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LOST FIDELITIES

BARRY CUSHMAN*

Owen Roberts was accused of a variety of things in 1937, but fidelity was not among them. While he was widely razzed for his apparently inconsistent performance on the bench, some of the most trenchant criticism came from insiders. Referring to the April 12 decisions upholding the National Labor Relations Act, Justice Harlan Fiske Stone remarked, "in order to reach the result which was reached in these cases last Monday, it was necessary for six members of the Court either to be overruled or to take back some things they subscribed to in the Guffey Coal Act case."¹ Felix Frankfurter, an intimate of Justice Brandeis

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1. ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 459 (1956). There is evidence that Roberts's behavior perplexed other members of the Court as well. See Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311, 315 (1955) (reproducing a memorandum in which Roberts reported that when he voted in conference against summary disposition in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), one of the Four Horsemen asked another, "What is the matter with Roberts?"). Joseph L. Rauh, Jr., Justice Cardozo's clerk in 1937, offered two somewhat differing accounts suggesting that Cardozo agreed with Stone's assessment. In the first account, published in 1983, Rauh reported that he was waiting at the Justice's apartment when Cardozo

came back after the Wagner Act had been upheld in the *Jones and Laughlin* case. He said, "Oh, Mr. Rauh, you won't believe what happened. Roberts and Hughes switched without even saying why they were switching." He referred to the fact that in the *Carter Coal* case the year before the Court had ruled out a law very similar to the Wagner Act. Everyone knew why. It was because Roosevelt's Court-packing plan had the Court scared stiff. I still remember the wonderment with which Cardozo said, "You know, judges ought to explain their actions. They have a right to change, but they oughtn't to pretend that they're not changing." He had such a wonderful time when things like that happened. Of course, it was a vindication for him because he'd written the *Carter Coal* dissent and now that was the law of the land.

and a persistent correspondent of Stone's, wrote the latter that Roberts's "somersault" in *West Coast Hotel Co. v. Parrish*² was "incapable of being attributed to a single factor relevant to the professed judicial process. Everything that he now subscribes to he rejected not only June first last, but as late as October twelfth. . . . It is very, very sad business."³ On the day the Court announced its decisions in the *Labor Board Cases*, Frankfurter

THE MAKING OF THE NEW DEAL: THE INSIDERS SPEAK 58 (Katie Loucheim ed., 1983) (citations omitted). In the second account, published in 1990, Rauh recounted that:

when Cardozo reported on the conference action during our ride home from the courthouse, he was elated by the switches. But about all that this kindly gentleman could bring himself to say in criticism was that he "considered it quite an achievement to make the shift without even a mention of the burial of a recent case." He did smile some time later when I told him the gag going around about a "switch in time saves Nine," but he never said anything like that himself.

Joseph L. Rauh, Jr., *An Unabashed Liberal Looks at a Half-Century of the Supreme Court*, 69 N.C. L. REV. 213, 217-18 (1990). Interestingly, Felix Frankfurter had used a similar locution in praising Roberts's opinion in *Nebbia v. New York*, 291 U.S. 502 (1934). Roberts, he wrote, had "showed what an empty husk 'affected with a public interest' really is and didn't even give decent Christian burial to the Sutherland-Butlerian concoction that price-fixing is forbidden by the Constitution." Letter from Felix Frankfurter to Learned Hand (Mar. 15, 1934), quoted in MICHAEL E. PARRISH, FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS 257 (1982).

The Cardozo-Rauh conversation is not related in Richard Polenberg's recent biography, *The World of Benjamin Cardozo: Personal Values and the Judicial Process* (1997). Andrew Kaufman, however, citing his 1958 interview with Mr. Rauh, reports that Cardozo was "amazed when both Hughes and Roberts voted at conference to uphold the statute" in the *Labor Board Cases* (*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)), because Cardozo had been unable to "find a satisfactory distinction" between the facts of those cases and those of *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). ANDREW L. KAUFMAN, CARDZO 526 (1998). The day after the Court announced the decisions, Cardozo wrote to Frankfurter: "What a change in the centre of gravity . . . since the previous term ended a year ago." *Id.*

For a discussion of whether the *Labor Board Cases* are plausibly understood as a vindication of Cardozo's dissent in *Carter Coal*, see BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 170-74 (1998).

2. 300 U.S. 379 (1937).

3. Letter from Justice Felix Frankfurter to Justice Harlan Fiske Stone (Mar. 30, 1937), quoted in PARRISH, *supra* note 1, at 271. On June 1, 1936, Roberts had joined the majority in striking down New York's minimum wage statute in *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936). On October 12, the Court had denied the State's petition for rehearing. See *Morehead v. New York ex rel. Tipaldo*, 299 U.S. 619 (1936) (mem).

wrote to Franklin Roosevelt, "I feel like finding some honest profession to enter."⁴ The following day Frankfurter wrote to Charles Wyzanski:

To me it is all painful beyond words, the poignant grief of one whose life has been dedicated to faith in the disinterestedness of a tribunal and its freedom from responsiveness to the most obvious immediacies of politics. . . . It all . . . gives one a sickening feeling which is aroused when moral standards are adulterated in a convent.⁵

Eight years later, in 1945, Roberts announced his resignation from the Court. It fell to then-Chief Justice Stone to draft the customary letter from the Justices to a departing colleague. Stone's letter expressed "a profound sense of regret that our association with you in the daily work of the Court must now come to an end."⁶ It commended Roberts for having "given to the work of the Court the benefit of your skill and wide knowledge of the law, gained through years of assiduous study and practice of your profession," and for having "faithfully discharged the heavy responsibility which rests upon a Justice of this Court with promptness and dispatch, and with untiring energy."⁷ Finally, the letter assured Roberts of his colleagues' "continued good will and friendly regard," and wished him "good health, abiding strength" and "the full enjoyment of those durable satisfactions which will come from the continued devotion of your knowledge and skill to worthy achievement."⁸

An effusive letter this was not. Justice Robert Jackson characterized it as "formal and not too cordial."⁹ Frankfurter, now himself an Associate Justice, described it as "the minimum of what you could write and say anything that wasn't ungracious."¹⁰ It

4. Letter from Justice Felix Frankfurter to President Franklin Roosevelt (Apr. 12, 1937), *quoted in* PARRISH, *supra* note 1, at 271.

5. Letter from Justice Felix Frankfurter to Charles Wyzanski (Apr. 13, 1937), *quoted in* PARRISH, *supra* note 1, at 272.

6. Memorandum from Chief Justice Harlan Fiske Stone to the Court, *quoted in* MASON, *supra* note 1, at 765.

7. *Id.*

8. *Id.* at 766.

9. Letter from Justice Robert Jackson to Chief Justice Harlan Fiske Stone (Sept. 8, 1945), *quoted in* MASON, *supra* note 1, at 767.

10. Letter from Justice Felix Frankfurter to Chief Justice Harlan Fiske Stone

was "to say the least not overgenerous."¹¹ But Stone's draft did contain one sentence of tribute that provoked such a controversy among the Justices that no letter to Roberts ever was sent. The tribute in question read: "You have made fidelity to principle your guide to decision."¹² Justice Hugo Black objected to this sentence and refused to sign the letter unless it were omitted. Justice William O. Douglas sided with Black.¹³ Justice Jackson objected that omission of the sentence left the letter "reading like a left-handed condemnation,"¹⁴ and wrote Stone that he did not want to join a letter to Roberts "that deliberately omits the only sentence that credits him with good motives—the quality I think he possessed above all others."¹⁵ Roberts, he insisted, "deserves better of us."¹⁶

The most vehement advocate for retaining the sentence, however, was Frankfurter. As he wrote Stone, he could not "in self-respect" sign any letter from which it was omitted:

So to do, would involve acquiescence in denial that Roberts *has* "made fidelity to principle" his "guide to decision." If there's one thing true about Roberts, that's it! He had, from my point of view, serious intellectual limitations—above all, a lack of a more or less coherent juristic or social philosophy, except in a very few defined areas. But "fidelity" to what were for him the governing "principles" for the decision in a case was his outstanding characteristic—often misconceiving of course the relevance of principles or their conditioned limits. I *know* that was Brandeis' strong view of him."¹⁷

(Aug. 20, 1945) (on file in the Frankfurter Papers, LC, Reel 64).

11. *Id.* (quoting Letter from Justice Robert Jackson to Chief Justice Harlan Fiske Stone (Sept. 8, 1945)).

12. MASON, *supra* note 1, at 765 (quoting from the "Memorandum for the Court").

13. See MASON, *supra* note 1, at 766-67; Letter from Justice Frankfurter to Chief Justice Stone (Aug. 25, 1945) (on file in the Frankfurter Papers, Harvard, Series III, Reel 4); Letter from Chief Justice Stone to Justice Frankfurter (Sept. 18, 1945) (on file in the Frankfurter Papers, LC, Reel 64).

14. Letter from Justice Jackson to Chief Justice Stone (Sept. 8, 1945) (on file in the Frankfurter Papers, Harvard, Series III, Reel 4), *quoted in* MASON, *supra* note 1, at 767.

15. *Id.*

16. *Id.*

17. Letter from Justice Frankfurter to Chief Justice Stone (Aug. 20, 1945), *supra* note 10.

Ten days later Frankfurter expressed these views to all of his colleagues. In a letter addressed "Dear Brethren," Frankfurter wrote:

I cannot be party to the denial, under challenge, of what I believe to be the fundamental truth about Roberts, the Justice,—that he "made fidelity to principle" his "guide to decision." I *know* that that was Justice Brandeis' view of Roberts, whose character he held in the highest esteem. My numerous and serious disagreements with Roberts are, of course, beside the point.¹⁸

The squabble over the Roberts retirement letter reflected deep personal and jurisprudential divisions that had emerged on the Stone Court.¹⁹ But these cleavages alone do not explain the form that the fight took. In particular, they do not explain why the proponents of Stone's letter were, in 1945, insistent upon characterizing Roberts in a manner so at odds with their assessments of him only eight years earlier. To be sure, fellow feeling and a sense of decorum informed the campaign for a gracious farewell. But why were Jackson and particularly Frankfurter prepared to go to the mat over a sentence that praised Roberts for, of all things, his "fidelity to principle"? And why did Stone, the only other remaining member of the 1937 Court, select such an obviously contested encomium in the first place?

An examination of Roberts's performance in economic regulation cases raising Fifth and Fourteenth Amendment questions may provide a better understanding of how Stone, Jackson, and Frankfurter might have come to see a consistency and integrity to their departing colleague's jurisprudence that others did not detect. That examination, which is the focus of Part III of this Article, should in turn provide an improved understanding of the mechanisms of constitutional change in the 1930s. Before undertaking that inquiry, however, we must first briefly survey the contours of the constitutional landscape within which Roberts

18. Letter from Justice Frankfurter to "Dear Brethren," (Aug. 30, 1945) (on file in Box 62, Hugo Black MSS, LC).

19. See MELVIN I. UROFSKY, *DIVISION AND DISCORD: THE SUPREME COURT UNDER STONE AND VINSON, 1941-1953*, at 45-46 (1997).

worked, and we must also attempt a situated understanding of the contemporary significance of his landmark opinion in *Nebbia v. New York*.²⁰

I. ECONOMIC LIBERTY AND 1937

Roberts served on the Court during a period of extraordinary constitutional ferment. The American constitutional order underwent striking transformations during his tenure. But our accounts of this transformation must not proceed at such high levels of generality that we exaggerate discontinuities and sacrifice nuance and descriptive power. The birthing of our modern constitutional order was long, slow, tortuous, and occasionally painful; we must resist the temptation to compress all of the significant constitutional change of the New Deal Era into a sixty-day window in the spring of 1937. To do so is to make two errors: first, to overlook the lingering agonies, public and private, of older doctrinal commitments;²¹ and second, to apply too steep a discount to the importance of antecedent constitutional development that brought much of the New Deal into the realm of constitutional possibility.

In order to appreciate the nature and extent of 1937's transformations in constitutional jurisprudence, we must first understand a few things about the structure of the constitutional order upon Franklin Roosevelt's accession to the presidency. First, we must recognize that any characterization of the period between 1890 and 1937 as an age of rampant anti-regulatory activism simply fails to capture the texture and the dynamic quality of the Court's jurisprudence during this period. As several scholars have taught us, the number of cases in which the Justices of this era invalidated economic regulation simply pales in comparison to the number of such statutes they sustained.²²

20. 291 U.S. 502 (1934).

21. I discuss these agonies with respect to the Commerce Clause in CUSHMAN, *supra* note 1, at 177-224. In this Article, I focus discussion on Fifth and Fourteenth Amendment restraints on the government's power to regulate economic activity.

22. See, e.g., Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943, 945 n.11 (1927) (stating that the Supreme Court invalidated 6 of 98 police regulations challenged on due process grounds between 1868 and 1912, 7 of 97 between 1913 and 1920, and 15 of 53 between 1921 and 1927);

Take, for example, the type of regulation invalidated in *Lochner v. New York*.²³ Of the more than twenty working-hours cases that the Court decided between 1898 and 1930,²⁴ I know of only one other than *Lochner* in which the Court invalidated such a regulation; and that decision didn't even cite *Lochner* as authority.²⁵ As far as the regulation of working hours is concerned, *Lochner* is an exceptional rather than a representative case.

Thomas Reed Powell, *The Judiciality of Minimum-Wage Legislation*, 37 HARV. L. REV. 545, 555 (1924) ("[T]he catalogue shows that the Court has sustained many more regulatory statutes than it has annulled."); Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294, 294-95 (1913) (explaining that of the 560 cases arising under the Fourteenth Amendment between 1887 and 1911, only three invalidated social and economic regulation). See generally Michael J. Phillips, *How Many Times Was Lochner-Era Substantive Due Process Effective?*, 48 MERCER L. REV. 1049 (1997) (examining the frequency with which the Court invoked substantive due process to invalidate government action from 1897 to 1937); Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era*, 1983 SUP. CT. HIST. SOC'Y Y.B. 53, 70 ("[H]ostility to protective legislation was just not the norm in the Progressive era.").

23. 198 U.S. 45 (1905).

24. See, e.g., *Radice v. New York*, 264 U.S. 292 (1924) (upholding statute prohibiting employment of women in large-city restaurants between 10 P.M. and 6 A.M.); *United States v. Brooklyn E. Dist. Terminal*, 249 U.S. 296 (1919) (holding terminal subject to federal Hours of Service Act); *Dominion Hotel, Inc. v. Arizona*, 249 U.S. 265 (1919) (upholding statute limiting working hours of women in hotels); *Chicago & Alton R.R. v. United States*, 247 U.S. 197 (1918) (affirming conviction for violation of the federal Hours of Service Act); *Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 244 U.S. 336 (1917) (affirming conviction for violation of the federal Hours of Service Act); *Bunting v. Oregon*, 243 U.S. 426 (1917) (upholding maximum hours law for employees of mills and factories); *Wilson v. New*, 243 U.S. 332 (1917) (upholding maximum hours law for railway workers); *Bosley v. McLaughlin*, 236 U.S. 385 (1915) (upholding maximum hours law for women); *Miller v. Wilson*, 236 U.S. 373 (1915) (same); *Hawley v. Walker*, 232 U.S. 718 (1914) (same); *Riley v. Massachusetts*, 232 U.S. 671 (1914) (per curiam) (same); *Missouri, Kansas & Texas Ry. Co. of Texas v. United States*, 231 U.S. 112 (1913) (affirming convictions for violation of federal Hours of Service Act); *United States v. Garbish*, 222 U.S. 257 (1911) (construing strictly exceptions to an eight-hour workday law for public works); *Baltimore & Ohio R.R. Co. v. ICC*, 221 U.S. 612 (1911) (upholding federal Hours of Service Act); *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding maximum hours law for women); *Ellis v. United States*, 206 U.S. 246 (1907) (upholding maximum hours law for public works); *Cantwell v. Missouri*, 199 U.S. 602 (1905) (per curiam) (upholding maximum hours law for mine workers); *Atkin v. Kansas*, 191 U.S. 207 (1903) (upholding maximum hours law for public works); *Holden v. Hardy*, 169 U.S. 366 (1898) (upholding maximum hours law for miners); *Elkan v. State*, 90 A. 183 (Md. 1914) (upholding maximum hours law for public works).

25. See *Charles Wolff Packing Co. v. Court of Indus. Relations*, 267 U.S. 552 (1925).

During this period the Court also upheld not only hours regulations, but numerous wage and payment regulations, occupational licensing statutes, utility regulations, a national collective bargaining statute, state child labor laws, workmen's compensation statutes and statutes abrogating common law tort defenses, the Interstate Commerce Commission, the Federal Trade Commission and numerous state and federal antitrust laws, the Safety Appliance Act, the Federal Employers Liability Act, the Pure Food and Drug Act, the Packers and Stockyards Act, the Grain Futures Act, a federal-state program providing grants for nutrition for expectant mothers, and a vast array of federal, state, and local taxation and police power statutes.²⁶ If this was a night watchman state, then this night watchman had a very active thyroid. Calling this period "the *Lochner* Era" may be a little like calling the 1980s "the Al Franken decade." For decades preceding the inauguration of Franklin Roosevelt, the Court had repeatedly accommodated, on both the state and national levels, the emergence of an active, expanding, regulatory and welfare state.

Of course, this is not to deny that the Court was far more active in scrutinizing economic regulation before 1937 than it has been since. "*Lochnerism*" was not confined to working hours statutes, and there is no gainsaying the existence of cases like *Adair v. United States*,²⁷ striking down a federal anti-yellow dog contract statute,²⁸ *Tyson & Brother v. Banton*,²⁹ invalidating state price regulation,³⁰ and *Adkins v. Children's Hospital*,³¹ scuttling a minimum wage statute for women.³² Nor can we casually dismiss the significant constraints that such precedents imposed upon regulatory reform. But if we are to evaluate the importance of "1937," we must understand the trajectory of the lives of these strands of substantive due process. By the time *Bunting v.*

26. For a catalog of such decisions, see Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 561-71, 586-638 nn.22-121 (1997).

27. 208 U.S. 161 (1908).

28. *See id.* at 180.

29. 273 U.S. 418 (1927).

30. *See id.* at 445.

31. 261 U.S. 525 (1923).

32. *See id.* at 562.

*Oregon*³³ was decided in 1917, it was clear that the Court would no longer hold that regulation of the hours of labor in the ordinary trades was beyond the reach of the police power. In the 1930 case of *Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks*,³⁴ the Court effectively overruled *Adair*, thereby removing a critical due process obstacle to collective bargaining legislation.³⁵ In 1934, *Nebbia v. New York*³⁶ abandoned the doctrine restricting price regulation to a narrow category of businesses affected with a public interest.³⁷ *Nebbia*'s abandonment of this "business affected with a public interest" limitation, however, had ramifications extending well beyond the domain of price regulation. For the public/private distinction was a central organizing principle of economic substantive due process. This is why Justice McReynolds, who had written an anguished dissent recognizing those ramifications,³⁸ wrote James Beck that *Nebbia* and *Home Building & Loan Ass'n v. Blaisdell*³⁹ marked "the end of the Constitution as you and I regarded it. An Alien influence has prevailed."⁴⁰ This "Alien influence" by the way, was Herbert Hoover, who had appointed Hughes, Roberts, and Cardozo, the Justices providing the margin of victory in those two cases. Chief Justice Taft always had distrusted Hoover as a "Progressive," and feared his own death while Hoover was in office lest "the Bolsheviki" gain control of the Court.⁴¹ McReynolds's fears with respect to *Nebbia* were realized in part when the Court rejected substantive due process challenges to the application of the Wagner Act's collective bargaining provisions to three manufacturing concerns he considered "private" in 1937;⁴² but here, as with the minimum wage, 1937 was a doc-

33. 243 U.S. 426 (1917).

34. 281 U.S. 548 (1930).

35. See *id.* at 570-71.

36. 291 U.S. 502 (1934).

37. See *id.* at 536.

38. See *id.* at 539-59 (McReynolds, J., dissenting).

39. 290 U.S. 398 (1934).

40. Letter from Justice McReynolds to James M. Beck (Apr. 10, 1934), quoted in MORTON KELLER, IN DEFENSE OF YESTERDAY: JAMES M. BECK AND THE POLITICS OF CONSERVATISM 1861-1936, at 254 (1958).

41. See CUSHMAN, *supra* note 1, at 225.

42. See *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58, 76, 101-03

trinal denouement. Indeed, because regulation of wages had been sustained repeatedly when the employment in question was public or affected with a public interest,⁴³ a wide variety of observers—ranging from Robert Hale to the Four Horsemen—opined that *Nebbia* heralded the death of *Adkins*.⁴⁴ There would be one more bump along the road in the form of *Morehead v. New York ex rel. Tipaldo*⁴⁵ in 1936; but these prophecies were fulfilled the very next year in an opinion that relied extensively on *Nebbia*'s authority.⁴⁶ I follow a number of contemporary observers in believing that the *Tipaldo* aberration can be explained;⁴⁷ but even if these commentators misunderstood *Nebbia*'s implications for *Adkins*, which is doubtful, it is nevertheless safe to say that by 1937 the prohibition against minimum wage legislation was pretty close to all that was left of economic substantive due process.

Even that piece had been hanging by a thread for two decades. In 1917, the Supreme Court affirmed a decision upholding Oregon's minimum wage law by an equally divided Court.⁴⁸ Justice Brandeis had counseled the state on the matter before his appointment to the bench, and so recused himself.⁴⁹ Had he been at liberty to participate, minimum wage laws for women would have received the Court's imprimatur right in the middle of the *Lochner* Era.⁵⁰ By the time the issue came back to the Court in 1923, personnel changes had shifted the balance. Unconstrained by any decision with precedential force, the Justices invalidated the District of Columbia's minimum wage law by a vote of five to

(McReynolds, J., dissenting).

43. See CUSHMAN, *supra* note 1, at 56-60, 62-64, 73-78.

44. See *infra* note 129.

45. 298 U.S. 587 (1936).

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

47. See CUSHMAN, *supra* note 1, at 92-104.

48. See *Stettler v. O'Hara*, 243 U.S. 629 (1917). During that same term the Court upheld both a federal statute establishing a temporary minimum daily wage for railway workers in *Wilson v. New*, 243 U.S. 332 (1917), and an Oregon statute limiting working hours in certain employments and requiring time-and-a-half payment for overtime work in *Bunting v. Oregon*, 243 U.S. 426 (1917). For other instances in which the Court upheld wage regulation, see CUSHMAN, *supra* note 1, at 56-60.

49. See ALEXANDER BICKEL & BENNO SCHMIDT, *THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910-1921*, at 592-603 (1984).

50. See *id.* at 602; CUSHMAN, *supra* note 1, at 61-62.

three, with Brandeis again not participating.⁵¹ Only two years later, however, Justice Stone replaced Justice McKenna.⁵² If at that time he held the same views on the issue that he would announce in dissent eleven years later,⁵³ by 1925 there were again five votes for the constitutionality of minimum wage regulation. In fact, there were apparently three occasions between 1925 and 1937 in which the Court affirmed a decision invalidating a state minimum wage law notwithstanding the fact that a majority of the Justices believed that *Adkins* had been wrongly decided.⁵⁴ If so, *Parrish* signaled not a change in the long-held substantive views of a Court majority, but instead a refusal to allow stare decisis any longer to impede their formal adoption.

II. FIDELITY, 1934-1937

I have argued elsewhere that *Nebbia's* abandonment of the public interest limitation played a critical role not only in the minimum wage story, but more broadly in many of the constitutional successes of the Second New Deal.⁵⁵ These consequences

51. See *Adkins v. Children's Hosp.*, 261 U.S. 525, 525 (1923). Thomas Reed Powell contended that there was a majority for sustaining the minimum wage until June of 1922, and that the appeal in *Adkins* might have been heard and a favorable decision rendered by that time had not the Court of Appeals of the District of Columbia ordered the case reheard and reargued after an initial decision upholding the statute. See Powell, *supra* note 22, at 547-56. Powell's survey of decisions of state supreme courts, federal appellate courts, and the United States Supreme Court revealed that 35 of the 45 judges sitting in cases challenging the constitutionality of minimum wage legislation had voted to uphold the statute. See *id.* at 547-53.

52. See David P. Currie, *The Constitution in the Supreme Court: 1921-1930*, 1986 DUKE L.J. 65, 65.

53. See *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) (Stone, J., dissenting).

54. In *Murphy v. Sardell*, 269 U.S. 530 (1925) (per curiam), the Court affirmed a decision invalidating Arizona's minimum wage statute. See *id.* Justice Brandeis dissented, and Justice Holmes noted that he concurred solely because he considered himself bound by the authority of *Adkins*. See *id.* at 536. The other dissenters in *Adkins*, Chief Justice Taft and Justice Sanford, concurred silently, as did Stone. See *id.* *Donham v. West-Nelson Manufacturing Co.*, 273 U.S. 657 (1927), affirmed per curiam a decision invalidating Arkansas's minimum wage statute. See *id.* at 657. Brandeis again noted a dissent, but this time Holmes, Taft, Sanford, and Stone each concurred silently. See *id.* The third instance, of course, was *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936). See CUSHMAN, *supra* note 1, at 92-104.

55. See CUSHMAN, *supra* note 1, at 134-215.

flowed not from something as amorphous and unrefined as a new "attitude" toward "social legislation" or the embrace of the "pro-regulatory principles" of "big government," but instead from the fact that lawmakers and advocates recognized and exploited opportunities presented by *Nebbia*'s reconfiguration of an elaborated structure of doctrine.⁵⁶ Just as it would be a mistake to characterize the American constitutional order before 1934 as a regime of laissez-faire, so it also would be ridiculous to suggest that *Nebbia* lifted all limitations on governmental regulatory power. It plainly did not. *Nebbia* concerned restraints imposed on governmental regulatory authority by the Due Process Clause. It did not purport to retire the Tenth Amendment.⁵⁷ It did not promise unrestrained license to delegate governmental power.⁵⁸ It did not discard the doctrine of intergovernmental immunities.⁵⁹ It did not overrule a century of dormant Commerce Clause jurisprudence.⁶⁰ *Nebbia* did not hit safely in fifty-six consecutive baseball games. *Nebbia* did not clean anyone's oven.

The Court's performance in the three years following *Nebbia* does create some interesting puzzles, and it is the purpose of the next Part to explore and unpack them. First, however, it should be recognized that those puzzles are reduced to only a few if we avoid the mistake of thinking about the decisions in gross terms. We should not find it surprising that Roberts and Hughes voted in 1935 to strike down provisions of the National Industrial Recovery Act (NIRA) on nondelegation grounds⁶¹ and in 1936 to invalidate the Agricultural Adjustment Act (AAA) on Tenth

56. *See id.*

57. *See infra* notes 62, 65-66. *Nebbia* did, however, have important consequences for Commerce Clause doctrine. *See CUSHMAN, supra* note 1, at 154-55, 193-96, 203-07.

58. *See infra* note 61.

59. *See infra* note 63.

60. *See, for example, Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), in which Justice Cardozo wrote the unanimous opinion of the Court, holding that a New York regulation prohibiting the sale of milk imported from out-of-state unless the price paid to the producer equaled or exceeded New York's minimum price, violated the dormant Commerce Clause. *See id.* at 528.

61. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935).

Amendment grounds.⁶² Nor should we be shocked to find Roberts in the majority in a 1936 decision holding that the Municipal Bankruptcy Act ran afoul of the doctrine of intergovernmental immunities.⁶³ In none of the opinions in these cases—majority, concurring, or dissenting—was *Nebbia* even mentioned.⁶⁴ Neither should holdings that provisions of the NIRA and the National Bituminous Coal Conservation Act of 1935 exceeded Congress's power to regulate interstate commerce leave us scratching our heads in bewilderment. It would have been suprising had Hughes's *Schechter* opinion held that the Live Poultry Code's wage and hour regulations violated the Due Process Clause.⁶⁵ But it did not. It would have been surprising had the majority opinion in *Carter Coal* held that the wage, hour, or price regulation provisions of the Guffey Coal Act deprived employers or employees of liberty of contract. But it did not.⁶⁶ These high-profile decisions striking down legislation between 1934 and 1937 were inconsistent with *Nebbia* only in the sense that *Nebbia* upheld a government regulation. But comparisons made at the level of abstraction at which doctrinal categories are utterly ignored are not always the most illuminating.

Only with attention to such doctrinal categories—the kind of attention with which legal thinkers of the day treated them—can we avoid an anachronistic assessment of *Nebbia*'s contemporary

62. See *United States v. Butler*, 297 U.S. 1 (1936).

63. See *Ashton v. Cameron County Water Improvement Dist. No. 1*, 298 U.S. 513 (1936).

64. Nor did the Court mention *Nebbia* in *Jones v. SEC*, 298 U.S. 1 (1936).

65. See *Schechter Poultry*, 295 U.S. at 551 (declining specifically to take up the due process arguments).

66. The majority struck down the wage and hour provisions on the ground that (a) they exceeded the scope of the commerce power, and, (b) insofar as the Act delegated to the majority of coal producers, rather than to the government, the power to fix the hours and wages of employees of other coal producers, it was "clearly arbitrary" and thus violated the Fifth Amendment's Due Process Clause. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). The majority invalidated the price provisions due to their alleged inseparability from the wage and hour provisions. See *id.* at 312-16. The failure of the majority to hold squarely that wage and price regulation infringed liberty of contract was conspicuous. See *id.* at 304, 310-16; CUSHMAN, *supra* note 1, at 92-93. Chief Justice Hughes, who in a concurring opinion agreed that the labor provisions were invalid on federalism grounds, invoked *Nebbia* in support of his view that the price regulation provisions were valid. See *Carter Coal*, 298 U.S. at 319 (Hughes, C.J., concurring).

significance. And examination of a variety of sources suggests that *Nebbia's* significance should not be underestimated. We might profitably begin with a review of lower court cases that were decided between *Nebbia* and *West Coast Hotel*, involved Fifth or Fourteenth Amendment challenges, and discussed (or at least mentioned) *Nebbia*. The milk business was one of the most heavily regulated in the 1930s, and it is no surprise to find that *Nebbia* was cited most frequently in cases concerning the constitutionality of state and local regulation of various aspects of that enterprise.⁶⁷ *Nebbia's* authority, however, was by no means un-

67. See, e.g., *Highland Farms Dairy, Inc. v. Agnew*, 16 F. Supp. 575, 580-82 (E.D. Va. 1936) (upholding Virginia milk control law), *aff'd* 300 U.S. 608 (1937); *Birkheiser v. City of Los Angeles*, 11 F. Supp. 689, 689-90 (S.D. Cal. 1935) (upholding municipal regulation of milk delivery); *Borden's Farm Prods. Co. v. Baldwin*, 7 F. Supp. 352, 353 (S.D.N.Y.) (upholding provision of New York milk control law permitting dealers of "unadvertised milk" to sell at a price lower than that prescribed for dealers in milk sold under trade names), *rev'd*, 293 U.S. 194 (1934); *Hegeman Farms Corp. v. Baldwin*, 6 F. Supp. 297, 297-98 (S.D.N.Y.) (upholding provisions of New York milk control law), *aff'd*, 293 U.S. 163 (1934); *Franklin v. State ex rel. Alabama State Milk Control Bd.*, 169 So. 295, 298 (Ala. 1936) (upholding Alabama milk control law); *Miami Home Milk Producers Ass'n v. Milk Control Bd.*, 169 So. 541, 547 (Fla. 1936) (upholding Florida milk control law); *Albert v. Milk Control Bd.*, 200 N.E. 688, 691-95 (Ind. 1936) (upholding Indiana milk control law); *Hy-Grade Dairies v. Falls City Milk Producers Ass'n*, 86 S.W.2d 1046, 1047 (Ky. 1935) (upholding regulation of marketing of milk); *In re Opinion of the Justices*, 190 A. 713, 714-15 (N.H. 1937) (upholding milk regulation); *State ex rel. State Bd. of Milk Control v. Newark Milk Co.*, 179 A. 116, 122-26 (N.J. 1935) (upholding New Jersey milk control law); *State Bd. of Milk Control v. Richman Ice Cream Co.*, 175 A. 796, 797 (N.J. 1934) (upholding New Jersey milk control law); *Mayflower Farms, Inc. v. Baldwin*, 195 N.E. 532, 532, 534, 536 (N.Y. 1935) (upholding statute permitting dealers in "unadvertised" milk to sell at a price lower than that permitted for dealers selling milk under a trade name), *rev'd*, 297 U.S. 266 (1936); *John E. Rosasco Creameries, Inc. v. Cohen*, 292 N.Y.S. 1, 4 (N.Y. App. Div. 1936) (holding contract entered into in violation of New York Milk Control Law unenforceable), *rev'd*, 11 N.E.2d 908 (N.Y. 1937); *Muller Dairies, Inc. v. Baldwin*, 274 N.Y.S. 975, 978 (N.Y. App. Div. 1934) (upholding Milk Control Board's denial of license renewal); *Ten Eyck v. Eastern Farm Prods.*, 290 N.Y.S. 475, 476 (N.Y. Sup. Ct. 1936) (upholding provision of New York Milk Control Law); *Royce v. Rosasco*, 287 N.Y.S. 692, 706-08 (N.Y. Sup. Ct. 1936) (upholding provisions of New York Milk Control Law); *Co-operative Dairymen v. Ten Eyck*, 286 N.Y.S. 351, 355 (N.Y. Sup. Ct. 1936) (refusing to grant injunction to restrain state commissioner of agriculture and markets from canceling milk dealer's license); *Baldwin v. Lenahan*, 293 N.Y.S. 742, 743-44 (N.Y. Sup. Ct. 1935) (upholding licensing requirement for milk dealing); *Stark County Milk Producers' Ass'n v. Tabeling*, 194 N.E. 16, 19-20 (Ohio 1934) (upholding milk marketing co-operative established pursuant to statute); *Rohrer v. Milk Control Bd.*, 186 A. 336, 338-43 (Pa. 1936) (upholding Pennsylvania milk control law), *rev'g* *Rohrer v.*

derstood to be confined to the dairy industry. Courts invoked Roberts's opinion in support of a wide variety of state and local exercises of the police power.⁶⁸ To be sure, some courts were

Milk Control Bd., 184 A. 133 (Pa. Super. Ct. 1936) (holding milk control act violated Pennsylvania state constitution); Dairymen's Co-operative Sales Ass'n v. Public Serv. Comm'n, 174 A. 826, 830 (Pa. Super. Ct. 1934) (upholding state regulation of transportation of milk), *aff'd*, 177 A. 770 (Pa. 1935); Reynolds v. Milk Comm'n of Virginia, 179 S.E. 507, 514-15 (Va. 1935) (upholding Virginia milk control law), *superseding* 177 S.E. 44 (Va. 1934) (holding Virginia milk control law violated Virginia state constitution); State *ex rel.* Finnegan v. Lincoln Dairy Co., 265 N.W. 197, 201 (Wis. 1936) (upholding Wisconsin milk control law). *But see* State v. Old Tavern Farm, Inc., 180 A. 473, 482-86 (Me. 1935) (divided court invalidating requirement of posting bond as precondition to obtaining license to operate a milk gathering station); Sheffield Farms Co. v. Seaman, 177 A. 372, 374-75 (N.J. 1935) (finding that city may not arbitrarily deny a license to sell and distribute milk).

68. *See, e.g.,* Jewel Tea Co. v. City of Troy, 80 F.2d 366, 368 (7th Cir. 1935) (upholding municipal ordinance regulating and licensing vehicles carrying foodstuffs); S.H. Kress & Co. v. Johnson, 16 F. Supp. 5, 8-9 (D. Colo.), *aff'd per curiam*, 299 U.S. 511 (1936) (upholding regulation of restaurant business); Premier-Pabst Sales Co. v. State Bd. of Equalization, 13 F. Supp. 90, 95, 97 (S.D. Cal. 1935) (upholding state regulation of advertising for sale of alcoholic beverages); *In re* Interrogatories of the Governor on Chapter 118, Sess. Laws, 52 P.2d 663, 667 (Col. 1935) (upholding statute providing for licensing of establishments preparing food for human consumption); *Ex parte* Hawthorne, 156 So. 619, 622-23 (Fla. 1934) (upholding state regulation of primary election campaigns); Territory v. Fung, 34 Haw. 52, No. 2302, 1936 WL 4430, at *2 (Dec. 23, 1936) (upholding requirement that common carriers by automobile obtain a certificate of convenience and necessity); People *ex rel.* McLaughlin v. G. H. Cross Co., 198 N.E. 356, 362-63 (Ill. 1935) (upholding statute regulating consignment and sale on commission of farm produce), *aff'd sub nom.* Hartford Accident & Indem. Co. v. Illinois *ex rel.* McLaughlin 298 U.S. 155 (1936); Nourse v. City of Russellville, 78 S.W.2d 761, 764 (Ky. 1935) (upholding municipal power to define, declare and abate nuisances, and citing *Nebbia* for the proposition that "[t]he right of property is a legal right and not a natural right, and it must be measured by reference to the rights of others and of the public"); Locatelli v. City of Medford, 192 N.E. 57, 58 (Mass. 1934) (upholding zoning ordinance creating district restricted to single residences); City of St. Paul v. Clark, 259 N.W. 824, 824-25 (Minn. 1935) (upholding ordinance establishing minimum taxi fares); State *ex rel.* Freeman v. Abstracters Bd. of Exam'rs, 45 P.2d 668, 672 (Mont. 1935) (upholding statute requiring applicant for a certificate of authority to conduct abstracting business to provide a set of abstract books showing all instruments affecting title to real estate); *In re* Mechanics Trust Co., 181 A. 423, 434 (N.J. 1935) (upholding statutory scheme for reorganization of insolvent financial institutions); People v. Vitale, 272 N.Y.S. 503, 505-06 (N.Y. Magis. Ct. 1934) (upholding state alcoholic beverage control licensing law); State v. Eubank, 9 N.E.2d 1007, 1010 (Ohio App.) (upholding statute requiring a license to operate a steam boiler), *appeal dismissed*, 8 N.E.2d 247 (Ohio), *and appeal dismissed*, 302 U.S. 646 (1937); Creditors' Serv. Corp. v. Cummings, 190 A. 2, 8 (R.I. 1937) (upholding statute prohibiting debt adjustment by non-attorneys). *But see* Scully v. Hallihan, 6 N.E.2d 176, 181 (Ill. 1936) (striking down as unrea-

chary of interpreting such a departure from precedent too broadly. In New York, where a closely divided Court of Appeals struck down the state's minimum wage statute in *People ex rel. Tipaldo v. Morehead*,⁶⁹ courts also invalidated a provision of a fair trade statute prescribing that the minimum resale prices for books,⁷⁰ perfumes, toilet preparations, and cosmetics⁷¹ not be lower than that established by contract between the producer and any other retailer of the item in question. The court of chancery of neighboring New Jersey followed suit, invalidating the provisions of its identical state fair trade act as applied to a retailer of dental cream, tooth brushes, shaving cream, baby powder, Listerine, and sal hepatica.⁷² And a vigorous debate over *Nebbia's* implications for the scope of state power to regulate the barbering trade broke out in the state courts, with four of six jurisdictions rebuffing intrusions into the *sanctum tonsorium*.⁷³ Although efforts

sonable licensing requirements in the drain-laying trade); *Olds v. Klotz*, 3 N.E.2d 371, 374 (Ohio 1936) (striking down as unreasonable statute prescribing opening and closing hours for retail food and grocery stores).

69. 200 N.E. 799 (N.Y.), *aff'd*, 298 U.S. 587 (1936).

70. *Compare* Doubleday, Doran & Co. v. R.H. Macy & Co., 199 N.E. 409, 410-11 (N.Y. 1936) (invalidating a statute fixing the price for books on the ground that books were "not 'affected with a public interest'"), *overruled in part by* Bourjois Sales Corp. v. Dorfman, 7 N.E.2d 30 (N.Y. 1937), *with* *People v. Kahn*, 60 P.2d 596, 599 (Cal. App. 1936) (relying on *Nebbia* in upholding conviction under state unfair practices act for selling a six-pound can of Crisco below cost for the purpose of injuring competitors and destroying competition), *and* *Joseph Triner Corp. v. McNeil*, 2 N.E.2d 929, 935-37 (Ill.) (relying on *Nebbia* in upholding state fair trade statute prescribing minimum resale prices for whiskey), *aff'd sub nom.* Old Dearborn Distrib. Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936).

71. *See* *Coty, Inc. v. Hearn Dep't Stores, Inc.* 284 N.Y.S. 909, 918-25 (N.Y. Sup. Ct. 1935).

72. *See* *Johnson & Johnson v. Weissbard*, 184 A. 783, 789 (N.J. Ch. 1936), *rev'd*, 191 A. 873 (N.J. 1937).

73. *Compare* *Wilson v. City of Zanesville*, 199 N.E. 187, 191-92 (Ohio 1935) (divided court upholding municipal regulation of opening and closing hours for barber shops), *overruled in part by* *City of Cincinnati v. Correll*, 49 N.E.2d 412 (Ohio 1948), *and* *State ex rel. Attorney Gen. v. Fasekas*, 269 N.W. 700, 704-05 (Wis. 1936) (divided court upholding wage and price regulation in the trade notwithstanding the Supreme Court's decision in *Tipaldo*), *with* *City of Mobile v. Rouse*, 173 So. 254, 263 (Ala. Ct. App. 1937) (divided court invalidating municipal price regulation of barber services), *and* *City of Mobile v. Gibson*, 173 So. 264, 264 (Ala. Ct. App. 1937), *and* *State ex rel. Fulton v. Ives*, 167 So. 394, 400, 403 (Fla. 1936) (divided court striking down price regulation for barber services), *and* *Duncan v. City of Des Moines*, 268 N.W. 547, 553 (Iowa 1936) (invalidating municipal ordinance fixing minimum prices

to discipline the drycleaning sector proved somewhat more successful,⁷⁴ these decisions nevertheless cast considerable doubt on the capacity of the New Deal to effect a revolution in the personal grooming industry.⁷⁵

One should, of course, never underestimate the importance of good hygiene. Yet it bears emphasis that judges from across the political spectrum repeatedly relied on *Nebbia* in decisions upholding other, arguably more significant aspects of state and national programs for economic recovery and reform. In June of 1934, for example, a federal district judge in Missouri⁷⁶ anticipated the Court's decision in the *Gold Clause Cases*,⁷⁷ invoking *Nebbia* in upholding federal legislation rendering "gold clauses" in private contracts unenforceable.⁷⁸ In August, a federal district judge in neighboring Nebraska⁷⁹ upheld price regulation under the NIRA's Code of Fair Competition for the lumber industry,⁸⁰

for barbering services), and *State ex rel. Pavlik v. Johannes*, 259 N.W. 537, 538-39 (Minn. 1935) (divided court invalidating municipal ordinance prescribing opening and closing hours for barber shops).

74. Compare *United States v. Spotless Dollar Cleaners, Inc.*, 6 F. Supp. 725, 730 (S.D.N.Y. 1934) (relying on *Nebbia* in upholding price regulation under the NIRA's Code of Fair Competition for the cleaning and dyeing trade), and *Ex parte Lasswell*, 36 P.2d 678, 681-82 (Cal. Dist. Ct. App. 1934) (relying on *Nebbia* in upholding conviction under state recovery act for, inter alia, cleaning and pressing clothes for less than the prescribed minimum rate), with *Kent Stores of New Jersey v. Wilentz*, 14 F. Supp. 1, 10 (D.N.J. 1936) (invalidating state price regulation in the cleaning and dyeing trade), and *Wilentz v. Crown Laundry Serv., Inc.*, 172 A. 331, 332 (N.J. Ch. 1934) (noting that state may, in light of *Nebbia*, have authority to authorize price regulation in the laundry business, but it must do so in "explicit, unambiguous language"). Judge John Clark Knox, a Wilson appointee, wrote *Spotless*, and William Clark, a Coolidge appointee, wrote *Kent Stores*. See HAROLD CHASE ET AL., BIOGRAPHICAL DICTIONARY OF THE FEDERAL JUDICIARY 50-51, 155, 370 (1976).

75. Not so in California. See *Max Factor & Co. v. Kunsman*, 55 P.2d 177, 184-87 (Cal.) (relying on *Nebbia*, a divided court upheld resale price maintenance provisions of state fair trade act as applied to cosmetics and toilet articles), *aff'd*, 299 U.S. 198 (1936).

76. Wilson appointee Charles Breckenridge Faris. See CHASE, *supra* note 74, at 88-89, 369.

77. *Perry v. United States*, 294 U.S. 330 (1935); *Nortz v. United States*, 294 U.S. 317 (1935); *Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 240 (1935).

78. See *In re Missouri Pac. R.R. Co.*, 7 F. Supp. 1, 9 (E.D. Mo. 1934), *aff'd sub nom. Norman v. Baltimore & Ohio R.R. Co.* 294 U.S. 240 (1935).

79. The judge was FDR appointee James A. Donohue. See CHASE, *supra* note 74, at 74, 372.

80. See *United States v. Canfield Lumber Co.*, 7 F. Supp. 694, 697 (D. Neb.),

while a colleague in the Eastern District of New York⁸¹ sustained indictments for violations of the NIRA's Live Poultry Code.⁸² In November, a federal district judge in California⁸³ upheld price regulation provisions of the NIRA's code for the motor vehicle retailing trade,⁸⁴ *Spielman Motor Sales Co. v. Dodge*⁸⁵ had sustained the New York State analog the preceding month.⁸⁶

New York trial courts would sustain price regulation in the coal industry twice before the year was out,⁸⁷ and the sponsors of the Bituminous Coal Conservation Act of 1935 similarly interpreted *Nebbia* as authorizing the statute's price regulation provisions.⁸⁸ A federal district court opinion issued in November of

appeal dismissed, 76 F.2d 1003 (8th Cir. 1934).

81. This was Harding appointee Marcus B. Campbell. See CHASE, *supra* note 74, at 41, 369.

82. See *United States v. Schechter*, 8 F. Supp. 136, 142, 149 (E.D.N.Y. 1934), *aff'd in part, rev'd in part sub nom. United States v. A.L.A. Schechter Poultry Corp.*, 76 F.2d 617 (2d Cir.), *aff'd in part, rev'd in part*, 295 U.S. 495 (1935). In May, Hoover appointee E. Marvin Underwood, see CHASE, *supra* note 74, at 282, 371, had quoted extensively from *Nebbia* in an opinion sustaining the NIRA's National Hosiery Code against a Fifth Amendment challenge. See *Richmond Hosiery Mills v. Camp*, 7 F. Supp. 139, 143 (N.D. Ga.), *aff'd*, 74 F.2d 200 (5th Cir. 1934).

83. The judge was Coolidge appointee Adolphus Frederic St. Sure. See CHASE, *supra* note 74, at 244, 370.

84. See *United States v. James W. McAlister, Inc.*, 8 F. Supp. 529, 533 (N.D. Cal. 1934).

85. 8 F. Supp. 437 (S.D.N.Y. 1934), *modified*, 295 U.S. 89 (1935). Wilson appointee Martin Thomas Manton wrote *Spielman Motor Sales*, and was joined by Hoover appointee Robert Porter Patterson and FDR appointee George Murray Hulbert. See CHASE, *supra* note 74, at 133, 175, 216, 369, 371-72.

86. See *Spielman Motor Sales*, 8 F. Supp. at 439-40.

87. See *Spaulding v. Kaminski*, 276 N.Y.S. 663, 666 (N.Y. Sup. Ct. 1934) (upholding provisions of state industrial recovery act establishing uniform standards of fair competition pursuant to NIRA); *Stokes v. Newtown Creek Coal & Coke Co.*, 275 N.Y.S. 290, 291 (N.Y. Sup. Ct. 1934) (upholding both NIRA and state act providing for codes of fair competition); see also *Sabatini v. Andrews*, 243 A. 109, 114 (N.Y. App. Div. 1934) (upholding state recovery act's adoption of national standards of fair competition).

88. See H.R. REP. NO. 74-1800, at 10 (1935) ("It is plain that the decision in the *Nebbia* case by implication recognizes that there may be a national public interest in any business, trade or industry."); 79 CONG. REC. 12,293 (1935) (statement of Rep. Snyder) (citing *Nebbia* in support of the claim "[t]hat the bituminous coal-mining industry is affected with a national public interest and can be so declared and regulated by Congress seems obvious"). Even some opponents of the bill appeared to concede that the coal business was "affected with a national public interest." H.R. REP. NO. 74-1800, at 55 (1935) (statement of Rep. Cooper); see *id.* at 59 (statement

1935 agreed, upholding the Act's regulation of both prices and wages.⁸⁹ Even after the Court had reversed this decision in *Carter v. Carter Coal Co.*,⁹⁰ observers remained hopeful that the Court would sustain congressional price regulation in the coal industry.⁹¹ Two days after the Court announced its decision, Senator Joseph Guffey introduced a new coal bill.⁹² The revised measure omitted the 1935 Act's labor regulation provisions, but retained the price regulation provisions,⁹³ the constitutionality of which the Court had not considered separately. The bill passed the House, but Congress adjourned before the Senate could take up the measure.⁹⁴ When Guffey reintroduced the bill in the next

of Rep. Knutson); see also Comment, *The Bituminous Coal Conservation Act of 1935*, 45 YALE L.J. 293, 311 (1935) (noting that the minimum wage controls and collective bargaining features of the bill could be sustained in the context of the coal industry); cf. 79 CONG. REC. 13,467 (1935) (statement of Rep. Church).

89. See *R.C. Tway Coal Co. v. Glenn*, 12 F. Supp. 570, 593-94 (W.D. Ky. 1935). FDR appointee Elwood Hamilton wrote the opinion. See CHASE, *supra* note 74, at 113-14, 372.

90. 298 U.S. 238, 317 (1936).

91. See Comment, 34 MICH. L. REV. 1167, 1178-79 (1936); Orval N. Thompson, Note, *Constitutional Law—The Guffey Coal Act Decision and the Future for Federal Price Regulation*, 16 OR. L. REV. 67, 71-79 (1936); Federal Legislation, *The Bituminous Coal Act of 1937*, 25 GEO. L.J. 986, 992-93 (1937); see also 81 CONG. REC. 2047 (1937) (statement of Rep. Casey); 81 CONG. REC. 2044 (1937) (statement of Rep. Jenkins) (expecting the Court to sustain a bill that regulated prices in the coal industry); cf. Recent Decision, 11 ST. JOHN'S L. REV. 107, 109 (1936) (writing about *Carter Coal* in the wake of *Tipaldo*: "The principal opinion purports to leave open the question of federal price fixing. It would seem that price fixing in regard to wages or fixing of hours bears no legal distinction from fixing of prices in the sale of commodities. If one is unconstitutional under the Fifth Amendment, the other is also").

92. See 81 CONG. REC. 2950 (1937) (statement of Sen. Guffey).

93. See *id.*

94. See *id.*; RALPH HILLIS BAKER, *THE NATIONAL BITUMINOUS COAL COMMISSION* 63, 65 (1941); Thomas C. Longin, *Coal, Congress and the Courts: The Bituminous Coal Industry and the New Deal*, 35 W. VA. HIST. 101, 123-24 (1974). Again, the bill's sponsors relied on *Nebbia*. See S. REP. NO. 74-2370, at 8 (1936); H.R. REP. NO. 74-2832, at 6, 8 (1936); 80 CONG. REC. 9620 (1936) (statement of Rep. Jenkins); 80 CONG. REC. 9613-15 (1936) (statement of Rep. Vinson) ("[I]f Mr. Justice Roberts, who wrote the opinion in the [*Nebbia*] case in March 1934, had been willing to agree that the price-fixing provisions in the Coal Act were invalid there would have been no trouble in the Court knocking down the price-fixing features of the act, and I feel that it is fair to assume that he refused to make the fifth member of the Court to refuse the Congress the same power in relation to interstate commerce as he had expressed for the Court was in the State of New York for intrastate commerce.").

Congress, it passed the Senate by a vote of fifty-eight to fifteen⁹⁵ and the House by a voice vote.⁹⁶ Stripped of its provisions regulating production and employment relations at the mine, the constitutionality of the bill was not seriously contested.⁹⁷ Solicitor General Reed testified that he believed the bill was constitutional,⁹⁸ as did future Chief Justice Fred Vinson. "[A]s a member of this House," the Kentucky Representative remarked,

I know the genuine respect that my colleagues here have for the law and the courts. I have the same respect. As a lawyer and a Member of this body, I say to you that we have tried to square the language of this bill with the decisions of the Supreme Court Our efforts have not been to circumvent any opinion of our highest Court, but we have worked in a bona-fide attempt to meet the law laid down by them in a proper, legal, constitutional manner.⁹⁹

The bill could be constitutional only if sanctioned by *Nebbia*, in which Vinson and his colleagues repeatedly took comfort.¹⁰⁰ As Representative Jenkins reported, "great confidence is expressed by the Attorney General's Department and others who vouch for the constitutionality of this bill in the case of *Nebbia v. New York*."¹⁰¹ "Mr. Justice Roberts wrote [the *Nebbia*] opinion about a

Vinson and Jenkins made these remarks on June 16, 1936, more than two weeks after *Tipaldo* had been decided.

95. Seven Republicans joined eight Democrats in opposition. See 81 CONG. REC. 3145 (1937).

96. See 81 CONG. REC. 2128-29 (1937).

97. "The question of [the] constitutionality of the measure was not the storm center that it had been in 1935," reported Ralph Baker. BAKER, *supra* note 94, at 66. "The House Ways and Means Committee had devoted considerable time to a discussion of the constitutional features, but apparently there was almost complete harmony in these discussions." *Id.* Some who had opposed the 1935 Act on constitutional grounds announced their support for the revised bill, which they thought constitutional. See 81 CONG. REC. 3014 (1937) (statement of Sen. McKellar); *id.* at 2048 (statement of Rep. McCormack).

98. See BAKER, *supra* note 94, at 66 (acknowledging, however, that "[r]eports vary on what the Solicitor General actually told the Committee").

99. 81 CONG. REC. 2032 (statement of Rep. Vinson); see also 81 CONG. REC. 2952 (1937) (statement of Sen. Guffey).

100. See H.R. REP. NO. 75-294, at 11 (1937); S. REP. NO. 75-252, at 4-5 (1937); *id.* at 2953 (statement of Sen. Guffey); 81 CONG. REC. 2042 (statement of Rep. Jenkins); *id.* at 2038-39 (statement of Rep. Vinson).

101. 81 CONG. REC. 2042 (statement of Rep. Jenkins) (citations omitted).

year before the [Carter] case," Vinson observed.¹⁰² "If he had any change of mind relative to the power of Congress to regulate prices and unfair methods of competition within its sphere, it would have been an easy matter to have invalidated those points of the statute" on due process grounds.¹⁰³ For surely the four *Nebbia* dissenters had been prepared to take that step. But Sutherland's majority opinion had not. The majority had instead held that the price regulation provisions were inseparable from the offending labor provisions and therefore must fall as well. Had Roberts believed that regulation of coal prices violated the Due Process Clause, Vinson maintained, the majority would have said so.¹⁰⁴ Vinson and Jenkins made these remarks on March 9, 1937; the House swept the bill to passage two days later.¹⁰⁵ *West Coast Hotel's* March 29 "revolution" in due process jurisprudence was still more than two weeks away.¹⁰⁶

In several instances, state and federal courts did invalidate state and national recovery acts on nondelegation or Tenth Amendment grounds.¹⁰⁷ In opinions that actually reached the

102. 81 CONG. REC. 2039 (1937) (statement of Rep. Vinson).

103. *Id.*

104. See *id.*; see also S. REP. NO. 75-252, at 5 (1937) ("In light of the decisions of the Supreme Court, control of production is apparently beyond congressional power. Consequently price regulation appears to be the only remaining means by which the Congress can transform into order the chaos which for a generation has notoriously ruled the bituminous coal industry of the Nation."); H.R. REP. NO. 75-294, at 11 (1937) ("[F]our members of the Court [in *Carter Coal*] were of the opinion that the price provisions were valid. The majority did not pass upon this question, but it will be recalled that 2 years ago a strong opinion of the Court, delivered by Mr. Justice Roberts, sustained the due process of price fixing in the regulation of the milk industry.").

105. See 81 CONG. REC. 2126 (1937).

106. Moreover, the bill's sponsors recognized that *Nebbia* could be linked with the *Shreveport Case* (*Houston, East & West Texas Ry. Co. v. United States*), 234 U.S. 342 (1914), to extend federal regulatory authority of the price of intrastate sales of coal as well. See CUSHMAN, *supra* note 1, at 194-95.

107. See *United States v. Eason Oil Co.*, 8 F. Supp. 365, 377 (W.D. Okla. 1934) (invalidating provisions of Code of Fair Competition for the petroleum industry regulating drilling of oil wells as an effort to regulate purely intrastate activity, observing that "the fact that the state has power to fix intrastate prices or regulate intrastate business does not in any way justify the conclusion that Congress has the same power, for the only power which Congress has to deal with commerce is to regulate commerce 'among the several States'", *appeal dismissed*, 79 F.2d 1013 (10th Cir. 1935); *United States v. Gearhart*, 7 F. Supp. 712, 715-16 (D. Colo. 1934) (refusing to enjoin sale of coal at price below minimum NIRA code price, holding that

due process issue, however, state and federal courts repeatedly viewed *Nebbia* as authorizing wage and price regulation in a variety of industries that the Court had never held to be affected with a public interest. As the Court of Chancery of New Jersey put it, *Nebbia* meant that:

[I]f the legislative reason be the protection and welfare of the people, it may regulate the price of any commodity . . . in price fixing of commodities, the commodity need not be affected with a public interest . . . governments may, to insure the safety and happiness, the comfort and welfare of its people, fix the price of any essential article.¹⁰⁸

A similar pattern can be found in cases involving regulation of agriculture, in which courts occasionally found that state and

"the particular acts and conduct of the defendant here complained of do not restrain or burden interstate commerce and are not subject to federal regulation," and distinguishing *Nebbia* by noting that while the police powers of the state are plenary, the federal government "has no general police powers, but only such as are specifically enumerated in the Constitution, and . . . the Ninth and Tenth Amendments reserve all others to the states or the people"), *appeal dismissed*, 77 F.2d 1017 (10th Cir. 1935); *United States v. Mills*, 7 F. Supp. 547, 554, 559 (D. Md. 1934) (invalidating provisions of the Code of Fair Competition for the petroleum industry regulating local sales of gasoline on Tenth Amendment grounds); *Hart Coal Corp. v. Sparks*, 7 F. Supp. 16, 26 (W.D. Ky.) (invalidating provisions of the NIRA Bituminous Coal Code regulating wages and hours of coal miners on Tenth Amendment grounds as a scheme of regulation of "strictly local affairs," and distinguishing *Nebbia* as an exercise of the police power held by the states and not by the national government), *vacated*, 74 F.2d 697 (6th Cir. 1934); *Darweger v. Staats*, 275 N.Y.S. 394 (N.Y. Sup. Ct. 1934) (invalidating state recovery act's regulation of coal on nondelegation grounds), *aff'd*, 278 N.Y.S. 87 (N.Y. App. Div.), *aff'd*, 196 N.E. 61 (N.Y. 1935). *But see Hume-Sinclair Coal Mining Co. v. Nee*, 12 F. Supp. 801, 805-06 (W.D. Mo. 1935) (invalidating provisions of the National Bituminous Coal Conservation Act of 1935 on Tenth Amendment grounds, and while noting that "[b]y legislative fiat the Congress could not convert property used exclusively in private business into a public utility," not reaching the Fifth Amendment issue, because "even if [the coal industry was] affected with a public interest, nevertheless these are matters reserved exclusively to the states as the police power in such case would be involved and the national government is not authorized to enforce police regulations"); *Darweger v. Staats*, 196 N.E. 61, 67 (N.Y. 1935) (divided court striking down state recovery act's regulation of coal on nondelegation grounds, and while not reaching the due process issue, doubting "that the [*Nebbia*] Case is an authority for the Legislature to fix the prices of all commodities"). Albert L. Reeves, a Harding appointee, wrote *Hume-Sinclair*. See CHASE, *supra* note 74, at 231, 370.

108. *Wilentz v. Sears, Roebuck & Co.*, 172 A. 903, 904 (N.J. Ch. 1934) (invalidating the New Jersey Code of Fair Competition for the Retail Rubber Tire Trade on unrelated grounds).

federal programs transgressed federalism¹⁰⁹ or nondelegation¹¹⁰ limitations. When such objections were not fatal, however, *Nebbia* was typically sufficient to dispatch complaints that due process had been denied. In April 1934, a federal district judge in Illinois¹¹¹ brushed aside Commerce Clause and nondelegation objections, holding that the Secretary of Agriculture had the power to fix the price to be paid to producers for milk to be distributed in the Chicago market.¹¹² Federal courts in Massachusetts¹¹³ and Missouri¹¹⁴ invoked *Nebbia* in rejecting due process objections to processing and other taxes imposed by the Agricultural Adjustment Act of 1933 (AAA). In February of 1936, after the Supreme Court's decision in *United States v. Butler*,¹¹⁵ the

109. See, e.g., *Royal Farms Dairy, Inc. v. Wallace*, 8 F. Supp. 975, 978-80 (D. Md. 1934) (holding that the federal government is without constitutional power to regulate purely intrastate sales of milk); *Douglas v. Wallace*, 8 F. Supp. 379, 384-85 (W.D. Okla. 1934) (holding Agricultural Adjustment Act of 1933 unconstitutional insofar as it attempted to regulate prices in purely local commerce, distinguishing *Nebbia* on the ground that Congress has no police power and can exercise only enumerated powers).

110. See, e.g., *Ferretti v. Jackson*, 188 A. 474, 479-80 (N.H. 1936) (striking down state milk control act as an improper delegation of legislative power to an administrative agency); *Van Winkle v. Fred Meyer, Inc.*, 49 P.2d 1140 (Or. 1935) (invalidating act providing for execution of agricultural marketing agreements as unconstitutional delegation of legislative power, and by a divided court holding price regulation of farm commodities beyond the state's police power, with only the dissent discussing *Nebbia*); *State v. Matson Co.*, 47 P.2d 1003, 1005-06 (Wash. 1935) (striking down state milk control act as an improper delegation of legislative power to an administrative agency); *Chas. Uhden, Inc. v. Greenough*, 43 P.2d 983, 988 (Wash. 1935) (invalidating state agricultural adjustment act as an excessive delegation of legislative authority, and while expressing "grave doubt" as to whether *Nebbia* authorized price regulation of melons and tomatoes, finding that question "unnecessary here to determine"); *Griffiths v. Robinson*, 43 P.2d 977, 979 (Wash. 1935) (striking down state milk control act as an improper delegation of legislative power to an administrative agency).

111. The judge was FDR appointee William H. Holly. See CHASE, *supra* note 74, at 127, 372.

112. See *United States v. Shissler*, 7 F. Supp. 123, 126 (N.D. Ill. 1934).

113. See *Franklin Process Co. v. Hoosac Mills Corp.*, 8 F. Supp. 552, 562 (D. Mass. 1934), *rev'd sub nom. Butler v. United States*, 78 F.2d 1 (1st Cir. 1935), *aff'd*, 297 U.S. 1 (1936). Writing for the court was Harding appointee Elisha Hume Brewster. See CHASE, *supra* note 74, at 30, 369.

114. See *Larabee Flour Mills Co. v. Nee*, 11 F. Supp. 132, 133 (W.D. Mo. 1935). Writing for the court was Harding appointee Albert L. Reeves. See CHASE, *supra* note 74, at 231, 370.

115. 297 U.S. 1 (1936).

Supreme Court of California relied heavily on *Nebbia* in upholding a state statute establishing a commission to regulate the amounts of specified agricultural commodities that individual producers would be permitted to harvest and prepare for market.¹¹⁶ Moreover, in September, well after the conclusion of the Court's 1935 term, a federal district judge in California¹¹⁷ made *Nebbia* the centerpiece of his opinion upholding regulation of the handling and shipment of oranges and grapefruit by the Secretary of Agriculture under the authority of the marketing provisions of the AAA.¹¹⁸ The view that *Nebbia* provided a constitu-

116. See *Agricultural Prorate Comm'n v. Superior Court*, 55 P.2d 495, 508-10, 512 (Cal. 1936); see also *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 184 (1935) (invoking *Nebbia* in upholding California statute prescribing standards for containers in which horticultural products were marketed).

117. FDR appointee Leon Rene Yankwich. See CHASE, *supra* note 74, at 373.

118. See *United States v. Edwards*, 16 F. Supp. 53, 54-55 (S.D. Cal. 1936), *aff'd*, 91 F.2d 767 (9th Cir. 1937). The *Edwards* court observed that in *Nebbia*:

the power of the state to set up a minimum price for a commodity was sustained. In effect, the court there recognized it as within the power of a state to exercise such control in the matter of prices as would result in the abolition of "cut throat" competition and in the establishment of a code of "fair" competition. Can it then be said that the plenary power of the Congress to regulate commerce does not extend to the regulation of quantities of products to be sent in interstate commerce? The regulation of prices would have a much more direct bearing upon the production of goods than the regulation of the quantities to be shipped in interstate commerce. Such regulation would, according to ordinary economic principles, affect the entire price structure of the product, and would be felt not only by the portion of the product in interstate commerce, but also by the portion sold locally. It is an economic truism, that a stable price structure affects production. . . . A regulation of prices must affect production directly. And yet such regulation is within the power to regulate commerce.

How then, can it be said that the exercise of that power, when it aims to limit the quantity of products to be shipped in interstate commerce, is invalid, as involving control over production?

To deny to Congress its plenary power over commerce, merely upon the assumption that, in some indirect way, such control may induce persons to increase production voluntarily, would, if carried to its ultimate conclusion, cripple and destroy the power.

Id. at 54.

After *Tipaldo's* reaffirmation of *Adkins* in early June, see *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 604 (1936) (noting that the petition did not question the validity of *Adkins* and, therefore, *Adkins* dictated the outcome in *Tipaldo*), overruled in part by *Olson v. Nebraska ex rel. Western Reference & Bond Ass'n*, 313 U.S. 236 (1941), some opinions began to suggest that features of the

tional foundation for such regulation was of course not idiosyncratic. The Act's advocates had taken the same position in the House and Senate,¹¹⁹ where in 1935 it had passed by votes of 168-52¹²⁰ and 64-15.¹²¹

Nebbia's ramifications for labor and employment law were similarly manifest throughout 1936. In March, a federal district judge for the Western District of New York¹²² relied upon *Nebbia* in upholding the National Labor Relations Act (NLRA).¹²³ In

Administration's agriculture program might violate the Fifth Amendment. That July, in an opinion that would be reversed by the First Circuit the following year, Harding appointee Elisha Brewster, see CHASE, *supra* note 74, at 369, held that the marketing provisions were inseparable from the unconstitutional provisions of the act regulating agricultural production. See *United States v. David Buttrick Co.*, 15 F. Supp. 655, 658 (D. Mass. 1936), *vacated*, 91 F.2d 66 (1st Cir. 1937). Without reaching the due process issue, Judge Brewster did suggest a narrow reading of *Nebbia*: "If it be conceded that the federal government may regulate the sale of and prices for milk as a commodity affected with a public interest, it does not follow that such powers would extend to all agricultural commodities." *Id.* (citations omitted). The preceding year, Judge Brewster read *Nebbia* narrowly in *United States v. Seven Oaks Dairy Co.*, 10 F. Supp. 995, 1002 (D. Mass. 1935). Hoover appointee, Oscar Raymond Luhring, see CHASE, *supra* note 74, at 371, followed Buttrick in *Ganley v. Wallace*, 17 F. Supp. 115, 117-19 (D.D.C. 1936) (citing *Adkins* and *Tipaldo* for the proposition that the plaintiffs had standing to maintain the suit, and invalidating an order issued by the Secretary of Agriculture under the authority of the AAA as an attempt to regulate agricultural production), *rev'd*, 95 F.2d 364 (D.C. Cir. 1938). In *Chester C. Fosgate Co. v. Kirkland*, 19 F. Supp. 152 (S.D. Fla. 1937), Coolidge appointee Alexander Akerman, see CHASE, *supra* note 74, at 370, invoked *Adkins* and *Tipaldo* in an opinion finding marketing agreement provisions of the AAA unconstitutional, primarily but not exclusively on Tenth Amendment and nondelegation grounds. See *Kirkland*, 19 F. Supp. at 161, 163, 166.

119. See H.R. REP. NO. 74-1241, at 10 (1935); 79 CONG. REC. 11,150-54, 11,158, 11,219 (1935) (statement of Sen. Bankhead); 79 CONG. REC. 11,154 (1935) (statement of Sen. Black); 79 CONG. REC. 9485 (1935) (statement of Rep. Cooley); 79 CONG. REC. 9461-62 (1935) (statement of Rep. Jones); see also Comment, *Agricultural Adjustment and Marketing Control*, 46 YALE L.J. 130, 141, 252 (1936) (noting the view that the *Nebbia* rule would sustain the constitutionality of price control, or any other regulation, as long as the regulation complied with the normal due process requirements, regardless of any public interest element).

120. See 79 CONG. REC. 9595 (1935).

121. See *id.* at 11,658. Nine Democrats joined six Republicans in opposition. See *id.* Here again the bill's sponsors recognized, as the Court would ultimately hold, that *Nebbia* could be linked to the *Shreveport Case* to expand federal regulatory authority over the prices of intrastate sales. See CUSHMAN, *supra* note 1, at 203.

122. The judge was FDR appointee Harlan Watson Rippey. See CHASE, *supra* note 74, at 235, 373.

123. See *Precision Castings Co. v. Boland*, 13 F. Supp. 877, 887 (W.D.N.Y.), *aff'd*,

July, after both *Carter Coal* and *Tipaldo* had been decided, a three-judge panel of the Second Circuit¹²⁴ unanimously followed suit, turning back a due process challenge to the Act's self-organization provisions.¹²⁵ In April, a divided New York Court of

85 F.2d 15 (2d Cir. 1936).

124. The judges were Wilson appointee Martin Manton and Coolidge appointees Thomas Walter Swan and Augustus Noble Hand. See CHASE, *supra* note 74, at 114, 175, 266, 369-71.

125. See *NLRB v. Associated Press*, 85 F.2d 56, 60 (2d Cir. 1936), *aff'd*, 301 U.S. 103 (1937). Similarly, again after *Tipaldo* had been decided, a unanimous Fourth Circuit panel, consisting of Hoover appointee Morris Ames Soper and Coolidge appointees John Johnston Parker and Elliott Northcott, see CHASE, *supra* note 74, at 370-71, rejected a Fifth Amendment challenge to the Act's collective bargaining provisions. See *NLRB v. Washington, Va. & Md. Coach Co.*, 85 F.2d 990, 993-94 (4th Cir. 1936). Brushing aside the contention that *Adair v. United States* and *Coppage v. Kansas* were controlling, the court sustained the Act on the more recent authority of *Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548 (1930). See *Washington, Va. & Md. Coach Co.*, 85 F.2d at 993-94. In the wake of *Tipaldo*, the same panel had unanimously sustained the 1934 amendments to the Railway Labor Act against the claim that they violated the Fifth Amendment. See *Virginia Ry. Co. v. System Fed'n No. 40*, 84 F.2d 641, 651-52 (4th Cir. 1936), *aff'd*, 300 U.S. 513 (1937). And in *Tipaldo's* aftermath, a unanimous Fifth Circuit panel, consisting of Wilson appointee Samuel Hale Sibley, Hoover appointee Joseph C. Hutcheson, Jr., and FDR appointee Edwin Ruthven Holmes, see CHASE, *supra* note 74, at 369, 371-72, had opined of the NLRA:

For a long period Congress has considered and legislated upon difficulties relating to labor unions and strikes as burdening and impeding interstate and foreign commerce. That they may be constitutionally regulated in much the same way as this act proposes when affecting interstate railroad transportation was decided in [*Texas & New Orleans Railroad Co. v. Brotherhood*].

Bradley Lumber Co. v. NLRB, 84 F.2d 97, 99 (5th Cir. 1936) (citation omitted). Some post-*Tipaldo* opinions did suggest that the Act violated the Fifth Amendment. In *Pratt v. Stout*, 85 F.2d 172 (8th Cir. 1936), Hoover appointee John B. Sanborn, see CHASE, *supra* note 74, at 371, although not opining on the constitutionality of the NLRA, concluded that the trial court's conclusion that the Act, as applied to a flour manufacturer, exceeded Congress's commerce power and abridged the employer's Fifth Amendment rights was not "without substantial support." *Pratt*, 85 F.2d at 179. In *NLRB v. Mackay Radio & Telegraph Co.*, 87 F.2d 611 (9th Cir. 1937), *rev'd*, 304 U.S. 360 (1938), a divided court denied a petition for enforcement of an NLRB order against the company. See *id.* at 631. Hoover appointee Curtis Dwight Wilbur, see CHASE, *supra* note 74, at 3-11, wrote an opinion denying the petition on the authority of *Adair* and *Coppage*. See *Mackay Radio & Tel.*, 87 F.2d at 626-27. He was unable, however, to persuade either of his colleagues on the panel that the Act's provisions abridged Fifth Amendment rights. FDR appointee Clifton Mathews, see CHASE, *supra* note 74, at 372, concurred in the judgment as a matter of statutory interpretation, finding it unnecessary to reach the Fifth Amendment issue. See *Mackay Radio & Tel.*, 87 F.2d at 631 (Mathews, J., concurring). FDR ap-

Appeals relied upon Roberts's 1936 elaboration of *Nebbia* in *Borden's Farm Products Co. v. Ten Eyck*¹²⁶ in upholding the state's unemployment compensation insurance statute,¹²⁷ in December, the Supreme Judicial Court of Massachusetts invoked *Nebbia* and *Borden's Farm Products* in upholding the Bay State's unemployment compensation law.¹²⁸ Between 1934 and 1936, a variety of commentators interpreted *Nebbia* to herald the demise of *Adkins v. Children's Hospital*.¹²⁹ In April of 1936,

pointee Francis Arthur Garrecht, see CHASE, *supra* note 74, at 372, dissented, maintaining that *Adair* and *Coppage* had "been modified or overruled by the later case of [*Texas & New Orleans R.R. Co. v. Brotherhood of Railway Clerks*] . . ." Mackay Radio & Tel., 87 F.2d at 638 (Garrecht, J., dissenting) (citation omitted). For contemporary commentary doubting that *Adair* and *Coppage* survived *Railway Clerks*, see *Hearing on S. 1958 Before the Senate Committee on Education and Labor*, 74th Cong. 233 (1935) (statement of Professor Milton Handler), reprinted in LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 1613 (1949) [hereinafter NLRA LEGISLATIVE HISTORY]; *Hearing on S. 1958 Before the Senate Committee on Education and Labor*, 74th Cong. 5253 (statement of Sen. Wagner), reprinted in NLRA LEGISLATIVE HISTORY, *supra*, at 1428-29; NLRA LEGISLATIVE HISTORY, *supra*, at 2338 (statement of Sen. Wagner); BERNARD C. GAVIT, THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION 231-33 (1932); JOEL I. SEIDMAN, THE YELLOW DOG CONTRACT 35 n.109 (1932); Edward Berman, *The Supreme Court Interprets the Railway Labor Act*, 20 AM. ECON. REV. 619, 629-36 (1930); Osmond K. Fraenkel, *Recent Statutes Affecting Labor Injunctions and Yellow Dog Contracts*, 30 ILL. L. REV. 854, 862 & n.46 (1936); E.F. Albertsworth, Comment, 25 ILL. L. REV. 307, 308 (1930); Comment, 40 YALE L.J. 92, 92-93 (1930); Henry K. Higginbotham, *Recent Case, Federal Protection of Collective Bargaining Under Railway Labor Act of 1926*, 37 W. VA. L.Q. 101 (1930).

Several courts invalidated NLRB orders on the grounds that they regulated local activity, without reaching the due process issue. See, e.g., *Myers v. Bethlehem Shipbuilding Corp.*, 88 F.2d 154, 156 (1st Cir. 1937), *rev'd*, 303 U.S. 41 (1938); *Foster Bros. Mfg. Co. v. NLRB*, 85 F.2d 984, 990 (4th Cir. 1936); *Fruehauf Trailer Co. v. NLRB*, 85 F.2d 391, 392 (6th Cir. 1936), *rev'd*, 301 U.S. 49 (1937); *NLRB v. Jones & Laughlin Steel Corp.*, 83 F.2d 998, 998-99 (5th Cir. 1936), *rev'd*, 301 U.S. 1 (1937); cf. *NLRB v. National N.Y. Packing & Shipping Co.*, 86 F.2d 98, 99 (2d Cir. 1936) (upholding NLRB order directed to an interstate packing and shipping concern).

126. 297 U.S. 251 (1936).

127. See *W.H.H. Chamberlin, Inc. v. Andrews*, 2 N.E.2d 22, 26 (N.Y. 1936).

128. See *Howes Bros. Co. v. Massachusetts Unemployment Compensation Comm'n*, 5 N.E.2d 720, 726, 728 (Mass. 1936).

129. See HUGH WILLIS, CONSTITUTIONAL LAW OF THE UNITED STATES 736 (1936) (predicting that *O'Gorman* and *Nebbia* are "a prophecy" that *Adkins* "will be overruled whenever a case giving the Supreme Court an opportunity to do so is presented to it"); Morris Duane, *Government Regulation of Prices in Competitive Business*, 10 TEMP. L.Q. 262, 264 (1936) (arguing that *Nebbia* "practically overruled a number

of cases in which the Court had held state price fixing a violation of the [D]ue [P]rocess [C]lause of the Fourteenth Amendment; also another number in which state control of hours and wages had been declared invalid—a very similar problem”); Robert L. Hale, *Minimum Wages and the Constitution*, 36 COLUM. L. REV. 629, 633 (1936) (suggesting that *Nebbia* had overruled *Adkins*); John E. Hannigan, *Minimum Wage Legislation and Litigation*, 16 B.U. L. REV. 845, 865 (1936) (“[T]he *Nebbia* case doctrine, if applied in the [*Adkins*] case, would have sustained the law.”); Norman Macbeth, Jr., *Present Status of the Adkins Case*, 24 KY. L.J. 59, 66 (1935) (positing that had Hughes and Roberts “been on the [C]ourt in 1923, it is highly improbable that they would have concurred in the *Adkins* decision” and recognizing that in light of *O’Gorman* and *Nebbia*, it seems “probable that they will now refuse to follow the *Adkins* doctrine”); Alpheus Thomas Mason, *Labor, the Courts, and Section 7(a)*, 28 AM. POL. SCI. REV. 999, 1008 (1934) (stating that *Nebbia* “augurs well for minimum wage regulations”); Thomas Raeburn White, *Constitutional Protection of Liberty of Contract: Does It Still Exist?*, 83 U. PA. L. REV. 425, 438, 440 (1935) (noting that “[the Court] has in effect surrendered its power to declare void acts of legislature on the ground that they infringe liberty of contract” and that state legislatures now “may fix the rates of wages and the hours of labor”); Note, *Nebbia v. People: A Milestone*, 82 U. PA. L. REV. 619, 622 (1934) (noting that the change wrought by *Nebbia* is “so great as to overrule for all practical purposes a host of cases decided in recent years under the due process clause;” it is now “possible that a state may legally regulate all its businesses even to the extent of fixing prices, wages, and hours of labor”); Francis W. Matthys, *Recent Decision*, 9 NOTRE DAME LAW. 468, 470 (1934) (asserting that *Nebbia* “clinch[ed] the battle”; “No longer may a man cry out ‘Unconstitutional!’ against every law that seems to restrict his freedom of contract or to deprive him of his property. . . . The gateway to social legislation has at last been opened. Labor laws, health laws, and other legislation that is sorely needed . . . now stand a good chance of being enacted”); Joseph H. Mueller, *Recent Decision*, 23 ILL. B.J. 89, 91 (1934) (“[*Nebbia*] is noteworthy for it would scarcely be denied from an economic standpoint that the regulation of wages, hours of labor, etc., as well as price regulation invade the right of private property in a manner clearly affecting price.”); *Recent Case*, 85 U. PA. L. REV. 117, 118 (1936) (stating that wages “are but the price of a commodity which is sold to employers, and the labor and health of women are easily as essential to the welfare of a state as is milk. Therefore, if the dairy industry may be protected by minimum price laws, the states should be permitted to extend similar aid to the far more helpless women workers”); see also *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 635-36 (1936) (Stone, J., dissenting) (noting that “[*Nebbia*] should control the present case,” because the decision and declaration in *Nebbia* are “irreconcilable with the decision and most that was said in the *Adkins* case,” and this has “left the Court free of [*Adkins*] restriction as a precedent. . . . We should follow our decision in the *Nebbia* case”); *Nebbia v. New York*, 291 U.S. 502, 555 (1934) (McReynolds, J., dissenting) (“[T]he argument advanced here would support general prescription of prices for farm products, groceries, shoes, clothing, all the necessities of modern civilization, as well as labor, when some legislature finds and declares such action advisable and for the public good.”); Thomas C. Chapin, *Stare Decisis and Minimum Wages*, 9 ROCKY MTN. L. REV. 297, 306 (1937) (stating that *Nebbia* had entailed “a liberal ruling in the *Morehead Case*”); Paul Y. Davis, *The Washington Minimum Wage Decision*, 12 IND. L.J. 415, 417 (1937) (“It now seems clear that Mr. Justice Roberts’

a unanimous Supreme Court of Washington signaled its agreement, relying heavily on *Nebbia* in an opinion sustaining the state's minimum wage statute.¹³⁰

Like some courts, some commentators read the due process holding of *Nebbia* narrowly.¹³¹ But they were a distinct minority.

concurrence in an opinion so at variance with the principle of his own pronouncement in *Nebbia v. New York* was only obtained because of the supposed procedural bar to a re-examination of the [Adkins] case.”); Kurt Stern, *Recent Interpretation by the Supreme Court of Liberty of Contract in Employment Cases*, 11 U. CIN. L. REV. 82, 89 (1937) (arguing that in view of *Nebbia*, “the real reason for the holding in the *Morehead* case is the weight of *stare decisis*”); Olin L. Browder, Comment, 25 ILL. B.J. 284, 286 (1937) (“[C]onsidering the ground of decision in the *Morehead* case, and considering also that it was Justice Roberts who wrote the opinion of the Court in the *Nebbia* case, his switch to the liberal side [in *Parrish*] can be sufficiently explained without resorting to political explanations.”); Comment, 25 ILL. B.J. 75, 76 (1936); Note, 22 IOWA L. REV. 565, 570-71 (1937); Comment, 34 MICH. L. REV. 1180, 1187 (1936) (“[I]t seems very difficult to understand why prices can be fixed without violating due process, but wages cannot be. Both interfere with liberty of contract.”); Louis H. Rubenstein, Note, *The Minimum Wage Law*, 11 ST. JOHN’S L. REV. 78, 82-83 (1936) (noting that in light of *Nebbia*, “one would have felt confident that the New York Minimum Wage Law could successfully withstand charges of unconstitutionality”).

130. See *Parrish v. West Coast Hotel Co.*, 55 P.2d 1083, 1089-90 (Wash. 1936), *aff’d*, 300 U.S. 379 (1937).

131. See Charles Bunn, *Production, Prices, Incomes, and the Constitution*, 11 WIS. L. REV. 313, 316 (1936) (“[I]n the *Nebbia* case as in all the other cases price fixing has been sustained, the Court was careful to assemble special facts which seemed to make price fixing in that particular industry of particular importance to the public. I believe that it is accurate to say, as the cases stand, that regulation of the price of ordinary articles and services, in ordinary times, simply to affect the economic balance which our text lays down, and in the absence of peculiar facts creating a special situation in a single industry, is unconstitutional deprivation of liberty of business conduct.”); Irving B. Goldsmith & Gordon W. Winks, *Price Fixing: From Nebbia to Guffey*, 31 ILL. L. REV. 179, 201 (1936) (“A bare majority of the Supreme Court decided to remove the public interest limitation, but that same bare majority has done no more than to permit temporary price fixing under exceptional circumstances on strong showing of fact.”); Charles Grove Haines, *Judicial Review of Acts of Congress and the Need for Constitutional Reform*, 45 YALE L.J. 816, 841 (1936) (arguing that cases such as *Nebbia* and *Blaisdell*, “though indicating a trend toward more liberal criteria for the consideration of legislative acts, have been so interpreted as to affect but little the scope of the field of public regulation”); Herbert T. Brunn, Note, 22 CORNELL L.Q. 397, 397, 399 (1937) (arguing *Nebbia*’s “broad implications . . . have been somewhat narrowed in recent United States Supreme Court decisions The most recent cases leave doubtful the effect of the *Nebbia* case. While it seems clear that price fixing is valid as long as the method adopted is suitable and it is required by the general welfare, it is questionable whether a permanent statute will be upheld since the court has lately been emphasizing the emer-

Most observers, while occasionally cautious, read *Nebbia* far more broadly.¹³²

agency feature of price fixing legislation."); Louis Paul Haffer, Note, 16 B.U. L. REV. 775, 778 (1936) (discussing cases invalidating resale price maintenance statutes as applied to cosmetics and noting that "the *Nebbia* case may be reconciled by the not easily dispelled assertion that the legislation which [*Nebbia*] declared valid was either passed for a compelling emergency, or to control an essential element of human existence"); Louis Paul Haffer, Note, 16 B.U. L. REV. 506, 513 (1936) (suggesting that *Nebbia* was "concerned merely with emergency measures with respect to emergency goods"); Theodore Woodrow Kheel, Legislation, 22 CORNELL L.Q. 445, 447 n.13 (1937) ("While the [*Nebbia*] case was taken to mean that the Legislature could fix prices of commodities not necessarily 'affected with the public interest,' it could not be taken to mean that the Legislature could fix all prices."); Recent Decision, 11 ST. JOHN'S L. REV. 104, 105, 107 (1936) ("[T]he recent decision of [*Tipaldo*] dealing with the New York minimum wage statute makes the applicable scope of the *Nebbia* case seem doubtful. . . . As indicated by the *Mayflower Farms* case, the court may narrow its decision in the *Nebbia* case to a point of ineffectiveness by rejection of detailed regulations which are numberless in some industries, particularly the milk industry."); Recent Decision, 10 ST. JOHN'S L. REV. 319, 319 (1936) ("The legislature may not fix the prices nor regulate the rates of an industry not intimately affected with the public interest."); Recent Case, 8 TEMP. L.Q. 422, 426 (1934) (concluding that "the legislature may fix prices only when the business involved is 'affected with a public interest'"); Note, 2 U. CHI. L. REV. 329, 331 (1935) ("[T]he liberal [*Nebbia*] decision [may] not be applied as extensively as has been suggested.").

132. See, e.g., *Due Process and the Nebbia Case*, 20 A.B.A. J. 225 (1934) ("The significance of the decision with respect to various provisions of the National Recovery Program will hardly be overlooked."); George J. Feldman, *Legal Aspects of Federal and State Price Control*, 16 B.U. L. REV. 570, 591-93 (1936) (maintaining that "[t]he legality under the 'due process clause' of the prices fixed depends in each case on the particular circumstances involved," and therefore "[i]t is not proper to conclude from the *Nebbia* case that a legislature may now at any time regulate the selling price of any and all commodities," but asserting nevertheless that *Nebbia* "is extremely important because it lays down a new conception of public interest in business and opens the door to legislative regulation of prices and production in those industries in which the legislature can reasonably find from the surrounding economic facts and conditions that the public welfare requires the regulation, provided the statute is not arbitrary, capricious or discriminatory"); Robert L. Hale, *The Constitution and the Price System: Some Reflections on Nebbia v. New York*, 34 COLUM. L. REV. 401, 404, 422, 424 (1934) ("The *Nebbia* case does repudiate the doctrines announced in some other recent decisions. . . . The majority of the Court did not confine its discussion to the power to fix minimum prices in the particular circumstances of the case, but discussed the constitutionality of price fixing generally. . . . As a result of the *Nebbia* case, the horizontal limit has been removed from price fixing."); Thomas P. Hardman, *Public Utilities I. The Quest for a Concept—Another Word*, 40 W. VA. L.Q. 230, 238 (1934) (arguing that *Nebbia* "seems to stand for the proposition that there is no difference, legally speaking, between the kind of control that is exercised over so-called businesses affected with a public interest and the control exercised over so-called private businesses"); Frank E.

Horack, Jr., & Julius Cohen, *After the Nebbia Case: The Administration of Price Regulation*, 8 U. CIN. L. REV. 219, 231-32 (1934) (arguing that after *Nebbia*, the Court "may now look to the reasonableness of the regulation and does not have to filter reasonability through the judicial screens already clogged with the remains of *Wolff Packing v. Industrial Commission*, the *Adkins* case, the *Tyson* case, and many others. . . . If the *Nebbia* case expresses the policy of the court, then the future will see judicial inquiry directed toward the 'reasonableness of price' and not toward the initial competency to regulate. This will leave to the legislature (for the most part) the problem of policy. . . ."); Robert M. Kerr, *Price Fixing and Marketing Regulations*, 15 OR. L. REV. 46, 50, 51 (1935) ("It would seem, therefore, that the *Nebbia Case* has significance far beyond the particular commodity there involved. It lends support to the proposition that agriculture and each of its branches are industries 'subject to control for the public good,' the prosperity of which is [a] legitimate concern of the state. . . . The Supreme Court having at last recognized that the police power is competent to deal with any business, using all of the necessary weapons, including price control, to protect the public interest, there would appear now to remain only the question of wherein lies the public interest in relation to any particular commodity or industry affected. And that, of course, is primarily a matter for the legislative branch of the government to determine as the occasion arises."); Robert A. Maurer, *Due Process and the Supreme Court—A Revaluation*, 22 GEO. L.J. 710, 711 (1934) (discussing "the recent *New York Milk* case, in which the Supreme Court is thought by some to have turned its back upon prior decisions, and to have indicated an intention to allow social and economic legislation to be enforced untrammelled by any constitutional limitation heretofore supposed to exist in the [D]ue [P]rocess [C]lause"); *Regulation of Milk Industry Valid Says Highest Court*, 40 CASE & COM. 2, 3 (1934) ("[I]t is possible that this decision heralds a return to the concepts of an earlier day when due process was less burdensome on state action than the decisions of the last quarter of a century would seem to indicate."); J. Louis Warm, *The Rationale of Price Fixing Under the Codes*, 8 U. CIN. L. REV. 529, 533 n.13 (1934) ("All of the reasoning which the court uses, all of the facts which it presents are as valid for normal economic periods, so-called, as for emergencies. The public is entitled to the same protection under any conditions."); White, *supra* note 129, at 438 (1935) ("[I]t would seem clear [after *Nebbia*] that Congress or the state legislatures (so far as the due process clauses are concerned), may fix maximum prices for the sale of commodities of all kinds. . . . If they may fix maximum prices, they may also fix minimum prices. They may provide that the employees of industry must belong to unions or they may forbid them to belong to unions. . . . They may limit the output of the manufacturer or farmer and determine the kind and character of product he shall make or grow."); Thela F. Call, Note, *Legislative Control of the Milk Industry*, 3 GEO. WASH. L. REV. 494, 500, 505 (1935) ("The case of *Nebbia v. New York* can best be explained by realizing that the courts are recognizing the principle that the policy of noninterference in private business must yield to the policy of regulation when it is to the interest of society at large. . . . While it is a general maxim that the federal government does not have power to regulate intrastate commerce, yet when it is so mingled with interstate commerce that one cannot be regulated without the other, there is ample authority for the proposition that Congress has the requisite power. There is no question as to the power to regulate interstate commerce, and the only limitation is the 5th Amendment. The *Nebbia Case* seems to have settled that question as far as recovery legislation is con-

cerned.”); Note, *Constitutionality of the New York Fair Trade Act*, 22 VA. L. REV. 556, 559-62 (1936) (“In the now famous *New York Milk Case* the court executed a surprising volte face . . . the phrase [affected with a public interest] was effectively emasculated. . . . The effect of the *Nebbia Case* seems to be to put governmental price control on the same footing as all other social legislation. . . . In the passage of economic legislation, as elsewhere, the due process clause requires only that the exercise of the police power be not arbitrary nor discriminatory.”); William M. Krug, Note, 14 B.U. L. REV. 396, 397 (1934) (“Instead of using the emergency as a basis for the validity of the statute, the court upheld the measure on the ground that it was a valid exercise of the police power. The court deliberately went out of its way to remove the so-called ‘affected with a public interest test’ as a basis of permissible price regulation from our law. A reading of the broad and definite language of the decision prevents one from reaching any other conclusion.”); Corlett McClennan, Comment, *Can a State Regulate Prices at a Private Industry?*, 9 IND. L.J. 522, 525, 529 (1934) (“[I]t seems clear that the *Milk Case* gives us some new law directly overruling the dogma of the previous cases and introduces an era of governmental regulation. . . . The decision removes a great deal of uncertainty as to the price fixing provisions of the ‘New Deal’ legislation and it is the opinion of the writer that those provisions will not meet with much difficulty if the court finds that price control is an effective method of protecting the paramount social interests involved.”); Comment, 34 MICH. L. REV. 691, 697-98 (1936) (“Certain it is that the now famous case of *Nebbia v. New York* has cast considerable doubt upon all those decisions which established for price legislation a different standard than for other forms of business regulation; for the court, in that opinion, appears definitely to have gone out of its way to remove the ‘affected with a public interest’ test as a basis of permissible price fixing.”); Note, 13 N.Y.U. L. REV. 267, 275 (1936) (citing *Nebbia* for the proposition that, “[a]lthough not all authorities are agreed as to the efficacy of price maintenance, the courts, in determining whether such legislation is warranted may not, if the question is a controversial one, substitute their own economic views for those of the legislature”); Norman Parker, Note, *Nebbia v. New York and Business Affected with the Public Interest*, 19 ST. LOUIS L. REV. 202, 209 (1934) (“[G]overnmental regulation is sustainable when the competitive system has broken down as a means of substantially protecting both the buyer and the seller. The legislative determination of the feasibility of the means adopted to attain a designated end is viewed more as a finality; it is less open to judicial inquiry, especially from the point of view of substance, than has been the tendency hitherto.”); Note, *Price Fixing and Due Process of Law*, 19 IOWA L. REV. 577, 580 (1934) (“Taking into consideration the language of this opinion and the alignment of the court, it seems from the result that the majority of the court are tending towards acceptance of the position of Justice Holmes in the *Tyson* case; that price fixing in itself does not violate any concept of due process; and that regulation by the legislature is permissible in any business without regard to affectation with a public interest if regulation is reasonable, in the sense of having any relation to the end, for the public good.”); William A. Reppy, Comment, 9 S. CAL. L. REV. 370, 373 (1936) (“[T]he *Nebbia* case took a position even further advanced than the dissents in the previous cases. The existence of separate business categories was flatly denied, as was the notion that there is something peculiarly sacrosanct about prices.”); Comment, 7 S. CAL. L. REV. 325, 330 (1934) (“The *Nebbia* case leaves the responsibility of the regulation of public affairs with state legislatures. The Supreme Court is no longer a

Committee of Nine to settle the economic problems of the States."); George M. Snellings, Jr., Comment, *Liquidation of the Public Utility Concept: The Decision in Nebbia v. New York*, 8 TUL. L. REV. 442, 448, 449, 451 (1934) ("Certainly the import of this latest opinion is clear beyond a doubt. . . . [Nebbia offers] a present promise of more liberal presumptions in favor of the validity of social and economic experimentation through organized government at a time when the exigencies of the situation imperatively demand some positive effort on the part of government. . . . It may, therefore, be respectfully suggested that the Supreme Court of the United States is now prepared to consider with willing hearts and open minds cases involving the constitutionality of the operation of such enactments as the National Industrial Recovery Act or the Agricultural Adjustment Act, with 'every possible presumption' to obtain in favor of their validity."); Note, *Some Constitutional Problems Arising out of Federal and State Control of Milk*, 34 COLUM. L. REV. 1336, 1337-38 (1934) ("The recognition in *Nebbia v. New York* of the power of a state to regulate retail milk prices marked a departure from the accepted theory that price regulation was permissible only as to business 'affected with a public interest' or 'devoted to a public use.' Under the doctrine of that case, freedom from price fixing is to enjoy no special sanctity, but price like other regulation will be valid when reasonable."); Note, 82 U. PA. L. REV. 619, 621-22 (1934) ("[T]he Court has not relied on the economic emergency or the temporary character of the legislation, but has gone much further and has placed the decision solely on the ground that the state has a right to pass price fixing legislation as part of its police power whenever the welfare of its citizens reasonably demands it . . . all businesses may be subject to the exercise of the police power if the legislature reasonably states that the public welfare is involved. . . . The decision marks the change from an era of *laissez-faire* to an era of governmental regulation."); Note, 20 VA. L. REV. 887, 891 (1934) ("Granted the power to legislate for the general welfare, the conclusion of the court that price fixing legislation which is not 'arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt' is permissible in any industry seems logically inevitable."); Legislation, *Fair Trade Legislation: The Constitutionality of a State Experiment in Resale Price Maintenance*, 49 HARV. L. REV. 811, 816 (1937) (arguing that although *Nebbia* "may be assimilated, by a process of attrition, to cases justifying price fixing in an 'emergency,' the face value of its language indicates such a reversal of Supreme Court policy as to remove the former ban which rendered legislative price setting of ordinary commodities *per se* invalid, and to make reasonableness alone the determinant of validity"); Recent Decision, 24 GEO. L.J. 1011, 1012 (1936) ("The great importance of the *Nebbia* case . . . is that it establishes the principle that it is not required that business be affected with a public interest to be subject to the states' regulatory power, and concludes that the private character of a business does not prevent the state from regulating prices."); Recent Decision, 22 GEO. L.J. 614, 616 (1934) ("The decision has been widely heralded for the bearing it may have upon the future of national emergency legislation," and "might fairly be interpreted to mean that there is nothing invalid in the N.R.A. and the A.A.A. as far as due process, interference with liberty of contract, or deprivation of private property are concerned"); Recent Cases, 2 GEO. WASH. L. REV. 404, 407 (1934) ("[T]he several references made by the Court to the Fifth Amendment and the regulatory powers of the Federal Government appear to be more than mere fortuitous dicta, and probably indicate the future attitude of the Court as to problems of due process arising out of Federal legislation."); Recent Decision, 34 MICH. L. REV.

The foregoing data would appear to be difficult to reconcile with the recent claim that neither "lower court judges" nor other "serious" contemporary observers viewed *Nebbia* as creating far-reaching new regulatory opportunities for state and national government.¹³³

1241, 1242 n.9 (1936) (stating that it is "usually thought that *Nebbia v. New York* did away with this artificial [affected with a public interest] standard"); Recent Decision, 33 MICH. L. REV. 961, 962 (1935) ("The constitutionality of price fixing *per se* in industries not traditionally 'affected with a public interest' may now be a matter of history."); Legislation, *Milk Regulation: A Problem in Economics, Legislation, and Administration*, 40 W. VA. L.Q. 247, 250 (1934) ("By a brave leap, the majority discarded the empty concept of 'business affected with a public interest' as the test of price regulation, for an enlarged concept of the police power. Apparently, 'price' will now be included with other police power regulation when its control is vital to the status of a large economic class or of society itself."); Recent Case, 18 MINN. L. REV. 874, 875 (1934) ("[T]he Supreme Court did not make the validity of the statute dependent on the existence of a general economic emergency."); Richard F. Mooney, Recent Decision, 18 MARQ. L. REV. 198, 199 (1934) ("In rediscovering *Munn v. Illinois* the court renounces the *laissez-faire* philosophy of the cases which had given so narrow a construction to the phrase, 'affected with a public interest.' As the law now stands, a business is affected with a public interest, so as to be subject to the exercise of the police power, when the legislature reasonably determines that regulation is for the best interests of the people as a whole."); Joseph H. Mueller, Recent Decision, 23 ILL. B.J. 89, 91 (1934) ("*Nebbia* has the virtue of opening the way for a pragmatic examination of each individual case on its merits and enabling the court to uphold whatever laws the needs of an ever-changing society may demand. In view of recent momentous changes in our social and economic structure the importance of this is significant."); Recent Decision, 9 NOTRE DAME LAW. 468, 469 (1934) ("It is evident that in the principal case the Supreme Court has overruled its former decisions."); Recent Case, 11 TEMP. L.Q. 100, 101, 103 (1936) ("[T]he effect of this [*Nebbia*] decision is far-reaching and indeterminate. . . . [D]ue to the alacrity with which some of the courts have accepted the *Nebbia* ruling, one is tempted to foresee the elimination of major abuses in other industries by governmental price control based upon the principles enunciated in the milk control cases."); Recent Case, 9 TEMP. L.Q. 95, 97-98 (1934) ("The *Nebbia* case has definitely rejected the public interest test. . . . This is a distinct departure from the decided cases, [and is] strong evidence of the course the court is likely to follow" in cases involving price regulation under the amended AAA; see also *supra* note 129 (interpreting *Nebbia* to signal the demise of *Adkins*).

133. Bruce Ackerman, *Revolution on a Human Scale*, 108 YALE L.J. 2279, 2335 (1999). Ackerman's assertion is unashamedly categorical. By contrast, the spirited student article upon which he relies (which was prepared under Ackerman's direction) acknowledges a small fraction of the sources marshalled here, dismissing them as idiosyncratic while overlooking the balance of the evidence impeaching this particular Ackermanian conceit. See David A. Pepper, *Against Legalism: Rebutting an Anachronistic Account of 1937*, 82 MARQ. L. REV. 63, 63 (1998) (offering Professor Ackerman "deep thanks for his active and enthusiastic guidance throughout this

III. LOST FIDELITIES, 1934-1940

Returning from the broader constitutional culture to the Supreme Court, we find that there were cases decided between 1934 and 1937 in which Hughes or Roberts joined opinions in invalidating statutory provisions on the ground that they violated the Fifth or Fourteenth Amendments. These cases involved the interpretation of either the same clause (due process) or at least the same amendment (the Fourteenth) as that implicated in *Nebbia*. It is therefore entirely appropriate to suggest that they might require somewhat more explanation than do post-*Nebbia* cases decided on federalism or separation of powers grounds. Yet Hughes and Roberts clearly believed at the time that their votes in these cases were consistent with *Nebbia*. Moreover, they continued to adhere to the substantive positions articulated in those cases even *after* they had voted to uphold the minimum wage in *Parrish*.

Three cases are of particular interest: *Railroad Retirement Board v. Alton Railroad Co.*,¹³⁴ *Colgate v. Harvey*,¹³⁵ and *Mayflower Farms Inc. v. Ten Eyck*.¹³⁶ Each of these cases illustrates

project"). Both suffer from regrettable inattention to doctrinal nuance and the voting behavior of individual Justices. See *infra* note 221.

134. 295 U.S. 330 (1935).

135. 296 U.S. 404 (1935).

136. 297 U.S. 266 (1936). For the present, I leave to one side cases in which the decision to invalidate a statute was unanimous. See, e.g., *Treigle v. Acme Homestead Ass'n*, 297 U.S. 189, 197-98 (1936); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601-02 (1935); *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 63 (1935); *W.B. Worthen Co. v. Thomas*, 292 U.S. 426, 434 (1934). Such decisions serve only to demonstrate that even Brandeis, Stone, and Cardozo, who along with many others maintained that *Nebbia* was the controlling authority in the minimum wage cases, believed that the Fifth and Fourteenth Amendments, as well as the Contracts Clause, still imposed some substantive limits on governmental power. The "Three Musketeers," like Hughes and Roberts, apparently saw their votes in *Nebbia* and *Parrish* as consistent with their votes in these cases. Unless we are prepared to embrace the novel contention that Brandeis, Stone and Cardozo "switched" in 1937, the ostensible contrast between *Parrish* and these unanimous decisions cannot advance the case for the view that Hughes or Roberts underwent such a conversion.

For similar reasons I leave aside cases decided in 1937 and thereafter in which the decision to uphold a statute was unanimous. See, e.g., *Townsend v. Yeomans*, 301 U.S. 441, 459 (1937); *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 324 (1937); *National Fertilizer Ass'n v. Bradley*, 301 U.S. 178, 181 (1937); *Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke*, 300 U.S. 440, 470 (1937);

an incontrovertible fact: *Nebbia* was not *Ferguson v. Skrupa*.¹³⁷ This is not to minimize *Nebbia*'s importance, but simply to understand more precisely the nature of its importance. In abandoning the public/private distinction, *Nebbia* did not remove the requirement that regulations of business be reasonable, that is, not arbitrary or discriminatory. As *Alton*, *Colgate*, and *Mayflower* illustrate, that standard was not as relaxed in the hands of Hughes and Roberts in 1935 and 1936 as it eventually came to be. But the standard came to be more relaxed not because Hughes and Roberts changed, but because the Court did.

In *Alton*, Justice Roberts bludgeoned the Railroad Retirement Act of 1934 to death. Before declaring that the Act was not a regulation of commerce within the meaning of Article I, Section 8, Roberts had declared several of its provisions unconstitutional on the ground that they deprived employers of their property without due process of law.¹³⁸ Although this was far from a whole-hearted embrace of the welfare state, the holding was at the same time hardly a repudiation of *Nebbia*. Railroads were, after all, the paradigmatic businesses affected with a public interest. Their rates had long been subject to regulation.¹³⁹ Before *Nebbia*, only specified businesses affected with a public interest had been subject to certain types of regulation. By abandoning the business affected with a public interest limitation, *Nebbia* dramatically enlarged the category of businesses subject to those types of regulation. Even with respect to businesses

Henderson Co. v. Thompson, 300 U.S. 258, 267 (1937); Midland Realty Co. v. Kansas City Power & Light Co., 300 U.S. 109, 114-15 (1937); Hauge v. Chicago, 299 U.S. 387, 392 (1937). Such decisions advance the view that Hughes and Roberts switched only if we accept the novel proposition that the Four Horsemen switched as well. For an explanation of the differing results in *Radford* and *Wright*, see Barry Cushman, *The Hughes Court and Constitutional Consultation*, 1998 J. SUP. CT. HIST. 79, 81-84.

Finally, I also leave to one side *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936), which I discuss in detail in CUSHMAN, *supra* note 1, at 92-104.

137. 372 U.S. 726 (1963).

138. See *Alton*, 295 U.S. at 348-60.

139. See generally Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 YALE L.J. 1017 (1998) (discussing the relationship between the regulation of railroads in the late 19th century and current theories of economic regulation).

affected with a public interest, however, the government's regulatory power had never been without limits; and *Nebbia* did not purport to lift those limits. So while Chief Justice Hughes filed a vigorous dissent, nowhere did he assert that the majority's ruling was inconsistent with *Nebbia*. In fact, Hughes didn't even cite the case.¹⁴⁰

There are several things to note about *Alton*. First, it did not stand as an insuperable obstacle to the enactment of an effective federal pension statute for railway workers. Shortly after the Court announced the decision, Congress went to work to frame a pension statute based not on the commerce power, but instead on the powers to tax and spend. By the summer of 1937, congressional leaders and administration officials had crafted a formulation acceptable to the major railroads and railway unions, and embodied it in the Carrier Taxing Act of 1937¹⁴¹ and the Railroad Retirement Act of 1937.¹⁴² Representatives of the railroads and the brotherhoods promised not to contest the constitutionality of the legislation, and "to use their influence against having anyone else bring such action."¹⁴³ And they delivered. The pension system they created remains with us in modified form today.¹⁴⁴

Second, even the *Alton* dissenters found that one of the statute's provisions violated the Due Process Clause. "I agree," wrote Hughes, "with the conclusion that the requirement that the carriers shall pay retiring allowances to [all workers in service one year prior to the enactment, although they might never be re-employed] is arbitrary and beyond the power of Congress."¹⁴⁵ No one from the *Nebbia* majority took the position that

140. For a similar view, see Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891, 1929 (1994).

141. Ch. 405, 50 Stat. 435 (1937) (codified as amended at 45 U.S.C.A. §§ 261-273 (1946)).

142. Pub. L. No. 75-167, 50 Stat. 307 (codified as amended at 45 U.S.C.A. §§ 231-231v (1994)).

143. 81 CONG. REC. 6087 (1937) (statement of Mr. Mapes); see Cushman, *supra* note 136, at 90 & n.114.

144. I tell this story in greater detail in Cushman, *supra* note 136, at 88-91 & nn.89-116.

145. *Railroad Retirement Bd. v. Alton R.R. Co.*, 295 U.S. 330, 389 (1935) (Hughes, C.J., dissenting).

the Due Process Clause no longer constrained economic regulation.

Third, in light of the unanimity with which the Court had upheld the Railway Labor Act in 1930, the decision in *Alton* cast no shadow over the collective bargaining provisions of the Wagner Act.¹⁴⁶ Regulation of collective bargaining clearly was within congressional power when the business in question was engaged in interstate commerce and affected with a public interest. This was borne out by the unanimity with which the Court sustained the 1934 amendments to the Railway Labor Act in March of 1937.¹⁴⁷ The Court again confirmed the constitutionality of such regulation when it unanimously sustained the application of the Wagner Act to an interstate bus company the following month.¹⁴⁸ The Four Horsemen dissented in each of the manufacturing cases because they denied that the commerce power authorized congressional regulation of labor relations in such enterprises, and, having dissented in *Nebbia*, they insisted that the businesses in question were private.¹⁴⁹ They did not maintain that government could not impose such labor regulations on businesses affected with a public interest.¹⁵⁰

But what of *Alton's* status after 1937? Wasn't it effectively overruled in *West Coast Hotel Co. v. Parrish*?¹⁵¹ Consider *United States v. Carolene Products Co.*,¹⁵² in which the Court held that a federal statute prohibiting interstate shipment of "filled milk"¹⁵³ was both within the power of Congress to regulate in-

146. National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1994)).

147. See *Virginian Ry. Co. v. System Fed'n* No. 40, 300 U.S. 515, 563 (1937).

148. See *Washington, Va. & Md. Coach Co. v. NLRB*, 301 U.S. 142, 146 (1937).

149. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 76 (1937) (McReynolds, J., dissenting).

150. Cf. Laura Kalman, *Law Politics and the New Deal(s)*, 108 YALE L.J. 2165, 2188 (1999) ("[S]o long as we read Leuchtenburg's marvelous essay about Justice Roberts's 'almost medieval' conception of 'the relation of employer and employee' in [*Alton*] . . . , it will remain difficult for us to understand the Justice Roberts of two years later without finding any explanation other than politics convincing.")

151. 300 U.S. 379 (1937).

152. 304 U.S. 144 (1938).

153. Filled Milk Act, ch. 262, 42 Stat. 1486 (1923) (codified as amended at 21 U.S.C. §§ 61-64 (1994)).

terstate commerce and consistent with due process.¹⁵⁴ The most celebrated portions of Justice Stone's opinion appear under the heading "*Third*." Here one finds both the famous Footnote Four and the oft-quoted passage setting forth a deferential standard of review in cases involving economic regulation. "[R]egulatory legislation affecting ordinary commercial transactions," wrote Stone, "is not to be pronounced unconstitutional unless in light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."¹⁵⁵ Less often quoted are a series of passages in this same part in which Stone fleshed out and qualified this famous formulation.¹⁵⁶ For present purposes, we need consider only one:

[W]e recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, although within the prohibited class, is so different from the others of the class as to be without the reason for the prohibition.¹⁵⁷

The citation for this proposition?: "*Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330, 349, 351, 352 [(1935)]."¹⁵⁸ The cited pages are those of Roberts's opinion for the majority.

154. See *Carolene Prods.*, 304 U.S. at 148, 154.

155. *Id.* at 152.

156. Stone stated:

We may assume for present purposes that no pronouncement of a legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act, and that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis.

Id.

Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.

Id. at 153 (citations omitted).

157. *Id.* at 153-54.

158. *Id.* at 154.

What on earth was a citation to *Alton*, a decision vilified in the law review literature,¹⁵⁹ doing in the opinion announcing the triumph of deferential review? In 1935, Stone had declared that "the decision in the Railroad Retirement Act was the worst performance of the Court in my time,"¹⁶⁰ even "about the worst performance of the Court since the Bake Shop Case [*Lochner v. New York*]."¹⁶¹ What could have induced him to invoke a precedent he detested? Consider the vote in *Carolene Products*. McReynolds dissented without opinion.¹⁶² Butler wrote a separate opinion concurring only in the result.¹⁶³ Cardozo did not participate, nor did Reed, who had replaced Sutherland. That left only five Justices in the majority. Like Stone, Hughes and Brandeis had dissented in *Alton*. Certainly they had no interest in recognizing that the majority opinion had any continuing vitality. But Justice Roberts apparently did. He was, after all, the only member of the *Carolene Products* majority who was also in the *Alton* majority. While unfortunately we have no record of intracurial correspondence that would shed light on this question, it is difficult to explain the citation to *Alton* as anything other than an accommodation to Roberts. And it could be an accommodation to Roberts only if he continued to believe that the case had been decided correctly. The citation certainly was not the idea of the fifth member of the majority, Hugo Black. The published report of the case noted that Black "concurs in the result and in all of the opinion except the part marked 'Third.'"¹⁶⁴ The sole New Dealer in the majority did not join the

159. See, e.g., Thomas Reed Powell, *Commerce, Pensions and Codes*, 49 HARV. L. REV. 1, 8-24 (1935); Bruce R. Trimble, *The Judicial Treatment of the New Deal*, 4 KAN. CITY L. REV. 104, 106 (1936); Note, 25 GEO. L.J. 161, 172-73 (1936); William H. Quasha, Note, *The Railroad Retirement Acts*, 10 ST. JOHN'S L. REV. 53, 57-58 (1935); Recent Decision, 4 FORDHAM L. REV. 498, 500-01 (1935); cf., Comment, 33 MICH. L. REV. 1214, 1219-24 (1935); 20 MINN. L. REV. 49, 49-56 (1935) (reviewing the *Alton* decision).

160. Letter from Chief Justice Harlan Fiske Stone to Thomas Reed Powell (May 31, 1935), quoted in MASON, *supra* note 1, at 397.

161. Letter from Chief Justice Harlan Fiske Stone to Justice Felix Frankfurter (May 9, 1935), quoted in WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN* 48 (1995).

162. See *Carolene Prods.*, 304 U.S. at 155.

163. See *id.* at 155 (Butler, J., concurring).

164. See *id.*

portion of the opinion in which the Court articulated the famous "deferential standard."¹⁶⁵ For Black recognized that the rational basis test adopted by the majority was not the rational basis test as we have come to understand it.¹⁶⁶ No rational basis test that was informed by Roberts's *Alton* opinion could be.¹⁶⁷

The second case illustrating *Nebbia's* limitations is *Colgate v. Harvey*,¹⁶⁸ in which the Court rejected claims that two of the provisions of the Vermont Income and Franchise Tax Act of 1931 violated the Equal Protection and Privileges or Immunities Clauses of the Fourteenth Amendment.¹⁶⁹ But Sutherland's opinion for the majority, which Hughes and Roberts joined, did hold that a third provision, which treated interest income from money loaned within the state more favorably than income from money loaned outside the state, violated the same clauses.¹⁷⁰ "The test to be applied in such cases as the present one," wrote Sutherland, "is: Does the statute arbitrarily and without genuine reason impose a burden upon one group of taxpayers from which it exempts another group, both of them occupying substantially the same relation toward the subject matter of the legislation?"¹⁷¹ Applying that test, the majority found wanting

165. See ROGER K. NEWMAN, HUGO BLACK 276-77 (1994).

166. See Letter from Justice Hugo L. Black to Chief Justice Harlan Fiske Stone (Apr. 21, 1938), reprinted in Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093, 1109 (1982) ("As I read the opinion in connection with the cases cited, it approves the submission of proof to a jury or a court under certain circumstances to determine whether the legislature was justified in the policy it adopted.") (emphasis added). Lusky scores as a "misconception . . . the notion that the Footnote calls for denial of strict scrutiny in all cases involving property rights or economic interests." Lusky, *supra*, at 1105; cf. BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 489-90 n.45 (1998) ("The real surprise was Black, who refused—without . . . giving any reasons—to join the crucial section of Stone's opinion.").

167. "Would you ever hold any statute unconstitutional on grounds of substantive due process?" Stone wrote to Black. Letter from Chief Justice Harlan Fiske Stone to Justice Hugo L. Black (Apr. 22, 1938), quoted in NEWMAN, *supra* note 165, at 277. "If not, then of course you could not agree with the third [section] in the opinion in the *Carolene* case." See *id.*

168. 296 U.S. 404 (1935).

169. See *id.* at 416-22, 434-36.

170. See *id.* at 433.

171. *Id.* at 423.

the provision in question.¹⁷² Because the classification was "based upon a difference having no substantial or fair relation to the object of the act," it worked a "discrimination" that was "arbitrary."¹⁷³ Justice Stone, joined by Justices Brandeis and Cardozo, published a dissent that ran to fourteen printed pages in the U.S. Reports.¹⁷⁴ The dissent summoned a spate of authorities in support of the validity of the classification, scoring the claim that the statute violated "the almost forgotten privileges and immunities clause of the Fourteenth Amendment" as "[f]eeble indeed."¹⁷⁵ But not once did the dissenters mention *Nebbia*.¹⁷⁶ Doctrinally, *Nebbia* simply was inapposite. To be sure, the dissenters believed that the *Colgate* majority had erred. Nowhere did they suggest, however, that the error lay in a failure to recognize that abandonment of the public interest limitation entailed upholding the tax in question.

Colgate was accorded a critical reception in the law reviews,¹⁷⁷ and it was not long before another case presented the Court with an opportunity to recant. In 1940, a Kentucky taxpayer invoked the decision when challenging the constitutionality of a Kentucky statute taxing deposits in in-state banks at a lower rate than deposits in out-of-state banks.¹⁷⁸ Kentuckian Stanley Reed wrote the opinion rejecting the taxpayer's claims that the statute violated the Equal Protection and Privileges and Immunities Clauses, and explicitly overruling *Colgate*.¹⁷⁹ Justice Doug-

172. See *id.* at 424-25.

173. *Id.*

174. See *id.* at 436-50 (Stone, J., dissenting).

175. *Id.* at 443 (Stone, J., dissenting).

176. See *id.* at 436-50 (Stone, J., dissenting). Stone's disagreement with Hughes and Roberts over the scope of protection afforded by the privileges or immunities clause continued in *Hague v. CIO*, 307 U.S. 496 (1939). See *id.* at 500-18 (opinion of Roberts, J.); *id.* at 518-32 (opinion of Stone, J.); *id.* at 532 (Hughes, C. J., concurring).

177. See Note, *Classification in State Legislation Under the Equal Protection and Privileges and Immunities Clauses of the Fourteenth Amendment*, 45 YALE L.J. 926, 927-30 (1936); S.J. Stern, Jr., Note, 14 N.C. L. REV. 282, 282-86 (1936); Recent Decision, 5 FORDHAM L. REV. 352, 352-55 (1936); Recent Case, 11 IND. L.J. 390, 390-93 (1936); Recent Case, 1 MO. L. REV. 187, 187-89 (1936); Recent Decision, 13 N.Y.U. L.Q. REV. 496, 497-98 (1936); Recent Case, 3 U. CHI. L. REV. 506, 506-08 (1936); Recent Case, 84 U. PA. L. REV. 655, 655-57 (1936).

178. See *Madden v. Kentucky*, 309 U.S. 83, 93 (1940).

179. See *id.* at 90-93.

las was so excited he could barely contain himself. "Three cheers!" he wrote on the back of Reed's circulated draft, "Let's go out and get drunk!"¹⁸⁰ More sober were the responses of Hughes and Roberts. Neither was prepared to repudiate *Colgate*. The published report of the case states that Hughes "concurs in the result upon the ground, as stated by the Court of Appeals of Kentucky, that the classification adopted by the legislature rested upon a reasonable basis."¹⁸¹ Justice Roberts, by contrast, dissented:

Four years ago in *Colgate v. Harvey*, this court held that the [E]qual [P]rotection [C]lause and the [P]rivileges and [I]mmunities [C]lause of the Fourteenth Amendment prohibit such a discrimination as results from the statute now under review. I adhere to the views expressed in the opinion of the court in that case, and I think it should be followed in this.¹⁸²

The third and final case illustrating *Nebbia's* limitations is *Mayflower Farms, Inc. v. Ten Eyck*.¹⁸³ The Court decided *Mayflower* and *Borden's Farm Products Co., Inc. v. Ten Eyck*¹⁸⁴ the same day, and in each case Hughes joined Roberts's opinion for the majority.¹⁸⁵ In *Borden's Farm Products*, the Court upheld against an equal protection challenge a provision of the New York Milk Control Act allowing milk dealers without well-advertised trade names to sell milk at a penny less per quart than those with well-advertised trade names.¹⁸⁶ The differential had been incorporated into the scheme of price regulation, Roberts explained, because:

[T]he legislature believed that a fixed minimum price by dealers to stores would not preserve the existing economic method of attaining equality of opportunity. That method was for the well-advertised dealers to rely on their advertising to obtain a given price, and for the independents to retain their

180. Box 60, Stanley Reed MSS, University of Kentucky.

181. *Madden*, 309 U.S. at 93.

182. *Id.* at 93-94 (Roberts, J., dissenting) (citation omitted).

183. 297 U.S. 266 (1936).

184. 297 U.S. 251 (1936).

185. *See id.* at 251, 256; *Mayflower Farms*, 297 U.S. at 266-70.

186. *See Borden's Farm Prods.*, 297 U.S. at 261.

share of the market, not by counter advertising but by a slight reduction of price.¹⁸⁷

To have fixed a uniform minimum price would have been to deprive the independents of their competitive strategy while leaving the tactics employed by the well-advertised dealers unimpaired.¹⁸⁸ By establishing the price differential, the legislature had sought to avoid having the prescription of a minimum price disturb "the existing relationship of advantage established by the past trade practices of the two groups."¹⁸⁹ "There was," Roberts maintained, "a plain reason for the classification."¹⁹⁰ To attempt to avoid disturbing the balance of advantage established by past practice "was to strive for equality of treatment, equality of burden, not to create inequality. To adapt the law to the existing trade practice was neither unreasonable nor arbitrary."¹⁹¹ "In the light of the facts found," wrote Roberts, "the legislature might reasonably have thought trade conditions existed justifying the fixing of a differential. Judicial inquiry does not concern itself with the accuracy of the legislative finding, but only with the question whether it so lacks any reasonable basis as to be arbitrary."¹⁹²

The Four Horsemen filed an opinion in which they dissented once again from the holding in *Nebbia*.¹⁹³ Their differences with Roberts, however, did not concern only the question of legislative power to regulate milk prices. They further maintained that the provision in question was "grossly arbitrary and oppressive" to the well-advertised dealers and accordingly denied them equal protection.¹⁹⁴ Borden had acquired the public's good will by "fair

187. *Id.* at 261-62.

188. *See id.*

189. *Id.* at 262.

190. *Id.*

191. *Id.*

192. *Id.* at 263. For another instance in which Justices Hughes and Roberts voted to uphold portions of the New York Milk Control statute, see *Hegeman Farms Corp. v. Baldwin*, 293 U.S. 163, 167-72 (1934). *Cf.* *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 609-17 (1937) (upholding portions of the Virginia Milk and Cream Act).

193. *See Borden's Farm Prods.*, 297 U.S. at 264 (McReynolds, J., dissenting, joined by Van Devanter, Sutherland and Butler, J.J.).

194. *Id.* at 265.

advertisement and commendable service.”¹⁹⁵ The statute sought to deprive Borden “of the right to benefit by this and thereby aid[ed] competitors to secure the business.”¹⁹⁶ To sustain the statute was to hold “that a dealer, who through merit has acquired a good reputation, can be deprived of the consequent benefit in order that another may trade successfully.”¹⁹⁷ The statute destroyed equality of opportunity, putting Borden “at a disadvantage because of merit.”¹⁹⁸ Because Borden could not adjust its prices to compete with independent dealers, it might “suffer utter ruin solely because of good reputation, honestly acquired.”¹⁹⁹

In *Mayflower*, however, the Four Horsemen joined Hughes and Roberts in striking down a provision of the Milk Control Act allowing the one cent differential only to those independents who had been engaged in milk dealing continuously since April 10, 1933.²⁰⁰ Roberts maintained that the record disclosed no reason for the discrimination, and that the New York authorities did “not intimate that the classification bears any relation to the public health or welfare generally; that the provision [would] discourage monopoly; or that it was aimed at any abuse, cognizable by law, in the milk business.”²⁰¹ As the Court had recognized in *Borden’s Farm Products*,

[t]he very reason for the differential was the belief that no one could successfully market an unadvertised brand on an even price basis with the seller of a well advertised brand. One coming fresh into the field would not possess such a brand and clearly could not meet the competition of those having an established trade name and good will, unless he were allowed the same differential as others in his class. By denying him this advantage the law effectually barred him from the business.²⁰²

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 266.

200. *See Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266, 270 (1936).

201. *Id.* at 274.

202. *Id.* at 273.

The statute effectively provided that "during the life of the law no person or corporation might enter the business of a milk dealer in New York City."²⁰³ It was a legislative "attempt to give an economic advantage to those engaged in a given business at an arbitrary date as against all those who enter the industry after that date."²⁰⁴ The classification was therefore "arbitrary and unreasonable," denying Mayflower Farms the equal protection of the laws.²⁰⁵

Taken together, *Borden's Farm Products* and *Mayflower* were hardly a repudiation of *Nebbia*. They simply illustrated how abandonment of the public interest limitation in economic regulation could co-exist with a requirement that differential treatment of similarly situated enterprises subject to such regulation meet a reasonableness standard less relaxed than *Perry Como*. Would this co-existence persist after 1937?

In *United States v. Rock Royal Co-operative, Inc.*,²⁰⁶ the Court upheld orders of the Secretary of Agriculture that set minimum prices for milk sales in the metropolitan areas of New York and Boston.²⁰⁷ Justice Roberts filed a dissent, joined by Hughes "so far as it relates to the invalidity of the order on the ground stated."²⁰⁸ That ground was not, of course, that the federal government lacked power to prescribe minimum prices in the milk industry.²⁰⁹ It was instead that, as "drawn and administered," one of the orders deprived small handlers of milk in the New York marketing area of their property without due process of law.²¹⁰ One aim of the Agricultural Marketing Agreement Act, on the authority of which the order was issued, was to provide a minimum price to be paid by milk handlers to milk producers.²¹¹ Through a device known as price "blending," the order permitted

203. *Id.*

204. *Id.* at 274.

205. *Id.*

206. 307 U.S. 533 (1939).

207. *See id.* at 570-71.

208. *Id.* at 587 (Roberts, J., dissenting).

209. *See id.* (Roberts, J., dissenting).

210. *Id.* (Roberts, J., dissenting).

211. *See id.* at 543; *see also id.* at 584 (Roberts, J., dissenting) (specifying the purpose of the Act as providing a "uniform" minimum price).

larger milk handlers selling milk both inside and outside the marketing area to buy milk in the production area at a price lower than the minimum prescribed for smaller handlers who purchased milk solely for sale in the marketing area.²¹² This enabled the larger handlers "to resell the milk in the marketing area, in which no resale price is fixed, at a cut rate which is destructive of their competitors' business."²¹³ The order therefore "inevitably tend[ed] to destroy the business of smaller handlers by placing them at the mercy of their larger competitors."²¹⁴ Such a discrimination, Roberts maintained, was inconsistent with the requirements of the Fifth Amendment.²¹⁵ As *Borden's Farm Products* had indicated, a discrimination that allowed dealers without a well-advertised brand name to sell at a price just below that prescribed for those with established names had a rational basis;²¹⁶ but for Roberts, a discrimination that allowed large handlers to undersell their smaller competitors, like a discrimination that froze out potential market entrants, was inconsistent with minimal requirements of equal treatment.

IV. THE FATE OF THE THIRD WAY

By 1939, however, Justices of the Supreme Court would express such views only in dissent.²¹⁷ They had carried the day in

212. *See id.* at 584 (Roberts, J., dissenting).

213. *Id.* at 586-87 (Roberts, J., dissenting).

214. *Id.* at 587 (Roberts, J., dissenting).

215. *See id.* at 583-87 (Roberts, J., dissenting).

216. *See Borden's Farm Prods. Co. v. Ten Eyck*, 279 U.S. 251, 261-62 (1936).

217. Lower courts continued to invalidate economic regulation on the authority of pre-1937 interpretations of the Fourteenth Amendment. *See, e.g., United States v. Rock Royal Co-operative, Inc.*, 26 F. Supp. 534, 550-55 (N.D.N.Y. 1939) (relying on *Alton* in declaring that an order of the Secretary of Agriculture issued under the authority of the Agricultural Marketing Agreement Act of 1937 deprived defendants of property without due process); *Noble v. Davis*, 161 S.W.2d 189, 192 (Ark. 1942) (distinguishing *Nebbia* and *West Coast Hotel* in holding statute regulating minimum prices for barbering services violated the Fourteenth Amendment); *Boothby v. City of Westbrook*, 23 A.2d 316, 319-20 (Me. 1941) (invoking *Colgate* in holding that ordinance prohibiting possession for sale of explosive materials within three hundred feet of a schoolhouse but exempting existing gas stations constituted "an arbitrary discrimination between persons, firms and corporations carrying on the same business under substantially the same conditions, and upon grounds which bear no reasonable or real relation to the legitimate purpose of the law," thereby investing "the owners

the mid-1930s, when Hughes's and Roberts's views had occupied an intermediate position between the heightened scrutiny endorsed by McReynolds and the more deferential standard championed by Cardozo. Theirs was a jurisprudence that rejected the principal categorical restraints of substantive due process while at the same time insisting on a rationality standard with some teeth. They were willing to embrace broader notions of public purpose²¹⁸ and thus more relaxed standards of government neutrality²¹⁹ than were the Four Horsemen. But they were not pre-

of existing filling stations with a monopoly in the explosive business in the designated territory" and denying equal protection); *Blaustein v. Levin*, 4 A.2d 861, 863-64 (Md. 1939) (relying on *Colgate* in holding that scheme for taxation of income from non-resident trusts "sets up an arbitrary and unreasonable discrimination between persons of the same general class" in violation of the Equal Protection Clause); *State v. Sunset Ditch Co.*, 145 P.2d 219, 223 (N.M. 1944) (relying on *Mayflower* and *Colgate* in holding that a statute authorizing dissolution of corporations for failure to file annual reports with the State Corporation Commission, which applied only to corporations organized under territorial law and not to corporations organized after the date of statehood, denied equal protection); *Russo v. Morgan*, 21 N.Y.S.2d 637, 642 (N.Y. Sup. Ct. 1940) (relying on *Mayflower* in holding that rules of the Fulton Fish Market denying use permits to tenants of upper floors constituted arbitrary and unreasonable discrimination in violation of the Due Process and Equal Protection Clauses); *Commonwealth v. A. Overholt & Co.*, 200 A. 849, 854 (Pa. 1938) (relying on *Colgate* in holding that a statute taxing liquor at two dollars per gallon regardless of its value denied equal protection); *Gasque, Inc. v. Nates*, 2 S.E.2d 36, 41-43 (S.C. 1939) (relying on *Colgate* in holding that a statute imposing maximum hour regulations on certain businesses and exempting others was "arbitrary and without reasonable basis"); *State ex rel. F.W. Woolworth Co. v. State Bd. of Health*, 298 N.W. 183, 184 (Wis. 1941) (relying on *Mayflower* in holding that a statute applying certain health and safety regulations only to restaurants established after the effective date of the act denied due process and equal protection).

State courts also continued to construe the due process clauses of their state constitutions to proscribe certain forms of economic regulation. See John A.C. Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U. L. REV. 226, 228-51 (1958); Monrad Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91, 92-118 (1950).

218. See *Nebbia v. New York* 291 U.S. 502, 530 (1934); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 438 (1934).

219. On the principle of neutrality, see OWEN FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910*, at 156, 160 (1993); HOWARD GILLMAN, *THE CONSTITUTION BESIEGED 175-93* (1993); MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 19-31 (1992); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 298, 304-31 (1985); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of 'Laissez-faire' Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970,

pared to abandon entirely the Court's traditional role of preserving state neutrality—particularly in instances that implicated the right to pursue a lawful calling on terms of equality with all others.²²⁰ Their views briefly held a dominant position in the mid-1930s, when their votes frequently were necessary to form a majority to uphold or invalidate regulatory legislation. But such an intermediate posture could no longer command a majority after Black had replaced Van Devanter and Reed had supplanted Sutherland.²²¹ The deferential standard would tri-

973-1004 (1975); Stephen A. Siegel, *Understanding the Lochner Era: Lessons from the Controversy Over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187, 189-93 (1984); Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921*, 5 LAW & HIST. REV. 249, 278-79 (1987); Cass Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 878-89 (1987).

220. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 278-80 (1932) (invalidating statute conditioning issuance of license to manufacture, sell or distribute ice on the applicant's successful showing that existing licensed facilities in the community were inadequate to meet the public's needs; an opinion Hughes and Roberts joined); *Truax v. Raich*, 239 U.S. 33, 41 (1915) (Hughes, J.) ("It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure."). For a similar view, see CUSHMAN, *supra* note 1, at 256-67 n.75; Friedman, *supra* note 140, at 1922 n.150. For the expression of views sympathetic to such an intermediate posture, see Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 40-45.

221. Compare ACKERMAN, *supra* note 166, at 489 n.38:

See [*Mayflower Farms Inc. v. Ten Eyck*], 297 U.S. 266 (1936), in which Roberts wrote an opinion of the Court that is transparently inconsistent with the principles proclaimed two years later in *Carolene Products*. . . . In joining the *Mayflower* majority, Roberts and Hughes made it abundantly clear that they continued to endorse the Court's historic mission of aggressively protecting free market liberties under the Fourteenth Amendment.

I do not suggest that *Mayflower* was flatly inconsistent with *Nebbia*. The later case protected the right to enter a business, while *Nebbia's* retreat concerned price regulation. As a consequence, it remained open for the Court to rationalize both cases or use one as a lever for the subsequent reconsideration of the other. Only after the switch of 1937 did it become clear that *Nebbia*, rather than *Mayflower*, would prosper in the years ahead.

This means that legalist scholars are begging a big question when they use *Nebbia* to disparage the importance of 1937. On their view, *Nebbia* had already undercut substantive due process in 1934, and so it is melodramatic to focus on 1937 as a crucial moment in the demise of

umph,²²² and the jurisprudence of Hughes and Roberts would suffer the fate of a project that was never fully developed and never well-understood: it would be seen as inconsistent, incoherent, inscrutable. It would become conventional wisdom²²³ that they had waffled unpredictably back and forth between the only two possible positions: "aggressive" review and "deferential" review. Roberts had conducted "an ultimately unsuccessful search for a coherent judicial philosophy."²²⁴ Hughes was "the man on the flying trapeze,"²²⁵ swinging to and fro betwixt the two poles. Jurisprudentially, they were moody guys.

Black's and Douglas's refusal to assent to the contested tribute in Stone's letter to Roberts suggests that for some this interpretation had already become unshakable. Stone and Frankfurter certainly had subscribed to that position in 1937. They couldn't see how Roberts had demonstrated fidelity to principle, because they didn't understand the principle. But judgments reached in the midst of a crisis and with limited information are not always the most durable. By 1945, having witnessed Roberts's post-1937 performance, Stone and Frankfurter had begun to understand, even if they did not approve.

It is often pointed out that, after 1936, the Court never struck down a piece of economic regulation on the ground that it denied economic substantive due process.²²⁶ This is a significant obser-

laissez-faire constitutionalism. But this interpretation of *Nebbia* presupposes the importance of 1937. Without the switch in time, *Nebbia*, and not *Mayflower*, might have been the case with the brief half-life!

Id. (citations omitted).

222. A standard far more deferential than that advocated by Holmes and Brandeis. See Phillips, *supra* note 22, at 1083-87; G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations*, 70 N.Y.U. L. REV. 576, 578 (1995).

223. For a fascinating recounting of the manner in which the conventional view of this period was constructed and perpetuated, see G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL: A REASSESSMENT* (forthcoming 2000); see also his exceptionally perceptive *Cabining the Constitutional History of the New Deal in Time*, 94 MICH. L. REV. 1392 (1996).

224. UROFSKY, *supra* note 19, at 15. Laura Kalman puts the point more strongly: "In my heart, I still believe the Roberts of 1937 had undergone a jurisprudential lobotomy. . . ." Kalman, *supra* note 150, at 2188.

225. DREW PEARSON & ROBERT S. ALLEN, *THE NINE OLD MEN* 74, 94-97 (1936) (describing Hughes as a "weak-kneed oscillator").

226. See, e.g., TINSLEY E. YARBROUGH, *MR. JUSTICE BLACK AND HIS CRITICS* 53

vation about the course of American constitutional history; but insofar as it purports to inform us about what happened in 1937, it focuses on the wrong unit of analysis. The Court afforded subsequent legislation deferential review not because Hughes and Roberts changed in 1937, but because President Roosevelt was able to change the Court around them. Even a casual examination of the U.S. Reports reveals the tenacity with which they continued to cling to established views.²²⁷ Within those pages there are lost fidelities, waiting to be found.

(1988).

227. For additional examples, see CUSHMAN, *supra* note 1, at 31; Friedman, *supra* note 140, at 1967-74.