

REVIEWS

The Structure of Classical Public Law*Barry Cushman*†

The Rise and Fall of Classical Legal Thought
Duncan Kennedy. Beard, 2006. Pp vii, 273.

INTRODUCTION

The “most widely circulated and cited unpublished manuscript in twentieth-century American legal scholarship”¹ since Henry M. Hart, Jr. and Albert M. Sacks’s legal process materials has at long last been formally published. The original manuscript is here accompanied by a lengthy and disarming preface entitled “Thirty Years Later,” which provides interesting insights into Duncan Kennedy’s early intellectual influences and scholarly ambitions, and situates the project in the legal literature and academic politics of the 1970s. In the preface Kennedy explains that the manuscript was “the first draft of the first half of a book about the history of American legal thought from the early nineteenth century to World War II” (p vii). The second half of the intended project, which was to be about the “fall” of Classical legal thought, he abandoned in 1979. What is published here as *The Rise and Fall of Classical Legal Thought* is in fact almost exclusively about its “rise.”

The book consists of five chapters. The first two consider the structure and development of classical public law.² The third and fourth examine the structure and development of classical private law, employing a method that will be familiar to readers of Kennedy’s early ar-

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¹ G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 Va L Rev 485, 583 n 278 (2002) (arguing that the most important critical scholarship was historical in nature).

² The first chapter was published as Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940*, 3 Rsrch in L & Sociology 3 (1980).

ticles, *The Structure of Blackstone's Commentaries*³ and *Form and Substance in Private Law Adjudication*.⁴ The final chapter gestures toward an account of the integration of classical public and private law. In this Review, my focus is on the chapters on public law.⁵

Kennedy's writing, though often abstract, is lucid and relatively unencumbered by jargon.⁶ There is the occasional factual error,⁷ and important nuances of doctrine are sometimes obscured.⁸ The research into the history of constitutional law is impressionistic. Nevertheless, Kennedy succeeds in identifying and elaborating two ideas that prove quite useful to understanding the constitutional law of the classical period. The first is the concept of legal consciousness;⁹ the second concerns the structural analysis of constitutional doctrine.¹⁰ I consider each of them in turn.

³ Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 *Buff L Rev* 205, 209–21 (1979) (applying “to legal thought techniques developed over two centuries in what is sometimes called the ‘continental’ tradition of philosophy, social theory, history, psychology, and anthropology”).

⁴ Duncan Kennedy, *Form and Substance of Private Law Adjudication*, 89 *Harv L Rev* 1685, 1725–37 (1976) (discussing three historical phases of the conflict between “altruism” and “individualism,” constructs that “break down the sense that legal argument is autonomous from moral, economic, and political discourse”).

⁵ At the conclusion of the preface, Kennedy lists a series of articles written in the late 1970s and early 1980s by colleagues and former students that, as he puts it, “extend[ed]” or “elaborate[d]” *The Rise and Fall* (pp xli–xliii). Nearly all of the cited pieces are concerned principally with doctrinal subjects outside of constitutional law. This is perhaps a reflection of the areas of study that most attracted the attention of legal historians at the time. Much of this Review is devoted to showing what studies applying the structuralist method advocated in *The Rise and Fall* to the domain of constitutional history might look like and reveal.

⁶ See, however, the references to “unlimited, absolute absoluteness” (pp 34, 36) and to “interlocked, everchanging absolutenesses” (p 156).

⁷ For example, he incorrectly reports that *Texas v White*, 74 US (7 Wall) 700 (1869), was decided in 1866 (p 35); he also incorrectly reports that *Home Building & Loan Association v Blaisdell*, 290 US 398 (1934), was decided in 1933, and that it concerned a statute enacted by the legislature of Wisconsin rather than that of Minnesota (p 261).

⁸ See notes 85–89 and accompanying text.

⁹ Though Kennedy appeared to abandon the idea of legal consciousness immediately following the sentence in which he famously renounced the fundamental contradiction, see Peter Gabel and Duncan Kennedy, *Roll Over Beethoven*, 36 *Stan L Rev* 1, 15–16 (1984), his preface suggests that he has not lost all use for the concept (pp iv–xvii).

¹⁰ Whether Kennedy ever abandoned structuralism is the subject of controversy. Compare William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 *Stan L Rev* 1065, 1075 n 66 (1997) (“Kennedy is adamant [] that renunciation of the fundamental contradiction did not entail abandonment of the larger structuralist method. . . . ‘I remain,’ he insisted in a conversation with the author, ‘a Structuralist to my toes.’”), with Daniel R. Ernst, *The Critical Tradition in the Writing of American Legal History*, 102 *Yale L J* 1019, 1032 (1993) (“By 1983, Kennedy decided that structuralism had lost the destabilizing value it once possessed, and dropped it for a post-modern stance.”).

I.

Kennedy takes as his subject “the development and disintegration of a form of American legal thought that emerged between 1850 and . . . 1940,” a “way of thinking” that he calls “Classical legal thought” (p 1). He sets out to displace the view that “the ‘real’ alliance influencing legal outcomes between 1865 and 1940 was that of the older conservatism of the profession with a class of despoiling entrepreneurs and politicians against the working class, the farmers, and the ‘public interest,’” which was “an article of faith in the liberal historiography of the period” (pp 1–2). He urges the reader to abandon “the preoccupation with validating this vision of the recent past” and instead to “recognize and confront the existence of legal consciousness as an entity with a measure of autonomy” (p 2). Legal consciousness, “the body of ideas through which lawyers experience legal issues” (p 3), “is a set of concepts that evolves according to a pattern of its own, and exercises an influence on results distinguishable from those of political power and economic interest” (p 2).¹¹ He insists that this autonomy was “no more than relative” and that his “approach denies the importance neither of ideologies like laissez-faire, nor of concrete economic interests, nor of the underlying structure of political power. It insists only that legal consciousness, which has its own structure, mediates their influence on particular legal results” (p 2).¹² His objective is to replace “the simpler vision of an unmediated interplay of purposes and outcomes” (p 2) with an “intellectual history” (p 4) “of the transformation of legal consciousness” (p 3). Through the exploration of the structure of legal consciousness as it exhibits itself at different times, Kennedy believes that “we can arrive at a history of the experience of judicial boundness” (p 21).

Kennedy’s principal illustrations of the capacity of legal consciousness to produce “judicial boundness” are *Lochner v New York*¹³ and *In re Debs*.¹⁴ He points out that both Justice Rufus Peckham’s opinion for the *Lochner* majority and Justice John Harlan’s dissenting opinion operated within the same analytic framework, differing only in the appropriate allocation of the burden of proof (pp 12–13). Similarly, he observes that Justice David Brewer’s “creative” opinion in *In*

¹¹ Kennedy explains:

My premise is that although Classical legal thought is unintelligible except in relation to thought as a whole, it was nonetheless an entity. It was not a mere reflection upon law of extra-legal ideas. It had elements of internal coherence and a logic of its own that made it partially autonomous (p 253).

¹² “The introduction of a third tier between interest or power and outcomes,” as Kennedy points out, “greatly complicates the task of historical exposition” (p 2).

¹³ 198 US 45 (1905).

¹⁴ 158 US 564 (1895).

re Debs, authorizing a federal court to enjoin a railway strike, relied upon analogies to dormant Commerce Clause and public nuisance jurisprudence that all of his colleagues found persuasive (p 17). Yet the skeptic might justly question how much mediating work the “legal consciousness” of the justices was actually doing in each of these instances. In *Lochner*, the analytic framework was sufficiently supple to allow justices to work within it and yet to reach diametrically opposed conclusions concerning the constitutionality of the challenged statute. Similarly, the opinion in *In re Debs* was unanimous and—insofar as Kennedy’s account reveals—no justice preferred to reach a contrary result but was persuaded by the power of Justice Brewer’s analogical reasoning that no dissenting opinion could be professionally respectable. *Lochner* and *In re Debs* are, to be sure, examples of legal consciousness *shaping* the ways in which the justices reasoned to their respective conclusions. But they do not appear to be instances in which that consciousness ultimately *constrained* the justices concerning the results to which they might reason. An even stronger case for the “judicial boundness” created by a shared legal consciousness might be made were one able to identify instances in which a justice felt constrained to reach a result differing from his preferred outcome.¹⁵

The period about which Kennedy writes provides numerous illustrations of this phenomenon of “judicial boundness.” Let me mention just a few. When future-Justice Edward Douglass White was representing Louisiana in the Senate in 1892, he delivered a lengthy speech in opposition to the Hatch Anti-Option Bill.¹⁶ That bill would have imposed prohibitive excise taxes on options contracts concerning certain enumerated agricultural commodities.¹⁷ During that speech then-Senator White maintained that the 1886 federal statute imposing an excise tax of two cents per pound on colored oleomargarine¹⁸ had been “objectively constitutional” because on its face it appeared to be designed to raise revenue. At the same time, the statute was “unconstitutional, subjectively” because it was in fact designed not to raise revenue but instead to regulate a matter reserved to the several states.¹⁹ White insisted that as a

¹⁵ I leave to one side, as raising different and more difficult issues of verification, the possibility that a justice’s legal consciousness might be so integral to or constitutive of his political, social, or economic consciousness that he experiences no such divergence. For criticism of Kennedy’s conception of the constraints legal consciousness places on the legal imagination as overly deterministic, see Fisher, 49 *Stan L Rev* at 1099 (cited in note 10) (“Kennedy’s formulation seems to imply that . . . the intellectual freedom of individual lawyers is dramatically limited. . . . [T]he structuralist portion of his analysis plainly tilts in the direction of determinism.”).

¹⁶ See 52d Cong, 1st Sess, 23 *Cong Rec S* 6513–20 (July 21, 1892).

¹⁷ See Anti-Option Bill, HR 7845, 52d Cong, 1st Sess, in 23 *Cong Rec* 5071 (June 6, 1892).

¹⁸ Oleomargarine Act of 1886, 24 *Stat* 210.

¹⁹ 23 *Cong Rec S* 6518 (July 21, 1892).

senator he “would not vote for a dishonest bill raising revenue,” but he conceded that if he were “a judge and the bill came to me, then having passed out of this sphere and into another sphere where motives could not enter, I should say the sole question presented to me was, does it raise revenue on its face, and, if so, I would hold it constitutional.”²⁰

White was appointed to the Supreme Court by President Grover Cleveland in 1894. In 1902, Congress amended the 1886 statute to raise the excise on colored oleomargarine from two to ten cents per pound.²¹ The 1886 bill, in its original form, similarly had proposed a ten cent per pound excise,²² a tax then-Senator White had characterized as “prohibitive” in the Anti-Option Bill debate.²³ The constitutionality of the amended statute was challenged in *McCray v United States*.²⁴ As he had suggested he would do on the Senate floor in 1892, now-Justice White wrote for the majority upholding the tax. In an opinion laced with expressions of concern over the possibility of “judicial usurpation” eliminating “the entire distinction between the legislative, judicial, and executive departments of the government, upon which our system is founded,”²⁵ Justice White rejected the contention “that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.”²⁶ Though White believed that the statute was subjectively unconstitutional and would have voted against it for that reason as a senator, his conception of the judicial role prevented him from vindicating that conviction in his capacity as a justice.

Consider next an instance involving Justice Mahlon Pitney. Section 10 of the Erdman Act of 1898²⁷ prohibited interstate carriers from requiring their employees, or any person seeking employment, as a condition of employment to enter into an agreement not to become or remain a member of a labor organization (a so-called “yellow-dog” contract).²⁸ Section 10 further prohibited carriers from threatening any employee with loss of employment or discriminating against any employee because of his union membership.²⁹ During the debates on the bill, no member of either house of Congress suggested that this provision was unconstitu-

²⁰ Id at 6519.

²¹ Oleomargarine Act of 1902, Pub L No 57-110, 32 Stat 194.

²² HR 8328, 49th Cong, 1st Sess, in 17 Cong Rec H 4911 (May 25, 1886).

²³ 23 Cong Rec at 6518.

²⁴ 195 US 27 (1904).

²⁵ Id at 54.

²⁶ Id at 56.

²⁷ Erdman Act of 1898, 30 Stat 424.

²⁸ Erdman Act § 10, 30 Stat at 428.

²⁹ Id.

tional,³⁰ and Pitney, who was then a representative from New Jersey, voted to enact the bill.³¹ In 1908, the Supreme Court in *Adair v United States*³² invalidated § 10 as an infringement of the liberty of contract guaranteed by the Fifth Amendment.³³ Pitney was appointed to the Supreme Court by then-President William Howard Taft in 1912. In 1915, the Court heard *Coppage v Kansas*,³⁴ which reviewed the conviction of a supervisor for the St. Louis and San Francisco Railway Company for violating a Kansas statute prohibiting employers from requiring their employees to sign yellow-dog contracts.³⁵ Now-Justice Pitney wrote the majority opinion holding that *Coppage* “cannot be distinguished from *Adair*” and that the Kansas statute therefore deprived employers and employees of the liberty of contract protected by the Fourteenth Amendment.³⁶

The case of *United Mine Workers v Coronado Coal Co*³⁷ is particularly revealing. The Court had established in *United States v E.C. Knight*³⁸ that the federal commerce power, and hence the Sherman Antitrust Act, did not reach corporate consolidation in the manufacturing sector in the absence of a showing of intent to restrain interstate commerce.³⁹ Subsequent cases demonstrated that the same limiting principle also covered attempts to use the Act to enjoin or penalize labor strikes, boycotts, and disturbances at manufacturing establishments.⁴⁰ *Coronado Coal* was such a case. The Court unanimously reversed the Sherman Antitrust Act judgment against the union that the company had secured below, holding that “[c]oal mining is not interstate commerce, and the power of Congress does not extend to its regulation as such.”⁴¹ Yet Chief Justice Taft’s opinion for the Court made no effort to conceal his discomfort with the result he understood established doctrine to require. “The circumstances,” Taft wrote, which had involved both homicide and arson commit-

³⁰ For the legislative history, see HR 4372, S 3653, and S 3662, 55th Cong, 2d Sess, in 31 Cong Rec 74-5566 (1897-98); HR Rep No 55-454, 55th Cong, 2d Sess (1898); S Rep No 55-591, 55th Cong, 2d Sess (1898).

³¹ See 31 Cong Rec at 5053.

³² 208 US 161 (1908).

³³ Id at 172.

³⁴ 236 US 1 (1915).

³⁵ Id at 6-7.

³⁶ Id at 13.

³⁷ 259 US 344 (1922).

³⁸ 156 US 1 (1895).

³⁹ See id at 17 (noting that an indirect effect on trade or commerce “was not enough to entitle complainants to a decree”).

⁴⁰ See, for example, *Levering & Garrigues v Morrin*, 289 US 103, 107 (1933) (finding that the aim of a labor strike among New York steelworkers was “not for the purpose of affecting the sale or transit of materials in interstate commerce”); *United Leather Workers International Union v Herkert & Meisel Trunk Co*, 265 US 457, 471 (1924) (finding that a leatherworking union’s picketing campaign was an “indirect and remote obstruction” to interstate commerce).

⁴¹ *Coronado Coal*, 259 US at 407.

ted by union members, “are such as to awaken regret that, in our view of the federal jurisdiction, we cannot affirm the judgment.”⁴² Justice William Day wrote on his return of Chief Justice Taft’s circulated opinion, “I agree, and regret that this gross outrage by the local union cannot be reached by federal authority.”⁴³ Justice James McReynolds, on his return, wrote, “I am sorry you can’t make the scoundrels pay,” and Justice Pitney quipped, “Too true to be good.”⁴⁴

Such instances were commonplace during the New Deal. Justices Harlan Fiske Stone and Louis Brandeis each disapproved of both the National Industrial Recovery Act⁴⁵ (NIRA) and the first Agricultural Adjustment Act⁴⁶ (AAA), yet they voted to invalidate the former⁴⁷ and to uphold the latter.⁴⁸ Stone’s policy preferences ran against both the Railroad Retirement Act of 1934⁴⁹ and the Administration’s legislation abrogating the Gold Clause,⁵⁰ yet he voted to uphold each statute.⁵¹

⁴² *Id.* at 413.

⁴³ William Howard Taft, 1922 Pres Papers, Reel 615.

⁴⁴ *Id.*

⁴⁵ National Industrial Recovery Act, Pub L No 73-67, 48 Stat 195 (1933).

⁴⁶ Agricultural Adjustment Act, Pub L No 73-10, 48 Stat 31 (1933). For the justices’ disapproval of both laws, see Marian C. McKenna, *Franklin Roosevelt and the Great Constitutional War* 79, 103–05 (Fordham 2002) (“The NIRA was subjected to withering criticism by Justice Brandeis both before and after its passage.”); *id.* at 128 (noting that “Justice Stone disliked the AAA and said he would not have voted for it” and that “Justice Brandeis also disliked the AAA.”); Lewis Paper, *Brandeis* 345, 347 (Prentice-Hall 1983) (noting that Brandeis “repeatedly warned” members of the Agricultural Adjustment Administration “that they were going down the wrong path” and that NIRA “especially disturbed him”); Bruce Murphy, *The Brandeis/Frankfurter Connection* 139–43 (Oxford 1982) (“Brandeis formulated a powerful argument against what he viewed as the bigness of the AAA.”); Peter Irons, *The New Deal Lawyers* 140 (Princeton 1982) (describing the report of Thomas Reed Powell to Felix Frankfurter in November of 1933 that Brandeis was “very strongly opposed” to much of the AAA); Melvin I. Urofsky, *Louis D. Brandeis and the Progressive Tradition* 162 (Little, Brown 1981) (reporting that Brandeis wrote to his daughter in April of 1934 that he saw “little to be joyous about in the New Deal measures most talked about: NIRA and AAA seem to be going from bad to worse”); Allison Dunham, *Mr. Chief Justice Stone*, in Allison Dunham and Phillip Kurland, eds, *Mr. Justice* 229, 231 (Chicago 1964) (“Stone regarded [the AAA] as so bad that, even four years later when I first came to know him, he would talk about it in scathing terms.”); Alpheus Thomas Mason, *Harlan Fiske Stone: Pillar of the Law* 371–75 (Viking 1956) (quoting a letter dated March 27, 1934 from Stone to Herbert Hoover deploring “the creation of drastic administrative procedures without legislative definition and without provision for their review by the courts”); *id.* at 416 (quoting a letter dated January 9, 1936 from Stone to Charles C. Burlingham, in which Stone insisted, “You do not dislike the AAA any more than I do”).

⁴⁷ *Schechter Poultry Corp v United States*, 295 US 495 (1935) (invalidating NIRA as an unlawful delegation of legislative power and because it exceeded congressional power regulate commerce).

⁴⁸ *United States v Butler*, 297 US 1, 78–88 (1936) (Stone dissenting) (arguing that the AAA should be upheld as a lawful exercise of congressional taxing power).

⁴⁹ Railroad Retirement Act of 1934, Pub L No 73-485, 48 Stat 1283.

⁵⁰ A Joint Resolution to Assure Uniform Value to the Coins and Currencies of the United States, Pub L No 73-10, 48 Stat 112 (1933) (“Gold Clause legislation”). For details of Stone’s policy preferences on these laws, see Mason, *Harlan Fiske Stone* at 393 (cited in note 46) (quoting a May 9, 1935 letter from Stone to Felix Frankfurter: “If I had been a member of Congress, I am certain I should have voted against [the Railroad Retirement Act]”); *id.* at 390 (noting that Stone was “sorely troubled”

Similarly, Justice Brandeis opposed the Gold Clause legislation yet voted to uphold it,⁵² and though he strongly supported the objectives of the Frazier-Lemke Farm Mortgage Act,⁵³ he wrote the unanimous opinion striking it down.⁵⁴ Roosevelt's Secretary of the Interior Harold Ickes recorded in his diary that he had spoken with Justice Roberts at a dinner party shortly after the Court had rendered its 8-1 decision in *Panama Refining Co v Ryan*⁵⁵ ("*Hot Oil Case*") invalidating certain provisions of NIRA. Ickes's diary reveals that on that occasion Justice Owen Roberts (who had voted with the majority) "assured me that he is entirely sympathetic with what we are trying to do in the oil matter and that he hoped that we would pass a statute that would enable us to carry out our policy."⁵⁶

Robert Jackson, who along with several of his colleagues would soon confront similar concerns as he grappled with the issues presented by *Wickard v Filburn*,⁵⁷ wrote in 1941 that liberal presidents had often failed in their efforts to reshape the nation's law through judicial appointments because "the Court influences appointees more consistently than appointees influence the Court."⁵⁸ Members of the legal profession, he explained, were "much concerned with precedents, authorities, existing customs, usages, vested rights, and established relationships."⁵⁹ The lawyer's "method of thinking" cultivated "a supreme

by the abrogation of the Gold Clause); Dunham, *Mr. Chief Justice Stone* at 231 (cited in note 46) (reporting that Stone was "so incensed" that "he proposed never again to purchase government bonds").

⁵¹ *Railroad Retirement Board v Alton Railroad Co*, 295 US 330 (1935) (Railroad Retirement Act); *Nortz v United States*, 294 US 317 (1935) (Gold Clause legislation); *Norman v Baltimore & Ohio Railroad Co*, 294 US 240 (1935) (Gold Clause legislation).

⁵² See Paper, *Brandeis* at 346 (cited in note 46) ("Brandeis put aside his personal feelings and supported the majority decision that left the government's policy intact."); Stanley Reed Oral History Project, Interview with Paul A. Freund *17-18 (unpublished transcript, University of Kentucky, Oct 18, 1982) (noting that Brandeis joined the majority opinion upholding the constitutionality of the Gold Clause "without enthusiasm").

⁵³ Frazier-Lemke Farm Mortgage Act, Pub L No 73-486, 48 Stat 1289 (1934).

⁵⁴ Compare Paper, *Brandeis* at 350 (cited in note 46) (noting that despite Justice Brandeis's sympathy to providing debt relief for farmers, he "could not get around the fact that it simply cut off the rights of the person holding the mortgage"), with *Louisville Joint Stock Land Bank v Radford*, 295 US 555, 601-02 (1935) (holding that the Frazier-Lemke Farm Mortgage Act violated the Fifth Amendment by taking private property without just compensation).

⁵⁵ 293 US 388 (1935).

⁵⁶ Harold L. Ickes, 1 *The Secret Diary of Harold L. Ickes: The First Thousand Days 1933-1936* 273 (Simon and Shuster 1953).

⁵⁷ 317 US 111 (1942). See Barry Cushman, *Rethinking the New Deal Court* 212-22 (Oxford 1998) (describing the various stages in Jackson's attempts to "think his way through the commerce clause issue").

⁵⁸ Robert H. Jackson, *The Struggle for Judicial Supremacy* vii (Knopf 1941).

⁵⁹ *Id.* at 313.

respect for the past, and its order.”⁶⁰ As Frederic Maitland succinctly put the point, “taught law is tough law.”⁶¹

Jackson had seen these lawyerly habits of mind as “sustained institutional and procedural pressures towards conservatism,”⁶² and there is a sense in which this is true. But as the examples I have offered suggest, and as the division in *Lochner* discussed by Kennedy illustrates, there were many cases in which these pressures did not produce or require conservative political outcomes.⁶³ Indeed, the later history of the New Deal reveals that the constitutional difficulties faced by portions of the early New Deal had to do not with the policy objectives of the invalidated legislation, but instead with the means by which those objectives had been sought. Shortly after the Court invalidated the Frazier-Lemke Farm Mortgage Act, Congress enacted legislation designed to achieve the same policy objective while addressing the constitutional objections raised in Justice Brandeis’s unanimous opinion.⁶⁴ When the revised statute was challenged before the Court in 1937, each of the justices—the Four Horsemen⁶⁵ included—joined Brandeis’s opinion upholding the new law.⁶⁶ Similarly, shortly after the *Hot Oil Case* decision was rendered, Congress enacted the Connally Act,⁶⁷ which sought to achieve the objectives of its invalidated predecessor while eliminating the delegation feature that the Court had held unconstitutional. Challenges to the constitutionality of the Act were uniformly rejected in the lower federal courts.⁶⁸ When an indictment for violating the Act ultimately reached the Court in 1939, the defendants did not even allege that the Act was unconstitutional. The unanimous opinion sustaining the indictment was joined by the two remaining Horse-

⁶⁰ Id at 313–14.

⁶¹ Frederic W. Maitland, *English Law and the Renaissance* 18 (Cambridge 1901). See also Roscoe Pound, *The Formative Era of American Law* 82 (P. Smith 1938) (meditating on the “[t]enacity of a taught legal tradition”).

⁶² Jackson, *The Struggle for Judicial Supremacy* at vii (cited in note 58).

⁶³ For a more general treatment of this point, examining a multitude of cases in which “conservative” justices voted in support of “liberal” case outcomes, see generally Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 Va L Rev 559 (1997).

⁶⁴ Amendment to Bankruptcy Act of 1898, 49 Stat 943 (1935).

⁶⁵ The Four Horsemen included Justices Pierce Butler, James McReynolds, George Sutherland, and Willis Van Devanter. See Cushman, *The Secret Lives of the Four Horsemen*, 83 Va L Rev at 559.

⁶⁶ See *Wright v Vinton Branch Bank*, 300 US 440, 456–70 (1937) (distinguishing the amended statute from the original Frazier-Lemke Farm Mortgage Act on multiple grounds).

⁶⁷ Connally Act, Pub L No 74-14, 49 Stat 30 (1935).

⁶⁸ See *Genecov v Federal Petroleum Board*, 146 F2d 596, 597 (5th Cir 1944); *The President of the United States v Skeen*, 118 F2d 58, 59 (5th Cir 1941); *Hurley v Federal Tender Board No 1*, 108 F2d 574, 576 (5th Cir 1939); *Griswold v The President of the United States*, 82 F2d 922, 923 (5th Cir 1936); *President of the United States v Artex Refineries Sales Corp*, 11 F Supp 189, 192 (SD Tex 1935).

men, Justices James McReynolds and Pierce Butler.⁶⁹ In 1936, *Carter v Carter Coal Co*⁷⁰ held that the labor regulation provisions of the Guffey-Snyder Coal Act⁷¹ of 1935 exceeded the scope of the commerce power, and invalidated the Act's provisions regulating coal prices on the ground that those portions of the statute were not severable from the objectionable labor provisions.⁷² Congress soon enacted the Bituminous Coal Act of 1937,⁷³ which essentially reenacted the Guffey-Snyder Coal Act's price regulation provisions while omitting its labor provisions. The Court upheld the revised Act in 1940 over the lone dissent of Justice McReynolds.⁷⁴ The 1936 decision in *United States v Butler*⁷⁵ saw Chief Justice Hughes join Justice Roberts's majority opinion striking down the AAA of 1933 as an unconstitutional effort to regulate agricultural production through the use of the taxing and spending powers.⁷⁶ The Agricultural Adjustment Act of 1938,⁷⁷ by contrast, sought to buoy the sagging prices of agricultural commodities not by limiting their production but instead by regulating their marketing in interstate commerce.⁷⁸ When the revised Act was challenged before the Court in 1939, Hughes joined Roberts's majority opinion upholding the statute as a legitimate exercise of the commerce power.⁷⁹

In these instances, congressmen and commentators professed faith that the revised legislation would pass muster where the earlier initiatives had failed. Representatives and senators who had voted against the earlier bills because they judged them to be unconstitutional supported the second wave of legislation, which they believed had addressed the concerns they had harbored over the first wave.⁸⁰ The decisions invalidating the earlier New Deal statutes were not simple manifestations of personal distaste for their respective policy goals. They were instead lawyerly objections to the failures of Con-

⁶⁹ *United States v Powers*, 307 US 214 (1939).

⁷⁰ 298 US 238 (1936).

⁷¹ Guffey-Snyder Coal Act, Pub L No 74-402, 49 Stat 991 (1935).

⁷² *Carter Coal*, 298 US at 316.

⁷³ Bituminous Coal Act of 1937, Pub L No 75-48, 50 Stat 72.

⁷⁴ *Sunshine Anthracite Coal Co v Adkins*, 310 US 381, 403-04 (1940).

⁷⁵ 297 US 1 (1936).

⁷⁶ *Butler*, 297 US at 68.

⁷⁷ Agricultural Adjustment Act of 1938, Pub L No 75-430, 52 Stat 31.

⁷⁸ *Id* at 45-62.

⁷⁹ *Mulford v Smith*, 307 US 38, 48 (1939) (holding that the provisions of the act in question regulated interstate and foreign commerce rather than production, and thus were within congressional authority). For a fuller treatment of the cases and legislation discussed in this paragraph, see generally Barry Cushman, *The Hughes Court and Constitutional Consultation*, 1998 J S Ct Hist 79.

⁸⁰ See Cushman, 1998 J S Ct Hist at 81-94 (cited in note 79) (discussing the means by which Congress sought with the second wave of legislation to remedy the constitutional difficulties plaguing the first wave).

gress to seek its objectives through legal forms consistent with the requirements of constitutional doctrine as understood by the justices. The constraints these justices experienced were not those of policy preference but instead those of legal consciousness.⁸¹

II.

Kennedy is interested not merely in the fact of classical legal consciousness but also in its structure and operation. Classical legal thought, he argues, “amounted to a rationalistic ordering of the whole legal universe” (p 1) into “formal arrangement[s]” (p 27), reducing an “enormous mass of rules and standards” to “a much smaller number with a definite pattern” (p 7). These “elements” of legal consciousness were ordered through their “integration” into structures that Kennedy calls “subsystems” (p 16). Subsystems are integrated along two dimensions, the “vertical” and the “horizontal.” A subsystem is integrated along the vertical dimension where there is “a connection between an abstract proposition (contract protects will of the parties) and a particular rule (expectation damages)” (p 21). Horizontal integration concerns “the question of how many of the doctrinal areas or fields within legal consciousness have been assimilated to a particular integrating sub-system or structure” (p 20), as well as “the manner in which they are related to one another” (p 28). Kennedy offers as an example of horizontal integration the issues raised in *In re Debs*:

We have to decide whether, in the absence of a relevant statute, the federal government can get an injunction from a federal court against a railroad strike on the ground that the strike has interrupted interstate commerce. First, is it relevant that the courts would grant an injunction against a state statute which discriminated against interstate commerce through unequal taxation? Second, is it relevant that a private party, under the private law of nuisance, can obtain an injunction against a house of prostitution (p 17)?

In answering these questions in the affirmative, Kennedy observes:

Brewer’s opinion supplied the total absence of closely analogous precedents with what he took to be logical inferences from precedents about the relation of federal commerce power to state police power, about the power of a state to remove physical obstruction

⁸¹ As Charles Curtis wrote of the New Deal Court, “It is absurd to think that these Justices would have reasoned as they did to us in these opinions, if they had been asked to give, not judicial opinions, but solutions of our national problems.” Charles Curtis, *Lions under the Throne* 190 (Houghton Mifflin 1947).

from highways and water-ways, and about the abatement by injunction of nuisances in general (p 20).

The vertical and horizontal integration of rules and principles within a subsystem in turn creates logical and analogical pressures on those whose legal consciousness is comprised in part by that subsystem. As Kennedy explains, “[I]f your position about X puts a good deal of moral and intellectual pressure on you to take a particular position with respect to Y, then the two are part of a subsystem” (pp 16–17). Whether one experiences the relation between two rules as one of necessary logical inference or of compelling analogy, Kennedy maintains that “[e]ach of these modes of interrelation involves the experience of being bound, to some extent, to do X as an implication of commitment to Y” (p 21). Kennedy refers to this capacity of certain rules or principles to generate “concrete prescriptions that are felt to be inescapable” as “operativeness” (p 28).⁸² Classical legal thought was in this sense “a structured whole with a great deal of internal consistency and a powerful internal logic” (p 242).⁸³

Kennedy contends that Classical legal thought was organized by four fundamental legal relations: the relation between private citizen and private citizen, the relation between private citizen and state, the relation between the state and federal governments, and the relation between the legislature and the judiciary. Before the Civil War, Kennedy maintains, the American legal elite conceived of these relations as “qualitatively distinct from one another and as operated legally according to qualitatively distinct principles” (p 2). He notes, however:

During the Classical period, the legal elite conceived these four institutional relationships as four particular instances of a single general relation: each of them was an example of the delegation of legal powers absolute within their spheres.⁸⁴ The role of the ju-

⁸² Kennedy believes that “[w]ith the disintegration of Classicism, there has been something close to a disappearance” of this “experience that appears to have been common at the turn of the [twentieth] century” and, with it, a decline in the credibility of “claims to an objective basis for judicial review . . . that seemed perfectly plausible” during the classical age (p 25).

⁸³ Compare the contemporaneous formulation of English historian, E.P. Thompson: law “has its own characteristics, its own independent history and logic of evolution.” E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* 262 (Allen Lane 1975).

⁸⁴ Over time, Kennedy maintains, certain features of these fundamental relations came to bear a greater resemblance to one another. By 1885 there was “such a marked similarity” between the citizen-citizen and state-citizen relations “that it was an easy matter for thinkers so inclined to put them together into a single integrated Classical theory of law” (p 93). So, Kennedy offers by way of example that “[b]y 1898 . . . [t]he freedom of contract protected by the 14th Amendment against legislative interference was the same entity as the freedom of contract enforced by the common law in litigation between businessmen” (p 41), and that by 1900, “the rights the Fourteenth Amendment guaranteed against state abridgment got their legal definition from common law rules governing the relations of neighbors” (p 91).

diciary (its sphere of absolute power) was the application of a single, distinctively legal, analytic apparatus to the job of policing the boundaries of these spheres (pp 2–3).

Within this system, the federal judiciary assumed the role “of umpire and line drawer” (p 39), the “absolute master of the operation of drawing the boundary lines between spheres, using a technique of construction of the Constitution that was legal rather than prudential or political” (p 41). It was thought that the employment of this “objective, quasi-scientific” and “peculiar legal technique” of “elaborating general principles” (p 6) prevented judicial usurpation of the authority of legislatures and citizens. Judges did not make law; they simply applied it in an impersonal, neutral fashion. They did not exercise will; instead, they merely carried out the will of other autonomous legal actors (p 253).

This idea of powers “absolute within” their spheres but “void outside” them (p 6) could benefit from some refinement. With respect to federal-state relations, it does not capture areas of concurrent power, such as that existing with respect to the regulation of interstate commerce under the doctrine of *Cooley v Board of Wardens of the Port of Philadelphia*⁸⁵ that persisted during the classical period.⁸⁶ Concerning the public-private distinction, it seduces Kennedy into claiming that

⁸⁵ 53 US 299 (1851). The taxing and bankruptcy powers were similarly concurrent.

⁸⁶ See, for example, *Clason v Indiana*, 306 US 439, 443 (1939) (upholding a statute requiring license to transport large dead animals not slaughtered for human consumption on the state highways as an “appropriate sanitary measure whose effect upon interstate commerce, if any, is merely incidental”); *Mintz v Baldwin*, 289 US 346, 350 (1933) (upholding a cattle inspection law); *Corn Products Refining Co v Eddy*, 249 US 427, 432 (1919) (upholding a Kansas requirement that corn syrup containers include a label displaying ingredients despite its “incidental interference” with interstate commerce); *Erie Railroad Co v Williams*, 233 US 685, 704 (1914) (upholding a New York statute requiring common carriers to pay their employees on a semimonthly basis); *Standard Stock Food Co v Wright*, 225 US 540, 549–50 (1912) (upholding an inspection charge for stock food); *Savage v Jones*, 225 US 501, 528–29 (1912) (same); *Reid v Colorado*, 187 US 137, 148–49 (1902) (upholding a cattle quarantine law); *Compagnie Francaise de Navigation a Vapeur v Louisiana State Board of Health*, 186 US 380, 390–91 (1902) (permitting a state to restrict travel through quarantined areas); *Smith v St. Louis and Southwestern Railway Co*, 181 US 248, 257–58 (1901) (upholding a quarantine statute); *Rasmussen v Idaho*, 181 US 198, 201–02 (1901) (upholding a statute forbidding shipment of diseased cattle into the state); *Lindsay and Phelps Co v Mullen*, 176 US 126, 146–48 (1900) (allowing lumber inspections); *Patapsco Guano Co v North Carolina Board of Agriculture*, 171 US 345, 361 (1898) (allowing fertilizer inspections); *Missouri, Kansas and Texas Railway Co v Haber*, 169 US 613, 627 (1898) (upholding a cattle quarantine statute); *Morgan’s Steamship Co v Louisiana Board of Health*, 118 US 455, 465 (1886) (upholding quarantine laws); *Esanaba Co v Chicago*, 107 US 678, 687 (1882) (holding that states have plenary control over navigable rivers until Congress acts); *Munn v Illinois*, 94 US 113, 135 (1877) (permitting state regulation of grain elevator rates). Kennedy is not alone in overstating the exclusive character of postbellum federalism—I, too, have been guilty. See Cushman, *Rethinking the New Deal Court* at 141–42 (cited in note 57). For my own small effort at redemption, see Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U Chi L Rev 1089, 1114–16 (2000).

“[w]ith respect to . . . the regulation of railroads and other activities ‘affected with a public interest’ . . . the legislature was a legal power holder able to command absolute obedience to its will objectively construed” (p 254). As is demonstrated by *Smyth v Ames*⁸⁷ and its progeny, invalidating “confiscatory” public transportation and utility rate regulations,⁸⁸ as well as numerous other cases of the period,⁸⁹ this is a considerable

⁸⁷ 169 US 466 (1898).

⁸⁸ See, for example, *West v Chesapeake and Potomac Telephone Co of Baltimore*, 295 US 662, 671 (1935) (telephone rates); *Western Ohio Gas Co v Public Utilities Commission of Ohio (No 2)*, 294 US 79, 80–83 (1935) (gas rates); *Western Ohio Gas Co v Public Utilities Commission of Ohio (No 1)*, 294 US 63, 67–77 (1935) (gas rates); *Columbus Gas and Fuel Co v Public Utilities Commission of Ohio*, 292 US 398, 404–05 (1934) (gas rates); *Central Kentucky Natural Gas Co v Railroad Commission*, 290 US 264, 275 (1933) (gas rates); *Railroad Commission v Maxcy*, 282 US 249, 250–51 (1931) (water rates); *United Railways and Electric Co of Baltimore v West*, 280 US 234, 249 (1930) (street railway fares); *Denney v Pacific Telephone and Telegraph Co*, 276 US 97, 101–04 (1928) (telephone rates); *Chicago, Milwaukee and St. Paul Railway v Public Utilities Commission*, 274 US 344, 350–52 (1927) (railroad rates); *Ottinger v Brooklyn Union Gas Co*, 272 US 579, 580–81 (1926) (gas rates); *McCardle v Indianapolis Water Co*, 272 US 400, 410–21 (1926) (water rates); *Patterson v Mobile Gas Co*, 271 US 131, 134–35 (1926) (gas rates); *Board of Public Utility Commissioners v New York Telephone Co*, 271 US 23, 31–32 (1926) (telephone rates); *Smith v Illinois Bell Telephone Co*, 270 US 587, 590–92 (1926) (telephone rates); *Banton v Belt Line Railway*, 268 US 413, 419–25 (1925) (street railway fares); *Northern Pacific Railway v Department of Public Works*, 268 US 39, 42–45 (1925) (railroad rates); *Ohio Utilities Co v Public Utilities Commission of Ohio*, 267 US 359, 364 (1925) (electricity rates); *Pacific Gas and Electric Co v City of San Francisco*, 265 US 403, 405–16 (1924) (gas rates); *Bluefield Water Works and Improvement Co v Public Service Commission*, 262 US 679, 690 (1923) (water rates); *Southwestern Bell Telephone Co v Public Service Commission*, 262 US 276, 287–89 (1923) (telephone rates); *Prendergast v New York Telephone Co*, 262 US 43, 50–51 (1923) (telephone rates); *City of Paducah v Paducah Railway*, 261 US 267, 275 (1923) (electric street car fares); *City of Houston v Southwestern Bell Telephone Co*, 259 US 318, 321–25 (1922) (telephone rates); *Newton v Consolidated Gas Co*, 258 US 165, 174–78 (1922) (gas rates); *City of San Antonio v San Antonio Public Service Co*, 255 US 547, 555–58 (1921) (street railway fares); *Southern Iowa Electric Co v City of Chariton*, 255 US 539, 542–46 (1921) (electricity rates); *Vandalia Railroad v Schnull*, 255 US 113, 118–22 (1921) (railroad rates); *Groesbeck v Duluth, South Shore and Atlantic Railway Co*, 250 US 607, 609 (1919) (railroad rates); *Detroit United Railway v City of Detroit*, 248 US 429, 436 (1919) (street railway fares); *City of Denver v Denver Union Water Co*, 246 US 178, 194 (1918) (water rates); *Rowland v Boyle*, 244 US 106, 107–11 (1917) (railroad rates); *Norfolk and Western Railway Co v Conley*, 236 US 605, 614 (1915) (railroad rates); *Northern Pacific Railway Co v McCue*, 236 US 585, 601 (1915) (railroad rates); *San Joaquin and Kings River Canal and Irrigation Co v County of Stanislaus*, 233 US 454, 458–61 (1914) (water rates); *The Missouri Rate Cases*, 230 US 474, 507–09 (1913) (railroad rates); *The Minnesota Rate Cases*, 230 US 352, 433–73 (1913) (railroad rates).

⁸⁹ See, for example, *Chicago, Rock Island, and Pacific Railway Co v United States*, 284 US 80, 100 (1931) (invalidating an agency rule that favored short railroad lines by exempting them from statutory payments that applied to all railroads); *Chicago, St. Paul, Minneapolis and Omaha Railway Co v Holmberg*, 282 US 162, 164 (1930) (invalidating a requirement that a railroad build an underground cattle pass); *Great Northern Railway Co v Cahill*, 253 US 71, 77 (1920) (invalidating an order requiring a railroad to install and maintain scales); *Brooks-Scanlon Co v Railroad Commission of Louisiana*, 251 US 396, 399 (1920) (invalidating a requirement that a railroad continue to operate at a loss); *Mississippi Railroad Commission v Mobile and Ohio Railroad Co*, 244 US 388, 396 (1917) (invalidating a requirement that a railroad restore certain passenger trains to service); *Chicago, Milwaukee, and St. Paul Railroad Co v Wisconsin*, 238 US 491, 499 (1915) (invalidating a state statute penalizing railroads for their arrangement of beds); *Great Northern Railway Co v State Railroad and Warehouse Commission*, 238 US 340, 345–47 (1915)

overstatement. But Kennedy's claim that the period's constitutional law divided the world into spheres of federal and state authority and of public and private right has considerable descriptive power. In the balance of this Review I propose to show, in a highly compressed fashion, how what Kennedy would call integration within and between those subsystems can help to explain aspects of the development, functioning, and "fall" of classical constitutional law.⁹⁰

Consider first the relation between affirmative and dormant Commerce Clause jurisprudence. In the years following the Civil War, the Court developed an interpretation of the Commerce Clause treating its grant to Congress of power to regulate commerce among the several states as *exclusive*. Where the subject regulated was interstate commerce, it fell within the sole jurisdiction of Congress. State and local governments could tax or regulate "local" matters but were powerless to encroach upon this "national" domain. This interpretation of the commerce power as exclusive enabled the Court to break down state and local barriers to interstate trade such as taxing, licensing, and inspection statutes designed to favor local interests.⁹¹ Yet it might, if "followed to its logical conclusion," have resulted in the implied constitutional preemption of any state or local action having some effect on interstate commerce.⁹² Contemporaries realized that such an interpretation threatened to eviscerate state and local government and to leave significant portions of American economic life unregulated.⁹³ The Court avoided this potential hazard by determining that regulations imposing a "direct" burden on interstate commerce were uncon-

(invalidating an order requiring railroads to install and maintain scales); *Chicago, Milwaukee, and St. Paul Railway v Polt*, 232 US 165, 167 (1914) (invalidating a penalty statute doubling jury-imposed damages on due process grounds); *Missouri Pacific Railway Co v Tucker*, 230 US 340, 351 (1913) (invalidating a statute imposing liquid damages of \$500 on railroads for each violation of rate controls); *St. Louis, Iron Mountain, and Southern Railway Co v Wynne*, 224 US 354, 358 (1912) (invalidating penalty statute doubling railroads' liability for the killing of livestock); *Missouri Pacific Railway Co v Nebraska*, 217 US 196, 207 (1910) (invalidating a mandate that a railroad install side tracks to grain elevators); *Missouri Pacific Railway Co v Nebraska*, 164 US 403, 417 (1896) (invalidating a requirement that a railroad grant an easement on its property for purpose of building a grain elevator).

⁹⁰ Kennedy appears to believe that the fall of Classical legal thought can be attributed primarily to a breakdown in its operativeness along the vertical dimension (pp xix, 250–52, 261–63). The account that follows, by contrast, suggests that its disintegration was in several particulars shaped by operative forces along the horizontal dimension.

⁹¹ See Cushman, 67 U Chi L Rev at 1101–08 (cited in note 86).

⁹² Bernard C. Gavit, *The Commerce Clause* 8–9 (Principia 1932) (noting that the preemption of state action would have forced "Congress to legislate immediately and in detail").

⁹³ See, for example, George G. Reynolds, *The Distribution of Power to Regulate Interstate Carriers between the Nation and the States* 77 (Columbia 1928); Frederick H. Cooke, *The Commerce Clause* 120 (Baker, Voorhis 1908); David Walter Brown, *The Exclusive Power of Congress to Regulate Interstate and Foreign Commerce*, 4 Colum L Rev 490, 491 (1904); Louis M. Greeley, *What is the Test of a Regulation of Foreign or Interstate Commerce?*, 1 Harv L Rev 159, 181 (1887).

titutional, but that exercises of the police or taxing powers that affected interstate commerce only “indirectly” or “incidentally” were permissible.⁹⁴ The paradigmatically “local” activities, the regulation and taxation of which affected interstate commerce only “indirectly,” were those of production—mining, manufacturing, and agriculture.⁹⁵

These categories—distinguishing “local” from “national activities,” “production” from “commerce,” and “direct” from “indirect” effects on commerce—became key points of integration between dormant Commerce Clause jurisprudence and its affirmative counterpart. From the late nineteenth century through the mid-1930s, in such leading cases as *E.C. Knight* and *Carter Coal*, the Court routinely held that activities of production were “local” rather than “national,” affected interstate commerce “indirectly” rather than “directly,” and were therefore beyond the reach of the power of Congress to regulate interstate commerce. In doing so, these decisions relied principally on precedents drawn from the Court’s dormant Commerce Clause jurisprudence.⁹⁶ For decades, jurists and treatise writers viewed these two lines of doctrine as parts of an integrated whole.⁹⁷ Only when the Court finally abandoned these categories in the affirmative Commerce Clause case of *Wickard* were the two lines of doctrine decoupled,⁹⁸ and dormant Commerce Clause reoriented around norms of interest ba-

⁹⁴ See Cushman, 67 U Chi L Rev at 1110–20 (cited in note 86).

⁹⁵ See, for example, *Champlin Refining Co v Corporation Commission of Oklahoma*, 286 US 210, 235 (1932) (petroleum production); *Utah Power and Light Co v Pfof*, 286 US 165, 182 (1932) (electricity generation); *Leonard and Leonard v Earle*, 279 US 392, 397 (1929) (oyster packing); *Hope Natural Gas Co v Hall*, 274 US 284, 288 (1927) (production of natural gas); *Olivier Iron Mining Co v Lord*, 262 US 172, 179 (1923) (iron ore mining); *Crescent Cotton Oil Co v Mississippi*, 257 US 129, 136 (1921) (cotton ginning); *American Manufacturing Co v City of St. Louis*, 250 US 459, 464 (1919) (manufacturing); *Armour and Co v Virginia*, 246 US 1, 7 (1918) (manufacturing); *Capital City Dairy Co v Ohio*, 183 US 238, 245 (1902) (manufacture of colored oleomargarine); *Kidd v Pearson*, 128 US 1, 20–21 (1888) (manufacturing); *McCready v Virginia*, 94 US 391, 396–97 (1877) (oyster planting).

⁹⁶ Cushman, 67 U Chi L Rev at 1097–99, 1124–26, 1134 (cited in note 86) (discussing affirmative Commerce Clause decisions restricting federal regulatory authority and relying upon dormant Commerce Clause precedents).

⁹⁷ See generally F.D.G. Ribble, *State and National Power over Commerce* (Columbia 1937); Gavit, *The Commerce Clause* (cited in note 92); Frederick N. Judson, *The Law of Interstate Commerce and Its Federal Regulation* (T.H. Flood 2d ed 1912); Cooke, *The Commerce Clause* (cited in note 93); Thomas H. Calvert, *Regulation of Commerce under the Federal Constitution* (Thompson 1907); Paul Jones, *The Commercial Power of Congress* (privately printed, 1904); E. Parmalee Prentice and John G. Egan, *The Commerce Clause of the Federal Constitution* (Callaghan 1898); William Draper Lewis, *The Federal Power over Commerce and Its Effects on State Action* (UPenn 1892).

⁹⁸ See Cushman, 67 U Chi L Rev at 1137–46 (cited in note 86) (discussing Justice Jackson’s efforts in *Wickard* to jettison the national-local and direct-indirect distinctions as ill-suited to “the complexity of causation in the modern American economy”).

lancing and antidiscrimination.⁹⁹ It was no mere coincidence that the Court jettisoned the older categories of dormant Commerce Clause jurisprudence less than two months after *Wickard* was decided.¹⁰⁰

Kennedy believes that the post-Civil War conception of the relation between the state and federal governments “served as a model or exemplar or paradigm in the construction” of the conception of the relation between citizen and state expressed in the public-private distinction (p 40). This claim was at least debatable even at the time Kennedy was writing. By 1971, Harry Scheiber had shown how the public-private matrix that had organized the law of riparian rights, eminent domain, and tax subsidies in antebellum state court jurisprudence provided the template for the category of the “business affected with a public interest” that organized the Supreme Court’s rate and price regulation jurisprudence after the 1877 decision in *Munn v Illinois*.¹⁰¹ But there can be little doubt that the public-private distinction provided a similarly powerful integrating framework for postbellum constitutional doctrine. In 1975, the year in which Kennedy completed his manuscript, Charles McCurdy published an article in which he demonstrated that Justice Stephen Field’s views on the various constitutional limitations on public regulatory and promotional authority found expression in “an extraordinarily consistent body of immutable rules designed to separate the public and private sectors into fixed and inviolable spheres.”¹⁰²

The public-private distinction similarly played a central role in organizing and integrating economic substantive due process jurisprudence in the era of Classical legal thought. Just as rates and prices could be regulated where the business in question was affected with a public interest,¹⁰³ so wages and compensation could be regulated where the

⁹⁹ See *id.* at 1147–48 (describing the uncertainties created by *Wickard*’s shift in Commerce Clause doctrine). See also generally Donald Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich L Rev 1091 (1986).

¹⁰⁰ *Parker v Brown*, 317 US 341, 362–63, 367 (1943) (refusing to analyze state regulations as imposing “direct” or “indirect” burdens on interstate commerce, and instead upholding a regulation “upon a consideration of all the relevant facts and circumstances” after “comparing the relative weights of the conflicting local and national interests involved”).

¹⁰¹ 94 US 113 (1877). See generally Harry Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, in Donald Fleming and Bernard Bailyn, eds, *Law in American History* 329 (Harvard 1971).

¹⁰² Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-faire Constitutionalism, 1863–1897*, 61 J Am Hist 970, 973 (1975).

¹⁰³ See, for example, *Chicago Board of Trade v Olsen*, 262 US 1, 40 (1923) (grain exchanges); *Producers Transportation Co v Railroad Commission*, 251 US 228, 231 (1920) (oil pipelines); *Van Dyke v Geary*, 244 US 39, 47 (1917) (water utilities); *German Alliance Insurance Co v Kansas*, 233 US 389, 411–13 (1914) (fire insurance); *Cotting v Kansas City Stockyards Co*, 183 US 79, 91 (1901) (public stockyards); *Chicago, Burlington & Quincy Railroad Co v Iowa*, 94 US 155, 161 (1877) (railroads); *Munn*, 94 US at 132 (grain elevators).

work in question was performed for such a business,¹⁰⁴ or for a government contractor.¹⁰⁵ Where the business in question was private, however, neither the rates or prices it charged,¹⁰⁶ nor the compensation it paid those in its employ,¹⁰⁷ could be fixed by legislative authority.¹⁰⁸

In 1934, Justice Roberts announced for a 5-4 majority that legislative authority to regulate rates and prices would no longer be confined to businesses traditionally regarded as affected with a public interest.¹⁰⁹ Legal observers, ranging from Robert Hale to the Four Horsemen, understood this declaration to entail the abandonment of “the corollary rule as to wage-fixing.”¹¹⁰ When those expectations were disap-

¹⁰⁴ See, for example, *O’Gorman & Young v Hartford Fire Insurance Co*, 282 US 251, 257 (1931) (commissions for agents selling fire insurance); *Tagg Brothers and Moorhead v United States*, 280 US 420, 439 (1930) (commissions for agents selling livestock at public stockyards); *Wilson v New*, 243 US 332, 346 (1917) (wages for railroad employees).

¹⁰⁵ See, for example, *Atkin v Kansas*, 191 US 207, 224 (1903) (upholding a Kansas statute regulating compensation of workers employed by or on behalf of the state or its municipalities).

¹⁰⁶ See, for example *Williams v Standard Oil Co*, 278 US 235, 239 (1929) (retail gasoline sales); *Ribnik v McBride*, 277 US 350, 355 (1928) (employment agencies); *Tyson & Brother v Banton*, 273 US 418, 439–41 (1927) (theater ticket brokers).

¹⁰⁷ See, for example, *Adkins v Children’s Hospital*, 261 US 525, 554 (1923) (hotel and hospital workers); *Murphy v Sardell*, 269 US 530, 530 (1925) (per curiam) (following *Adkins* without opinion); *Donham v West-Nelson Manufacturing Co*, 273 US 657, 657 (1927) (per curiam) (same).

¹⁰⁸ The doctrine concerning regulation of working hours was more complex, as the hours worked by employees of private businesses might nevertheless be subject to limitations for health and safety reasons under the police power. See, for example, *Bunting v Oregon*, 243 US 426, 434 (1917) (workers in mills and manufacturing establishments); *Muller v Oregon*, 208 US 412, 416 (1908) (women); *Holden v Hardy*, 169 US 366, 395 (1898) (miners). Statutes limiting working hours in private businesses were, however, more susceptible to successful challenge than were those regulating public contractors and businesses affected with a public interest. Compare, for example, *Baltimore & Ohio Railroad Co v Interstate Commerce Commission*, 221 US 612, 618 (1911) (railroads); *Atkin*, 191 US at 224 (public contractors), with *Charles Wolff Packing Co v Kansas Court of Industrial Relations*, 267 US 552, 563 (1925) (meat packers); *Lochner v New York*, 198 US at 64 (bakeries).

¹⁰⁹ *Nebbia v New York*, 291 US 502, 531–36 (1934).

¹¹⁰ See Thomas C. Chapin, *Stare Decisis and Minimum Wages*, 9 U Colo L Rev 297, 306 (1937) (arguing that *Nebbia* foreshadowed future Court decisions upholding minimum-wage laws). See also *Nebbia*, 291 US at 555 (McReynolds dissenting) (“The argument advanced here would support general prescription of prices for farm products, groceries, shoes, clothing, all the necessities of modern civilization, as well as labor, when some legislature finds and declares such action advisable and for the public good.”); Robert Hale, *Minimum Wages and the Constitution*, 36 Colum L Rev 629, 633 (1936) (suggesting that *Nebbia* had overruled *Adkins*); Morris Duane, *Government Regulation of Prices in Competitive Business*, 10 Temp L Rev 262, 264 (1936) (noting that *Nebbia* “practically overruled a number of cases in which the Court had held state price fixing a violation of the due process clause of the Fourteenth Amendment; also another number in which state control of hours and wages had been declared invalid—a very similar problem”); John E. Hannigan, *Minimum Wage Legislation and Litigation*, 16 BU L Rev 845, 865 (1936) (“[T]he *Nebbia* case doctrine, if applied to the *Adkins* case, would have sustained the law.”); Hugh Willis, *Constitutional Law of the United States* 736 (Principia 1936) (remarking that *Nebbia* constitutes “a prophecy” that *Adkins* “will be overruled whenever a case giving the Supreme Court an opportunity to do so is presented to it”); Recent Cases, 85 U Pa L Rev 109, 118 (1936) (arguing that wages “are but the price of a commodity which is sold to employers, and the labor and health of women are easily as essential to the welfare of a state as is milk”); Thomas Rae-

pointed in *Morehead v Tipaldo*,¹¹¹ legal commentators expressed understandable surprise.¹¹² Yet when Justice Roberts's vote the following year to uphold the Washington state minimum wage law in *West Coast Hotel v Parrish*¹¹³ fulfilled those expectations, commentators contended that his anomalous performance in *Tipaldo* had been driven not by his views on the doctrinal merits but by some more technical legal consideration.¹¹⁴ One contemporary, who was among those who believed

burn White, *Constitutional Protection of Liberty of Contract: Does It Still Exist?*, 83 U Pa L Rev 425, 438, 440 (1935) (remarking that the Court "has in effect surrendered its power to declare void acts of legislature on the ground that they infringe liberty of contract" and that state legislatures now "may fix the rates of wages and the hours of labor"); Norman J. Macbeth, Jr., Note, *Present Status of the Adkins Case*, 24 Ky L J 59, 66 (1935) (speculating that had Justices Hughes and Roberts "been on the court in 1923, it is highly improbable that they would have concurred in the *Adkins* decision" and that in light of *Nebbia*, it seems "probable that they will now refuse to follow the *Adkins* doctrine"); Note, *Nebbia v. People: A Milestone*, 82 U Pa L Rev 619, 619, 622 (1934) (asserting that the change wrought by *Nebbia* is "so great as to overrule for all practical purposes a host of cases decided in recent years under the due process clause" and that it is now "possible that a state may legally regulate all its businesses even to the extent of fixing prices, wages, and hours of labor"); Francis W. Matthys, Recent Decision, 9 Notre Dame L Rev 468, 470 (1934) (stating that *Nebbia* "clinched the battle No longer may a man cry out 'Unconstitutional!' against every law that seems to restrict his freedom of contract or to deprive him of his property The gateway to social legislation has at last been opened."); Alpheus Thomas Mason, *Labor, the Courts, and Section 7(a)*, 28 Am Polit Sci Rev 999, 1007-08 (1934) (arguing that *Nebbia* "augurs well for minimum wage regulations"); Joseph H. Mueller, Note, *Price Fixing*, 23 Ill Bar J 89, 91 (1934) (asserting that *Nebbia* "is noteworthy for it would scarcely be denied from an economic standpoint that the regulation of wages, hours of labor, etc., as well as price regulation invade the right of private property in a manner clearly affecting price").

¹¹¹ 298 US 587, 611 (1936) (following *Adkins* to hold a state minimum wage law for women unconstitutional).

¹¹² See *id* at 635-36 (Stone dissenting) (arguing that *Nebbia* "should control the present case," is "irreconcilable with the decision and most that was said in the *Adkins* case," and has "left the Court free of [*Adkins*'s] restriction as a precedent. . . . We should follow our decision in the *Nebbia* case"). See also Olin Browder, Jr., Note, *Validity of New York Minimum Wage Law*, 25 Ill Bar J 75, 76 (1936) (contending that the authority of *Nebbia* provided "a further ground to support the validity of [the New York minimum wage] statute which might reasonably have been accepted by the Court."); Louis H. Rubenstein, *The Minimum Wage Law*, 11 St John's L Rev 78, 82-83 (1936) (speculating that, in light of *Nebbia*, "one would have felt confident that the New York minimum wage law could successfully withstand charges of unconstitutionality"); Comment, 34 Mich L Rev 1180, 1187 (1936) ("[I]t seems very difficult to understand why prices can be fixed without violating due process, but wages cannot be. Both interfere with liberty of contract.").

¹¹³ 300 US 379, 400 (1937) (overruling *Adkins* and distinguishing *Tipaldo* in upholding a state minimum wage law for women).

¹¹⁴ See Kurt Stern, Note, *Recent Interpretation by the Supreme Court of Liberty of Contract in Employment Cases*, 11 U Cin L Rev 82, 89 (1937) (arguing that, in light of *Nebbia*, "the real reason for the holding in the *Morehead* case is the weight of *stare decisis*"); Paul Y. Davis, *The Washington Minimum Wage Decision*, 12 Ind L J 415, 417 (1937) ("It now seems clear that Mr. Justice Roberts' concurrence in an opinion so at variance with the principle of his own pronouncement in *Nebbia v. New York* was only obtained because of the supposed procedural bar to a re-examination of the *Adkins* case."); Chapin, 9 U Colo L Rev at 306 (cited in note 110) (asserting that *Nebbia* had entailed "a liberal ruling in the *Morehead Case*," which "went off on a technicality"); Olin Browder, Jr., Note, *Validity of Washington Minimum Wage Law*, 25 Ill Bar J 284, 286 (1937) ("[C]onsidering the ground of decision in the *Morehead* case, and considering also that it was Justice Roberts who wrote the opinion of the Court in the *Nebbia* case, his switch

that *Parrish* was entailed by *Nebbia*, wrote in 1937 that “[t]he interaction of the price-fixing cases and the wage-fixing cases suggests a concise outline of how the conclusion of the logical syllogism may set up such stresses as to help compel the revision of the major premise.” That “logical syllogism,” he explained, went as follows:

There can be no price-fixing save in a business affected with a public interest [citing *Munn*]; therefore, since wages are the price of labor, there can be no wage-fixing in private business [citing *Adkins*]. But now regulation of prices is permissible like any regulation [citing *Nebbia*]; therefore a minimum wage statute is valid [citing *Parrish*].¹¹⁵

For those immersed in the “powerful internal logic” of classical legal culture, horizontal integration of substantive due process was “operative.”

Classical public law was characterized by integration not only within domains of constitutional doctrine, such as substantive due process and the Commerce Clause, but across them as well. Consider the so-called “realistic” Commerce Clause doctrines of the classical age: the stream of commerce doctrine and the doctrine developed in the *Shreveport Rate Case*.¹¹⁶ The former doctrine permitted congressional regulation of otherwise “local” activities that were situated in a “stream” or “current” of interstate commerce.¹¹⁷ But the mere fact that a local activity was spatially and temporally situated between two interstate activities was not alone sufficient to support federal regulation. Such a local activity affected interstate commerce “directly” only if it was also a business affected with a public interest. The integration of this due process limitation into this Commerce Clause doctrine served to limit both the range of its application and the extent of its deviation from the *Knight* line of cases. Before 1937, the Court upheld federal regulation of a local activity under the stream of commerce doctrine in only four cases.¹¹⁸ Three involved transactions at public

to the liberal side [in *Parrish*] can be sufficiently explained without resorting to political explanations.”); Note, *Progress in the Minimum Wage Struggle*, 22 Iowa L Rev 565, 570–71 (1937). For my own assessment, see Cushman, *Rethinking the New Deal Court* at 92–104 (cited in note 57).

¹¹⁵ Chapin, 9 U Colo L Rev at 309 & n 81 (cited in note 110). Chapin concluded that Roberts’s “real change of heart was not in 1937, then, but in 1934, with the *Nebbia* case.” Id at 307.

¹¹⁶ *Houston, East and West Texas Railway Co v United States*, 234 US 342 (1914) (“*Shreveport Rate Case*”).

¹¹⁷ See, for example, *Stafford v Wallace*, 258 US 495, 514–16, 519 (1922); *Chicago Board of Trade*, 262 US at 33–34 (1923).

¹¹⁸ See Cushman, 67 U Chi L Rev at 1126–29 (cited in note 86) (arguing that the “affected with a public interest” due process constraint restrained federal power to regulate local activities); Cushman, *Rethinking the New Deal Court* at 141–51 (cited in note 57) (discussing the view that the “current of commerce” and “affected with a public interest” doctrines “would operate as reciprocal restraints on federal power”).

stockyards,¹¹⁹ and the fourth concerned transactions on the Chicago Board of Trade.¹²⁰ As the Court pointed out in its opinions, each of these businesses was affected with a public interest.¹²¹

The *Shreveport Rate Case* authorized federal regulation of charges for intrastate rail carriage, a “local” matter, because of their “close and substantial relation to interstate traffic.”¹²² Though this formulation taken at face value might be read to authorize extensive regulation of local activities, the due process context in which it functioned again limited its range of operation. Congressional power to regulate rates was limited to that narrow class of businesses, like railroads, that were affected with a public interest. Indeed, until the mid-1930s, all of the cases upholding federal regulation of local activities under the *Shreveport* doctrine concerned railroads.¹²³

Nebbia’s retirement of the “affected with a public interest” limitation in due process doctrine had dramatic ramifications for both of these Commerce Clause doctrines. Thereafter, Congress had power to regulate the price at which ordinary commodities like coal, milk, and other agricultural commodities were sold in interstate commerce. The *Shreveport* doctrine, in turn, empowered Congress to regulate the price at which those goods were sold in intrastate commerce. Congress recognized and capitalized on these opportunities with such programs as the Bituminous Coal Act of 1937,¹²⁴ the Agricultural Marketing

¹¹⁹ See *Moorhead*, 280 US at 435; *Stafford*, 258 US at 512; *Swift and Co v United States*, 196 US 375, 394 (1905).

¹²⁰ See *Chicago Board of Trade*, 262 US at 33.

¹²¹ See *id.* at 40–41 (“The Board of Trade conducts a business which is affected with a public interest and is, therefore, subject to reasonable regulation in the public interest.”); *Stafford*, 258 US at 516 (“[T]he various stockyards of the country . . . conduct a business affected by a public use of a national character and subject to national regulation.”).

¹²² 234 US at 351–53.

¹²³ See *Ohio v United States*, 292 US 498, 506 (1934); *Florida v United States*, 292 US 1, 12 (1934); *United States v Louisiana*, 290 US 70, 74–75 (1933); *Alabama v United States*, 279 US 229, 230 (1929); *Colorado v United States*, 271 US 153, 164 (1926); *United States v Village of Hubbard*, 266 US 474, 476 (1925); *Dayton-Goose Creek Railway Co v United States*, 263 US 456, 474 (1924); *Railroad Commission of Wisconsin v Chicago, Burlington & Quincy Railroad Co*, 257 US 563, 579 (1922); *Illinois Central Railroad Co v Public Utilities Commission of Illinois*, 245 US 493, 506 (1918); *American Express Co v Caldwell*, 244 US 617, 624 (1917). The first Supreme Court decision applying the *Shreveport* doctrine to an enterprise other than railroads was *NLRB v Jones & Laughlin Steel Corp*, 301 US 1, 38 (1937) (labor relations in the steel industry). The lower federal courts began to apply the *Shreveport Rate Case* outside the railroad context in 1934. See, for example, *United States v Gregg*, 5 F Supp 848, 854 (SD Texas 1934) (radio broadcasting); *United States v Shissler*, 7 F Supp 123, 127 (ND Ill 1934) (milk distribution); *Richmond Hosiery Mills v Camp*, 7 F Supp 139, 146 (ND Ga 1934) (hosiery manufacture); *United States v Canfield Lumber Co*, 7 F Supp 694, 699 (D Neb 1934) (lumber sales); *United States v Wilshire Oil Co*, 9 F Supp 396, 401 (SD Cal, 1934) (petroleum refining); *R.C. Tway Coal Co v Glenn*, 12 F Supp 570, 592 (WD Ky 1935) (coal mining); *United States v Edwards*, 14 F Supp 384, 391 (SD Cal 1936) (fruit packaging).

¹²⁴ See note 73 and accompanying text.

Agreement Act,¹²⁵ and the Agricultural Adjustment Act of 1938,¹²⁶ each of which the Court upheld on the authority of the *Shreveport Rate Case*.¹²⁷

Nebbia similarly promised to transform the stream of commerce doctrine. Because all businesses now were affected with a public interest, formerly “private” enterprises might be located in a current of interstate commerce and thus affect that commerce “directly.”¹²⁸ Lawyers defending the constitutionality of the National Labor Relations Act¹²⁹ accordingly selected as test cases labor disputes at steel, trailer, and manufacturing plants (later referred to as the *Labor Board Cases*¹³⁰) that imported most of their raw materials from other states and shipped their finished products in interstate commerce, contending that each of those factories was situated in a stream of interstate commerce subject to federal regulation.¹³¹ Their efforts were rewarded with success, and such broadened stream of commerce arguments continued to figure prominently in legal argument, scholarly commentary, and judicial decisions throughout the late 1930s.¹³²

This doctrinal cross-pollination flowed both ways, as Commerce Clause concepts came to play an integral role in portions of the Court’s due process jurisprudence. From 1908, when the Court invalidated § 10

¹²⁵ Agricultural Marketing Agreement Act, Pub L No 75-137, 50 Stat 246 (1937) (authorizing the Secretary of Agriculture to set minimum prices at which processors could purchase certain agricultural commodities from producers).

¹²⁶ See notes 77–78 and accompanying text.

¹²⁷ See *Sunshine Anthracite Coal*, 310 US at 394 (Bituminous Coal Act of 1937); *United States v Wrightwood Dairy*, 315 US 110, 124 (1942) (Agricultural Marketing Agreement Act); *H. P. Hood & Sons, Inc v United States*, 307 US 588, 595 (1939) (same); *United States v Rock Royal Cooperative, Inc*, 307 US 533, 568 (1939) (same); *Mulford*, 307 US at 47 (Agricultural Adjustment Act). For more detailed treatments of these statutes and the litigation in which they were sustained, see Cushman, 67 U Chi L Rev at 1132–37 (cited in note 86); Cushman, *Rethinking the New Deal Court* at 190–207 (cited in note 57).

¹²⁸ See Cushman, *Rethinking the New Deal Court* at 155 (cited in note 57).

¹²⁹ National Labor Relations Act, Pub L No 74-198, 49 Stat 449 (1935).

¹³⁰ *NLRB v Friedman-Harry Marks Clothing Co*, 301 US 58, 75 (1937) (clothing manufacturer); *NLRB v Fruehauf Trailer Co*, 301 US 49, 57 (1937) (trailer manufacturer); *Jones & Laughlin Steel Corp*, 301 US at 31 (steel manufacturer).

¹³¹ For discussion of the selection of the test cases, and the briefing and arguing of the cases on the stream of commerce theory, see Cushman, *Rethinking the New Deal Court* at 162–68 (cited in note 57) (describing how the test cases realized the potential of *Nebbia* to revolutionize Commerce Clause doctrine); Irons, *The New Deal Lawyers* at 254–71 (cited in note 46) (describing the NLRB lawyers’ “master plan” to uphold the National Labor Relations Act). For an explanation of why the stream of commerce doctrine was not applicable in *Schechter Poultry*, nor in *Carter Coal*, see Cushman, 67 U Chi L Rev at 1132–34 (cited in note 86) (noting that in *Schechter Poultry*, the flow of interstate commerce “had ceased,” while in *Carter Coal* it “had not begun”); Cushman, *Rethinking the New Deal Court* at 156–68 (cited in note 57) (noting that *Schechter Poultry* and *Carter Coal* did not involve interstate shipments).

¹³² See Cushman, *Rethinking the New Deal Court* at 162–82, 184–89 (cited in note 57). For discussion of the role that the stream of commerce theory played in securing the crucial vote of Justice Roberts, see Barry Cushman, *Continuity and Change in Commerce Clause Jurisprudence*, 55 Ark L Rev 1009, 1044–46 (2003); Cushman, *Rethinking the New Deal Court* at 170–75.

of the Erdman Act in *Adair*, to 1937, when the Court upheld the National Labor Relations Act in the *Labor Board Cases*, the Court's jurisprudence concerning federal regulation of labor-management relations was organized by a common doctrinal model. Federal regulation of those relations violated the liberty of contract protected by the Fifth Amendment unless two conditions were satisfied: first, the business in question was affected with a public interest; and second, there was a "real and substantial relation" between the subject of the regulation and the protection of interstate commerce. Just as the curtailment of contractual liberty by the states in order to protect public health and safety might be justified under the police power, so the limitation of such liberty by the federal government to protect interstate commerce might be justified under the commerce power.¹³³ The *Adair* majority, over the astonished dissent of Justice Joseph McKenna,¹³⁴ maintained that there was no real and substantial relation between the protection of interstate commerce and the Erdman Act's prohibitions on both the use of yellow-dog contracts and discrimination on the basis of union membership in the railroad industry.¹³⁵ Yet as the justices came to a more realistic appraisal of that relation, they became accordingly more receptive to federal regulation of the labor relations of enterprises engaged in interstate transportation. In 1930, the Court unanimously upheld provisions of the Railway Labor Act of 1926¹³⁶ that protected the rights of railroad workers to organize and bargain collectively, affirming a lower court order requiring a railroad to reinstate employees it had discharged for engaging in lawful union activities.¹³⁷ In 1937, the Court again unanimously upheld the 1934 amendments to the Act requiring carriers to negotiate exclusively and in good faith with the selected representatives of their employees.¹³⁸ Also in 1937, the Court unanimously sustained application of the National Labor

¹³³ See Cushman, *Rethinking the New Deal Court* at 109–38 (cited in note 57).

¹³⁴ 208 US at 181, 189 (McKenna dissenting) ("A provision of law which will prevent or tend to prevent the stoppage of every wheel in every car of an entire railroad system" had a "legal [and] logical connection with interstate commerce").

¹³⁵ *Id.* at 178–79.

¹³⁶ Railway Labor Act of 1926, Pub L No 69-257, 44 Stat 577.

¹³⁷ See *Texas & New Orleans Railroad Co v Brotherhood of Railway & Steamship Clerks*, 281 US 548, 570 (1930) (holding that Congress could take into account the right of employees to unionize in issuing regulations to "facilitate the amicable resolution of disputes which threaten the service of the necessary agencies of interstate transportation"). Justice McReynolds did not participate. Justice Van Devanter, who had joined the *Coppage* majority, wrote Chief Justice Hughes that he considered the opinion "as near perfect as is humanly possible." Merlo J. Pusey, *Charles Evans Hughes* 713 (Macmillan 1951).

¹³⁸ *Virginian Railway Co v System Federation, No 40*, 300 US 515, 553 (1937).

Relations Act to an interstate passenger bus company.¹³⁹ Where a business was affected with public interest and its labor relations bore a real and substantial relationship to interstate commerce, those relations might be regulated by Congress without infringing the liberty of contract secured by the Fifth Amendment.

Juxtaposing these unanimous decisions upholding federal regulation of labor relations with the closely divided *Labor Board Cases* of 1937 helps to illustrate the “operativeness” of the doctrinal integration I have been discussing. In each of the cases involving the regulation of labor relations at a manufacturing plant, the Four Horsemen published a consolidated dissent in which they registered two principal objections. One was that the businesses whose labor relations were being regulated were not affected with a public interest but instead were private.¹⁴⁰ The second was that the commerce power could neither provide federal jurisdiction over the employers nor supply the commerce power rationale for curtailment of their contractual liberties, as they were manufacturing concerns to which the stream of commerce doctrine was inapplicable.¹⁴¹ That doctrine had been employed to reach activities of production in the past, but those businesses had been affected with a public interest. To these *Nebbia* dissenters, the distinction between public and private enterprise, as integrated into the jurisprudence of labor regulation and the stream of commerce doctrine, continued to prescribe the limits of legitimate regulatory authority.¹⁴² For the majority justices who had renounced that distinction, such restraints no longer obtained.

The same can be said, moreover, with respect to the application of the *Shreveport* doctrine. Just as the Four Horsemen had repeatedly voted to uphold federal regulation of interstate carriers, so had they routinely joined opinions upholding federal regulation of intrastate aspects of their operations under the *Shreveport* doctrine.¹⁴³ When Congress relied upon that doctrine, as modified by *Nebbia*, to regulate the prices and marketing practices of “private” businesses, however,

¹³⁹ *Washington, Virginia, & Maryland Coach Co v NLRB*, 301 US 142, 146 (1937) (upholding application of the law on the authority of *Texas & New Orleans Railroad* and *Virginian Railway*).

¹⁴⁰ See *Friedman-Harry*, 301 US at 101–03 (McReynolds dissenting).

¹⁴¹ *Id.* at 96–101.

¹⁴² See *id.* at 97–103 (rejecting the “stream of commerce” argument and insisting that *Adair* and *Coppage* precluded the federal regulation of the contractual labor relations of “a private owner”). For further discussion of the Four Horsemen’s dissent, see Cushman, *Rethinking the New Deal Court* at 136–38, 174–75 (cited in note 57).

¹⁴³ See note 123.

the Horsemen balked.¹⁴⁴ In their view, the public-private distinction continued to limit the range of *Shreveport's* proper application.

Consider finally, and in very brief compass, an example that integrates all three of Kennedy's public law dichotomies: federal-state, public-private, and judicial-legislative. In the late nineteenth century, Congress began to take an interest in regulating substances and activities that it could not reach through the commerce power by imposing prohibitive excise taxes on them. Each of these was a matter that the states might regulate or prohibit under the police power: colored oleomargarine, compound lard, mixed flour, and filled cheese to prevent consumer fraud; narcotics and white phosphorus matches to protect health; grain and cotton futures contracts to curtail gambling.¹⁴⁵ Just as legitimate police power regulation by the state would not deprive any citizen of liberty or property in violation of the Fourteenth Amendment, so legitimate regulation by the federal government would not deprive any citizen of his rights under the Fifth Amendment.¹⁴⁶ There were those in Congress who argued that such measures did not impose true taxes but were instead regulations of matters reserved to the States, and thus transgressed the Tenth Amendment. But it was generally recognized in Congress that such objections were not judicially cognizable.¹⁴⁷ As Chief Justice Salmon Chase, in *Veazie Bank v Fenno*,¹⁴⁸ said in upholding the federal excise on state bank notes:

[T]he judicial can not prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected.¹⁴⁹

Tenth Amendment limitations on exercises of the taxing power, it was believed, could be imposed only by the political branches.

This view was confirmed by Chief Justice White in *McCray v United States*,¹⁵⁰ which upheld a ten cent per pound federal excise tax on oleo-

¹⁴⁴ See *Sunshine Anthracite Coal*, 310 US at 404 (McReynolds dissenting); *Rock Royal Cooperative*, 307 US at 582 (McReynolds and Butler dissenting); *Currin v Wallace*, 306 US 1, 19 (1939) (McReynolds and Butler dissenting).

¹⁴⁵ See generally R. Alton Lee, *A History of Regulatory Taxation* (Kentucky 1973).

¹⁴⁶ For contemporary decisions rejecting Fourteenth Amendment objections to measures regulating such matters, see, for example, *Booth v Illinois*, 184 US 425, 429 (1902) (prohibiting options contracts in grain futures); *Austin v Tennessee*, 179 US 343, 348 (1900) (prohibiting "the sale of noxious or poisonous drugs"); *Powell v Pennsylvania*, 127 US 678, 687 (1888) (prohibiting manufacture of oleomargarine and imitation cheese).

¹⁴⁷ See Barry Cushman, *Painful Duties* *97-105 (unpublished manuscript, 2008).

¹⁴⁸ 75 US 533 (1869).

¹⁴⁹ *Id* at 548.

¹⁵⁰ 195 US 27 (1904).

margarine. White rejected the contention that “because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused.”¹⁵¹ He recoiled from the proposition that the judiciary should intervene to prevent an exercise of a “lawful power . . . for an unlawful purpose.”¹⁵² To invalidate the tax would be to accept “the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department.”¹⁵³ That proposition, White worried, “if sustained, would destroy all distinction between the powers of the respective departments of the government.”¹⁵⁴ White quoted at length from judicial paeans to separation of powers¹⁵⁵ and worried aloud about “judicial usurpation” overthrowing “the entire distinction between the legislative, judicial, and executive departments of the government, upon which our system is founded.”¹⁵⁶ He recognized that the lack of judicial authority to invalidate the exercise of an enumerated power animated by “a wrongful motive or purpose” might result in “temporarily effectual” “abuses of a power conferred.”¹⁵⁷ But he insisted that the remedy lay “not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power.”¹⁵⁸

The Court’s analysis on this point seemed to suggest that the congressional power to tax was subject to no federalism-based limitations at all. A congressional purpose to usurp state regulatory preroga-

¹⁵¹ *Id.* at 54.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *McCray*, 195 US at 54–55.

¹⁵⁵ See *id.* at 55, quoting Justice Miller in *Kilbourn v Thompson*, 103 US 168, 190 (1881):

It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to governments, whether State or National, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall, by the law of its creation, be limited to the exercise of the powers appropriate to its own department, and no other.

¹⁵⁶ *McCray*, 195 US at 54.

¹⁵⁷ *Id.* at 55.

¹⁵⁸ *Id.*

tives through prohibitive regulatory taxation did not authorize judicial invalidation of the tax; nor was there a justiciable Tenth Amendment issue even though the effect of the tax was to eliminate an activity otherwise subject to state authority. Yet Chief Justice White and his colleagues in the majority were unprepared to close the door completely on judicial supervision of regulatory taxation. “Let us concede,” White wrote in the opinion’s closing paragraph,

That if a case was presented where the abuse of the taxing power was so extreme as to be beyond the principles which we have previously stated, and where it was plain to the judicial mind that the power had been called into play not for revenue but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, that it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred.¹⁵⁹

Were a statute imposing a tax to destroy such fundamental rights, White was saying, the Court would be bound to say one of two things: either that the statute was “an abuse of a delegated power,” transgressing express or implied limitations on enumerated powers, or that the statute constituted “the exercise of an authority not conferred” — in other words, that it was not the exercise of the taxing power at all, even though on its face the statute imposed an excise. That principle was inapplicable in the present case, White pointed out, because the Court’s cases regarding police powers showed that “the manufacture of artificially colored oleomargarine may be prohibited by a free government without a violation of fundamental rights.”¹⁶⁰ But in a case in which such a fundamental right would be destroyed, White seemed to say, the outcome would be different.

The doctrinal structure that emerged from *McCray* thus entwined Fifth Amendment, Tenth Amendment, and separation of powers concerns in a peculiar configuration. As a general rule, principles of separation of powers would preclude the Court from inquiring into whether a regulatory tax was intended to invade the regulatory space reserved to the states by the Tenth Amendment and was thus merely the pretextual exercise of an enumerated power “for the accomplishment of objects not entrusted to the government.”¹⁶¹ It was only in instances in which an act purporting to exercise the enumerated power to tax destroyed fundamental rights of the sort protected by the Fifth Amendment that the

¹⁵⁹ *Id.* at 64.

¹⁶⁰ *McCray*, 195 US at 64.

¹⁶¹ *McCulloch v. Maryland*, 17 US 316, 423 (1819).

Court would be prepared to denounce the statute as a pretextual exercise of the power to tax.¹⁶² Only in cases that so imperiled a fundamental right would the Court overcome its separation of powers scruples and vindicate the Tenth Amendment interest in confining federal government authority to that conferred by the Constitution. So long as congressional regulatory taxation did not venture beyond the due process limits that the Fourteenth Amendment imposed upon the exercise of the states' police powers, there would be no occasion for the Court to subject such pretextual enactments to searching judicial scrutiny.

In truth, then, it was for the time being that the Fifth Amendment, rather than the Tenth, imposed the constitutional limit on congressional power to regulate through taxation. The sole means through which a Tenth Amendment interest might be judicially vindicated was through the assertion of a Fifth Amendment interest. We might call this Fifth Amendment federalism.

As Congress became increasingly aggressive in imposing excise taxes for regulatory purposes, support on the Court dwindled to a narrow majority.¹⁶³ In 1922, that majority collapsed. The Court invalidated the Child Labor Tax¹⁶⁴ and the Future Trading Act¹⁶⁵ by votes of 8-1 and 9-0, respectively.¹⁶⁶ There was no plausible contention that regulation of child labor or options contracts in grain futures transgressed limitations imposed by the Due Process Clause. The Court had unanimously sustained an Illinois law regulating child labor¹⁶⁷ and had upheld that state's prohibition on options contracts in futures in 1902.¹⁶⁸ These federal statutes, however, had imposed an excise on deviations from a prescribed and highly detailed course of conduct. The Court condemned these sta-

¹⁶² In his opinion Justice White stated that the Fifth Amendment "qualif[ied]" but did not "take away," "withdraw[,] or expressly limit the grant of power to tax conferred by the Constitution upon Congress," and he seemed to prefer to treat the "fundamental rights" of which he wrote as "implied" rather than anchored to the Fifth Amendment's Due Process Clause. *McCray*, 195 US at 61, 63. Nevertheless, the Fifth Amendment's due process clause, like its counterpart in the Fourteenth Amendment, would continue to provide the textual basis for such fundamental rights as "liberty of contract," see *Adair*, 208 US at 172; *Wilson*, 243 US at 357; *Children's Hospital*, 261 US at 545; the right to pursue a lawful calling on terms of equality with others, see *Yu Cong Eng v Trinidad*, 271 US 500, 525 (1926); and parental rights with respect to the education of their children, see *Farrington v Tokushige*, 273 US 284, 288-89 (1927).

¹⁶³ See *United States v Doremus*, 249 US 86 (1919) (upholding provisions of the Harrison Narcotics Act by a vote of 5-4).

¹⁶⁴ Child Labor Tax, Pub L No 65-254, 40 Stat 1138 (1919)

¹⁶⁵ Future Trading Act, Pub L No 67-66, 42 Stat 187 (1921).

¹⁶⁶ See *Bailey v Drexel Furniture Co*, 259 US 20, 37 (1922) (Child Labor Tax); *Hill v Wallace*, 259 US 44, 66 (1922) (Future Trading Act).

¹⁶⁷ See *Sturges & Burn Manufacturing Co v Beauchamp*, 231 US 320, 325-26 (1913).

¹⁶⁸ See *Booth*, 184 US at 429. Moreover, the Court would uphold in 1923 a federal statute regulating grain futures contract under the Commerce Clause in *Chicago Board of Trade*. See 262 US at 33.

tutes as “penalties” rather than as true taxes. As Congress possessed no enumerated power to impose such penalties, the statutes violated the Tenth Amendment. These decisions signaled the emergence of Tenth Amendment federalism in the Court’s regulatory taxation jurisprudence.

In 1933, the Roosevelt Administration sought to boost sagging agricultural prices by encouraging farmers to decrease output and thereby bring supply more into line with demand. There was good reason to believe that imposing a prohibitive excise on farmers planting an excess of acreage in specified commodities would run afoul of the precedents established by *Bailey v Drexel Furniture Co*¹⁶⁹ and *Hill v Wallace*.¹⁷⁰ What Congress did instead was to turn the excise tax upside down and frame it as a conditional expenditure. Those who signed acreage reduction contracts would receive a benefit payment; those who did not, would not.¹⁷¹ As the benefit payments were designed to provide the farmer with greater remuneration than he would receive were he to plant to capacity and sell at market prices, the noncooperating farmer would be worse off than his cooperating competitor and thus effectively taxed for his noncompliance. In *United States v Butler*, the Court effectively assimilated the law of conditional expenditure to the law of regulatory taxation, invalidating the Agricultural Adjustment Act as a violation of the Tenth Amendment.¹⁷²

The acreage reduction contracts authorized by the Agricultural Adjustment Act were financed by an excise tax imposed upon commodities processors. The representative of the processor involved in the *Butler* litigation argued strenuously in his brief that taxing the processor in order to underwrite a benefit payment to a farmer took from the processor his property for a private rather than a public purpose, and thereby denied him rights safeguarded by the Fifth Amendment.¹⁷³ Justice Roberts did not directly address this contention in his opinion for the majority, but he did observe that “[a] tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government. The word has never been thought to connote the expropriation of money from one group for the benefit of another.”¹⁷⁴ The fact that the Act took the property of *A* and gave it to *B*, thereby implicating the sort of Fifth

¹⁶⁹ 259 US 20 (1922).

¹⁷⁰ 259 US 44 (1922).

¹⁷¹ See Agricultural Adjustment Act, 48 Stat at 33 (authorizing the Secretary of Agriculture to issue a “nontransferable-option contract” to cotton producers that agreed to reduce production).

¹⁷² 297 US at 70–73 (describing the coercive force of “the so-called tax imposed by the present act”).

¹⁷³ Brief for Respondents, *United States v Butler*, No 95-401, *36–42 (filed Nov 30, 1935), available on Westlaw at 1935 WL 32712.

¹⁷⁴ *Butler*, 297 US at 61.

Amendment interest to which Chief Justice White had alluded in *McCray*, gave rise to two conclusions. The first was that “the act is one regulating agricultural production” and “the tax is a mere incident of such regulation.” In other words, as “the act is not an exertion of the taxing power and the exaction not a true tax,” it could not claim the protection of *McCray*.¹⁷⁵ The second was that “the respondents have standing to challenge the legality of the exaction.”¹⁷⁶ Here again, the Tenth Amendment interest could be vindicated because of the presence of an implicated Fifth Amendment interest.

Congress responded by removing the cognizable Fifth Amendment interest. The Soil Conservation and Domestic Allotment Act of 1936¹⁷⁷ (SCDAA), enacted within two months of the *Butler* decision, authorized the Secretary of Agriculture to pay farmers to shift their acreage out of surplus commodities. Rather than financing these payments from a specified tax, as the Agricultural Adjustment Act had done, the new statute appropriated the necessary funds from general revenue.¹⁷⁸ This was done to shelter the act under the taxpayer standing doctrine announced in an opinion written by Justice Sutherland in 1923. There a taxpayer had asserted that the effect of appropriations under the Sheppard-Towner Act¹⁷⁹ would be “to increase the burden of future taxation and thereby take her property without due process of law.”¹⁸⁰ The Court had unanimously rebuffed her claim, maintaining that her

interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment of the funds, so remote, fluctuating, and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.¹⁸¹

Because no one had a cognizable interest conferring standing to challenge the payments made from general revenue under the SCDAA, the claim of its congressional opponents that it was a regulatory expenditure trespassing upon the domain reserved to the states under the Tenth Amendment could not be vindicated in a judicial forum.¹⁸² *Butler* and its legislative aftermath thus revealed that the law of regu-

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Soil Conservation and Domestic Allotment Act of 1936, Pub L No 74-461, 49 Stat 1148.

¹⁷⁸ *Id.* at 1149.

¹⁷⁹ Sheppard-Towner Maternity Act, Pub L No 67-97, 42 Stat 224 (1921).

¹⁸⁰ *Frothingham v Mellon*, 262 US 447, 486 (1923).

¹⁸¹ *Id.* at 487.

¹⁸² See Cushman, 1998 J S Ct Hist at 92–93 (cited in note 79) (noting that opponents of the SCDAA in its “unchallengeable form” were defeated by the bill’s proponents).

latory taxation and the law of conditional spending had become integrated in a common regime of Fifth Amendment federalism.

In order to appreciate how this last subsystem functioned and how it was understood by justices who applied it and reformers who sought to negotiate it, one needs to recognize the relationships among a variety of different doctrinal areas of the period's constitutional law: regulatory taxation, conditional expenditure, the Fifth Amendment, the Tenth Amendment, and two species of justiciability doctrine. Our conventional constitutional law pedagogy, which is focused on the separate study of individual lines of doctrine, is poorly adapted to cultivating that sort of understanding. The kind of analysis advocated by Kennedy, which calls for investigation across doctrinal fields to identify and map systems and structures of legal thought, is by contrast well suited to the task.

CONCLUSION

The *Rise and Fall of Classical Legal Thought's* treatment of classical public law is more theory than history, more hypothesis than demonstration. It remained, and still remains, for other scholars to conduct the research necessary to assess its historical claims. Yet there can be little doubt that Duncan Kennedy, by calling attention to the promise of the structural analysis¹⁸³ of classical constitutional doctrine, has helped to bring us closer to the elusive goal of total legal consciousness.

So we've got that going for us. Which is nice.¹⁸⁴

¹⁸³ For thoughtful reflections on various virtues and limitations of structural analysis, see Fisher, 49 *Stan L Rev* at 1073–76, 1089, 1093–95, 1099–1101 (cited in note 10); Ernst, 102 *Yale L J* at 1029–32, 1035, 1037–40, 1044–45, 1074–75 (cited in note 10); Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 *NYU L Rev* 429, 471–95 (1987).

¹⁸⁴ With apologies to Carl Spackler for excessive plagiarism of this phrase. See *Caddyshack* (Orion Pictures 1980), quotation available online at www.imdb.com/title/tt0080487/quotes (visited Aug 29, 2008).