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Barry Cushman

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Cover Page Footnote

The author gratefully acknowledges the valuable criticisms of Patrice Cushman, Chris Eisgruber, Roger Goldman, John Griesbach, Alan Howard, Michael Klarman, Charles McCurdy, Eben Moglen, William Nelson, John Phillip Reid, G. Edward White, Doug Williams, and the members of the Legal History Colloquium at the New York University School of Law. Thanks are also due to William E. Jackson and Mary Jackson Craighill for permission to quote from the Robert Jackson papers

ARTICLE

A STREAM OF LEGAL CONSCIOUSNESS: THE CURRENT OF COMMERCE DOCTRINE FROM SWIFT TO JONES & LAUGHLIN

BARRY CUSHMAN*

In this article on constitutional development and the New Deal Court, Professor Cushman argues that the conventional story of the Court's radical reversing of its jurisprudence in the face of the Court-packing plan is misconceived. The article instead seeks to demonstrate that Jones & Laughlin, one of the cases comprising the Constitutional Revolution of 1937, was conceptually, stylistically, and doctrinally congruent with the Court's contemporary jurisprudence. The paradigm shift in commerce clause jurisprudence, Professor Cushman contends, came not in 1937, but in 1941 and 1942, after Roosevelt had had an opportunity to refashion the Court with a new generation of legal thinkers.

MORE than a generation of constitutional historians have viewed the events of 1937 as a political drama in which a recalcitrant judiciary reluctantly knuckled under to the political muscle of Franklin Roosevelt. Together with the decisions in *West Coast Hotel v. Parrish*¹ and the Social Security cases,² the opinions in the Wagner Act cases³ have been cast as part of the "Constitutional Revolution" of 1937. Indeed, the claim that the Wagner Act cases marked a reversal of (or a substantial departure from) the Court's earlier Commerce Clause jurisprudence has been accepted with near-unanimity by the historical community.⁴ The con-

* Assistant Professor of Law, St. Louis University School of Law; B.A. 1982, Amherst College; M.A., J.D. 1986, University of Virginia. The author gratefully acknowledges the valuable criticisms of Patrice Cushman, Chris Eisgruber, Roger Goldman, John Griesbach, Alan Howard, Michael Klarman, Charles McCurdy, Eben Moglen, William Nelson, John Phillip Reid, G. Edward White, Doug Williams, and the members of the Legal History Colloquium at the New York University School of Law. Thanks are also due to William E. Jackson and Mary Jackson Craighill for permission to quote from the Robert Jackson papers.

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

2. See *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937); *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937).

3. See *Associated Press v. NLRB*, 301 U.S. 103 (1937); *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937); *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49 (1937); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Washington, Virginia & Maryland Coach Co. v. NLRB*, 301 U.S. 142 (1937).

4. See Joseph Alsop & Turner Catledge, *The 168 Days* 142-47 (1938); Richard C. Cortner, *The Jones & Laughlin Case* 159, 174 (1970) [hereinafter *The Jones & Laughlin Case*]; Richard C. Cortner, *The Wagner Act Cases* 184-94 (1964) [hereinafter *The Wagner Act Cases*]; Edward S. Corwin, *Constitutional Revolution*, *Ltd.* 53, 72 (1941) [hereinafter *Constitutional Revolution, Ltd.*]; Edward S. Corwin, *Court Over Constitution* 156 & n. 60 (1938) [hereinafter *Court Over Constitution*]; Robert H. Jackson, *The Struggle for Judicial Supremacy* 191-92, 218, 235 (1941); Alpheus T. Mason, Harlan Fiske Stone: *Pillar of the Law* 455, 458 (1956); Alpheus T. Mason & William M. Beaney, *The Supreme Court in a Free Society* 182-84 (1959); Robert G. McCloskey, *The American Supreme Court* 176-77 (1960); Paul L. Murphy, *The Constitution in Crisis* *Times*, 1918-

ventional view is that the Court beat a "strategic retreat"⁵ from its earlier jurisprudence: chastened by Roosevelt's landslide victory in the 1936 election, and coerced by his subsequent plan to reform the federal judiciary, the Court bowed to the inevitability of the New Deal.⁶

I have expressed elsewhere my reasons for doubting that either the Court-packing plan or the 1936 election satisfactorily explains the Court's disposition of cases in the spring of 1937.⁷ In this article I am concerned with the effect that this conventional wisdom has had on our understanding of the development of Commerce Clause jurisprudence. I will argue that the conceptualization of the Wagner Act cases as essentially political responses to political pressure has impoverished our understanding of Commerce Clause doctrine in two ways: first, the conventional learning ignores important conceptual and doctrinal continuities displayed in Chief Justice Hughes' Wagner Act opinions; and second, the conventional wisdom understates the extent to which cases decided by the Roosevelt Court in the early 1940s were truly revolutionary.

This conventional wisdom is grounded in the potent combination of legal realism and Progressive historiography, exemplified by the work of Edward Corwin, which for decades served as the dominant paradigm for understanding the constitutional history of the late nineteenth and early twentieth centuries. In Corwin's view, dual federalism and substantive due process were merely convenient weapons in the arsenal of a reactionary Court devoted to maintaining the hegemony of corporate and financial elites at the expense of ordinary citizens.⁸ More recently, scholars have begun to challenge this view, persuasively contending that the doctrines of economic substantive due process were not simply spun out of

1969, at 153-54 (1972) [hereinafter *Crisis Times*]; Fred Rodell, *Nine Men: A Political History of the Supreme Court from 1790 to 1955*, at 249-50 (1955); Bernard Schwartz, *The Supreme Court: Constitutional Revolution in Retrospect* 16, 35 (1957); William F. Swindler, *Court and Constitution in the Twentieth Century: The New Legality 1932-1968*, at 99-100, 137 (1970); Benjamin F. Wright, *The Growth of American Constitutional Law* 179 (1967); William Leuchtenberg, *Franklin D. Roosevelt's Supreme Court 'Packing' Plan*, in *Essays on the New Deal* 69, 94 (Harold M. Hollingsworth & William F. Holmes eds., 1969).

5. See *The Wagner Act Cases*, *supra* note 4, at 188; McCloskey, *supra* note 4, at 224; Walter F. Murphy, *Congress and the Court: A Case Study in the American Political Process* 65 (1962); Wright, *supra* note 4, at 222.

6. See Alsop & Catledge, *supra* note 4, at 141; *Court Over Constitution*, *supra* note 4, at 127; *Crisis Times*, *supra* note 4, at 115; Swindler, *supra* note 4, at 81; Wright, *supra* note 4, at 205.

7. See Barry Cushman, *Unmaking the Myth of the New Deal Court: The 'Switch-in-Time' Reconsidered* (currently unpublished manuscript, on file with the *Fordham Law Review*).

8. For a discussion of the array of ideas comprehended by the term "dual federalism", see Edward S. Corwin, *The Twilight of the Supreme Court* 11-12 (1934) [hereinafter *Twilight of the Supreme Court*]; Edward S. Corwin, *The Commerce Power Versus States Rights: "Back to the Constitution"* 115-72 (1936) [hereinafter *Commerce Power*]. On the distinction between procedural and substantive due process, see John E. Nowak et al., *Constitutional Law* 416-18 (2d ed. 1983).

thin air in order to protect the position of the robber barons of the Gilded Age. Substantive due process doctrines have instead come to be understood as the juristic embodiments of such antebellum ideological commitments as northern "free labor ideology" and the Jacksonian's egalitarian opposition to "class legislation," and we now recognize that they were frequently deployed to the detriment of business interests.⁹ Similarly, the roots of dual federalism may be seen in the ideological commitment to the preservation of liberty through the diffusion of power—a commitment that certainly antedated the Gilded Age, and can hardly be said to have been forged for the purpose of perpetuating elite hegemony.¹⁰ In short, dual federalism and substantive due process were two conceptual manifestations of a well-established, integrated vision of civic liberty in the late nineteenth and early twentieth century United States. Recent scholarship counsels us not to allow the fact that wealthy and powerful interests often manipulated these concepts to their advantage to cheapen our understanding.¹¹

This integrated vision of civic liberty was set forth trenchantly in a speech given by Chief Justice Melville Fuller before a joint session of Congress on the occasion of the centennial of George Washington's inauguration as President. Contemplating the future of the republic Washington had helped to create, Fuller spoke of two great dangers looming on the horizon.

One was that "the drift toward the exertion of the national will" might ultimately result in "consolidation," which in turn would impair the "vital importance" of the states and undermine self-government by extending the sphere of legislative authority to such a degree that the people no longer controlled it. The other was "the drift . . . towards increased interference by the State in the attempt to alleviate inequality of conditions." Fuller admitted that "[s]o long as that interference is . . . protective only," it was not only legitimate but necessary. "But," he added, "the rights to life, to use one's faculties in all lawful ways, and to acquire and enjoy property, are morally fundamental rights antecedent to constitutions, which do not create, but secure and protect them."¹²

9. See Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 *Law & Hist. Rev.* 293, 293-331 (1985); William Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 *Wis. L. Rev.* 767, 767-817 (1985); Charles W. McCurdy, *The Roots of 'Liberty of Contract' Reconsidered: Major Premises in the Law of Employment, 1867-1937*, in *Yearbook of the Supreme Court Historical Society* 20, 20-33 (1984).

10. See Bernard Bailyn, *The Ideological Origins of the American Revolution* 198-229 (1967); Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, at 344-89 (1969); Harry N. Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 *U. Tol. L. Rev.* 619, 635, 676 (1978).

11. See generally Harry N. Scheiber, *Federalism and the American Economic Order, 1789-1910*, 10 *Law & Soc'y Rev.* 57 (1975) (discussing relationship between American federalism and the American economic order).

12. Charles W. McCurdy, *Fuller, Melville W. (1833-1910)*, in 2 *Encyclopedia of the American Constitution* 813, 813-14 (Leonard W. Levy et al. eds., 1986) (quoting Melville

These concerns of course were to be manifested in the Fuller Court's Commerce Clause and due process jurisprudence. Just as the ideological commitments underlying these two areas of jurisprudence were part of an integrated vision of civic liberty for Fuller and many of his contemporaries, so during Fuller's tenure would the juridical manifestations of these commitments become integrated at the level of doctrine. As I shall show here and elsewhere,¹³ due process concepts informed Commerce Clause concepts, and conversely. As a result, the two areas of doctrine became developmentally interdependent: changes in due process doctrine implied modifications of Commerce Clause doctrine; developments in Commerce Clause jurisprudence foretold transformations of due process doctrine.

With this understanding, we can begin to trace the ways in which certain constitutional conceptions evolved to the point that they could work a "constitutional revolution." We can see how these conceptions were forged and molded in the hands of the Justices; how they were grasped, manipulated and deployed by legislators framing statutes and lawyers selecting test cases and crafting legal arguments; how these legal arguments resonated with the doctrinal categories comprising the constitutional culture and consciousness of the New Deal Justices; and how these categories quickly became irrelevant to the new generation of men appointed to the Court by Franklin Roosevelt. To achieve this understanding, our story must begin not with the year of Franklin Roosevelt's election as President, but rather with the period of his youth.

PROLOGUE: LAISSEZ-FAIRE FORMALISM AND THE EMERGENCE OF THE CURRENT OF COMMERCE DOCTRINE

In 1869, Chief Justice Salmon P. Chase used the opportunity presented by *Texas v. White*¹⁴ to adumbrate the contours of the postbellum constitutional order. "[T]he perpetuity and indissolubility of the Union," Chase declared, "by no means implies the loss of distinct and individual existence, or of the right of self-government by the States."¹⁵ Each of the several state governments were, like the federal government, "endowed with all of the functions essential to separate and independent existence."¹⁶ "[T]he preservation of the States," Chase concluded, "and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National [G]overnment. The Constitution, in all its provi-

W. Fuller, Address in Commemoration of the Inauguration of George Washington as First President of the United States, Delivered Before the Two Houses of Congress (Dec. 11, 1889)).

13. See Barry Cushman, *The Trail of the Yellow Dog: Liberty of Contract and Collective Bargaining from Adair to the Wagner Act Cases*, 1992 Sup. Ct. Rev. (forthcoming 1992).

14. 74 U.S. (7 Wall.) 700 (1869).

15. *Id.* at 725.

16. *Id.* (quoting *County of Lane v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869)).

sions, looks to an indestructible Union, composed of indestructible States."¹⁷ The aphoristic quality of Chase's dictum disposed it to repetition; and indeed, "'an indestructible Union, composed of indestructible States' quickly supplanted *E pluribus unum* as the motto of choice for conveying the essence of American federalism."¹⁸ Moreover, because judicial review had been securely established by 1869, to say that the maintenance of such a Union was "within the design and care of the Constitution" was to appoint the federal judiciary as its conservator.¹⁹

Espousing the constitutional cosmology expounded by Chase in *Texas v. White*, Supreme Court Justices of the late nineteenth century elaborated the theory of constitutional government that Edward Corwin dubbed "dual federalism." Because the federal government was one of enumerated powers, argued exponents of dual federalism, and because the Tenth Amendment reserved all unenumerated powers to the states, state and federal authorities were absolutely sovereign within their respective spheres of power. These respective spheres of state and federal authority were completely separate and distinct: there was no area in which state and federal authority overlapped. If an entity or activity was subject to federal regulation, it was immune to state regulation, and conversely. The boundaries and diameters of these spheres of federal and state authority were, moreover, immutable and timeless—the necessary implications of our constitutional system.²⁰

In practice, the theory of dual federalism yielded a narrow construction of the scope of the federal government's power to regulate commerce. Two antitrust prosecutions from the 1890s serve to illustrate this proposition. In *United States v. E.C. Knight Co.*,²¹ the American Sugar Refining Company had, through acquisition of four Pennsylvania refining companies, obtained control of over ninety-eight percent of the sugar refining capacity of the United States. The federal government brought an action under the Sherman Antitrust Act, seeking to void the transactions by which the Pennsylvania refineries had been acquired. In an opinion teeming with the language of dual federalism, the Supreme Court rejected the government's prayer.²² "That which belongs to commerce is within the jurisdiction of the United States," wrote Chief Justice Fuller, "but that which does not belong to commerce is within the jurisdiction of the police power of the State."²³ The refinement of sugar was held to be

17. *Id.*

18. Charles W. McCurdy, *Federalism and the Judicial Mind in a Conservative Age: Stephen Field, in Power Divided: Essays on the Theory and Practice of Federalism* 33 (Harry N. Scheiber & Marcus M. Feeley eds., 1989) [hereinafter *Federalism and the Judicial Mind*] (quoting *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868)).

19. *Id.*

20. See Court Over Constitution, *supra* note 4, at 131; Commerce Power, *supra* note 8, at 115-72; Twilight of the Supreme Court, *supra* note 8, at 11-12; *Federalism and the Judicial Mind*, *supra* note 18, at 32-35.

21. 156 U.S. 1 (1895).

22. See *id.* at 17.

23. *Id.* at 12.

a subject within the jurisdiction of the states.²⁴ "Commerce succeeds to manufacture," the Court held, "and is not a part of it."²⁵ "It is vital," explained Fuller,

that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the . . . autonomy of the States as required by our dual form of government.²⁶

Fuller found support for the Court's position in Justice Lamar's opinion in *Kidd v. Pearson*:²⁷

Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. . . . If it be held that the term [commerce] includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry.²⁸

Combinations to control domestic enterprise in manufacturing, the Court held, affected interstate commerce only *indirectly*. To be subject to the federal commerce power, the impact of an activity was required to be *direct*.²⁹

*Hopkins v. United States*³⁰ further illustrates the restrictions placed upon the commerce power by dual federalism. *Hopkins* involved a prosecution of members of the Kansas City Livestock Exchange under the Sherman Antitrust Act. The Exchange was an association of commission merchants doing business at the Kansas City Stock Yards. That association had adopted certain governing rules which, the Justice Department contended, constituted agreements in restraint of trade. The objectionable rules prohibited members from buying livestock from any Kansas City commission merchant who was not a member of the Exchange, and fixed the commissions for the sale of livestock. Justice Rufus W. Peckham held that the transactions engaged in by the commission merchants were purely local in nature and therefore did not fall within the scope of the Sherman Act.³¹

The sale or purchase of live stock as commission merchants at Kansas City is the business done, and its character is not altered because the

24. *See id.* at 17.

25. *Id.* at 12.

26. *Id.* at 13.

27. 128 U.S. 1 (1888).

28. *E.C. Knight*, 156 U.S. at 14 (quoting *Kidd*, 128 U.S. at 20-21).

29. *See id.* at 16-17.

30. 171 U.S. 578 (1898).

31. *See id.* at 588.

larger proportion of the purchases and sales may be of live stock sent into the State from other States or from the Territories. Where the stock came from or where it may ultimately go after a sale or purchase, procured through the services of one of the defendants at the Kansas City stock yards, is not the substantial factor in the case. The character of the business of defendants must, in this case, be determined by the facts occurring at that city. . . . [W]e regard the [commission merchant's] services as collateral to such [interstate] commerce and in the nature of a local aid or facility provided for the cattle owner towards the accomplishment of his purpose to sell them; and an agreement among those who render the services relating to the terms upon which they will render them is not a contract in restraint of interstate trade or commerce.³²

Existing alongside of dual federalism as a restraint on governmental regulatory power was the distinction between public and private enterprise found in the Court's due process jurisprudence. At common law, the State was clothed with a general police power to regulate private business for the protection of public health, safety, and morals. Governmental regulation of prices charged for goods and services, however, was limited to "businesses affected with a public interest."³³

The doctrine of a business affected with a public interest was first introduced into American constitutional law in *Munn v. Illinois*,³⁴ a case involving the validity of an Illinois statute regulating rates for grain elevators. Upholding the Illinois regulation against charges that it deprived the petitioner of his property without due process of law in violation of the Fourteenth Amendment, Chief Justice Waite held:

Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect a community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.³⁵

Holding that the grain elevator owned by Munn was a business affected with a public interest, and therefore subject to reasonable regulation for the public good, Waite described the elevator as standing "in the very 'gateway of commerce,' [taking] toll from all who pass."³⁶ This language might seem more appropriate to the discussion of an issue concerning the commerce power than to discussion of a due process issue. Indeed, the

32. *Id.*

33. On the origins of the "public interest" concept and its adoption in *Munn v. Illinois*, see Charles Fairman, *The So-Called Granger Cases, Lord Hale, and Justice Bradley*, 5 *Stan. L. Rev.* 587, 588 (1953); Walton H. Hamilton, *Affection with Public Interest*, 39 *Yale L.J.* 1089, 1092-99 (1930); Breck P. McAllister, *Lord Hale and Business Affected with a Public Interest*, 43 *Harv. L. Rev.* 759, 768-69 (1930).

34. 94 U.S. 113 (1877).

35. *Id.* at 126.

36. *Id.* at 132.

common law doctrine from which Waite was borrowing had been developed in part to prevent exorbitant charges for necessary services from impeding the flow of commercial traffic.

The image of a gateway of commerce was to be echoed in later Commerce Clause discourse. The Court, while retaining the public interest doctrine as a due process restraint on state and federal regulatory authority, would at the same time seek to reunite the doctrine with its early commercial traffic rationale by transplanting it to the Court's Commerce Clause jurisprudence. Waite's invocation of commerce language in discussing a due process issue, then, foreshadowed the profound conceptual interrelation that later Justices were to forge between those two areas of doctrine.³⁷

Justice Field, joined by Justice Strong, filed a dissent which stands as a landmark in the history of laissez-faire formalism. Envisioning an onslaught of business regulation and an end to property rights as he knew them, Field offered a generally applicable, bright-line distinction between public and private enterprise:

It is only where some right or privilege is conferred by the government or municipality upon the owner, which he can use in connection with his property, or by means of which the use of his property is rendered more valuable to him, or he thereby enjoys an advantage over others, that the compensation to be received by him becomes a legitimate mat-

37. See *infra* notes 49-63, 79-86 and accompanying text. Waite's opinion was modeled on a memorandum written by fellow Justice Joseph Bradley, in which Bradley defended the Illinois regulations on the basis of the common-law notion of a business affected with a public interest innovated by Lord Matthew Hale in his works *De Jure Maris* and *De Portibus Maris*. For a discussion of Hale's works and their publication, see Francis Hargrave, *A Collection of Tracts Relative to the Law of England from Manuscripts* (1787). In those writings, Hale supported public regulation of ferries, wharves, wharf cranes and port warehouses on the ground that they were so peculiarly situated in the commercial market that they might exact "arbitrary and excessive duties." Fairman, *supra* note 33, at 656, 670-71 (quoting Hale, *De Portibus Maris*, pt. II, ch. VI, in Hargrave, *supra*, at 77, and quoting Hale, *De Jure Maris*, pt. I, ch. II, in Hargrave, *supra*, at 6). The use of each of these instrumentalities was a necessary incident of the movement of people or goods in the furtherance of commercial intercourse, and each of them was situated at a choke point in that movement. The exaction of such "arbitrary and excessive duties" might therefore impede the ordinary course of commercial traffic. As Charles Fairman noted, these were for Hale "situations where the private interest of the owner is subordinated to the general interest in the flow of commerce." Fairman, *supra* note 33, at 655 (emphasis added). The gateway notion in which due process and Commerce Clause doctrine were to converge was therefore present in the thought of the innovator of the public interest doctrine. Though the doctrine was imported into our constitutional law through the Due Process Clause, it was clearly designed in part to remove impediments to the flow of commercial traffic. It is therefore not surprising that later Justices would welcome the concept into their Commerce Clause jurisprudence. See *infra* notes 49-63, 79-86 and accompanying text. In fact, Waite conceded that grain elevators might have been so closely connected to interstate commerce as to be subject to congressional regulation. In the absence of such congressional action, however, he and his brethren were not prepared to deny to the State the power to regulate what was quite naturally at the time considered a "domestic concern." *Munn*, 94 U.S. at 135. See Fairman, *supra* note 33, at 647.

ter of regulation. Submission to the regulation of compensation in such cases is an implied condition of the grant, and the State, in exercising its power of prescribing the compensation, only determines the conditions upon which its concession shall be enjoyed.³⁸

Despite the concerns of Justice Field, the class of businesses that the Court recognized as being affected with a public interest remained small for more than fifty years after *Munn*. In 1923, Chief Justice Taft identified three general classes of businesses affected with a public interest:

(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.

(2) Certain occupations, regarded as exceptional. . . . Such are those of the keepers of inns, cabs and grist mills.

(3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly.³⁹

The select nature of membership in this third class of businesses affected with a public interest is illustrated by the fact that, *Munn* included, the Court cited only eight Supreme Court cases over a forty-six year period in which a statute had been upheld as a valid regulation of a business affected with a public interest.⁴⁰ Moreover, the Court's opinion evinced an intent to keep Taft's third class of businesses affected with a public interest narrow:

It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation. . . . [N]owadays one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances.⁴¹

Indeed, perhaps fearing the parade of horrors described by Field in his *Munn* dissent,⁴² Taft sought to define the contours of the third class of

38. *Munn*, 94 U.S. at 146-47.

39. *Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522, 535 (1923) (citations omitted).

40. *See id.* at 535-36.

41. *Id.* at 537.

42. *See Munn v. Illinois*, 94 U.S. 113, 136, 140-154 (1877).

businesses affected with a public interest: "In nearly all the businesses included under the third head above, the thing which gave the public interest was *the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation.*"⁴³

The concept of a business affected with a public interest became incorporated into Commerce Clause doctrine in an extremely important way in 1905. *Swift & Co. v. United States*⁴⁴ involved, in the words of Justice Holmes, a prosecution under the Sherman Act charging:

[A] combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against each other in the live stock markets of the different States, to bid up prices for a few days in order to induce the cattle men to send their stock to the stock yards, to fix prices at which they will sell, and to that end to restrict shipments of meat when necessary, to establish a uniform rule of credit to dealers and to keep a black list, to make uniform and improper charges for cartage, and finally, to get less than lawful rates from the railroads to the exclusion of competitors.⁴⁵

Holding the activities of the packers to be within the reach of the federal commerce power and thereby opening the first chink in the armor of dual federalism, Justice Holmes wrote:

[C]ommerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, 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 among the States, and the purchase of the cattle is a part and incident of such commerce.⁴⁶

This language, of course, easily could have been deployed to sustain the prosecution in *United States v. Hopkins*; indeed, District Judge Casius Foster had coined the term "stream of commerce" in upholding the government's prosecution of the Kansas City Live Stock Exchange.⁴⁷ When the current of commerce theory had been offered to the Supreme Court on appeal in 1898, however, the Justices had unanimously rejected it.⁴⁸ In order to persuade those of his brethren who had so recently eschewed the current of commerce theory, Holmes was obliged to articu-

43. *Wolff Packing*, 262 U.S. at 538 (emphasis added).

44. 196 U.S. 375 (1905).

45. *Id.* at 394.

46. *Id.* at 398-99.

47. *See United States v. Hopkins*, 82 F. 529 (C.C.D. Kan. 1897), *rev'd*, 171 U.S. 578 (1898).

48. *See* Brief for Appellee at 132, *Hopkins v. United States*, 171 U.S. 578, 590-91 (1898); *see also* David Gordon, *Swift & Co. v. United States: The Beef Trust and the Stream of Commerce Doctrine*, 28 Am. J. Legal Hist. 244, 250-53 (1984) (analyzing the evolution of the stream of commerce doctrine).

late a distinction between the facts of *Hopkins* and those of *Swift*, and mere location in a current of interstate commerce would not suffice. "All that was decided there," Holmes wrote of *Hopkins*,

was that the local business of commission merchants was not commerce among the States, even if what the brokers were employed to sell was an object of such commerce. The brokers were not like the defendants before us, themselves the buyers and sellers. They only furnished certain facilities for the sales. Therefore, there again the effects of the combination of brokers upon the commerce was only indirect and not within the act. *Whether the case would have been different if the combination had resulted in exorbitant charges, was left open.*⁴⁹

The clear implication of the highlighted language was noted by Chief Justice Taft in *Stafford v. Wallace*:

[I]f the result of the combination of commission men in the *Hopkins Case* had been to impose exorbitant charges on the passage of live stock through the stockyards from one State to another, the case would have been different. . . . The effect on interstate commerce in such a case would have been direct.⁵⁰

The language employed to distinguish *Hopkins* by Holmes in *Swift* and by Taft in *Stafford* is, of course, the language Taft used in *Wolff Packing* to describe the third class of businesses affected with a public interest.

Holmes made two significant conceptual moves here. First, by identifying the capacity to affect commerce directly with the capacity to exact exorbitant charges, Holmes effectively conflated the direct/indirect distinction of *Knight* with the public/private distinction of *Munn*. A business affected with a public interest had the capacity to affect commerce directly; a purely private business did not. Second, by accepting the concept of a current of commerce into the constitutional lexicon, Holmes threatened to bring business activities previously considered purely local within the reach of the federal commerce power.

Both of these moves were, of course, the stuff of a laissez-faire formalist's⁵¹ nightmare. If every business affected with a public interest had the capacity to affect interstate commerce directly, then every such business would be subject to federal regulation and the police powers of the states would be greatly curtailed. Likewise, in an economy becoming increasingly integrated on a national scale, there was virtually no end to the list of business activities that could be conceived as existing in a current of commerce.

Holmes wrote *Swift* for a unanimous Court of Justices reared on for-

49. *Swift & Co. v. United States*, 196 U.S. 375, 397 (1905) (emphasis added).

50. 258 U.S. 495, 525 (1922).

51. In this article I use "laissez-faire formalist" to denote legal thinkers whose jurisprudence embraced dual federalism and the various manifestations of economic substantive due process. See generally Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism*, 61 J. Am. Hist. 970 (1975) (discussing laissez-faire formalism).

malism, and the solution he implicitly proposed to this formalist dilemma was simple yet ingenious: these two concepts, that of a current of commerce and that of a business affected with a public interest, would operate as reciprocal restraints on federal power and would, to an extent, become conflated. An intrastate business affected with a public interest could not be reached by the federal commerce power unless it could be located within a current of interstate commerce, and an intrastate business activity did not constitute part of a federally regulable current of commerce unless it was also a business affected with a public interest. In short, the current of commerce came to be understood as a sequence of interstate business activities connected by intrastate business activities affected with a public interest. Because the category of businesses affected with a public interest promised to remain small and select, the current of commerce promised to cut a narrow channel. The realities of a nationally integrated economy thus could be acknowledged by the Constitution without dismantling the categories of laissez-faire formalism or significantly altering the balance of intergovernmental authority. It was this essentially formalistic understanding of the current of commerce that prevailed throughout the 1920s and, I shall argue, throughout the 1930s as well.⁵²

I. THE CURRENT OF COMMERCE, 1921-1930

A. *The Packers and Stockyards Act of 1921 and Stafford v. Wallace*

*Stafford v. Wallace*⁵³ brought to the Court the issue of the constitutionality of the Packers and Stockyards Act of 1921.⁵⁴ The Act authorized the Secretary of Agriculture to regulate the business of meat packers done in interstate commerce, and forbade the packers from engaging in any unfair, discriminatory, or deceptive practices in interstate commerce. Title III of the Act authorized the Secretary to regulate transactions in the stockyards, including the rates to be charged for stockyard services and the fees to be charged by commission men making sales of stock in interstate commerce. The constitutionality of the Act was challenged by commission men doing business at the Union Stock Yards in Chicago.

The definition of commerce set forth in Title I betrayed the debt of the Act's draftsmen to Holmes. That definition provided in pertinent part:

[A] transaction in respect to any article shall be considered to be in commerce if such article is part of that current of commerce usual in the live-stock and meat-packing industries, whereby live stock . . . are

52. For the contrary, conventional view that *Swift* overruled *Knight*, see, for example, Court Over Constitution, *supra* note 4, at 120; Twilight of the Supreme Court, *supra* note 8, at 40; Thomas R. Powell, Vagaries and Varieties of Constitutional Interpretation 59 (1956); Wright, *supra* note 4, at 118; Edward S. Corwin, *The Schechter Case—Landmark or What?*, 13 N.Y.U. L.Q. Rev. 151, 166 (1936) [hereinafter *Landmark or What?*].

53. 258 U.S. 495 (1922).

54. See Act of Aug. 15, 1921, ch. 64, 42 Stat. 159 (1921) (current version at 7 U.S.C. §§ 181-229 (1992)).

sent from one State with the expectation that they will end their transit, after purchase, in another.⁵⁵

In its defense of the bill's constitutionality, the report of the House Committee on Agriculture relied heavily on *Swift*. Distinguishing *Hopkins*, the report stated that "Congress in treating this question is attempting to regulate evils which it had found to exist in respect to exorbitant charges and unreasonable practices in the stockyards, resulting in a direct burden on interstate commerce."⁵⁶

Floor debate over the bill's constitutionality focused on two issues: first, whether the transactions taking place in the stockyards were in interstate commerce, opponents wielding *Hopkins* while proponents brandished *Swift*; and second, whether the stockyards were a business affected with a public interest. However, the debates revealed more than merely a congressional desire to comply with the requirements of the Commerce Clause and the Fifth Amendment. Even as the legislators groped for analogies, humorously debating whether the Chicago stockyards were more like a railroad bridge or a hotel for pigs, a general understanding that only businesses affected with a public interest were part of a federally regulable stream of commerce informed the colloquy.⁵⁷ The Holmesian conflation of due process and Commerce Clause doctrines had become a working premise of congressional constitutional thought.

Holmes' formula had become received doctrine in the judicial branch as well, and the Act was accorded a warm reception before the high Court. "Whatever amounts to more or less constant practice," the Court declared in *Stafford*,

and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the Commerce Clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent.⁵⁸

Taken at face value, this pronouncement would seem to have wrought a constitutional revolution beyond the wildest dreams of the most rabid realist; and, indeed, had it been so understood, the events of 1937 would lose some of their interest. Yet these words were not written by Holmes or Brandeis, but by Chief Justice William Howard Taft, a man who, though his health was failing badly in 1930, hesitated to resign from the Court because he distrusted Herbert Hoover as a "progressive."⁵⁹ The

55. § 2(b), 42 Stat. at 160.

56. H.R. Rep. No. 77, 67th Cong., 1st Sess. 13-14 (1921).

57. See 61 Cong. Rec. 1804, 1813, 1868-73, 1886-87, 1928-30, 2670 (1921).

58. *Stafford v. Wallace*, 258 U.S. 495, 521 (1922).

59. *Mason & Beaney*, *supra* note 4, at 162. Indeed, intracurial correspondence reveals that Taft, Clarke, and Taft's fellow "conservative" Van Devanter formed the core around which the *Stafford* supermajority was constructed. Taft sent Van Devanter a

Court's deferential declaration must, therefore, be understood against the backdrop of Holmes' formulation—a formulation with which the *Stafford* analysis of the commerce power is suffused.

Taft initially identified as the goal of the Act the “unburdened flow” of livestock from west to east, unencumbered by “exorbitant charges.”⁶⁰ The Chief Justice then proceeded to make his adoption of Holmes' formulation explicit:

[T]he stockyards are not a place of rest or final destination. Thousands of head of live stock arrive daily by carload and trainload lots, and must be promptly sold and disposed of and moved out to give place to the constantly flowing traffic that presses behind. The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current [of commerce] from the West to the East, and from one State to another. Such transactions can not be separated from the movement to which they contribute and necessarily take on its character. The commission men are *essential* in making the sales without which the flow of the current would be obstructed, and this, whether they are made to packers or dealers. The dealers are *essential* to the sales to the stock farmers and feeders. The sales are not in this aspect merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but, on the contrary, being *indispensable* to its continuity. The origin of the live stock is in the West, its ultimate destination known to, and intended by, all engaged in the business is in the Middle West and East either as meat products or stock for feeding and fattening. This is the definite and well-understood course of business. The stockyards and the sales are *necessary factors* in the middle of this current of commerce.⁶¹

draft of the *Stafford* opinion with a note saying, “I am sending this to you and Judge Clarke, because we three are very clear in our judgment, and I would like the benefit of your criticism before I send it on to other members of the Court who are more doubtful.” Letter From Chief Justice William H. Taft to Justice Willis Van Devanter re: *Stafford v. Wallace* (Apr. 20, 1922) (on file with the *Fordham Law Review* and the Library of Congress, Van Devanter MSS, Box 32).

60. See *Stafford*, 258 U.S. at 514-15.

The object to be secured by the Act is the free and unburdened flow of live stock from the ranges and farms of the West and the Southwest through the great stockyards and slaughtering centers on the borders of that region, and thence in the form of meat products to the consuming cities of the country in the Middle West and East, or still as live stock, to the feeding places and fattening farms in the Middle West or East for further preparation for the market . . . [An] evil which [Congress] sought to provide against by the act, was exorbitant charges. . . . Expenses incurred in the passage through the stockyards necessarily reduce the price received by the shipper, and increase the price to be paid by the consumer. If they be exorbitant or unreasonable, they are an undue burden on the commerce which the stockyards are intended to facilitate. Any unjust or deceptive practice or combination that unduly and directly enhances them is an unjust obstruction to that commerce.

Id.

61. *Id.* at 515-16 (emphasis added).

Having described the stockyards in the very language of "indispensability" he had used to characterize his third class of businesses affected with a public interest in *Wolff Packing*, Taft drew his conclusion:

The act, therefore, treats the various stockyards of the country as *great national public utilities* to promote the flow of commerce from the ranges and farms of the West to the consumers in the East. It assumes that they conduct a *business affected by a public use* of a national character and subject to national regulation. That it is a business within the power of regulation by legislative action needs no discussion. That has been settled since the case of *Munn v. Illinois*. . . . The only question here is whether the business done in the stockyards between the receipt of the live stock and the shipment of them therefrom is a part of interstate commerce, or is so associated with it as to bring it within the power of national regulation.⁶²

Applying the principles set forth in *Swift* to the findings of fact reproduced above, Taft answered the question posed in the affirmative, upholding the Act as a valid exercise of the federal commerce power. Justice McReynolds dissented without opinion, while Justice Day took no part in the decision of the case. Justice Van Devanter, later to be described, with Justice McReynolds, as one of the "Four Horsemen," voted with the majority.

A portion of Taft's discussion of *Swift* is worthy of some attention. "The application of the Commerce Clause of the Constitution in the *Swift Case*," wrote the Chief Justice,

was the result of the natural development of interstate commerce under modern conditions. It was the inevitable recognition of the great central fact that such streams of commerce from one part of the country to another which are ever flowing are in their very essence the commerce among the States and with foreign nations which historically it was one of the chief purposes of the Constitution to bring under national protection and control. This court declined to defeat this purpose in respect of such a stream and take it out of complete national regulation by a nice and technical inquiry into the non-interstate character of some of its necessary incidents and facilities when considered alone and without reference to their association with the movement of which they were an essential but subordinate part.⁶³

In this passage, one can see Taft squinting in the direction of New Deal realism: the modern conditions of interstate commerce must be taken into account; business activities should not be removed from the realm of federal power by nice and technical inquiries. Yet Taft's squinting was done through a set of conceptual lenses that limited the reach of his vision. In Taft's jurisprudential *Weltanschauung*, the distinction between public and private enterprise was not nice and technical, but true and immutable. Taft could speak expansively on judicial deference to con-

62. *Id.* at 516-17 (emphasis added).

63. *Id.* at 518-19.

gressional determinations and somewhat realistically about interstate commerce because he assumed the immutability of the jurisprudential backdrop against which he spoke. So long as the essential categories of laissez-faire formalism remained intact, and so long as the public/private distinction informed Commerce Clause doctrine, the realism reflected in the current of commerce doctrine posed no serious threat to the dual federalist order.

B. *The Grain Futures Act and Chicago Board of Trade v. Olsen*

The 1921 Congress also enacted the Future Trading Act,⁶⁴ which sought to regulate sales of grain futures on boards of trade by taxing such sales at a prohibitive rate and then exempting from the tax all sales on boards of trade complying with federal regulations. The Act was declared an unconstitutional exercise of the taxing power in *Hill v. Wallace*.⁶⁵ Writing for a unanimous Court, Chief Justice Taft held that sales of grain futures on boards of trade were not per se interstate commerce, and that Congress therefore could not use its taxing power to regulate indirectly a business activity not within federal control. In dicta, however, the Chief Justice all but requested that Congress pass an act modeled on the Packers and Stockyards Act.⁶⁶

Congress was not slow in responding to Taft's invitation. On September 21, 1922, the Grain Futures Act⁶⁷ became law. The Act adopted, *mutatis mutandis*, the definition of commerce set forth in the Packers and Stockyards Act.⁶⁸ Moreover, section 3 of the Act explicitly charac-

64. See ch. 86, 42 Stat. 187 (1921) (amended by the Grain Futures Act, ch. 369, 42 Stat. 998 (1922)) (codified as amended at 7 U.S.C. §§ 1-26 (1992)).

65. 259 U.S. 44 (1922).

66. *Id.* at 68-69.

There is not a word in the act from which it can be gathered that it is confined in its operation to interstate commerce. The words "interstate commerce" are not to be found in any part of the act from the title to the closing section . . . [Congress] did not have the exercise of its power under the Commerce Clause in mind and so did not introduce into the act the limitations which certainly would accompany and mark an exercise of the power under the latter clause. . . . It follows that sales for future delivery on the Board of Trade are not in and of themselves interstate commerce. They can not come within the regulatory power of Congress as such, unless they are regarded by Congress, from the evidence before it, as directly interfering with interstate commerce so as to be an obstruction or a burden thereon (citation omitted). It was upon this principle that in *Stafford v. Wallace*, 258 U.S. 495, we held it to be within the power of Congress to regulate business in the stockyards of the country, and include therein the regulation of commission men and of traders there, although they had to do only with sales completed and ended within the yards, because Congress had concluded that through exorbitant charges, dishonest practices and collusion they were likely, unless regulated, to impose a direct burden on the interstate commerce passing through.

Id.

67. See ch. 369, 42 Stat. 998 (1922) (amended by the Commodity Exchange Act, ch. 545, 49 Stat. 1491 (1936)) (codified as amended at 7 U.S.C. §§ 1-26 (1992)).

68. Section 2(b) provided in part: "a transaction in respect to any article shall be

terized the sale of grain futures on boards of trade as a business "affected with a national public interest."⁶⁹

The report of the Senate Committee on Agriculture and Forestry defended the constitutionality of the bill on the authority of *Swift, Stafford*, and *New York and Chicago Grain & Stock Exchange v. Chicago Board of Trade*,⁷⁰ wherein the Supreme Court of Illinois had held, invoking the language of *Munn*, that "the floors of this exchange hall stand in the gateway of commerce."⁷¹ Indeed, floor debate on the bill's constitutionality focused entirely on whether grain exchanges were located in a current of interstate commerce. Even the bill's opponents conceded that boards of trade were businesses affected with a public interest and accordingly subject to regulation by the governments of the states in which they were located.⁷²

The Grain Futures Act survived constitutional challenge in *Board of Trade of Chicago v. Olsen*.⁷³ Writing for a seven-man majority,⁷⁴ Chief Justice Taft immediately located the grain exchange in a current of interstate commerce.⁷⁵ Indeed, Taft noted, insofar as the case concerned "the

considered to be in interstate commerce if such article is part of that current of commerce usual in the grain trade whereby grain and grain products and by-products thereof are sent from one State with the expectation that they will end their transit, after purchase, in another." 42 Stat. at 999.

69. *Id.*

Transactions in grain involving the sale thereof for future delivery as commonly conducted on boards of trade and known as "futures" are affected with a national public interest . . . the transactions and prices of grain on such boards of trade are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the producer or the consumer and the persons handling grain and products and by-products thereof in interstate commerce, and that such fluctuations in prices are an obstruction to and a burden upon interstate commerce in grain and the products and by-products thereof and render regulation imperative for the protection of such commerce and the national public interest therein.

Id.

70. 19 N.E. 855 (Ill. 1889).

71. S. Rep. No. 871, 67th Cong., 2d Sess. 4-7 (1922).

72. See 61 Cong. Rec. 9404-07, 9411, 9423, 9430, 9440-41, 9447, 12,720-25 (1921).

73. 262 U.S. 1 (1923).

74. The "liberal" Brandeis, who joined Taft's opinion, was actually inclined to dissent. "You will recall," he wrote Taft, "that I voted the other way and the opinion has not removed my difficulties . . . [b]ut I have differed from the Court recently on three expressed dissents and concluded that in this case, I had better 'shut up.'" Alpheus T. Mason, William Howard Taft: Chief Justice 201 (1965) (quoting Letter from Justice Louis D. Brandeis to Chief Justice William H. Taft (Dec. 23, 1922)).

75. See *Board of Trade of Chicago*, 262 U.S. at 33.

The railroads of the country accommodate themselves to the interstate function of the Chicago market by giving shippers from Western states bills of lading through Chicago to points in Eastern states with the right to remove the grain at Chicago for temporary purposes of storing, inspecting, weighing, grading, or mixing, and changing the ownership, consignee or destination and then to continue the shipment under the same contract and at a through rate. Such a contract does not . . . take [the grain] out of interstate commerce in such a way as

cash grain, the sales to arrive, and the grain actually delivered in fulfillment of future contracts," it was indistinguishable from *Stafford*.⁷⁶ Addressing himself specifically to the effect of sales of grain futures on this current of commerce, Taft formulated the questions before the Court as:

[W]hether the conduct of such sales is subject to constantly recurring abuses which are a burden and obstruction to interstate commerce in grain? And further, are they such an incident of that commerce and so intermingled with it that the burden and obstruction caused therein by them can be said to be direct?⁷⁷

Echoing the deferential posture the Court had struck in *Stafford*, Taft noted that Congress had specifically answered that question affirmatively in the text of the Act. Reviewing the evidence before the Court, Taft concluded that the Justices would have been unwarranted in rejecting this finding of Congress as unreasonable. It was clear, he noted, that "[m]anipulations of grain futures for speculative profit . . . exert[ed] a vicious influence and produce[d] abnormal and disturbing temporary fluctuations of prices" that "disturb[ed] the normal flow of actual consignments."⁷⁸ By virtue of its singular capacity to exert such extraordinary influence on wheat prices, the Court held, following *Munn* and *Stafford*, that the Chicago Board of Trade was a business affected with a national public interest, and was accordingly subject to federal regulation.⁷⁹

Justice McReynolds again dissented without opinion, this time joined by Justice Sutherland, who had replaced Justice Clarke on October 2, 1922. Justice Van Devanter again voted with the majority, this time joined by the man destined to become the Fourth Horseman: Justice Pierce Butler who replaced Justice Day on January 3, 1923.

C. *The Packers and Stockyards Act Revisited: Tagg Bros. & Moorhead v. United States*

The Packers and Stockyards Act came under attack again in *Tagg Bros. & Moorhead v. United States*.⁸⁰ The group of commission agencies comprising the membership of the Omaha Livestock Exchange had established rules requiring all members to charge the same rates for their

to deprive Congress of the power to regulate it, as is . . . expressly recognized in *Stafford v. Wallace*.

Id. (citations omitted).

76. *Id.* at 34.

The sales on the Chicago Board of Trade are just as indispensable to the continuity of the flow of wheat from the West to the mills and distributing points of the East and Europe, as are the Chicago sales of cattle to the flow of stock toward the feeding places and slaughter and packing houses of the East.

Id. at 36.

77. *Id.*

78. *Id.* at 39.

79. *See id.* at 40-41.

80. 280 U.S. 420 (1930).

services. The Exchange had promulgated a rate schedule to govern fees charged by its members, effectively eliminating rate competition among Omaha commission agencies. Pursuant to his authority under the Act, the Secretary of Agriculture suspended the operation of the Exchange's rate schedule and supplanted it with a schedule of his own making. The members of the Exchange sought to enjoin the Secretary's action.

The plaintiffs conceded that they were engaged in interstate commerce at a public stockyard and were therefore subject to some congressional regulation.⁸¹ They contended, however, that the rates charged for their services could not be regulated because their business was not affected with a public interest.⁸² The plaintiffs argued essentially that only capital-intensive businesses could be affected with a public interest, that their business was labor rather than capital-intensive, that rate-fixing for labor-intensive businesses constituted wage-fixing in violation of the Fifth Amendment, and that the commissions they charged for the sale of live-stock therefore could not be regulated by Congress.⁸³

The Court, in an opinion authored by Justice Brandeis, unanimously rejected the plaintiffs' contentions. "There is nothing in the nature of monopolistic personal services," wrote Brandeis,

which makes it impossible to fix reasonable charges to be made therefor; and there is nothing in the Constitution which limits the Government's power of regulation to businesses which employ substantial capital. . . . Plaintiffs perform *an indispensable service in the interstate commerce in live stock*. They enjoy a substantial monopoly at the Omaha Stock Yards. . . . The purpose of the regulation attacked is to prevent their service from thus becoming an undue burden upon, and obstruction of, that commerce.⁸⁴

Tagg Bros. reaffirmed Holmes' conflation of Commerce Clause and due process doctrines in an important way. The plaintiffs had sought to drive a wedge between the current of commerce doctrine and the public/private distinction, and the Court had unanimously rebuffed them. The Court said, in effect, to be in the current of commerce was to be a business affected with a public interest. Indeed, research has disclosed no case in which the Court held that a business activity was located in a current of commerce but was beyond congressional rate-regulation because it was not a business affected with a public interest.⁸⁵ Within the

81. *See id.* at 433.

82. *See id.* at 437-38.

83. *See id.* at 438.

84. *Id.* at 438-39 (emphasis added) (citing *Stafford v. Wallace*, 258 U.S. 495, 515-16 (1922); *Chicago Board of Trade v. Olsen*, 262 U.S. 1, 34 (1923)).

85. Indeed, the only case in which the current of commerce theory would have appeared to be applicable but was nevertheless rejected by the Court was *Hopkins v. United States*, 171 U.S. 578 (1898). The Kansas City Livestock Exchange was as clearly located in a current of interstate commerce as were the Chicago stockyards in *Swift & Co. v. United States*, 196 U.S. 375 (1905) and *Stafford*, 258 U.S. at 495, the Chicago Board of Trade in *Olsen*, 262 U.S. at 1, and the Omaha Livestock Exchange in *Tagg Bros. v.*

current of commerce doctrine, the conflation of the direct/indirect distinction with the public/private distinction was complete. When Edward Corwin argued that the Supreme Court was attempting to convert the direct/indirect distinction "into a sort of due process clause protective of state power,"⁸⁶ he wrote truer than he knew.

D. *Other Salient Features of the Current of Commerce*

The root distinction of dual federalism opposed that which was local to that which was national. The dynamism of the current of commerce doctrine lay in its capacity to compromise this root distinction. An otherwise local business activity could be subjected to national regulation if it could be characterized as a business affected with a public interest located in a current of interstate commerce. Yet despite its dynamic potential, current of commerce doctrine fit comfortably into the body of early twentieth century Commerce Clause jurisprudence, largely because it shared with that body of doctrine certain core assumptions about the nature of the federal commerce power.

In the minds of the Taft Court Justices, *Swift*, *Stafford*, and *Olsen* could happily co-exist with an array of cases that held a business activity to be beyond federal regulation or within the regulatory power of a state because it transpired at one of the *terminals* of a flow of interstate commerce. A few examples will suffice. In *United Mine Workers v. Coronado Coal Co.*⁸⁷ and *United Leather Workers v. Herkert & Meisel Trunk Co.*,⁸⁸ the Court held labor strikes at a coal mine and a trunk factory to be beyond the reach of federal jurisdiction under the Sherman Act. In the absence of a showing of a specific intent to restrain commerce, the Court held, strikes by the employees of enterprises engaged in production were local matters subject only to local regulation.⁸⁹ Commerce succeeded to production and was not a part of it. In *Sonneborn Bros. v. Cureton*,⁹⁰ the Court unanimously upheld a state wholesale sales tax on oil which included in its base local sales of oil shipped to Texas from outside the state. Rejecting the claim that the tax burdened interstate commerce in oil, the Court held that the oil had "come to rest" within the state in the company's warehouse, where it was held for local sale; and having thus become commingled with the general mass of property within the state, the oil was subject to state taxation.⁹¹ Two years

United States, 280 U.S. 420 (1930). However, as Holmes pointed out in *Swift*, and as Taft reiterated in *Stafford*, the Government in *Hopkins* had not shown that the Kansas City commission merchants were capable of exacting exorbitant charges. The effect of the merchants' activities on interstate commerce was therefore indirect.

86. *Landmark or What?*, *supra* note 52, at 159-60.

87. 259 U.S. 344, 350-53 (1922).

88. 265 U.S. 457, 469-71 (1924).

89. *See id.* at 469-71; *United Mine Workers*, 259 U.S. at 350-53.

90. 262 U.S. 506 (1923).

91. *See id.* at 508-09.

later, in *Hygrade Provision Co. v. Sherman*,⁹² the Court upheld a New York statute regulating the sale of kosher meats against the contention that the regulation burdened interstate commerce. Once the meat had come to rest within the state and was held solely for local disposition and use, held the Court, it fell within the state's regulatory bailiwick, despite the fact that the regulation might "incidentally affect interstate commerce."⁹³

In these cases, as in the current of commerce cases and other commerce cases of the period, commerce was "conceived of primarily as transportation."⁹⁴ "In the light of the opinions of the United States Supreme Court," wrote Professor Ribble of the University of Virginia in 1934, "interstate commerce may be fairly described as movement, subject, at least in part, to human direction or control, which movement starts in one state and continues into another."⁹⁵ The Commerce Clause jurisprudence of the period, noted Edward Corwin a year later, betrayed "the Court's mental image of the interstate commerce process as a *physical movement merely* of goods from one state to another."⁹⁶ The current of commerce doctrine, noted Ribble, sought to deal with "practices which obstructed the flow of commerce among the states."⁹⁷ The existence of such "obstructions" to the interstate movement or transportation of goods, and the need for their removal, was the very focus of the doctrine.⁹⁸ The current of commerce doctrine could peacefully co-exist with Taft Court commerce jurisprudence because it rested on this conception of commerce as physical movement.⁹⁹

Yet despite this apparently cozy fit, the current of commerce doctrine contained within itself the potential for a terrific breach of interdoctrinal harmony. For the current of commerce doctrine was necessarily a slightly volatile exception to the pristine, symmetrical rules of dual federalism. McReynolds in *Stafford*,¹⁰⁰ joined by Sutherland in *Olsen*,¹⁰¹ had undoubtedly seen that it was an exception that could eventually swallow the rules. The public/private distinction helped to hold this volatility in check, but the fact remained that the current of commerce doctrine had

92. 266 U.S. 497, 502-03 (1925).

93. *Id.* at 503.

94. Edward S. Corwin, *Congress's Power to Prohibit Commerce a Crucial Constitutional Issue*, 18 Cornell L.Q. 477, 495 (1933).

95. F.D.G. Ribble, *The 'Current of Commerce': A Note on the Commerce Clause and the National Industrial Recovery Act*, 18 Minn. L. Rev. 296, 312 (1934) [hereinafter Ribble, *Current of Commerce*].

96. *Landmark or What?*, *supra* note 52, at 166. See also Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 Harv. L. Rev. 1335, 1336, 1347-48, 1360-61, 1363 (1934) (noting in defense of the NIRA that "although the Court has generally talked of interstate commerce as if it meant interstate movement, there has heretofore been no need for a broader definition").

97. Ribble, *Current of Commerce*, *supra* note 95, at 314.

98. See *id.* at 301-02, 316-17.

99. See Stern, *supra* note 96, at 1361.

100. See *Stafford v. Wallace*, 258 U.S. 495 (1922).

101. See *Chicago Board of Trade v. Olsen*, 262 U.S. 1 (1923).

the capacity to transform the local into the national. The production/commerce distinction was derived from the root local/national distinction, and the capacity to compromise the borders of the latter necessarily entailed the power to compromise those of the former. Indeed, both *Swift* and *Stafford* had suggested that the slaughter and packing of meat, both activities of production, occurred in the current of commerce.¹⁰² The Court had never suggested that a production facility located in a current of interstate commerce caused a "break" in the current or was otherwise beyond federal regulation. The dicta in *Swift* and *Stafford* intimated that any tension between the current of commerce doctrine and the production/commerce distinction would be resolved in favor of the former.¹⁰³ To borrow a metaphor from contract bridge, the current of commerce doctrine was trump.

The threat that the current of commerce doctrine posed to the production/commerce distinction was not lost on contemporary commentators.¹⁰⁴ In his 1931 Presidential Address before the American Political Science Association, Edward Corwin told his audience,

in "the typical and actual course of events," even manufacturing becomes but a stage in the flow of the raw product to the mill and the out-flow of the finished product from the mill to the market; and while checking momentarily the current of interstate commerce, is at the same time, to adapt the words of Chief Justice Taft in *Stafford v. Wallace*, "indispensable to its continuity."¹⁰⁵

Discussing the current of commerce doctrine three years later, Corwin reiterated this theme.

What we are called upon to vision is a current which has its source in certain acts, or procedures, of production; which takes its way across the country with ever increasing volume and without interruption by, or even awareness of, state lines; which comes to pause now and again in an eddy, as it were, for certain further operations and transactions, including again acts of production (the preparation of meat products, fattening on the farms), but which ever resumes its flow to its diverse and nation-spread destination.¹⁰⁶

Two years later, in 1936, writing for a lay audience on the eve of the CIO sitdown strikes in the automobile industry, Robert Carr noted that

certain . . . enterprises, while not interstate in themselves, are nevertheless related to others that are, and for that reason become subject to federal control. What, for instance, of the manufacture of

102. See *Mason & Beaney*, *supra* note 4, at 160-61; Joel F. Paschal, Mr. Justice Sutherland 193-94 (1951).

103. See *Stafford v. Wallace*, 258 U.S. 495, 520-21 (1922); *Swift & Co. v. United States*, 196 U.S. 375, 397-98 (1905).

104. See, e.g., Ribble, *Current of Commerce*, *supra* note 95, at 315 (discussing particular cases dealing with the production/commerce distinction).

105. Edward S. Corwin, *Social Planning Under the Constitution*, 26 Am. Pol. Sci. Rev. 1, 15 (1932) (citations omitted).

106. *Twilight of the Supreme Court*, *supra* note 8, at 43.

automobiles? The construction of a Ford in Detroit is not interstate commerce, but the steel and rubber and paint that make up the car are brought to Detroit from a dozen different states, and the finished Fords will be sent to every state in the Union, for sale. Clearly, the entire process from beginning to end involves interstate commerce at a good many points. Is this close relationship between the different steps that make up the complete process sufficient to enable Congress to regulate those steps that are not interstate along with those that are?¹⁰⁷

Carr would not have long to wait for an answer.

Born in 1905 and nurtured through the 1920s, by the beginning of the New Deal decade Holmes' formula was a staple of American constitutional jurisprudence. In the decade to come it would undergo significant transformation, and by the decade's end it would be of little more than historical interest. Before its demise, however, it was to serve as the conceptual foundation of one of the more important events in the nation's legal history.

II. THE IMPORTANCE OF *NEBBIA V. NEW YORK*

At the same time that the Taft Court was elaborating the current of commerce concept in constitutional law, another group of legal thinkers was busily proposing reforms in American private law. The experience and methodology of these private law reformers of the New Era of the 1920s would be reflected in the public law jurisprudence of the Supreme Court during the New Deal of the 1930s.

In 1923, a group of the nation's most distinguished lawyers, jurists, and law professors formed the American Law Institute.¹⁰⁸ Among the founders were Charles Evans Hughes, former Associate Justice of the Supreme Court,¹⁰⁹ Harlan Fiske Stone, Dean of Columbia University School of Law, and Benjamin Cardozo, a judge on the New York Court of Appeals.¹¹⁰ Troubled by the uncertainty and complexity of the common law in America, the founders of the ALI proposed to undertake the

107. Robert K. Carr, *Democracy and the Supreme Court* 30 (1936).

108. See Lawrence M. Friedman, *A History of American Law* 676 (2d ed. 1985); Herbert F. Goodrich & Paul A. Wolkin, *The Story of the American Law Institute 1923-1961*, at 5 (1961); Edward A. Purcell, Jr., *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* 79-90 (1973); Arthur L. Corbin, *The Restatement of the Common Law by the American Law Institute*, 15 *Iowa L. Rev.* 19, 19-41 (1929); Norris Darrell & Paul A. Wolkin, *The American Law Institute*, 52 *N.Y.S.B.J.* 99, 99-101, 139-43 (1980); N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 *L. & Hist. Rev.* 55, 55-96 (1990); William P. La Piana, 'A Task of No Common Magnitude': *The Founding of the American Law Institute*, 11 *Nova L. Rev.* 1085, 1085-1126 (1987); William D. Lewis, *History of the American Law Institute and the First Restatement of the Law: 'How We Did It'*, in *American Law Institute Restatement in the Courts: Permanent Edition 1932-1944*, at 1-4 (1945); Herbert Wechsler, *The Course of the Restatements*, 55 *A.B.A. J.* 147, 147-151 (1969).

109. See Wechsler, *supra* note 108, at 147.

110. See Goodrich & Wolkin, *supra* note 108, at 5-6.

enormously ambitious task of "restating" it.¹¹¹ The inauguration of the National Reporter system in the 1870s had, by the 1920s, produced an avalanche of reported decisions "that made it impossible for judges and lawyers to stay properly informed."¹¹² The founders of the institute believed that "out of the overwhelming mass of law cases and legal literature clearer statements of the rules of the common law in effect in a great majority of the states could be made and expressed."¹¹³ This would require that "the thousands upon thousands of decisions of courts be reduced to a systematic, concise statement of the law."¹¹⁴

Many of the chief draftsmen on the Restatement projects, such as Samuel Williston and Austin Scott, were the authors of "massive treatises in the strict, conceptual, Langdell mold"¹¹⁵ and the task of "restating" the law, while not necessarily a formalist exercise,¹¹⁶ was of course a Langdellian enterprise.¹¹⁷ The Restaters would take a complex and unwieldy body of case law and extract from it its essential elements; from the thousands of reported cases on a given area of the law they would synthesize lean and clear rules of general application. Beginning with the *Restatement of the Law of Contracts*¹¹⁸ in 1932, the Institute published a series of Restatements of the principal areas of the common law: *Agency*¹¹⁹ in 1933, *Torts*¹²⁰ and *Conflict of Laws*¹²¹ in 1934, and *Trusts* in 1935.¹²² Between 1928 and 1935, the ALI also published tentative drafts of Restatements for the areas of *Business Associations*, *Property* and *Sales of Land*.¹²³ Just as the Supreme Court was confronting the issues of the

111. See *id.* at 5-11; Purcell, *supra* note 108, at 79-80.

112. Purcell, *supra* note 108, at 79.

113. Goodrich & Wolkin, *supra* note 108, at 15.

114. *Id.* at 8.

115. Friedman, *supra* note 108, at 676. On the legal thought and influence of Christopher Columbus Langdell, see William La Piana, *Logic and Experience: American Legal Thought and Legal Education, 1800-1920*, at 154-82 (1987) (Ph.D. dissertation, Harvard University) (forthcoming Spring, 1993, Oxford University Press).

116. Hull persuasively argues that many of the Restaters were not full-fledged Langdellian devotees of legal science, but instead transitional figures positioned between formalism and realism. She uses the term "progressive-pragmatist" to describe Cardozo and others, and the term might, with some qualification, also be used to describe Hughes, Stone, Brandeis, and perhaps Roberts. All trained in the "heyday of formalism," their jurisprudence retained an air of Langdellian conceptualism. See Hull, *supra* note 108, at 84. Yet they were not thoroughgoing formalists. See, e.g., *Nebbia v. New York*, 291 U.S. 502 (1934) (discussed *infra* notes 124-137 and accompanying text). Indeed, they were able to deformalize their jurisprudence at the same time that they were engaged in the essentially Langdellian enterprise of synthesizing the disparate doctrinal formulations of existing cases into lean rules of general application. In other words, "formalist" will not suffice as a complete description of Langdellianism. See Hull, *supra* note 108, at 83-85.

117. See Friedman, *supra* note 108, at 676; Purcell, *supra* note 108, at 75-80.

118. See *Restatement of the Law of Contracts* (1932).

119. See *Restatement of the Law of Agency* (1933).

120. See *Restatement of the Law of Torts* (1934).

121. See *Restatement of the Law of Conflict of Laws* (1934).

122. See *Restatement of the Law of Trusts* (1935); Wechsler, *supra* note 108, at 147.

123. See *Restatement of the Law of Business Associations* (Tentative Draft No. 1,

constitutionality of the New Deal, the ALI was proceeding apace with the Langdellian task of restating the common law.

By 1934, Hughes, Stone, and Cardozo, founders of the Restatement projects, had taken seats on the United States Supreme Court. By that year, it appears that these charter members of the Restatement movement, who came to legal maturity in the era of Langdellian hegemony, had begun to impress the Restatement methodology upon the nation's *constitutional* law.

Nowhere was this impact more evident than in the case of *Nebbia v. New York*.¹²⁴ *Nebbia* involved a New York State Control Board regulation of retail milk prices. The regulation was an attempt to ameliorate the effects of cutthroat competition in the retail milk business, where price-cutting had reduced the income of dairy farmers to a level below the cost of production. Leo Nebbia, a retailer convicted of selling milk below the price prescribed by state regulation, argued that the regulation deprived him of property without due process of law in violation of the Fourteenth Amendment. Price regulation, *Nebbia* contended, was constitutional only as applied to a business affected with a public interest. For a business to be affected with a public interest, he argued, it had to be either a public utility or a natural monopoly. Because neither *Nebbia's* business itself nor the milk industry as a whole belonged to either of these categories, *Nebbia* contended that his business was not affected with a public interest and therefore was not subject to price regulation.¹²⁵

The Court, by a vote of five to four (the Four Horsemen—McReynolds, Sutherland, Van Devanter and Butler—dissenting), rejected *Nebbia's* contentions, and in so doing effectively retired the formalist distinction between public and private enterprise.¹²⁶ The Court declined to resolve the dispute by reference to abstract categories. Instead, Justice Roberts' opinion presented a lengthy survey of instances in which exercises of the police power had been sustained both generally¹²⁷ and in the regulation of prices.¹²⁸ Price regulation had been upheld with respect to railroads,¹²⁹ grain elevators,¹³⁰ premiums for fire insurance,¹³¹ interest rates,¹³² compensation of insurance agents,¹³³ attorneys' contingent

1928); Restatement of the Law of Property (Tentative Draft No. 1, 1929); Restatement of the Law of Sales of Land (Tentative Draft 1935).

124. 291 U.S. 502 (1934).

125. *See id.* at 531.

126. Justice Roberts, who wrote the majority opinion, "paced the floor of his Washington home till the early hours of the morning before he finally decided how he should vote." *Constitutional Revolution, Ltd.*, *supra* note 4, at 75-76.

127. *See Nebbia*, 291 U.S. at 521-30.

128. *See id.* at 531-37.

129. *See Chicago, B. & Q. R.R. v. Iowa*, 94 U.S. 155 (1876); *Peik v. Chicago & N.W. Ry.*, 94 U.S. 164 (1876).

130. *See Brass v. North Dakota*, 153 U.S. 391 (1894); *Munn v. Illinois*, 94 U.S. 113 (1876).

131. *See German Alliance Ins. Co. v. Lewis*, 233 U.S. 389 (1914).

132. *See Griffith v. Connecticut*, 218 U.S. 563 (1910).

fees,¹³⁴ stockyards,¹³⁵ and private contract carriers.¹³⁶ From this array of exceptions to what was arguably a general rule against price regulation, Justice Roberts distilled a general principle. "It is clear," he wrote, "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."¹³⁷

Nebbia's dismantling of the public/private distinction is a milestone in American constitutional development, and it merits some observations relevant to our inquiry. First, *Nebbia* destroyed one of the central tenets of laissez-faire formalism before the announcement of the Court-packing plan, before the 1936 election and, indeed, before the 1934 election. Hughes, who voted with the majority, and Roberts, who authored the opinion, are both generally considered to have been the crucial swing votes in 1937. In *Nebbia*, they thus evinced an inclination to deviate from laissez-faire values and formalist styles of thinking long before Roosevelt's crushing defeat of Alf Landon.

Second, and more important, the breakdown of the public/private distinction signalled by *Nebbia* held dramatic potential consequences for Commerce Clause doctrine. The current of commerce doctrine was essentially a realist conception restrained by a formal one. The current of commerce, we recall, was conceived as a sequence of interstate business activities connected by intrastate business activities affected with a public interest. As long as the class of business activities affected with a public interest remained small, the channel cut by the current of commerce promised to remain narrow. Because *Nebbia* threw the class of businesses affected with a public interest wide open, the internal logic of the current of commerce doctrine impelled the court toward a recognition of a broader conception of the current of commerce. *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.

Moreover, *Nebbia* demonstrated that the Court was inclined to look to the effects exerted by a business activity rather than to the nature of the business considered in a vacuum, and to examine the business pragmatically rather than metaphysically—in short, to treat the public/private distinction more realistically and less formally. This inclination prefigured the Court's retreat from a formalistic understanding of the

133. See *O'Gorman & Young v. Hartford Fire Ins. Co.*, 282 U.S. 251 (1931).

134. See *Margolin v. United States*, 269 U.S. 93 (1925); *Yeiser v. Dysart*, 267 U.S. 540 (1925); *Calhoun v. Massie*, 253 U.S. 170 (1920); *Newman v. Moyers*, 253 U.S. 182 (1920); *Capital Trust Co. v. Calhoun*, 250 U.S. 208 (1919); *Frisbie v. United States*, 157 U.S. 160 (1895).

135. See *Cotting v. Kansas City Stock Yards Co.*, 183 U.S. 79 (1901).

136. See *Stephenson v. Binford*, 287 U.S. 251 (1932).

137. *Nebbia v. New York*, 291 U.S. 502, 536 (1934).

distinction between direct and indirect burdens on commerce. The impact of this new understanding of the public/private distinction on the direct/indirect distinction would be realized, however, only within the framework of the doctrine within which the two distinctions had become conflated. Only within the context of a dispute which could be conceptualized as a current of commerce case would *Nebbia's* ramifications for *Swift's* internal logic be worked out. For want of such an appropriately tailored case, the impact of *Nebbia* on Commerce Clause doctrine remained latent for the next three years. However, in 1937, the fallout from *Nebbia* was to be felt in a dramatic and often misunderstood way.

III. INTERLUDE: *SCHECHTER POULTRY CORP. V. UNITED STATES* AND *CARTER V. CARTER COAL*

*Schechter Poultry Corp. v. United States*¹³⁸ involved the conviction of a Brooklyn slaughterhouse operator for several violations of the "Live Poultry Code."¹³⁹ Promulgated pursuant to the National Industrial Recovery Act ("NIRA"),¹⁴⁰ the Code contained provisions establishing, inter alia, minimum wages and maximum hours of labor.

The Schechter Poultry Corporation was a slaughterhouse operator that purchased live poultry from commission men in New York City and Philadelphia, slaughtered the purchased poultry at its Brooklyn slaughterhouse, and then sold the slaughtered poultry to local retail poultry dealers and butchers for direct sale to consumers. The corporation did not sell poultry in interstate commerce. The principals of the corporation were convicted of violating, inter alia, the provisions of the Code pertaining to minimum wages and maximum hours.

The lawyers in the Justice Department had not intended for *Schechter* to be the case in which the Court would determine the constitutionality of the NIRA. The Department had been preparing *United States v. Belcher*,¹⁴¹ a prosecution for violation of the wage and hour provisions of the Lumber and Timber Code, to serve as the NIRA test case. As the April 8, 1935, date for Supreme Court oral argument approached, however, Department lawyers began to doubt the prudence of using *Belcher* as the vehicle for a constitutional test. Due both to doubts concerning the Lumber Code's constitutionality and the lack of a full trial record, the Department requested on March 25 that the case be dismissed. The Court granted the Department's motion to dismiss the following week.¹⁴²

138. 295 U.S. 495 (1935).

139. The full title of the Code was the "Code of Fair Competition for the Live Poultry Industry of the Metropolitan Area in and about the City of New York." *Id.* at 519 n.1.

140. See Act of June 16, 1933, ch. 90, 48 Stat. 195 (1933) (amended 1935) (history of the Act at 15 U.S.C. §§ 703, 744 (1992)).

141. *Appeal dismissed*, 294 U.S. 736 (1935).

142. See Thomas I. Emerson, *Young Lawyer for the New Deal* 24 (Joan P. Emerson ed., 1991); Peter H. Irons, *The New Deal Lawyers* 75-82 (1982).

The failure of NRA¹⁴³ and Department lawyers to formulate "a coherent litigation strategy pointed toward a strong, well-prepared constitutional test case"¹⁴⁴ left the administration without any promising test vehicles on the horizon. The NIRA was due to expire by its own terms in June and, as the *New York Times* and numerous other anti-NRA commentators observed, the administration was "now in the indefensible position of urging Congress to extend with slight modifications an act the constitutionality of which it is deliberately refusing to test."¹⁴⁵ Fortunately, the Second Circuit upheld the Schechters' conviction on the very day that *Belcher* was dismissed.¹⁴⁶ Due to the lateness in the Court's term, however, the case would not be heard until the following autumn unless the Government requested expedited review. The statute might, in the meantime, expire or be re-enacted in modified form, and the necessity for a constitutional test might in some manner be avoided. Donald Richberg, however, was able to convince Roosevelt that "the morale of the [NRA], already at a low ebb in coping with the herculean task of enforcement and facing widespread noncompliance, could not endure any further temporizing."¹⁴⁷ Thus, against the advice of Felix Frankfurter and Tommy Corcoran, Solicitor General Reed requested expedited appeal April 11.¹⁴⁸

Justice Department lawyers doubted from the beginning that the Schechters' slaughterhouse operations fell within the federal regulatory bailiwick. In particular, Department attorneys "were uneasy about the evidentiary underpinnings of the Commerce Clause argument. They recognized that reliance on the expansive line of Supreme Court precedent required a showing of some 'burden' on an uninterrupted 'stream of commerce.'"¹⁴⁹ Solicitor General Reed warned Roosevelt that *Schechter* involved "wages and hours of slaughter house employees after poultry has been received in New York, and not hours and wages involved in interstate transportation. This is the most difficult type of labor provision to maintain."¹⁵⁰ Even Blackwell Smith, acting general counsel to the NRA, thought *Schechter* was "the weakest possible case."¹⁵¹

The nine Justices of the Supreme Court could not have agreed more. In an opinion written by Chief Justice Hughes, the Court unanimously

143. The "National Recovery Administration," the agency charged with the duty of administering the NIRA. See Irons, *supra* note 142, at 27.

144. *Id.* at 85.

145. *Id.* at 82 (quoting *N.Y. Times*, Apr. 2, 1935, at 20).

146. See *United States v. Schechter Poultry Corp.*, 76 F.2d 617 (2d Cir.), *rev'd*, 295 U.S. 495 (1935).

147. Paul A. Freund, *Charles Evans Hughes As Chief Justice*, 81 *Harv. L. Rev.* 4, 32 (1967).

148. See *id.*; Irons, *supra* note 142, at 83-85.

149. Irons, *supra* note 142, at 91.

150. *Id.* at 85 (quoting Letter From Solicitor General Stanley F. Reed to President Franklin D. Roosevelt (Apr. 11, 1935)).

151. *Id.* See also Emerson, *supra* note 142, at 25 (commerce issue not raised in favorable form).

reversed the convictions. The Court first held that, because the NIRA was an unconstitutional delegation of authority, the Code enacted pursuant to this authority was void. Second, the Court held that, even were the Code otherwise a valid regulation, it could not constitutionally be applied to the defendants. Since the defendants were not engaged in interstate commerce, their activities were beyond the reach of federal regulation. "The undisputed facts," wrote Hughes,

afford no warrant for the argument that the poultry handled by defendants at their slaughterhouse markets was in a "current" or "flow" of interstate commerce and was thus subject to congressional regulation. The mere fact that there may be a constant flow of commodities into a State does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the State and is there held solely for local disposition and use. So far as the poultry here in question is concerned, the flow in interstate commerce had ceased. The poultry had come to a permanent rest within the State. It was not held, used, or sold by defendants in relation to any further transactions in interstate commerce and was not destined for transportation to other States. Hence, decisions which deal with a stream of interstate commerce—where goods come to rest within a State temporarily and are later to go forward in interstate commerce—and with the regulations of transactions involved in that practical continuity of movement, are not applicable here.¹⁵²

Nor, the Court held, did the defendants' transactions exert a direct effect on interstate commerce. The Government argued that a slaughterhouse operator paying lower wages or reducing his overhead through exacting long hours of work was enabled to cut his prices, and that such cuts in prices generated a demand for cheaper goods and demoralized the price structure, thereby affecting interstate commerce.¹⁵³ These effects on interstate commerce, the Court held, were merely indirect.¹⁵⁴ Indeed, Hughes stated, were such effects considered direct, "the extent of the regulation of cost would be a question of discretion and not of power."¹⁵⁵

Justice Cardozo filed a concurring opinion in which Justice Stone joined. Cardozo agreed that the NIRA constituted an unlawful delegation of authority, but he also registered "another objection, far-reaching

152. *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 543 (1935).

153. *See id.* at 548-49.

154. *See id.* at 547-51.

155. *Id.* at 549. Hughes elaborated:

If the federal government may determine the wages and hours of employees in the internal commerce of a State, because of their relation to cost and prices and their indirect effect upon interstate commerce, it would seem that a similar control might be exerted over other elements of cost, also affecting prices, such as the number of employees, rents, advertising, methods of doing business, etc. All the processes of production and distribution that enter into cost could likewise be controlled.

Id.

and incurable."¹⁵⁶ Regarding the power of Congress to regulate commerce, Cardozo wrote:

I find no authority in that grant for the regulation of wages and hours of labor in the . . . defendants' business. As to this feature of the case little can be added to the opinion of the court. There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. . . . Activities local in their immediacy do not become interstate and national because of distant repercussions.¹⁵⁷

"To find immediacy or directness here," wrote Cardozo, "is to find it almost everywhere."¹⁵⁸

The unanimity of the decision impressed contemporary commentators. Edward Corwin noted with some consternation that even the "liberal" members of the Court appeared to be thinking about the commerce power in formalist terms rather than the realist terms of some younger legal thinkers. "In a word," wrote Corwin, "the conceptualism, the determination to resist the inrush of fact with the besom of formula, which pervades the Chief Justice's opinion for the Court, is not altogether absent from Justice Cardozo's opinion."¹⁵⁹ "When men like Stone, Cardozo, Brandeis and Hughes believe that the Constitution compels them to decide, as they did in this case," wrote the *New Republic*, "there is no point any longer in saying that the Constitution is infinitely flexible."¹⁶⁰ One might question the *New Republic's* conclusion without doubting its premise. The Constitution itself may or may not possess considerable elasticity; but in practice it is malleable only to the extent that its authoritative interpreters believe it to be so. Though Cardozo was beginning to offer a less rigidly formal way of thinking about commerce power issues,¹⁶¹ he and his colleagues had inherited modes of thinking about

156. *Id.* at 553 (Cardozo, J., dissenting).

157. *Id.* at 554.

158. *Id.*

159. *Landmark or What?, supra* note 52, at 170.

160. Arthur M. Schlesinger, Jr., *The Politics of Upheaval* 284 (1960) (quoting *The New Republic*, June 12, 1935).

161. Cardozo in his concurring opinion had observed that "[a] society such as ours 'is an elastic medium which transmits all tremors throughout its territory; the only question is of their size'. . . . The law is not indifferent to considerations of degree." *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring) (citations omitted). He nevertheless betrayed his embrace of formalist categories by remarking, "[t]o find *immediacy or directness* here is to find it almost everywhere." *Id.* (emphasis added). Sensitivity to considerations of degree would later be blended with current of commerce jurisprudence to create a transitional Commerce Clause jurisprudence for the late 1930s. See the Wagner Act Cases (discussed *infra* notes 195-271 and accompanying text); see also *NLRB v. Fainblatt*, 306 U.S. 601 (1939) (upholding application of the Wagner Act "to employers, who are engaged in a relatively small business of processing materials which are transmitted to them by the owners through the channels of interstate commerce and which after processing are distributed through those channels"); *Santa Cruz Fruit Packing Co. v. NLRB*, 303 U.S. 453 (1938) (holding that a California fruit-packing plant receiving fresh fruit from points within the state and subsequently shipping a substantial portion of its packaged products to points outside the state

commerce power issues that were simply incompatible with the ways that Government attorneys were (and subsequent Supreme Court Justices would soon be) thinking about those issues.¹⁶² Corwin and the editors at *The New Republic* were sensitive to the fact that the intellectual styles that these aging Justices had inherited from an earlier era played a critical role in the New Deal saga.

In the wake of the *Schechter* decision, Congress enacted the Bituminous Coal Conservation Act of 1935 (the "Guffey Coal Act").¹⁶³ The statute's introductory section detailed the circumstances thought to justify the Act. That section declared, among other things, that the mining and distribution of bituminous coal throughout the United States were affected with a national public interest, that the production and distribution of coal by producers directly affected interstate commerce, and that the right of workers to organize and bargain collectively over terms of employment was necessary in order to avoid the recurring obstructions to interstate commerce in coal caused by labor disputes at the mines.¹⁶⁴ Section 4 of the Act set out the substantive provisions in controversy. Part II of that section authorized a National Bituminous Coal Commission to regulate the price at which bituminous coal was sold in interstate commerce.¹⁶⁵ Part III of section 4 conferred upon the employees of coal producers the right to organize and to bargain collectively, and created a labor board to adjudicate labor disputes in the coal industry.¹⁶⁶

The Wagner Act, which was also enacted in the wake of the *Schechter* decision, sailed through Congress with comparative ease and was passed by large majorities in both Houses.¹⁶⁷ The Guffey Coal Act was not to have such an easy go of it. Hearings held before a subcommittee of the House Ways and Means Committee in June of 1935 focused primarily on the question of the bill's constitutionality. The subcommittee requested Attorney General Cummings and Solicitor General Reed to appear and offer their views concerning the bill's constitutional basis.¹⁶⁸ Lawyers in the Justice Department were convinced that the bill was unconstitutional in light of *Schechter*,¹⁶⁹ and, according to an unconfirmed report, had

was subject to the Wagner Act). Soon, however, the Court in its Commerce Clause jurisprudence would both completely abandon its adherence to the formal categories of dual federalism and become completely insensitive to questions of degree. See *Wickard v. Filburn*, 317 U.S. 111 (1942).

162. See, e.g., *id.* at 128-29 (holding that the Commerce Clause gave Congress the power to regulate prices of production of wheat intended solely for consumption, and not for commerce).

163. See Ch. 824, 49 Stat. 991 (1925) (repealed 1937, as noted in 15 U.S.C. §§ 801-827).

164. See *id.* at 991-92, § 1.

165. See *id.* at 995-1001, § 4, part II.

166. See *id.* at 1001-02, § 4, part III.

167. See discussion of the Wagner Act, *infra* notes 195-216 and accompanying text.

168. See Ralph Baker, *The National Bituminous Coal Commission* 49-50 (1941).

169. See Irons, *supra* note 142, at 248.

told Cummings as much before his appearance.¹⁷⁰ Cummings refused to opine concerning the bill's constitutionality, instead advising the subcommittee "to push it [the bill] through and leave the question to the courts."¹⁷¹

On July 5th, the day of Cummings' appearance before the subcommittee, President Roosevelt sent a letter to the chairman of the subcommittee, Samuel B. Hill, pleading for a favorable recommendation. "Admitting that mining coal, considered separately and apart from its distribution in the flow of interstate commerce, is an intrastate transaction," wrote the President,

the constitutionality of the provisions based on the Commerce Clause of the Constitution depends upon the final conclusion as to whether production conditions directly affect, promote, or obstruct interstate commerce in the commodity. Manifestly, no one is in a position to give assurance that the proposed act will withstand constitutional tests . . . [but] all doubts should be resolved in favor of the bill, leaving to the courts, in an orderly fashion, the ultimate question of constitutionality. . . . I hope your committee will not permit doubts as to constitutionality, however reasonable, to block the suggested legislation.¹⁷²

Though four of the seven members of the subcommittee continued to believe the bill to be unconstitutional, the White House was able to get the bill reported to the full House Ways and Means Committee "without recommendation."¹⁷³

The bill faced similar difficulties in the full Committee. Eight of the Committee's eighteen Democrats and six of its seven Republicans were known to oppose the bill. The Democratic members of the Committee held a series of secret meetings throughout early August in an attempt to muster enough votes to secure a favorable report. On August 12, a meeting of the full Committee was held at which the bill was reported favorably by a vote of twelve to eleven. As Representative Allen Treadway of North Carolina remarked, "[t]his was made possible by the simple expedient of having two members of the majority party withdraw their negative votes and answer 'Present.'"¹⁷⁴

The report of the minority focused almost exclusively on the question of the bill's constitutionality. Representative Jere Cooper of Tennessee filed with the minority report a brief against the bill in which four of his colleagues concurred. Cooper contended that the current of commerce cases could offer no constitutional support for the bill. "In the *Schechter* case," Cooper argued,

170. See Baker, *supra* note 168, at 50 (citing N.Y. Times, July 6, 1935, at 2).

171. *Id.*

172. Letter From President Franklin D. Roosevelt to Subcommittee Chairman Samuel B. Hill (July 5, 1935), reprinted in 79 Cong. Rec. 13,449 (1935).

173. Baker, *supra* note 168, at 51; 79 Cong. Rec. 13,437 (1935) (remarks of Rep. Allen Treadway of North Carolina).

174. Baker, *supra* note 168, at 51; 79 Cong. Rec. 13,437 (1935) (remarks of Rep. Allen Treadway of North Carolina).

it was pointed out that when poultry was trucked to slaughterhouses in Brooklyn for local disposition, it became commingled with the mass of property within the State, and the flow of interstate commerce ceased. . . . In the case of mining or producing coal, interstate commerce has not even commenced, so the coal is still a part of the mass of the property of the State of its production until it commences its final movement for transportation from the State of its origin to that of its destination.¹⁷⁵

In the floor debates on the bill, members of both Houses repeatedly contested proponents' claims that the Commerce Clause authorized congressional regulation of coal mining.¹⁷⁶ Representative Allen Treadway of North Carolina produced a lengthy argument distinguishing the mining of coal from the activities regulated in the current of commerce cases. Like the local sale of poultry, coal mining occurred at one of the *terminals* of the current of commerce. Citing *Schechter's* dismissal of the current of commerce argument, Treadway contended that "[i]f decisions which deal with a stream of interstate commerce have no relevancy in a case where interstate commerce has ended, then it would seem that they would have no relevancy in a case where interstate commerce has not begun."¹⁷⁷ *Swift* provided no more authority for congressional regulation of the production of coal at the mine than it did for federal regulation of production of cattle on the farm.¹⁷⁸ The current of commerce decisions authorized federal regulation of local activities only in instances in which such activities were located in a current of interstate commerce. Coal mining was not so situated.¹⁷⁹

The closeness of the final votes on the bill reflected the seriousness of the legislators' constitutional doubts. Though Republicans now held fewer than thirty percent of the seats in the House,¹⁸⁰ the bill was passed by the comparatively narrow margin of 194-168.¹⁸¹ In the Senate, where Democrats now held sixty-nine of the ninety-six seats,¹⁸² the bill squeaked through by a vote of 45-37.¹⁸³ Despite considerable administration pressure, both public and private, a substantial number of Democrats defied the President.¹⁸⁴ In light of the comparatively large margins by which the Wagner Act was passed, it seems unlikely that the negative

175. 79 Cong. Rec. 12,461 (1935) (remarks of Rep. Jere Cooper of Tennessee).

176. See 79 Cong. Rec. 13,435-37, 13,481-85 (1935) (Rep. Treadway); 13,438 (Rep. Cox); 13,446-48 (Rep. Knutson); 13,457-60 (Rep. Fuller); 13,460-65 (Rep. Cooper); 13,465 (Rep. McCormack); 13,466-69 (Rep. Church); 13,568 (Rep. Hobbs); 13,771-73 (Sen. Tydings); 14,066 (Sen. Connally); 14,073 (Sen. King); 14,083 (Sen. Walsh).

177. 79 Cong. Rec. 13,482 (1935).

178. See 79 Cong. Rec. 13,482 (1935).

179. See 79 Cong. Rec. 13,483 (1935).

180. See William E. Leuchtenberg, *Franklin D. Roosevelt and the New Deal 1932-1940*, at 116 [hereinafter *Leuchtenberg*, Franklin D. Roosevelt].

181. See 79 Cong. Rec. 13,666-67 (1935).

182. See *Leuchtenberg*, Franklin D. Roosevelt, *supra* note 180, at 116.

183. See 79 Cong. Rec. 14,084 (1935).

184. See *Baker*, *supra* note 168, at 51-52.

votes were motivated by any general animosity toward federal regulation of labor relations. Many members of Congress sincerely doubted the constitutionality of the Guffey Coal Act but not that of the Wagner Act.

The Supreme Court would soon vindicate the doubts of the minority. In an opinion written by Justice Sutherland, the Court held that Part III of the Act was an unconstitutional attempt by Congress to regulate labor relations in the purely local activity of coal production.¹⁸⁵ Denying the applicability of *Swift* and *Stafford*, the Court remarked:

It was nowhere suggested in these cases that the interstate commerce power extended to the growth or production of the things which, after production, entered the flow. . . . The restricted field covered by the *Swift* and kindred cases is illustrated by the *Schechter* case. . . . There the commodity in question, although shipped from another state, had come to rest in the state of its destination, and, as the Court pointed out, was no longer in a current or flow of interstate commerce. The *Swift* doctrine was rejected as inapposite. In the *Schechter* case the flow had ceased. Here it had not begun. The difference is not one of substance. The applicable principle is the same.¹⁸⁶

The local production of coal was neither itself interstate commerce, nor was it part of a current of commerce, nor, the Court held, did it directly affect interstate commerce.¹⁸⁷ Despite the Act's severability clause, the Court held that Part III was not separable from the price-regulation provisions of Part II.¹⁸⁸ Accordingly, the majority struck down the Act in its entirety.¹⁸⁹

Chief Justice Hughes filed a separate opinion in which he agreed that production preceded commerce and was therefore a subject of state rather than federal control.¹⁹⁰ Hughes believed that Part II was separable from Part III, however, and therefore would have affirmed the portion of the lower court's opinion upholding the price-regulation provisions of the Act.¹⁹¹

Most interesting, however, was an aside tucked away in Hughes' discussion of the federal commerce power: "We are not at liberty," he wrote, "to deny to the Congress, with respect to interstate commerce, a power commensurate with that enjoyed by the States in the regulation of their internal commerce. See *Nebbia v. New York*."¹⁹² Hughes' prophetic citation of *Nebbia* in the context of a discussion of the commerce power indicated his recognition that *Nebbia* had expanded the class of businesses affected with a *national* public interest as well as that of businesses affected with the public interest of a state.

185. See *Carter v. Carter Coal*, 298 U.S. 238, 308 (1936).

186. *Id.* at 305-06.

187. See *id.* at 308-09.

188. See *id.* at 316.

189. See *id.* at 316-17.

190. See *id.* at 317.

191. See *id.* at 321-22.

192. *Id.* at 319 (citing *Nebbia v. New York*, 291 U.S. 502 (1934)).

Justice Cardozo filed a dissenting opinion in which Justices Stone and Brandeis joined. Cardozo contended that Part II of the Act was a proper regulation of interstate commerce, that Part II was separable from Part III, and that, insofar as no controversy between the coal producers and their employees had yet materialized with respect to the provisions of Part III, the employers' suits sought a premature declaration regarding Part III's validity.¹⁹³ Cardozo did hint at one point in his opinion that there might have been limited circumstances in which federal regulation of the miners' wages might have been constitutional.¹⁹⁴ However, it is safe to say that, as of the time the *Carter* decision was rendered, no member of the Court had gone on record positively stating that the federal government had the power to regulate the labor relations of local enterprises engaged in production.

It is quite likely that the activity involved in *Schechter* could have been considered a business affected with a public interest within the meaning of *Nebbia*; it is almost certain that the production of coal could have been so considered. Yet in both cases the potentially revolutionary impact of *Nebbia* on Commerce Clause doctrine, hinted at in Hughes' *Carter* opinion, could not be realized because the business activities in question could not be located within a current of interstate commerce. The following year, however, the Court would hear three cases through which the potential of *Nebbia* could be tapped.

IV. THE WAGNER ACT CASES

A. *Framing the Act*

The drafting of earlier New Deal statutes, such as the NIRA and the AAA, had been dominated by politicians, bureaucrats, and lobbyists who had paid little attention to thorny questions of constitutionality.¹⁹⁵ By contrast, each of the drafters of the Wagner Act was a lawyer,¹⁹⁶ and the legal training of the Act's framers was reflected by the central role that constitutional concerns played in their shaping of the Act's provisions.

Introduced in the Senate by Wagner on February 21, 1935, S. 1958 reflected the influence exerted by the current of commerce cases on the thought of its drafters. The bill stated in its Declaration of Policy that denials of the right to bargain collectively led

to strikes and other manifestations of economic strife, which create further obstacles to the free flow of commerce. It is hereby declared to be the policy of the United States to remove obstructions to the free flow of commerce and to provide for the general welfare by encouraging the practice of collective bargaining.¹⁹⁷

193. See *id.* at 324.

194. See *id.* at 327-28.

195. See Irons, *supra* note 142, at 227.

196. See *id.*

197. S. 1958, 74th Cong., 1st Sess. (1935), reprinted in 1 Legislative History of the

The term "affecting commerce" was defined to mean "in commerce, or burdening or affecting commerce, or obstructing the free flow of commerce, or having led or tending to lead to a labor dispute that might burden or affect commerce or obstruct the free flow of commerce."¹⁹⁸

An accompanying memorandum comparing the bill to its predecessor in the 73rd Congress noted that "[d]enials of the right to bargain collectively through freely chosen representatives lead to strikes and other economic strife, thus creating physical and other obstructions to the flow of interstate commerce."¹⁹⁹ The same memorandum repeatedly cited the Packers and Stockyards Act and the Grain Futures Act as models for the bill's provisions, and *Stafford*²⁰⁰ and *Olsen*²⁰¹ as precedents bolstering the bill's constitutionality.²⁰²

The current of commerce language in the bill's Declaration of Policy, however, was preceded by a broader commerce power justification for the bill. The Declaration stated that inequality of bargaining power obtained in instances in which employees were not free to organize and bargain collectively, and that "the resultant failure to maintain equilibrium between the rate of wages and the rate of industrial expansion impairs economic stability and aggravates recurrent depressions, with consequent detriment to the general welfare and to the free flow of commerce."²⁰³ The language of this purchasing power theory was revised in the Senate Committee on Education and Labor,²⁰⁴ but the theory itself

National Labor Relations Act, 1935, at 1295, 1295 (1985) [hereinafter 1 NLRB, Legislative History].

198. *Id.* at 1297.

199. Comparison of S. 2926 (73rd Congress) and S. 1958 (74th Congress) Senate Committee Print, 74th Cong., 1st Sess. (1935), *reprinted in* 1 NLRB, Legislative History, *supra* note 197, at 1319, 1338.

200. *See* 258 U.S. 495 (1922).

201. *See* 262 U.S. 1 (1922).

202. *See* 1 NLRB, Legislative History, *supra* note 197, at 1339-42, 1347-48, 1358.

203. S. 1958, 74th Cong., 1st Sess. (1935), *reprinted in* 1 NLRB, Legislative History, *supra* note 197, at 1295. Identical language may be found in competing versions of the bill. *See* H.R. Rep. No. 6187, 74th Cong., 1st Sess. (1935), *reprinted in* 2 Legislative History of the National Labor Relations Act, 1935, at 2445 (1985) [hereinafter 2 NLRB, Legislative History]; H.R. Rep. No. 6288, 74th Cong., 1st Sess. (1935), *reprinted in* 2 NLRB, Legislative History, *supra*, at 2459.

204. The Committee's reformulation of the purchasing power theory stated:

The inequality of bargaining power between employer and individual employees which arises out of the organization of employers in corporate forms of ownership and out of numerous other modern industrial conditions, impairs and affects commerce by creating variations and instability in wage rates and working conditions within and between industries and by depressing the purchasing power of wage earners in industry, thus increasing the disparity between production and consumption, reducing the amount of commerce, and tending to produce and aggravate recurrent business depressions. The protection of the right of employees to organize and bargain collectively tends to restore equality of bargaining power and thereby fosters, protects, and promotes commerce among the several States.

S. Rep. No. 573, 74th Cong. 1st Sess. (1935), *reprinted in* 2 NLRB, Legislative History, *supra* note 203, at 2285-86. Identical language may be found in competing versions of the

retained its primacy throughout the bulk of the bill's legislative history. Indeed, the purchasing power theory remained the emphasized constitutional basis of the bill when it passed the Senate by a vote of 63-12 on May 16.²⁰⁵

On May 27, 1935, however, the Supreme Court handed down its *Schechter* decision. Senator Wagner, fearing that the opinion cast some doubt on the constitutionality of his bill, managed "to have the bill re-committed to the House Labor Committee for the purpose of redrafting the Declaration of Policy and the definitions of commerce."²⁰⁶ Wagner lieutenants Leon Keyserling, Calvert Magruder, and Philip Levy revised the Declaration of Policy "to emphasize the effect of labor disputes on interstate commerce and to de-emphasize the mere economic effects which had been rejected by the court."²⁰⁷ Indeed, as reported back on June 10, 1935, the bill now gave the current of commerce theory primacy over the purchasing power theory. The Declaration of Policy was replaced by a "Findings and Policy," which now began:

The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing interstate and foreign commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce.²⁰⁸

There followed a statement of the purchasing power theory, which was in turn followed by the argument that protection of the right of collective bargaining "safeguards commerce from injury, impairment, or interruption, and promotes the flow of interstate and foreign commerce by removing certain recognized sources of industrial strife and unrest."²⁰⁹

The amended bill also contained a revised definition of "affecting commerce." Though it retained "affecting commerce" as the defined term, Congress no longer made any pretense to jurisdiction over practices that merely "affected" commerce. Instead, the term was now defined to mean "in commerce, or burdening or obstructing commerce or the free flow of

bill. See H.R. Rep. No. 7937, 74th Cong., 1st Sess. (1935), reprinted in 2 NLRB, Legislative History, *supra* note 203, at 2845; H.R. Rep. No. 7978, 74th Cong., 1st Sess. (1935), reprinted in 2 NLRB, Legislative History, *supra* note 203, at 2857.

205. See 79 Cong. Rec. 7681 (1935).

206. The Wagner Act Cases, *supra* note 4, at 82. See The Jones & Laughlin Case, *supra* note 4, at 59; James A. Gross, *The Making of the National Labor Relations Board* 144 (1974).

207. Gross, *supra* note 206, at 144 (quoting from the author's oral history interview with Philip Levy).

208. H.R. Rep. No. 1147, 74th Cong., 1st Sess. (1935), reprinted in 2 NLRB, Legislative History, *supra* note 203, at 3032-33.

209. *Id.* at 3034.

commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."²¹⁰

Defending the amended bill on the floor of the House, Representative Charles Truax of Ohio drew again upon the most powerful constitutional metaphor in the arsenal of federal regulatory power:

Whenever the normal flow of the river is obstructed and impeded by water-logged trees and stumps or refuse, the only effective remedy is to either shove, pry out, or blast out these impediments and so put the same logic and process of reasoning when the natural flow of manufactured goods or raw materials which are the products of wage-workers, of men who earn their bread by the sweat of their brows, is impeded, restrained, and obstructed by reactionary, selfish, greedy water-logged employers, then it is high time that Congress should enact legislation to remove once and for all time the causes of the impediments to human progress and welfare.²¹¹

Truax's colleagues concurred, and on June 19th the same House that was to express such grave constitutional misgivings about the Guffey Coal Act passed the Wagner Act by a voice vote.²¹² The Senate conferees readily acceded to the House's amendments,²¹³ and the Senate agreed to the conference report without debate.²¹⁴ Signing the bill on July 5th, President Roosevelt emphasized the comparatively modest ambitions of the legislation. The Wagner Act, he declared, "must not be misinterpreted. It may eventually eliminate one major cause of labor disputes, but it will not stop all labor disputes. It does not cover all industry and labor, but is applicable only when violation of the legal right of independent self-organization would burden or obstruct interstate commerce."²¹⁵

The *Schechter* decision had intervened in time to give the Act's framers guidance concerning the commerce power theory most likely to sustain the Act through judicial review. The timing of the decision had also afforded the sponsors of the Act an opportunity to shore up its constitutional foundation. As Richard Cortner has noted, the Act's proponents now "were essentially betting on the viability of the 'flow of commerce' cases."²¹⁶ It was now up to the lawyers of the NLRB to find test cases for which the current of commerce doctrine could serve as a vessel.

210. *Id.* at 3035.

211. *Id.* at 3187.

212. See 79 Cong. Rec. 9731 (1935), reprinted in 2 NLRB, Legislative History, *supra* note 203, at 3227.

213. See H.R. Rep. No. 1371, 74th Cong., 1st Sess. (1935), reprinted in 2 NLRB, Legislative History, *supra* note 203, at 3252.

214. See 79 Cong. Rec. 10,259 (1935), reprinted in 2 NLRB, Legislative History, *supra* note 203, at 3260.

215. 79 Cong. Rec. 10,720 (1935), reprinted in 2 NLRB, Legislative History, *supra* note 203, at 3269.

216. The Wagner Act Cases, *supra* note 4, at 185.

B. *Selecting the Test Cases*

Before the Wagner Act had even been signed, the NLRB lawyers were preparing a strategy for selecting promising cases through which the constitutionality of the Act might be sustained. The "master plan," set forth in a memorandum entitled "Selection of Test Cases Under the National Labor Relations Act," was crafted in the early summer of 1935 and adopted by Charles Fahy when he became general counsel in August of that year.²¹⁷ Anxious to avoid the fumbling that had characterized the defense of the NIRA, and temperamentally unlike the litigation-averse lawyers of the AAA, the NLRB lawyers "were eager to press for court enforcement of the Wagner Act and determined to outline a step-by-step strategy leading from case selection to the Supreme Court."²¹⁸

The NLRB lawyers recognized from the start that the most common and legally challenging type of case they would encounter would involve the application of the Act to enterprises engaged in manufacturing or processing. Here, the NLRB would have to face the line of Supreme Court precedent holding that manufacturing and commerce were distinct. They also recognized that the line of precedent under which the Act was most likely to be sustained in such cases was that which authorized Congress to remove obstructions from the stream of commerce. "The first job of the NLRB, then, would be to develop cases in which obstruction, particularly to the flow of goods from one state to another, could be demonstrated conclusively."²¹⁹ The NLRB lawyers were instructed in this regard to keep an eye out for enterprises in which "a substantial part of the raw materials flow from other states into the manufacturing plant and a substantial part of the resulting products flow out from the plant to other states."²²⁰

As Peter Irons has noted, the NLRB's litigation strategy was "a logical outgrowth of the structure of the Wagner Act and a perceptive analysis of the . . . conflicting lines of precedent."²²¹ NLRB general counsel Charles Fahy certainly agreed. In a 1963 conversation with Charles Leonard, Fahy contended that "the Wagner Act should have been sustained on the basis of precedents, . . . and I am not inclined to attribute the fact that it was sustained to anything but that it was believed to be constitutional."²²² No doubt reflecting on the fact that Van Devanter and Butler had joined in the Taft Court's current of commerce opinions, Fahy remarked, "[i]n fact, I thought it might be sustained by a vote other than

217. See Irons, *supra* note 142, at 240-41.

218. *Id.*

219. *Id.* at 241.

220. *Id.* at 242 (quoting Memorandum, Selection of Test Cases Under the National Labor Relations Act, July 9, 1935, by Tom Emerson, Gerhard Van Arkle, Charles Wood, and Garnet Patterson).

221. *Id.* at 243.

222. Charles A. Leonard, A Search for a Judicial Philosophy: Mr. Justice Roberts and the Constitutional Revolution of 1937, at 109 (1971).

Roberts'."²²³

The NLRB master strategy also called for the identification of test cases involving the manufacture of goods that were vital to the nation's economy. Autos, steel, textiles, and clothing were all singled out for particular attention. Throughout 1935 and 1936, the NLRB lawyers winnowed and selected promising test cases, carefully guiding them through the trial and appellate courts. By late 1936, they had three promising test cases before the Supreme Court. The Jones & Laughlin Company manufactured steel at its plant in Aliquippa, Pennsylvania;²²⁴ the Friedman-Harry Marks Clothing Company manufactured men's clothing in Richmond, Virginia;²²⁵ and the Fruehauf Trailer Company built trailers in the Motor City.²²⁶ Each plant received the bulk of its raw materials from out of state, and each plant shipped the bulk of its products to states other than the one in which it was located. In each case the company had been found guilty of an unfair labor practice under the provisions of the National Labor Relations Act.²²⁷

C. Briefing and Arguing the Cases

The briefs in these three cases dutifully carried out the directives of the master memorandum. The Government relied principally on *Stafford* and *Olsen*. In each case, the plant in question was located in a current of interstate commerce, and in each, the Government contended that labor disturbances at the plants threatened to obstruct the free flow of interstate commerce. Since location in a current of commerce transformed the local into the national, "the fact that the injury actually arises from local activities is of no moment."²²⁸ The purpose of the Act, the Government emphasized, was "to prevent the direct physical obstruction to the stream of commerce caused by industrial strife."²²⁹

The two principal challenges faced by the Government attorneys were that of breaching the production/commerce distinction and that of distinguishing *Carter Coal*. For the former task the Government relied heavily on *Stafford*. Citing Taft's portrait of a current of commerce flowing through "slaughtering centers," the Government contended that "[t]he Court thus recognized that stoppage for purposes of processing in the packing plant, involving a definite interruption in the physical movement and a very distinct transformation in the nature of the commodity,

223. *Id.* Indeed, Fahy was utterly confident that Hughes and Roberts would vote to sustain the Act, and "encouraged his staff to prepare their arguments on the assumption that an unfavorable decision in *Carter* would not invalidate the Wagner Act." Irons, *supra* note 142, at 252-53.

224. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

225. See *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937).

226. See *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49 (1937).

227. See Emerson, *supra* note 142, at 71-89.

228. Brief for Petitioner at 77, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (No. 419).

229. *Id.* at 66.

did not cause a break in the 'stream' or 'current' of commerce in the constitutional sense."²³⁰ "Moreover," continued the Government's brief,

operations in the meat packing plants are as essentially manufacturing as are the operations at Aliquippa. It is common knowledge that meat packing involves a very extensive transformation in the nature of the commodity; this is fully brought out in the authorities upon which the Court relied in the *Stafford* case. There, as here, the essential purpose of the processing operation is not merely to facilitate the flow of commerce, but also to halt it and to transform the commodities in question into things considerably different, by manufacturing or processing operations of varying degrees of complexity. Indeed, due to the seasonal character of the supply of raw materials and the stable demand for meat products, with a consequent necessity for much storage, and to the necessary slowness of many of the operations in the meat-packing industry, such as chilling, curing and smoking, the delays or stoppages of the flow of products in that industry are frequently much longer than those in the operations of respondent.²³¹

The current of commerce doctrine was also the principal means by which the Wagner Act cases were to be distinguished from *Carter Coal*:

[T]he National Labor Relations Act as here applied is concerned with activities which occur under circumstances closely related to a flow of commerce, and which directly affect that flow. In the *Schechter* case the flow of goods had ceased; in the *Carter* case the flow had not yet begun. In both cases the Court was careful to restrict its decision to that state of facts, and to distinguish the facts of cases such as *Stafford v. Wallace* and the case at bar.²³²

Industrial strife in the cases at bar did "not, in the words of the *Carter* case, operate 'mediately, remotely or collaterally;' rather, it actually stops the movement of goods."²³³

The Government's oral arguments echoed the themes sounded in its briefs. In each case the Government attorneys described in elaborate detail the in-flow of raw materials and the out-flow of semi-finished and finished products from the manufacturing plants. Again, citing Taft's *Stafford* dictum, Warren Madden contended that the Court had there found meat packing plants to be part of a current of interstate commerce. "[T]he analogy which we draw of the flow of raw materials into and through and the flow of finished products out of the steel mills," he contended, "seems to be a logical one."²³⁴

Throughout the course of their arguments, the Government attorneys were at pains to distinguish *Carter Coal*. Indeed, immediately after Madden's invocation of the *Stafford* dictum, Justice Sutherland sought to lead

230. *Id.* at 67.

231. *Id.* at 67-69.

232. *Id.* at 90-91.

233. *Id.* at 78.

234. Arguments in Cases Arising Under Labor Acts Before the Supreme Court, S. Doc. No. 52, 75th Cong., 1st Sess. 116 (1937) [hereinafter Arguments].

him into the mistake of claiming for Congress the authority to regulate productive activities transpiring at the terminals of the current of commerce.

Justice SUTHERLAND: So far as the cattle are concerned, how far could you go? You say that that is an analogous situation?

Mr. MADDEN: That is right.

Justice SUTHERLAND: Taking it back, for instance, to the herder; suppose the herders raising cattle organized a union. Could Congress regulate that?

Mr. MADDEN: I should say not, Your Honor. . . . We no more assert that manufacturing is interstate commerce than did this Court in *Stafford v. Wallace* assert that meat packing or soap making or feeding hay to cows is interstate commerce. We merely assert that the Government, which has the responsibility, cannot have the factory gates slammed in its face and have it said to it, "Inside here you have lost your control, and whatever happens to your great stream of commerce is none of the National Government's business."²³⁵

Madden's parry of Sutherland's thrust was representative of the Government's strategy in arguing the Wagner Act cases. As Richard Cortner has noted, "the government was not seeking a full retreat from the direct-indirect effects formula and the doctrine of dual federalism, but rather a shifting of emphasis by the Court from those principles to the principles embodied in the stream of commerce cases."²³⁶

In his peroration, Labor Department Solicitor Charles Wyzanski alluded, in connection with the *Fruehauf* case, to the CIO sitdown strikes taking place in the automobile industry:

[T]here is a national public interest in this subject . . . and I contend that where two colossal forces are standing astride the stream of commerce threatening to disrupt it, it cannot be that this Government is without power to provide for the orderly procedure by which the dispute may be adjusted without interruption to the stream of commerce.²³⁷

Wyzanski's invocation of Holmes' formula was the last thing the Justices heard before retiring to their chambers to consider their decision.

D. *The Opinions*

The craftsmanlike labors of the NLRB lawyers had presented Hughes and his colleagues with a well-established doctrinal theory upon which the Wagner Act might be sustained. In each of the three test cases, raw materials flowed into the enterprise from outside the state and, after a transformation in form, were shipped on to purchasers outside the state of manufacture. Chief Justice Taft had made clear in *Stafford* that the fact that the enterprise in question was engaged in production was not

235. *Id.* at 116-17.

236. The Jones & Laughlin Case, *supra* note 4, at 148-49.

237. Arguments, *supra* note 234, at 173-74.

dispositive; and, as a general proposition, this point was amply supported by numerous cases not involving the current of commerce theory.²³⁸ *Schechter* and *Carter Coal* could both easily be distinguished on the grounds that the enterprises in question there had been located at one of the terminals of, rather than *in*, a current of interstate commerce. Indeed, the Court in each of those two cases had explicitly rejected current of commerce arguments for precisely that reason.

No departure from existing commerce doctrine was necessary in order to sustain the Act. Indeed, the current of commerce doctrine would have appeared to require that the Act be upheld. Had Hughes and his colleagues wished simply to uphold the Wagner Act, whether out of fear of the Court-packing plan or in response to the 1936 election, yet at the same time wished to maintain the appearance of a strict doctrinal consistency so as to avoid charges of trimming principles for political convenience, they could easily have done so by simply accepting the current of commerce theory offered up by the Government. Had they done so, a great deal of historical confusion about the New Deal Court might have been averted.

Rather than taking the safe, convenient route marked by the Government attorneys, Hughes and his colleagues from the *Nebbia* majority again indulged themselves in an eminently Langdellian enterprise. Like Williston and his colleagues at the American Law Institute, Hughes used the opportunity occasioned by the Wagner Act cases to set forth a grand restatement of the law. Of the same age and intellectual generation as Williston (born 1861), Hughes (born 1862) in *Jones & Laughlin* applied the Restatement method to Commerce Clause jurisprudence. Drawing together all of the various exceptions to the local/national distinction that had accrued over the past three decades, Hughes sought to reformulate them into a single, synthetic principle. The current of commerce cases were "particular, and not exclusive, illustrations" of the instances in which the federal government might, under the aegis of the commerce power, regulate activities that were, when considered separately, purely local in nature. Several cases had authorized congressional regulation of the intrastate rates of common carriers in order to prevent unjust discrimination against interstate commerce.²³⁹ The Safety Appliance Act and the Hours of Service Act had similarly been upheld as applied to instrumentalities and persons working solely in intrastate transportation.²⁴⁰ Antitrust prosecutions against combinations of employers engaged in productive industry had been sustained in *Standard Oil Co. v.*

238. See cases discussed *infra* notes 241-43.

239. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37-38 (1937) (citing *Shreveport Case*, 234 U.S. 342, 351-52 (1914); *Florida v. United States*, 282 U.S. 194, 210-11 (1931); *Wisconsin R.R. Comm'n v. Chicago, B. & Q. R.R. Co.*, 257 U.S. 563, 588 (1922)).

240. See *Jones & Laughlin*, 301 U.S. at 38 (citing *Baltimore & Ohio R.R. Co. v. ICC*, 221 U.S. 612 (1911); *Southern Ry. v. United States*, 222 U.S. 20 (1911)).

*United States*²⁴¹ and *United States v. American Tobacco Co.*²⁴² Similarly, the Sherman Act had been consistently and successfully applied to the conduct of employees engaged in production where it had been shown that such conduct was intended to restrain or control the supply of a product entering and moving in interstate commerce.²⁴³

From among these disparate exceptions to the local/national distinction of dual federalism, Hughes concluded, one could deduce a single synthetic principle of general application. "Although activities may be intrastate in character when separately considered," wrote Hughes, "if they have such a close and substantial relation to 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."²⁴⁴

Hughes was undoubtedly aware that the principle he was articulating was rather amorphous, and he hastened to assure that the Court did not intend to tamper with the contours of dual federalism:

Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree.²⁴⁵

As this passage illustrates, the distinction between direct and indirect burdens on commerce was not obsolete—it was simply no longer formal.²⁴⁶ As it had in *Nebbia*, the Court declined to decide an issue of constitutional law by recourse to a formalist metaphysic. "We are asked to shut our eyes," Hughes exclaimed,

to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. . . . We have often said that interstate commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience.²⁴⁷

Interestingly, this deformalization of the direct/indirect distinction,

241. 221 U.S. 1 (1911).

242. 221 U.S. 106 (1911).

243. See *Jones & Laughlin*, 301 U.S. at 39-40 (citing *Local 167 v. United States*, 291 U.S. 293, [2]97 (1934); *Bedford Cut Stone Co. v. Stone Cutters' Ass'n.*, 274 U.S. 37 (1927), superseded by statute, *Norris-LaGuardia Act*, 29 U.S.C. §§ 101-110, 113-115, as stated in *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, 457 U.S. 702 (1982); *Loewe v. Lawlor*, 208 U.S. 274 (1908); *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295 (1925)).

244. *Jones & Laughlin*, 301 U.S. at 37.

245. *Id.* (citation omitted).

246. Indeed, one finds Justice Roberts employing the notion of direct and indirect burdens on commerce in a majority opinion as late as 1939. See *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346 (1939).

247. *Jones & Laughlin*, 301 U.S. at 41-42.

which mirrored *Nebbia's* deformalization of the public/private distinction, occurred in cases that the Government had argued on a current of commerce theory—the doctrine within which the two distinctions had become conflated. The logical consequences that *Nebbia's* deformalization held for Commerce Clause doctrine were thus realized in the first current of commerce case the Court saw in the post-*Nebbia* era.

The language Hughes used to adumbrate his formulation was clearly influenced by Cardozo. Cardozo had, in his *Schechter* concurrence, stated that the law was not indifferent to considerations of degree, but that “[t]o find immediacy or directness here is to find it almost everywhere.”²⁴⁸ “There is a view of causation,” Cardozo had written, “that would obliterate the distinction between what is national and what is local in the activities of commerce. . . . Activities local in their immediacy do not become interstate and national because of distant repercussions.”²⁴⁹

Unfortunately, there is virtually no record of the fascinating intracurial conversation that must have taken place on this issue. However, it does not seem at all improbable that Cardozo had convinced Hughes and Roberts of several things. First, in light of the extent to which the economy had become integrated since the days of their youth, the categories of direct and indirect, which they had inherited from the nineteenth century Court, were no longer satisfactory ways of describing the manner in which certain activities affected interstate commerce. Second, in light of the dissatisfaction they had expressed in *Nebbia* with rigidly formalistic ways of interpreting the Due Process Clause, it was incongruous to cling to such a formalistic way of construing the Commerce Clause. Third, in light of the numerous cases carving out exceptions to the local/national distinction, many of which Hughes had either written or joined, formalistic doctrinal expressions of that distinction no longer accurately stated the nation’s constitutional law. Finally, as the ultimate expositors of constitutional principles, it was incumbent upon the Justices to distill from the various fragments of existing Commerce Clause doctrine a single, unifying principle.

This is precisely what had happened during the drafting of the Restatement of Contracts in the 1920s. Samuel Williston (born in 1861) and Arthur Corbin (born in 1874) had been engaged in a fundamental dispute over what should be the Restatement’s definition of consideration. Williston was a devotee of the very strict, classical definition of consideration set forth in section 75. Corbin, a great admirer of the contract opinions written by Cardozo (born in 1870) while on the New York Court of Appeals, argued for the broader, detrimental reliance definition set forth in section 90. Initially, Williston and his followers won out. However, at the ensuing meeting of the Restatement group, Corbin

248. *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring).

249. *Id.*

presented a plethora of cases in which the courts had imposed contractual liability in the absence of consideration as defined by section 75. "Gentlemen," he reportedly said to them, "you are engaged in restating the common law of contracts. . . what do you intend to do about these cases?"²⁵⁰ The Restaters found Corbin's arguments unanswerable and, as a result, section 90 was included in the Restatement of Contracts.²⁵¹

For Hughes and Roberts, the beauty of adopting Cardozo's formulation was that it did not commit them to results different from those they had voted for in *Schechter* and *Carter Coal*. Cardozo had concurred in *Schechter*; and while he had dissented in *Carter Coal*, he had not contended that the provisions of the Guffey Coal Act regulating working conditions were constitutional—rather, he had written that the question of the constitutionality of those provisions was not yet ripe. Cardozo's formulation thus permitted Hughes and Roberts to accede to the intellectual merits of their fellow Justice's arguments without feeling the twinge of intellectual hypocrisy.

Yet Hughes and Roberts must have recognized that this subtlety would be lost on most, and surely knew that the midst of the Court-packing crisis would be considered a suspicious time during which to restate Commerce Clause jurisprudence. Indeed, they must have been sorely tempted to accept the doctrinally consistent alternative so painstakingly prepared for them by the NLRB lawyers. Rather than choosing to travel either the comfortable path paved by the current of commerce doctrine or the formidable restatement path, the Justices chose a middle course. The Government had prepared for the Court a rationale with an impeccable pedigree; and while the majority declined specifically to rest its decision on that rationale, the opinion made clear that, had it wished to do so, the Court could easily have reached the same result with the current of commerce theory. The availability of the current of commerce theory as a doctrinal backstop served to distinguish the Wagner Act cases from *Schechter* and *Carter Coal*. Furthermore, it also served to assure both the Justices and their audience that the Court was not trimming its principles to achieve the politically expedient result. The availability of the current of commerce rationale gave the Court the liberty to concede the persuasiveness of Cardozo's position.

Accordingly, Hughes structured his opinions so that the availability of the current of commerce theory was apparent to anyone who read the decisions. In describing Jones & Laughlin's enterprise, Hughes emphasized the far-flung nature of its holdings, the integrated, interstate nature of its operations,²⁵² and the importance of the business in which the cor-

250. Grant Gilmore, *The Death of Contract* 63 (1974).

251. *See id.* at 55-85.

252. The corporation, Hughes wrote, was

the fourth largest producer of steel in the United States. With its subsidiaries—nineteen in number—it is a completely integrated enterprise, owning and operating ore, coal and limestone properties, lake and river transportation facilities

poration was engaged.²⁵³ By selecting these features of the enterprise for emphasis, Hughes described Jones & Laughlin's Aliquippa plant in terms that could easily be characterized as those of a business affected with a public interest located in a current of interstate commerce. Raw materials came to Aliquippa from points outside Pennsylvania; at Aliquippa those materials were transformed into steel; the steel was then shipped to purchasers at various locations around the country.²⁵⁴ The Labor Board, Hughes noted, had characterized the company's plants at Pittsburgh and Aliquippa as

the heart of a self-contained, highly integrated body. They draw in the raw materials from Michigan, Minnesota, West Virginia [and] Pennsylvania in part through arteries and by means controlled by the respondent; they transform the materials and then pump them out through the vast mechanism which the respondent has elaborated.²⁵⁵

The objective and effect of the corporation's far-flung activities were the movement of ore from the Great Lakes in raw form to points around the country in finished form. The Aliquippa plant stood in the very gateway of that integrated, interstate movement.

Hughes' opinions in the two companion cases to *Jones & Laughlin, NLRB v. Fruehauf Trailer Co.*²⁵⁶ and *NLRB v. Friedman-Harry Marks Clothing Co.*,²⁵⁷ also made clear the availability of the current of commerce rationale. In each case raw or semi-finished materials were imported from out of state and were, after manufacture, exported to other states in semi-finished or finished form. In each case, labor strife threatened a significant disruption of this interstate flow.

In culling the facts from the Labor Board's findings, Hughes carefully

and terminal railroads located at its manufacturing plants. It owns or controls mines in Michigan and Minnesota. It operates four ore steamships on the Great Lakes, used in the transportation of ore to its factories. . . . It owns limestone properties in various places in Pennsylvania and West Virginia. . . . Much of its product is shipped to its warehouses in Chicago, Detroit, Cincinnati and Memphis . . . In Long Island City, New York, and in New Orleans it operates structural steel fabricating shops in connection with the warehousing of semi-finished materials sent from its works. . . . It has sales offices in twenty cities in the United States and a wholly-owned subsidiary which is devoted exclusively to distributing its product in Canada. Approximately 75 per cent. of its product is shipped out of Pennsylvania.

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 26-27 (1937).

253. To carry on the activities of the entire steel industry, 33,000 men mine ore, 44,000 men mine coal, 4,000 men quarry limestone, 16,000 men manufacture coke, 343,000 men manufacture steel, and 83,000 men transport its product. Respondent has about 10,000 employees in its Aliquippa plant, which is located in a community of about 30,000 persons.

Id. at 27. In a decade of chronic unemployment, there could be little doubt that the steel industry was affected with a national public interest.

254. *Id.* at 26.

255. *Id.* at 27.

256. 301 U.S. 49 (1937).

257. 301 U.S. 58 (1937).

placed Fruehauf's Detroit trailer manufacturing plant in a current of interstate commerce:

Respondent maintains 31 branch sales offices in 12 different States and has distributors and dealers in the principal cities of the country. A wholly-owned subsidiary operates in Toronto, Canada, where sales are made and considerable assembly work is done with materials obtained from the Detroit plant and in Canada. More than 50 per cent in value of the materials used by the respondent in manufacture, assembly and shipping during the year 1934 were transported to its Detroit plant from Ohio, Illinois, Indiana, and other States. Most of the lumber was transported from Southern States and most of the finished parts were transported from States other than Michigan. . . . More than 80 per cent of its sales are of products shipped outside the State of Michigan through and to other States and foreign countries.²⁵⁸

Noting the importance of Fruehauf in the trailer industry and the indispensable nature of its manufacturing plant, Hughes observed:

In 1934, respondent's sales amounted to \$3,318,000. Its nearest competitor sold only 37 per cent of that amount. . . . The manufacturing and assembly operations at the Detroit plant are essentially connected with and dependent upon the purchase, sales and distribution operations without the State of Michigan.²⁵⁹

Hughes similarly culled facts from the Labor Board's findings placing Marks' clothing manufacturing plant in a current of interstate commerce:

Respondent, a Virginia corporation, has its plant at Richmond, where it is engaged in the purchase of raw materials and the manufacture, sale and distribution of men's clothing. The principal materials are woolen and worsted goods. 99.57 per cent of these goods come from States other than Virginia, 75 per cent being purchased in New York and fabricated for the most part in other States. Cotton linings come from several southern States. . . . Of the garments manufactured by respondent, 82.8 per cent are purchased by customers outside the State.²⁶⁰

Concerning the men's clothing industry generally, Hughes noted the following findings of the Board:

"The men's clothing industry is thus an industry which is nearly entirely dependent in its operations upon purchases and sales in interstate commerce and upon interstate transportation. There is a constant flow of raw wool from the western States and foreign countries to the mills of New England where it is transformed into men's wear fabrics, then to the sponging and shrinking plants of New York and Philadelphia, then, joined by the other necessary raw materials, to the fabricating factories of the Middle Atlantic States for manufacture into

258. *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49, 53 (1937).

259. *Id.* at 53-54.

260. *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58, 72 (1937).

clothing.”²⁶¹

Hughes also noted the significance of the clothing industry in American life, citing the Board’s finding that “[t]he men’s clothing industry is among the twenty most important manufacturing industries in this country.”²⁶² With respect to the importance of labor relations within that important industry, Hughes observed:

“The Amalgamated Clothing Workers of America is a labor organization composed of over 125,000 men and women employed in the men’s and boys’ clothing industry. . . . The periods before the recognition by the employers of the Amalgamated was marked by long and bitter strikes. In 1921 there had been a general strike in New York City which had lasted for eight months and caused losses of millions of dollars to employers and employees. A similar general strike in New York in 1924 lasted for six weeks and involved all of the 500 firms in that area and their 35,000 workers. The wage loss to the workers was nearly \$6,000,000, the financial loss to the manufacturers ran into the millions. . . . Today the Amalgamated has collective agreements with clothing manufacturers and contractors employing the greater number of the clothing workers in the United States.”²⁶³

In both *Fruehauf* and *Marks*, the Court simply set forth the facts and, in the final paragraph of the opinion, upheld the application of the Wagner Act to the enterprise in question, “[f]or the reasons set forth in our opinion in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*”²⁶⁴ The Court neither elaborated doctrine nor applied, in any detailed fashion, doctrine to facts. The facts set forth in the opinions were the facts deemed by the Court to be relevant, under *Jones & Laughlin*, to a determination of the validity of the Act’s application to the respective enterprises.

Thus, in each of these three companion cases, the Court carefully located the enterprise in a current of interstate commerce, and then proceeded to characterize the enterprise, or the industry of which it was a part, in the broad language of a business affected with a public interest innovated by *Nebbia*. Like Lord Hale’s port warehouses and *Munn*’s grain elevator, each of the enterprises in the Wagner Act cases stood astride a current of commerce and was capable of halting its flow. If a business activity could be located in a current of interstate commerce, and the enterprise itself or the industry of which it was a part could be characterized as affected with a public interest (as almost any industry could in the wake of *Nebbia*), the fact that the enterprise was one of production did not preclude federal regulation. It was not necessary to

261. *Id.* at 73 (quoting Order of the National Labor Relations Board (Mar. 28, 1936)).

262. *Id.* at 72.

263. *Id.* at 73-74 (quoting Order of the National Labor Relations Board (Mar. 28, 1936)).

264. *Id.* at 75. See *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49, 57 (1937).

overrule *Carter Coal* in order to embrace this proposition, and the Court did not do what was not required.

Justice Roberts himself, writing years later, suggested that the current of commerce metaphor had in fact formed part of the basis of the Court's decision. Describing the theory on which the Wagner Act had been framed and upheld, the retired Justice wrote:

That act premises its provisions upon the proposition that industrial conflicts interfere with and limit interstate transportation and commerce. Albeit a strike is localized in a given community, the flow of goods to and from that community is interfered with. The interference may be so great as to be a matter of national concern . . . even though the situations with which the statute deals are in their essence purely local.²⁶⁵

Moreover, there were several contemporary commentators who doubted that the Wagner Act cases stood for anything broader than the proposition that the labor relations of a productive enterprise that stood astride a current of interstate commerce could be regulated in the national public interest.²⁶⁶

The Four Horsemen, defenders of the formalist faith, of course could not accept Hughes' restatement. Moreover, because they viewed the enterprises in question as purely private businesses not affected with a public interest, they could not concede the applicability of the current of commerce theory.²⁶⁷ However, their dissents should not be taken as a paroxysm of crude anti-labor sentiment. In the companion case of *Washington, Virginia & Maryland Coach Co. v. NLRB*,²⁶⁸ the Horsemen joined in the Court's unanimous opinion upholding the application of the Wagner Act to an interstate common carrier. Just two weeks earlier, in

265. Owen J. Roberts, *American Constitutional Government: Blueprint and the Structure*, 29 B.U. L. Rev. 1, 25 (1949).

266. See, e.g., Robert E. Cushman, *Constitutional Law in 1936-1937*, 32 Am. Pol. Sci. Rev. 278, 283-84 (1938) ("It is important to note, however, that in none [of these cases] does the court generalize beyond the facts of the case. There is no broad holding that all labor relations in industries producing goods for the interstate market are to be regarded as directly connected with interstate commerce."); D.J. Farage, *That Which "Directly" Affects Interstate Commerce*, 42 Dick. L. Rev. 1, 8-9 (1937) (suggesting that the finding of a direct effect on interstate commerce in the Wagner Act cases may have been "predicated on the fact that both the raw materials as well as the finished product moved in interstate commerce"); F.D.G. Ribble, *The Constitutional Doctrines of Chief Justice Hughes*, 41 Colum. L. Rev. 1190, 1207 (1941) ("A return to the opinion rendered by Hughes in the *Jones and Laughlin* case will demonstrate existing deference to the idea that the commerce power must be related to humanly directed movement from state to state."); Burton A. Finberg, Note, 17 B.U. L. Rev. 710, 721 (1937) ("The crux of the majority opinion is that Congress may protect the 'stream of commerce,' and that where a concern engaged in the business of manufacture buys its raw materials outside the state, converts it into a manufactured product, and ships that product to points outside the state—that concern is within the 'stream of commerce.'").

267. See *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58, 97-99, 103 (1937) (McReynolds, J., dissenting).

268. 301 U.S. 142 (1937).

Virginian Railway Co. v. System Federation No. 40,²⁶⁹ the Horsemen had joined in the Court's unanimous opinion upholding the collective bargaining provisions of the amended Railway Labor Act.²⁷⁰ However, these cases, unlike the Wagner Act cases in which the Horsemen dissented, involved a business affected with a public interest clearly engaged in interstate transportation.

The dissenters, who had the advantage of being present when the cases were discussed in conference, clearly believed that the majority was, at least in part, basing its decision on the current of commerce doctrine. "We are told," wrote Justice McReynolds,

that Congress may protect the "stream of commerce" and that one who buys raw materials without the state, manufactures it therein, and ships the output to another state is in that stream. Therefore it is said that he may be prevented from doing anything which may interfere with its flow. . . . May a mill owner be prohibited from closing his factory or discontinuing his business because so to do would stop the flow of products to and from his plant in interstate commerce? May employees in a factory be restrained from quitting work in a body because this will close the factory and thereby stop the flow of commerce? . . . May arson of a factory be made a federal offense whenever this would interfere with such flow? If the ruling of the Court just announced is adhered to these questions suggest some of the problems certain to arise.²⁷¹

McReynolds' choice of examples for his *reductio ad absurdum* is revealing. The arson example merely evinces a solicitude for the values of federalism. Yet, the other two examples combine federalist concerns with a concern for the protection of the kinds of zones of private economic decisionmaking safeguarded by such due process doctrines as liberty of contract and the business affected with a public interest. Federalism and due process were both sentinels standing guard over a vision of liberty. The current of commerce doctrine's use of a due process formula to constrain a deviation from federalist orthodoxy was a monument to the normative commonality of these two principal pillars of laissez-faire formalism, and its most striking example of their conceptual interrelation. *Nebbia*, by renouncing its strand of due process doctrine, had sundered this relation. It was no accident, then, that the dissenters in *Nebbia* were also the dissenters in the Wagner Act Cases.

269. 300 U.S. 515 (1937).

270. Lest it be thought that these votes were sacrifices made to appease backers of the Court-packing plan, it should be remembered that the Horsemen also voted unanimously to uphold the collective bargaining provisions of the original Railway Labor Act in 1930. See *Texas & N.O.R. Co. v. Railway Clerks*, 281 U.S. 548 (1930).

271. *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58, 97-98 (1937) (McReynolds, J., dissenting).

CONCLUSIONS AND A CODA

A close study of the Wagner Act decisions thus reveals that the current of commerce doctrine, as implicitly modified by *Nebbia v. New York*, served as the safety-valve theory that allowed the majority to synthesize existing commerce doctrine into a general principle while at the same time assuring themselves and the world that they were not succumbing to political pressure. Had the current of commerce theory not existed, the case might well have gone the other way.

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. Doctrinal synthesis had been a dominant mode of legal reasoning and scholarship at least since Langdell, and was warmly embraced by the contemporary Restatement projects. Moreover, it is clear that what troubled the Court in these cases was the physical obstruction to the interstate movement of goods that might be created by unresolved industrial strife. The opinions clearly illustrate the Court's continued conceptualization of interstate commerce as the transportation of goods and people across state lines, and its understanding of the commerce power as the power to remove physical obstructions to that movement. Finally, the Court chose to shore up the synthetic portion of its opinion with an established doctrinal buttress: the current of commerce doctrine. No doubt the channel cut by the current had never before been understood to be so wide. However, neither the 1936 election nor the Court-packing plan were required to broaden the channel. The expansion was implicit in the internal logic of *Swift* and *Nebbia*.

Thus the Court, in deciding these cases, continued to operate within dominant stylistic, conceptual and doctrinal paradigms. This was not revolution; it was the kind of incremental evolution that Thomas Kuhn might have described as "normal science."²⁷² In the late 1930s and early 1940s, however, Franklin Roosevelt would have the opportunity to re-fashion the Court by appointing men who had come to legal maturity not in the age of Cooley and Langdell, but rather in the era of Pound and Llewellyn. During the tenure of these men, the obstruction-to-transportation theory of commerce undergirding cases like *Jones & Laughlin* quickly gave way to a broader understanding of the federal commerce power. This new understanding, under which federal regulatory power became truly plenary, rendered the current of commerce doctrine obsolete.

By the time the Court handed down its opinion in *United States v. Darby*²⁷³ in 1941, all of the Four Horsemen had left the Court. Of the Justices who had been on the Court in 1937, only Hughes, Roberts and Stone remained. The case concerned a provision of the Fair Labor Stan-

272. Thomas S. Kuhn, *The Structure of Scientific Revolutions* 10 (2d ed. 1970).

273. 312 U.S. 100 (1941).

dards Act of 1938 that prohibited the employment of workers engaged in "production for interstate commerce" at substandard wages or for excessive hours.²⁷⁴ The case presented a golden opportunity for (if it did not require) the Court to overrule *Hammer v. Dagenhart*.²⁷⁵ *Hammer*, which had struck down the nation's first federal law regulating child labor,²⁷⁶ had long been a black mark on the Supreme Court's record. Indeed, *Hammer* and a later case striking down a subsequent child labor law²⁷⁷ had spawned a movement to add a Child Labor Amendment to the Constitution, a movement that very nearly succeeded.²⁷⁸ A Justice sensitive to the public's passion for social reform and concerned about his place in history almost certainly would have relished the opportunity to pen the decision overturning such an odious precedent. Hughes had taken the lead in writing such controversial commerce decisions as *Schechter* and *Jones & Laughlin*, and one might well have expected the Chief to take the lead in *Darby*.

Yet he did not. Instead, he ceded the limelight, and assigned the opinion to Stone. At the *Darby* conference, Hughes expressed substantial reservations about the power of Congress to regulate all "production for commerce."²⁷⁹ Production was not in itself commerce, Hughes argued; and Congress had in the Act provided "no machinery for determining whether . . . in a particular case" the requisite "close and substantial relationship" between the act of production and interstate commerce existed.²⁸⁰ If the regulatory power of Congress were to be extended to local acts having only "remote relationships" to interstate commerce, Hughes argued, "our dual system of government would be at an end."²⁸¹ Here, Hughes noted, the report of the Labor Committee had indicated that the Act was intended to reach "every act no matter how trivial which has a relationship to commerce."²⁸² When the vote on the case was taken, seven of the Justices voted to uphold the Act; but Hughes passed.²⁸³ Indeed, it appears that Hughes came near to dissenting from Stone's opinion upholding the Act and interring the Tenth Amendment as an independent limitation on federal power. "Even with the best possible test," he wrote Stone privately, "the statute is a highly unsatisfactory one, but as it is a border line case I should prefer not to write."²⁸⁴ More-

274. *Id.* at 109.

275. 247 U.S. 251 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941).

276. See Act of Sept. 1, 1916, ch. 432, 39 Stat. 675 (1916).

277. See *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922) (striking down the Child Labor Tax, Act of Feb. 24, 1919, title XII, ch. 18, 40 Stat. 1057, 1138 (1919)).

278. See Carl B. Swisher, *American Constitutional Development* 729-32 (2d ed. 1954).

279. Conference Notes on No. 82, U.S. v. F.W. Darby Lumber Co. (Dec. 21, 1940) (on file with the Library of Congress, Douglas MSS, Box 51).

280. *Id.*

281. *Id.*

282. *Id.*

283. McReynolds also passed at the conference vote, and retired from the Court before the opinion was handed down. See *id.*

284. Letter from Chief Justice Hughes to Justice Stone re: United States v. Darby

over, in place of his usually cheerful "I agree," he wrote grudgingly on the back of the circulated draft of Stone's opinion, "I will go along with this."²⁸⁵

Even Hughes had retired by the time the Court placed its imprimatur on the Agricultural Adjustment Act of 1938 in *Wickard v. Filburn*. The fascinating story of Justice Jackson's intellectual struggle with the Commerce Clause issues presented in *Wickard* must await a later day for an adequate recounting. However, as one reads Jackson's opinion finding that Congress had the power to regulate the amount of wheat Mr. Filburn could grow for home consumption (an activity that was admittedly "neither interstate nor commerce"),²⁸⁶ one recognizes the conceptual distance the Court had travelled in the years since *Jones & Laughlin*.

Growth of wheat for home consumption, Jackson reasoned, reduced the demand for wheat sold in interstate commerce and thereby reduced the price at which such wheat was sold. Because Congress was empowered to regulate the prices at which goods were sold in interstate commerce, it could regulate those activities that affected such prices. Though Filburn's wheat-growing activities taken alone might exert little or no effect on the price of wheat, his activities, "taken together with that of many others similarly situated,"²⁸⁷ might exert a substantial effect. Thus the kinds of arguments that had in *Schechter* been greeted with a skeptical eye even by Cardozo, carried a unanimous Court only seven years later. Indeed, Stone's comments on Jackson's November 11, 1942, draft of the *Wickard* opinion testify to the intellectual distance the Court had traversed. "I like very much," Stone wrote, "what you say about 'direct' and 'indirect.' I had hoped for something like that when I remained silent and left it to Cardozo to write the concurring opinion in the *Schechter* Case. But he did not see the matter as you and I do."²⁸⁸

Economic effects upon commerce that, in 1935, a unanimous Court considered too remote and indirect to subject local activities to congressional regulation, were now sufficient to justify federal legislation. To embrace this proposition, it was necessary for Jackson and his colleagues to *reject* much of what Cardozo had written in *Schechter* and what Hughes had written in *Jones & Laughlin*. Embracing Cardozo's *Schechter* views in *Jones & Laughlin*, Hughes had stated that the scope of congressional power

must be considered in the light of our dual system of government and

Lumber Co. 1-2 (Jan. 27, 1941) (on file with the *Fordham Law Review* and the Library of Congress, Stone MSS, Box 66).

285. Opinion draft, *United States v. Darby Lumber Co.* (Feb. 3, 1941) (on file with the Library of Congress, Stone MSS, Box 66).

286. Letter from Justice Jackson to Chief Justice Stone re: *Wickard v. Filburn* 1-2 (May 25, 1942) (on file with the Library of Congress, Jackson MSS, Box 125).

287. *Wickard v. Filburn*, 317 U.S. 111, 128 (1942).

288. Chief Justice Stone's comments on Justice Jackson's November 11, 1942, draft opinion of *Wickard v. Filburn* (on file with the Library of Congress, Jackson MSS, Box 125).

may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree.²⁸⁹

Jackson's opinion dismissed as irrelevant the question of whether the effect on commerce was direct or indirect, remote or proximate; the sole relevant issue was whether the effect exerted was in the aggregate "substantial."²⁹⁰ In a memorandum to his law clerk, Jackson had privately derided the direct/indirect distinction to which Hughes had clung as a "legal phrase of limitation" having "almost no value in weighing economic effects," one among many unsatisfactory "judicial shibboleths."²⁹¹ In a separate memorandum, Jackson even criticized the *Darby* opinion to which Hughes had only reluctantly assented. *Darby's* statement that Congress may regulate what is "appropriate" for regulation in connection with interstate commerce, Jackson wrote, had as a test "no real value."²⁹² In private correspondence, Jackson disavowed any further role for the Court in maintaining what Hughes had called "our dual system of government." In a letter to then-Circuit Judge Sherman Minton explaining his *Wickard* opinion, Jackson wrote,

in any case where Congress thinks there is an effect on interstate commerce, the Court will accept that judgment. All of the efforts to set up formulae to confine the commerce power have failed. When we admit that it is an economic matter, we pretty nearly admit that it is not a matter which courts may judge.²⁹³

Darby cited *Jones & Laughlin* only once in passing;²⁹⁴ *Wickard* did not cite it at all.²⁹⁵ Such short shrift leads one to wonder whether the Justices of 1941-42 regarded *Jones & Laughlin* as a particularly important or revolutionary case.²⁹⁶ They certainly recognized that much of what Hughes had written was in tension with their broader conceptions of federal power—Jackson clearly saw Hughes' opinion as only one among

289. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

290. *Wickard*, 317 U.S. at 125.

291. Memorandum for Mr. Costelloe re: *Wickard v. Filburn* 14-18 (July 10, 1942) (on file with the *Fordham Law Review* and the Library of Congress, Jackson MSS, Box 125).

292. Memorandum for Mr. Costelloe re: *Wickard v. Filburn* 3 (June 19, 1942) (on file with the *Fordham Law Review* and the Library of Congress, Jackson MSS, Box 125).

293. Letter from Justice Jackson to Circuit Judge Sherman Minton 1-2 (Dec. 21, 1942) (on file with the *Fordham Law Review* and the Library of Congress, Jackson MSS, Box 125).

294. See *United States v. Darby*, 312 U.S. 100, 119 (1941).

295. See *Wickard v. Filburn*, 317 U.S. 111 (1942).

296. Indeed, there is reason to doubt that Stone and Jackson believed that *Jones & Laughlin* had overruled *Carter Coal*. In *Darby*, Stone stated that *Carter* had been "limited in principle" rather than overruled by the Wagner Act cases. 312 U.S. at 123. And in a draft of the *Wickard* opinion, Jackson cited *Darby*, rather than *Jones & Laughlin*, as the case having overruled *Carter Coal*. See *Wickard v. Filburn*, Memorandum by Mr. Justice Jackson at 7 (undated) (on file with the *Fordham Law Review* and the Library of Congress, Jackson MSS, Box 125).

many inadequate judicial attempts to articulate a formula that would salvage the role of the Court in supervising exercises of the commerce power. While Hughes had taken care to draw a portrait of interstate movement of goods being physically impeded, to locate Jones & Laughlin's plant in a current of interstate commerce that could be envisioned in the mind's eye, the authors of *Darby* and *Wickard* believed that it was simply no longer necessary to bother. The current of commerce doctrine, once the most promising doctrinal escape hatch from the strictures of dual federalism, had in a very short time become little more than a quaint artifact of a bygone era.

The trajectory of the Court's Commerce Clause jurisprudence between 1937 and 1942 is no doubt the subject of a complex story that has yet to be told adequately. However, there can be little doubt that, by 1942, the Court was thinking about the federal commerce power (and the role of the Court in policing exercises of that power) in ways that were fundamentally at odds with the ways the Court had treated such issues only five years before. Indeed, *Jones & Laughlin* bears in many respects a far greater resemblance to the commerce cases that preceded it than it does to those that followed. The fact that such a rapid transformation of Commerce Clause jurisprudence coincided with Roosevelt's bevy of new appointments to the Court brings to mind Max Planck's remark in his *Scientific Autobiography*: "[A] new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it."²⁹⁷ It was the replacement of the Nine Old Men with younger men who had more recently come to legal maturity that brought forth a new paradigm for Commerce Clause jurisprudence. *This*—not the plot of the conventional story of capitulation to external political pressure—was the "structure" of the constitutional revolution. Ironically, then, the proponents of the electoral theory of the revolution in Commerce Clause jurisprudence are correct—not because the results of the 1936 election persuaded the Nine Old Men to ratify the New Deal, but because the Democratic victory enabled Franklin Roosevelt, through the power of appointment, to refashion the high Court in his own image.

297. Max Planck, *Scientific Autobiography and Other Papers* 33-34 (F. Gaynor trans., 1949). See also Kuhn, *supra* note 272, at 151 (citing Max Planck, *Scientific Autobiography and Other Papers* 33-34).