

The attached is a draft of Chapter 5 of the endless Volume X of the Oliver Wendell Holmes Devise History of the Supreme Court of the United States

The chapter 5 discusses the Taft Court's treatment of social and economic legislation. The Taft Court revived Lochnerism. It created precedents that in the next decade would directly contribute to the constitutional crisis of the New Deal. President Harding, who served for only two years, had remade the Court in his own conservative image by appointing a remarkable four Justices. Previous chapters in the history have discussed these individual members of the Court, as well as their dynamic interactions.

Part I of Chapter 5 discusses the immense influence of World War I, when the American state for the first time acquired the economic and statistical expertise for large-scale social planning. Parts II and III examine the Taft Court's struggle to assimilate and cabin the direct legacy of this influence. Part IV traces the renaissance of substantive due process jurisprudence, while Part V discusses the *chef d'oeuvre* of the Taft Court, *Adkins v. Children's Hospital*, which struck down a congressional statute establishing minimum wages for women in the District of Columbia. Part VI discusses the creation of new Taft Court doctrine that struck down as unconstitutional all price fixing for property that was not "affected with a public interest." Part VII queries why the Taft Court was so keen on protecting property, examining well-known cases like *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, and *Village of Euclid v. Ambler Realty Co.* Part VIII concludes the chapter by sketching how the Taft Court's ratemaking jurisprudence led directly to the rebellion of progressive Republican and Democratic Senators to the confirmation of Charles Evans Hughes as Taft's successor.

If you are pressed for time, I recommend reading Parts I-II; IV-VII. For ease of reading, I have converted all the footnotes to endnotes. They contain material that might be of interest to specialists.

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Chapter 5

The Taft Court: Social and Economic Legislation

The newly elected President, Warren G. Harding, paraded down Pennsylvania Avenue on the day of his inauguration, March 4, 1921. Among the spectators was Justice Brandeis's law clerk, Dean Acheson. The "most striking feature of the parade," he later recalled, "was 'the biggest broom ever made,' gilded of handle, topped by an American flag, given to the President by an Oklahoma delegation to typify the 'possibilities of change of administration from Democratic to Republican.'"¹ Harding himself succinctly summarized the sweeping vector of change in his Inaugural Address: "[O]ur supreme task," he said, must be "the resumption of our onward, normal way."²

The nation had just passed through the furnace of World War I, the country's first encounter with global warfare. It "learned that modern war" required not only battlefield tactics, but also "the organized mobilization of all the economic resources of a nation."³ The Wilson administration responded by establishing "a most remarkable and unprecedented exercise of Federal power" that gave the government "control over corporate and individual existence which infinitely transcends the wildest dreams of those who advocate centralized authority."⁴ Harding bitterly complained in 1918 that "the radicals at home are making the republic the realm of state socialism."⁵ As President he intended to wield his gilded broom to cleanse the country of all such "abnormal conditions of war."⁶ If "we shackled, regulated, restrained, reprov'd and revised during the war," Harding proclaimed, if all this "was accepted as a war necessity,"⁷ it was now time to "[b]reak the shackles of war-time legislation for both business and citizens, because the war is actually ended . . . [G]ive us the normal ways of government and of men."⁸

Nowhere did Harding's broom produce more lasting change than on the Supreme Court. Although President for little more than two years, Harding appointed four Justices, producing what was then seen as an abrupt shift in the Court's orientation toward social legislation.⁹ Montana District Judge George Bourquin, nominated by Taft in 1912, observed in a published opinion:

It is said that Chief Justice White admitted that "in my time we relaxed constitutional guarantees from fear of revolution," and that Chief Justice Taft declared that "at a conference I announced 'I have been appointed to reverse a few decisions,' and," with his famous chuckle, "I looked right at old man Holmes when I said it."¹⁰

By the end of Taft's tenure, the verdict of the eminent political scientist Edward S. Corwin was that Taft had succeeded in his task. In 1932, Corwin noted that if the tendency of the White Court had been to express "expansive views of governmental power, although not always, Chief Justice Taft's period, on the other hand, was one, frequently, of reaction toward earlier concepts, sometimes indeed of their exaggeration."¹¹

Harding's appointments created a "significant divide in the history of the Supreme Court."¹² Writing in 1934, Felix Frankfurter observed that "after the World War, during the decade when William H. Taft was Chief Justice, the Court . . . veered toward a narrow conception of the Constitution Between 1920 and 1930 the Supreme Court invalidated more state legislation than during the fifty years preceding."¹³ The very institution whose jurisdiction had been expanded in 1914 to create a check against conservative state court interpretations of the federal Constitution¹⁴ had been so transformed by the time of Taft's resignation in February 1930 that it could be attacked as "the zenith of reaction."¹⁵ Contemporaries believed that the Court had become "particularly active since the World War in striking down legislation, both State and federal."¹⁶ Fearing that the rush "Back to Normalcy" had transformed the Court's jurisprudence,¹⁷ they castigated "the Taft Court" as "an anachronism in its attempt to restore the conditions of an earlier generation."¹⁸

The actual story, however, is more complex. The nation's extraordinary response to World War I forever altered the landscape of the country's social and economic legislation. "The values of continuity and regularity, functionality and rationality, administration and management set the form of problems and outlined their alternative solution."¹⁹ World War I made the necessity of planning all but inescapable, but it simultaneously provoked a fierce backlash in favor of older ideals of *laissez-faire* individualism. The result was a "new era"²⁰ in which "planning reflected *both* the antistatistism of American political culture *and* the modern search for national managerial capabilities."²¹

Harding himself perfectly inhabited this confusion, appointing to his cabinet both the arch-conservative Andrew Mellon, who insisted "on a minimal role for government,"²² and the progressive engineer Herbert Hoover, who believed that after the "convulsion" of the war "there could be no complete return to the past."²³ The pairing was not inadvertent.²⁴ The powerful Senator Henry Cabot Lodge had desperately wanted Mellon but recoiled at Hoover. Harding coldly forced his hand, telling him "Mellon and Hoover or no Mellon."²⁵

Taft's personal ambivalence toward social and economic regulation, which we have already sketched,²⁶ mirrored the muddle of Republican-dominated Washington in the new era of the 1920s. Taft would lead his Court into an erratic, jumbled jurisprudence that both restricted social and economic regulation in ways that would grow increasingly rigid and conservative, and yet that also affirmed regulation in ways that would have been all be inconceivable before the war. To unpack this complex story, we must step back and grasp the vast and subtle impact of World War I on American social and political thought.

I. World War I and the American State

With much pomp and ceremony, the Unknown Soldier was laid to rest in Arlington Cemetery on November 11, 1921. His burial commemorated the nation's sacrifices during the Great War. The Supreme Court attended the burial.²⁷ Chief Justice Taft was described as looking "strong, rosy, and cheerful."²⁸

Although the war had lasted only eighteen months, from April 6, 1917, to November 11, 1918, more than four-and-a-half-million Americans had been mobilized; 116,516 had been killed and 204,002 wounded.²⁹ The European slaughter left Henry James, of all people, at a loss for

words. “One finds in the mist of all this as hard to apply one’s words as to endure one’s thoughts. The war has used up words; they have weakened, they have deteriorated like motor car tires.”³⁰ James’s childhood friend, Oliver Wendell Holmes, was at first “disgusted by the vulgarities of the bogus sentiment” at the burial of the Unknown Soldier, but then “when I saw the coffin borne into the great rotunda of the Capitol, which became beautiful and impressive in the dim twilight, and afterwards saw the miles of people marching through, three abreast, from early morning into the next day, I realized that a feeling may be great notwithstanding its inability to get itself expressed.”³¹

World War I has today all but faded from memory. It has become “the forgotten conflict of America’s war-torn twentieth century.”³² Over time, the dead of other wars were buried in the tomb of the Unknown Soldier, and Armistice Day has evolved into Veterans Day.³³ A visitor to Washington D.C. now “looks in vain for a national memorial to the soldiers of World War I.”³⁴ This is startling, because the “epochal changes”³⁵ wrought by the war “left the nation transformed.”³⁶ The war “was a pervasive presence in the lives of Americans”³⁷ during the 1920s. Yet because the war now “occupies a rather obscure corner of the collective memory,”³⁸ it requires a strenuous effort of historical imagination to recapture the paths of its immense influence.

A recurring story is that World War I killed progressivism in America.³⁹ But that is a serious over-simplification. Although pre-war progressivism was a potpourri with multiple different tendencies, we would not be far off to identify its core as the aspiration so brilliantly described by Walter Lippmann as the effort “to substitute purpose for tradition,”⁴⁰ to seek “the infusion of scientific method” and the “careful application of administrative technique”⁴¹ so that government could address society “not as something given but as something to be shaped.”⁴² At root, Lippmann asserted, the assumption of “mastery” was necessary if the country was to make popular will effective now that “self-government has become a really effective desire.”⁴³

From this perspective, the transformation produced by World War I “reflected the triumph of an extreme version of the progressive impulse.”⁴⁴ During America’s long years of neutrality, the nation acquired a healthy “respect for the power of the Teutonic military machine”;⁴⁵ it came to understand the relationship between modern warfare and “nation-wide planning and coordination of production.”⁴⁶ Of necessity European belligerents brought “the resources of industrial societies to bear on their enemies on the battlefield.”⁴⁷ Noting “that the necessities of war are driving the nations of Europe to adopt large helpings of what used to be regarded as crazy idealism,” American progressives stressed “that successful war is impossible to-day for a nation that clings to a *laissez-faire* policy about property, business, labor, and social organization. Preparedness is the Trojan horse most in fashion at the moment. Reformers are not ashamed to confess that they regard the fear of war as an excellent way of improving the establishment of peace.”⁴⁸

At the very moment that Wilson came before Congress to request a declaration of war, therefore, he explicitly warned that belligerency would “involve the organization and mobilization of all the material resources of the country.”⁴⁹ It was immediately obvious to all that “we can fight Germany only by reconstructing the United States.”⁵⁰ “The choice is between efficiency and defeat.”⁵¹ Progressives recognized and celebrated the potential of the war to inculcate precisely the kind of “mastery” that Lippmann had celebrated three years earlier:

We shall count or fail as we succeed in remedying those defect of our national organization against which reformers have fought long before this was conceived. The enemy is bad work, corruption, special interest, administrative slack, planlessness—the typical evils of a sprawling, half-educated competitive capitalism. . . .

The leadership in the work must fall naturally to the inventive civilians, to those very reformers and pioneers who all along have preached the very gospel which is now transformed from an amiable hobby into a world necessity.⁵²

The Wilson administration proposed, and the nation accepted, “the most sweeping extension of national power experienced by the country up to that time.”⁵³ It was “a kind of governmental effort absolutely new in American history.”⁵⁴ The federal government took control of the nation’s railroads, its telegraphs and telephones, and its shipping industries. It assumed authority to regulate the production and prices of food and fuel. Through closely co-ordinated interventions, it directed the country’s manufacturing capacities away from civilian goods and towards the production of essential military resources.⁵⁵ It altered the fiscal structure of the government, instituting sharply progressive income taxes. It imposed a “massive” nationwide conscription. “[A]ll American men between eighteen and forty-five had to register for the draft; nearly five million were called to serve.”⁵⁶ It established national labor policies and agencies. It decreed national prohibition. It almost instantaneously created institutions that would serve as prototypes fifteen years later for the New Deal.⁵⁷ Within a month of the declaration of war, Illinois Representative James Mann could proclaim on the floor of Congress that “We are undergoing the greatest revolution in government which this country has ever seen.”⁵⁸

Nothing like this explosion of federal regulatory power had ever been exercised before. Surveying the scene in 1918, *The New Republic* could report with unmistakable self-satisfaction that the war had “forever exploded the myth that all we have to do is to leave things alone. . . . [T]he war has forced men to turn over to the state the chief means of production and to regulate monopolies, prices, wages and labor conditions. *Laissez-faire* has been adjourned We have entered upon the stage of state-capitalism in which all our main economic activities are subordinated to the public interest.”⁵⁹ The domestic “story” of World War I, as Grosvenor Clarkson put it, was that “of the conversion of a hundred million combatively individualistic people into a vast cooperative effort in which the good of the unit was sacrificed to the good of the whole.”⁶⁰

For many Americans, however, these sacrifices seemed inimical to fundamental values. Mark Sullivan would later recall:

Of the effects of the war on America, by far the most fundamental was our submission to autocracy in government. . . . Every businessman was shorn of dominion over his factory or store, every house-wife surrendered control of her table, every farmer was forbidden to sell his wheat except at the price the government fixed. Our institutions, the railroads, the telephones and telegraphs, the coal mines, were taken under government control The prohibition of individual liberty in the interest of the state could hardly be more complete.⁶¹

Almost immediately, therefore, the “near-socialism” prompted by the war’s relentless dedication to “achieve one supreme end” evolved into a strenuous debate whether such state mastery should be “temporary” or “permanent.”⁶² Conservatives warned “against beginning after-war reconstruction ‘under the auspices of semi-Socialistic and bureaucratic paternalism.’”⁶³ They feared “the short-sighted provincial attitude of certain elements who are seizing the opportunity to force changes in our fundamental laws to meet theories of social life not supported by experience, and upon which there is wide divergence of opinion.”⁶⁴

Progressives, by contrast, celebrated the fact that “We are more of a unified, self-conscious nation than ever before.”⁶⁵ They were acutely aware that “Our society today is as fluid as molten iron; it can be run into any mold,” and they were determined to ensure that the “social control” that “was a necessity during the war” not be abandoned to “unrestrained private initiative.”⁶⁶ “What we have learned in war we shall hardly forget in peace,” proclaimed Walter Weyl in 1918. “We shall no longer be content with an industrial machine which is so ill-regulated that it loses its force in waste heat and develops little drive. We shall be obliged to retain conceptions and practices acquired during the war. The new economic solidarity, once gained, can never again be surrendered.”⁶⁷ The confidence of progressives can be seen in a letter that William Allen White wrote his friend Mark Sullivan in January 1918:

The war swallowed the progressive issues. . . . I think the big thing to do now is quietly organize a hundred or so fellows who are dependable and who may take such steps as are necessary after the war to serve all the economic and social campaigns that the war brings to us. I think price fixing should be permanent, but not done by Wall Street. I think the government should tighten its control either into ownership or operation of the railroads. I think that labor arbitration should be a permanent thing, and that we should federalize education through universal training, making it a part of the system of education⁶⁸

But the hopes of progressives were soon dashed. Throughout the war Wilson had been “ambiguous and hesitant about expanding state control over the economy.”⁶⁹ In 1912 he had been elected on the platform of the New Freedom, which Lippmann had then mercilessly attacked as exemplifying a “deliberate attempt to create an undeliberate society,” a Utopian dream of a “Golden Age in which” Americans “could drift with impunity.”⁷⁰ In the face of the unprecedented managerial demands of the war, Wilson sought to remain as “faithful” as he could “to the country’s voluntarist traditions.”⁷¹ At the close of the war, therefore, “every trace of the war organization was destroyed as rapidly as possible.”⁷² Wilson “allowed his administration to close in a riot of reaction.”⁷³

Wilson lost both Houses of Congress in the 1918 election. Diagnosing the defeat to his friend James Bryce, Henry Cabot Lodge wrote that “Mr. Wilson’s defeat at the elections and the magnitude of the defeat are almost unbelievable. . . . The underlying cause was the dread deep down in the people’s hearts of the establishment of a dictatorship, and in view of the great bureaucratic machine which has been built up the alarm was anything but ill founded.”⁷⁴ Harding’s crushing victory in 1920 capped a sweeping popular repudiation of wartime mastery. “After the great storm,” Harding announced in his inaugural address, “we must strive for normalcy to reach stability.”⁷⁵

But the genie could not so easily be stuffed back into the bottle. For all the ambivalence associated with “the massive economic regulation World War I demanded,” the war marked a

“watershed” in the orientation of the federal government.⁷⁶ It “changed the trajectory of American political development.”⁷⁷ The fiscal foundations of the federal government, for example, were permanently and essentially transformed.⁷⁸ The war centralized authority “in the executive branch” and its “administrative agencies.”⁷⁹ The “administrator” became “the man of the hour.”⁸⁰ This reorientation would prove irreversible.

No one was more opposed to the war’s attribution of “excess power to the executive”⁸¹ than Harding.⁸² Yet in his first State of the Union address, despite acknowledging that the war had involved “excessive grants of authority and . . . extraordinary concentration of powers in the Chief Executive,”⁸³ Harding nevertheless felt compelled to request that the Tariff Commission be given amplified discretion so that it might enjoy “flexibility and elasticity . . . to meet unusual and changing conditions which can not be accurately anticipated.”⁸⁴ Without a trace of irony, Harding conceded that “I must disavow any desire to enlarge the Executive’s powers or add to the responsibilities of the office. They are already too large. If there were any other plan I would prefer it.”⁸⁵ Seven years later the resulting expansion of executive power would be unanimously ratified by the Taft Court in *J.W. Hampton, Jr. & Co. v. United States*, which upheld the “flexible tariff provision” on grounds that would become fundamental for the modern administrative state: “If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”⁸⁶

A lasting effect of World War I was the creation of “bureaucratic professionalization” to meet the enormous “planning capacity” demanded by wartime regulation.⁸⁷ Contemporaries marveled at the sheer statistical expertise suddenly required to oversee “the drafting of men, the commandeering of ships and workshops and supplies, the control of prices and output, the restriction of exports and imports, the supervision of the processes of market distribution, the regulation of consumption, the coordination and administration of transportation agencies, the solution of labor difficulties, the raising of vast sums of money through taxes and loans, and the creation of priority rights.”⁸⁸ It was apparent that the acquisition of such knowledge profoundly altered “the possibilities . . . of rationally adapting the mechanism of national life to fit national ends.”⁸⁹

The newly discovered bureaucratic capacity to administer large systems generated a concomitant responsibility to manage essential national services. The inability of the railroads to meet national needs had forced the federal government successfully to seize control of the rail system in 1917.⁹⁰ Although Congress refused to nationalize the railroads after the war, it nevertheless enacted the Transportation Act of 1920,⁹¹ which revolutionized the role of the Interstate Commerce Commission (“ICC”). The Transportation Act “was a clear departure from the regulatory system established under the Interstate Commerce Act and subsequent railroad legislation. Unlike earlier policy, which was driven by the fear of railroad abuses and a concern for the rights of shippers to reasonable and just rates, the 1920 act was dominated by a recognition of the financial needs of the railroads and the desire for stability.”⁹² The Act imagined the railway system of the nation as a single unit, relieving railroads from the strictures of antitrust law.⁹³

The extraordinarily far-reaching authority of the ICC to oversee the operational health of the country’s railroad system was unanimously affirmed by the Taft Court in *Dayton-Goose Creek Ry. Co. v. United States*,⁹⁴ which identified and sustained the legislative purpose of

creating “a system of railways prepared to handle promptly all the interstate traffic of the country,” and hence of putting “the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged.”⁹⁵

The war also marked the beginning of “economic inquiry for purposes of managing the economic system as a whole.”⁹⁶ “The business economist . . . came into his own during the Great War.”⁹⁷ The war had “brought dozens of trained economists into government service and put them to work producing the data, tools, and understanding needed for effective performance of the new managerial tasks”; it thus transformed “attitudes about the value and practical utility” economic thinking.⁹⁸ “Credentialed economic inquiry” was credited with the capacity of enhancing “a society’s capacity for planning and purposeful management.”⁹⁹ In the 1920s this attitude would become “the dominant mode of thought in agencies like the Forest Service, the Geological Survey, the Bureau of Mines, and the Bureau of Public Roads,” as well as “the Department of Agriculture.”¹⁰⁰

Particularly influential was the approach that had been adopted by the War Industries Board (“WIB”). During the war, the WIB had organized fifty-seven “commodity sections,” each consisting of “a chief and assistants, who usually came from the industry to be regulated, and representatives from the army, navy, and other claimant agencies.”¹⁰¹ The United States Chamber of Commerce, in turn, “certified about 300 war service committees,” which consisted of elected members of industries with trade associations or representatives selected by the Chamber itself for unorganized industries. The function of the war service committees was to advise the commodity sections.¹⁰² The object was to set prices and priorities in ways that would maximize the production of war-related goods.

Wartime planning proceeded in close coordination with the corporate interests of the affected industries, which in the process discovered the immense advantages of cooperation with each other and with the government. The President of the United States Chamber of Commerce wrote that “Preparation for and participation in the military struggle is accomplishing now an organization of business that will outlive the war. . . . Creation of the War Service Committees promises to furnish the basis for a truly national organization of industry whose proportions and opportunities are unlimited. . . . Industries torn apart for years by factional differences have been brought together in committees and are working with one another in closest harmony. . . . Competition has been put on a clean and enduring basis. The integration of business, the expressed aim of the National Chamber, is in sight. War is the stern teacher that is driving home the lesson of cooperative effort.”¹⁰³

Just as the war had convinced the nation of the need for an integrated railroad system, so the “World War profoundly changed general conceptions with reference to the desirability of industrial combinations; it was found that to win the war, concentration of control was inevitable.”¹⁰⁴ In its final Report, the WIB argued that the war had demonstrated that “practices of cooperation and coordination in industry as have been found to be clearly of public benefit should be stimulated and encouraged by a Government agency.”¹⁰⁵ The WIB especially praised trade associations, which it deemed “capable of carrying out purposes of greatest public

benefit.”¹⁰⁶ Even so sober an observer as Charles Evans Hughes could remark that “The War has compelled co-operation and the Government, under this compulsion, has fostered what is previously denounced as criminal. The conduct which had been condemned by the law as a public offense was found to be necessary for the salvation of the Republic. But the public need so dramatically disclosed by the War is not . . . removed by the termination of the War. Co-operation is just as necessary to secure the full benefits of peace as it was to meet the exigencies of War. And without it we shall miss the great prosperity and advance in trade to which with our skill and energy we are entitled.”¹⁰⁷

In the years after the war, trade associations multiplied in the United States.¹⁰⁸ Herbert Hoover entered the Commerce Department “with his mind made up to reestablish the essence of the plan inaugurated by the War Industries Board” and to maximize production by working with “business organizations, chambers of commerce, boards of trade, and trade associations.”¹⁰⁹ Hoover believed that “We have reached a stage of national development of such complexity and interdependence of economic life that we must have a national planning of industry and commerce. We have gained a larger perspective than individual business because without the prosperity of the whole, individual prosperity is impossible. . . . Government has a definite relationship to it, not as an agency for production and distribution of commodities, not as an economic dictator, but as the greatest contributor in the determination of fact and of co-operation with industry and commerce in the solution of its problems.”¹¹⁰

Under Hoover, the Commerce Department offered “guidance for corporate planners” by publishing “the monthly *Survey of Current Business* as a sourcebook of primary and secondary statistics.”¹¹¹ Using a structure derived from the WIB, Hoover divided the Commerce Department into commodity divisions that distributed relevant trade information to specific industries and sought to increase efficiency by promoting standardization and simplification.¹¹² Hoover was passionately committed to eliminating “national waste” that decreased “the efficiency of the entire industrial machine and . . . the available commodities for distribution.”¹¹³ He believed “better distribution of information bearing upon future supply and demand”¹¹⁴ would increase productivity. He favored government programs that would preserve the centrality of “individual initiative.”¹¹⁵ He “opposed government price-fixing,” commenting that “I would not propose price-fixing in any form short of again reentering the trenches of a World War.”¹¹⁶ The upshot was a new vision of “an ‘associative state,’ tied to, cooperating with, and helping to develop and guide” voluntary organizations, “particularly trade associations.”¹¹⁷ Hoover “saw himself both as an anti-statist and as an ardent champion of one form of positive government and national planning.”¹¹⁸

II. Making Legal Sense of the Legacy of World War I

New forms of economic planning thus emerged from the war. An important question was how this kind of co-operation would fare under traditional antitrust policy. At first the Taft Court attempted to use pre-war antitrust doctrine to discipline innovative post-war economic coordination. In *American Column & Lumber Co. v. United States*,¹¹⁹ the Court held that the Sherman Act invalidated the “Open Competition Plan”¹²⁰ of a trade association of hardwood manufacturers. The announced purpose of the plan was “to disseminate among members accurate knowledge of production and market conditions so that each member may gauge the market intelligently instead of guessing at it; to make competition open and above board instead

of secret and concealed.”¹²¹ The Plan was run by a “Manager of Statistics,”¹²² who circulated to the membership detailed reports that included his “suggestions as to both future prices and production.”¹²³ The Court held that the Plan was in effect an agreement “to bring about a concerted effort to raise prices regardless of cost or merit, and so was unlawful.”¹²⁴ Holmes, McKenna and Brandeis dissented.¹²⁵

American Column & Lumber Co. caused an uproar in the business community.¹²⁶ Hoover was so concerned that he immediately wrote Attorney General Daugherty to defend the “propriety” of trade associations for the “promotion and advancement of the public welfare and for progressive economic organization.”¹²⁷ Hoover boldly proposed to legitimate the informational functions of trade associations by having them transmit economic data to the Department of Commerce, which in turn would publish the data to the general public. “If information regarding production, capacity, and distribution by districts, with average prices for grades, brands sizes, styles, or qualities sold in the respective districts for specified periods of time could be given to the public at the same time that such information is available to the members of an association, in my judgment, great public good would result.”¹²⁸ Daugherty grudgingly conceded the legitimacy of the plan, “*provided always* that whatever is done is not used as a scheme or device to curtail production or enhance prices, and does not have the effect of suppressing competition.”¹²⁹

Nevertheless in 1923 the Taft Court struck down yet another (especially rigorous and coercive) information-sharing scheme in *United States v. American Linseed Oil Co.*¹³⁰ Speaking for a unanimous Court,¹³¹ McReynolds opined that it was “not normal” for competitors to limit “their freedom of action by requiring each to reveal to all the intimate details of its affairs. . . . Obviously they were not *bona fide* competitors; their claim in that regard is at war with common experience and hardly compatible with fair dealing. . . . Their manifest purpose was to defeat the Sherman Act.”¹³² The decision threatened to disrupt Hoover’s plan to have the Department of Commerce distribute trade association information.¹³³ In 1925, however, the Taft Court executed an abrupt and unexpected *volte face* after Stone, who had been close to Hoover in Coolidge’s cabinet,¹³⁴ joined the Bench.

In *Maple Flooring Manufacturers Ass’n v. United States*,¹³⁵ the Court once again considered the relationship between the Sherman Act and the exchange of price and production information within trade associations. Writing for a majority of six,¹³⁶ Stone was careful to note at the outset that “it is neither alleged nor proved that there was any agreement among the members of the Association either affecting production, fixing prices or for price maintenance.”¹³⁷ The precise question, therefore, was not whether the organized exchange of information could be used to unreasonably restrain trade, which Stone conceded would be illegal, but whether such an exchange was intrinsically and necessarily incompatible with the Sherman Act.¹³⁸ In language referencing Hoover, Stone held that it was not.

“It is the consensus of opinion of economists and of many of the most important agencies of government,” he wrote, “that the public interest is served by the gathering and dissemination, in the widest possible manner, of information with respect to the production and distribution, cost and prices in actual sales, of market commodities because the making available of such information tends to stabilize trade and industry, to produce fairer price levels and to avoid the waste which inevitably attends the unintelligent conduct of economic enterprise.”¹³⁹ “We do not conceive that the members of trade associations become . . . conspirators merely because they

gather and disseminate information, such as is here complained of, bearing on the business in which they are engaged and make use of it in the management and control of their individual businesses.”¹⁴⁰ In dissent, McReynolds objected that “ordinary knowledge of human nature and of the impelling force of greed ought to permit no serious doubt” that the sharing of pertinent trade information was inimical to “that kind of competition long relied upon by the public for the establishment of fair prices.”¹⁴¹

By mid-decade, in other words, the Taft Court had pivoted from the assumption that competition inhered in atomistic, fierce, and privatized action, to the quite different assumption that competition instead consisted of rational conduct mediated by the expert uptake of pertinent economic knowledge whose distribution could be facilitated by government. The shift in perspective was profound.¹⁴² The very idea that “unintelligent” competition could produce “waste” presupposed that competition was itself a form of behavior whose purpose was to maximize output given available resources, an insight that built on state efforts during World War I to incentivize the greatest possible production of war related goods.

It was the foundational insight that inspired Hoover’s transformation of the Department of Commerce during the 1920s. Hoover insisted that the Sherman Act no longer be interpreted to require the maintenance of “a great host of highly competitive units in every trade,” even when the resulting competition was “highly destructive.” He instead believed that the statute be construed to permit “forms of collective action to eliminate definite wastes” whenever such action was “obviously in the public interest and productive of a fundamental strengthening of competition itself.”¹⁴³ The function of government was to create “a better synchronizing of the parts of the economic machine,” by, for example “eliminating waste through standardizing of dimensions, qualities of goods and business practice.”¹⁴⁴ A lasting legacy of World War I was the idea that government policy could be used to shape economic practices to serve intelligible social purposes.

What makes the 1920s so difficult to characterize is that this idea could coexist with its opposite, with the assumption that active government intervention disrupted the “normal” and effective operation of the market. Coolidge might be said to epitomize this latter perspective. He was, as Hoover said, “a real conservative, probably the equal of Benjamin Harrison.”¹⁴⁵ By contrast, Harding had been far more ambivalent.

Consider Harding’s Conference on Unemployment, convened in September 1921. The country was facing a sharp recession with a consequent serious uptick in unemployment.¹⁴⁶ Hoover pushed Harding into sponsoring a conference with representatives of employers, labor and the public “to inquire into the volume and distribution of unemployment, to advise upon emergency measures that can be properly taken by employers and local authorities and civic bodies, and to consider such measures as would tend to give impulse to the recovery of business and commerce to normal.”¹⁴⁷ This was classic Hoover activism,¹⁴⁸ and in fact the Conference eventually recommended a rudimentary macro-economic strategy of counter-cyclical spending.¹⁴⁹ But Harding himself inaugurated the conference by frankly avowing his uncertainty about the entire enterprise: “It is fair to say,” he remarked to those gathered to confer, “that you are not asked to solve the long-controverted problems of our social system. We have builded the America of to-day on the fundamentals of economic, industrial, and political life which made us what we are, and the temple requires no remaking now. We are incontestably sound. We are

constitutionally strong. We are merely depressed after the fever, and we want to know the way to speediest and dependable convalescence.”¹⁵⁰

Harding’s ambivalence is exemplary. Throughout the 1920s there was a running battle in America between those who believed that the “temple requires no remaking,” and those who sought to remedy “long-controverted problems” of the “social system.” The Taft Court is now chiefly remembered for its efforts to use the Constitution to referee this battle. The experience of World War I overhung its efforts. As Charles Evans Hughes had insightfully predicted in 1918, military conscription would have deep but subtle consequences for constitutional adjudication, including “a new appreciation of the power of our government”:

What will be the reaction to this new impression of power? Will it be in favor of individual liberty, or in favor of a larger measure of governmental control over individual conduct and property in the days of peace? I am disposed to think that in some degree there will be both reactions. But I cannot escape the belief that in the main the present exercise of authority over the lives of men will hereafter find its counterpart in a more liberal exercise of power over the conduct, opportunities and possessions of men. Among the ten million young men who have been registered under the draft act, there will probably be a host who are not likely to shrink at the application of power to others if they conceive it to be in the general interest, the supremacy of which they have been bound to acknowledge. If former conceptions of property right and individual liberty are to be maintained in the years to come, it will not be through the same instinctive regard for them which has hitherto distinguished our people, but because it is the conviction that the common interest will be better served by freedom of individual opportunity than by fettering it. . . . [I]ndividual privilege when challenged will have to show cause before a public to which old traditions are no longer controlling—a public trained to sacrifice—which will have and enforce its own estimate of the extent of the common right.¹⁵¹

The Taft Court would struggle throughout the decade to discern constitutional boundaries in a world where “the common right” had grown to mammoth proportions, and yet in which “old traditions” were no longer sustained by “instinctive regard.” It was a difficult, if not impossible task. Stripped of their implicit moorings in customary understandings, constitutional limitations came increasingly to seem to many as merely willful restraints on significant political victories.¹⁵² The administrative precedents of World War I stood as a continual reminder of what American society could accomplish if only the “general interest” were deemed sufficiently important. They were precedents that the New Deal would later freely invoke. But during the 1920s, as the forces of regulation unleashed by World War I washed against the uncertain dykes of constitutional restraint, a jurisprudential crisis began to loom.

To defenders of the old order, like Sanford, “the aftermath of war” produced “troubled and bewildered days, when . . . many evil passions have been turned loose that . . . seek to undermine the foundations of Liberty itself.”¹⁵³ Taft was apt to refer to “the depths in which we have been since the War.”¹⁵⁴ The lingering efforts of the Wilson Administration to exert wartime powers gave Van Devanter the queasy sensation that “everything is on edge” and that “existing conditions are not well balanced. Some day they may take a slide just as the snow does on the mountain and carry everything before them.”¹⁵⁵ Governments, Van Devanter observed to a friend in 1920, “cannot be maintained . . . on the principle of the sailor who thinks any port looks good

in a storm.”¹⁵⁶ Van Devanter sought to mute his elation at Harding’s gilded broom by reminding himself that “so many things have to be done and done wisely to put us on a good footing again that it will be almost impossible to do what the people generally want done. Sickness, when it has become pronounced, cannot be thrown off quickly no matter who the doctor is.”¹⁵⁷

III. Cabining the Constitutional Implications of the War

The first step in curing the illness of the war was to re-impose a proper sense of constitutional limitations. “Congress is passing extraordinary legislation and the Administration is doing many extraordinary things,” George Sutherland wrote his friend Arthur Thomas, the ex-Governor of Utah, in September 1917.¹⁵⁸ “On the whole, while mistakes are being made, I think war matters are being pretty well handled, though I have no doubt both legislative and executive powers are being exceeded in many particulars, the reckoning for which will come after the war. As soon as peace is declared, the flood of litigation will begin and Washington ought to be a place where a lawyer can earn bread and butter.”¹⁵⁹

One of Taft’s first duties as Chief Justice was to preside over a memorial to his predecessor, Edward Douglass White. In that ceremony Taft praised White’s “genius . . . as a statesman and a jurist,” singling out White’s opinions “in the World War . . . supporting statutes enacted to enable the Government to carry on the struggle, to mass all its resources of men and money in the country’s defense.”¹⁶⁰ During his own time as Chief Justice, Taft would preside over many decisions examining the scope of the government’s powers during war. Yet although his Court would largely validate the exercise of wartime power,¹⁶¹ it would simultaneously strive to contain the staggering reach of those powers from leaching into the nation’s peace time authority. As the Court unanimously put it in 1926, war “is abnormal and exceptional; and, while the supreme necessities which it imposes require that, in many respects, the rules which govern the relations of the respective citizens of the belligerent powers in time of peace must be modified or entirely put aside, there is no tendency in our day at least to extend them to results clearly beyond the need and the duration of the need.”¹⁶²

A good example of the strain of simultaneously validating and containing the exercise of war time powers may be found in *Highland v. Russell Car & Snowplow Co.*,¹⁶³ in which the Taft Court, speaking unanimously through an opinion by Butler,¹⁶⁴ upheld the power of Congress in the Lever Act¹⁶⁵ to authorize the President during the war “to fix the price of coal, to regulate distribution among dealers and consumers, . . . and to require producers to sell only to the United States through a designated agency empowered to regulate resale prices.”¹⁶⁶ In *Highland*, the owner of a coal mine had contracted with a buyer to sell coal at \$4.05 per ton, but the buyer eventually paid only \$2.45 per ton, which was the price set by the federal government. The seller’s suit for the difference turned on the constitutionality of the executive order fixing the price. Although the Taft Court found for the buyer, it did so in a curiously ambivalent fashion.

“It is everywhere recognized,” Butler began, “that the freedom of the people to enter into and carry out contracts in respect of their property and private affairs is a matter of great public concern and that such liberty may not lightly be impaired.” Citing *Adkins v. Children’s Hospital of the District of Columbia*,¹⁶⁷ Butler affirmed that the right to contract “protected by the due process clauses of the Fifth and Fourteenth Amendments.” Yet the right was “not absolute or

universal,” and “Congress may regulate the making and performance of such contracts whenever reasonably necessary to effect any of the great purposes for which the national government was created.” In particular, when “Congress and the President exert the war power of the nation, . . . they have wide discretion as to the means to be employed successfully to carry on.” Again citing *Adkins*, Butler affirmed that “the measures here challenged are supported by a strong presumption of validity, and they may not be set aside unless clearly shown to be arbitrary and repugnant to the Constitution.”

The principal purpose of the Lever Act was to enable the President to provide food, fuel, and other things necessary to prosecute the war without exposing the government to unreasonable exactions. The authorization of the President to prescribe prices and also to requisition mines and their output made it manifest that, if adequate supplies of coal at just prices could not be obtained by negotiation and price regulation, expropriation would follow. Plaintiff was free to keep his coal, but it would have been liable to seizure by the government. The fixing of just prices was calculated to serve the convenience of producers and dealers, as well as of consumers of coal needed to carry on the war. As it does not appear that plaintiff would have been entitled to more if his coal had been requisitioned, the act and orders will be deemed to have deprived his only of the right or opportunity by negotiation to obtain more than his coal was worth. . . . As applied to the coal in question, the statute and executive orders were not so clearly unreasonable and arbitrary as to require them to be held repugnant to the due process clause of the Fifth Amendment.¹⁶⁸

Butler’s opinion is noteworthy in several respects. First, it upholds government wartime price fixing at a time when, in decisions like *Tyson & Brothers v. Banton*,¹⁶⁹ and *Ribnik v. McBride*,¹⁷⁰ the Taft Court was engaged in an increasingly strident effort to prevent the expansion of peacetime price fixing authority.¹⁷¹ The tension was made manifest by Butler’s bold reliance on *Adkins*, the Court’s controversial invalidation of a minimum wage statute for women. The invocation of *Adkins* seemingly implies the implausible proposition that identical constitutional standards should apply to price-fixing regulations in both wartime and peacetime. The stress caused by this premise is visible in Butler’s strikingly narrow and lukewarm conclusion, which affirms the constitutionality of the Lever Act only “as applied to the coal in question.”¹⁷²

Second, Butler argues that because the seller would not have been entitled to a higher price than that set by the government “if his coal had been requisitioned,” the loss of the contract price deprived him “only of the right or opportunity by negotiation to obtain more than his coal was worth.”¹⁷³ This reasoning is odd because manifestly inconsistent with controlling Taft Court decisions. There were clear precedents holding that the fixing of coal prices during the war did not constitute the taking of contracts to sell coal.¹⁷⁴ But even assuming that the state had taken the seller’s coal, Butler had himself held in *United States v. New River Collieries Co.*¹⁷⁵ that the value of coal requisitioned under the Lever Act *after* the war was to be determined by the “market price prevailing at the time and place of the taking.”¹⁷⁶ Butler had explicitly rejected the argument that a coal producer was entitled only to “the ‘real’ value of the coal as distinguished from its market value,” even though the “real” value of the coal was determined by “the owner’s

cost of production and a reasonable profit,”¹⁷⁷ the very criteria used by Wilson to fix the price of coal at issue in *Highland*.¹⁷⁸

Butler might have argued in *Highland* that there was no market for coal during the war because of government price regulations. But such an argument would implicitly validate the very price-fixing scheme that the seller was constitutionally attacking, and Butler was not tempted to take that position. In roughly analogous cases, the Taft Court had not hesitated to use a market-value test of damages for wartime takings, despite massive government interference in the market and all the “circumstances-uncertainties of the war.”¹⁷⁹ Under the Court’s own precedents, therefore, the government had not requisitioned the seller’s coal, and, if it had, the likely measure of damages would have been the very contract price the seller was seeking to enforce.

The unusual analytic slippage in Butler’s reasoning seems evidence of the strain of defending wartime price fixing from attacks based on freedom of contract. Given the doctrinal framework of the right “to enter into and carry out contracts” that Butler initially proposed, the most obvious path open to Butler was to explain why the circumstances of the war had rendered it “reasonably necessary” to regulate the price of coal.¹⁸⁰ But to pursue this line of analysis would have required Butler to articulate criteria of necessity that would be applicable to government efforts to fix prices during peacetime.

Such criteria would be most unwelcome to a Court that was increasingly moving toward a *per se* rule prohibiting price-fixing in the absence of a showing that regulated property was “affected with a public interest.” Coal was definitely not such property. In a case dealing with the Wilson Administration’s efforts to revive the authority of the Lever Act to control the price of coal in response to the grave national emergency provoked by the coal miner’s strike of 1919, for example, the Taft Court was brusquely unsympathetic.¹⁸¹ The upshot of *Highland*’s strangely contorted reasoning, therefore, was to validate the government’s aggressive efforts to fix prices during World War I, but to leave obscure the constitutional implications of that validation for analogous government efforts to regulate the economy during peacetime.

A distinct and somewhat more plausible framework for distinguishing wartime powers from peacetime authority lay in the thought that the war had created a crisis that justified abnormal forms of regulation that were no longer legitimate “upon the passing of the emergency.”¹⁸² As Taft himself wrote in 1918, “The Central Government now has very wide war powers. When peace comes, these must end, if the Republic is to be preserved.”¹⁸³ The best illustration of this framework is *Chastleton Corp. v. Sinclair*,¹⁸⁴ which concerned the constitutionality of rent control in the District of Columbia.¹⁸⁵

In 1921, the White Court had in *Block v. Hirsh*¹⁸⁶ upheld a 1919 congressional statute temporarily imposing rent control in the District of Columbia in response to “emergencies growing out of the war, resulting in rental conditions in the District dangerous to the public health and burdensome to public officers, employees and accessories, and thereby embarrassing the Federal Government in the transaction of the public business.”¹⁸⁷ Holmes, in an opinion for a five-person majority that included Brandeis, Day, Pitney, and Clarke, concluded that these emergencies had converted housing in the District into property affected with a public interest,

so that its price could constitutionally be regulated. “Congress has stated the unquestionable embarrassment of Government and danger to the public health in the existing condition of things. The space in Washington is necessarily monopolized in comparatively few hands, and letting portions of it is as much a business as any other. Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present.”¹⁸⁸ Although legislative declarations of emergency “may not be held conclusive by the Courts,” they were nevertheless entitled “to great respect,” and in this case the facts establishing the emergency were “publicly notorious”¹⁸⁹ and sufficient to clothe “the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law.”¹⁹⁰

Citing the need to respond to the same wartime emergency that had convinced the Court in *Block*, Congress renewed rent control in the District in 1921,¹⁹¹ and again in 1922.¹⁹² To conservative contemporaries it seemed as if Congress were under “the spell of war,” which spawned the “doctrine that in emergencies the constitution must yield to the police power.”¹⁹³ *Chastleton* arose when a landlord, whose rents were controlled in 1922, sought to break that spell by bringing a bill in equity alleging that the emergency that had justified the 1919 statute was no longer in effect. His claim was that Congress’s two extensions of the rent control statute were unconstitutional. Lower courts dismissed the bill on the authority of *Block*.

By the time *Chastleton* was argued at the Supreme Court in April 1924, the only remaining members of the *Block* majority were Justices Holmes and Brandeis. Justice Butler’s docket book indicates that the Court nevertheless voted unanimously to reverse the judgment of the lower courts. Van Devanter is recorded as taking the position that the extensions were “bad” and that this did not depend upon any “objective question of fact.” Justices Sutherland, Butler and Sanford were noted as agreeing with Van Devanter. Justice Holmes alone contended that the constitutionality of the rent control extensions depended upon “a question of fact”; namely, whether the “emergency” continued to exist.¹⁹⁴

With characteristic shrewdness, Taft assigned the opinion to Holmes, who framed the question as whether “the emergency that justified interference with the ordinarily existing private rights in 1919 had come to an end in 1922, and no longer could be applied consistently with the Fifth Amendment of the Constitution.”¹⁹⁵ Holmes noted that

We repeat what was stated in *Block v. Hirsh* as to the respect due to a declaration of this kind by the Legislature so far as it relates to present facts. But even as to them a Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. . . . A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed.¹⁹⁶

Holmes regarded it as a “matter of public knowledge that the Government has considerably diminished its demand for employees that was one of the great causes of the sudden afflux of people to Washington.”¹⁹⁷ And then, with deft strokes, Holmes quietly undercut the continuing influence of World War I: “[i]f about all that remains of war conditions is the increased cost of living, that is not in itself a justification of the act. . . . In that case the operation of the statute would be at an end.”¹⁹⁸

Holmes ended the original draft of his opinion with a quick and efficient remand to the trial court for a determination of the relevant facts.¹⁹⁹ But at the very time *Chastleton* was under consideration, Congress was debating whether to extend rent control in the District to 1925. The conservative members of the Court were determined to draw a sharper constitutional line between the extraordinary emergency of the war and the normal conditions then obtaining under Calvin Coolidge.²⁰⁰ Holmes was forced to recirculate his opinion with the notation “Corrected by C.J. in accord with majority view.” He altered the conclusion of the second draft to read:

[I]f the question were only whether the statute is in force today, upon the facts that we judicially know we should be compelled to say that the law has ceased to operate. Here however it is material to know the conditions of Washington at different dates in the past. Obviously the facts should be accurately ascertained and carefully weighed, and this can be done more conveniently in the Supreme Court of the District than here.²⁰¹

Chastleton's message was that the extraordinary powers unleashed by World War I could be confined by boundaries cognizable by judicial notice.²⁰² The limits of the abnormal could be established as a mere “matter of public knowledge.” This was not a happy message to those progressives who had hoped to use wartime legislation as a “Trojan horse” to undermine constitutional restrictions that had been imposed before the war. Thus Fiorello LaGuardia, in the course of congressional debates about whether to extend rent control to 1925,²⁰³ argued that rent control should be constitutional whether or not there was a wartime emergency. He complained that “the only blessing that came from the war is that it brought a condition which gave the legislatures of the various States sufficient courage to pass, for the first time in history, regulatory powers over dwellings in cities.”²⁰⁴ But progressive pleas that such powers receive peacetime constitutional sanction were insufficient to halt the Court’s determined march toward normalcy.

IV. Diminishing Judicial Deference

The sweep of that march carried important implications for the Taft Court’s review of social and economic legislation. It would ultimately lead to the constitutional confrontations of the New Deal era, when the nation sought to draw “on the experience of economic mobilization of World War I for instrumentalities to combat hard times.”²⁰⁵ We might perhaps begin to assess these implications by examining the Court’s decision in *Jay Burns Baking Co. v. Bryan*,²⁰⁶ decided the week before *Chastleton*.

Jay Burns Baking Co. involved a challenge to a Nebraska statute fixing minimum and maximum weights for standard-sized loaves of bread.²⁰⁷ In the first half of the 19th century, it had been common to regulate the price and quality of bread. Although bread was a necessity of life, urban populations lacked ovens in which they could bake their own loaves. As the Court had observed in its seminal 1876 opinion in *Munn v. Illinois*, “it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, *bakers*, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States some or all these subjects; and we

think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the Fifth Amendment in force, Congress, in 1820, conferred power upon the city of Washington ‘to regulate . . . the weight and quality of bread.’”²⁰⁸

As home ovens came into ordinary use, bread regulation fell into desuetude. But it was revived during the progressive era as part of a general movement, exemplified by the creation in 1901 of the National Bureau of Standards,²⁰⁹ to promote “both National and State legislation tending toward securing uniformity of the laws pertaining to weights and measures.”²¹⁰ By 1912, Taft’s Secretary of Commerce and Labor (and Brandeis’s brother-in-law) Charles Nagel could endorse an organization created by the Bureau, the Annual Conference on Weights and Measures, which brought together local, state and national weights and measures officials to implement “the general decision that better standards shall be enforced throughout the country.”²¹¹ The Conference swiftly became a clearinghouse for national and local initiatives to standardize the size of bread loaves; it was believed that fair competition for bread was impossible because consumers had no idea of the actual weight of the loaves they were buying.²¹²

The White Court was generous toward these efforts to standardize bread loaves. In *Schmidinger v. Chicago* (1913), the Court unanimously upheld a Chicago ordinance fixing minimum standard weights for bread against the charge that it was “an unreasonable and arbitrary exercise of police power and . . . an unlawful interference with the freedom of contract secured” by the Due Process Clause of the Fourteenth Amendment.²¹³ Speaking through Justice Day, the Court adopted a highly deferential standard of review. “This Court has frequently affirmed that the local authorities intrusted [sic] with the regulation of such matters, and not the courts, are primarily the judges of the necessities of local situations calling for such legislation, and the courts may only interfere with laws or ordinances passed in pursuance of the police power where they are so arbitrary as to be palpably and unmistakably in excess of any reasonable exercise of the authority conferred.”²¹⁴

The standardization of bread loaves reached its apogee during World War I,²¹⁵ when the United States Food Administration decreed that bread could be served only in standard loaves of 1, 1.5, or 2 pounds, or other pound multiples.²¹⁶ For the first time, government prohibited bread loaves that weighed too much, as well as loaves that weighed too little. The Food Administration permitted “variations at the rate of 1 ounce per pound over and 1 ounce per pound under” the prescribed weights for loaves.²¹⁷ The success of this wartime regulation prompted a revived emphasis on “the imperative need of uniform standardization of loaf weight of bread in order to protect the purchasing public.”²¹⁸ State legislation requiring standardized bread weights first appeared in Indiana in 1919.²¹⁹ By 1924 such laws had been enacted by some eighteen states,²²⁰ as well as by Congress for the District of Columbia.²²¹ Of these, ten states and the District of Columbia allowed variances in weight that roughly mirrored those used by the Food Administration during the war.²²² By the middle of the decade, therefore, it was evident that “The modern trend of State legislation, in relation to the sale of bread is . . . undoubtedly in favor of the principle of standard weights.”²²³

Nebraska was one of the states that participated in this new trend. In 1921, it enacted a statute requiring that bread be sold in specified weights, decreeing that “a tolerance at the rate of two ounces per pound in excess of the standard weights herein fixed shall be allowed, and no

more, provided that the standards weights herein prescribed shall be determined by averaging the weight of not less than twenty-five loaves of any one unit.”²²⁴ Although not a literal extension of wartime emergency legislation, as was the case in *Chastleton*, the Nebraska statute nevertheless reflected a peacetime version of popular and effective wartime regulation. The tolerances permitted by the Nebraska statute were far more generous than what the Food Administration had permitted in 1917. But the baking industry nevertheless challenged the statute on the ground “that the provision fixing the maximum weights . . . is unnecessary, unreasonable and arbitrary” and hence an infringement of freedom of contract under the Due Process Clause.²²⁵

The Court split five to four in conference, with McKenna, Holmes, Brandeis, and Sutherland voting to sustain the statute.²²⁶ Taft assigned the opinion to Butler, who eventually authored a decision for seven Justices, with only Brandeis and Holmes dissenting.²²⁷ Butler concluded that setting maximum weight tolerances “is not necessary for the protection of purchasers against imposition and fraud by short weights and is not calculated to effectuate that purpose, and . . . it subjects bakers and sellers of bread to restrictions which are essentially unreasonable and arbitrary, and is therefore repugnant to the Fourteenth Amendment.”²²⁸ At the core of Butler’s opinion lay a resolutely common-sense judgment, verging on outrage, that a law seeking to prevent fraudulently short-weighted loaves should perversely set maximum weights.²²⁹

The rhetoric of Butler’s opinion oddly recapitulates *Chastleton*’s reliance on public knowledge and judicial notice to set the bounds of the normal. The litigants in *Jay Burns Baking Co.* had sought to establish that in many conditions of humidity and temperature in Nebraska it would be “impossible to comply with the law without wrapping the loaves or employing other artificial means to prevent or retard evaporation.”²³⁰ Butler credited the bakers’ evidence to conclude:

The uncontradicted evidence shows that there is a strong demand by consumers for unwrapped bread. It is a wholesome article of food, and plaintiffs in error and other bakers have a right to furnish it to their customers. . . . It would be unreasonable to prevent unwrapped bread being furnished to those who want it in order technically to comply with a weight regulation and to keep within limits of tolerance so narrow as to require that ordinary evaporation be retarded by wrapping or other artificial means. It having been shown that during some periods in Nebraska bread made in a proper and usual way will vary in weight more than at the rate of two ounces to the pound during 24 hours after baking, the enforcement of the provision necessarily will have the effect of prohibiting the sale of unwrapped loaves when evaporation exceeds the tolerance.²³¹

While far from accomplished writing, the passage carries a certain force that draws almost entirely upon an implicit opposition between the “ordinary” world of “wholesome” unwrapped bread, “made in a proper and usual way,” and the “artificial” and “technical” requirements of the statute. For the Taft Court, Fourteenth Amendment stood as a firm shield to protect everyday routines and expectations.²³²

Yet, examined closely, the premise of Butler’s reasoning was odd. Progressive agitation to require that commercially baked bread be wrapped to protect it from contamination was common in the second decade of the twentieth-century;²³³ statutes requiring that bread be wrapped before sale had heretofore easily passed constitutional muster.²³⁴ Indeed, at the very

time *Jay Burns* was under advisement, Congress was considering a proposed “Federal Bread Act” that would require the wrapping of bread before shipment in interstate commerce.²³⁵ Even if compliance with the maximum tolerances of the Nebraska statute would have required the wrapping of bread, therefore, it is unclear why that result would have intolerably interfered with constitutional rights.²³⁶

It is true that the plaintiffs in *Jay Burns* had created an extensive record of expert testimony designed to establish the unreasonableness of a 2 ounce maximum tolerance,²³⁷ whereas the State of Nebraska had produced what in retrospect seems a largely perfunctory defense.²³⁸ But Nebraska no doubt imagined that it could afford to be somewhat casual because of the generously deferential standard of *Schmidinger*, and because the nation had by the middle of the decade already accumulated extensive experience with maximum bread tolerances far more stricter than those imposed by Nebraska.²³⁹ This experience was epitomized by Hoover’s successful wartime regulations, which all agreed had “worked like a charm.”²⁴⁰ The Court was perfectly aware of this history, because it was detailed in Brandeis’s dissent.²⁴¹

It might be possible to characterize the conservative majority of *Jay Burns* as scrupulous to decide the constitutionality of the Nebraska statute based purely on the facts placed into evidence by the parties, as though ascertaining the constitutionality of legislation were exactly analogous to a rendering a verdict in a dispute between two private parties.²⁴² But we know from the Court’s anxiety to exercise judicial notice in *Chastleton* that its members were subject to no such scruples; that, to quote an early draft of *Chastleton*, they were prepared to acknowledge “all that a man with eyes open can see.”²⁴³ The Court knew full well that judgments of constitutionality often turned on legislative facts that had no ready analogue to the structure of merely private litigation.²⁴⁴ As Taft wrote to Sutherland congratulating him on his appointment to the Court: “I do not minimize at all the importance of having Judges of learning in the law on the Supreme Bench, but the functions performed by us are of such a peculiar character that something in addition is much needed to round out a man for service upon that Bench, and that is a sense of proportion derived from a knowledge of how Government is carried on, and how higher politics are conducted in the State. A Supreme Judge must needs keep abreast of the actual situation in the country so as to understand all the phases of important issues which arise, with a view to the proper application of the Constitution, which is a political instrument in a way, to new conditions.”²⁴⁵

By 1924 the Court’s “sense of proportion” had shifted markedly away from the deferential standard that it had articulated in *Schmidinger*. Perhaps it was because state administrative interventions into “ordinary” business practices, buoyed by the precedent of the war, had become more frequent, intrusive, and unjustified. Or perhaps it was because the Court, eager to return to antebellum normality, had become more alert to regulatory overreach and determined to put the budding administrative state to its proofs.²⁴⁶ Nebraska had defended the need for maximum tolerances on the ground that they prevented “a loaf of one standard size from being increased so much that it can readily be sold for a loaf of a larger standard size,”²⁴⁷ but the Court felt comfortable negating this statutory purpose by taking judicial notice of the proposition that “it is contrary to common experience and unreasonable to assume that there could be any danger of such deception.”²⁴⁸ It was for this reason that Butler concluded that maximum tolerances were “not necessary for the protection of purchasers against imposition and fraud by short weights.”²⁴⁹

Brandeis, in a brilliant and memorable dissent, sought by contrast to take judicial notice of the “administrative necessity” of prohibiting “excessive weights” if “short weights were to be prevented.”²⁵⁰ In recounting the post-war history of imposing limits on excessive bread weight, Brandeis frankly admitted that he was citing evidence “not in the record.” But, recalling his path-breaking brief in *Muller v. Oregon*,²⁵¹ Brandeis insisted that in deciding questions of constitutionality courts were obligated to take “judicial notice” of “the history of the experience gained under similar legislation,” as well as of “the results of scientific experiments,” “whether occurring before or after the enactment of the statute or of the entry of the judgment.”²⁵² In words that would reverberate throughout the following century, Brandeis concluded:

Put at its highest, our function is to determine, in the light of all facts which may enrich our knowledge and enlarge our understanding, whether the measure, enacted in the exercise of an unquestioned police power and of a character inherently unobjectionable, transcends the bounds of reason; that is, whether the provision as applied is so clearly arbitrary or capricious that legislators acting reasonably could not have believed it to be necessary or appropriate for the public welfare.

To decide, as a fact, that the prohibition of excess weights ‘is not necessary for the protection of the purchasers against imposition and fraud by short weights,’ that it ‘is not calculated to effectuate that purpose,’ and that it ‘subjects bakers and sellers of bread’ to heavy burdens, is, in my opinion, an exercise of the powers of a super-Legislature--not the performance of the constitutional function of judicial review.²⁵³

Today we are most likely to interpret Brandeis’s argument through the lens of deference. If the Court is to avoid second-guessing the outcome of the legislative process, it must *defer* to legislative judgments unless those judgments can be characterized as patently arbitrary and capricious. But in 1924, Brandeis’s words would also be heard to sound in the register of material evidence. Brandeis was saying that no Court should presume to find a legislative judgment irrational unless it first considered all the various forms of evidence, “all facts which may enrich our knowledge and enlarge our understanding,” which a legislature may have considered when enacting a statute. Brandeis believed that the rationality of the Nebraska statute could be assessed only in light of all the accumulated administrative expertise of the nation. And to this form of evidence Butler was resolutely oblivious.

In *Jay Burns* the majority of the Taft Court seemed to turn its back on the kind of government administrative expertise that had been earned since the war, trusting instead to the carefully manipulative experiments of the plaintiff’s trial evidence and to their own view of a “common experience” that intuitively rendered irrelevant the need for maximum bread tolerances. *Jay Burns* was for this reason condemned as “an unexpected reversion to the past,”²⁵⁴ and, more pointedly, as “reminiscent of the majority opinion in *Lochner v. New York*,”²⁵⁵ which had struck down a New York law limiting the employment of bakers to 60 hours per week. Brandeis himself believed that *Jay Burns* was “worse even than *Lochner*.”²⁵⁶

Jay Burns evoked *Lochner* not merely because it was about bakeries, and not merely because it seemed to revive the Due Process Clause as a potent threat against social legislation. *Jay Burns* threatened, in the words of the standard progressive critique of *Lochner*, to preclude “effective judicial investigation or consideration of the situations of fact behind or bearing upon the statutes.”²⁵⁷ Butler’s appeal to “common experience” to establish the crucial point that maximum tolerances were unnecessary to prevent fraud eerily evoked *Lochner*’s appeal to

“common understanding” to establish that “the trade of a baker has never been regarded as an unhealthy one.”²⁵⁸ *Lochner* had been savaged precisely because “[t]he majority opinion was based upon ‘a common understanding’ as to the effect of work in bakeshops upon the public and upon those engaged in it. ‘Common understanding’ has ceased to be the reliance in matters calling for essentially scientific determination.”²⁵⁹

In influential and stinging words, Brandeis attacked Butler for exactly this same mistake: “Knowledge is essential to understanding; and understanding should precede judging. Sometimes, if we would guide by the light of reason, we must let our minds be bold. But, in this case, we have merely to acquaint ourselves with the art of breadmaking and the usages of the trade.”²⁶⁰ Academic commentary on *Jay Burns* echoed Brandeis’s attack. “One of the judicial reforms for which Mr. Justice Brandeis has long been contending is the abandonment of speculative, doctrinaire, a priori effusions in judicial opinions and the substitution of a realistic and concrete examination of the relevant facts. Those who wish to see both methods in their respective perfections should read *Jay Burns Baking Co. v. Bryan*.”²⁶¹

Read in the context of *Chastleton*, which was decided the following week, *Jay Burns* is best interpreted as an effort to check what ABA President and soon to be Democratic Presidential nominee John W. Davis called in 1923 the “flood of laws” that has “come to crowd our statute books and clog our courts,” a flood prompted by “the fatuous belief that a ready solution can be found for every social or economic evil by invoking the agencies of government.”²⁶² The experience of conservative elites in the 1920s was that the war had sparked a “tendency towards paternalistic legislation,” which reduced “all men . . . to a level of uniformity” they associated with “August 1914.”²⁶³ In their view a “state consisting of a powerful and paternalistic government and subservient citizens is good for nothing except war.”²⁶⁴ The conservative majority of the Taft Court understood itself as restoring the constitutional balance. *Jay Burns* was a step in that direction.

Within a month of the decision, the Court cited *Jay Burns* for the proposition that “The validity of regulatory measures may be challenged on the ground that they transgress the Constitution, and thereupon it becomes the duty of the court, in the light of the facts in the case, to determine whether the regulation is reasonable and valid or essentially unreasonable, arbitrary and void.”²⁶⁵ Within two years, in the important decision of *Weaver v. Palmer Brothers Co.*,²⁶⁶ the Court would again cite *Jay Burns*, this time to support a holding that a 1923 Pennsylvania statute prohibiting the use of “shoddy” in bedding was “purely arbitrary and violates the due process clause of the Fourteenth Amendment.”²⁶⁷ The opinion was written by Butler. Holmes, Brandeis and Stone dissented.

Shoddy is material made by grinding up old rags and waste fabric materials. The resulting fibers are then used to stuff comforters, mattresses, and other forms of bedding. Because it was believed that shoddy could spread infection, it was commonly regulated, and since 1915 at least nine states had, like Pennsylvania, prohibited its use in bedding materials.²⁶⁸ Whether such a ban was arbitrary, Butler wrote in clear and decisive prose, “depends upon the facts of the case. Legislative determinations express or implied are entitled to great weight; but it is always open to interested parties to show that the legislature has transgressed the limits of its power. Invalidity may be shown by things which will be judicially noticed or by facts established by evidence. The burden is on the attacking party to establish the invalidating facts.”²⁶⁹

Because the Pennsylvania statute permitted the use of sterilized secondhand materials other than shoddy in bedding, and because it was conceded that sterilization could eliminate whatever health risk shoddy might pose, Butler concluded that the statute could not “be sustained as a measure to protect health” and that it was therefore “purely arbitrary” to prohibit shoddy.²⁷⁰ As he had noted in the context of unwrapped bread, Butler emphasized that “shoddy-filled” products “are useful articles for which there is much demand. And it is a matter of public concern that the production and sale of things necessary or convenient for use should not be forbidden.”²⁷¹ The Taft Court thus set itself the task of vindicating a “public concern” to protect the normal (meaning unregulated) functioning of the market. This was a fundamental shift from the judicial orientation of *Schmidinger*.

In striking down the statute as “purely arbitrary,” Butler virtually ignored the key justification for Pennsylvania’s legislation. Pennsylvania had argued to the Court that it was “known and recognized in the industry” that shoddy was a material whose “very nature facilitates the practice of fraud and deceit.”²⁷² Whereas it was relatively easy for inspectors to determine whether other secondhand material had been sterilized, this was not true of shoddy.²⁷³ Particularly for bedding manufactured out of state, as was the case in *Weaver* itself, “the testimony clearly establishes that it is impracticable and impossible to determine by such inspection as can be made . . . whether or not shoddy has been actually sterilized.”²⁷⁴

Pennsylvania defended its statute based on its need for effective administrative enforcement. Butler met this defense by asserting that the statute could not “be sustained as a measure to prevent deception” because the State provided for the inspection of manufacturers, and because the state required the display of tags stating the particulars of the sterilization process.²⁷⁵ Although the Court was without evidence to support its assumption that Pennsylvania could enforce its requirement that shoddy be sterilized, particularly with respect to out-of-state manufacturers, it was nevertheless unwilling to accord the state any leeway on this question. It was enough to establish that sterilized shoddy would present no danger to the health of the public. “The constitutional guarantees may not be made to yield to mere convenience,” Butler wrote.²⁷⁶ The Court thus drew the line at precisely the same “administrative necessity” that had been the sticking point of *Jay Burns*.

In dissent Holmes underlined what he regarded as the key fallacy of the Court’s opinion. “It is admitted to be impossible to distinguish the innocent from the infected product in any practicable way, when it is made up into the comfortables. On these premises, if the Legislature regarded the danger as very great and inspection and tagging as inadequate remedies, it seems to me that in order to prevent the spread of disease it constitutionally could forbid any use of shoddy for bedding and upholstery.”²⁷⁷ Holmes worried that the Court was impeaching the important White Court precedent of *Purity Extract & Tonic Co. v. Lynch*,²⁷⁸ in which, speaking through Hughes, the Court had explicitly extended deference to a state’s choice of such measures “as it may deem necessary in order to make” its laws “effective.”²⁷⁹ In unusually strong language, Holmes cautioned, “I think we are pressing the Fourteenth Amendment too far.”²⁸⁰

Commentators noted that *Weaver* had explicitly altered previous canons of deference,²⁸¹ emphasizing that the decision was “irreconcilable with prior police power cases.”²⁸² Together with *Jay Burns*, the case was said to “demonstrate, if demonstration still were needed, that the due process clauses are being utilized by the Supreme Court for general revision of legislation. Questions composed of fact, opinion and subtle matters of degree, where unconscious hopes and

fears play an enormous part have . . . become the most significant judicial controversies.”²⁸³ It was apparent that the Taft Court was no longer willing to defer to government expertise on questions of administrative convenience and enforceability.

The point was driven home by *Schlesinger v. Wisconsin*,²⁸⁴ which had been decided the week before *Weaver*. Speaking through McReynolds, the Court in *Schlesinger* struck down a Wisconsin statute providing that gifts made within six years of death “shall be construed to have been made in contemplation of death” and hence subject to inheritance taxes.²⁸⁵ McReynolds deemed the conclusive presumption “wholly arbitrary” and hence “in plain conflict with the Fourteenth Amendment.”²⁸⁶

“The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the Legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, A. may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the state readily to collect lawful charges against B. Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The state is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever.”²⁸⁷ Whether the challenge was as a formal matter made under the Due Process Clause or the Equal Protection Clause,²⁸⁸ the Court could not have been plainer that administrative convenience and necessity would no longer count for much in justifying the constitutionality of a statute.²⁸⁹

In dissent, Holmes penned an elegant and classic opinion:

[I]t seems to me not too late to urge that in dealing with state legislation upon matters of substantive law we should avoid with great caution attempts to substitute our judgment for that of the body whose business it is in the first place, with regard to questions of domestic policy that fairly are open to debate.

The present seems to me one of those questions. I leave aside the broader issues that might be considered and take the statute as it is written, putting the tax on the ground of an absolute presumption that gifts of a material part of the donor's estate made within six years of his death were made in contemplation of death. If the time were six months instead of six years I hardly think that the power of the State to pass the law would be denied, as the difficulty of proof would warrant making the presumption absolute; and while I should not dream of asking where the line can be drawn, since the great body of the law consists in drawing such lines, yet when you realize that you are dealing with a matter of degree you must realize that reasonable men may differ widely as to the place where the line should fall. I think that our discussion should end if we admit what I certainly believe, that reasonable men might regard six years as not too remote. Of course many gifts will be hit by the tax that were made with no contemplation of death. But the law allows a penumbra to be embraced that goes beyond the outline of its object in order that the object may be secured. . . .

I think that with the States as with Congress when the means are not prohibited and are calculated to effect the object we ought not to inquire into the degree of the necessity for resorting to them.²⁹⁰

Brandeis and Stone joined in the dissent, which marked the exact moment at which the classic triumvirate emerged as a recognizable phenomenon.²⁹¹ Taken together, *Schlesinger* and *Weaver*

cemented the Taft Court's reputation as determined to expand "the meaningless meaning of the 'due process' clause of the Fourteenth Amendment" to put "constitutional compulsion behind the private judgment of its members upon disputed and difficult questions of social policy."²⁹² All recognized that the Taft Court had adopted "a more rigid attitude . . . toward the constitutionality of state legislation."²⁹³

It was left to Sutherland to bestow crisp doctrinal articulation on this new attitude. *Louis K. Liggett Co. v. Baldridge*²⁹⁴ involved a 1927 Pennsylvania statute providing that only licensed pharmacists could own pharmacies or drug stores. A Massachusetts corporation challenged the statute as invalid under the Fourteenth Amendment. A three judge district court upheld the statute: "It may be the Legislature thought that a corporate owner, in purchasing drugs, might give a greater regard to the price than to the quality; and, if such was the thought of the Legislature, can this court say it was without a valid connection with the public interests, and so unreasonable as to be unlawful?"²⁹⁵ On appeal, however, the Taft Court, in an opinion by Sutherland for seven justices, held that the lower court was mistaken.²⁹⁶ Holmes and Brandeis dissented.

Sutherland had dedicated his 1917 American Bar Association presidential address to deploring the national "passion for making laws," which he lampooned as a "prevailing obsession . . . that statutes, like crops, enrich the country in proportion to their volume."²⁹⁷ The good intentions of legislation, he argued, should "be of small consequence, or of no consequence at all, in the domain of law," because in the name of "a diffused desire to do good" the community was nevertheless made to suffer "from the affliction of mischievous and meddling statutes."²⁹⁸ "I have a very firm conviction," Sutherland had announced to the New York State Bar Association in 1921, "that the tendency to control our activities by statutory rule is being over-emphasized. Too many laws are being passed in haste. Too many that simply reflect a temporary prejudice, a passing fad, a fleeting whim, a superficial view or an exaggerated estimate of the extent, or a mistaken impression of the quality of an evil."²⁹⁹ Echoing his close friend Harding, Sutherland had urged that the state "must not be allowed to wander too far from the sphere of its normal and traditional functions, nor interfere over-much with the liberty of the individual to work out his destiny here and his salvation hereafter in his own way."³⁰⁰

Baldridge offered Sutherland the perfect occasion to express these concerns in the language of clear and forceful constitutional doctrine. The Pennsylvania statute, under the "masquerade"³⁰¹ of a health measure, was "obviously intended to prevent the further extension of chain drug stores."³⁰² Sutherland used this discrepancy to drive to the surface the implicit premise of decisions like *Jay Burns* and *Weaver*.

Sutherland began his opinion with the axiom that "appellant's business is a property right and as such entitled to protection against state legislation in contravention of the federal Constitution."³⁰³ It followed that "unless justified as a valid exercise of the police power, the act assailed must be declared unconstitutional because the enforcement thereof will deprive appellant of its property without due process of law."³⁰⁴ The purported goal of the act was to protect public health. Thus, Sutherland reasoned, "the determination we are called upon to make is whether the act has a real and substantial relation to that end or is a clear and arbitrary invasion of appellant's property rights guaranteed by the Constitution."³⁰⁵ In effect, therefore, courts were

to strike down as “arbitrary” statutes regulating businesses if the government could not demonstrate that the statutes bore “a real and substantial relation” to an appropriate end.

In *Baldrige*, the Court held the Pennsylvania statute unconstitutional because “[n]o facts are presented by the record, and, so far as appears, none were presented to the legislature which enacted the statute,” that restricting ownership would contribute to public health.³⁰⁶ The lesson was clear: State interference with normal market operations would be held unconstitutional absent evidence establishing a substantial relationship to an appropriate end.³⁰⁷ Sutherland thus made elegantly explicit the dismantling of deference that had been implicit in *Jay Burns* and *Weaver*.³⁰⁸ In dissent Holmes could say only that “[b]ut for decisions to which I bow I should not think any conciliatory phrase necessary to justify what seems to me one of the incidents of legislative power. I think however that the police power as that term has been defined and explained clearly extends to a law like this, whatever I may think of its wisdom, and that the decree should be affirmed.”³⁰⁹

V. *Adkins v. Children’s Hospital*

The decisions to which Holmes bowed were all Taft Court precedents.³¹⁰ One decision that Sutherland did not cite in *Baldrige*, but which was undoubtedly the foundation for many subsequent Taft Court cases, was his own 1923 opinion in *Adkins v. Children’s Hospital of the District of Columbia*.³¹¹ In the eyes of contemporaries, *Adkins* was the “*chef d’oeuvre* of the Taft Court.”³¹² It held that the minimum wage legislation enacted by Congress for the District of Columbia was unconstitutional under the Due Process Clause of the Fifth Amendment.

Speaking for a majority of five, Sutherland in *Adkins* laid the theoretical groundwork for the Taft Court’s increasingly aggressive attitude toward legislative attempts to exercise the police power. “There is, of course, no such thing as absolute freedom of contract,” Sutherland wrote. “But freedom of contract is, nevertheless, the general rule and restraint the exception, and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances.”³¹³ This is the precise proposition expressed by *Baldrige*’s doctrinal structure five years later. *Adkins* would become the progenitor of a distinctively dogmatic and unbending line of Taft Court precedents that categorically prohibited price fixing unless property was “affected with a public interest.” As we have seen, it was this line of cases that would eventually drive Stone into the arms of Brandeis and Holmes.³¹⁴

Adkins concerned a 1918 federal statute providing for minimum wages for women and minors in the District of Columbia.³¹⁵ The purpose of the Act was “to protect the women and minors of the District from conditions detrimental to their health and morals, resulting from wages which are inadequate to maintain decent standards of living.”³¹⁶ Enacted “while the country was still inspired by war conditions to subordinate individual rights of liberty and property to the accomplishment of the common good,”³¹⁷ the Act was relatively uncontroversial, passing with only sixteen negative votes in the House³¹⁸ and only twelve in the Senate.³¹⁹ Although legislation fixing minimum wages for women was a recent innovation—the first state statute was enacted in 1912—Congress could by 1918 draw on existing legislation in eleven states.³²⁰ The constitutionality of this legislation had been upheld by decisions in four state supreme courts.³²¹

Back in December 1914, Brandeis had himself argued before the Supreme Court when it reviewed the first of these decisions, the Oregon case of *Stettler v. O'Hara*.³²² The case mysteriously lay dormant for years, but was restored to the docket for re-argument after Brandeis's appointment to the Court in 1916. By then Frankfurter had succeeded Brandeis as counsel *extraordinaire* for the National Consumers' League, and it was thus Frankfurter who re-argued the case in January 1917.³²³ Eventually the Oregon Supreme Court decision upholding the legislation was affirmed by an equally divided Court on April 9, 1917, with Brandeis recusing himself. It was plain to all, therefore, that between 1916 and 1922 a majority of five Justices were prepared to affirm the constitutionality of legislation establishing minimum wages for women.³²⁴ *Adkins* was anticipated as the case that "will be the first to show the alignment of the new court,"³²⁵ which had just been augmented by three new Harding appointments. When finally released, Sutherland's opinion for McKenna, Van Devanter, McReynolds and Butler was "surprising and shocking"³²⁶ in its ambition to cabin what until then had virtually been taken for granted.³²⁷

Stripped to its essentials, the theory of minimum wage legislation for women was that large numbers of them were receiving wages less than that required to sustain "the barest necessities" of life.³²⁸ Congress concluded that "the health of a considerable section of the present generation was impaired by undernourishment, demoralizing shelter and insufficient medical care. Inevitably, the coming generation was thereby threatened. . . . [F]inancial burdens were imposed upon the District involving excessive and unproductive taxation, for the support of charitable and quasi-charitable institutions engaged in impotent amelioration rather than prevention."³²⁹ The legislation authorized a Minimum Wage Board to set a "living wage" for women that would make up "for the deficit between the cost of women's labor—i.e., the means necessary to keep labor going—and any rate of women's pay below the minimum level for living, and thereby to eliminate all the evils attendant upon such a deficit on a large scale."³³⁰ Frankfurter represented the District. He filed a sprawling 1,138 page Brandeis brief, filled with what the Court called a "mass of reports, opinions of special observers and students of the subject,"³³¹ which sought to demonstrate that the harms identified by Congress were real and that Congress's choice of a remedy was not arbitrary.³³²

The question presented by *Adkins* was whether the minimum wage statute was inconsistent with "the right to contract about one's affairs" that inhered in "the liberty of the individual protected" by the Due Process Clause.³³³ The statute was challenged by the Children's Hospital of the District of Columbia, which alleged that the statute interfered with its right to employ "a number of women—scrubwomen, washerwomen, attendants, etc.—at less than the minimum wage." It was also challenged by Willie A Lyons, a 21 year old woman employed by the Congress Hall Hotel who was fired after the Hotel claimed that it could not afford to employ her at the minimum wage.³³⁴ Alleging that the statute was "a 'price-fixing' law, pure and simple," these plaintiffs argued that "*the amount of the charge* received . . . for . . . labor in private business can not *itself* be called a matter affecting the public health, morals or safety, and thus brought within the scope of the police power."³³⁵ "The reason for this . . . is that the Constitution itself has laid down certain fundamental principles of economics in establishing private ownership of property and individual liberty; that these principles can not *themselves* be declared to be inimical to the public health, safety, morals or welfare, and changed under the guise of an exercise of the 'police power.'"³³⁶

Plaintiffs argued that a minimum wage law was distinct from legislation “limiting work in underground mines or restricting hours of labor,” for the latter “directly” promotes health and safety. Even if such laws “affect indirectly contractual relations between individuals or cause loss to one or gain to another,” this redistribution is a “secondary” result, “not the ‘evil’ aimed at.”³³⁷ “[T]o take the property of A and give it to B, C and D is fundamentally different, even though by enriching B, C and D, their health or morals might be promoted indirectly. Laws which would transfer the money of one individual to another or fix the amount of money to be given in exchange for property, cannot have any real or direct relation to health.”³³⁸

To modern eyes, it might appear as if the argument framed for the Court was about Congress’s actual subjective purpose in enacting minimum wage legislation. Was it to protect the health and morals of women, or was it instead to redistribute wealth from employers to women employees? But *Adkins* actually posed a constitutional issue that was different and more obscure. *Adkins* asked whether government possessed constitutional authority to manipulate the price of labor to protect the health of women workers.

Many modern historians now believe that in the latter half of the 19th Century the Court created the antecedents of substantive due process doctrine to prohibit “‘class,’ ‘special,’ ‘partial,’ or ‘unequal’ legislation, ‘legislation that could not be regarded as public-regarding because it benefited certain interests groups or took from A to give to B.’”³³⁹ It is clear that “one of the central distinctions in nineteenth-century constitutional law” was that “between valid economic regulation” which served the public interest, and “invalid ‘class legislation,’” which served merely factional or partial interests.³⁴⁰ The Court’s hostility to “class legislation,” to legislation that benefitted only particular persons rather than the public as a whole, had deep roots in the anti-factionalism of the Founding period, as well as in the anti-privilege stance of Jacksonian Democracy.³⁴¹ With the exception of Holmes, who from the outset had conceived legislation as little more than the outcome of class struggle,³⁴² this intellectual framework deeply impressed members of the Taft Court who had come of age during the late 19th Century. When considering government regulation of labor unions or labor organizing, the rhetoric of “class legislation” came readily to mind.

Taft, for example, was frank to say that “I don’t like special legislation for labor unions.”³⁴³ Accepting the Republican nomination for President in 1912, Taft had condemned proposals “forbidding the use of the writ of injunction to protect a lawful business against the destructive effect of a secondary boycott” as “class legislation designed to secure immunity for lawlessness in labor disputes on the part of laborers.”³⁴⁴ Sutherland considered “class legislation” to be “the most odious form of legislative abuse,” and it “is by no means infrequent.”³⁴⁵

The distinction between legislation designed to benefit the entire community and legislation designed to benefit special classes became analytically obscure, however, when states at the turn of the century began to pass laws to provide for the safety of particular occupations or groups, as for example legislation limiting hours of work for underground miners³⁴⁶ or for women.³⁴⁷ The Court approved such legislation because it promoted the health of the statute’s beneficiaries, and because “the whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer.”³⁴⁸ Once the good of the entire public became indistinguishable from the good of its component parts, the very idea of class legislation became hopelessly ambiguous.³⁴⁹ It was no longer clear what it

meant to say that “the power of government could not be legitimately exercised to benefit one person or group at the expense of others.”³⁵⁰ The more trenchant question became whether legislation sufficiently served the good of its beneficiaries to justify intruding into freedom of contract.

*Lochner v. New York*³⁵¹ illustrates the point. In *Lochner*, the Court considered a New York statute limiting the hours of bakers to ten hours per day or sixty hours per week.³⁵² New York sought to justify its law as necessary to preserve the health of bakers. The question posed by the Court was whether the legislation was “a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?”³⁵³ Appealing to “common understanding,” the Court ruled “that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor.”³⁵⁴

The Court did not ask whether the New York statute served the interests of bakers or of the public. It instead questioned whether the legislation could be justified as necessary for the health of bakers, which was *assumed* to serve a common good. But the “mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.”³⁵⁵ This structure of analysis set the pattern for Taft Court decisions we have discussed, like *Jay Burns*, *Weaver* or *Baldridge*, which focus entirely on the instrumental adequacy of a statute’s justification.

In an important passage that presaged the specific argument of the plaintiffs in *Adkins*, however, *Lochner* also held that New York would be unjustified in limiting the hours of bakers merely “as a labor law, pure and simple.”

There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state, interfering with their independence of judgment and of action. They are in no sense wards of the state. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals, nor the welfare, of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker.³⁵⁶

The Court did not specify exactly why the New York legislation would be *per se* unconstitutional as a labor law.³⁵⁷ Perhaps it was because a pure labor law would constitute prohibited class legislation, for its *only* purpose was the forbidden objective of redistributing income from employers to bakers.³⁵⁸ Or perhaps it was because a pure labor statute lacked adequate justification to outweigh its impact on what the Court was coming to regard as the

increasingly valuable constitutional “right of free contract.”³⁵⁹ Or perhaps it was because a pure labor law would unconstitutionally “take” property without compensation.³⁶⁰ Whatever the explanation, some statutory regulations were off limits for the state, and in effect that is what the plaintiffs in *Adkins* alleged.

Defending the minimum wage law, Frankfurter established in *Adkins* that Congress’s stated purpose in enacting the legislation was to protect the health and morals of women. He also offered a massive evidentiary record to show that such legislation was rationally related to these purposes.³⁶¹ But, drawing on the tradition of *Lochner*, plaintiffs in *Adkins* argued that fixing the wages of women could not *as a matter of law* be held to promote the health of women, for explicit price fixing must be deemed, as a matter of constitutional law, “only remotely or indirectly” connected to the purpose of promoting health.³⁶²

Although Sutherland found for the plaintiffs, he did not accept their reasoning. He knew that the state could regulate prices for “property affected with a public interest,”³⁶³ and he did not wish to invalidate such regulation wholesale. He therefore chose to emphasize those aspects of *Lochner* stressing that the promotion of health could justify restrictions on freedom of contract only if there was good evidence of “direct relation, as a means to an end” for the restrictions.³⁶⁴ Although Sutherland asserted that this principle had “never been disapproved,”³⁶⁵ the Court had in fact abandoned it in 1917 in *Bunting v. Oregon*,³⁶⁶ which over the dissenting votes of White, Van Devanter and McReynolds, had upheld an Oregon statute limiting work to ten hours per day for men and women “in any mill, factory or manufacturing establishment in this State.”³⁶⁷ Sutherland mentioned *Bunting*, but confined it to its facts.³⁶⁸

Determining whether a statute was adequately connected to its purpose would seem to involve empirical questions. But Sutherland explicitly ignored the massive evidentiary record presented by Frankfurter’s brief, claiming that it was only “mildly persuasive”³⁶⁹ because bearing only on “the desirability or undesirability of the legislation” and reflecting “no legitimate light upon the question of its validity.”³⁷⁰ In a remarkable arrogation of authority, Sutherland relied on neither evidence nor precedents to conclude that the minimum wage statute was “a naked, arbitrary exercise of power.”³⁷¹ Sutherland reached this conclusion based upon purely deductive reasoning.³⁷² With a single sweep of his hand, Sutherland ruled out as constitutionally irrelevant the evidence of administrative practice and history that Brandeis had struggled for a lifetime to introduce into the Court’s constitutional logic.

Sutherland found much to criticize in Congress’s minimum wage statute.³⁷³ He unleashed a barrage of objections.³⁷⁴ He argued that the “standard furnished by the statute for the guidance of the board is so vague as to be impossible of practical application with any reasonable degree of accuracy.”³⁷⁵ He contended that it was impossible to set a standard minimum wage because each worker, depending on their particular financial circumstances, required a different weekly income to meet the necessities of life.³⁷⁶ He complained that “the relation between earnings and morals is not capable of standardization.”³⁷⁷ He protested that the law “ignores the necessities of the employer” by imposing obligations on him “irrespective of the ability of his business to sustain the burden.”³⁷⁸ He worried that the authority to fix a minimum wage implied the authority to fix a maximum wage, which would widen “the field for the operation of the police power . . . to a great and dangerous degree.”³⁷⁹ He demurred that the law compels an employer to pay a minimum wage “because the employee needs it, but requires no service of equivalent value from the employee. . . . To the extent that the sum fixed exceeds the fair value of the

services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility.”³⁸⁰

But the “feature of this statute, which perhaps more than any other, puts upon it the stamp of invalidity,” Sutherland wrote, “is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract or the work the employee engages to do. . . . The moral requirement implicit in every contract of employment, viz. that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored.”³⁸¹

The farrago of objections in Sutherland’s *Adkins* opinion make the decision confusing to parse, because it is impossible to determine what force to attribute to any given point. Taken individually, Sutherland’s complaints do not amount to much. It would be bold indeed to strike down the statute because it delegated too much discretion to the Minimum Wage Board, since the Court had approved delegations that were far less specific.³⁸² That different individual workers might require different levels of support to meet life’s requirements is a mere cavil; the same might be said of maximum hours legislation because individual workers possess different levels of physical stamina. The causal connection between low earnings and prostitution is an empirical question, but Sutherland categorically disclaimed the relevance of empirical data.³⁸³ Minimum wage legislation no more ignores the “necessities” of employers than does maximum hours legislation; each limits an employer’s freedom of contract in light of a categorical judgment about the needs of employees. It is, as Taft politely observed in his dissent, a simple “*non sequitur*” to claim that the power to fix a minimum wage implies the power to fix a maximum wage.³⁸⁴ If it is constitutionally objectionable to exact obligations from employers without demanding corresponding obligations from employees, it is an objection that equally applies against laws limiting hours of employment.

The crux of Sutherland’s critique, therefore, lay in the claim that the statute arbitrarily required employers to pay for the needs of employees, thus violating the core “moral requirement implicit in every contract of employment” that wages and service “shall bear to each other some relation of just equivalence.”³⁸⁵ Sutherland’s indictment of the statute combined two distinct assertions: (1) That it was *arbitrary* to fasten on employers obligations to pay for employee necessities for which employers bear “no peculiar responsibility”;³⁸⁶ and (2) that in so doing minimum wage legislation *ruptured* the “just” or “fair” exchange of value³⁸⁷ that is the essence of an employment contract. Sutherland asserted that regulating price, in contrast to regulating hours, went to “the heart of the contract, that is, the amount of wages to be paid and received.”³⁸⁸

With regard to the first of these assertions, minimum wage legislation rests on the premise that wages represent the primary income of most employees and that therefore, if wages cannot cover the cost of living of employees, they will become wards of the state. In effect, therefore, minimum wage legislation requires employers to internalize the minimum cost for the maintenance of labor and to pass that cost on to consumers in the form of higher prices. This is precisely the rationale that Sutherland himself had articulated in his powerful 1913 defense of workmen’s compensation laws: “The great industries of to-day are engaged in producing commodities or in rendering services for the general public. The consumers of these commodities or the recipients of these services are justly obligated to pay what they cost plus a fair return upon investment. . . . The injury of a workman resulting in loss of earning ability or

death as truly enters into the cost of production as the breaking of a piece of machinery. . . . There is no reason why the industry should not bear the expense . . . collecting it in the last analysis from the consumer just as it collects every other item of expense entering into the production.”³⁸⁹

Workmen’s compensation legislation forces employers to assume the costs of accidents that they do not individually cause, in the sense of acting negligently to injure employees. But Sutherland nevertheless accepted this attribution of responsibility, acknowledging that “It must be frankly recognized that the compensation law substitutes the communistic idea of benefit for the whole class in place of the individualistic theory which permits a minority of the class to recover much and the majority little or nothing. The justification for a compulsory and exclusive workmen’s compensation law rests in the conception that the workmen employed in any enterprise are industrial soldiers, who being injured in its service are entitled to be cared for to a fair and equitable extent, having in view the ability of the industry to pay.”³⁹⁰

Minimum wage legislation assumes the very same relationship between employers and employees as does workmen’s compensation legislation. In Sutherland’s words, “Workmen’s Compensation legislation rests upon the idea of status, not upon that of implied contract; that is, upon the conception that the injured workman is entitled to compensation for an injury sustained in the service of an industry to whose operations he contributes his work as the owner contributes his capital—the one for the sake of the wages and the other for the sake of the profits.”³⁹¹

The employee status recognized by Sutherland in the context of workmen’s compensation legislation sharply undermines Sutherland’s claim in *Adkins* that “In principle, there can be no difference between the case of selling labor and the case of selling goods.”³⁹² When Sutherland argued that the principle of minimum wage legislation would equally justify requiring a grocer to sell discounted food to a penurious customer,³⁹³ he was overlooking the obvious fact that no status relationship exists between a grocer and her customers. But Sutherland himself defended workmen’s compensation legislation in terms of the special status relationship between employers and employees, and this same relationship was equally pertinent in the context of minimum wage legislation. The relationship meant that it was not *arbitrary* to allocate the costs of both industrial accidents and employee subsistence to the employer/employee nexus.

In advocating for workmen’s compensation laws, Sutherland had been careful to caution that “our righteous anxiety to minimize human suffering” may lead too far in that it may remove “the stimulating necessity of personal effort which compels us to rise.” “The unfortunate must be cared for; the soldiers of industry who fall must be lifted up, but no deadlier check could be put upon the upward march of civilization than to embark upon such a scheme of emotional socialism as would put upon the backs of the strong not only the care of those who can not but of those who can but will not bear their own burdens. In framing our laws we must never lose sight of the vital distinction between helplessness, which is a misfortune, and laziness, which is a vice.”³⁹⁴ Sutherland plainly believed that minimum wage legislation fell on the wrong side of this line.

The question is why the placement of this line was not quintessentially a matter for legislative judgment. Sutherland’s answer was that a minimum wage statute is “simply and exclusively a price-fixing law”³⁹⁵ that deprives employers of the “just” or “fair” exchange of value that is “the moral requirement implicit in every contract of employment.” The mark of an

employment contract is that, “generally speaking, the parties have an equal right to obtain from each other the best terms they can as the result of private bargaining.”³⁹⁶ By requiring that employees receive more than the “fair” or “just” value of their work, as defined by voluntary exchange in the market, minimum wage legislation corrupts the “heart” of the employment contract and encourages laziness. Sutherland thus viewed minimum wage legislation as inconsistent with a regime of private property.

Yet Sutherland’s analytic framework rested on a simple and obvious fallacy. There is nothing intrinsically “fair” or “just” or “moral” about wage contracts. A wage contract represents merely what Sutherland (quoting Adam Smith) called the “higgling of the market.”³⁹⁷ The market does not necessarily produce fair, just, or moral bargains.³⁹⁸ Indeed, the contrast between “real” and “market” value was, as we have seen, the basis of the Court’s decision one month after *Adkins* in *United States v. New River Collieries Co.*,³⁹⁹ in which the Court held that market price, rather than “real” value, should measure compensation for property confiscated by the state.⁴⁰⁰ In a properly functioning market, employment wages represent a voluntary meeting of the minds that may or may not be “fair,” “just” or “moral.”

The essential question, then, is whether good reason exists to distrust the voluntariness of women’s wages set in the “higgling” of the labor market. Sutherland himself had acknowledged the relevance of this inquiry when, in defending workmen’s compensation legislation, he had explained the need to abandon the common law doctrine of assumption of the risk: “[T]he laborer in modern industry in this day of sharp competition is not quite free to accept or refuse work at his pleasure.”⁴⁰¹ The lack of a free labor market is why Sutherland believed that workmen’s compensation legislation should be based on the “status” of the employment relationship rather than on “contract.”⁴⁰²

Whether the functioning of the labor market justified confidence in a voluntary meeting of the minds about wages was ultimately an empirical question. The issue was particularly acute in the labor market for women, who were paid less than men for equivalent work and who were less well organized than men.⁴⁰³ Ultimately the case for the District of Columbia minimum wage statute “depended upon the belief that a woman might be forced by necessity to accept wages” that were inadequate, unjust, unfair, and immoral,⁴⁰⁴ just as workmen might be forced by necessity to accept work that was inherently unsafe. The precise constitutional question was whether that belief was reasonable.

Sutherland’s answer to this question was characteristically abstract. He postulated that *Adkins* concerned a statute that forbade “two parties having lawful capacity . . . to freely contract with one another in respect of the price for which one shall render service to the other in a purely private employment where both are willing, perhaps anxious, to agree.”⁴⁰⁵ As for the specific status of women’s labor, Sutherland remarked that the “revolutionary changes which have taken place. . . in the contractual, political and civil status of women, culminating in the Nineteenth Amendment,” have diminished non-physical differences between the sexes almost “to the vanishing point.”⁴⁰⁶ “We cannot accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she

must be given special protection or be subjected to special restraint in her contractual and civil relationships.”⁴⁰⁷

It is not clear, however, why the 19th Amendment was relevant to the facts of *Adkins*. Unlike the maximum hours legislation in *Muller*, the constitutional case for the District of Columbia minimum wage statute did not purport to rest on physical differences between men and women.⁴⁰⁸ Nor did the case for the statute purport to rest on the ground that women, like minors, were generically unable to engage in contractual bargaining, an argument that the Nineteenth Amendment might indeed have ruled out of order. Instead the constitutionality of the statute rested on the claim that the specific structure of the market for women’s wages significantly constrained their voluntary choices and thus justified state intervention, in the same way that analogous constraints justified the state’s abolition of the common law doctrine of assumption of risk in the context of workmen’s compensation.⁴⁰⁹

Ultimately, the argument for congressional minimum wage legislation was that “[l]ack of organization, the brevity of [women’s] industrial life, the large numbers of them ready to compete for unskilled jobs, the tradition of lower wages, the presence of many women working only for pin money and underbidding those who must earn a living . . . have convinced most people that women in industry” were unable to contract for the full value of their labor.⁴¹⁰ By refusing in *Adkins* to attend to empirical evidence that might either support or undermine the reasonableness of that claim, Sutherland undercut the ground from his own best defense of the statute.⁴¹¹

Brandeis did not participate in the Court’s deliberations, because his daughter Elizabeth was Secretary to the Minimum Wage Board.⁴¹² Taft authored a dissenting opinion that Sanford joined; Holmes dissented separately.⁴¹³ *Adkins* was commonly and appropriately received as the equivalent of a close five-to-four decision.⁴¹⁴ Two weeks after its release, Van Devanter confided to his friend John Pollock that “In many ways I have been fairly pleased with the court’s work, more so than with that of two or three years. However, the narrow vote by which a sane doctrine prevailed in the Women’s Minimum Wage admonishes one that he should not be too optimistic.”⁴¹⁵

Holmes’s dissent was basically what one would expect.⁴¹⁶ Adopting Frankfurter’s framing of the case, he affirmed that “the power of Congress seems absolutely free from doubt.”⁴¹⁷

The end, to remove conditions leading to ill health, immorality and the deterioration of the race, no one would deny to be within the scope of constitutional legislation. The means are means that have the approval of Congress, of many States, and of those governments from which we have learned our greatest lessons. When so many intelligent persons, who have studied the matter more than any of us can, have thought that the means are effective and are worth the price it seems to me impossible to deny that the belief reasonably may be held by reasonable men.⁴¹⁸

Holmes was especially perturbed that the statute was so plainly valid when measured against any of the “specific provisions of the Constitution”; no one contended, for example, that the law took “private property without just compensation.”⁴¹⁹ Instead the Court condemned the statute using only “the vague contours of the Fifth Amendment.”⁴²⁰ But this was to constrain legislative discretion based purely on a judicially created “dogma” of “Liberty of Contract.” “Contract,”

said Holmes, “is not specially mentioned in the text that we have to construe. It is merely an example of doing what you want to do, embodied in the word liberty. But pretty much all law consists in forbidding men to do some things that they want to do, and contract is no more exempt from law than other acts.”⁴²¹ Usury laws exemplified constitutional price regulations that constricted freedom of contract.

Sutherland was also wrong to think there was some untouchable “heart” to a contract; “the bargain is equally affected” by legislation restricting hours of employment.⁴²² Holmes was distressed that Sutherland had spent more than two pages quoting at length from *Lochner*. Holmes believed that *Lochner* should instead “be allowed a deserved repose.”⁴²³ “The criterion of constitutionality,” Holmes stressed, “is not whether we believe the law to be for the public good,” but whether “a reasonable man reasonably” might believe it to be so.⁴²⁴ This criterion was satisfied “by a very remarkable collection of documents submitted on behalf of the appellants.”⁴²⁵

If Holmes’s opinion was unsurprising,⁴²⁶ Taft’s dissent was distinctly unexpected.⁴²⁷ But Taft had co-chaired the War Labor Board during the war, and under his leadership the Board had declared that “all workers, including common laborers,” were entitled “to a living wage.”⁴²⁸ “In fixing wages, minimum rates of pay shall be established which will insure the subsistence of the workers and his family in health and reasonable comfort.”⁴²⁹ Taft was therefore unlikely to accept Sutherland’s glib attacks on the indeterminacy and incoherence of the very concept of a living wage. Taft in fact chided Sutherland for relying on distinctions “formal rather than real.”⁴³⁰

Taft’s dissent was powerful and cogent. He precisely identified the premise of minimum wage legislation. It proceeded, Taft said, “on the assumption that employees, in the class receiving least pay, are not upon a full level of equality of choice with their employer and in their necessitous circumstances are prone to accept pretty much anything that is offered. They are peculiarly subject to the overreaching of the harsh and greedy employer. The evils of the sweating system and of the long hours and low wages which are characteristic of it are well known.”⁴³¹ That the minimum wage for any given employee may be over or under inclusive was irrelevant, so long as the specified value of the minimum wage inures “to the benefit of the general class of employees in whose interest the law is passed and so to that of the community at large.”⁴³²

Taft also condemned Sutherland’s decision to rehabilitate *Lochner*. “It is impossible for me to reconcile the *Bunting Case* and the *Lochner Case* and I have always supposed that the *Lochner Case* was thus overruled *sub silentio*.”⁴³³ Insofar as the Court did not mean to overrule *Bunting*, there was no constitutional distinction, Taft argued, “between a minimum of wages and a maximum of hours in the limiting of liberty to a contract. . . . In absolute freedom of contract the one term is as important as the other, for both enter equally into the consideration given and received, a restriction as to one is not any greater in essence than the other, and is of the same kind. One is the multiplier and the other the multiplicand.”⁴³⁴ Certainly the Court should have respected the evidence presented “in the record and in the literature” that low wages and long hours “are equally harmful” to the “health” of employees.⁴³⁵ Taft was careful not to express an opinion about minimum wages for adult men, but cited *Muller* for the proposition that it was peculiarly within the province of government to protect the health of women.⁴³⁶

It was a heartfelt, compact, trenchant performance,⁴³⁷ but Taft would never again exercise such public independence from the gravitational pull of his conservative brethren.⁴³⁸ In the course of the decade, *Adkins* would flower into a line of cases prohibiting price-fixing that would set the Court on a collision course with the New Deal, and Taft would be solidly in the majority.

Adkins provoked an immediate public furor.⁴³⁹ Within the world of scholarship it was received with “practically unanimous disapproval”⁴⁴⁰ as “a step backward, to be retraced at the first opportunity.”⁴⁴¹ “As a flagrant instance of insufficient reasons and of a judgment widely regarded as an indefensible judgment, the minimum-wage decision has few, if any, rivals.”⁴⁴² It was also said that no Supreme Court decision “in many years has aroused the public interest created” by *Adkins*.⁴⁴³

Adkins was condemned as “the most deplorable pronouncement of the court since the Dred Scott decision.”⁴⁴⁴ It provoked the governors of Washington,⁴⁴⁵ Oregon,⁴⁴⁶ and Wisconsin⁴⁴⁷ to call for a meeting of governors to discuss a constitutional amendment to authorize Congress to prohibit child labor and to set minimum wages.⁴⁴⁸ Coolidge himself in his first State of the Union called for a constitutional amendment that would enable Congress to pass minimum wage legislation for women “in all cases under the exclusive jurisdiction of the Federal Government.”⁴⁴⁹ *Adkins* prompted others, like the Governor of Arizona and Senator Robert La Follette, to demand a constitutional amendment that would authorize Congress to override judicial decisions finding federal statutes unconstitutional.⁴⁵⁰ *Adkins* spurred the effort to pass congressional legislation that would prevent the Supreme Court from constitutionally invalidating federal legislation with less than a seven person majority.⁴⁵¹

In the end almost nothing came from any of these movements. A few States, particularly on the West Coast, persisted in open defiance of *Adkins*, even after the Court reaffirmed the unconstitutionality of minimum wage statutes in cases involving Arizona (1925) and Arkansas (1927).⁴⁵² With the crushing defeat of La Follette’s third-party presidential bid in 1924, open agitation against the Court’s constitutional jurisdiction effectively subsided for the remainder of the decade.

VI. Price-Fixing and Property Affected with a Public Interest

The Taft Court’s conservative wing would seize this lull further to tighten constitutional restrictions on government regulation. Building on *Adkins*, the Court explicitly distinguished price-fixing from all other forms of police power regulation, and it held that price-fixing was permissible only for property that could constitutionally be classified as “affected with a public interest.” The Court increasingly embraced Sutherland’s signature style of abstract reasoning sharply to limit the category of property affected with a public interest, a doctrinal usage that had developed gradually since the late 19th Century.

Famously first propounded in the 1876 case of *Munn v. Illinois*,⁴⁵³ the doctrine originally identified the kinds of property or businesses that could constitutionally be subject to comprehensive administrative regulation, including rate regulation.⁴⁵⁴ Such property was exemplified by railroads and utilities. Until 1923 there had been an erratic but steady expansion of the kinds of property deemed “affected with the public interest.”

The apex of this expansion was perhaps the Court's 1914 decision in *German Alliance Insurance Co. v. Kansas*,⁴⁵⁵ which had held that the business of fire insurance was "so far affected with a public interest as to justify legislative regulation of its rates."⁴⁵⁶ Citing precedents like *Schmidinger* and *Muller*, McKenna, writing for six Justices, declared in *German Alliance* that the "underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation."⁴⁵⁷ "Contracts of insurance," McKenna observed, belong to the category of property affected with a public interest because they "have greater public consequences than contracts between individuals to do or not to do a particular thing whose effect stops with the individuals."⁴⁵⁸

McKenna pointedly refused to draw any distinction between regulating the practices of a business and regulating its prices. "It is idle," he said, "to debate whether the liberty of contract guaranteed by the Constitution of the United States is more intimately involved in price regulation than in the other forms of regulation as to the validity of which there is no dispute. . . . [H]ow can it be said that fixing the price of insurance is beyond [the power of government] and other instances of regulation are not?"⁴⁵⁹ In a powerful dissent, Justice Lamar, joined by Van Devanter and Chief Justice White, argued that "The fixing of the price for the use of private property is as much a taking as though the fee itself had been condemned for a lump sum But the court in this case holds that there is no distinction between the power to take for public use and the power to regulate the exercise of private rights for the public good. . . . [I]f, as seems to be implied, the fact that a business may be regulated is to be the test of the power to fix rates, it would follow, since all can be regulated, the price charged by all can be regulated."⁴⁶⁰

World War I actualized the dissent's nightmare. "The extraordinary circumstances of the war" brought a wide swath of businesses "clearly into the category of those which are affected with a public interest and which demand immediate and thorough-going public regulation."⁴⁶¹ The government engaged in aggressive and comprehensive price fixing,⁴⁶² which the White Court permitted to bleed over into peacetime rent control in cases like *Block v. Hirsh*.⁴⁶³ In their quest for normalcy, however, Harding's appointments almost immediately initiated what contemporaries correctly perceived as "a flat reversal of direction."⁴⁶⁴ *Adkins*, with its sharp distinction between regulating hours of employment and regulating wages, was the opening salvo. Only two months later, speaking through Taft, the Court unanimously decided the pivotal case of *Chas. Wolff Packing Company v. Kansas Court of Industrial Relations*,⁴⁶⁵ which in dicta sought deliberately to contract the definition of property affected with a public interest.

At issue in *Wolff Packing* was the constitutionality of a remarkable Kansas statute declaring that industries involved in the production or manufacture of clothing, food, and fuel were "affected with a public interest." The statute established a Court of Industrial Relations with authority to fix wages and other conditions of operation within these industries whenever their "continuity or efficiency" was endangered.⁴⁶⁶ Because the statute prohibited strikes, it was widely regarded as imposing compulsory arbitration.⁴⁶⁷

The case for the Kansas statute essentially rested on *Wilson v. New*,⁴⁶⁸ in which the White Court, over the dissents of Day, Pitney, Van Devanter and McReynolds, had upheld congressional legislation setting an eight-hour day and temporarily setting a wage-scale for employees of interstate railroads.⁴⁶⁹ The legislation had been enacted during an "emergency";⁴⁷⁰ it was intended to avert an imminent nationwide strike that "would leave the public helpless, the

whole people ruined and all the homes of the land submitted to a danger of the most serious character.”⁴⁷¹

The Court upheld the legislation, because “the business of common carriers by rail is in a sense a public business because of the interest of society in the continued operation and rightful conduct of such business,” and because this “public interest begets a public right of regulation to the full extent necessary to secure and protect it.”⁴⁷² That the setting of wages was ordinarily “primarily private” and “not subject” to the control of “public authority”⁴⁷³ was irrelevant. The “dispute between the employers and employees as to a standard of wages” and “their failure to agree” imminently threatened “the entire interruption of interstate commerce . . . and the infinite injury to the public interest.”⁴⁷⁴

Wilson v. New was decided only one month before the nation entered World War I. The urgent need for national integration and unification permeates the opinion. The Kansas statute was an effort to project that same sense of public necessity into the post-war years. It had been proposed by Kansas Governor Henry Justin Allen upon his return from Europe after the war. A progressive, Bull Moose Republican,⁴⁷⁵ Allen had a robust conception of the public interest.⁴⁷⁶ Upon confronting a bitter coal strike during the freezing winter of 1919-20,⁴⁷⁷ he recruited a volunteer army of mostly ex-servicemen to replace the striking miners.⁴⁷⁸ Resolving that the public would never again suffer because of private labor disputes,⁴⁷⁹ Allen proposed a statute that imposed full-fledged “legal compulsion”⁴⁸⁰ onto the workplace.⁴⁸¹

The statute created a Kansas Court of Industrial Relations (“KCIR”), which was intended to speak for a public interest that transcended the “private war”⁴⁸² of capital and labor. Its authority was succinctly summarized by a question put by Allen to Samuel Gompers during a well-publicized debate between the two men in Carnegie Hall. Gompers vigorously attacked the Kansas statute’s prohibition of strikes as a denial of “liberty,” an infringement of “the right to own oneself . . . that he may do with his powers what best conserves his interests and his welfare.”⁴⁸³ Allen responded with a question:

When a dispute between capital and labor brings on a strike affecting the production or distribution of the necessaries of life, thus threatening the public peace and impairing the public health, has the public any rights in such a controversy, or is it a private war between capital and labor?

If you answer this question in the affirmative, Mr. Gompers, how would you protect the rights of the public?⁴⁸⁴

The KCIR was designed to enforce “the rights of the public.” The Kansas statute was thus the polar opposite of “invalid ‘class’ legislation.”⁴⁸⁵ The KCIR was established to exercise public “mastery” of public problems, exactly as the country had done during the war.⁴⁸⁶ What lent plausibility to this claim was that post-war labor strife in the United States had become so intense that it seemed to transform the entire nation into a battlefield. In upholding the KCIR in 1921, the Kansas Supreme Court detailed the carnage:

Between April 6, 1917, and November 11, 1918, the period of our participation in the World War, there were more than 6,000 strikes in the United States, some of which imperiled winning the war. . . .

During the war the various war agencies responded, under direction of the President, to the demands of labor with great liberality; but in his message before Congress of May 20, 1919, the president said:

“We cannot go any further in our present direction. We have already gone too far. We cannot live our right life as a nation or achieve our proper success as an industrial community if capital and labor are to continue to be antagonistic instead of being partners; . . .

The strike record of the year 1919, however, proved to be the most disheartening one in our industrial history. The statistics are amazing, even to minds accustomed to war figures. Millions of men and women were involved. The following is a partial list of the more important strikes and lockouts shown by the government report for 1919:

“A general strike in Tacoma and Seattle in February in sympathy with the metal-trades strikers, in which 60,000 persons were involved; 65,000 employees in the Chicago stockyards struck in August; 100,000 longshoremen along the Atlantic Coast struck in October; 100,000 employees in the shipyards of New York City and vicinity struck in October; 115,000 members of the building trades were locked out in Chicago in July; 125,000 in the building trades in New York City struck in February; 250,000 railroad shop workers struck in August; 367,000 iron and steel workers struck in September; and 435,000 bituminous coal miners struck in November. The number of persons concerned in these nine strikes and lockouts was upward of 1,600,000, while the total number of persons involved in strikes and lockouts during 1919 was 4,112,507.” . . .

The direct losses in money amounted to stupendous sums. William Z. Foster, who conducted the steel strike, says that struggle alone cost a billion dollars. The indirect losses were beyond computation. The moral effect was such that school children learned to strike; and the unspeakable crime was committed in Boston when the policemen struck. . . .⁴⁸⁷

It is no wonder that the Kansas legislation captured widespread “public attention.”⁴⁸⁸

The doctrinal category that proponents of the KCIR hoped would justify its extraordinary power was that of “property affected with a public interest.” The railroads in *Wilson v. New* had historically been classified as such property; it was argued, not without reason, that “the price of food and raiment” were “more important to the community than the cost of its carriage.”⁴⁸⁹ The Kansas Supreme Court adopted this theory in upholding the KCIR:

Organized government has never been without power to make regulations whenever the conduct of business threatened public harm, and the power has been exercised as occasion required . . . In 1876, the decision in *Munn v. Illinois* was rendered. That decision was followed by determined reactionary efforts to limit its application to definite classes of business These and other efforts to limit, and even to overthrow, the doctrine of the *Munn Case*, failed, and all the arguments by which they were sustained were refuted in the opinion in the case of *German Alliance Insurance Co. v. Kansas* . . . a landmark in the progress of the law almost as noteworthy as the case of *Munn v. Illinois*.⁴⁹⁰

Property affected with a public interest could constitutionally be subject to comprehensive regulation, exemplified by “the minutely detailed government supervision”⁴⁹¹ established by the Transportation Act of 1920.⁴⁹² The argument of the Kansas Supreme Court implied that government could apply such comprehensive regulation as public necessity required, virtually throughout the economy. This would extend wartime price fixing authority into the 1920s. The possibility was deeply worrisome to conservatives:

The control of business activities exercised by the Federal Government during the war . . . more or less accustomed people to government supervision, restraint and direction. The assertion by the State legislatures of similar control, since the close of hostilities, therefore, has met with less opposition than naturally would have been the case without such preparation. The most striking example of this type of legislation is that furnished by the Kansas “Industrial Court Law.”⁴⁹³

In *Wolff Packing*, Taft, speaking for a unanimous Court,⁴⁹⁴ used the Fourteenth Amendment to cut short any such doctrinal expansion of the category of property affected with a public interest.⁴⁹⁵ Taft’s concern was not that Kansas had enacted impermissible class legislation; he was not worried that Kansas had intervened to aid either labor or management. To the contrary, both Taft⁴⁹⁶ and Sutherland⁴⁹⁷ believed that the public possessed a strong and legitimate interest in diminishing industrial strife. Only four months previously Taft had authored an important unanimous opinion upholding the Railroad Labor Board, which had been created by the Transportation Act of 1920 “to act as a board of arbitration” empowered to articulate “the force of public opinion” with regard to “the economic interest of every member of the public in the undisturbed flow of interstate commerce.”⁴⁹⁸ No one disagreed that the KCIR spoke for this same public interest. In *Wolff Packing*, therefore, Taft focused not on whether the KCIR favored one class over another, but instead on whether the statute intruded too unreasonably on “the freedom of contract and of labor secured by the Fourteenth Amendment.”⁴⁹⁹

At issue in *Wolff Packing* was a KCIR order raising wages and altering other conditions of employment within a small and unprofitable meat packing company.⁵⁰⁰ In his original draft, Taft had apparently based his decision on the theory that preparing human food was not “affected with the public interest.”⁵⁰¹ In his final, published version, however, Taft merely cast strong doubt on this question and decided that, even if the Wolff Packing Company were clothed with the public interest, its owners and workers could not be ordered to continue in business “on terms fixed by an agency of the State.”⁵⁰²

Taft’s discussion of the “affected with the public interest” doctrine was nevertheless extensive and revealing. It began by quoting *Adkins* to the effect that “[f]reedom is the general rule, and restraint the exception.”⁵⁰³ Pointedly emphasizing that the classification of property as affected with a public interest is “always a subject of judicial inquiry” and could never be determined by “the mere declaration by a legislature,”⁵⁰⁴ Taft proceeded to explore the “circumstances” that could justify a “change from the status of a private business and its freedom from regulation into one in which the public have come to have an interest.”⁵⁰⁵ Taft knew full well that “[a]ll business is subject to some kinds of public regulation,” so that, in his most careful formulation, he fashioned the doctrine to determine “when the public becomes so peculiarly

dependent upon a particular business that one engaging therein subjects himself to a more intimate public regulation.”⁵⁰⁶

Taft had enormous difficulty giving analytic content to this boundary. His opinion sometimes evokes the “indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation.”⁵⁰⁷ Sometimes it refers to the “fear of monopoly.”⁵⁰⁸ Sometimes it employs the image of an “owner . . . devoting his business to the public use.”⁵⁰⁹ Sometimes it speaks of “great temporary public exigencies,” like those that had been determinative in *Wilson v. New* or *Block v. Hirsh*.⁵¹⁰ In the end, however, Taft was forced to confess that “it is very difficult under the cases to lay down a working rule by which readily to determine when a business has become ‘clothed with a public interest.’”⁵¹¹

Taft’s difficulty arose because he had no functional account of the purpose of the doctrine of “affected with a public interest.” While he could distinguish national emergencies, like those that had existed during the World War, he did not possess an analytic framework that could convincingly discriminate among the myriad lesser public purposes government regulation could serve. Nor did he have any explanation of the constitutional values at stake in the classification of particular forms of property as either private or public.⁵¹²

The most that can be said is that the rhetoric of Taft’s opinion points vaguely but unmistakably toward the importance of safeguarding from state intrusion a realm of freedom, whose boundaries are normative rather than functional, and whose center is located in the rounds of everyday life. “If . . . the common callings are clothed with a public interest by a mere legislative declaration, which necessarily authorizes full and comprehensive regulation within legislative discretion,” then, Taft saw, “there must be a revolution in the relation of government to general business.”⁵¹³ “It has never been supposed,” Taft wrote, “that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator, or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation. . . . [N]owadays one does not devote one’s property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings.”⁵¹⁴ In the end, therefore, Taft’s opinion in *Wolff Packing* evokes the same valorization of ordinary life and its “common callings” as that we detected in Butler’s opinion in *Jay Burns Baking*.

Although Taft’s opinion in *Wolff Packing Co.* does not explicate why the Constitution might protect the common callings from “intimate public regulation,” the debate that surrounded the KCIR offers some intriguing suggestions. Opposition to the KCIR centered on the claim that it brought ordinary economic life “under the managerial control of the State,”⁵¹⁵ that it sought to establish “managerial supervision, regulation, and control of a very extensive field of private industries.”⁵¹⁶ This kind of supervision reflects the same organizational expertise, the same use of a “science of administration and management, which rests on research, planning and cooperative control,”⁵¹⁷ which flourished during the World War I. Taft in *Wolff Packing* was determined to interpret the doctrine of “affected with a public interest” to limit the managerial prerogatives implicit in that expertise.⁵¹⁸

Taft did not explain why the managerial prerogatives of the state should be constitutionally limited, nor did he offer any crisp account of the parameters of how those constitutional limitations might be ascertained. Taft could only reaffirm *Adkins*' general presumption in favor of "freedom." That presumption, however, resonated with widespread popular objections to the KCIR, where "the experiment of Kansas to regulate the intimate details of the daily life of its citizens met with the disapproval and resentment of both employer and employee."⁵¹⁹ On all sides of the political spectrum, opposition to the KCIR circled around the claim that it subordinated social life to the dictates of an "administrative tribunal . . . miscalled a court,"⁵²⁰ empowered to adjust the "common machine"⁵²¹ of industrial life through administrative authority. Advocates of labor opposed the KCIR because it denied the "right of all workers to control their own lives."⁵²² Business interests opposed the KCIR because it violated "the American principle of economic freedom."⁵²³ The liberal center opposed the KCIR because it transformed independent democratic citizens into objects of managerial supervision. "What we want is a self-reliant, independent, free people, capable of working out their own destinies. The more opportunities people can have for self-control and the less they are dominated and directed . . . the more likely they are to develop in that direction."⁵²⁴

No doubt this same spectrum of views was present on the Court itself. What is striking about *Wolff* is its unanimity. On the left, we know that Brandeis had opposed compulsory arbitration since at least 1913, because he believed that it impaired the "moral vigor" necessary to maintain "the fighting quality, the stamina, and the courage to battle for what we want when we are convinced that we are entitled to it."⁵²⁵ In a note signifying his assent to Taft's opinion in *Wolff*, Brandeis wrote that "In *Wilson v. New* there was 'clear and present danger' and the 'curse was in its bigness.'"⁵²⁶ Only a month later Brandeis expounded to Frankfurter his belief that "fundamental rights" of "speech," "education," "choice of profession," and "locomotion" should "not be impaired or withdrawn except as judged by 'clear and present danger' test."⁵²⁷ It seems fair to infer, then, that Brandeis regarded the KCIR as an assault on the fundamental liberties necessary for democratic citizenship.

On the right, McReynolds gave full throated expression to the stakes at issue in *Wolff* when he dissented in 1934 in *Nebbia v. New York*, when the Hughes Court overruled Taft Court precedents and upheld price fixing in the dairy industry.⁵²⁸ In *Nebbia*, the Court rejected the idea that there existed any distinct category of property "affected with a public interest," noting that the phrase was the simple "equivalent of 'subject to the exercise of the police power'; and it is plain that nothing more was intended by the expression."⁵²⁹ In a dissent joined by Van Devanter, Sutherland, and Butler, McReynolds bitterly complained that fixing "the price at which A, engaged in an ordinary business, may sell, in order to enable B, a producer, to improve his condition, has not been regarded as within legislative power. This is not regulation, but management, control, dictation—it amounts to the deprivation of the fundamental right which one has to conduct his own affairs honestly and along customary lines. . . . [I]f it be now ruled that one dedicates his property to public use whenever he embarks on an enterprise which the Legislature may think it desirable to bring under control, this is but to declare that rights guaranteed by the Constitution exist only so long as supposed public interest does not require their extinction. To adopt such a view, of course, would put an end to liberty under the Constitution."⁵³⁰ Liberty, for the Taft Court's conservative members, included the right to conduct one's economic affairs "honestly and along customary lines."

All sides of the Court, then, recognized a sphere of individual liberty that was beyond the administrative management of the state. They differed in defining the exact nature and justification of that sphere. Those on the right emphasized economic freedoms associated with property, which they regarded as necessary both for production of economic wealth and for the expression of individual agency. Those on the left focused on the freedoms necessary for developing the competence of democratic citizens. The facts of *Wolff* allowed both sides to concur in striking down the KCIR.

The tragedy of Taft Court jurisprudence was that it failed to develop a normative account of the “property affected with a public interest” doctrine that might capitalize on this overlap and explain the contours and purposes of the doctrine. Instead the Court would develop the doctrine with the sole purpose of checking government authority to fix prices. In the second half of the decade, Sutherland would author three opinions for the Court, each sharply constricting the scope of “property affected with a public interest,” each dogmatically declaring that price-fixing was impermissible except with respect to such property.

We have already discussed the first two of these decisions, *Tyson & Brother v. Banton*⁵³¹ and *Ribnik v. McBride*.⁵³² In *Tyson*, New York had declared “that the price of or charge for admission to theatres . . . is a matter affected with a public interest,” and that theater tickets could not be resold “at a price in excess of fifty cents in advance of the price printed on the face” of a ticket.⁵³³ Sutherland, writing for a bare majority of five,⁵³⁴ began his analysis with the premise that “the power to regulate property, services or business can be invoked only under special circumstances.”⁵³⁵ Sutherland then took deliberate aim at the essential holding of *German Alliance Insurance*, which was that there was no qualitative differences between the power to regulate and the power to fix prices.⁵³⁶ Sutherland wrote that “the authority to regulate the conduct of a business or to require a license, comes from a branch of the police power which may be quite distinct from the power to fix prices. The latter, ordinarily, does not exist in respect of merely private property or business, but exists only where the business of the property involved has become ‘affected with a public interest.’”⁵³⁷

Conceding that “the full meaning” of the doctrinal classification of “property affected with a public interest” “cannot be exactly defined,”⁵³⁸ Sutherland nevertheless insisted that government had no constitutional authority to fix prices except with respect to property that “bore such a substantial and definite relation to the public interest as to justify an indulgence of the legal fiction of a grant by the owner to the public of an interest in the use.”⁵³⁹ Although the Court in *Weller v. New York*⁵⁴⁰ had unanimously upheld New York legislation requiring ticket brokers to be licensed,⁵⁴¹ Sutherland explicitly held that “a license is not a franchise which puts the proprietor under the duty of furnishing entertainment to the public or, if furnished, of admitting everyone who applies.”⁵⁴² The power to require a license falls “far short of the one here invoked to fix prices.”⁵⁴³

Building on *Wolff*, Sutherland, with Taft supplying the fifth vote,⁵⁴⁴ held that the “importance” of “theatres and other places of entertainment” to the public “falls below” that of “food and shelter . . . provisions or clothing.”⁵⁴⁵ “If it be within the legitimate authority of government to fix maximum charges for admission to theatres, . . . it is hard to see where the

limit of power in respect of price fixing is to be drawn.”⁵⁴⁶ “Subversions” of constitutional protections of property “are fraught with the danger that, having begun on the ground of necessity, they will continue on the score of expediency, and, finally, as a mere matter of course. Constitutional principles, applied as they are written, it must be assumed, operate justly and wisely as a general thing, and they may not be remolded by lawmakers or judges to save exceptional cases of inconvenience, hardship or injustice.”⁵⁴⁷

Sutherland’s opinion in *Tyson*, like Taft’s in *Wolff*, is directed at checking the undue expansion of state regulatory power. Sutherland’s odd claim that the Court was simply applying the Constitution as “written” was too much for Holmes, who was provoked to assert in dissent that, “as I intimated in *Adkins*, . . . the notion that a business is clothed with a public interest and has been devoted to the public use is little more than a fiction intended to beautify what is disagreeable to the sufferers. The truth seems to me to be that, subject to compensation when compensation is due, the Legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it.”⁵⁴⁸ “[P]olice power often is used in a wide sense to cover and . . . to apologize for the general power of the Legislature to make a part of the community uncomfortable by a change. I do not believe in such apologies. I think the proper course is to recognize that a state Legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain.”⁵⁴⁹ This was remarkably strong and pointed language for Holmes, whose opinion was joined by Brandeis.⁵⁵⁰

Stone and Sanford each dissented on the narrower ground that the New York legislation was not aimed at theaters, but at ticket brokers, who, “by virtue of arrangements which they make with the theater owners, ordinarily acquire an absolute control of the most desirable seats in the theaters, by which they . . . are enabled to exact an extortionate advance in prices for the sale of such tickets to the public.”⁵⁵¹ Stone and Sanford each sought to give rational economic meaning to the doctrine of “affected with the public interest.” They believed that the doctrine should be interpreted to authorize price fixing whenever the normal “‘free’ competition among buyers and sellers” had, for one reason or another, broken down.⁵⁵²

“No comment on Mr. Justice Sutherland’s elaboration of the words ‘affected with a public interest’ could be more cruel,” wrote Thomas Reed Powell, “than to place his discourse in juxtaposition with Mr. Justice Stone’s elucidation of its question-begging meaninglessness.”⁵⁵³ But Powell missed the larger point. Although Sutherland purported to value the higgling of the market, he was in fact uninterested in the empirics of actual market failure. Sutherland did not intend to fashion doctrine that would offer helpful guidelines about when price-fixing was constitutional and when it was not. His aim was instead simply to stop the post-war expansion of price-fixing regulation.⁵⁵⁴ And in this *Tyson* succeeded. Commentators immediately recognized that it was an “epochal case” that marked the “road to the supremacy of the Supreme Court over legislative action.”⁵⁵⁵

The Court advanced further down that road the following year in *Ribnik v. McBride*,⁵⁵⁶ in which Sutherland authored an opinion for five Justices striking down a New Jersey statute requiring that employment agencies charge only reasonable fees.⁵⁵⁷ *Ribnik* hardened the holding

of *Tyson* into a flat, mechanical, arbitrary rule.⁵⁵⁸ Even though employment agents were extensively regulated and licensed, “the power to require a license for and to regulate the conduct of a business is distinct from the power to fix prices.”⁵⁵⁹ Even though the public was properly and “deeply interested” in the behavior of employment agencies,⁵⁶⁰ its interest “is not different in quality or character from its interest” in the behavior of druggists, butchers, bakers, grocers, real estate rentals, and real estate brokers, and “in none of them is the interest that ‘public interest’ which the law contemplates as the basis for legislative price control.”⁵⁶¹ “Under the decisions of this Court it is no longer fairly open to question that, at least in the absence of a grave emergency, the fixing of prices for food or clothing, of house rental or of wages to be paid, whether minimum or maximum, is beyond the legislative power. And we perceive no reason for applying a different rule in the case of legislation controlling prices to be paid for services rendered in securing a place for an employee or an employee for a place.”⁵⁶² The employment brokers in *Ribnik* were no different from the ticket brokers in *Tyson*;⁵⁶³ the essential point is that both were essentially “private” businesses.⁵⁶⁴

This was a constitutional law of labels. The labels were fashioned to authorize ongoing price-fixing in areas that had been traditional before the war,⁵⁶⁵ like railroads and utilities, while preventing the expansion of the practice to other “common callings,” like employment agencies or the manufacturers of food.⁵⁶⁶ It was a deliberately non-purposive form of constitutional law, indifferent to why price fixing might be permissible for railroads but not for employment agencies. It refused to ask what function the doctrinal category of “property affected with a public interest” might meaningfully be designed to serve.

Stone authored a brutal dissent. He argued that there was no “controlling difference between reasonable regulation of price, if appropriate to the evil to be remedied, and other forms of appropriate regulation which curtail liberty of contract or the use and enjoyment of property.”⁵⁶⁷ Taking a leaf from Brandeis’s dissent in *Jay Burns*, Stone marshaled the data of “repeated investigations, official and unofficial,” to mount a devastating case documenting widespread abuses in the employment agency business and demonstrating that price control was the only effective remedy for those abuses.⁵⁶⁸ It was one thing, Stone acerbically noted, “[t]o overcharge a man for the privilege of hearing the opera, . . . to control the possibility of his earning a livelihood would appear to be quite another.”⁵⁶⁹ Matters of such importance should not be decided with eyes closed “to available data throwing light on the problem with which the Legislature had to deal.”⁵⁷⁰

Ribnik was roundly and justifiably criticized.⁵⁷¹ R.G. Tugwell, for example, celebrated the “pragmatic view of human necessity” informing Stone’s dissent and condemned the “blind adherence to some outmoded faith” animating Sutherland’s majority opinion.⁵⁷² He was appalled by the “pure and unreasoned dogma” of Sutherland’s decision, its “obvious . . . prejudice and dislike for bureaucratic meddling.”⁵⁷³ It is precisely this quality that drove Stone to reorient his understanding of the judicial role and to embrace the necessity of deference to avoid the possibility of imposing “personal economic predilections.”⁵⁷⁴

A year after *Ribnik*, the Taft Court in *Williams v. Standard Oil Co.*⁵⁷⁵ struck down a Tennessee statute regulating the price of gasoline. Sutherland’s opinion for the Court was essentially a victory lap. “It is settled by recent decisions of this court,” he said, “that a state Legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property involved is ‘affected with a

public interest.”⁵⁷⁶ “Nothing is gained by reiterating the statement that the phrase is indefinite,” Sutherland acknowledged, but nevertheless “that phrase . . . has become the established test by which the legislative power to fix prices of commodities, use of property, or services, must be measured.”⁵⁷⁷

Property was not to be classified as affected with a public interest “merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance.”⁵⁷⁸ It did not matter that gasoline “has become necessary and indispensable in carrying on commercial and other activities within the state. . . . [W]e are here concerned with the character of the business, not with its size or the extent to which the commodity is used. Gasoline is one of the ordinary commodities of trade, differing, so far as the question here is affected, in no essential respect from a great variety of other articles commonly bought and sold by merchants and private dealers in the country.”⁵⁷⁹

Sutherland could not have been clearer that the Court would arrogate to itself the authority to determine when price fixing was warranted, and that it would exercise its authority in a manner that was indifferent to purposive considerations of public policy. He could not have been clearer that the Court was determined to protect freedom to conduct “ordinary” economic transactions. As Robert Jackson subsequently observed, “‘Due Process,’ meant uncontrolled prices except where the Court saw fit to hold otherwise. . . . The Court pulled the teeth of regulation.”⁵⁸⁰ In effect this meant that the Court would permit price-fixing in areas in which it had been imposed before the war, but that it would not permit an expansion of that authority, and that it would refuse to give reasons for this bright line.

One can readily understand why this kind of decision-making might be perceived as arbitrary. Two decades previously Roscoe Pound had famously condemned the *Lochner* Court as exemplifying a mere “mechanical jurisprudence,”⁵⁸¹ blundering through a “cloud of rules . . . at the expense of practical results” and appealing “to artificial criteria of general application” that prevented “effective judicial investigation or consideration of the situations of fact behind or bearing upon the statutes.”⁵⁸² But the Taft Court was not blundering. It was engaged in a deadly serious effort to use the Constitution to contain the regulatory explosion unleashed by the war. Without ascertainable doctrinal guidance, the Court was in effect asking the American people to trust the Court’s intuitions about when price-fixing might be appropriate.

The adamant commitment of the conservative bloc wore down the opposition. Brandeis and Stone concurred in the result in *Williams*. Holmes was disgusted. He dissented, but without opinion. He wrote Stone that “in spite of Brandeis’s exhortations I do not intend to write. I have said my say. I thought I should say this: ‘Of course I yield to the authority of decided cases, and although I thought this case might be distinguished from its predecessor it is for the propriety that established the precedents to say how far the violet rays of the Fourteenth Amendment reach.’”⁵⁸³ “I am rather pleased with the innuendo of ‘violet rays,’” Holmes added, with a sardonic twinkle.⁵⁸⁴

Stone was not amused. “I like your phrase about the violet rays of the Fourteenth Amendment and would like to join you in it,” he wrote. “I hesitate merely because there are so many solemn-minded people, unembarrassed by any sense of humor, who might feel that we were treating lightly and irreverently a very serious matter. I shall, of necessity, touch the susceptibilities of such people often enough, so that I hesitate to do it unnecessarily. Of course there is a good deal in the majority opinion which seems utter rubbish to me.”⁵⁸⁵

VII. The Protected Realm of Freedom

It is worth pausing to think more carefully about the protected area of economic freedom that the Taft Court struggled so hard to protect from bureaucratic overreach. Consider the Court's decision in *Fairmont Creamery Co. v. Minnesota*,⁵⁸⁶ decided only two months after *Tyson* when the Court's rightward turn began to gather unstoppable momentum. Written by McReynolds, with Holmes, Brandeis and Stone dissenting, *Fairmont Creamery* considered a 1923 Minnesota statute that required those buying milk products to pay the same price in all areas of the state, "after making due allowance for the difference . . . in the actual cost of transportation."⁵⁸⁷ The statute was aimed at large centralized creameries, "supplied with ample capital and facilities," who would acquire a monopoly position by driving out competitors through overbidding on milk products.⁵⁸⁸

McReynolds objected that the statute contained no scienter requirement distinguishing price differentials engaged in with the purpose "of destroying competition" from perfectly innocent price differentials caused by the natural operation of the market.⁵⁸⁹ "As the inhibition of the statute applies irrespective of motive," McReynolds concluded,

we have an obvious attempt to destroy plaintiff in error's liberty to enter into normal contracts, long regarded, not only as essential to the freedom of trade and commerce, but also as beneficial to the public. Buyers in competitive markets must accommodate their bids to prices offered by others, and the payment of different prices at different places is the ordinary consequent. Enforcement of the statute would amount to fixing the price at which plaintiff in error may buy, since one purchase would establish this for all points, without regard to ordinary trade conditions.⁵⁹⁰

The real question comes to this: May the state, in order to prevent some strong buyers of cream from doing things which may tend to monopoly, inhibit plaintiff in error from carrying on its business in the usual way heretofore regarded as both moral and beneficial to the public and not shown now to be accompanied by evil results as ordinary incidents?

The passage invokes tropes of the "normal," the "usual," and the "ordinary," tropes which we have already seen pervade the Taft Court oeuvre. Although the Minnesota statute sought to override usual business practices in order to avert the acknowledged evil of monopoly, McReynolds concluded that "the inhibition of the statute has no reasonable relation to the anticipated evil--high bidding by some with purpose to monopolize or destroy competition."⁵⁹¹

When legislation forbids conduct because it might cause harm, it is customary to inquire into the causal connection between the prohibition and the harm. This ordinarily requires evidence about whether and how much the prohibition will in fact diminish the harm. What is striking about *Fairmont Creamery* is that McReynolds made no effort whatever to pursue any such empirical inquiry. He did not ask whether the Minnesota statute would actually prevent monopolization in the dairy industry. Instead his condemnation of the Minnesota statute rested entirely on normative assertion. "Looking through form to substance, [the statute] clearly and unmistakably infringes private rights, whose exercise does not ordinarily produce evil

consequences, but the reverse.”⁵⁹² The statute was arbitrary and unreasonable because of the intuitions of common sense.

Underlying *Fairmont Creamery* was a normative logic that is illuminated by a 1924 address of Charles Evans Hughes. Speaking as the President of the American Bar Association, Hughes postulated that “the spirit of the common law,” which was “the law of a free people, springing from custom, responsive to their sense of justice,” was “opposed to those insidious encroachments upon liberty which take the form of an uncontrolled administrative authority--the modern guise of an ancient tyranny, not the more welcome to intelligent free men because it may bear the label of democracy.”⁵⁹³ Although it was “doubtless impossible to cope with the evils incident to the complexities of our modern life . . . by the means which were adapted to the simpler practices of an earlier day,” Hughes nevertheless insisted that “there is no panacea for modern ills in bureaucracy” except “the ancient right . . . to reasonable definite and proclaimed standards.” He therefore celebrated the constraints imposed upon state power by the doctrine of substantive due process, which “does not refuse to legislatures the authority to enact reasonable measures to promote the safety, health, morals and welfare of the people,” but which requires enforcing “reasonableness after the essential method of the common law.”⁵⁹⁴

Constitutional reasonableness, on this account, expressed the same norms of custom and tradition as did the common law. Substantive due process doctrine deployed the criterion of reasonableness to protect the world of normal, ordinary economic transactions, long recognized by the common law, against the vast expansion of legislative regulation seeking to control market misfires. This is the structure of McReynolds’s opinion in *Fairmont Creameries*. All abrogations of traditional common law rights were not prohibited, as the example of workmen’s compensation legislation illustrates.⁵⁹⁵ But statutory regulations of “normal” business practices would be scrutinized under the essentially normative rubric of “reasonableness.”

The Taft Court jealously guarded its position as the ultimate authority of reasonableness. When the Federal Trade Commission sought to exercise its statutory and administrative prerogatives to regulate ordinary market practices, for example, the Court came down hard. “‘The words ‘unfair method of competition’ are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.’”⁵⁹⁶

The FTC, the Taft Court held, “has no general authority to compel competitors to a common level, to interfere with ordinary business methods or to prescribe arbitrary standards for those engaged in the conflict for advantage called competition. The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain. And to this end it is essential that those who adventure their time, skill, and capital should have large freedom of action in the conduct of their own affairs.”⁵⁹⁷

The Taft Court’s hostility to the FTC stands in sharp contrast to the deference that it typically accorded to ICC regulation of railroads.⁵⁹⁸ Brandeis wrote Taft that “I think the Court’s

treatment of the Federal Trade Commn—is much like that given the I.C.C. in its early years—and I fear that the fruit of our action may be again bitter. It is not good statesmanship to clamp down safety valves.”⁵⁹⁹ To modern eyes, the Court’s review of the ICC and the FTC should have been controlled by the same general principles of administrative law. But from the perspective of the Taft Court the two agencies were quite distinct. The mission of the ICC was to regulate property affected with a public interest, whereas the job of the FTC was to control “ordinary business methods.”

In protecting this realm of normal economic practices, the Taft Court fashioned a substantive due process doctrine that in many aspects eerily anticipates contemporary First Amendment jurisprudence, which performs the analogous task of protecting a constitutionally valuable realm of speaker autonomy. Many of the Taft Court’s decisions have the form of what today would be described as “overbreadth” analysis. In essence, the Taft Court required regulations to be narrowly tailored to their objective; they could not restrict more protected conduct than was necessary.⁶⁰⁰

This was the essence of Sutherland’s reasoning in *Tyson*, for example. After concluding that theatres were private businesses, Sutherland argued that price fixing was an unconstitutional method of regulating “fraud, extortion, collusive arrangements between the management and those engaged in reselling tickets,” because it “ignores the righteous distinction between guilt and innocence, since it applies wholly irrespective of the existence of fraud, collusion or extortion. . . . It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers also may be caught.”⁶⁰¹ McReynolds cited this passage from *Tyson* in *Fairmont Creameries* to support his conclusion that Minnesota could not suppress the price competition of all to prevent the improper overbidding of some.⁶⁰² In both *Tyson* and *Fairmont Creameries*, the Court strongly intimated that a proper scienter requirement would solve the overbreadth problem. The Taft Court also developed strong doctrines of vagueness⁶⁰³ and of unconstitutional conditions.⁶⁰⁴ It created a category of “great temporary public exigencies”⁶⁰⁵ that both acknowledged and cabined wartime regulations and that was homologous to the clear and present danger test.

At no time did the Taft Court explain why the realm of ordinary economic transactions required special judicial solicitude. But it is easy enough to infer that these transactions embodied, at least for the conservative Taft Court Justices, the prerogatives of property itself. They regarded these prerogatives as necessary to sustain the discipline and entrepreneurial energy that produced civilization.⁶⁰⁶ Respect for these prerogatives was indistinguishable from respect for the persons who possessed them. Economic liberty was regarded as essential for personhood itself.⁶⁰⁷ To deny a person the “property which is the fruit and badge of his liberty,” asserted Sutherland, evoking the grand American tradition of free-labor ideology,⁶⁰⁸ “is to . . . leave him a slave.”⁶⁰⁹ “Take from the citizen the right to freely contract and sell his labor for the highest wage which his individual skill and efficiency will command,” the District of Columbia Court of Appeals had affirmed in *Adkins*, “and the laborer would be reduced to an automaton--a mere creature of the state.”⁶¹⁰

These assumptions were part of everyday political culture during the 1920s. In *Shaw v. Gibson-Zahniser Oil Corp.*,⁶¹¹ for example, the Court addressed the issue of whether Oklahoma could tax land purchased for “a full blood Creek Indian” by the Secretary of the Interior. The

federal government provided that the land could not “be alienated or leased during the lifetime of the grantee prior to April 26, 1931.”⁶¹² The constitutional question, Stone wrote for a unanimous Court, turned upon “the purpose and character of the legislation” creating the Indian land allotment.⁶¹³ Whereas “early legislation affecting” Indians had “as its immediate object the closest control by the government of their lives and property,” so as to shield them “alike from their own improvidence and the spoliation of others,” later legislation sought to lead them to “the more independent and responsible status of citizens and property owners” by “the gradual relinquishment of restrictions upon the lands originally allotted to the Indians,” and “by encouraging their acquisition of other property and gradually enlarging their control over it until independence should be achieved.”⁶¹⁴ Thus, said Stone, to hold such lands immune from state taxation “would be inconsistent with one of the very purposes of their creation, to educate the Indians in responsibility.”⁶¹⁵

Stone’s equation of the prerogatives of property ownership with adult self-mastery and “the independent and responsible status of citizens”⁶¹⁶ well expresses the premises behind the Taft Court’s constitutional valorization of a realm of ordinary economic transactions. It almost certainly underlay a unanimous opinion like *Wolff Packing*. It was in fact a commonplace of thought in the 1920s. The owner of private property, affirmed one popular text, enjoys “a greater amount of independence; he develops personality.” Property thus “acts as a character-builder.”⁶¹⁷ I stress the normative dimensions of property ownership, rather than merely its instrumental connection to economic development, because Taft Court Justices generalized these dimensions to many of the customary prerogatives recognized by common law. It understood these prerogatives as prerequisite for the formation of adult independence and maturity, and hence for citizenship in a democracy. This is evident in two Taft Court precedents that remain vital today, *Meyer v. Nebraska*⁶¹⁸ and *Pierce v. Society of Sisters*,⁶¹⁹ each authored by McReynolds.

Decided a week before *Wolff Packing*, *Meyer* struck down a Nebraska statute prohibiting the teaching of foreign languages before eighth grade and the offering of private school instruction “in any language other than . . . English.”⁶²⁰ Legislation of this kind had been enacted by 21 States “in the patriotic stress of war,”⁶²¹ creating restrictions that by the 1920s were commonly regarded as springing “out of a war hysteria.”⁶²² As Barbara Woodhouse has observed, these restrictions were “supported by many who described themselves as progressive,”⁶²³ in part because of their vision of Americanization as a vehicle for creating “one common people, united for the common good in a just society, free from divisions of class and race.”⁶²⁴ Indeed, when the Nebraska Supreme Court upheld the statute, it stressed that it was not “class legislation, discriminating against some and favoring others,”⁶²⁵ but was instead “necessary for the public good.”⁶²⁶ Hence “individual rights must yield to the general public benefit.”⁶²⁷

The issue for the Taft Court in reviewing the statute, however, was not whether it was “‘class,’ ‘special,’ ‘partial,’ or ‘unequal’ legislation,”⁶²⁸ but rather “whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff . . . by the Fourteenth Amendment.”⁶²⁹ McReynolds, speaking for seven Justices,⁶³⁰ crafted an eloquent opinion defining that liberty in terms far transcending the narrow realm of market transactions:

While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration . . . Without doubt it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to

engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. . . . The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts.⁶³¹

The passage is extraordinarily rich and allusive. It expands from the “common occupations” explicitly affirmed in opinions like *Jay Burns*, *Wolff Packing*, *Tyson*, and *Fairmont Creamery*, to embrace an entire range of freedoms “long recognized at common law as essential to the orderly pursuit of happiness by free men.” Emphasizing the interdependence of economic prerogatives with and other common law rights, the passage cites a long string of substantive due process decisions that range from *Lochner* to *Adkins*.⁶³² *Meyer* would itself be cited by subsequent Taft Court cases dealing specifically with freedom of market transactions.⁶³³ We now inhabit a post-New Deal jurisprudential world, in which economic rights are sharply distinguished from other rights. But in the 1920s, this division had not yet opened into an unbridgeable chasm. *Meyer* illustrates that the pre-New Deal Court did not categorically distinguish “liberty” from “property” when describing the freedom protected by substantive due process.⁶³⁴ The blended prerogatives of property and liberty protected by the doctrine concerned the entitlements required for the maintenance of adult independence.

Meyer is sometimes read as a pinched opinion turning merely on the protection of property.⁶³⁵ It is true that *Meyer* emphasized the right of teachers of modern languages to pursue their “calling,” which McReynolds pointedly noted had always “been regarded as useful and honorable, essential, indeed, to the public welfare.”⁶³⁶ And it is also true that the opinion embraced “the natural duty of the parent to give his children education suitable to their station in life.”⁶³⁷ But the opinion stressed in addition that “the American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted.”⁶³⁸ The opinion contained little or no discussion of property,⁶³⁹ emphasizing instead the “fundamental rights” of individuals “which must be respected.”⁶⁴⁰ These rights were explicitly enumerated as those customarily protected by the common law as necessary for an ordinary life. The decision was contemporaneously understood as protecting “liberty.”⁶⁴¹ “The decision is rightly based on the ground that to forbid the learning of any tongue is an infringement upon personal liberty.”⁶⁴² Taft himself glossed *Meyer* as preventing states from banning the study of “foreign language, because such study was not the study of anything vicious and curtailed, in violation of the 14th Amendment, the liberty which the States were not permitted to deny to persons within its jurisdiction.”⁶⁴³

Holmes dissented from *Meyer* on the classic progressive ground that “I am not prepared to say that it is unreasonable to provide” that youth, raised in conditions of extreme linguistic pluralism, “shall hear and speak only English at school.” If “men reasonably might differ” about the importance of the policy, “it is not an undue restriction of the liberty either of teacher or scholar.”⁶⁴⁴ Brandeis, by contrast, rejected his usual pattern of progressive deference and joined McReynolds’s opinion. Brandeis observed to Frankfurter one month after *Meyer*’s publication

that “fundamental rights” concerning “education” and “choice of profession” should “not be impaired or withdrawn except as judged by ‘clear and present danger’ test.”⁶⁴⁵

The jurisprudential difference between Holmes and Brandeis is significant. For Holmes, deference signified appropriate judicial respect for “the will of the dominant forces of the community,”⁶⁴⁶ which he deemed equivalent to sovereign commands.⁶⁴⁷ For Brandeis, by contrast, deference signified appropriate judicial respect for the functioning of democratic processes of self-government.⁶⁴⁸ Because the right to education at issue in *Meyer* was prerequisite for democracy itself, deference was inappropriate. Thus in an editorial likely written by Walter Lippmann, the *New York World* praised *Meyer* for preventing States from dictating “what shall be and shall not be taught. This is a power which a free people can never surrender to any majority.”

[W]ithout liberty of opinion, which includes reasonable liberty of teaching, the majority which is often wrong is deprived of the means by which it can set itself right. For that reason, of all liberties the liberty to think and teach is the most fundamental. It is the one liberty above all others which a people cannot destroy and still remain free.

Therefore the judgment of the Supreme Court is to be welcomed as a very important landmark in the recovery of American liberty from the vandalism of the non-combatants who went mad during the war. . . .

The dissenting opinion of Mr. Justice Holmes is actuated, as we understand it, by no affection for these particular laws but by a strong conviction that the Federal power should not be used to interfere with the sovereignty of the States With this conviction of Mr. Justice Holmes The World would on almost any other issue agree.

Nothing is more important constitutionally than to preserve against Federal aggrandizement the authority of the States. There is, it seems to us, however, one thing which is still more important, democratically, and that is to preserve liberty of thought against all governmental authority.⁶⁴⁹

“*Meyer* was a watershed,” writes Gerald Gunther, because it split the progressive community.⁶⁵⁰ Unlike Lippmann, “Hand and Frankfurter quickly embraced Holmes’s position.”⁶⁵¹ By the late 1920s, Hand’s rejection of “the idea of a ‘common will’ existing independent of positive law,” as well as his loss of confidence “in the practicability of truly popular government,”⁶⁵² had induced him to adopt a purely Holmesian skepticism. But Brandeis never lost his faith in self-government, and throughout the decade he would seek to explore how courts could facilitate the democratic process itself.⁶⁵³

Brandeis believed in the rights of democratic citizens because he believed in the responsibilities of democratic citizenship. McReynolds’s opinion in *Meyer*, like Stone’s opinion in *Shaw*, reflects an analogous republican logic. Citizens enjoy the rights that establish them as independent in part because they are obligated to govern. These political overtones pervade McReynolds’s opinion in *Meyer*.

Nebraska had defended its statute on the ground that it was necessary “to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals.”⁶⁵⁴ But McReynolds proposed a very different image of the relationship between the state and its citizens:

For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide:

‘That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. * * * The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.’

In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.

The desire of the Legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. Unfortunate experiences during the late war and aversion toward every character of truculent adversaries were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the state and conflict with rights assured to plaintiff in error. The interference is plain enough and no adequate reason therefor in time of peace and domestic tranquility has been shown.⁶⁵⁵

Because the American state must be responsive to the will of the American people, the state was not constitutionally free to mold the American people into whatever shape it wished. To that end American citizens possessed constitutional rights to preserve the independent agency necessary for democratic citizens to control the state. This concept of substantive due process survives in modern doctrine, which in its best moments seeks to safeguard “from unjustified interference by the State” those aspects of “the culture and traditions of the Nation” deemed necessary for “the ability independently to define one’s identity that is central to any concept of liberty.”⁶⁵⁶

McReynolds more concisely expressed this same sense of republican independence two years later in *Pierce v. Society of Sisters*,⁶⁵⁷ in which he spoke for a unanimous Court⁶⁵⁸ in striking down an Oregon statute that had been adopted by referendum and that effectively prohibited private schooling for children between 8 and 16 years of age.⁶⁵⁹ Unlike *Meyer*, which involved a constitutional defense to a state criminal prosecution, *Pierce* arose in a federal suit for injunctive relief against the operation of the statute. The plaintiffs were corporations; one was a private Catholic religious school and the other a private military academy. Neither corporation could technically plead a violation of their liberty under the Fourteenth Amendment.⁶⁶⁰ But they could and did claim that the statute irreparably damaged their business and thus impaired their property rights. The question in the case was whether the Oregon statute was a constitutionally proper exercise of the police power.

The key holding of *Pierce* was that

Under the doctrine of *Meyer v. Nebraska*, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.⁶⁶¹

Unlike *Meyer*, which had spoken eloquently of the promotion of education, *Pierce* seemed on its face to turn more narrowly on the “liberty of parents and guardians to direct the upbringing and education of children under their control.” This has led to subsequent interpretations of *Pierce* as addressed to parental control within the family unit.⁶⁶² But McReynolds’s language was likely due to the fact that the damage to plaintiffs’ business was specifically caused by parental decisions to withdraw their children from private schools. The holding of *Pierce* was not about the attribution of decision-making authority within the family to parents as distinct from children. It was instead that state control of parental decisions was constitutionally unjustified.

On this point *Pierce* reiterated the logic of *Meyer*. The state lacked competence “to standardize its children by forcing them to accept instruction from public teachers only,” because the “child is not the mere creature of the state.” *Pierce* concerned the limits of state power, not the allocation of authority within the family.⁶⁶³ McReynolds was prepared to cede to the state a good deal of discretion over compulsory education,⁶⁶⁴ but he was determined to set limit conditions on that discretion. At the extreme, the state could not require all children to receive the same publicly supervised education. This limit should be understood in light of the development of public-school education in the United States.

During the oral argument of *Meyer*, the attorney for the defendant had rhetorically asked “When was the first compulsory school law passed? Within the lifetime of people in this court room. . . . The compulsory system, requiring children to attend some school, public or private, was first enacted in 1852.”⁶⁶⁵ Until the end of the 19th century, however, compulsory school laws were largely “symbolic,” because they “were unenforced and probably unenforceable.”⁶⁶⁶ After 1890, the compulsory schooling movement entered what historians call its “bureaucratic stage,” in which mandatory school attendance was extended to high school and enforced by increasingly complex administrative mechanisms, “including requirements for censuses to determine how many children there were, attendance hours, elaborate ‘pupil accounting,’ and often state financing of schools in proportion to average daily attendance.”⁶⁶⁷ “Each year,” Stanford education Professor Elwood P. Cubberley wrote exultingly in 1909, “the child is coming to belong more and more to the state, and less and less to the parent.”⁶⁶⁸

The creation of professional school administration was a major achievement of the progressive era. But it meant that the domain of childhood was increasingly colonized by administrative techniques analogous to those used by government agencies to regulate the

market. The expansion of state control in education aroused the same worries of objectification, independence, and agency as those provoked by managerial supervision in the economic sphere. As in *Meyer*, a “central concern of *Pierce* is the substantial threat to liberty posed by state-compelled identity.”⁶⁶⁹ Taft considered *Pierce* “the *Meyer* case over again.”⁶⁷⁰ *Pierce* turned on the proposition that the state cannot “standardize its children,” because the “child is not the mere creature of the state.”⁶⁷¹

The word “standardize” strongly suggests an underlying hostility to the mass administrative techniques so triumphantly featured during World War I and carried forward by Hoover’s Commerce Department,⁶⁷² which celebrated “the man who has a standard automobile, a standard telephone, a standard bathtub, a standard electric light, [and] a standard radio.”⁶⁷³ In their ballot argument against the proposed Oregon statute “The Seventh Day Adventists of Oregon” had argued that “The government that turns its citizens into subjects and makes them mere cogs in a wheel, without any rights of their own, is a government that is transforming itself into a tyranny.”⁶⁷⁴ The fear was of the instrumentalization of citizens unchecked by traditional liberal commitments to a private sphere of life immune from public regulation. In post-war America, this fear was associated with hostility to Prussian autocracy and communist Russia. A ballot argument against the proposed Oregon statute argued that “This measure initiates the method of public education which brought Prussia to her deserved destruction—giving the state dictatorial powers over the training of children and destroying independence of character and freedom of thought. In the present day Russia the Bolshevik government treats the child as the ward of the state. This measure proposes to adopt this method and to substitute state control for the authority and guidance of the parents and is destructive of American independence.”⁶⁷⁵ The proposed statute was “destructive of true Americanism.”⁶⁷⁶

Americanism, however, was a highly fraught subject during the 1920s. Just as the necessities of the war had promoted economic integration and planning, so they had inspired impulses toward national unity reflected in calls for “100 per cent Americanism.”⁶⁷⁷ Progressive, professional, well-intentioned educators had long viewed the public school as an essential pathway for Americanizing the huge influx of foreign immigrants who came to this country without speaking English and without comprehending American civic institutions, and this project accelerated during the 1920s.⁶⁷⁸ In the “tribal twenties,”⁶⁷⁹ when the nation suffered sharp increases in nativism, xenophobia, and intolerance of all kinds,⁶⁸⁰ the project of Americanization could easily become infected with terrible forms of prejudice.

This is the story of the Oregon statute itself. The ballot argument for the statute offered sober reasons that might be attributable to elite educators throughout the country. Public schools, it asserted,

Are the creators of true citizens by common education, which teaches those ideals and standards upon which our government rests. . . .

The assimilation and education of our foreign born citizens in the principles of our government, the hopes and inspiration of our people, are best secured by and through attendance of all children in our public schools.

We must now halt those coming to our country from forming groups, establishing schools, and thereby bringing up their children in an environment often antagonistic to the principles of our government.

Mix the children of the foreign born with the native born, and the rich with the poor. Mix those with prejudices in the public school melting pot for a few years while their minds are plastic, and finally bring out the finished product—a true American.⁶⁸¹

But the initiative was in fact a direct product of the Ku Klux Klan's "One Flag, One School" campaign," which was a "centerpiece of the Klan's platform of 100 percent Americanism."⁶⁸² The Court was well aware of the initiative's connection to the Klan,⁶⁸³ which had become a notorious powerhouse in Oregon.⁶⁸⁴ The Klan's primary target was the Catholic Church and its system of parochial schools. In the eyes of the Klan, Catholic and Jewish children should be compelled to undergo indoctrination by the Protestant majorities they assumed would control the public schools. Socialization in "common" values was a pre-eminent objective.⁶⁸⁵ Americanism, in the hands of the Klan, sought a form of ideological uniformity that would obliterate the distinction between public and private spheres of life.

Today we commonly use constitutional law to police the boundary between public and private spheres, but we typically do so by appealing to specific personal rights. *Pierce*, which "has proved the single, solid survivor of the era of substantive due process,"⁶⁸⁶ would now probably be regarded as a case involving religious liberty. A statute that deliberately sought to suppress private religious education would undoubtedly be challenged as inconsistent with the Free Exercise Clause. In *Pierce*, lawyers for private schools did in fact repeatedly raise questions of religious liberty.⁶⁸⁷ When *Pierce* was decided, however, the Free Exercise Clause had not yet been incorporated into the Due Process Clause for application against the States. The Court would take its first tentative steps in that direction one week later in *Gitlow v. New York*,⁶⁸⁸ when it incorporated the right of free speech. But it would refrain from incorporating the Free Exercise Clause for another fifteen years.⁶⁸⁹

Pierce instead deployed the Due Process Clause to negotiate the boundary between public and private spheres.⁶⁹⁰ Because the Clause says nothing specific about that boundary, the Court's appeal to the Clause was necessarily informed by deeper, implicit philosophical understandings,⁶⁹¹ which must be reconstructed. We can learn from *Meyer* and *Pierce* that the Court's two most moralistic Justices, Brandeis and McReynolds, were each fiercely committed constitutionally to defending *some* line that would immunize private individuals from state regulation. A plausible reconstruction is that each defined that sphere in terms of what they believed was necessary to ensure that persons would become and remain independent moral agents. They differed, however, in how they defined that sphere to serve this end.

McReynolds was far more likely than Brandeis to stress the importance of entrepreneurialism. This tells us something about McReynolds's tacit concept of personhood and its connection to active participation in the market. From McReynolds's other decisions, we can infer that he was also committed to the continuity and traditions of the common law, which he understood to define the sphere protected from state intrusion by the Fourteenth Amendment.⁶⁹² This suggests that McReynolds believed that individual agency was formed through the capacity

to exercise the freedoms protected in the common law,⁶⁹³ which reasonably adjudicated when the agency of one individual would become unacceptably oppressive to that of another.⁶⁹⁴

Although Brandeis valued small entrepreneurs like McReynolds, he was also deeply concerned about employees. He was focused on how the private power of some inhibited the personal development of others. For that reason he was far more likely than McReynolds to embrace innovative government interventions designed to offset the potentially crushing effects of private power authorized by traditional common law rules.

A case like *Meyer* indicates the overlap between the vision of McReynolds and Brandeis. The unanimity of decisions like *Wolff Packing* and *Pierce* suggests that this line between public and private existed in one way or another for all Taft Court Justices. In theory, each Justice revealed something of his understanding of the construction of independent moral agency by how was prepared to draw the line between public and private spheres of life. McReynolds and Brandeis are particularly clear cases because of their intense moralism. For Justices like Taft and Sutherland, by contrast, it is often impossible to disentangle a commitment to the construction of individual agency from a policy commitment to the systemic incentive effects of economic rights, which they believed were necessary to propel the economic development required for civilization.⁶⁹⁵

In *Adkins*, for example, Sutherland explained that the wage bargain should be immunized from state control because of the fairness and justice of that bargain. The plausibility of that argument turned on whether the bargain represented the voluntary consent of the parties, which expressed their independent agency. Sutherland had defended the constitutionality of workmen's compensation laws on the ground that employees could not be said to have meaningfully consented to workplace injuries. Workmen's compensation laws therefore did not override the economic agency of workers.

It is possible, however, that Sutherland's decision in *Adkins* was actually motivated by his policy judgment that minimum wage legislation produced intolerably negative effects on essential economic incentives, whereas his support of workmen's compensation statutes reflected his belief that such statutes did not seriously undermine the market. It is in retrospect impossible to know how much Sutherland's invocation of the normative requirements of independent agency was simply a rationalization of his views of appropriate economic policy. Sutherland's categorical refusal in *Adkins* to hear empirical evidence about the compulsions of the sweat labor system raises reasonable doubts about whether he scrupulously reserved the remedy of constitutional invalidation for cases in which individual agency was seriously imperiled.

The attempt to give construct a single, coherent account of the Taft Court's resurrection of substantive due process doctrine must always confront the complex array of possible motivations that might affect the resolution of any given case. Cases like *Meyer* and *Pierce* make unmistakably clear that the Taft Court sometimes used the doctrine to establish a public/private distinction that would preserve the moral independence of democratic citizens. It is this underlying clarity that accounts for the ongoing vitality of these decisions. What is now difficult for us to apprehend is that many Taft Court Justices regarded economic rights as

essential to this private sphere of moral independence. Our understanding of that view has been obscured by the cataclysm of the Great Depression.

During the 1920s, the thought that the interdependence of economic life had drained property of its moral and utilitarian significance was not accepted by a majority of the Taft Court Justices with respect to the “common callings.” In one of the most important of the Court’s decisions, however, this thought did surface in the specific context of urban land. In *Village of Euclid v. Ambler Realty Co.*,⁶⁹⁶ the Court upheld the constitutional authority of cities to engage in comprehensive municipal zoning. Sutherland authored the opinion for six Justices; Van Devanter, McReynolds and Butler each dissented without opinion.

It is hard to overstate the importance of *Euclid*. The decision “has had a profound effect on American life and jurisprudence,” providing “the constitutional foundation for an explosive growth in modern zoning, subdivision controls, and other governmental land use regulation that has transformed the organization and development of land and communities.”⁶⁹⁷ Yet the Taft Court had an extremely difficult time deciding *Euclid*, and its reasons for doing so remain the subject of perpetual controversy.

The case arose when the tiny village of Euclid, located just outside the municipal boundaries of Cleveland, invoked the authority of Ohio’s new zoning enabling legislation to adopt a comprehensive zoning ordinance in 1922.⁶⁹⁸ The ordinance restricted development on much of the land owned by the Ambler Realty Company to residential uses, thus (allegedly) reducing its value from \$10,000 per acre to \$2,500 per acre.⁶⁹⁹ Ambler hired Newton D. Baker, Wilson’s Secretary of War and former reform Mayor of Cleveland, to represent its interests. Baker promptly sought an injunction in federal court declaring the Euclid ordinance unconstitutional on its face.

It was the first federal lawsuit challenging the constitutionality of comprehensive zoning.⁷⁰⁰ “There was ample ground” for suspicion, wrote Alfred Bettman, a national expert on zoning whose amicus brief would prove influential in *Euclid*’s resolution, “that the Ambler Realty Company . . . represented a larger group seeking to destroy the zoning movement.”⁷⁰¹ Euclid might have been selected as a test case because even zoning experts considered it “a piece of arbitrary zoning and on the facts not justifiable.”⁷⁰²

The zoning movement was a recent development in American land use law. The first zoning ordinance had been enacted by New York City in 1916.⁷⁰³ It was motivated chiefly by the desire of upscale Fifth Avenue merchants to keep the rabble of the garment industry south of midtown.⁷⁰⁴ The value of New York real estate was so interdependent that rapid change in the character of neighborhoods could destroy millions of dollars of real estate investment. New York therefore stressed the necessity for zoning to secure the stability of property values necessary to attract future investment.⁷⁰⁵ It also emphasized the importance of “city planning” to “the health, comfort and welfare of the city and its inhabitants. New York City has reached a point beyond which continued unplanned growth cannot take place without inviting social and economic disaster. It is too big a city . . . to permit the continuance of the *laissez faire* methods of earlier days.”⁷⁰⁶ Without planning, the City could not adequately provide necessary services like fire

suppression, traffic control, rapid transit, sewage removal, street cleaning, public improvements, or water provision.⁷⁰⁷ Nor could it adequately secure the “public health” of its residents.⁷⁰⁸

The New York ordinance set off a national stampede. Fueled by rapid urbanization,⁷⁰⁹ the “growth of zoning in the United States was phenomenal. It swept the nation in the 1920’s.”⁷¹⁰ Immediately appreciating the importance of zoning, Hoover in September 1921 formed an advisory committee to consider the subject.⁷¹¹ The committee published both a Model Zoning Enabling Act⁷¹² and *A Zoning Primer*.⁷¹³ Both were enormously influential,⁷¹⁴ giving a “great national impetus to the practice of zoning.”⁷¹⁵ By the end of 1923, “zoning was in effect in 218 municipalities, with more than 22,000,000 inhabitants”; by 1925, 19 states had adopted the Model Act.⁷¹⁶

Baker filed his Bill of Complaint in May 1923. He sought to stem the overwhelming legislative tide toward zoning by alleging that the Euclid ordinance, which was mostly an unexceptional instance of the genre, “was enacted for the purpose of preserving the ideas of beauty officially entertained by the members of the council of said village and excluding uses of private property in said village offensive to the eccentric and supersensitive taste of said members of council and arresting and diverting the normal and lawful development of the lands of the plaintiff . . . in said village from those industrial, commercial and residence uses for which it is best suited and most available, all of which this plaintiff avers is done by . . . restrictions which invade alike the rights of private property and personal liberty guaranteed by the Constitution of the United States.”⁷¹⁷

The District Judge, D.C. Westenhaver, was Baker’s former law partner. He was a conservative jurist who had replaced Clarke on the Ohio bench after the latter had been promoted to the Supreme Court.⁷¹⁸ Westenhaver handed Baker a complete victory. Citing *Adkins* and *Wolff*, as well as Holmes’s opinion *Pennsylvania Coal Co. v. Mahon*,⁷¹⁹ Westenhaver concluded that Euclid had effectively confiscated Ambler’s property and so owed it compensation.⁷²⁰ “There can be no conception of property aside from its control and use,” Westenhaver reasoned.⁷²¹ The Euclid zoning ordinance drastically limited Ambler’s use of its property in a manner that had no “real and substantial relation to the maintenance and preservation of the public peace, public order, public morals, or public safety.”⁷²² Westenhaver in effect ruled “that zoning ordinances are necessarily unconstitutional.”⁷²³

The opinion threw the entire future of the burgeoning zoning movement into disarray. With the case headed to the Supreme Court, leaders of the National Conference on City Planning, which had been founded in 1910 to promote city planning, yielded to the entreaties of Bettman and decided to submit an amicus brief to the Court.⁷²⁴ Euclid was represented by James Metzenbaum, a determined bulldog of a lawyer who produced a sprawling hodge podge of a brief.⁷²⁵ Bettman’s submission, by contrast, was a disciplined and controlled professional effort that effectively summarized existing case law,⁷²⁶ distinguished zoning regulations from the taking of property,⁷²⁷ explained that the purpose of zoning was not merely aesthetics,⁷²⁸ and cast zoning law as analogous to but not conterminous with traditional nuisance regulation.⁷²⁹

Unfortunately, in a delicious irony about the foresight of city planners, “by an oversight Mr. Bettman” missed the deadline for filing his brief, which was the date of oral argument.⁷³⁰

Euclid was argued on January 27, 1926, before a bench on which Sutherland was absent.⁷³¹ Metzbaum was worried about what he believed were misrepresentations in the final minutes of Baker's oral argument, and by dramatic telegram on January 29 he sought permission to file a reply brief. On February 2, Metzbaum was given one week to file a brief, and Baker was given one subsequent week to respond.⁷³² Baker filed his brief within the deadline on February 16. Yet, according to Stone's docket book,⁷³³ the Court met on February 13 and voted five to three to sustain Westenhaver's opinion.⁷³⁴ Sutherland and Taft were in the majority;⁷³⁵ dissenting were Brandeis, Sanford, and Stone.⁷³⁶ There is no vote recorded one way or another for Holmes.⁷³⁷ Most unusually, there is no marking in Stone's docket book indicating the Justice to whom the opinion was assigned for authorship.

On the same day as the Court's conference, February 13, Bettman discovered his mistake and wrote Taft, who was a friend from Cincinnati,⁷³⁸ seeking leave to file his amicus brief. Taft brought the request to conference, which approved Bettman's request on February 26.⁷³⁹ In Stone's docket book there is an undated note, written in a hand that Barry Cushman plausibly speculates is that of Alfred McCormack, Stone's law clerk during that Term,⁷⁴⁰ which states: "Rehearing suggested by Sutherland, J., and case set down for rehearing in October Term 1926."⁷⁴¹ Taft announced the rehearing on March 1.⁷⁴² *Euclid* was re-argued on October 12, 1926, and six weeks later Sutherland produced his opinion.⁷⁴³ Sutherland and Taft had switched their votes.⁷⁴⁴

Zoning was a quintessential form of progressive "social planning."⁷⁴⁵ As Bettman forthrightly acknowledged in his brief, zoning "represents the application of foresight and intelligence to the development of the community."⁷⁴⁶ In *Adkins*, Sutherland had expressed hostility to the subordination of property to such planning. Contemporaries found it "difficult to believe that it is the same Mr. Justice Sutherland who wrote the majority opinions in" *Tyson* and *Euclid*.⁷⁴⁷ *Euclid*'s endorsement of zoning "must surely be acknowledged as . . . the most important redefinition of the nature of private property ever made in United States courts."⁷⁴⁸ It was exceedingly odd that it was at the hands of a conservative Justice like Sutherland.

In his brief, Baker had stressed that zoning interrupts "the operation of natural economic laws," by redistributing value in ways that are "arbitrary and unnatural" insofar as it reflects not "the operation of economic laws," but instead "arbitrary considerations of taste enacted into hard and fast legislation."⁷⁴⁹ "The theory of our liberty," Baker wrote, "has always been to maintain the right of the individual to his liberty and to his property and to allow free play to economic laws, private contract and personal choice."⁷⁵⁰ The idea that freedom was to be measured by the rhythm of "natural" market transactions, with which it was unconstitutional folly to interfere, should have been attractive to Sutherland, because he had himself expressed similar sentiments in 1921. "[T]here are certain fundamental social and economic laws which are beyond the power, and certain underlying governmental principles which are beyond the right, of official control," Sutherland had affirmed, "and any attempt to interfere with their operations inevitably ends in confusion, if not disaster. These laws and principles may be compared with the forces of nature whose movements are entirely outside the scope of human power."⁷⁵¹

The discrepancy between Sutherland in 1926 and Sutherland in 1921, however, is less stark than might appear at first glance. Sutherland adroitly fashioned *Euclid* to turn on a very

modern distinction between “facial” and “as applied” challenges to legislation. “[I]t may happen,” Sutherland wrote, “that not only offensive or dangerous industries will be excluded, but those which are neither offensive nor dangerous will share the same fate.”

But this is no more than happens in respect of many practice-forbidding laws which this court has upheld, although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves. . . . The inclusion of a reasonable margin, to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation. In the light of these considerations, we are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the proscribed class. It cannot be said that the ordinance in this respect “passes the bounds of reason and assumes the character of a merely arbitrary fiat.”⁷⁵²

Whereas in *Tyson* Sutherland would facially invalidate overbroad legislation that failed to respect “the righteous distinction between guilt and innocence,”⁷⁵³ in *Euclid* he was prepared to recognize that zoning laws could and would be overinclusive. Sutherland found the Euclid ordinance *facially* constitutional because he chose to endow it with “a reasonable margin to insure effective enforcement.”⁷⁵⁴ The very existence of that margin, however, also created the possibility of challenging the *application* of zoning ordinances to the particular circumstances of individual plaintiffs.⁷⁵⁵ Sutherland embraced the vehicle of “as applied” challenges eighteen months later in *Nectow v. City of Cambridge*,⁷⁵⁶ when, speaking for a unanimous Court, he struck down the application of a zoning law.⁷⁵⁷ *Euclid*, therefore, did not insulate zoning ordinances from constitutional supervision. It merely insulated the generic municipal project of imposing an over-all plan on urban growth.⁷⁵⁸

That having been said, it is nevertheless important to note the striking contrast between an opinion like *Euclid* and an opinion like *Adkins*. In *Adkins*, Sutherland had airily dismissed the “mass of reports, opinions of special observers and students of the subject, and the like,” which Frankfurter had put before the Court. Sutherland had found them “interesting, but only mildly persuasive.”⁷⁵⁹ He had rejected the “large number of printed opinions approving the policy of the minimum wage” on the explicit ground that such expertise was “proper enough for the consideration of the lawmaking bodies” but shone “no legitimate light upon the question of its validity, and that is what we are called upon to decide.”⁷⁶⁰

In *Euclid*, by contrast, Sutherland expressed great deference to the many “commissions and experts” who had discussed the necessity of zoning to serve the public health, safety, morals and welfare.⁷⁶¹ “The results of their investigations,” Sutherland explained, “have been set forth in comprehensive reports” which “bear every evidence of painstaking consideration.” If Sutherland was not quite ready to concede that the judgments of city planners “demonstrate the wisdom or sound policy in all respects” of zoning restrictions, he was prepared to affirm that these judgments “at least” offered “reasons” that were “sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are

clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”⁷⁶² Nothing could be further from the judicial sensibility of *Adkins*.

The experts in *Euclid* conveyed in a single voice the massive and systematic interconnectedness of urban life.⁷⁶³ If Justices like McReynolds, Van Devanter and Butler understood private property as a site for the exercise and constitution of independent moral agency, “the increasing ‘interdependence of modern city dwellers’”⁷⁶⁴ had made urban property particularly vulnerable to blight, which is to say to how neighbors chose to use their property. The dense reports supporting New York City’s pioneering zoning law, which Metzenbaum had painstakingly caused to be delivered to each Justice, and especially to Sutherland,⁷⁶⁵ had demonstrated the pressing need for zoning to stabilize property prices.⁷⁶⁶

In his amicus brief, moreover, Bettman had cleverly extracted long passages from 1916 testimony to the New York City Zoning Commission by Taft’s intimate, life-long friend, the conservative New York mortgage banker Clarence H. Kelsey, declaring with some degree of irritation, that if New York refuses to enact “a well considered plan,” it “is failing to protect itself and property values as well. Its present policy of allowing every owner of real estate to do as he pleases with his own, is a policy of self-destruction. . . . I have no doubt of the favorable effect of this proposed control of the improvement and use of real estate. . . . These restrictions will tend to steady values and enable all real estate owners to make reasonable use of their property. This is certainly better for the city as a whole than to continue to allow a few out of many to make unfair use of their property and depress still further the value of the remaining property and ultimately their own as well.”⁷⁶⁷

Insofar as urban congestion and interdependence made obvious and inescapable the need for systematic planning to stabilize prices and to provide essential city services, like traffic control, fire suppression, sewerage removal, and the like,⁷⁶⁸ it also undermined the moral experience of independence on the part of individual property owners. “There is little resentment at the traffic policeman who halts us at a busy corner,” observed a Chamber of Commerce pamphlet excerpted in Bettman’s brief, “for it is obvious that the regulation of traffic benefits us all.”⁷⁶⁹ Although extensive traffic regulation strictly constrained individual freedom of action, it did not restrict freedom that was socially meaningful. No sane driver would experience freedom from traffic regulation as a site for the construction of independent moral agency.

In the same way, the increasingly obvious interdependence of city real estate drained the freedom to deploy urban property of moral significance. Sutherland gently referenced this point when he observed in *Euclid* that “restrictions in respect of the use and occupation of private lands in urban communities” that would have seemed “arbitrary and oppressive” a half century before, are now “sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable.”⁷⁷⁰

It is striking that in *Euclid* Sutherland did not conceptualize urban property from the point of view of the owner, but from the perspective of the complex social system in which that property was embedded. So, for example, he wrote that “the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question

whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality.”⁷⁷¹ By stressing systemic constraints on the use of urban property, Sutherland concomitantly deemphasized its importance to the construction of individual moral agency. An urban property owner did not become a slave if he was prevented from using his land in ways that disrupted the interdependence of his urban neighborhood. He was no more transformed into a creature of the state than was the driver who obeyed traffic regulations.

What is especially unusual about *Euclid* is that Sutherland, like Taft, tended to regard property through the lens of individual incentive. “Any attempt to fix a limit to personal acquisition is filled with danger,” Sutherland had written in 1921, “since, being arbitrary, it is sure to be fluctuating, tending always toward narrower and narrower limits and, in the end, destructive of that great incentive to individual effort which is furnished by the feeling of certainty that one will be allowed to enjoy the fruits of his own industry and genius.”⁷⁷² This view of property had come to dominate American legal thinking in the 19th century, when American common law diverged from its English roots. If English property law stressed the protection of existing entitlements, American law instead emphasized unrestrained market access as a way of promoting economic growth.⁷⁷³

Zoning altered this traditional American understanding of real property. The zoning of urban land “privileged security over freedom.”⁷⁷⁴ When the *Minneapolis Star Tribune* editorialized in favor of a proposed zoning statute, it emphasized the need for “realty values” to be “made more stable” and for “residential communities” to be “given better insurance against undesirable invasion.”⁷⁷⁵ If Sutherland’s customary view of property stressed its immunity from regulation to facilitate economic development, zoning instead appealed to a different image of real property. Zoning sought to make urban land into a safe investment, rather than to allow it to become a scene of unending rampant speculation.⁷⁷⁶ It converted urban property into a haven insulated from transformation, rather like the nostalgic restored villages, with their ideal representations of past communities, that sprung up during the unsettled Twenties.⁷⁷⁷ In the words of Robert Wiebe’s influential interpretation of the period, the nation had come to prioritize “the regulative, hierarchical needs of urban-industrial life,” which “sought continuity and predictability in a world of endless change.”⁷⁷⁸

The upshot was that *Euclid* endorsed a framework of urban land regulation that had more in common with traditional, static, English conceptions of real property than with American 19th century precedents.⁷⁷⁹ Zoning favored the maintenance of the *status quo* over the allure of a boundless future. But this meant that zoning also froze into place existing class stratification. This was obvious to contemporaries.⁷⁸⁰ Westenhaver had struck down *Euclid*’s ordinance in part because it constituted prohibited class legislation. “In the last analysis,” said Westenhaver

the result to be accomplished is to classify the population and segregate them according to their income or situation in life. The true reason why some persons live in a mansion and others in a shack, why some live in a single-family dwelling and others in a double-family dwelling, why some live in a two-family dwelling and others in an

apartment, or why some live in a well-kept apartment and others in a tenement, is primarily economic. It is a matter of income and wealth⁷⁸¹

In 1904, the great Ernst Freund, in his magisterial treatise on the police power, had definitively opined that “It is certain . . . that in defining nuisances no standards may be established which discriminate against the poor?”⁷⁸²

Postwar America, however, was hungry for normalcy. It wanted to preserve existing values rather than to sacrifice stability on the altar of future development. Robert H. Whitten, an important figure in the development of American zoning legislation who had testified as an expert on the village’s behalf in the trial of *Euclid*,⁷⁸³ frankly admitted “that zoning tends inevitably toward the segregation of the different economic classes,” but he considered this effect “merely incidental” and “neither undemocratic nor anti-social.”⁷⁸⁴

Unlike Westenhaver, Sutherland displayed not a trace of anti-class ideology in *Euclid*. He authored an opinion that was purely concerned with the liberty to use and control urban land. This abandonment of anti-class ideology, however, was associated with darker social developments. Questions of preservation and stability were in the twenties characteristically associated with anti-immigrant or overtly racist sentiments. “The immigrant,” writes Seymour Toll, “is the fiber of zoning. . . . In early twentieth-century New York he is seen as a southeastern European, the lower East Side garment worker whose presence in midtown Manhattan created one of the most decisive moments in the history of zoning.”⁷⁸⁵

Ernst Freund, while acknowledging that zoning violated the principle that police regulations “operate irrespective of class distinctions,” was by the 1920s prepared to concede that the principle “not be made a fetish.”⁷⁸⁶ He sought to explain “the crux of the zoning problem”--“the residential district”--by reference to “the concept of amenity,” by which he meant “residential preference.” Residential preference was simply a nice way of referring to social discrimination; it could be illustrated by “the coming of colored people into a district.” Although “any attempt to give official recognition to social differences would be utterly futile, partly because it would be repudiated by public sentiment, partly because it would be impossible to find an appropriate legal formula,” zoning nevertheless effectively enforced residential preferences.⁷⁸⁷ In modern times, the exclusive zoning made possible by *Euclid* has been bluntly condemned as “racism with a progressive, technocratic veneer”; its “basic purpose is “to keep Them where They belonged—Out.”⁷⁸⁸

In *Euclid*, Sutherland found “no difficulty” in sustaining zoning regulations that separated industrial from residential uses.⁷⁸⁹ “The serious question in the case,” he wrote, “arises over the provisions of the ordinance excluding from residential districts apartment houses, business houses, retail stores and shops, and other like establishments. This question involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded.”⁷⁹⁰ It is on this precise question that Sutherland chose to rely on “commissions and experts.” “With particular reference to apartment houses,” he wrote

it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities-until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.⁷⁹¹

Much has been written about this unfortunate passage. "Apartment houses 'retard,' 'destroy,' 'monopolize,' 'interfere,' and 'deprive;' they are 'mere parasites,' which 'take advantage' of a desirable environment created by others while carrying 'disturbing noises,' and bringing an 'occupation' of the streets."⁷⁹² "Without ever mentioning race, immigration, or tenement houses," Sutherland nevertheless managed "to call upon other code words that had the same impact."⁷⁹³ Although the Court had in 1917 struck down a city ordinance in Louisville, Kentucky, that prohibited racial residential segregation,⁷⁹⁴ *Euclid* sanctioned zoning regulations that were effective, facially neutral mechanisms "to prevent the alien or the Negro from coming into a district."⁷⁹⁵ If in *Pierce* the Court had set its face against a nativism that paradoxically expressed itself in a demand for universal public education, in *Euclid* Sutherland, who had dissented in *Meyer*, laid the groundwork for future suburban segregation.⁷⁹⁶

We cannot attribute definitive motives to Sutherland's decision to switch his vote in *Euclid*. We cannot ascertain whether and how much Sutherland was influenced by the etiolation of moral agency in the context of urban property, or by the altered function that he attributed to such property, or by the need to insulate suburbanites from the contamination of "undesirable neighbors."⁷⁹⁷ Suffice it to say that *Euclid* exists in each of these dimensions. In any individual case, the Taft Court doctrine of substantive due process could serve any or all of these many purposes.

VIII. Ratemaking and Property Affected With a Public Interest

If Sutherland developed the *Tyson* line of cases to prevent government price-fixing with respect to ordinary property, he was nevertheless prepared to concede that prices could be fixed insofar as property was "impressed with a public interest."⁷⁹⁸ The reason, he explained in *Adkins*, was that the owner of such property "in effect, grants to the public an interest in the use which may be controlled by the public for the common good to the extent of the interest thus created."⁷⁹⁹ Property affected with a public interest was for this reason not a morally significant site for the construction of independent agency. Judicial protections for such property thus

tended to reflect juridical policy about the incentives necessary for property affected with a public interest to motivate entrepreneurship and development.

During the Taft Court era, railroads and utilities were paradigmatic examples of property affected with a public interest. Since the days of the Waite Court, such entities had been “subject to legislative control as to their rates of fare and freight.”⁸⁰⁰ At first the Court had ceded control over rates to legislatures,⁸⁰¹ but within a decade the Court became concerned to stress that the “power to regulate is not a power to destroy, and . . . is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot . . . do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law.”⁸⁰² The Court was thus confronted with the question of when publicly set rates had become so low as to constitute an unconstitutional taking of property.

At the beginning of the Taft Court, the governing precedent on this question was the venerable 1898 precedent of *Smyth v. Ames*,⁸⁰³ which had held, in Harlan’s vague and inflated prose:

The corporation may not be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it. How such compensation may be ascertained, and what are the necessary elements in such an inquiry, will always be an embarrassing question. . . .

We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And, in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth.⁸⁰⁴

Whether publicly imposed rates constituted “just compensation” for property conscripted to serve the public interest turned on whether they yielded an adequate rate of return on the value of the property. *Smyth* created what later became known as the “fair value” test to measure the constitutional adequacy of that value.⁸⁰⁵ The test incorporated such a diverse, eclectic and miscellaneous set of factors that the conceptually incoherent foundations of the concept of “fair value” were instantly obvious.⁸⁰⁶

The root source of the confusion had become apparent by the 1920s. Because the value of regulated property depended upon the rates set by the government,⁸⁰⁷ the “fair value” test was essentially caught “in a hopeless vicious circle. We cannot tell what rates the company is to charge until we know what its value is, and we cannot what its value is till we know what rates it may charge.”⁸⁰⁸ Once property was immunized from the higgling of the market, in other words,

the very idea of its “fair value” could not be settled merely by a factual or empirical inquiry. The value of the property depended upon the social functions demanded of the property.⁸⁰⁹ The failure to theorize these functions ensured that determining fair value would remain “an embarrassing question.”

Explaining when rates were so low as to be unconstitutionally confiscatory was a daunting jurisprudential puzzle.⁸¹⁰ Taft confessed that “I am afraid we shall have in increasing numbers these so-called confiscation cases, that is the cases that involve the question of rates in public utilities. I dislike them extremely, and don’t feel myself competent in them. . . . I would like to get rid of all such cases. I prefer even patent cases.”⁸¹¹ Holmes was also explicit that “rate cases” were “of the kind I hate.”⁸¹² They raised constitutional issues that he regarded as essentially political and arbitrary:

[W]e had some rate cases We solemnly weigh the valuation of the property and all the tests and decide pro or con—but really it is determining a line between grabber and grabbee that turns on the feeling of the community. You say the public is entitled to this and the owners to that. I see no *a priori* reason for the propositions except that that is the way the crowd feels. I tell them that if the rate-making power will only say I have considered A.B. & C., all the elements enumerated, we accept the judgment unless it makes us puke. It is like the ideal of woman—on one end you have the dames of the *Decameron* who care only for God and man, at the other a peaked, elbowed school marm who talks on high themes and thinks man a superfluity of nature. A given community fixes its conception somewhere midway according to the dominance of companionship or dimples.⁸¹³

Others on the Court were attracted to rate cases. As Taft wrote his son, “we have some experts on our Court. One is Pierce Butler, the other is Brandeis. And I think McReynolds aspires to figure in that field of our jurisdiction.”⁸¹⁴ In fact, Butler, McReynolds and Brandeis cared passionately about ratemaking cases, and they believed that there were important constitutional principles at stake.⁸¹⁵ Throughout the 1920s they maintained a running battle about whether the “fair value” of property affected with a public interest should be determined by the contemporary “cost of reproduction less depreciation,”⁸¹⁶ or instead by amount of capital prudently invested in the property.⁸¹⁷ Taft initially handled this debate with exemplary probity.⁸¹⁸

The issue arose early in the 1922 Term when the Taft Court had to consider two ratemaking cases: *Georgia Ry. & Power Co. v. Railroad Commission of Georgia*,⁸¹⁹ argued on November 29, 1922, and *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Comm’n of Missouri*,⁸²⁰ argued on December 8, 1922. Butler, having been confirmed on December 21, did not hear argument in either case.⁸²¹ Brandeis took the occasion to launch a full scale attack on *Smyth v. Ames* and to advance an entirely new theory of fair return on prudential investment. As he later told Frankfurter:

[W]e have a better atmosphere for discussion—in valuation cases . . . in *S.W. Telephone* case there was much division & I suggested “I’ll report on that if you want me to.” So Taft asked me to report. I took months to prepare a memo, printed it & had it circulated, about 62 pp as a basis for discussion. I had a job holding in McReynolds who wrote his opinion in *S.W.* (My memo was evoked by [*Georgia Ry.*] case.) But through

Chief and Van the thing was held up until my report was in. We then had a whole day set aside for discussion. And it was a thorough discussion. Some didn't grasp the facts & hadn't thoroughly mastered the memo but it was a new method in consideration of issues.⁸²²

Recognizing the conceptual difficulties in ratemaking cases, and recognizing Brandeis's expertise in these issues--even though that expertise derived from challenging utilities and railroads in the name of the public interest--Taft dedicated an entire day for the Court to discuss the proper approach to the constitutional jurisprudence of confiscation. This bespeaks a remarkable open-mindedness, especially considering that Brandeis's new theory of prudential investment would overturn established precedent. Butler records in his docket book that the unique day-long conference to consider Brandeis's memorandum "in support of Prudent investment" occurred on May 12, 1923, and that the "discussion resulted in disapproval of theory."⁸²³

The question debated by the Court was essentially whether railroads and utilities were to be valued at their "present, current, or reproduction cost," or instead at their "original cost, including expenditures on permanent improvements."⁸²⁴ There were opportunistic reasons to adopt one test or the other. In times of depressed prices, state regulatory commissions were inclined to advance the cost of reproduction theory of value, because it meant lower rates. In *Smyth*, for example, William Jennings Bryan had argued for a reproduction theory of value to *decrease* railroad rates.⁸²⁵ But in the 1920s the "shoe" was "on the other foot"; rising prices meant that "reproduction cost" was "higher than original cost."⁸²⁶ Utilities and railroads therefore pushed hard for a reproduction theory of value that would yield higher rates.⁸²⁷

Apart from these strategic incentives, however, the two approaches to valuation differed over matters of policy: Should railroads and utilities be compensated based on their present marginal value, which if accurately assessed would efficiently allocate national economic resources, or should they instead receive only a steady and predictable rate of return because they were entities "controlled by the public for the common good,"⁸²⁸ in compensation for which they received special advantages unavailable to other purely private investments, like rights of eminent domain or insulation from competition?⁸²⁹

A disadvantage of the cost of reproduction theory is that it did not cogently connect this policy question to the constitutional issue of confiscation, which during the Taft Court era was the only ground for judicial intervention. The theory simply assumed that owners of public utilities were entitled to the present market value of their property, an assumption in tension with the very premise of the legal category of property affected with a public interest.⁸³⁰ By contrast, the prudential investment theory centered its approach on the constitutional question of a constitutionally mandatory minimum rate of return on invested capital.

An important meta-issue underlay these theoretical differences. It was always questionable whether an elusive and hypothetical inquiry like "present reproduction cost" could be pursued with predictable, consistent rigor, or whether it would produce unacceptably arbitrary and unreliable valuations.⁸³¹ This practical issue masked an even greater difficulty. From an economic perspective, society values the *service* provided by public utilities,⁸³² not their existing

physical plants. Assessing the reproduction cost of that service would always entail an essentially contested and hypothetical debate.⁸³³ These practical difficulties have in the long run proved so decisive that in the years since the Taft Court most regulatory bodies have come to use the prudent investment model, at least as a first cut.⁸³⁴

During the Taft Court era, however, debate between the two views ferociously centered on the purely practical ground of which approach would provide sufficient incentives for adequate capital investment in railroads and utilities. As Taft wrote to Van Devanter, he considered “Brandeis as the borer from within the Court on ‘prudential investment’ attacks on the capital of the country.”⁸³⁵ For the most part, those in favor of a reproduction test of value were successful during Taft Court era, although Brandeis was not without important influence.

The immediate result of the May 12 conference was that Justice McReynolds authored an opinion for five Justices in *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Comm’n of Missouri*⁸³⁶ essentially stressing a cost of reproduction theory of valuation. The Court set aside a state commission’s order for reduced telephone rates as confiscatory:

It is impossible to ascertain what will amount to a fair return upon properties devoted to public service without giving consideration to the cost of labor, supplies, etc., at the time the investigation is made. An honest and intelligent forecast of probable future values made upon a view of all the relevant circumstances, is essential. If the highly important element of present costs is wholly disregarded such a forecast becomes impossible. Estimates for to-morrow cannot ignore prices of to-day.⁸³⁷

Brandeis converted the memorandum that he had prepared for the May 12 conference into a memorable and influential dissent that announced his opposition to the “so-called rule of *Smyth v. Ames*” on the ground that “the thing devoted by the investor to the public use is not specific property, tangible and intangible, but capital embarked in the enterprise.”⁸³⁸ In authoritative and trenchant prose, Brandeis explained his newly minted prudential investment theory of ratemaking.⁸³⁹ He essentially argued that constitutional confiscation was possible only if investors were denied “the opportunity to earn a fair return” on their prudently invested capital.⁸⁴⁰

Three weeks after *Southwestern Bell Telephone*, Brandeis authored an opinion for the Court in *Georgia Ry. & Power Co. v. Railroad Commission of Georgia*.⁸⁴¹ Brandeis specifically approved gas rates set by a state commission that had given “careful consideration to the cost of reproduction” but that had “refused to adopt reproduction cost as the measure of value” on the ground that “‘present fair value’ is not synonymous with ‘present replacement cost’, particularly under abnormal conditions.”⁸⁴² Butler and Sanford did not participate in the case,⁸⁴³ but McKenna dissented on the reasonable ground that the decision could not “be reconciled” with the holding of *Southwestern Bell Telephone* that the value of property affected with a public interest must be determined by “the reproduction cost of the utility.”⁸⁴⁴ Brandeis later observed to Frankfurter that “we got by in the Georgia case holding that reconstruction is not the measure but merely a factor. . . . I think gradually Court will work out pretty satisfactorily on these cases. Trouble is they don’t, most of them, understand the problem.”⁸⁴⁵

The Court indeed displayed evidence of confusion. On the very same day that it issued *Georgia Ry. & Power Co.*, it also released *Bluefield Water Works & Improvement Co. v. Public*

Service Comm'n of West Virginia,⁸⁴⁶ in which Butler, citing *Southwestern Bell Telephone*, constitutionally struck down rates set by a state commission on the ground that a state agency had “failed to give weight to cost of reproduction less depreciation on the basis of” contemporary prices.⁸⁴⁷ Brandeis mysteriously noted that he concurred “in the judgment . . . for the reasons stated by him in *Missouri ex re. Southwestern Bell Telephone Co.*”⁸⁴⁸ The “three opinions delivered within three weeks” produced “not a little bewilderment”⁸⁴⁹ and “disconcerting uncertainty.”⁸⁵⁰ It was said that “the result of the debate” in the Court about valuation “seems to have been a draw. . . . [T]he original uncertainties of *Smyth v. Ames* still remain.”⁸⁵¹

In 1926, however, the Taft Court revisited these issues in *McCardle v. Indianapolis Water Co.*,⁸⁵² in which Butler authored a forceful opinion for six Justices striking down rates set by a state agency for a water utility on the seemingly straightforward ground that the fair value of the utility was to be determined by “the present value” of its land “and the present cost of construction” of its plant.⁸⁵³ Brandeis, joined by Stone, dissented on the ground that “reproduction cost” was “not conclusive evidence of value.”⁸⁵⁴ Butler’s “practically decisive”⁸⁵⁵ opinion was taken by many as a “whole-hearted adoption of the cost of reproduction theory,”⁸⁵⁶ and hence as a significant clarification of the ambiguities that had shrouded the Court’s 1923 opinions.⁸⁵⁷ “A majority of the United States Supreme Court seems to have gone entirely over to the theory of reproduction cost as the correct rate base, and to have defined this as reproduction cost new on the day of valuation.”⁸⁵⁸ It was thus feared that “every public utility in the country will seek to establish new schedules of rates in keeping with the decision of the supreme court,” and that “millions of dollars will be taken from the American people when the principle just laid down by the supreme court has been carried through the public utility and railroad structure of the country.”⁸⁵⁹

What lent edge to this fear was that the Interstate Commerce Commission was nearing completion of its massive task of valuing the nation’s railroads. The ICC had originally been tasked with this burden in 1913 under the Valuation Act, which required the agency to “investigate, ascertain, and report the value of all the property” of the American railway system.⁸⁶⁰ The task had been amplified by the Transportation Act of 1920, which required the ICC to establish “uniform” group or geographical rates⁸⁶¹ adequate to “foster, protect and control” the nation’s transportation system “with appropriate regard to the welfare of those who are immediate concerned, as well as the public at large, and to promote its growth and insure its safety.”⁸⁶² Because these rates were to be set on a group basis, individual railroads would be variably profitable.⁸⁶³ The Act therefore authorized the ICC to recapture half of the excess income from successful roads, defined as those with incomes higher than 6 percent of the fair value of their property, and to redistribute that income to financially less remunerative roads, so that the fiscal health of the entire transportation system could be maintained.⁸⁶⁴ These recapture provisions required the ICC to determine the fair value of each of the nation’s railroads.

Remarkably, no case reviewing the ICC’s methods of railroad property evaluation had ever been decided by the Supreme Court. But a test of the ICC’s approach had been anticipated throughout the 1920s. The importance of the issue had led to insistence during Butler’s confirmation hearings in 1922 that his prominent role as a private attorney pressing for cost of reproduction valuation for railroads disqualify him as a Justice from participating in forthcoming railroad valuation cases, an insistence to which Butler apparently acquiesced.⁸⁶⁵ This history was vivid when *McCardle* was decided, and there were complaints that Butler should have

“disqualified” himself in *McCardle* because the decision “establishes the precedent, that will probably be followed in the valuation decision when it finally reaches the court.”⁸⁶⁶

It was obvious that the aggressive approach of *McCardle* would entitle railroads “to raise their rates so as to require the people of the United States to pay to them a billion dollars a year more than at present.”⁸⁶⁷ Within weeks of the decision, Illinois Congressman Henry T. Rainey proclaimed on the floor of the House that “The greatest lawsuit in the history of the world will soon be on its way to the Supreme Court of the United States. We are now engaged in appraising the railroad properties of the United States. . . . Under the ‘prudent investment’ theory it is estimated that the railroads are worth from fifteen to twenty billion dollars, and, of course, rates should be fixed to yield a fair return on that evaluation. According to the Wall Street Journal, if the ‘reproduction cost’ theory is adopted the railroads will be valued at more than \$35,000,000,000, and the rates must be fixed to yield a ‘fair return’ on that amount.”⁸⁶⁸ It is no wonder that immediately after *McCardle* Stone observed to his friend John Bassett Moore that “with the present . . . reproduction cost of railroads of thirty three billions, which probably exceeds actual cost by eleven or twelve billions, we are likely to have some interesting rate problems in the next few years, the solution of which may have very far reaching consequences.”⁸⁶⁹

As it happens, the ICC threw down the gauntlet to *McCardle* a bare three months after the Court’s decision. *Excess Income of St. Louis & O’Fallon Railway Co.*⁸⁷⁰ concerned the valuation of a minuscule but nevertheless profitable nine mile-long coal-carrying road, for the purpose of determining its excess income. The ICC chose as its test case a proceeding that had begun in 1924⁸⁷¹ and that presented a relatively simple problem. “We are dealing here with one small railroad,” it said, but “what we do in this case we must in principle do for all the railroads in the United States. . . [H]aving in mind . . . the whole railroad situation, the decision is of the greatest consequence from both private and public viewpoints.”⁸⁷² The precise question before the ICC was what excess income it would recapture from the O’Fallon line for the years 1920-1923. But this question turned on how the ICC chose to establish the value of the line.

The Transportation Act directed that in determining value the ICC “shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes.”⁸⁷³ The Taft Court’s entire approach to rate-making had been oriented to the constitutional question of confiscation; its decisions focused on whether rates were set so low as to constitute a prohibited taking of property. But the ICC chose to begin its analysis of the “law of the land” from an entirely different premise.

The legislative mission of the ICC was to maintain “an adequate national system of railway transportation, capable of providing the best possible service to the public at the lowest cost consistent with full justice to the private owners.”⁸⁷⁴ So long as the ICC valued railroad property in a manner designed to service those purposes, and so long as its valuations allowed railroads to charge rates and earn income sufficient to attract and encourage “further capital ventures,” the ICC believed that it would be “idle” to discard its valuations as confiscatory.⁸⁷⁵ The agency’s approach would fit comfortably within the concept of “fair value”⁸⁷⁶ created by “the kaleidoscopic rule of *Smyth v. Ames*.”⁸⁷⁷

The ICC then pivoted directly to face the Taft Court’s recent precedents. It argued that to use “the cost of reproduction new” as “the basic measure of ‘fair value,’ to the exclusion of all other factors,”⁸⁷⁸ would essentially frustrate the purposes of the agency’s legislative mandate.

Depending on annual price variations, a cost of reproduction method of valuation would produce “violent fluctuations” in railroad rates and income that would be “utterly inconsistent with the necessary attraction of private capital.”⁸⁷⁹ If the valuation of aggregate railroad property was taken to be \$18 billion in 1919 (in 1914 prices), a cost of reproduction new methodology would have produced “a gain of 23.4 billions in 1922, a loss of 6.3 billions in 1921, a further loss of 6.8 billions in 1922, and a gain again of 3 billions in 1923. These huge ‘profits’ and ‘losses’ would have occurred without change in the railroad property used in the public service other than the theoretical and speculative change derived from a shifting of general price level.”⁸⁸⁰ In times of rising prices, the “grotesque” speculative gains would chiefly accrue to holders of common stock, as distinct from those who provided two-thirds of actual railroad capital by investing in “bonds, notes, or preferred stock, the holders of which are limited to a fixed or maximum return.”⁸⁸¹ In times of falling prices, the effect on railroad revenues would be catastrophic.⁸⁸²

Approaching valuation by assessing “actual, legitimate investment,” by contrast, would produce a stable, predictable income that would “lend confidence to industry and investment.”⁸⁸³ It would be transparent, reproducible, and reliable. It would also smooth out price fluctuations because the continuous rejuvenation of railroad property would gradually introduce price changes into the rate base. In an apparent concession to the “current cost of reproduction”⁸⁸⁴ methodology, however, the ICC also decided to “value lands at their prevailing market values.”⁸⁸⁵ Commissioner Joseph Eastman, a former “progressive protégé” of Brandeis from his days in New England battling public utilities,⁸⁸⁶ objected to this concession.⁸⁸⁷ But it was in any event insufficient to prevent four dissents from Commissioners who, citing Taft Court precedents, argued that the “law of the land” required the agency to give “an effectual weight” to “the present as compared with the original cost of construction.”⁸⁸⁸ In the words of Commissioner Aitchison, “This is not the place to discuss the economic and political results of the enforcement of a rule laid down by the Supreme Court. Our present duty is to ascertain the rule of law and to enforce it.”⁸⁸⁹

The ICC’s judgment was immediately attacked before a three-judge district court on the ground that the agency had valued the property of the O’Fallon using an “assumed prudent investment basis and failed to give ‘effective and dominant consideration * * * to the cost of reproduction.’”⁸⁹⁰ On December 10, 1927, the court found that the O’Fallon had not been prejudiced because, even accepting its own claimed self-valuation, the income which it had been allowed to retain by the ICC yielded returns “for the last ten months of 1920, 6.97 per cent; for 1921, 8.71 per cent; for 1922, 8.29 per cent; for 1923, 8.43 percent.”⁸⁹¹ Returns of this magnitude could not constitutionally be condemned as confiscatory, and hence the ICC’s order was “not open to attack upon the ground of wrongful valuation.”⁸⁹²

As the case headed for resolution in the Taft Court, anticipation and tension ran high. Headlines proclaimed “The Greatest Lawsuit in History” that would affect “the astounding sum of \$52,000,000,000, and the economic interests of every man, woman and child in the United States of America.”⁸⁹³ The issue was framed as a “clear cut . . . dispute between the Interstate Commerce Commission, which defends the principle of actual cost, or ‘prudent investment,’ as the proper rate base, and the carriers which assert not only the constitutional right but also the economic wisdom of the rival principle of cost of reproduction.”⁸⁹⁴ Noting that *O’Fallon* “involved issues of wide and exceptional public interest and of immense consequence to all the people of the United States,” the Senate passed an unusual resolution, urged by George Norris, requesting that the Court permit “Donald R. Richberg, as counsel for the . . . National

Conference on Valuation, to intervene in [the] O’Fallon case for the purpose of making oral argument and filing a brief therein.”⁸⁹⁵ The Court granted the Senate’s request in November.⁸⁹⁶

Arguments were held on January 3 and 4, 1929. Butler, true to his word, did not participate.⁸⁹⁷ The Court’s opinion was authored by McReynolds, who turned his judgment on the fact that the Transportation Act required the ICC in its valuation of the O’Fallon line to “give due consideration to all elements of value recognized by the law of the land for rate-making purposes.”⁸⁹⁸ “This is an express command,” McReynolds wrote, “and the carrier has a clear right to demand compliance therewith.”⁸⁹⁹ The district court was therefore mistaken to sidestep the question of proper agency valuation. “Whether the Commission acted as directed by Congress was the fundamental question presented. If it did not, the action taken, being beyond the authority granted, was invalid.”⁹⁰⁰ Even though the excess income recaptured by the ICC may not have been confiscatory, it might nevertheless be illegal if not determined according to appropriate statutory standards.

Stressing his own opinion in *Southwestern Bell Telephone*, McReynolds observed that “the present cost of construction or reproduction” had been an element “of value recognized by the law of the land for rate-making purposes” at least since *Smyth v. Ames*.⁹⁰¹ The ICC, however, had carefully refrained “from stating that any consideration whatever was given to present or reproduction costs in estimating the value of the carrier’s property.”⁹⁰² It followed that the ICC had “disregarded the approved rule and thereby failed to discharge the definite duty imposed by Congress.”⁹⁰³

As originally drafted, McReynolds’s opinion seemed to accept the contention of the railroads that the cost of reproduction must be the primary “rule” to be applied in valuation proceedings. But Brandeis circulated a detailed, powerful dissent demonstrating with embarrassing specificity that any such mechanical application of a cost of reproduction rule to railroad valuation would be nonsensical. Many railroad lines had “been scrapped since 1920,” for example, because they had “become valueless for transportation, either because traffic ceased to be available or because competitive means of transportation precluded the establishment of remunerative rail rates. Obviously, no one would contend that their actual value just before abandonment was what it originally cost to construct them or what it would then have cost to reconstruct them.”⁹⁰⁴ The valuation of railroads thus differed from the valuation of monopolies like the water companies at issue in *Bluefield Water Works* or *McCardle*, where there was no elasticity of demand. Any sensible evaluation of railroads must account for their ability to attract business, whereas the value of monopolies of essential goods like water and electricity need not be theoretically limited in this way.⁹⁰⁵

The circulation of Brandeis’s dissent produced an immediate impact. Immediately after its distribution,⁹⁰⁶ McReynolds announced at the Court’s conference of May 12 “that the CJ wanted this [paragraph] inserted & that he (McR) was willing.”⁹⁰⁷

The question on which the Commission divided is this: When seeking to ascertain the value of railroad property for recapture purposes, must it give consideration to current, or reproduction costs? The weight to be accorded thereto is not the matter before us. No doubt there are some, perhaps many, railroad the ultimate value of which should be placed far below the sum necessary for reproduction. But Congress has directed that values shall be fixed upon a consideration of present costs along with all other pertinent facts, and this mandate must be obeyed.

Even in his last year on the Court, and despite his failing health, Taft was able adroitly to intervene to prevent his more ideologically inclined conservative colleagues from imposing abstractly unworkable views.

It would have been catastrophic for the Court to have required the ICC to follow a crude cost of reproduction measure of value as a dominant consideration in valuation.⁹⁰⁸ But Taft's paragraph specifically negated this implication.⁹⁰⁹ It instead identified the legal mistake of the ICC to be that of categorically ruling out *any* consideration of the cost of reproduction.⁹¹⁰ Taft's paragraph ensured that the Court said nothing whatever about how the cost of reproduction should affect any ultimate conclusion. It effectively transformed the Court's opinion into a mere slap on the ICC's wrist for having had the audacity overtly to criticize the Court's cases.⁹¹¹

Thus what began the week of May 20 as the "greatest lawsuit in history," ended the week as a bust.⁹¹² Newspaper headlines initially reported the decision as a significant railroad victory that portended a "Possible Doubling of Present Book Value" and a "Rise in Rates."⁹¹³ Railroad stocks kited up.⁹¹⁴ But as the *O'Fallon* opinion was more closely scrutinized, and as the implications of Taft's crucial paragraph were digested, the decision came to appear "less clear-cut. . . . Rail stocks sagged again, and editors and correspondents began to wonder whether the decision would have any effect except to throw the whole valuation situation into confusion and make more work for the Interstate Commerce Commission and the railroad lawyers."⁹¹⁵ The realization sunk in that the "most remarkable feature of the decision by the Supreme Court of the *O'Fallon* case is the uncertainty in which it leaves the law concerning the valuation of public utilities, despite the tremendous effort of all the participants to obtain a clear statement of just what the law is."⁹¹⁶ "The Supreme Court has told the Interstate Commerce Commission how not to make a valuation. It has not told it how to make one."⁹¹⁷

The upshot of *Fallon's* ambiguous resolution was widespread realization that ICC determinations of value were ultimately a side issue, because "the determinant of rates is generally what the traffic will bear, and with increasing competition from water routes, trucks and buses it would be hazardous to attempt any general revision upward of rates."⁹¹⁸ "The railroads face increasing competition from motor vehicles and are not at all likely to take any action which may drive more traffic from their rails to the public highways. . . . [I]t is a safe assumption that no increase in rates comparable with that in the official valuations which may result from the *O'Fallon* decision will take place."⁹¹⁹ No doubt that is why President Hoover could almost immediately pronounce that "I am confident that there will be no increase in railway rates as the result of the *O'Fallon* decision."⁹²⁰

Almost inadvertently, therefore, *O'Fallon* triggered public acknowledgment of the essential premise of Brandeis's brilliant dissent. The value of railroad property ultimately depended upon public demand for railroad services, which in turn depended upon competitive substitutes. To imagine that the value of railroad property could be ascertained by reproduction costs alone, apart from the entire national system of transportation within which it was embedded, was to put the cart before the horse.⁹²¹

Consistent with his commitment to a purposive public law, Brandeis had seen in his dissent that the ICC's task in evaluating the value of railroad property was to justify the rates necessary to achieve the purpose of the Transportation Act, which was "the maintenance of an adequate national system of railway transportation, capable of providing the best possible service to the public at the lowest cost consistent with full justice to the private owners."⁹²² The value of railroad properties was thus a function of the rates necessary to serve that purpose.⁹²³ McReynolds's original opinion, by implying that railroad rates hinged on rights of private property that were somehow independent of the purposes of the Transportation Act, had pushed the Court to the brink of conceptual and practical disaster.

The conservative press praised *O'Fallon* because "The Supreme Court has again stood as a bulwark against disregard of the rights of property."⁹²⁴ That was indeed the ideological message conveyed by the decision.⁹²⁵ But in reality it was only Taft's timely intervention, an intervention that rendered *O'Fallon*'s doctrinal framework virtually meaningless, that allowed the Court to preserve the fiction that ratemaking was determined by the independent value of property, rather than the reverse.⁹²⁶

By the following Term, however, Taft was too ill to hold back his conservative colleagues, who on policy grounds were anxious to press for ever greater returns to private capital. *United Railways and Electric Co. v. West*,⁹²⁷ a case involving the constitutionality of rates imposed by a state commission on a Baltimore street car company, was argued on October 29, 1929, and not decided until January 6, 1930, the very day on which Taft decided to withdraw from Court participation to recuperate from disabling illness.⁹²⁸ Sutherland, writing for six Justices,⁹²⁹ flatly asserted that "It is the settled rule of this Court that the rate base is present value."⁹³⁰ Gone was the subtlety that Taft had inserted into the *O'Fallon* opinion.

The primary controversy in *West* concerned less the valuation of the utility's property than the rate of return that the company was constitutionally entitled to receive on that property.⁹³¹ The operative test for this question had been explained by Butler in 1923 in *Bluefield Water Works & Improvement Co.*:

A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding, risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally.⁹³²

Sutherland invoked this passage, adding that "the fundamental principle to be observed is that the property of a public utility, although devoted to the public service and impressed with a

public interest, is still private property; and neither the corpus of that property nor the use thereof constitutionally can be taken for a compulsory price which falls below the measure of just compensation.”⁹³³ The measure of just compensation was to be determined “by present day conditions.”⁹³⁴ The question is “not capable of exact mathematical demonstration. It is a matter more or less of approximation about which conclusions may differ.”⁹³⁵ Sutherland intimated that “There is much evidence in the record to the effect that in order to induce the investment of capital in the enterprise or to enable the company to compete successfully in the market for money to finance its operations, a net return upon the valuation fixed by the commission should be not far from 8 per cent.”⁹³⁶ But because the company itself had sought from the state commission a rate that would produce a return of only 7.44 percent, Sutherland contented himself with the holding that the enforcement of any rates “producing less than this would be confiscatory and in violation of the due process clause of the Fourteenth Amendment.”⁹³⁷

This was a stunning holding, given that the Transportation Act itself had authorized rates returning only 5.5 to 6 percent on the fair value of railroad property, and that the Act had authorized the recapture of income above 6 percent.⁹³⁸ By requiring that utilities receive rates that in the Court’s view would make them competitive in ordinary financial markets, the Court was striving to endow utility property with entitlements that would render it financially equivalent to ordinary property. The alignment of the Court’s conservative majority with the financial interests of the regulated utilities was impossible to obscure. And this left the Court highly vulnerable to public objection.

Less than a month after *West* was announced, Taft officially resigned and Hoover nominated Charles Evans Hughes to replace him. Hughes’s nomination was at first expected to sail through the Senate, but, suddenly and unexpectedly,⁹³⁹ an “intense,”⁹⁴⁰ “amazing fight”⁹⁴¹ erupted as a “formidable”⁹⁴² coalition of progressive Republicans and Democrats attacked Hughes because his presumed views “on economic questions”⁹⁴³ associated him with the conservative wing of the Taft Court.⁹⁴⁴ All conceded Hughes’s remarkably distinguished professional qualifications, but Senators feared that his extensive corporate practice would lead him to view ratemaking cases through the lens of corporate interests.

West became a lightning rod for opposition to Hughes. Senator Norris read the entire opinion into the congressional record,⁹⁴⁵ and Senator after Senator attacked the decision.⁹⁴⁶ Senator La Follette noted that, “carried to its logical conclusion,” *West* implied “the destruction of all regulatory power [A]s you increase the rate of return which these corporations may enjoy you finally reach a point where they are entitled by judicial sanction to charge rates which are all that the traffic will bear. We are, through the action of the court, driven back to the position which we occupied when this fight for regulation of these public-service corporations first began in this country.”⁹⁴⁷ Senators chose to discuss *West* “not because Justice Hughes was a member of the court” when it was decided, “but for the reason that . . . Justice Hughes is associated in his views with the contention which is sustained by the majority, and which, in the end, if carried to its logical conclusion, must result in great economic oppression to the people of the United States. . . . As Justice Sutherland says in his majority opinion, what constitutes confiscation is not a thing that one can mathematically ascertain . . . it is according to the view of whether one is thinking most about property and the rights of property or about human rights or the rights of individuals. . . [W]hen we are passing upon this matter we are entitled to take into

consideration the views upon constitutional and economic questions which the nominee entertains.”⁹⁴⁸

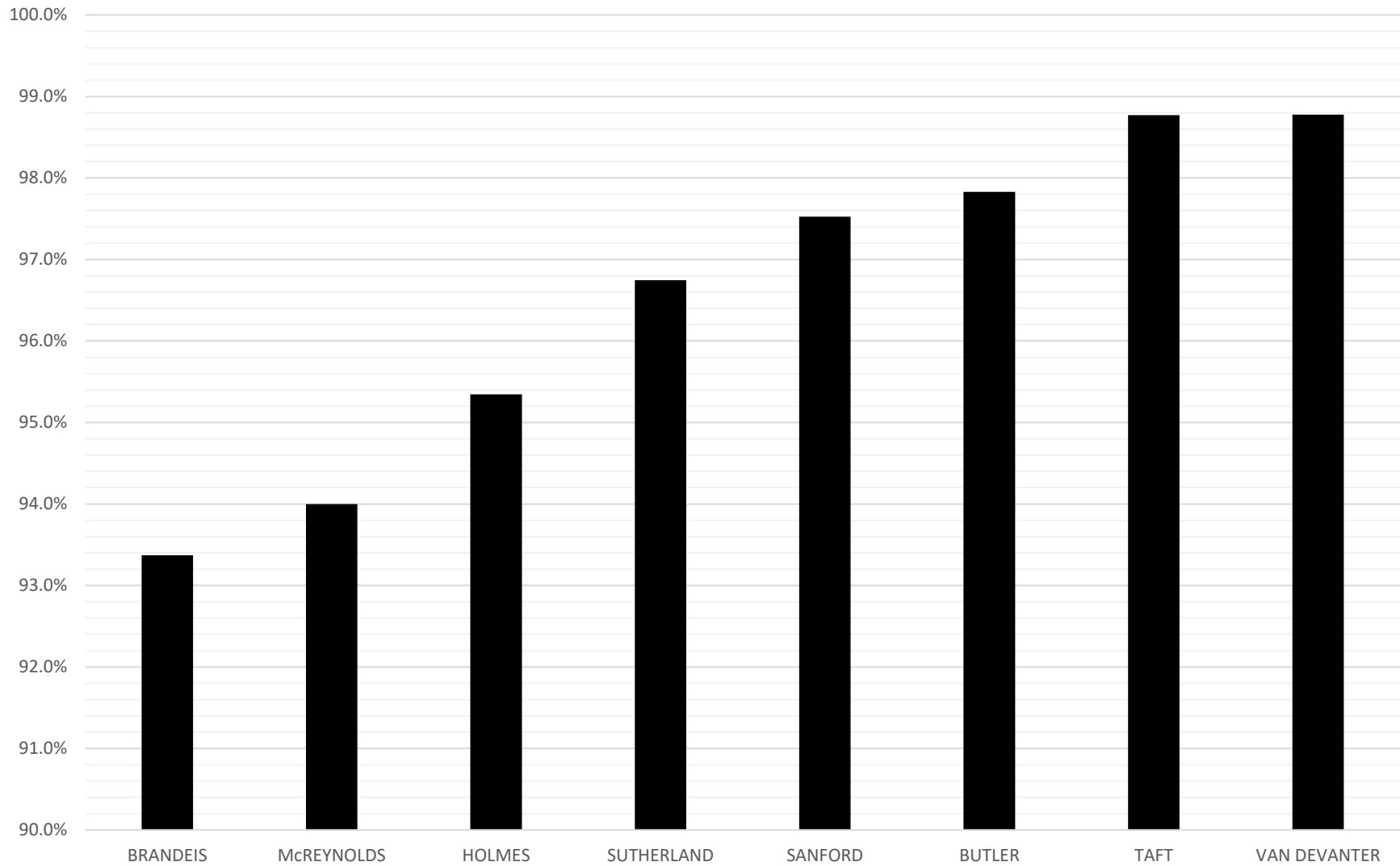
The confirmation of Pierce Butler was cited as a negative precedent. Butler “on the bench . . . has supported the same theories of valuation that he so ably championed as the spokesman of the carriers.”⁹⁴⁹ A bipartisan coalition of progressive Senators did not wish to repeat that mistake. Recall that Butler’s appointment had occasioned the “only near heated” argument between Brandeis and Taft; the Chief Justice had insisted that the Court required for its legitimacy representation from both political parties rather than from those with different “creeds on property.”⁹⁵⁰ Decisions like *West* so exposed the orientation of the Justices on matters of economic policy that large numbers of Senators openly adopted Brandeis’s perspective.⁹⁵¹ They explicitly challenged the relevance of party affiliation, and sought instead to determine whether Hughes held “progressive” or “reactionary” views on property.⁹⁵² *West* thus provoked a public debate that helped fix the popular image of the Taft Court as a bastion of reaction insistent on maintaining the constitutional prerogatives of property in the face of pressing contrary public needs.⁹⁵³

Only a dozen years before the federal government had taken over the railroads, and in the Transportation Act of 1920 the federal government had insisted that close public control was necessary to preserve the health of the national system. The Taft Court, in its ratemaking cases, seemed intent on recreating a pre-war world, where even property affected with a public interest could claim the same rewards as purely private property. The pushback was bipartisan and alarmingly powerful.

The Hughes hearings were in fact shocking. “There has never been such a spectacle as has just been witnessed, an open, mass attack upon the Supreme Court, a tearing away, as one senator after another said in the three days of debate, of its sanctity, of the cloak of immunity from criticism which it has heretofore generally enjoyed.”⁹⁵⁴ The day after Hughes’s confirmation, progressive Washington Senator Clarence Dill rose to respond to charges “that the Senate has dragged the Supreme Court into politics as has not been done in our time.”⁹⁵⁵ Unrepentant, Dill proclaimed that “the Supreme Court of this country will be in politics or will not be in politics, depending entirely upon whether or not this system of writing into the valuations of the great public utilities that provide the necessities of life continues or not. It is for the judges to say.”⁹⁵⁶

It is worth noting that by its conclusion the Taft Court had worked itself into this position of political vulnerability because its conservative majority was committed to protecting the incentives attached to property affected with a public interest, rather than because its conservative majority had remained committed to the protection of a private sphere of independent moral agency. By February 1930, fully a third of the Senators voting on the confirmation of Hughes had come to believe that such questions of public policy were best left in the political arena.

**FIGURE 5-1: PERCENTAGE OF CASES IN WHICH A PARTICIPATING JUSTICE JOINS OR
AUTHORS AN OPINION FOR THE COURT, 1921-1928 TERMS**



¹ DEAN ACHESON, MORNING AND NOON 45-46 (Houghton Mifflin Co. Boston 1965). See *Natural Democracy Inaugural Keynote*, THE WASHINGTON POST (March 5, 1921), at 1.

² 61 CONG. REC. 4-6 (1921) (Inaugural Address of Warren G. Harding).

³ JOHN MAURICE CLARK, THE COSTS OF THE WORLD WAR TO THE AMERICAN PEOPLE 29 (Yale University Press: New Haven 1931). See Ernest L. Bogart, *Economic Organization for War*, 14 AMERICAN POLITICAL SCIENCE REVIEW 587, 587-88 (1920) (“The world conflict has taught us that war is not waged altogether by armies in the field. It is a contest between the industrial organization and technique of the opposing nations. . . . War has meant, therefore, the industrial organization of the nation, and victory has been dependent not merely upon the number of men in the field and on the seas, nor upon the strategy of warfare, but to an even greater extent upon the effectiveness of the industrial organization behind the lines.”).

⁴ HENRY LITCHFIELD WEST, FEDERAL POWER: ITS GROWTH AND NECESSITY vii (George H. Doran Co.: New York 1918).

⁵ Warren G. Harding, *America in the War: Address at the Ohio Republican State Convention, Columbus, Ohio, August 27, 1918*, in RE-DEDICATING AMERICA: THE LIFE AND RECENT SPEECHES OF WARREN G. HARDING 178 (Frederick E. Schortemeier ed., Bobbs Merrill: Indianapolis 1920).

⁶ Warren G. Harding, *The Republican Party and America: Address before the Republican Rally at Memorial Hall, Columbus, Ohio, February 23, 1920*, in RE-DEDICATING AMERICA, *supra* note 5, at 191.

⁷ Warren G. Harding, *The Problems of Business: Address Before the Providence Chamber of Commerce at Providence, Rhode Island, February 25, 1920*, in RE-DEDICATING AMERICA, *supra* note 5, at 203.

⁸ Warren G. Harding, *Auto-Intoxication: Address before the Baltimore Press Club at Baltimore, Maryland, February 5, 1920*, in RE-DEDICATING AMERICA, *supra* note 5, at 219.

⁹ The relative coherence of the voting of the Harding Justices can be seen in Figure 5-1.

¹⁰ *Investors' Syndicate v. Porter*, 52 F.2d 189, 196 (D. Mont. 1931) (Bourquin, J., dissenting). Soon after Taft became Chief Justice, Van Devanter sent him an article by Georgetown Law School professor Joseph Sullivan. Joseph D. Sullivan *Supreme Court and Social Legislation*, 10 GEORGETOWN LAW JOURNAL 1 (1921). The Supreme Court “is having difficulty in finding a sound and logical basis upon which to found its policy towards the many statutes involving social and economic problems,” Sullivan wrote. He explained that the Court was divided between conservatives, like Van Devanter and McReynolds, who believed in “maintaining vested rights and the security of property,” *id.* at 3, and radicals like Brandeis, Holmes and Clarke, who sought to interpret the Constitution to “give effect to advanced legislation along social and economic lines.” *Id.* at 2. Noting that “Ideas of property rights and contractual obligations inherited from the common law, and sought to be perpetuated by the Federal Constitution are in danger of radical revision if the new conceptions are adopted by” the Court, Sullivan fretted that “Much interest attaches to the attitude of Chief Justice Taft. . . . With which group will he align himself?” *Id.* at 12. “Whether the conservative or liberal interpretation of our constitution” will prevail, Sullivan concluded, “will be largely a matter determined by his attitude.” *Id.*

Taft thanked Van Devanter for the article and replied, “One good turn deserves another.” WHT to WVD (January 8, 1922) (Taft papers). Taft sent Van Devanter a long address by Alabama attorney Forney Johnston attacking the jurisprudence of Holmes and Brandeis. Forney Johnston, *Address of Forney Johnston*, PROCEEDINGS

OF THE TWENTY-SIXTH ANNUAL MEETING OF THE MARYLAND STATE BAR ASSOCIATION 149 (Maryland State Bar Association 1921). Johnston expressed the “growing concern on a part of the Bar over what appears to be the illusory character of the constitutional guarantees.” *Id.* at 150. He worried over a “perceptible limitation upon the judicial review of all legislation, state and federal, involving the regulation of property right in the interest of some ideal deemed for the moment by legislatures a public necessity. This tendency has become of controlling importance because of the death of the late Chief Justice, whose attitude . . . was conservative in that it was based firmly upon the traditional view of the Constitution as a fixed landmark constituting a vital limitation upon arbitrary action by government rather than as a mere floating symbol to rise and fall with the preponderating opinion of the times.” *Id.* at 152.

¹¹ Edward S. Corwin, *Social Planning Under the Constitution—A Study in Perspectives*, 26 THE AMERICAN POLITICAL SCIENCE REVIEW 1, 19 (1932).

¹² ALEXANDER M. BICKEL AND BENNO C. SCHMIDT, JR., *THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910-1921* 4 (MacMillan Publishing Co.: New York 1984).

¹³ FELIX FRANKFURTER, *LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER 1913-1938* 27 (Archibald MacLeish & E.F. Prichard, Jr., eds., Harcourt, Brace and Co.: New York 1939). See KEITH E. WHITTINGTON, *REPUGNANT LAWS: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT* 167 (Lawrence: University Press of Kansas 2019) (showing that the rate at which the Taft Court invalidated federal legislation was more than double that of the White Court).

¹⁴ See Act of Dec. 23, 1914, Pub. L. No. 224, 38 Stat. 790 (1914) (authorizing the United States Supreme Court to use a writ of certiorari to review judgments of the highest court of a state upholding a federal right). The purpose of the Act was to empower the Court to review state court decisions striking down progressive labor legislation. See, e.g., FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 188-98* (1927); Charles Warren, *The Progressives of the United States Supreme Court*, 13 COLUMBIA LAW REVIEW 294, 296 (1913). On a possible cause of the Court’s “Progressive Phase,” LOUIS B. BOUDIN, 2 GOVERNMENT BY JUDICIARY 474 (1932), see Thomas Reed Powell, *The Police Power in American Constitutional Law*, 1 JOURNAL OF SOCIETY OF COMPARATIVE LEGISLATION AND INTERNATIONAL LAW 160, 171 (3d ser. 1919):

The Bake Shop Case and the annulment of a workmen’s compensation law by the New York Court of Appeals furnished munition for Mr. Roosevelt’s demand in 1912 for the “recall of judicial decisions”—a device for taking direct appeals from the judiciary to the electorate on decisions annulling police measures.... As a campaign slogan it aroused wide popular interest.... The proposal shocked the conservative traditions of the American bar, but it is thought by many to have induced Courts to relax somewhat their censorship over novel police measures.

Felix Frankfurter was even more emphatic than Powell: “No student of American constitutional law can have the slightest doubt that Mr. Roosevelt’s vigorous challenge of judicial abuses was mainly responsible for a temporary period of liberalism which followed in the interpretation of the due process clauses, however abhorrent the remedy of judicial recall appeared to both bar and bench. The public opinion which the Progressive campaign aroused subtly penetrated the judicial atmosphere. In cases involving social-industrial issues, public opinion, if adequately informed and sufficiently sustained, seeps into Supreme Court decisions. Roosevelt shrewdly observed: ‘I may not know much about law, but I do know one can put the fear of God into judges.’” FRANKFURTER, *supra* note 13, at 15.

¹⁵ *Supreme Court and Interstate Commerce Commission*, 69 NEW REPUBLIC (January 20, 1932), at 256. See also Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARVARD LAW REVIEW 943, 944 (1927) (“[I]n the six years since 1920 the Supreme Court has declared social and economic legislation unconstitutional under the due process clauses of either the Fifth or Fourteenth Amendment in more cases than in the entire fifty-two previous years during which the Fourteenth Amendment had been in effect.”). “Scholars have long noted that until the 1920s the Supreme Court took a fairly permissive stance on industrial regulation laws.” Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 NORTH CAROLINA LAW REVIEW 1, 13 (1991).

¹⁶ Felix Frankfurter, *The Supreme Court and the Public*, 83 FORUM 329, 333 (1930). “The World War and its aftermath ushered in once again a period dominated by fears—the fear of change, the fear of new ideas—and these

fears were written into the Constitution.” Felix Frankfurter, *The United States Supreme Court Molding the Constitution*, 32 CURRENT HISTORY 235, 239 (1930). For similar contemporaneous observations, see, e.g., Zechariah Chafee, Jr., *Liberal Trends in the Supreme Court*, 35 CURRENT HISTORY 338, 338 (1931); Edward S. Corwin, *Judicial Review*, in 8 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 457-64 (Edward R.A. Seligman & Alvin Johnson eds., 1937). For modern historians sensitive to this periodization, see David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEORGETOWN LAW JOURNAL 1, 10 (2003) (“There was not one *Lochner* era, but three. The first period began in approximately 1897 and ended in about 1911, with moderate *Lochnerians* dominating the Court. The second era lasted from approximately 1911 to 1923, with the Court, while not explicitly repudiating *Lochner*, generally refusing to expand the liberty of contract doctrine to new scenarios, and at times seeming to drastically limit the doctrine. From 1923 to the mid-1930s, the Court was dominated by Justices who expanded *Lochner* by voting to limit the power of government in both economic and noneconomic contexts.”); RUSSELL GALLOWAY, THE RICH AND THE POOR IN SUPREME COURT HISTORY 1790-1982 101-31 (1982); Russell W. Galloway, Jr., *The Taft Court (1921-29)*, 25 SANTA CLARA LAW REVIEW 1, 1 (1985).

¹⁷ BOUDIN, *supra* note 14, at 474. See Joseph P. Pollard, *Justice Sutherland Dissents*, 158 OUTLOOK AND INDEPENDENT 496, 497 (No. 16) (August 19, 1931) (“The liberal wave that swept political thought before the war resulted in the Supreme Court sustaining a Kansas act limiting the rates to be charged by insurance companies. That was before the Harding appointees brought the court back to the ‘normalcy’ of Mark Hanna.”).

¹⁸ ERNEST SUTHERLAND BATES, THE STORY OF THE SUPREME COURT 264 (1936). See Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921*, 5 LAW & HISTORY REVIEW 249, 254 (1987).

¹⁹ ROBERT H. WIEBE, THE SEARCH FOR ORDER 1877-1920 295 (New York: Hill and Wang 1967).

²⁰ AMERICA AND THE NEW ERA (Elisha M. Friedman, ed., E.P. Dutton & Co.: New York, 1920).

²¹ GUY ALCHON, THE INVISIBLE HAND OF PLANNING: CAPITALISM, SOCIAL SCIENCE, AND THE STATE IN THE 1920S 4 (Princeton University Press: Princeton 1985) (Emphasis added).

²² KENNETH WHYTE, HOOVER: AN EXTRAORDINARY LIFE IN EXTRAORDINARY TIMES 259 (New York: Alfred A. Knopf 2017). Mellon “was as orthodox as they came, insisting on a minimal role for government generally: it was responsible for national defense, the currency, customs and excise, and little else. Washington spent roughly 3 percent of gross national product before the war, and Mellon aimed to return to that level from wartime highs of 23 percent by keeping spending tight and taxes low.” *Id.*

²³ HERBERT HOOVER, THE MEMOIRS OF HERBERT HOOVER: THE CABINET AND THE PRESIDENCY 1920-1933 41 (New York: The MacMillan Co., 1952) (“The people were demanding a return to ways of prewar living—Harding’s ‘normalcy.’ But in reality, after such a convulsion, there could be no complete return to the past. Moreover, the social sense of our people, livened by the war, was demanding change in many directions.”).

²⁴ The pairing represented Harding’s effort to straddle the “ideological split” between the “conservatism of the Old Guard centered on a faith in the old, entrepreneurial, laissez-faire doctrine,” and “a new conception of industrial development” that fostered “cooperation between the business sector and government.” Peri Ethan Arnold, *Herbert Hoover and the Continuity of American Public Policy*, 20 PUBLIC POLICY 525, 530 (Fall 1972).

²⁵ *Id.* at 36.

²⁶ See chapter 3 at –

²⁷ The only missing Justice was Oliver Wendell Holmes, who had “allowed representations of danger to the aged to persuade me not to go to Arlington.” OWH to Harold Laski (November 13, 1921), in 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 381 (Harvard University Press: Cambridge, Mark DeWolfe Howe, ed. 1953) (1 HOLMES-LASKI CORRESPONDENCE).

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- ²⁸ Philip Kinsley, *Throngs Watch Cortège*, CHICAGO DAILY TRIBUNE (November 12, 1921), at 1. See Arthur Sears Henning, *Capital Bows As Hero is Laid in Final Couch*, CHICAGO DAILY TRIBUNE (November 12, 1921), at 1.
- ²⁹ Anne Leland & Mari-Jana “M-J” Oboceanu, *American War and Military Operations Casualties: Lists and Statistics 2* (Congressional Research Service, February 26, 2010).
- ³⁰ Quoted in Preston Lockwood, *Henry James’s First Interview*, NEW YORK TIMES (March 21, 1915), at Sunday Magazine 3. It was left to Ernest Hemingway to create a literature of deflated words.
- ³¹ OWH to Harold Laski (November 13, 1921), in 1 HOLMES-LASKI CORRESPONDENCE, *supra* note 27, at 381.
- ³² David Reynolds, *America’s “Forgotten War” and the Long Twentieth Century*, in WORLD WAR I AND AMERICAN ART 20 (Robert Cozzolino, Anne Classen Knutson, & David M. Lubin, eds., Pennsylvania Academy of the Fine Arts, in association with Princeton University Press: Princeton, n.d.).
- ³³ Jennifer D. Keene, *Remembering the “Forgotten War”: American Historiography on World War I*, 78 THE HISTORIAN 439, 443 (2016). 20
- ³⁴ Reynolds, *supra* note 32, at 19.
- ³⁵ LDB to Frederick Wehle (October 28, 1924), in THE FAMILY LETTERS OF LOUIS D. BRANDEIS 395 (University of Oklahoma Press: Norman, Melvin I. Urofsky and David W. Levy eds. 2002) (“BRANDEIS FAMILY LETTERS”).
- ³⁶ HAZEL HUTCHISON, THE WAR THAT USED UP WORDS: AMERICAN WRITERS AND THE FIRST WORLD WAR 14 (Yale University Press: New Haven 2015).
- ³⁷ Robert Cozzolino, Anne Classen Knutson, & David M. Lubin, *Introduction*, in WORLD WAR I AND AMERICAN ART *supra* note 32, at 11.
- ³⁸ HUTCHISON, *supra* note 36, at 14.
- ³⁹ See, e.g., William Hard, Clarence Darrow, Newton D. Baker, *et al.*, *Where Are the pre-War Radicals?*, THE SURVEY (February 1, 1926), at 556; Frederick C. Howe, *Where Are the pre-War Radicals?*, THE SURVEY (April 1, 1926), at 33.
- ⁴⁰ WALTER LIPPMANN, DRIFT AND MASTERY: AN ATTEMPT TO DIAGNOSE THE CURRENT UNREST 266 (New York: Henry Holt and Company 1917). “We can no longer treat life as something that has trickled down to us. We have to deal with it deliberate, devise its social organization, alter its tools, formulate its method, educate and control it. In endless ways we put intention where custom has reigned. We break up routines, make decisions, choose our ends, select means.” *Id.* at 267. DRIFT AND MASTERY was first published in 1914.
- ⁴¹ *Id.*, at 145. “That is what mastery means: the substitution of conscious intention for unconscious striving. Civilization, it seems to me, is just this constant effort to introduce plan where there has been clash, and purpose into the jungles of disordered growth.” *Id.* at 269.
- ⁴² *Id.* at 275.
- ⁴³ *Id.* at 171.
- ⁴⁴ Steven F. Lawson, *Progressives and the Supreme Court: A Case for Judicial Reform in the 1920s*, 42 THE HISTORIAN 419, 420 (1980). See William E. Leuchtenburg, *The New Deal and the Analogue of War*, in CHANGE AND CONTINUITY IN TWENTIETH-CENTURY AMERICA (John Braeman, Robert H. Bremner, and Everett Walters eds., Ohio State University Press, 1964); Stanley Shapiro, *The Great War and Reform: Liberals and Labor, 1917-19*, 12 LABOR HISTORY 323 (1971); Charles Hirschfeld, *Nationalist Progressivism and World War I*, 45 MID-AMERICA: AN HISTORICAL REVIEW 139 (1963); Robert Cuff, *Organizing for War: Canada and the United States During World War I*, in THE CANADIAN HISTORICAL ASSOCIATION, HISTORICAL PAPERS 1969, at 141-56; OTIS L. GRAHAM JR.,

THE GREAT CAMPAIGNS: REFORM AND WAR IN AMERICA 1900-1928, at 97-111 (Englewood Cliffs, N.J.: Prentice-Hall, 1971).

⁴⁵ CLARK, *supra* note 3, at 29. “One of the important features of the present European development for Americans to consider is the fact that it has been along the line of military organization and discipline. The surrender of individual liberty to superior control which is essential to the discipline and efficiency of an army has been extended to civil life and applied in governmental direction of productive industry, of transportation, and of consumption. . . . The question how far the abandonment of individualism and the establishment of rigid government control is to be continued or extended for purposes of efficiency in peaceful competition is of the highest interest and importance to us. . . . [I]t is plainly the duty of all Americans, whatever their calling, to consider by what means they can contribute through either the increase or the conservation of power in their own fields of action, towards the permanent higher efficiency of the people of the United States.” Elihu Root, *Address of the President*, 39 ANNUAL REPORTS OF THE AMERICAN BAR ASSOCIATION 355, 356 (1916).

⁴⁶ GEORGE SOULE, *PROSPERITY DECADE: FROM WAR TO DEPRESSION: 1917-1929* 9 (Rinehart & Co.: New York 1947). “[F]or a great modern war the decisive factor is the national organization behind the armaments. . . . Modern war is a relentless test of a nation’s capacity to cooperate, initiate, think in detail and see large.” Walter Lippmann, *Correspondence*, 6 THE NEW REPUBLIC 157-58 (No. 71) (March 11, 1916). “The real situation confronting America to-day is that while we hang back in the nineteenth-century industrial chaos, the great states of Europe have been shaken into extreme efficiency either for war or for peace, Their governments have been made into highly centralized and delicately adjusted machines which own the railroads, control the other fundamental industries, enlist the cooperation of labor, and regulate the distribution and prices of necessities. Waste motion in the economic life of these countries is largely eliminated. Seeing this situation many of us are rightly alarmed. . . . Nothing will really suffice but a thoroughgoing program of nationalization.” *Republican Resurrection*, 9 THE NEW REPUBLIC 172, 173 (No. 111) (December 16, 1916).

⁴⁷ Pierre Purseigle, *The First World War and the Transformations of the State*, 90 INTERNATIONAL AFFAIRS 249, 253 (2014). “The challenge of economic mobilization was not simply one of scale. . . . Wealth was necessary but not sufficient; technological and scientific knowhow and organizational skills were also required to match the political will to enact a swift and profound, if temporary, transformation of national economies. Total war was indeed ‘the largest enterprise hitherto known to man, which had to be consciously organized and managed’ and could only be pursued by highly specialized industrialized societies. The history of the wartime state has thus rightly focused on national administrative structures and governmental agencies.” *Id.* at 253.

⁴⁸ *Preparedness—A Trojan Horse*, 5 THE NEW REPUBLIC 6 (November 6, 1915). “What do they mean when they shout for preparedness?” Walter Lippmann asked presciently in 1916. “Are they willing to unify and socialize the railroads and the means of communication, to regulate rigorously basic industries like steel and coal mining, are they willing to control the food supply and shipping and credit, are they willing to recognize labor as a national institution? Are they willing to go behind all this and create a workable, modern, scientific federalized system of education? Are they ready to end the destruction of national vitality through unemployment, child labor, overwork, and poverty? Are they willing to do all of this which is the price of cooperation for a free people? If they are not, what are they talking about so earnestly?” Walter Lippmann, *The Issues of 1916*, 7 THE NEW REPUBLIC 107, 108 (No. 83) (June 3, 1916).

⁴⁹ *Address by the President of the United States*, 55 CONG. REC. 101, 103 (April 2, 1917).

⁵⁰ *Morale*, 10 NEW REPUBLIC 337, 337 (No. 29) (April 21, 1917).

⁵¹ *The American Tradition and the War*, 104 THE NATION 484, 485 (No. 2704) (April 26, 1917). “War necessitates organization, system, routine, and discipline. . . . The executive side of the Administration will have to be strengthened by the appointment of trained specialists. Socialism will take tremendous strides forward. . . . We shall have to give up much of our economic freedom. . . . The only way to fight Prussianism is with Prussian tools. The danger is lest we forget the lesson of Prussia: that the bad brother of discipline is tyranny—which our fathers fought to put down and our immigrants came to our shores to escape. It would be an evil day for America if we threw overboard liberty to make room for efficiency.” *Id.*

⁵² *Morale*, *supra* note 50, at 338.

⁵³ RICHARD L. WATSON, JR., *THE DEVELOPMENT OF NATIONAL POWER: THE UNITED STATES, 1900-1919* 219 (Boston: Houghton Mifflin 1976).

⁵⁴ Charles M. Hough, *Law in War Time--1917*, 31 *HARVARD LAW REVIEW* 692, 699 (1918).

⁵⁵ “Non-war-related production would decrease during the war: \$24.3 billion worth of war materials were produced, of which only \$1.9 billion came from increased output while \$22.4 billion came from diverting civilian production to war needs.” MEIRION AND SUSIE HARRIES, *THE LAST DAYS OF INNOCENCE: AMERICA AT WAR 1917-1918* 279 (New York: Random House, 1997).

⁵⁶ JILL LEPORE, *THESE TRUTHS: A HISTORY OF THE UNITED STATES* 395 (W.W. Norton & Co.: New York 2018).

⁵⁷ Leuchtenburg, *supra* note 44.

⁵⁸ 55 *CONG. REC.* 2832 (May 24, 1917). For discussions of wartime regulation, see generally ELLIS W. HAWLEY, *THE GREAT WAR AND THE SEARCH FOR A MODERN ORDER, A HISTORY OF THE AMERICAN PEOPLE AND THEIR INSTITUTIONS 1917-1933* (New York: St. Martin's Press, 1979); DAVID M. KENNEDY, *OVER HERE: THE FIRST WORLD WAR AND AMERICAN SOCIETY* 45-190 (Oxford: Oxford University Press, 1980); NEIL A. WYNN, *FROM PROGRESSIVISM TO PROSPERITY: WORLD WAR I AND AMERICAN SOCIETY* 65-85 (New York: Holmes & Meier, 1986); ROBERT HIGGS, *CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT* 123-59 (Oakland, CA: The Independent Institute, 1987); RONALD SCHAFFER, *AMERICA IN THE GREAT WAR: THE RISE OF THE WAR WELFARE STATE* 31-61 (New York: Oxford University Press, 1991); PAUL A.C. KOISTINEN, *MOBILIZING FOR MODERN WAR: THE POLITICAL ECONOMY OF AMERICAN WARFARE, 1865-1919* (University Press of Kansas, 1997).

⁵⁹ *Stabilizing Demand for Labor*, 16 *NEW REPUBLIC* 125, 125-26 (Aug. 31, 1918). See Charles Merz, *War as Pretext*, 11 *THE NEW REPUBLIC* 129, 130-31 (June 2, 1917) (“Why should war not serve as a pretext to foist innovations upon the country? . . . It is a certain extenuation of war that by creating enormous pressure, it makes obvious the defects in political and economic organization. We shall not in this war be accomplishing much that we are setting out to accomplish if we foreclose to ourselves the full chances of profiting from a dear experience.”). See Neva R. Deardorff, *The Demise of a Highly Respected Doctrine*, *THE SURVEY* (January 12, 1918), at 416 (“LAISSEZ FAIRE is dead! Long live social control! Social control not only to enable us to meet the rigorous demands of war, but also as a foundation for the peace and brotherhood that is to come. This was the theme that ran strongly through all the annual meetings of the learned societies of the social sciences which were held holiday week in Philadelphia.” The annual meetings included those of the American Sociological Society, the American Political Science Association, the American Economic Association, the American Association for Labor Legislation, the American Statistical Association, the American Historical Association, the American Farm Management Association, and the Association of Accounting Instructors.

⁶⁰ GROSVENOR B. CLARKSON, *INDUSTRIAL AMERICA IN THE WORLD WAR: THE STRATEGY BEHIND THE LINE 1917-1918* 3-4 (Boston: Houghton Mifflin, 1923).

⁶¹ MARK SULLIVAN, *OUR TIMES: AMERICA AT THE BIRTH OF THE TWENTIETH CENTURY* 567 (New York: Scribner, 1996).

⁶² J.M. Clark, *The Basis of War-Time Collectivism*, 7 *AMERICAN ECONOMIC REVIEW* 772, 772 (1917). “These stupendous increases in the functions of the national government are threatening to the interests and even to the survival of many powerful classes in the community. They involve a radical change in the balance of economic power, an increase of administrative as compared to legislative power which Congress will fear, and an increase of central as compared with local power which the states will dislike. All these opposing interests will regard this vast extension of national authority which is associated with the autocratic but necessary war power of the executive as ephemeral as the war power itself. Indeed what many of the most convinced opponents of government intrusion into private business mean by a reconsideration of these questions at the end of the war is in substance an automatic and inevitable return to the status quo ante. They regard the former industrial conditions as essentially normal and

permanent, and the recent intrusion of the government as a catastrophe precipitated by the violent irrelevance of war." *After the War—Reaction or Reconstruction*, 13 THE NEW REPUBLIC 331, 331 (No. 168) (January 19, 1918),.

⁶³ *Kahn Warns Against After-War Socialism*, BOSTON DAILY GLOBE (October 11, 1918), at 3.

⁶⁴ Walter George Smith, *Civil Liberty in America: Address of the President*, 41 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 209, 216 (1918). See *War Measures for War Times*, 208 NORTH AMERICAN REVIEW 180 (No. 753) (August 1918); *Constitutional Government in War and Peace*, 3 THE CONSTITUTIONAL REVIEW 222 (1919); Cordenio A. Severance, *Constitution and Individualism*, 8 ABAJ 535 (1922).

⁶⁵ *Nationalism and Internationalism*, 17 THE NEW REPUBLIC 5 (No. 209) (November 2, 1918). "Sectionalism, which not more than two years ago appeared to be a growing force in this country, has all but disappeared. We are hearing practically nothing of the peculiar needs and demands of South or Far West, New England or the central industrial district. Officially and unofficially, we are emphasizing the points in which the interests of labor and capital coincide and slurring the points in which they conflict. And in so far as we are thinking at all about reconstruction policies, we are instinctively adopting the premise that the interest of each group in our nation is the interest of all." *Id.* See *Mob Violence and War Psychology*, 16 THE NEW REPUBLIC 5, 7 (No. 196) (August 3, 1918) ("The essential unity of this country has been magnificently vindicated. America is more of a nation today than she has ever been in the past and her nationality is more firmly attached than ever to democratic domestic and foreign policy.").

⁶⁶ *The Uses of an Armistice*, 17 THE NEW REPUBLIC 59, 60-61 (No. 211) (November 16, 1918). See *Carrying Forward of War-Time Industrial Standards*, THE SURVEY (December 7, 1918), at 308 ("All those who had come from intimate contact during the war with the government agencies in the industrial field believe that a real and permanent gain has been made in many directions, and especially that of greater democracy in industry. But with regard to the latter set of standards, relating to the activity of the government itself, it was clearly shown that only a strong and immediate expression of public opinion can rescue from an untimely end the new agencies and methods established during the war which would be valuable in peace time.").

⁶⁷ WALTER E. WEYL, *THE END OF THE WAR* 303-04 (New York: The MacMillan Company 1918). "It would be blind obscurantism to treat the nationalization of the railroads and the coal and food supplies of the country as the ephemeral and episodic consequence of a military emergency, and to ignore the question as to how far the breakdown of private management during the war emergency was not the natural fruits of defects which had been sufficiently conspicuous under more normal conditions. It would be no less obscurantist to surrender helplessly at the end of the war the public benefits which may have accrued from the incorporation of these essential sources into the national organization. . . . Radicals have consequently a sufficient excuse for considering the compulsory nationalizing of the economic organization under the emergency of war as an illuminating experiment. It indicates the road which the American people will have to travel, in case they wish their economic and social system to serve public rather than private interests." *After the War—Reaction or Reconstruction*, *supra* note 62, at 331-32.

⁶⁸ William Allen White to Mark Sullivan (January 28, 1918), in *SELECTED LETTERS OF WILLIAM ALLEN WHITE 1899-1943* 185 (Walter Johnson, ed., New York: Henry Holt and Co., 1947).

⁶⁹ KENNEDY, *supra* note 58, at 137. See KOISTINEN, *supra* note 58, at 204 (Wilson "took a rather enigmatic stance throughout the war years over economic mobilization.").

⁷⁰ LIPPMANN, *supra* note 40, at 178-79. See *id.* at 132-44.

⁷¹ MEIRION AND SUSIE HARRIES, *supra* note 55, at 278.

⁷² George Soule, *Hard-Boiled Radicalism*, 65 THE NEW REPUBLIC 261, 262 (No. 842) (January 21, 1931).

⁷³ RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT* 274 (New York: A.A. Knopf, 1948). See generally BURT NOGGLE, *INTO THE TWENTIES: THE UNITED STATES FROM ARMISTICE TO NORMALCY* 1-213 (Urbana: University of Illinois Press, 1974). "The return to 'normalcy' was to be an effective Republican slogan after the war, but in fact throughout the conflict it had been Wilson's main intention to depart from the normal as little as possible, especially in economic matters." KENNEDY, *supra* note 58, at 250.

⁷⁴ Henry Cabot Lodge to James Bryce (December 14, 1918) (Henry Cabot Lodge papers), quoted in KENNEDY, *supra* note 58, at 244-45.

⁷⁵ 61 CONG. REC. 5 (1921) (Inaugural Address of Warren G. Harding).

⁷⁶ Paul A.C. Koistinen, *The “Industrial-Military Complex” in Historical Perspective: World War I*, 41 THE BUSINESS HISTORY REVIEW 378, 379-80 (1967).

⁷⁷ MARC ALLEN EISNER, FROM WARFARE STATE TO WELFARE STATE: WORLD WAR I, COMPENSATORY STATE BUILDING, AND THE LIMITS OF THE MODERN ORDER 2 (University Park, Pennsylvania: The Pennsylvania state University Press, 2000).

⁷⁸ See, e.g., Ajay K. Mehrotra, *Lawyers, Guns and Public Moneys: The U.S. Treasury, World War I, and the Administration of the Modern Fiscal State*, 28 LAW AND HISTORY REVIEW 173, 173, 175, 179-82, 187 (2010):

World War I was a pivotal event for U.S. political and economic development, particularly in the realm of public finance. For it was during the war that the federal government ended its traditional reliance on regressive import duties and excise taxes as principal sources of revenue and began a modern era of fiscal governance, one based primarily on the direct and progressive taxation of personal and corporate income. . . .

As part of the war mobilization effort, the federal government significantly expanded its powers and reach over U.S. society. Overall federal spending, for instance, skyrocketed from a paltry 0.2 percent of GDP in 1914 to about 3.2 percent by 1919. . . .

In fiscal year 1914, as the tariff and excise taxes continued to dominate federal revenues, only about 2 percent of the labor force paid income taxes, and income tax receipts, accordingly, made up fewer than 10 percent of total federal revenues.

By the end of the war, however, levies on income and profits had eclipsed all other forms of taxation. Marginal individual income tax rates soared to a top figure of 77 percent, the percentage of the labor force filing income taxes climbed to nearly 17 percent, and monies generated by income and profits taxes accounted for roughly half of all federal revenues in fiscal year 1919. . . .

World War I triggered a sea change in the historical development of a powerful U.S. nation-state. Unparalleled interconnections among economy, society, and polity were undergirded by fundamental transformations in public finance and federal bureaucratic capacity. After the war, the steeply progressive tax rates were scaled back, just as tariff revenues increased in response to the revival of international trade. But the national tax system did not return to either its prewar levels or even its prewar trajectory—the war was thus the pivot upon which the early twentieth-century fiscal revolution turned.

⁷⁹ EISNER, *supra* note 77, at 35.

⁸⁰ Elisha Friedman, *The New Era and Social Progress*, in AMERICA AND THE NEW ERA, *supra* note 20, at 6. See, e.g., F. Herbert Snow, *The Engineer and the State*, PROCEEDINGS OF THE AMERICAN SOCIETY OF CIVIL ENGINEERS (January 1919), at 11 (“‘Winning the War’ . . . brought to the fore the Engineer as the man of the hour.”); Rexford G. Tugwell, *America’s War-Time Socialism*, 124 THE NATION 364 (No. 3222) (April 6, 1927) (“[T]he war was an industrial engineer’s Utopia.”).

⁸¹ Harding, *supra* note 5, at 176.

⁸² In accepting the Republican nomination for President, Harding had decried “the surrender of Congress to the growing assumption of the executive.” Warren G. Harding, *Speech of Acceptance, Address at Formal Notification of His Nomination for the Presidency, at Marion, Ohio, July 22, 1920*, in RE-DEDICATING AMERICA, *supra* note 5, at 36.

⁸³ *Address by the President of the United States*, 62 CONG. REC. 36 (December 6, 1921). “During the anxieties of war, when necessity seemed compelling, there were excessive grants of authority and an extraordinary concentration of powers in the Chief Executive. The repeal of war-time legislation and the automatic expirations which attended

the peace proclamations have put an end to these emergency excesses, but I have the wish to go further than that. I want to join you in restoring . . . the spirit of coordination and cooperation, and that mutuality of confidence and respect which is necessary in representative popular government. Encroachment upon the functions of Congress or attempted dictation of its policy are not to be thought of, much less attempted” *Id.*

⁸⁴ *Id.* at 37.

⁸⁵ *Id.*

⁸⁶ *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 400, 409 (1928).

⁸⁷ EISNER, *supra* note 77, at 36-37.

⁸⁸ Allyn A. Young, *National Statistics in War and Peace*, 59 THE AMERICAN STATISTICIAN 58, 58 (2005) (Originally delivered as the Presidential Address of the American Statistical Association on December 27, 1917, and published in 16 JOURNAL OF THE AMERICAN STATISTICAL ASSOCIATION (1918). The realization of these possibilities required “a degree of national self-knowledge far beyond anything that we might have imagined necessary or possible in the past. . . . [T]he formulation and administration of wise national policies must depend upon the national self-knowledge that only statistical information, gathered on a much larger scale than we have been accustomed to think possible, can give.” *Id.* at 58, 61.

⁸⁹ *Id.* at 61. *See e.g.*, Wesley C. Mitchell, *Statistics and Government*, 16 PUBLICATIONS OF THE AMERICAN STATISTICAL ASSOCIATION 226 (March 1919) “The war forced a rapid expansion in the scope of federal statistics and the creation of new statistical agencies. What is more significant, the war led to the use of statistics . . . as a vital factor in planning what should be done. . . . We cherish the hope that what they helped to accomplish during the war toward the guidance of public policy by quantitative knowledge of social fact may not be lost in the period of reconstruction through which we are passing, and in the indefinite period of peace upon which we are about to enter. . . . [T]he development of social science offers more hope for solving our social problems than any other line of endeavor.” *Id.* at 226, 230.

⁹⁰ EISNER, *supra* note 77, at 72.

⁹¹ Pub. L. 66-152, 41 Stat. 456 (February 28, 1920).

⁹² EISNER, *supra* note 77, at 135. Thus instead of setting maximum rates, the ICC after the Transportation Act began to “to set *minimum* rates” in the interest of “preventing ruinous rate wars and promoting the stability and profitability of the industry.” *Id.* In order “to bring stability and certainty of return, to restore railway credit, to place rigid restraints upon a supposedly hostile regulating body,” the ICC was charged with fixing rates that would bring at least a 5.5% percent return on the “fair value” of the aggregate railway property within a given district. Gerard C. Henderson, *Railway Valuation and the Courts*, 33 HARVARD LAW REVIEW 902, 902 (1920). *See* 41 Stat. 488. *See* Samuel W. Moore, *Railroad Rates and Revenues*, 16 VIRGINIA LAW REVIEW 243, 244 (1930).

⁹³ 41 Stat. 481-82.

⁹⁴ 263 U.S. 456 (1924). *See* chapter 3, at-- Butler’s docket book indicates that McKenna was the only dissenting vote in conference.

⁹⁵ *Id.* at 478.

⁹⁶ Ellis W. Hawley, *Economic Inquiry and the State in New Era America: Antistatist Corporatism and Positive in Uneasy Coexistence*, in THE STATE AND ECONOMIC KNOWLEDGE: THE AMERICAN AND BRITISH EXPERIENCES 288 (Mary O. Furner and Barry Supple, eds., Cambridge: Woodrow Wilson International Center for Scholars and Cambridge University Press 1990). *See* SOULE, *supra* note 46, at 62: “[T]he eyes of many who had participated in the war planning or who had observed it with understanding, were opened to the possibilities of managing the economy for chosen ends. Whereas in previous years the behavior of the economic order had seemed like a series of unpredictable and uncontrollable natural phenomena, it now was analyzed with the aid of masses of new statistics

and more detailed examination of cause and effect. It began to be possible to speak in terms of relative magnitudes and large aggregates, and to apply deliberate social controls by policies of priority and other devices. Toward the end of the war, a relatively few people began to ask why, if production and distribution could be governed even by a hastily improvised organization for war purposes, even better results might not be achieved over a longer period for purposes regarded as desirable in peace.”

⁹⁷ Hugh P. Baker, *Practical Problems of Trade Associations*, 11 PROCEEDINGS OF THE ACADEMY OF POLITICAL SCIENCE IN THE CITY OF NEW YORK 629, 632(1926).

⁹⁸ Hawley, *supra* note 98, at 289.

⁹⁹ *Id.*

¹⁰⁰ Ellis W. Hawley, “*Industrial Policy*” in *the 1920s and 1930s*, in THE POLITICS OF INDUSTRIAL POLICY 65 (Claude E. Barfield and William A. Schambra, eds, Washington D.C.: American Enterprise Institute for Public Policy Research, 1986). *See, e.g.*, Bogart, *supra* note 3, at 606 (“New duties have been placed upon the government and new opportunities for service have been accepted, so that the net result of the participation by the United States in the war will be a permanent enlargement of the functions of the national government.”).

¹⁰¹ KOISTINEN, *supra* note 58, at 211.

¹⁰² *Id.* at 209-11. “The war service committees secured business far more immunity from the antitrust laws than even the most sanguine advocates of industrial cooperation had espoused during the Progressive years. A private commercial body, not the federal government, certified that the committees represented the collective interests of business.” *Id.* at 209.

¹⁰³ Harry W. Wheeler, *Putting Our Resources on Tap*, 6 NATION’S BUSINESS 9 (August 1918), at 9. “So well has the system operated thus far that it is only a step to the time when the system of competitive bidding on war orders will be obsolete. Bidding is made unnecessary when manufacturers are ready to lay their cost sheets on the table before their competitors and let the government fix its own price on their products. And the government is coming to see that orders must be placed with a view to conserving industry as a whole, that the industrial structure must not be torn down.” *Id.*

¹⁰⁴ E.F. Albertsworth, *The Federal Supreme Court and Industrial Development*, 16 ABAJ 317, 319 (May 1930). “With the war,” wrote Mark Sullivan in 1925:

solidarity of industry, coöperation among the units composing each industry, was seen to be, for purpose of the war, not reprehensible but desirable. . . . Out of this . . . came a greater popular tolerance of combination. The economic benefits of production on a large scale, and the reduced costs that accompany it, came to outweigh, to some extent, the popular hostility toward combinations because of the suspicion against the power put into the hands of the individuals who control these combinations. Along with this went a greater tolerance on the part of government.

For nearly two decades, it was a major issue in American politics to prevent consolidation of the railroads. . . . Twenty years later, the Government is actually demanding consolidation of the railroads into larger units; and the machinery is at this moment under way bringing practically all the railroads of the country into a smaller number of units.

Mark Sullivan, *Looking Back on La Follette*, 49 WORLD’S WORK 324, 330 (No. 3) (January 1925).

¹⁰⁵ BERNARD M. BARUCH, AMERICAN INDUSTRY IN THE WAR: A REPORT OF THE WAR INDUSTRIES BOARD 107 (Washington D.C.: Government Printing Office 1921).

¹⁰⁶ *Id.* at 105.

They can increase the amount of wealth available for the comfort of the people by inaugurating rules designed to eliminate wasteful practices attendant upon multiplicity of styles and types of articles in the various trades; they can assist, in cultivating the public taste for rational types of commodities; by exchange of trade information, extravagant methods of production and distribution can be avoided through them, and production will tend to be localized in places best suited economically for it. By acting as centers of

information, furnishing lists of courses to purchasers and lists of purchaser to producers, supply and demand can be more economically balanced. From the point of vantage which competent men have at the central bureau of an association, not only can new demands be cultivated, but new sources of unexploited wealth can be indicated.

Id. at 105-06.

¹⁰⁷ Charles Evans Hughes, *Our After-War Dangers*, 61 FORUM 237 (No. 2) (February 1919).

¹⁰⁸ EISNER, *supra* note 77, at 89-91.

¹⁰⁹ George T. Odell, *Herbert Hoover—Super-Business Man*, 121 THE NATION 325, 325-26 (September 23 1925). See Arnold, *supra* note 24, at 530-35; Tugwell, *supra* note 80, at 367 (“The sole representative of the War Industries idea in Washington today is Mr. Hoover, and the contrast between the activities of his Department and the attitude of President Coolidge and his Department of Justice is amusing and instructive.”).

¹¹⁰ Quoted in *Hoover Says Boom Should Not Bring Inflation Perils*, NEW YORK TIMES (May 9, 1923), at 7. Both Brandeis and Franklin Delano Roosevelt had pushed the Democratic Party to nominate Hoover for President in 1920. Marc Winerman & William E. Kovacic, *Outpost Years for a Start-Up Agency: The FTC From 1921-1925*, 77 ANTITRUST LAW JOURNAL 145, 160 (2010).

¹¹¹ Evan Metcalf, *Secretary Hoover and the Emergence of Macroeconomic Management*, 49 BUSINESS HISTORY REVIEW 60, 61, 68 (No. 1) (Spring 1975).

¹¹² Arnold, *supra* note 109, at 535-36; Metcalf, *supra* note 111, at 69; HOOVER, *supra* note 23, at 66. See *Address by Hon. Herbert Hoover*, in DEPARTMENT OF COMMERCE, BUREAU OF STANDARDS, FOURTEENTH ANNUAL CONFERENCE ON WEIGHTS AND MEASURES 79 (Government Printing Office: Washington D.C. 1922) (“The whole conception of standardization has changed in recent years and has come to the first rank of importance. . . . [T]he question of standards has become a question embracing the very fundamental of efficiency in our whole commercial and industrial fabric.”).

¹¹³ Herbert Hoover, *The World Economic Situation: Address of Herbert Hoover Before the San Francisco Commercial Club* (October 9, 1919), at 15 (available at <http://hdl.handle.net/2027/uc2.ark:/13960/t9v11xx20>).

¹¹⁴ Quoted in Arnold, *supra* note 24, at 535.

¹¹⁵ Quoted in *Hoover Says Boom Should Not Bring Inflation Perils*, *supra* note 110, at 7. Thus Hoover insisted
 To curb the forces in business which would destroy equality of opportunity and yet to maintain the initiative and creative faculties of our people are the twin objects we must attain. To preserve the former we must regulate that type of activity that would dominate. To preserve the latter, the Government must keep out of production and distribution of commodities and services. This is the deadline between our system and socialism. Regulation to prevent domination and unfair practices, yet preserving rightful initiative, are in keeping with our social foundations. Nationalization of industry or business is their negation.
 HERBERT HOOVER, *AMERICAN INDIVIDUALISM* 54-55 (New York: Doubleday, Page & Co. 1923).

¹¹⁶ Quoted in Joan Hoff Wilson, *Herbert Hoover's Agricultural Policies, 1921-1928*, in ELLIS W. HAWLEY, *HERBERT HOOVER AS SECRETARY OF COMMERCE: STUDIES IN NEW ERA THOUGHT AND PRACTICE* 121 (Iowa City: University of Iowa Press 1981). Price-fixing was necessary during the war, Hoover said at the time, because the government had been “forced into the issue of becoming the dominant purchaser and thereby, willingly or unwillingly, the price determiner in particular commodities.” Herbert Hoover to Woodrow Wilson (March 26, 1918), in *Board to Determine War Policy With Respect to Meat Industry*, 2 OFFICIAL BULLETIN 1, 6 (No. 272) (April 1, 1918).

¹¹⁷ Ellis W. Hawley, *Herbert Hoover, the Commerce Secretariat, and the Vision of an “Associative State,” 1921-1928*, 61 JOURNAL OF AMERICAN HISTORY 117-18 (1974). Hoover regarded trade associations as groups within which “the individual finds an opportunity for self-expression and participation in the moulding of ideas, a field for training and the stepping stones for leadership.” HOOVER, *supra* note 115, at 42.

¹¹⁸ Hawley, *supra* note 117, at 118.

¹¹⁹ 257 U.S. 377 (1921). The case had been originally argued on October 20-21, 1920; it was reargued a year later on October 12-13, 1921, after Taft joined the Court. The opinion was authored by John Clarke, who considered the case “one of the most important anti-trust cases ever decided by [the] Court for it involved for the first time there ‘the Open Competition Plan’ which was devised with all the cunning astute lawyers & conscienceless business men could command to defeat or circumvent the law. It seemed to me and to six others that it was a most flagrant case of law breaking.” JHC to Woodrow Wilson (September 9, 1922) (Wilson papers).

¹²⁰ The plan was “sometimes called “The New Competition.” 257 U.S. at 392. This was likely a reference to ARTHUR JEROME EDDY, *THE NEW COMPETITION* (New York: D. Appleton and Co. 1912), which strongly endorsed the creation of “open-price” associations.

¹²¹ 257 U.S. at 392.

¹²² *Id.* at 397.

¹²³ *Id.* at 399.

¹²⁴ *Id.* at 409. The Court explained:

In the presence of this record it is futile to argue that the purpose of the Plan was simply to furnish those engaged in this industry, with widely scattered units, the equivalent of such information as is contained in the newspaper and government publications with respect to the market for commodities sold on Boards of Trade or Stock Exchanges. One distinguishing and sufficient difference is that the published reports go to both seller and buyer, but these reports go to the seller only; and another is that there is no skilled interpreter of the published reports, such as we have in this case, to insistently recommend harmony of action likely to prove profitable in proportion as it is unitedly pursued.

Id. at 411.

¹²⁵ There is an undated note in Taft’s papers entitled “Votes” (reproduced on Reel 617 of the Taft papers), in which Taft counts among the dissenters in *American Column & Lumber Co.* “Brandeis, Vandevanter [sic], Holmes, McKenna.” Apparently Van Devanter subsequently acquiesced to the Court’s published opinion, although his sympathy to trade associations would emerge later in the decade. In his powerful dissent, Brandeis argued that “it was neither the aim of the Plan, nor the practice under it, to regulate competition in any way. Its purpose was to make rational competition possible, by supplying data not otherwise available, and without which most of those engaged in the trade would be unable to trade intelligently.” *Id.* at 415 (Brandeis, J., dissenting). Brandeis stressed that “No information gathered under the Plan was kept secret from any producer, any buyer, or the public. Ever since its inception in 1917, a copy of every report made and of every market letter published has been filed with the Department of Justice, and with the Federal Trade Commission.” *Id.*

Concerning grain, cotton, coal, and oil, the government collects and publishes regularly, at frequent intervals, current information on production, consumption, and stocks on hand; and Boards of Trade furnish freely to the public details of current market prices of those commodities, the volume of sales, and even individual sales, as recorded in daily transactions. Persons interested in such commodities are enabled through this information to deal with one another on an equal footing. The absence of such information in the hardwood lumber trade enables dealers in the large centers more readily to secure advantage over the isolated producer. And the large concerns, which are able to establish their own bureaus of statistics, secure an advantage over smaller concerns. Surely it is not against the public interest to distribute knowledge of trade facts, however detailed.

Id. at 415-416. Brandeis was quite pleased with his dissent. “I was waiting for a chance to say some of those things.” LDB to Felix Frankfurter (December 31, 1921), in 5 *LETTERS OF LOUIS D. BRANDEIS* 41 (Melvin I. Urofsky and David W. Levy, eds., Albany: State University of New York Press, 1978) (“5 *LETTERS OF LOUIS D. BRANDEIS*”).

¹²⁶ M. Browning Carrott, *The Supreme Court and American Trade Associations, 1921-1925*, 44 *THE BUSINESS HISTORY REVIEW* 320, 329-30 (1970). See Homer Hoyt, *Trade Associations and the Sherman Act*, 1 *NORTH CAROLINA LAW REVIEW* 21, 21 (1922) (The case “has aroused more discussion among business men than any

decision of the Supreme Court of the United States within the last two or three years, for the interpretation of the Sherman Law adopted in the case apparently throws into question the legality of the trade association—a type of co-operative business activity that has grown rapidly since the war. . . . Thousands of business men are wondering today whether activities that seem indispensable to the efficient conduct of their business have been outlawed by this case.”). One commentator observed that the decision “manifestly goes counter to the trend of our national commercial life,” because “co-operation is the tocsin of the new age. Almost every interest in the community has its local organization” whose “prime purpose” is “to collect data and to co-operate for mutual benefit. Furthermore, government bureaus and boards of trade have been organized with the same general purpose. They furnish details of sales and current prices in daily transactions.” *Restraint of Trade: “Open Competition Plan” Violates Sherman Anti-Trust Act*, 10 CALIFORNIA LAW REVIEW 350, 352 (1922).

¹²⁷ Herbert Hoover to Harry Daugherty (February 3, 1922), in FRANKLIN D. JONES, *TRADE ASSOCIATION ACTIVITIES AND THE LAW* 327 (New York: McGraw-Hill 1922).

¹²⁸ *Id.* at 328. See Franklin D. Jones, *Business Statistics as a Means of Stabilizing Business*, 11 PROCEEDINGS OF THE ACADEMY OF POLITICAL SCIENCE IN THE CITY OF NEW YORK 598 (1926). For a discussion of Hoover’s response to *American Column*, see Arnold, *supra* note 24, at 538-39.

¹²⁹ Harry Daugherty to Herbert Hoover (February 8, 1922), in JONES, *supra* note 127, at 332. Prominent corporate attorney Gilbert H. Montague supported Hoover’s plan. See Gilbert H. Montague, *Trade Associations and the Government*, 215 THE NORTH AMERICAN REVIEW 751 (June 1922). Montague noted with some irony that “Less than four years ago, the Government was fervently urging businessmen everywhere to combine with their competitors into trade committees or trade associations in order to stabilize supply and demand, restrict competition, and even agree upon prices, in coöperation with the United States Fuel Administration, the United States Food Administration, and the War Industries Board. . . . Many business men have experienced during the war, for the first time in their careers, the tremendous advantages, both to themselves and to the general public, of combination, of cooperation and common action, with their natural competitors.” Yet in *American Column & Lumber Co.* the Court had “declared that it is criminal for a trade association to collect and disseminate information among its members regarding supply and demand and prices, if in the association’s meetings and bulletins the members are told how they may best act upon this information.” Montague asserted that “No development in business life is more significant than the increase of financial and industrial services that furnish information to enable business executives to take their bearings and determine their course.” Interpreting *American Column & Lumber Co.* as turning on the distribution of advice about how to act on pricing information, Montague endorsed Hoover’s offer for the Department of Commerce “to disseminate promptly and periodically all information collected by trade associations and filed with him for distribution.” Montague suggested that trade associations could to gather statistics with a level of “detail and freshness” that could not be duplicated by any government agency.

In the *Hardwood* case, the mischief began when the Association in its meetings and bulletins tried to instruct its members how best to act upon trade information. May it not, therefore, be possible for trade associations merely to collect such trade information from their members, and to distribute it not only among their members but also among the Government bureaus, the trade press, the daily newspapers so far as they are interested, and the fast growing number of statistical service organizations that in recent years have sprung up for the purpose of interpreting to business men the tendencies and developments in business throughout the country?

Montague pioneered the development of a legal practice focused on federal regulations of business. See Wyatt Wells, *Counterpoint to Reform: Gilbert H. Montague and the Business of Regulation*, 78 THE BUSINESS HISTORY REVIEW 423 (2004).

¹³⁰ 262 U.S. 371 (1923). William J. Donovan later commented about *American Linseed Oil Co.* that the case was inaccurately “designated as a trade association case.” “The defendants . . . were not members of a trade association group, but they had bound themselves by contract to a so-called ‘business bureau’ which had certain of the attributes of a pool. The defendants entered into an agreement, with provisions for financial forfeiture in the event of violation, for the organization and maintenance of a bureau, the function of which was to gather and disseminate information among members as to all price lists. Adherence to these prices was required of members and all information was treated as confidential and concealed from the buyers.” William J. Donovan, *The Legality of Trade Associations*, 11 PROCEEDINGS OF THE ACADEMY OF POLITICAL SCIENCE IN THE CITY OF NEW YORK 571, 573 (1926).

¹³¹ Butler's surviving docket book for the 1922 indicates that the surface show of unanimity may perhaps have been misleading. At conference, Butler's notation strongly suggests that Holmes, Brandeis and Sutherland, and perhaps even Butler himself, were uncertain about how to vote, and that McKenna had affirmatively voted against McReynold's judgment.

¹³² 262 U.S. at 389-90 In the press, it was reported that "The Court's decision is regarded here as sufficiently sweeping to cause all trade associations which have continued to disseminate price information among their members to cease doing so. The co-called "open price" associations were a development of war-time conditions. . . . Government officials, however, have recognized a need for more complete statistics relative to production, consumption and prices of major commodities and the Department of Commerce has endeavored to expand its statistical service as far as it could do so along this line without running counter to the law." Grafton Wilcox, *Linseed Trade Plans Are Hit*, LOS ANGELES TIMES (June 5, 1923), at 15.

¹³³ Ellis W. Hawley, *Herbert Hoover and the Sherman Act, 1921-1933*, IOWA LAW REVIEW 1067, 1079-83 (1989); ROBERT F. HIMMELBERG, *THE ORIGINS OF THE NATIONAL RECOVERY ADMINISTRATION: BUSINESS, GOVERNMENT, AND THE TRADE ASSOCIATION ISSUE, 1921-1933* 26-42 (New York: Fordham University Press 1993). Following *American Linseed Oil Co.* "the opinion gained currency among lawyers as well as among laymen that the mere collection and dissemination of statistical information was unlawful." Donovan, *supra* note 130, at 574.

¹³⁴ While Stone was Attorney General, he had been committed to Hoover's view of trade associations. He may even have been involved in the selection of *Maple Flooring Manufacturing Ass'n* as a test case. HIMMELBERG, *supra* note 133, at 45-47; RUDOLPH J.R. PERITZ, *COMPETITION POLICY IN AMERICA: HISTORY, RHETORIC, LAW* 87 (Oxford: Oxford University Press 1996).

¹³⁵ 268 U.S. 563 (1925). The case had been originally argued on December 1-2, 1924, but after McKenna's retirement it was reset for argument on March 3, 1925. The case was paired with *Cement Manufacturers Protective Ass'n v. United States*, 268 U.S. 588 (1925). On March 5, Holmes wrote Laski that "We have been having some cases under the Sherman Act, which I loathe and despise—and I am pleased to know that Brandeis who used to uphold it, doesn't think it does any good. I am wondering whether I shall be in a minority. I don't mean to let my disbelief in the act affect my application of it--but I think it has been enlarged by construction in ways that I regret." OWH to Harold Laski (March 5, 1925), in 1 HOLMES-LASKI CORRESPONDENCE, *supra* note 27, at 719.

¹³⁶ Taft, McReynolds, and Sanford dissented. Van Devanter's defection from the position seemingly implied by his public vote in *American Column & Lumber Co.* was foreshadowed by his initial vote in conference in that case. *See supra* note 125. Sutherland's and Butler's seeming shift from their public votes in *American Linseed Oil Co.* might also have been foreshadowed by their uncertainty in conference in that case. *See supra* note 131. In 1927, Van Devanter, Sutherland and Butler would silently dissent from the Stone's opinion for the Court in *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927), holding that an agreement to fix prices was illegal even if the price agreed upon was reasonable. By contrast, Taft wrote to Stone about his opinion in *Trenton Potteries* that "This is one of the best opinions written by you or anyone this term. I felicitate you." (Stone papers). Holmes wrote to Stone, "I defer, but unwillingly." (Stone papers).

In his notes summarizing the conference after the first argument of *Maple Floor Manufacturers Ass'n*, Butler briefly summarized the position of each voting Justice. He wrote that Taft had argued that the district court decree enjoining the plan should be affirmed "under the language of McR in *Linseed Oil Case*—Change of method not a change of purpose." McKenna had voted with Taft to affirm the decree. Holmes, by contrast, had blasted the decree as a "Disgrace to the U.S." Butler recorded Van Devanter as commenting, "Wrong—reverse." McReynolds and Sanford had voted to affirm; Brandeis, Sutherland and Butler to reverse. Taft was ill during the conference that followed the re-argument of the case, and it was Holmes, as the presiding senior Justice, who assigned the opinion to Stone. W. Barton Leach Jr., to Felix Frankfurter (May 31, 1938) (Holmes papers). Taft urged William J. Donovan, who headed DOJ's antitrust division, that "it may be properly argued in future cases that the Cement and Maple Flooring cases are not a departure from the wholesome rule laid down by Justice McReynolds in the *Linseed Oil case*." WHT to William J. Donovan (September 4, 1925) (Taft papers). He teased Van Devanter that if their mutual friend Solicitor General William D. Mitchell had briefed the case, "some of you people in the majority might have seen the proper light." WHT to WVD (September 11, 1925) (Van Devanter papers).

¹³⁷ 268 U.S., at 567. Nor was there any evidence that the exchange of information had influenced prices, either by producing a “practical uniformity of net delivered prices” or by affecting “prices adversely to consumers.” *Id.*

¹³⁸ 268 U.S. at 572. Stone emphasized that “all reports of sales and prices dealt exclusively with past and closed transactions,” and that the statistics were “published in trade journals which are read by from 90 to 95% of the persons who purchase the products of Association members. They are sent to the Department of Commerce which publishes a monthly survey of current business.” 268 U.S. at 573-74. He noted that the statistics did not “differ in any essential respect from trade or business statistics which are freely gathered and public disseminated in numerous branches of industry producing a standardized product such as grain, cotton, oil.” *Id.* at 574. In contrast to *American Column & Lumber Co.*, “there was no discussion of prices in meetings. . . . [T]he Association was advised by counsel that future prices were not a proper subject of discussion.” *Id.* at 575.

¹³⁹ 268 U.S. at 582-83. Stone was in direct correspondence with Hoover while drafting the opinion. *See* Herbert Hoover to HFS (April 3, 1925) (Stone papers); HFS to Herbert Hoover (April 4, 1925) (Stone papers); Herbert Hoover to HFS (April 18, 1925) (Stone papers); HFS to Herbert Hoover (April 20, 1925) (Stone papers) (“What I was especially interested in when I telephoned to you the other day was in getting information as to how far there was any general distribution of information as to the cost of standardized products of industry.”); HFS to Herbert Hoover (June 1, 1925) (Stone papers). Hoover found Stone’s opinion “of the most powerful interest and extraordinarily helpful. It is a great economic document!” *See* Herbert Hoover to HFS (June 3, 1925) (Stone papers).

In his opinion, Stone stressed that “Exchange of price quotations of market commodities tends to produce uniformity of prices in the markets of the world. Knowledge of the supplies of available merchandise tends to prevent overproduction and to avoid the economic disturbances produced by business crises resulting from overproduction. But the natural effect of the acquisition of wider and more scientific knowledge of business conditions, on the minds of the individuals engaged in commerce and its consequent effect in stabilizing production and price, can hardly be deemed a restraint of commerce, or, if so, it cannot, we think be said to be an unreasonable restraint, or in any respect unlawful.” 268 U.S. at 582. “It was not the purpose or the intent of the Sherman Anti-Trust Law to inhibit the intelligent conduct of business operations, nor do we conceive that its purpose was to suppress such influences as might affect the operations of interstate commerce through the application to them of the individual intelligence of those engaged in commerce, enlightened by accurate information as to the essential elements of the economics of a trade or business, however gathered or disseminated. Persons who unite in gathering and disseminating information in trade journals and statistical reports on industry, who gather and publish statistics as to the amount of production of commodities in interstate commerce, and who report market prices, are not engaged in unlawful conspiracies in restraint of trade merely because the ultimate result of their efforts may be to stabilize prices or limit production through a better understanding of economic laws and a more general ability to conform to them, for the simple reason that the Sherman Law neither repeals economic laws nor prohibits the gathering and dissemination of information.” 268 U.S. at 583-84.

¹⁴⁰ 268 U.S. at 584. Holmes called Stone’s opinion “Good sense and good law.” (Stone papers). Brandeis commented about *Maple Flooring Manufacturers Ass’n* and *Cement Manufacturers Protective Ass’n* that “These are two uncommonly good opinions.” (Stone papers). He thought them Stone’s “best work.” LDB to Felix Frankfurter (June 2, 1925), in 5 LETTERS OF LOUIS D. BRANDEIS, *supra* note 125, at 175. Van Devanter noted on Stone’s draft that it was “a model opinion in every respect.” (Stone papers). Sutherland remarked that “I think you have done a good and useful job.” (Stone papers).

¹⁴¹ 269 U.S. at 587 (McReynolds, J., dissenting). Taft and Sanford separately dissented in both *Maple Flooring Manufacturers Ass’n* and *Cement Manufacturers Protective Ass’n* on the ground that “the evidence established in each case brings it substantially within the rules stated in the *American Column Co.* and *American Linseed Oil Co. Cases*, the authority of which . . . is not questioned in the opinions of the majority of the Court.” *Id.* at 586 (Taft, C.J. and Sanford, J., dissenting). In contrast to McReynolds, Taft and Sanford did not contend that the exchange of information constituted a *per se* violation of the Sherman Act. They instead believed that there were sufficient facts in the record to demonstrate the existence of an independent agreement to fix prices. (The government later filed an unsuccessful petition for re-hearing in both cases on precisely these grounds. Donovan, *supra* note 130, at 576-77.) After publication of the Court’s opinion, Taft received a letter from his good friend Charles D. Hilles, the Vice-Chairman of the Republican National Committee, expressing surprise “at the majority opinion in the Trades Associations case. It is difficult to see how practically the Government can permit the intimate interchanges between competitors which the decision legalizes and still prevent, or even detect, the meeting of minds on prices.” Charles

D. Hilles to WHT (June 8, 1925) (Taft papers). Taft replied that “I was disappointed in the Trade Association cases, and I think this decision may return to plague the majority, but we shall see.” WHT to Charles D. Hilles (June 9, 1925) (Taft papers).

¹⁴² See Emerson P. Schmidt, *The Changing Economics of the Supreme Court*, 147 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 66 (January 1930).

¹⁴³ Herbert Hoover, *We Can Cooperate and Yet Compete*, 14 NATION’S BUSINESS 11 (No. 7) (June 5, 1926). Hoover illustrated his point with the example of agricultural co-operatives. In 1928 the Taft Court would accept this insight. See *infra* note 345.

¹⁴⁴ *Id.* “These accomplishments,” Hoover wrote, “involve not only the units of a given trade but also cooperation between the many producing and consuming trades of a given commodity. . . . I might cite the widely successful organized cooperation between several score different shippers’ and transportation organization for the more regular and efficient transport of goods. These undertakings result not only in greater economy in production and consumption, but also eventuate in less costs to consumer.” In this extraordinary essay, Hoover also discusses the increasing separation of ownership from control within American business, and hence the growth of “a new profession, business administration.” “The expert has passed from the land of derision to the land of esteem. We have realized from this . . . great advances in quality of leadership, in technology, organization and adaptability to new ideas and to shifting demand.”

¹⁴⁵ HOOVER, *supra* note 23, at 56. Coolidge deeply disliked Hoover. Marc Winerman & William E. Kovacic, *The William Humphrey and Abram Myers Years: The FTC from 1925 to 1929*, 77 ANTITRUST LAW JOURNAL 701, 709 (2011).

¹⁴⁶ In Taft’s words, “We had been through the greatest war of history and were attempting to return to peace conditions, and had reached a time in 1920 when business was bad and financial disaster threatened. . . . [W]e were in the grip of a nation-wide industrial and business depression.” *United States v. Stone & Downer Co.*, 274 U.S. 225, 240 (1927).

¹⁴⁷ REPORT OF THE PRESIDENT’S CONFERENCE ON UNEMPLOYMENT 16 (Washington D.C.: Government Printing Office 1921).

¹⁴⁸ “Intervention of such a scale by a federal ‘quasi-voluntary body,’ as Hoover described it, ‘to handle the whole problem of unemployment . . . on a nation-wide basis,’ would have been inconceivable before the war. Hoover and aides like Arthur Woods brought to this peacetime problem the experience of numerous war agencies in similar drives to mobilize local and private groups to act with a national purpose. More than one observer compared the conference’s method of issuing an ‘official appeal . . . for unofficial action’ to the wartime appeals of Hoover’s Food Administration for meatless and wheatless days, ‘without the passage of any law.’” Metcalf, *supra* note 111, at 72.

¹⁴⁹ The Conference recommended, *inter alia*:

7. Public construction is better than relief. The municipalities should expand their school, street, sewage, repair work, and public buildings to the fullest possible volume compatible with the existing circumstances. That existing circumstances are favorable is indicated by the fact that over \$700,000,000 of municipal bonds, the largest amount in history, have been sold in 1921. Of these, \$106,000,000 were sold by 333 municipalities in August. Municipalities should give short-time employment the same as other employers. . . .

9. The Federal authorities, including the Federal Reserve Banks, should expedite the construction of public buildings and public works covered by existing appropriations. . . .

REPORT OF THE PRESIDENT’S CONFERENCE ON UNEMPLOYMENT, *supra* note 147, at 20. Hoover was frustrated that the conference did not produce legislative results. “Specifically, he wanted something permitting the countercyclical phasing of public works, an idea too advanced even for so progressive a senator as Nebraska’s George Norris, who said, ‘We had better let God run [the economy] as in the past.’ Hoover’s partisans nonetheless declared victory: bond issues for local public works hit record highs within months of the gathering, and several federal departments advanced spending projects that had been lingering on drawing boards.” WHYTE, *supra* note 22, at 263. In the press

it was said that the “response” to the Conference’s recommendations “was not unlike that which we all made to Mr. HOOVER’s wartime appeals for the conservation of food.” *Cycles of Unemployment*, NEW YORK TIMES (April 3, 1922), at 12. On the left, however, it was said that “The most acute criticism made of the United States Food Administration was that Herbert Hoover conceived the American food problem to be a temporary emergency, and that when the war was over nothing of permanent serve to the nation was left. That is also true of the unemployment conference. . . . What the recent Washington conference did was to consider the industrial depression and to offer business suggestions.” William L. Chenery, *Mr. Hoover’s Hand*, THE SURVEY (October 22, 1921), at 107-08.

On “Hoover’s introduction of macroeconomic policy into official thinking the 1920s,” see Metcalf, *supra* note 111, at 79.

¹⁵⁰ REPORT OF THE PRESIDENT’S CONFERENCE ON UNEMPLOYMENT, *supra* note 147, at 27.

¹⁵¹ Charles E. Hughes, *New Phases of National Development*, 4 ABAJ 92, 107-08 (1918). On the contemporary experience of the tension between peacetime constitutional precedents and the exercise of wartime powers, see *A Reprieve for the Children*, 16 THE NEW REPUBLIC 7 (No. 196) (August 3, 1918) (“In case after case, the executive branch has felt itself compelled in the public interest and especially in the field of labor to over-rule solemn decisions of the Supreme Court.”); Edwin S. Corwin, *War, the Constitution Moulder*, 11 THE NEW REPUBLIC 153, 153-54 (No. 136) (June 9, 1917) (“Measures of this description look toward the permanent reshaping of both our governmental and our industrial systems The war has overtaken us at a peculiarly favorable moment for effecting lasting constitutional changes. For several years forces have been accumulating behind the barriers of the old Constitution, straining and weakening them at many points, yet without finding adequate enlargement. Where the stress of war falls coincident with such forces we may expect it to thrust aside accepted principles, not for the time only, but permanently.”).

¹⁵² Consider John W. Davis’s assessment of the impact of the war in 1923:

The Great War and its aftermath have profoundly disturbed the foundations of society and government. . . . Men and women were taken from their normal and accustomed occupations and set to new and strange tasks. They were required to reverse the orderly habit and custom of their lives. Power was given to those who before had been impotent. . . . It is not to be wondered at that in the name of reform one remedy after another is offered to a world whose discontent makes it eager to embrace any gospel, even when condemned by all past experience. . . . Some senators of the United States and other would-be leaders are willing, or would have themselves believed to be willing, to strike down our whole theory of constitutional government by transferring from the Courts to Congress the ultimate power to determine when the limit of constitutional authority has been overstepped.

John W. Davis, *Some Current Activities of the American Bar Association*, 29 WEST VIRGINIA LAW QUARTERLY 109, 117-18 (1923).

¹⁵³ Edward T. Sanford, Address to the Harvard Alumni Association, June 19, 1924 (Sanford papers).

¹⁵⁴ WHT to Mrs. Bellamy Storer (September 4, 1924) (Taft papers).

¹⁵⁵ WVD to J.H. Farley (February 12, 1920) (Van Devanter papers).

¹⁵⁶ *Id.*

¹⁵⁷ WVD to John C. Pollock (November 4, 1920) (Van Devanter papers).

¹⁵⁸ GS to Arthur L. Thomas (September 21, 1917) (Sutherland papers). Thomas had written Sutherland: “I fear, very much fear, that the day of reckoning is not far off. The old fashioned idea of a government of balanced powers is rapidly being displaced by the most absolute centralization of power the world has ever known, and this is happening in the Great American Republic.” Arthur L. Thomas to GS (September 10, 1917) (Sutherland papers).

¹⁵⁹ GS to Arthur L. Thomas (September 21, 1917) (Sutherland papers).

¹⁶⁰ Remarks of Chief Justice Taft, 257 U.S. xxiv, xxvii (1921). Taft admired White’s “intense patriotic appreciation of the necessity of vesting full powers in the nation when its integrity is threatened and of the existence of ample authority to this end in the Constitution.” *Id.*

¹⁶¹ The Taft Court did extend to civil actions the holding of the White Court that the provision of the Lever Act prohibiting “unjust or unreasonable” or “excessive” charges for “necessaries” was unconstitutionally vague. *See* A.B. Small Co. v. American Sugar Refining Co., 267 U.S. 233 (1925); United States v. Cohen Grocery Co., 255 U.S. 81 (1921).

¹⁶² Sutherland v. Mayer, 271 U.S. 272, 287 (1926).

¹⁶³ 279 U.S. 253 (1929).

¹⁶⁴ Stone’s docket book shows that McReynolds had initially “passed” at conference, suggesting ambivalence about the Court’s holding.

¹⁶⁵ Pub. L. 65-41, 40 Stat. 276 (August 10, 1917).

¹⁶⁶ 279 U.S. at 259.

¹⁶⁷ 261 U.S. 525 (1923).

¹⁶⁸ 279 U.S. at 261-62.

¹⁶⁹ 273 U.S. 418 (1927).

¹⁷⁰ 277 U.S. 350 (1928).

¹⁷¹ *See* Chapter 1 ---

¹⁷² The narrowness of the “as applied” conclusion is notable because, as Butler repeatedly emphasizes, the purchaser in *Highland* was the manufacturer of railroad equipment needed by the government, and hence any increase in the price of coal “would have been directly opposed to the interest of the government.” 279 U.S. at 262. The “as applied” holding of *Highland* is consistent with the Taft Court’s decision in *Matthew Addy Co. v. United States*, 264 U.S. 239 (1924), in which the Taft Court held unanimously that government regulations of the price of coal did not apply retroactively to jobbers who had already purchased coal at unregulated prices. The Court was explicit that any other construction of the executive order fixing the price of coal would require consideration of the “grave constitutional question” of congressional “power to fix prices at which persons then owning coal must sell thereafter, if they sold at all, without providing compensation for losses If this difficulty can be eliminated by some reasonable construction of the order, it should be accepted.” *Id.* at 245. Butler’s docket book shows that at conference Holmes was “*dubitante*” about the Court’s conclusion.

¹⁷³ 279 U.S. at 262. On the equivalence of requisitioning property and the taking of that property through eminent domain, see *Liggett & Myers tobacco Co. v. United States*, 274 U.S. 215 (1927) (per Butler, J.).

¹⁷⁴ *Morrisdale Coal Co. v. United States*, 259 U.S. 188, 190 (1922) (“The claimant in consequence of the regulation . . . sold some of its coal to other parties at a less price than it what it would otherwise have got. That is all. . . . Making the rule was not a taking and no lawmaking power promises by implication to make good losses that may be incurred by obedience to its commands.”).

There were powerful pragmatic reasons for the Taft Court, in reviewing wartime regulation, carefully to distinguish between the frustration of contracts and the taking of contracts. In *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923), for example, the *Omnia Commercial Co.* in 1917 had a contract with the Allegheny Steel Co. for steel plate. “The contract was of great value, and if carried out would have produced large profits.” But the contract was foiled when “the United States government requisitioned the steel company’s entire production of steel plate for the year 1918,” directing the company “not to comply with the terms” of *Omnia*’s contract. *Omnia* brought an action alleging that the government had “taken” its contract with Allegheny and seeking lost profits as

damages. Speaking for a unanimous Court, Sutherland conceded that the contract “was property within the meaning of the Fifth Amendment” and that if it had been “taken for public use the government would be liable.” *Id.* at 508, 510. But the Court ruled that the government had merely rendered performance of the contract “impossible”; it had not “appropriated” the contract itself. *Id.* at 511.

The government took over during the war railroads, steel mills, shipyards, telephone and telegraph lines, the capacity output of factories and other producing activities. If appellant’s contention is sound, the government thereby took and became liable to pay for an appalling number of existing contracts for future service or delivery, the performance of which its action made impossible. This is inadmissible. Frustration and appropriation are essentially different things.

Id. at 513.

¹⁷⁵ 262 U.S. 341 (1923). As published, *New River Collieries Co.* is unanimous, but Butler’s docket book indicates that McReynolds and Sanford had dissented in conference.

¹⁷⁶ 262 U.S. at 344. *See Standard Oil Co. of New Jersey v. Southern Pacific Co.*, 268 U.S. 146, 155-56 (1925). In taking cases arising from the war, Butler was meticulous to enforce the “government’s obligation” under eminent domain “to put the owners in as good a position pecuniarily as if the use of their property had not been taken.” *Phelps v. United States*, 274 U.S. 341, 344 (1927). *See Seaboard Air Line Railway Co. v. United States*, 261 U.S. 299 (1923).

¹⁷⁷ 262 U.S. at 343-44.

¹⁷⁸ “The basis prescribed for the determination of prices to be charged by producers of coal was the cost of production, including the expense of operation, maintenance, depreciation, and depletion, plus a just and reasonable profit. And prices to be charged by dealers were to be made by adding to their cost a just and reasonable sum for profit.” *Highland*, 279 U.S. at 259-60. In *New River Collieries Co.*, Butler had explicitly held that “[t]he owner’s cost, profit, or loss did not tend to prove market price or value at the time of taking.” 262 U.S. at 344. *See Davis v. George B. Newton Coal Co.*, 267 U.S. 292 (1925).

¹⁷⁹ *Brooks-Scanlon Corp. v. United States*, 265 U.S. 106, 123-26 (1924) (per Butler, J.). *See Russell Motor Car Co. v. United States*, 261 U.S. 514 (1923).

¹⁸⁰ The closest Butler came to any such argument was the proposition that wartime price-fixing was necessary “to prevent manipulations to enhance prices by those having coal for sale and to lessen apprehension on the part of consumers in respect of their supply and the prices liable to be exacted.” 279 U.S. at 261. It would, of course, be easy to make such a showing to justify peacetime price-fixing when necessary to effect legitimate peacetime national interests.

¹⁸¹ *Davis v. George B. Newton Coal Co.*, 267 U.S. 292 (1925). For a contemporary discussion, *see Sidney Post Simpson, Due Process and Coal Price Regulation*, 9 IOWA LAW BULLETIN 145 (1924).

¹⁸² *Russell Motor Car Co. v. United States*, 261 U.S. 514, 521-22 (1923).

¹⁸³ WHT to Allen B. Lincoln (September 2, 1918) (Taft papers).

¹⁸⁴ 264 U.S. 543 (1924).

¹⁸⁵ The story of *Chastleton* is well told in CHRISTOPHER N. MAY, *IN THE NAME OF WAR: JUDICIAL REVIEW AND THE WAR POWERS SINCE 1918*, at 223-53 (1989).

¹⁸⁶ 256 U.S. 135 (1921).

¹⁸⁷ 256 U.S. at 154. The Court simultaneously upheld rent control within New York City. *See Marcus Brown Holding Co., Inc. v. Feldman*, 256 U.S. 170, 199 (1921). On the controversial nature of the congressional statute, *see Constitutional Government in War and Peace, supra* note 64, at 230-232 (“It is the disposition of people to demand,

and of legislators to adopt, such measures as seem to them good without regard to what the constitutions may have to say. That is symptomatic, and it is disquieting.”).

¹⁸⁸ 256 U.S. at 156.

¹⁸⁹ 256 U.S. at 154-55.

¹⁹⁰ 256 U.S. at 154-55. There was a strong dissent by McKenna. Joined by White, Van Devanter and McReynolds, McKenna complained that the decision relegated the Constitution to “an anachronism,” an “‘archeological relic’ no longer to be an efficient factor in affairs but something only to engage and entertain the studies of antiquarians.” *Id.* at 163. McKenna asked:

Have conditions come, not only to the District of Columbia, embarrassing the Federal Government, but to the world as well, that are not amenable to passing palliatives, so that socialism, or some form of socialism, is the only permanent corrective or accommodation? It is indeed strange that this court, in effect, is called upon to make way for it and, through the instrument of a constitution based on personal rights and the purposeful encouragement of individual incentive and energy, to declare legal a power exerted for their destruction. The inquiry occurs, Have we come to the realization of the observation that “War unless it be fought for liberty is the most deadly enemy of liberty?”

Id. at 162-63 (McKenna, J., dissenting). “There can be no conception of property aside from its control and use,” McKenna argued. “Protection to it has been regarded as a vital principle of republican institutions. . . . Our social system rests largely upon its sanctity, ‘and that State or community which seeks to invade it will soon discover the error in the disaster which follows.’ . . . As we understand, the assertion is, that legislation can regard a private transaction as a matter of public interest. It is not possible to express the possession or exercise of more unbounded or irresponsible power.” *Id.* at 165, 167.

Two days after the opinion Holmes wrote to Frankfurter: “The best defence [sic] [of constitutional rights] I ever heard came from Brandeis many years ago--that constitutional restrictions enable a man to sleep at night and know that he won’t be robbed before morning--which, in days of legislative activity and general scheming, otherwise he scarcely would feel secure about. I am afraid McKenna thinks that security at an end.” OWH to Felix Frankfurter (April 20, 1921), in in *HOLMES & FRANKFURTER: THEIR CORRESPONDENCE, 1912-1934* 110 (University Press of New England: Hanover, Robert M. Mennel and Christine L. Compston eds., 1996) (*HOLMES-FRANKFURTER CORRESPONDENCE*).

It is clear, however, that even Holmes felt some discomfort with the extent of rent control authorized by congressional statute. Eighteen months later, for example, he would write that “The late decisions upon laws dealing with the congestion of Washington and New York, caused by the war, dealt with laws intended to meet a temporary emergency and providing for compensation determined to be reasonable by an impartial board. They went to the verge of the law.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). In *Block v. Hirsh*, Holmes had specifically stressed that “A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.” 256 U.S. at 157. In March 1922, however, in a 6-3 opinion authored by Justice Clarke (with Justices McKenna, Van Devanter and McReynolds dissenting), the Court reaffirmed the constitutionality of rent control in the state of New York in a way that distinctly de-emphasized the relevance of emergency conditions to constitutional assessment. *See Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242, 245 (1922). Clarke’s statement of the justification for rent control glossed the concept of emergency in a manner that far transcended the specific and presumably temporary conditions caused by the war:

The warrant for this legislative resort to the police power was the conviction on the part of the state legislators that there existed in the larger cities of the State a social emergency, caused by an insufficient supply of dwelling houses and apartments, so grave that it constituted a serious menace to the health, morality, comfort, and even to the peace of a large part of the people of the State.

Id. at 245. Clarke’s only concession to the temporary quality of the “emergency” justifying rent control was to note in passing the “notorious fact that a grave social problem has arisen from the insufficient supply of dwellings in all the large cities of this and other countries, resulting from the cessation of building activities incident to the war.” *Id.* at 246.

¹⁹¹ Act of Aug. 24, 1921, Pub. L. No. 71, 42 Stat. 200 (1921) (extending rent control until May 22, 1922).

¹⁹² Act of May 22, 1922, 42 Stat. 5443 (1922) (extending rent control until May 22, 1924). *Chastleton* was decided on April 21, 1924.

¹⁹³ John W. Davis, quoted in *J.W. Davis Assails Reformers Who Would Alter Constitution to Regulate Individual Morals*, THE ST. LOUIS STAR AND TIMES (January 19, 1923), at 13. See John W. Davis, *Present Day Problems*, 9 ABAJ 553, 554 (1923).

¹⁹⁴ Butler records that McReynolds “thinks the bill good and [should be] reversed.” Brandeis is recorded as having advocated a “short cut. Validity need not be answered” because of inadequate service to the parties. *Id.* Brandeis eventually adopted this position in his separate published opinion “concurring in part.” See 264 U.S. at 549.

¹⁹⁵ 264 U.S. at 546.

¹⁹⁶ *Id.* at 547-48.

¹⁹⁷ *Id.* at 548.

¹⁹⁸ *Id.*

¹⁹⁹ Holmes papers

²⁰⁰ McReynolds, for example, replied to Holmes’ circulated draft: “I will not say no. But I should much prefer to have you say that facts within the knowledge of the court make it entirely clear that no emergency exists and the act is no longer in force. This will put an end to mischievous agitation now going on in Congress and clear the air.” *Id.* Similarly, Sutherland wrote: “I voted to go further and reckon the Emergency to have passed on what we know. Perhaps it is better to dispose of the case as you have done, but I should like to hear what the brethren who voted as I did think about it.” *Id.* Van Devanter wrote Holmes that “I have read and reread your opinion in the rent case and am still inclined to take the view that we ought to end it now, but I have not had an opportunity to take it up with others who also had that view.” *Id.*

²⁰¹ 264 U.S. at 548-49. Even this change, however, was not enough completely to satisfy McReynolds, who wrote to Holmes: “I will acquiesce in this if it is accepted all round. But I do think that if we held conditions [existing in] 1922 were such as to show no emergency the result would be better.” (Holmes papers). Justice Butler responded, “Yes, I go along with the others. Would prefer to hold law invalid and have an end of it now.” *Id.* *Chastleton* was decided on April 21, 1924, and, on the basis of the paragraph quoted in text, the Court of Appeals of the District of Columbia declared rent control unconstitutional as of May 2, 1924. See *Peck v. Fink*, 2 F.2d 912, 913 (D.C. Cir. 1924). The appellate court could not resist making the lesson of *Chastleton* explicit: “It of course is unnecessary for us to attempt to add to the reasoning of the Supreme Court, but we may say with propriety that, if the emergency in question is not at an end, then this legislation may be extended indefinitely, and that which was ‘intended to meet a temporary emergency’ may become permanent law.” *Id.* at 913.

²⁰² As Brandeis wrote to Frankfurter: “To fully appreciate the rent decision, recent Congressional record & files of Washington papers on proposed extension of law to 1926 must be considered.” LDB to Felix Frankfurter (April 23, 1924), in 5 LETTERS OF LOUIS D. BRANDEIS, *supra* note 125, at 126.

²⁰³ Remarkably, Congress did vote to extend rent control until May 22, 1925. See Act of May 17, 1924, Pub. L. No. 119, 43 Stat. 120 (1924). The law, however, was judicially overturned. See *MAY*, *supra* note 185, at 244-53.

²⁰⁴ 65 CONG. REC. 7391-92 (1924).

²⁰⁵ Leuchtenburg, *supra* note 44, at 83.

²⁰⁶ 264 U.S. 504 (1924).

²⁰⁷ *Id.* at 511.

²⁰⁸ 94 U.S. 113, 125 (1876) (Emphasis added). See *Munn v. People*, 69 Ill. 80, 91 (1873) (“Ever since the organization of our State government, the legislature has exercised . . . unquestioned” power “to regulate . . . the weight and price of bread.”).

²⁰⁹ 31 Stat. 1449 (March 3, 1901).

²¹⁰ DEPARTMENT OF COMMERCE AND LABOR, BUREAU OF STANDARDS, CONFERENCE ON THE WEIGHTS AND MEASURES OF THE UNITED STATES 44 (Government Printing Office: Washington D.C. 1905).

²¹¹ *Remarks of Honorable Charles Nagel, Secretary of Commerce and Labor* (February 15, 1912), in DEPARTMENT OF COMMERCE AND LABOR, BUREAU OF STANDARDS, SEVENTH ANNUAL CONFERENCE ON WEIGHTS AND MEASURES 11 (Government Printing Office: Washington D.C. 1912).

²¹² *See* DEPARTMENT OF COMMERCE AND LABOR, BUREAU OF STANDARDS, FIFTH ANNUAL CONFERENCE ON WEIGHTS AND MEASURES 19-22, 26-29, 58, 86, 88-89 (Government Printing Office: Washington D.C. 1911); DEPARTMENT OF COMMERCE AND LABOR, BUREAU OF STANDARDS, SIXTH ANNUAL CONFERENCE ON WEIGHTS AND MEASURES 22-23; 132-33; 157 (Government Printing Office: Washington D.C. 1912); DEPARTMENT OF COMMERCE AND LABOR, BUREAU OF STANDARDS, SEVENTH ANNUAL CONFERENCE ON WEIGHTS AND MEASURES 24, 32, 64, 69, 75, 82 (Government Printing Office: Washington D.C. 1912); DEPARTMENT OF COMMERCE, BUREAU OF STANDARDS, EIGHTH ANNUAL CONFERENCE ON WEIGHTS AND MEASURES 23, 29, 33, 259, 278, 284, 289 (Government Printing Office: Washington D.C. 1914).

²¹³ *Schmidinger v. Chicago*, 226 U.S. 578, 585 (1913). The Court stated: “To the argument that to make exactly 1 pound loaves is extremely difficult, if not impracticable, the supreme court of Illinois has answered, and this construction is binding upon us, that the ordinance is not intended to limit the weight of a loaf to a pound or the fractional part or multiple of a pound, but that the ordinance was passed with a view only to prevent the sale of loaves of bread which are short in weight.” *Id.* at 589. In his brief to the Court, however, Schmidinger had asserted that he had been “charged with and found guilty of making and selling bread in loaves *in excess* of the prescribed weights, although correctly labeled as to the actual weight thereof.” Brief of Plaintiff in Error, at 17.

²¹⁴ 226 U.S. at 587-88.

²¹⁵ As a general matter, the national Bureau of Standards “received a very great impulse due to the war work.” *Address of S.W. Stratton, Director of the Bureau of Standards*, in DEPARTMENT OF COMMERCE, BUREAU OF STANDARDS, TWELFTH ANNUAL CONFERENCE ON WEIGHTS AND MEASURES 24 (Government Printing Office: Washington D.C. 1920).

²¹⁶ WILLIAM CLINTON MULLENDORE, *HISTORY OF THE UNITED STATES FOOD ADMINISTRATION 1917-1919* 164 (Stanford University Press: Stanford 1941). In part the Food Administration imposed standardization to conserve domestic food consumption; in part to make the production of bread more efficient; in part to promote the capacity of consumers to know what they were buying; and in part because these goals could be administratively enforced only if loaves were standardized. The Food Administration standardized not only the size of loaves, but also the recipe for bread, as well as the grades of flour that could be used in the production of bread.

²¹⁷ *Id.* *See Hoover Fixes Standard Loaf*, NEW YORK TIMES (November 12, 1917), at 1.

²¹⁸ Resolution passed at the Thirteenth Annual Conference on Weights and Measures, sponsored by the Bureau of Standards, May 27, 1920, in DEPARTMENT OF COMMERCE, BUREAU OF STANDARDS, THIRTEENTH ANNUAL CONFERENCE ON WEIGHTS AND MEASURES 174-75 (Government Printing Office: Washington D.C. 1921). *See id.* at 117, 142. The resolution urged “the passage by the several states of legislation tending to bring about the adoption of such a uniform standard.” The next year, after much debate, the Conference adopted a model ordinance specifying bread weights. DEPARTMENT OF COMMERCE, BUREAU OF STANDARDS, FOURTEENTH ANNUAL CONFERENCE ON WEIGHTS AND MEASURES 131 (Government Printing Office: Washington D.C. 1922). *See id.* at 24-44, 80-87. Hoover himself addressed the Conference, suggesting that “the question of bread weights” was a matter “of simplifying the process of manufacture, and in simplifying the process of manufacture you are contributing to a lower production cost and protecting both producer and consumer.” *Address by Hon. Herbert Hoover* (May 25, 1921), in *id.* at 79.

²¹⁹ HEARINGS BEFORE THE HOUSE COMMITTEE ON AGRICULTURE ON H.R. 4533, 68th CONG. 1st SESS. (1924), at 18; DEPARTMENT OF COMMERCE, BUREAU OF STANDARDS, SEVENTEENTH ANNUAL CONFERENCE ON WEIGHTS AND MEASURES 40-41 (Government Printing Office: Washington D.C. 1924). “The demand for bakery legislation including standard bread weights followed closely the ending of the war and undoubtedly came as the result of the experiences both of the baker and of the consumer under the regulations of the United States Food Administration.” I.L. Miller, *Enforcement of the Indiana Bread Law*, in *id.* at 40-41. The Indiana statute permitted a tolerance of “one ounce per pound over and one ounce per pound under the standard unit weight.” *Id.* at 41. The law, including its tolerances, was fully supported by Indiana bakers. *Id.* at 44-45. After the war, standardized weights for bread loaves was understood to promote educated consumption and also to protect bakers against unethical competition.

²²⁰ HEARINGS BEFORE THE HOUSE COMMITTEE ON AGRICULTURE ON H.R. 4533, 68th CONG. 1st SESS. (1924), at 13-14, 16; to the list provided in the Hearings should be added New York, North Dakota, and South Dakota. *See* DEPARTMENT OF COMMERCE, BUREAU OF STANDARDS, FEDERAL AND STATE LAWS RELATING TO WEIGHTS AND MEASURES 570, 596, 762 (Government Printing Office: Washington D.C., 3d ed. 1926).

²²¹ Pub. L. 46-358, 41 Stat. 1217, 1220 (Act of March 3, 1921), amended by Pub. L. 67-72, 42 Stat. 201 (August 24, 1921).

²²² HEARINGS, *supra* note 219, at 12-13. Massachusetts should be added to the list provided in the Hearings. *See* DEPARTMENT OF COMMERCE, BUREAU OF STANDARDS, FEDERAL AND STATE LAWS RELATING TO WEIGHTS AND MEASURES 361 (Government Printing Office: Washington D.C., 3d ed. 1926).

²²³ *Statement of Mr. F.S. Holbrook, Chief of the Weights and Measures Division, Bureau of Standards, Washington D.C.*, in HEARINGS, *supra* note 219, at 16.

²²⁴ *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 510-11 (1924).

²²⁵ *Id.* at 511.

²²⁶ *Butler Docket Book*, 1923 Term.

²²⁷ Brandeis later reported to Frankfurter that the case “was really 5 to 4, but Van Devanter ‘got busy,’ in his personal way, talking & laboring with members of Court, finally led Sutherland & Sanford to suppress their dissents.” Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUPREME COURT REVIEW 299, 328 (July 2, 1924) (“*Brandeis-Frankfurter Conversations*”). Most likely Brandeis confused Sanford with McKenna, substituting in his recollection one weak Justice for another. In the Brandeis Papers there is a note from McKenna to Brandeis, stating: “Disturbing doubts have come to me. I am struggling with them and frankly I don’t know whether they go to the conclusions or to details and reasoning.” JM to LDB (Brandeis Papers).

²²⁸ 264 U.S. at 517.

²²⁹ Butler wrote: “Undoubtedly, the police power of the State may be exerted to protect purchasers from imposition by sale of short weight loaves. . . . But a state may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them. . . . Constitutional protection having been invoked, it is the duty of the court to determine whether the challenged provision has reasonable relation to the protection of purchasers of bread against fraud by short weights and really tends to accomplish the purpose for which it was enacted.” *Id.* at 513.

²³⁰ *Id.* at 515.

²³¹ *Id.* at 516.

²³² As one commentator accurately put it, Butler’s opinion rests on “common experience.” Oscar E. Monnig, *Constitutional Law--Due Process-- Statutes Establishing Standard Weights for Loaves of Bread*, 3 TEXAS LAW REVIEW 447, 449 (1925).

²³³ *Bakers Wrap Bread in Paper: Efforts Making To Have Practice Extended*, CHRISTIAN SCIENCE MONITOR (March 15, 1912), at 6; *Bacterial Contamination of Bread*, THE ATLANTA CONSTITUTION (July 21, 1912), at B7; *Wrap Bread? Sure Say Club Women*, CHICAGO DAILY TRIBUNE (March 6, 1913), at 3; *Aldermen Urge Clean Bread Law*, CHICAGO DAILY TRIBUNE (July 24, 1913), at 17; *State Board of Health Pushes Campaign for Wrapped Bread*, LOUISVILLE COURIER-JOURNAL (February 6, 1913), at 7; *Wrapped Bread Scores a Point*, LOUISVILLE COURIER-JOURNAL (October 14, 1914), at 6; *Women Oppose Bakers in Hearing on Wrapped Bread*, ST. LOUIS POST-DISPATCH (October 13, 1915), at 10; *Health Departments and Dirty Bread*, ST. LOUIS POST-DISPATCH (December 8, 1915), at 14; *Wrapped Bread to Go on Market*, LOUISVILLE COURIER-JOURNAL (March 6, 1923), at 8; ; DEPARTMENT OF COMMERCE, BUREAU OF STANDARDS, SIXTEENTH ANNUAL CONFERENCE ON WEIGHTS AND MEASURES 104 (Government Printing Office: Washington D.C. 1924) (Louisiana required that bread be wrapped and labelled).

²³⁴ *State v. Normand*, 76 N.H. 541 (1913). See DEPARTMENT OF COMMERCE, BUREAU OF STANDARDS, FEDERAL AND STATE LAWS RELATING TO WEIGHTS AND MEASURES 516 (Government Printing Office: Washington D.C., 3d ed. 1926).

²³⁵ HEARINGS, *supra* note 219, at 1-2, 5. The Federal Bread bill had originally set standard sizes for loaves that allowed “a tolerance of two ounces per pound in excess of the declared weights.” *Id.* at 1-2. Herbert Hoover’s Department of Commerce co-operated with the Department of Agriculture to draft the bill. House Report No. 990, 68th CONG. 1st SESS. (June 5, 1924), at 1. The bill was redrafted after *Jay Burns* to increase tolerance to “three and one-half ounces per pound in excess of the standard weights.” H.R. 8981, 68th CONG. 1st SESS. (JUNE 5, 1924). The bill was favorably reported out of a House committee but died on the floor.

²³⁶ Butler did emphasize that “The act is not a sanitary measure,” 264 U.S. at 516, as though measures that would be constitutional if enacted to uphold sanitation would be unconstitutional if enacted to require standardized loaves to prevent consumer confusion.

²³⁷ The evidence purporting to establish the impossibility of complying with the statute’s tolerances mostly involved unwrapped bread.

²³⁸ Transcript of Record, *Jay Burns Baking Co. v. Bryan*, No. 94, October Term 1923. The historian Barry Cushman heavily emphasizes this point in his discussion of *Jay Burns*. Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 BOSTON UNIVERSITY LAW REVIEW 881, 945-952 (2005). Cushman rightly observes that the Court, speaking unanimously through Justice Butler, would in 1934 uphold a subsequent Nebraska statute fixing the standard size of loaves and imposing a maximum tolerance of 3 ounces per pound. *P.F. Petersen Baking Co. v. Bryan*, 290 U.S. 570 (1934). Having learned its lesson, Nebraska would offer extensive expert testimony in *Petersen* to sustain the more generous tolerance of its new law..

Notwithstanding the subsequent outcome in *Petersen*, moreover, it is plain that in *Jay Burns* Nebraska produced more than enough evidence to demonstrate that bread could be baked within the tolerances of the statute, even if unwrapped. See *Brief and Argument for Defendants in Error*, at 17-28, 49-51. Many of the plaintiffs’ experts testified that in their tests they had made no effort to bake loaves whose weight would be within the tolerances of Nebraska statute. Nebraska also offered probative evidence that the plaintiffs’ experts had conducted their baking experiments under “unfair” and “artificial conditions.” *Id.* at 53.

²³⁹ In 1921, for example, Charles M. Fuller, the sealer of weights and measures of the Los Angeles Country, had reported to the Fourteenth Annual Conference on Weights and Measures on “the result of five years’ successful enforcement of a standard-weight bread law” that allowed “a tolerance of 1 ounce above the standard weight” for each pound. No tolerance for short weight was allowed. Fuller noted “that the act has worked out so successfully in eliminating the unfair competition of bakers who would cut the price by selling an underweight loaf that even those firms which were first opposed to the idea of a standard-weight bread law are now in favor of it.” Charles M. Fuller, *Enforcement of Bread Legislation, Including Proper Tolerances* (May 24, 1921), in DEPARTMENT OF COMMERCE, BUREAU OF STANDARDS, FOURTEENTH ANNUAL CONFERENCE ON WEIGHTS AND MEASURES 37 (Government Printing Office: Washington D.C. 1922). In 1921, the Conference resolved to appoint a committee to study proper tolerances for legislation setting standardized bread weights. FOURTEENTH ANNUAL CONFERENCE ON WEIGHTS AND MEASURES, at 84-87.

The next year the Committee recommended “A tolerance of 2 ounces per pound in excess and 1 ounce per pound in deficiency” on the weight of individual loaves, but a tolerance only “of 1.5 ounces per pound in excess and 1 ounce per pound in deficiency shall be allowed on the average weight of 10 or more loaves of bread of the same nominal weight.” *Report of Committee on Specifications and Tolerances, On Tolerances for Bread Loaves, Presented by F.S. Holbrook, Chairman* (May 25, 1922), in DEPARTMENT OF COMMERCE, BUREAU OF STANDARDS, FIFTEENTH ANNUAL CONFERENCE ON WEIGHTS AND MEASURES 79 (Government Printing Office: Washington D.C. 1922). The committee’s recommendation was based upon “a very large amount of work” weighing “several thousand loaves” of bread “in a number of small cities in the State of New York and in the city of Chicago.” *Discussion of Report on Tolerances*, in *id.* at 80. The committee weighed 1564 one pound loaves baked in large Chicago bakeries, and it determined that 99.4% fell “within a tolerance of $\pm\frac{3}{4}$ ounce.” “[T]he lightest loaf was 0.85 ounce underweight and the heaviest loaf was 1.05 ounces overweight.” *Id.* at 82. The committee weighed 993 loaves of white bread produced in 99 “small” bakeries. Ninety-seven percent “were within ± 1 ounce.” *Id.* The committee’s report was attacked on the floor of the Conference for allowing tolerances that were “too large.” *Id.* at 88, 92; DEPARTMENT OF COMMERCE, BUREAU OF STANDARDS, SIXTEENTH ANNUAL CONFERENCE ON WEIGHTS AND MEASURES 114 (Government Printing Office: Washington D.C. 1924). It was agreed that the question of tolerances should be taken up with “a committee of the baking industry to endeavor to agree . . . upon tolerances which will be satisfactory to both sides.” *Id.* at 93. The next year it was reported that representatives of the baking industry, who included Jay Burns himself, had rejected the concept of maximum sizes for standardized loaves and proposed a tolerance of “1 ounce per pound under the standard unit.” *Synopsis of Provisions of Bill Submitted by Bakers’ Committee* (May 23, 1923), DEPARTMENT OF COMMERCE, BUREAU OF STANDARDS, SIXTEENTH ANNUAL CONFERENCE ON WEIGHTS AND MEASURES 112-14 (Government Printing Office: Washington D.C. 1924).

The Conference’s consideration of tolerances in 1924 was derailed by the Court’s decision in *Jay Burns*. DEPARTMENT OF COMMERCE, BUREAU OF STANDARDS, SEVENTEENTH ANNUAL CONFERENCE ON WEIGHTS AND MEASURES 126 (Government Printing Office: Washington D.C. 1924). At the 1924 Conference, the evidence of the plaintiffs’ experts in *Jay Burns* was treated with bemused skepticism. F.S. Holbrook of the national Bureau of Standards noted with incredulity that “It is a most remarkable fact that figures indicating shrinkages of as much as $3\frac{3}{4}$ to $4\frac{1}{4}$ ounces in 24 hours, on individual loaves weighing about a pound, were exhibited. The temperature and humidity of the air in these cases of excessive shrinkage were not shown, but the notation is made that it was ‘dry.’ Doubtless it was—very dry. In this relation I might say that the Bureau of Standards has conducted shrinkage experiments on loaves of bread commercially baked and kept in the ordinary way and has never found shrinkages at all comparable to shrinkages such as these. Our experiments are all to the effect that the range in the Nebraska law is an ample one. Figures published by other investigators are to the same effect.” *Id.* at 53-54. The Conference went on to endorse the Federal Bread Act, amended to permit a tolerance of “three and one-half ounces per pound in excess of the standard weights.” Even after *Jay Burns*, Arizona enacted legislation fixing the standard size of bread loaves with an excess tolerance of only one ounce per pound. *See* DEPARTMENT OF COMMERCE, BUREAU OF STANDARDS, FEDERAL AND STATE LAWS RELATING TO WEIGHTS AND MEASURES 74 (Government Printing Office: Washington D.C., 3d ed. 1926).

²⁴⁰ “What the bakers had thought impossible before the creation of the Food Administration worked like a charm, and the trade, being relieved of the destructive competition in weight and the necessity of constantly watching the juggling of weight by their competitors, could settle down to the more important problem of furnishing the people, even under adverse conditions, with quality bread, at a price which, despite the extraordinary and oftentimes exasperating circumstances, made bread still the cheapest and best food on the American table. . . . This standard weight insisted upon by the Food Administration is one of the regulations referred to as having been found so advantageous by the majority of bakers that in a great many cities the rule has been either voluntarily adopted as a sound business practice by the bakers or, at the instance of the trade, has been incorporated into new afterwar bakery laws and regulations.” H.E. Barnard, Director, American Institute of Baking, *Bread Legislation from the Standpoint of the Baker*, in DEPARTMENT OF COMMERCE, BUREAU OF STANDARDS, FOURTEENTH ANNUAL CONFERENCE ON WEIGHTS AND MEASURES 27 (Government Printing Office: Washington D.C. 1922) (Quoting from a paper read before the convention of the Southeastern Bakers’ Association). “During the period of war control of the bakers by the United States Food Administration, it was clearly demonstrated that it was entirely feasible for bakers to bake loaves to a uniform size, and this is also admitted by the bakers themselves. This indicates that the proposal to standardize the weight of loaves of bread present no difficulties of manufacture which may not readily be adjusted.” John M. Mote, *Reasons for Standard-Weight Loaves of Bread and Enforcement of Ohio Standard-Weight Bread Law*, in DEPARTMENT OF COMMERCE, BUREAU OF STANDARDS, FIFTEENTH ANNUAL CONFERENCE ON WEIGHTS AND MEASURES 89 (Government Printing Office: Washington D.C. 1922).

²⁴¹ Brandeis's dissent was joined by Justice Holmes, who commented that it was "A-1. A sockdologer. I agree of course." (Brandeis Papers).

²⁴² On the pervasive role of judicial notice and non-adjudicative facts in determining constitutionality, see Note, *The Consideration of Facts in "Due Process" Cases*, 30 COLUMBIA LAW REVIEW 360 (1930), which nevertheless considered *Jay Burns* an example of a case in which "facts brought into the record are clearly responsible for some decisions holding legislation invalid." *Id.* at 366.

²⁴³ Holmes papers.

²⁴⁴ Henry Wolf Biklé, *Judicial Determination of Questions Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARVARD LAW REVIEW 6, 15-18 (1924).

²⁴⁵ WHT to GS (September 10, 1922) (Sutherland papers). Taft's comment is merely a prosy way of saying what Holmes had aphoristically observed in his *Lochner* dissent: "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise." 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

²⁴⁶ This interpretation is consistent with *Jay Burns*'s odd insinuation that Nebraska would apply its statute in bad faith. The tolerances set by the statute were to "be determined by averaging the weight of not less than twenty-five loaves of any one unit." In a startling passage, Butler wrote that because individual loaves will always vary in weight, and because "any loaves of the same unit at any time on hand during 24 hours after baking may be selected to make up the 25 or more to be weighed in order to test compliance with the act," "if only a small percentage of the daily output of the loaves in large bakeries shall exceed the maximum when taken from the oven or fall below the minimum weight within 24 hours, it will always be possible to make up lots of 25 or more loaves whose average weight will be above or below the prescribed limits." 264 U.S. at 514. Butler's interpretation would seem contrary to the rather obvious purpose of taking an average weight of 25 loaves. It is certainly contrary to Nebraska's presentation of the statute in its brief. See *Brief and Argument for Defendants in Error*, at 52. Butler's unwarranted speculations led an employee of the Bureau of Standards to later advise state officials to craft legislation explicitly requiring that "the loaves used in arriving at an average weight . . . be taken at random." DEPARTMENT OF COMMERCE, BUREAU OF STANDARDS, SEVENTEENTH ANNUAL CONFERENCE ON WEIGHTS AND MEASURES 58 (Government Printing Office: Washington D.C. 1924). The employee expressed shock at the Court's imputation of bad faith: "It is inconceivable that an inspector would weigh a large number of loaves and pick out all the lightest or all the heaviest ones to establish a prosecution; nor should he be allowed to do so." *Id.*

²⁴⁷ 264 U.S. at 519 (Brandeis, J., dissenting). See *Brief and Argument for Defendants in Error*, at 49.

²⁴⁸ 264 U.S. at 516-17: "Concretely, the sole purpose of fixing the maximum weights, as held by the Supreme Court, is to prevent the sale of a loaf weighing anything over 9 ounces for a one pound loaf, and the sale of a loaf weighing anything over 18 ounces for a pound and a half loaf, and so on. The permitted tolerance, as to the half-pound loaf, gives the baker the benefit of only 1 ounce out of the spread of 8 ounces, and as to the pound loaf the benefit of only 2 ounces out of a like spread. There is no evidence in support of the thought that purchasers have been or are likely to be induced to take a 9 ½ or a 10 ounce loaf for a pound (16-ounce) loaf, or an 18 ½ or a 19 ounce loaf for a pound and a half (24-ounce) loaf, and it is contrary to common experience and unreasonable to assume that there could be any danger of such deception. Imposition through short weights readily could have been dealt with in a direct and effective way." *Jay Burns* was thus read by some courts during the 1920s as prohibiting limits on bread weights exceeding standard sizes. See, e.g., *Holsum Baking Co. v. Green*, 45 F.2d 238, 240 (N.D. Ohio 1930):

Manifestly, considered as a proper exercise of the state's police powers, there is a distinction between a provision for a surplus tolerance and one for a deficiency. The latter is manifestly in the public interest as a safeguard against imposition, and, moreover, observance of it entails no substantial embarrassment to the baker, whereas the former, as observed in the *Burns* decision, serves the consuming public in no substantial manner, and it is readily seen to be a definitely hampering restriction in baking operations.

Cf. *State v. Curran*, 220 Ala. 4 (1929). For a contrary interpretation of *Jay Burns*, see F.S. Holbrook, *The Recent Decision of the United States Supreme Court on Nebraska Bread Law*, in DEPARTMENT OF COMMERCE, BUREAU OF

STANDARDS, SEVENTEENTH ANNUAL CONFERENCE ON WEIGHTS AND MEASURES 51-59 (Government Printing Office: Washington D.C. 1924).

²⁴⁹ 264 U.S. at 517.

²⁵⁰ 264 U.S. at 520 (Brandeis, J., dissenting).

²⁵¹ 208 U.S. 412 (1908). *See* chapter 2, at --.

²⁵² 264 U.S. at 533 (Brandeis, J., dissenting). Brandeis fully acknowledged the existence of “evidence contained in the record in this case” that conflicted with the judgment that the Nebraska statute was reasonable. *Id.* But he argued that “with this conflicting evidence we have no concern. It is not our province to weigh evidence.” *Id.* at 533-34.

²⁵³ 264 U.S. at 534 (Brandeis, J., dissenting). For examples of the rich subsequent history of the concept of a “super-legislature,” *see* *Obergefell v. Hodges*, 135 S.Ct. 2584, 2617 (2015) (Roberts, C.J. dissenting); *Ewig v. California*, 538 U.S. 11, 28 (2003); *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 384 (2001) (Breyer, J., dissenting); *Heller v. Doe*, 509 U.S. 312, 319 (1993); *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 846 (1987) (Brennan, J., dissenting); *Shea v. Louisiana*, 470 U.S. 51, 62 (1985) (White J., dissenting); *Plyler v. Doe*, 457 U.S. 202, 231 (1982) (Blackmun, J., concurring); *Hodel v. Indiana*, 452 U.S. 314, 333 (1981); *City of Mobile v. Bolden*, 446 U.S. 55, 76 (1980); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124 (1978); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 64 (1973); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 31 (1973); *Shapiro v. Thompson*, 394 U.S. 618, 661 (1969) (Harlan, J., dissenting); *Desist v. United States*, 394 U.S. 244, 259(1969) (Harlan, J., dissenting); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); *Ferguson v. Skrupa*, 372 U.S. 726, 731(1963); *Day-Brite lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952); *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 788 n.4 (1945) (Black, J., dissenting); *West Virginia v. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 648 (1943) (Frankfurter, J., dissenting).

At the time Brandeis was writing, the term “super-legislature” was primarily a term of opprobrium used to describe the powerful Anti-Saloon League, promoter of Prohibition, “which has long seemed to regard itself as a super-Legislature.” *A Sorry Spectacle*, NEW YORK TIMES (July 31, 1923), at 16. *See Warning from the Super-Government*, NEW YORK TIMES (February 25, 1919), at 10 (“Mr. William H. Anderson, Super-intendent of the New York Anti-Saloon League, the Super-Legislature and Super-Government of the State, has issued another message.”); *Drier Dryness*, NEW YORK TIMES (April 27, 1921), at 13 (“From the point of view of a few purists it may be regrettable that the league doesn’t possess formally and constitutionally the powers it exercises severely in fact of a Supreme Super-Legislature and Super-Government.”). Sometimes the term was also used to disparage the League of Nations. *See Mr. Root’s Amendments*, NEW YORK TIMES (March 31, 1919), at 12; *Labor Indorses League After Bitter Debate*, NEW YORK TRIBUNE (June 21, 1919), at 7.

²⁵⁴ Monnig, *supra* note 232, at 450.

²⁵⁵ Robert Cushman, *Constitutional Law in 1923-1924*, 19 AMERICAN POLITICAL SCIENCE REVIEW 51, 63 (1925). *See Lochner v. New York*, 198 U.S. 45, 64 (1905).

²⁵⁶ LDB to Felix Frankfurter (April 23, 1924), in 5 LETTERS OF LOUIS D. BRANDEIS, *supra* note 125, at 126. The opinion prompted Holmes to comment to his friend Frederick Pollock that “The Fourteenth Amendment is a roguish thing.” OWH to Sir Frederick Pollock (May 11, 1924), in 2 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874-1932 136 (Harvard University Press: Cambridge, Mark DeWolfe Howe, ed. 1942) (“2 HOLMES-POLLOCK CORRESPONDENCE”).

²⁵⁷ Roscoe Pound, *Liberty of Contract*, 18 YALE LAW JOURNAL 454, 457-58 (1909).

²⁵⁸ 198 U.S. 45, 59 (1905).

²⁵⁹ Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARVARD LAW REVIEW 353, 370 (1916). *See* Ernst Freund, *Limitation of Hours of Labor and the Federal Supreme Court*, 17 GREEN BAG 411, 416 (1905) (“Has not the progress of sanitary science shown that common understanding is often equivalent to popular ignorance and fallacy? And if common understanding is to be turned into judicial notice, is there any other case of

judicial notice with regard to which respectable judicial opinion is evenly divided?"). See HOWARD GILLMAN, *THE CONSTITUTION BESIEGED* 136 (Duke University Press: Durham 1993).

²⁶⁰ 264 U.S. at 520 (Brandeis, J., dissenting). Brandeis famously repeated his admonition that “if we would guide by the light of reason, we must let our minds be bold” in his dissent in *New Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). From that setting, the aphorism has frequently inspired later judges. See, e.g., *Boy Scouts of America v. Dale*, 530 U.S. 640, 664 (2000) (Stevens, J., dissenting); *Chandler v. Florida*, 449 U.S. 560, 579 (1981); *Whalen v. Roe*, 429 U.S. 589, 597 n.20 (1977); *McGautha v. California*, 402 U.S. 183, 312 (1971) (Brennan, J., dissenting); *Lucas v. Forty-Fourth General Assembly of the State of Colorado*, 377 U.S. 713, 752 (1964) (Clark, J., dissenting). By contrast, Brandeis’s warning that “Knowledge is essential to understanding, and understanding should precede judging” seems mostly to have influenced scholars. See, e.g., Barry Sullivan, *Just Listening: The Equal Hearing Principle and the Moral Life of Judges*, 48 *LOYOLA UNIVERSITY CHICAGO LAW JOURNAL* 351, 356 n.12 (2016); Leslie W. Abramson, *What Every Judge Should Know About the Appearance of Impartiality*, 79 *ALBANY LAW REVIEW* 1579, 1615 (2015-16); Joel K. Goldstein, *Edmund S. Muskie: The Environmental Leader and Champion*, 67 *MAINE LAW REVIEW* 225, 230 (2015); Laura Rothstein, *Disability Discrimination Law: The Impact on Legal Education and the Profession*, 51 *UNIVERSITY OF LOUISVILLE LAW REVIEW* 429, 433 (2013); Paul R. Baier, *Chief Justice Dixon: Twenty Years in Retrospect*, 65 *TULANE LAW REVIEW* 1, 10 n.42 (1990); Isabel Marcus, *Reflection on the Significance of the Sex/Gender System: Divorce Law Reform in New York*, 42 *UNIVERSITY OF MIAMI LAW REVIEW* 55, 63 (1987); Serbei S. Zlinkoff, *The American Investor and the Constitutionality of Section 61-B of the New York General Corporation Law*, 54 *YALE LAW JOURNAL* 352, 358 (1945); Walton H. Hamilton and George D. Braden, *The Special Competence of the Supreme Court*, 50 *YALE LAW JOURNAL* 1319, 1341 n.83 (1941).

²⁶¹ Thomas Reed Powell, *The Work of the Supreme Court*, 40 *POLITICAL SCIENCE QUARTERLY* 71, 75 (Supp. 1925). Robert Cushman cited the opinion as an example of the “willingness of the court to form its own opinion with respect to the existence or nonexistence of the facts upon which the validity of the act must in the last analysis depend, and to adhere to that opinion in the face of the conflicting testimony of experts and the contrary opinion of the legislature.” Cushman, *supra* note 255, at 63. A note in the *Yale Law Journal* observed that “the distinguishing characteristic between the majority opinion of the Court... and the minority... lies in the absence, in the majority opinion, of any extended discussion of the facts of scientific experience in the making and distribution of bread, and in the almost exclusive devotion of the minority opinion of Justice Brandeis to an exhaustive discussion of the scientific investigations of the federal and state governments and of experts. . . . It is not necessary even to agree with the preponderant conclusion of the experts in order to believe that the Supreme Court made an error in substituting its own judgment as to policy or reasonableness or appropriateness of means to end for that of the legislature, sustained by the state court.” Comment, *State Police Legislation and the Supreme Court*, 33 *YALE LAW JOURNAL* 847, 848-49 (1924).

²⁶² John W. Davis, *Drawing Up Profession’s Balance Sheet*, 9 *ABAJ* 93, 94 (1923). Davis lectured American lawyers that “a crucial test of the American system” was “approaching,” in which the nation would have to choose “between the doctrines of individual liberty under which we have grown to greatness, and the philosophy of collectivism which can bring in its train nothing but stagnation and decline. On one side is the conviction that the unit of society is the individual and his freedom the State’s greatest care; on the other the theory that human society is a concrete whole, and the individual its mere servant.” *Id.*

²⁶³ *A Phrase Deserving Immortality*, 26 *LAW NOTES* 221, 221-22 (1923).

²⁶⁴ *Id.*

²⁶⁵ *Norfolk & W. Ry. Co. v. Public Service Commission of West Virginia*, 265 U.S. 70, 74 (1924). In *Norfolk & W. Ry Co.* the Court upheld an order of the West Virginia Public Service Commission requiring a railroad to construct and maintain a crossing for the use of vehicles to haul freight across its tracks in a small West Virginia town.

²⁶⁶ 270 U.S. 402 (1926).

²⁶⁷ 270 U.S. at 415. Oddly, the Court initially framed the question as whether the statutory prohibition “violates the due process clause of the equal protection clause.” *Id.* at 410.

²⁶⁸ Brief of Appellant, Exhibit B.

²⁶⁹ 270 U.S. at 410.

²⁷⁰ 270 U.S. at 414-15.

²⁷¹ 270 U.S. at 412. Such articles, Butler observed, “are to be distinguished from things that the State is deemed to have power to suppress as inherently dangerous.” *Id.* at 412-13.

²⁷² Brief of Appellant, at 28.

²⁷³ *Id.* at 33-34.

²⁷⁴ *Id.* at 18.

²⁷⁵ 270 U.S. at 414-15.

²⁷⁶ 270 U.S. at 415.

²⁷⁷ 270 U.S. at 415 (Holmes, J., dissenting).

²⁷⁸ 226 U.S. 192 (1912).

²⁷⁹ *Id.* at 201. “It does not follow that because a transaction, separately considered, is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government. With the wisdom of the exercise of that judgment the court has no concern.” *Id.* See *Sturges & Burn Manufacturing Co. v. Beauchamp*, 231 U.S. 320, 325 (1913) (State can “select means appropriate to make its prohibition effective.”).

²⁸⁰ 270 U.S. at 416 (Holmes, J., dissenting).

²⁸¹ Cuthbert W. Pound, *Defective Law—Its Cause and Remedy*, 1 NEW YORK STATE BAR ASSOCIATION BULLETIN 279, 283 (1929). See Alfred McCormack, *Book Review*, 26 COLUMBIA LAW REVIEW 645, 646 (1926). See Note, *Constitutionality of Co-Operative Marketing Acts*, 11 IOWA LAW REVIEW 375, 378 (1926).

²⁸² Note, *The Constitutionality of Statutes Creating a Conclusive Presumption that Gifts Within a Fixed Period of Death Were Made in Contemplation of Death*, 26 COLUMBIA LAW REVIEW 737, 741 (1926).

²⁸³ T.F. T. Plucknett, *Book Review*, 27 COLUMBIA LAW REVIEW 628, 630 (1927). See Robert Cushman, *Constitutional Law in 1925-1926*, 21 AMERICAN POLITICAL SCIENCE REVIEW 71, 84-86 (1927); Note, *Act Preventing Use of Shoddy in Manufacture of Comfortables Held Unconstitutional*, 12 VIRGINIA LAW REVIEW 662, 663 (1926).

²⁸⁴ 270 U.S. 230 (1926).

²⁸⁵ 270 U.S. at 236. “Twelve states besides Wisconsin, and Congress in the Federal Estate Law of 1926,” had revenue codes with similar conclusive presumptions “for various periods prior to death.” Note, *supra* note 282, at 738. The presumptions were “clearly based on the judgment that most gifts made within such period are in contemplation of death, and that nothing short of a conclusive presumption will prevent widespread tax evasion.” *Id.*

²⁸⁶ 270 U.S. at 240. The Court did not deny the power of Wisconsin “to tax gifts inter vivos,” *id.* at 239, but in Court’s view the conclusive presumption arbitrarily swept certain inter vivos gifts into the “graduated” schedule that characterized inheritance taxes, a schedule that “could not properly be laid on all gifts, or, indeed, upon any gift without testamentary character.” *Id.* at 240. Three years later, in *Bromley v. McCaughn*, 280 U.S. 124 (1929), the

Court held in an opinion by Stone that an inter vivos gift tax could be graduated because it was not a “direct” tax and hence need not be uniform. Sutherland authored a dissent, joined by Van Devanter and Butler. Stone’s docket book suggests that in conference McReynolds was uncertain about how to vote.

²⁸⁷ 270 U.S. at 240. The Court would in 1932 strike down a conclusive presumption in the federal tax code that gifts made within two years of death were made in contemplation of death. *Heiner v. Donnan*, 285 U.S. 312 (1932). It interpreted *Schlesinger* to hold that the presumption was invalid because it was “conclusive without regard to actualities, while like gifts at other times were not thus treated.” 285 U.S. at 325.

²⁸⁸ *See supra* note 267.

²⁸⁹ Sanford took the unusual step of concurring in the Court’s result alone, not in its opinion.

²⁹⁰ 270 U.S. at 241 (Holmes, J., dissenting).

²⁹¹ By the end of the Taft Court era, it would be common in the press to observe “the existence of two well defined groups in the nation’s highest tribunal—a consistently conservative majority and an equally consistent liberal or even radical minority. In virtually every case of major importance involving constitutional or economic issues in the last three years, Justices Oliver Wendell Holmes, Louis Brandeis, and Harlan F. Stone have stood together in the minority” 3 ‘Liberals’ in *Supreme Court Again Dissent to Rail Ruling*, CHICAGO DAILY TRIBUNE (May 22, 1929), at 4. *See* Richard L. Strout, *President Hoover and the Supreme Court*, CHRISTIAN SCIENCE MONITOR (March 11, 1930), at 16.

²⁹² *The Supreme Court as Legislator*, 46 THE NEW REPUBLIC 158 (March 31, 1926).

²⁹³ Note, *supra* note 282, at 744.

²⁹⁴ 278 U.S. 103 (1928).

²⁹⁵ *Louis K. Liggett Co. v. Baldridge*, 22 F.2d 993, 995-96 (E.D. Pa. 1927).

²⁹⁶ Stone’s docket book indicates that McReynolds had passed in conference. Stone’s failure to dissent is noteworthy. Future Justice Owen Roberts represented the appellant.

²⁹⁷ George Sutherland, *Address of the President: Private Rights and Government Control*, 40 ANNUAL REPORTS OF THE AMERICAN BAR ASSOCIATION 198 (1917). Sutherland decried the “widespread demand for innovating legislation—a craze for change.” *Id.* at 200.

²⁹⁸ *Id.* at 199-200. “[U]nfortunately . . . governmental incursions . . . are being extended beyond the limits of necessity and even beyond the bounds of expediency into the domain of doubtful experiment.” *Id.* at 201.

²⁹⁹ George Sutherland, *Principle or Expedient*, 5 CONSTITUTIONAL REVIEW 195, 208 (1921). *See* GS to Horace H. Smith (March 2, 1921) (Sutherland papers) (“The tendency everywhere is to over-legislate and to penalize a lot of things that ought to be left to the individual to determine for himself, or at any rate, left to be dealt with by public opinion.”). Compare WILLIAM HOWARD TAFT, *THE PRESIDENCY: ITS DUTIES, ITS POWERS, ITS OPPORTUNITIES AND ITS LIMITATIONS* 9 (New York: Charles Scribner’s Sons 1916) (“In this age and generation . . . the danger to the best interests of the country, is in the overwhelming mass of ill-digested legislation.”).

³⁰⁰ Sutherland, *Principle or Expedient*, *supra* note 299, at 209.

³⁰¹ T.R. Powell, *Supreme Court and State Police Power*, 18 VIRGINIA LAW REVIEW 1, 9 (1931).

³⁰² Comment, *Taxation Directed Against the Chain Store*, 40 YALE LAW JOURNAL 431, 435 (1931). *See* Note, 15 VIRGINIA LAW REVIEW 376, 376 (1929) (“The statute was obviously aimed at the chain store corporations operating in Pennsylvania, although the legislature gave as the purpose of the act an attempt to protect the public health and safety.”).

³⁰³ 278 U.S. at 111.

³⁰⁴ 278 U.S. at 111.

³⁰⁵ 278 U.S. at 111.

³⁰⁶ 278 U.S. at 113.

³⁰⁷ “It is a matter of public notoriety that chain drug stores in great numbers, owned and operated by corporations, are to be found throughout the United States. They have been in operation for many years. We take judicial notice of the fact that the stock in these corporations is bought and sold upon the various stock exchanges of the country and, in the nature of things, must be held and owned to a large extent by persons who are not registered pharmacists. If detriment to the public health thereby has resulted or is threatened, some evidence of it ought to be forthcoming. None has been produced, and, so far as we are informed, either by the record or outside of it, none exists. The claim, that mere ownership of a drug store by one not a pharmacist bears a reasonable relation to the public health, finally rests upon conjecture, unsupported by anything of substance. This is not enough; and it becomes our duty to declare the act assailed to be unconstitutional as in contravention of the due process clause of the Fourteenth Amendment.” *Id.* at 113-14.

³⁰⁸ Contemporaries observed that although an “attitude of non-interference with state policies once found expression in the majority opinions of the Court, it is now stated in dissents.” Comment, *supra* note 302, at 435.

³⁰⁹ 278 U.S. at 115 (Holmes, J., dissenting). “Argument has not been supposed to be necessary in order to show that the divorce between the power of control and knowledge is an evil.” *Id.* at 114. *Baldrige* should be compared to *Roschen v. Ward*, 279 U.S. 337 (1929), in which, speaking through Holmes, the Taft Court upheld a New York statute requiring a licensed physician or optometrist to “be in charge of and personal attendance” whenever prescription eyeglasses were sold. “We cannot say, as complainants would have us say, that the supposed benefits are a cloak for establishing a monopoly and a pretense.” *Id.* at 340.

³¹⁰ To support the key assertions in his *Baldrige* opinion, Sutherland cited: “*Burns Baking Co. v. Bryan*, 264 U. S. 504, 513. See also *Meyer v. Nebraska*, 262 U. S. 390, 399-400; *Norfolk Ry. v. Public Service Comm’n*, 265 U. S. 70, 74; *Pierce v. Society of Sisters*, 268 U. S. 510, 534-535; *Weaver v. Palmer Bros. Co.*, 270 U. S. 402, 412-415; *Fairmont Co. v. Minnesota*, 274 U. S. 1, 9-11.” *Baldrige*, 278 U.S. at 113.

³¹¹ 261 U.S. 525 (1923).

³¹² Corwin, *supra* note 11, at 19. In 1931 Contemporaries believed that *Adkins* was “the case which, next to the New York Bakers case, is considered by intelligent modern thinkers to be the one most unjust and hurtful to the needs of humble men in an oppressive industrial age.” Pollard, *supra* note 17, at 496.

³¹³ 261 U.S. at 546.

³¹⁴ See chapter 1 at –

³¹⁵ Pub. L. 65-215, 40 Stat. 960 (September 19, 1918).

³¹⁶ 40 Stat. 964.

³¹⁷ Thomas I Parkinson, *Minimum Wage and the Constitution*, 13 THE AMERICAN LABOR LEGISLATION REVIEW 131, 131 (1923).

³¹⁸ 56 CONG. REC. 10732-33 (September 24, 1918).

³¹⁹ 56 CONG. REV. 10285 (September 13, 1918).

³²⁰ Massachusetts (1912); California (1913); Colorado (1913); Minnesota (1913); Oregon (1913); Utah (1913); Washington (1913); Wisconsin (1913); Arkansas (1915); Kansas (1915); and Arizona (1917). The relevant statutes are in the Brief for Appellants, at 584-686.

³²¹ *Stettler v. O'Hara*, 69 Or. 519 (1914); *State v. Crowe*, 130 Ark. 272 (1917); *Williams v. Evans*, 139 Minn. 32 (1917); *Larsen v. Rice*, 100 Wash. 642 (1918).

³²² 69 Or. 519 (1914), *aff'd by an equally divided court*, 243 U.S. 629 (1917). See LDB to Felix Frankfurter (March 29, 1937), in "HALF BROTHER, HALF SON": THE LETTERS OF LOUIS D. BRANDEIS TO FELIX FRANKFURTER 594 (University of Oklahoma Press: Norman 1991 Melvin I. Urofsky and David W. Levy eds.) ("BRANDEIS FRANKFURTER CORRESPONDENCE"): "It was Dec. 16-17/14 that I argued *Stettler-O'Hara*." Brandeis wrote Frankfurter on the occasion of *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), which overruled *Adkins*: "Overruling *Adkins*' Case must give you some satisfaction." Frankfurter replied: "It is characteristically kind of you to think of the aspects of the Washington minimum wage case that would give me some satisfaction, but, unhappily, it is one of life's bitter-sweets and the bitter far outweighs the sweet." Quoted in BRANDEIS FRANKFURTER CORRESPONDENCE, at 594 n.1.

³²³ On Frankfurter's substitution for Brandeis in the League's cases, see FELIX FRANKFURTER, FELIX FRANKFURTER REMINISCES: RECORDED IN TALKS WITH DR. HARLAN B. PHILLIPS 96-103 (Reynal & Co.: New York 1960).

³²⁴ In 1917 most commentators speculated that the four Justices who had voted to sustain the Oregon statute were McKenna, Holmes, Day, and Clarke. See Thomas Reed Powell, *The Constitutional Issue in Minimum-Wage Legislation*, 2 MINNESOTA LAW REVIEW 1, 1 (1917). But after McKenna joined Sutherland's majority opinion in *Adkins*, Powell instead postulated that fourth Justice in 1917 had been Pitney. Thomas Reed Powell, *The Judiciality of Minimum-Wage Legislation*, 37 HARVARD LAW REVIEW 545, 549-50 (1924). (Given what we know about McKenna's extreme reaction to *Block v. Hirsch*, *supra* note 190, it is of course possible that McKenna had changed his mind about the constitutionality of price-fixing in the intervening six years.) But Powell believed that "the Supreme Court from October, 1921, to June, 1922, contained six Justices who thought minimum-wage legislation constitutional." *Id.* at 550. Powell waggishly noted that if the votes of judges "outside of the United States Supreme Court" were counted, there were by the time *Adkins* was argued "twenty-nine judges thinking compulsory minimum wage legislation not wanting in due process as against four judges thinking the contrary." *Id.* at 548.

³²⁵ "*The Chief of These is Property*," 33 NEW REPUBLIC 59, 60 (No. 419) (December 13, 1922). The Court of Appeals of the District of Columbia had engaged in unsavory maneuvering to decide the case against the constitutionality of the statute. *Id.* at 59. The anxiety of the District of Columbia judges to strike down the statute is apparent in their full-throated defense of property rights from the intrusion of government price fixing:

Legislation tending to fix the prices at which private property shall be sold, whether it be a commodity or labor, places a limitation upon the distribution of wealth, and is aimed at the correction of the inequalities of fortune which are inevitable under our form of government, due to personal liberty and the private ownership of property. . . .

The police power cannot be employed to level inequalities of fortune. Private property cannot by mere legislative or judicial fiat be taken from one person and delivered to another, which is the logical result of price fixing. . . .

A wage based upon competitive ability is just, and leads to frugality and honest industry, and inspires an ambition to attain the highest possible efficiency, while the equal wage paralyzes ambition and promotes prodigality and indolence. It takes away the strongest incentive to human labor, thrift, and efficiency, and works injustice to employee and employer alike, thus affecting injuriously the whole social and industrial fabric. . . .

The tendency of the times to socialize property rights under the subterfuge of police regulation is dangerous, and if continued will prove destructive of our free institutions. It should be remembered that of the three fundamental principles which underlie government, and for which government exists, the protection of life, liberty, and property, the chief of these is property; not that any amount of property is more valuable than the life or liberty of the citizen, but the history of civilization proves that, when the citizen is deprived of the free use and enjoyment of his property, anarchy and revolution follow, and life and liberty are without protection. . . .

Take from the citizen the right to freely contract and sell his labor for the highest wage which his individual skill and efficiency will command, and the laborer would be reduced to an automaton—a mere creature of the state. It is paternalism in the highest degree, and the struggle of the centuries to establish the principle that the state exists for the citizen, and not the citizen for the state, would be lost.

Children’s Hospital of District of Columbia v. Adkins, 284 F. 613, 617, 621-23 (D.C. Ct. of App. 1922).

³²⁶ Frances Perkins, *Conserve—but Check—the Court*, 50 THE SURVEY 257 (No. 4) (May 15, 1923). “No one was prepared . . . for the kind of argument presented in Justice Sutherland’s opinion.” *Id.*

³²⁷ In his 1918 Presidential address to the New York State Bar, no less a figure than Charles Evans Hughes had summarized the vast changes that had transformed the constitutional capacity of government to regulate labor. “As we look to the America that is to be—the United States after the war,” Hughes said, “we must know the equipment of recognized constitutional authority with which it will face its problems”:

[A]s illustrating the power of the state with respect to conditions of employment, it is to be observed that the Oregon law limiting the hours of employees in mills, factories and manufacturing establishments, to 10 hours, with provision for allowing extra time at increased pay, was upheld as a valid health regulation. It is true that the Supreme Court of the United States was equally divided with respect to the validity of the Minimum Wage Law of Oregon and hence the decision of the State Supreme Court sustaining that law was affirmed by a divided court. While this leaves the constitutional question still open to debate, it is apparent that opportunity is afforded for experimentation which cannot fail to throw light at least upon the wisdom of the legislative policy.

As we contemplate future problems, in the light of these and earlier decisions, especially as we consider the importance of intelligent action with respect to conditions of labor, to labor organizations, to the relation of employers and employees in activities affected with a public interest, and the broad field for the exercise of legislative discretion, either by Congress or the states according to the nature of the subject, without invading constitutional rights of private persons, we cannot fail to realize that the failure to deal with these problems with the adequacy demanded by good sense and the spirit of fairness will not be due to lack of power so far as the Federal Constitution is concerned, but to the mis-use or non-use of the power which the nation and the states respectively possess.

Hughes, *supra* note 151, at 93, 103-04.

³²⁸ Brief for Appellants, at xxvii. The Minimum Wage Board had determined that one could not live in the District for less than \$16 per week, but that 72.2% of women employed in hotels, 42.6% of women employed in restaurants, and 82.3% of women employed in hospitals, were receiving less than that. *Id.* at xxvii-xxviii.

³²⁹ Brief for Appellants, at xxix. “If an industry can maintain itself only by paying workers less than a living wage, it is a socially unprofitable enterprise.” Emilie J. Hutchinson, *Women’s Wages*, 89 STUDIES IN HISTORY ECONOMICS AND PUBLIC LAW 1, 83 (1919).

³³⁰ Brief for Appellants, at xxx.

³³¹ 261 U.S. at 560.

³³² Frankfurter detailed the operation of the minimum wage law in 11 states, in Great Britain, Australia and Canada. It argued that “No industry which fails to supply even the bare minimum living requirements of its own workers can possibly be sound.” *Id.* at xlix.

³³³ 261 U.S. at 545.

³³⁴ Brief for Appellees, at 4-7. Lyons claimed “that the work was light and healthful, the hours short, with surroundings clean and moral, and that she was anxious to continue it for the compensation she was receiving, and that she did not earn more. Her services were satisfactory to the Hotel Company, and it would have been glad to retain her, but was obliged to dispense with her services by reason of the order of the board and on account of the penalties prescribed by the act. The wages received by this appellee were the best she was able to obtain for any work she was capable of performing, and the enforcement of the order, she alleges, deprived her of such employment and wages. She further averred that she could not secure any other position at which she could make a

living, with *543 as good physical and moral surroundings, and earn as good wages, and that she was desirous of continuing and would continue the employment, but for the order of the board.” 261 U.S. at 542-43.

³³⁵ Brief for Appellees, at 9, 13. They also alleged that the law was unconstitutionally vague. *Id.*, at 11.

³³⁶ *Id.* at 14.

³³⁷ *Id.* at 30.

³³⁸ *Id.* at 31. “Laws fixing prices in the bargains between individuals are intended to change the rules for the distribution of wealth. They are attempts to correct the inequalities of fortune which follow inevitably from the very form of government which we have—a form which recognizes private ownership of property and personal liberty; they are attempts to alter the economic principles embodied in the Constitution itself, on the ground that the operation of those very principles is itself inimical to the public health, morals and safety. This cannot be done without an amendment of the Constitution.” *Id.* at 35.

³³⁹ Cushman, *supra* note 238, at 882. The locus classicus for this view is GILLMAN, *supra* note 259. Other historians, however, have stressed the independent importance of liberty of contract. *See, e.g.,* Bernstein, *supra* note 16 (*Lochner* was not decided on the basis of a hostility to class legislation but in order to protect fundamental liberties); David N. Mayer, *Substantive Due Process Rediscovered: The Rise and Fall of Liberty of Contract*, 60 MERCER LAW REVIEW 563, 625 (2008). For other views, *see* Gary D. Rowe, *Lochner Revisionism Revisited*, 24 LAW & SOCIAL INQUIRY 221 (1999).

³⁴⁰ GILLMAN, *supra* note 259, at 10. *See also* John V. Orth, *Taking From A and Giving to B: Substantive Due Process and the Case of the Shifting Paradigm*, 14 CONSTITUTIONAL COMMENTARY 337, 337-45 (1997); G. Edward White, *Revisiting Substantive Due Process and Holmes’s Lochner Dissent*, 63 BROOKLYN LAW REVIEW 87, 88-89 (1997) (Substantive due process claims tested “the boundary between the police powers of the states and the principle that no legislature could enact ‘partial’ legislation, legislation that imposed burdens or conferred benefits on one class of citizens rather than the citizenry as a whole.”).

³⁴¹ GILLMAN, *supra* note 259, at 22-60.

³⁴² *See* Chapter 2 ---.

³⁴³ WHT to Robert A. Taft (February 23, 1925) (Taft papers). Taft gave constitutional expression to this sentiment in *Truax v. Corrigan*, 257 U.S. 312, 333 (1921) (“Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application if, within the sphere of its operation, it affects alike all persons similarly situated, is not within the amendment.”) (Quoting *Barbier v. Connolly*, 113 U.S. 27, 32 (1884)).

³⁴⁴ *Speech of William Howard Taft Accepting the Republican Nomination for President of the United States*, S. Doc. No. 902, 62nd CONG. SESS. at 10 (August 1, 1912). *See* Veto Message of President Taft, 49 CONG. REV. 4828 (March 4, 1913) (Vetoing as “class legislation of the most vicious sort” an appropriation bill forbidding funds to be spent to enforce antitrust laws against unions and farmers). “Americanism,” Taft would proclaim in the aftermath of the strikes of 1919, “rejects and resents class hatred and regards as seditious all propaganda which would promote the selfish gratification of class at the expense of the suffering of the whole community.” *Taft Tells Minneapolitans What Constitutes True and Ideal Americanism*, MINNEAPOLIS MORNING TRIBUNE (February 12, 1920), at 6. Taft would put this view of labor legislation into constitutional law in *Truax v. Corrigan*, 257 U.S. 312, 332-33 (1921) (The Equal Protection Clause “was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process.”).

³⁴⁵ Sutherland, *supra* note 297, at 212. *See* Remarks of Senator Sutherland, 51 CONG. REC. 11803-11804 (July 8, 1914) (Discussing Pub. L. No. 63-161, 38 Stat. 609, 652 (August 1, 1914), forbidding funds to be spent to enforce antitrust laws against unions and farmers). In 1921, Sutherland proclaimed that “any law which arbitrarily separates

men into classes to be punished or rewarded, not according to what they do but according to the class to which they are assigned, is odious and despotic, no matter how large a majority may have approved it.”

I have personally the greatest possible sympathy for the farmers of the country who have been first to feel the hardship of falling prices, but legislation which proposes to extend special and exclusive aid to them is almost sure to be, in one way or another, at the expense of other classes of our citizenship. Apart from all other consideration, the danger of all such legislation is that it may constitute the first link in a chain of precedents which, beginning in necessity, passes from one gradation to another until, at length, it rests in mere favor.

Not so long ago Congress enacted legislation which attempted to exempt combinations of farmers and horticulturists and workmen from penalties of the Sherman Anti-Trust law, while leaving combinations of business men subject to it. The right of farmers to form associations and the right of workmen to form unions for the purpose of improving their condition and advancing their legitimate interests, is beyond question. . . . An organization of farmers, or an organization of workmen is, *per se*, entirely legal, but so is an organization of business men. It is only when such an organization has for its object the restraint of interstate commerce . . . that it becomes amenable to the Sherman Law. . . . [I]f restraint of trade be an offense when effected by a combination of lumber dealers it is, to my mind, a perversion of all logical processes to contend that restraint of trade is not an offense when effected by a combination of farmers or workmen; and no such distinction can be made unless we are prepared to incorporate into our political system the new and dangerous doctrine that the character of the actor, and not the quality of the act, shall be the test of culpability.

Sutherland, *supra* note 299, at 207-09. I quote this passage at length to illustrate how malleable and irrelevant the concept of class legislation had become during the Taft Court. In 1928, for example, the Court unanimously decided *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-Operative Marketing Ass'n*, 276 U.S. 71 (1928), which addressed the constitutionality of a Kentucky statute authorizing the incorporation of nonprofit agricultural cooperatives that could consist only of farmers and that would be exempt from otherwise generally applicable antitrust laws. In 1921, in the passage quoted in text, Sutherland condemned precisely this kind of statute as impermissible class legislation. No doubt Sutherland had in mind *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902), in which the Court had struck down as impermissible class legislation an Illinois antitrust statute on the simple ground that it had exempted agricultural products and livestock while in the hands of the producer or raiser. Yet by 1928 Sutherland could join McReynolds's opinion for the Court, which surveyed the large number of states that had established co-operative agricultural marketing acts to overcome the peculiar disabilities facing dispersed, small farmers, and which easily concluded that “The opinion generally accepted—and upon reasonable grounds, we think—is that co-operative marketing statutes promote the common interest. . . . The liberty of contract guaranteed by the Constitution is freedom from arbitrary restraint—not immunity from reasonable regulation to safeguard the public interest. The question is whether the restrictions of the statute have reasonable relation to a proper purpose.” 276 U.S. at 96-97. McReynolds thus subsumed the question of class legislation into the question of whether the legislation served a proper statutory purpose. He did not pursue the question of whether the statute served the interests of only a special class of persons, as distinct from the public as a whole. Stone commented to his former clerk Milton Handler that “I agree with you that McReynolds opinion in the Co-operative Marketing case is easily the most important decision this term, and is handled in admirable fashion. . . . Of course, if its reasoning is followed it puts a different aspect on the rule of classification as announced in some of the earlier cases.” HFS to Milton Handler (March 2, 1928) (Stone papers). For a good discussion of *Liberty Warehouse* in the context of older ideas of class legislation, see Matthew O. Tobriner, *The Constitutionality of Cooperative Marketing Statutes*, 17 CALIFORNIA LAW REVIEW 19 (1928).

Sutherland's complaint about “the new and dangerous doctrine that the character of the actor, and not the quality of the act, shall be the test of culpability” is curious, given that Sutherland himself had eloquently defended a conception of workman's compensation that was, in his own words, premised entirely on “the status of industry and workman.” *Address of Hon. George Sutherland to the Third Annual Convention of International Association of Casualty and Surety Underwriters*, S. Doc. No. 131, 63rd CONG. 1st SESS. (June 14, 1913). See *Cudahy Packing Co. v. Parramore*, 263 U.S. 418, 423 (1923) (“Workmen's Compensation legislation rests upon the idea of status, not upon that of implied contract.”) (Per Sutherland, J.).

³⁴⁶ *Holden v. Hardy*, 169 U.S. 383 (1898). *Holden* upheld a Utah statute that limited work in underground mines to eight hours a day. *Id.* at 380. It had been challenged under the Due Process Clause of the Fourteenth Amendment. The Court noted that it violated due process for the state unjustly to discriminate “in favor of or against a particular

individual or class of individuals.” *Id.* at 383. But such discrimination was nevertheless permissible “where the legislature had adjudged that a limitation is necessary for the preservation of the health of employes, and there are reasonable grounds for believing that such determination is supported by the facts. The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class.” *Id.* at 398. The Court affirmed:

The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employes, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules, and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority. . . .

[T]he fact that both parties are of full age, and competent to contract, does not necessarily deprive the state of the power to interfere, where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. ‘The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer.’

Id. at 397.

³⁴⁷ *Muller v. Oregon*, 208 U.S. 412 (1908). *Muller* upheld against attack under the Due Process Clause an Oregon statute limiting the hours of work of women in factories and laundries to ten hours a day. The Court reasoned: “That woman’s physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race. . . . Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained. . . . The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all.” *Id.* at 421-22.

³⁴⁸ *Holden*, 169 U.S. at 397.

³⁴⁹ Which did not, of course, prevent the Court from using it. *See, e.g., Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902).

³⁵⁰ Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HISTORY REVIEW 293, 298 (1985).

³⁵¹ 198 U.S. 45 (1905).

³⁵² For a concise overview of *Lochner* era’s police power jurisprudence, see OWEN M. FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910* 160-62 (MacMillan: New York 1993).

³⁵³ 198 U.S. at 56.

³⁵⁴ 198 U.S. at 59.

³⁵⁵ 198 U.S. at 57-58. “Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable

in and of itself, to say that there is material danger to the public health, or to the health of the employees, if the hours of labor are not curtailed.” 198 U.S. at 61.

³⁵⁶ 198 U.S. at 57.

³⁵⁷ The Court said merely that “If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris*, as employer or employee, to make contracts for the labor of the latter under the protection of the provisions of the Federal Constitution, there would seem to be no length to which legislation of this nature might not go.” 198 U.S. at 58. On the ambiguity of *Lochner*, see Matthew J. Lindsay, *The Presumptions of Classical Liberal Constitutionalism*, 102 IOWA LAW REVIEW 259, 283-85 (2017).

³⁵⁸ Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIFORNIA LAW REVIEW 751, 768 (2009); FISS, *supra* note 352, at 295. This aspect of *Lochner* did indeed push toward a doctrinal framework of impermissible motives. Thus the Court noted that “This interference on the part of the legislatures of the several states with the ordinary trades and occupations of the people seems to be on the increase. . . . It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose.” 198 U.S. at 63-64.

³⁵⁹ “If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the legislature. Not only the hours of employees, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength of the state be impaired. We mention these extreme cases because the contention is extreme. We do not believe in the soundness of the views which uphold this law. On the contrary, we think that such a law as this, although passed in the assumed exercise of the police power, and as relating to the public health, or the health of the employees named, is not within that power, and is invalid. The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts.” 198 U.S. at 60-61.

³⁶⁰ Any such conclusion, however, would stretch “takings” jurisprudence very far, for it would implicitly find a taking in the absence of compulsion and in the absence of any limitation on “property” apart from pure liberty of contract.

³⁶¹ On the day of the oral argument, Holmes wrote to his friend Nina Gray that “I have little to do except to go to Court and hear an argument on the Minimum wages for women on which I expect my friend Frankfurter will hold forth again. He always makes good arguments.” OWH to Mrs. John Chipman Gray (March 14, 1923) (Holmes papers).

³⁶² Brief for Appellees, at 41.

³⁶³ 261 U.S. at 546-47, 551.

³⁶⁴ 261 U.S. at 549.

³⁶⁵ 261 U.S. 550.

³⁶⁶ 243 U.S. 426 (1917).

³⁶⁷ 243 U.S. at 433-34. Against the contention that this was “not a health regulation” and so inconsistent with the requirements of Due Process, the Court had explicitly held that it could not “assent” to “the charge of pretense against the legislation.” *Id.* at 436. Against the contention “that the law . . . is not either necessary or useful ‘for preservation of the health of employes in mills, factories and manufacturing establishments,’” the Court stated that “The record contains no facts to support the contention, and against it is the judgment of the legislature and the Supreme Court.” *Id.* at 438. The Court had thus held in 1917 that absent specific contradictory evidence it would credit a legislative statement of purpose and defer to a legislative judgment about the instrumental connection between legislation and the promotion of health. Sutherland gave lip service to this deference at the outset of his opinion in *Adkins*. Legislative determinations “must be given great weight,” he said, and “every possible presumption” must be extended “in favor of the validity of an act of Congress until overcome beyond rational doubt.” 261 U.S. at 544. But Sutherland’s actual and explicit refusal to extend such deference was a crucial moment in the Taft’s Court’s changing posture toward constitutional adjudication.

Bunting had been argued by Felix Frankfurter. He recalled that “During the course of the argument McReynolds said to me, ‘Ten hours! Ten hours! Ten! Why not four?’ He was then the youngest member of the Court and was sitting to my extreme right. ‘If ten, why not our?’ in his snarling, sneering way. I paused, synthetically, self-consciously, dramatically, just said nothing. Then I moved down towards him and said, ‘Your honor, if by chance I may make such a hypothesis, if your physician should find that you’re eating too much meat, it isn’t necessary for him to urge you to become a vegetarian.’ Holmes said, ‘Good for you!’ very embarrassingly right from the bench. He loathed these arguments that if you go this far you must go further. ‘Good for you!’ Loud. Embarrassingly.” FRANKFURTER, *supra* note 323, at 102.

³⁶⁸ 261 U.S. at 550-51. Sutherland characterized *Bunting* as a case in which “in the absence of facts to support the contrary conclusion,” the Court chose to “accept” the “judgment” of the state legislature and State Supreme Court” that legislation was “necessary for the preservation of the health of employees.” In *Adkins*, Sutherland did not even purport to find facts in the record establishing that the minimum wage statute was unnecessary for the health of women workers.

³⁶⁹ 261 U.S. at 560.

³⁷⁰ 261 U.S. at 559-60.

³⁷¹ 261 U.S. at 559. The statute was deemed unconstitutional “by clear and indubitable demonstration.” *Id.* at 544.

³⁷² “Anyone who reads the decision written by Justice Sutherland will realize that by far the greater part of his arguments have nothing at all to do with law or precedent. He thinks that the minimum wage law is unfair to the employer, is contrary to economic and business interests, and is bad public policy. As stated again and again by the court in times past, these considerations are entirely irrelevant to the judicial function. The business of the judge is to interpret law, not to determine legislative policy.” John A. Ryan, *What “Unconstitutional” Means*, 50 THE SURVEY 258 (No. 4) (May 15, 1923).

³⁷³ After publication of his opinion, Sutherland received a letter from the recent Republican candidate for Governor of Virginia expressing delight “that the Court has the ‘guts’ to stand up in defense of personal liberty against the constant encroachments of government. If the Court had done the same thing in its decision on the Adamson Law [Wilson v. New, 243 U.S. 332 (1917)], many of the troubles which we have had since and will have in the future, would have been avoided. . . . I think the circumstances and conditions surrounding the country at the time largely influenced that judgment. . . . Incidentally it is rather interesting to observe our old friend Gompers, who defends the Herrin Murders and the Dynamiting Cases on the ground of personal liberty, complaining of your decision in defense of the essential personal liberty of contract.” Henry W. Anderson to GS (April 10, 1923) (Sutherland papers).

³⁷⁴ Judge Charles Robb, who had joined Van Orsdel’s opinion below holding the statute unconstitutional in the Court of Appeals for District of Columbia, wrote Sutherland to emphasize how much his decision had “impressed me. It is one of the best opinions I have ever read and its logic is irresistible.” Charles H. Robb to GS (April 12, 1923) (Sutherland papers). Sutherland also received a letter from Andrew Furuseth, the President of the International Seamen’s Union of America, with whom Sutherland had worked closely in 1915 to enact the Seamen’s Act of 1915, *see* Samuel Gompers to C.E. Ashbridge (June 30, 1916) (Sutherland papers), saying that “To me the decision seems

alright. In fact I should have been very much surprised if you had written any other decision on that question. . . . If the legislative body has the power to determine a minimum wage it seems to me to follow that it may determine a maximum wage. The equality of the sexes will thus make it possible to return to wages set by law as it was for centuries in Britain. . . . Those who have enjoyed freedom a long time cannot understand the real meaning of bondage, and are likely to hold out their hands for shackles.” Andrew Furuseth to GS (May 5, 1923) (Sutherland papers). Sutherland replied, “You have exactly the right view of it.” GS to Andrew Furuseth (May 11, 1923) (Sutherland papers).

³⁷⁵ 261 U.S. at 555. *See Connolly v. General Construction Co.*, 269 U.S. 385 (1926) (Striking down as unconstitutionally vague an Oklahoma statute providing that “the current rate of per diem wages in the locality where the work is performed shall be paid to . . . laborers, workmen, mechanics, or other persons employed by contractors or subcontractors in the execution of any contract or contracts with the state.”) (per Sutherland, J.). Vague administrative statutes were roundly condemned by Sutherland before he joined the Court. *See Sutherland, supra* note 299, at 203-05.

³⁷⁶ 261 U.S. at 555-56. Thus “the inquiry in respect of the necessary cost of living and of the income necessary to preserve health and morals, presents an individual and not a composite question, and must be answered for each individual considered by herself and not by a general formula prescribed by a statutory bureau.” *Id.* at 556.

³⁷⁷ 261 U.S. at 556. “It cannot be shown that well paid women safeguard their morals more carefully than those who are poorly paid. . . . As a means of safeguarding morals the attempted classification, in our opinion, is without reasonable basis.”

³⁷⁸ 261 U.S. at 557.

³⁷⁹ 261 U.S. at 560-61.

³⁸⁰ 261 U.S. at 557-58. Sutherland speculated that something other than cost of living must have motivated the Board’s decisions, because it had set the minimum wage in restaurants and mercantile establishments at \$16.50 per week, in printing shops at \$15.50 per week, and in laundries at \$15 per week. Plainly the cost of living of the workers in these different settings did not vary. “The board probably found it impossible to follow the indefinite standard of the statute, and brought other and different factors into the problem; and this goes far in the direction of demonstrating the fatal uncertainty of the act, an infirmity which, in our opinion, plainly exists.” *Id.* at 556-57. It seems fair to conclude that in setting minimum wage standards, the Board was considering the economics of the regulated industry as well as the minimum income necessary for workers to live. After the decision in *Adkins*, therefore, Frankfurter decided to exploit Sutherland’s stress on the need for “fair value” and to substitute the idea of a “fair wage” for that of a “living wage,” thus leading to the eventual enactment of the Fair Labor Standards Act. The story is well told in VIVIEN HART, *BOUND BY OUR CONSTITUTION: WOMEN, WORKERS, AND THE MINIMUM WAGE* 122-67 (Princeton University Press: Princeton 1994).

³⁸¹ 261 U.S. at 558. “In principle, there can be no difference between the case of selling labor and the case of selling goods. If one goes to the butcher, the baker, or grocer to buy food, he is morally entitled to obtain the worth of his money; but he is not entitled to more. If what he gets is worth what he pays, he is not justified in demanding more, simply because he needs more; and the shopkeeper, having dealt fairly and honestly in that transaction, is not concerned in any peculiar sense with the question of his customer’s necessities. Should a statute undertake to vest in a commission power to determine the quantity of food necessary for individual support, and require the shopkeeper, if he sell to the individual at all, to furnish that quantity at not more than a fixed maximum, it would undoubtedly fall before the constitutional test.” *Id.* at 558-59. This language infuriated labor leaders. Samuel Gompers wrote that “The brutality of the majority decision can beget nothing but wrath. It went so far as to unblushingly liken the purchase of the labor power of women and girls to the purchase of provisions in a grocery store, or meat in a butcher shop.” Samuel Gompers, *Usurped Power*, 50 *THE SURVEY* 221-22 (No. 4) (May 15, 1923).

³⁸² As Holmes observed in his dissent: “I see no greater objection to using a Board to apply the standard fixed by the Act than there is to the other commissions with which we have become familiar” 261 U.S. at 570 (Holmes, J., dissenting).

³⁸³ Hutchinson, *supra* note 329, at 49 (“From the mass of material collected by vice commissions and industrial investigators, the economic connection between inadequate earnings and occasional or regular prostitution is clearly established.”); Robert L. Hale, *Judicial Power and Judicial Social Theories*, 9 ABAJ 810, 811 (December 1923) (“Despite Justice Sutherland’s denial, the evidence of those who know seems to prove that there is a relation between pay and morals.”).

³⁸⁴ 261 U.S. at 565 (Taft, C.J. dissenting) (“A line of distinction like the one under discussion in this case is, as the opinion elsewhere admits, a matter of degree and practical experience and not of pure logic. Certainly the wide difference between prescribing a minimum wage and a maximum wage could as a matter of degree and experience be easily affirmed.”). “Surely a little calm reflection,” T.R. Powell commented in a devastating critique of Sutherland’s opinion, “would instill in Mr. Justice Sutherland a confidence that an approval of the minimum-wage law would not incapacitate him from distinguishing between it and a maximum-wage law.” T.R. Powell, *The Judiciality of Minimum-Wage Legislation*, *supra* note 324, at 516. Brandeis commented that this article by Powell “should open eyes & cannot fail to help. Such shots continued a few years may revolutionize attitudes. He talks English . . . Some might say, ‘He talks turkey.’” LDB to Felix Frankfurter (April 6, 1924), in 5 LETTERS OF LOUIS D. BRANDEIS, *supra* note 125, at 124.

³⁸⁵ 261 U.S. at 558.

³⁸⁶ 261 U.S. at 558.

³⁸⁷ 261 U.S. at 557.

³⁸⁸ 261 U.S. at 554.

³⁸⁹ *Address of Hon. George Sutherland*, *supra* note 345 **Error! Bookmark not defined.**, at 7. See *Truax v. Corrigan*, 257 U.S. 312, 338-39 (1921) (“The general end of [workmen’s compensation] legislation is that the employer shall become the insurer of the employee against injuries from the employment without regard to the negligence, if any, through which it occurred, leaving to the employer to protect himself by insurance and to compensate himself for the additional cost of production by adding to the prices he charges for his products.”); *The Report of the Employers’ Liability and Workmen’s Compensation Commission*, Senate Document No. 338, 62nd CONG. 2nd SESS. (February 12, 1912). In strongly defending Workmen’s Compensation legislation, Sutherland had stressed Holmes’s broad definition of the scope of the police power in *Noble State Bank v. Haskell*, 219 U.S. 110 (1911), concluding that legislation may be enacted “in order to promote the public health, safety, morality, or welfare . . . although it involve the taking of private property to some extent for what in its immediate purpose is a private use.” *The Report of the Employers’ Liability and Workmen’s Compensation Commission*, at 31. In *Noble*, Holmes had written:

It may be said in a general way that the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.

219 U.S. at 111. From this Sutherland reasoned that legislation “can not be held invalid under the fifth amendment because there is involved to a comparatively inconsiderable degree a taking of or the placing of a burden upon . . . property . . . not in accordance with some rule of the common law.” *The Report of the Employers’ Liability and Workmen’s Compensation Commission*, at 34.

³⁹⁰ *Address of Hon. George Sutherland*, *supra* note 345 **Error! Bookmark not defined.**, at 9. “The thought behind this movement [for workmen compensation laws] is that if society en masse for the general welfare may command the self-effacing loyalty of each of its constituent units society in turn must shape and preserve conditions which will protect each unit in the unequal struggle for individual well-being. There is a growing feeling that the individualist theory has been pushed with too much stress upon the dry logic of its doctrines and too little regard for their practical operation from the humanitarian point of view. We are discovering that we can not always regulate our economic and social relations by scientific formulae, because a good many people perversely insist upon being fed and clothed and comforted by the practical rule of thumb rather than by the exact rules of logic.” *Id.* at 11.

³⁹¹ *Cudahy v. Packing Co. v. Parramore*, 263 U.S. 418, 423 (1923) (Per Sutherland, J.).

³⁹² 261 U.S. at 558.

³⁹³ See *supra* note 381.

³⁹⁴ Address of Hon. George Sutherland, *supra* note 345, at 11-12.

³⁹⁵ 261 U.S. at 554.

³⁹⁶ 261 U.S. at 545.

³⁹⁷ Sutherland, *supra* note 299, 206 (“[T]he owner has an inherent, constitutional right to the market price, fixed by what is called the ‘higgling of the market,’ irrespective of the extent of his profits. Such a right is, indeed, itself essentially property which stands upon an equality with life and liberty, under the guaranties of the Fifth and Fourteenth Amendments.”).

³⁹⁸ Sutherland’s assumption of an objective “fair value” presupposes a “fallacy . . . which could have been pointed out by any competent conventional economist.” Hale, *supra* note 383, at 811. See Thomas Reed Powell, *Protecting Property and Liberty, 1922-1924*, 40 POLITICAL SCIENCE QUARTERLY 404, 414 (1925) (“Mr. Justice Sutherland assumes that there is some determinable ‘fair value of the services rendered’ by employees, and he declares the statute void for basing the minimum wage on the amount needed for the support of the worker rather than on this fair value of her services. Nowhere does he show how such fair value can be ascertained. He insists, however, that in so far as the sum fixed by the minimum-wage board exceeds this fair value, ‘it amounts to a compulsory exaction from the employer.’”).

³⁹⁹ 262 U.S. 341 (1923).

⁴⁰⁰ See *supra* text at note 177.

⁴⁰¹ Address of Hon. George Sutherland, *supra* note **Error! Bookmark not defined.**, at 4.

⁴⁰² *Id.* at 4.

⁴⁰³ Sybil Lipschultz, *Workers, Wives and Mothers: The Problem of Minimum Wage Laws for Women in Early Twentieth Century America*, PhD Dissertation in American Civilization at the University of Pennsylvania (1986), at 139-40.

⁴⁰⁴ *The Legal Right to Starve*, 34 THE NEW REPUBLIC 254, 254 (No. 439) (May 2, 1923).

⁴⁰⁵ 261 U.S. at 554-55.

⁴⁰⁶ 261 U.S. at 553. Sutherland had championed the 19th Amendment, in part because he advocated for “equality of legal status—including the right of contract and to hold property.” 53 CONG. REC. 11318 (July 20, 1916). In 1921 Ethel Smith, a member of the District of Columbia’s Minimum Wage Board, had written Sutherland to ask his opinion “as to the effect of the so-called ‘equal rights’ amendment to the Constitution which has been proposed for introduction in the senate on behalf of the National Woman’s Party.” Smith was concerned that the Amendment might jeopardize “existing laws in many States and the District of Columbia, providing an 8-hour day and a minimum wage for women in industry.” Ethel M. Smith to GS (December 19, 1921) (Sutherland papers). Sutherland had replied:

I have a good deal of doubt as to the advisability or wisdom of any federal constitutional amendment of the kind suggested. The women of every state in the Union now having been accorded the privilege of equal suffrage, I am inclined to think better results will be obtained by seeking, at the hands of the various state legislatures, such remedial legislation as may be needed in each state. I was very earnestly in favor of the 19th amendment because it dealt with a question which was, to my mind, fundamentally national. But there is danger in undertaking to reach all sorts of evils by additional amendments.

Of course, no one can predict what construction the courts will put upon the proposed amendment. I think they would struggle to give it a reasonable interpretation, and to save the state laws relating to the eight hour a day for women, and so on. But, or course, the Supreme Court might take the view that the

amendment meant precisely what it said, and that a law which gave unequal advantage to women was as obnoxious to the amendment as one which was equally to their disadvantage. GS to Ethel M Smith (December 24, 1921) (Sutherland papers).

⁴⁰⁷ 261 U.S. at 553. In their oral argument to the Court, plaintiffs in *Adkins* had stressed the opposition to single-sex minimum wage legislation of the National Woman's Party, the National Woman's Suffrage Association, and the Equal Rights Association. *Oral Argument of Wade H. Ellis*, at 6-7. See *Women at Odds on Laws for Them*, NEW YORK TIMES (March 25, 1923), at XX3. Alice Paul of the National Woman's Party had in fact actively co-operated with the plaintiffs' lawyer in *Adkins* to undermine what Paul regarded as old-fashioned and harmful women-protective legislation. Joan G. Zimmerman, *The Jurisprudence of Equality: The Women's Minimum Wage, the First Equal Rights Amendment, and Adkins v. Children's Hospital, 1905-1923*, 78 JOURNAL OF AMERICAN HISTORY 188, 220-23 (June 1991). On the extreme tension between those like Alice Paul, who sought an Equal Rights Amendment for women, and those, like Florence Kelley, who sought instead women's protective legislation like the District of Columbia minimum wage legislation, see, e.g., HART, *supra* note 380, at 108-129; AMY E. BUTLER, *TWO PATHS TO EQUALITY: ALICE PAUL AND ETHEL M. SMITH IN THE ERA DEBATE, 1921-1929* 90-107 (State University of New York Press: Albany 2002); Nancy F. Cott, *Feminist Politics in the 1920s: The National Woman's Party*, 71 JOURNAL OF AMERICAN HISTORY 43 (1984); Lipschultz, *supra* note 403, at 55-87. Citing specifically the passages quoted in text, Alice Paul praised Sutherland's opinion in *Adkins* as "vividly" expressing "the increasing tendency to regard women as adult human beings standing on an equal plane with men." Alice Paul, *Adult Human Beings*, in 50 THE SURVEY 222, 256 (No. 4) (May 15, 1923). See *National Woman's Party Acclaims as Big Victory Minimum Wage Decision*, CHRISTIAN SCIENCE MONITOR (April 12, 1923), at 1.

⁴⁰⁸ Holmes's famous aperçu that "It will need more than the Nineteenth Amendment to convince me that there are no differences between men and women, or that legislation cannot take those differences into account," 261 U.S. at 570 (Holmes, J., dissenting), may inadvertently have contributed to this misapprehension of the stakes in *Adkins*. Holmes's actual point, however, was that physical differences between the sexes were irrelevant to the constitutional question in *Adkins*: "I should not hesitate to take [these differences] into account if I thought it necessary to sustain this act. But after *Bunting v. Oregon* I had supposed that it was not necessary." *Id.* (Emphasis added).

Holmes was correct to observe that the Nineteenth Amendment did not disturb the Court's jurisprudence of physical differences between the sexes. In 1924, speaking unanimously through Sutherland, the Court upheld a New York statute prohibiting women from being employed in restaurants in large cities between the hours of ten at night and six in the morning. *Radice v. New York*, 264 U.S. 292 (1924). The Court explicitly held that "The legislature had before it a mass of information from which it concluded that night work is substantially and especially detrimental to the health of women. We cannot say that the conclusion is without warrant. The loss of a restful night's sleep can not be fully made up by sleep in the day time, especially in busy cities, subject to the disturbances incident to modern life. The injurious consequences were thought by the legislature to bear more heavily against women than men, and, considering their more delicate organism, there would seem to be good reason for so thinking." *Id.* at 294. Sutherland distinguished *Adkins* on the ground that the latter involved a "wage-fixing law, pure and simple. It had nothing to do with the hours or conditions of labor." *Id.* at 295. Sutherland's deference to legislative facts in *Radice* contrasts starkly with his refusal to consider such facts in *Adkins*. It is hard to resist the conclusion that Sutherland was simply not interested in facts that might establish a market failure with regard to the price of labor.

Frankfurter once recorded a conversation with Brandeis in which Frankfurter had said that he "was certain that Ct would decide NY statute prohibiting night work by women favorably as it did. L.D.B. took me aside and said 'You might have been certain but it was not all certain. That was one of those 5 to 4 that was teetering back & forth for some time. The man who finally wrote—Sutherland was the fifth man & after a good deal of study (for whatever you may say of him he has character & conscience) came out for the act & then wrote his opinion. That swung the others around to silence. It was deemed inadvisable to express dissent and add another 5 to 4.'" *Brandeis-Frankfurter Conversations*, *supra* note 227, at 330 (July 6, 1924). According to Butler's docket book, the dissenting votes in conference were McKenna, Van Devanter, McReynolds, and Butler.

The controversy in *Radice* did not so much concern the Due Process Clause as the Equal Protection Clause. A great part of Sutherland's opinion was devoted to demonstrating that the statute's distinction between large cities and other cities, and its exclusion from coverage of women "employed in restaurants as singers and performers, attendants in ladies' cloak rooms and parlors, as well as those employed in dining rooms and kitchens of hotels and in lunch rooms or restaurants conducted by employers solely for the benefit of their employees," 264 U.S. at 196, did not violate equal protection because the classifications of the statute were not "actually and palpably

unreasonable and arbitrary.” 264 U.S. at 296. “If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied.” 264 U.S. at 298. Brandeis remarked to Frankfurter that “The doubt as to the statute turned on unequal protection, which now looms up even more menacingly than due process, because the statute omitted some night work & only included some.” *Brandeis-Frankfurter Conversations*, supra note 227, at 330 (July 6, 1924). Butler in his docket book inscribed next to Sutherland’s name: “Classification can be sustained.” He inscribed next to McReynolds’s name: “Doubtfully.”

⁴⁰⁹ Hutchinson, supra note 329, at 83 (“What can be said of the bargaining power of the individual in such a group of young, inexperienced, untrained, shifting workers whose wage work is regarded by themselves and every one else as something to be done in the years between leaving school and getting married?. . . Obviously under such circumstances the employer may practically dictate the wage rate. To the degree that competition for work is active among the employees, wages will tend to the level of the most necessitous or the most ignorant.”).

⁴¹⁰ Edward Berman, *The Supreme Court and the Minimum Wage*, 31 JOURNAL OF POLITICAL ECONOMY 852, 855 (No. 1) (February 1923). “Will the learned justices of the majority be pardoned for overlooking the cardinal fact that minimum wage legislation is not and never was predicated upon political, contractual or civil inequalities of women? It is predicated rather upon evils to society, resulting from the exploitation of women in industry, who *as a class labor under a tremendous economic handicap*. The problem is one of economic fact, not of political, contractual or civil status.” Barbara N. Grimes, *Constitutional Law: Police Power: Minimum Wage for Women*, 11 CALIFORNIA LAW REVIEW 352, 357 (1923). See Mary Anderson, *Get Back to the Facts*, 50 THE SURVEY 256 (No. 4) (May 15, 1923).

In *Holden*, the Court had appealed to an analogous failure in the labor market to uphold legislation setting maximum hours for underground miners: “[T]he fact that both parties are of full age, and competent to contract, does not necessarily deprive the state of the power to interfere, where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself.” *Holden v. Hardy*, 169 U.S. 383, 397 (1898).

⁴¹¹ “The trend of legislation, of public opinion, and even of Supreme Court decisions for many years has been in the direction of a recognition of the fact that between an employer with a job to give and an employee with very little choice but to accept, there is and can be no equality of contracting power. It is a bit surprising to come upon evidence of a lack of recognition of such a fact after a quarter century of legislation based on its recognition.” Berman, supra note 410, at 854. “We cannot escape the conclusion that the opinion of the court reveals an ignorance of the nature of the modern employment contract and of the facts which surround it which, in view of the court’s pivotal position is determining the economic policy of the country, is nothing short of shocking. It assumes that there exists between employee and employer an equality of position which enables each to bargain with the other upon an equally advantageous footing. To suppose that such a situation exists in modern industrial society is indeed naïve.” *The Supreme Court Supplants Congress*, 116 THE NATION 484, 484 (No. 2016) (April 25, 1923).

⁴¹² See, e.g., Elizabeth Brandeis to WHT (October 30, 1922) (Taft papers) (“I am concerned with the operation of the District police court because persons charged with violating the minimum wage law are prosecuted in that court. My experience seems to show that anyone under prosecution in the Police Court who demands a jury trial can delay the trial of his case practically indefinitely. . . . I realize that this must seem a very unimportant matter about which to ask for your help, but nevertheless I am hopeful that you may feel able to do something.”); WHT to Elizabeth Brandeis (October 31, 1922) (Taft papers) (“I deeply sympathize with you in your patience [sic] at this delay in the Police Court. The demanding of a jury trial in a police court is a boon to criminals, and I can readily understand how employers, who are violating the law, and their attorneys, chuckle at the thought of the delays that protect them against punishment for violation of a plain provision of the statute. I don’t think I am given any authority under the present law, but it is possible such a provision might be put through, and then you could count on my doing everything I could to help you. I shall talk it over with the Judiciary Committee.”).

⁴¹³ In his dissent, Taft graciously said “But for my inability to agree with some general observations in the forcible opinion of MR. JUSTICE HOLMES, who follows me, I should be silent and merely record my concurrence in what he says. It is perhaps wiser for me, however, in a case of this importance separately to give my reasons for dissenting.” 261 U.S. at 567 (Taft, C.J., dissenting). Holmes had written Taft on March 28 that Holmes had “sketched” “a few feeble words” in dissent in *Adkins*, “so as not long to delay the opinions when they are sent around.” OWH to WHT (March 28, 1923) (Holmes papers). Taft had replied: “I facilitate you on your dissenting opinion in the minimum

wage case. It is very strong. I think you, too, for the array of authorities. I feel as if I ought to say something on the subject. It will not be long. You have relieved me of much, but there are two or three things I would like to say. I have been wondering if we were not going to receive a recirculated opinion from Sutherland after the more careful Vandevanter [sic] has gotten in his handiwork to modify some of the extreme statements of the opinion, notably the resuscitation of the *Lochner* case and the somewhat garish reference to the effect of the nineteenth amendment in changing the nature of women.” WHT to OWH (April 4, 1923) (Holmes papers). I was “on my lone,” Holmes wrote to his friend Nina Gray, because “a few general remarks that I think obvious commanded no assent.” OWH to Mrs. Chapman Gray (April 23, 1923) (Holmes papers). Holmes wrote Laski that “The C.J. and Sanford seemed to think I said something dangerous or too broad so they dissented separately. . . . I think that what I said was plain common sense. It was intended *inter alia* to dethrone Liberty of Contract from its ascendancy in the Liberty business. I am curious to see what the enthusiasts for liberty of contract will say with regard to liberty of speech under a State law punishing advocating the overthrow of government – by violence.” OWH to Harold Laski (April 14, 1923), in 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 495 (Harvard University Press: Cambridge, Mark DeWolfe Howe, ed. 1953) (1 HOLMES-LASKI CORRESPONDENCE). Laski replied that he thought Sutherland’s opinion “was windy and poor; and half of his opinion never comes near the point at all.” Harold Laski to OWH (April 26, 1923), in *id.* at 496.

⁴¹⁴ See, e.g., *A One-Man Constitution*, NEW YORK WORLD (April 12, 1923), at 10 (“The decision of the Supreme Court in the minimum-wage case again makes the Constitution of the United States a matter of one man’s opinion. Against his opinion, the opinion of the House of Representatives which passed the bill, the opinion of the Senate which concurred in the bill and the opinion of the President who signed the bill are swept aside as irrelevant and immaterial.”). See *Borah Wants Minimum Wage Left to States*, NEW YORK TRIBUNE (April 11, 1923), at 2 (“Senator Borah said: ‘This is practically another 5 to 4 decision.’”). The fact that Harding’s four appointments had split evenly, two joining the Court and two dissenting, was also remarked upon.

⁴¹⁵ WVD to John C. Pollock (April 25, 1923) (Van Devanter papers).

⁴¹⁶ Brandeis commented on the draft of Holmes’s dissent, “It ought to make converts.” (Holmes papers).

⁴¹⁷ 261 U.S. at 567 (Holmes, J., dissenting).

⁴¹⁸ 261 U.S. at 567-68 (Holmes, J., dissenting).

⁴¹⁹ As Holmes pointed out, “This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as the minimum requirement of health and right living.” 261 U.S. at 570 (Holmes, J., dissenting).

⁴²⁰ 261 U.S. at 568 (Holmes, J., dissenting).

⁴²¹ 261 U.S. at 568 (Holmes, J., dissenting). Holmes cited many examples of legislative restrictions on freedom of contract, including *Schmidinger*. 261 U.S. at 569 (Holmes, J., dissenting).

⁴²² 261 U.S. at 569 (Holmes, J., dissenting).

⁴²³ 261 U.S. at 570 (Holmes, J., dissenting). In the popular press it was said that “the Court had gone prancing back to dear old Justice Peckham.” *Changeable Silk*, 8 THE FREEMAN 609, 612 (No. 208) (March 5, 1924). The emphasis on *Lochner* “suggests that the majority of the court is disposed to return to the attitude of the court in the *Lochner* case and to emphasize the individual’s right to freedom from restraint, rather than the public welfare which justifies legislative restriction of that freedom.” Parkinson, *supra* note 317, at 134. It was said that the “revival of the *Lochner* case is among the most significant points of the opinion, for we are thrown back upon a decision arrived at without adequate investigation of the facts upon which the Statute was based.” Harry Cohen, *Minimum Wage Legislation and the Adkins Case*, 2 NEW YORK UNIVERSITY LAW REVIEW 48, 53 (1925). The “vice” of *Lochner* was said to be its reliance “upon ‘common understanding’ which Prof. Freund suggest ‘is often equivalent to popular ignorance and fallacy.’” *Id.* at 53-54.

⁴²⁴ 261 U.S. at 570 (Holmes, J., dissenting).

⁴²⁵ 261 U.S. at 570 (Holmes, J., dissenting). “If I were Frankfurter,” Laski wrote Holmes, “I should rest content that I had secured the dissent from you.” Harold Laski to OWH (April 26, 1923), in 1 HOLMES-LASKI CORRESPONDENCE, *supra* note 27, at at 496.

⁴²⁶ Holmes received a letter from the Acting Editor of the Brotherhood of Locomotive Engineers Journal, commending Holmes on a dissent that “goes to the heart of the whole matter in three brief pages, and presents the social as well as legal fallacies underlying the majority decision in an unanswerable manner.”

I wonder if the majority of the Court realize just what is the effect of this and similar decisions which ignore the needs of the people and block social progress. Last night I heard an address by a well known “radical”, Wm. Z. Foster of Chicago. Mr. Foster brought ringing applause from a building packed with more than 1200 people when he compared “the dictatorship of a few black-robed men of the Supreme Court” with “the dictatorship of the black-shirted Fascisti in Italy”. He pointed out the injustice of permitting one man, appointed for life by a reactionary president, to nullify repeatedly legislation protecting the welfare of the people. Certain of your colleagues would be shocked to learn that their decisions are promoting radicalism faster than all the soapbox orators of the country combined.

Albert F. Coyle to OWH (May 2, 1923) (Holmes papers).

⁴²⁷ Sanford’s vote is best explained by his dependence on Taft. Throughout his career on the Taft Court, Sanford was continually swayed by Taft’s views. *See* chapter 1, at --

⁴²⁸ *Labor Truce is Planned*, THE WASHINGTON POST (March 31, 1918), at 1.

⁴²⁹ *Id.* The Board had also declared that “If it shall become necessary to employ women on work ordinarily performed by men, they must be allowed equal pay for equal work and must not be allotted tasks disproportionate to their strength.” *Id.* In the popular mind the war was responsible for bringing women flooding into the workforce. “The war gave us new practices in regard to government control and intensified many of the problems connected with unionism, but in no place did it so completely upset preconceived notions as in the field of women’s work. The war gave the finishing blow to the old tradition that woman’s only place was in the home.” Malcom Keir, *Post-War Causes of Labor Unrest*, 81 THE ANNALS 101, 106 (January 1919). There is evidence, however, that as many as 95% of women “who went into war industry came from other industries in which they had previously gained a livelihood and industrial experience. The war-time employment of women has been characterized by a shifting from the lower paid to the higher paid occupations, and from nonessential industries, rather than by any large accession of women who would not normally have come into industry in any event.” A.B. Wolfe and Helen Olson, *War-Time Industrial Employment of Women in the United States*, 27 JOURNAL OF POLITICAL ECONOMY 639, 640 (January 1919).

⁴³⁰ 261 U.S. at 562 (Taft, C.J., dissenting).

⁴³¹ 261 U.S. at 562 (Taft, C.J. dissenting).

⁴³² 261 U.S. at 563 (Taft, C.J. dissenting).

⁴³³ 261 U.S. at 564 (Taft, C.J. dissenting). A recent study has concluded that *Lochner* had “proved largely a nonentity, a relative outlier in an era that generally upheld protective economic regulation.” Sean Beienburg, *Progressivism and States’ Rights: Constitutional Dialogue between the States and Federal Courts on Minimum Wages and Liberty of Contract*, 8 AMERICAN POLITICAL THOUGHT 25, 29 (2019). *See* Walter F. Dodd, *Social Legislation and the Courts*, 28 POLITICAL SCIENCE QUARTERLY 1, 5 (1913). It thus made sense for Taft to imagine that *Lochner* had been overruled.

⁴³⁴ 261 U.S. at 564 (Taft, C.J. dissenting).

⁴³⁵ 261 U.S. at 564 (Taft, C.J. dissenting).

⁴³⁶ 261 U.S. at 565-56 (Taft, C.J. dissenting). Taft’s brother Horace wrote him that “The women folk are singing your praises” because of your dissent, but “I daresay that is praise that you have no stomach for.” Horace D. Taft to WHT (April 17, 1925) (Taft papers).

⁴³⁷ Clarke sent Taft a letter affirming that “I should have been with you in the Minimum Wage case, you may be sure.” JHC to WHT (April 29 1923) (Taft papers). Taft replied, “In the minimum wage case, I think some of my brethren went too far, even if they had to take that view on the merits of the case. I think there are expressions in Sutherland’s opinion that will merely return to plague us. However, we are getting along very well, and I have no reason to complain of the brethren, except that one has passed his usefulness, and as to another of them, whom you know, there is some question as to how much of usefulness ever existed.” WHT to JHC (May 3, 1923) (Taft papers). Clarke promptly replied, “I agree with you that there are passages in the opinion likely to return to plague the Court. The spirit of the contention in the Conference Room is apparent in every paragraph—it even mars the English of it! But the outstanding feature seems to me to be the strongest statement I remember of the rule that statutes shall be overthrown only in clear cases. He says the invalidity must appear ‘beyond a rational doubt’ & then goes forward & declares the statute invalid with the C.J. & 2 (3!) other judges in clearly reasoned opinions differing with him. One would think three of his brethren one the Chief Justice differing [illegible] thus sharply would be sufficient to start “a rational doubt” as to the validity of his own thinking. I remember saying when on the Court that I would never be one of four to overthrow an act of Congress or of a state legislature because I would respect the opinions of my four dissenting brethren to the extent of saying that their views raised the doubt in my mind which prevented such a holding. So good a lawyer [illegible] as Judge Day urged me not to anticipate such a case & particularly not to take that position as I might wish to modify it. But I had worked out to it more carefully than he thought I had. Observance of the rule, voluntarily by the Court, may save its jurisdiction from being mutilated by Congress in an amendment.” JHC to WHT (May 5, 1923) (Taft papers). Clarke later reiterated these criticisms of *Adkins* in print in *The “New Federalist Series”*: *John C. Clarke Writes of “Judicial Power to Declare Legislation Unconstitutional,”* 9 ABAJ 689 (November 1923). He emphasized that the rule that legislation be upheld unless it could be shown to be unconstitutional “‘beyond a rational doubt’ . . . by ‘clear and indubitable demonstration’” was “of the utmost importance to our country. It is no new suggestion that if the Court would give real and sympathetic effect to this rule by declining to hold a statute unconstitutional whenever several of the Justices conclude that it is valid—by conceding that two or more being of such opinion in any case must necessarily raise a ‘rational doubt’—an end would be made of five to four constitutional decisions and great benefit would result to our country and to the Court.” *Id.* at 692.

⁴³⁸ *Adkins* was twice reaffirmed in the decade: in *Murphy v. Sardell*, 269 U.S. 530 (1925) (Arizona), and then again in *Donham v. West-Nelson Co.*, 273 U.S. 657 (1927) (Arkansas). Barry Cushman writes of *Sardell* that in Stone’s docket book,

Next to the votes to affirm of Taft, Holmes, and Sanford—the three dissenters in *Adkins* (Brandeis had not participated)—Stone wrote “on authority [illegible] [illegible].” Stone also wrote this next to his own vote to affirm. The illegibility of the latter two words in Stone’s notation makes it difficult to be certain, but it seems very likely that these four Justices indicated at the conference that they were voting to invalidate the statute only because they regarded themselves as bound by the recent authority of *Adkins*. If that is the case, then after McKenna’s replacement by Stone in 1925, there was a majority of the Court that believed that *Adkins* had been wrongly decided. Four of those five Justices continued to strike down state minimum wage laws solely on the basis of a precedent that they believed was demonstrably erroneous. This no doubt frustrated Brandeis, whose solo dissents from [*Sardell* and *Donham*] decisions might be read as opposing not only their results, but also the fealty to stare decisis that he soon would criticize in his celebrated dissent in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-10 (1932) (Brandeis, J., dissenting).

Barry Cushman, *Inside the Taft Court: Lessons From the Docket Books*, 2015 THE SUPREME COURT REVIEW 345, 382-83 (2015). I have also found the words in Stone’s docket book to be unintelligible, but Cushman’s interpretation is almost certainly correct. After *Sardell*, Stone wrote to Thomas Reed Powell to thank him for a copy of a volume of commentary on *Adkins* that Florence Kelley had compiled in frustration after *Sardell*, THE SUPREME COURT AND MINIMUM WAGE LEGISLATION: COMMENT BY THE LEGAL PROFESSION ON THE DISTRICT OF COLUMBIA CASE (New Republic, Inc.: New York 1925). Stone remarked, “I had some view on this subject when the *Adkins* case was decided. Such limited experience as I have had, has strengthened them, but I suppose it is the part of prudence not to express them until the proper opportunity is presented.” HFS to Thomas Reed Powell (January 16, 1926) (Stone papers). In a similar vein Stone wrote to Walter Wheeler Cook the next year in the context of *Bedford Cut Stone Co. v. Journeyman Stone Cutters’ Ass’n of North America*, 274 U.S. 37 (1927): “I think there is a difference between being one of five and one of six to uphold an earlier opinion with which the Judge does not agree. That, at any rate, was my view both in the *Bedford* case and in the second minimum wage case.” HFS to Walter Wheeler Cook (May

4, 1927) (Stone papers). For Stone's ultimate views on the minimum wage, see *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 631 (1936) (Stone, J., dissenting).

At the time of *Sardell*, Holmes wrote Laski, "Don't make a mistake about Stone. He is a mighty sound and liberal-minded thinker. In the case to which I suppose you to refer he thought as I did but also thought that no countenance should be given to the notion that the decisions of the Court were subject to a change of personnel and therefore refrained from joining in my declaration." OWH to Harold Laski (November 29, 1925) in 1 HOLMES-LASKI CORRESPONDENCE, *supra* note 27, at 800. In *Sardell*, the official memorandum opinion of the Court notes: "Mr. Justice Holmes requests that it be stated that his concurrence is solely upon the ground that he regards himself bound by the decision in *Adkins v. Children's Hospital*." 269 U.S. 530 (1925). Brandeis dissented in both *Sardell* and *Donham*.

On the popular reaction to *Sardell*, see *Tightening the Bonds*, 44 THE NEW REPUBLIC 271 (No. 570) (November 4, 1925) (*Adkins* "gave a jolt to the administration of minimum wage laws all over this country. But the states with changing degrees of energy persisted in their policy in the hope that the *Adkins* case was after all not the pronouncement of a generalized principle of law but the disposition of a specific statute related to a rather narrow set of circumstances in the District of Columbia. That hope is now dashed by the recent decision of the Supreme Court in the Arizona Minimum Wage case.").

⁴³⁹ Two days after the decision was announced, Taft's brother Horace wrote him, "Well, you folks are raising hell. We are now going to revise the Constitution from the ground up." Horace D. Taft to WHT (April 22, 1923) (Taft papers).

⁴⁴⁰ Charles E. Clark, *The Courts and the People*, 57 LOCOMOTIVE ENGINEERS JOURNAL 626, 627 (No. 8) (August 1923). See Ray A. Brown, *Book Review*, 39 HARVARD LAW REVIEW 909, 909 (1926) (Referring to "the unpopularity of the decision with teachers and students of law and the social sciences").

⁴⁴¹ Frank M. Parrish, *Minimum Wage Law for Women as a Violation of the Fifth Amendment*, 21 MICHIGAN LAW REVIEW 906, 910 (1923).

⁴⁴² Powell, *The Judiciality of Minimum-Wage Legislation*, *supra* note 324, at 572.

⁴⁴³ *The Minimum Wage Law Decision*, THE NEW YORK LAW JOURNAL (April 16, 1923), at 192. For a blistering symposium on the case, see *The Minimum Wage—What Next?*, 50 THE SURVEY 215 (No. 4) (May 15, 1923).

⁴⁴⁴ JOHN A. RYAN, THE SUPREME COURT AND THE MINIMUM WAGE 56 (The Paulist Press: New York, 1923). Governor Louis Hart of Washington suggested that *Adkins* "may be in its effected upon our economic and industrial life second only to the famous Dred Scott decision." Louis F. Hart, *A New Dred Scott Case?* in 50 THE SURVEY 218, 219 (No. 4) (May 15, 1923). Florence Kelley, the General Secretary of the National Consumers' League, decried the decision because it "obliterated a workable and necessary law for freeing wage-earning women in the District of Columbia from the 'lash of starvation. . . . This is a new 'Dred Scott' decision.'" Florence Kelley, *Progress of Labor Legislation for Women*, PROCEEDINGS OF THE NATIONAL CONFERENCE OF SOCIAL WORK 114 (University of Chicago Press: Chicago 1923). "Sooner or later women must be added to the court," Kelley argued. "The monopoly of the interpretation and administration of the law by men alone can never again be accepted without criticism or protest. It is a survival of the age before women were full citizens." *Id.* at 115. See *Women on the Bench!*, 50 THE SURVEY 222 (No. 4) (May 15, 1923).

⁴⁴⁵ Hart, *supra* note 444, at 219.

⁴⁴⁶ Walter M. Pierce, *Protect the Untrained Worker*, 50 THE SURVEY 218 (No. 4) (May 15, 1923).

⁴⁴⁷ Frank W. Kuehl, *For an Amendment*, 50 THE SURVEY 219 (No. 4) (May 15, 1923).

⁴⁴⁸ See also *Does the Constitution Prevent Justice?* 133 THE OUTLOOK 694, 696 (No. 16) (April 18, 1923); *Mr. Untermeyer on the Minimum Wage Decision*, 30 AMERICAN FEDERATIONIST 408 (May 1923); Ryan, *supra* note 372, at 258; Minor Bronaugh, *Minimum-Wage Laws*, in THE SUPREME COURT AND MINIMUM WAGE LEGISLATION, *supra* note 438, at 219.

⁴⁴⁹ Calvin Coolidge, *Address of the President*, 65 CONG. REC. 99 (December 6, 1923). Coolidge had supported minimum wage legislation when in Massachusetts state politics. Beienburg, *supra* note 433, at 31 n.21.

⁴⁵⁰ George W.P. Hunt, *Ridiculous Reasoning*, 50 THE SURVEY 217 (May 15, 1923); *Full Text of La Follette's Speech*, NEW YORK TIMES (September 19, 1924), at 2. See also Gompers, *supra* note 381; *The Supreme Court Supplants Congress*, *supra* note 411, at 485.

⁴⁵¹ See *Wage Act Voiding Stirs Demand for Majority Decision*, NEW YORK WORLD (April 11, 1923), at 2 (The Court's action has added to the complaints of Congressmen, labor leaders and others who feel that steps should be taken to prevent the setting aside of laws by close decisions. Senator Borah (R. Ida.) issued a statement saying it 'was time for the practice to stop in the interest of good Government.' He will seek passage of an act requiring decisions by seven to nine."); *A One-Man Constitution*, *supra* note 414, at 10 ("Senator Borah is right when he insists that 'a law which has the approval of both the other departments of the Government as being constitutional ought not to be held void upon a mere 5 to 4 decision, or ought not to turn upon a single view or the opinion of one Judge.' On this point public sentiment is rapidly becoming unanimous. The Constitution of the United States cannot remain indefinitely a one-man Constitution."); Perkins, *supra* note 326, at 258; W. Jett Lauck, *Require a Two-thirds Vote*, 50 THE SURVEY 260 (No. 4) (May 15, 1923); Ryan, *supra* note 372, at 258; *Cf. Progressives to Curb Power of High Court*, SPRINGFIELD DAILY REPUBLICAN (April 11, 1923), at 8 ("Progressive circles in Congress seethed today with renewed demands of a constitutional amendment designed to curb the present unlimited power of the United States supreme court to declare legislation unconstitutional by the barest of majorities. . . . [L]egislation to limit the court's power is virtually certain of introduction in the next Congress. . . . Senator Borah . . . said today that as soon as the next Congress convenes he will introduce a bill compelling a 7-to-2 vote by the court before it can declare an act of Congress unconstitutional. Another plan, sponsored by Senator La Follette, Republican, of Wisconsin, would give Congress the power to re-enact laws by a two-thirds vote over an adverse decision by the supreme court. . . . A third, proposed by Senator Fess, Republican, of Ohio, would require a two-thirds vote of the nine supreme court's justices to make effective any decision holding an act of Congress unconstitutional. All three plans drew ardent supporters today as a result of the minimum wage decree."); John R. Commons, *Restore the Balance of Power*, 50 THE SURVEY 261 (No. 4) (May 15, 1923) ("[T]he time has come for a constitutional amendment requiring at least a two-thirds vote or a three-fourths vote to declare an act of Congress unconstitutional. The same rule should apply when state legislation is before the United States court."); *Borah Wants Minimum Wage Left to States*, *supra* note 414, at 2 ("A proposal to amend the Constitution of the United States to make it possible for the states to enact minimum wage legislation probably will grow out of the decision of the Supreme Court of the United States yesterday invalidating the District of Columbia minimum wage law for women."); *Curb on Supreme Court Projected*, NEW YORK WORLD (April 13, 1923), at 8 ("Plans have been laid by La Follette progressives for passage next Congress of some measures restricting the power of the Supreme Court to nullify laws by so-called 'one man' decisions. An arrangement has been made with Democratic leaders by which the progressives will be given the balance of power on the House Judiciary committee before which this legislation will come. . . . Some leading Democrats are in favor of requiring the Supreme Court to come to a two-thirds vote before it can declare an act unconstitutional. La Follette progressives would go further, although they are divided, with La Follette himself wanting Congress to override the Supreme Court by a two-thirds vote and Frear (R. Wis.) seeking a unanimous decision of the Court.").

Despite worry that Harding's appointments would determine the "complexion" of the Court "for a decade," *The New Republic* regarded Borah's proposed bill as "so clearly unconstitutional that we suspect he introduced it more with the thought of keeping the issue alive than the hope of relieving the pain caused by five to four decisions." *The Supreme Court Again*, 34 THE NEW REPUBLIC 59, 59 (No. 432) (March 14, 1923). *The New Republic* cautioned that if the public was coming to believe "that a great number constitutional decisions turn upon the court's view of what is best for the country," the Court was running the risk of "provoking some such sweeping impairment of judicial independence as that proposed by Mr. Frear. We can see little harm and much virtue in a constitutional requirement that the court act with some degree on unanimity on questions where it, itself, has said that it will not act unless the case is clear." But "Mr. Frear's sweeping proposals for the recall of the judges and the decisions of the court go far beyond the justification of experience." *Id.* at 60.

Proposals like Borah's particularly irked Taft. He wrote his son that "The vote of five to three . . . on the minimum wage, as accentuated the attack on the power of five in the Court to set aside a law. It is said to be a 'one-man' decision. Of course this is unjust. It is just as unjust as it would be to require that every measure that passed the House and the Senate should be passed by a two-thirds vote. They speak glibly of putting through a law of that

sort. I think they will have very great difficulty in sustain such a law if they ever get it through.” WHT to Robert A. Taft (April 16, 1923) (Taft papers).

⁴⁵² See *supra* note 438. The story is nicely told in Beienburg, *supra* note 433. The continuous open defiance of the State of Washington, together with the strong support of the local business community, explains why in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the Court could marvel that the minimum wage statute of Washington had been “in force” through the “entire period” since *Adkins*. *Id.* at 391.

⁴⁵³ 94 U.S. 113, 126 (1876). For a good discussion of the background of the case, see Harry N. Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, 5 PERSPECTIVES IN AMERICAN HISTORY 329, 402 (1971).

⁴⁵⁴ For accounts of the doctrine in the 1920s, see Walton H. Hamilton, *Affection with Public Interest*, 39 YALE LAW JOURNAL 1089, 1089-1112 (1930); Breck P. McAllister, *Lord Hale and Business Affected with a Public Interest*, 43 HARVARD LAW REVIEW 759, 759-91 (1930); Dexter Merriam Keezer, *Some Questions Involved in the Application of the ‘Public Interest’ Doctrine*, 25 MICHIGAN LAW REVIEW 596, 596-621 (1927); Gustavus H. Robinson, *The Public Utility: A Problem in Social Engineering*, 14 CORNELL LAW QUARTERLY 1, 1-27 (1928); ; Gustavus H. Robinson, *The Public Utility Concept in American Law*, 41 HARVARD LAW REVIEW 277, 277-308 (1928).

⁴⁵⁵ 233 U.S. 389 (1914).

⁴⁵⁶ 233 U.S. at 406.

⁴⁵⁷ 233 U.S. at 411, 413.

⁴⁵⁸ 233 U.S. at 413. McKenna added:

To the contention that the business is private we have opposed the conception of the public interest. We have shown that the business of insurance has very definite characteristics, with a reach of influence and consequence beyond and different from that of the ordinary businesses of the commercial world, to pursue which a greater liberty may be asserted. The transactions of the latter are independent and individual, terminating in their effect with the instances. The contracts of insurance may be said to be interdependent. They cannot be regarded singly, or isolatedly, and the effect of their relation is to create a fund of assurance and credit.

Id. at 414.

⁴⁵⁹ 233 U.S. at 415-16. McKenna continued:

We may venture to observe that the price of insurance is not fixed over the counters of the companies by what Adam Smith calls the higgling of the market, but formed in the councils of the underwriters, promulgated in schedules of practically controlling constancy which the applicant for insurance is powerless to oppose and which, therefore, has led to the assertion that the business of insurance is of monopolistic character and that “it is illusory to speak of liberty of contract.” It is in the alternative presented of accepting the rates of the companies or refraining from insurance, business necessity impelling if not compelling it, that we may discover the inducement of the Kansas statute; and the problem presented is whether the legislature could regard it of as much moment to the public that they who seek insurance should no more be constrained by arbitrary terms than they who seek transportation by railroads, steam, or street, or by coaches whose itinerary may be only a few city blocks, or who seek the use of grain elevators, or to be secured in a night’s accommodation at a wayside inn, or in the weight of a 5 cent loaf of bread. We do not say this to belittle such rights or to exaggerate the effect of insurance, but to exhibit the principle which exists in all and brings all under the same governmental power.

233 U.S. at 417.

⁴⁶⁰ 233 U.S. at 419, 423-24 (Lamar, J., dissenting). Lamar continued, “[G]reat and pervasive as is the power to regulate, it cannot override the constitutional principle that private property cannot be taken for private purposes. That limitation on the power of government over the individual and his property cannot be avoided by calling an unlawful taking a reasonable regulation. Indeed, the protection of property is an incident of the more fundamental

and important right of liberty guaranteed by the Constitution, and which entitled the citizen freely to engage in any honest calling, and to make contracts as buyer or seller, as employer or employee, in order to support himself and family.” *Id.* at 424.

⁴⁶¹ Charles Evans Hughes, *War Powers Under the Constitution*, 40 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 232, 247 (1917).

⁴⁶² On the vast extent of wartime price fixing, see Lewis H. Haney, *Price Fixing in the United States During the War*, 34 POLITICAL SCIENCE QUARTERLY 104 (March 1919).

⁴⁶³ See *supra* notes 186-190. The experience seems to have permanently altered McKenna’s attitude toward price fixing. See *supra* note 190. As we have seen, the Taft Court terminated war-time rent control in *Chastleton* because the emergency of the war had ended.

⁴⁶⁴ Arthur L Haugan, *Vicissitudes of the Price Fixing Doctrine*, 2 DAKOTA LAW REVIEW 430, 431 (1929); see also R. G. Tugwell, *That Living Constitution*, 55 NEW REPUBLIC 120, 120 (June 20, 1928).

⁴⁶⁵ 262 U.S. 522 (1923). For excellent discussions of the remarkable facts surrounding the case, see David A. Schwarz, *Compelled Consent: Wolff Packing and the Constitutionality of Compulsory Arbitration*, 12 NEW YORK UNIVERSITY JOURNAL OF LAW & LIBERTY 14 (2018); James Gray Pope, *Labor’s Constitution of Freedom*, 106 YALE LAW JOURNAL 941, 1023-24 (1997).

⁴⁶⁶ The complete statute is reproduced in *State v. Howat*, 198 P. 686, 705-10 (Kan. 1921). For good discussions of the historical background of the unusual Kansas court, see DOMENICO GAGLIARDO, *THE KANSAS INDUSTRIAL COURT: AN EXPERIMENT IN COMPULSORY ARBITRATION* (1941); NATIONAL INDUSTRIAL CONFERENCE BOARD, *THE KANSAS COURT OF INDUSTRIAL RELATIONS*, RESEARCH REPORT NO. 67 (New York 1924); Bureau of Labor Statistics, United States Department of Labor, *Kansas Court of Industrial Relations*, BULLETIN OF THE UNITED STATES BUREAU OF LABOR STATISTICS No. 322, (Apr. 1923). The Kansas Court produced several decisions in the United States Supreme Court. See *Dorchy v. Kansas*, 272 U.S. 306 (1926); *Wolff Packing Co. v. Court of Indus. Relations*, 267 U.S. 552 (1925); *Howat v. Kansas*, 258 U.S. 181 (1922).

⁴⁶⁷ See, e.g., *Wolff Packing Co. v. Court of Indus. Relations*, 267 U.S. 552, 564-65 (1925); *Howat v. Kansas*, 258 U.S. 181, 184 (1922).

⁴⁶⁸ 243 U.S. 332 (1917).

⁴⁶⁹ In Taft’s view, the Adamson law upheld by *Wilson v. New* was “a humiliating page in the history of congressional legislation, when a comparatively small body of men performing a function indispensable to the life of the country ‘held Congress up,’ rejected arbitration and demanded and received its own price. This was pure sovietism.” William Howard Taft, *The Inauguration* (March 4, 1921), in JAMES F. VIVIAN, WILLIAM HOWARD TAFT: COLLECTED EDITORIALS 1917-1921 551 (New York: Praeger 1990).

⁴⁷⁰ 243 U.S. at 348.”[E]mergency may afford a reason for the exertion of a living power already enjoyed.”

⁴⁷¹ 243 U.S. at 351. “The President of the United States invited a conference between the parties. He proposed arbitration. The employers agreed to it and the employees rejected it. The President then suggested the eight-hour standard of work and wages. The employers rejected this and the employees accepted it. Before the disagreement was resolved the representatives of the employees abruptly called a general strike throughout the whole country, fixed for an early day. The President, stating his efforts to relieve the situation, and pointing out that no resources at law were at his disposal for compulsory arbitration, to save the commercial disaster, the property injury and the personal suffering of all, not to say starvation, which would be brought to many among the vast body of the people if the strike was not prevented, asked Congress, first, that the eight-hour standard of work and wages be fixed by law, and second, that an official body be created to observe during a reasonable time the operation of the legislation, and that an explicit assurance be given that if the result of such observation established such an increased cost to the employers as justified an increased rate, the power would be given to the Interstate Commerce Commission to

authorize it. Congress responded by enacting the statute whose validity, as we have said, we are called upon to consider. Act of September 3, 5, 1916, 39 Stat. at L. 721, chap. 436.” 243 U.S. at 342.

⁴⁷² 243 U.S. at 347.

⁴⁷³ 243 U.S. at 347.

⁴⁷⁴ 243 U.S. at 347-48.

⁴⁷⁵ See HOMER E. SOCOLOFSKY, *KANSAS GOVERNORS 152-55* (Lawrence: University Press of Kansas 1990); *May Day in Kansas*, 125 *OUTLOOK* 58, 58 (May 12, 1920).

⁴⁷⁶ According to Allen, the Court of Industrial Relations was not “for the general regulation of business, of capital, or of labor, but for the protection of the public in an emergency when the processes of production are threatened and all efforts at conciliation have been exhausted. The law adds to the provisions of the second industrial conference: when that fails then the law takes hold.” Quoted in P.F. Walker, *A Year of the Kansas Industrial Court*, 1 *MANAGEMENT EFFICIENCY* 171, 174 (Sept. 1921).

⁴⁷⁷ See Henry J. Allen, *A Substitute for Strikes*, *SATURDAY EVENING POST* (March 6, 1920), at 6-7.

⁴⁷⁸ See Henry J. Allen, *Speech at the Annual Banquet of the League for Industrial Rights*, in *The Annual Banquet of the League*, 2 *LAW AND LABOR* 82, 85 (Apr. 1920); Henry J. Allen, *Liberty and Law in Kansas*, 61 *AMERICAN REVIEW OF REVIEWS* 597, 597 (June 1920).

⁴⁷⁹ See Edna Osborne Whitcomb, *Governor Allen’s Solution: How Kansas Undertakes to Abolish Industrial Strife*, 61 *AMERICAN REVIEW OF REVIEWS* 292, 292 (Mar. 1920) (“Governor Allen determined to deal with the problem of strikes and other labor troubles by legislation.”); Ray Yarnell, *Speaking of Anti-Strike Laws*, 8 *NATION’S BUSINESS* 16, 17 (Mar. 1920).

⁴⁸⁰ *Arbitration--Compulsory or Voluntary?* 22 *NEW REPUBLIC* 396, 397 (May 26, 1920).

⁴⁸¹ See, e.g., Willard Atkins, *The Kansas Court of Industrial Relations*, *JOURNAL OF POLITICAL ECONOMY* 339, 339 (1920); John A. Fitch, *Government Coercion in Labor Disputes*, 90 *ANNALS OF AMERICAN ACADEMY OF POLITICAL & SOCIAL SCIENCE* 74, 74-77 (July 1920). Even as early as 1918, writers like Thorstein Veblen were advocating that “the derangement of conditions caused by the war, as well as the degree in which the public attention now centres on public questions, mark the present as the appointed time to take stock and adopt any necessary change in the domestic policy.” Thorstein Veblen, *A Policy of Reconstruction*, 14 *NEW REPUBLIC* 318, 318 (April 13, 1918). Veblen advocated public control over industrial disputes, because, “seen from the point of view of the interest of the community,” private rights in property and in the right to strike “figure up to something that may be called a right to exercise an unlimited sabotage, in order to gain a private end, regardless of the community’s urgent need of having the work go on without interruption and at full capacity.” *Id.* at 319. For a similar view, see Walter Lippman, *Unrest*, 20 *NEW REPUBLIC* 315, 315-22 (November 12, 1919).

⁴⁸² *The Court of Industrial Relations*, 61 *AMERICAN REVIEW OF REVIEWS* 294, 294 (Mar. 1920). The metaphor of “industrial war,” William Allen White, *supra* note 481, at 14, was prevalent in contemporary discussions of the Kansas Court, so much so that the Kansas statute was sometimes termed a “war against war.” William Leavitt Stoddard, *Industrial Courts, Collectives Agreements, or What?* 4 *ADMINISTRATION* 261, 268 (September 1922). The *New York Times* could refer to the statute as “legislation born in the stress of war.” *Industrial Relations Courts*, *NEW YORK TIMES* (June 12, 1921), at 14. See WALTER GORDON MERRITT, *SOCIAL CONTROL OF INDUSTRIAL WARFARE* (League for Industrial Rights, n.d.); William Reynolds Vance, *The Kansas Court of Industrial Relations With Its Background*, 30 *YALE LAW JOURNAL* 456, 465 (1921); William L. Higgins, *Just What Has the Supreme Court Done to the Kansas Industrial Act? Why Did It Do It?*, 11 *ABAJ* 363, 364 (1925). Allen himself argued:

The Kansas court of industrial relations is founded upon the principle that government should have the same power to protect society against the ruthless offenses of an industrial strife that it has always had to protect against recognized crime.... It was time... when a tribunal should be established having the power to take under its jurisdiction the offenses committed against society in the name of industrial warfare.

Henry J. Allen, *How Kansas Broke a Strike and Would Solve the Labor Problem*, 68 CURRENT OPINION 472, 474-77 (April 1920); Allen, *supra* note 478, at 600-01. Sometimes the industrial strife justifying public intervention was described not as “war” but as “a free-for-all exemplification of the Darwinian doctrine of the survival of the fittest.” Ben Hooper, *Peaceful Settlement of Differences Between Carriers and Employees*, 2 STATION AGENT 19, 21 (February 1922).

⁴⁸³ DEBATE BETWEEN SAMUEL GOMPERS AND HENRY J. ALLEN AT CARNEGIE HALL MAY 28, 1920, at 9 (New York: E.P. Dutton & Co. 1920).

⁴⁸⁴ *Id.* at 37-38. The question sparked a huge literature. *See, e.g.*, Ralph M. Easley, *Is the Labor Problem Unsolvable?* 5 NATIONAL CIVIC FEDERATION REVIEW 1 (July 10, 1920); J.B. Gardiner, *Labor--the New Tyrant*, 67 FORUM 396, 400 (May 1922); *The Industrial Court*, NEW YORK TIMES (February 18, 1921), at 10. Gompers eventually responded to Allen’s question by arguing that there was no public wholly separate and apart from employers and employees. *See* HENRY J. ALLEN, THE PARTY OF THE THIRD PART: THE STORY OF THE KANSAS INDUSTRIAL RELATIONS COURT 114-16 (New York: Harper & Brothers, 1921). For an example of the discomfort of progressives who both opposed the anti-strike provisions of the Kansas statute and who believed in the transcendent prerogatives of the public, *see The Kansas Challenge to Unionism*, 27 NEW REPUBLIC 3, 4 (June 1, 1921) (“Are we to accept the thesis of the extreme defenders of trade unionism methods that the interest of the public is in the long run identical with the interest of labor, and that therefore the public ought to bear with good grace the inconveniences and sufferings incident to the labor struggle?”). For early and prescient evidence of this discomfort, *see* Walter Lippmann, *Can the Strike Be Abandoned?* 21 NEW REPUBLIC 224, 224 (January 21, 1920).

⁴⁸⁵ GILLMAN, *supra* note 259, at 10. Thus the Kansas Industrial Court had “the distinction of being opposed by both capital and labor.” William Allen White, *Industrial Justice-- Not Peace*, NATION’S BUSINESS 14 (May 1922). *See* John A. Fitch, *Industrial Peace by Law--The Kansas Wage*, 44 SURVEY 7 (April 3, 1920).

⁴⁸⁶ *See, e.g.*, LIPPMANN, *supra* note 40; John Spargo, *The Public in Industrial Warfare*, 103 INDEPENDENT 173 (August 14, 1920). Henry Allen put it this way: “We stand at this hour to give evidence that no class under government shall live above the law.” Henry J. Allen, *How Kansas Settles Its Labor Disputes*, 6 WORLD OUTLOOK (August 1920) (No. 8), at 39. As the Kansas Supreme Court announced in upholding the KCIR: “Heretofore, the industrial relationship has been tacitly regarded as existing between two members, industrial manager and industrial worker. They have joined wholeheartedly in excluding others. The Legislature proceeded on the theory there is a third member of those industrial relationships which have to do with production, preparation, and distribution of the necessities of life, the public. The Legislature also proceeded on the theory the public is not a silent partner. Whenever the dissensions of the other two become flagrant, the third member may see to it the business does not stop. . . . The rights of society as a whole . . . are dominant over industry.” *State ex rel. Hopkins v. Howat*, 198 P. 686, 705 (Kan. 1921).

⁴⁸⁷ *State ex rel. Hopkins v. Howat*, 198 P. 686, 697 (Kan. 1921).

⁴⁸⁸ George Wickersham, *Recent Extensions of the State Police Power*, 54 AMERICAN LAW REVIEW 51 (1920) (“Few measures of recent legislative enactment have attracted so much public attention, as that by which the State of Kansas attempted to grapple with the strike of coal miners during the winter of 1919-1920.”). As the *St. Louis Daily Globe-Democrat* observed, “Perhaps no industrial legislation in recent years has attracted as much public attention as the Kansas creating an industrial court.” *The Industrial Court Decision*, ST. LOUIS DAILY GLOBE-DEMOCRAT (June 13, 1923) at § II, page 14. Analogous legislation was “introduced in State after State.” *Courts of Industrial Injustice*, 110 NATION 416 (April 3, 1920); *see also* K.H. Condit, *The Kansas Industrial Court*, 53 AMERICAN MACHINIST 749, 752 (October 21, 1920); John A. Fitch, *Shall Strikes Become Crimes: The “Industrial Court” Movement and What It Means*, 11 LABOR AGE 2 (March 1922); *Gompers Sees Labor Defying Court Law: Warns That an Industrial Relations Act Here Will Not Be Obeyed*, NEW YORK TIMES (January 6, 1922), at 19; *Industrial Relations Courts*, NEW YORK TIMES (June 14, 1921), at 14; *Labor Opposing Anti-Strike Bill: Illinois Measure to Prohibit “Unwarranted Industrial Warfare” Would, It Is Alleged, Do Away with Trade Unions*, CHRISTIAN SCI. MONITOR (March 23, 1921), at 5; *Manufacturers in 21 States Seek Industrial Court Law*, NEW YORK CALL (February 20, 1921), at 2; Glen E. Plumb, *Plumb Dissects Oklahoma Industrial Court Bill; It Is Similar to Labor Laws Proposed for Several States*, LABOR (February 5, 1921), at 21; *The Public and the Strike*, NEW YORK TIMES (February 9, 1922), at 16; REPORT OF THE PROCEEDINGS OF THE FORTIETH ANNUAL CONVENTION OF THE AMERICAN

FEDERATION OF LABOR 90, 262, 264-65, 378-83 (Washington D.C. : Law Reporter Printing Co. 1920); *State Control of Strikes*, 108 INDEPENDENT & WEEKLY REVIEW 192 (February 25, 1922); Harry Tipner, *Labor Courts Do Not Solve Problem*, 46 AUTOMOTIVE INDUSTRIES 629, 629 (March 16, 1922) (“There are pending in ten states bills modeled along the lines of the Kansas law for the establishment of industrial courts with the expectation of eliminating strikes.”). Even Harding in his Annual Message of December 6, 1921, declared that “In an industrial society such as ours the strike, the lockout, and the boycott are as much out of place and as disastrous in their results as is war or armed revolution in the domain of politics. The same disposition to reasonableness,... the same provision of fair and recognized tribunals and processes, ought to make it possible to solve the one set of questions as easily as the other.” THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS, 1790-1966, at 2625 (Fred L. Israel ed., 1967). Cf. *A National Court for Labor*, 64 LITERARY DIGEST 14, 14 (January 10, 1920). See also A.H. Rodrick, *Again--The Kansas Industrial Court*, FACTORY (Apr. 1922), at 418-19. For a discussion of these various proposals, see *Legislative Attacks on Trade Unions*, in REPORT OF THE PROCEEDINGS OF THE FORTY-SECOND ANNUAL CONVENTION OF THE AMERICAN FEDERATION OF LABOR 51-57 Washington D.C. : Law Reporter Printing Co. 1922).

Allen energetically promoted the Court, and at one time Allen was even considered a presidential possibility because of it. See Fitch, *Industrial Peace*, *supra*; Frank P. Walsh, *Henry Allen's Industrial Court*, 110 NATION 755 (June 5, 1920) (“The one big campaign card of Governor Allen as a candidate for the Presidency is the passage of his Kansas Industrial Court Bill last January.”). Indeed Brandeis wrote in his note marking his concurrence in Taft's opinion striking down the Kansas Court that “this will clarify thought and bury the ashes of a sometime presidential boom.” (Taft papers).

⁴⁸⁹ George B. Rose, *The War and the Constitution*, 24 CASE AND COMMENT 374, 377 (OCTOBER 1917).

⁴⁹⁰ State ex rel. Hopkins v. Howat, 198 P. 686, 701 (Kan. 1921).

⁴⁹¹ *Wolff Packing*, 262 U.S. at 543.

⁴⁹² See *supra* note 95.

⁴⁹³ Wickersham, *supra* note 488, at 817. Cordenio Severance, the President of the American Bar Association, made a similar complaint: “If a legislature can by a simple resolution declare that a business or occupation never before deemed to be affected with a public interest and thus subject to regulation, is in fact so affected, what limits are there to what it may do? The enlargement of the scope of the police power in recent years has gone far in the direction of a communistic state.” Cordenio A. Severance, *Constitution and Individualism*, 8 ABAJ 535, 539 (1922).

⁴⁹⁴ Butler's docket books suggests that the case was unanimous in conference.

⁴⁹⁵ The political point of the decision did not go unnoticed. *The Providence Journal*, for example, stressed the “exceptional importance” of *Wolff Packing*, noting that “it comes at a time when the general tendency has been too strongly in the direction of interferences by State and national authority with private industry, and its effect may be to modify that tendency very materially.” *The Kansas Industrial Court*, PROVIDENCE JOURNAL (June 14, 1923), at § II, at 16. See *In the Kansas Case*, PHILADELPHIA PUBLIC LEDGER (June 13, 1923), at 10 (“The opinion calls a sharp halt on the efforts of legislators, State and national, who for a generation have been steadily encroaching upon the rights of the individual in attempts to regulate business and industry in ‘the public interest.’ The Nation had come to a place where a line had to be drawn as nearly as possible between what is undoubtedly the ‘public interest’ and what is not.”).

⁴⁹⁶ See e.g., *Industrial Peace* (May 26, 1919), in VIVIAN, *supra* note 469, at 216-17; see also *Red Control of Labor* (October 18, 1919), in *id.* at 287-89; *Gary and Unionism* (April 27, 1921), in *id.* at 571-72; *Labor and the Farmers* (June 29, 1921), in *id.* at 591-93.

⁴⁹⁷ Thus Sutherland had written to Harding in 1920 that with respect to the labor question, special emphasis should be laid upon the rights of the general public, from whose pockets in the last analysis come both dividends and wages and who, while greatly outnumbering both employers and workmen, are unorganized and therefore in danger of being ground between these highly disciplined organizations. I am not sure but that one of the gravest dangers the people as a whole are facing is that of being dominated and exploited by and for the benefit of organized minorities of various kinds who know

exactly what they want. The government while bound within the legitimate scope of its powers to enforce a square deal as between labor and capital, owes a peculiar, if not a paramount duty to the general public-- numerically strong, but strategically weak--to see that it is not made the victim of the conscious or unconscious selfishness of both classes. I am afraid that compulsory arbitration is not the remedy. There are inherent and serious difficulties in the way of supplying the coercive processes of the law to large groups of men whose offense may often consist of simply failing to recognize and discharge their economic duties to society. But I think at least we should devise some plan by which the claims of either against the other where they cannot be settled by mutual arrangement, may be heard and determined by a thoroughly impartial tribunal whose standing and character will be such that its findings will have behind them the sanction of an instructed and determined public opinion.

GS to Warren G. Harding (June 26, 1920) (Sutherland papers).

⁴⁹⁸ *Pennsylvania R. Co. v. United States Railroad Labor Board*, 261 U.S. 72, 79, 84 (1923).

⁴⁹⁹ 262 U.S. at 540. Progressives like Felix Frankfurter were simultaneously relieved and concerned by the *Wolff Packing* decision. “The Kansas Court of Industrial Relations is dead. That great achievement of the Middle Western ‘law and order’ movement is killed by the Supreme Court of the land. . . . Thus fails another social experiment, not because it has been tried and found wanting, but because it has been tried and found unconstitutional. . . . The *New Republic* is opposed to the idea which underlay the Kansas Industrial Court. . . . We . . . disbelieve in compulsory arbitration as a social policy; but we do not disbelieve in Kansas or any other state venturing a trial of the experiment. . . . We too rejoice with Messrs. Gompers and Emery over the death of the Kansas Industrial Court; but it was for the legislature of Kansas, and not for the Supreme Court, to kill it.” *Exit the Kansas Court*, 35 NEW REPUBLIC 112, 112-13 (June 27, 1923). Compare Hoover’s carefully ambivalent characterization of the Kansas legislation in 1920:

[L]abor legislation of Kansas . . . provides for the repression of the right to strike or lockout, for the compulsory settlement of labor disputes, for the determination of a fair wage and a fair profit, and as a final resort the conduct of the industry by the state. The experiment may succeed. It is, however, an experiment with many dangers, for it sacrifices a right of labor for the sake of problematical gains. The sacrifice of liberty is an insecure road to progress. If it does succeed it will again vindicate a broad tolerance of political experimentation by pioneering state for the benefit of the others in the Union. Furthermore, it will justify the comparative study of political procedure among our states and abroad. . . . The experiment may be worth while for the determination to the American people of its futility and any such determination is of value in social progress.

Herbert Hoover, *Foreword*, in *AMERICA AND THE NEW ERA*, *supra* note 20, at xxix.

⁵⁰⁰ For a report of the decision of the KCIR, see *The Kansas Court of Industrial Relations Regulates Labor Relations in the Packing Industry*, LAW AND LABOR 144 (June 1921). The KCIR ordered, *inter alia*, that “women workers should receive the same wages as men engaged in the same class and kind of work.” *Id.* at 146; *see also Decision of the Court of Industrial Relations of Kansas in Meat Packing Company Case*, 13 MONTHLY LABOR REVIEW 206, 206-07 (July 1921). On the whole, the rulings of the KCIR were highly favorable to labor. For example, the KCIR held that workers were entitled to a “living wage,” meaning “a wage which enables the worker to supply himself and those absolutely dependent upon him with sufficient food to maintain life and health; with a shelter from the inclemencies of the weather; with sufficient clothing to preserve the body from the cold and to enable persons to mingle among their fellows in such ways as may be necessary in the preservation of life.” *State v. Topeka Edison Co.*, reproduced in WILLIAM L. HUGGINS, *LABOR AND DEMOCRACY* 165 (1922). The KCIR also held that workers were entitled to a “fair wage,” by which it meant, among many other things, that “‘first-class workers’ as well as ‘skilled workers’ . . . are entitled to a wage which will enable them by industry and economy not only to supply themselves with opportunities for intellectual advancement and reasonable recreation, but also to enable the parents working together to furnish the children ample opportunities for intellectual and moral advancement, for education, and for an equal opportunity in the race of life. A fair wage will also allow the frugal man to provide reasonably for sickness and old age.” *Id.* at 166-67.

⁵⁰¹ We do not have the original draft of Taft’s opinion, but on May 29, 1923, he wrote to Van Devanter asking him to review the manuscript and make “suggestions.” WHT to WVD (May 29, 1923) (Taft papers). Van Devanter responded with a long (undated) analysis, arguing that

As a whole, I fear the opinion will leave the impression that if only the Wolf [sic] Company's business were affected with a public interest, the provisions of the statute as applied to it would be valid. To my mind this would not be so. Take for instance an elevator business and concede that it is so far affected with a public interest that the legislature may prescribe the rates to be charged to the public. Does this carry with it a power to make the owner continue the business, or a power to fix the wages which he must pay and his employees must accept, etc.? This hardly can be so. I cannot believe that all business affected with a public interest may be put on the same ground, nor that the power of regulation concededly extending to some features of such a business extends to every feature. The phrase "affected with a public interest" to me does not convey a definite conception of uniform application....

Even if Kansas could regulate the price at which the Wolf [sic] Company may sell its meat products, I do not think this carries with it what really is in question in the present case. I fear that the opinion lays too much stress upon the question of when a business is affected with a public interest and not enough on the other questions.

(Taft papers). Taft thanked Van Devanter for his "frank note," and said that he could alter his opinion to put it "on the ground that regulation of businesses that develop by change of conditions . . . into those affected with a public interest can not be regulated to secure their continuity and compel use of property and services by labor. I agree with you that the character of permissible regulation must vary with the kind of business but the cases are not such that it is easy to draw useful distinctions." WHT to WVD (undated) (Van Devanter papers).

⁵⁰² 262 U.S. at 534. For examples of the Taft Court's willingness to require continuity of service with respect to property affected with a public interest, see *Western & Atl. R.R. v. Georgia Pub. Serv. Comm'n*, 267 U.S. 493, 496-98 (1925) (holding that an order requiring the Railroad Company to continue service on an industrial side track did not deprive the company of its property without due process of law); *Southern Ry. Co. v. Clift*, 260 U.S. 316, 321 (1922) ("The service of a railroad is in the public interest; it is compulsory."); *United Fuel Gas Co. v. Railroad Commission of Kentucky*, 278 U.S. 300, 309 (1929) (Approving the order of a state commission compelling a public utility gas company "to continue their service in the cities named."). In *Wolff*, however, Taft held that such "continuity of a business" could only be required "where the obligation to the public of continuous service is direct, clear and mandatory and arises as a contractual condition express or implied of entering the business either as owner or worker. It can only arise when investment by the owner and entering the employment by the worker create a conventional relation to the public somewhat equivalent to the appointment of officers and the enlistment of soldiers and sailors in military service." 262 U.S. at 541. Supporters of the KCIR had advanced precisely this metaphor of employers and employees conscripted into public service. Thus F. Dumont Smith argued that employees in necessary industries were like a "locomotive engineer" who is not free to quit while the train is running, but must "remain with his engine until he reaches the next division point."

When once we get that principle, we will understand... that this law is constitutional; when we establish that these industries are essential to human life and to human health, whoever enters those industries in effect enlists exactly as does the soldier or the policeman in the preservation of the public peace. He is bound, not to continue to work individually--he may retire from that employment at any moment. But he can't conspire, he can't stir up a mutiny that shall destroy the army of the public weal.

F. Dumont Smith, *The Kansas Industrial Court*, REPORT OF THE FORTY-FIFTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 208, 214 (1922); see also *The Right to Strike*, 110 NATION 389, 389 (March 27, 1920) (quoting remarks of Judge Wendell Phillips Stafford of the Supreme Court of the District of Columbia to the effect that public employees "have no more right to strike than any other soldier has."). Taft had himself invoked the image of employees as soldiers in his condemnation of the Boston police strike of 1919. See William Howard Taft, *Address of William Howard Taft at Malden, Massachusetts* 20 (Oct. 30, 1919) (Taft papers) (Police "are not compelled to serve. Their duty is as high as that of soldiers and sailors in the army of the United States, but they are not as strictly bound. A soldier or sailor can not resign--a policeman may. He is not compelled to serve, but he may not combine with his fellows to embarrass the state he serves by a strike which shall leave that state helpless. That is a combination that ought never to be permitted and ought to be denounced by law. With soldiers and sailors it would be punishable as mutiny, and morally it is the same offense with policemen.").

⁵⁰³ 262 U.S. at 534.

⁵⁰⁴ 262 U.S. at 536.

⁵⁰⁵ 262 U.S. at 536.

⁵⁰⁶ 262 U.S. at 538-39.

⁵⁰⁷ 262 U.S. at 538.

⁵⁰⁸ 262 U.S. at 538. “There is no monopoly in the preparation of foods. The prices charged by plaintiff in error are, it is conceded, fixed by competition throughout the country at large. Food is now produced in greater volume and variety than ever before. Given uninterrupted interstate commerce, the sources of the food supply in Kansas are country-wide, a short supply is not likely, and the danger from local monopolistic control less than ever.” *Id.*

⁵⁰⁹ 262 U.S. at 535. “In a sense, the public is concerned about all lawful business because it contributes to the prosperity and well being of the people. The public may suffer from high prices or strikes in many trades, but the expression ‘clothed with a public interest,’ as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered. The circumstances which clothe a particular kind of business with a public interest, in the sense of *Munn v. Illinois* and the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public.” *Id.* at 536.

⁵¹⁰ 262 U.S. at 541-42. “It is urged that under this act the exercise of the power of compulsory arbitration rests upon the existence of a temporary emergency as in *Wilson v. New*. If that is a real factor here, as in *Wilson v. New*, and in *Block v. Hirsh*, . . . it is enough to say that the great temporary public exigencies, recognized by all and declared by Congress, were very different from that upon which the control under this act is asserted. Here it is said to be the danger that a strike in one establishment may spread to all the other similar establishments of the state and country, and thence to all the national sources of food supply so as to produce a shortage. . . . The small extent of the injury to the food supply of Kansas to be inflicted by a strike and suspension of this packing company’s plant is shown in the language of the Kansas Supreme Court in this case.” *Id.* at 542-43.

⁵¹¹ 262 U.S. at 538.

⁵¹² Taft proposed a tripartite schema of “businesses said to be clothed with a public interest justifying some public regulation” that was endlessly repeated and that was wholly unhelpful:

- (1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.
- (2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, . . . Such are those of the keepers of inns, cabs and grist mills.
- (3) Business which though not public at their inception may be fairly said to have risen to be such and have become subject in consequences to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly.

262 U.S.. at 535.

⁵¹³ 262 U.S. at 539. After the publication of his opinion in *Wolff Packing*, Taft received a letter of praise from labor attorney Frank P. Walsh, with whom Taft had co-chaired the War Labor Board. “[I]t is my sincere thought that your opinion in this case will go down in the history of your high court as one of its greatest decisions.” Frank P. Walsh to WHT (June 18, 1923) (Taft papers). Any other conclusion, Walsh wrote, “would have been a great stride towards state socialism, the bridge over which it is urged the march must be made to a communistic state.”

⁵¹⁴ 262 U.S. at 537. Surely resonating in Taft’s language is that nursery-rhyme evocation of the quotidian: “The butcher, the baker, the candlestick maker. . . .” The phrase “ordinary callings” apparently originated in long-standing hostility toward publicly granted monopoly. See FRANK R. STRONG, *SUBSTANTIVE DUE PROCESS OF LAW: A DICHOTOMY OF SENSE AND NONSENSE* 96 (Durham, North Carolina 1986).

⁵¹⁵ *Kansas Labor Court Between Two Fires*, NEW YORK TIMES (February 25, 1922), at 19 (Remarks of Harry Sharp, Secretary of Associated Industries of Kansas).

⁵¹⁶ Matthew Woll, *How the Kansas Plan Defies Fundamental American Freedom*, 29 AMERICAN FEDERATIONIST 317, 321 (May, 1922); see also *Kansas Labor Court Between Two Fires*, supra note 515 (Remarks of John S. Dean, counsel for Associated Industries of Kansas).

⁵¹⁷ George Soule, supra note 72, at 265. See Felix Frankfurter, *The Zeitgeist and the Judiciary*, 29 SURVEY 542, 542 (Jan. 25, 1913): “The tremendous economic and social changes of the last fifty years have inevitably reacted upon the functions of the state. More and more government is conceived as the biggest organized social effort for dealing with social problems.... Growing democratic sympathies, justified by the social message of modern scientists, demand to be translated into legislation for economic betterment, based upon the conviction that laws can make men better by affecting the conditions of living.”

⁵¹⁸ It is fair to say the supporters of the KCIR precisely believed that managerial organization had already invaded the domains of economic life regulated by the KCIR. Thus Elmer T. Peterson, Associate Editor of the *Wichita Beacon* (of which Henry J. Allen was the Editor), wrote:

Organization, advanced by specialization, invention and other modern developments, has set up an invisible government. The only way the people have of retrieving their political power and staving off economic pressure is to erect governmental tribunals with power to prevent economic strangulation....

Elmer T. Peterson, *Is the Labor Problem Unsolvable?* 5 NATIONAL CIVIL FEDERATION REVIEW 14 (September 25, 1920). The logic of the KCIR, in other words, was to invoke organization in order to fight organization.

⁵¹⁹ Minor Bronaugh, *Business Clothed With a Public Interest Justifying State Regulation*, 27 LAW NOTES 87, 89 (1923). The experiment “may be said to have . . . served a useful purpose,” Bronaugh continued, because “it furnished the occasion for the restatement, or should we say re-establishment, of the doctrine of individual liberty embodied in the Constitution but apparently lost sight of by many of our legislators and members of the judiciary in recent years.” *Id.*

⁵²⁰ *Howat v. Kansas*, 258 U.S. 181, 183 (1922); see also *State ex rel. Hopkins v. Howat*, 198 P. 686, 694 (Kan. 1921).

⁵²¹ Henry J. Allen, *The Settlement of Labor Disputes*, ELECTRIC RAILWAY JOURNAL 753 (October 16, 1920) (“All reasonable men, whether they belong in the ranks of capital or labor, realize that we are working under modern conditions and that all the elements of manufacturing, production, transportation, and distribution are mixed together in a common machine; that a break in one part of the far-flung machinery breaks down the whole public relations.”).

⁵²² Walsh, supra note 488, at 757; see also W.B. Rubin, *The Kansas Industrial Act and the United States Supreme Court*, AMERICAN FEDERATIONIST 832, 833 (October 1923) (“The right to free contract, the right to work or not to work, the right to advise or not to advise some one to join with another in such things marks the boundary line between slavery and freedom.”); Matthew Woll, *Industry’s Eternal Triangle*, 8 NATION’S BUSINESS 17, 17-18 (June 1920). The *American Federationist* argued that the KCIR would “legislate men into serfdom,” because “the very essence of democracy is found” in “the trade union practice of collective bargaining and... trade agreement.” Samuel Gompers, *What’s the Matter with Kansas?* 27 AMERICAN FEDERATIONIST 155, 156 (February 1920); Alexander Howat, *Kansas Stands for Freedom*, LABOR AGE 12, 12-23 (December 1921).

⁵²³ *The Kansas Decision*, NEW YORK TRIBUNE (June 13, 1923), at 12; see also *Kansas Industrial Court Dead*, BROOKLYN DAILY EAGLE (June 12, 1923), at 6; *The Kansas Industrial Court*, NEW YORK TIMES (June 13, 1923), at 18. The *Philadelphia Public Ledger* interpreted *Wolff Packing* as a direct warning to “progressives” in the Senate who sought to regulate business: “Not alone for its effect on the nationally known Kansas Court, . . . but as a warning to the ‘Progressive bloc’ in the next Congress, bent on governmental regulation of all manner of industries--chiefly coal, sugar, gasoline--was the Supreme Court’s decision held to be of the highest importance.” Robert Barry, *High Court Halts State Wage Fixing*, PHILADELPHIA PUBLIC LEDGER (June 12, 1923), at 1. In a subsequent editorial, the *Ledger* observed that “If progressives of both parties... have been seeking a sign from the Supreme Court, they now have that sign. They know now what that tribunal’s attitude will be toward more government in industry at the expense of the individual’s rights.” *In the Kansas Case*, PHILADELPHIA PUBLIC LEDGER (June 13, 1923), at 10.

⁵²⁴ John A. Fitch, *The Case Against the Law*, 44 SURVEY 303 (May 29, 1920).

⁵²⁵ Quoted in *Brandeis on the Labor Problem: How Far Have We Come on the Road to Industrial Democracy?* 5 LA FOLLETTE'S WEEKLY MAGAZINE 5-15 (May 24, 1913).

⁵²⁶ LDB to WHT (Taft papers).

⁵²⁷ *Brandeis-Frankfurter Conversations*, supra note 227, at 320 (July 19, 1923). See Chapter 2 at ---

⁵²⁸ 291 U.S. 502 (1934).

⁵²⁹ 291 U.S. at 533. "It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good." *Id.* at 536.

⁵³⁰ 291 U.S. at 554-55 (McReynolds, J., dissenting).

⁵³¹ 273 U.S. 418 (1927). See Chapter one, at ---.

⁵³² 277 U.S. 350 (1928). See Chapter one, at ---.

⁵³³ 273 U.S. at 427.

⁵³⁴ Holmes, Brandeis, Sanford and Stone dissented.

⁵³⁵ 273 U.S. at 429.

⁵³⁶ *German Alliance*, Sutherland wrote, "marks the extreme limit to which this court thus far has gone in sustaining price fixing legislation." 273 U.S. at 434.

⁵³⁷ 273 U.S. at 430. The power to regulate prices, Sutherland asserted, "is not only a more definite and serious invasion of the rights of property and contract, but its exercise cannot always be justified by circumstances which have been held to justify legislative regulation of the manner in which a business shall be carried on." 273 U.S. at 431. Sutherland had strongly defended this position before entering the Court. See Chapter one, at ---. Sutherland opposed price fixing as a matter of "great political principle." Sutherland, *Principle or Expedient?*, supra note 299, at 277.

⁵³⁸ 273 U.S. at 430.

⁵³⁹ 273 U.S. at 438.

⁵⁴⁰ 268 U.S. 319 (1925).

⁵⁴¹ In conference in *Weller* Taft opined that "Within power to license brokers. Doubt as to price." Cushman, supra note 438, at 362. Sutherland had sent Taft a memorandum in *Weller* stating that although it was a "rather close question, . . . I am disposed to think that a theatre is not a business impressed with a public interest, but a private enterprise as much under the control of the owner as a shop for the sale of goods. I do not see upon what theory the legislature could fix the price at which the owner should sell tickets of admission; and I think the middleman stands in the same situation." GS to WHT (April 23, 1925) (Taft papers).

⁵⁴² 273 U.S. at 441.

⁵⁴³ 273 U.S. at 441.

⁵⁴⁴ Taft believed that *Tyson* was “a fine opinion.” WHT to GS (January 31, 1927) (Taft papers).

⁵⁴⁵ 273 U.S. at 440.

⁵⁴⁶ 273 U.S. at 442.

⁵⁴⁷ 273 U.S. at 445.

⁵⁴⁸ 273 U.S. at 446 (Holmes, J., dissenting).

⁵⁴⁹ 273 U.S. at 446 (Holmes, J., dissenting). Holmes described his dissent as “a few sardonic remarks,” OWH to Harold Laski (February 25, 1927), in 2 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 1926-1935 (Harvard University Press: Cambridge, Mark DeWolfe Howe, ed. 1953) (2 HOLMES-LASKI CORRESPONDENCE), at 921, that took “a whack at ‘police power’ and ‘dedicated to a public use’—as apologetic phrases springing from the unwillingness to recognize the fact of power.” OWH to Harold Laski (March 17, 1927), in *id.* at 927. Learned Hand wrote Holmes about his dissent, “It said much that I had always wanted to have said, and said it in a way that especially reached my vitals, the ganglia where the pleasure centers are.” Learned Hand to OWH (March 7, 1927) (Holmes papers). Holmes replied, “I am more than pleased that you approve of my dissent in the theatre ticket case. I had some doubt whether it was worth printing but Brandeis and my secretary said fire it off.” OWH to Learned Hand (March 10, 1927) (Holmes papers). Frankfurter wrote Holmes rejoicing “over your new declaration of independence of all those sterile ‘apologies’ which ‘police power’ and ‘affected with public interest’ cover. You have never written a more illuminating opinion on Due Process and I throw my hat into the air for it.” Felix Frankfurter to OWH (March 19, 1927), in HOLMES-FRANKFURTER CORRESPONDENCE, *supra* note 190, at 212.

⁵⁵⁰ Brandeis’s view, as he was later to express it in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), was that the “notion of a distinct category of business ‘affected with a public interest,’ employing property ‘devoted to a public use,’ rests upon historical error,” and that “the true principle is that the state’s power extends to every regulation of any business reasonably required and appropriate for public protection. I find in the due process clause no other limitation upon the character or the scope of regulation permissible.” *Id.* at 302-03 (Brandeis, J., dissenting).

⁵⁵¹ 273 U.S. at 455 (Sanford, J., dissenting). “The question as stated is not one of reasonable prices, but of the constitutional right in the circumstances of this case to exact exorbitant profits beyond reasonable prices. . . . Laws against monopoly which aim at the same evil and accomplish their end by interference with private rights quite as much as the present law are not regarded as arbitrary or unreasonable or unconstitutional because they are not limited in their application to dealings in the bare necessities of life.” 273 U.S. at 452-53 (Stone, J., dissenting). Holmes and Brandeis joined Stone’s dissent.

⁵⁵² 273 U.S. at 451 (Stone, J., dissenting).

⁵⁵³ Thomas Reed Powell, *State Utilities and the Supreme Court, 1922-1930*, 29 MICHIGAN LAW REVIEW 811, 836 (1931). Taft snorted apropos of Powell’s attack on *Tyson* that “If his views were followed, it would mean that we would have no Constitution at all.” WHT to Moses Strauss (March 31, 1927) (Taft papers). Sutherland’s opinion was blasted in the law reviews as “legal phlogiston.” Maurice Finkelstein, *From Munn v. Illinois to Tyson v. Banton: A Study in the Judicial Process*, 27 COLUMBIA LAW REVIEW 769, 778 (1927). For a summary of the academic literature disapproving the decision, see Maurice H. Merrill, *The New Judicial Approach to Due Process and Price Fixing*, 18 KENTUCKY LAW JOURNAL 3, 16 n.56 (1929). Taft wrote to his brother that *Tyson* “has awakened the condemnation of a good many, but it is right, and that is the way the academicians and those who are not in favor of any Constitution get even with us.” WHT to Horace D. Taft (January 7, 1929) (Taft papers). See Horace D. Taft to WHT (January 4, 1929) (Taft papers).

⁵⁵⁴ As Rexford Tugwell put it, “Under war-pressure industry had experimented with a kind of voluntary socialism—and liked it. It liked the substitution of solidarity for suspicion, of unity for compelled disunion, of cooperation for competition, of a common purpose for haphazard growth. But when the war was over, old ideas which had been in

suspension again stirred in the politicians” minds The Supreme Court drew a long breath and eyed the war powers arrogated by the Administration with the chilly disfavor which recently found expression in the *Tyson* case, decisively turning back legislative efforts to regulate prices.” Rexford G. Tugwell, *supra* note 80, at 366. *The New Republic* correctly viewed *Tyson* as consolidating a sharp rightward swing in the Court’s jurisprudence. “Until recent years the Court could generally be counted on to take a liberal attitude toward statutes outside the labor field. . . . The last three years have witnessed a marked change. The Nebraska bread law, the Pennsylvania shoddy law, and now the New York scalping law, have been successively invalidated. . . . [I]f the trend of the past three years continues, the due process clause will furnish an increasingly effective obstruction to every effort of legislature or city council.” *The Constitution Shelters the Ticket Speculator*, 50 NEW REPUBLIC 84, 86 (March 16, 1927).

⁵⁵⁵ Finkelstein, *supra* note 553, at 769, 782.

⁵⁵⁶ 277 U.S. 350 (1928).

⁵⁵⁷ Stone, joined by Holmes and Brandeis, dissented. Sanford concurred “upon the controlling authority of *Tyson*, which, as applied to the question in this case, I am unable to distinguish.” 277 U.S. at 359 (Sanford, J., concurring).

⁵⁵⁸ “A few years ago, when the business of insuring against fire was brought within the category of those businesses which are so ‘affected with a public interest’ as to make them regulable, it seemed that the Court might easily go on extending this classification to other employments hitherto regarded as private. The *Tyson* case reversed the trend. *Ribnik vs. McBride* confirms the reversal.” Tugwell, *supra* note 464, at 120.

⁵⁵⁹ 277 U.S. at 358. In response to the Court’s judgment in *Ribnik*, New Jersey enacted a strict licensing law that required, among many other things, employment agencies to post a public schedule of fees. *See* Ch. 283, 1928 N.J. Laws 775-84.

⁵⁶⁰ 277 U.S. at 357.

⁵⁶¹ 277 U.S. at 357.

⁵⁶² 277 U.S. at 357.

⁵⁶³ 277 U.S. at 357.

⁵⁶⁴ 277 U.S. at 357.

⁵⁶⁵ The Taft Court was quite willing to enforce pre-existing boundaries between essentially private property and property affected with a public interest, as is evidenced by a case like *Washington ex rel. Stimson Lumber Co. v. Kuykendall*, 275 U.S. 207 (1927), in which the Court unanimously upheld state rates imposed upon towboats who were common carriers.

⁵⁶⁶ *Ribnik* was particularly significant because at the time more than twenty-eight states imposed some form of price regulation on employment agencies. *See* Note, *The Regulation of Employment Agencies*, 38 YALE LAW JOURNAL 225, 229-30 (1928). The Note characterizes *Tyson* and *Ribnik* as “radical innovations.” *Id.* at 234. “It is surprising,” the author of the Note writes, “to find Justice Sutherland disposing of an issue in public policy by a purely conceptual argument; it is disturbing to find the selection of concepts resting upon nothing more basic than an arbitrary choice.” *Id.* at 233.

⁵⁶⁷ 277 U.S. at 373 (Stone, J. dissenting). Stone continued: “[I] can see no difference between a reasonable regulation of price and a reasonable regulation of the use of property, which affects its price or economic return. The privilege of contract and the free use of property are as seriously cut down in the one case as in the other.” *Id.* at 374.

⁵⁶⁸ 277 U.S. at 363 (Stone, J., dissenting).

⁵⁶⁹ 277 U.S. at 373 (Stone, J., dissenting). *See also id.* at 362 (Stone, J., dissenting).

⁵⁷⁰ 277 U.S. at 363 (Stone, J., dissenting). At about the time of *Ribnik*, Stone began to complain that argumentation before the Court did not provide the data necessary for decision. “Verbal logic chopping, with no apparent consciousness of the social and economic forces which are really involved, are about all we get. If anything more appears in the opinion it is because some member of the court takes the time and energy to go on an exploring expedition of its [sic] own.” HFS to John Bassett Moore (June 5, 1928) (Stone papers); *see also* HFS to Hessel E. Yntema (October 24, 1928) (Stone papers) (“[T]here is still much to be done in the education of lawyers and judges. Take, for example, the recent case of *Ribnik* and *McBride*, in which I wrote a dissenting opinion. You will search in vain in briefs and prevailing opinions for any reference to the considerable amount of material to which I referred in my dissenting opinion. It seems not to have occurred to any of them that such data had very much to do with the case.”).

⁵⁷¹ For a review of highly unfavorable academic reactions to *Ribnik*, *see* Merrill, *supra* note 553, at 16 n.56. Merrill regarded the “sinister aspect” of *Ribnik* to lie in its “apparent abandonment of the fruitful practicality of the method of approach to which expression was given in the *Wolff* case in favor of a rigidly unyielding judicial prohibition against further extension of the public utility concept.” *Id.* at 15. He also characterized *Tyson* and *Ribnik* as a “radical departure” from the “realistic method” of past decisions. *Id.* at 8.

⁵⁷² Tugwell, *supra* note 464, at 121.

⁵⁷³ *Id.*

⁵⁷⁴ *See* Chapter One, at--; *Morehead v. New York ex rel. Tiplado*, 298 U.S. 587, 633 (1936) (Stone, J., dissenting).

⁵⁷⁵ 278 U.S. 235 (1929).

⁵⁷⁶ 278 U.S. at 239.

⁵⁷⁷ 278 U.S. at 239.

⁵⁷⁸ 278 U.S. at 240.

⁵⁷⁹ 278 U.S. at 240.

⁵⁸⁰ ROBERT JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 56-57 (New York: Alfred A. Knopf 1941).

⁵⁸¹ Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUMBIA LAW REVIEW 605, 616 (1908).

⁵⁸² Roscoe Pound, *Liberty of Contract*, 18 YALE LAW JOURNAL 454, 457-58 (1909).

⁵⁸³ OWH to HFS (December 20, 1928) (Stone papers).

⁵⁸⁴ *Id.*

⁵⁸⁵ HFS to OWH (December 21, 1928) (Stone papers).

⁵⁸⁶ 274 U.S. 1 (1927).

⁵⁸⁷ 274 U.S. at 3-4.

⁵⁸⁸ 274 U.S. at 7.

⁵⁸⁹ 274 U.S. at 8. The Minnesota statute had originally contained such a scienter requirement, but in 1923 Minnesota “eliminated purpose as an element of the offense.” 274 U.S. at 4.

⁵⁹⁰ 274 U.S. at 8-9.

⁵⁹¹ 274 U.S. at 9.

⁵⁹² 274 U.S. at 9.

⁵⁹³ *President Hughes Responds for the Association*, 10 ABAJ 567, 569 (1924).

⁵⁹⁴ *Id.*

⁵⁹⁵ *See, e.g.,* *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 115-16 (1927) (“Lord Campbell’s Act and its successors, establishing liability for wrongful death where none existed before, the various Workmen’s Compensation Acts imposing new types of liability, are familiar examples of the legislative creation of new rights and duties for the prevention of wrong or for satisfying social and economic needs. Their constitutionality may not be successfully challenged merely because a change in the common law is effected.”); *Missouri Pac. R.R. Co. v. Porter*, 273 U.S. 341, 346 (1927); *International Stevedoring Co. v. Haverty*, 272 U.S. 50, 52 (1926). But see *Panama R.R. Co. v. Rock*, 266 U.S. 209 (1924) (holding that a statute should be construed in accordance with common law).

⁵⁹⁶ *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, 453-54 (1922) (Quoting *FTC v. Gratz*, 253 U.S. 421, 427 (1920)).

⁵⁹⁷ *FTC v. Sinclair Refining Co.*, 261 U.S. 463, 475-76 (1923).

⁵⁹⁸ *See, e.g.,* *United States v. Illinois Central Railroad Co.*, 263 U.S. 515 (1924).

⁵⁹⁹ LDB to WHT (December 23, 1922) (Taft papers). Brandeis’s note was a propos of *FTC v. Curtis Pub. Co.*, 260 U.S. 568 (1923), in which the Court set aside an FTC finding of unfair methods of competition. Taft had written Brandeis that “I am disturbed by McReynolds’ opinion in the Curtis Publishing Co’s case--as he has put it, it seems to me that he is weighing evidence in making his conclusions as if we were a jury or a chancellor. What do you think of it?” WHT to LDB (December 23, 1922) (Brandeis papers). Brandeis replied that “I agree your criticism of the Curtis Pub. Co. opinion. You will recall that I voted the other way, and the opinion has not removed my difficulties. Indeed I differ widely from McReynolds concerning the functions and practices of the Trade Commn.—as you know from the Gratz Case. [*FTC v. Gratz*, 253 U.S. 421 (1920).] But I have differed from the Court recently in three expressed dissents & concluded that, in this case, I had better “shut up,” as in Junior days.” LDB to WHT (December 23, 1922) (Taft papers). Brandeis eventually joined Taft’s separate opinion, “doubting,” because McReynolds’s opinion “may bear the construction that the court has discretion to sum up the evidence pro and con on issues undecided by the commission, and make itself the fact-finding body.” 260 U.S. at 583 (Taft, C.J., doubting). “I think it of high importance,” Taft added, “that we should scrupulously comply with the evident intention of Congress that the Federal Commission be made the fact-finding body and that the court should in its rulings preserve the board’s character as such, and not interject its views of the facts where there is any conflict in the evidence.” *Id.*

⁶⁰⁰ In his comprehensive summary of the Court’s doctrine, Thomas Reed Powell notes the many cases in which the Court refused to allow state regulations to “extend beyond the area of actual evil in order to make more certain that no evil will escape”:

A flat prohibition of price discrimination in purchases of milk cannot be sustained as a means of preventing monopoly and restraint of trade, since such practices do not necessarily tend to monopoly and it is feasible to confine the prohibition to discrimination in aid of such ultimate vice. Maximum weights cannot be set for loaves of bread as a means of preventing fraud against customers who mistake a large small loaf for a small large one. The state cannot exclude all shoddy from a . . . comfortable in order to ensure that no unsterilized shoddy finds its way in.

Thomas Reed Powell, *The Supreme Court and State Police Power, 1922-1930--IX*, 18 VIRGINIA LAW REVIEW 597, 615-16 (1932).

⁶⁰¹ 273 U.S. at *Id.* at 442-43.

⁶⁰² 274 U.S. at 11.

⁶⁰³ See, e.g., *Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 235 (1925) (holding that statute violates due process by creating a duty “so vague and indefinite as to be no rule or standard at all”); *Connolly v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (holding that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application, violates the first essential of due process of law); *Cline v. Frink Dairy Co.*, 274 U.S. 445, 458 (1927).

⁶⁰⁴ See *Frost Trucking Co. v. Railroad Comm’n*, 271 U.S. 583, 592-94 (1926) (holding that a state may not affix to a private carrier’s privilege of using its highways the unconstitutional condition that the carrier must assume against its will the burdens and duties of a common carrier).

⁶⁰⁵ See *Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 552, 542 (1925).

⁶⁰⁶ See Chapter 2, at ---

⁶⁰⁷ For a good discussion of the history of the moral values that Americans have attached to economic liberty, see Harry N. Scheiber, *Economic Liberty and the Constitution*, in *ESSAYS IN THE HISTORY OF LIBERTY: SEAVER INSTITUTE LECTURES AT THE HUNTINGTON LIBRARY 75-99* (John Phillip Reid, ed., Huntington Library: 1988). For a relatively modern statement of this position, see Charles A. Reich, *The New Property*, 73 *YALE LAW JOURNAL* 733, 771-74 (1964) (“[P]roperty performs the function of maintaining independence, dignity, and pluralism in society by creating zones within which the majority has to yield to the owner.”); C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 *UNIVERSITY OF PENNSYLVANIA LAW REVIEW* 741, 761-64 (1986).

⁶⁰⁸ See, e.g., ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 11-39* (New York: Oxford University Press, 1970).

⁶⁰⁹ Sutherland, *Principle or Expedient?*, *supra* note 299, at 278. Sutherland believed that “The more democratic a people is, the more it is necessary that the individual be strong and his property sacred.” George Sutherland, *Private Rights and Public Duties*, in *REPORT OF THE FORTIETH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 197*, 213 (1917). Even Holmes was willing to acknowledge the connection between property and identity:

A man who has lived with a belief, however uncritically accepted, for thirty years, instinctively rejects a new truth no matter how deeply founded in reason and fact if it threatens the existing structure. He fights for his life--and that is why reason has so little of the power that we expect it to have. One of my old chestnuts is that property, friendship and truth have a common root in time. Title by prescription is the most philosophically grounded of any.

OWH to The Viscount Kentaro Kaneko (August 19, 1925) (Holmes papers). For Holmes, “We end with an arbitrary can’t help.” OWH to Harold Laski (February 6, 1925), in 1 *HOLMES-LASKI CORRESPONDENCE*, *supra* note 27, at 706.

⁶¹⁰ *Children’s Hosp. v. Adkins*, 284 F. 613, 623 (App. D.C. 1921), *aff’d*, 261 U.S. 525 (1923). See, e.g., *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 375 (1855) (Campbell, J. dissenting) (“Individuals are not the creatures of the State, but constitute it. They come into society with rights, which cannot be invaded without injustice.”).

⁶¹¹ 376 U.S. 575 (1928).

⁶¹² 276 U.S. at 577.

⁶¹³ 276 U.S. at 578.

⁶¹⁴ 276 U.S. at 579.

⁶¹⁵ 276 U.S. at 580-81.

⁶¹⁶ For a modern version of this point, see Cass R. Sunstein, *On Property and Constitutionalism*, in *CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY: THEORETICAL PERSPECTIVES 389-93* (Durham: Duke University Press, Michael Rosenfeld ed., 1994) (“A constitutional system that respects private property should

be regarded not as an effort to oppose liberal rights to collective self-government, but instead as a way of fortifying democratic processes.”).

⁶¹⁷ MARGARET K. BERRY AND SAMUEL B. HOWE, *ACTUAL DEMOCRACY: THE PROBLEMS OF AMERICA* 57 (New York: Prentice-Hall, Inc. 1923). See Walter George Smith, *Property Rights Under the Constitution*, 10 *ABAJ* 242, 243 (1924) (“A man without property is to a great extent a man without independence of action, and while far removed from the condition of a slave, until he can by his earning accumulate some wage he is helpless indeed, and, of course, dependent upon those who are more fortunate or more thrifty than himself.”).

⁶¹⁸ 262 U.S. 390 (1923).

⁶¹⁹ 268 U.S. 510 (1925).

⁶²⁰ 262 U.S. at 397. *Meyer* was decided simultaneously with *Bartels v. Iowa*, 262 U.S. 404 (1923), in which the Court struck down an Iowa statute similar to Nebraska’s and an Ohio statute specifically prohibiting the teaching of German before the eighth grade. In a letter to a friend, Taft described what he regarded as the exact parameters of the decision in *Meyer*, which in Taft’s view held

that the liberty, secured by the 14th Amendment to the Federal Constitution against State legislation, makes invalid a State law, which forbids a private school and a private school teacher from teaching German. It does not prevent the Legislature from excluding German or any other subject from the curriculum of a public school, and it does not prevent the Legislature from requiring the study of English and the study of the fundamental branches in English in every private school, but it does prevent the Legislature from forbidding a parent to employ a private school or private school teacher to teach his child any subject matter which is not itself vicious.

WHT to George L. Fox (July 31, 1923) (Taft papers). For historical discussions of *Meyer*, see WILLIAM G. ROSS, *FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION: 1917-1927* (Lincoln: University of Nebraska Press, 1994); ORVILLE H. ZABEL, *GOD AND CAESAR IN NEBRASKA: A STUDY OF THE LEGAL RELATIONSHIP OF CHURCH AND STATE, 1854-1954* (Lincoln: University of Nebraska, New Series No. 14, 1955); Barbara Bennett Woodhouse, *Who Owns the Child? Meyer and Pierce and the Child as Property*, 33 *WILLIAM & MARY LAW REVIEW* 995 (1992).

⁶²¹ *The Right to Learn Foreign Tongues*, *NEW YORK TIMES* (June 6, 1923), at 20. See William G. Ross, *A Judicial Janus: Meyer v. Nebraska in Historical Perspective*, 57 *UNIVERSITY OF CINCINNATI LAW REVIEW* 125, 133 (1988).

⁶²² *The Week*, 35 *NEW REPUBLIC* 54, 57 (June 13, 1923). On the close relationship between these statutes and World War I, see Ross, *supra* note 621, at 127-34; Niel M. Johnson, *The Missouri Synod Lutherans and the War Against the German Language, 1917-1923*, 56 *NEBRASKA HISTORY* 137-56 (1975); Carroll Engelhardt, *Compulsory Education in Iowa, 1872-1919*, 49 *ANNALS OF IOWA* 58, 75 (Summer/Fall 1987); Carl Zollmann, *Parental Rights and the Fourteenth Amendment*, 7 *MARQUISE LAW REVIEW* 53, 53 (1923); Note, *Foreign Languages in Private Schools--Unconstitutionality of Statutes*, 9 *IOWA LAW BULLETIN* 123, 124 (1924). The decision of the Iowa Supreme Court upholding the statute struck down in *Bartels* made this connection explicit:

The advent of the great World War revealed a situation which must have appealed very strongly to the Legislature as justifying the enactment of this statute. Men called to the colors were found to be in some instances not sufficiently familiar with the English language to understand military... orders. It was to meet this situation, to encourage the more complete assimilation of all foreigners into our American life, to expedite the full Americanization of all our citizens that the Legislature deemed this statute for the best interests of the state.

State v. Bartels, 181 N.W. 508, 513 (Iowa 1921). Nebraska had attempted to justify the statute on the grounds that “an emergency exists.” *Id.* at 397. McReynolds specifically repudiated the language of “emergency”: “No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed.” *Id.* at 403.

⁶²³ Woodhouse, *supra* note 620, at 1003.

⁶²⁴ *Id.* at 1017.

⁶²⁵ Nebraska Dist. Of Evangelical Lutheran Synod of Missouri v. McKelvie, 187 N.W. 927, 928-29 (Neb. 1922) (quoting *Barbier v. Connolly*, 113 U.S. 27, 31 (1885)).

⁶²⁶ *Id.* at 929 (quoting *Wenham v. State*, 91 N.W. 421, 424 (Neb. 1902)).

⁶²⁷ *Id.* at 928-29.

⁶²⁸ Cushman, *supra* note 238, at 882.

⁶²⁹ *Meyer*, 262 U.S. at 399. *See id.* at 403. At oral argument, Taft put the problem in this way:

Here are two conflicting principles--I hope they are not conflicting; but at any rate, they seem to be currents flowing in different directions--here is the regulatory power of the State, to require proper education among its people, to protect itself, and to protect all the people in the education of all. . . . And then, on the other hand, is this freedom, this liberty.

21 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 779-80 (Arlington, Va.: University Publications of America, Philip B. Kurland & Gerhard Casper eds., 1975).

⁶³⁰ Holmes's dissent, which was joined by Sutherland, is published in the accompanying case of *Bartels v. Iowa*, 262 U.S. 404, 412 (1923) (Holmes, J., dissenting). Holmes and Sutherland joined the Court in striking down Ohio's statute, which prohibited *only* the teaching of German. *Id.* at 413.

⁶³¹ *Meyer*, 262 U.S. at 399-400.

⁶³² The string of citations is: "Slaughter-House Cases, 16 Wall. 36; *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746; *Yick Wo v. Hopkins*, 118 U.S. 356; *Minnesota v. Barber*, 136 U.S. 313; *Allegeyer v. Louisiana*, 165 U.S. 578; *Lochner v. New York*, 198 U.S. 45; *Twining v. New Jersey* 211 U.S. 78; *Chicago, B. & Q. R. R. v. McGuire*, 219 U.S. 549; *Truax v. Raich*, 239 U.S. 33; *Adams v. Tanner*, 244 U.S. 590; *New York Life Ins. Co. v. Dodge*, 246 U.S. 357; *Truax v. Corrigan*, 257 U.S. 312; *Adkins v. Children's Hospital*, 261 U.S. 525; *Wyeth v. Cambridge Board of Health*, 200 Mass. 474." 262 U.S. at 399.

⁶³³ *See, e.g.*, *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 113-14 (1928); *Seattle Trust Co. v. Roberge*, 278 U.S. 116, 120-23 (1928); *Weaver v. Palmer Bros. Co.*, 270 U.S. 402, 415 (1926); *Wolff Packing Co. v. Court of Indus. Relations*, 267 U.S. 552, 562-69 (1925); *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 513 (1924). Conversely, the pre-New Deal would cite economic substantive due process decisions in support of extending protections to freedoms that we would now regard as civil liberties. *See, e.g.*, *Near v. Minnesota*, 283 U.S. 697, 707-08 (1931); *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 527 (1926).

⁶³⁴ *See, e.g.*, *Adair v. United States*, 208 U.S. 161, 173-75 (1908); *Coppage v. Kansas*, 236 U.S. 1, 14 (1914).

⁶³⁵ *See, e.g.*, William G. Ross, *The Contemporary Significance of Meyer and Pierce for Parental Rights Issues Involving Education*, 34 AKRON LAW REVIEW 177, 178 (2000).

⁶³⁶ *Meyer*, 262 U.S. at 400. "Mere knowledge of the German language," McReynolds continued, "cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable. [The defendant in this case] taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the amendment." 262 U.S. at 400.

⁶³⁷ *Meyer*, 262 U.S. at 400. At the time of *Meyer* there was considerable common law precedent establishing "virtually absolute parental authority over a child's course of study," even in public schools. Stephen Provasnik, *Judicial Activism and the Origins of Parental Choice: The Court's Role in the Institutionalization of Compulsory Education in the United States, 1891-1925*, 46 HISTORY OF EDUCATION QUARTERLY 311, 324 (2006). In 1891, for example, the Nebraska Supreme Court had itself affirmed the right of a father to prevent a public school from teaching his child grammar:

The testimony tends to show that Anna Sheibley is about 15 years of age; that she is pursuing studies outside of those taught in the school, which occupy a portion of her time. Now, who is to determine what studies she shall pursue in school,—a teacher who has a mere temporary interest in her welfare, or her

father, who may reasonably be supposed to be desirous of pursuing such course as will best promote the happiness of his child? The father certainly possesses superior opportunities of knowing the physical and mental capabilities of his child. It may be apparent that all the prescribed course of studies is more than the strength of the child can undergo, or he may be desirous, as is frequently the case, that his child while attending school should also take lessons in music, painting, etc., from private teachers. This he has a right to do. The right of the parent, therefore, to determine what studies his child shall pursue is paramount to that of the trustees or teacher. Schools are provided by the public, in which prescribed branches are taught, which are free to all within the district between certain ages; but no pupil attending the school can be compelled to study any prescribed branch against the protest of the parent that the child shall not study such branch, and any rule or regulation that requires the pupil to continue such studies is arbitrary and unreasonable.

Nebraska ex rel. Sheibley v. School Dist. No. 1 of Dixon County, 49 N.W. 393, 394-95 (Neb. 1891). See Nebraska ex rel. Kelley v. Ferguson, 144 N.W. 1039, 1040 (Neb. 1914) (“The right of a parent to make a reasonable selection from the prescribed course of studies which shall be carried by his child in the free public schools of the state is not limited to any particular school nor to any particular grade in any of such public schools. . . . [W]hen a parent makes a reasonable selection from the course of studies which has been prescribed by the school authorities and requests that his child may be excused from taking the same, the request should be granted.”). Common law parental rights to control the content of their children’s education, however, were understood to be circumscribed by the state’s authority to require parents to send their children “to public or private schools for longer or shorter periods during certain years of the life of such children.” Indiana v. Bailey, 61 N.E. 730, 732 (Ind. 1901). See Jeffrey Shulman, *Meyer, Pierce, and the History of the Entire Human Race: Barbarism, Social Progress, and the (The Fall and Rise of) Parental Rights*, 43 HASTINGS CONSTITUTIONAL LAW QUARTERLY 337, 381 n.218 (2016). The state’s authority was explained on the ground that “one of the most important natural duties of the parent is his obligation to educate his child, and this duty he owes not to the child only, but to the commonwealth. If he neglects to perform it or willfully refuses to do so, he may be coerced by law to execute such civil obligation.” Indiana v. Bailey, 61 N.E. 730, 732 (Ind. 1901). In *Meyer*, McReynolds was explicit that “The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the state’s power to prescribe a curriculum for institutions which it supports. Those matters are not within the present controversy.” *Meyer*, 262 U.S. at 402.

⁶³⁸ *Meyer*, 262 U.S. at 400. The conclusion of *Meyer* is that Nebraska had materially interfered “with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.” *Id.* at 401. McReynolds offered an analogous definition of the relevant liberty in his subsequent opinion for the Court applying *Meyer* to the Hawaiian Islands. See *Farrington v. Tokushige*, 273 U.S. 284, 298-99 (1927) (“The general doctrine touching rights guaranteed by the Fourteenth Amendment to *owners, parents and children* in respect of attendance upon schools has been announced in recent opinions.”) (Emphasis added).

⁶³⁹ See Ross *supra* note 621, at 185-86.

⁶⁴⁰ *Meyer*, 262 U.S. at 401.

⁶⁴¹ *U.S. Court Kills Laws of 3 States Forbidding Teaching of German*, NEW YORK WORLD (June 5, 1923), at 2; *A Decision for Liberty*, 17 SCHOOL AND SOCIETY 668 (No. 442) (June 16, 1923).

⁶⁴² 116 THE NATION 682 (June 13, 1923). See *Languages in School*, CHICAGO DAILY TRIBUNE (June 6, 1923), at 8 (“If legislative majorities can enter the field of education, whether lay or sectarian, and forbid the teaching of subjects acceptedly a part of the educational equipment, they can make rather drastic inroads upon individual liberty of thought and freedom of judgment.”).

⁶⁴³ WHT to Mrs. Bellamy Storer (June 27, 1923) (Taft papers). See WHT to George L. Fox (July 31, 1923) (Taft papers) (“The extent to which [Meyer] goes is to hold that the liberty, secured by the 14th Amendment to the Federal Constitution as against State legislation, makes invalid a state law, which forbids a private school and a private school teacher from teaching German. It does not prevent the Legislature from excluding German or any other subject from the curriculum of a public school, and it does not prevent the Legislature from requiring the study of English and the study of the fundamental branches in English in every private school, but it does prevent the

Legislature from forbidding a parent to employ a private school or a private school teacher to teach his child any subject matter which is not itself vicious.”).

In 1924, Taft personally wrote the editor of the *St. Louis Globe Democrat* to urge that he oppose La Follette’s presidential campaign against the Court, suggesting that “I think it might be well to point out . . . the cases of *Meyer vs. Nebraska* and *Bartels v. Iowa*, in which we held that the forbidding of the teaching of German in private schools under the eighth grade, or requiring of school branches to be taught in such schools in the English language, was a violation of the right of liberty under the 14th Amendment. . . . I should think that this illustration would convince people, especially among your readers, that they have some rights that they would rather not entrust to the Legislature or to Congress to violate. Of course I think this the most important issue in the campaign . . . “WHT to Casper S. Yost (September 11, 1924) (Taft papers). Yost responded with a strong editorial. *See* Casper S. Yost to WHT (September 19, 1924) (Taft papers). *See La Follette and the German Vote*, ST. LOUIS GLOBE-DEMOCRAT (September 17, 1924) (“The Supreme Court in two recent decisions has held that it was a violation of the right of liberty under the fourteenth amendment to forbid the teaching of German in private schools under the eighth grade. . . . Suppose the Supreme Court . . . [was] deprived of the power of declaring unconstitutional laws invalid, as La Follette proposed. Any American Congress or Legislature that chooses to pass such laws as this could then do so without hindrance. . . . [T]he people, their rights and their liberties, will be constantly at the mercy of legislators, state and national, moved by passions, prejudices or unwisdom, with no constitutional restraints upon them. . . . The citizens of German blood, and all others, should give serious thought to these things.”).

⁶⁴⁴ *Bartels v. Iowa*, 262 U.S. 404, 412 (1923) (Holmes, J., dissenting). Sutherland joined Holmes’s dissent. McKenna returned the draft of Holmes’s opinion with a notation that “There is strength in this dissent and you have developed it but I am inclined the other way.” JM to OWH (Holmes papers). To Laski, Holmes wrote that “I didn’t think the dissent on teaching languages worth sending. I agreed with the Court that an Ohio law excluding German only (I believe an ebullition of Cox when he wanted to be President) was bad – but said that it was legitimate to try to make the young citizens speak English and that if a legislature thought that the best way to do that for children who could hear only Polish or German or French at home, was to make them talk only English during school hours I was not prepared to say that it was an unconstitutional limitation of the liberty of the school master.” OWH to Harold Laski (June 24, 1923), in 1 HOLMES-LASKI CORRESPONDENCE, *supra* note 27, at 508. To Frankfurter, Holmes wrote that “As to teaching the young, you will find that I said little and that cautiously and was willing to agree with the Court as to the fool law against German alone.” OWH to Felix Frankfurter (June 6, 1923), in HOLMES-FRANKFURTER CORRESPONDENCE, *supra* note 190, at 153.

Progressive educational experts found the decision in *Meyer* “almost incomprehensible,” because it gave such little weight to the imperative of Americanization. Ellwood P. Cubberley, *The American School Program from the Standpoint of the Nation*, 61 PROCEEDINGS OF NATIONAL EDUCATION ASSOCIATION 180, 181 (1923). *See* Kenneth B. O’Brien, Jr., *Education, Americanization and the Supreme Court: The 1920s*, 13 AMERICAN QUARTERLY 161, 165-66 (1961); Woodhouse, *supra* note 620, at 1098-99.

⁶⁴⁵ *Brandeis-Frankfurter Conversations*, *supra* note 227, at 320 (July 19, 1923). *See* Chapter 2 at ---

⁶⁴⁶ OWH to Felix Frankfurter (March 24, 1914), in HOLMES-FRANKFURTER CORRESPONDENCE, *supra* note 190, at 19. *See* chapter 2, at ---.

⁶⁴⁷ The only major exception to this stance of deference in Holmes’s jurisprudence concerned freedom of speech, as to which Holmes was prepared to assume a stance of aggressive judicial review. This was likely due to epistemological rather than political concerns.

⁶⁴⁸ *See* chapter 2, at ---.

⁶⁴⁹ *A Decision for Liberty*, NEW YORK WORLD June 6, 1923), at 12. “Freedom of teaching, like freedom of thought, must among a free people be put beyond the interference of majorities. For without freedom of thought and freedom of teaching there is no way by which the tyrannies and follies of temporary majority can be peacefully resisted. A people which is to be governed by majorities must keep wide open the right of minorities to think for themselves and to attempt to persuade the majority. A majority protected against the criticism of minorities outside itself and within itself is, as de Tocqueville pointed out long ago, the most intolerable of all tyrants.” *Id.* *The World* opined that “it is to be expected that people in States which are afflicted with the Bryan nonsense about ‘evolution’ will take advantage of this decision to vindicate the freedom of scientific inquiry.”

⁶⁵⁰ GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 377 (New York: Alfred A. Knopf, 1994).

⁶⁵¹ GUNTHER, *supra* note 650, at 377. The day after *Meyer* Frankfurter wrote Hand:

For myself, I should have voted with the minority. Of course, I regard such know-nothing legislation as uncivilized, but for the life of me I can't see how it meets the condemnation of want of "due process" unless we frankly recognize that the Supreme Court of the United States if the revisory legislative body. . . . That kind of confinement of the activity of our legislatures shrinks their responsibility and the sense of responsibility of our votes much beyond what is healthy for ultimate securities. The more I think about this whole "due process" business, the less I think of lodging that power in those nine gents at Washington.

Felix Frankfurter to Learned Hand (June 5, 1923), quoted in *id.* at 377-78. Hand endorsed Frankfurter's position: "I can see no reason why, if a state legislature wishes to make a jackass of itself by that form of Americanization, it should not have the responsibility for doing so rather than the Supreme Court. But then, like you, I am ultra-latitude in such matters." Learned Hand to Felix Frankfurter (June 6, 1923), quoted in *id.* at 378. See Edward Corwin, *Constitutional Law in 1922-1923*, 18 AMERICAN POLITICAL SCIENCE REVIEW 49, 69-70 (1924):

The successive decisions in the Minimum Wage cases, the Industrial Court case, and the Foreign Language cases, put the Supreme Court's doctrine of liberty on a stronger foundation than ever before. Hitherto, the term has had little significance beyond that afforded by the almost equally vague phrase "freedom of contract." Now it is apparent that the court intends to subject all legislative novelties, which are seriously restrictive of previously enjoyed freedom of action, to the test of the doctrine that "freedom is the general rule, and restraint the exception," that "the legislative authority to abridge an be justified only by exceptional circumstance"—so exceptional, indeed, that the court can take cognizance of them without proof. The result will be disliked by reformers . . .

See WHT to Mrs. Frederick J. Manning (June 11, 1923) ("We shall deliver opinions to-day, and some important ones, too. I deliver a unanimous opinion holding the Kansas Industrial Court Act invalid, and last week we held invalid a great many laws which forbade the teaching, in any school, public or private, of German to children before they reach the High School, or of any language but English. We are engaged in correcting the constitutional errors of some of the State legislatures.").

Lippmann, in contrast, appalled by Tennessee's efforts to suppress the teaching of evolution, believed in the need "to develop some new doctrine to protect education from majorities. My own mind has been getting steadily antidemocratic: the size of the electorate, the impossibility of educating it sufficiently, the fierce ignorance of these millions of semiliterate priest-ridden and parson-ridden people have got me to the point where I want to confine the actions of majorities." Walter Lippmann to Learned Hand (June 8 or 9, 1925), quoted in GUNTHER, *supra* note 650, at 382. Lippmann was frank to admit that Thomas Reed Powell and Morris Cohen had taken the position that "the constitutionality of the law ought not to be attacked. Such foolishness should be within the province of the legislature." *Id.*

⁶⁵² Edward A. Purcell, Jr., *Learned Hand: The Jurisprudential Trajectory of an Old Progressive*, 43 BUFFALO LAW REVIEW 873, 910-11 (1995).

⁶⁵³ The split between old-style progressive judicial deference and a newer liberal turn toward the active protection of civil rights was accelerated by the excesses of national Prohibition, as we shall see in chapter --.

⁶⁵⁴ *Meyer*, 262 U.S. at 401.

⁶⁵⁵ *Meyer*, 262 U.S. at 401-02. McReynolds knew something about anti-German prejudice during the war. In *Berger v. United States*, 255 U.S. 22 (1921), the Court had affirmed the disqualification of a federal district judge for expressing prejudice against German defendants in a criminal trial. Among other remarks, the judge had said of German-born Americans, "Your hearts are reeking with disloyalty." 255 U.S. at 29. McReynolds dissented from the Court's holding on the piquant grounds that "Intense dislike of a class does not render the judge incapable of administering complete justice to one of its members. A public officer who entertained no aversion towards disloyal German immigrants during the late war was simply unfit for his place. And while 'an overspeaking judge is no well-tuned cymbal,' neither is an amorphous dummy unspotted by human emotions a becoming receptacle for judicial power." 255 U.S. at 42 (McReynolds, J., dissenting).

⁶⁵⁶ *Roberts v. United States Jaycees*, 468 U.S. 609, 618-19 (1984).

⁶⁵⁷ 268 U.S. 510 (1925). On the history of the case, see PAULA ABRAMS, *CROSS PURPOSES: PIERCE V. SOCIETY OF SISTERS AND THE STRUGGLE OVER COMPULSORY EDUCATION* (Ann Arbor: University of Michigan Press 2009).

⁶⁵⁸ Sutherland, who had dissented in *Meyer*, wrote after *Pierce* that the Court's decision "was the only possible one. There was never any division of sentiment in the Court from the beginning." GS to William H. Church (June 8, 1925) (Sutherland papers). Interestingly, a day later Taft wrote a close friend, "We had no difficulty after we had decided the Nebraska language case. I can tell you sometime about how we made the Court unanimous." WHT to Charles D. Hilles (June 9, 1925) (Taft papers). The story of the Court's unanimity has never been made public.

⁶⁵⁹ The circumstances of *Pierce* were manifestly on the Court's mind when it had decided *Meyer* two years before. The Oregon statute had been adopted on November 7, 1922, approximately three months before the argument in *Meyer*. In December, the eminent New York Catholic lawyer William D. Guthrie, who at the age of thirty-six had won a decision striking down the federal income tax as unconstitutional, *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895), was brought into the case by the National Catholic Welfare Conference to find a way constitutionally to invalidate the statute. Guthrie believed that the constitutional questions were "close" and "very delicate." ABRAMS, *supra* note 657, at 90-94. Representing "various religious and educational institutions in the United States," Guthrie quickly filed an amicus brief in *Meyer* that did not advocate for "either party," but that instead called the Court's attention to "the statute of Oregon" and argued that the Court ought not decide *Meyer* in any way that would affirm the "virtually unlimited" police power "of a state over the education of minors." Brief of Amici Curiae in *Meyer v. Nebraska*, at 1-2. McReynolds's reference to Plato's Commonwealth likely derived from Guthrie's brief. *See id.* at 3 ("The notion of Plato that in a Utopia the state would be the sole repository of parental authority and duty and the children be surrendered to it for upbringing and education . . . was long ago repudiated."). Guthrie made the contemporary political implications of Plato's ideal explicit. "It adopts the favorite device of communistic Russia—the destruction of parental authority, the standardization of education despite the diversity of character, aptitude, inclination and physical capacity of children, and the monopolization by the state of the training and teaching of the young." *Id.* at 3. The oral argument in *Meyer* suggests that Guthrie's brief made a deep impression on McReynolds's thinking. *See* ABRAMS, *supra* note 657, at 120-22.

⁶⁶⁰ *Pierce*, 268 U.S. at 535.

⁶⁶¹ *Pierce*, 268 U.S. at 534-35.

⁶⁶² Barbara Bennett Woodhouse, *Child Abuse, The Constitution, and the Legacy of Pierce v. Society of Sisters*, 78 UNIVERSITY OF DETROIT MERCY LAW REVIEW 479 (2001).

⁶⁶³ Thus T.R. Powell contemporaneously summarized *Pierce* as turning upon the "constitutional rights of *parents and children* to select other than public schools." T.R. Powell, *Supreme Court and State Police Power*, 17 VIRGINIA LAW REVIEW 765, 796 (1931) (Emphasis added). *But see* Arthur Dean, *A Far Reaching Decision*, 27 INDUSTRIAL EDUCATION MAGAZINE 37, 38 (August 1925) (By the Court's "decision we have discovered something we were forgetting, namely: Children do belong primarily to parents and only to a limited extent to the state."); *Oregon's Public School Law Not Constitutional*, CHICAGO DAILY TRIBUNE (June 2, 1925), at 16 (*Pierce* upheld "the inherent right of a parent to send his boy or girl to any school he deems best.").

⁶⁶⁴ McReynolds was careful to note that "No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare." *Pierce*, 268 U.S. at 534.

⁶⁶⁵ Oral Argument of Arthur F. Mullen, in Behalf of Plaintiffs-in-Error, *Meyer v. Nebraska*, at 8.

⁶⁶⁶ David B. Tyack, *Ways of Seeing: An Essay on the History of Compulsory Schooling*, 46 HARVARD EDUCATIONAL REVIEW 355, 359 (1976).

⁶⁶⁷ Tyack, *supra* note 666, at 361-62. See MICHAEL S. KATZ, A HISTORY OF COMPULSORY EDUCATION LAWS 21 (Bloomington, Indiana: The Phi Delta Kappa Educational Foundation 1976) (“Between 1900 and 1930, compulsory schooling laws were transformed in many states from symbolic dead letters into reasonably effective statutes. The emergence of effective enforcement mechanisms translated an isolated phenomenon—school attendance—into an integral part of the state’s systematic regulation of the conduct of school-aged youth.”); George D. Strayer, *The Financing of the American Schools*, 61 PROCEEDINGS OF NATIONAL EDUCATION ASSOCIATION 158, 158 (1923) (“It is only during the last generation that we have begun to enforce compulsory education. The increase in days of attendance in our public schools was 139 per cent from 1890 to 1920. Still more remarkable was the increase in high-school attendance from 200,000 to 2,000,000.”).

⁶⁶⁸ ELLWOOD P. CUBBERLEY, CHANGING CONCEPTIONS OF EDUCATION 63 (Boston: Houghton Mifflin Co. 1909). “The state oversight of private and parochial education is likely to increase slowly, especially along the lines of uniformity in statistics and records, sanitary inspection, common standards of work, and the enforcement of the attendance laws. In particular, the attitude toward the control of the child is likely to change.” *Id.* See Mrs. A. H. Reeve, *Parent Power—A School Auxiliary*, 61 PROCEEDINGS OF NATIONAL EDUCATION ASSOCIATION 176, 177 (1923) (“In the past twenty-five years we have been awakening to a general consciousness that after all, a fraction is part of a unit, and must always be so . . . So the unit that was formerly the family had developed into the unit that is in the community, and the child of today—even the average child—is being considered less and less as the personal property of its parents, and more and more as belonging to the State.”).

⁶⁶⁹ ABRAMS, *supra* note 657, at 215. See *id.* at 222.

⁶⁷⁰ When Taft bumped into Guthrie in a small Court conference room, and when Guthrie asked Taft for more time for argument, Taft replied, “I don’t see why you want any more time. In principle, this case is simply the *Meyer* case over again.” ABRAMS, *supra* note 657, at 180.

⁶⁷¹ *Pierce*, 268 U.S. at 535.

⁶⁷² See *supra* note 112; Hoover, *Address*, *supra* note 112, at 79 (“The whole conception of standardization has changed in recent years and has come to the first rank of importance.”).

⁶⁷³ Hoover, *supra* note 143, at 14.

⁶⁷⁴ THE OREGON SCHOOL FIGHT: A TRUE HISTORY 17 (Portland, Oregon: A.B. Cain, n.d.).

⁶⁷⁵ THE OREGON SCHOOL FIGHT: A TRUE HISTORY, *supra* note 674, at 11. When the federal District Court struck down the Oregon statute, the *New York Times* celebrated: “The nearest analogy to this policy . . . is to be found in Russia under the present regime, and in Turkey under a bill which proposed specifically to prohibit attendance upon other than schools conducted by the Government. The law partook also of the spirit and method of the Prussian educational system. . . . Despite all that may be said of the desirability of bringing children of varying tradition, creed and social status into the common training schools, a policy of compulsion violates the very first principle of individual freedom. The State may and does require of the private and parochial schools the teaching of the same subjects, the observance of like standards, the same preparation of teachers and the same period of attendance as in the public schools. But to go further and to force all children into the public school is practically to take from the parent all discretion as to the education of the child.” *The Oregon School Law*, NEW YORK TIMES (April 2, 1924), at 18.

⁶⁷⁶ THE OREGON SCHOOL FIGHT: A TRUE HISTORY, *supra* note 674, at 11.

⁶⁷⁷ See, e.g., *An America Message*. CHICAGO DAILY TRIBUNE (April 24, 1918), at 8 (“The meeting of the Irish Fellowship club . . . expressed 100 per cent Americanism and was a rebuke to hyphenism which ought to carry far.”); *Elect Loyal Men to Congress, Plea of Elihu Root; 100 Per Cent Americanism Urged at National Security League Meeting*, NEW YORK TRIBUNE (May 9, 1918), at 10; *Roosevelt Joins Move to Rout Out All ‘Yell Dogs’; Colonel Declares Nothing Less Than 100 Per Cent Americanism Will Do*, NEW YORK TRIBUNE (July 26, 1918), at 9; *Loyalty Issue in Missouri Primary*, THE CHRISTIAN SCIENCE MONITOR (July 29, 1918), at 13 (“The primary campaign . . . is, for the most part, being waged on the lines of loyalty and 100 per cent Americanism.”); *A Hundred*

Per Cent Man, CHICAGO DAILY TRIBUNE (September 2, 1918), at 6 (“The man who is 100 per cent American, 100 per cent patriotic, 100 per cent efficient, 100 per cent intelligent, and 100 per cent honest has no weak spots in his equipment.”); *Unloyalty*, ARIZONA REPUBLICAN (September 21, 1918), at 4 (“We hear much of 100 per cent Americanism. That is a catch phrase and nothing more. ‘The 100 per cent’ is quite superfluous. Americanism is pure or it is nothing.”).

⁶⁷⁸ See, e.g., Cubberley, *supra* note 644, at 180-81 (“[W]hen the World War began we realized . . . how vast was the number of foreign-born peoples who had settled in our midst but had not become one with us in language or thought or spirit. . . . The problem which still faces the United States is that of assimilating into our national life and citizenship these millions of foreign-born and foreign-thinking peoples. . . . [T]his process of assimilation . . . is after all largely a problem of education and one that our schools must take the lead in solving. New peoples coming among us must be initiated into the language, traditions, hopes, and aspirations of our people if we are to preserve our National character.”). In 1921, the NEA adopted in its platform a commitment to “the Americanization of the foreign-born.” *A Platform of Progress*, 10 JOURNAL OF THE NATIONAL EDUCATION ASSOCIATION 120, 121 (1921). The NEA also proclaimed that it was “glad to co-operate with the American Legion in the establishment of a universal requirement of English as the only basic language of instruction in all schools—public, private, and parochial—and we commend heartily their demand that thorough-going instruction in American History and Civics be required of all students for graduation from elementary and from secondary schools.” *Id.* See Woodhouse, *supra* note 620, at 1009-1012. The NEA also republished and distributed H.R. Rep. No. 1201, 66th CONG. 3d SESS. (January 7, 1921), which sought to establish a federal department of education. The Report earnestly pushed “the Americanization of our foreign born.”

We have now more than 15,000,000 foreign-born population in the United States. More than 5,000,000 can not read or write the English language. . . . This mass of ignorance . . . has become and is now an active source of danger to the Republic. Alien communities where our language is not spoken, where our magazine and newspapers are not read, and where no American ideals or any understanding of our institutions are made known constitute a rich soil in which are sown the seeds of unrest and revolt. . . .

There is but one cure for these conditions, and that is to educate the immigrant to understand our language, our Government, and our institutions.

Id. at 8-9. See *Committee Reports Education Bill*, 10 JOURNAL OF THE NATIONAL EDUCATION ASSOCIATION 41 (1921).

⁶⁷⁹ JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925* 264 (New York: Atheneum 1970).

⁶⁸⁰ In 1924, for example, that the country reversed centuries of open immigration to sharply restrict the intake of new citizens. See e.g., Immigration Act of 1924, Pub.L.68–139, 43 Stat. 153 (May 26, 1924). Known as the Johnson-Reed Act, the legislation limited entry to the United States by adopting restrictive national origins quotas based upon the 1890 census.

⁶⁸¹ THE OREGON SCHOOL FIGHT: A TRUE HISTORY, *supra* note 674, at 7.

⁶⁸² ABRAMS, *supra* note 657, at 8. “The measure professed to be one of equality,” said the *New York Times*, “but it was plainly directed most intolerantly at a single class. It was one of the most hateful by-products of the Ku Klux movement.” *A Bad Law Voided*, NEW YORK TIMES (June 2, 1925), at 22. “It was a bigoted measure inspired by the Ku Klux Klan against Roman Catholics and all other non-Protestant elements—and is well out of the way.” 120 THE NATION 641 (June 10, 1925). “The initiation of this drastic movement was under influences connected with the Ku Klux Klan, which has a considerable membership and a larger sympathetic affiliation in Oregon. One purpose, perhaps the main purpose, was to destroy schools maintained by or under the auspices of the Catholic Church.” *The Oregon School Law*, NEW YORK TIMES (August 5, 1923), at E4.

⁶⁸³ In June, Taft wrote Van Devanter that “[I]t has happened that the Ku Klux Klan and other extremists have forced upon the Court the necessity of making clear to country the protection which the Constitution and the Court in interpreting and enforcing its [?] to large bodies of people against a deprivation of their cherished liberty.” WHT to WVD (June 19, 1925) (Van Devanter papers). In 1928, the Taft Court upheld a New York Klan registration statute. See *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928).

⁶⁸⁴ “Oregon vies with Texas and Oklahoma as the state in which the Ku Klux nuisance comes nearest being an actual menace.” *Intolerance in Oregon*, 49 THE SURVEY 76 (October 15, 1922). See Waldo Roberts, *The Ku-Kluxing of Oregon*, 133 THE OUTLOOK 490, 491 (March 14, 1923) (“Had the war never happened, the Ku Klux Klan in Oregon never would have happened. The armistice came suddenly—too suddenly, many people believe. The fighting spirit of the American people was aroused to a high pitch. But suddenly there was no one to fight. The flood of destructive passion was arrested. It had to find an outlet somewhere. In Oregon it found an outlet through the Ku Klux Klan and against the Catholic Church.”).

⁶⁸⁵ Oddly, the Klan supported a measure whose ballot argument proclaimed that “[W]e recognize and proclaim our belief in the free and compulsory education of the children of our nation in public primary schools supported by public taxation, upon which all children shall attend and be instructed in the English language only without regard to race or creed as the only sure foundation for the perpetuation and preservation of our free institutions.” THE OREGON SCHOOL FIGHT: A TRUE HISTORY, *supra* note 674, at 7.

⁶⁸⁶ Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARVARD LAW REVIEW 4, 61 (1983).

⁶⁸⁷ Themes of religious liberty pervaded Guthrie’s argument. See *id.* at 21-22, 24-27, 29. He bitterly commented “upon this cant of Americanization on the part of the promoters of this un-American measure. Imagine destroying the most valuable right that we Americans have inherited from the inspired generation that established this Government—imagine destroying the right to religious liberty and freedom of education in the name, in the cant, on the pretense, of Americanization.” Oral Argument on Behalf of Appellee, at 28. Guthrie’s words must have rung true to Brandeis, who in 1915 had addressed that same cant in his famous address on “True Americanism.” See *True Americanism* in LOUIS D. BRANDEIS, BUSINESS—A PROFESSION 364-74 (Boston: Hale, Cushman & Flint, 1933). “America,” Brandeis had declared in language directly applicable to *Pierce* (and to *Meyer*), “has believed that we must not only give to the immigrant the best that we have, but must preserve for America the good that is in the immigrant and develop in him the best of which he is capable. America has believed that in differentiation, not in uniformity, lies the path of progress. . . . The new nationalism adopted by America proclaims that each race or people, like each individual, has the right and duty to develop, and that only through such differentiated development will high civilization be attained. Not until these principles of nationalism . . . are generally accepted will liberty be fully attained and minorities be secure in their rights.” *Id.* at 372-74.

⁶⁸⁸ 268 U.S. 652 (1925). *Pierce* was decided on June 1, 1925; *Gitlow* was decided the next week on June 8.

⁶⁸⁹ *Cantwell v. Connecticut*, 310 U.S. 296 (1940). The Court did not incorporate the Establishment Clause for another 7 years. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

⁶⁹⁰ In cases like *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (upholding a right to an abortion) and *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) (upholding the right to same-sex marriage), the contemporary Court still uses the Due Process Clause to negotiate this boundary.

⁶⁹¹ For this reason, *Pierce* provoked in Frankfurter the same skepticism that he had experienced in the context of *Meyer*. See *supra* note 651. Frankfurter published an unsigned editorial in *The New Republic* conceding that “The Oregon decision, like its Nebraska forerunner, in and of itself, gives just cause for rejoicing. The Supreme Court did immediate service on behalf of the essential spirit of liberalism. It put the quietus on two striking manifestations of post-war obscurantism.” *Can the Supreme Court Guarantee Toleration?* 43 THE NEW REPUBLIC 85, 86 (No. 550) (June 17, 1925). (Strikingly, Frankfurter omitted this passage when he later republished this editorial in FRANKFURTER, *supra* note 13, at 196, no doubt because of his subsequent judicial hostility to *Pierce*.) But Frankfurter then went on to say that in assessing the value of *Pierce* account must also be taken of the “heavy price” of other substantive due process decisions like “The New York bakeshop case, the invalidation of anti-trade union laws, the sanctification of the injunction in labor cases, the veto of minimum wage legislation.” *Can the Supreme Court Guarantee Toleration*, at 86. The essential problem was that “the fateful words of the Fourteenth Amendment” mean “what the shifting personnel of the United States Supreme Court from time to time makes them mean. The inclination of a single Justice, the tip of his mind—or his fears—determines the opportunity of a much-needed social experiment to survive, or frustrates, at least for a long time, intelligent attempt to deal with a social evil.” *Id.* “For ourselves,” Frankfurter concluded, “we regard the cost of this power of the Supreme Court on the

whole as greater than its gains.” *Id.* See *Social Policy and the Supreme Court*, 43 THE NEW REPUBLIC 195 (No. 554) (July 15, 1925).

Brandeis’s friend, the journalist Robert W. Bruère, had a slightly different interpretation of *Pierce*. Writing in *The Survey*, Bruère noted that precisely because the conclusions of the Court transcended “legal technicalities” and depended upon “what is broadly termed common sense,” their ultimate “force” would turn on “the support of prevailing public opinion.” Robert W. Bruère, *The Supreme Court on Educational Freedom*, 54 THE SURVEY 379, 380 (July 1, 1925). Using that criterion, “The reaction of public opinion to the Supreme Court’s verdict, insofar as it can be gaged by press comment, would seem to indicate that the majority of Americans follow the reasoning of the Court with approval.” *Id.*

Pierce was indeed a strikingly popular and salient opinion. “Few decisions in years . . . attracted as much attention” as the “momentous” case of *Pierce*. *Oregon School Law Declared Invalid by Supreme Court*, NEW YORK TIMES (June 2, 1925), at 1; *The Oregon School Law in Court*, 85 THE LITERARY DIGEST 32 (April 18, 1925). *The Literary Digest* reported that “the press comment that has reached this office seem to be all in approval of the Supreme Court’s decision.” *Death of the Oregon School Law*, 85 THE LITERARY DIGEST 7, 8 (June 13, 1925). “A new *Magna Charta* for the integrity of family life,’ ‘a decision against tyranny,’ ‘a triumph for the rights of minorities,’ ‘a victory for freedom of education,’ ‘a crushing defeat for bigotry,’ ‘a bulwark against the tyranny of the majority’—these are some of the characterization of this decision by such representative dailies as the *Newark News*, *Brooklyn Eagle*, *Portland Oregonian*, *New York Herald Tribune* and *World*, and *Boston Herald*.” *Id.* at 7. “The decision elicited comment in 490 newspapers in 44 States, all practically unanimous in favor of the Court’s decision.” Robert F. Drinan, *Parental Rights and American Law*, 172 THE CATHOLIC WORLD 21, 22 (October 1956).

⁶⁹² *Butler v. Perry*, 240 U.S. 328 (1916), is a striking case in the McReynolds *oeuvre*. Speaking for a unanimous Court, McReynolds upheld a Florida statute requiring males between twenty-one and forty-five years of age “to work on the roads and bridges of the several counties for six days” a year. *Id.* at 329. McReynolds noted that conscription for road work was a traditional form of tax and that the statute “introduced no novel doctrine.” *Id.* at 333. “[T]o require work on public roads has never been regarded as a deprivation of either liberty or property.” *Id.* Because the Fourteenth “Amendment was intended to preserve and protect fundamental rights long recognized under the common law,” there was no violation of due process of law. *Id.* The case strongly suggests that for McReynolds agency was constructed by traditional and historical expectations enshrined in the common law.

⁶⁹³ American legal tradition generally viewed common law as “founded on long and general custom,” which reflected “nothing else, but free and voluntary consent.” I THE WORKS OF JAMES WILSON 184 (Cambridge: Harvard University Press, Robert Green McCloskey ed., 1967). The common law both reflected and created the personal identity of individuals. Hence the Taft Court was prepared to explain common law negligence as enforcing “a standard of human conduct which all are reasonably charged with knowing,” precisely because it regarded the standard as already socialized within the identity of “the average man.” *Cline v. Frink Dairy Co.*, 274 U.S. 445, 464 (1927).

⁶⁹⁴ The common law was understood to reflect the teachings of “experience.” THE WORKS OF JAMES WILSON, *supra* note 693, at 348. See also CHARLES B. GOODRICH, THE SCIENCE OF GOVERNMENT AS EXHIBITED IN THE INSTITUTIONS OF THE UNITED STATES OF AMERICA 239 (Boston: Little, Brown & Co. 1853); ZEPHANIAH SWIFT, I SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 40 (Windham: John Bryne 1795).

⁶⁹⁵ See Chapter 2 at ---.

⁶⁹⁶ 272 U.S. 365 (1926). The dramatic and fascinating history of *Euclid* has often been told. See, e.g., MICHAEL ALLAN WOLF, THE ZONING OF AMERICA: *EUCLID V. AMBLER* (University of Kansas Press 2008); SEYMOUR I. TOLL, ZONED AMERICAN 213-268 (New York: Grossman Publishers 1969); Arthur V.N. Brooks, *The Office File Box--Emanations from the Battlefield, in Zoning and the American Dream*, in ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP (Charles M. Haar and Jerold S. Kayden, eds. Chicago: Planners Press, 1969), at 3-30; William M. Randle, *Professors, Reformers, Bureaucrats, and Cronies: The Players in Euclid v. Ambler*, in *id.* at 31-70; Timothy Alan Fluck, *Euclid v. Ambler: A Retrospective*, 52 JOURNAL OF THE AMERICAN PLANNING ASSOCIATION 326 (Summer 1986); Garrett Power, *The Advent of Zoning*, 4 PLANNING PERSPECTIVES 1 (1989); Michael Allan Wolf, ‘*Compelled by Conscientious Duty*’: Village of *Euclid v. Ambler Realty Co. as Romance*, 2 JOURNAL OF SUPREME COURT HISTORY 88 (1997); Garrett Power, *Advocates at Cross-Purposes: The Briefs on Behalf of Zoning in the Supreme Court*, 2 JOURNAL OF SUPREME COURT HISTORY 79 (1997).

⁶⁹⁷ Gerald Korngold, *The Emergence of Private Land Use Controls in Large-Scale Subdivisions: The Companion Story to Village of Euclid v. Ambler Realty Co.*, 51 CASE WESTERN RESERVE LAW REVIEW 617, 617 (2001). See Michael Allen Wolf, *The Prescience and Centrality of Euclid v. Ambler*, in ZONING AND THE AMERICAN DREAM, *supra* note 696, at 252 (“The importance” of *Euclid* “is indisputable.”).

⁶⁹⁸ TOLL, *supra* note 696, at 214-16. The preface to the zoning ordinance announced:

Whereas, it is the desire of the citizens of said Village, and the Council thereof, to preserve the present character of said Village and the public improvements therein, to prevent congestion, and to promote and provide for the health, safety, convenience, comfort prosperity, and general welfare of the citizens thereof, for which reason the subject matter hereof constitutes an emergency as hereinafter specifically provided.

Transcript of Record of Village of Euclid v. Ambler, at 13.

⁶⁹⁹ *Euclid*, 272 U.S. at 384.

⁷⁰⁰ James Metzbaum, *Zoning on Trial Before the U.S. Supreme Court*, 35 THE AMERICAN CITY MAGAZINE 74 (No. 1) (July 1926).

⁷⁰¹ Alfred Bettman, *The Decision of the Supreme Court in the Euclid Village Zoning Case*, 1 UNIVERSITY OF CINCINNATI LAW REVIEW 184, 184 (1927).

⁷⁰² Keith D. Revell, *The Road to Euclid v. Ambler: City Planning, State-Building, and the Changing Scope of the Police Power*, 13 STUDIES IN AMERICAN POLITICAL DEVELOPMENT 50, 108 (Spring 1999) (Quoting Edward M. Bassett, *see infra* note 711). Alfred Bettman believed “that the Euclid ordinance was chosen for this purpose because of certain weaknesses which were felt to inhere in its provisions.” *Id.* Among those weaknesses was the fact that Euclid’s ordinance was adopted without a prior comprehensive city plan and was essentially, as Euclid proudly told the Court in its Brief, “an exact duplicate of the New York City Zoning Ordinance, except as to local names and locations.” Brief on Behalf of the Appellants, at 96. Keith Revell calls the Euclid ordinance “the most egregious use of the zoning rationale by municipal officials.” Revell, *supra*, at 108. See also A. Dan Tarlock, *Euclid Revisited*, 34 LAND USE LAW & ZONING DIGEST 4, 5 (No. 1) (January 1982) (“*Euclid* was not the best case with which to test the constitutionality of zoning because the facts did not favor the village. When the zoning ordinance was adopted, the village’s grand residential boulevard, Euclid Avenue, had deteriorated into a mixed-use area.”). Several years after the Supreme Court’s decision all of Ambler Realty’s land was rezoned for industry. Today on Euclid Avenue, gasoline filling stations, used car lots and fast food restaurants abound.” Garrett Power, *The Advent of Zoning*, 4 PLANNING PERSPECTIVES 1, 10 (1989).

⁷⁰³ TOLL, *supra* note 696, at 143-87. Los Angeles had enacted proto-zoning ordinances before New York, *see, e.g.*, Gordon Whitmall, *History of Zoning*, 155 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 1, 10-11 (1931), but the 1916 New York ordinance is generally taken as the moment “when comprehensive zoning was implemented in the United States.” EMILY TALEN, CITY RULES: HOW REGULATIONS AFFECT URBAN FORM 23 (Washington: Island Press 2012). Zoning was “fundamentally different from a building code, which applies rules uniformly to all parts of a city.” *Id.* at 21. Zoning applied different building codes to different parts of the city, so that “one area of the city was allowed to be denser, taller, and more diverse, while another area was required to be sparsely populated and more homogeneous.” *Id.*

⁷⁰⁴ Yale Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, in ZONING AND THE AMERICAN DREAM, *supra* note 696, at 105.

⁷⁰⁵ The New York ordinance was preceded by a massive report justifying the ordinance. See COMMISSION ON BUILDING DISTRICTS AND RESTRICTIONS, FINAL REPORT (New York, June 2, 1916). That Report stated:

With some eight billions already invested in New York City real estate and the certainty of added billions in the coming years, a plan of city building that will end to conserve and protect property values becomes of vital importance not only to individual owners but to the community as a whole. Why not protect the areas as yet unspoiled and insure that the hundreds of millions that shall be spent in the improvement of real estate in the coming years shall contribute to the solid and permanent upbuilding of

this great city. Permanence and stability can be secured only by a far-sighted building plan that will harmonize the private interests of owners and the health, safety and convenience of the public. *Id.* at 14. *See id.* at 13: “Through haphazard construction and invasion by inappropriate uses the capital value of large areas have been greatly impaired. The destruction of capital value, not only in the central commercial and industrial section of Manhattan, but also throughout the residential sections of the five boroughs, has reached huge proportions. It does not stop with the owners in the areas immediately affected, but is reflected in depressed values throughout the city.” *Id.* at 13-14.

James Metzenbaum, Euclid’s lawyer, took pains to acquire bound copies of this Report (as well as of its 1913 prequel) to distribute to the Justices of the Supreme Court. Metzenbaum sent the Reports to the Clerk and noted that “I am particularly anxious that Justice Sutherland should have a copy of either the 1913 or the 1916 Report.” TOLL, *supra* note 696, at 239. The Clerk confirmed to Metzenbaum that he had complied with his request. *Id.* at 240.

⁷⁰⁶ *Id.* at 6.

⁷⁰⁷ *Id.* at 6-11, 20.

⁷⁰⁸ *Id.* at 9. The Report stressed the “provision of light and air,” the minimization of “nervous disorders and troubles,” and the prevention of “street accidents.” *Id.* at 9-12. The Report claimed that “The decline in property value . . . is merely an economic index of the disregard of essential standards of public health, safety, and convenience in building development.” *Id.* at 14. The Report emphasized that “The protection of the home environment is vital to the welfare of the state. It needs no argument to demonstrate that a business or industrial street does not furnish the most favorable environment for a home. Quiet is a prime requisite.” *Id.* at 20. It decried “congested tenement” districts, noting that while “the population of the city is largely recruited from the country, the city’s criminal population is largely bred right within its own congested centers.” *Id.* at 21-22. The Report also discussed the relationship between zoning and moral uplift:

The moral influences surrounding the homes are of the greatest importance. The sordid atmosphere of the ordinary business street is not a favorable environment in which to rear children. Immediate and continual proximity to the moving picture show, dance hall, pool room, cigar store, saloon, candy store and other institutions for the creation and satisfaction of appetites and habits is not good for the moral development of child. Influences and temptations resulting from the proximity of such business to the homes may affect seriously the morals of the youth of the community. Under such conditions it is difficult to cultivate the ideals of life that are essential to the preservation of our civilization.

Id. at 22.

⁷⁰⁹ Newman F. Baker, *Zoning Legislation*, 11 CORNELL LAW REVIEW 164, 164 (1926).

⁷¹⁰ TOLL, *supra* note 696, at 188. *See, e.g., The Remarkable Spread of Zoning in American Cities*, 25 THE AMERICAN CITY MAGAZINE 456 (No. 6) (December 1921). By 1929 there were “754 cities, towns and villages, with a total population of 37,000,000” that had “the protection afforded by zoning regulations.” *Zoning Laws Grow in Popularity*. 15 ABAJ 328 (1929). *See Zoning Legislation During 1928-1929*, 16 ABAJ 411 (1930).

⁷¹¹ The only lawyer on the committee was Edward M. Bassett, who was known as the “father of zoning” and who had been the chair of the New York Commission that produced the 1916 Report. Revell, *supra* note 702, at 50, 57.

⁷¹² ADVISORY COMMITTEE ON ZONING, A STANDARD STATE ZONING ENABLING ACT (Washington D.C.: Government Printing Office 1924). The Act was first issued in mimeographed form in August 1922. It was first printed in 1924. The text of the 1924 Act may be found at https://archive.org/stream/standardstatezon05bass/standardstatezon05bass_djvu.txt.

⁷¹³ THE ADVISORY COMMITTEE ON ZONING, A ZONING PRIMER (Washington D.C.: Government Printing Office 1922). The pamphlet stressed that zoning prevents blight and helps ensure that “property values become more stable, mortgage companies . . . more ready to lend money.” *Id.* at 2. Zoning “prevents an apartment house from becoming a giant airless hive, housing human beings like crowded bees.” *Id.* It stressed the need for standardization:

We know what to think of a household in which an undisciplined daughter makes fudge in the parlor, in which her sister leaves soiled clothes soaking in the bathtub, while father throws his muddy shoes on the stairs, and little Johnny makes beautiful mud pies on the front steps.

Yet many American cities do the same sort of thing when they allow stores to crowd in at random among private dwellings, and factories and public garages to come elbowing in among neat retail stores or well-kept apartment houses. Cities do not better when they allow office buildings so tall and bulky and so closely crowded that the lower floors not only become too dark and unsatisfactory for human use but for that very reason fail to earn a fair cash return to the individual investors

It is this stupid, wasteful jumble which zoning will prevent and gradually correct.

Id. at 1.

⁷¹⁴ “In less than a month and a half . . . the Commerce Department had distributed over 25,000 copies” of the *Primer*. Ruth Knack, Stuart Meck, and Israel Stollman, *The Real Story Behind the Standard Planning and Zoning Acts of the 1920s* LAND USE LAW (February 1996), at 6. See Thoeodora Kimball, *Survey of City and Regional Planning in the United States, 1922*, 13 LANDSCAPE ARCHITECTURE MAGAZINE 122, 123,-24 (No. 2) (January 1923) (“The *Zoning Primer*, issued by Secretary Hoover’s Advisory Committee on Zoning . . . has probably been circulated more widely than any previous city planning publicity leaflet.”); Thomas H. Reed, *City Planning*, 17 AMERICAN POLITICAL SCIENCE REVIEW 430, 431 (1923). Bettman referred to Hoover’s work in his brief, and included extracts from the *Primer* in his amicus brief in *Euclid*. Brief on Behalf of the National Conference on City Planning, the Ohio State Conference on City Planning, the National Housing Association and the Massachusetts Federal of Town Planning Boards, at 42, 133. See *id.* at 120.

⁷¹⁵ Gordon Whitnall, *History of Zoning*, 155 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 1, 12 (1931) (Part II).

⁷¹⁶ Herbert Hoover, *Foreword*, in ADVISORY COMMITTEE ON ZONING, A STANDARD STATE ZONING ENABLING ACT (Washington D.C.: Government Printing Office 1926), at iii & n.1. As of September 1921, “only 48 cities and towns, with less than 11,000,000 inhabitants, had adopted zoning ordinances.” *Id.* See Joseph P. Chamberlain, *Zoning Progress*, 15 ABAJ 535 (1929). On Hoover’s involvement with the zoning question, see Richard H. Chused, *Euclid’s Historical Imagery*, 51 CASE WESTERN RESERVE LAW REVIEW 597, 598-600 (2001).

⁷¹⁷ Transcript of Record, *supra* note 698, at 11.

⁷¹⁸ Randle, *supra* note 696, at 31, 34-35, 40-42. Westenhaver had also been law partners with Frederic C. Howe, as well as Harry and James. R. Garfield. Westenhaver had presided over the trial of Eugene Debs for violating the Espionage Act of 1917. *Id.* at 31.

⁷¹⁹ 260 U.S. 393 (1922).

⁷²⁰ *Ambler Realty Co. v. Village of Euclid*, 297 F. 307, 312 (N.D. Ohio 1924). Were the *Euclid* ordinance a legitimate exercise of the police power, it could reduce the value of *Ambler*’s property without compensating it. Since Westenhaver characterized the zoning ordinance as instead a taking, *Euclid* owed *Ambler* market damages for the reduced value of its land. In *Mahon*, Holmes had held:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.

260 U.S. at 413.

⁷²¹ 297 F. at 313.

⁷²² 297 F. at 314.

⁷²³ Metzenbaum, *supra* note 700, at 75. Prior to Westenhaver's opinion, the supreme courts of New York, Minnesota, Louisiana and Kansas had ruled in favor of zoning, but the supreme courts of Texas, New Jersey, and Missouri had held them unconstitutional, either under federal or state constitutional law. By the time *Euclid* was argued at the Court, the supreme courts of California, Wisconsin, Massachusetts, Ohio and Illinois had also affirmed the constitutionality of zoning, but the Supreme Court of Maryland had come out against it. The Maryland Court of Appeals had held that even though "[w]ithin the last few years a veritable flood of so-called 'zoning' legislation has swept over the country," "the power to hold, use, and enjoy property" could not "restricted or taken away by the state under the guise of the police power for purely aesthetic reasons or for any such elastic and indeterminate object as the general prosperity without compensation." *Goldman v. Crowther*, 128 A. 50, 55, 57 (Md. 1925). For a discussion of the Maryland decision, see Joshua Gordon, *A Euclid-Turn: R.B. Construction Co. v. Jackson and the Zoning of Baltimore*, 22 THE MARYLAND HISTORIAN 26 (No. 1) (Spring/Summer 1991).

⁷²⁴ ROBERT AVERILL WALKER, *THE PLANNING FUNCTION IN URBAN GOVERNMENT* 11-12, 77 (2nd ed., Chicago: University of Chicago Press 1950). The Conference was formed out of an alliance among the American Institute of Architects, The American Society of Landscape Architects, the American Civic Association, and the National Conference of Charities and Corrections. The Conference was initially associated more with the impulse for city planning, and in particular with the City-Beautiful Movement, than with the zoning movement. (Sometimes zoning ordinances were connected to comprehensive city plans, and sometimes they were not. In *Euclid's* case, the zoning ordinance was not the product of a comprehensive city plan.)

⁷²⁵ Brief on Behalf of the Appellants. For the story of Metzenbaum's tireless involvement in the case, see JAMES METZENBAUM, *THE LAW OF ZONING* 108-22 (New York: Baker, Voorhis and Co., 1930).

⁷²⁶ Brief on Behalf of the National Conference on City Planning, the Ohio State Conference on City Planning, the National Housing Association and the Massachusetts Federal of Town Planning Boards, at 13-23. The irony, of course, was that Bettman disapproved of the *Euclid* ordinance. See *supra* note 702.

⁷²⁷ Taking his cue from Westenhaver, Baker spent two pages of his brief invoking *Pennsylvania Coal Co. v. Mahon*. Brief and Argument for Appellee, at 53-54. Bettman sought to distinguish *Mahon* on the grounds that "the statute involved in that case is utterly different from and remote in kind, character and degree from a zoning law or ordinance. In that case the statute destroyed, not regulated, but destroyed a property title or interest expressly created by and reserved in a deed. The right of the mining company to mine coal was created by specific and express deeds and the statute expressly abolished that right. . . . No property or contract right created by deed or other instrument is here in any respect abolished, suppressed, destroyed or even regulated. The property rights asserted are simply those which inhere generally in all owners of land; and it is axiomatic that all property is held subject to the general right of the public to regulate its use for the promotion of public health, safety, convenience, welfare. Zoning regulations are quite free from and outside of the scope of the *Pennsylvania Coal Company* case, in which specified property interests created by contract were destroyed by the statute." Brief on Behalf of the National Conference on City Planning, the Ohio State Conference on City Planning, the National Housing Association and the Massachusetts Federal of Town Planning Boards, at 12.

⁷²⁸ "Appellee's attorneys constantly refer to aesthetic considerations and the promotion of beauty; seeking, apparently, to give the impression that the promotion of aesthetic values is the chief purpose of the creation of residential districts Zoning does aim to improve the good order of the cities, that is the general orderliness, which is perhaps, what appellee's attorneys have in mind. That is, however, something quite different from the artistic or the beautiful The essential object of promoting what might be called orderliness in the lay-out of cities is not the satisfaction of taste or aesthetic desires, but rather the promotion of those beneficial effects upon health and morals which come from living in orderly and decent surroundings. When we put the furnace in the cellar rather than in the living room, we are not actuated so much by dictates of good taste or aesthetic standards, as by the conviction that the living room will be a healthier place in which to live and the house a more generally healthful place if the furnace and the gas range and the shop, if there be one, and the other industrial, so to speak, features of the house are kept out of the living room and the sleeping rooms and the dining room." Brief on Behalf of the National Conference on City Planning, the Ohio State Conference on City Planning, the National Housing Association and the Massachusetts Federal of Town Planning Boards, at 28-29.

⁷²⁹ Brief on Behalf of the National Conference on City Planning, the Ohio State Conference on City Planning, the National Housing Association and the Massachusetts Federal of Town Planning Boards, at 23-24. In Bettman's words, although zoning is not "restricted to or identical with nuisance regulation," it nevertheless "represents no radically new type of property regulation, but merely a new application of sanctioned traditional methods for sanctioned traditional purposes." *Id.* at 26. Remarkably, Metzenbaum said of this argument: "We wish here to advert to the brief filed by the National conference on City Planning, as *Amici Curiae*. With no intention of criticism and with a fitting respect for this brief, the Village nevertheless feels that in defense of its own position it does not wish this brief, like its predecessor in Trial Court below, to prejudice any of the rights of the Village, for (a) the Village earnestly finds itself unable to subscribe to several of the doctrines urged in this brief just as they were urged in the Trial Court, and (b) in addition thereto the Village--having studiously refrained, from resting upon citations of so-called 'nuisance' and 'semi-nuisance' cases as supporting zoning ordinances--the Village can not conscientiously subscribe to the citation of such cases in the brief of the *Amici Curiae*." Brief on Behalf of the Appellants On Rehearing, at 42-43. *See* Power, *Advocates at Cross-Purposes*, *supra* note 696, at 80.

⁷³⁰ WALKER, *supra* note 724, at 78.

⁷³¹ JOURNAL OF THE SUPREME COURT OF THE UNITED STATES (October Term 1925), at 171. On January 10, Taft had written his daughter that "Sutherland has concluded to give up three weeks of this present session to seeking health in the South because of his blood pressure. He is our colleague from Utah and one of the strongest and ablest men we have. We are very anxious to get him away in order that he may not break himself down, as he most certainly would if he remained. We hope to have him back in March." WHT to Mrs. Frederick J. Manning (January 10, 1926) (Taft papers). On January 15, Sutherland had written Taft from Charleston, South Carolina, to say that "I think I am feeling better and that my blood pressure has abated. The air is good and it is not too cold, though far from being tropical. Shall stick out the three weeks, though I'd rather be in Court. I miss the daily contact with you all more than I can say." GS to WHT (January 15, 1926). Taft replied the next day, "I read your word to the Brethren. They all send love to you. We miss you but agree you are where you ought to be." Taft added a postscript in large handwriting, "Don't Bother. It is worry that hurts." WHT to GS (January 16, 1926) (Sutherland papers). *See* LDB to GS (January 20, 1926) (Sutherland papers) ("We miss you very much."). On January 20, Sutherland wrote Taft that "I see no reason why I should not be in good form after I get back, for the remainder of the term. I feel impatient and disgusted with myself, but am trying to accept it philosophically." GS to WHT (January 20, 1926) (Taft papers). Sutherland wrote Taft on January 25 that "We expect to be back in Washington on Tuesday, February 2nd." GS to WHT (January 25, 1926) (Taft papers). Three days later he added "I am feeling 100% better and am anxious to get back." GS to WHT (January 28, 1926) (Taft papers). On February 1, Taft wrote his wife saying that "I had a note from Mrs. S saying that they had had a pleasant stay and she thought that the vacation had done him good. But she said he was very impatient to get back and get to work. Well I have given him one important case and that is all he has. He can't overload himself with work therefore." WHT to Helen H. Taft (February 1, 1926) (Taft papers).

⁷³² METZENBAUM, *supra* note 725, at 117-18. Because of a freak snowstorm, Metzenbaum was forced to send his telegram by tossing it from a moving train.

⁷³³ For an excellent analysis of the docket book entries on *Euclid*, *see* Cushman, *supra* note 438, at 392-94.

⁷³⁴ Stone Docket Book.

⁷³⁵ Sutherland's position must be reconciled with a memorandum he had sent Taft in April 1925 about the upcoming argument of *New York ex rel. Rosevale Realty Co. v. Kleinhert*, 268 U.S. 646 (1925), which involved the constitutionality of a zoning ordinance. Although the Court ultimately chose to dismiss the case on procedural grounds, Sutherland had written Taft that "[i]n the modern development of cities and towns, zoning laws are universally recognized as necessary and proper. The question presented by the law under review is a matter of degree, and I am not prepared to say that the judgment of the local law-makers was arbitrarily exercised." GS to WHT (April 1925) (Taft papers).

⁷³⁶ Brandeis had been intimately involved in an earnest but largely unsuccessful effort to create a city plan for Boston in 1909. MELL SCOTT, *AMERICAN CITY PLANNING SINCE 1890* 110-17 (Berkeley: University of California Press 1969). Stone was closely associated with the outlook of Hoover. Sanford would dissent the next year in *Tyson*.

⁷³⁷ According to WALKER, *supra* note 724, at 78, “It is understood that a divided court had decided against the validity of comprehensive zoning by one vote following the first hearing.” Walker does not reveal his sources. On May 22, George T. Simpson, who had filed an amicus brief in the case in support of Ambler, wrote Baker to say that this morning I had a talk with a man that had been the private secretary to Mr. Justice Brandeis, [and] who had just come from Washington. He is now practicing law here in Minneapolis and told me that he had had a conversation with Brandeis’s secretary, who told him that the order for the reargument in the Village of Euclid case came about by reason of the fact that the court was so closely divided that neither side dared to risk a vote.

Brandeis and Holmes certainly are in favor of this zoning business, McReynolds, Van Devanter and Butler opposed to it, with Taft an uncertain quantity, Stone a new member who was not fully conversant with the situation, and who desired more time that he may acquaint himself.

I got the impression from what he said that the reargument was made at Stone’s suggestion.
Quoted in Brooks, *supra* note 696, at 17.

⁷³⁸ Lawrence C. Gerckens, *Bettman of Cincinnati*, in *THE AMERICAN PLANNER: BIOGRAPHIES AND RECOLLECTIONS* (New York: Methuen 1983), at 134.

⁷³⁹ WALKER, *supra* note 724, at 78. Bettman had conservative credentials; he had worked in the Justice Department during the war and “had gained a reputation as ‘the man who put socialist Eugene Debs behind bars.’” Power, *supra* note 702, at 6.

⁷⁴⁰ Cushman, *supra* note 438, at 392.

⁷⁴¹ Stone Docket Book. Many years later McCormack wrote that “Justice Sutherland... was writing an opinion for the majority in Village of Euclid v. Ambler Realty Co., holding the zoning ordinance unconstitutional, when talks with his dissenting brethren (principally Stone, I believe) shook his convictions and led him to request a reargument, after which he changed his mind and the ordinance was upheld.” Alfred McCormack, *A Law Clerk’s Recollections*, 46 *COLUMBIA LAW REVIEW* 710, 712 (1946). See note 735 *supra*. We know that Stone thought *Euclid* to be exceedingly significant. Four days after the opinion’s announcement, he wrote his son that “We had some opinions of great importance in the economic and political life of the nation. The Court, by divided vote, upheld the Ohio zoning ordinance. When one considers how important the regulation of the distribution of population in urban communities is going to be in the next twenty years, it is, I think, difficult to over estimate the importance of this decision.” HFS to Lauson Stone (November 26, 1926) (Stone papers).

⁷⁴² WOLF, *supra* note 696, at 76. Metzenbaum, *supra* note 700, at 75.

⁷⁴³ “Had the Supreme Court’s decision been adverse to zoning,” acidly remarked *The Literary Digest*, “its effect might have been very upsetting, for in the past ten years 500 municipalities in the United State have followed the lead of New York and adopted zoning ordinances.” *Now We Can Zone Our Cities*, 91 *THE LITERARY DIGEST* 14 (No. 11) (December 11, 1926).

⁷⁴⁴ On the influence of Bettman’s brief on Sutherland’s opinion, see Tarlock, *supra* note 702, at 8.

⁷⁴⁵ Corwin, *supra* note 11, at 21. See Wolf, *supra* note 697, at 255 (“[I]n many ways, Euclidean zoning is a quintessential Progressive concept,” in part because of “the reliance on experts to craft and enforce a regulatory scheme”).

⁷⁴⁶ Brief on Behalf of the National Conference on City Planning, the Ohio State Conference on City Planning, the National Housing Association and the Massachusetts Federal of Town Planning Boards, at 37.

⁷⁴⁷ Note, *Constitutional Regulation of Fees of Employment Agencies*, 14 *CORNELL LAW QUARTERLY* 75, 80 n.36 (1928); see also Robert E. Cushman, *Constitutional Law in 1926-1927*, 22 *AMERICAN POLITICAL SCIENCE REVIEW* 70, 94 (February 1928) (“The opinion of Mr. Justice Sutherland embodies a most liberal attitude toward the states’ police power. In fact, it is hard to realize that he is the same justice who wrote the majority opinions in Tyson and

Bro. v. Banton and the Minimum Wage Case.”). George T. Simpson, who had filed an amicus brief supporting Ambler on behalf of the American Wood Products Co., the Northwestern Feed Co., Lyle Culvert & Road Equipment Co., wrote Baker that “Frankly few of us here can understand the attitude of the court, for I am convinced that if this opinion stands in its present nakedness, the property interests of this nation, on which, I think, perhaps, the whole court would agree the future welfare of the nation depends, are in danger. George Sutherland is generally understood to be a property man. I know all about his appointment, and, to have George Sutherland write an opinion of this kind makes a fellow stop and think.” Quoted in Brooks, *supra* note 696, at 21. Baker himself wrote that

Of all the people I know, Mr. Justice Sutherland seemed to me the unlikeliest to write such an opinion as the one he handed down. When he was president of the American Bar Association in 1917, he made a presidential address at the annual meeting in Saratoga Springs in which he said, “It is not enough, however, that we should continue free from the despotism of a supreme autocrat. We must keep ourselves free from the petty despotism which may come from the vesting of final discretion to regulate individual conduct in the hands of lesser officials.” It he has not subjected us to the petty despotism of lesser officials in this opinion, I confess I do not see how it could be done.

Quoted in Brooks, *supra* note 696, at 20. Later in the 1926 Term Sutherland explicitly upheld the system of variances that has made zoning, in form so abstract and general, so particular in practice. See *Gorieb v. Fox*, 274 U.S. 603, 607 (1927).

⁷⁴⁸ Charles M. Haar, *Reflections on Euclid: Social Contract and Private Purpose*, in *ZONING AND THE AMERICAN DREAM*, *supra* note 696, at 334.

⁷⁴⁹ Brief and Argument for Appellee, at 15. Baker argued that the police power “must be reasonably exercised, and that a municipality may not, under the guise of the police power, arbitrarily divert property from its appropriate and most economical uses or diminish its value by imposing restrictions which have no other basis than the momentary taste of the public authorities.” *Id.* at 42.

⁷⁵⁰ *Id.* at 82-83.

⁷⁵¹ Sutherland, *Principle or Expedient*, *supra* note 299, at 197. “We may temporarily divert the small tributaries of the Mississippi from their natural channels in the uplands,” Sutherland continued, “but who is so vain as to attempt to control the forces of gravity which will finally bring their waters down to the accustomed level or change the course of the great river itself in its majestic journey to the sea?” *Id.* Contrast this passage with the remarkably firm affirmation of the importance of political will over natural market forces in *Euclid* itself:

It is said that the village of Euclid is a mere suburb of the city of Cleveland; that the industrial development of that city has now reached and in some degree extended into the village, and in the obvious course of things will soon absorb the entire area for industrial enterprises; that the effect of the ordinance is to divert this natural development elsewhere, with the consequent loss of increased values to the owners of the lands within the village borders. But the village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit, within the limits of the organic law of its creation and the state and federal Constitutions. Its governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined, not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitely fixed lines. If it be a proper exercise of the police power to relegate industrial establishments to localities separated from residential sections, it is not easy to find a sufficient reason for denying the power because the effect of its exercise is to divert an industrial flow from the course which it would follow, to the injury of the residential public, if left alone, to another course where such injury will be obviated.

Euclid, 272 U.S. at 389-90.

⁷⁵² *Euclid*, 272 U.S. at 388-89.

⁷⁵³ See text at *supra* notes 600-601.

⁷⁵⁴ Compare with *Weaver v. Palmer Bros. Co.*, 270 U.S. 402 (1926), and *Schlesinger v. Wisconsin*, 270 U.S. 230 (1926), and text at *supra* notes 272-289.

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It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable. But where the equitable remedy of injunction is sought, as it is here, not upon the ground of a present infringement or denial of a specific right, or of a particular injury in process of actual execution, but upon the broad ground that the mere existence and threatened enforcement of the ordinance, by materially and adversely affecting values and curtailing the opportunities of the market, constitute a present and irreparable injury, the court will not scrutinize its provisions, sentence by sentence, to ascertain by a process of piecemeal dissection whether there may be, here and there, provisions of a minor character, or relating to matters of administration, or not shown to contribute to the injury complained of, which, if attacked separately, might not withstand the test of constitutionality. . . . Under these circumstances, therefore, it is enough for us to determine, as we do, that the ordinance in its general scope and dominant features, so far as its provisions are here involved, is a valid exercise of authority, leaving other provisions to be dealt with as cases arise directly involving them.

Euclid, 272 U.S. at 395-97.

⁷⁵⁶ 277 U.S. 183 (1928).

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An inspection of a plat of the city upon which the zoning districts are outlined, taken in connection with the master's findings, shows with reasonable certainty that the inclusion of the locus in question is not indispensable to the general plan. . . . The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare. . . . Here, the express finding of the master, already quoted, confirmed by the court below, is that the health, safety, convenience, and general welfare of the inhabitants of the part of the city affected will not be promoted by the disposition made by the ordinance of the locus in question.

Nectow, 277 U.S. at 188. See *Remarks of Alfred Bettman*, in PLANNING PROBLEMS OF TOWN, CITY AND REGION: PAPERS AND DISCUSSIONS AT THE TWENTY-FIRST NATIONAL CONFERENCE ON CITY PLANNING (Philadelphia: Wm F. Fell Co. 1929), at 98 ("If the doctrine in the Cambridge case [is] that each part of a zoning ordinance must demonstrate its relation to the health and so forth of the immediate neighborhood, I think we are in for trouble.")

⁷⁵⁸ See *Zahn v. Board of Public Works of City of Los Angeles*, 274 U.S. 325, 327 (1927); *Gorieb v. Fox*, 274 U.S. 603, 609-10 (1927). Sutherland, despite the opinion below, never so much as mentioned the possibility that *Euclid*'s zoning regulations might constitute an unconstitutional confiscation of property that would require compensation. Sutherland never cited or discussed *Pennsylvania Coal Co. v. Mahon*.

⁷⁵⁹ *Adkins*, 261 U.S. at 560.

⁷⁶⁰ *Adkins*, 261 U.S. at 559-60.

⁷⁶¹ *Euclid*, 272 U.S. at 394. In a superb example of a Brandeis brief, Bettman had attached to his amicus brief an appendix with 74 pages of expert testimony and opinion.

⁷⁶² *Euclid*, 272 U.S. at 394-95.

⁷⁶³ One regional planning conference in Pasadena "opened with a paper called 'The Declaration of Interdependence.'" Kimball, *supra* note 714, at 127. The conference was "chiefly significant for the recognition accorded the principle of community interdependence." Thomas H. Reed, *City Planning*, 17 AMERICAN POLITICAL SCIENCE REVIEW 430, 431 (1923).

⁷⁶⁴ Baker, *supra* note 709, at 166. See Samuel Price Wetherill, Jr., *Public Guidance in Urban Land Utilization*, 148 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 199, 202 (March 1930); CHESTER C. MAXEY, AN OUTLINE OF MUNICIPAL GOVERNMENT 9 (Garden City: Doubleday, Page & Co. 1924 ("[I]n the city economic independence does not exist, except as a fiction in the minds of people whom it does not please to admit

that the interdependence of modern city dwellers has forever vitiated the old individualistic conception of governmental functions.”).

⁷⁶⁵ See *supra* note 705.

⁷⁶⁶ “Paradoxically,” writes Charles Haar, “the driving political and economic force that catapulted zoning forward was the real estate industry.” Haar, *supra* note 748, at 341.

⁷⁶⁷ Brief on Behalf of the National Conference on City Planning, the Ohio State Conference on City Planning, the National Housing Association and the Massachusetts Federal of Town Planning Boards, at 126-27,

⁷⁶⁸ In 1916, the distinguished Frederick Law Olmsted, son of the designer of New York’s Central Park, had proclaimed:

City planning is the attempt to exert a well-considered control on behalf of the people of a city over the development of their physical environment as a whole. . . .

The new and significant fact for which this new term, "city planning," stands is a growing appreciation of a city's organic unity, of the interdependence of its diverse elements, and of the profound and inexorable manner in which the future of this great organic unit is controlled by the actions and omissions of today.

We are learning how, in the complex organism of a city, anything we decide to do or leave undone may have important and inevitable consequences wholly foreign to the motives immediately controlling the decision, but seriously affecting the welfare of the future city; and with our recognition of this is growing a sense of social responsibility for estimating these remoter consequences and giving them due weight in reaching every decision.

Frederick Law Olmsted, *Introduction*, in *CITY PLANNING: A SERIES OF PAPERS PRESENTING THE ESSENTIAL ELEMENTS OF A CITY PLAN* (John Nolen, ed., New York: D. Appleton and Co. 1916). In his amicus brief, Bettman quoted a letter sent by Hoover to the President of the National Conference on City Planning: “The fact is constantly brought before me as Secretary of Commerce that lack of city planning and zoning constantly hampers commerce and industry in their basic function of serving mankind. This is particularly true in connection with housing and general living conditions, while the waste and inefficiency in transportation, and losses through bad location of structures are a constant drag on our resources, and tend to retard increases in living standards.” Brief on Behalf of the National Conference on City Planning, the Ohio State Conference on City Planning, the National Housing Association and the Massachusetts Federal of Town Planning Boards, at 34.

⁷⁶⁹ Brief on Behalf of the National Conference on City Planning, the Ohio State Conference on City Planning, the National Housing Association and the Massachusetts Federal of Town Planning Boards, at 117 (quoting John Ihlder, *City Zoning is Sound Business*). In Ihlder’s words, “Zoning has a sane, common-sense purpose—so to guide the development of a city's area that each part will be put to the most effective use and the whole community benefited by the substitution of system and order for chaos and disorder.” “What the regulations do is to prevent one owner from injuring his neighbor by erecting a store or a factory or a public garage in a residence district years before there is any prospect that other stores or factories or garages would come into the neighborhood. In this way the probable life of any building erected today will be greatly lengthened, and the builder will be justified in investing a larger amount in constructing a finer building.” “The zoning regulations . . . protect residence districts from . . . intrusion in order that men may feel greater assurance in investing their savings in things that build up family and social life.” *Id.* at 113-14, 116-17.

⁷⁷⁰ *Euclid*, 272 U.S. at 386-87.

⁷⁷¹ *Euclid*, 272 U.S. at 388.

⁷⁷² Sutherland, *Principle or Expedient*, *supra* note 299, at 207.

⁷⁷³ See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* 31-53, 70-80, 99, 101-08 (Cambridge: Harvard University Press 1977); Robert A. Williams, Jr., *Euclid’s Lochnerian Legacy*, in *ZONING AND THE AMERICAN DREAM*, *supra* note 696, at 278.

⁷⁷⁴ Nadav Shoked, *The Reinvention of Ownership: The Embrace of Residential Zoning and the Modern Populist Reading of Property*, 28 YALE JOURNAL ON REGULATION 91, 143 (2011).

⁷⁷⁵ *The Proposed Zoning Ordinance*, MINNEAPOLIS STAR TRIBUNE (March 31, 1924), at 6.

⁷⁷⁶ “[T]he primary objects of zoning are . . . not so much the protection of public health and safety, as the protection of the value and usefulness of urban land It is predicated upon a basic principle of urban land economics, that a certain conformity in use stabilizes and insures the value of land. . . . Zoning ordinances ore evidence of a legislative recognition of what is fast ripening into a new property right, which might be termed, a restrictive easement against what someone has called ‘illegitimate and unfair non-conformity’ in use of the adjoining or neighboring parcels. They recognize that a property owner has a right to expect the municipality in some degree to protect his property from the blighting effect of non-conforming uses.” Edward D. Landels, *Zoning: An Analysis of Its Purposes and Legal Sanctions*, 17 ABAJ 163, 165 (1931). See Bertram H. Saunders, *Zoning: What Can Be Done for It Where the Courts are Unfavorable?* 34 THE AMERICAN CITY MAGAZINE 237, 237 (No. 3) (March 1926) (“[T]o-day in our cities population rises like a flood. Gambling in real estate grows to enormous proportions and overshadows the operations of the conservative broker. More and more the land is owned by men who will not own it to-morrow; by men whose only interest in land is to crowd every available foot of it with whatever structures will yield the highest and quickest profit; by men who make commerce of neighborhood amenities, and who care nothing for the detrimental community effects of their activities.”); *Protection Rather Than Restriction Is the Strong Argument for Zoning*, 37 THE AMERICAN CITY MAGAZINE 651 (No. 5) (November 1927);

⁷⁷⁷ David Glassberg, *History and The Public: Legacies of the Progressive Era*, 73 JOURNAL OF AMERICAN HISTORY 957, 975 (1987). Michael Kammen has usefully stressed the “contrapuntal impulses” characteristic of the twenties, when Americans were “increasingly preoccupied with retrospection and recovering the past,” “usually by fabricating a history of consensus,” and at the same time increasingly committed to science, accurate history, and “debunking.” MICHAEL KAMMEN, *MYSTIC CHORDS OF MEMORY: THE TRANSFORMATION OF TRADITION IN AMERICAN CULTURE* 481-83 (Vintage: New York 1993).

⁷⁷⁸ ROBERT H. WIEBE, *supra* note 19, at xiv.

⁷⁷⁹ Shoked, *supra* note 774, at 142-43 (“Euclid reconnected the New World to the Old. . . . Euclid placed the right to security in landholding, to quiet enjoyment of the homestead, at the forefront—at the expense of free exploitation of property and commercial expansion.”).

⁷⁸⁰ Martha A. Lees, *Preserving Property Values? Preserving Proper Homes? Preserving Privilege?: The Pre-Euclid Debate Over Zoning for Exclusively Private Residential Areas, 1916-1926*, 56 UNIVERSITY OF PITTSBURGH LAW REVIEW 367 (1994).

⁷⁸¹ 297 F. at 316. Westenhaver cited *Buchanan v. Warley*, 245 U.S. 60 (1918), in which the White Court had invalidated an ordinance “districting and restricting residential blocks so that the white and colored races should be segregated.” 297 F. at 312. He reasoned that the effect of Euclid’s zoning ordinance would be similar. “The blighting of property values and the congesting of population, whenever the colored or certain foreign races invade a residential section, are so well known as to be within the judicial cognizance.” *Id.* at 313.

⁷⁸² ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* § 178 (Chicago: Callaghan & Co. 1904). See *Quintini v. City of Bay St. Louis*, 64 Miss. 483, 490 (1887) (“The law can know no distinction between citizens because of the superior cultivation of the one over the other. It is with common humanity that courts and legislatures must deal; and that use of property which in all common sense and reason is not a nuisance to the average man cannot be prohibited because repugnant to some sentiment of a particular class.”).

⁷⁸³ Transcript of Record, at 109-122; Randle, *supra* note 696, at 38-40.

⁷⁸⁴ Robert F. Whitten, *Social Aspects of Zoning*, 48 THE SURVEY 418, 418-19 (No. 10) (June 15, 1922). “My own observation,” Whitten continued, “is that wherever you have a neighborhood made up of people largely in the same economic status, you have a neighborhood where there is the most independence of thought and action and the most intelligent interest in the neighborhood, city, state and national affairs. . . . The so-called industrial classes will

constitute a more intelligent and self-respecting citizenship when housed in homogenous neighborhoods than when housed in areas used by all the economic classes.” *Id.* at 418-19.

In 1922, Whitten had proposed a zoning plan for Atlanta that created three residential districts: white, colored and undetermined. Bruno Lasker, *The Atlanta Zoning Plan*, 48 *THE SURVEY* 114, 114 (No. 4) (April 22, 1922). Bruno Lasker observed that Whitten’s “Atlanta plan is the first which makes a distinction concerning type of residents as well as type of residence. To judge from the support it has received from the local newspapers and organizations of citizens, it seems to answer the prevailing desire of the white Atlantans—the more so since the emphasis in the commission’s report and in the publicity supporting it has been laid entirely to the protection of property values as the main purpose of zoning. But as a precedent it opens up the possibility of new zoning ordinances embodying restrictions against immigrants or immigrants of certain races, against persons of certain occupations, political or religious affiliations, or modes of life.” *Id.* at 115. Even though Whitten’s plan for Atlanta was eventually struck down by the Georgia Supreme Court, *see Bowen v. City of Atlanta*, 159 Ga. 145 (1924), “Atlanta officials continued to use the racial zoning map to guide its planning for decades to come.” RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 46 (New York: Liveright Publishing Corp. 2017).

⁷⁸⁵ TOLL, *supra* note 696, at 29. In New York, the Fifth Avenue Merchants’ Association had demanded zoning because “hordes of immigrant labourers violated the ambiance in which luxury retailing prospered.” Power, *supra* note 702, at 3.

⁷⁸⁶ Ernst Freund, *Some Inadequately Discussed Problems of the Law of City Planning and Zoning*, 24 *ILLINOIS LAW REVIEW* 135, 137 (1929).

⁷⁸⁷ *Id.* at 146-47.

⁷⁸⁸ FRANK J. POPPER, *THE POLITICS OF LAND-USE REFORM* 54-55 (Madison: University of Wisconsin Press 1981). *See* JESSICA TROUNSTINE, *SEGREGATION BY DESIGN: LOCAL POLITICS AND INEQUALITY IN AMERICAN CITIES* (Cambridge: Cambridge University Press 2018).

⁷⁸⁹ *Euclid*, 272 U.S. at 390.

⁷⁹⁰ *Id.* *See* Alfred Bettman, *The Present State of Court Decisions on Zoning*, 2 *CITY PLANNING* 24, 25 (January 1926) (“The single-family district from which the apartment house or multiple-family structure is excluded is the feature about whose validity the most anxiety is felt.”).

⁷⁹¹ *Euclid*, , 272 U.S. at 394-95.

⁷⁹² Shoked, *supra* note 774, at 116. As of 1926, no court in the United States had ruled an apartment building to be a nuisance.

⁷⁹³ Chused, *supra* note 716, at 614.

⁷⁹⁴ *Buchanan v. Warley*, 245 U.S. 60 (1917). “Many border and southern cities ignored the *Buchanan* decision.” ROTHSTEIN, *supra* note 784, at 46. The Taft Court, however, invoked the authority of *Buchanan* to strike down a New Orleans ordinance that attempted to zone on the basis of race. *Harmon v. Tyler*, 273 U.S. 668 (1927).

⁷⁹⁵ Bruno Lasker, *The Issue Restated*, 44 *THE SURVEY* 278, 279 (No. 8) (May 22, 1920). Zoning “provided suburbs and other local government entities with a powerful tool to limit and define their areas on economic, social welfare, and (in practice and covertly) class and racial bases.” Randle, *supra* note 696, at 41. For the view that the maintenance of racial segregation was a conscious aim of Hoover’s zoning advisory committee, as well as of “city planners across the nation,” *see* ROTHSTEIN, *supra* note 784, at 51-54.

⁷⁹⁶ Six months before *Euclid*, in *Corrigan v. Buckley*, 271 U.S. 323 (1926), the Taft Court had refused constitutionally to prohibit the enforcement of private, racially-restrictive covenants. The year at *Euclid*, in *Gong Lum v. Rice*, 275 U.S. 78 (1927), the Taft Court upheld explicit southern racial segregation in education.

⁷⁹⁷ Lasker, *supra* note 795, at 279. There was available to Sutherland yet another explanation of the importance of preserving neighborhoods devoted single-family residences, which was the civic and social value of the American home. This perspective was most forcefully articulated by the California Supreme Court in 1925:

In addition to all that has been said in support of the constitutionality of residential zoning as part of a comprehensive plan, we think it may be safely and sensibly said that justification for residential zoning may, in the last analysis, be rested upon the protection of the civic and social values of the American home. The establishment of such districts is for the general welfare because it tends to promote and perpetuate the American home. It is axiomatic that the welfare, and indeed the very existence of a nation depends upon the character and caliber of its citizenry. The character and quality of manhood and womanhood are in a large measure the result of home environment. The home and its intrinsic influences are the very foundation of good citizenship, and any factor contributing to the establishment of homes and the fostering of home life doubtless tends to the enhancement not only of community life but of the life of the nation as a whole.

The establishment of single family residence districts offers inducements not only to the wealthy but to those of moderate means to own their own homes. With ownership comes stability, the welding together of family ties and better attention to the rearing of children. With ownership comes increased interest in the promotion of public agencies, such as church and school, which have for their purpose a desired development of the moral and mental make-up of the citizenry of the country. With ownership of one's home comes recognition of the individual's responsibility for his share in the safeguarding of the welfare of the community and increased pride in personal achievement which must come from personal participation in projects looking toward community betterment.

It is needless to further analyze and enumerate all of the factors which make a single family home more desirable for the promotion and perpetuation of family life than an apartment, hotel, or flat. It will suffice to say that there is a sentiment practically universal, that this is so. But few persons, if given their choice, would, we think, deliberately prefer to establish their homes and rear their children in an apartment house neighborhood rather than in a single home neighborhood.

Miller v. Board of Public Works of the City of Los Angeles, 195 Cal. 477, 492-94 (1925). *Euclid* does not adopt any of this rhetoric. Sutherland chose to justify residential zoning exclusively in terms of facially neutral factors like safety, health and financial stability.

⁷⁹⁸ *Adkins*, 261 U.S. at 546.

⁷⁹⁹ *Adkins*, 261 U.S. at 546.

⁸⁰⁰ *Chicago, Burlington, and Quincy Railroad Co. v. Iowa*, 94 U.S. 155, 161 (1876).

⁸⁰¹ *Munn v. Illinois*, 94 U.S. 113, 134 (1876).

⁸⁰² *Stone v. Farmers' Loan & Trust Co.*, 116 U.S. 307, 331 (1886).

⁸⁰³ 169 U.S. 466 (1898). See Edwin C. Goddard, *The Evolution of Cost of Reproduction as the Rate Base*, 41 HARVARD LAW REVIEW 564, 564 (1928).

⁸⁰⁴ *Smyth v. Ames*, 169 U.S. 466, 546-47 (1898).

⁸⁰⁵ CHARLES F. PHILLIPS, JR., *THE REGULATION OF PUBLIC UTILITIES: THEORY AND PRACTICE* 305-07 (Public Utilities Reports, Inc.: Arlington VA 1988).

⁸⁰⁶ "Fair value has been fixed with reference to some compound of contradictory considerations concocted by the alchemy of uncontrolled and changeful compromise." T.R. Powell, *Protecting Property and Liberty, 1922-1924*, 40 POLITICAL SCIENCE QUARTERLY 404, 407 (1925).

⁸⁰⁷ "It has long since become a commonplace of rate regulation that to judge the reasonableness of rates by the return they yield on the value of the property is to reason in a circle, for the value is the result of the rates charged." Robert L. Hale, *Political and Economic Review: Public Utility Valuation*, 9 ABAJ 392, 392 (1923). No one contended that the mere salvage value of railroads or utilities represented an accurate measure of their worth.

⁸⁰⁸ Henderson, *supra* note 92, at 1032. See James C. Bonbright, *The Breakdown of 'Present Value' As A Basis of Rate Control*, 14 PROCEEDINGS OF THE ACADEMY OF POLITICAL SCIENCE 75, 75 (May 1930).

⁸⁰⁹ “The whole doctrine of *Smyth v. Ames* rests upon a gigantic illusion. The fact which for twenty years the court has been vainly trying to find does not exist. ‘Fair value’ must be shelved among the great juristic myths of history, with the Law of Nature and the Social Contract. As a practical concept, from which practical conclusions can be drawn, it is valueless.” Henderson, *supra* note 92, at 1051. See Robert L. Hale, *Rate Making and the Revision of the Property Concept*, 22 COLUMBIA LAW REVIEW 209 (1922). Stone’s sympathy with this critique is evident in a letter that he wrote to Herbert Hoover in 1926: “You will find the articles by Henderson and Hale quite illuminating . . . and both point out what they regard as economic fallacies of the courts and [sic] determining what rates are confiscatory.” HFS to Herbert Hoover (December 14, 1926). See *West v. Chesapeake & Potomac Telephone Co. of Baltimore City*, 295 U.S. 662 689-90 (1935) (Stone, J., dissenting).

⁸¹⁰ For an illuminating discussion of the jurisprudential and intellectual controversies over ratemaking, see Stephen A. Siegel, *Understanding the Lochner Era: Lessons from the Controversy Over Railroad and Utility Rate Regulation*, 70 VIRGINIA LAW REVIEW 187 (1984).

⁸¹¹ WHT to Robert A. Taft (October 21, 1928) (Taft papers). When Robert L. Hale wrote Taft to point out the “vicious circle” that lay at the heart of the Court’s ratemaking cases, Robert L. Hale to WHT (March 28, 1927) (Taft papers), Taft replied, “I am sorry that I can not discuss with you what you think is a vicious circle in the reasoning of the majority of the court on this question. I am afraid that if I were to enter upon the question, I should have to give up my work on other cases in the Court. The question of rates is most difficult.” WHT to Robert L. Hale (April 1, 1927) (Taft papers).

⁸¹² OWH to Harold Laski (April 18, 1924), in 1 HOLMES-LASKI CORRESPONDENCE, *supra* note 27, at 610.

⁸¹³ OWH to Harold Laski (October 23, 1926), in 2 HOLMES-LASKI CORRESPONDENCE, *supra* note 548, at 887-88. In *Cedar Rapids Gas Light Co. v. City of Cedar Rapids*, 223 U.S. 655, 669-70 (1912), Holmes had basically conceptualized the problem of fair value not as a question of property, but as a question of the political bargain struck between government and its utilities: “An adjustment of this sort under a power to regulate rates has to steer between Scylla and Charybdis. On the one side, if the franchise is taken to mean that the most profitable return that could be got, free from competition, is protected by the 14th Amendment, then the power to regulate is null. On the other hand, if the power to regulate withdraws the protection of the Amendment altogether, then the property is nought. This is not a matter of economic theory, but of fair interpretation of a bargain. Neither extreme can have been meant. A midway between them must be hit.”

When Robert L. Hale sent Holmes his article arguing “that the Supreme Court should definitely repudiate *Smyth v. Ames* and all its brood,” Robert L. Hale to OWH (April 3, 1922) (Holmes papers), Holmes responded that “I share your skepticism in large part, although I do not feel driven some of the conclusions that I suppose to be yours.” See OWH to Robert L. Hale (April 6, 1922) (Holmes papers).

I think I showed that I understood the difficulty years ago but the problem that my father used to put to me as a little boy – What would happen if an irresistible encountered an immovable body – or its analogue sometimes meets us in the law without reducing us to despair. And if you should say so much the worse for the judges I should not agree.

Id. Hale answered with a call for “repudiating “*Smyth v. Ames* with all its progeny and starting afresh . . . charting the course between Scylla and Charybdis . . . by deciding consciously how close you want to sail to each, instead of pretending to steer straight for Scylla while escaping it only by tampering with the compass.” Robert L. Hale to OWH (April 8, 1922) (Holmes papers). Holmes replied with a twinkle: “Possibly your letter thinks me in need of more explanation of the seeming impasse than I am. If I ever have the pleasure of seeing you I will tell you the profound formula that I once whispered in Brandeis’ ear but I dare not write it. I hope that the time may come.” OWH to Robert L. Hale (April 10, 1922) (Holmes papers).

⁸¹⁴ WHT to Robert A. Taft (October 21, 1928) (Taft papers). For examples of Brandeis’s opinions in this area, see *Galveston Electric Co. v. City of Galveston*, 258 U.S. 388 (1922); *Georgia Ry. & Power Co. v. Railroad Commission of Georgia*, 262 U.S. 625 (1923); *Northern Pac. Ry. Co. v. Department of Public Works of Washington*, 268 U.S. 39 (1925). For examples of Butler’s opinions in this area, see *City of Paducah v. Paducah*

Ry. Co., 261 U.S. 267 (1923); Bluefield Waterworks & Improvement Co. v. public Service Comm'n of West Virginia, 262 U.S. 679 (1923); Banton v. Belt Line Ry. Corp., 268 U.S. 413 (1925); Board of public Utility Com'rs v. New York Telephone Co., 271 U.S. 23 (1926); McCardle v. Indianapolis Water Co., 272 U.S. 400 (1926); Aetna Ins. Co. v. Hyde, 275 U.S. 440 (1928); Railroad Comm'n of California v. Los Angeles Ry. Corp., 280 U.S. 145 (1929). For examples of McReynolds's opinions in this area, see Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Comm'n of Missouri, 262 U.S. 276 (1923); Ottinger v. Consolidated Gas Co. of New York, 272 U.S. 576 (1926); Pacific Gas & Electric Co. v. City and County of San Francisco, 265 U.S. 403 (1924); Brimstone R. & Canal Co. v. United States, 276 U.S. 104 (1928); Gilchrist v. Interborough Rapid transit Co., 279 U.S. 159 (1929); St. Louis & O'Fallon Ry. Co. v. United States, 279 U.S. 461 (1929). It is odd that Taft did not mention Sutherland in this context, for Sutherland authored many important ratemaking decisions. See, e.g., Brush Electric Co. v. City of Galveston, 262 U.S. 443 (1923); Ohio Utilities Co. v. Public Utilities Comm'n of Ohio, 267 U.S. 359 (1925); Smith v. Illinois Bell Telephone Co., 270 U.S. 587 (1926); United Railways & Electric Co. of Baltimore v. West, 280 U.S. 234 (1930).

⁸¹⁵ On Butler's strong views before coming to the Court, see Pierce Butler, "Valuation of Railway Property for Purposes of Rate Regulation," 23 JOURNAL OF POLITICAL ECONOMY 17 (1915). Butler denied that the valuation of railroad property was caught in a vicious circle. See *supra* note 808. Butler believed that "the ascertainment of the value of a thing, whether it be a vacant lot or a railroad property, is the determination of a fact, and that the same property cannot be of two or more different values at one time." "Valuation of Railway Property for Purposes of Rate Regulation," at 17. Yet Butler was notably vague about how the "fact" of value of railroad properties was to be ascertained. He was clear that "the same principles govern valuation of railroad property for the purpose of rate regulation as apply in the case of condemnation of private property for public use." *Id.* at 23 [Emphasis in the original]. But, as Butler was the first to argue, value in ordinary takings cases were to be determined by the competitive market. See *supra* note 176. The absence of an analogous competitive market for railroads, precisely because of the presence of ratemaking, rendered it unclear how Butler imagined that he had escaped the vicious circle. Butler also held that it was "a mistake to suppose that railroad rates are, or as a practical matter can be, made or based upon the value of the property used to render the service." *Id.* at 19. Yet he was also clear that rates could be unconstitutionally low and therefore confiscatory if they did not "yield a fair return upon the full value of the property." *Id.* at 25.

⁸¹⁶ Bluefield Waterworks & Improvement Co. v. Public Service Commission of West Virginia, 262 U.S. 679, 692 (1923). See McCardle v. Indianapolis Water Co., 272 U.S. 400, 408-11 (1926).

⁸¹⁷ Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Comm'n of Missouri, 262 U.S. 276, 290-91, 306-07 (1923) (Brandeis, J., dissenting). See McCardle v. Indianapolis Water Co., 272 U.S. 400, 421-24 (1926) (Brandeis, J., dissenting).

⁸¹⁸ It is likely that Taft was personally committed to a cost of reproduction theory of fair value. In 1921, when Taft had been nominated as Chief Justice, he was serving as one of three arbitrators tasked with determining the value of Grand Trunk Railway in the context of its nationalization. See John A. Eagle, *Monopoly or Competition: The Nationalization of the Grands Trunk Railway*, 62 CANADIAN HISTORICAL REVIEW 3,29 (1981). In his opinion in that proceeding, Taft had urged:

The question to be settled is of a class of questions the most difficult ever presented to a tribunal, to wit, to determine the fair value of a great railway System

[I]t seemed to me a proper course to allow the company and the shareholders to offer in evidence proof of the reproduction value of the whole Grand Trunk railway System Such evidence is held in the United States to be competent and relevant in adjudging what a railway company should earn and therefore to fix its rates. . . .

Evidence of this kind here produced might have materially affected the opinion which the Board would form of the earning capacity of the road and its future possibilities, especially in view of the fact that the tendency of railway legislation in the United States, as shown by the last United States Transportation Act, is toward making the reproduction value of railroad property used economically for transportation a proper basis for fixing rates.

Reasons for Dissent By the Honourable William Howard Taft, in ANNUAL REPORT OF THE DEPARTMENT OF RAILWAYS AND CANALS FOR THE FISCAL YEAR FROM APRIL 1, 1920, TO MARCH 31, 1921 179, 187 (Ottawa: F.A. Acland 1921). Evidence of cost of reproduction, however, was ruled irrelevant to the question of value by the two

non-American arbitrators, *Reasons for Award By the Rt. Hon. Sir Thomas White*, in *id.* at 169, and this ruling was upheld in England by the Privy Council. A.W. CURRIE, *THE GRAND TRUNK RAILWAY OF CANADA* 468 (Toronto: University of Toronto Press 1957). See LESLIE T. FOURNIER, *RAILWAY NATIONALIZATION IN CANADA: THE PROBLEM OF THE CANADIAN NATIONAL RAILWAYS* 100-116 (Toronto: The MacMillan Co. of Canada 1935).

⁸¹⁹ 262 U.S. 625 (1923).

⁸²⁰ 262 U.S. 276 (1923).

⁸²¹ Butler's lack of participation in these cases is scrupulously noted in his docket book. Butler had apparently agreed to recuse himself in railroad valuation cases. See *infra* note 865.

⁸²² *Brandeis-Frankfurter Conversations*, *supra* note 227, at 316 (July 1, 1923). See LDB to Alice Goldmark Brandeis (May 8, 1923), in 5 LETTERS OF LOUIS D. BRANDEIS, *supra* note 125, at 93 ("Next Saturday has been specifically assigned for the exclusive consideration of my elaborate memo;--so you see we are very friendly.). "Taft," observed Brandeis, "hasn't the slightest grasp of fiscal or utility aspects of these cases. P. Butler is about what people said he was. He is gunning after valuation of land grants in land grant roads." *Brandeis-Frankfurter Conversations*, *supra* note 227, at 311 (June 12, 1923).

⁸²³ The entry is under the *Georgia Ry. & Power Co.* case. Butler added: "PB takes no part in this." Butler had emphatically written in 1915 that "The substitution of *cost* for *value* and the making of rates on that basis would unjustly deny reward and profit to the owners of the best railroads of the country and amount to seizure of the use of private property without just compensation." Butler, *supra* note 815, at 24.

⁸²⁴ PHILLIPS, *supra* note 805, at 307-313.

⁸²⁵ Charles G. Ross, *An Exposition of the Vital Problem of Valuation: Prudent Investment Principle Regards All Public Utilities in Light of Servants of the State*, ST. LOUIS POST DISPATCH (May 15, 1927), at 1; Alfred Evens, *Valuation in the Supreme Court*, 16 ABAJ 485, 485-86 (1930).

⁸²⁶ Ross, *supra* note 825.

⁸²⁷ PHILLIPS, *supra* note 805, at 307; See D. PHILIP LOCKLIN, *ECONOMICS OF TRANSPORTATION* 380 (7th ed.; Richard D. Irwin, Inc.: Homewood, Ill. 1972); Hugh Evander Willis, *The Rate Base for Rate Regulation*, 3 INDIANA LAW JOURNAL 225, 230-31 (1927); Evens, *supra* note 825, at 487; *The O'Fallon Decision*, 59 THE NEW REPUBLIC 30 (No. 756) (May 29, 1929).

⁸²⁸ *Adkins*, 261 U.S. at 546.

⁸²⁹ See, e.g., *Smyth v. Ames*, 169 U.S. 466, 544 (1898):

A railroad is a public highway, and none the less so because constructed and maintained through the agency of a corporation deriving its existence and powers from the state. Such a corporation was created for public purposes. It performs a function of the state. Its authority to exercise the right of eminent domain and to charge tolls was given primarily for the benefit of the public. It is under governmental control, though such control must be exercised with due regard to the guaranties for the protection of its property. It cannot, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the state may fix its rates with a view solely to its own interests, and ignore the rights of the public.

⁸³⁰ See James C. Bonbright, *The Problem of Judicial Valuation*, 27 COLUMBIA LAW REVIEW 493, 505 (1927) ("The distinction . . . between rate-making value and market value . . . is far from adequately recognized. Yet it is a distinction which underlies the whole theory of public utility regulation, a theory which is based on the principle that . . . public utilities . . . should not be allowed to charge whatever prices they might be able to charge if their power to coerce customers by means of the bargaining process were not limited.").

The difference between market value and rate-making value in fact prompted Taft's magisterial opinion in *Dayton-Goose Creek Railway Co. v. United States*, 263 U.S. 456 (1924), which upheld the recapture provisions of

the Transportation Act of 1920: “[T]he carrier owning and operating a railroad, however strong financially, however economical in its facilities, or favorably situated as to traffic, is not entitled as of constitutional right to more than a fair net operating income upon the value of its properties which are being devoted to transportation.” *Id.*, at 481. On the radical quality of Taft’s reasoning, see Leslie Craven, *Railroad Valuation: A Statement of the Problem*, 9 ABAJ 681, 686 (1923), which argued that a failure to recognize the economic value arising from “superior location” is “an appropriation of the property rights in the physical property. . . . The fact that a railroad is ‘affected with a public interest; has up to this time justified its regulation in order to insure the performance of its public duties, but it has not yet been held that railroad property is so out of the category of private property as to justify the appropriation without compensation of those increments of value due to these differentials, which increments could probably not be taken from the owner of the business lots of a city or the ranch owner on the plains, without an overturning of the very government itself.’”

If the owner of a business affected with a public interest was not constitutionally entitled to the value of its market income or the market value of the location of its property, why was he nevertheless constitutionally entitled to the current market value of reproducing its physical property, as was assumed by the cost of reproduction theory of valuation?

⁸³¹ In the early days of ratemaking regulation, it was difficult to ascertain the amount of capital prudently invested in railroads and utilities, so that Brandeis’s proposed test could not easily be applied. But the rationalization of capital markets had by the 1920s made it relatively simple to assess initial capital investments. It was a commonplace observation, however, that the cost of reproduction test produced disparate and erratic results. As Brandeis observed:

The adoption of the amount prudently invested as the rate base and the amount of the capital charge as the measure of the rate of return would give definiteness to these two factors involved in rate controversies which are now shifting and treacherous, and which render the proceedings peculiarly burdensome and largely futile. Such measures offer a basis for decision which is certain and stable. The rate base would be ascertained as a fact, not determined as matter of opinion. It would not fluctuate with the market price of labor, or materials, or money. It would not change with hard times or shifting populations. It would not be distorted by the fickle and varying judgments of appraisers, commissions, or courts. It would, when once made in respect to any utility, be fixed, for all time, subject only to increases to represent additions to plant, after allowance for the depreciation included in the annual operating charges. The wild uncertainties of the present method of fixing the rate base under the so-called rule of *Smyth v. Ames* would be avoided, and likewise the fluctuations which introduce into the enterprise unnecessary elements of speculation, create useless expense, and impose upon the public a heavy, unnecessary burden.

Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Comm’n of Missouri, 262 U.S. 276, 306-07 (1923) (Brandeis, J., dissenting). See Willis, *supra* note 827, at 231 (“[T]he chief objection to reproduction cost is its uncertainty. It is nothing but a guess. The engineering estimates required are airy calculations on impossible assumptions.”); Donald R. Richberg, *Value—By Judicial Fiat*, 40 HARVARD LAW REVIEW 567, 570 (1927) (The cost of reproduction theory “makes the entire process of valuation one of imaginative guess work. The evidence to be considered must consist wholly of opinions of partisan experts, estimating the cost of an imaginary but impossible construction, at imaginary and impossible prices, under imaginary and impossible conditions.”). A particularly useful explication of the relative merits of the cost of reproduction and prudent investment theories of valuation was James C. Bonbright, *Railroad Valuation with Special Reference to the O’Fallon Decision*, 18 AMERICAN ECONOMIC REVIEW 181 (1927).

⁸³² *St. Louis & O’Fallon Railway Co. v. United States*, 279 U.S. 461, 517-18, 532 (1929) (Brandeis, J., dissenting).

⁸³³ For this reason, those advocating for a cost of reproduction theory of value focused on the more ascertainable cost of reproducing the physical plant. See, e.g., *McCardle v. Indianapolis Water Co.*, 272 U.S. 400, 417-18 (1926) (“There is to be ascertained the value of the plant used to give the service and not the estimated cost of a different plant. Save under exceptional circumstances, the court is not required to enter upon a comparison of the merits of different systems. Such an inquiry would lead to collateral issues and investigations having only remote bearing on the fact to be found, viz. the value of the property devoted to the service of the public.”). This approach can be economically justified only on the assumption that the cost of reproducing a physical plant is an efficient proxy for the marginal cost of providing the service, and this assumption is highly questionable.

⁸³⁴ Stephen Breyer, *Economics for Lawyers and Judges*, 33 JOURNAL OF LEGAL EDUCATION 294, 297-99 (1983).

⁸³⁵ WHT to WVD (June 22, 1927) (Van Devanter papers). In his letter, Taft was most likely referring to the discussion in Ross, *supra* note 825, which discussed how votes on the Court might line up to support a prudential investment theory of valuation.

⁸³⁶ 262 U.S. 276 (1923). Butler and Sanford did not participate in the decision. Butler docket book. Brandeis and Holmes dissented.

⁸³⁷ 262 U.S. at 287-88.

⁸³⁸ 262 U.S. at 290 (Brandeis, J., dissenting). Holmes joined Brandeis's dissent. He wrote to Brandeis, "I am inclined to follow you in this but am embarrassed by not having heard the discussion." (Brandeis papers).

⁸³⁹ The impact of Brandeis's dissent was immediate and powerful. See *Certainty and Confusion in Public Utility Rates*, THE 35 NEW REPUBLIC 33 (No. 444) (June 6, 1923) ("The majority opinion unfortunately stands for the present as the law. In the future . . . public service commissions will have to struggle with competing technical estimates as to cost of reproduction before they can determine fair rates. They will still have to reckon as part of the cost of service an arbitrary percentage on an arbitrary physical valuation, instead of the actual capital charges embodied in the contracts on which security issues are based. But the absurdity of such a proceeding condemns it to disappearance in the end. No one who reads Judge Brandeis's opinion can doubt that it outlines the law of the future."); Donald R. Richberg, *The Supreme Court Discusses Value*, 37 HARVARD LAW REVIEW 291, 296 (1924) ("During an argument upon valuation theory before the Interstate Commerce Commission in July, 1923, while the writer was quoting from the *Southwestern Bell* opinions, a railroad lawyer of considerable standing and of well-known antagonism to the 'prudent investment' theory was overheard remarking to a colleague: 'I do not know what the law is today, but in my judgment that Brandeis opinion is a statement of what the law is going to be.'"); Willis, *supra* note 827, at.226 ("The prudent investment theory . . . has had the almost unanimous support of legal writers.").

⁸⁴⁰ 262 U.S. at 290 (Brandeis, J., dissenting). Taft himself, in *Dayton-Goose Creek Ry. Co. v. United States*, 263 U.S. 456 (1924), would later observe that "[b]y investment in a business dedicated to the public service the owner must recognize that, as compared with investment in private business, he can not expect either high or speculative dividends but that his obligations limits him to only fair or reasonable profit." 263 U.S. at 481.

⁸⁴¹ 262 U.S. 625 (1923).

⁸⁴² 262 U.S. 625, 629-30 (1923). Taft returned the draft of Brandeis's opinion with the comment: "I confess I can't find in this opinion the dynamitic assault on that model of exact definition [unintelligible] that ever helpful guide of Harlan, J. in *Smyth v. Ames*. The horns of the alter are still unimpaired." McReynolds agreed to Brandeis's draft, but objected to this sentence in the proposed opinion: "The question on which this Court divided in the *Southwestern Bell Telephone* case is not involved here." McReynolds commented: "I rather think reference to a division by the court is not the best form." Brandeis retained the sentence in his published opinion. 262 U.S. at 631.

⁸⁴³ Butler docket book.

⁸⁴⁴ 262 U.S. at 636 (McKenna, J., dissenting).

⁸⁴⁵ *Brandeis-Frankfurter Conversations*, *supra* note 227, at 312 (June 12, 1923). Brandeis added two weeks later that he had "hoped to get Ga. Case out with *Southwestern*. But it was laid over for reconsideration & so was decided with full consideration, on June 11, & gained reinforcement through McKenna's dissent. Upshot is that reconstruction value is not measure but merely a factor and so needs to be considered, but in fact need not pay attention, as in Ga. Case." *Id.* at 314 (June 28, 1923).

⁸⁴⁶ 262 U.S. 679 (1923).

⁸⁴⁷ 262 U.S. at 692. Sanford did not participate in the case. Butler docket book.

⁸⁴⁸ 262 U.S. at 695.

⁸⁴⁹ Edgar Bronson Tolman, *Review of Recent Supreme Court Decisions*, 9 ABAJ 627, 627 (1923).

⁸⁵⁰ *Public Utility Valuations for Rate Making Purposes*, 26 MICHIGAN LAW REVIEW 89, 89 (1927). See Wm. M. Wherry, *The O'Fallon Case*, 34 COMMERCIAL LAW LEAGUE JOURNAL 696, 698 (November 1929).

⁸⁵¹ Edward S. Corwin, *Constitutional Law in 1922-1923*, 18 AMERICAN POLITICAL SCIENCE REVIEW 49, 71 (1924). See Philip Barton Warren, *Value As A Rate Base for Public Utilities*, 6 ILLINOIS LAW QUARTERLY 98, 101 (1924) (“The last two apparently conflicting decisions of the United States Supreme Court, coming as they do upon the heels of the very definite and forceful pronouncement and application of the principle, in a decision handed down only a few days earlier, that any finding of value will not be sustained if it fails to give effect to reproduction costs at prevailing prices, has created the impression among advocates of original cost that the Supreme Court is not so certain that the position its previous decisions were leading to, viz., that every finding of value must give substantial effect to reproduction costs, was correct. This impression is not justified.”). Warren presciently noted that “Up to the date of these two apparently conflicting decision rendered by the same court on the same day, it had been held that a commission could not immunize itself from reversal by the mere assertion in its findings that it had given consideration to reproduction costs, if as a matter of fact its value was based on original cost.” *Id.* at 100.

⁸⁵² 272 U.S. 400 (1926).

⁸⁵³ 272 U.S. at 410-11. Holmes concurred in the result. See OWH to Felix Frankfurter (December 8, 1926), in HOLMES-FRANKFURTER CORRESPONDENCE, *supra* note 190, at 209. Brandeis, joined by Stone, dissented. Stone’s 1925 docket book (p. 456) shows that the vote at conference had been five to four, with Sutherland and Sanford joining Brandeis and Stone. In the Brandeis papers there is a return from Sutherland on Brandeis’s proposed dissent in which Sutherland remarks, “I had some doubt; but after reading Butler’s opinion, I think it best to close the matter up as he has done.” (Brandeis papers).

⁸⁵⁴ 272 U.S. at 422 (Brandeis, J., dissenting).

⁸⁵⁵ Richberg, *supra* note 833, at 567. “The majority opinion now puts a seal of approval on the practice of ascribing *decisive* weight to a method of determining value which is generally repudiated by practical men as impractical.” *Id.* at 571.

⁸⁵⁶ *Public Utility Valuations for Rate Making Purposes*, *supra* note 850, at 90.

⁸⁵⁷ Gustavus H. Robinson, *The O'Fallon Case: Latest battle in the Public Utility valuation War*, 8 NORTH CAROLINA LAW REVIEW 3, 5 (1929) (*McCardle* “put the Supreme Court more definitely in opposition to Mr. Justice Brandeis’ view.”).

⁸⁵⁸ Willis, *supra* note 827, at 228-29. See *U.S. Supreme Court Deals with Important Utility Questions*, 40 THE AMERICAN CITY MAGAZINE 90 (June 1929) (*McCardle* came “out flatly for reproduction cost”). For the contrary view, that *McCardle* merely “reaffirmed *Smyth v. Ames*,” see Evens, *supra* note 825, at 490. Evens cites Butler’s observation that “The weight to be given to . . . cost figures and other items or classes of evidence is to be determined in the light of the facts of the case at hand.” 272 U.S. at 410.

⁸⁵⁹ *Again the American People Will Pay*, THE CAPITAL TIMES (December 7, 1926), at 20.

⁸⁶⁰ Pub. L. No. 62-400, 37 Stat 701 (1913). The Act provided that the ICC “shall ascertain and report in detail as to each piece of property owned or used by said common carrier for its purposes as a common carrier, the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained.” *Id.* The Act had been pushed by Robert La Follette to expose what he believed to be watered railroad stock. *Working on the Railroads*, 151 OUTLOOK AND INDEPENDENT 100 (January 16, 1929).

⁸⁶¹ 41 Stat. 481, 489 (1920).

⁸⁶² *Dayton-Goose Creek Railway Co. v. United States*, 263 U.S. 456, 478 (1924).

⁸⁶³ The Taft Court endorsed the idea of aggregate rates in *Aetna Insurance Co. v. Hyde*, 275 U.S. 440 (1928). “The Fourteenth Amendment does not protect against competition. . . . It has never been and cannot reasonably be held that state-made rates violate the Fourteenth Amendment merely because the aggregate collections are not sufficient to yield a reasonable profit or just compensation to all companies that happen to be engaged in the affected business.” *Id.* at 447.

⁸⁶⁴ 41 Stat. 489. The constitutionality of the redistribution scheme was upheld in *Dayton-Goose Creek Railway Co. v. United States*, 263 U.S. 456 (1924). *See supra* notes 830 and 840.

⁸⁶⁵ *See* DAVID J. DANIELSKI, *A SUPREME COURT JUSTICE IS APPOINTED* 128, 137 (New York: Random House 1964); DREW PEARSON AND ROBERT S. ALLEN, *THE NINE OLD MEN* 119 (Garden City:Doubleday, Doran & Co. 1937). Speaking on the floor of the Senate in 1933, Henrik Shipstead of Minnesota recalled visiting Washington in 1922 to protest Butler’s confirmation. “The three distinguished Senators on the subcommittee of the Committee on the Judiciary were Senator Knute Nelson, Senator Cummins, and Senator Walsh of Montana. . . . As a result of my objection, they all agreed that Justice Butler would be disqualified from sitting in a case affecting the valuation of railroads when the Supreme Court should finally decide that question. . . . But the first case involving valuation for rate-making purposes was the *Indianapolis Water Rate case*, and the decision was written by Justice Butler, and the rule was fixed in that case.” 77 CONG. REC. 4411-12 (1933). Joining the discussion, George Norris recalled the Butler confirmation controversy “so distinctly that I can pick out the seat of practically every Senator in participated in that debate.” Norris affirmed that because Butler had been “at the head of the list of attorneys who were making the fight on behalf of the railroads,” it was accepted that he would “stand aside and would not participate” when ICC evaluations of railroad property were brought before the Court for constitutional review. *Id.* at 4412.

Then what happened? The *O’Fallon case* was soon coming on to be argued in the Supreme Court, but ahead of that case came the *Indianapolis Water Works case*, where identically the same question was involved. . . . The rate the company could charge for water depended upon the valuation . . . and the same controversy was under consideration in the *O’Fallon case*

That question was argued in the Supreme Court before the *Railroad case* was argued. Everyone knew the identical question was involved in both; and the man who had been confirmed sat with the Court in determining that question. Not only that but when the Court reached a conclusion . . . he wrote the opinion of the Court, and it became the law of the land that governed railroad-valuation cases just as completely as though the decision had been made in those cases. So when the question of the valuation of railroads came on it came into the Court then with that question already determined, true to what Senators said here, behind closed doors when that nomination was under consideration, the man who had been confirmed at that time stepped aside and did not participate in the railroad case. . . . [I]t was not necessary for him to step aside; the question had been previously determined.

Id.

⁸⁶⁶ George Norris to Donald R. Richberg (December 1, 1926) (Norris papers). It was said in the press that “a pretty good summary of” *McCardle* “can be obtained by reading Justice Butler’s argument as a railroad attorney before the Interstate Commerce Commission.” *Supreme Court Ethics*, THE NEW YORK TELEGRAM (October 2, 1927), at 4.

⁸⁶⁷ Willis, *supra* note 827, at 229. *See* Herbert Little, *The Omnipotent Nine*, 15 THE AMERICAN MERCURY 48, 53 No. 57) (September 1928) (*McCardle* “tickled Wall Street, for under it public utility rates in most of the cities of the nation can now be increased materially by the mere process of applying to a Federal court.”).

⁸⁶⁸ 68 CONG. REC. 167 (December 9, 1926). Rainey pointed his finger squarely at Butler: “At the present time there sits on the Supreme Bench of the United States a judge, one of the ablest members of that court, who is committed to the doctrine of ‘reproduction cost.’ In fact, the theory of ‘reproduction cost’ is his invention.” Butler was a lead attorney for the railroads in the influential *Minnesota Rate Cases*, 230 U.S. 352 (1913).

⁸⁶⁹ HFS to John Bassett Moore (November 20, 1926) (Stone papers). Stone wrote his son that *McCardle* “may have very far-reaching consequences if the Court should ultimately hold that the present time reproduction cost is the proper value on which to base a rate for all public service companies.” HFS to Lauson Stone (November 26, 1926) (Stone papers).

⁸⁷⁰ 124 I.C.C. Reports 3 (February 15, 1927).

⁸⁷¹ *St. Louis & O'Fallon Railway Co. v. United States*, 279 U.S. 461, 481 (1929).

⁸⁷² 124 ICC Reports at 26. "In important aspects it is a problem which has never before been presented to either a commission or a court. We must carefully review the significance to the Nation of the decision which we make in this case in its bearings on the relation between all the railroads and all the people of the United States. It may well be that the valuation of railroads on a national scale requires the beginning of a new chapter in valuation." *Id.* at 26-27.

⁸⁷³ 41 Stat. 489.

⁸⁷⁴ 124 ICC at 27.

⁸⁷⁵ 124 ICC at 30. For an excellent account of the purposive nature of the ICC's reasoning, see John Bauer, *Interstate Commerce Commission Adopts Actual Investment at Cost Basis*, 16 NATIONAL MUNICIPAL REVIEW 454 (July 1927).

⁸⁷⁶ 124 ICC at 28-30.

⁸⁷⁷ Hugh Willis, *St. Louis & O'Fallon Case*, 5 INDIANA LAW JOURNAL 120 122 (1929).

⁸⁷⁸ 124 ICC at 28.

⁸⁷⁹ 124 ICC at 30.

⁸⁸⁰ 124 ICC at 32. Between 1919 and 1920, the aggregate value of railroad property—and consequently railroad rates—"would have been increased . . . by a sum greater than the present national debt . . . and the transportation burden upon the people of the country would have been correspondingly increased without the investment of a single dollar by those who would reap the benefits." *Id.*

⁸⁸¹ 124 ICC at 34-35. "The conception of a rate base and returns thereon fluctuating up and down with changes in the level of general prices is a conception which, if carried into actual operation, could have no appeal except to stock-market speculators." *Id.* at 35.

⁸⁸² Moreover railroad property "since the price revolution brought about by the World War" has never been valued using a cost reproduction new methodology, and yet "the market for railroad securities since the passage of the transportation act, 1920, has steadily improved" and the "credit of the railroads in general is now excellent."

With exceptions in certain sections of the country it will be conceded that the railroads are now in better credit and financial condition, in all probability, than at any time in their history. The standards of service is clearly better than ever before. . . . Under such circumstances can it be said with any show of reason that the private owners of this property devoted to the public service are suffering confiscation? Yet the current cost of reproduction doctrine would lead to that conclusion.

124 ICC at 33-34.

⁸⁸³ 124 ICC at 36.

⁸⁸⁴ 124 ICC at 39.

⁸⁸⁵ 124 ICC at 39.

⁸⁸⁶ ARI AND OLIVE HOOGENBOOM, *A HISTORY OF THE ICC: FROM PANACEA TO PALLIATIVE* 91 (New York: W.W. Norton and Co., 1945). See I.L. SHARFMAN, *THE INTERSTATE COMMERCE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE* 33 (New York: The Commonwealth Fund 1931).

⁸⁸⁷ “The land-value doctrine followed in this case apparently means that when land has been donated by the State or by individuals to a railroad in aid of construction, the carrier from the moment it begins operation is entitled to exact from the public served a full return upon the value of that land based on the then market value of adjoining lands. I am unwilling to believe that the Constitution is an instrument of public oppression.” 124 ICC at 58-59 (Commissioner Eastman, concurring). Comparing *McCardle* with *Georgia Power Ry. & Power Co.*, Eastman half-heartedly claimed that the Taft Court had “very wisely avoided a crystallization of the law with respect to the limits set by the Constitution to the public regulation of undertakings affected with a public interest. *Id.* at 49, 52. But he then went on to argue that even assuming that the Taft Court were settled in its view, the question of ICC valuation was fundamentally a question “of public policy,” and in such matters reasoning ought not to “be confined to deductions from past judicial utterances. The vital thing is the essential purpose of the law in its relation to the public interest.” *Id.* at 50. The ICC ought not to “neglect the illumination which is thrown upon the law by its own intimate knowledge of transportation affairs and problems. I feel sure that the Supreme Court is itself desirous that we should speak both frankly and fully on these matters. . . . After the court has heard what we have to say it may decide that our conclusions as to the fundamental law are erroneous, and that will end the matter; but certainly we ought not to deprive the court of the help which it may gain from the special knowledge which it is our duty under the law to acquire.” *Id.* at 51.

⁸⁸⁸ 124 ICC at 62 (Commissioner Hall, dissenting).

⁸⁸⁹ 124 ICC at 64 (Commissioner Aitchison, dissenting).

⁸⁹⁰ *St. Louis & I Fallon Ry. Co. v. United States*, 22 F.2d 980, 983 (E.D. Mo. 1927).

⁸⁹¹ 22 F.2d at 984.

⁸⁹² 22 F.2d at 984.

⁸⁹³ John J. Daley, *The Greatest Lawsuit in History*, THE WASHINGTON POST (December 30, 1928), at SM1. “It is no exaggeration to say that this case is one of the most important—if not the most important—ever to come before the United States Supreme Court. Its decision may have a stupendous effect upon the stock market. Financial houses throughout the country are sending broadcast to their clients pamphlets and brochures discussing the probable effects of this case upon the future value of railroad securities.” *Id.* See Thomas Gammack, *What is a Railroad Worth?* 150 OUTLOOK AND INDEPENDENT 1420 (December 26, 1928) (“[T]he Supreme Court’s decision should be one to take its place among the important precedents which have been laid down by the highest court of land.”).

⁸⁹⁴ Bonbright, *supra* note 831, at 182. “The importance of the case can hardly be exaggerated. There could be no clearer joining of issues.” Bauer, *supra* note 875, at 459.

⁸⁹⁵ 69 CONG. REC. 7856-7959 (May 7, 1928). The Conference was a progressive institution organized to advocate for the interests of shippers and the public. Richberg had participated in the ICC proceedings; he had been permitted to file an amicus brief but not to argue before the district court. In March he had written to Norris, who was the president of the Conference, asking for the backing of “a large group of Senators and Representatives” to increase the likelihood of his participating in the case before the Supreme Court. Donald R. Richberg to George W. Norris (March 20, 1928) (Norris papers). See 69 CONG. REC. 7951; George W. Norris to Donald R. Richberg (March 26, 1928) (Norris papers); Donald R. Richberg to George W. Norris (May 6, 1928) (Norris papers). The railroads refused to consent to Richberg’s participation. See 69 CONG. REC. 7951. The Senate debated the propriety of the resolution for two hours and finally voted 46 to 31 in its favor. *Senate ‘Advises’ The Supreme Court*, NEW YORK TIMES (May 8, 1928), at 45.

⁸⁹⁶ Stone 1928 docket book. In November, Taft wrote Holmes to summarize the results of a Court conference: “131 and 132 were the cases in which the Senate desired . . . to allow a man named Richberg to file a brief and make an oral argument. He represented a farmers’ association. We have concluded to allow him to file the brief and to make an oral argument as amicus curiae, at a time to be set later.” WHT to OWH (November 24, 1928) (Taft papers). Richberg was eventually granted “an hour and a quarter” of oral argument. WHT to Charles Elmore Cropley (December 15, 1928) (Taft papers). Later Taft wrote his brother that in *O’Fallon* “the Senate requested that we hear argument from a counsel for farmers’ associations and consider how little the railroads ought to be valued in order to

lower their rates. The request of the Senate that we hear this man, with a statement by it that the Senate is entirely impartial in the matter, was enough to make the Court laugh, but we let him in, and he made a very good argument from the standpoint of his side.” WHT to Horace D. Taft (January 24, 1928) (Taft papers). *See* WHT to Robert A. Taft (December 30, 1928) (Taft papers).

⁸⁹⁷ Charles G. Ross, *Railroads Win O’Fallon Case in Supreme Court*, ST. LOUIS POST-DISPATCH (May 20, 1929), at 1 (“Justice Butler, however, because of his connection with valuation cases on the side of the railroads before going on the Supreme bench, did not participate in the decision.”). *See The Supreme Court’s O’Fallon Decision*, 86 RAILWAY AGE 1213 (No. 21) (May 25, 1929).

⁸⁹⁸ 279 U.S. at 484. Brandeis published a long, detailed dissent, in which Holmes and Stone joined. Stone authored a shorter, more pithy dissent, in which Holmes and Brandeis joined.

⁸⁹⁹ 279 U.S. at 484.

⁹⁰⁰ 279 U.S. at 488.

⁹⁰¹ 279 U.S. at 485.

⁹⁰² 279 U.S. at 486. This precise claim was false. *See supra* text at note 885. It could even be said “that the Commission did give ‘due consideration’ to reproduction costs, although it did not use them, and severely criticized their use, as an exclusive measure of value.” Robert E. Cushman, *Constitutional Law in 1928-1929*, 24 AMERICAN POLITICAL SCIENCE REVIEW 67, 85 (1930).

⁹⁰³ 279 U.S. 487.

⁹⁰⁴ 279 U.S. at 495-96 (Brandeis, J., dissenting).

⁹⁰⁵ 279 U.S. at 538 (Brandeis, J., dissenting). In drafting his dissent, Brandeis engaged in extensive correspondence with Commissioner Joseph Eastman. *See* Joseph B. Eastman to LDB (February 16, 1929) (Brandeis papers); Joseph B. Eastman to LDB (March 6, 1929) (Brandeis papers); Joseph B. Eastman to LDB (March 8, 1929) (Brandeis papers); Joseph B. Eastman to LDB (March 16, 1929) (Brandeis papers); Joseph B. Eastman to LDB (March 26, 1929) (Brandeis papers); Joseph B. Eastman to LDB (April 4, 1929) (Brandeis papers); Joseph B. Eastman to LDB (April 10, 1929) (Brandeis papers); Joseph B. Eastman to LDB (April 13, 1929) (Brandeis papers); Joseph B. Eastman to LDB (April 15, 1929) (Brandeis papers); Joseph B. Eastman to LDB (April 18, 1929) (Brandeis papers); Joseph B. Eastman to LDB (April 29, 1929) (Brandeis papers); Joseph B. Eastman to LDB (April 30, 1929) (Brandeis papers); Joseph B. Eastman to LDB (May 1, 1929) (Brandeis papers); Joseph B. Eastman to LDB (May 9, 1929) (Brandeis papers); Joseph B. Eastman to LDB (May 10, 1929) (Brandeis papers); Joseph B. Eastman to LDB (May 14, 1929) (Brandeis papers). Throughout Eastman used the resources of the ICC to provide research for Brandeis’s dissent.

⁹⁰⁶ *See* WHT to Charles P. Taft 2d (May 12, 1929) (Taft papers).

⁹⁰⁷ This is a note in Brandeis’s handwriting on the draft paragraph eventually inserted at page 487 of McReynolds’s opinion. The draft paragraph may be found in the Brandeis papers.

⁹⁰⁸ It would have led, as Stone succinctly observed in his dissent, directly to the “economic paradox that the value of the railroads may be far in excess of any amount on which they could earn a return.” 279 U.S. at 552 (Stone, J., dissenting). Charles Burlingham wrote Stone that “I have just read your short dissenting opinion in the O’Fallon case. It seems to me unanswerable.” Charles C. Burlingham to HFS (May 27, 1929) (Stone papers). Stone replied, “Thank you for you . . . for your comments on my dissent in the O’Fallon case. It is always good for the dissenter to know that there are few who agree with him.” HFS to Charles C. Burlingham (May 28, 1929) (Stone papers). Stone’s former clerk Milton Handler also wrote Stone praising his dissent. “Your dissent seems to clear that one wonders how the majority could have decided the case the way it did. It is quite apparent from the late cases that a fascinating battle is now being waged.” Milton Handler to HFS (May 24, 1929).

⁹⁰⁹ See, e.g., Charles B. Elder, *The St. Louis and O'Fallon Decision—What Does it Mean?*, 24 ILLINOIS LAW REVIEW 296, 309 (1929).

⁹¹⁰ After publication of the opinion, Taft wrote his son that in *O'Fallon* “you will find an enormous dissenting opinion well drawn, but it seems to me to miss the point.” WHT to Charles P. Taft 2d (May 19, 1929) (Taft papers). See WHT to Robert A. Taft (May 19, 1929) (Taft papers).

⁹¹¹ Consider this angry passage from McReynolds’s opinion: “The report of the Commission is long and argumentative. Much of it is devoted to general observations relative to the method and purpose of making valuations; many objections are urged to doctrine approved by us; and the superiority of another view is stoutly asserted.” 279 U.S. at 485. Stone pointed out in his dissent that “Had the Commission not turned aside to point out in its report the economic fallacies of the use of reproduction cost as a standard of value for rate making purposes, which it nevertheless considered and to some extent applied, I suppose it would not have occurred to anyone to question the validity of its order.” 279 U.S. at 550 (Stone, J., dissenting). See Cushman, *supra* note 902, at 86 (“Whatever uncertainties may have been injected into the valuation situation by this decision, we are at least fairly certain that it is unsafe for an administrative commission to try to criticize the economic theory of the Supreme Court.”).

⁹¹² *Railroad Valuation*, 152 OUTLOOK AND INDEPENDENT 216 (June 5, 1929).

⁹¹³ *Railways Victors in Valuation Case in Supreme Court*, THE PHILADELPHIA INQUIRER (May 21, 1929), at 1 (“The decision is regarded as a great victory for the railroads of the country The railroads generally are contending that the cost of reproduction must be the basis of valuation of their properties, or at least that it must be an important element in reckoning any valuation of their properties.”). See Ross, *supra* note 897.

⁹¹⁴ *Railroads Win Suit Involving Billions*, CHICAGO DAILY TRIBUNE (May 21, 1929), at 1. Realizing the potential for this consequence, Taft on the morning of the decision’s announcement “took the extraordinary step of ordering the doors closed so that the court room would not be confused by eager correspondents rushing from the place to get bulletins on the wires.” *Railways Victors in Valuation Case in Supreme Court*, *supra* note 913, at 4.

⁹¹⁵ *The Railroad Victory in the Supreme Court*, THE LITERARY DIGEST (June 1,, 1929), at 8. See Robinson, *supra* note 857, at 6-9. “Railroad stocks shot up when tickers announced the Supreme Court’s decision in the O’Fallon test case, but eased down as it became better understood.” *Railroad Valuation*, *supra* note 912, at 216. “A day’s consideration of the Supreme Court’s ruling in the railway valuation case has served to show that hastily predicted and sensational results of it will hardly follow.” *Effect of the Decision*, NEW YORK TIMES May 22, 1929), at 26. “What the court actually held appears to be that the Interstate Commerce Commission must give ‘due consideration’ to reproduction cost now in making its railroad valuation. It does not say, as some have hastily assumed, that reproduction cost shall be controlling. It is to be one of the factors, but not the only one. . . . The decision seems to open the door to another controversy likely to be bitterly fought—the question of how much weight the commission must assign to reproduction cost. The court meticulously refrained from giving even a hint of its view on this highly important point.” *The O’Fallon Decision*, LOS ANGELES TIMES (May 22, 1929), at A4. “Views held by Wall Street . . . underwent considerable revision last week. Announced at a time when trading was proceeding on the Stock Exchange, the first news of the decision caused a sharp upturn in the carrier stocks More extended study of the decision . . . was accompanied by a return of the carrier stocks to near their former levels. While described as a victory for the carriers, the decision of the Supreme Court failed to sustain their methods of evaluation. . . . It did not give positive direction as to what would be the right way to value a railroad, and, instead left that to the interpretation of the commission.” *O’Fallon Decision Seen as Not Final*, NEW YORK TIMES (May 26, 1929), at N9. “The decision is a stimulus to litigation. The Supreme Court will be flooded with railroad valuation cases, as it has been with local utility valuation cases. Every railroad with recapturable income will want to appeal to the courts, in the hope of getting a higher valuation.” *The Value of Railroads*, 128 THE NATION 662, 662 (No. 3335) (June 5, 1929).

⁹¹⁶ Donald R. Richberg, *After the O’Fallon Decision*, 59 THE NEW REPUBLIC 62, 62 (No. 757) (June 5, 1929). See William L. Ransom, *Undetermined Issues in Railroad Valuation Under the O’Fallon Decision*, 44 POLITICAL SCIENCE QUARTERLY 321, 321 (1929) (“[T]he present decision left to the future nearly all of the vital and controverted issues as to what this valuation should be and how it should be reached.”)

⁹¹⁷ *Value and Recapture*, 86 RAILWAY AGE 1543, 1544 (No. 26) (June 29, 1929). “It is clear, then that the ruling of the court did not sustain the contention of the carriers that the primary consideration in any determination of values must be cost of reproduction.” *What the Railroads Have Won*, THE WORLD (May 22, 1929), at 14.

⁹¹⁸ *O’Fallon Case to Help Roads*, WALL STREET JOURNAL (May 22, 1929), at 3.

⁹¹⁹ *What the Railroads Have Won*, *supra* note 917, at 14. See *The O’Fallon Case*, DAILY BOSTON GLOBE (May 22, 1929), at 18. It is in this context that Brandeis’s subsequent remark to Frankfurter about Brandeis’s *O’Fallon* dissent should be understood: “I am glad you think well of the O’Fallon opinion. I guess no one of the majority knows the RR’s plight, but I guess P.B. understands.” LDB to Felix Frankfurter (May 24, 1929) in “HALF BROTHER, HALF SON”: THE LETTERS OF LOUIS D. BRANDEIS TO FELIX FRANKFURTER 375 (University of Oklahoma Press: Norman 1991 Melvin I. Urofsky and David W. Levy eds.) (“BRANDEIS FRANKFURTER CORRESPONDENCE”). Butler, recall, was perfectly clear that ratemaking could not be based upon value. See *supra* note 815. One can only imagine how he regarded the Court’s position in *O’Fallon* that “the law of the land for rate-making purposes” was exclusively about constitutional determinations of value.

⁹²⁰ *Hoover Confident Rates Won’t Rise; Rail Chiefs Agree*, NEW YORK TIMES (May 22, 1929), at 1. It was generally agreed, therefore, that the “outstanding significance of the St. Louis & O’Fallon decision of the Supreme Court is that it limits and defers recapture liability under the Transportation Act of 1920.” *O’Fallon Case to Help Roads*, *supra* note 918, at 1. “The chief effect of the decision it now appears will be the safeguarding of a portion of the earnings of the more prosperous roads from recapture by the government. That, however, is a matter of a few hundred millions, and not of the billions over whom the commission and the carriers have been contending.” *What the Railroads Have Won*, *supra* note 917, at 14. “The ruling will have the effect of largely nullifying the recapture provisions of the Transportation Act of 1920. The number of roads with recapturable income, and the amount of recapturable income, may be very small.” *The Value of Railroads*, *supra* note 915, at 662. See *O’Fallon Decision Seen as Not Final*, *supra* note 915, at N9 (“The chief importance of the O’Fallon decision is regarded now as being its effect on the recapture of earnings by the government.”); *Says O’Fallon Case Will Not Raise Rates*, NEW YORK TIMES (September 3, 1929), at 39. The recapture provision, having never worked, was repealed in 1933. RICHARD D. STONE, *THE INTERSTATE COMMERCE COMMISSION AND THE RAILROAD INDUSTRY: A HISTORY OF REGULATORY POLICY* 34 (Praeger: New York 1991).

⁹²¹ “Criticism of the decision lies in the fact that the majority of the Court did not inquire into the basic purpose of Congress of which valuation was merely an instrument of administration and did not consider that purpose in its bearing on fair value. The ‘law of the land’ was looked upon as distinct from these underlying policies and the basis of value was treated as a matter of inherent property right not subject to modification to meet the requirements of public policy.” Julia Arthur Burrell, *Instate Commerce—Recapture Under Transportation Act*, 8 TEXAS LAW REVIEW 566, 573 (1930).

⁹²² 279 U.S. at 501 (Brandeis, J., dissenting).

⁹²³ The Commission “knew that the value for rate making purposes could not be more than that sum on which a fair return could be earned by legal rates ;and that the earnings were limited both by the commercial prohibition of rates higher than the traffic would bear and the legal prohibition of a rates higher than are just and reasonable.” 279 U.S. at 501-02 (Brandeis, J., dissenting).

⁹²⁴ *A Notable Decision*, THE HARTFORD COURANT (May 22, 1929), at 8. For a good example of the confusion cast by *O’Fallon* on traditional conservative conceptualizations of valuation, see Wherry, *supra* note 850, at 702: “As to the effect on railroad rates . . . [c]ompetitive factors also enter into consideration. Because of this the railroads have little chance of increasing their rates to what would be theoretically possible, as was done by other public utilities after the *Bluefield*, *Southwestern Bell*, and the *Indianapolis Water Company* cases. On the other hand, although an immediate increase in the rates of railroads may be doubtful, at least the decision should make a reduction of rates increasingly difficult. . . . The importance of this decision is that a new stability is added to the railroads. This should strengthen their credit and greatly aid the reconstruction of transportation facilities, which has been rapidly progressing in this country since the War.” Even the tepid conclusion that *O’Fallon* added “stability” to the railroads assumed the continuation of price inflation, which the onset of the Depression would immediately disprove. That

valuations based upon cost of reproduction would be disastrous for the railroads during periods of price deflation was uncontroversial.

⁹²⁵ Taft's old nemesis, Amos Pinchot, *see* chapter 2, at --, registered this message loud and clear. Pinchot stressed that *O'Fallon* applied to "all public utilities regulated by commissions," and that in many contexts would serve as "a precedent for a general boosting of rates, thereby increasing the concentration of wealth, already a serious enough problem in this country." And he offered a class-based account of the decision's provenance. "It is possible," he said, that

the public will look at the decision of the court realistically, seeing in it, not so much the echo of the law of the land, as the reflection of the background and consequent bias of five individuals who may be described respectively as (1) an ex-attorney of the Northern Pacific Railroad Company; (2) an ex-attorney of the Southern Pacific railway Company; (3) an able conservative lawyer, once Attorney General of the United States, who has, on the bench, shown at least ordinary zeal in defending corporate interests; (4) a member of the Republican old guard of Tennessee, the selection of President Harding. This justice's father was principal owner of the Knoxville and Ohio Railroad, later bought by the Southern Railway; and his own law firm was counsel for the East Tennessee, Virginia and Georgia, as well as the Knoxville and Ohio. And finally, the Chief Justice, Mr. William Howard Taft, an amiable Ohioan, . . .

Amos Pinchot, *The Railroads Win the O'Fallon Case*, 128 *THE NATION* 666, 667 (No. 3335) (June 5, 1929).

⁹²⁶ It was observed by economists that "public service regulation has come close to a complete breakdown under the incubus of rate control by valuation." Bonbright, *supra* note 808, at 76. *See id.* at 79.

⁹²⁷ 280 U.S. 234 (1930).

⁹²⁸ WHT to OWH (January 6, 1930) (Taft papers).

⁹²⁹ Holmes, Brandeis, and Stone dissented. Stone's docket book suggests that in conference McReynolds had initially voted with the three dissenters.

⁹³⁰ 280 U.S. at 254. Sutherland used this premise to conclude that, as a matter of constitutional law, allowances for annual depreciation must be made "based upon present value," rather than upon initial cost. 280 U.S. at 253. "Manifestly, this allowance cannot be limited by the original cost, because, if values have advanced, the allowance is not sufficient to maintain the level of efficiency. . . . This naturally calls for expenditures equal to the cost of the worn out equipment at the time of replacement; and this, for all practical purposes, means present value. It is the settled rule of this Court that the rate base is present value, and it would be wholly illogical to adopt a different rule for depreciation." 280 U.S. at 254. This prompted a long, scholarly, outraged dissent from Brandeis, who, joined by Holmes, demonstrated that it was the universal practice of businesses and accountants to base depreciation allowances on initial cost. Brandeis considered Sutherland's rule to be "a pervasion of this business device." 280 U.S. at 278 (Brandeis, J., dissenting). "No method for ascertainment of the amount of the charge yet invented is workable if fluctuating present values be taken as the basis. . . . To use as a measure of the year's consumption of plant a depreciation charge based on fluctuating present values substitutes conjecture for experience." *Id.* Brandeis noted that "If the contention now urged by the Railways is sound, the management misrepresented by its published accounts its financial condition and the results of operation of the several years; and it paid dividends in violation of law." *Id.* at 288. In a short dissent, Stone observed that "what amounts annually carried to reserve will be sufficient to replace all the elements of a composite property purchased a various times, at varying price levels, as they wear out or become obsolete, is a question, not of law but of fact." 280 U.S. at 289 (Stone, J., dissenting).

⁹³¹ The Court refused to consider whether it had been proper to include in the company's costs of reproduction easements to use city streets, freely given to the railway company by the city. These costs added \$5 million to the company's rate basis. The Court considered this question waived. 280 U.S. at 248-49. In dissent, Brandeis disagreed. "Franchises to lay pipes or tacks in the public streets . . . are not donations to a utility of property by the use of which profit may be made. They are privileges granted to utilities to enable them to employ their property in the public service and make profit out such use of that property." 280 U.S. at 257-58 (Brandeis, J., dissenting).

⁹³² 262 U.S. at 692-93. Compare Butler, *supra* note 815, at 31-32. Butler's formulation has remained highly influential. *See, e.g., In re Permian Basin Area Rate Cases*, 390 U.S. 747, 806 (1968).

⁹³³ 280 U.S. at 249.

⁹³⁴ 280 U.S. at 249.

⁹³⁵ 280 U.S. at 251.

⁹³⁶ 280 U.S. at 251.

⁹³⁷ 280 U.S. at 252.

⁹³⁸ 41 Stat. 488-489. Taft had effectively sidestepped the issue of a constitutionally mandated fair rate of return in *Dayton-Goose Creek Railway Co.*:

The [Transportation] act fixes the fair return for the years here involved, 1920 and 1921, at 5 ½ per cent. and the Commission exercises its discretion to add one-half of 1 per cent. The case of *Bluefield Waterworks & Improvement Co. v. Public Service Commission*, 262 U. S. 679, is cited to show that a return of 6 per cent. on the property of a public utility is confiscatory. But 6 per cent. was not found confiscatory in *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 48, 50, in *Cedar Rapids Gas Light Company v. Cedar Rapids*, 223 U. S. 655, 670, or in *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153, 172,. Thus the question of the minimum of a fair percentage on value is shown to vary with the circumstances. Here we are relieved from considering the line between a fair return and confiscation, because under the provisions of the act and the reports made by the appellant the return which it will receive after paying one-half the excess to the Commission will be about 8 per cent. on the reported value. This can hardly be called confiscatory. Moreover, the appellant did not raise the issue of confiscation in its bill and it cannot properly be said to be before us.

263 U.S. at 486.

⁹³⁹ Carlisle Bargeron, *Hughes Confirmed, 52 to 26, As Senate Hits Supreme Court*, THE WASHINGTON POST (February 14, 1930), at 1.

⁹⁴⁰ *Hughes is Attacked by Borah and Glass; Foes Force a Delay*, NEW YORK TIMES (February 12, 1930), at 1. “Not in a century have such attacks been made upon confirmation of a chief justice.” *Id.*

⁹⁴¹ *Senate Confirms Hughes, 52 to 26*, DAILY BOSTON GLOBE (February 14, 1930), at 1.

⁹⁴² M. Farmer Murphy, *Opposition to Hughes Mounts to Formidable proportions in Senate*, THE SUN (February 13, 1930), at 1.

⁹⁴³ *Senate Confirms Hughes, supra* note 941

⁹⁴⁴ The attack on Hughes “began slowly, but gathered unexpected momentum as it progressed.” Carlisle Bargeron, *Hughes fight Breaks out on Senate Floor*, THE WASHINGTON POST (February 12, 1930), at 1. “The struggle to prevent confirmation centred chiefly around the so-called conservative majority decisions of the United States Supreme Court, which the opposition contended elevated property rights above human rights, and with which view, it was alleged, Mr. Hughes was aligned.” *Hughes Confirmed by Senate*, NEW YORK TIMES (February 14, 1930), at 1.

⁹⁴⁵ Remarks of Senator Norris, 72 CONG. REC. 3565-81 (February 13, 1930) (extensively commenting on and reprinting the Court’s opinion in *West*).

⁹⁴⁶ “During the debate yesterday and today much was said about the Supreme Court decision in the United Railways fare case from Baltimore. It was mentioned by almost every speaker as a striking example of the tendency to exalt the rights of property above those of individuals and the public.” Murphy, *supra* note 942, at 1.

⁹⁴⁷ Remarks of Senator La Follette, 72 CONG. REC. 3564 (February 13, 1930).

⁹⁴⁸ Remarks of Senator Borah, 72 CONG. REC. 3448-49 (February 11, 1930). *See* Remarks of Senator Dill, 72 CONG. REC. 3499-3503 (February 12, 1930) (“The views of Mr. Hughes on economic questions are just as important as his legal ability. Why do I say that? Because the Supreme Court has seen fit . . . to go into the question of the valuation of public utilities When you allow a court to write into its decisions a valuation upon franchises given by the people for the right to serve the people, you then enable those corporations to pick the pockets of the common men and women of America of unjustified profits under the guise of a constitutional right. . . . Those who have studied the history of the fight of the progressives of this country . . . know that to-day the last resort of organized capital that plunders the common people of America is the Supreme Court of the United States. . . .[B]y writing their economic theories of the supremacy of property rights into the decisions of the highest court of this land, they are gradually building up a tremendous valuation of public utilities upon which the American people must pay literally hundreds of millions of dollars of tribute annually that never could be collected otherwise. So I say the decisions of the judges of the Supreme Court themselves are to blame for our being compelled to bring into this discussion the economic views of men who are presented to us to be confirmed as members of the Supreme Court.”); Remarks of Senator Brookhart, 72 CONG. REC. 3505 (February 12, 1930) (“[T]he Supreme Court of the United States is now divided into two political parties. The progressive party is headed by that grand old humanitarian, Oliver Wendell Holmes. He is followed by Mr. Justice Brandeis and Mr. Justice Stone. The other members of the court belong to the conservative or reactionary party. This division more truly represents the political situation in the United States than any other party alignment at this time. We have so-called Republicans and so-called Democrats, but the vote on this confirmation will determine their real alignment. It will determine whether the progressive party want to increase the progressive strength in the United States or the conservative or reactionary party wants to continue the rule of that court. . . . [When the Court says in *West*] that there will be confiscation unless [a public utility is] granted as much as 7.44 per cent as the rate of return . . . then that court itself become the greatest confiscator of property in the history of this world. . . . The confiscations of the earnings of farmers alone are five or six billion dollars per year since 1920. . . . Party alignment will soon divide upon that question. The present illogical division must cease as the people realize and find out that in this way their earnings and their substance are being taken from them and transferred to the pockets of the few who control the corporate interests of the country.”); Remarks of Senator Connally, 72 CONG. REC. 3515 (February 12, 1930) (“The great questions that now confront us are economic questions, questions as to the whether the powers of the Federal Government and the powers of the State governments are adequate to control and regulate the great aggregated masses of wealth which are rapidly seizing upon and controlling many of the necessities of life of the people of the Nation.”); Remarks of Senator Wheeler, 72 CONG. REC. 3516-17 (February 12, 1930) (“No man who is familiar with the decision of the Supreme Court of the United States in the recent case decided with reference to the street-railway lines in Baltimore, no man who has studied the decision of the court in the O’Fallon case, can fail to come to the solemn conclusion that the Supreme Court of the United States of America has to-day assumed to decide not only legal questions but is deciding economic questions. . . . As far as I am concerned, I am not going to vote against Mr. Hughes because of the fact that he is a Republican; that is not my view about it. I am voting against him because of the economic views he holds.”); Remarks of Senator Blaine, 72 CONG. REC. 3518 (February 12, 1930) (“[T]o whom did the railroad corporations go when they desired to have set aside and made null and void the legislation of Congress providing for a valuation of the railroads and their properties for purpose of fixing rates? They went to Mr. Hughes.”); Remarks of Senator George, 72 CONG. REC. 3587 (February 13, 1930) (“If the decision of the Supreme Court which has been commented upon here for two days [*West*] is to stand, the recapture clause in the transportation act is not worth the paper upon which it is written; for there provision is made for the recapture of all over and above 6 per cent of the net earnings of the carriers of this country, and the court solemnly says that 6.26 per cent is confiscatory!”).

⁹⁴⁹ Remarks of Senator Dill, 72 CONG. REC. 3501 (February 12, 1930). *See* Remarks of Senator Brookhart, 72 CONG. REC. 3508 (February 12, 1930); Remarks of Senator Glass, 72 CONG. REC. 3553 (February 13, 1930).

⁹⁵⁰ *Brandeis-Frankfurter Conversations*, supra note 227, at 318 (July 3, 1923). *See* chapter 1, at ---.

⁹⁵¹ Compare Arthur T. Hadley, *Property in America*, THE INDEPENDENT (April 16, 1908), at 837: “The fundamental division of powers in the Constitution of the United States is between voters on the one hand and property owners on the other. The forces of democracy on one side, divided between the executive and the legislature, are set over against the forces of property on the other side, with the judiciary as arbiter between them.”)

⁹⁵² *See supra* note 948. “With national attention once more attracted to the Supreme Court, new understanding has been given to the clear-but and deep cleavage existing between two elements within the court on economic, rather

than judicial grounds. . . . In the past there has been some effort to retain a balance between Republicans and Democrats in the membership of the august body. Decisions in certain recent cases . . . indicate that it will be far more important to maintain a balance between two conflicting terms of economic thought which have nothing to do with politics as they have been expressed up to the present by current parties. In general the difference between the two groups involves issues between Property and Persons, with the Holmes-Brandeis group on the latter side.” Richard L. Strout, *President Hoover and the Supreme Court*, CHRISTIAN SCIENCE MONITOR (March 11, 1930), at 16.

⁹⁵³ Appalled, Stone wrote his former law clerk Milton Handler: “I wonder if you read the debates in the Congressional Record over the Hughes nomination. There were some pretty severe things said about the Court and for the first time since the Dred Scott decision there were extended debates over the opinions of the Court. The O’Fallon case and the Baltimore Railways case seem to incite the most interest. The latter was printed at length in the record.” HFS to Milton Handler (April 8, 1930) (Stone papers). Ironically, Frankfurter had written Stone just after the Court’s opinion in *West*:

I have just finished the reading of the January 6th batch of opinions, and I find I’m deeply in your debt –all of us are, who really care about our constitutional system & your Court and are apprehensive over the prevailing trend to read personal limitations of outlook or economics into the Constitution. Hughes, in his Lecture on the Court, speaks of the “self-inflicted wounds” of the Court. Clearly such dissenting disavowals as the youngest and the two oldest members have been giving will help to soften the mischief of those “wounds.” Your dissent in the United Railways case . . . [is] the kind of utterance that will help—I hope—to confine the mischievous doctrines from undue growth.

Felix Frankfurter to HFS (January 13, 1930) (Stone papers). Stone replied, “I am bound to say that I feel a good deal of concern over some of our recent decision, but I suppose that is the natural state of one who finds himself playing the role of dissenter. I sometimes wonder whether dissenting has any utility beyond enabling the dissenter to live comfortably with himself. But that is sufficient justification for me. It is some comfort, too, to know that there are those who study our work with painstaking care and appreciate its significance.” HFS to Felix Frankfurter (January 16, 1930) (Stone papers).

⁹⁵⁴ Bargeron, *supra* note 939. “The underlying motive, in fact, the frequently expressed motive of the attack, was to ‘teach the court a lesson.’” *Id.* The press noted “a tendency by some speakers to criticize not only Mr. Hughes but the Supreme Court itself. This criticism pointed out the fact that the court today not only interprets law but lays down policies and it was objected that this exceeds the intended authority of the court . . .” See *Warning Contained in Hughes Fight*, THE HARTFORD COURANT (February 14, 1930), at 2.

⁹⁵⁵ 72 CONG. REC. 3642 (February 14, 1930). Invoking *Dred Scott*, Dill charged that the Court was creating a “system of law that is fast bringing economic slavery in this country.” *Id.*

⁹⁵⁶ 72 CONG. REC. 3643 (February 14, 1930).

When the people in their homes all over America find, as they are finding and will find, that their telephone bills are going up, and they go their councilmen, to their legislators, to their Congressmen and their Senators and ask for legislation for relief and told that there is no way to relieve them because of the valuation decisions of the Supreme Court that have read valuations into telephone properties that never were heretofore known in this system of American government and have read into these decisions a rate of return as being confiscatory that has heretofore been looked upon as amply compensatory, they are going to begin to think about the Supreme Court. When they find that the street-car fares are up and are being raised, and they appeal to local officials to help them are told that it is because of a valuation system established by Supreme Court decision, and it can not be helped, they are going to begin to want to know about the Supreme Court. . . . [T]hey are going to begin to ask, “What is this Supreme Court, and who are these men that are saddling upon the American people these billions of dollars of valuations upon which we are compelled to pay this added return?” Then the Supreme Court will be in politics.

Id. at 3642-43.