The Great Depression and the New Deal

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Abstract

This essay was written for the forthcoming Cambridge History of Law in America. Part I describes the economic conditions of the Great Depression and details the executive and legislative responses produced under the Hoover and Roosevelt Administrations. Part II examines contemporary controversies over the growth of federal executive authority and the elaboration of the administrative state. Part III documents the relaxation of constraints on economic regulation imposed by the Fifth and Fourteenth Amendments and the Contract Clause. Part IV analyzes various manifestations of the revolution in constitutional federalism. Part V explores the growth of protections for civil rights, civil liberties, and democratic processes.
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Introduction

The New Deal era was the principal watershed in twentieth century American constitutional development. The profound economic crisis that gripped the nation during the Great Depression inspired a period of extraordinary legislative ferment, generating a series of strikingly wide-ranging and far-reaching changes in the American legal and constitutional order. By the time the United States was drawn into World War II, Congress would wield an unprecedented degree of authority over the nation’s peacetime economy. The national legislature underwrote a voluminous array of spending programs to relieve distress and to stimulate economic growth, while at the same time it enacted a remarkable succession of regulatory programs designed to restore health to the convulsing economy. The administration of these new programs of federal provision and control called for the creation of several new federal agencies and the significant expansion of existing ones, resulting in an explosive growth in the size and power of the federal bureaucracy and the full flowering of what seemed in retrospect only an incipient administrative state. At the apex of this burgeoning fiscal and administrative apparatus stood the office of the presidency, supported by a significantly expanded staff and invested with enhanced authority over agencies within the executive branch. Just as the chief executive emerged from the Depression with greater authority over the administration of domestic affairs, so the commander-in-chief would enter World War II.
with greater discretion over the conduct of American foreign policy. Meanwhile, the federal judiciary would become increasingly assertive in the vindication of civil rights and civil liberties such as freedom of speech and rights of the accused, just as it receded from its traditional role as the umpire of the federal system and the guardian of vested rights. In upholding new programs of redistributive and protective legislation that might once have been condemned as “special” or “partial” legislation, the Supreme Court’s evolving jurisprudence cleared the way for a style of national politics frankly centered on a model of interest-group pluralism.

The signature transformation of the New Deal era was the dramatic growth in the size, power, and responsibility of the federal government. A deepening conviction that only the national government could effectively ameliorate the protracted distress provided a powerful impetus to the centripetal forces of regulatory and fiscal centralization. President Franklin Roosevelt’s New Deal would precipitate a striking expansion of both the scope of federal authority and the ambition of its exercise. Federal spending programs now undertook to provide economic security for all citizens, while Congress extended its regulatory influence over areas previously controlled principally, if at all, by state governments. Banking, securities markets, agriculture, energy, industrial labor relations, and much more now fell under the authority of federal officers. Though the preemption of state regulation in such critical areas significantly reduced the formal authority of state governments, the states were by no means subsumed into a unitary national state. Local officials were often granted substantial discretion in the administration of federal grants-in-aid, while states retained most of their traditional authority over the content of vast domains of law regulating subjects such as property.
contracts and commercial transactions, business associations, torts, crime, and the family. Similarly, the Supreme Court lifted longstanding impediments to state regulation as it retired economic substantive due process and relaxed restraints imposed by the Contract and Dormant Commerce Clauses of the federal Constitution. Nevertheless, the concentration of an unprecedented degree of authority and responsibility in a national regulatory and welfare state constituted a revolution in the American federal system.

The breathtakingly novel reach of federal economic regulation, its effect on vested property rights, and the scope of discretionary authority confided to the executive branch in its administration each stretched established understandings of constitutional limitation, sometimes to the breaking point. To be sure, existing constitutional doctrine provided a comfortable foundation for many New Deal spending programs to relieve poverty. Yet a number of congressional measures rested on understandings of federal regulatory powers unprecedented in their breadth, while several state and federal statutes curtailed private economic rights in a manner raising serious constitutional questions under the Contract Clause and the Due Process Clauses of the Fifth and Fourteenth Amendments. The fate of state and federal legislation addressed to the economic havoc wrought by the Depression accordingly turned on two critical variables: the capacity of lawmakers to accommodate transformative statutory initiatives within the structure of contemporary doctrine, and the inclination of Supreme Court justices to relax or abandon constitutional constraints on federal and state regulatory power.

The mechanisms through which the New Deal order ultimately secured the Court’s constitutional sanction are readily discernible. The conditions of the Great Depression and the inadequacy of Republican efforts to deal with them cemented the
electoral influence of a political coalition that would entrust the presidency and both
Houses of Congress to the Democratic Party from 1933 forward. The sustained
dominance of that coalition ensured that the demand for national action to grapple with
the crisis would be both powerful and persistent. That persistence would in turn have two
important ramifications. First, in those instances in which the justices held that an initial
legislative attempt to address a particular problem did not pass constitutional muster, the
New Deal Congress would have the opportunity to reformulate the program to achieve
the desired end through means consistent with prevailing constitutional doctrine.
Throughout the 1930s, New Dealers would repeatedly employ this adaptive strategy with
remarkable success. The second consequence grew out of Franklin Roosevelt’s repeated
reelection to the presidency. Facing a federal judiciary bearing the imprint of twelve
years of Republican ascendancy in presidential politics, throughout his tenure Roosevelt
steadily filled lower court vacancies with loyal Democrats. Yet neither death nor
resignation provided a frustrated Roosevelt with an opportunity to appoint a Supreme
Court justice during his first term. Though President Hoover’s three appointments to the
Court had created a majority seemingly more receptive to government regulation than the
Taft Court had been, that majority was fragile and by no means fully committed to the
constitutional views of the Administration. Between 1937 and 1941, however, the
President would elevate seven New Dealers to life tenure on the nation’s highest court.
Fully reflecting the constitutional sensibilities undergirding the New Deal vision of
government, these appointees would in turn transform the nation’s constitutional law to
accommodate regulatory innovations that their judicial predecessors could not have
approved. The continued electoral success of Democrats even after Roosevelt’s death
would enable the Party further to entrench its position in the federal judiciary, so that New Deal constitutionalism would remain a powerful orthodoxy even as its sponsoring political coalition began to fray.

The balance of this Chapter consists of five topical Parts and a Conclusion. Part I describes the economic conditions of the Great Depression and details the executive and legislative responses produced under the Hoover and Roosevelt Administrations. Part II examines contemporary controversies over the growth of federal executive authority and the elaboration of the administrative state. Part III documents the relaxation of constraints on economic regulation imposed by the Fifth and Fourteenth Amendments and the Contract Clause. Part IV analyzes various manifestations of the revolution in constitutional federalism. Part V explores the growth of protections for civil rights, civil liberties, and democratic processes.

I. The Great Depression: Conditions and Responses

At the close of a decade celebrated for its prosperity, the American economy underwent a profound contraction whose baleful effects were remarkable both for their duration and their intensity. Though the depression would linger throughout the 1930s until dispatched by the stimulus of wartime production, the precipitous economic decline of its first four years was particularly staggering. Between 1929 and 1933 national income was cut in half. Manufacturing output, retail sales volume, and wholesale and commodity prices all suffered devastating reductions. In 1930 alone a record 26,355 businesses failed, while 1931 recorded some 65,000 cases in bankruptcy. Between September of 1929 and March of 1933 the aggregate value of all domestic stocks listed
on the New York Stock exchange declined by 80%, from approximately $80 billion to about $16 billion. During the same period farm values declined by a third, and foreign trade was dramatically curtailed, with both exports and imports decreasing by nearly 70%. By 1933 the ranks of the unemployed had increased to nearly thirteen million workers, leaving one quarter of the American workforce idle. Even those who survived the epidemic of layoffs saw wages decline and working hours reduced. At the same time more than five thousand banks collapsed – nearly 2,300 in 1931 alone – decimating over nine million savings accounts. Though the business cycle had produced recurrent periods of boom and bust throughout American history, such punishing economic collapse was unprecedented.

The Hoover Administration was not entirely inert in the face of this crisis. Throughout the 1920s Congress had grappled unsuccessfully with the seemingly intractable problem of depressed prices resulting from overproduction of farm commodities. Early in his term President Hoover called Congress into special session to enact the Agricultural Marketing Act of 1929. The Act established a Federal Farm Board, which was authorized to make loans from a $500 million revolving fund to farmer-owned commodity stabilization corporations and agricultural marketing associations. It was hoped that by using the funds to purchase and store surplus farm produce and to regulate its flow to terminal markets, these private entities might increase the demand for agricultural commodities and thereby raise the prices at which they traded. Similarly, Hoover oversaw the creation of the federal Reconstruction Finance Corporation, a temporary agency authorized to extend billions of dollars in loans to prevent the economic collapse of railroads, insurance companies, banks, and other financial
Yet Hoover’s valorization of individual initiative, his preference for economic solutions grounded in voluntary cooperation in the private sector rather than government regulation, and his aversion to concentrations of political and economic power led him to resist the sorts of far-reaching proposals for federal intervention that would be embraced by his successor. For example, his program contained no proposal for legislative reform of the national securities markets. The President opposed the delegation of government power to private interests, rejecting proposals from business interests calling for a suspension of antitrust laws that would enable them to establish federally administered cartels. In 1931, Hoover vetoed a bill that would have authorized government-owned electric and nitrogen plants built at Muscle Shoals during World War I to sell power and fertilizer in competition with privately-owned concerns. And while supporting such initiatives as the expansion of credit, tax relief, and modest appropriations to support public works, the President was reluctant to heed requests for federal relief expenditures to aid the millions of the unemployed.

Hoover’s limited and ineffectual responses to the crisis left him vulnerable to his Democratic challenger in 1932, the affable Governor of New York. Franklin Roosevelt’s platform did call for greater federal relief to the unemployed, but in most other respects it differed little from the economic policy espoused in its Republican counterpart. Though one may in retrospect detect germinal hints of portions of the New Deal in some of his campaign speeches, for the most part the frontrunner was content to rely upon vague references to the need for bold experimentation, “imaginative and purposeful planning,” and greater solicitude for “the forgotten man.” In November Roosevelt and the
Democrats coasted to victory in a landslide.

Shortly following his inauguration in March of 1933, these generalities began to take shape as specific policy proposals. By the time Roosevelt assumed the presidency, officials in thirty-eight states had closed their banks in the face of a growing spate of bank failures, and banking operations had been curtailed even in the remaining ten state jurisdictions. Meanwhile, the monetary system was increasingly roiled by nervous hoarding of gold and currency, and a troubling flight of gold to foreign markets. The President immediately initiated a series of emergency measures to staunch the hemorrhaging, proclaiming a nationwide “bank holiday” and proscribing further export of gold. At the same time Roosevelt called into special session the new Congress, which quickly ratified his actions with the Emergency Banking Act of 1933. The statute provided for the reopening of solvent banks under executive supervision, confirmed presidential control over transactions in gold, and required that those holding gold bullion, gold coin, and gold certificates surrender them to the Treasury in exchange for new Federal Reserve notes. Once federal control over the nation’s gold supply had been rendered more secure, Roosevelt would undertake to arrest the deflationary spiral by significantly reducing the gold content of the dollar.

Having eased the banking crisis, the Roosevelt Administration next placed before the Congress an ambitious program of prescriptions for relief, recovery, and reform. Relief measures took a variety of forms. The Federal Emergency Relief Administration distributed direct public assistance through state and local agencies. Other federal programs – such as the short-lived Civil Works Administration and later the Works Progress Administration and the Public Works Administration – employed the jobless in
a variety of public works and improvement projects. Similarly, the Civilian Conservation Corps put unemployed youth to work on reforestation projects in the national forests. Meanwhile, the Farm Security Administration offered low-interest loans to distressed tenant farmers and sharecroppers, just as the Farm Credit Administration and the Home Owner’s Loan Corporation underwrote a massive refinancing of defaulting farm and home mortgages. The swelling federal budget told the story of this remarkable proliferation of federal programs and grants-in-aid to support relief and public employment: between 1929 and 1939 federal expenditures mushroomed from $2.6 billion to $9 billion. The relief of persistent poverty by the federal government proved enormously popular with the voters, and contributed in no small part to the remarkable electoral successes of the New Deal coalition.

Roosevelt’s recovery program could not lay claim to comparable laurels. Its two principal pillars were the Agricultural Adjustment Act (AAA) of 1933 and the National Industrial Recovery Act (NIRA). The AAA sought to raise farm prices not by purchasing the agricultural surplus and either storing it or dumping it abroad, but instead by decreasing production. The Act imposed a tax on the processors of specified agricultural commodities, the proceeds of which were used to pay farmers who contracted with the Department of Agriculture to reduce their production of those commodities. The NIRA similarly sought to stabilize plummeting prices by limiting industrial output. Suspending enforcement of the antitrust laws, the program provided for an unprecedented degree of industrial self-regulation. Acting under the sanction of the newly created National Recovery Administration (NRA), business representatives were authorized to promulgate elaborate and legally enforceable “codes of fair competition” to govern their respective
industries, including the prescription of minimum wages and maximum working hours. Section 7(a) of the Act guaranteed the rights of workers to organize and bargain collectively with their employers. Dogged by vocal criticism and widespread unpopularity, each of these short-lived programs would be declared unconstitutional before Roosevelt’s first term was out.

More enduring were the New Deal’s contributions to economic reform. Restoration of confidence in the nation’s troubled financial sector ranked high among the Roosevelt Administration’s priorities. The Glass-Steagall Banking Act of 1933 mandated the separation of commercial banking from investment banking, thereby preventing bankers from using ordinary deposits to underwrite securities issues or to speculate in securities markets. The Act also created the Federal Deposit Insurance Corporation, which helped to revive flagging faith in the banking system by providing insurance on small bank accounts. The Securities Act of 1933 required that all new securities offered to the public through either the facilities of interstate commerce or the postal service first be registered with the Federal Trade Commission (FTC). All registration statements were required to disclose detailed financial information concerning the securities and to be certified by an independent accountant. Those failing truthfully to disclose the information required were subjected to civil and criminal penalties, and the FTC was granted considerable regulatory authority over the issuance of new securities. The Securities Exchange Act of 1934 created the Securities and Exchange Commission (SEC) and transferred to the SEC the authority confided to the FTC under the 1933 Act. The 1934 Act extended the disclosure requirements of the 1933 Act to all companies listing securities on a national exchange, requiring them to file detailed annual financial reports.
with the Commission. The 1934 Act further authorized the SEC to regulate the stock exchanges, to police abuses such as stock market manipulation, and to prohibit fraud in connection with secondary-market transactions. The SEC’s anti-fraud authority, which reached both the stock exchanges and the over-the-counter market, was later expanded by the Maloney Act of 1938. In addition, the 1934 Act authorized the Federal Reserve Board to establish minimum margin requirements for the purchase of securities on credit. Finally, the Public Utility Holding Company Act of 1935 required such companies conducting interstate business to register with the SEC, and subjected the utilities to the agency’s supervision in matters pertaining to corporate structure and dissolution. The Federal Power Commission was authorized to regulate the rates and business practices of such companies.

The Social Security Act of 1935 brought two major innovations in social insurance. One title of the Act created a federal program of compulsory, contributory old-age and survivors insurance financed by payroll taxes levied on employers and employees, with the first benefits payable in 1942. A second title established a cooperative federal-state system of unemployment insurance: employers paying into a qualifying state unemployment compensation fund would receive a credit against a tax otherwise payable to a comparable federal fund. By mid-1937 every state and territory had adopted a qualifying statute. Other provisions of the Act authorized federal grants-in-aid to states for aid to the blind and disabled, to dependent children, and to those among the needy aged – such as domestic and agricultural workers – who were ineligible to participate in the old-age insurance program. The Act further authorized grants to state programs for the promotion of public health, for maternal and child health and welfare,
and for vocational rehabilitation. A Social Security Board was vested with authority to administer these programs.

The New Deal similarly produced two enduring reforms in the field of labor relations. The National Labor Relations Act of 1935 (NLRA) sought to prevent or resolve labor disputes threatening to disrupt interstate commerce. The Act guaranteed to selected industrial workers the rights to organize and to bargain collectively with their employers through their elected representatives, and prohibited employer interference with those rights. A National Labor Relations Board modeled on the Federal Trade Commission was created to administer the Act’s organization and representation provisions, and was empowered to issue orders enforceable in federal court to cease and desist in the commission of “unfair labor practices” such as cultivating employer-sponsored “company unions” and discouraging union membership through discrimination in hiring, discharge, or terms of employment. Three years later, the Fair Labor Standards Act of 1938 prohibited the interstate shipment of selected goods manufactured by children or by workers employed at wages below or for hours exceeding federally prescribed standards.

The reform efforts of the New Deal Congress did not stop there. Legislation establishing the Tennessee Valley Authority, for example, went well beyond the earlier Muscle Shoals bills envisioning government manufacture and sale of electricity and fertilizer. The Act further authorized a massive regional development project involving the construction of new dams and public power plants, as well as programs for flood control, reforestation, and the prevention of soil erosion. By 1941 the Rural Electrification Administration had increased the percentage of American farms with electric power from ten to forty. The U.S. Housing Authority and the Federal Housing...
Administration underwrote the construction and rehabilitation of low- and middle-income housing. The year 1938 saw significant revisions to existing federal legislation concerning both bankruptcy and food and drug regulation. And under the leadership of Commissioner of Indian Affairs John Collier, the Roosevelt Administration inaugurated an “Indian New Deal” for Native Americans. Collier discontinued existing federal policies restricting enjoyment of civil liberties such as the freedoms of speech and religion and the right to travel, and extended criminal procedure protections of the Bill of Rights to proceedings in Courts of Indian Offenses. In 1934 Collier persuaded Congress to enact the Indian Reorganization Act, which abolished the policy of land allotment, authorized a substantial measure of tribal self-government, and established funds to support the education of Native Americans and to promote economic development on Indian reservations.

The New Deal was thus breathtaking in scope and freewheeling in style. The product of pressure from disparate elements within the Democratic coalition, the Administration’s program was grounded in no single coherent or systemic theory. Roosevelt himself was a pragmatist who once elusively described his ideological commitments as those of “a Christian and a Democrat,” and his Administration produced policies which occasionally conflicted in their objectives and effects. While the relief program sought to alleviate widespread conditions of want, for example, the AAA aimed to raise the price of food through enforced scarcity. Similarly, the Administration’s recovery efforts chafed against the Social Security Act’s withdrawal of capital from the economy through payroll taxes. Yet Democratic control of the White House and both houses of Congress offered a much-anticipated chance to implement a long-frustrated
progressive agenda for reform, while the exigencies of the moment nurtured an experimental temperament congenial to young lawyers reared on sociological jurisprudence and legal realism at institutions like Harvard, Yale, and Columbia.

Such young lawyers would be central to significant developments in the practice of law and in the composition of the American bar. While the economic contraction reduced the demand for lawyers engaged in private practice, the New Deal offered fresh and exciting possibilities for public service in Washington. Many graduates of elite law schools who might earlier have heeded the call of Wall Street were now drawn to the nation’s capital by the appeal of Roosevelt’s crusade and the attractions of power and a steady paycheck. Jewish and Catholic lawyers facing discrimination in private employment were particular beneficiaries of the expanded legal opportunities centered in the Justice Department and the alphabet agencies. At the same time the profuse generation of new federal law created significant new opportunities for private sector specialization in burgeoning areas such as administrative law and labor law – opportunities of which many New Deal lawyers would soon avail themselves.

A number of the New Deal’s legal innovations presented serious issues concerning the scope of federal power, the separation of powers, and constitutional protections for property rights. While many New Deal initiatives would never face judicial review, challenges to some of the central features of the programs for recovery and reform would produce landmark decisions in the Supreme Court. Several of these decisions were unanimous in upholding or invalidating congressional or executive action. Yet several other important cases were decided by a closely divided Court. It is always hazardous to offer general characterizations of a justice’s jurisprudence, as the
complexity of a jurist’s record so often confounds stereotypic assessments. Yet of the Taft Court veterans the justices most likely to regard elements of the New Deal as constitutionally problematic were the so-called conservative “Four Horsemen”: Willis Van Devanter, James Clark McReynolds, George Sutherland, and Pierce Butler. Their more liberal Taft Court colleagues Oliver Wendell Holmes, Louis Brandeis, and Harlan Fiske Stone, by contrast, had shown somewhat greater receptivity to state and federal economic regulation.

Between 1930 and 1932 President Hoover appointed three justices to the Court. In 1932 he replaced Holmes with Benjamin Cardozo, who shared many of the jurisprudential views of his predecessor. The outcomes in several closely divided cases would therefore be determined by the votes of Hoover’s 1930 appointments of Charles Evans Hughes to replace Taft and Owen Roberts to take the seat previously occupied by Edward Terry Sanford. Where New Dealers could draft statutes, select test cases, and craft arguments securing the support of these two constitutional moderates, they were virtually certain of victory. It would take some time and bitter experience, however, before reformers in Congress and the Administration were able to formulate and execute a series of remarkably successful legal strategies.

II. Executive Authority and the Administrative State

The persistent economic crisis besetting the country in the 1930s consolidated the popular conviction that an unregulated free market guided solely by the invisible hand of private interest could lead only to grief. The Roosevelt Administration insisted that the countervailing power of government, administered by disinterested expert regulators, was
necessary to discipline the market and stabilize an economy that the “economic royalists” had left in tatters. The result was a stunning expansion of administrative authority both within and independent of the executive branch.

Agency government was by no means a novelty in 1933. Congress had established the Interstate Commerce Commission (ICC) in 1887, and in the near half-century that followed, the federal legislature had enacted a series of regulatory statutes authorizing administrative bodies to superintend a variety of activities and enterprises. Some of these statutes were administered by independent regulatory agencies; others had delegated new responsibilities to specific cabinet departments. The explosion of federal administrative authority inaugurated by the Roosevelt Administration and the New Deal Congress was nevertheless unprecedented both in terms of the number of agencies created and the scope of regulatory authority conferred. The Depression decade witnessed the creation of several new independent commissions: the Securities and Exchange Commission, the Federal Communications Commission, the National Labor Relations Board, the U.S. Maritime Commission, and the Civil Aeronautics Authority (transferred in 1940 to the Department of Commerce). To regulate prices and trade practices in the troubled coal industry, statutes enacted in 1935 and 1937 each created a National Bituminous Coal Commission, whose brief and turbulent life ended in 1939 when an executive order assigned its functions to the Department of the Interior. Still other existing commissions saw their jurisdictions enlarged or their powers enhanced.

The Federal Power Commission, which had been reorganized in 1930, was given expanded responsibilities under the Federal Power Act of 1935 and the Natural Gas Act of 1938. The Motor Carrier Act of 1935 gave the ICC regulatory authority over the
interstate trucking industry. In 1936 Congress charged the Federal Trade Commission
with administration of the Robinson-Patman “Anti-Chain Store” Act, which prohibited
firms engaged in interstate commerce from price discrimination in sales of the same
commodity to different purchasers when the result would be to decrease competition or
to create a monopoly. The New Deal created a vast new federal bureaucracy with
extensive administrative authority over a multitude of activities that had previously been
regulated by state and local government or not at all.

This dramatic expansion of federal administrative authority promised to raise
numerous constitutional controversies centered on questions of due process, federalism,
and the separation of powers. With respect to the last of these issues, agency authority
received a warmer reception from the justices than many might have anticipated. In 1937
the President’s Committee on Administrative Management, also known as the Brownlow
Committee, would denounce independent federal commissions as comprising “a headless
‘fourth branch’ of the Government, a haphazard deposit of irresponsible agencies and
uncoordinated powers” doing “violence to the basic theory of the American Constitution
that there should be three major branches of the Government and only three.”\(^1\) By
contrast, advocates for the administrative state such as former SEC Chairman and
Harvard Law School Dean James Landis valorized the specialized expertise and political
independence of agency officials, dismissing “the traditional tripartite theory of
government organization” as talismanic “political conceptualism.”\(^2\) Yet on the eve of the
New Deal the Court had fortuitously secured the constitutional footing of the
administrative state with its decision in *Crowell v. Benson*.\(^3\) In upholding the
congressional delegation to a deputy commissioner of authority to adjudicate workers’
compensation claims filed by maritime employees, the Court approved conferral of broad fact-finding and adjudicative authority on administrative agencies as consistent with the requirements of both due process and the separation of powers. Administrative agencies, the Hughes Court justices recognized, were necessitated “by the increasing complexities of our modern business and political affairs.” Though judicial review of agency action remained essential to preserve constitutional limitations and to safeguard constitutional liberties, ordinary administrative findings would enjoy the deference traditionally accorded to jury verdicts. And while a narrow majority of the Court would continue to insist that Congress could not make agency findings of “jurisdictional” facts final, Justice Van Devanter’s retirement at the conclusion of the 1936 term would herald the triumph of the minority’s more deferential position.

Perhaps the most significant safeguard of the political independence of the regulatory commissions came in an opinion that was widely perceived as a reproach to the President. In *Humphrey’s Executor v. United States,* President Roosevelt had removed a Hoover appointee to the FTC without cause, notwithstanding provisions of the Federal Trade Commission Act limiting presidential removal of commissioners to instances of inefficiency, neglect of duty, or malfeasance in office. The Court affirmed the view announced in *Myers v. United States* that the President enjoyed sole and illimitable power to remove “purely executive officers” such as postmasters. Yet notwithstanding obiter dicta in *Myers* that appeared to suggest the contrary, a unanimous Court held that with respect to independent agencies exercising legislative and judicial functions, Congress might constitutionally restrict the President’s removal power as it had in the Act.
At the same time, however, particular exercises of agency authority could still provoke strong judicial reactions. While sustaining the registration requirements imposed by the Securities Act of 1933 and the Public Utilities Holding Company Act of 1935, for example, the Court nevertheless denounced the Securities and Exchange Commission’s refusal to permit withdrawal of a registration statement allegedly containing material misrepresentations, and quashed its subpoena of the withdrawing registrant’s testimony and business records. The majority castigated the Commission for unauthorized appropriation and arbitrary, autocratic exercise of power, encroaching upon fundamental liberties in a manner reminiscent of “the intolerable abuses of the Star Chamber.” The three dissenting justices, who found “hyperbole in the sanguinary simile,” maintained that the majority’s ruling would “invite the cunning and unscrupulous to gamble with detection,” knowing that they could evade investigation and punishment by the simple expedient of a timely withdrawal. Thus, wrote Justice Cardozo, might the Act and its sanctions “become the sport of clever knaves.”

The Court was by no means alone in its anxiety over excessive agency discretion. The American Bar Association’s Special Committee on Administrative Law, chaired by former Harvard Law Dean Roscoe Pound, was a persistent critic of what Pound viewed as growing “administrative absolutism.” The 1938 Pound Report’s allusion to the looming totalitarian threat across the Atlantic found a receptive ear in Congress, which the following year took up a bill to promulgate a uniform code of procedure for federal agencies, formalizing their internal processes, separating their legislative, prosecutorial, and adjudicative functions, and expanding judicial review of their decisions. Though passed by both houses of Congress in 1940, the Walter-Logan Bill was vetoed by
President Roosevelt. Yet the bill’s ambition to constrain administrative discretion would persist. It was embraced in moderated form in the “minority bill” proposed in 1941 by the Attorney General’s Committee on Administrative Procedure, which in turn provided the blueprint for the Administrative Procedure Act of 1946.

Though members of Congress were anxious to see federal agencies subjected to greater control, they were uncomfortable entrusting that task to the President. Roosevelt’s veto of the Walter-Logan Bill followed on the heels of a bruising political battle over the President’s proposal to reorganize the executive department. In 1937 Roosevelt requested that Congress embody in legislation the Brownlow Committee’s recommendation that the President be granted authority to bring under greater presidential control more than one hundred federal administrative bodies, including independent regulatory commissions, by consolidating and merging them into existing executive departments. Roosevelt publicly denied charges of attempted executive aggrandizement, asserting that the measure was necessary for effective management and coordination of the activities of bodies charged by Congress with the administration of federal law. This admonition went unheeded in the House, which rebuffed the President’s request in 1938. Congress did enact an executive reorganization bill granting the President much weaker authority in 1939, but at the same time sought to restrain the power of the executive branch by restricting the political activities of its employees. Concerns among Republicans and conservative Democrats that federal relief officials had improperly used their positions to influence voting behavior prompted Congress to enact the Hatch Act of 1939, which prohibited lower-level executive employees from taking an active part in any political campaign.
The central separation-of-powers issues confronting the Hughes Court concerned the scope of congressional power to delegate legislative authority. Previous decisions had identified limits on the authority of Congress to confer legislative power on the executive branch, but the Court had never before held that a statute failed to satisfy those limiting criteria. That would change in early 1935, when two oil companies challenged the constitutionality of section 9(c) of the National Industrial Recovery Act in *Panama Refining Co. v. Ryan*. In response to price destabilization in the petroleum industry brought on by a frenzy of wildcat drilling in the East Texas oil fields, Congress had authorized the President to prohibit the interstate shipment of “contraband” or “hot” oil produced in violation of quotas imposed by the state of production. The President had announced such a prohibition by executive order, delegated to the Secretary of Interior authority to promulgate appropriate rules and regulations, and approved a Code of Fair Competition for the petroleum industry. In preparing to meet the constitutional challenge to the Administration’s oil regulation program before the Supreme Court, government attorneys were chagrined to discover that one of the provisions of the Petroleum Code they had been defending in the lower courts had in fact been repealed inadvertently by a subsequent executive order, and was therefore not even law. Though this peccadillo would prompt Congress in 1935 to enact legislation requiring publication of all federal agency and department rules and regulations in the newly created *Federal Register*, it proved to be inconsequential to the disposition of the case. An 8-1 majority found that section 9(c) transgressed previously latent limitations on congressional delegation. That section, objected Chief Justice Hughes, offered the President no guidance concerning the circumstances under which he was to prohibit interstate transportation of hot oil.
than establishing a policy or standard to govern the President’s course, Congress had instead conferred upon him an unlimited legislative authority.

The *Panama Refining* decision cast a pall of doubt over the constitutionality of the broader recovery program, and the Court let the other shoe drop in *Schechter Poultry Corp. v. United States*, the famous “sick chicken” case. *Schechter* involved the conviction of a kosher slaughtering concern in Brooklyn for violation of various provisions of the Live Poultry Code promulgated pursuant to section 3 of the NIRA. That section authorized the President to prescribe codes of fair competition to govern various trades and industries, and to approve codes proposed by trade and industry representatives. The President was further authorized to provide exceptions and exemptions from the provisions of the codes where in his sole discretion he deemed it necessary to accomplish the policy of promoting industrial recovery.

A unanimous Court condemned this unprecedented delegation of legislative authority to the executive. Section 3, wrote Chief Justice Hughes, prescribed neither rules of conduct nor any meaningful standard to guide the exercise of the President’s “virtually unfettered” discretion to prescribe and approve codes. Congress might authorize the executive branch to promulgate subordinate legal rules, so long as the legislation established standards sufficient to guide and confine the discretion of the executive in carrying out the declared legislative policy. But Congress could not alienate the essential legislative functions with which it was vested. Even Justice Cardozo, who had dissented alone in *Panama Refining*, would not defend Section 3. Its delegation of legislative power, he observed, was “not canalized within banks that keep it from overflowing. It is unconfined and vagrant.” The President had been granted “a roving commission to
inquire into evils and upon discovery correct them.” This, Cardozo exclaimed, was “delegation running riot.”

Following the Schechter decision Congress enacted the Bituminous Coal Conservation Act of 1935, also known as the Guffey Coal Act. Seeking to impose order on a chaotic industry plagued by cutthroat competition, the Act created a National Bituminous Coal Commission, which it authorized to regulate the price at which bituminous coal moved in interstate commerce. A further provision created a labor board to adjudicate labor disputes in the industry, and safeguarded the right of coal company employees to organize and bargain collectively. The Act provoked numerous constitutional objections, among them that one of its provisions unlawfully delegated to a majority of coal producers the power to fix the hours and wages of the employees of other coal producers. In Carter v. Carter Coal Co. the Court held that this delegation of legislative power, not to a government official, but to private parties having interests possibly and often actually adverse to the competitors over whom they would wield such power, was “clearly arbitrary” and thus a denial of the rights safeguarded by the Fifth Amendment’s Due Process Clause.

The practical significance of these decisions should not be overestimated. Few mourned the death of the NIRA, which had been greeted with widespread noncompliance and weak enforcement. Consumer prices and unemployment had risen during its tenure, while workers’ wages (especially those of black workers) had remained low, as employers flouted with impunity the wage, hour, and collective bargaining regulations of the codes. The code-making authorities had been dominated by the representatives of larger business enterprises, whose efforts to reduce competition and to restrict production
ill-served their smaller competitors. The NIRA’s two-year charter was set to expire
within three weeks of the *Schechter* decision, and difficulties with the unpopular statute’s
administration had already made any extension doubtful. Moreover, Congress had no
difficulty placing its oil and coal programs on a sound constitutional footing. Within six
weeks of the *Panama Refining* decision Congress enacted the Connally Act, which
solved the delegation problem by simply prohibiting interstate shipment of hot oil. The
statute was uniformly sustained in the lower courts, and unanimously upheld by the Court
in 1939. Similarly, Congress enacted a revised Bituminous Coal Conservation Act in
early 1937, stripping out the provisions that had not withstood constitutional scrutiny.
With the objectionable delegation to private producers now removed, the Court had no
difficulty upholding the revised Act in 1940. In two cases decided in 1939 the
Agricultural Marketing Agreement Act would again provoke Roberts, Butler, and
McReynolds to press delegation objections – and indeed Roberts would continue to raise
such objections to the wartime Emergency Price Control Act after the others had retired.
By the late 1930s, however, a series of Roosevelt appointments to the Court had
consigned the delegation views of these justices to the minority. The nondelegation
doctrine was never a serious obstacle to the accomplishment of the Administration’s
domestic policy objectives.

Nor did scruples over legislative delegation impede the President’s conduct of
foreign affairs. In 1934 Congress passed a joint resolution authorizing the President to
prohibit arms sales to Paraguay and Bolivia, except under such limitation and exceptions
as the President might prescribe, should he find that such a prohibition might contribute
to the cessation of ongoing hostilities between those neighboring countries. Had the
resolution pertained to the internal, domestic affairs of the nation rather than to international relations, one might have expected the Court to brand it an unconstitutional delegation of legislative authority insufficiently confined by a standard. Yet in *United States v. Curtiss-Wright Export Corp.*, only Justice McReynolds dissented from Justice Sutherland’s opinion upholding the President’s action under the resolution. The federal government’s power to conduct foreign relations, the Court held, was an inherent feature of sovereignty rather than an enumerated grant. The President was the sole representative of the nation in the field of international relations, and the requirements for the successful conduct of those complicated and delicate relations justified Congress in conferring upon the chief executive a degree of discretion that would be impermissible in the domestic context.

The implications of *Curtiss-Wright* were elaborated the following year in *United States v. Belmont*. The case involved the validity of an assignment to the United States of Soviet claims against American nationals by the so-called Litvinov Agreement, a bilateral compact entered into coincident with the establishment of diplomatic relations between the two countries in 1933. The Agreement took the form of an executive agreement rather than a treaty, and was accordingly never presented to the Senate for its advice and consent. The Court confirmed that entry into the Agreement was within the competence of the President and was, like a treaty, entitled to the dignity accorded the supreme law of the land. The principles established in *Curtiss-Wright* and *Belmont* would soon underwrite an array of congressional authorizations and executive measures undertaken following the outbreak of hostilities in Europe. As the continental powers lurched toward global conflict, the Court’s decisions consolidated the triumph of
executive discretion in the conduct of American foreign relations.

It is perhaps not surprising that congressional delegation to the judicial branch received a warm reception at the Supreme Court. Throughout the 19th and early 20th centuries, legal actions in the federal trial courts had been governed by the Process and Conformity Acts, which instructed federal judges to follow the forms of civil procedure employed by the courts of the state in which the federal court sat. The federal courts also continued to employ the traditionally distinct forms of procedure for actions at law and cases in equity, long after many states had merged the two into a single system. The bar’s growing dissatisfaction with the resulting lack of uniformity in federal procedure provoked Congress to enact the Rules Enabling Act of 1934, authorizing the Supreme Court to prescribe uniform rules of pleading, practice, and procedure for civil actions in the federal trial courts. The Act further authorized the Court to unify the procedure for actions at law and cases in equity brought in the federal courts, by establishing a single set of rules to govern both. The Court in turn appointed an Advisory Committee to draft the rules and, after modification of the draft in response to comment from the legal profession, approved the new Federal Rules of Civil Procedure in 1938. As approved, the rules merged law and equity, simplified and relaxed rules of pleading, and expanded procedures for pre-trial discovery. In *Sibbach v. Wilson*, the justices treated the delegation of legislative authority under which they had promulgated the Rules as constitutionally unproblematic. At the decade’s close it appeared that if any constitutional limitations on the power of Congress to delegate legislative authority still remained, it would require an effort to transgress them.
III. The Revolution in Due Process Jurisprudence

*Liberty of Contract, Rate Regulation, and the Minimum Wage*

The idea that the Due Process Clause of the Fourteenth Amendment might limit the power of state and local governments to regulate prices had emerged before Reconstruction’s close. In *Munn v. Illinois*, the Court had held that prices charged could be fixed by law only if the business in question were “affected with a public interest.”¹⁹ “Private” businesses were not amenable to such regulation. Over the course of the next half century, the Court upheld price regulation of such “public” enterprises as railroads, grain elevators, water utilities, and public stockyards, yet forbade regulation of prices charged by theater ticket brokers, employment agencies and, in early 1929, by the Standard Oil Company for gasoline. Decisions concerning price regulation in the District of Columbia revealed that federal regulatory power was similarly constrained by the Due Process Clause of the Fifth Amendment. On the eve of the Great Depression, governmental authority to regulate prices was tightly circumscribed.

This distinction between public and private enterprise similarly informed the Court’s views on wage regulation. In *Adkins v. Children’s Hospital*,¹⁹ the Court invalidated a congressional statute authorizing the prescription of minimum wages for women working in the District of Columbia. Analogizing wage regulation to price regulation, the Court observed that such legislation could be constitutionally applied to those engaged in public employment and to those working in businesses affected with a public interest. As applied to those employed in a private business, however, wage regulation was not an appropriate exercise of the police power. It deprived the parties of their “liberty of contract” and took the property of the employer without due process of
Adkins’ declaration that wages might be regulated in businesses affected with a public interest was reaffirmed in 1930 when a unanimous Court upheld federal regulation of fees charged by commission men on sales of livestock in major stockyards, and again in 1931 when a narrowly divided Court sustained a New Jersey statute regulating commissions paid to agents selling fire insurance. Yet prospects for more systemic wage regulation, and for the minimum wage in particular, remained dim so long as the category of businesses affected with a public interest remained narrowly defined. That constitutional obstacle was removed in 1934, when a sharply divided Court upheld state regulation of minimum retail milk prices in *Nebbia v. New York*. Rejecting as impertinent the contention that the milk business was not “affected with a public interest,” the majority opinion insisted that the guarantee of due process required “only that the law shall not be unreasonable, arbitrary, or capricious, and that the means shall have a real and substantial relation to the object sought to be attained.” “There is no closed class or category of business affected with a public interest,” wrote Justice Roberts. The term meant “no more than that an industry, for adequate reason, is subject to control for the public good.”

The dissenting Four Horsemen were not alone in recognizing that the principles advanced in the majority opinion “would support general prescription of prices for...labor, when some legislature finds and declares such action advisable and for the public good.” (Shortly after the decision was announced, Justice McReynolds wrote his old friend former Solicitor General James Beck lamenting “the end of the constitution as you and I regarded it. An alien influence has prevailed.”) Commentators arrayed across
the political spectrum recognized that *Nebbia* could underwrite the constitutionality of ambitious programs of state and federal price regulation, and virtually guaranteed the demise of *Adkins*. This latter promise was fulfilled in *West Coast Hotel v. Parrish*, in which the justices comprising the *Nebbia* majority narrowly upheld Washington state’s minimum wage statute for women, thereby pronouncing last rites for what Justice Holmes had once called “the dogma, Liberty of Contract.”

The preceding year, however, Justice Roberts had confounded observers by joining the majority in a 5-4 decision invalidating a comparable New York statute on the authority of *Adkins*. This has prompted speculation concerning the cause of Justice Roberts’ contrasting performance in *Parrish*. Some wags have described it as “the switch in time that saved the Nine,” suggesting that Roberts was capitulating to the pressure brought to bear by the President’s scheme to “pack” the Court. Yet this cannot be the case. Roosevelt’s proposal to add a new Justice to the Court for each Justice who had not retired within six months following his seventieth birthday was introduced on February 5, 1937. The vote to uphold the Washington minimum wage statute was taken in conference on December 19, 1936, more than six weeks before the plan, known only to a handful of the President’s most intimate advisors, was unveiled. Others have speculated that Roberts might have been responding to Roosevelt’s landslide victory in the November 1936 elections; yet this hypothesis is also problematic. The New Deal had won an enormous vote of confidence with the congressional Democrats’ historic triumphs in the 1934 mid-term elections. Yet Justice Roberts and his colleagues had appeared completely unfazed by this popular endorsement, proceeding over the next two years to invalidate a bevy of major federal programs for recovery and reform. Moreover, the results of the 1936
presidential election could convey no independent information concerning popular support for the minimum wage, as both the Republican platform and party standard-bearer Alf Landon explicitly endorsed such legislation.

Upon his retirement in 1945, Roberts acceded to Felix Frankfurter’s request that he prepare a memorandum explaining his behavior in the minimum wage cases. In that memorandum Roberts recalled that counsel for the state of New York had not requested that *Adkins* be overruled, but had instead sought to distinguish the statute from the law invalidated in *Adkins*. Roberts had been unable to see any constitutionally significant distinction, and had accordingly been unwilling to rest a decision upholding the statute on that ground. Justices Brandeis, Stone, and Cardozo had been willing to overrule *Adkins*, but Chief Justice Hughes had written separately insisting that the New York statute could be upheld without impairing the authority of *Adkins*. In both *Schechter Poultry Co. v. United States* and *Carter v. Carter Coal Co.* (two cases decided after *Nebbia* but before the 1936 minimum wage case), the Court had declined to invoke liberty of contract as a rationale for invalidating federal regulation of wages – presumably because Roberts, the author of *Nebbia*, had refused to join the Four Horsemen to make a majority for this view. While it is possible that better communication among the justices might have altered the result, it appears that Roberts’ unwillingness to uphold the New York statute unless at least four of his colleagues were prepared to confront and overrule *Adkins*, combined with Hughes’ insistence that the precedent be distinguished rather than overruled, conspired to produce the anomalous 1936 minimum wage decision. In *Parrish*, by contrast, where Hughes was prepared to confront and overrule *Adkins*, Roberts would join him to form a new majority to sustain
the minimum wage.

Decisions in the early 1940s solidified this revolution in due process jurisprudence. *United States v. Darby Lumber Co.* confirmed that the minimum wage provisions of the Fair Labor Standards Act of 1938 did not violate the Fifth Amendment. *Olsen v. Nebraska* reaffirmed *Nebbia’s* abandonment of the “affected with a public interest” limitation in upholding state regulation of fees charged by employment agencies. Contemporaneous decisions receded from decades of precedent under which the Court had rigorously scrutinized public utility rate regulation to ensure a fair return to investors. Governmental powers to regulate wages and prices had emerged from the Great Depression virtually unconstrained by the Constitution’s Due Process Clauses.

*Liberty of Contract and Collective Bargaining*

When the United States entered World War II in 1941, the rights of American workers to organize and bargain collectively were more robust than at any time in the past. This was made possible by the eradication of due process constraints that had previously limited legislative efforts to secure those rights. In the 1908 decision of *Adair v. United States*, the Court had invalidated provisions of the 1898 Erdman Act prohibiting interstate carriers from discharging or discriminating against any worker because of his membership in a labor union, or requiring him to agree as a condition of his employment not to join a union. Similarly, in 1915 *Coppage v. Kansas* had invalidated a Kansas statute outlawing such “yellow dog” contracts. In each instance, the Court had held that such legislation deprived the employer of his liberty of contract. Legal support for efforts to organize had reached its nadir on the eve of the nation’s
engagement in the war in Europe. In the 1917 case of *Hitchman Coal & Coke Co. v. Mitchell*, the Court had enjoined an effort by the United Mine Workers to organize a non-union mine as an unlawful attempt to induce the company’s employees to breach their yellow dog employment contracts.

All of this was to change over the ensuing two decades. In 1926, Congress enacted the Railway Labor Act, which safeguarded railroad workers’ rights of organization and collective bargaining from employer interference. In a 1930 opinion emphasizing employee rights of association and downplaying the employer’s claimed injury to its liberty of contract, a unanimous Court upheld the Act and the order of a lower court requiring a railroad to reinstate employees it had discharged for engaging in lawful union activities. This decision further inspired Congress to enact a provision of the Norris-LaGuardia Act declaring yellow dog contracts contrary to public policy and unenforceable in federal courts. (Other provisions of the Act limiting the power of federal courts to issue injunctions in cases involving labor disputes were upheld by the Court in 1938). Finally, the 1934 amendments to the Railway Labor Act requiring carriers to negotiate exclusively and in good faith with the selected representatives of its employees were upheld by a unanimous Court in March of 1937.

This set the stage for the Court’s decision the following month upholding the NLRA. The National Labor Relations Board initiated a series of test cases in which employers had fired employees for engaging in activity protected under the statute. The Court unanimously sustained the Act as applied to an interstate bus company which, as a common carrier, was a classic business affected with a public interest. The justices narrowly divided on the due process issue in the three cases involving manufacturing
concerns, however. For the majority, the issue had been effectively settled in the 1930
decision upholding the Railway Labor Act’s protection of the “fundamental right” of
self-organization. In the view of the dissenting Four Horsemen, however, that principle
applied only to businesses affected with a public interest, not to “private” enterprises.
Here again, the issue that divided the justices was the one that a fractured Court had
settled three years earlier in *Nebbia*.

Subsequent construction of the statute would make clear that the justices had not
abandoned all solicitude for employers’ rights of property and contract. For example, the
Court read the Act to authorize struck employers to hire permanent replacement workers,
but not to protect from discharge aggrieved employees staging sit-down strikes. By the
spring of 1941, however, with each of the Four Horsemen having retired, there was no
one left to dissent from the assertion that “the course of decisions in this Court since
*Adair v. United States* and *Coppage v. Kansas* have completely sapped those cases of
their authority.”\(^{35}\) The Court had consolidated the constitutional revolution in labor law.

**The Contract Clause and Due Process: Debt Relief**

In the early 1930s, widespread unemployment, a wave of bank failures, and a
powerful deflationary spiral placed profound stress on relations between debtors and their
creditors. Prices and wages fell nearly 25% between 1929 and 1933, while millions of
workers lost their jobs and remained chronically unemployed. While the contraction of
the money supply diminished the prices and wages that businessmen, farmers, workers,
and other debtors could command in the marketplace, it did not alter the face amount of
obligations undertaken before the economic collapse had so devastated their earning
capacity. In the winter of 1932-33, frustration over inability to service mortgage debt boiled over into riots protesting the epidemic of residential and farm foreclosures in several mid-western states. A number of state legislatures responded by enacting various forms of debtor relief legislation.

In Minnesota, where more than half of the owner-operated farms were mortgaged, the state legislature passed a mortgage moratorium law in April of 1933. The statute empowered the state courts to extend the period of redemption up to two years beyond the one year provided by prior law, provided the defaulting mortgagor in possession paid the reasonable rental value of the mortgaged property during the extended period. Though much of the existing precedent suggested that such a legislative modification of the debtor’s obligation would violate the Contract Clause, a sharply divided Court upheld the law as a valid and reasonable exercise of the state’s police power in *Home Bldg. & Loan Assn. v. Blaisdell.* Under such conditions of economic emergency, wrote Chief Justice Hughes, the statute’s temporary, conditional, and limited alteration of the mortgagor’s undertaking did not impair the underlying obligation of the contract.

At the federal level, the government sought to ease the debt crisis by reinflating the currency. A critical feature of the Administration’s monetary plan depended upon the power of the federal government to abrogate a provision routinely inserted in long-term debt contracts. This so-called “gold clause” required the obligor to repay in gold coin of a specified weight and fineness, or in an equivalent amount of paper money as measured by the gold content of the dollar on the date of the contract. Congress had therefore enacted a joint resolution declaring all gold clauses against public policy and forbidding their enforcement even with respect to existing contractual obligations. The
constitutionality of this prohibition was contested in the Gold Clause Cases.

In the case of Norman v. B. & O. R.R. Co., the Court upheld the abrogation of the gold clause in private contracts by a vote of 5-4. Such action, wrote Chief Justice Hughes for the majority, was a necessary and proper means of exercising Congress’ power to establish and regulate the value of a uniform national currency. The Administration, fearing an avalanche of bankruptcies were the nation’s debtors required to repay obligations at $1.69 on the newly devalued dollar, breathed an enormous sigh of relief. The opinion in Perry v. United States, by contrast, held unconstitutional the abrogation of the gold clause in federal government bonds. Yet the Administration’s expectation that the rise in the price of gold resulting from government purchase and its devaluation of the dollar would be accompanied by an immediate general increase in domestic prices had not been realized. Chief Justice Hughes accordingly maintained for the majority that payment to Perry in the uniform devalued currency had left him with no less purchasing power than he would have enjoyed had no devaluation occurred. Accordingly, he had suffered no injury and was entitled to no relief. Congress subsequently withdrew the government’s consent to suit on monetary claims as of January 1, 1936, thereby depriving bondholders of the opportunity to show actual damages.

Both Blaisdell and the Gold Clause Cases provoked impassioned dissents from the Four Horsemen. “Fewer questions of greater moment than that just decided have been submitted for judicial inquiry during this generation,” wrote Justice Sutherland dissenting in Blaisdell. “He simply closes his eyes to the necessary implications of the decision who fails to see in it the potentiality of...serious and dangerous inroads upon the limitations of
the Constitution which are almost certain to ensue.” Justice McReynolds condemned the monetary program as embracing “a debased standard, adopted with the definite purpose to destroy obligations.” Such “arbitrary and oppressive action” violated the Fifth Amendment. “Just men regard repudiation and spoliation of citizens by their sovereign with abhorrence,” he remonstrated. “Loss of reputation for honorable dealing will bring us unending humiliation; the impending legal and moral chaos is appalling.” When delivering his dissent from the bench, he extemporaneously gave voice to sentiments he had earlier expressed privately over *Nebbia* and *Blaisdell*. “This is Nero at his worst,” he thundered. “The Constitution is gone.”

These reports of the Constitution’s demise turned out to be greatly exaggerated. In the twenty-five months following the announcement of the *Blaisdell* decision, the Court heard three cases involving challenges to state debtor relief legislation under the Contract Clause. In each case, the Court invalidated the legislation by a unanimous vote. *W.B. Worthen Co. v. Thomas* struck down an Arkansas statute absolutely and retroactively exempting the proceeds of certain insurance policies from liability for debts and seizure under judicial process. *W. B. Worthen Co. v. Kavanaugh* disapproved another Arkansas debtor-relief package as “an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security.” “With studied indifference to the interests of the mortgagee or to his appropriate protection,” wrote Justice Cardozo, the legislature had “taken from the mortgagee the quality of an acceptable investment for a rational investor.” And in *Treigle v. Acme Homestead Assn.*, the justices found that a Louisiana statute diminishing the rights of withdrawing members of building and loan associations was neither temporary nor conditional, but
instead arbitrary and oppressive. Nor did the celebrated events of 1937 mark the end of judicial enforcement of the Contract Clause. Over the objection of some Roosevelt appointees, the Court would find fault with statutes impairing the obligation of contract in 1938 and again in 1941. Though the Contract Clause would slumber for more than three decades after Hughes retired in the summer of 1941, throughout his Chief Justiceship context-specific judgments of reasonableness continued to constrain state legislative regulation of contractual obligations.

The same was true at the federal level. The Frazier-Lemke Farm Debt Relief Act of 1934 permitted distressed farmers to stay foreclosure proceedings for a period of five years, during which time they could take title to the mortgaged property free and clear by paying its appraised value rather than the amount of the debt. In *Louisville Joint Stock & Bank Co. v. Radford*, the Court unanimously held that the Act unconstitutionally impaired the vested rights of mortgage creditors. Yet Justice Brandeis’ opinion for the Court offered Congress guidance on how the statute might be reformulated so as to conform to the requirements of the Fifth Amendment. Congress accepted the advice and quickly redrafted the measure accordingly. When the inevitable challenge came before the Court in *Wright v. Vinton Branch Bank*, the opinion upholding the revised statute was again unanimous. It was not a change in constitutional doctrine, but instead a change in legislative means that enabled Congress to attain its desired objective.

*The Persistence of the Old School and the Significance of the Roosevelt Appointments*

The Court upheld state and federal regulatory legislation more frequently in the late 1930s than it had earlier in the decade. This was due in no small part to greater
efforts by legislative draftsmen, such as those who rewrote the Frazier-Lemke Act, to comply with constraints imposed by contemporary constitutional doctrine. At the same time, a good deal of this increased success was owing to transformations in constitutional doctrine brought about by changes in Court personnel. Just as decisions such as *Nebbia* and its progeny were the result of Hoover’s appointments of Hughes, Roberts, and Cardozo, so too were later decisions relaxing the restraints of the Fifth and Fourteenth Amendments on federal and state regulatory power the consequence of Roosevelt’s nominations from 1937 to 1943 of Hugo Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, James F. Byrnes, Robert H. Jackson, and Wiley Rutledge. For the voting patterns of Hughes and especially Roberts in cases decided between 1938 and 1940 belie the notion that they “switched” in 1937 to the view that those amendments did not constrain governmental regulatory authority. Instead, those decisions illustrate the remarkable persistence of these centrist justices’ moderate constitutional views.

In the 1935 case of *Railroad Retirement Board v. Alton*, Justice Roberts wrote for a narrowly divided Court that the Railroad Retirement Act of 1934 was unconstitutional, first because several of its provisions violated the Due Process Clause of the Fifth Amendment, and second because the establishment of a pension system for railroad workers exceeded Congress’ power to regulate interstate commerce. Though *Alton* marked no retreat from *Nebbia*’s dramatic abandonment of the “affected with a public interest” limitation, it did indicate that *Nebbia*’s requirement that regulatory legislation “not be unreasonable, arbitrary, or capricious” was not entirely toothless. Chief Justice Hughes, whose opinion for the four dissenters agreed that one of the
statute’s provisions violated due process, was one among many observers who believed that the Commerce Clause holding doomed any comparable pension legislation, even if redrafted to address the Court’s due process objections. Yet astute members of Congress realized that such a pension program funded from general revenue rather than from an earmarked source might be immunized from constitutional attack under the taxpayer standing doctrine announced in *Frothingham v. Mellon.* The pension payments could be made directly from the general treasury rather than from a segregated fund, with the necessary revenue derived from a special tax on interstate carriers. President Roosevelt persuaded representatives of the major railway unions and railway companies to join Congress and the Administration in hammering out the details of such a program, which were then set forth in the Railroad Retirement and Carrier Taxing Acts of 1937. Representatives of the unions and the companies also kept their promises not to challenge the program’s constitutionality, and their pension system, with some modifications, remains in place to this day.

Though this turn of events precluded relitigation of the precise issues that had been before the Court in *Alton*, Roberts’ subsequent treatment of the precedent testifies that his views had not changed. In the 1938 decision of *United States v. Carolene Products Co.*, Justice Stone famously declared that “regulatory legislation affecting ordinary commercial transactions 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.” Yet New Dealer Justice Black refused to join this portion of the opinion, for Stone then proceeded to qualify that pronouncement in a passage citing
Roberts’ *Alton* opinion as authority. As every other Justice joining that portion of Stone’s opinion had dissented in *Alton*, the citation is explicable only as an accommodation to Roberts. Roberts again expressed his conviction that his 1935 decision had been correct when *United States v. Lowden* effectively overruled *Alton* in 1939. The reconstituted “Roosevelt Court’s” decision was unanimous, but only because Roberts suppressed the dissenting vote he had cast in conference.

Still other decisions from the mid- and late-1930s illustrate how *Nebbia* and *West Coast Hotel* could co-exist with a rationality standard that stopped short of complete deference to the legislature. For example, in 1935 Hughes and Roberts joined the 6-3 decision in *Colgate v. Harvey* holding that a provision of a Vermont tax violated the Equal Protection and Privileges or Immunities Clauses of the Fourteenth Amendment. *Colgate* would be overruled in *Madden v. Kentucky* in 1940, but only over the dissent of Justice Roberts. Similarly, in the 1932 case of *New State Ice v. Liebmann*, Hughes and Roberts had joined the opinion holding unconstitutional an Oklahoma statute designed to exclude aspiring entrants to the ice business. In the 1936 decision of *Mayflower Farms, Inc. v. Ten Eyck*, these justices again voted with the majority, this time to strike down a New York milk industry regulation that operated to freeze out potential market entrants. And in 1939, this time in dissent, Hughes and Roberts voted to invalidate a federal milk regulation they believed placed smaller milk dealers at an unconstitutional disadvantage in the competition with their larger rivals. Hughes and Roberts continued throughout their careers to maintain that the Constitution safeguarded the right to pursue a lawful calling on terms of legal equality with all others. These features of constitutional doctrine changed not because Hughes and Roberts revised their longstanding views, but because
President Roosevelt repopulated the Court with justices harboring different commitments.

When Justice Roberts retired in 1945, then-Chief Justice Stone prepared a draft of the customary farewell letter from the remaining members of the Court. Stone’s draft contained the encomium, “You have made fidelity to principle your guide to decision.” Justices Black and Douglas, partisans of the “switch-in-time” narrative, refused to sign any letter containing such an assertion, while Justices Frankfurter and Jackson refused to join any letter from which the sentence was omitted. This impasse resulted in no letter being sent. Yet it now appears that Stone, Frankfurter, and Jackson had come correctly to see in Roberts’ jurisprudence a principled character that Black, Douglas, and many others could not or would not recognize.

IV. The Revolution in Federalism Jurisprudence

The Commerce Power

In 1929, the power of the national government to regulate the economy was qualified not only by the restraints of the Due Process Clause, but also by those of constitutional federalism. By the end of 1942, both of those limitations had dissolved, and federal regulatory power over economic matters was virtually plenary. The principal means through which Congress exerted control over “ordinary commercial transactions” was through exercises of its power to regulate commerce among the several states.

Since 1895, Commerce Clause jurisprudence had been organized around two fundamental distinctions, each drawn from the Court’s Dormant Commerce Clause doctrine. Those distinctions were between production and commerce, and between direct
and indirect effects on commerce. The Court recognized broad federal authority to regulate interstate transportation and interstate sales. Yet a series of cases involving the Sherman Antitrust Act had established the principle that the power to regulate commerce did not as a general matter include the power to regulate activities of production such as agriculture, mining, and manufacturing. The Act might reach such “local” activities as corporate mergers and labor strikes were it shown that they were intended to restrain interstate commerce. In such instances commerce was affected “directly.” Without proof of such intent, however, the effect on commerce – irrespective of its magnitude – was merely “indirect” or “incidental,” leaving the activity in question beyond the reach of federal authority.

One of the principal qualifications to this general framework found expression in the “stream of commerce” doctrine. A series of Fuller and Taft Court decisions had held that the activities of a “local” enterprise might nevertheless be subjected to federal regulation if they occurred in a “current” or “flow” of interstate commerce that began outside the state and later continued beyond its borders. In *Stafford v. Wallace*, for example, the Court upheld federal regulation of “local” transactions in the Chicago stockyards. The livestock came from the western states to Chicago, where they were housed, fed, watered, sold, and often slaughtered. They then continued their interstate journeys to other states in the Midwest or East for ultimate consumption. The stockyards were the “throat” through which this current of interstate commerce flowed, the transactions therein being essential to its interstate movement.

The scope of the stream of commerce doctrine was constrained, however, by the due process requirement that the “local” business regulated be affected with a public
interest. Only these businesses had the capacity to exact exorbitant charges and thereby affect the flow of interstate commerce “directly.” So long as that category of business remained small and select, the stream of commerce promised to cut a narrow channel. With *Nebbia’s* abandonment of the public interest limitation in due process jurisprudence, however, the potential range of application of the stream of commerce doctrine was dramatically enlarged. Now any business located in a current of interstate commerce was amenable to federal regulation.

Yet it remained necessary that the local activity be situated within the current of interstate commerce, rather than at one of its terminals. Just as the Court’s Dormant Commerce Clause decisions continued to maintain that activities that took place before interstate commerce had begun or after it had ceased remained subject to state and local powers to tax and regulate, so the Court’s affirmative Commerce Clause jurisprudence adhered to the view that such activities lay outside federal regulatory competence. Thus, the stream of commerce doctrine was inapposite in *Schechter Poultry Corp. v. United States*. The chickens butchered at the Schechters’ slaughterhouse had “come to a permanent rest” in New York, and were sold locally rather than in interstate trade. Because interstate commerce in the poultry had come to an end, the NIRA’s Live Poultry Code regulated local activity that affected interstate commerce only indirectly. Such activity was subject to exclusive state jurisdiction. Though President Roosevelt denounced the decision as adopting a “horse and buggy” era conception of interstate commerce, the judgment was unanimous. Indeed, Justice Department lawyers and other Roosevelt advisors had regarded *Schechter* as an extraordinarily weak case for the government, and had tried to prepare the President for an adverse outcome.
Administration lawyers similarly were convinced that the provisions of the Guffey Coal bill regulating labor relations at the mine were unconstitutional in view of the Court’s opinion in *Schechter*, and Attorney General Cummings refused to offer a subcommittee of the House Ways and Means Committee an opinion on the bill’s constitutionality. Instead, he urged the representatives to “push it through and leave the question to the courts.” President Roosevelt similarly cajoled the subcommittee’s chairman, Sam B. Hill, not to “permit doubts as to constitutionality, however reasonable,” to block the bill’s enactment. Majorities of both the subcommittee and the full committee considered the bill unconstitutional, and it was only through such vigorous prodding from the Administration and the resulting abstention of dissenting Democrats that the bill was even reported to the House floor. Though Democrats vastly outnumbered Republicans in both the House and the Senate, the bill was passed in each by uncharacteristically narrow margins.

The constitutional doubts of the bill’s critics were vindicated in *Carter v. Carter Coal Co.* Justice Sutherland’s majority opinion echoed what congressional opponents had pointed out: the stream of commerce doctrine could have no application where the interstate flow had not yet begun. The Guffey Coal Act presented the same difficulty the Court identified in *Schechter*, though from the opposite end of the stream. The coal mine in question lay at the source rather than amid the flow of the current of commerce. The Act therefore regulated labor relations in the local activity of production, which affected interstate commerce only indirectly. The majority accordingly invalidated the Act’s labor provisions. Moreover, despite the Act’s severability clause, the majority held that the labor provisions were inseparable from its price-regulation provisions, thereby vitiating
the entire statute. Chief Justice Hughes wrote separately, agreeing with the majority that the labor provisions were unconstitutional. Yet Hughes maintained that those provisions were separable from the price-regulation provisions, which were constitutional in light of *Nebbia*. In dissent, Justices Cardozo, Brandeis and Stone insisted that the price regulation provisions were constitutional, that they were separable from the labor provisions, and that the constitutional challenge to the labor provisions was premature. Significantly, none of the justices contended that the labor provisions were within the scope of the Commerce Power.

A number of observers read the *Schechter* and *Carter* decisions to cast doubt on the constitutionality of the NLRA. Government lawyers preparing cases to test the Act’s constitutionality before the Court did not. In selecting those test cases they had shrewdly pursued instances involving labor disputes at steel, trailer, and clothing plants that imported raw materials from other states and then shipped their products across state lines for subsequent purchase. Labor Board lawyers contended that these factories, like the Chicago stockyards in *Stafford v. Wallace*, were located in a stream of interstate commerce whose flow would be disrupted by work stoppages produced by labor strife. The power to enact regulations designed to prevent or curtail such disruptions was therefore comprehended by Congress’ power to regulate interstate commerce. The Court upheld application of the NLRA to such manufacturing enterprises in the *Labor Board Cases*, with Justices Brandeis, Stone, Roberts, Cardozo joining Chief Justice Hughes’ opinions for the majority. Hughes maintained that it was unnecessary to decide whether the factories in question lay in a stream of interstate commerce, for that doctrine was merely one illustration of a principle also immanent in the Court’s Sherman Act and
railroad regulation precedents: any activity whose “close and substantial relation” to interstate commerce made its regulation necessary to protect such commerce from burdens and obstructions was subject to appropriate congressional control.67 Hughes cautioned readers against interpreting this formulation too broadly, and both the dissenting opinion of the Four Horsemen and subsequent remarks by Justice Roberts strongly suggested, as many contemporary observers recognized, that the government’s stream of commerce analogy had in fact provided the basis for Roberts’ crucial fifth vote to sustain the Act.

Others, however, have suggested that Roberts’ behavior – and that of Hughes as well – was prompted by entirely different considerations. President Roosevelt’s proposed Judicial Reorganization Act – known colloquially as the “Court-packing Plan” – remained pending in Congress even as the justices were deciding and announcing the result in the Labor Board Cases. Because six of the sitting justices had already celebrated their seventieth birthdays, the bill would have empowered Roosevelt to expand the personnel of the Court from nine to fifteen immediately. Roosevelt claimed that the measure was necessary because the aged justices – the “Nine Old Men,” as a popular book of the day68 called them – were unable to keep pace with the demands of the Court’s docket. Yet it was generally understood, as Roosevelt essentially admitted in a fireside chat in early March, that the bill’s objective was to secure a Court majority sympathetic to the New Deal.

Though neither house of Congress would approve the President’s proposal, there has long been speculation that Hughes and Roberts voted to uphold the NLRA in order to blunt Roosevelt’s attack on the Court and thereby defeat the Plan. Though the question of
motivation cannot be resolved with absolute certainty, there are reasons to be skeptical of this view. While acknowledging the strain the justices felt during the crisis, both Hughes and Roberts denied that the pending bill had affected their votes. One would of course not expect a contrary admission, but there is abundant evidence to corroborate their claims. First, the justices had ample reason to doubt that Congress would enact the President’s proposal. The bill provoked vigorous opposition from the moment it was introduced, from powerful forces both inside and outside Congress. It was denounced in the press, by leaders in higher education, and by a variety of civic organizations including the American Bar Association. It was conspicuously criticized by prominent liberals and former members of Roosevelt’s own Administration. While organized labor offered the proposal only faint praise, farm organizations launched public campaigns of opposition. Congressmen found that constituent correspondence ran heavily against the Plan, and contemporary public opinion polls registered both consistent opposition to Court-packing and a steady decline in Roosevelt’s popularity.

The signals from Congress were similarly ominous. The President’s failure to consult with congressional leaders before unveiling his proposal created hard feelings on Capitol Hill. Hatton Sumners, Chair of the House Judiciary Committee, responded with two measures. First, he quickly pushed a judicial retirement bill through Congress with the aim of persuading his colleagues that the problem of judicial opposition to the New Deal could be solved simply by offering elderly conservative justices a financial incentive to leave the bench. In this Sumners was successful. Two of the justices were anxious to retire, and had remained on the Court only because the Economy Bill of 1933 had left the provisions for retired federal judges at unacceptably parsimonious levels.
Justice Van Devanter would announce his retirement within two months of the retirement act’s passage; Justice Sutherland would step down the following January, and but for the pendency of the Court-packing bill would have retired with Van Devanter the previous spring. Second, Sumners lined up a comfortable majority of his committee against the President’s Plan, assuring the opposition control of the hearings and the power to bottle the bill up in committee for an indefinite period.

It was due to the opposition of Sumners and his colleagues on the committee that the Administration took the unusual step of introducing the bill instead in the Senate. There as well, however, the Plan faced stiff resistance. All of the Senate Republicans and many Senate Democrats, led by liberal Burton Wheeler of Montana, announced their opposition. By mid-February Henry Morgenthau, Roosevelt’s Secretary of the Treasury, assessed the bill’s chances as even at best. Two events later in March prompted observers to revise this estimate downward. On March 29, the Court took wind out of the Plan’s sails when it announced its decision upholding the minimum wage in *West Coast Hotel v. Parrish*. A week earlier, on March 22, Senator Wheeler had read before the Senate Judiciary Committee a letter he had solicited from Chief Justice Hughes with the approval of Justices Brandeis and Van Devanter. The letter rebutted point by point each of the President’s allegations concerning the Court’s efficiency. Hughes insisted that the Court was fully abreast of its calendar, was granting all meritorious petitions for review, and that the addition of new justices would frustrate rather than enhance the Court’s efficient operation. The impact of Wheeler’s recitation prompted Vice-President Garner to telephone Roosevelt to tell him, “We’re licked.”

At least two weeks earlier, it had become clear that the opposition intended to
filibuster the bill on the floor of the Senate, and appeared to have at least enough votes to prevent cloture, if not to defeat the bill in an up-or-down vote. Even had the bill’s proponents succeeded in cutting off debate in the Senate, however, the obstacles raised by Sumners and his colleagues remained looming in the House. Yet the continuing deterioration of the bill’s fortunes throughout the spring prevented the bill from getting even that far. By early May the opposition held a clear majority in the Senate; at mid-month the Senate Judiciary Committee issued its adverse report on the bill. In early June Roosevelt finally relented to Democratic leaders and agreed to support a compromise measure that would have permitted him to appoint a smaller number of additional justices over a longer period of time. Efforts to revive the Plan again foundered in the Senate, however, and the bill was recommitted with instructions to excise its Court-packing provisions.

Moreover, the voting patterns of the justices are difficult to reconcile with the claim that they were influenced by the President’s proposal. A number of congressional bills to constrain the Court had been introduced in 1935 and 1936, yet none of them appeared to have any effect on its decisions. The Court upheld New York’s unemployment compensation statute over due process objections ten weeks before the announcement of the Plan; West Coast Hotel was decided in conference six weeks before the justices could have known of the President’s intentions; and the Social Security Act was upheld after it appeared that the Plan was doomed. Moreover, Hughes and Roberts continued to vote to uphold state and federal regulatory statutes – and occasionally to invalidate them – long after the Court-packing Plan was dead and buried. And while some or all of the Four Horsemen occasionally voted to uphold such programs after
1936, their votes to invalidate important New Deal measures in the spring of 1937 demonstrate the failure of Roosevelt’s effort to pressure them into compliance. Improvements in congressional draftsmanship and Administration lawyering rather than raw power politics best account for the Court’s greater receptivity to the NLRA and other New Deal initiatives.

Subsequent NLRA decisions underscored the continuity in doctrinal development. *Santa Cruz Fruit Packing Co. v. NLRB*70 upheld the application of the NLRA to employees engaged not in production, but in the initial stages of interstate transportation. *Consolidated Edison Co. v. NLRB*71 concerned a company whose activities were indispensable to the operation of a vast network of interstate communication and transportation, and upheld NLRB jurisdiction only on this narrow ground. *NLRB v. Fainblatt*72 involved a clothing manufacturer situated in a stream of interstate commerce, receiving raw materials from outside the state and shipping its products across state lines.

Nor did contemporaneous decisions upholding federal regulation of the coal industry and agriculture push back the frontiers of Commerce Clause jurisprudence. In a series of statutes enacted between 1935 and 1938, Congress had revised its strategy for stabilizing prices in these troubled sectors of the economy. Rather than controlling the conditions or quantities of local production in these enterprises, Congress now regulated the interstate marketing of their products. This price stabilization was to be accomplished either directly, through price regulation, or indirectly, through limitation of the amount of the item that could be marketed in interstate commerce. Before *Nebbia*, the Fifth Amendment’s Due Process Clause would have prohibited price regulation with respect to such ordinary commodities; after *Nebbia*, federal regulation of the price at which goods...
moved in interstate commerce was constitutionally unproblematic. Yet members of Congress recognized that coal and agricultural produce sold in intrastate commerce competed with such items sold in interstate commerce. If price stabilization in interstate commerce were to be effective, these intrastate transactions would have to be comprehended within the federal regulatory scheme.

Congressional sponsors found authority for such intrastate regulation in the 1914 *Shreveport Rate Cases.* There the Court had held that Congress could regulate the intrastate rates charged by interstate carriers where necessary to make federal regulation of rates for competing interstate carriage effective. This authority to regulate intrastate rates was thus derivative of Congress’ authority to regulate interstate rates. Before *Nebbia,* the Due Process Clause had confined that authority to businesses affected with a public interest. Indeed, before 1934, every decision following the *Shreveport* doctrine had involved regulation of that paradigmatic business affected with a public interest, rail carriage. After *Nebbia,* however, the potential application of the *Shreveport* doctrine expanded dramatically. Now Congress could regulate the price at which coal and agricultural commodities were sold in interstate commerce; and as intrastate sales of coal and agricultural commodities competed with interstate sales of these items, *Shreveport* authorized federal price regulation of these local transactions as well.

Thus the Bituminous Coal Conservation Act of 1937, unlike its predecessor struck down in *Carter Coal,* did not purport to regulate labor relations and conditions in the coal industry. Instead, its sponsors invoked *Nebbia* and *Shreveport* in support of the Act’s regulation of the price at which coal was sold in both interstate and intrastate commerce. In *Sunshine Anthracite Coal Co. v. Adkins* the Court upheld the Act over
the lone dissent of Justice McReynolds, the sole remaining *Nebbia* dissenter. The Agricultural Adjustment Act (AAA) of 1938 similarly did not seek to prescribe the amount of specified commodities farmers could produce. Its proponents instead again pointed to *Shreveport* in support of the Act’s restrictions on the quantities of such commodities producers could market in either interstate or intrastate commerce. Justice Roberts, joined by Chief Justice Hughes, wrote the opinion upholding the Act in *Mulford v. Smith*.75 The sponsors of what became the Agricultural Marketing Agreement Act of 1937 maintained that *Nebbia* and *Shreveport* supported the Act’s provisions authorizing the Secretary of Agriculture to set minimum prices for interstate and intrastate sales of certain agricultural commodities. The Court accepted this contention, upholding the Act in *United States v. Rock-Royal Cooperative*,76 *H.P. Hood & Sons v. United States*,77 and *United States v. Wrightwood Dairy Co.*78 By regulating marketing rather than production, Congress could address the problems that had plagued the energy and agricultural sectors with programs that could withstand judicial scrutiny; and all of this could be accomplished, as Justice Cardozo put it, “within rulings the most orthodox.”79

Thus, while *Nebbia*’s transformation of due process doctrine allowed existing Commerce Clause precedents far greater scope than they had previously enjoyed, developments in Commerce Clause doctrine itself remained relatively modest in the late 1930s. This helps to explain Justice Brandeis’ landmark 1938 opinion in *Erie Railroad Co. v. Tompkins*.80 Ever since the decision of *Swift v. Tyson*81 in 1842, the Court had interpreted Section 34 of the Judiciary Act of 1789 to require federal courts sitting in diversity to apply the statutory but not the common law of the states in cases coming before them. Where the relevant state legislature had enacted no statute covering the
issue in question, the federal courts were to apply the “general common law,” the content of which many came to criticize as unduly favoring corporate litigants. In *Erie*, the Court held that this longstanding interpretation of Section 34 was not only incorrect, but unconstitutional. Federal courts henceforth would be required to apply state common law rules as rules of decision in diversity cases. “There is no federal general common law,” declared Justice Brandeis. “Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or ‘general,’ be they commercial law or part of the law of torts.”82 The federal courts had no power to declare general rules of commercial and tort law for the states, Brandeis maintained, in part because Congress had no power to do so. As Chief Justice Hughes had written in the *Labor Board Cases*, the reach of the Commerce Power “must be considered in light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.”83 The justices made it clear throughout the 1930s that the Commerce Power remained subject to judicially enforceable constraints of constitutional federalism.

That would change in the early 1940s. By February of 1941 all but three of the sitting justices were Roosevelt appointees. None of the remaining justices had participated in the notorious case of *Hammer v. Dagenhart*,84 in which a 5-4 majority had invalidated the Keating-Owen Child Labor Act’s prohibition of interstate shipment of goods made by child labor. The statute, the majority had held, was a pretextual use of the Commerce Power to regulate manufacturing, a matter reserved to the states. *Hammer* and
a subsequent decision invalidating an excise tax on firms employing child workers had inspired a movement to amend the Constitution to empower Congress to regulate the practice. The Child Labor Amendment received the requisite endorsement of Congress in 1924, but fell eight states short of ratification. In 1938, however, Congress again asserted its authority under the Commerce Power to regulate employment of children, as well as the wages and hours of adult employees, in the Fair Labor Standards Act. In *United States v. Darby*,85 the Roosevelt Court unanimously overruled *Hammer* in upholding provisions of the Act prohibiting interstate shipment of goods made by employees working under substandard labor conditions. The Court also unanimously sustained provisions of the Act prohibiting employment of workers engaged in “production for interstate commerce” at substandard wages or for excessive hours, though internal Court records reveal that Chief Justice Hughes was deeply troubled by this latter extension of the Commerce Power. While in cases following Hughes’ retirement the Roosevelt appointees would find that Congress had not intended by this language to include every employee working for firms engaged in production for interstate commerce, only Roberts would insist that Congress was powerless to reach “purely local” activities.

*Wickard v. Filburn*86 cast grave doubt on whether there were any activities left in that category. The Secretary of Agriculture had penalized Roscoe Filburn for growing wheat in excess of his annual allotment under the amended AAA of 1938. Filburn maintained that the surplus wheat was intended solely for personal use and consumption rather than for sale, and that its production was therefore a purely local activity beyond the reach of federal authority. This extension of the Commerce Power sought by the government troubled many of the justices, including several Roosevelt appointees, and
when the case was initially argued in the spring of 1942 there was not a majority to uphold it. After reargument in the fall, however, the Court unanimously sustained the penalty. In an opinion that didn’t even cite the Labor Board Cases, Justice Jackson reasoned that if many farmers satisfied their own needs by growing for personal use, they would reduce the total demand for the crops marketed and thus the price at which those crops were sold in interstate commerce. The aggregate effect of such activity on interstate commerce might be “substantial.” Congress’ regulation of such activity was therefore a necessary and proper means of regulating the interstate price of agricultural commodities.

Roberts’ opinion in Mulford had taken pains to demonstrate that the AAA of 1938 regulated “marketing” rather than “production.” At the Darby conference, Chief Justice Hughes had voiced concern over the FLSA’s regulation of all “production for commerce.” These justices had regarded “production” as presumptively immune from federal regulation. In NLRA decisions such as Santa Cruz Fruit and Consolidated Edison, moreover, Hughes had continued to employ the older vocabulary of “direct” and “indirect” effects. The Wickard opinion, by contrast, expressly repudiated the notion that such nomenclature was even useful, much less controlling. Though initially expressing doubts about the government’s position in just such traditional terms, Jackson had come to believe that the Court never had succeeded — and never could succeed — in developing a workable legal standard for determining which economic effects made federal regulation appropriate and which did not. Neither the direct/indirect test nor the “close and substantial” test provided an adequate legal criterion for judicial evaluation of congressional policy judgments. Indeed, Jackson could no longer conceive of an activity
whose relation to commerce was so attenuated as to make its regulation by Congress inappropriate. He consequently despaired of the enterprise and turned instead to a conceptualization of Commerce Power issues as presenting political rather than judicial questions. The national political process would allocate regulatory authority between the state and federal governments, and the Court would defer to those political judgments. Whereas Hughes and Roberts had insisted that the Court was responsible for policing the line beyond which exercises of the Commerce Power usurped state regulatory authority, the Wickard Court concluded that “effective restraints” on the power’s exercise “must proceed from political rather than from judicial processes.”

The Dormant Commerce Clause

Just as political process theory helped to rationalize the Court’s withdrawal from enforcing federalism limitations on congressional exercises of the Commerce Power, so it also explained the persistence of judicial enforcement of the Dormant Commerce Clause. State interests were theoretically represented in the national Congress; but as Justice Stone observed in *South Carolina Highway Department v. Barnwell Bros.*, out-of-state interests were often not adequately represented in state legislatures. “[W]hen the regulation is of such a character that its burden falls principally upon those without the state,” Stone explained, “legislative action is not likely to be subjected to those political constraints which are normally exerted on legislation where it affects adversely some interests within the state.” So, for example, in 1941 the Court invalidated a California statute that prohibited transporting into the state indigent non-residents, as the excluded persons were “deprived of the opportunity to exert political pressure upon the California
Yet this persistence of enforcement was accompanied by significant doctrinal change. Since the 1870s Dormant Commerce Clause doctrine had been organized around the same categories that had structured affirmative Commerce Clause jurisprudence. State or local regulation that affected interstate commerce “directly” was forbidden; regulation that affected such commerce only “incidentally or indirectly” was permitted. In the late 1930s the Court continued to employ these categories in analyzing questions of both state and federal power. With their abandonment in *Wickard*, however, their persistence in Dormant Commerce Clause doctrine became anomalous. Adjectives inadequate for describing the effects of activities on interstate commerce were surely inadequate to describe the effect of state and local regulations on such commerce. Moreover, understood through the older vocabulary, *Wickard* suggested that virtually every local activity affected interstate commerce sufficiently “directly” to warrant its federal regulation. If it now followed that state and local regulation of those local activities now also affected interstate commerce “directly,” then all such regulation would violate the Dormant Commerce Clause. The expansion of federal power thus threatened to destroy traditional state and local regulatory authority by implication. The Court’s solution to this difficulty, adopted in *Parker v. Brown* later in the same term that *Wickard* was decided, was to decouple Dormant Commerce Clause doctrine from its affirmative counterpart, to abandon the categories each had shared, and to treat regulatory authority over local activities as presumptively concurrent. Henceforth, in the absence of congressional preemption, nondiscriminatory state and local regulation would be evaluated by “comparing the relative weights of the conflicting local and national
interests involved."91

In one area of the law the uncertainties created by this doctrinal reorientation were sufficient to provoke congressional intervention. Since 1869 the Court had consistently maintained that the business of writing contracts of insurance was not itself interstate commerce, and that state regulation of the insurance industry therefore did not violate the dormant commerce clause. In view of the prevailing symmetrical relationship between affirmative and Dormant Commerce Clause doctrine, each of the branches of the federal government had treated the regulation of insurance as a matter for the states rather than the federal government. The Court disrupted this understanding in 1944, however, holding in two cases that the activities of certain insurance companies bore sufficient relation to interstate commerce to bring them within the reach of the Sherman Act and the NLRA. These decisions created anxiety over how much state insurance regulation would now be treated as implicitly preempted by federal statute or the Dormant Commerce Clause. Congress quickly responded by enacting the McCarran-Ferguson Act of 1945, providing that neither congressional silence nor federal legislation should be construed to displace such state regulation by implication. Only statutes specifically relating to the business of insurance would trump state law.

**Taxing and Spending**

This expansion of the realm of concurrent jurisdiction in Commerce Clause jurisprudence found its complement in the erosion of intergovernmental tax immunities.

In 1939 *Graves v. New York ex rel. O'Keefe*92 overruled *Collector v. Day*93 and its more recent progeny in announcing that the salaries of federal officers and employees would
no longer enjoy constitutional immunity from state taxation, nor would the compensation of state officials be exempted from the federal income tax. Similarly, in *United States v. Bekins* the reconstituted Court upheld a federal municipal bankruptcy act comparable to one narrowly invalidated two years before under related principles of intergovernmental immunity. Moreover, while “essential” functions and instrumentalities of the national and state governments would retain their traditional implied immunity from taxation by the other sovereign, that category came to be understood more narrowly than it had been previously. Nevertheless, the doctrine continued to be complicated by lines of distinction that Justice Jackson would later characterize as “drawn by an unsteady hand.”

The Court’s Tenth Amendment jurisprudence similarly constrained congressional power to impose regulatory taxes on activities whose control had been reserved to the states. In early decisions such as *McCray v. United States* and *United States v. Doremus*, the majority opinions for divided benches had come near to suggesting that Congress enjoyed unfettered authority to levy substantial excises on disfavored activities. Yet the Court had corrected that impression in the 1922 *Child Labor Tax Case of Bailey v. Drexel Furniture Co.* There Chief Justice Taft wrote for an 8-1 majority including Justices Holmes and Brandeis that an excise on ten percent of the net profits of companies employing child labor was a penalty rather than a tax. As the penalty was imposed only upon mines and manufacturing establishments failing to comply with the statute’s prescribed regime of employment relations, it transcended the limitations of the Tenth Amendment.

The Hughes Court’s regulatory taxation decisions suggested some differences
among the justices concerning these Tenth Amendment limitations on congressional power, but did not openly question the underlying structure of the doctrine. In fact, the divisions among the justices concerning the congressional authority to regulate through the use of fiscal powers emerged most openly in a case involving the Spending Power. *United States v. Butler* involved a constitutional challenge to the AAA of 1933. A food processor challenged the tax by which the acreage-reduction benefit was funded as a step in a federal scheme to regulate the local activity of agricultural production, and thus a usurpation of the powers reserved to the states by the Tenth Amendment. By a vote of 6-3, the Court invalidated the Act.

The differences between the majority justices and the dissenters boiled down to a question of the perspective from which the benefit payment should be viewed. Assuming noncompliance with the federal scheme and thus non-receipt of the benefit payment as the baseline, the dissenters saw payment of the benefit as a reward for compliance with the terms of a contract the farmer was free to reject. “Threat of loss, not hope of gain, is the essence of economic coercion,” wrote Justice Stone. By contrast, the majority justices assumed compliance with the scheme and thus receipt of the payment as the baseline – and, indeed, the vast majority of American farmers did comply and receive the payment – and therefore regarded the withholding of the benefit as a regulatory tax on noncompliance. In *Bailey*, a manufacturer remained free to employ child labor, but only by paying a tax that would presumably place him at a competitive disadvantage with competitor who complied with the federal regulation. Similarly, in *Butler*, a farmer remained free to produce in excess of the Secretary’s target quota for his farm, but only at the cost of forgoing a benefit payment that his compliant competitors were receiving.
In each instance, an enumerated fiscal power was employed to induce compliance with a federal effort to regulate local production.

The *Butler* Court did not, however, adopt the Madisonian understanding of the Spending Power. While that power might not be employed to usurp regulatory prerogatives confided to the states by the Tenth Amendment, it was not limited to carrying into effect exercises of other powers enumerated in Article I, Section 8. Instead, and for the first time, the Court explicitly endorsed the Hamiltonian view of the power to spend as an independent grant of power not so limited. This commitment provided the foundation for Justice Cardozo’s 1937 opinions for the Court upholding the old-age pension and unemployment compensation titles of the Social Security Act in *Helvering v. Davis*\(^{101}\) and *Steward Machine Co. v. Davis*.\(^{102}\) The vote in *Helvering* was 7-2, with Justices Van Devanter and Sutherland joining the majority. The vote in *Steward Machine* was 5-4, but Van Devanter and Sutherland’s dissent voiced general approval of the statute, objecting only to certain easily correctable administrative provisions. Similarly, when the Court upheld the Alabama state unemployment compensation law in *Carmichael Southern Coal & Coke Co. v. Alabama*,\(^ {103}\) Van Devanter, Sutherland, and Butler agreed that the statute’s objective was constitutional, and took issue only with the particular means selected by the state legislature. Their dissent detailed how the statute might be revised so as to pass constitutional muster, pointing to the Wisconsin statute as an exemplar of constitutionality. Even at the height of the Court-packing struggle, these conservative justices had set a face of flint to minimum wage legislation and federal regulation of local employment relations. Yet they clearly shared the majority’s view that no constitutional revolution was necessary to sustain state and federal programs of social...
security.

Even the significance of the Court’s embrace of the Hamiltonian understanding of the Spending Power should not be overestimated. Though the proper understanding of that power’s scope had long been the subject of controversy in Congress and elsewhere, *Mellon’s* taxpayer standing doctrine had operated to confine the debate to extrajudicial fora. The taxpayer standing doctrine so thoroughly insulated federal expenditures from judicial review that the constitutionality of a wide array of New Deal spending initiatives financed from general revenue was never challenged. Among these were the Civilian Conservation Corps, the Farm Credit Act, the Reconstruction Finance Corporation, the Rural Electrification Administration, and the Emergency Relief Appropriation Act of 1936. Moreover, the Supreme Court and the lower federal courts repeatedly invoked the *Mellon* doctrine in rejecting constitutional challenges to loans and grants made by the Public Works Administration.

Indeed, the taxpayer standing doctrine played a central role in the subsequent history of the Administration’s farm program. After the *Butler* decision invalidated the AAA’s tax on food processors, the government continued to pay the benefits payments it had promised to individual farmers, but now in unchallengeable fashion from general revenue. Within two months of the decision, Congress had replaced the AAA with the Soil Conservation and Domestic Allotment Act of 1936. The Act authorized the Secretary of Agriculture to pay farmers to shift acreage from overproduced “soil-depleting” crops to “soil-conserving” crops. The bill’s sponsors refused to support a companion taxing measure designed to produce the revenue necessary to finance these expenditures, and thereby successfully inoculated the measure against constitutional
While instances involving the taxpayer standing doctrine were the most important examples of the manner in which justiciability doctrine shielded the New Deal from judicial review, they were not singular. A series of lower court decisions refused to consider constitutional challenges to various New Deal initiatives on the ground that the plaintiff had not suffered a legally cognizable injury, and it was on this basis that the justices rebuffed constitutional attacks on the Tennessee Valley Authority. Throughout the 1930s, the “passive virtues” served as a significant, self-imposed restraint on judicial superintendence of the political branches.

V. The Emergence of Modern Civil Rights

At the same time that the justices were sustaining state and federal economic reforms designed to secure “positive” liberties for working men and women, the Court’s decisions also increasingly evinced heightened concern for certain “negative” liberties of American citizens. With one eye on the alarming rise of repressive totalitarian states in Europe, the Hughes Court affirmed and elaborated American constitutional commitments to civil rights, civil liberties, and democratic processes at a time when many Western intellectuals were questioning the future of democracy. In *United States v. Carolene Products Co.*, the Court had declared that legislation regulating “ordinary commercial transactions” would enjoy a robust “presumption of constitutionality.”\(^{104}\) But if constitutional law had become increasingly agnostic on matters of economic policy, it nevertheless remained and would become more strongly committed to certain core political values. In the famous “Footnote Four” of his *Carolene Products* opinion, Justice
Stone identified three types of statute that would be subjected to “more exacting judicial scrutiny”: legislation appearing to conflict with “a specific prohibition of the Constitution, such as those of the first ten amendments”; “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation”; and statutes directed at “discrete and insular” “religious, national, or racial minorities,” prejudice against whom tended “seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.”105 There was often considerable overlap among these categories: a law directed at a discrete and insular minority might itself restrict the political process or implicate a provision of the Bill of Rights; a law implicating the Bill of Rights might itself restrict the political process. Nonetheless, the categories provide a useful heuristic. And though subsequent decisions would both enlarge the scope and strengthen the content of these three categories of prohibition, none of them was without recent precedent in the Court’s jurisprudence.

For decades since Reconstruction the Court had rejected contentions that the Fourteenth Amendment incorporated various of the criminal procedure protections of the Bill of Rights. In the 1937 case of *Palko v. Connecticut* Justice Cardozo’s opinion unanimously reaffirmed these precedents, holding that the protection against double jeopardy was not so “implicit in the concept of ordered liberty” that its observance was a requirement of due process. Only principles of justice “so rooted in the traditions and conscience of our people as to be ranked as fundamental,” those “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions” were so comprehended.106 Yet two significant Hughes Court decisions, while not incorporating
the corresponding provision of the Bill of Rights, read the Due Process Clause to afford criminal defendants comparable protections. In *Brown v. Mississippi*,\(^{107}\) decided in 1936, the Court overturned the murder conviction of a black man who had denied commission of the offense until subjected to a severe beating by police. The unanimous Court held that the brutal extortion of this confession, which constituted the principal basis for the conviction, was “revolting to the sense of justice.” The states were not bound by the Fifth Amendment’s prohibition against compulsory self-incrimination, wrote Chief Justice Hughes, but “[t]he rack and torture chamber may not be substituted for the witness stand.”\(^{108}\) In 1940 *Chambers v. Florida*,\(^{109}\) would extend this principle, unanimously overturning murder convictions secured on the basis on confessions elicited from four African-American defendants through the sorts of third-degree methods of interrogation condemned by former Attorney General George W. Wickersham’s Committee on Official Lawlessness nearly a decade earlier.

The decade similarly witnessed significant development of the right to counsel in criminal cases. *Powell v. Alabama*\(^{110}\) involved the first trial of the “Scottsboro Boys,” nine African-Americans charged with raping two white girls. There the Court overturned the capital convictions due to the failure of the trial court either to provide the illiterate defendants adequate opportunity to secure counsel or to appoint effective counsel to act on their behalf. Effective assistance of counsel in a capital case was a necessary component of the hearing to which a defendant was entitled as a matter of due process. *Powell* found a more expansive federal counterpart in *Johnson v. Zerbst*,\(^{111}\) decided the same term as *Carolene Products*. There the Court held for the first time that in federal criminal prosecutions the Sixth Amendment did not merely overturn the eighteenth
century English rule severely limiting the assistance felony defendants could receive from their counsel. Instead, the right to assistance of counsel ensured by the Amendment imposed an affirmative obligation to provide an attorney to federal defendants who were unable to obtain representation. Not for another quarter century, however, would the Court fully guarantee this right to defendants in state criminal prosecutions.

Enforcement of National Prohibition by federal authorities had also presented the Court with a series of cases implicating the search and seizure provisions of the Fourth Amendment. Though the Eighteenth Amendment and the Volstead Act were successful in reducing the consumption of alcohol in the United States, by the late 1920s they had come to be regarded with widespread public disaffection and even disregard. As public enthusiasm for the “Noble Experiment” waned, the Court routinely excluded evidence obtained by warrantless searches without probable cause, evidence obtained by searches beyond the scope authorized by the warrant, and evidence obtained illegally by state officials cooperating with federal officials. Powered by demands to stimulate legitimate job growth and to redirect the resources of federal law enforcement, by the desire for the excise revenue that legalization could afford, and by congressional reapportionment that enhanced the clout of more urban, ethnic constituencies, the Democrat-led movement for repeal sailed to victory in 1933 with the ratification of the Twenty-First Amendment. The first constitutional amendment ever to repeal another was also the only amendment for which Congress has required ratification by popularly elected ratifying conventions rather than state legislatures.

Though many of the decade’s leading criminal procedure decisions involved the discrete and insular minority of African-American defendants, the Court’s opposition to
racial bias in the administration of criminal justice emerged most explicitly in cases involving discriminatory practices in the selection of grand and petit juries. The Hughes Court consistently overturned such convictions, two of which involved subsequent trials of the Scottsboro Boys. Meanwhile, the Court fired its opening salvo in support of the NAACP’s incipient campaign to desegregate public education in the 1938 case of \textit{Missouri ex rel. Gaines v. Canada}.\footnote{Hughes Court} Rather than admitting blacks to its state law school or providing separate legal education to its black citizens within the state, Missouri officials paid the tuition of black Missourians admitted to law schools in adjacent states. The Court held that furnishing legal education within the state to whites while not doing so for its black citizens denied them equal protection. Missouri must either admit its qualified African-American residents to its existing state law school, or establish within the state “substantially equal” facilities for their legal education.\footnote{Missouri v. Gaines}

By 1938 the justices could also claim to have invalidated numerous statutes restricting the operation of political processes. Critical to the proper functioning of that process was the freedom of the press. In the 1931 case of \textit{Near v. Minnesota},\footnote{Near v. Minnesota} the Court struck down a statute authorizing the imposition of prior restraints on publication of any malicious, scandalous, or defamatory matter, even if true. Such a restriction on the power of the press to report and criticize the actions of public officials, wrote Chief Justice Hughes, was “the essence of censorship.”\footnote{Near v. Minnesota} In \textit{Grosjean v. American Press Co.},\footnote{Grosjean v. American Press Co.} decided in 1936, the Court denounced a Louisiana tax applicable only to newspapers with a weekly circulation of 20,000 or more -- a tax allegedly designed to punish or reduce the circulation of urban papers critical of the Administration of Governor Huey Long -- as an unconstitutional prior restraint on the freedom of the press. The purpose of a free press,
wrote Justice Sutherland for a unanimous Court, was to provide the people with “full information in respect of the doings and misdoings of their government.” The free circulation of such vital public information was integral to the process through which undesirable governmental action might be restrained and redressed by the people.

While the White and Taft Courts had developed the modern “clear and present danger” framework for analyzing questions of free speech, it was the Hughes Court that deployed the doctrine to shield political dissenters from prosecution. Though the Court upheld denial of citizenship to foreign pacifists – two of them women – for refusing to pledge armed defense of the United States, the justices repeatedly vindicated the speech and assembly rights of leftist citizens. In *Stromberg v. California*, decided in 1931, the Court overturned the conviction of a summer camp counselor for violating a California statute prohibiting the display of a red flag “as a sign, symbol or emblem of opposition to organized government.” Stromberg had supervised campers in a daily ceremony in which the children raised a reproduction of the flag of the Communist Party of the United States. During the ceremony the children stood, saluted, and recited a pledge of allegiance “to the workers’ red flag, and to the cause for which it stands; one aim throughout our lives, freedom for the working class.” “The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means,” wrote Chief Justice Hughes, “is a fundamental principle of our constitutional system.” Insofar as the statute was “so vague and indefinite” that it might be construed to punish protected expressions of “peaceful and orderly opposition to government by legal means and within constitutional limitations,” the Court held, it offended this fundamental principle.
In 1937 the Court again invoked this fundamental principle, unanimously reversing Dirk De Jonge’s conviction under Oregon’s criminal syndicalism statute for his participation in a peaceable assembly of the Communist Party at which no unlawful conduct was advocated. “[P]eaceable assembly for lawful discussion cannot be made a crime,” Hughes insisted. “The holding of meetings for peaceable political action cannot be proscribed.” Later that year the Court again vindicated this fundamental principle. Angelo Herndon, an African-American and a paid organizer for the American Communist Party, had been convicted for violating a Georgia statute prohibiting any attempt, “by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State.” Herndon had held meetings seeking to recruit members for the Party, and was found in possession of Party literature advocating mass action and revolutionary struggle against the ruling white bourgeoisie. But there was no evidence that Herndon had read or distributed any of the literature, nor that he had himself advocated or incited the forcible subversion of governmental authority. A divided Court held that to construe the statute to prohibit Herndon’s actions deprived him of his rights of free speech and peaceable assembly. Unlike the power of the state to regulate ordinary commercial transactions, the power to abridge freedom of speech and assembly was “the exception rather than the rule,” and “must find its justification in a reasonable apprehension of danger to organized government.”

Among the chief beneficiaries of this New Deal for free speech was organized labor. In *Hague v. CIO*, decided in 1939, the Court held that the freedom of labor organizers to assemble peaceably to disseminate and discuss information concerning the provisions of the NLRA was protected by the Fourteenth Amendment. A municipal
ordinance prohibiting exercise of those rights on public streets and in public parks unless authorized by municipal officials enjoying unfettered discretion was accordingly facially void, as was an ordinance absolutely prohibiting distribution of handbills. The following year, in *Thornhill v. Alabama*, the justices relied explicitly on Footnote Four in making clear what they had only intimated in *Senn v. Tile Layers Union*: that peaceful labor picketing was also protected speech. Exercise of the right to picket was subject to reasonable regulation to preserve order, and acts of violent intimidation and defamation lay outside the scope of constitutional immunity. But state statutes and common law policies prohibiting peaceable persuasion and communication of grievances impaired “those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government.”

The Court’s solicitude for rights of expression ran to religious speech as well. In the late 1930s and early 1940s the Jehovah’s Witnesses, often assisted by the American Civil Liberties Union, conducted a vigorous and remarkably successful litigation campaign to vindicate the rights of their members to proselytize for their faith. Between 1938 and 1940 the Court invalidated several ordinances prohibiting the distribution of literature on public streets. During this time the justices similarly struck down as prior restraints on expression ordinances punishing the distribution of literature and solicitation of contributions on the public streets or door-to-door without first obtaining a permit which might be conferred or withheld in the discretion of local authorities. Such regulations, the Court maintained, restricted “appropriate means through which, in a free society, the processes of popular rule may effectively function.” This string of victories under the Free Speech and Free Exercise Clauses was brought to an abrupt if temporary
halt in *Minersville School District v. Gobitis*, however, where the Court upheld a state regulation requiring public school students to participate in a daily ceremony saluting the flag and reciting the Pledge of Allegiance. Rendered in the midst of Hitler’s devastating conquests in Western Europe in the spring of 1940, the decision held that the scriptural injunction against bowing down before graven images must yield to the public interest in promoting sentiments of patriotism and national unity. The Free Exercise Clause did not exempt individuals from the commands of generally applicable laws that did not target the religious commitments of particular sects. Justice Stone, dissenting alone, affirmed the values and elaborated the theory he had articulated in Footnote Four. Asserting that the Constitution required more than “that democratic processes must be preserved at all costs,” Stone maintained that the free exercise rights of “this small and helpless” “discrete and insular minority,” which were “admittedly within the scope of the protection of the Bill of Rights,” must be secured through a more “searching judicial inquiry into legislative judgment” than that afforded by the majority. A properly functioning democracy afforded protection of such minority rights.

Stone’s position would command a majority within three years. In *Jones v. Opelika*, the Court upheld the application of nondiscriminatory municipal license taxes on itinerant sales agents to Witnesses selling religious literature. Stone again dissented, insisting that the freedoms of speech and religion -- two of the “Four Freedoms” identified by President Roosevelt in his 1941 State of the Union address – occupied “a preferred position.” Those freedoms could thus be afforded no less protection from burdensome taxation than the Court had given ordinary commercial transactions in interstate commerce. This time, however, Stone was joined in dissent by three members
of the *Gobitis* majority—Justices Black, Douglas, and Murphy. Apparently influenced in part by the outpouring of unfavorable commentary on the decision and reports of widespread and often violent private and official persecution of Witnesses that followed in its wake, these justices took the extraordinary step of confessing error in voting to uphold the compulsory flag salute. By the following term this dissenting bloc had become the core of a new majority to renounce both *Jones* and *Gobitis*. Now nondiscriminatory license taxes could not be imposed on the privilege of selling religious literature; the door-to-door distribution of such literature could not be prohibited; nor could the flag salute be made compulsory. “If there is any fixed star in our constitutional constellation,” wrote Justice Jackson overruling *Gobitis* in *West Virginia Board of Education v. Barnette*, “it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion....Authority here is to be controlled by public opinion, not public opinion by authority.” Alluding to “the fast failing efforts of our present totalitarian enemies,” Jackson cautioned that “[t]hose who begin coercive elimination of dissent soon find themselves eliminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.”

Cases involving voting rights illustrated both concern for the proper functioning of the political process and the doctrinal limitations on that commitment. In the 1915 decision of *Guinn v. United States*, the Court had unanimously invalidated an Oklahoma suffrage regulation exempting from its literacy requirement anyone lineally descended from a person qualified to vote in 1866. This “grandfather clause,” obviously designed to exempt whites but not blacks from the literacy test, violated the Fifteenth Amendment’s prohibition against racial discrimination regarding the right to vote. A
special session of the state legislature had responded by enacting a new election law bestowing permanent registration status on anyone who had voted in 1914 under the now-invalidated election law, and granted all other qualified electors only twelve days within which to register or be permanently disfranchised. The effect of this transparent attempt to prolong the discriminatory impact of the grandfather clause was not as great as one might surmise: African-Americans were permitted to register and vote in most counties despite the statute. When an Oklahoma citizen disfranchised under the statute brought a constitutional challenge in the 1939 case of Lane v. Wilson, he won the support of a unanimous Court.

In other voting rights cases, the results were mixed. In Nixon v. Herndon, decided in 1927, a unanimous Court had held that a Texas statute excluding its black citizens from participation in the primary elections of the Democratic Party denied them equal protection. The Texas legislature had responded by repealing this statute and enacting another simply authorizing the Executive Committee of each of the state’s political parties to prescribe qualifications for membership and participation in its primary elections. The Executive Committee of the state Democratic Party had in turn adopted a resolution excluding blacks from voting in its primaries. In Nixon v. Condon, handed down in 1932, a narrowly divided Court held that, as the authority to prescribe the qualification was derived from the statute, the action of the Executive Committee constituted impermissible discriminatory state action. Three weeks after the decision in Condon, the state Democratic convention adopted a resolution limiting membership in the party to white voters. This time, however, a unanimous Court invoked the state action limitation in rejecting the black petitioner’s equal protection challenge. In 1935 Grovey v.
Townsend\textsuperscript{136} held that the Texas Democratic Party was a voluntary, private association, unconstrained by the requirements of the Fourteenth Amendment. And in Breedlove v. Suttles,\textsuperscript{137} rendered in 1937, a unanimous Court upheld a provision of the Georgia constitution treating payment of a poll tax as a prerequisite to exercise of the elective franchise. Though proposed constitutional amendments to abolish payment of poll taxes as a prerequisite to voting in federal elections would be introduced in Congress regularly over the next twenty-five years, it was not until 1964 that the goal was achieved through ratification of the Twenty-Fourth Amendment, nor until 1966 that the Court would invalidate poll taxes for state elections as well.

The white primary’s lease on life would prove short by comparison. As the culminating step in a more general reorganization of the Justice Department in the 1930s, Attorney General Frank Murphy created the Civil Liberties Unit (later renamed the Civil Rights Section) of the Criminal Division in early 1939. Encouraged by the success of prosecutions under federal statutes prohibiting peonage and involuntary servitude in the mid- and late-1930s, the CLU initiated a series of actions under Reconstruction-era civil rights statutes in cases involving both official and private infringements of civil rights and liberties. Among these was the 1941 case of United States v. Classic,\textsuperscript{138} in which the justices sustained convictions under the Enforcement Act of 1870 of Louisiana Commissioners of Elections who had fraudulently tabulated the results of a congressional Democratic primary election. Qualified voters had the right to participate in congressional primary elections which were either integral to the selection process or which effectively determined the ultimate electoral outcome, and Congress could protect that right by appropriate legislation. Three years later, in Smith v. Allwright,\textsuperscript{139} the Court

http://law.bepress.com/uvalwps/uva_publiclaw/art23
relied upon *Classic* in overruling *Grovey v. Townsend*. Because a series of state actions had made the Democratic primary integral to the electoral process, party determinations of eligibility to participate constituted state action within the meaning of the Fifteenth Amendment. The invalidation of the white primary, bolstered by shifting white attitudes and the enforcement efforts of the NAACP and the Justice Department, contributed to a dramatic increase in southern black voter registration: from 3% in 1940 to 20% in 1952.

Despite the obvious significance of these decisions as articulations of official constitutional ideology, their actual impact on law and social practice should not be overstated. Poverty and lack of access to adequate legal services conspired with improvised strategies of official evasion and private intimidation to diminish the significance of incipient constitutional protections for those accused of crime, while the Warren Court revolution in criminal procedure doctrine still lay two decades in the future. Widespread disfranchisement of southern blacks would persist until enactment of the Voting Rights Act of 1965. The Court would soon sustain the Administration’s disgraceful wartime treatment of Japanese-Americans; the Cold War’s severe challenge to civil liberties lay just around the corner; and much of American society would continue to be legally segregated by race. Nevertheless, by the time the war effort had begun inexorably to rouse the American economy from its long Depression nightmare, it had become apparent that protection of civil rights, civil liberties, and democratic processes was emerging as a central preoccupation of the nation’s highest court.

**Conclusion**

Americans surveying the legal and constitutional landscape from the vantage of
World War II could hardly mistake the transformation that had occurred. Congress and the federal administrative state now exercised virtually unlimited authority over the nation’s economy. Constitutional dual federalism had been supplanted by fiscal cooperative federalism, as the ballooning federal budget bore witness to the national government’s commitment to guaranteeing economic security, promoting public works, and placating powerful constituencies. Substantive due process and related doctrines no longer posed a threat to state and federal regulatory programs, yet the federal judiciary increasingly invalidated government restrictions on the exercise of non-economic civil rights and civil liberties. A great deal had happened in a relatively short time.

Yet despite the seemingly frenetic pace and panoramic quality of these developments during the Great Depression, one must not underestimate the importance of the groundwork laid in the preceding decades. The New Deal constitutional order did not emerge overnight. It instead marked the culmination of a long, slow, tortuous, and occasionally painful process. For more than a generation, progressive reformers at the state and federal levels had persistently sought to realize their policy objectives within the structure of contemporary constitutional law, and where that was not possible, to persuade the Court to alter its doctrine. In some instances, social experience or persuasive argumentation had prompted justices to re-evaluate and revise doctrinal premises that no longer appeared to suffice as persuasive descriptions of social reality. In others, changes in Court personnel had been the principal agent of doctrinal change. Yet while some periods witnessed more significant developments than did others, the dialectic of the American constitutional system ensured that doctrine was always in motion, never fully at rest. Doctrinal formulations were persistently expanded, qualified, elaborated,
reshaped. This process of constitutional evolution regularly revealed channels of new legislative opportunity to creative and sophisticated reformers alert to possibilities latent in the doctrine.

These persistent pressures of statutory innovation and efforts at accommodation, dramatically accelerated by the New Deal but by no means begun there, thus steadily worked to reshape both the legal system on the ground and the constitutional terrain confronting subsequent reformers. By the time Franklin Roosevelt first took the oath of office, the Court had already sanctioned a vast array of state police power statutes, including wage and payment regulations, workmen’s compensation statutes, regulation of working hours and child labor, blue sky laws, and utility and price regulations. Similarly, the Court had upheld extensive regulation of interstate business practices, approving initiatives ranging from federal antitrust laws and the Federal Trade Commission to the Pure Food and Drugs Act. The Court had similarly sustained extensive federal regulation of the railroad industry, upholding a series of acts creating and conferring authority upon the Interstate Commerce Commission, as well as the Federal Employer Liability Act, the Safety Appliance Act, and the Railway Labor Act. The Shreveport and stream of commerce doctrines further permitted federal regulation of “local” activities having a sufficient nexus with interstate commerce, while the taxpayer standing doctrine offered a recipe for unfettered federal spending and grants-in-aid. For decades preceding Franklin Roosevelt’s inauguration, the Court had repeatedly though by no means uniformly acquiesced in the growth and elaboration of a nascent regulatory and welfare state. At the same time, the justices had already begun to render significant decisions protecting the civil rights and civil liberties of ethnic, racial, and religious minorities, political
dissenters, and those accused of crime.

By 1933, then, antecedent doctrinal development had already brought American constitutional law to the point at which significant elements of the New Deal order could be envisioned as within the realm of constitutional possibility. Those aspirations for reform would become realized, however, only through the concentrated and innovative legal efforts of New Deal reformers and jurists, who together dramatically expanded the repertoire of the American legal imagination and left a remarkably durable imprint on American law.

3 285 U.S. 22 (1932).
5 295 U.S. 602 (1935).
6 272 U.S. 52 (1926).
8 *Jones*, 298 U.S. at 28.
9 298 U.S. at 32-33.
11 293 U.S. 388 (1935).
13 295 U.S. at 542.
14 295 U.S. at 551, 553.
15 298 U.S. 238, 311 (1936).
16 299 U.S. 304 (1936).
17 301 U.S. 324 (1937).
18 312 U.S. 1 (1940).
19 94 U.S. 113, 126 (1877).
20 261 U.S. 525 (1923).
23 J.C. McReynolds to James M. Beck, April 10, 1934, quoted in Morton Keller, In
Defense of Yesterday: James M. Beck and the Politics of Conservatism, 1861-1936 (New
24 Adkins v. Children’s Hospital, 261 U.S. 525, 568 (1923) (Holmes, J., dissenting).
26 298 U.S. 238 (1936).
27 312 U.S. 100 (1941).
28 313 U.S. 236 (1941).
29 208 U.S. 161 (1908).
30 236 U.S. 1 (1915).
31 245 U.S. 529 (1917).
32 Texas & N. O. R. Co. v. Brotherhood of Railway and Steamships Clerks, 281 U.S. 548
(1930).
34 49 Stat. 449 (74-1), ch. 372.

35 *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187 (1941).

36 290 U.S. 398 (1934).


38 294 U.S. 330 (1935)

39 *Home Building & Loan Assoc. v. Blaisdell*, 448 (Sutherland, J., dissenting).


42 292 U.S. 426 (1934).


44 297 U.S. 189 (1936).


47 300 U.S. 440 (1937).


49 262 U.S. 447 (1923).

50 304 U.S. 144, 152 (1938).

51 308 U.S. 225 (1939).

52 296 U.S. 404 (1935).

53 309 U.S. 83 (1940).

54 285 U.S. 262 (1932).

55 297 U.S. 266 (1936).


58 258 U.S. 495 (1922).


60 4 The Public Papers and Addresses of Franklin D. Roosevelt 200, 221 (Samuel I. Rosenman ed., 1938).


63 298 U.S. 238 (1936).


67 Burton Wheeler, Yankee From the West 333 (1962).

68 303 U.S. 453 (1938).

69 305 U.S. 197 (1938).


76 307 U.S. 533 (1939).
77 307 U.S. 588 (1939).
78 315 U.S. 110 (1942).
79 Carter v. Carter Coal, 298 U.S. at 329.
80 304 U.S. 64 (1938).
81 41 U.S. 1 (1842).
82 Erie Railroad Co. v. Tompkins, 304 U.S. at 77-78.
83 NLRB v. Jones & Laughlin Steel Co., 301 U.S. at 37.
84 247 U.S. 251 (1918).
85 312 U.S. 100 (1941).
86 317 U.S. 111 (1942).
87 Wickard v. Filburn, 317 U.S. at 120.
88 303 U.S. 177, 184-5, n.2 (1938).
90 317 U.S. 341 (1943).
92 306 U.S. 466 (1939).
93 78 U.S. 113 (1871).
94 304 U.S. 27 (1938).
96 195 U.S. 27 (1904).
97 249 U.S. 86 (1919).
98 259 U.S. 20 (1922).
83

100 United States v. Butler, 297 U.S. at 81.

101 301 U.S. 619 (1937).

102 301 U.S. 548 (1937).

103 301 U.S. 495 (1937).

104 United States v. Carolene Products Co., 304 U.S. at 152.


110 287 U.S. 45 (1932).

111 304 U.S. 458 (1938).

112 305 U.S. 337 (1938).

113 Missouri ex rel. Gaines v. Canada, 305 U.S. at 351.

114 283 U.S. 697 (1931).

115 Near v. Minnesota, 283 U.S. at 713.


118 283 U.S. 359, 361 (1931).

119 Stromberg v. California, 283 U.S. at 362.

120 Stromberg v. California, 283 U.S. at 369.


123 307 U.S. 496 (1939).
124 310 U.S. 88 (1940).

125 301 U.S. 468 (1937).


129 316 U.S. 584 (1942).

130 *Jones v. Opelika*, 316 U.S. at 608.


132 238 U.S. 347 (1915).

133 307 U.S. 268 (1939).


135 286 U.S. 73 (1932).


137 302 U.S. 277 (1937).

138 313 U.S. 299 (1941).

139 321 U.S. 649 (1944).