Court's Shift to Liberalism*, LITERARY DIG., June 13, 1931, at 8, 8.

⁷⁶ Joseph P. Pollard, *Our Supreme Court Goes Liberal*, 86 FORUM 193, 195 (1931).

Writing to his friend Frankfurter at Harvard, he expressed the belief that "the mastiffs" were being subdued into a minority so quickly⁷⁷ that by the next Term "most times we will be in the majority and, if not, the Chief will take the laboring oar."⁷⁸ Frankfurter's colleague Zechariah Chafee, perceptive as usual, sounded a more cautious tone. Liberal antagonism to the Court "appears to be dying down," he noted, and he predicted that "[i]n the near future we are likely to hear less of proposals to limit its powers by constitutional amendment or otherwise."⁷⁹ But the Court had not touched several important areas recently; those who thought of Hughes and Roberts as liberals were "likely to meet with some sharp disappointment."⁸⁰

C. *Retrenchment?*

Disappointment set in during the Court's next Term. More often than not in cases dividing the Court along ideological lines, the conservatives prevailed. In large part, this occurred because the cases invoked three conservative aspects of Hughes's judicial ideology, each of which stood in tension with his recognition of the need to give adequate scope to governmental power and each of which persisted beyond the crisis of 1937: his fear of confiscation,⁸¹ his judicialized view of administrative law,⁸² and his concern

⁷⁷ Letter from Justice Stone to Felix Frankfurter (June 2, 1931), in 105 FRANKFURTER PAPERS, *supra* note 59 (attributing the "mastiffs" sobriquet to Learned Hand).

⁷⁸ Letter from Justice Stone to Felix Frankfurter (June 5, 1931) in 105 FRANKFURTER PAPERS, *supra* note 59.

⁷⁹ Zechariah Chafee, Jr., *Liberal Trends in the Supreme Court*, 35 CURRENT HIST. 338, 344 (1931).

⁸⁰ *Id.*

⁸¹ Brandeis said this about Hughes and confiscation: "He is crazy about 'confiscation.' He has a mania on the subject—driven by fear and that blinds his judgment, so that his very considerable brains are not at work." Memorandum of Conversation with Brandeis (May 20, 1936), in 38 FRANKFURTER PAPERS (Library of Congress).

Hughes's fears about confiscation led him to resist what he regarded as governmental efforts to tax citizens on property beyond their control or beyond the government's own jurisdiction; Roberts may have had much the same concern. Thus, Roberts wrote for the Court, and Hughes joined the majority against the dissent of all three liberals, in *Hooper v. Tax Comm'n*, 284 U.S. 206 (1931), holding that a state could not properly lay a tax on the total income of a married couple; one's tax could not be computed by reference to another's income. See *id.* at 215. In the same month that the Court decided *Hooper*, confiscation was explicitly part of the rationale for the Court's invalidation—also with the concurrence of both Hughes and Roberts, and over the dissent of all three liberals—of an order of the Interstate Commerce Commission. See *Chicago, R. I. & Pac. Ry. v. United States*, 284 U.S. 80, 96-97 (1931). Later in the Term, the Court, once again with the concurrence of both Hughes and Roberts, and over the dissent of the two liberals then sitting, relied heavily on *Hooper*

that governmental action not unduly interfere with freedom of opportunity.⁸³

to hold unconstitutional a provision of federal tax law creating a conclusive presumption that gifts made within two years prior to death of the donor were made in contemplation of death. See *Heiner v. Donnan*, 285 U.S. 312, 326-28 (1932) (stating that the provision often has the effect "of putting upon an estate the burden of a tax measured in part by the value of property never owned by the estate or in the remotest degree connected with the death which brought it into existence"). And it was presumably fear of confiscation again that led both Hughes and Roberts to join the majority in *Coombes v. Getz*, 285 U.S. 434 (1932). There, the Court held that both the Obligation-of-Contracts Clause of Article I, § 10 of the Constitution and the Due Process Clause of the Fourteenth Amendment precluded retroactive application of the repeal of a state constitutional provision giving creditors a right of action against directors of a corporation for moneys embezzled or misappropriated by officers of the corporation. See 285 U.S. at 442. Cardozo, in his first opinion on the Court, dissented, joined by the other liberals.

The resistance of Hughes and Roberts to arguably confiscatory measures soon eased; in 1933, they joined the liberals against the conservative bloc to form a majority that adopted precisely the point of view expressed by Holmes's dissent in *Hoeper*. See *Burnet v. Wells*, 289 U.S. 670, 683, 685 (1933) (Sutherland, J., dissenting) (relying on *Hoeper* and *Heiner*, and stating that the "distinction between taxation and confiscation must still be observed"). Hughes's opinion for the same five-member majority in *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), discussed *infra* part I.D.1, seems squarely in conflict with *Coombes*. Even late in his tenure, however, Hughes still seemed motivated by concern that government action might be confiscatory in effect. See *Curry v. McCannless*, 307 U.S. 357, 374-83 (1939) (Butler joining in dissent from a broad-based rejection of the doctrine that intangible assets could be taxed in only one state).

⁸² See *Crowell v. Benson*, 285 U.S. 22, 54 (1932) (holding, over the dissent of Roberts and the two liberals then sitting, that the trial judge acted properly in holding a *de novo* hearing and disregarding an administrative finding, "where the determinations of fact are fundamental or 'jurisdictional,' in the sense that their existence is a condition precedent to the operation of the statutory scheme") (footnotes omitted). Hughes eventually drew back from some of the more extreme aspects of his opinion in *Crowell*. See *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 257-58 (1940) (limiting the scope of judicial review of an administrative finding); *Shields v. Utah Id. Cent. R.R.*, 305 U.S. 177, 184-85 (1938) (similar discussion); *Voehl v. Indemnity Ins. Co.*, 288 U.S. 162, 166 (1933) (same). But his attempt to force administrative procedure into a judicial mold persisted. See, e.g., *Morgan v. United States*, 304 U.S. 1, 14-15 (1938) (noting the judicial-like protections required in some administrative proceedings); *Hughes Appeals to Lawyers to Seek Qualified Judges*; *Roosevelt Sees New Spirit*, N.Y. TIMES, May 13, 1938, at 1 (Hughes to the American Law Institute: "the spirit which should animate [administrative] action must be the spirit of the just judge"). For an extended analysis of this aspect of Hughes's jurisprudence, see Richard D. Friedman, *Charles Evans Hughes as Chief Justice 1930-1941*, at 99-119 (1978) (unpublished D. Phil. dissertation, Oxford University).

⁸³ Hughes frequently spoke of freedom of opportunity. See 2 MERLO J. PUSEY, CHARLES EVANS HUGHES 693 (1951) (quoting a speech by Hughes given on June 9, 1932, that spoke of constitutional limitations as "requiring a measure of freedom of opportunity which even legislatures must respect"); *Hughes Urges Bar Aid Law Reforms*, N.Y. TIMES, Sept. 30, 1931, at 26 ("freedom of individual opportunity"); *Secured Liberties Sought By Hughes*, N.Y. TIMES, June 22, 1937, at 21 ("The question

The latter concern apparently accounted for the biggest jolt of the Term. In March 1932, both Hughes and Roberts joined in Sutherland's opinion for a six-to-two majority in *New State Ice Co. v. Liebmann*,⁸⁴ invalidating on due process grounds an Oklahoma statute that, by forbidding any person to manufacture or distribute ice without satisfying a licensing commission of the need for additional supply, had the effect of creating local monopolies in the business. Sutherland concluded that the ice industry was "as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker," and therefore was not "charged with a public use."⁸⁵ By concurring passively in this opinion, however, Hughes and Roberts did not signal that they agreed with the conservatives that industries falling outside of a narrow category deemed to reflect a "public use" or "public interest" were practically immune from state regulation. In *O'Gorman*, Hughes and Roberts had already helped to undermine that doctrine,⁸⁶ and in two years they would be decisive in destroying it.⁸⁷ What appears to have been significant to both Hughes and Roberts is that the statute did not merely regulate conduct within the industry; rather, it had "the effect of denying or unreasonably curtailing the common right to engage in a lawful private business."⁸⁸ Hughes later professed to have regarded *New State Ice* as a borderline case.⁸⁹ Whether or not

is . . . whether a unified people, putting forth its great strength for national ends, will leave appropriate scope for individual freedom. The question is not one of the adequate power of government, designed to keep clear the highways of honest endeavor, but how that power shall be used."). This concern with freedom of individual opportunity might help explain Hughes's opinion in *Smith v. Cahoon*, 283 U.S. 553 (1931). For a brief discussion of *Smith*, see *supra* note 48 and accompanying text. It also presumably had a good deal to do with his willingness to join the conservatives in giving unexpected force to the "[P]rivileges or [I]mmunities" Clause of the Fourteenth Amendment with respect to the right "to engage in business, to transact any lawful business." *Colgate v. Harvey*, 296 U.S. 404, 430 (1935). And, late in his tenure, it also probably led him to resist the Court's dramatic transformation of the law concerning state taxation of interstate commerce. See *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 69 (1940) (Hughes, C.J., dissenting) ("[A] free national market . . . is not less now than heretofore a vital concern of the national economy.").

⁸⁴ 285 U.S. 262 (1932). The case was argued in the interregnum between Holmes and Cardozo, so neither participated in the decision.

⁸⁵ *Id.* at 277.

⁸⁶ See *supra* notes 39-44 and accompanying text.

⁸⁷ See *infra* part I.D.2 (discussing *Nebbia v. New York*, 291 U.S. 502 (1934)).

⁸⁸ *New State Ice*, 285 U.S. at 278. Roberts appears to have shared fully Hughes's concern on this score. See *Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266 (1936), discussed *infra* note 150.

⁸⁹ See 2 PUSEY, *supra* note 83, at 698.

he thought of it that way at the time, "the right of any person to pursue a common calling" was so vital to him⁹⁰ that in this case it outweighed the usual legislative freedom to determine economic policy.

The Court reinforced the appearance of retrenchment on March 13, 1933, just nine days after Franklin D. Roosevelt's inauguration during one of the most acute crises of the Great Depression. Like the *Jackson* case of 1931,⁹¹ *Louis K. Liggett Co. v. Lee*⁹² concerned a state statute designed, through a system of graduated taxes or fees, to inhibit the spread of chain stores. Writing for the Court, Roberts relied heavily on *Jackson* to uphold most of the statute's provisions. But he also held unconstitutionally arbitrary a novel provision imposing heavier fees where the multiple stores of a single chain were located in more than one county.⁹³ All three liberals dissented from this conclusion, Brandeis in one lengthy dissent and Cardozo, joined by Stone, in a briefer one. Despite the heat generated by these dissents, neither Hughes nor Roberts indicated any inclination to draw back from *Jackson*. Even the disputed issue might have been decided differently had the legislature been more explicit about its intentions.⁹⁴ And later, but well before the climactic events of 1936 and 1937, Hughes and Roberts would join the liberals against all the conservatives in establishing that a state might not only tax a chain more heavily than a single store but might "make the tax so heavy as to discourage multiplication of the units to an extent believed to be inordinate."⁹⁵

Indeed, despite the appearance of retrenchment in these years following the Hughes Court's first full Term, the Court continued to make significant constitutional advances in various areas. In the field of regulation, the Court began the process of limiting its rather aberrant decision in *Smith v. Cahoon*,⁹⁶ a process that by 1935 would leave *Smith* an empty shell.⁹⁷ On the perplexing and

⁹⁰ Joseph P. Pollard, *An Unexpected Champion*, 237 N. AM. REV. 351, 355 (1934).

⁹¹ 283 U.S. 527 (1931); see *supra* text accompanying notes 55-58.

⁹² 288 U.S. 517 (1933).

⁹³ See *id.* at 533.

⁹⁴ See *id.* at 535 (noting that the Court was loathe to attribute any particular "motive to the present statute in the absence of legislative declaration").

⁹⁵ *Fox v. Standard Oil Co.*, 294 U.S. 87, 100 (1935); see also *Great Atl. & Pac. Tea Co. v. Grosjean*, 301 U.S. 412, 419 (1937) (4-3 decision) (Roberts for the Court, allowing computation based on the total number of stores in an interstate chain).

⁹⁶ 283 U.S. 553 (1931); see *supra* note 48 and accompanying text; see also *Continental Baking Co. v. Woodring*, 286 U.S. 352, 364 (1932) (upholding a statute because it did not "attempt to compel private carriers to become public carriers").

⁹⁷ See *Aero Mayflower Transit Co. v. Georgia Public Serv. Comm'n*, 295 U.S. 285,

recurrent problem of determining whether administratively fixed utility rates were unconstitutionally confiscatory, the Court indicated a flexibility that brought a dissent from Butler and Sutherland.⁹⁸ Albeit not steadily,⁹⁹ the Court continued its assault on the intergovernmental tax immunity doctrine, in one decision frankly overruling one of the Taft-era precedents that had provided a foil for Thomas Reed Powell in 1931.¹⁰⁰

In the area of individual rights, the Court took a major step towards incorporation against the states of the criminal justice portions of the Bill of Rights; in the first of the *Scottsboro* cases¹⁰¹ to reach the Court, *Powell v. Alabama*,¹⁰² all the Justices but Butler and McReynolds held that the defendants had been denied due process because they had not had effective assistance of counsel.¹⁰³

Given its racial setting, the *Scottsboro* litigation had a significant civil rights aspect. The Court directly confronted civil rights issues in *Nixon v. Condon*.¹⁰⁴ In response to a Taft-era decision invalidating a Texas law barring blacks from state primaries,¹⁰⁵ the state had authorized each party to decide for itself the qualifications of voters in its primaries. Over the protests of the Four Horsemen that this tactic did not constitute state action, the Court nullified this evasion.¹⁰⁶ The Hughes Court is properly remembered as

292 (1935) ("[T]he limits of [*Smith's*] holding, clear enough at the beginning, have been brought out in sharp relief."); see also *Hicklin v. Coney*, 290 U.S. 169, 173-75 (1933) (holding, on rather thin ground, that the exemptions involved there "differ materially from that found to be objectionable in *Smith v. Cahoon*").

⁹⁸ See *Los Angeles Gas & Elec. Corp. v. Railroad Comm'n*, 289 U.S. 287 (1933).

⁹⁹ See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393 (1932) (Roberts and the three liberals dissenting from the majority opinion).

¹⁰⁰ See *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932) (overruling *Long v. Rockwood*, 277 U.S. 142 (1928)); *supra* note 31; see also *Pacific Co. v. Johnson*, 285 U.S. 480 (1932) (three conservative dissenting votes).

¹⁰¹ Among the accounts of the notorious *Scottsboro* affair are DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* (1969), and a first-person account, HAYWOOD PATTERSON & EARL CONRAD, *SCOTTSBORO BOY* (1950).

¹⁰² 287 U.S. 45 (1932).

¹⁰³ Two of the *Scottsboro* cases returned to the Court in 1935, and again the Court, this time in opinions by Hughes, held in favor of the petitioners. The Court held in *Norris v. Alabama*, 294 U.S. 587, 589-90 (1935), that it was not barred by state factual findings from inquiring into exclusion of blacks from jury rolls. In *Patterson v. Alabama*, 294 U.S. 600, 605-07 (1935), the Court declined to treat as dispositive an independent nonfederal ground, Patterson's lateness in filing his appeal, supporting the state decision. Given the outcome in *Norris*, the Court remanded the case for another look "in the light of the situation which has now developed." *Id.* at 607.

¹⁰⁴ 286 U.S. 73 (1932).

¹⁰⁵ See *Nixon v. Herndon*, 273 U.S. 536 (1927).

¹⁰⁶ The resourceful legislators' third tactic, mere silence, was more successful, as

having made substantial progress on issues of criminal justice and civil rights.¹⁰⁷ It is important to bear in mind that the Court began compiling that record well before 1936.¹⁰⁸

D. *Thunderbolts*

Significant as many of the Hughes Court's cases were during the first few years of the Court, most of them did not yet reflect the desperateness of the nation's economic state.¹⁰⁹ That changed dramatically beginning late in 1933.

1. *Blaisdell*

In April, Minnesota passed a drastic Mortgage Moratorium Law to relieve the state's hard-pressed farmers and homeowners. For the duration of the emergency, but in no event past May 1935, this statute authorized state courts to postpone foreclosures and to extend redemption periods, allotting towards the suspended mortgage at least part of the income earned during the interim on the affected property. A challenge to such a statute under the Contracts Clause of Article I, Section 10 of the Constitution was inevi-

Roberts held for a unanimous Court in *Grove v. Townsend*, 295 U.S. 45, 49 (1935), that party-ordered exclusion, without any statutory suggestion of authority, did not constitute state action. *Grove* was nearly overlooked in the glare of the *Scottsboro* cases, but liberals regarded it as tragic and of far greater significance. See *Black Justice*, 140 NATION 497, 497 (1935). Before Hughes retired, however, the Court's decision in *United States v. Classic*, 313 U.S. 299 (1941), suggested that *Grove* would soon be overturned. See *id.* at 316-17 (treating a party primary as an integral part of the electoral process established by the state). It soon was, in *Smith v. Allwright*, 321 U.S. 649 (1944).

¹⁰⁷ See A. Leon Higginbotham, Jr. & William C. Smith, *The Hughes Court and the Beginning of the End of the "Separate But Equal" Doctrine*, 76 MINN. L. REV. 1099, 1101 (1992) (characterizing the Hughes Court's overall civil rights record as "a mixed record of progress" but also arguing that "the seminal civil rights decisions of [the Hughes] era redressed some of the most egregious instances of state-sponsored racism").

¹⁰⁸ Indeed, the Hughes Court began compiling that record even before the cases described in the text. See *Aldridge v. United States*, 283 U.S. 308, 314-15 (1931) (reversing a murder conviction because of trial court's refusal to allow inquiry into racial prejudices of prospective jurors). And the Court consistently added to its record, both during the crisis years, see, e.g., *Brown v. Mississippi*, 297 U.S. 278 (1936), described in RICHARD C. CORTNER, A "SCOTTSBORO" CASE IN MISSISSIPPI: THE SUPREME COURT AND BROWN V. MISSISSIPPI 131-36 (1986), and afterwards. See *infra* note 419.

¹⁰⁹ But note, for example, Brandeis's dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 306 (1932), dolefully assessing the deepening economic crisis as "an emergency more serious than war."

table, and the case of *Home Building & Loan Ass'n v. Blaisdell*¹¹⁰ reached the Court for argument in November. "Few questions of greater moment," wrote Justice Sutherland for the conservative four when the Court decided the case in January 1934, "have been submitted for judicial inquiry during this generation."¹¹¹ Hughes clearly agreed, and he wrote an uncharacteristically philosophical and contemplative opinion, upholding Minnesota's statute by a bare majority of the Court.

The result of *Blaisdell* was important, and so was its impact on the Contracts Clause.¹¹² Of broader significance, though, was the nature of the debate between Sutherland and Hughes. Placed together, their opinions provide a stunning illustration of the old constitutionalism on the wane and the new constitutionalism on the rise.¹¹³

The majority confronted the difficulty that, as Sutherland showed, the moratorium act was precisely the type of emergency regulation for the relief of debtors against which the framers of the Constitution had aimed the Contracts Clause. Sutherland admitted that constitutional clauses could bring new conditions within their grasp. "But their *meaning* is changeless," he emphasized, "it is only their *application* which is extensible."¹¹⁴ He found it impossible to believe that the Clause had taken on a meaning "distinctly opposite" to that for which it was framed.¹¹⁵ "If the provisions of the Constitution be not upheld when they pinch as well as when they comfort," he concluded gloomily, "they may as well be abandoned."¹¹⁶ "My dear Sutherland," wrote Brandeis on the proofs of his colleague's able exposition of the conservative viewpoint, "This is one of the great opinions in American constitutional law.

¹¹⁰ 290 U.S. 398 (1934).

¹¹¹ *Id.* at 448 (Sutherland, J., dissenting).

¹¹² See, e.g., Robert A. Graham, Note, *The Constitution, the Legislature, and Unfair Surprise: Toward a Reliance-Based Approach to the Contract Clause*, 92 MICH. L. REV. 398, 407-13 (1993) ("The Court's holding in *Blaisdell* set the stage for later decisions in which the Court engaged in wholesale balancing without regard to party reliance or unfair surprise.").

¹¹³ But see Charles A. Bieneman, Note, *Legal Interpretation and a Constitutional Case: Home Building & Loan Association v. Blaisdell*, 90 MICH. L. REV. 2534, 2535 (1992) (using *Blaisdell*, very appropriately, as a vehicle for exploring various methods of constitutional interpretation—and arguing "that *Blaisdell* was wrongly decided under any theory of interpretation").

¹¹⁴ *Blaisdell*, 290 U.S. at 451.

¹¹⁵ *Id.* at 448.

¹¹⁶ *Id.* at 483.

Regretfully, I adhere to my error."¹¹⁷

In contrast to Sutherland, Hughes emphasized that the Contracts Clause could not be "read with literal exactness like a mathematical formula."¹¹⁸ He ridiculed as carrying "its own refutation" the "narrow conception" that "the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them."¹¹⁹ Scorning the fine distinction between meaning and application, Hughes found a better guide in the "memorable warning" of John Marshall—"that it is *a constitution* we are expounding, . . . a constitution intended to endure for ages to come."¹²⁰

To assure that the Constitution would endure, Hughes believed, a necessary postulate of the legal order was that the reservation of sovereign power be read into contracts. "The policy of protecting contracts against impairment," he wrote, "presupposes the maintenance of a government . . . which retains adequate authority to secure the peace and good order of society."¹²¹ This passage most assuredly did not, as one scholar has claimed, imply that "limitations of the Constitution may be put aside" to serve a superior "law of . . . survival."¹²² Rather, by citing the "progressive recognition"¹²³ of his principle, Hughes was doing no more than claiming victory in a battle he had joined nearly a quarter century before, to prevent the Contracts Clause from vitiating the regulatory power of the state; government must retain a reservoir of authority even over prior contracts, or else well-drafted private arrangements, rather than public legislation, would control.¹²⁴ The requirements of the Contracts Clause, he had previously suggested, are no more than the usual ones of due process,¹²⁵ and now he confirmed this view

¹¹⁷ Interview with Francis R. Kirkham, Esq., former law clerk to Hughes (Aug. 30, 1976) (notes on file with author); Letter from Francis R. Kirkham to Paul A. Freund (May 17, 1962) (on file with author). Mr. Kirkham recited Brandeis's comment from memory, claiming in his letter to Freund that the wording was "about" right, but not necessarily exact.

¹¹⁸ *Blaisdell*, 290 U.S. at 428.

¹¹⁹ *Id.* at 443.

¹²⁰ *Id.* (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 415 (1819)).

¹²¹ *Id.* at 435.

¹²² SAMUEL HENDEL, CHARLES EVANS HUGHES AND THE SUPREME COURT 181 (1951).

¹²³ *Blaisdell*, 290 U.S. at 435.

¹²⁴ See Note, *supra* note 28, at 987-88 (stating that Hughes believed that "contracts . . . must be made subject to law, and not vice versa").

¹²⁵ See *Sproles v. Binford*, 286 U.S. 374, 390 (1932) (declaring that contracts

in more explicit language. "The question," he said, was simply "whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end."¹²⁶

But special care was required to answer that question here. Hughes conceded force to the argument that only those contracts that were themselves hostile to a permissible state policy might be nullified by a later state law. Here Minnesota had not condemned mortgages. The moratorium had been imposed for a policy completely unrelated to them and apparently one-sided—to relieve debtors. But in fact, he declared, "the legislation was not for the mere advantage of particular individuals but for the protection of a basic interest of society."¹²⁷ This rather daring assertion crystallized one of the most crucial passages of Hughes's opinion. "It is manifest," he said,

that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.¹²⁸

Hughes made this point only after receiving a suggestion from Justice Cardozo and reading Sutherland's dissent.¹²⁹ He did not

"which relate to the use of the highways must be deemed to have been made in contemplation of the regulatory authority of the state"); *cf.* *Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 282 (1933) (holding that "Congress did not authorize the Commission to act arbitrarily or capriciously in making a redistribution [of broadcast licenses], but only in a reasonable manner to attain a legitimate end. . . . Those who operated broadcasting stations had no right superior to the exercise of this power of regulation.").

¹²⁶ 290 U.S. at 438.

¹²⁷ *Id.* at 445.

¹²⁸ *Id.* at 442.

¹²⁹ See Letter from Chief Justice Hughes to Justice Stone (Jan. 4, 1934), in 60

have to be pushed, however, because the idea had been implicit in his thinking on the Contracts Clause since his years as an Associate Justice.¹³⁰ Indeed, it was central to his general concept of the need for regulation. "Now one increasingly finds himself controlled by a social urge," he had told his grandson's graduating class at the Deerfield Academy the previous spring. "Economic independence is now difficult, if not impossible, to realize. We cannot save ourselves unless we save society. No one can go it alone."¹³¹

Even under this view of an integrated public good, Hughes believed, the Contracts Clause imposed limits, albeit open-ended ones, on the reserved power of the state.¹³² The Court's construction of the Contracts Clause eventually transcended those limits. But in several crucial aspects, *Blaisdell* is a strikingly modern decision, one very much of a piece with the decisions that later expanded the reach of federal power—in its rejection of an originalist view of the Constitution, in its attempt to find flexibility even at the core of the Contracts Clause, in its perception that integration of the economy had created a broader need than before for governmental regulation, in its view that private contractual arrangements could not supersede governmental power to regulate the economy, but rather that the needs of society to improve the public welfare were a legitimate basis for altering those private arrangements, and in its insistence that the validity of the statute be determined not by categorization but by a receptive examination of the legitimacy of its ends and the reasonableness of its means. And, it bears emphasis, *Blaisdell* was achieved—under the leadership of Hughes and with the decisive participation of Roberts—well before 1936.

HARLAN FISKE STONE PAPERS (Library of Congress) [hereinafter STONE PAPERS].

¹³⁰ See Note, *supra* note 28, at 988-89 (contending that, as an Associate Justice, Hughes regarded active enforcement of the Contracts Clause as an obstacle to legitimate legislative action in the public interest).

¹³¹ 2 PUSEY, *supra* note 83, at 733; see also *Unity to Keep Our Democratic Form Is Hughes Theme*, N.Y. TIMES, Mar. 5, 1939, at 45 (quoting speech by Hughes: "One member of our body politic cannot say to another—'I have no need of thee.'").

¹³² The power, wrote Hughes, must not be "construed so as to destroy the limitation" of the Contracts Clause. *Blaisdell*, 290 U.S. at 439. Whether the particular intrusion on the contract should be deemed legitimate was a very fact-laden inquiry. Here, Hughes regarded as significant the fact that the law did not deprive the mortgagee of all remedies, but rather ensured it some rental value during the suspension period. Of even greater importance, the legislature had written the statute against the background of, and limited it to, the pressing economic emergency.

2. *Nebbia*

Eight weeks after *Blaisdell*, on March 5, 1934, Hughes and Roberts once again lined up with the liberals to give them a great victory over the Four Horsemen. In response to the drastic deflation that had beset its dairy industry, New York had set the price of milk at nine cents per quart. *Nebbia v. New York*¹³³ presented a challenge, under the doctrine of freedom of contract, to this prescription. In *O'Gorman*, Hughes and Roberts had provided decisive support for the liberals in rejecting a similar challenge to another price regulation.¹³⁴ But, although Brandeis's opinion in *O'Gorman* pointed briefly to the "presumption of constitutionality" favoring legislation in general, his argument there attempted no new synthesis; he purportedly applied and did not attempt to reshape the doctrine, established through many cases, that a state could regulate the price at which a commodity might be sold or a service rendered only if the business was "affected with a public interest."¹³⁵ Writing for the majority three weeks later in *Nebbia*, Roberts used a far broader brush, putting a heavy gloss on the doctrine by declaring that "there is no closed class or category of businesses affected with a public interest. . . . The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good."¹³⁶ What is more, Roberts recognized broad legislative discretion in determining whether such control was justified. His language was not limited to the context of price regulation but addressed the whole doctrine of substantive due process:

So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. . . . With the wisdom of the policy

¹³³ 291 U.S. 502 (1934).

¹³⁴ See discussion *supra* text accompanying notes 39-44.

¹³⁵ See, e.g., *Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522, 537 (1923) (stating that regulation is justified when the business is "clothed" with a public interest); *Munn v. Illinois*, 94 U.S. (4 Otto) 113, 126 (1876) (adopting, in the context of determining when price regulation is valid under the Fourteenth Amendment, the common law principle "that when private property is 'affected with a public interest, it ceases to be *juris privati* only'" (quoting Lord Chief Justice Hale, 1 Harg. Law Tracts 78 (n.d.))).

¹³⁶ *Nebbia*, 291 U.S. at 536.

adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. . . .

. . . Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unwarranted interference with individual liberty.¹³⁷

In a recent article in the *Harvard Law Review*, Professor Michael Ariens belittles the importance of *Nebbia*.¹³⁸ There are two rather odd turns in his argument. First, he emphasizes—as “the striking element of Roberts’s opinion in *Nebbia*”—not its diminution of the judicial role, but rather the fact that it reaffirmed a judicial role at all.¹³⁹ That is a little bit like saying that “the striking element” of a vicious assault is that the victim did not die. Clearly the point that Roberts was at pains to make, as suggested by the language quoted above, was how deferential the Court should be to legislative policy choices. And the language used by Roberts—similar to language used by later, indisputably liberal Justices in a variety of contexts¹⁴⁰—would be unremarkable even in a far more liberal Court. Indeed, though Ariens regards *Nebbia* as “strikingly different in both force and tone from Chief Justice Hughes’s language in *West Coast Hotel*,”¹⁴¹ the midcrisis minimum wage case, both language that Ariens quotes from *West Coast Hotel* and language that he does

¹³⁷ *Id.* at 537, 539.

¹³⁸ See Ariens, *supra* note 6, at 642-45.

¹³⁹ *Id.* at 643.

¹⁴⁰ See, e.g., *McLean Trucking Co. v. United States*, 321 U.S. 67, 91 (1944) (Rutledge, J.) (upholding against statutory attack an Interstate Commerce Commission’s order approving consolidation of certain motor carriers, the Court being unable to “find anything arbitrary or unreasonable” in the Commission’s key factual finding); *Adam v. Saenger*, 303 U.S. 59, 67-68 (1938) (Stone, J.) (stating in the context of procedural due process: “The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence.”); *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938). In *Barnwell Bros.*, Justice Stone noted:

In the absence of [congressional] legislation the judicial function, under the commerce clause as well as the Fourteenth Amendment, stops with the inquiry whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought.

Id. at 190.

¹⁴¹ Ariens, *supra* note 6, at 643 (citing *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)).

not¹⁴² are quite similar to *Nebbia*'s. Ariens argues that in *West Coast Hotel* Hughes offered only conclusory statements to justify his opinion that the statute satisfied the constitutional test, whereas in *Nebbia* Roberts "attempted at length to explain why the New York law was reasonable."¹⁴³ But in fact nearly all of Roberts's opinion in *Nebbia* is devoted to discussion of legal generalities, leading to his enunciation of a standard; he stated with remarkable brevity, and with no detailed examination of the underlying facts, his conclusion that the New York statute was reasonable.¹⁴⁴

The second odd aspect of Ariens's argument relates to his contention that *Nebbia* signaled no change in the view of Hughes or Roberts with respect to the judicial role in evaluating economic legislation against attack based on the Fourteenth Amendment.¹⁴⁵ Factually that contention is true, but for a reason nearly opposite to the one Ariens suggests: *Nebbia* did not represent a change in opinion for Hughes or Roberts because, with respect to the constitutional validity of price regulation, they had already lined up with the liberals in *O'Gorman*,¹⁴⁶ a case not mentioned at all by Ariens. True, they had also joined the conservatives in *New State Ice*,¹⁴⁷ but as I have pointed out, that was a far different case; it did not involve price regulation at all, and it invoked other concerns that they found persuasive.¹⁴⁸

Taken together, *O'Gorman*, *New State Ice*, and *Nebbia* suggest that while Hughes and Roberts may have been more willing than the liberals to invalidate economic legislation as arbitrary or discriminatory, they were squarely in the liberal camp—as indeed Hughes had been since his first term on the Court¹⁴⁹—with respect to the validity of price regulation. Two other cases discussed by Ariens,

¹⁴² See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) (stating that "regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process"). *West Coast Hotel* is discussed *infra* part II.A.

¹⁴³ Ariens, *supra* note 6, at 643.

¹⁴⁴ See *Nebbia*, 291 U.S. at 530, 539 (stating that "[i]n the light of the facts the order appears not to be unreasonable or arbitrary").

¹⁴⁵ See Ariens, *supra* note 6, at 642, 644.

¹⁴⁶ *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251 (1931); see discussion *supra* text accompanying notes 39-40.

¹⁴⁷ *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

¹⁴⁸ See discussion *supra* note 88 and accompanying text.

¹⁴⁹ See *German Alliance Ins. Co. v. Kansas*, 233 U.S. 389, 417-18 (1914) (upholding, with Hughes joining the liberal majority, the regulation of rates for fire insurance).

but here relegated to a footnote, both involving regulation of the New York milk industry, underscore the point.¹⁵⁰

Nebbia, therefore, represents not a turn of direction for the Court in economic substantive due process matters, but rather a reaffirmation of the more liberal direction in which Hughes and Roberts had led it. But focusing on the consistency of results is to understate the enormous importance of *Nebbia*. As Professor Barry Cushman has stated: *Nebbia* "effectively retired the formalist distinction between public and private enterprise," and this makes it "a milestone in American constitutional development."¹⁵¹ Its noncategorical approach, and its emphasis on the susceptibility to control for the public good of what had previously been deemed private, fit easily alongside *Blaisdell*—and, as Cushman has emphasized, alongside the Court's later pronouncements on the powers of the national government.¹⁵² And it bears emphasis (if this is beginning to sound like a broken record, the effect is intentional) that the Court achieved this milestone well before 1936.

¹⁵⁰ In *Borden's Farm Prods. Co. v. Ten Eyck*, 297 U.S. 251, 261-63 (1936), Roberts, again writing for the Court over the dissent of the conservative four, upheld a portion of a New York law that allowed dealers who did not have well-advertised trade names to sell bottled milk in New York City at a slightly lower price than dealers who did. The challenge there was based on equal protection grounds, but Roberts's opinion and the dissent both make clear that this question was subsidiary to the due process question in *Nebbia*. Roberts upheld the classification as a reasonable method of implementing the basic price regulation approved in *Nebbia* without having to alter the competitive balance between advertised and nonadvertised brands.

At the same time, in *Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266, 273-74 (1936), Roberts and Hughes both joined the conservatives to invalidate a provision denying the price differential to new market entrants. Given that "[t]he very reason for the differential was the belief that no one could successfully market an unadvertised brand on an even price basis with the seller of a well advertised brand," wrote Roberts, this restriction was "but another way of saying the legislature determined that during the life of the law no person or corporation might enter the business of a milk dealer in New York City." *Id.* at 273. As in *New State Ice*, but in contrast to *O'Gorman* and *Nebbia*, the state had precluded the opportunity to enter the market, and both Hughes and Roberts found this idea unpalatable.

Ariens also discusses one more New York milk case that appears utterly irrelevant. In *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527-28 (1935), the Court, unanimously and per Cardozo, held invalid against the Commerce Clause a portion of New York's Milk Control Act that prohibited sale in New York of milk imported from another state unless the price paid to the producer in that other state was as high as the levels prescribed by New York for purchasers from local producers.

¹⁵¹ Cushman, *Stream of Legal Consciousness*, *supra* note 6, at 129-30.

¹⁵² See *id.* at 130, 146-54 (arguing that the "affected with public interest" doctrine and the "stream of commerce" doctrine were often conflated, and that the latter doctrine provided critical support for the Court's Labor Board decisions of 1937).

3. The *Gold Clause Cases*

Although *Blaisdell* and *Nebbia* concerned exercises of state power, the dramatic measures adopted by the federal government under President Franklin Roosevelt had not yet come before the Court. In January 1935, however, with only Cardozo dissenting, the Court held unconstitutional a provision of the National Industrial Recovery Act of 1933 that authorized the President to bar the shipment in interstate commerce of "hot oil"—that is, oil produced or withdrawn from storage in excess of state limitations. Hughes's decision for the Court, *Panama Refining Co. v. Ryan*,¹⁵³ was a narrow one, based only on the perception—a perception persuasively punctured by Cardozo—that Congress had made an uncontrolled delegation of power to the President. Hughes expressed particular concern that the statute did not state a standard or policy to guide or limit him, nor did it require him to make formal findings justifying his action. The delegation doctrine was a time bomb, but for the time being the Court's decision, carefully confined and nearly unanimous, did not raise much notice.

A far more closely followed litigation, because its potential consequences were so immediate and enormous, was the *Gold Clause Cases*.¹⁵⁴ In early 1934, Congress had struck against disastrous deflation by devaluing the dollar substantially, from 25 8/10 grains of gold to 15 5/21. Many contracts, however, both private and public, had long anticipated such a change by specifying that payment would be in a set amount of gold or in the currency equivalent. If this "gold clause" were given effect, a debtor whose income was in devalued dollars would have to discharge his obligation in the equivalent of pre-1933 dollars; a debt of \$100 would suddenly become one of \$169, without a corresponding rise in income. Because the clause had frequently been included in bonds, the amounts concerned were so huge—an estimated \$100 billion in obligations, about one-fourth in state and federal bonds, were subject to the clause in 1933¹⁵⁵—that the clause threatened to defeat the entire purpose of devaluation. Even before devaluation, however, on June 5, 1933, Congress passed a resolution

¹⁵³ 293 U.S. 388 (1935).

¹⁵⁴ *Norman v. Baltimore & O.R.R. and United States v. Bankers Trust Co.*, 294 U.S. 240 (1935); *Nortz v. United States*, 294 U.S. 317 (1935); *Perry v. United States*, 294 U.S. 330 (1935).

¹⁵⁵ See ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS* 98-99 (1941).

declaring the gold clause void against public policy; all debts must be discharged in currency, dollar for dollar. The vital question remained whether this abrogation of contract rights was constitutional. Until the Supreme Court gave a final answer the uncertainty would remain "a paralyzing influence"¹⁵⁶ blocking business recovery.

In January 1935, the Supreme Court heard arguments on four cases involving gold clauses, and on February 18, after much anxious anticipation by the public and the Administration,¹⁵⁷ the Court issued its decisions in all four cases. Hughes wrote for the Court in all of the cases. In each, the Court divided five to four, with all the conservatives in dissent, and it denied relief to the claimant invoking the gold clause. The announcement of the decisions was a dramatic event. "[T]he impending moral and legal chaos is appalling," McReynolds declared in dissent.¹⁵⁸ Surprising spectators by the harshness of his language,¹⁵⁹ McReynolds closed his oral presentation by proclaiming: "As for the Constitution, it does not seem too much to say that it is gone. Shame and humiliation are upon us now!"¹⁶⁰

Two of the cases, decided together under the heading *Norman v. Baltimore & Ohio Railroad*,¹⁶¹ involved gold clauses in private contracts. For the Justices that had constituted the majority in *Blaisdell*, this was an easy case. It required "no acute analysis or profound economic inquiry," wrote Hughes, "to disclose the dislocation of the domestic economy" that would result if debtors received money in one currency and owed it in a more valuable one.¹⁶² "Contracts, however express," he asserted, "cannot fetter

¹⁵⁶ *The Gold Decision Was Doubly Agreeable*, LITERARY DIG., Mar. 2, 1935, at 36, 36.

¹⁵⁷ See, e.g., LEONARD BAKER, BACK TO BACK: THE DUEL BETWEEN FDR AND THE SUPREME COURT 113 (1967) (describing February 18th, the day of the decision, as "one of high nervousness on the part of Administration officials"); JOHN M. BLUM, FROM THE MORGENTHAU DIARIES: YEARS OF CRISIS 1928-1938, at 130 (1959) (describing the Treasury Department's preparation for an adverse decision); 1 HAROLD L. ICKES, THE SECRET DIARY OF HAROLD L. ICKES: THE FIRST THOUSAND DAYS, 1933-1936, at 294 (1953) (stating that the Roosevelt Administration was "somewhat jittery" about the gold cases).

¹⁵⁸ *Perry*, 294 U.S. at 381.

¹⁵⁹ See *Constitution Gone, Says McReynolds*, N.Y. TIMES, Feb. 19, 1935, at 1.

¹⁶⁰ WILLIAM F. SWINDLER, COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE NEW LEGALITY, 1932-1968, at 37 (1970).

¹⁶¹ 294 U.S. 240 (1935).

¹⁶² *Id.* at 315. This conclusion, however, is powerfully criticized in Kenneth W. Dam, *From the Gold Clause Cases to the Gold Commission: A Half Century of American Monetary Law*, 50 U. CHI. L. REV. 504, 519-21 (1983). Dam suggests that *Norman* was

the constitutional authority of the Congress.”¹⁶³ Moreover,

[t]o subordinate the exercise of the Federal authority to the continuing operation of previous contracts would be to place to this extent the regulation of interstate commerce in the hands of private individuals and to withdraw from the control of the Congress so much of the field as they might choose by “prophetic discernment” to bring within the range of their agreements.¹⁶⁴

The question was far more difficult when the contractual debtor was the government itself. The third case, *Nortz v. United States*,¹⁶⁵ involved a governmental obligation, but also presented a loophole that enabled Hughes to avoid the ultimate issues.¹⁶⁶ But the last case, *Perry v. United States*,¹⁶⁷ involved a federal obligation—a \$10,000 bond with a gold clause—that the owner had not presented for payment until after devaluation. Thus, if the promise of the government to pay gold or its currency equivalent were given effect, it seemingly could only be by paying Perry \$16,931 devalued dollars. Perry’s claim therefore presented the question whether the government’s power over the monetary system entitled it to abrogate its own promise. The Court held emphatically in the negative.¹⁶⁸ But then the opinion took a sharp turn. Perry could only recover for actual loss caused by the government’s repudiation and, to the astonishment of all, Hughes held that there had been none: “Plaintiff has not shown, or attempted to show, that in relation to buying power he has sustained any loss whatever. On the contrary”—an even more surprising addition—payment of the amount

motivated by the same concern that evidently motivated Hughes in the *Perry* case, see *infra* text accompanying note 169—namely, the desire to prevent a windfall to creditors. See *id.* at 520-22.

¹⁶³ 294 U.S. at 307.

¹⁶⁴ *Id.* at 310 (quoting *Philadelphia, B. & W. R.R. v. Schubert*, 224 U.S. 603, 614 (1912)).

¹⁶⁵ 294 U.S. 317 (1935).

¹⁶⁶ Nortz had turned his gold certificates in to the Treasury after the Treasury had ended private bullion holdings and before official devaluation, though the dollar was already discounted on the international market. See *id.* at 323. Hughes held that Nortz was entitled to receive for his certificates neither gold bullion nor the amount of dollars that the gold would have bought on the international market; had Nortz received gold, his only legal option would have been to return it to the Treasury for currency at the predevaluation rate. See *id.*

¹⁶⁷ 294 U.S. 330 (1935).

¹⁶⁸ Justice Stone refused to join this part of Hughes’s opinion, which was unnecessary to its result. But of course the four dissenters, as well as the remaining members of the majority, subscribed to the proposition that the government had acted improperly. See *id.* at 358.

Perry demanded would be "an unjustified enrichment."¹⁶⁹ There were no actual damages, therefore no relief. End of case.

Hughes's reasoning on damages was plainly very suspect. As Henry Hart noted, the bondholder might have "contracted for more than protection against injury, . . . for the very windfall now denied him."¹⁷⁰ Strangely enough, though, Hughes probably conscientiously believed the position he articulated: he regarded the gold clause as a legitimate "protection against loss,"¹⁷¹ but he was not inclined to give force to the terms of a contract if in the particular case they would have produced what he considered an unfair result.¹⁷² In this case—with no indication that the bondholder was dealing on international markets¹⁷³—damages must have seemed to him like a gambling payoff.¹⁷⁴

To what extent Hughes's concurring colleagues were persuaded by his reasoning, or at least by his resistance to giving the creditors a windfall, is hard to know. They may have voted with him for other reasons—perhaps a judgment of realpolitik that granting relief to bondholders would cause economic chaos, perhaps (not all that different) a judgment of principle that the government as regulator of the currency could legitimately relieve the government as debtor, uniformly with private debtors, of an obligation that appeared to threaten monetary policy.¹⁷⁵ In any event, the bottom line is that

¹⁶⁹ *Id.* at 357-58.

¹⁷⁰ Henry M. Hart, Jr., *The Gold Clause in United States Bonds*, 48 HARV. L. REV. 1057, 1079 (1935).

¹⁷¹ *Perry*, 294 U.S. at 348.

¹⁷² See Friedman, *supra* note 82, at 72-76, 209-10; see also *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *infra* notes 226-39 and accompanying text.

¹⁷³ But see *Guaranty Trust Co. v. Henwood*, 307 U.S. 247 (1939), discussed *infra* note 434 and accompanying text, in which the gold clause provided for payment in gold dollars or in fixed amounts of currency of one of several nations, and in which Stone, joined by Hughes, McReynolds, and Butler, dissenting, would have held for the bondholders. See *id.* at 260-61.

¹⁷⁴ See Henry Hazlitt, *If the Court Turns Thumbs Down*, 140 NATION 126, 126 (1935) (stating that, under prevailing conditions, victory for Perry "would merely throw huge unearned profits into the laps of creditors, who would chiefly turn out to be a new crop of speculators and gamblers"). Professor Dam offers, without necessarily endorsing, a very insightful argument that gives this perception some intellectual legitimacy. The gold clauses, which operated upon devaluation, had been inserted into debt instruments as a creditor protection, albeit imperfect, against inflation: "Devaluation is usually associated with . . . a more rapid rate of inflation than that of other countries." Dam, *supra* note 162, at 524. The devaluation of 1934, however, was a result of monetary policy adopted by Roosevelt to combat steep deflation; even after the inflationary impact of his actions, prices remained substantially below 1929 levels, so "the windfall argument was not entirely baseless." *Id.* at 525.

¹⁷⁵ Hart believed a "strong-fibred explanation" for holding the government's action

a majority of the Court allowed the government to overcome private contractual protections to achieve a daring change in monetary policy for the broader societal good—and, of course, the Court did this before 1936.

4. Rumination

We can now focus more carefully on the first thought experiment with which I began this Article. Suppose for the moment that just before *Blaisdell*, after a period in which the Hughes Court appeared to be retrenching, Roosevelt had proposed to pack the Court with extra members. Suppose also that his plan occupied a prominent place on the political stage until after the *Gold Clause* decisions. During that interval, the three most significant cases decided by the Court—*Blaisdell*, *Nebbia*, and the *Gold Clause Cases*—were all liberal victories, all by five-to-four votes; the most significant liberal loss, *Panama Refining*, was narrow and nearly unanimous.

I believe it would have been deemed obvious that the two swing members of the Court, Hughes and Roberts, had changed direction in response to the political pressure created by the Court-packing plan and, in the case of the *Gold Clause Cases*, the great Democratic victory in the congressional election of 1934. Thus, this thought experiment provides a useful warning to avoid post hoc reasoning: The Hughes Court was capable of surprise, even flurries of surprises, without the intervention of any apparent external factor.¹⁷⁶

E. The Confrontation Begins

As it turned out, the *Gold Clause Cases* were virtually the only major victory that the Court gave the Roosevelt Administration before 1937. I put aside here *Ashwander v. Tennessee Valley Authority*;¹⁷⁷ although the program of the TVA would have been invalidated on broad grounds had McReynolds's solo dissent been

proper would have been possible. Hart, *supra* note 170, at 1099; cf. ALPHEUS T. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 392 (1956) (quoting Learned Hand in a letter to Justice Stone: "Everybody dealing with a sovereign knows he is dealing with a creature who can welch if he wants to welch.").

¹⁷⁶ See Cushman, *New Deal Court*, *supra* note 6, at 259 & n.324 (noting constitutional reassessment and revisions that occurred before 1937 and concluding that "[e]xternal pressure is hardly a necessary condition for substantial change in constitutional doctrine").

¹⁷⁷ 297 U.S. 288 (1936).

the opinion of the Court, Hughes's narrowly crafted opinion turned back the challenge without reaching basic issues.¹⁷⁸

In May 1935, the Court delivered the Administration several important defeats. The first occurred on May 6, in *Railroad Retirement Board v. Alton Railroad*¹⁷⁹ With the avowed purpose of improving efficiency and morale in interstate commerce, the first New Deal Congress had passed a Railroad Retirement Act. Requiring retirement for railroad employees at age sixty-five, the statute set up a pension scheme financed by compulsory contributions from both the carriers and their employees. Justice Roberts, joining the four conservatives to form a bare majority against the Act, found a plethora of reasons why various facets of its reach—for example, its application to employees discharged for good reason—violated the Fifth Amendment's Due Process Clause.¹⁸⁰ But even if these unconstitutional features could be severed, Roberts wrote, the Act was not truly a regulation of interstate commerce. Perhaps because all four of his concurring brethren were well over sixty-five, he questioned whether "the man of that age is inefficient or incompetent."¹⁸¹ The "fostering of a contented mind" was not in itself a proper goal for Congress, and its bearing on efficiency was so attenuated that if it were allowed on that ground there "obviously" would be "no limit to the field of so-called regulation."¹⁸² The Act "really and essentially related solely to the social welfare of the worker," not to the regulation of commerce.¹⁸³

Hughes, in a powerful dissent joined by the three liberals,

¹⁷⁸ Hughes's opinion held that water power incidental to construction of a dam built for defense and navigation purposes, and the electrical energy yielded by such water power, were property of the United States, so that the TVA could constitutionally dispose of such energy. See *id.* at 330, 338.

¹⁷⁹ 295 U.S. 330 (1935); see also *Rail Pension Act Voided*, LITERARY DIG., May 11, 1935, at 8.

¹⁸⁰ This feature, said Roberts, was "arbitrary in the last degree." 295 U.S. at 349. In addition, he thought it equally arbitrary for Congress to give a pension right for work already done, especially to those workers covered by the Act who had actually retired before its passage; morale did not seem likely to be improved by allowing a pension to all employees at 65, whatever the duration of their service; nor would the economy likely be aided by providing pension to all employees, even those younger than 65, retiring after 30 years of service. See *id.* at 351-55. Moreover, the entire pension scheme violated the Fifth Amendment by lumping all carriers into one pool even though they stood in different circumstances in regard to the age of their employees—a common fund was therefore merely a transfer from one railroad to another. See *id.* at 355-61.

¹⁸¹ *Id.* at 364.

¹⁸² *Id.* at 368.

¹⁸³ *Id.*

argued that virtually all the legislative choices were reasonable ones consistent with the requirements of due process.¹⁸⁴ As to the Commerce Clause holding, Hughes thought that, on grounds of improving efficiency either by improving morale or by avoiding superannuation, the Act made reasonable choices. He did not rest on efficiency arguments alone, however. He took Roberts up on his own ground—that the plan was “an attempt for social ends to impose by sheer fiat non-contractual incidents upon the relation of employer and employee,” and hence outside the commerce power.¹⁸⁵ Seizing with alacrity on a suggestion by Justices Cardozo and Stone,¹⁸⁶ Hughes pointed to the analogy of workers’ compensation laws. “The fundamental consideration which supports this type of legislation,” he wrote, “is that industry should take care of its human wastage, whether that is due to accident or age.”¹⁸⁷

Alton represents Roberts at his most conservative, but it is hard to draw implications from it for his conduct in the critical cases of the following two years. Roberts’s opinion demonstrated vividly that he still perceived a substantial judicial role under the Constitution’s Due Process Clauses in response to economic legislation. But that had already been apparent, both before¹⁸⁸ and after¹⁸⁹ *Nebbia*, and it would be so again;¹⁹⁰ *Alton* did not involve the type of issue that had been at stake in *Nebbia* or would be present again in the minimum wage cases of 1936 and 1937.¹⁹¹

¹⁸⁴ He did agree that the Act was arbitrary in providing allowances for employees who had been in service within the year prior to enactment, even though they might never be reemployed, but he also regarded this provision as clearly severable. *See id.* at 389 (Hughes, C.J., dissenting).

¹⁸⁵ *Id.* at 374.

¹⁸⁶ Letter from Justice Cardozo to Chief Justice Hughes (Apr. 19, 1935), in 61 STONE PAPERS, *supra* note 129; *see* MASON, *supra* note 175, at 393 (quoting, in part, Cardozo’s letter to Hughes which suggested that there is no material distinction “between compensating men who have been incapacitated by accident (though without fault of the employer), and compensating men who have been injured by the wear and tear of time, the slow attrition of the years”).

¹⁸⁷ 295 U.S. at 384 (Hughes, C.J., dissenting).

¹⁸⁸ *See* *New State Ice Co. v. Liebmann*, 285 U.S. 262, 278-79 (1932); discussion *supra* notes 84-90 and accompanying text, and cases discussed *supra* note 81 (including *Coombes v. Getz*, 285 U.S. 434, 441 (1932); *Heiner v. Donnan*, 285 U.S. 312, 326-328 (1932); *Hoeper v. Tax Comm’n*, 284 U.S. 206, 215 (1931); and *Chicago, R.I. & Pac. Ry. v. United States*, 284 U.S. 80, 96-97 (1931)).

¹⁸⁹ *See* *Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266, 271 (1936); *supra* note 150.

¹⁹⁰ *See, e.g.,* *Welch v. Henry*, 305 U.S. 134, 151-59 (1938) (Roberts, J., dissenting); discussion *infra* notes 422, 427.

¹⁹¹ Those cases all involved price regulations. A compulsory pension scheme

As to Roberts's Commerce Clause holding, because it concerned the railroads, it did not raise the issue that was soon to be most important—the extent to which Congress's power could reach to matters deemed local because of their anticipated impact on interstate commerce. Roberts's Commerce Clause discussion does not suggest that he thought the regulation of the internal operation of the railroads, or even their labor relations, was beyond Congress's power. That congressional power did reach so far had been clearly established in many cases—most notably *Texas & New Orleans Railroad v. Brotherhood of Railway and Steamship Clerks*,¹⁹² in which all his conservative colleagues had concurred. Probably in none of those cases had the relationship of the regulation to the suitable maintenance of service been so speculative as in *Alton*. In any event, Roberts's stance in *Alton* clearly does suggest that in 1935, as in 1931 when he cast the decisive vote in *United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad*,¹⁹³ he was inclined to stay on traditional ground in Commerce Clause analysis.

For that matter, in 1935 none of the Justices were inclined to treat the Commerce Clause too venturesomely, as suggested by the extraordinarily narrow view of the scope of commerce that the Court had taken, unanimously, in recent cases under the Employers' Liability Act.¹⁹⁴ And, far more visibly but also unanimously, the Court declined to take a broad view of the constitutional limits of the commerce power when, three weeks after *Alton*, it unanimously decided against the government in the "Sick Chicken" case, *Schechter Poultry Corp. v. United States*.¹⁹⁵ Section 3 of the National Industrial Recovery Act had authorized the President, on application by a

might be considered to be a type of price regulation for labor. But Roberts did not suggest that a compulsory pension scheme adopted as a matter of state law would be per se illegal. It was only certain features of the Act that he believed violated due process, not the core idea of a pension scheme itself. See *Alton*, 295 U.S. at 361-62. He did believe the scheme was beyond the commerce power of Congress, but of course that would not affect state power. See *id.* at 368.

¹⁹² 281 U.S. 548 (1930); see *supra* notes 33-38 and accompanying text.

¹⁹³ 282 U.S. 311 (1931); see *supra* notes 45-47 and accompanying text.

¹⁹⁴ See *New York, N.H. & H. R.R. v. Bezue*, 284 U.S. 415, 420 (1932) (holding that an employee was not within the reach of the Act because of "[t]he length of the period during which the locomotive [in the repair of which he was injured] was withdrawn from service and the extent of the repairs"); *Chicago & N.W. Ry. v. Bolle*, 284 U.S. 74, 80 (1931) (holding that an employee whose job with the railway required him to produce steam for the company's station was not engaged in interstate commerce, the steam not being "used or intended to be used . . . in the transportation of anything").

¹⁹⁵ 295 U.S. 495 (1935).

trade group, to promulgate a "code of fair competition" for a particular industry. These codes, given the force of law, could specify unfair trade practices, prescribe wages, hours, and other employment conditions for the industry, and require collective bargaining. Writing for the Court, Hughes drew on his decision in *Panama Refining* to hold that this system—symbolized by the famous Blue Eagle of the National Recovery Administration—was improper delegation. Even Cardozo, who had dissented in *Panama Refining*, agreed. Concurring separately, in an opinion joined by Stone, Cardozo wrote that the delegation involved in section 3 "is not canalized within banks that keep it from overflowing. It is unconfined and vagrant."¹⁹⁶ Not limited to a single act or defined by a standard, it provided "a roving commission to inquire into evils and upon discovery correct them."¹⁹⁷ If this conception should prevail, Congress could transfer its entire power over commerce to the Executive. "This," Cardozo concluded, both pungently and accurately, "is delegation running riot."¹⁹⁸

But neither Hughes nor Cardozo stopped with discussion of delegation. The defendants in *Schechter*, slaughterhouse operators in Brooklyn, had been convicted of violating various sections of the Live Poultry Code, among them the wage and hours provisions; one of the counts charged them with having sold an unfit chicken. Both Hughes and Cardozo concluded that these activities were beyond Congress's reach under the commerce power. That the *Schechters* purchased virtually all their chickens from out of state was irrelevant, Hughes explained, for the interstate movement ended when the chickens were brought to their slaughterhouses.¹⁹⁹ Since the regulated transactions were therefore not in interstate commerce, the question then became whether they could be fairly considered to "affect" it.²⁰⁰ In deciding this question, Hughes claimed that, though "[t]he precise line can be drawn only as individual cases arise," "there is a necessary and well-established distinction between direct and indirect effects."²⁰¹ And here, Hughes did not find such a direct relationship. He rejected out of hand the macro-economic argument that the effect of general wage stimulation on

¹⁹⁶ *Id.* at 551 (Cardozo, J., concurring).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 553.

¹⁹⁹ *See id.* at 543 (noting that "[n]either the slaughtering or the sales by defendants were transactions in interstate commerce").

²⁰⁰ *Id.* at 544.

²⁰¹ *Id.* at 546.

the national economy provided a sufficient nexus between the labor provisions and interstate commerce.²⁰² And Cardozo, far from indicating disagreement, declared that on the commerce question "little can be added to the opinion of the court."²⁰³ Although he asserted that "[t]he law is not indifferent to considerations of degree," this was an argument against the code. His test was in terms of the hard words "immediacy" and "directness": "To find immediacy or directness here," he declared, "is to find it almost everywhere."²⁰⁴

As the unanimity suggests, *Schechter* was not a close case. No doubt a later Court, perhaps not all that much later,²⁰⁵ building on precedent, would have been able to find a sufficient nexus between the Schechters' activities and interstate commerce to justify the regulation. But not in 1935. Such a nexus was not apparent even to Brandeis, Stone, and Cardozo. As Robert Jackson, an ardent and perceptive New Dealer, later conceded, the code provisions in question "were hardly calculated to electrify any Court to the need of federal regulation."²⁰⁶

The same day as *Schechter*, the Supreme Court handed down its decisions in two other cases that held much public interest. Like *Schechter*, both decisions held against the Administration, and both were unanimous. One of them, *Louisville Joint Stock Land Bank v. Radford*,²⁰⁷ written by Brandeis, held invalid a federal debtor-relief statute, the Frazier-Lemke Act, that swept more broadly than the statute upheld in *Blaisdell*. It is significant, therefore, because it indicates that even the liberals were willing to hold redistributive legislation unconstitutional on grounds of confiscation.²⁰⁸

The triple blow gave May 27, 1935, the enduring name "Black Monday." In response, Roosevelt criticized the Court publicly, referring at a press conference to its "horse-and-buggy age" conception of the Constitution. This comment brought a startlingly hostile reaction, even from liberals,²⁰⁹ and Roosevelt did not

²⁰² See *id.* at 548-49.

²⁰³ *Id.* at 554 (Cardozo, J., concurring).

²⁰⁴ *Id.*

²⁰⁵ See *infra* text accompanying notes 443-46.

²⁰⁶ JACKSON, *supra* note 155, at 113.

²⁰⁷ 295 U.S. 555 (1935).

²⁰⁸ The third case was *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), which is of continuing constitutional importance on the constitutional separation of powers.

²⁰⁹ See William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347, 358 ("Most commentators upbraided the

follow up on it; indeed, careful to avoid raising an unnecessary issue, he kept a virtual public silence on the Court until well after the election of 1936.²¹⁰

F. Summary and a Look Ahead

One way of summarizing the discussion above, helpful to understanding the main themes of this Article, is to look ahead.

THOUGHT EXPERIMENT III: SEARCHING FOR THE MYSTERY

In the spring of 1937, in a highly charged political atmosphere, the Supreme Court decided three crucial sets of cases, all on the liberal side. Suppose there had been no 1936. Would 1937 have been very surprising?

I believe the answer is negative: based only on the Court's decisions through 1935, the 1937 decisions would not have been particularly surprising.

In the first of the great 1937 cases, *West Coast Hotel Co. v. Parrish*,²¹¹ the Court upheld a minimum wage law. Based on its decisions through 1935, that result would not only have been unsurprising but expected: *O'Gorman* and *Nebbia* pointed strongly in that direction.

A second set, the *Social Security Cases*,²¹² upheld the Social Security Act by implementing a broad conception of congressional power to tax and spend in pursuit of the general welfare. That result, too, would not have been surprising based on the Court's decisions through 1935. *Blaisdell* and the *Gold Clause Cases* indicated that a majority of the Court was already willing to take a broad view of governmental power to pursue the general welfare; *Blaisdell* in particular had indicated that the Court was willing to view the advancement of private interests as beneficial to society as a whole.

In the third set of cases, the Labor Board cases, the Court

President severely. . . . Nor were all liberals pleased with Roosevelt's remarks."); Charles P. Taft, "More Than This Would Be Revolution," SAT. EVENING POST, Apr. 10, 1937, at 18 ("The President certainly had a right to be startled at the hostile public reaction to his 'horse-and-buggy' press conference . . .").

²¹⁰ See Oswald G. Villard, *Issues and Men*, 143 NATION 547 (1936) (describing Roosevelt's silence); *infra* note 305 (discussing the election of 1936).

²¹¹ 300 U.S. 379 (1937).

²¹² *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937).

upheld application of the National Labor Relations Act (NLRA), a comprehensive federal regulation of labor relations, to productive activities. The unanimous decision in *Schechter* would not have made this result surprising, because the facts in *Schechter* were so much less favorable to an assertion of the commerce power than were the facts in the Labor Board cases. But the narrow view of the commerce power that Roberts seemed to share with the conservatives probably would have made mildly surprising his decision to join his more liberal colleagues in vitiating the longstanding doctrine that production is not commerce. The surprise would have been no more than mild because Roberts had not yet addressed an issue quite like the one presented by the Labor Board cases.

But of course 1936 did happen, and during that year each of the 1937 landmarks was preceded by a case pointing in the opposite direction. *Morehead v. New York ex rel. Tipaldo*,²¹³ with Roberts providing the decisive vote, invalidated a state minimum wage law. *United States v. Butler*,²¹⁴ a Roberts opinion joined by Hughes as well as the conservatives, invalidated a federal taxing and spending program. And in *Carter v. Carter Coal Co.*,²¹⁵ like the Labor Board cases involving a productive industry, the Court, with the full concurrence of Roberts and the partial agreement of Hughes, invalidated a statute that bore some resemblance to the NLRA.

Moreover, after the *Tipaldo* case, the Court endured a firestorm of criticism. Later that year, Franklin Roosevelt, the leader and personal embodiment of the New Deal, won a huge landslide reelection victory. And on February 5, 1937, just sixteen days after his second inauguration and before the Court had issued any of its landmark 1937 decisions, Roosevelt suddenly launched a bombshell, his plan to pack the Court. The battle over the plan raged while the Court issued those decisions. And meanwhile, a flurry of sit-down strikes hindered the nation's industrial recovery.²¹⁶

How, then, can we account for the Court's conduct in 1936 and 1937?

²¹³ 298 U.S. 587 (1936).

²¹⁴ 297 U.S. 1 (1936).

²¹⁵ 298 U.S. 238 (1936).

²¹⁶ See JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 46 (1983) ("From September 1936 through May 1937, sitdown strikes directly involved 484,711 workers and closed plants employing 600,000 others. In March 1937 alone, 167,210 people engaged in 170 occupations of employer property." (footnotes omitted)).

II. SWITCHES, REAL OR APPARENT

In this Part, I examine the three switches supposedly made by the Court in 1937; I analyze each of the 1937 landmarks together with the 1936 case that pointed the other way. Because the key votes in these cases were held by Hughes and Roberts, I focus on trying to understand their conduct in particular.

I argue that Hughes's votes in 1937 were not affected by short-term political factors—not by the reaction to the 1936 Court decisions, not by Roosevelt's reelection, and not by the Court-packing battle. Although the language of his opinions may occasionally have been affected by the political crisis that was steadily enveloping the Court, his votes were not. He voted in 1937 as his prior conduct, and indeed his later conduct, suggested he would.

As to Roberts, it is more difficult to be confident. His votes in the *Social Security Cases* are what one would expect even apart from the immediate political environment. His behavior in the minimum wage cases, however, is puzzling. Though political factors may help explain his willingness to confront the issue in 1937, they are not needed to explain how he reached the result he did, which is consistent with his earlier conduct. It seems most likely that his votes in the *Labor Board* cases represented some shift in his attitude towards the commerce power, but to what extent, if any, that shift depended on political factors is difficult to determine.

A. *The Minimum Wage Cases*

1. The Puzzle

On June 1, 1936, in *Morehead v. New York ex rel. Tipaldo*,²¹⁷ a five-member majority of the Court, composed of Roberts and the four conservatives, invalidated a New York statute prescribing minimum wages for women. Relying on *Adkins v. Children's Hospital*,²¹⁸ the Court held the statute to be a violation of the freedom of contract.²¹⁹ Hughes dissented, distinguishing *Adkins*.²²⁰ The three liberals concurred in Hughes's opinion, but they also joined in a separate opinion by Stone arguing that *Adkins*

²¹⁷ 298 U.S. 587 (1936).

²¹⁸ 261 U.S. 525 (1923).

²¹⁹ See 298 U.S. at 617-18.

²²⁰ See *id.* at 618-31.

should be overruled.²²¹

On March 29, 1937, in *West Coast Hotel Co. v. Parrish*,²²² the Court, by a five-to-four vote, upheld a Washington statute also prescribing minimum wages for women.²²³ This time, Roberts joined with the liberals in an opinion by Hughes, flatly overruling *Adkins*.²²⁴ The four conservatives dissented.²²⁵

Why did the Court change direction?

2. Hughes

One part of the puzzle, at least, is not difficult to solve; indeed, it should not be a puzzle at all. Some observers who should know better have spoken of Hughes's authorship of the majority opinion in *West Coast Hotel*, establishing the validity of minimum wage legislation for women, as if it represented an abandonment of his previous views.²²⁶ Robert Jackson had a clearer view. Present at the government counsel table as Hughes read his opinion to a jammed courtroom, with a double line of spectators leading all the way outside the building, Jackson found the occasion "a moment never to be forgotten."²²⁷ The Chief Justice's voice, he later recalled, "was one of triumph. He was reversing his Court, but not himself."²²⁸

Hughes had, of course, dissented in *Tipaldo*. Purportedly

²²¹ See *id.* at 631-36 (Stone, J., dissenting with Brandeis and Cardozo, JJ., joining).

²²² 300 U.S. 379 (1937).

²²³ See *id.* at 400.

²²⁴ See *id.* at 386-400.

²²⁵ See *id.* at 400-14 (Sutherland, J., dissenting with Van Devanter, McReynolds, and Butler, JJ., joining).

²²⁶ See JOSEPH ALSOP & TURNER CATLEDGE, *THE 168 DAYS 142* (1938) (calling Hughes's opinion an "unpleasant task" taken on to ease political pressure); MASON, *supra* note 175, at 456 (referring to some of Hughes's language in *West Coast Hotel*—including his declaration that "the decision in the *Adkins* case was a departure from the true application of the principles governing the regulation by the state of the employer and employed"—as "a far cry from the stand he had taken a year earlier in the *Tipaldo* case" and referring to the "day that the Hughes-Roberts switch won judicial sanction for the minimum wage"). Ariens notes that Pusey discusses "the change in position of Hughes and Roberts in *West Coast Hotel* and *Jones & Laughlin Steel*." Ariens, *supra* note 6, at 650 n.150 (citing MERLO J. PUSEY, *THE SUPREME COURT CRISIS 51-53* (1937)). Pusey, however, makes no suggestion that Hughes changed his position in *West Coast Hotel*. Cf. 2 HAROLD L. ICKES, *THE SECRET DIARY OF HAROLD L. ICKES: THE INSIDE STRUGGLE 1936-1939*, at 107 (1954) (writing after *West Coast Hotel*: "Hughes and Roberts ought to realize that the mob is always ready to tear and rend at any sign of weakness.").

²²⁷ JACKSON, *supra* note 155, at 207-08.

²²⁸ *Id.* at 208.

adhering to the issue on which that case was litigated, he did not then explicitly call for *Adkins* to be overruled but rather argued that the case was distinguishable: The *Adkins* statute, Hughes noted in his dissent, based the prescribed minimum wage solely on the cost of living, without taking into account the reasonable value of the employee's services, whereas the New York statute based the minimum wage on both these factors. But his opinion left no doubt that he had deep disdain for *Adkins*; indeed, he did not merely distinguish *Adkins* but abruptly cast it aside, treating it as having no authority at all for the case before the Court.²²⁹ And his public disdain was confirmed by his private correspondence with Stone. One sentence in Hughes's draft said that *Adkins* did not control unless the distinction between the two statutes was immaterial. Stone, fearing that this implied that *Adkins* did control if the distinction was immaterial, asked the Chief Justice to remove the offending passage. Hughes responded that he was "quite willing" to do so, and did.²³⁰

With *Adkins* shoved aside, Hughes's *Tipaldo* dissent contained a broadside attack on the doctrine of freedom of contract. He did not deny the existence of that freedom, but emphasized that it "is a qualified and not an absolute right."²³¹ With a conspicuous cite to *Nebbia*, he declared that the test of whether a statute invalidly encroaches upon that freedom "is not artificial"; the question, he wrote, was whether the restraint was "arbitrary and capricious" rather than "reasonably required in order appropriately to serve the public interest."²³²

For Hughes, the *West Coast Hotel* decision the next year represented not merely the nullification of *Tipaldo*, but the culmination

²²⁹ See *Tipaldo*, 298 U.S. at 624-25 (Hughes, C.J., dissenting) (contending that *Adkins* was distinguishable because the statute involved there, unlike the one in *Tipaldo*, did not require the prescribed wage to be reasonable, and pointing out that *Adkins* was closely divided). Hughes argued further that it was impossible to know what the result would have been absent this factor:

We have here a question of constitutional law of grave importance, applying to the statutes of several States in a matter of profound public interest. I think that we should deal with that question upon its merits, without feeling that we are bound by a decision which on its facts is not strictly in point.

Id. at 625.

²³⁰ MASON, *supra* note 175, at 423 (quoting Hughes as responding that he was "quite willing to omit the sentence").

²³¹ *Tipaldo*, 298 U.S. at 628 (Hughes, C.J., dissenting).

²³² *Id.* at 629.

of a long struggle against the doctrine of freedom of contract. As an Associate Justice, writing in the employment context, he had attempted to narrow the scope of the doctrine,²³³ and had joined in a dissent from a notorious application of that doctrine, also in the employment context.²³⁴ As Chief Justice, he not only had dissented in *Tipaldo*, but also had provided crucial votes for the majority in *O'Gorman*²³⁵ and *Nebbia*.²³⁶ In *West Coast Hotel*, he was able to incorporate the analysis of his *Tipaldo* dissent, and much of the same language, into a majority opinion:

The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law [T]he 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. 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.²³⁷

The resemblance to both *Nebbia* and *Blaisdell* is unmistakable. *Blaisdell* had reduced the Contracts Clause to a general, non-categorical test of reasonableness; *Nebbia* had done the same not only with respect to the "affected with a public interest" branch of the doctrine of freedom of contract but, in general terms, with respect to the entire doctrine of substantive due process; and now *West Coast Hotel*, really a corollary of *Nebbia*, confirmed that move with respect to freedom of contract. The similarity goes beyond narrow doctrinal questions. Both *Blaisdell* and the *Gold Clause Cases*, as well as the freedom of contract cases, reflected Hughes's consistent refusal—dating at least as far back as his tenure as Associate Justice²³⁸—to view legal problems through a contractarian lens.²³⁹

²³³ See *Philadelphia, B. & W. R.R. v. Schubert*, 224 U.S. 603, 609 (1912) (broadly applying the doctrine that if Congress has the power to impose liability in a given area, it also has the power to enforce such liability by prohibiting contracts designed to evade it); *Chicago, B. & Q. R.R. v. McGuire*, 219 U.S. 549, 567 (1911) (upholding the power of the state to forbid railroads to contract out of statutory liability, and declaring that freedom of contract, like any other liberty protected by the Due Process Clause, merely "implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community").

²³⁴ See *Coppage v. Kansas*, 236 U.S. 1, 27-42 (1915); see also discussion *supra* note 34 and accompanying text.

²³⁵ 282 U.S. 251 (1931); see *supra* notes 39-44 and accompanying text.

²³⁶ 291 U.S. 502 (1934); see *supra* part I.D.2.

²³⁷ *West Coast Hotel*, 300 U.S. at 391.

²³⁸ See Note, *supra* note 28, at 988 n.169 ("Emanations of Hughes's unwillingness

3. Roberts

I have offered the discussion above not simply to emphasize that Hughes did not switch between *Tipaldo* and *West Coast Hotel*, which should be obvious, but also to make two points that bear on understanding Roberts's conduct. First, the conservative positions that Roberts shared with Hughes—reflected most notably in their joining with the conservatives in *New State Ice Co. v. Liebmann*²⁴⁰—could coexist with opposition to the doctrine of freedom of contract; Hughes's passionate opposition to that doctrine, expressed before the turmoil began, was obviously conscientious. Second, the affinity between *Nebbia* and both of Hughes's opinions in the minimum wage cases was strong and obvious; by contrast, neither Butler's opinion in *Tipaldo* nor Sutherland's dissent in *West Coast Hotel* so much as mentioned *Nebbia*, and both represented the categorical type of jurisprudence that *Nebbia* had assailed. One would naturally expect the author of *Nebbia* to join Hughes's opinion (if not Stone's more daring one) in the first of the minimum wage cases as well as in the second: *Nebbia*'s broad endorsement of the state's power to set prices clearly implied the state's ability to set the price of labor.²⁴¹

to accept markets and contracts as sufficient tools of social ordering pervade his opinions.”).

²³⁹ I am using “contractarian” to describe a view relying heavily on contracts as a dominant instrument for organizing society. The Contracts Clause forbids states to “pass any . . . Law impairing the Obligation of Contracts.” U.S. CONST. art. I, § 10, cl. 1. Hence, it applies to contracts into which the parties have already entered at the time of the legislative intervention. The doctrine of freedom of contract restricted the states' ability to regulate contracts prospectively. The two doctrines thus present substantially different considerations. But Hughes's views on both indicate an unwillingness to let private contracts take priority over public regulation in ordering social relationships. Associated with Hughes's noncontractarian view was a reluctance to rely heavily on markets as determining outcomes. See *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 373-74 (1933) (stating Hughes's opinion that a large sellers' cooperative, which was given exclusive authority to set prices for its members' output, fostered fairer competition, given the distressed circumstances of the industry, than would prevail if each member priced its product independently).

²⁴⁰ 285 U.S. 262 (1932); see also *supra* notes 109, 150, and notes 84-90, 147-48, 188 and accompanying text (discussing *New State Ice*).

²⁴¹ Note in this connection that the Court in *Adkins* characterized the minimum wage statute challenged there as “simply and exclusively a price-fixing law.” 261 U.S. at 554.

a. *In Tipaldo*

Why did Roberts, who had not only written *Nebbia* but also cast a crucial vote for the *O'Gorman* majority, provide the fifth vote for Butler's *Tipaldo* opinion, which included a ringing endorsement of *Adkins*? At least twice in later years Roberts offered explanations. The first, and better known, explanation was embodied in a memorandum written by Roberts in 1945 and presented by Felix Frankfurter as part of a posthumous tribute to Roberts in the pages of this *Law Review*.²⁴² In 1946, Roberts also had a conversation with Merlo Pusey, Hughes's biographer, in which he appears to have offered a similar explanation.²⁴³

Professor Ariens has expressed serious reservations²⁴⁴ about the existence of the Roberts memorandum revealed by Frankfurter. I believe, though, that there is no genuine doubt that the memorandum was authentic. I state my reasons for this conclusion in the companion essay to this Article;²⁴⁵ here, I assume the memorandum's authenticity.

The State, contended Roberts, did not ask that *Adkins* be overruled, and he said at conference that he "was for taking the State of New York at its word."²⁴⁶ Rather, the State sought to distinguish *Adkins* on the basis of arguments that Roberts found "disingenuous and born of timidity."²⁴⁷ Rejecting them, he expressed his willingness to "concur in any opinion which was based on the fact that the State had not asked us to re-examine or overrule *Adkins* and that, as we found no material difference in the facts of the two cases, we should therefore follow the *Adkins* case."²⁴⁸

How well does this explanation hold up? Of one thing at least we can be quite certain. Butler's majority opinion clearly catered to the rationale later offered by Roberts:

The *Adkins* case, unless distinguishable, requires affirmance of the judgment below. The petition for the writ sought review upon the

²⁴² See Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311, 314-15 (1955).

²⁴³ Pusey's notes of that conversation do not appear to have survived, see Letter from Harvard Heath to Richard D. Friedman, Professor of Law, University of Michigan (Feb. 15, 1994) (on file with author), but Pusey gave an accounting of the conversation in Pusey, *supra* note 11, at 106-07.

²⁴⁴ See Ariens, *supra* note 6, at 645.

²⁴⁵ See Richard D. Friedman, *A Reaffirmation: The Authenticity of the Roberts Memorandum, or Felix the Non-Forger*, 142 U. PA. L. REV. 1985 *passim* (1994).

²⁴⁶ Frankfurter, *supra* note 242, at 314 (quoting Roberts's memorandum).

²⁴⁷ *Id.*

²⁴⁸ *Id.*

ground that this case is distinguishable from that one. No application has been made for reconsideration of the constitutional question there decided. The validity of the principles upon which that decision rests is not challenged. This court confines itself to the ground upon which the writ was asked or granted. Here the review granted was no broader than that sought by the petitioner. He is not entitled and does not ask to be heard upon the question whether the *Adkins* case should be overruled. He maintains that it may be distinguished on the ground that the statutes are vitally dissimilar.²⁴⁹

Apparently in response to Stone's dissent,²⁵⁰ Butler eventually included language making clear his own adherence to *Adkins* in principle. The next year, in *West Coast Hotel*, all four conservatives relied squarely on *Adkins*. Thus, Butler would have had no reason to incorporate into his opinion the limiting language just quoted unless, as Roberts claimed in the memorandum, it was the price of getting Roberts's vote.

But why would Roberts go along with the conservatives? One possibility is that his motivation was just as he later described it—that he found the cases indistinguishable and was unwilling to overrule *Adkins* absent a request by the State, the petitioner in the case. Certainly Roberts may have had conscientious reasons for not joining Hughes in distinguishing away *Adkins* on the basis of differences in the statutory standards for prescribing a minimum wage. As Butler's majority opinion in *Tipaldo* pointed out, the "dominant issue" in *Adkins* was the basic question of state power to set minimum wages for women,²⁵¹ the perceived defect in the standard for setting that wage was merely "an additional ground of subordinate consequence."²⁵² What is more, Roberts may well have been offended by the nature of the State's argument on the basis of the different standards.

The New York Court of Appeals had concluded, with support

²⁴⁹ *Tipaldo*, 298 U.S. at 604-05 (footnote and citations omitted); see also *id.* at 614 ("To distinguish this from the *Adkins* case, petitioner refers to changes in conditions that have come since that decision . . .").

²⁵⁰ See Frankfurter, *supra* note 242, at 315 (quoting Roberts's memorandum as follows: "[A]fter [Stone's] dissent had been circulated [Butler] added matter to [the] opinion, seeking to sustain the *Adkins* case in principle."). Stone apparently announced his intention to write his own dissent only after Butler and Hughes circulated the initial drafts of their opinions. See MASON, *supra* note 175, at 423.

²⁵¹ See 298 U.S. at 614.

²⁵² *Id.*; see also *Adkins*, 261 U.S. at 554 (viewing the state's setting of a minimum wage as a "price-fixing law" impairing freedom of contract).

from *Adkins*, that inclusion of the cost of living standard, even alongside the value of services standard, rendered the statute unconstitutionally vague. Apparently afraid the Supreme Court would agree, New York contended that its highest court had misconstrued the statute. The State contended that the cost of living served only to trigger the statute's machinery, the actual wage being based solely on the value of services.²⁵³ No matter how soundly this argument may have construed the statutory language, it was obviously futile—"untenable," Butler called it²⁵⁴—in the teeth of the Court of Appeals's decision.

New York's attempts to deal with *Adkins* went beyond the statutory language, however. The State argued strenuously that the social context in which New York passed its statute in 1933 differentiated the case from *Adkins*.²⁵⁵ Adoption of this argument might, of course, have had the same effect as overruling *Adkins* as a matter of principle—but not necessarily. It would make future cases extremely dependent upon the social context, with *Adkins* presumably retaining vitality after the country emerged from the Depression.

As Roberts's later memorandum suggested, New York presented this argument in a timid way. The "Questions Presented" in the petition for certiorari in *Tipaldo* did not argue for overruling *Adkins*.²⁵⁶ And, in briefing the case²⁵⁷ and at argument,²⁵⁸ New York and amici favoring the statute made the social context argument in the guise of asking for *Adkins* to be distinguished, rather than overruled. The petition for certiorari did suggest explicitly that "reconsideration" of *Adkins* might be appropriate²⁵⁹—a rather significant embarrassment to Roberts's account. The State's brief on the merits might be construed to have made the same suggestion, in a far more roundabout manner.²⁶⁰ But the

²⁵³ See 298 U.S. at 608-09.

²⁵⁴ *Id.* at 613.

²⁵⁵ Cf. *id.* at 635 (Stone, J., dissenting) (distinguishing the social contexts).

²⁵⁶ See Petition for Writ of Certiorari and Motion to Advance at 4-5, *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) (No. 838).

²⁵⁷ See Appellant's Brief on the Law at 32-49, *Tipaldo* (No. 838).

²⁵⁸ See *The Argument of the Minimum Wage Case*, 3 U.S.L.W. 858, 858 (1936).

²⁵⁹ In Point 6 of the petition, under "Reasons for Allowing This Writ," the State contended: "The circumstances prevailing under which the New York law was enacted call for a reconsideration of the *Adkins* case in the light of the New York act and conditions aimed to be remedied thereby." Petition for Writ of Certiorari and Motion to Advance at 9, *Tipaldo* (No. 838).

²⁶⁰ Seizing on the statement in *Adkins* that "[n]o real test of the economic value

essence of the argument was always that the asserted differences in social contexts made a different result appropriate.

This argument was hardly overwhelming. For one thing, as Butler pointed out, New York had not limited the effectiveness of its statute to any emergency period; rather, the statute reflected "a permanent policy."²⁶¹ Moreover, notwithstanding the *Adkins* court's complacency,²⁶² the low compensation paid to many working women was already a grievous problem in 1918 when Congress passed the statute considered in that case.²⁶³ Roberts's memorandum says that he "could find nothing in the record to substantiate the alleged distinction."²⁶⁴ The State did not make the argument that *Nebbia* suggests would have been more appealing—that *Adkins* was wrongly decided.

Thus, it is plausible that Roberts found *Adkins* and *Tipaldo* to be materially indistinguishable. An intellectually honest defense might also be constructed for the view that the nature of the State's arguments made it inappropriate to overrule *Adkins*. This defense is more than a little rickety but, as Professor Bobbitt has pointed out, it appears to square well with Roberts's general doctrinal approach.²⁶⁵ Nevertheless, one would not expect scruples on this score to cause a Justice to vote against the statute unless doing so satisfied some other interest or need.²⁶⁶

of the law can be had during periods of maximum employment, when general causes keep wages up to or above the minimum," 261 U.S. at 560, the State argued: "In the *Adkins* case, the Supreme Court considered the time not yet ripe for a consideration of the economic valuation of the Minimum Wage Law The time for an evaluation of the Minimum Wage Law, as indicated by this Court, has come." Appellant's Brief on the Law at 44-45, *Tipaldo* (No. 838).

²⁶¹ 298 U.S. at 615.

²⁶² See *supra* note 260 and accompanying text.

²⁶³ See H.R. REP. NO. 571, 65th Cong., 2d Sess. 2 (1918) ("Investigation has shown that a substantial proportion of wage-earning girls and women in this country receive less than a living wage.").

²⁶⁴ Frankfurter, *supra* note 242, at 314.

²⁶⁵ See PHILIP BOBBITT, CONSTITUTIONAL FATE 41 (1982).

²⁶⁶ Justice Stone declared:

I know of no rule or practice by which the arguments advanced in support of an application for certiorari restrict our choice between conflicting precedents in deciding a question of constitutional law which the petition, if granted, requires us to answer. Here the question which the petition specifically presents is whether the New York statute contravenes the Fourteenth Amendment. . . . Unless we are now to construe and apply the Fourteenth Amendment without regard to our decisions since the *Adkins* case, we could not rightly avoid its reconsideration even if it were not asked. We should follow our decision in the *Nebbia* case

I believe the key to finding that interest or need may lie in what might be called Roberts's own judicial timidity. This quality, quite distinct from personal timidity, manifested itself in various ways. Senior on the Court at this time only to Cardozo, Roberts did his best not to stick out. He hardly spoke out during argument; he asked fewer questions than any other Justice.²⁶⁷ Never during Hughes's entire tenure as Chief Justice did Roberts write a concurring opinion.²⁶⁸ Indeed, on only two occasions during that period did he silently concur in the result without joining the majority opinion, and both of those silent concurrences occurred in unusual circumstances that emphasize his caution.²⁶⁹ Shortly before his

298 U.S. at 636 (Stone, J., dissenting). As Edward Purcell has recently commented, "[t]o show that a doctrinal passageway existed . . . is not to show why [a particular Justice] chose to walk through it." Edward A. Purcell, Jr., *Rethinking Constitutional Change*, 80 VA. L. REV. 277, 280 (1994).

²⁶⁷ Thus far, I have found twelve separate transcripts of arguments to the Hughes Court. According to the transcripts, Roberts was utterly silent in all these cases but one, in which he asked two questions. Cardozo, the most junior Justice and the next quietest, asked 12 questions in three cases. Van Devanter, whose troubles writing for the Court were well known, was also on the silent side, asking 15 questions in three cases. All the others were far more active questioners. Hughes asked 154 questions in 11 arguments, McReynolds 169 in seven arguments, Brandeis 131 in five arguments, Sutherland 147 in eight arguments, Butler 222 in six arguments, and Stone 76 in five arguments. For simplicity, any judicial interruption is counted as a question. Both Brandeis and Butler asked the majority of their questions in *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

²⁶⁸ I do not count his opinion in *Sorrells v. United States*, 287 U.S. 435, 453 (1932), the noted entrapment case. Although denominated as a "separate opinion," this was really a dissent, as it disagreed with the resolution of the case; the Court remanded for further proceedings, presumably a new trial, but Roberts contended that the defendant should be discharged. See *id.* at 459.

²⁶⁹ In the first of these cases, *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936), decided just over a month before *Tipaldo*, Hughes wrote the majority opinion, Brandeis wrote a separate concurrence, and Stone and Cardozo wrote another concurring opinion. In another administrative law case dealing with similar issues, *Crowell v. Benson*, 285 U.S. 22 (1932), decided during the interregnum between Holmes and Cardozo, Roberts and Stone had joined Brandeis's dissent from Hughes's opinion for the Court. It seems likely, therefore, that Roberts was more sympathetic with the liberal concurrenrs in *St. Joseph* than with Hughes, who on matters of administrative law tended to be quite rigid. Roberts's silent notation of his concurrence in the result therefore appears to reflect his desire to avoid unnecessary conflict.

The second case was *Helvering v. Wood*, 309 U.S. 344 (1940), a tax case. That case was closely related to another case decided the same day, *Helvering v. Clifford*, 309 U.S. 331 (1940), in which Roberts wrote a dissenting opinion, joined by McReynolds. It is easy enough to see why Roberts, having written a dissent in the first case, would decline to join in the second majority opinion—and yet he still did not feel the need to state the reasons for his concurrence.

Like all the Justices, Roberts occasionally dissented. During his first seven terms

retirement, Roberts even expressed his keen sense of his own mediocrity.²⁷⁰

These manifestations of judicial timidity suggest an explanation for Roberts's pronounced tendency to avoid decisions on constitutional matters whenever possible. This was a tendency he shared with the liberals. Indeed, this was one of the few areas in which Roberts sympathized with the liberals far more than Hughes did. Roberts joined with Cardozo and Stone in Brandeis's concurrence in *Ashwander v. Tennessee Valley Authority*,²⁷¹ a classical expression of "passive virtues,"²⁷² and in the middle of the Court-packing crisis he joined with the liberals again in voting to avoid decision.²⁷³ The liberals, of course, were anything but timid. Their desire to avoid decision stemmed from a sense that, in their eyes, an activist Court was far more likely to do harm than good. Roberts's desire to avoid decision did not reflect ideology in the same way, for plainly his substantive views were more receptive than those of the liberals to judicial activism. Rather, alongside this substantive ideology stood Roberts's desire not to stick out his neck—or the Court's—further than necessary for deciding the case.

Indeed, when later asked about one of the boldest, most liberal

on the Court, however, he dissented less frequently than any other Justice but Hughes, and he hardly ever dissented alone. This does not tell us much. The position that Roberts and Hughes held near the ideological center of the Court helps explain the relative infrequency of their dissents; the position of Hughes—who was anything but timid—as Chief Justice may be an extra factor explaining the relative infrequency of his dissents. With the passage of time, as Roberts became both more senior and more isolated on the right wing of the Court, he dissented more frequently—and less timidly. See, e.g., *Smith v. Allwright*, 321 U.S. 649, 669 (1945) (Roberts complaining in dissent that "the instant decision, overruling that announced nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only"); *infra* note 438 (quoting from Roberts's dissents in 1940 that objected to what he perceived as judicial legislation).

²⁷⁰ See Letter from Justice Roberts to Justice Frankfurter (Oct. 12, 1944) ("I have no illusions about my judicial career. But one can only do what one can. Who am I to revile the good God that he did not make me a Marshall, a Taney, a Bradley, a Holmes, a Brandeis or a Cardozo.") (quoted in Frankfurter, *supra* note 242, at 312, and John W. Chambers, *The Big Switch: Justice Roberts and the Minimum-Wage Cases*, 10 LAB. HIST. 44, 69 n.105 (1969)).

²⁷¹ 297 U.S. 288, 341-56 (1936); see also discussion *supra* notes 177-78 and accompanying text.

²⁷² See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 111-98 (1962) (describing the ways the judiciary can insulate itself from the political fray).

²⁷³ See *Helvering v. Davis*, 301 U.S. 619, 639-40 (1937) (noting, in Cardozo's opinion for the majority, that Cardozo, Brandeis, Stone, and Roberts would hold that the petitioner lacked standing, but proceeding to the merits anyway because the majority concluded otherwise); see also *infra* text accompanying notes 340-43.

statements he ever made for the Court, Roberts responded that he "often wonder[ed] why the hell I did it just to please the Chief."²⁷⁴ Just two weeks before *Tipaldo*, in *Carter v. Carter Coal Co.*,²⁷⁵ the conservatives had cropped an opinion in a highly unpersuasive manner to pick up the vote of Roberts by avoiding the decision of an issue that, if confronted, would probably have split him from them.²⁷⁶ Much the same thing may have happened in *Tipaldo*.

Based on his interview with Roberts, Pusey portrays Roberts as being very unhappy with the necessity of deciding the issue of the minimum wage in the context of New York's arguments.²⁷⁷ Perhaps Roberts hesitated to draw even the simple corollary from *Nebbia* that if a state had the general power to set prices for goods and services, including such services as agency fees, it could set the price for labor. Perhaps he had lingering constitutional concerns about the statute's applicability to women but not to men. Given Roberts's prior record, it is hard to believe he would not have overcome these doubts in favor of the constitutionality of the statute if he had deemed himself required to confront them. But Roberts, apparently finding that the path of least resistance avoided these issues, insisted the Court's opinion be based on the proposition that the State had not challenged the authority of *Adkins*. And, naturally, as Roberts later came to regret, that path did not call for him to write a separate opinion stating the grounds for his concurrence,²⁷⁸ or even to protest when Butler, in response to Stone, included a defense of *Adkins*.

In short, to what extent Roberts's conduct in *Tipaldo* was intellectually honest and to what extent it was simply a manipulative means of issue avoidance is difficult to say. The answer is probably different at different levels of consciousness. In any event, Roberts clearly did not intend that conduct to be an endorsement of *Adkins*.

²⁷⁴ See *infra* note 319 and accompanying text.

²⁷⁵ 298 U.S. 238 (1936); see also discussion *infra* part III.C.

²⁷⁶ In an opinion written by Justice Sutherland, the majority held that the labor provisions of the statute there being considered were unconstitutional and (ignoring a clear statutory directive) inseverable from the marketing provisions. See *id.* at 312. The entire statutory scheme therefore fell, without necessity to examine the constitutionality of the marketing provisions. See *id.* at 316. Given *Nebbia*, it seems very unlikely that Roberts would have voted to invalidate those provisions which regulated the price of coal sold interstate.

²⁷⁷ See Pusey, *supra* note 11, at 106.

²⁷⁸ In his memorandum, Roberts said that this would have been his "proper course." Frankfurter, *supra* note 242, at 315.

b. *Between Tipaldo and West Coast Hotel*

Tipaldo prompted a furious reaction. Few could understand what *The New Republic* called the "Liberty to Starve."²⁷⁹ The firestorm spread far beyond the liberal camp. Even the Republican press vigorously criticized the Court's decision.²⁸⁰ During the Republican Party convention the following week, the GOP adopted a platform defending the Court against attack, but urging legislation, including minimum wage laws, to protect women and children laborers, and pointedly adding its belief that such laws were "within the Constitution as it now stands."²⁸¹ Alf Landon, soon to be the Republican presidential nominee, sent the convention a telegram explicitly endorsing this plank and even more pointedly adding that, if necessary, he would favor a constitutional amendment authorizing minimum wage legislation. "This obligation," he said, "we cannot escape."²⁸²

When the Court returned from recess in October 1936, it rejected a petition, filed over the summer, for rehearing *Tipaldo*.²⁸³ The petition, supported by several states, made the Court's basis for avoidance in *Tipaldo* look silly because it emphasized the breadth of the social argument made by New York and the narrowness of the Court's decision. The petition did not add anything new, however, and whether Roberts's adherence to that basis for avoidance was conscientious or not, the petition was unlikely to change his mind. By this time, Roberts may well have come to regret his vote,²⁸⁴ but a change of course on rehearing likely appeared to him, consciously or not, as particularly awkward. Then, as now, the Court hardly ever voted to rehear a case; the Justices made up their minds and, under Hughes's brisk, efficiency-minded leadership, moved on. Besides, at the same time the Court had before it another case that promised to present squarely the question of whether *Adkins* should be overruled.

Shortly before the decision in *Tipaldo*, the Washington Supreme Court had upheld a statute prescribing minimum wages for

²⁷⁹ Editorial, *Liberty to Starve*, 87 NEW REPUBLIC 116 (1936).

²⁸⁰ See, e.g., Editorial, *An Unfortunate Decision*, WASH. POST, June 2, 1936, at 8.

²⁸¹ NATIONAL PARTY PLATFORMS: 1840-1968, at 367 (Kirk H. Porter & Donald B. Johnson eds., 1970).

²⁸² *Landon Telegram on Platform*, WASH. POST, June 12, 1936, at 1.

²⁸³ 299 U.S. 619 (1936).

²⁸⁴ See *infra* notes 303-04 and accompanying text.

women.²⁸⁵ During the summer of 1936, the employer, West Coast Hotel Co., filed an appeal and in its jurisdictional statement cast the constitutional issue in very broad terms.²⁸⁶ As it began its new Term in October, the Supreme Court noted probable jurisdiction.²⁸⁷ Professor Ariens contends that, because the Washington court had upheld the statute, Roberts's vote to take the case signaled an intention to strike the statute down.²⁸⁸ This contention is not persuasive. Given the resolution in state court, the case came up on appeal rather than, as Ariens says,²⁸⁹ by certiorari, and in light of *Tipaldo* it would have been ludicrous to reject jurisdiction on the ground that the case did not present a substantial federal question. If in October a majority of the Court believed that *West Coast Hotel* was, or was likely to be, controlled by its decision in *Tipaldo*, then presumably the Court would not have held full briefing and oral argument. Rather, it would have been sensible either to reverse summarily in light of the earlier case (if the Court were really sure), or to remand the case to the lower court for further proceedings. Both these procedures were employed on numerous occasions by the Hughes Court.²⁹⁰ Plainly, though, there was not a majority of the Court in favor of such summary treatment. The defector from the *Tipaldo* majority must have been Roberts. Indeed, Roberts's memorandum asserts that the four conservatives, but not he, would have disposed of the case summarily in the employer's favor at the October conference.²⁹¹

According to the memorandum, Roberts's reason for voting to hear the case was that now "the authority of *Adkins* was definitely assailed and the Court was asked to reconsider and overrule it."²⁹²

²⁸⁵ See *Parrish v. West Coast Hotel Co.*, 55 P.2d 1083 (Wash. 1936).

²⁸⁶ See 33 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 90-91 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter 33 LANDMARK BRIEFS & ARGUMENTS].

²⁸⁷ See 57 S. Ct. 40, 40 (1936).

²⁸⁸ See Ariens, *supra* note 6, at 641.

²⁸⁹ See *id.*

²⁹⁰ See, e.g., *Helvering v. Stevens*, 297 U.S. 693, 693 (1936) (granting certiorari and summarily reversing on the authority of a recent Supreme Court decision); *Helvering v. Stokes*, 296 U.S. 551, 551 (1935) (same); see also *New York City v. Goldstein*, 299 U.S. 522, 522 (1936) (granting certiorari and summarily remanding for further proceedings in light of a recent Supreme Court decision); *Burnet v. J. Rogers Flannery & Co.*, 286 U.S. 524, 524-25 (1932) (same).

²⁹¹ See Frankfurter, *supra* note 242, at 315 (quoting Roberts's memorandum to the effect that upon Roberts's vote not to dispose of the case summarily, Roberts heard one Justice ask another: "What is the matter with Roberts?").

²⁹² *Id.*

This is an intriguing misstatement. Roberts did not accurately recall the procedural posture of the case. The employer, not the State or the employee, brought the appeal, and at this time the Court had no papers from defenders of the statute. It later turned out—again an embarrassment to Roberts's defense—that those defenders did *not* ask for *Adkins* to be overruled. But at the time the Court voted to take the case in October, he had no way of knowing that.

In September, the Republicans won a decisive victory in Maine's state election.²⁹³ In November, Landon beat Roosevelt in Maine and also in Vermont—but Roosevelt won the remaining forty-six states. And in December, the Court heard arguments in *West Coast Hotel Co. v. Parrish*.

c. *In West Coast Hotel*

On January 20, 1937, Roosevelt was reinaugurated. On February 5, he began the Court-packing battle, and on March 29, the Court issued its opinion upholding Washington's minimum wage law for women, explicitly overruling *Adkins*.²⁹⁴ Those were the most apparent facts. But a fuller chronology of the decision is quite certain; it is confirmed by, but not dependent on, Roberts's memorandum. The Court heard arguments in *West Coast Hotel* on December 16 and 17, 1936.²⁹⁵ The Hughes Court virtually always discussed cases in conference the Saturday after argument.²⁹⁶ At the time the Court heard arguments and conferred on *West Coast Hotel*, Justice Stone was very ill and unable to participate in the Court's work. On December 19, the Court voted in a four-to-four tie, with Roberts joining Hughes, Brandeis, and Cardozo against the conservatives. Knowing full well Stone's opinion (and no doubt eager to take advantage of his vote), Hughes held the case over rather than allow affirmance of the lower court's decision by an equal division. After Stone returned to work in February, establish-

²⁹³ See *Maine Vote Elates Republicans Here*, N.Y. TIMES, Sept. 16, 1936, at 9.

²⁹⁴ See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937).

²⁹⁵ See *id.* at 379.

²⁹⁶ See Edwin McElwain, *The Business of the Supreme Court as Conducted by Chief Justice Hughes*, 63 HARV. L. REV. 5, 17 (1949) ("After argument, a case was always discussed and voted upon at the noon conference the following Saturday."); *In Memory of Charles Evans Hughes*, PROC. BAR & OFFICERS SUP. CT. U.S. 122 (1950) (quoting from a prior memorial address by Roberts: "If the Saturday in question fell in an argument week, the agenda for the conference might contain a half dozen jurisdictional statements on appeal, twenty to thirty petitions for certiorari, a few miscellaneous motions, and ten or fifteen cases which had been argued that week.").

ing a majority in favor of upholding the statute, Hughes assigned the opinion to himself, and the Court handed down its decision rather promptly.²⁹⁷

Roberts's vote on the merits in *West Coast Hotel* thus preceded the unveiling of Roosevelt's Court-packing plan by about six weeks.²⁹⁸ Although the timing thus eliminates one potential explanation for that vote, it does not eliminate the mystery surrounding the vote. Indeed, the mystery is deepened by a factor misstated in Roberts's memorandum. Contrary to his assertion, and rather surprisingly in light of the Court's protestation in *Tipaldo*, neither the State nor Parrish, the employee, asked that *Adkins* be overruled in *West Coast Hotel*. Indeed, their failure to request an overruling is far clearer than that of New York's in *Tipaldo*. Rather, they contended on narrow and dubious grounds that *Adkins* was distinguishable.²⁹⁹

Why, then, was Roberts willing in December to join in overruling *Adkins* when he had not been seven months earlier? Once again, a conscientious argument can be constructed. Recall that Butler's opinion in *Tipaldo* had emphasized the Court's unwillingness to go beyond the grounds sought by the petitioner for certiorari. That principle, dubious as it was in *Tipaldo*, certainly would not apply in *West Coast Hotel*, in which the party relying on *Adkins* was seeking relief from the Supreme Court, rather than defending the state court decision, and doing so by mandatory appeal rather than by certiorari. Even if the statute remained totally undefended before the Supreme Court, Roberts might feel compelled to consider all arguments favoring the constitutionality of the statute before disturbing the highest state court's decision to uphold the statute. And indeed, Hughes included in his *West Coast Hotel* opinion a paragraph, evidently written for Roberts's bene-

²⁹⁷ See CHARLES EVANS HUGHES, in THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 311-12 (David J. Danelski & Joseph S. Tulchin eds., 1973); Frankfurt-er, *supra* note 242, at 315. If a majority at the December conference had favored invalidating the statute, the case would have been assigned and presumably issued well before March 29, 1937. The Hughes Court was quite quick.

²⁹⁸ See HUGHES, *supra* note 297, at 312 (stating that the "President's proposal had not the slightest effect on our decision").

²⁹⁹ In their brief, counsel for Parrish made the seemingly immaterial argument that in *Adkins* and *Tipaldo* the higher courts of the District of Columbia and New York, respectively, had disapproved the statutes. See *West Coast Hotel*, 300 U.S. at 382. At argument, counsel for Washington relied on the proposition that a hotel was a "business affected with a public interest"—a factor not likely to distinguish *Adkins* in the minds of any member of the *Nebbia* majority. U.S.L.W., Dec. 22, 1936, at 2, 32.

fit,³⁰⁰ justifying the decision to confront the issue of overruling *Adkins* and emphasizing the fact that the Washington Supreme Court had upheld the statute in the face of *Adkins*.³⁰¹

Once again, however, the argument is sufficiently frail—at least when attempting to stand alongside the arguments that would justify *not* confronting the question of overruling *Adkins* in *Tipaldo*—that it appears likely Roberts was more disposed to confront *Adkins* in *West Coast Hotel* than in *Tipaldo*.³⁰² Assuming so, why?

Part of the reason may be that Roberts felt he had been burned by what happened in *Tipaldo*; he had agreed to concur to a limited opinion and had wound up signing on to an opinion that went further than he intended, making him sound hostile to legislation that he would approve constitutionally.³⁰³ Undoubtedly, Roberts was glad to be on the more popular side in *West Coast Hotel*, the side that squared with his views on the merits.³⁰⁴ That does not mean that the extraordinarily harsh public reaction to *Tipaldo* was either

³⁰⁰ Hughes had a well-known tendency to distinguish cases on very thin grounds rather than overrule them. See, e.g., MASON, *supra* note 175, at 796 n.† (quoting Stone as saying: "It is really pretty appalling the way in which Hughes differentiated the decision in the Ashton case" (citations omitted)); OWEN J. ROBERTS, THE COURT AND THE CONSTITUTION 18 (1951) (contending that Hughes's opinion for the Court in *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937), discussed *infra* text accompanying note 412, "labored valiantly . . . to distinguish earlier cases"); Paul A. Freund, *Charles Evans Hughes as Chief Justice*, 81 HARV. L. REV. 4, 35 (1967) ("He thoroughly disliked the overruling of a precedent, but his gift for differentiation fostered the controlled evolution of doctrine."); F.D.G. Ribble, *The Constitutional Doctrines of Chief Justice Hughes*, 41 COLUM. L. REV. 1190, 1210 (1941) (stating that Hughes had "a consummate skill in distinguishing adverse or apparently adverse cases"). Despite his clear antipathy for *Adkins*, Hughes had demonstrated this tendency most recently in *Tipaldo* itself; no doubt, he would have been willing to do so again in *West Coast Hotel*.

³⁰¹ See *West Coast Hotel*, 300 U.S. at 389-90.

³⁰² That likelihood is increased by the fact that the year after *West Coast Hotel*, in *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), Roberts joined, without any apparent compunction, in overruling a long-established precedent that counsel had sought only to distinguish. See Purcell, *supra* note 266, at 289.

³⁰³ Edward Purcell, in an essay published while this one was in draft, has raised a similar possibility using similar language. See Purcell, *supra* note 266, at 289-90 (suggesting the possibility that "Roberts felt so badly burned by the criticism that his 'switch' had sparked that he decided he would not again allow such a technical consideration as a narrowly framed appeal to block a major ruling otherwise desirable on the merits"). In my view, Roberts's sense of having been "burned" may have arisen not only from public criticism of the result in *Tipaldo*, but also from his recognition that the majority there had run roughshod over his technical scruples.

³⁰⁴ Pusey reports that Roberts "made clear to me that he was relieved to have the issue brought promptly before the Court once more in a posture that made consideration of its fundamental merits imperative." Pusey, *supra* note 11, at 106.

a necessary or sufficient cause of his vote in *West Coast Hotel*. It is impossible, though, to deny the impact that reaction might have had on Roberts. However much he had taken his narrow stand on principle, its consequence was to avoid decision. He could not help but realize that this stand had created the perception, if not the reality, that the Court was gratuitously compounding the misery of the Depression.

There is no reason to believe that the presidential election had any significant impact on Roberts's vote. The public reaction to *Tipaldo* was apparent in June, long before the election. With Landon's acceptance message and the Republican platform, no formal balloting was necessary to inform Roberts how unpopular his vote in *Tipaldo* was. Moreover, although Republican campaigners tried to scare voters about what Roosevelt would do to the Court in his second term—by the appointments process or otherwise—the Democrats did their best to avoid making the Court an issue.³⁰⁵ Finally, the conference in October, when Roberts apparently first cast his lot with the liberals on the minimum wage by refusing to provide a fifth vote for summary disposition, had preceded the Roosevelt landslide.

In short, to the extent that a political explanation is needed to account for Roberts's move from *Tipaldo* to *Adkins*, it may be found in the reaction to *Tipaldo* itself, rather than in the election of 1936 or in the Court-packing battle of 1937. The short-term political factors seem likely to have affected Roberts only in inducing him to confront the issue whether *Adkins* should be overruled, not in leading him to believe a minimum wage law was constitutional; his prior conduct, in *Nebbia* and other cases, makes this the result one

³⁰⁵ See Cushman, *New Deal Court*, *supra* note 6, at 231 ("Roosevelt assiduously avoided raising either the Constitution or the Court as an issue in his campaign."). Professor Cushman presents an extended and effective argument against the proposition that the election of 1936 had a significant impact on the Court's 1937 decisions. See *id.* at 230-36. Misquoting Alsop and Catledge, *supra* note 226, at 18, Professor Bobbitt says that the vote in *West Coast Hotel* "followed by a month and a half the election and the President's public declaration that *Tipaldo* was 'the final irritant.'" BOBBITT, *supra* note 265, at 40. In fact, Roosevelt's only public comment about *Tipaldo* was brief and enigmatic. He said that the "no-man's land" between state and national power was becoming more sharply defined, and when asked what he intended to do about it smilingly refused to say. 31¢ *An Hour: Minimum Pay of New York Laundresses National Issue by Court Decision*, LITERARY DIG., June 13, 1936, at 6, 6. Alsop and Catledge, highly perceptive commentators, took the view that the Court itself was not a significant issue in the campaign. See ALSOP & CATLEDGE, *supra* note 226, at 19 (noting that "[Roosevelt] wanted the issue in the election to be himself and not the justices").

would most likely expect him to reach.

The "beginning of wisdom" in attempting to understand Roberts is to avoid the assumption that, absent political pressure, he would act in a way that most observers would regard as consistent. He surprised even his colleagues and perhaps even himself,³⁰⁶ and followed his own strange, sometimes unfathomable light.

B. The "General Welfare" Cases

1. The Puzzle

In *United States v. Butler*,³⁰⁷ decided in January 1936, the Court held invalid central provisions of the Agricultural Adjustment Act of 1933. Aiming to restore farm prices hard hit by the Depression to the levels they had occupied between 1909 and 1914, the Act operated simply and boldly. The government, through the Agricultural Adjustment Administration (AAA), reduced production for market by renting cultivable land, by purchasing surpluses, and by making straight-out benefit payments to farmers in return for agreements not to produce. The funds to operate this program for any particular commodity were raised by a tax on the processors of that commodity. In court, the Administration justified the Act on the basis not of the Commerce Clause, but of the clause authorizing Congress "to lay and collect taxes, . . . to pay the debts and provide for the . . . general Welfare of the United States."³⁰⁸

Roberts, writing for the Court in an opinion joined by Hughes as well as the conservative foursome, rejected this argument. The statute's taxes and appropriations, he held, were "but means to an unconstitutional end."³⁰⁹ The federal government had no authority to regulate agriculture, and participation in the AAA program could not truly be considered voluntary—the threatened loss of

³⁰⁶ According to Roberts's memorandum, when he voted against summary disposition in *West Coast Hotel*, one of the conservatives asked another, "What is the matter with Roberts?" Frankfurter, *supra* note 242, at 315. Roberts told Pusey that, when he sought out Hughes to tell him that he would join the liberal side in that case, Hughes almost hugged him. See Pusey, *supra* note 11, at 105. Leonard Baker reports that Hughes confessed to Stone that he had difficulty following Roberts's reasoning, and that Stone was also incredulous. See BAKER, *supra* note 157, at 176. Roberts himself, apparently not fully in jest, suggested that the "what I had for breakfast" type of explanation might have some force in explaining his conduct in the minimum wage cases. See *supra* note 11.

³⁰⁷ 297 U.S. 1 (1936).

³⁰⁸ U.S. CONST. art. 1, § 8, cl. 1.

³⁰⁹ *Butler*, 297 U.S. at 68.

benefits strongarmed farmers into participation. Wrote Roberts, "This is coercion by economic pressure. The asserted power of choice is illusory."³¹⁰ Even if the program of benefits were not coercive, moreover, it would still be unconstitutional; since Congress could not enforce its commands on the farmer directly, it could not "indirectly accomplish these ends by taxing and spending to purchase compliance."³¹¹ Stone, joined by the other two liberals, wrote a bitter and forceful dissent, contending both that the Act could not be deemed coercive and that what the Court condemned as "purchased regulation" was merely the appropriate imposition of conditions on a public expenditure.³¹²

On May 24, 1937, the Court decided in favor of the Administration in two cases involving the Social Security Act. One, *Helvering v. Davis*,³¹³ held valid under the same General Welfare Clause the payment of old age benefits under the Act. Only McReynolds and Butler, insisting that charitable works were beyond the scope of federal power, dissented from Cardozo's beautifully written opinion.

They were joined, however, by the other two conservatives in *Steward Machine Co. v. Davis*,³¹⁴ in which the Court upheld the Social Security Act's more intricate unemployment relief program. Title IX of the Act levied a tax on employers but credited up to ninety percent of it for amounts contributed instead to qualifying state unemployment funds. Such contributions were paid over to a trust fund maintained by the Secretary of Treasury and were withdrawn by the states for unemployment compensation. The aim of this scheme was to encourage the states to set up their own unemployment programs without fear of placing themselves at a competitive disadvantage against other states that chose to do nothing.³¹⁵ Naturally, the constitutional challenge to the scheme was based on *Butler's* strictures against use of the General Welfare Clause for a regulatory purpose.

Why did the Court appear to change course?

³¹⁰ *Id.* at 71.

³¹¹ *Id.* at 74.

³¹² *Id.* at 83 (Stone, J., dissenting).

³¹³ 301 U.S. 619 (1937).

³¹⁴ 301 U.S. 548 (1937).

³¹⁵ See JACKSON, *supra* note 155, at 225-26 (noting that the tax "was really a plan to enable the state to set up its own system without fear of competition from states which chose to do nothing").

2. Contradiction Denied

Professor Ariens contends that the *Social Security Cases* "distinguished into oblivion" Roberts's opinion in *Butler*.³¹⁶ At least in general terms, however, this is not so. On the contrary, although *Butler* held against the particular exercise of power challenged there, the opinion initially offered a remarkable dictum that provided the basis for Cardozo's opinions in the later cases.

The true meaning of the General Welfare Clause had never been definitively resolved. Madison had contended that Congress could tax and spend only in the exercise of other powers granted it;³¹⁷ on the other hand, Hamilton, seconded by the later writings of Joseph Story, had contended that the grant was of a distinct substantive power limited only by the conception of "the General Welfare."³¹⁸ In *Butler*, Roberts emphatically endorsed the Hamilton-Story interpretation. Why, given that the Court held *against* the particular exercise of power in the case, did Roberts include this statement? The answer is found in the note of a later conversation, scrawled by Felix Frankfurter on the appropriate page in his copy of the United States Reports: "FF. I hope you now realize what a door you opened in your—shall I say—much discussed *Butler* decision as to scope of 'general welfare.' O.J.R. I do realize, and often wonder why the hell I did it just to please the Chief."³¹⁹

The Chief's determination to write his view of the taxing and spending power into law grew out of work he had done while at the bar. In writing an opinion letter favoring the legality of loans issued under the authority of the Federal Farm Loan Act,³²⁰ and then arguing the matter successfully to the Court,³²¹ he had presented

³¹⁶ Ariens, *supra* note 6, at 651.

³¹⁷ See Amicus Brief on Behalf of the National Association of Cotton Manufacturers at 74-161, *United States v. Butler*, 297 U.S. 1 (1936), *reprinted in* 30 LANDMARK BRIEFS & ARGUMENTS, *supra* note 286, at 766-853 (giving, with extensive citation, an extended argument supporting the Madisonian interpretation of the General Welfare Clause).

³¹⁸ See Brief for the United States at 135-72, *United States v. Butler*, 297 U.S. 1 (1936), *reprinted in* 30 LANDMARK BRIEFS & ARGUMENTS, *supra* note 286, at 288-325 (giving, with extensive citation, an extended argument supporting the Hamilton-Story interpretation of the General Welfare Clause).

³¹⁹ The Report is now in the possession of Professor Andrew Kaufman of Harvard Law School. See Ariens, *supra* note 6, at 649 n.147.

³²⁰ See CHARLES E. HUGHES, FEDERAL LAND BANK BONDS: OPINION OF FORMER SUPREME COURT JUSTICE CHARLES E. HUGHES CONFIRMING THE VALIDITY OF THE ABOVE BONDS AND THEIR EXEMPTION FROM TAXATION 13-23 (1917).

³²¹ See *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921) (argument of

the Hamilton-Story view,³²² if some passages in the government's *Butler* brief seemed familiar to him, it may have been because they had been drawn from his own work.³²³

Roberts's reluctance to establish Hughes's longstanding views as law may have been attributable in part to his distaste for making unnecessary decisions,³²⁴ and in part to a less than complete state of conviction. But the bottom line is that, by January 1936—well before Roosevelt's landslide reelection—Roberts had come around, however tentatively, to the broad view of a fundamental national power.

Reviewing *Butler* in later years, Hughes declared that the general welfare dictum was its "most significant and important ruling."³²⁵ From a political standpoint this self-serving claim could not have been more wrong; politically, the most significant part of the opinion was the evisceration of the AAA. From a constitutional standpoint, Hughes's claim was right. The next year, in *Helvering v. Davis*,³²⁶ Cardozo cited Roberts's dictum and reasserted that the broad interpretation of the Constitution's General Welfare Clause was the correct one. "We will not resurrect the contest," he declared, "It is now settled by decision."³²⁷ And in *Steward Machine Co. v. Davis*, he wrote, with a citation to both *Butler* and *Helvering v. Davis*, "It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare."³²⁸

At the broadest level of generality, then, *Butler* was not contradictory to, but rather in the same line as, the *Social Security Cases*. We must, however, look beneath that level. Did the cases in fact implement different understandings of the General Welfare Clause?

In attempting to answer this question, one fact immediately leaps out: four Justices from the *Butler* majority—not only Hughes

Mr. Hughes). The Court affirmed the validity of the statute without addressing the scope of the General Welfare Clause. *See id.* at 192-93.

³²² *See* 1 MERLO J. PUSEY, CHARLES EVANS HUGHES 387 (1951) (describing Hughes's advocacy of the Hamilton-Story view in connection with the dispute over the farm bonds).

³²³ *See* DREW PEARSON & ROBERT S. ALLEN, THE NINE OLD MEN 288-89 (1936) (noting that Solicitor General Reed used part of Hughes's *Smith* brief).

³²⁴ *See supra* notes 271-76 and accompanying text.

³²⁵ HUGHES, *supra* note 297, at 309.

³²⁶ 301 U.S. 619 (1937).

³²⁷ *Id.* at 640.

³²⁸ *Steward*, 301 U.S. at 586-87.

and Roberts, but also Van Devanter and Sutherland, the more moderate pair of the conservative four—subscribed to Cardozo's analysis of federal power in the *Social Security Cases*. In *Helvering*, rejecting the argument that the old age benefits distributed under the Social Security Act were too particular to be part of the "general welfare,"³²⁹ even Van Devanter and Sutherland joined Cardozo in repeating a theme that Hughes had stressed most strikingly in *Blaisdell*:³³⁰ the "nation-wide calamity" had shown "the solidarity of interests" of all of the people, in this case in preventing fear of the poor house "when journey's end is near."³³¹ And in *Steward*, Sutherland and Van Devanter explicitly stated their agreement with most of Cardozo's argument, joining their more intransigent colleagues in dissent only because they were troubled by what they perceived as the abdication of state administrative powers required by the deposit of funds in the Federal Treasury.³³²

In no other cases—certainly not in the minimum wage or NLRB cases—had Van Devanter or Sutherland either trimmed their views in response to liberal political pressure or shown any alteration in

³²⁹ *Helvering*, 301 U.S. at 641.

³³⁰ See *supra* notes 127-31 and accompanying text. Hughes had also stressed the same themes in his opinions in *Tipaldo* and *West Coast Hotel*. See *supra* part II.A.2.

³³¹ *Helvering*, 301 U.S. at 641.

³³² See 301 U.S. at 609-10 (Sutherland, J., dissenting with Van Devanter, J., joining). The same day, in *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 527 (1937), the Court, by a five-to-four vote, upheld Alabama's unemployment insurance law. As in *Steward*, Sutherland and Van Devanter, now joined also by Butler, dissented only on narrow grounds. They expressed easy agreement that unemployment relief was an objective within the constitutional power of the state, and dissented only on the basis that the statute pooled all employers. See *id.* at 527-28 (Sutherland, J., dissenting). The problem would have been "comparatively simple," *id.* at 527, for the legislature to avoid, wrote Sutherland for the trio, pointing to a Wisconsin plan that they regarded as "so fair, reasonable and just as to make plain its constitutional validity." *Id.* at 531.

The outcome in *Carmichael* was no surprise; the prior November—after the election but before the Court-packing battle—when Stone was ill, the Court had upheld, by a four-to-four vote and without opinions, a New York statute materially similar to Alabama's. See *W.H.H. Chamberlin, Inc. v. Andrews*, 299 U.S. 515, 515 (1936). That three of the conservative Justices joined in concluding that a state could constitutionally require employers to make payments for unemployment insurance—the main issue at stake in these cases—disposes of any contention that Roberts's similar conclusion was a response to political pressure, or even that it was inconsistent with his opinion in *Railroad Retirement Board v. Alton Railroad*, 295 U.S. 330 (1935), discussed *supra* notes 179-93 and accompanying text. In *Alton*, Roberts had considered pooling unacceptable. See *id.* at 360. It could well be, though, that he regarded pooling as more appropriate with respect to unemployment insurance—because insurance is by nature the pooling of risk—than with respect to pensions, a form of employee compensation.

those views. It is virtually impossible to understand their votes in the *Social Security Cases* as anything but a conscientious reflection of their beliefs, consistent with their belief in the result of *Butler*. And if Van Devanter and Sutherland conscientiously believed in both the result in *Butler* and the application to the *Social Security Cases* of *Butler's* "general welfare" discussion, there is no reason to believe that Hughes and Roberts did not.

Moreover, it is rather easy to reconstruct straightforward views that might have underlay the four Justices' views of the "general welfare" issues in both *Butler* and the *Social Security Cases*. In *Butler*, the majority held that the benefit payments made to producers in return for agreement to limit production were coercive. Stone responded, "Threat of loss, not hope of gain, is the essence of economic coercion."³³³ In general, as the majority perceived, that approach does not help discern coercion of farmers acting in a competitive market: if one farmer's neighbors accept a governmental benefit lowering their marginal cost of production, he may well feel coerced into accepting such a benefit as well.³³⁴ In this case, in fact, the farmers were not coerced: the governmental benefits were designed to *raise* the marginal cost of production, and a farmer could well decide, free of coercion, either to accept the benefits or to plant his full acreage and take advantage of the price rise caused by the governmental program. That point may seem rather elementary to us now, but there is no reason to believe that the *Butler* majority perceived it.

In *Helvering*, by contrast, the payments were clearly not coercive: they were simple, unconditional benefit payments made to aged persons. In *Steward*, the tax credit for employers who contributed to qualifying unemployment plans adopted by the state was assertedly coercive of the state, but Cardozo had a ready response: the statutory scheme aimed to encourage the states to set up their own unemployment programs without fear of placing themselves at a competitive disadvantage against other states that chose to do nothing.³³⁵ It appeared that, far from being coerced, the state "chose to have relief administered under laws of her own making,

³³³ *Butler*, 297 U.S. at 81 (Stone, J., dissenting).

³³⁴ See *id.* at 71 (Roberts, J.) ("The power to confer or withhold unlimited benefits is the power to coerce or destroy. If the cotton grower elects not to accept the benefits, he will receive less for his crops; those who receive payments will be able to undersell him. The result may well be financial ruin.").

³³⁵ See JACKSON, *supra* note 155, at 225-26; see also *supra* text accompanying note 315.

by agents of her own selection, instead of under federal laws, administered by federal officers, with all the ensuing evils, at least to many minds, of federal patronage and power."³³⁶ Whether that argument is persuasive or not, it was at least colorable; it was of a different nature from the arguments over coercion in *Butler*, and nothing in *Butler* suggested that it was fallacious.

Similar considerations apply to the issue of whether the payments, even if not coercive, amounted to "purchased regulation." In *Butler*, the majority's affirmative answer aroused the ire of Stone, who asserted that under the majority view all sorts of conditional expenditures—for example, conditioning a grant to a rural school on a requirement that certain standards be maintained—would be unconstitutional.³³⁷ Surely, though, the *Butler* majority might have perceived a distinction—whether ultimately persuasive or not is an interesting question, but not the question material here—between the statutory scheme of the AAA and the type of conditions cited by Stone.

In *Butler*, the government did not attempt to restrict the recipient's use of the payments; the only benefit to the government from the expenditure was an agreement by the recipient to restrict its activities in a way that, by hypothesis, the government could not compel.³³⁸ At least arguably, these restrictions stand on a weaker ground than conditions placed on an otherwise valid governmental expenditure and designed to ensure that funds are paid only to intended recipients, or only when they are needed, that the recipient uses the funds for their intended purpose, or that the government is purchasing what it wants to. In *Helvering*, the expenditures were unconditional payments to the aged. In *Steward*, a state paying unemployment benefits would limit calls on the national Treasury; imposing requirements on the state's unemployment plan

³³⁶ *Steward*, 301 U.S. at 590. Note the Court's unanimous approval, earlier the same year, of another form of federal-state cooperation in *Kentucky Whip & Collar Co. v. Illinois Central Railroad*, 299 U.S. 334, 352 (1937), which held that Congress, in an attempt "to aid the enforcement of valid state laws," constitutionally prohibited the transportation of goods made by convict labor into any state where the goods were intended to be received, possessed, sold, or used in violation of its laws.

³³⁷ See 297 U.S. at 85-86 (Stone, J., dissenting).

³³⁸ The government did not argue in *Butler* that the statute was proper under the commerce power. In *Mulford v. Smith*, 307 U.S. 38, 47-48 (1939), decided after *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Court held the Agricultural Adjustment Act of 1938, a statute passed to replace the one invalidated in *Butler*, valid under the commerce power. See discussion *infra* notes 424-26 and accompanying text.

as a condition of giving a tax credit to employers who contributed to a state plan was therefore a reasonable effort to determine "that the law leading to the credit is in truth what it professes to be."³³⁹

These arguments are, of course, not conclusive; ultimately, they may not be persuasive, or even withstand close scrutiny. But clearly there were colorable arguments that might have accounted for the move made by four Justices—two of the Court's conservatives as well as its two swing members—between *Butler* and the *Social Security Cases*. There is no basis for concluding that Hughes and Roberts switched in response to political factors.

An additional factor counts against that hypothesis with respect to Roberts: had the Court acted in accordance with his procedural vote in *Helvering*, the result would have been—according to Assistant Attorney General Robert Jackson, who argued part of the case for the government—not a victory but a "grave disaster to the Administration."³⁴⁰ In light of the enormous amount of tax revenue involved, the government thought it essential to secure an early decision, and had taken the unusual step of expediting a case in which originally it had not even been involved.³⁴¹ Before the Supreme Court, as Cardozo noted, the government made an "earnest request" that the Court reach the merits.³⁴² Had Roberts and the liberals had their way, however, the Court would not have done so, but would have decided that the case was not proper for judicial consideration.³⁴³

C. *The Commerce Clause Cases*

1. The Puzzle

On May 18, 1936, in *Carter v. Carter Coal Co.*,³⁴⁴ Roberts joined the four conservatives in holding unconstitutional the Bituminous Coal Conservation Act of 1935.³⁴⁵ The Act imposed a heavy sales tax on bituminous coal, but rebated ninety percent of it for those operators accepting a code to be formulated from statutory specifications by a National Bituminous Coal Commission. Among

³³⁹ *Steward*, 301 U.S. at 593.

³⁴⁰ JACKSON, *supra* note 155, at 229.

³⁴¹ *See id.* at 228-30.

³⁴² *Helvering*, 301 U.S. at 639.

³⁴³ *See id.*; *see also supra* note 273.

³⁴⁴ 298 U.S. 238 (1936).

³⁴⁵ Pub. L. No. 402, § 3, 49 Stat. 991, 993-94 (1935).

the code's labor provisions were to be guarantees of the right to organize and bargain collectively.³⁴⁶ One section of the statutory outline, Part III(g), allowed representatives of specified percentages of the operators and miners to negotiate wage and hour standards binding on all code members.³⁴⁷ The majority, per Sutherland, held that these provisions were unconstitutional as a regulation of mining, which, like other productive activities, had long been held to be a local activity rather than part of interstate commerce.³⁴⁸ Sutherland called Part III(g) a "most obnoxious form" of legislative delegation; regulatory power was not even given to an impartial governmental body but to private parties competing with each other subject to the regulation.³⁴⁹

Hughes dissented. He agreed with the majority that Part III(g) was unconstitutional on various grounds, including that it went beyond any proper regulation of commerce.³⁵⁰ He concluded, however, that the tax could be upheld on the basis of other provisions of the Code, setting the price of bituminous coal sold in interstate commerce.³⁵¹ The three liberals, in an opinion by Cardozo, also dissented, but more simply. Like Hughes, they regarded the marketing provisions as clearly severable, and they voted to uphold the tax on the basis of those provisions without reaching the validity of the labor provisions.³⁵²

On April 12, 1937, in *NLRB v. Jones & Laughlin Steel Corp.*,³⁵³ by a five-to-four margin, the Court upheld the National Labor Relations Act (NLRA).³⁵⁴ The NLRA compelled employer recognition of, and collective bargaining with, employee-selected unions and established the National Labor Relations Board to prevent employers from committing a broad range of unfair labor practices. Both in *Jones & Laughlin* and in its companion cases, the Court—in opinions by Hughes joined by Roberts as well as the three liberals—held that the Act could validly be applied to labor relations in productive industries bearing a close and substantial impact on interstate commerce.³⁵⁵

³⁴⁶ See § 4, 49 Stat. at 1001 (Part III(a) of statutory outline of the code).

³⁴⁷ See § 4, 49 Stat. at 1002.

³⁴⁸ See *Carter Coal*, 298 U.S. at 302 ("Mining is not interstate commerce, but, like manufacturing, is a local business subject to local regulation and taxation." (quoting *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172, 178 (1922))); see also *infra* note 393.

³⁴⁹ *Id.* at 311.

³⁵⁰ See *id.* at 318-19 (Hughes, C.J., writing separately).

³⁵¹ See *id.* at 323-24.

³⁵² See *id.* at 324 (Cardozo, J., dissenting with Brandeis and Stone, JJ., joining).

³⁵³ 301 U.S. 1 (1937).

³⁵⁴ Act of July 5, 1935, ch. 372, § 1, 49 Stat. 449 (codified at 29 U.S.C. 151).

³⁵⁵ Apart from the commerce power issue, the NLRA was challenged on due

Why did the Court appear to change course?

2. Hughes

Hughes's treatment of the Commerce Clause in *Carter* does not sit easily alongside his monumental opinion in *Jones & Laughlin*. The two may be logically reconcilable,³⁵⁶ but I believe that, to the extent they are not, *Carter* is the aberration. *Jones & Laughlin* clearly represents Hughes's deeply held views.

The texts of the two opinions strongly suggest these conclusions. Hughes began his separate opinion in *Carter* with two paragraphs that discussed the general law of the Commerce Clause but hardly touched on the facts of the particular case.³⁵⁷ This passage did not climax with a holding—a paragraph later, Hughes expressed in one brief conclusory sentence his conclusion that Part III(g) went beyond Congress's commerce power—but with a sentence in effect declaring that the public should get off the backs of the Court:

If the people desire to give Congress the power to regulate industries within the State, and the relations of employers and employees in those industries, they are at liberty to declare their will in the appropriate manner, but it is not for the Court to amend the Constitution by judicial decision.³⁵⁸

Given the brevity of Hughes's discussion of the Commerce Clause in the context of the labor provisions, the even greater brevity of his conclusion on that score, and the fact that the discussion was altogether unnecessary in light of the result that he reached, I suspect that this public advertisement provided the motivation for the substantive discussion rather than vice versa. "He is deeply unhappy," Brandeis said to Frankfurter of Hughes two days after the

process grounds as an arbitrary interference with employers' ability to conduct their businesses in an orderly manner. In light of *Texas & New Orleans Railroad*, discussed *supra* text accompanying notes 33-38, and *Nebbia*, discussed *supra* part I.D.2, there was little doubt that a majority of the Court would reject this argument. And it did, see 301 U.S. at 45, leaving it clear that the old cases protecting "yellow dog" contracts were now empty shells. See also *supra* note 34 and accompanying text (discussing yellow dog contracts). Hughes's discussion on this point is interesting for its elaboration of what he regarded as a "fundamental right" of employees to organize and select representatives, 301 U.S. at 33, a right he regarded as "correlative" to employers' rights to conduct their business. *Id.* at 43-44. For a useful discussion of this aspect of the Labor Board cases, see Cushman, *supra* note 33, at 278-92.

³⁵⁶ See *infra* note 393 and accompanying text.

³⁵⁷ See *Carter*, 298 U.S. at 317-18.

³⁵⁸ 298 U.S. at 318.

Carter decision, "He has no control over the Court."³⁵⁹ It appears likely that Hughes, fearful of an approaching confrontation, was attempting to deflect criticism from the Court.³⁶⁰

Now compare Hughes's Commerce Clause discussion in his *Jones & Laughlin* opinion, an opinion that Fred Rodell accurately called "magisterial."³⁶¹ Hughes could be cagey and picky when it suited his purpose.³⁶² But now he roared. Joseph Alsop and Turner Catledge reported that Hughes made the oral delivery of his opinion "magnificently, giving its every phrase an overtone of infallibility which made the whole business sound like a rehearsal for the last judgment."³⁶³ Similarly, Thomas Emerson, then a lawyer for the NLRB, later remembered the delivery as "an amazing performance," staking out vast doctrines as if they were mere restatements of elementary principles of black-letter law.³⁶⁴ This was no mincing attempt to achieve an unpleasant result under political pressure.

"It is a familiar principle," Hughes declared, "that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. . . . It is the effect upon commerce, not the source of the injury, which is the criterion."³⁶⁵ Moreover, he used flexible language to describe the scope of this doctrine and to show its reach to productive industries:

Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to

³⁵⁹ Memorandum of Conversation with Brandeis (May 20, 1936), in 38 FRANKFURTER PAPERS (Library of Congress).

³⁶⁰ Compare Hughes's statement in *Carter* on the role of the Court with Roberts's statements in *Butler* that it is "a misconception" that the Court assumes "a power to overrule or control the action of the people's representatives," and that all the Court can do is to "announce its considered judgment" as to whether a challenged statute "squares with" the Constitution. 297 U.S. at 62. Roberts included another key passage in his *Butler* opinion "just to please the Chief," see *supra* text accompanying note 319, and perhaps he did in this one as well. Note also Hughes's statement in *Schechter* that it was "not the province of the Court to consider the economic advantages or disadvantages of a . . . centralized system. It is sufficient to say that the Federal Constitution does not provide for it." *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 549 (1935).

³⁶¹ FRED RODELL, *NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955*, at 250 (1955).

³⁶² See *supra* note 300.

³⁶³ ALSOP & CATLEDGE, *supra* note 226, at 146.

³⁶⁴ Reminiscences of Thomas I. Emerson, in Columbia University Oral History Collection 475 (n.d.) (unpublished) (notes on file with author).

³⁶⁵ *Jones & Laughlin*, 301 U.S. at 31-32 (citations omitted).

interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. . . .

....

The close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry when separately viewed is local.³⁶⁶

In this case, Hughes found application of the doctrine clear:

In view of respondent's far-flung activities, it is idle to say that the effect [of a labor stoppage] would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. . . . When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?³⁶⁷

These passages are not surprising in light of Hughes's prior record on the Commerce Clause. His opinion as an Associate Justice in the *Shreveport Rate Cases*,³⁶⁸ had foreshadowed the steel case by establishing that Congress's power extends to intrastate transactions that bear "a close and substantial relation to interstate traffic."³⁶⁹ *Shreveport* involved transportation, of course, but in a real sense *Jones & Laughlin* merely stated a corollary—one the Court had previously refused to draw—that productive industries could bear such a close relation to interstate commerce.

As Chief Justice, Hughes had already indicated the connection. "The interests of producers and consumers are interlinked," he wrote in *Appalachian Coals, Inc. v. United States*.³⁷⁰ "When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry."³⁷¹ Nor

³⁶⁶ *Id.* at 37-38 (citations omitted).

³⁶⁷ *Id.* at 41.

³⁶⁸ 234 U.S. 342 (1914).

³⁶⁹ *Id.* at 351.

³⁷⁰ 288 U.S. 344, 372 (1932).

³⁷¹ *Id.*

was there anything new about Hughes's perception, which he claimed experience had "abundantly demonstrated," that "often an essential condition of industrial peace" was the protection of employees' rights of organization and representation.³⁷² He had made similar statements, shortly after joining the Court, in the *Texas & New Orleans* case, upholding the Railway Labor Act.³⁷³ And in his bold dissent in *Alton*,³⁷⁴ he had emphasized not only the plenary nature of Congress's power over commerce,³⁷⁵ but also "the importance of conditions of employment" and "fair treatment" of employees "in conserving the peace and good order which are essential to the maintenance of the service without disastrous interruptions."³⁷⁶

Hughes had also written looking the other way in *Schechter*,³⁷⁷ but *Schechter* was a far different case; the entire Court had agreed with the substance of his Commerce Clause discussion there. Apart from the odd opinion in *Carter*, Hughes's prior career pointed strongly to the result he achieved in *Jones & Laughlin*.

Now observe how Hughes treated both *Carter* and *Jones & Laughlin* in subsequent cases. In *Jones & Laughlin* itself, had Hughes wished to achieve a pro-Administration result for political purposes while preserving *Carter*, he could have done so. Colorable, albeit perhaps rather flimsy, grounds of distinction were available,³⁷⁸ and even if he did not believe they were he could have made a conclusory declaration that the cases were distinguishable—as in fact he did with respect to *Schechter*.³⁷⁹ Instead, all he said was that in *Carter* "the Court was of the opinion that the provisions of the statute relating to production were invalid upon several grounds,"³⁸⁰ as if the Court had not meant what it said because it said other things as well.³⁸¹ This feeble explanation was an in-

³⁷² *Jones & Laughlin*, 301 U.S. at 42.

³⁷³ See 281 U.S. at 570; discussion *supra* notes 33-38 and accompanying text.

³⁷⁴ See *supra* notes 184-87 and accompanying text.

³⁷⁵ See 295 U.S. at 375-76 (Hughes, C.J., dissenting).

³⁷⁶ *Id.* at 376.

³⁷⁷ See *supra* notes 199-206 and accompanying text.

³⁷⁸ See *infra* note 393 (discussing possible grounds for distinguishing *Jones & Laughlin* from *Carter*).

³⁷⁹ See *Jones & Laughlin*, 301 U.S. at 40 (purporting to distinguish *Schechter* from *Jones & Laughlin* on the ground that the labor practice in *Schechter* was so remotely related to interstate commerce as to be beyond the federal power).

³⁸⁰ *Id.* at 41.

³⁸¹ Even in conference, Hughes—to the surprise of Cardozo—apparently found no need to distinguish *Carter*. See Interview with Joseph L. Rauh, Esq. (Aug. 17, 1976) (notes on file with author). Mr. Rauh was law clerk to Justice Cardozo when the

triguing misstatement of the Court's position in *Carter*. Sutherland had clearly held all the labor provisions invalid under the Commerce Clause and added arguments based on delegation and due process for Part III(g) alone; for much of the case then, the commerce ruling was essential and not merely alternative. Only in the separate opinion of Hughes, in fact, was the Commerce Clause merely an alternative basis of decision—and there because, as with the delegation and due process arguments, he limited its application to Part III(g).³⁸²

Jones & Laughlin's cavalier treatment sapped the life from *Carter*. Four years later, Hughes joined in administering the coup de grace. During those four years, Hughes wrote a series of opinions demonstrating that the advanced ground staked out by *Jones & Laughlin* was not a temporary outpost to be abandoned once the battle was over.³⁸³ He did not write an opinion in *United States v. Darby*,³⁸⁴ the celebrated case upholding the Fair Labor Standards Act of 1938 as applied to employees engaged in manufacturing. But his conduct in that case confirms his attitudes towards *Carter* and *Jones & Laughlin*. *Darby* pushed the idea of a "close and substantial" relation to interstate commerce to new limits, and at conference Hughes expressed misgivings as to whether it should be pushed so far, at least in a criminal statute that he regarded as badly drafted.³⁸⁵ Thus, when the case came to a vote, he passed. But he expressed no misgivings about the "close and substantial" test itself; indeed, he restated it at conference.³⁸⁶ After Stone circulated his

Court decided *Jones & Laughlin*.

³⁸² See 298 U.S. at 318, 322-23. The point seems always to have been overlooked: unlike the Court, Hughes gave no clear opinion on the validity of any of the labor provisions except for this one, where other available grounds weakened the impact of his commerce decision. On the other labor provisions, which would stand or fall on the Commerce Clause alone, Hughes very simply slipped the question.

³⁸³ See *Currin v. Wallace*, 306 U.S. 1, 18 (1939) (upholding the Tobacco Inspection Act of 1935); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 238 (1938) (upholding the NLRA as applied to a utility that sold power intrastate only); *Santa Cruz Fruit Packing Co. v. NLRB*, 303 U.S. 453, 464 (1938) (barely acknowledging the existence of *Carter* and elaborating on the "well-established principle" of *Jones & Laughlin*).

³⁸⁴ 312 U.S. 100 (1941).

³⁸⁵ See 51 Douglas Papers (Dec. 21, 1940) (Library of Congress) (conference notes for *United States v. Darby Lumber Co.*) [hereinafter Douglas Darby Papers]; 64 Murphy Papers (Jan. 4, 1941) (misdated Jan. 4, 1940) (Bentley Historical Library, University of Michigan) (conferences notes for case numbers 82 and 330) [hereinafter Murphy Darby Papers]. The date on the Douglas notes was typed apparently in advance of conference, the date on the Murphy notes, therefore, appears to be more reliable, apart from the obvious slip as to the year.

³⁸⁶ See 51 Douglas Darby Papers, *supra* note 385; 64 Murphy Darby Papers, *supra*

opinion for the majority, Hughes wrote to him, again expressing doubts about the outcome on the grounds that the scope of the statute was disturbingly vague for application in a criminal case. He had no doubts, though, about Stone's broad discussion of the commerce power. On the contrary, he began his letter by saying, "You have written a strong opinion, again setting forth with suitable elaboration the general principles which we have held should govern the exercise of the commerce power."³⁸⁷ Stone's elaboration included the declaration that, so far as *Carter* was inconsistent with the conclusions he expressed, it had already been "limited in principle" by later cases, especially those under the NLRA beginning with *Jones & Laughlin*.³⁸⁸

Overall, then, I believe the evidence strongly supports Hughes's insistence that *Jones & Laughlin* represented no change in his concept of the commerce power.³⁸⁹ Neither sit-down strike, nor landslide election, nor Court plan was necessary to persuade him.

3. Roberts

Most of Hughes's prior record, I have argued, pointed in the direction of his opinion in *Jones & Laughlin*. By contrast, most of Roberts's prior record suggested that he would join the conservatives in that case. In 1931, Roberts had given the conservatives a fifth vote in *United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad*,³⁹⁰ which drew on a restrictive view of the extent to which the Commerce Clause empowered Congress to reach matters that were not themselves interstate commerce. Two years later, in *Texas & Pacific Railway v. United States*,³⁹¹ he again gave the conservatives the decisive vote in a decision that, although purportedly construing the Interstate Commerce Act rather than the Commerce Clause of the Constitution, severely restricted the Interstate

note 385.

³⁸⁷ Letter from Chief Justice Hughes to Justice Stone (Jan. 27, 1941), in 66 STONE PAPERS, *supra* note 129. On the proofs of a companion opinion, *Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126 (1941), Hughes marked, "Very careful and satisfactory." Letter from Chief Justice Hughes, *supra*. *Opp* was a civil case.

³⁸⁸ *Darby*, 312 U.S. at 123.

³⁸⁹ See also HUGHES, *supra* note 297, at 312 ("I wrote the opinions for the Court in the *Jones & Laughlin* case, and other cases sustaining the N.L.R.A. These opinions were in no sense a departure from the views I had long held and expressed."); 2 PUSEY, *supra* note 83, at 771 (claiming confidential testimony from other Justices).

³⁹⁰ 282 U.S. 31 (1931); see also discussion *supra* note 45 and accompanying text.

³⁹¹ 289 U.S. 627 (1933).

Commerce Commission's power to protect local ports against discrimination by carriers. His very right-wing opinion in *Alton*, though for the most part concerning issues different from those involved in *Jones & Laughlin*, suggested hostility to a broad exercise of the commerce power. And, of course, Roberts joined the majority in *Carter*.³⁹²

It may be that even *Carter* is logically reconcilable with Roberts's vote in *Jones & Laughlin*.³⁹³ But the steel case does appear to

³⁹² Note also *Ashton v. Cameron County Water Improvement Dist. No. 1*, 298 U.S. 513 (1936), a case that involved the bankruptcy rather than the commerce power, in which Roberts's decisive vote for the conservatives may reflect some hostility on his part to novel exercises of national power. After the crisis, in *United States v. Bekins*, 304 U.S. 27 (1938), Roberts joined in Hughes's opinion for the majority, essentially nullifying *Ashton*.

³⁹³ The government attempted in *Jones & Laughlin* to distinguish *Carter* on several grounds. Its principal argument was that the purpose of the statute involved in *Carter*, the Bituminous Coal Conservation Act of 1935, was to stabilize the coal mining industry by regulation of prices and wages, whereas the principal purpose of the NLRA was to control strikes that had the intent or necessary effect of interfering with commerce. See Brief for the National Labor Relations Board at 88-89, NLRB v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1936), reprinted in 33 LANDMARK BRIEFS & ARGUMENTS, *supra* note 286, at 291-92; Oral Argument on Behalf of the National Labor Relations Board, NLRB v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1936), reprinted in 33 LANDMARK BRIEFS & ARGUMENTS, *supra* note 286, at 460. Professor Freund regarded this argument as plausible, at least to a person of Hughes's cast of mind: "[T]he setting of wages and hours for coal miners may not have seemed to be as intimately related to the protection of commerce from the stoppages incident to strikes as is a comprehensive guarantee of collective bargaining." Freund, *supra* note 300, at 34. "A mind that could find [very thin] distinctions congenial and compelling would hardly need the threat of Court-packing" to draw this distinction. *Id.* at 36.

The distinction is weak at both ends, however. On the one hand, in addition to the regulation of wages and hours in Part III(g), the Coal Conservation Act included in Part III(a) a guarantee of the rights to organize and bargain collectively that was a precursor of the more broadly applicable guarantee established by the NLRA. See *supra* text accompanying note 346. Although Hughes's opinion in *Carter* appears to have assailed only Part III(g), the majority opinion was not so limited. See *supra* notes 348, 382 and accompanying text. The government was therefore forced in *Jones & Laughlin* into the strained argument that the guarantee of collective bargaining in Part III(a) of the Coal Conservation Act had been merely a subordinate part of the statutory scheme intended to effectuate the main purpose expressed partially in Part III(g). See Brief, *supra*, at 88-89, reprinted in 33 LANDMARK BRIEFS & ARGUMENTS, *supra* note 286, at 291-92. And on the other hand, Solicitor General Stanley Reed's argument in *Jones & Laughlin* that the NLRA was directed at "the flow of interstate commerce itself and the carrying on of these great enterprises," and "not the labor relations in and of themselves" should probably be greeted with some skepticism. Oral Argument, *supra*, reprinted in 33 LANDMARK BRIEFS & ARGUMENTS, *supra* note 286, at 460.

The government also argued in *Jones & Laughlin* that the Coal Conservation Act applied to the whole industry, without providing any mechanism for determining in which enterprises there was a sufficient nexus to commerce to justify application of

represent a sharp break in his general attitude on the commerce power. Like Hughes, he joined the liberal side in the subsequent

the statute. See Brief, *supra*, at 89-90, reprinted in 33 LANDMARK BRIEFS & ARGUMENTS, *supra* note 286, at 292-93. But nothing in *Carter* suggested that such a mechanism might save the statute, or that any coal mining company might present a better basis for constitutional application of the statute than did the ones involved in the case.

Finally, the government argued that as applied to *Jones & Laughlin* the NLRA was "concerned with activities which occur under circumstances closely related to a flow of commerce, and which directly affect that flow." Brief, *supra*, at 90, reprinted in 33 LANDMARK BRIEFS & ARGUMENTS, *supra* note 286, at 293. The government emphasized the vast interstate movement of raw materials to Jones & Laughlin's plant in Alquippa, Pa., and the vast movement out in the form of iron and steel products. See Brief, *supra*, at 92, reprinted in 33 LANDMARK BRIEFS & ARGUMENTS, *supra* note 286, at 295. And, to strike a contrast, the government pointed to the Court's declaration in *Carter* that in *Schechter* the flow had ceased, whereas in *Carter* it had not begun. See *id.* Professor Cushman believes that this argument could well have led to success for the government without distorting the Court's precedent. See Cushman, *Stream of Legal Consciousness*, *supra* note 6, at 150 ("The Government had prepared for the Court a rationale with an impeccable pedigree; . . . had it wished to do so, the Court could easily have reached the same result with the current of commerce theory . . ."). I regard this argument as substantially weaker, in light of *Carter* and earlier cases, than Professor Cushman does.

The doctrine of the "current" (or "flow" or "stream") of commerce, first adopted by the Supreme Court in *Swift & Co. v. United States*, 196 U.S. 375 (1905), allowed local transactions to be brought within the reach of Congress's commerce power when they were part of a continuous movement in interstate commerce. See *Swift*, 196 U.S. at 398-99 ("When cattle are sent for sale from a place in one state . . . [to] another, . . . with only the interruption necessary to find a purchaser at the stock yards and when this is a typical, constantly recurring course, the current thus existing is a current of commerce . . ."). But the Court had long drawn a sharp distinction between manufacture and commerce. See *Carter*, 298 U.S. at 299 ("No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form or use. The functions of commerce are different." (quoting *Kidd v. Pearson*, 128 U.S. 1, 20 (1889))); see also *supra* note 348 and accompanying text. And as interpreted by *Carter*, *Swift* and its progeny "nowhere suggested . . . that the interstate commerce power extended to the growth or production of the things which, after production, entered the flow." *Carter*, 298 U.S. at 305. For support, the *Carter* Court pointed to *Arkadelphia Milling Co. v. St. Louis Southwest Railway* in which the Court, concluding that intrastate shipments of rough lumber to a mill were not part of interstate commerce, had emphasized that the lumber did not leave the mill "until it had been subjected to a manufacturing process that materially changed its character, utility, and value." *Arkadelphia Milling Co. v. St. Louis S.W. Ry.*, 249 U.S. 134, 151 (1919).

One measure of the difficulties confronting the "current of commerce" doctrine in *Jones & Laughlin* is that the government gave the doctrine a subsidiary position in its brief. See Brief, *supra*, at 90-92, reprinted in 33 LANDMARK BRIEFS & ARGUMENTS, *supra* note 286, at 293-95. And another measure is that the Court explicitly declined to use the doctrine, instead resting its result on a broader based theory of protecting interstate commerce against obstructions, whatever the source. See *Jones & Laughlin*, 301 U.S. at 36-37.

line of cases—but unlike Hughes, with no apparent misgivings in *Darby*.³⁹⁴ He continued on that side, after Hughes's retirement, in the remarkable case of *Wickard v. Filburn*.³⁹⁵ And after his retirement, he even referred to *Jones & Laughlin* as virtually overruling *Carter*.³⁹⁶ Thus, even if a fine distinction between *Carter* and *Jones & Laughlin* is possible, Roberts's prior and subsequent record suggests that some broader factor accounts for his votes. One obvious candidate is the hypothesis that Roberts voted with the liberals in *Jones & Laughlin* and its companions for manipulative reasons, to help defeat the Court-packing plan. For several reasons, this manipulation hypothesis is unpersuasive.

First, Roberts's consistency on the liberal side of Commerce Clause cases even after the crisis of 1937 had passed—though he remained notably conservative in other areas³⁹⁷—suggests that he did not put on a temporary liberal mask for political reasons.

Second, it was by no means obvious at the time that giving the Administration a victory in the NLRB cases would afford the Court any substantial protection against packing. The immediate reaction of many observers, as reported by the redoubtable Turner Catledge, was that the decisions would have little impact at all on the battle.³⁹⁸

Indeed, it appeared that the decisions might increase, rather than decrease, the probability that the Court would be subjected to some packing. To the extent that the decisions appeared to be a reaction to political pressure, they weakened the Court's prestige

³⁹⁴ See 51 Douglas Darby Papers, *supra* note 385; 64 Murphy Darby Papers, *supra* note 385.

³⁹⁵ 317 U.S. 111, 128-29 (1942) (holding that the commerce power authorizes the regulation of wheat grown for private consumption).

³⁹⁶ See ROBERTS, *supra* note 300, at 51-53.

³⁹⁷ See *infra* text accompanying note 412; *infra* notes 427-41 and accompanying text. In every one of the postcrisis cases cited *infra* notes 427-30, 432, and 436-41, Roberts dissented on the conservative side. See also Cushman, *New Deal Court*, *supra* note 6, at 235-36 (noting various areas in which Roberts remained conservative even after the 1937 crisis).

³⁹⁸ See Turner Catledge, *Split on Court Bill*, N.Y. TIMES, Apr. 13, 1937, at 1 (stating that "[m]any observers seemed to think tonight that the Wagner decisions had brought little change to the status of the court reorganization plan"). Immediately after the decision in *West Coast Hotel*, the equally redoubtable Arthur Krock expressed uncertainty about which side of the Court-packing battle it aided. See Arthur Krock, *Flexibility of Constitution Conceded by High Court*, N.Y. TIMES, Mar. 30, 1937, at 22. ("Argument has just begun on the question whether the Supreme Court's reversal of itself in the women's minimum wage case today is a point for or against the President's judiciary proposals.").

and therefore weakened the strongest argument against packing—the need to keep the Court free of outside political manipulation.³⁹⁹ Moreover, the decisions appeared to give Roosevelt a graceful opportunity to make an Aikenesque declaration of victory⁴⁰⁰ and work out a compromise that, without much further struggle, would yield two, rather than six, extra Justices.⁴⁰¹ Whether or not such an outcome would have been a victory for Roosevelt, it certainly would have been a defeat for the Court. Roosevelt, of course, spurned the opportunity—but the point is that the political effect of the NLRB decisions was not easily predictable in advance.⁴⁰²

Third, even if Roberts had confidence that a victory for the Administration would help sink the Court-packing plan, granting a total victory was almost certainly unnecessary. I do not base this proposition primarily on Professor Cushman's argument that by this time the packing proposal was already in deep trouble;⁴⁰³ the possibilities that Roosevelt had even then for compromise and the subsequent history of the plan⁴⁰⁴ suggest that the plan, in one

³⁹⁹ After *West Coast Hotel*, Harold Ickes had written that "on the whole, the effect will be to weaken the prestige of the Court in public estimation because when it was under fire, the Court ran to cover." 2 ICKES, *supra* note 226, at 107. Forgetting the Chief Justice's record on the minimum wage issue, he added, "Hughes and Roberts ought to realize that the mob is always ready to tear and rend at any sign of weakness." *Id.*

I suspect that if Roosevelt's assault on the Court were to have any impact on Hughes and Roberts at all, it would be to stiffen, rather than dissolve, their resistance to liberal arguments, in part to avoid giving an appearance of weakness. See A.F.C., *Backstage in Washington*, 158 OUTLOOK 170 (1931) (predicting that criticism would stiffen Hughes). In this connection, it is significant that Hughes briefly held up delivery of *West Coast Hotel* so that it would not appear to be a sign of weakness forced by political attack. See 2 PUSEY, *supra* note 83, at 757.

⁴⁰⁰ George Aiken, a Republican senator from Vermont, suggested in 1966 that President Johnson should "declare the United States the winner [of the Vietnam War] and begin de-escalation." Albin Krebs, *George Aiken, Longtime Senator and G.O.P. Maverick, Dies at 92*, N.Y. TIMES, Nov. 20, 1984, at B10.

⁴⁰¹ Joseph Robinson, the Senate majority leader, told a Roosevelt representative that "if the President wants to compromise I can get him a couple of extra justices tomorrow. What he ought to do is say he's won, which he has, agree to compromise to make the thing sure, and wind the whole business up." ALSOP & CATLEDGE, *supra* note 226, at 153. Robinson's judgment as to the feasibility of such a compromise appears to have been sound. See *id.* at 152.

⁴⁰² I do not deny that in fact the NLRB decisions substantially weakened Roosevelt's case for the six-addition plan. As Senator James Byrnes of South Carolina put it, "Why run for a train after you've caught it?" *Id.* But the actual impact could only be known in light of Roosevelt's response.

⁴⁰³ See Cushman, *New Deal Court*, *supra* note 6, at 210-20.

⁴⁰⁴ See William E. Leuchtenburg, *FDR's Court-Packing Plan: A Second Life, A Second Death*, 1985 DUKE L.J. 673, 673-74 (noting that "by early June of 1937 [not April,

form or another, still had plenty of life. Nevertheless, after the great liberal victory two weeks earlier on the minimum wage—the issue that by far had most aroused the public—a less than complete victory in the NLRB cases would have been sufficient to suggest a significant change of direction making the immediate addition of new Justices unnecessary. For example, the Court might have held for the NLRB in its cases against Jones & Laughlin and the giant Fruehauf Trailer Company,⁴⁰⁵ but held against the Board in its case against the smaller Friedman-Harry Marks Clothing Company.⁴⁰⁶ Such a result would greatly weaken any argument that the Court was trying to scuttle the New Deal; at the same time, it would make the future development of the commerce power the equivalent of trench warfare, in which each case must be fought carefully over its particular facts and the conservatives might have opportunities for victory. Roberts, however, joined not only in Hughes's sweeping opinion in *Jones & Laughlin*, but also in his opinions in the companion cases, which applied *Jones & Laughlin* conclusorily.⁴⁰⁷

Finally, the manipulation hypothesis gains no support from any other votes of Roberts. He had cast his vote in *West Coast Hotel* before the Court-packing battle began, and his votes in the *Social Security Cases*, as I have argued, reflected no change of view. The NLRB votes were not part of a manipulative pattern, and this suggests that they were not manipulative at all.

when the Court decided the NLRB cases, but after the critical events of May] Roosevelt appeared to be thoroughly whipped," but in early summer he brought out a modified plan and "came very close to putting it through").

⁴⁰⁵ See *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49, 53-57 (1937) (upholding the validity of the Board's jurisdiction over the nation's largest manufacturer of commercial trailers, which maintained branch sales offices in twelve different states and had distributors and dealers throughout the country).

⁴⁰⁶ See *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58, 72-75 (1937) (upholding the validity of the Board's jurisdiction over a manufacturer of men's clothing, which apparently was not a major factor in the industry, had one sales office in a state other than that of its factory, and had sales volume approximately half that of Fruehauf's); PETER H. IRONS, *THE NEW DEAL LAWYERS* 263 (1982) (characterizing *Friedman-Harry Marks* as a small or medium-sized company with a small volume of interstate commerce in relation to that of the industry as a whole, and insignificant in relation to the nation's aggregate industry); Arthur Krock, *Five Cases Decided*, N.Y. TIMES, Apr. 13, 1937, at 1 (reporting that "far narrower rulings had been expected").

⁴⁰⁷ Note also that on the same day as the other NLRB cases, Roberts issued the opinion for the Court in *Associated Press v. NLRB*, 301 U.S. 103, 129-30 (1937), which—again over the dissent of the four conservatives, in this case based on the First Amendment—held that the NLRA could validly be applied to editorial employees of the Associated Press. Roberts briefly incorporated the holdings of *Jones & Laughlin* into his opinion. See *id.* at 133.

I conclude that Roberts's votes in the NLRB case probably reflected a change—but a legitimate change—in his views. That is not surprising. Roberts, no less than other Justices, was persuadable and capable of growth; he had previously changed his mind on other matters, in relatively short order and free of significant political pressure.⁴⁰⁸ Certainly, as Professor Cushman has argued, the integrative view of the public good expressed in Hughes's opinion in *Jones & Laughlin* resonated with the views that Roberts had expressed three years earlier in the due process context, in *Nebbia*.⁴⁰⁹ His adoption in *Butler*, under persuasion from Hughes, of the Hamilton-Story conception of the taxing and spending power suggests that, in January 1936, his views on the general question of the scope of national powers were already in transformation. To some extent his apparent resistance to Hughes's persuasive efforts, and to a greater extent his vote in *Carter*, demonstrate that the transformation was far from complete.

Thus, it is plausible that Roberts would have voted as he did in the NLRB cases even if no new external factors had operated at all. That, of course, does not prove that such factors did not play a role. For the reasons I have suggested above, I doubt that the Court-packing battle had any substantial impact on Roberts's votes, at least at a level close to his consciousness; for many of the reasons argued by Professor Cushman, I doubt that the 1936 election did either.⁴¹⁰ The storm of sit-down strikes may well have had some

⁴⁰⁸ Note that Roberts wrote the conservative majority opinion in *Hoeper v. Tax Comm'n.*, 284 U.S. 206 (1931), see discussion *supra* note 81, barring computation of one's tax by reference to another's income, but two years later cast a decisive vote in favor of a directly contradictory liberal opinion in *Burnet v. Wells*, 289 U.S. 670 (1933). Similarly, in *Coombes v. Getz*, 285 U.S. 434 (1932), see discussion *supra* note 81, he joined the conservative majority in a Contracts Clause opinion that does not square easily with his decisive vote for the liberals two years later in *Blaisdell*, see discussion *supra* part I.D.1.

⁴⁰⁹ See Cushman, *Stream of Legal Consciousness*, *supra* note 6, at 130 ("*Nebbia* made it possible to conceptualize what had previously been considered purely private enterprises as businesses affected with a public interest. This in turn made it possible to locate such business activities in a current of commerce subject to federal control."); *id.* at 148-49 (*Jones & Laughlin*'s "deformalization of the direct/indirect distinction . . . mirrored *Nebbia*'s deformalization of the public/private distinction"). I would put less emphasis than Cushman does on the "current" metaphor, given Hughes's express unwillingness to rely on it in *Jones & Laughlin*. See 301 U.S. at 36 ("The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce."); discussion *supra* note 393.

⁴¹⁰ See Cushman, *New Deal Court*, *supra* note 6, at 230 (noting that the Court "clearly did not follow the election returns of 1934," a great Democratic victory, or

impact in persuading him that a national solution to labor problems was necessary, but it is impossible to be sure.

III. CONSOLIDATION

The Court-packing battle was still blazing when the Court ended its Term on June 1, 1937. Several factors had greatly weakened the chances that Congress would pass Roosevelt's original plan: the Court's liberal decisions, the prospect of Van Devanter's retirement, which he announced on May 18, and the adverse vote of the Senate Committee on the Judiciary, made the same day. Several weeks later, the majority of the Committee issued a harsh negative report on the bill. Even so, some form of packing bill likely would have passed the Senate had Majority Leader Joseph Robinson not suddenly died on July 14.⁴¹¹ After that, the President's forces quickly unraveled, and Congress soon passed a judicial reform bill that left the Supreme Court untouched. When the Justices returned to the bench on October 4, the Court-packing battle was past, and Hugo Black replaced Van Devanter. The Hughes Court would not again be under severe political pressure—and for the time being the liberals needed only one vote from the moderates, not both, to prevail.

Thus, in December 1937, Hughes, joined by the four liberals, wrote for the Court in a case that Roberts, in a dissent joined by the conservatives, said overruled "a century of precedents" on the doctrine of intergovernmental tax immunity.⁴¹² And yet the

those of 1938, a resounding Republican victory after which the Court, with Hughes and Roosevelt in the majority, continued to support the constitutionality of New Deal regulations of commerce, and that Alf Landon of Kansas, the only Republican governor to survive the 1934 election, supported, at least in principle, many important New Deal programs).

⁴¹¹ Robinson commanded the loyalty of many of his colleagues, and he hoped for a seat on the Court, a prospect that would be much more likely if the Court's membership were expanded—especially because Roosevelt was thought reluctant to name Robinson to the Court unless he were accompanied by more liberal nominees. See BAKER, *supra* note 157, at 255; see also Leuchtenburg, *supra* note 404, at 687 (quoting Hiram Johnson, a leading opponent of the plan, to the effect that not until shortly after Robinson's death did opponents have the votes sufficient to defeat the plan); Turner Catledge, *Court Bill Is Killed, 70 to 20, as Senate Galleries Cheer; Lower Court Change Likely*, N.Y. TIMES, July 23, 1937, at 1, 2 (reporting that the opponents of Court-packing acknowledged after the defeat of the plan that, because of Robinson's "personal force among his colleagues," they were beaten right up to the moment of his death).

⁴¹² *James v. Dravo Contracting Co.*, 302 U.S. 134, 161 (1937) (Roberts, J., dissenting).

conservatives could still prevail if both Hughes and Roberts joined them.⁴¹³ Even that degree of power was fleeting, however. In January 1938, Sutherland retired. Roosevelt promptly named his Solicitor General, Stanley Reed, to fill the vacancy. Now the liberals were in control. Butler's death in November 1939, and his replacement early the next year by the Attorney General, Frank Murphy, further consolidated their hold.

In the meantime, Felix Frankfurter replaced Cardozo, who had died, and William O. Douglas replaced Brandeis, who had retired. These two changes did not dramatically alter the ideological orientation of the Court in the near term. They did mean, however, that, even before McReynolds and then Hughes retired in 1941, Roosevelt appointees constituted a majority of the Court. Thus, even if all the remaining members of the crisis-era Court voted together, they could be outnumbered by their junior brethren.⁴¹⁴ "You are on the side of the angels," Hughes ribbed Stone at conference in April 1941, "and there are more angels on this court than there used to be."⁴¹⁵ And Harvard's Thomas Reed Powell began watching his clock on decision days "lest he be overruled before his lecture was done."⁴¹⁶

⁴¹³ See *Bogardus v. Commissioner*, 302 U.S. 34, 44 (1937) (holding, against the Commissioner and over the conclusion of the Board of Tax Appeals, that a payment by a corporation to its employees in recognition of past services was, as a matter of statutory construction, a gift not subject to income tax).

⁴¹⁴ See *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543, 553 (1940) (holding, in favor of the government, that the Interstate Commerce Commission was not statutorily authorized to establish requirements regarding motor carrier employees whose duties did not affect safety of operation; and concluding, over the dissent of the four senior Justices, that even when the "plain meaning" of a statute does not produce absurd results, but only an unreasonable one plainly at variance with legislative policy, the purpose, rather than the literal words of the statute, should be followed); *United States v. Dickerson*, 310 U.S. 554, 561 (1940) (holding that, in light of previous suspensions of a reenlistment allowance, a proviso in an appropriations act prohibiting appropriations in two fiscal years for reenlistment allowances should be construed to continue suspension of the allowance—thus accomplishing by judicial construction what congressional rules forbade, the enactment of substantive legislation via an appropriations bill).

⁴¹⁵ 64 Murphy Darby Papers, *supra* note 385 (1940 Term) (conference memorandum for case number 671). Hughes's comment did not suggest any disagreement with the Court's resolution of that particular case, *Olsen v. Nebraska*, 313 U.S. 236 (1941). Indeed, according to the same memorandum, Hughes began discussion of *Olsen* by noting that the lower court "made the mistake of following our discussion in the Ribnik case." 64 Murphy Darby Papers, *supra*; see also discussion *infra* note 421 (summarizing *Olsen*). These renditions of Hughes's comments include some prepositions and articles that Murphy's memorandum omitted.

⁴¹⁶ Walton Hamilton & George Braden, *The Supreme Court Today*, NEW REPUBLIC,

During the four postcrisis years of Hughes's Chief Justiceship, as before the crisis,⁴¹⁷ the Court—with the full participation of Hughes and Roberts—made major strides in the areas of civil liberties,⁴¹⁸ civil rights,⁴¹⁹ and criminal justice rights.⁴²⁰

As to the economic powers of government, the new Justices led a virtually uninterrupted liberal victory parade. The Court rapidly consolidated its receptive attitude towards economic regulation against due process objections. *Nebbia* played a somewhat larger and more visible role in this consolidation than did *West Coast Hotel*—not surprisingly, given that *West Coast Hotel* was essentially an application of *Nebbia*.⁴²¹ Though not willing to go quite so far as

Aug. 5, 1940, at 178, 178.

⁴¹⁷ See *supra* part I.B.3; *supra* notes 101-08 and accompanying text; see also *De Jonge v. Oregon*, 299 U.S. 353, 365-66 (1937) (holding unconstitutional a conviction for participating in the conduct of a meeting, otherwise lawful, held under the auspices of the Communist Party); *Grosjean v. American Press Co.*, 297 U.S. 233, 240-41, 251 (1936) (holding unconstitutional a state license tax on newspapers and other publications that sold advertising and had a circulation of more than 20,000 copies per week).

⁴¹⁸ With respect to free expression, see *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Carlson v. California*, 310 U.S. 106 (1940); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Schneider v. State*, 308 U.S. 147 (1939); *Hague v. Commission for Indus. Org.*, 307 U.S. 496 (1939); *Lovell v. City of Griffin*, 303 U.S. 444 (1938). But see *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940). *Cox* appears still to be good law; *Gobitis* was overruled in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943).

⁴¹⁹ See *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Mitchell v. United States*, 313 U.S. 80 (1941). *Gaines* was a major stepping stone on the path to *Brown v. Board of Education*, 347 U.S. 483 (1954). *Mitchell* was a celebrated case involving a railroad's discrimination against the sole black member of Congress.

⁴²⁰ See *Chambers v. Florida*, 309 U.S. 227, 239-40 (1940) (holding, notwithstanding a state court jury's conclusion that defendants' confessions were voluntary, that the surrounding circumstances, calculated to fill the defendants with terror, made conviction of the defendants based on such confessions unconstitutional); *Johnson v. Zerbst*, 304 U.S. 458, 468-69 (1938) (reversing the lower court's decision, in a habeas corpus case, that the defendant had waived his right to counsel).

⁴²¹ See *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 393 (1940) (establishing the power of Congress to set the price of bituminous coal sold in interstate commerce). *Sunshine Coal* cited *Nebbia* and its progeny prominently, see *id.* at 394, but *West Coast Hotel* not at all. *Olsen v. Nebraska*, 313 U.S. 236 (1941), overruling *Ribnik v. McBride*, 277 U.S. 350 (1928), and establishing the power of a state to limit the fees charged by employment agencies, gave more prominence to *Nebbia* than to *West Coast Hotel*. See *Olsen*, 313 U.S. at 244-46. *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533 (1939), relied heavily on *Nebbia*—as would be expected given that *Rock Royal*, like *Nebbia*, involved the regulation of milk prices—but noted *West Coast Hotel* only in a string citation. See *Rock Royal*, 307 U.S. at 549, 570-71. Correspondingly, *United States v. Darby*, 312 U.S. 100 (1941) (involving hour and wage labor standards), cited its most direct precedent, *West Coast Hotel*, rather than *Nebbia*, in its very brief due process discussion. See *Darby*, 312 U.S. at 125.

the liberals in eliminating due process as a substantive constraint against arbitrariness in economic regulation, Hughes and Roberts never suggested any inclination to draw back from either *Nebbia* or *West Coast Hotel*.⁴²²

Similarly, Hughes and Roberts stood by *Jones & Laughlin*, in one case after another joining the liberals in upholding the reach of Congress's commerce power into local matters.⁴²³ Hughes's reluctance to join *Darby* does not indicate an inclination to confine *Jones & Laughlin*, which his own postcrisis opinions had treated expansively. Not only did *Darby* pose for him a serious problem—the vagueness of the statute for criminal prosecution—absent from *Jones & Laughlin*, but *Darby* plainly required a far wider stretch of the concept of a “close and substantial” effect on interstate commerce.

Congress's aggressiveness in capitalizing on the Court's new receptivity to exercises of the commerce power rendered the spending power under the General Welfare Clause virtually redundant. *Mulford v. Smith*⁴²⁴ demonstrates the point. There, the Court, in an opinion by Roberts and over the dissent of the remaining conservatives, upheld the Agricultural Adjustment Act of

Interestingly, *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), cited neither *Nebbia* nor *West Coast Hotel*, but relied almost totally on older cases in upholding a federal statute against due process attack.

⁴²² In all the cases except *Rock Royal*, cited *supra* note 421, Hughes and Roberts joined the liberals. In both *Sunshine Coal* and *Rock Royal*, the remaining conservatives dissented. In *Carolene Products*, McReynolds dissented while Butler concurred on narrow grounds, maintaining that if the statutory provisions at issue were “construed to exclude from interstate commerce wholesome food products that demonstrably are neither injurious to health nor calculated to deceive,” they would be “repugnant to the Fifth Amendment.” 304 U.S. at 155. By the time of the decisions in *Darby* and *Olsen*, none of the conservative foursome remained on the Court.

Rock Royal concerned an order that regulated the price that milk handlers had to pay for milk that they marketed in the area in which it was produced, but left unregulated the price of milk marketed outside that area. See 307 U.S. at 558-59. Dissenting from an opinion upholding this order, Roberts, with the concurrence of Hughes, McReynolds, and Butler, contended that “it inevitably intends to destroy the business of smaller handlers by placing them at the mercy of their larger competitors.” *Id.* at 587. Roberts concluded that the order was not statutorily authorized, but that if it was it violated the due process guarantee. See *id.* The extent to which Hughes joined in this opinion is somewhat ambiguous; he may have concluded that the order was not statutorily authorized without concluding that it would violate due process. See *id.* (noting that Hughes joined in Roberts's opinion “so far as it relates to the invalidity of the order on the ground stated”); see also *infra* notes 428, 429 (discussing Roberts's dissent in *Rock Royal* and a companion case).

⁴²³ See cases cited *supra* note 383; see also *infra* text accompanying notes 424-26 (discussing *Mulford v. Smith*, 307 U.S. 38 (1939)).

⁴²⁴ 307 U.S. 38 (1939).

1938, a statute passed to replace the one that the Court had invalidated in *Butler*.⁴²⁵ The Act provided a mechanism for setting quotas, enforced by stiff penalties, for the amounts that a farm might market of five basic agricultural commodities. The government fought and won the case on the basis of the commerce power—a ground that it had not dared argue in defense of the earlier statute. Thus, the *Mulford* result suggested that the *Butler-Social Security Cases* line would have a rather slight impact on the Court's post-1937 jurisprudence; the virtually boundless development of the commerce power makes essentially moot the question whether Congress can use the taxing and spending power to coerce or purchase compliance with a regulatory scheme that it could not impose by straightforward regulation. Indeed, to whatever extent the broad concept of the General Welfare Clause has mattered in the Court's postcrisis decisions, the adoption of that concept in *Butler* has been at least as important as its implementation in the *Social Security Cases*.⁴²⁶

I have argued that Hughes and Roberts remained faithful after the crisis to the principles of the great cases decided during the crisis. But, as before the crisis, they were not entirely in the liberal camp.

THOUGHT EXPERIMENT IV: SWITCHING THE TIME OF THE LATE PERSONNEL CHANGES

Suppose Justices Van Devanter and Sutherland, instead of retiring in 1937 and 1938, respectively, had remained on the Court until their deaths. Suppose also that Justice Butler, instead of dying in 1939, lived and served on the Court until March 1941.

⁴²⁵ The statute was already amended several times before the *Mulford* decision. See 307 U.S. at 41 n.1.

⁴²⁶ See *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 738 (1950) (citing *Butler* as having declared, for the first time in an opinion of the Court, that Congress's power under the General Welfare Clause is separate and distinct from the later enumerated powers, and adding—without any elaboration or reference to *Steward*—that “[i]f any doubt of this power remained, it was laid to rest the following year in *Helvering v. Davis*”). Professor Tribe argues that the Court's summary affirmation, 435 U.S. 962 (1978), of *North Carolina ex rel. Morrow v. Califano*, 445 F. Supp. 532 (E.D.N.C. 1977), demonstrates its “disregard for *Butler*.” LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 322 n.9 (2d ed. 1988). I disagree. The condition placed there on a federal grant of aid seems perfectly compatible with *Butler*. See *United States v. Butler*, 297 U.S. 1, 73 (1936) (“We are not here concerned with a conditional appropriation of money, nor with a provision that if certain conditions are not complied with the appropriation shall no longer be available.”).

Would we talk very much about the Constitutional Revolution of 1937?

As suggested by this question, the course of decisions over the remaining years of the Hughes Court would have been very different had the liberals not been fortified by new members. In several areas, significant liberal victories would have been defeats.

During these years, for example, the Court dismantled several constitutional barriers, including ones of due process and equal protection, to the taxing power. Had the Court's membership remained unchanged, however, and the departing Justices' votes remained true to form, the Court would have fortified those barriers.⁴²⁷ Similarly, the Court would have shown that vitality remained both to the doctrine against excessive delegation⁴²⁸ and to the due process restraint on legislation deemed arbitrary⁴²⁹ or confiscatory,⁴³⁰ indeed, Stone's decision in *United States v. Carolene*

⁴²⁷ With respect to intergovernmental tax immunity, see *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940); *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937); *Silas Mason Co. v. Tax Comm'n*, 302 U.S. 186 (1937). With respect to the business situs doctrine, see *Curry v. McCanless*, 307 U.S. 357 (1939); *Graves v. Elliott*, 307 U.S. 383 (1939). With respect to other aspects of due process as it relates to extraterritoriality, see, for example, *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941); *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435 (1940). With respect to retroactivity, due process and equal protection, see *Welch v. Henry*, 305 U.S. 134 (1938). See also *Madden v. Kentucky*, 309 U.S. 83, 93 (1940) (overruling in part *Colgate v. Harvey*, 296 U.S. 404 (1935), and upholding against due process, equal protection, and privileges and immunities attacks a tax differentially imposed on deposits in banks inside and outside the state); cf. *Whitney v. State Tax Comm'n*, 309 U.S. 530, 537-42 (1940) (with McReynolds—the sole remaining member of the Four Horsemen—not participating and Roberts dissenting alone, virtually overruling *Binney v. Long*, 299 U.S. 280 (1936), and upholding against due process and equal protection attack inclusion in a decedent's estate for tax purposes of property never owned by her but appointed by her will under a limited power that could only be exercised in favor of four of her children, in such proportions as she might choose).

⁴²⁸ See *H.P. Hood & Sons, Inc. v. United States*, 307 U.S. 588, 603 (1939) (Roberts, J., dissenting with McReynolds and Butler, JJ., joining) (finding an unconstitutional delegation of legislative power to the Secretary of Agriculture, from a decision upholding an order by the Secretary under the Agriculture Marketing Agreement Act of 1937); see also *United States v. Rock Royal Co-Operative, Inc.*, 307 U.S. 533, 583 (1939) (Roberts, J., dissenting with McReynolds and Butler, JJ., joining) (noting without elaboration, because the matter was not pressed, his view that an order similar to that in *Hood* was unconstitutional delegation).

⁴²⁹ See *United States v. Rock Royal Co-Operative, Inc.*, 307 U.S. 533 (1939). This aspect of *Rock Royal* is discussed *supra* note 422.

⁴³⁰ See *Railroad Comm'n v. Rowan & Nichols Oil Co.*, 311 U.S. 570, 574-77 (1941) (upholding against an attack based on confiscation, endorsed in dissent by Hughes, McReynolds, and Roberts, an oil proration order that, with respect to most wells, allocated production on a flat per-well basis); *Railroad Comm'n v. Rowan & Nichols*

*Products Co.*⁴³¹ would have been for a plurality rather than for the majority. Notwithstanding the Court's generally expansive treatment of the commerce power, the unchanged Court would have set forth a restrained view of the scope of Congress's power over navigation;⁴³² more importantly, given Hughes's doubts, the Court may very well have decided *Darby* against the government.⁴³³ A new gold clause case would have been decided in favor of parties seeking protection from one type of gold clause, thus dealing a significant defeat to the government's monetary policy.⁴³⁴ Numerous conservative lower court decisions on constitutional matters would have been left standing by an equally divided Court.⁴³⁵ And in a wide variety of nonconstitutional contexts—most prominently in taxation,⁴³⁶ but also in administrative law,⁴³⁷ labor law,⁴³⁸

Oil Co., 310 U.S. 573 (1940) (Roberts, J., dissenting with Hughes, C.J., and McReynolds, J., joining) (same); cf. *Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co.*, 309 U.S. 4 (1940) (procedures for challenging rate-setting order).

⁴³¹ 304 U.S. 144 (1938).

⁴³² See *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 409 (1940) (holding, over Roberts's dissent, joined by McReynolds with Hughes not participating, that "[i]n determining the navigable character [of a river] it is proper to consider the feasibility of interstate use after reasonable improvements which might be made").

⁴³³ If Van Devanter, Sutherland, Butler, and McReynolds (who retired two days before the Court issued *Darby*) had all been on the Court, they and Hughes might have formed a majority against the government.

⁴³⁴ See *Guaranty Trust Co. v. Henwood*, 307 U.S. 247, 259 (1939) (construing, with Stone joined by Hughes, McReynolds, and Butler, dissenting, a congressional resolution to nullify a bondholder's right, pursuant to the terms of the bonds, to demand payment in Dutch guilders at a prescribed rate). The government appeared as amicus in *Henwood* on the prevailing side. See *id.* at 248-49; see also *supra* note 173 (discussing *Henwood*).

⁴³⁵ Perhaps most notably, *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), would have affirmed by an equally divided vote the decision of the Court of Appeals that "upon questions of general law the federal courts are free, in absence of a local statute, to exercise their independent judgment as to what the law is." *Erie R.R. v. Tompkins*, 90 F.2d 603, 604 (2d Cir. 1937); see also *Helvering v. Gerhardt*, 304 U.S. 405, 424 (1938) (holding that salaries of state employees performing functions that are not indispensable functions of state government are not immune from federal taxes); *Helvering v. Mountain Producers Corp.*, 303 U.S. 376, 387 (1938) (overruling precedents and holding that lessees of state-owned land may be subjected to a nondiscriminatory tax on income derived from that land); *Johnson v. Zerbst*, 304 U.S. 458, 469 (1938), discussed *supra* note 420.

⁴³⁶ See, e.g., *Cary v. Commissioner*, 313 U.S. 441 (1941); *Estate of Keller v. Commissioner*, 312 U.S. 543 (1941); *Helvering v. Campbell*, 313 U.S. 15 (1941); *Helvering v. Gambrell*, 313 U.S. 11 (1941); *Helvering v. Le Gierse*, 312 U.S. 531 (1941); *Helvering v. Reynolds*, 313 U.S. 428 (1941); *Maguire v. Commissioner*, 313 U.S. 1 (1941); *Helvering v. Clifford*, 309 U.S. 331 (1940); *Helvering v. Eubank*, 311 U.S. 122 (1940); *Helvering v. Horst*, 311 U.S. 112 (1940); *White v. United States*, 305 U.S. 281 (1938).

⁴³⁷ See, e.g., *United States v. Morgan*, 307 U.S. 183, 198 (1939) (emphasizing the

antitrust,⁴³⁹ and banking,⁴⁴⁰ among others⁴⁴¹—the Court's decisions would have had a far more conservative cast.

In short, that the spring of 1937 appears to have been a great constitutional watershed is attributable in significant part to the personnel changes that followed immediately. Those changes guaranteed that over the next several years the Court would be uniformly receptive to economic regulation. The contrast with the prior few years, with its substantial mix of liberal and conservative decisions, was clear; the contrast with the decades-long era preceding the Hughes Court could not have been more stark. Had all the Justices remained on the bench until Hughes's retirement, the substantial number of conservative victories would have yielded a contrast significantly less clear.

Moreover, of great importance, those conservative victories would have stood alongside the 1937 landmarks. That in itself suggests that those landmarks were not as revolutionary as is

need for cooperation between courts and agencies, and holding, over the dissent of Butler, joined by McReynolds and Roberts, that funds previously paid into district court, pending judicial review of an administrative rate-setting order subsequently set aside on procedural grounds, should be retained by the court pending a further and valid administrative determination of reasonable rates).

⁴³⁸ See *American Fed'n of Labor v. Swing*, 312 U.S. 321 (1941); *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146 (1941); *United States v. Hutcheson*, 312 U.S. 219 (1941); *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940). In his dissent in *Hutcheson*, Roberts said, "I venture to say that no court has ever undertaken so radically to legislate where Congress has refused so to do." 312 U.S. at 245. Judicial legislation was a favorite theme of Roberts's during this period. See, e.g., *Helvering v. Clifford*, 309 U.S. 331, 338 (1940) (Roberts, J., dissenting) ("The decision of the court disregards the fundamental principle that legislation is not the function of the judiciary but of Congress.").

⁴³⁹ See *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 232 (1939) (holding, over the dissent of Roberts, joined by McReynolds and Butler, that the evidence supported an inference that film distributors agreed among themselves in violation of the Sherman Act to impose restrictions on subsequent-run exhibitors).

⁴⁴⁰ See *Deitrick v. Greaney*, 309 U.S. 190, 199-200 (1940) (implementing, over the dissent of Roberts, joined by McReynolds, a broad view of the power of a bank receiver to recover on a note that was part of an illegal transaction in which the bank's officers participated); *Inland Waterways Corp. v. Young*, 309 U.S. 517, 524-25 (1940) (holding, in favor of the Administration and over the dissent of Roberts, joined by Hughes and McReynolds, that a national bank, though without authority to pledge its assets as security for private deposits, could do so as security for deposits made by a government corporation, notwithstanding dubious statutory authorization).

⁴⁴¹ See *SEC v. United States Realty & Improvement Co.*, 310 U.S. 434, 460 (1940) (holding, inter alia, that a bankruptcy proceeding should have been held under procedure allowing SEC intervention); *United States v. American Trucking Ass'ns*, 310 U.S. 534 (1940) (Interstate Commerce Act); *United States v. Dickerson*, 310 U.S. 554 (1940), discussed *supra* note 414.

generally supposed. Another thought experiment may help further in gauging their significance.

THOUGHT EXPERIMENT V: ELIMINATING THE MYSTERY

If there had been no 1936 or 1937, how different would the course of decisions afterwards have been?

The answer suggested by the above analysis of the years after 1937 is: Far less different than is commonly thought. Apart from their importance in upholding the Social Security Act itself, the *Social Security Cases* had a rather slight impact. *West Coast Hotel* was significant principally because it restored *Nebbia* to its proper place after the oddity of *Tipaldo*. Alone among the three, *Jones & Laughlin* had broad and enduring significance, for it represented a substantial turning in the Court's attitude towards the commerce power. *Jones & Laughlin* was of monumental importance. But revolutionary? I do not believe the term fits well.⁴⁴²

In short, the impact of the 1937 cases is significantly less than has generally been supposed.

CONCLUSION

I have told a messy story. Many different factors account for the constitutional transformation of the 1930s. The accession of Hughes and Roberts advanced constitutional law substantially before the spring of 1937; the accession of the Roosevelt appointees advanced it afterwards. Personnel changes account for much of the story.

Those changes cannot be a complete explanation, however. To understand the strange course of the Court's crucial decisions in 1936 and 1937, we must attempt to understand the minds of its swing members, and particularly of Roberts. I believe that Hughes acted consistently across cases; to some extent, too—with respect to both the General Welfare Clause and the substance of the due process issues—I believe Roberts's conduct was consistent as well. On the Commerce Clause, though, I suspect Roberts had a

⁴⁴² See Cushman, *Stream of Legal Consciousness*, *supra* note 6, at 156 ("Had it not been for the dramatic political events surrounding the Court's decisions, it would have been difficult to contend that there was anything very revolutionary in the opinions."). But see Norman Silber & Geoffrey Miller, *Toward "Neutral Principles" in the Law: Selections from the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854, 872-73 (1993) ("I think *Jones & Laughlin* was a revolution, a constitutional revolution." (quoting Herbert Wechsler)).

conscientious change of mind, at least the substance of which, if not the timing, can be understood independent of political factors. His willingness to confront the validity of the minimum wage laws in 1937, after straining to avoid the question in 1936, was likely attributable in part to the furious reaction to the 1936 decision. To some extent, though, Roberts might be impenetrable: he may have been motivated by factors that cannot be discerned by others, and that perhaps even he did not recognize, and this may have infused his conduct with a strong element of apparent randomness.

Finally, consider the element of time and precedent.

THOUGHT EXPERIMENT VI: SWITCHING THE TIME OF DECISIONS

Justices Stone and Roberts were part of the unanimous Court that held against Congress's exercise of the commerce power in *Schechter* in 1935,⁴⁴³ and part of the unanimous Courts that held in favor of the exercise of that power in 1941 and 1942 in *Darby*⁴⁴⁴ and *Wickard v. Filburn*.⁴⁴⁵ Suppose that *Darby* and *Wickard* had come before the Court in 1935, and that *Schechter* had come before the Court in 1942. Which way would the Court have gone in these cases? And which way would Justices Stone and Roberts have voted?

Had *Darby* and *Wickard* come before the Court in 1935, it seems certain that a majority of the Court, including Roberts, would have voted against the government. But it also seems probable that Stone would have voted the same way, as he did in *Schechter*; at least *Wickard*, and arguably *Darby*, pressed the commerce power further than did the government's arguments in *Schechter*. By the same token, if the Court had decided *Schechter* in 1942, it seems virtually certain that the entire Court—including Roberts and Stone, the two remaining members of the Court that actually decided *Schechter*—would have voted for the government; five years after *Jones & Laughlin*, and especially given *Wickard* and *Darby*, the macroeconomic arguments made by the government in *Schechter* would not have appeared particularly startling.⁴⁴⁶

So it seems likely that Stone, as well as Roberts, broadened his view of the commerce power between *Schechter* and *Darby*. Political

⁴⁴³ See *supra* text accompanying notes 195-206; see also *supra* text accompanying note 194 (noting the narrow view of commerce taken by an unanimous Court in the Federal Employers' Liability Act cases of the early 1930s).

⁴⁴⁴ See *supra* text accompanying notes 384-88, 394, 423, 433.

⁴⁴⁵ See *supra* note 395 and accompanying text.

⁴⁴⁶ See 295 U.S. at 548-49; discussion *supra* text accompanying note 202.

explanations are not necessary to account for Stone's switch. And neither are they to account for Roberts's. Time, as the newsreels of the era pointed out, marches on. Cases pile up. And sometimes people even change their minds.