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The Hughes Court and Constitutional Consultation

Barry Cushman*

Our conventional image of the Supreme Court under Charles Evans Hughes calls to mind the riddle of the Sphinx: What creature walks on four feet in the morning, on two at noon, and on three in the evening? The answer with which Oedipus rescued the city of Thebes from a reign of terror was, of course, "Man": he crawls on all fours in infancy, stands erect on two legs in adulthood, and leans on a staff in old age. The established story of the Hughes Court inverts the chronology somewhat, but the characters are the same. In the mid-1930s, the crotchety Nine Old Men impetuously flouted the popular will, eviscerating the New Deal. Chastened by the disciplining hand of a stern presidential father figure in 1937, a repentant Court was "reborn," then blossomed into beautiful but uncertain youth under Harlan Fiske Stone and Fred Vinson, and grew into mature adulthood under Earl Warren.

The story has its charm, and a certain simple elegance. It has for many years captured the

imagination of a great many extremely able and distinguished scholars. In my own impetuous youth I have come to conclusions that differ from theirs. But I will not belabor all of my reasons for reaching those conclusions here, for it is not my immediate objective to convert you to my view of the matter. I ask only that you suspend disbelief. Forget for a moment, if you will, that the Justices invalidated New Deal initiatives because they thought them unwise social policy; forget that they later upheld federal regulations only because the Court-packing plan put the fear of God into them; forget that they continued to do so only because they had seen the light. Forget that the Court's role under Hughes was entirely reactive: first obstructing, then surrendering to, the political branches. This will, of course, be disorienting. But if all of this forgetting has not already rendered you unconscious, it may enable us to see the Hughes Court and its role in the New Deal saga in a new light.

Franklin Delano Roosevelt was the greatest politician of his age. But he was not the greatest constitutional lawyer. For example, he had rather unorthodox views on questions of the separation of powers. Early in his first term, the President approached Chief Justice Hughes and suggested that the two of them form a sort of consultative relationship. As one contemporary account has it, Roosevelt "intimated that he would like to talk over with the Chief Justice all his important plans concerning the general welfare, to get the Court's slant on them before acting."¹ Article III, Section 2 of the Constitution provides that the judicial power of the United States shall extend only to certain specified cases and controversies; and the Supreme Court had first declined a presidential request for an advisory opinion in George Washington's second term, when the first President had sought counsel on specific questions of international law.² Hughes similarly demurred to Roosevelt's overtures, informing the Presi-

dent that "the Supreme Court is an independent branch of government."³ As one account puts it, "he turned the President down flat."⁴ Roosevelt related this story while defending his Court-packing plan to a doubtful Senator. "You see," the President sighed, "he wouldn't co-operate."⁵

There is, I suggest, no little irony in this defense of the effort to pack the Court. For in ways that Roosevelt apparently did not fully appreciate, but which others did, the Court was in fact cooperating with the political branches in seeking to formulate constitutional solutions to the economic crisis of the 1930s. I hope to illuminate this phenomenon by sketching a series of vignettes involving the fate of several Depression-era programs. Through these I hope to show that within the channels prescribed by Article III, and occasionally outside them as well, the Hughes Court offered the Roosevelt administration a distinctive form of consultative relationship.

Senator Lynn Joseph Frazier (above) was one of the authors of the Frazier-Lemke Farm Debt Relief Act of 1934. The Act provided extraordinary relief to financially distressed farmers, allowing them to stay foreclosure proceedings for five years by paying a reasonable rental on the mortgaged land. When the Court overruled the Act, which had been widely criticized as poorly and hastily drafted, a sympathetic Louis D. Brandeis took pains in his majority opinion to suggest how it could be revised to pass constitutional muster.

Consider, for example, the Frazier-Lemke Farm Debt Relief Act of 1934. The Act provided extraordinary relief to financially distressed farmers, allowing them to stay foreclosure proceedings for five years by paying a reasonable rental on the mortgaged land. At any time during this period the debtor could take title to the land free and clear of any mortgage simply by paying its appraised value—even if that value was substantially less than the amount of the mortgage debt.

The Act “inspired a storm of controversy [over] its validity.”¹⁰ Commentary in the law journals characterized the Act as “hastily drafted and hurriedly passed”¹¹ “by a harried Congress,”¹² rushing it “through as last minute emergency legislation.”¹³ It was criticized as “one of the worst recent examples of draftsmanship in Federal legislation.”¹⁴ “The failure of its ultimate passage even was feared at times,” noted one observer.¹⁵ It was enacted “[d]espite . . . the doubts of many members of Congress,”¹⁶ and “the fears of its proponents were not allayed when the President retained the bill for ten days before signing it”¹⁷ “with apparent hesitation and misgiving.”¹⁸ At the signing ceremony Roosevelt presciently remarked, “The bill is in some respects loosely worded and will require amendment at the next session of Congress.”¹⁹

The Act’s constitutionality was challenged before the Court in the Spring of 1935 in the case of *Louisville Joint Stock Land Bank v. Radford*.²⁰ The Justices of the Supreme Court were unanimously of the opinion that the Act transgressed limits imposed by the Due Process Clause of the Fifth Amendment. Chief Justice Hughes assigned the opinion to Justice Louis D. Brandeis, who had great sympathy for the plight of distressed small farmers and for the objectives of the Act.²¹ Brandeis did not squander the opportunity presented by the assignment. He offered a thirty-page examination of the history of legislative attempts to provide relief for distressed mortgagors, in which he painstakingly identified the ways in which the Frazier-Lemke Act enlarged these protections beyond anything previously sanctioned by the Court. The Justice did not confine himself to identifying one or two deficiencies of the Act and leave Congress guessing whether other features of the Act would require revision in

order to pass constitutional muster. Instead, he listed five specific substantive rights of the creditor that the Act infringed.²² As one comment in the *Cornell Law Review* noted, the Court “definitely showed that it appreciated the situation which led to this drastic measure. . . . It indicated that similar legislation might be upheld if it were found to preserve substantially the rights of mortgagees.”²³

The *Radford* case was handed down on “Black Monday”—May 27, 1935. That same day the Court unanimously drew the curtain on the brief career of the National Industrial Recovery Act in the famous “sick chicken” case, *Schechter Poultry v. United States*. Immediately following delivery of the decisions, Brandeis pulled Roosevelt lieutenant Ben Cohen aside and told him “The President has been living in a fool’s paradise. . . . I should not be surprised if everything would have to be redrafted.”²⁴ Brandeis’ message was clear. The Court, despite its unanimity, was not saying that the federal government was powerless to address the economic crisis. Had this been the import of the decisions, there would have been little sense in redrafting anything. Brandeis’ point was instead that the crisis would have to be addressed with measures consistent with the Constitution. And Brandeis’ opinion in *Radford*, with its meticulous discussion of the Act’s constitutional infirmities, provided illuminating advice on how the statute ought to be redrafted.

And redrafted it was.²⁵ Within ten days of the *Radford* decision Senator Frazier had introduced a revised bill, and by the first of July the Senate Judiciary Committee had issued a unanimous favorable report with amendments.²⁶ “Their task was simplified,” noted one observer, “by the opinion pointing out the constitutional defects of the former Act. . . .”²⁷ The result, as another put it, was a “more carefully drawn” statute that sought “to cure the flagrant defects summarized by the Court.”²⁸

When the bill reached the floors of the House and Senate, several legislators asked whether the revised bill had rectified the constitutional deficiencies of the first Act, and its many proponents uniformly professed confidence that it had.²⁹ Senate Judiciary Committee Chairman Henry Ashurst was one among

many who assured his colleagues that "This bill is an earnest and, I believe, an able effort to meet the objection announced by the Court. . . without any attempt to defy the Court or to circumvent the Constitution. . . ." ²⁶ The old Idaho Progressive Senator William Borah testified that he had voted against the first Frazier-Lemke Act solely because he had thought it unconstitutional, but that he supported the revised bill, which he believed could run the judicial gauntlet. ²⁷ Floor amendments removed or modified any remaining provisions over which members had constitutional qualms, ²⁸ and the bill then passed both chambers without a dissenting vote. ²⁹ A comment in the *Columbia Law Review* predicted that "Since those features of the original act which the Court found chiefly objectionable have been eliminated, the revised statute will probably be held consistent with due process. . . ." ³⁰

When the constitutionality of the new Act was challenged before the Court in *Wright v. Vinton Branch Bank* ³¹ in early 1937, the debtor emphasized the efforts of Congress to remedy the faults of the first Act. The new Act, he as-

serted, was "the result of a painstaking attempt by Congress to comply with the decision of this Court holding the first Frazier-Lemke Act unconstitutional." ³² After recounting the legislative history of the statute and detailing its improvements upon the old Act, ³³ the debtor's brief concluded: "We are not here concerned with the decision of the Supreme Court holding the original Frazier-Lemke Act unconstitutional. This is not the same act, but a new act drafted carefully so as to comply with the mandate laid down by the Supreme Court in that decision." ³⁴

The Justices did vote to uphold the second Frazier-Lemke Act, and Hughes again assigned the opinion to Brandeis. "The decision in the *Radford* case did not question the power of Congress to offer to distressed farmers the aid of a means of rehabilitation under the bankruptcy clause," wrote Brandeis. It had merely held that the first Act violated the Fifth Amendment by infringing the five substantive rights there enumerated. "In drafting the new Frazier-Lemke Act," Brandeis observed, "its framers sought to preserve to the mortgagee all of these rights so far as essential to the enjoyment of his security. The measure received careful con-

In 1937 Dorothea Lange photographed a South Carolina sharecropper (left), and Russell Lee captured Iowa chicken farmers (opposite), for the Farm Security Administration's photo documentation program. The revised Frazier-Lemke bill was upheld by the Court and provided much-needed help to desperate farmers.

sideration before the committees of the House and the Senate. Amendments were made there with a view to ensuring the constitutionality of the legislation recommended. The Congress concluded, after full discussion, that the bill, as enacted, was free from the objectionable features which had been held fatal to the original Act."³⁵ Brandeis explained how the new Act remedied each of the defects his *Radford* opinion had identified, demonstrating at each step a thorough mastery of the Act's legislative history. His opinion noted approvingly that "Emphasis upon the deliberate intention to meet the constitutional objections raised in [*Radford*] dominated the consideration of the bill in all stages."³⁶ "Amendments to the bill subsequent to its introduction plainly demonstrate[d] careful intention to leave the [creditor's] lien wholly unimpaired."³⁷ The Court

concurred in the congressional judgment that the provisions of the revised Act made no unreasonable modification of the creditor's rights, and hence were valid.³⁸

The *Wright* opinion was announced on March 29, 1937, at the height of the controversy over the President's Court-packing proposal. That same day the Court upheld Washington state's minimum wage statute;³⁹ two weeks later the Court upheld the application of the National Labor Relations Act to three manufacturing concerns;⁴⁰ in May the Court upheld the unemployment insurance provisions of the Social Security Act as well as Alabama's complementary state unemployment compensation act.⁴¹ These decisions have often been characterized, erroneously in my view, as jurisprudential about-faces, reactions to such external pressures as Roosevelt's landslide elec-

tion in 1936 and/or the Court-packing plan. In those cases, it is contended, the Court capitulated to the New Deal in order to defuse the Court-packing threat. Could it not be contended with equal force that the Court's decision to uphold the second Frazier-Lemke Act was similarly motivated?

I don't think so. For even if we assume that the conventional explanation of the more famous decisions of the spring of 1937 is correct, the *Wright* case stands on a different footing. For all of the other cases to which I have alluded were decided by votes of 5 to 4. Notwithstanding the pressures brought to bear by the election and by the Court-packing plan, the Four Horsemen continued to cast votes against major initiatives for social reform in the most celebrated cases of the day. The vote in the *Wright* case, by contrast, was unanimous. Sutherland, Butler, Van Devanter, and McReynolds were all with the majority. Given their voting records before, during, and after the Court-packing crisis, it seems unlikely in the extreme that they voted to uphold the second Frazier-Lemke Act for any reason other than that they thought it was constitutional. A much more persuasive assessment was offered by a contemporary commentator in the *Columbia Law Review*, who remarked, "this is a dramatic illustration of the manner in which by careful draftsmanship Congress can overcome constitutional objections when they are explicitly stated, and thus in a substantial measure attain the objectives sought by previously invalidated legislation."⁴²

A second national regulatory initiative struck down by the Court in 1935 was section 9(c) of the National Industrial Recovery Act.⁴³ In an effort to stabilize petroleum prices in the face of a frenzy of wildcat drilling in the East Texas oil fields, Congress authorized the President to prohibit interstate transportation of what was called "contraband" or "hot" oil—that is, oil produced in excess of the amount permitted by the law of the state of production. The President had done so by executive order, and had in turn delegated authority to promulgate appropriate rules and regulations to the Secretary of the Interior. The President had by further executive order approved a Code of Fair Com-

petition for the Petroleum Industry. Two petroleum companies sought to restrain enforcement of various provisions of the oil regulation program.⁴⁴

The litigation of the *Hot Oil Cases* was something of a fiasco. Unbeknownst to both the oil companies and the government lawyers, a provision of the Petroleum Code at issue had been inadvertently repealed by a subsequent executive order before the suits had been initiated.⁴⁵ The Attorney General's office had been unknowingly defending the constitutionality of a provision that was not even law. Secretary of the Interior Harold Ickes wrote in his diary that it made him sick when he thought of the way the Justice Department's representative had handled the case before the Supreme Court.⁴⁶ Yet notwithstanding a poor performance by the attorneys for the government, the Chief Justice still managed to make a little lemonade.

In an opinion written by Hughes, the Court by a vote of 8 to 1 held that section 9(c) constituted an unconstitutional delegation of legislative authority to the executive. "[I]n every case in which the question has been raised," Hughes observed, "the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that section 9(c) goes beyond those limits."⁴⁷ Hughes patiently reviewed the development of the Court's delegation jurisprudence from the years of the early republic to the 1930s, showing how each delegation previously sustained had satisfied criteria that were unmet in the instant case.⁴⁸ "As to transportation of oil production in excess of state permission," he maintained, "the Congress has declared no policy, has established no standard, has laid down no rule."⁴⁹ "Section 9(c) does not state whether, or in what circumstances or under what conditions, the President is to prohibit the transportation. . . . It establishes no criterion to govern the President's course. . . . So far as this section is concerned, it gives to the President an unlimited authority. . . ."⁵⁰

But as Hughes' opinion made clear, this problem was not irremediable. For as the cases showed, "Congress. . . may establish primary standards, devolving upon others the duty to carry out the declared legislative policy, that is,

as Chief Justice Marshall expressed it, 'to fill up the details' under the general provisions made by the legislature."⁵¹ "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform," Hughes counseled, "such legislative action is not a forbidden delegation of power."⁵²

Readers of the opinion were confident that the defects identified by Hughes could be "easily remedied." As one commentator observed, "That the decision of the Court was limited to the pronouncement that the 'primary standard' was too vague, in effect, suggests that there is a proper way to accomplish the end desired, i.e., Congress may set out definitely such a standard."⁵³ Representative Charles Wolverton maintained that a standard adequate to satisfy the Court "could have been placed in section

9(c) by the use of only a few words."⁵⁴ The requirement that the statute provide some standard to guide the President, observed another, "relates merely to the form of legislative drafting. As pointed out by one writer, 'the effect of the decision might be very like that of the Statute of Uses which has been said merely to have added six more words to every English conveyance.'"⁵⁵

At the height of the Court-packing fight, Roosevelt would contend that the series of decisions invalidating New Deal initiatives meant that the government was powerless in the face of grave economic crisis. In early 1935, however, he was much less pessimistic. At a press conference following the Court's decision in the *Hot Oil Cases*, the President told reporters, "You and I know that in the long run there may be half a dozen more court decisions

In an effort to stabilize petroleum prices in the face of a frenzy of wildcat drilling in the East Texas oil fields (above), Congress authorized the President to prohibit interstate transportation of what was called "contraband" or "hot" oil—that is, oil produced in excess of the amount permitted by the law of the state of production. Chief Justice Charles Evans Hughes' opinion in the *Hot Oil Cases* struck down the regulatory initiative as an unconstitutional delegation of legislative authority to the executive, but went out of its way to advise Congress on how to remedy the statute's defects.

before they get the correct language, before they get things straightened out according to correct constitutional methods."⁵⁶ Harold Ickes surely took encouragement from a conversation he had with Justice Roberts at a dinner party three days after the Court announced its decision. Ickes recorded in his diary that Roberts "assured me that he is entirely sympathetic with what we are trying to do in the oil matter and that he hoped we would pass a statute that would enable us to carry out our policy."⁵⁷

Eleven days after the Court announced its decision in the *Hot Oil Cases*, Senator Tom Connally of Texas introduced legislation to rectify the problems identified in the Chief Justice's opinion.⁵⁸ Connally, who affirmed his belief that the *Hot Oil Cases* had been correctly decided,⁵⁹ assured his colleagues that his bill "was drawn in collaboration with the legal authorities of the Department of the Interior and has been carefully scrutinized by the oil production board and their legal staff." They all joined the members of the Senate Committee on Mines and Mining in believing "that the present measure obviates the objections which were urged to the act before the Supreme Court." The new bill's solution to the delegation problem was arrestingly simple. Rather than delegating authority to prohibit interstate shipment of hot oil to the President, Congress itself prohibited such shipment by statute.⁶⁰ "While the Supreme Court did not in so many words hold that the Congress had authority to prohibit" such shipments, Connally maintained, "there is every suggestion in the opinion that in the original case if Congress itself had prohibited the interstate shipment of this oil it would have been better. . . ."⁶¹ The bill passed both houses of Congress without a record vote within six weeks of the Court's decision.⁶²

Observers were confident that the Connally bill would pass muster before the Court. "[I]t would seem," wrote one, "that Congress has effectively met the objections expressed by the Court to the former Act."⁶³ "[C]orrective legislation," wrote another, "has already been accomplished by the Connally Bill. . . ."⁶⁴ "[T]he immediate damage caused by the decision in the [*Hot Oil*] case," remarked a third, "is repaired."⁶⁵ These assessments were vindicated in due course. Attacks on the constitutionality

of the Act were uniformly rebuffed in the lower federal courts.⁶⁶ When an indictment for violation of the Act finally came before the Supreme Court in 1939, long after the Court-packing plan had been decisively repudiated, the defendants did not even challenge the Act's constitutionality. And the unanimous opinion sustaining the indictment was joined even by the two remaining Horsemen, Justices Pierce Butler and James C. McReynolds.⁶⁷

Just as overproduction had created turmoil in the petroleum industry, cutthroat competition in the bituminous coal industry exerted disastrous downward pressures on prices, wages, and working conditions. In an attempt to impose order on this chaotic situation, Congress enacted the Guffey Coal Act of 1935. One part of the Act regulated the price at which coal moved in interstate commerce.⁶⁸ Another part provided for regulation of wages, hours and labor relations at the mines.⁶⁹ Members of both houses were plagued by doubts about the constitutionality of the labor provisions, and the Roosevelt administration had to resort to extraordinary measures to secure a favorable committee report. The bill passed both houses by unusually slim margins; and the sentiments of many were summed up by Senator Millard Tydings' ominous forecast of the Act's future: "Like an autumn flower it will be blown away by the first winter blast of the Court."⁷⁰

The Court did hold the labor provisions unconstitutional in *Carter v. Carter Coal Co.*⁷¹ in 1936. The majority opinion did not, however, rule on the validity of the price regulation provisions. Instead, the majority found that those sections were inseparable from the offending labor provisions. Accordingly, the entire statute had to fall.⁷² Hughes wrote separately, agreeing that the labor provisions were invalid, but contending that the price provisions were valid, and were severable from the labor provisions.⁷³ Benjamin N. Cardozo, joined by Brandeis and Stone, agreed in dissent that the price regulation provisions were valid and severable.⁷⁴ Moreover, Cardozo noted suggestively, "Stabilizing prices would go a long way toward stabilizing labor relations by giving the producers capacity to pay a living wage."⁷⁵ If Congress could enact a law regulating the minimum price at which coal moved in interstate

Just as overproduction had created turmoil in the petroleum industry, cutthroat competition in the bituminous coal industry exerted disastrous downward pressures on prices, wages, and working conditions. In an attempt to impose order on this chaotic situation, Congress enacted the Guffey Coal Act of 1935. Above, unemployed miners in West Frankfort, Illinois, have opened primitive workings on the coal seam of an abandoned mine, known as a gopher hole.

commerce, the dissent intimated, many of the labor difficulties caused by cutthroat price competition might be ameliorated as a result.⁷⁶ And the opinions of Hughes and Cardozo, coupled with the fact that the majority opinion had refrained from declaring the price provisions themselves unconstitutional, suggested that such an act might well pass constitutional muster.⁷⁷

In the late winter and early spring of 1937, Congress framed just such a bill. The Bituminous Coal Conservation Act of 1937 essentially reenacted the Guffey Coal Act without the objectionable labor provisions.⁷⁸ Both in the committee reports and on the floor, sponsors repeatedly quoted from the Hughes and Cardozo opinions, emphasizing the limited scope of the majority opinion as they did so.⁷⁹ Everyone knew that each of the Four Horsemen held very restrictive views of governmental power to regulate prices, and it was almost certain that they would have been prepared to invalidate regulation of coal prices on the merits.⁸⁰ Supporters

of the bill therefore believed that the only reason that the *Carter* majority opinion had not squarely addressed the Guffey Act's price provisions was that Justice Owen J. Roberts did not consider them unconstitutional. After all, they pointed out, it was Roberts who had written the landmark opinion upholding broad governmental power to regulate prices in the 1934 case of *Nebbia v. New York*.⁸¹ If between 1934 and 1936 Roberts had "had any change in mind relative to the power of Congress to regulate prices," contended Representative Fred Vinson, "it would have been an easy matter to have invalidated those points" of the Guffey Act.⁸² Members of Congress thus interpreted the opinions in *Carter Coal* to mean that a majority of the Court would approve a separate price regulation measure.⁸³ Solicitor General Stanley F. Reed testified to his view that the bill was now constitutional, and its backers in Congress were optimistic about its prospects before the Court.⁸⁴ Even Senators and Representatives

who had opposed the Guffey Act on constitutional grounds announced their support for the revised bill.⁸⁵ As Senator Guffey put it, "The bill is drawn so as to bring it clearly within the light of limitations which constitutional interpretation has imposed upon the power of Congress."⁸⁶ "As a lawyer and a Member of this body, I say to you that we have tried to square the language of this bill with the decisions of the Supreme Court," Vinson told his colleagues. "Our efforts have not been to circumvent any opinion of our highest Court, but we have worked in a bona-fide attempt to meet the law laid down by them in a proper, legal, constitutional manner."⁸⁷

When the 1937 Act was upheld by the Hughes Court in 1940, only Justice McReynolds dissented. "There is nothing in the *Carter* case which stands in the way," wrote Justice William O. Douglas, echoing arguments made in

Congress three years before. "The majority of the Court in that case did not pass on the price-fixing provisions of the earlier Act. The Chief Justice and Mr. Justice Cardozo in separate minority opinions expressed the view that the price-fixing features of the earlier act were constitutional. We rest on their conclusions for sustaining the present Act."⁸⁸

Yet another federal initiative invalidated by the Court in 1935 was the Railroad Retirement Act of 1934.⁸⁹ Enacted under the aegis of the Commerce Power, the Act set up a system of compulsory retirement for employees of interstate carriers, under which all such employees and carriers were required to contribute to a federal fund from which annuities would be paid to retirees. The majority opinion was written by Justice Roberts, who opened with the broad-minded announcement that "Our duty. . . is fairly to construe the powers of Congress, and

Owen J. Roberts' majority opinion invalidating the Railroad Retirement Act of 1934 identified no fewer than nine ways in which its detailed provisions violated the Due Process Clause of the Fifth Amendment. Chief Justice Hughes was distressed that the opinion did not advise Congress on how to shape future acts to comport with the Constitution. The Act set up a system of compulsory retirement for employees of interstate carriers (including the brakeman at right and the engineer opposite), under which all such employees and carriers were required to contribute to a federal fund from which annuities would be paid to retirees.

to ascertain whether or not the enactment falls within them, uninfluenced by predilection for or against the policy disclosed in the legislation."⁹⁰ Roberts then proceeded to bludgeon the Act to death, identifying no fewer than nine ways in which its detailed provisions violated the Due Process Clause of the Fifth Amendment.⁹¹ Having pummeled the Act to a bloody pulp, Roberts then administered the *coup de grace*: even were all of the due process defects of the statute rectified, it would still be unconstitutional, for it was "not in purpose or effect a regulation of interstate commerce within the meaning of the Constitution."⁹²

Hughes was clearly distressed. The majority, in his view, was not performing its appropriate consultative function. It was not advising

Congress on how to shape future enactments so as to comport with the requirements of the Constitution. It was instead erecting an insuperable obstacle to any such ameliorative legislation. "If the opinion were limited to the particular provisions of the Act, which the majority find to be objectionable and not severable," he complained in dissent, "the Congress would be free to overcome the objections by a new statute. . . ."⁹³ "What was. . . found to be inconsistent with the requirements of due process could be excised and other provisions substituted. But after discussing these matters, the majority finally raise a barrier against all legislative action of this nature by declaring that the subject matter itself lies beyond the reach of congressional authority to regulate interstate commerce. In that view, no matter how suitably

limited a pension act for railroad employees might be. . . still under this decision Congress would not be at liberty to enact such a measure."⁹⁴ "The gravest aspect of the decision," Hughes remarked gravely, "is that it does not rest simply upon a condemnation of particular features of the Railroad Retirement Act, but denies to Congress the power to pass any compulsory pension act for railroad employees."⁹⁵

This lament was echoed by Cassandras in the law reviews,⁹⁶ but it proved to be unwarranted. In the April issue of the *St. Louis Law Review*, Ralph Fuchs played the contrarian. "The decision of the Court does *not* in reality exclude the power of Congress," he maintained. "No reason appears why Congress could not levy a payroll tax upon the carriers and provide also for the payment of pensions to retired employees *out of the Treasury*."⁹⁷ In other words, what Congress could not accomplish through its Commerce Power it might nevertheless be able to achieve through its powers to tax and spend. "To guard against an adverse decision upon a pension law enacted under the taxing power," Fuchs cautioned, "it might be wise to separate the taxing measure and the law authorizing the payment of the pensions."⁹⁸ Fuchs' theory was that the tax, considered separately from the pension payments, would be upheld as a legitimate revenue measure. And the appropriations to pay the pensions, separately considered, would similarly survive constitutional challenge—though for different reasons that I will explain momentarily.⁹⁹

That summer Congress followed the course mapped out by Fuchs, though it did so without much subtlety.¹⁰⁰ H.R. 8651 became the Railroad Retirement Act of 1935;¹⁰¹ H.R. 8652 became the Carrier Taxing Act of 1935.¹⁰² The Taxing Act was calibrated to generate the amount of revenue necessary to fund the pension payments authorized by the Retirement Act. This stratagem set off something of a chase scene in the Senate. Opponents of the plan, while stopping short of frankly accusing their colleagues of subterfuge, tried to get the plan's sponsors to confess that it was an attempt to circumvent the Court's decision. Proponents of the bill, assuring their interrogators that no such legerdemain was intended, struggled to keep a straight face while explaining that there were

two bills rather than one because pension legislation properly fell under the jurisdiction of one committee while taxing bills fell under the jurisdiction of another.¹⁰³

When the District Court of the United States for the District of Columbia granted the major railroads an injunction restraining collection of the tax in June of 1936,¹⁰⁴ it appeared that the Fuchs strategy had foundered. Citing extensively to the congressional debates,¹⁰⁵ the district court concluded that the Carrier Taxing Act and the Railroad Retirement Act were two parts of a single scheme that, taken as a whole, contained many of the defects from which the 1934 act had suffered.¹⁰⁶

The Railroad Retirement Board immediately took an appeal.¹⁰⁷ But in December of 1936, before the Court of Appeals could hear argument in the case, President Roosevelt suggested that railway management and labor get together and negotiate the terms of a railroad retirement act. Representatives of all of the major railway labor unions sat down with agents of all of the major railroad companies, members of the Railroad Retirement Board, representatives of the Treasury Department and members of Congress. By the summer of 1937 an agreement had been reached, and its provisions had been embodied in the Carrier Taxing Act of 1937, and the Railroad Retirement Act of 1937.¹⁰⁸ Congressmen praised the process and the agreement as "a great tribute to the principle of collective bargaining."¹⁰⁹ Such collective bargaining in the railroad industry had been institutionalized by the Railway Labor Act of 1926,¹¹⁰ which the Court had unanimously sustained in a 1930 opinion written by Hughes himself.¹¹¹ Sponsors professed their faith that both the 1937 bills and the 1935 Acts were constitutional.¹¹² Representative Clarence Lea added, however, that "Friends of this legislation, in my judgment, need not particularly fear ultimate Court disposal of this problem."¹¹³ For, as Representative Carl Mapes explained, as part of the deal "It is agreed between the representatives of the railroads and the brotherhoods that they will not contest the constitutionality of this legislation. . . and that they will use their influence against having anyone else bring such action."¹¹⁴ The parties were true to their words,¹¹⁵ and the retirement system they cre-

ated remains with us in modified form to this day.¹¹⁶

The strategy of the sponsors of the Carrier Taxing Act and the Railroad Retirement Act of 1935 was informed by the opinion of the Court in *Frothingham v. Mellon*.¹¹⁷ The case was actually decided in 1923, when William Howard Taft was Chief Justice. But a majority of the Justices who joined that unanimous opinion were also members of the Hughes Court. *Mellon* involved a constitutional challenge to the Sheppard-Towner Maternity Act of 1921,¹¹⁸ which established a federal grant-in-aid program for the reduction of maternal and infant mortality. Under the statute, Congress appropriated funds to be disbursed to states that established qualifying programs for the promotion of maternal and infant health. Frothingham complained that the appropriations would in-

crease the burden of future federal taxation and thereby take her property without due process of law. Justice Sutherland's opinion, joined by Justices Holmes, Brandeis, Van Devanter, Butler, and McReynolds, held that Frothingham's status as a taxpayer was insufficient to give her standing to challenge the appropriation. Her interest in the moneys of the federal treasury, he explained, was shared with millions of others, and was too "minute and indeterminable."¹¹⁹

This "taxpayer standing doctrine" had enormous ramifications for federal spending policy in the 1930s. As Edward Corwin observed at the time, "so long as Congress has the prudence to lay and collect taxes without specifying the purposes to which the proceeds from any particular tax are to be devoted, it may continue to appropriate the national funds without judicial

The Sheppard-Towner Maternity Act of 1921, which established a federal grant-in-aid program for the reduction of maternal and infant mortality, empowered Congress to appropriate funds to be disbursed to states that established qualifying programs (such as the clinic pictured above), for the promotion of maternal and infant health. A taxpayer complained that the appropriations would increase the burden of future federal taxation and thereby take her property without due process of law. The Court held that status as a taxpayer was insufficient to give her standing to challenge the appropriation. This "taxpayer standing doctrine" had enormous ramifications for federal spending policy in the 1930s.

let or hindrance."¹²⁰ Appropriations from the general revenue, as distinguished from expenditures of designated funds collected from a particular tax, simply could not be challenged in the courts.¹²¹ Such an appropriation might exceed congressional authority to spend for the general welfare, but the federal courts would nevertheless refuse to restrain the expenditure. "Thus," wrote Benjamin Wright, "the spending of billions of dollars in civilian relief, and in the building of public works was beyond the range of constitutional litigation."¹²² As Wright put it, "the principal way in which the Court sustained. . . New Deal measures was by refusing to pass upon the validity of the spending power."¹²³

And Wright was right. Throughout Hughes' tenure, the Supreme Court and the lower federal courts repeatedly invoked the *Mellon* doctrine in rejecting constitutional attacks on loans and grants made by one of the most popular and important New Deal relief agencies, the Public Works Administration.¹²⁴ Undoubtedly because the *Mellon* doctrine posed such an insuperable obstacle to securing judicial review, a vast array of New Deal spending programs, all financed from general revenue, never underwent constitutional challenge during Hughes' tenure. Examples include the Civilian Conservation Corps,¹²⁵ the Farm Credit Act,¹²⁶ the Reconstruction Finance Corporation,¹²⁷ the Rural Electrification Administration Act,¹²⁸ and the Emergency Relief Appropriation Act of 1936.¹²⁹ Indeed, the most significant thing about the Hughes Court's much-discussed spending power jurisprudence is how little it actually mattered in light of the taxpayer standing doctrine.

One major New Deal spending initiative that the taxpayer standing doctrine did not shelter from judicial review was the Agricultural Adjustment Act of 1933.¹³⁰ In an effort to boost sagging crop prices resulting from chronic agricultural surpluses, the Act authorized the Secretary of Agriculture to enter into contracts with individual farmers. In the contract, the farmer would agree to reduce his production of certain specified agricultural commodities in exchange for a benefit payment.¹³¹ For political reasons, however, President Roosevelt opposed payment of the benefits from general rev-

enues.¹³² He did not want it to appear that the nation's farmers were feeding at the public trough. Instead, he insisted that the program be and appear to be self-financing.¹³³ The necessary funds were therefore to be derived from a special excise tax on food processing. The tax was designed to generate the amount of revenue required to meet the benefit payments contracted for, and the act appropriated the proceeds of the tax for that purpose.¹³⁴ A food processor challenging the validity of the excise therefore had standing to question the propriety of the expenditure to which the proceeds of his tax payments were specifically devoted.¹³⁵ And in *United States v. Butler*¹³⁶ the Court struck down the tax as a step in a scheme to usurp the states' authority to regulate agricultural production.¹³⁷

But while the *Butler* opinion invalidated the processing tax, the government continued to make the benefit payments for which it had contracted. With the processing tax no longer enforced, no one had standing to challenge the appropriations from general revenue by which the payments were now funded.¹³⁸ Moreover, within two months of the *Butler* decision Congress enacted a statute to replace the AAA. The Soil Conservation and Domestic Allotment Act of 1936¹³⁹ authorized the Secretary of Agriculture to pay farmers to shift acreage from soil-depleting crops to soil-conserving crops. It was not sheer coincidence that the soil-depleting crops were the very surplus commodities whose production the AAA had sought to control, while the soil-conserving crops were not overproduced. Five hundred million dollars were appropriated to fund the payments, but no companion taxing measure was enacted to provide the necessary revenue. Opponents of the measure complained that it was clearly unconstitutional in light of the *Butler* decision. But because there was no tax identified with the expenditure, no one had standing to challenge the constitutionality of the payments.¹⁴⁰ Senator Daniel Hastings challenged defenders of the bill's constitutionality "to add to it a tax provision to supply the necessary money and thus give to the American people an early opportunity to test its validity. Do not do the cowardly thing and separate the tax provision from this bill, thus making it impossible to prevent

the illegal spending of at least a half billion dollars."¹⁴¹ But proponents of the bill, chastened by the fate of the AAA, ignored this school-yard taunt, and the law was enacted and implemented in its unchallengeable form.¹⁴²

As Robert Stern observed, however, the soil conservation strategy was "subject to the limitations of any voluntary system, even one in which cooperation was made profitable. There was no assurance that enough producers would cooperate to permit a limitation of production sufficient to raise prices."¹⁴³ Accordingly, in 1938 Congress turned to a regulatory solution, enacting a second Agricultural Adjustment Act. The 1938 Act did not regulate the *production* of staple crops – instead, it authorized the Secretary of Agriculture to prescribe and allocate *marketing quotas* for those crops.¹⁴⁴ Drawing on a long line of precedents holding that sales for subsequent shipments in interstate commerce were subject to federal regulation, Congress sought to control prices by controlling the supply of agricultural produce moving in interstate commerce.¹⁴⁵ But where could federal legislators have gotten the idea that Congress might achieve through its commerce power what it could not attain using its fiscal powers?

These are the opening lines of Roberts' discussion of the issue of federal power in *Butler*. "Article I, section 8 vests sundry powers in the Congress," he wrote. "But two of its clauses have any bearing upon the validity of the statute under review." The first was the Commerce Clause. But, as Roberts observed, "the act under review does not purport to regulate transactions in interstate or foreign commerce. Its stated purpose is the control of agricultural production, a purely local activity. . . . Indeed, the Government does not attempt to uphold the validity of the act on the basis of the commerce clause, which, for the purpose of the present case, may be put aside as irrelevant."¹⁴⁶

This was a curious passage. The act did not purport to be an exercise of the power to coin money or to establish post offices either; nor did the government defend the act as exercises of those powers. Why, if he was to so quickly lay it aside as inapposite "for the purpose of the *present* case," did Roberts even bother to mention the commerce power?

Learned students of the Court's federalism jurisprudence thought they detected a familiar signal. In 1921 Congress had sought to use its fiscal powers to regulate sales of grain futures on boards of trade. The Future Trading Act¹⁴⁷ imposed a prohibitive tax on all such sales, and then exempted from the tax all sales made on boards of trade complying with federal regulations. The Court had declared the Act unconstitutional in *Hill v. Wallace*¹⁴⁸ in 1922. Chief Justice Taft's opinion for a unanimous Court held that the Act imposed a regulatory penalty rather than a true tax, and was accordingly not a valid exercise of the taxing power.¹⁴⁹ In dicta, however, Taft had offered Congress an alternative means of achieving its goal. Noting that Congress "did not have the exercise of its power under the commerce clause in mind and so did not introduce into the act the limitations which certainly would accompany and mark an exercise" of that power, Taft suggested that sales of grain futures might be regulated under the commerce power if "they are regarded by Congress, from the evidence before it, as directly interfering with interstate commerce so as to be an obstruction or a burden thereon."¹⁵⁰ Taft even hinted that the revised statute be based on the current of commerce doctrine¹⁵¹ the Court had employed in upholding the Packers and Stockyards Act¹⁵² earlier in the Term.¹⁵³ Congress took the hint and enacted the Grain Futures Act,¹⁵⁴ which the Court upheld as a legitimate exercise of the commerce power the following year in *Chicago Board of Trade v. Olsen*.¹⁵⁵

Senator James Pope of Idaho, the principal sponsor of the Agricultural Adjustment Act of 1938, drew attention to this passage from Roberts' *Butler* opinion in his defense of the 1938 Act's constitutionality. "The legal theory on which the pending bill is based is entirely distinct from that which provided the basis for the Agricultural Adjustment Act," Pope explained.¹⁵⁶ Asserting the need to make the Act's constitutional foundation in the Commerce Clause explicit in the preamble, Pope observed that in *Butler* "the Court said by reason of the fact that there was no statement or claim in that bill that we were proposing to regulate interstate commerce, it was a purely local transaction."¹⁵⁷ "As stated by Mr. Justice Roberts,"

Justice Louis D. Brandeis thought that Congress could use its taxing power to encourage states to enact unemployment compensation laws by drawing on the authority of *Florida v. Mellon*. In that 1927 case, the Taft Court had unanimously upheld a federal inheritance tax that granted a credit for state inheritance taxes paid. States that had enacted inheritance taxes feared losing their wealthy residents to states like Florida that had no such taxes, and the federal provision had been designed to level the playing field.

Pope continued, "the commerce clause of the Constitution was put aside as irrelevant in the Butler . . . decision. Interstate and foreign commerce, however, is certainly not irrelevant to the plight of agriculture at the present time, and through the *proper* regulation by Congress of . . . interstate and foreign commerce pursuant to the provisions of this bill the economic situation of the farmer can be set aside."¹⁵⁸

Solicitor General Robert H. Jackson, defending the Act before the Court in *Mulford v. Smith*,¹⁵⁹ drew the obvious analogy to the fate of grain futures regulation under Taft. "It is clear from *Hill v. Wallace* and *Chicago Board of Trade v. Olsen*," he wrote in his brief, "that Congress may utilize the commerce power to regulate subjects which it may not reach under the taxing power."¹⁶⁰ True to form, Roberts used his opinion in *Mulford* to replicate Taft's performance in *Chicago Board of Trade v. Olsen*: he upheld the Act as a valid regulation of interstate commerce.¹⁶¹ Two years later Jackson wrote in *The Struggle for Judicial Supremacy*

that "the decision was followed by a good deal of uninformed comment to the effect that Mr. Justice Roberts had reversed his position and that the Court had reversed itself on the subject of control of agricultural production by the Federal Government." "This," the astute Jackson insisted, "was certainly untrue."¹⁶²

I would be remiss if I did not relate one final instance of constitutional consultation. I refer to what is now the familiar story of Justice Brandeis' role in framing the unemployment compensation provisions of the Social Security Act. In the summer of 1933 Brandeis was visited at his vacation cottage by his daughter, Elizabeth Brandeis Raushenbush, and her husband, Paul. Both were economists at the University of Wisconsin, and deeply interested in the subject of unemployment insurance. Paul expressed to the Justice his frustration that the states had resisted enacting statutes on the subject because they were fearful that local businesses would be placed at a competitive disadvantage vis-a-vis businesses of states not

having such laws. Brandeis replied by asking whether Paul had considered the case of *Florida v. Mellon*.¹⁶³ In that case the Taft Court had unanimously upheld a federal inheritance tax that granted a credit for state inheritance taxes paid. States that had enacted inheritance taxes feared losing their wealthy residents to states like Florida that had no such taxes, and the federal provision had been designed to level the playing field. Brandeis was suggesting that Congress could similarly use its taxing power to encourage states to enact unemployment compensation laws. Congress could simply impose a uniform national payroll tax on all employers, the proceeds to be paid into a federal unemployment insurance fund. Employers would be allowed a credit against the federal tax for any amount paid into a comparable insurance plan established by their own states. States could then enact such insurance plans free of the concerns that had previously restrained them.

That September the Justice wrote Paul and Elizabeth a letter detailing his proposal for a federal unemployment compensation statute. Throughout the fall of 1933 Brandeis personally lobbied a number of high administration officials to support his plan.¹⁶⁴ At the same time he had his friend Lincoln Filene help Paul and Elizabeth organize a meeting of the influential to discuss his proposal. Among those in attendance was Secretary of Labor Frances Perkins.¹⁶⁵ Perkins commissioned Paul Raushenbush and Thomas Eliot to draft a bill based on Brandeis' proposal. When it had been introduced in the House and the Senate, Brandeis referred to the bill as "my federal excise tax. . . to offset irregularity of employment."¹⁶⁶

As the bill ran into resistance in Congress and the White House, Elizabeth served as the Justice's eyes, ears, and chief lieutenant, lobbying the administration and recruiting opinion leaders to support the Brandeis proposal.¹⁶⁷ The Justice conscripted Felix Frankfurter to aid her in the crusade for the "one true faith," and met personally with Edwin Witte, the Executive Director of Secretary Perkins' Committee on Economic Security, in an effort to win him over. Brandeis even extended his evangelism to the Oval Office—he and Roosevelt had a personal

conference in which Brandeis made the case for his scheme of federal-state cooperation.¹⁶⁸

The bill that ultimately emerged gave Brandeis most of what he had wanted. His early initiative had framed the debate, and his position on the Court gave special weight to his counsel.¹⁶⁹ This counsel was vindicated in the spring of 1937, when the Court sustained the Act against constitutional challenge.¹⁷⁰ Figuring prominently in Justice Cardozo's majority opinion was the case of *Florida v. Mellon*.¹⁷¹

While Justices McReynolds and Butler maintained in dissent that any such program was beyond congressional power to enact,¹⁷² the author of *Florida v. Mellon* wrote separately.¹⁷³ Justice Sutherland had decided to retire from the Bench in March of 1937, and was waiting only for the Court-packing controversy to subside before taking his leave.¹⁷⁴ His colleague Justice Van Devanter had announced his retirement May 18, six days before the Social Security Act opinions were delivered.¹⁷⁵ Under these circumstances, one might have expected these Justices to quietly join the dissent of their fellow Horsemen. Instead they fashioned a dissent that provided precisely the sort of consultation that Hughes had called for in his own dissent in the railway pension case. Sutherland began by announcing that he agreed with most of what was said in the majority opinion.¹⁷⁶ In fact, the only element of the scheme to which Sutherland objected was a provision that required the states to pay the proceeds from their own payroll taxes into the federal treasury, and allowed withdrawals only by state agencies approved by the federal board. Such a requirement, in Sutherland's view, did not "comport with the dignity of a quasi-sovereign state;"¹⁷⁷ but the objectionable provision might also be easily revised by Congress, Sutherland explained. Indeed, he maintained that "everything which the act seeks to accomplish for the relief of unemployment might have been accomplished. . . without obliging the state to surrender, or to share with another government, any of its powers."¹⁷⁸ As Sutherland pointed out, the Social Security Act's old-age pension provisions had accomplished their goal in a manner consistent with the Constitution, and he and Van Devanter joined the opinion upholding them that very day.¹⁷⁹ Make one rela-

tively minor revision in the unemployment compensation provisions of the statute, their dissent made clear, and there would have been seven votes to uphold them as well.

That same day Justice Stone wrote the majority opinion upholding Alabama's state unemployment compensation act.¹⁸⁰ McReynolds simply dissented without opinion.¹⁸¹ But Sutherland, this time joined by both Van Devanter and Butler, again dissented separately. "The objective sought by the Alabama statute here in question, namely, the relief of unemployment, I do not doubt is one within the constitutional power of the state," Sutherland began. "But it is an objective which must be attained by legislation which does not violate the due process or the equal protection clause of the Fourteenth Amendment. This statute, in my opinion, does both, although it would have been a comparatively simple matter for the legislature to avoid both."¹⁸² After detailing the ways in which the act denied due process and equal protection,¹⁸³ Sutherland observed that "other states have not found it impossible to adjust their unemployment laws to meet the

constitutional difficulties thus presented by the Alabama act. The pioneer among these states is Wisconsin."¹⁸⁴ Of course, neither Wisconsin's nor any other state's unemployment act was before the Court. Sutherland nevertheless went on to explain the provisions of Wisconsin's statute,¹⁸⁵ and to offer an advisory opinion on its constitutionality: "I entertain no doubt that the Wisconsin plan is so fair, reasonable and just," he wrote, "as to make plain its constitutional validity."¹⁸⁶ Even in dissent at the end of their careers, Sutherland and Van Devanter were offering pointers on how to attain permissible ends through means consistent with the Constitution. Incidentally, the Wisconsin statute the dissenters praised had also been drafted by Paul Raushenbush. And that draft was based on a memorandum written in 1911 by an extraordinarily able constitutional lawyer: Louis D. Brandeis.¹⁸⁷

In March of 1937, at the height of the Court-packing struggle, Chief Justice Hughes was visited at his home by Senator Burton K. Wheeler. During that conversation Hughes wondered aloud whether the constitutional his-

Justice Brandeis enlisted his daughter, Elizabeth Brandeis Raushenbush, and her husband, Paul, both economists at the University of Wisconsin and both deeply interested in the subject of unemployment insurance, to help him shape the unemployment provisions of the Social Security Act. As the bill encountered opposition, Elizabeth served as the Justice's eyes, ears, and chief lieutenant, lobbying the administration and recruiting opinion leaders to support the bill. Here she is pictured with her father on his eightieth birthday, November 13, 1936.

tory of the New Deal would have been different had Roosevelt appointed a different Attorney General. Remarking that "the laws have been poorly drafted," Hughes told Wheeler, "We've had to be not only the Court but we've had to do the work that should have been done by the Attorney General."¹⁸⁸ Hughes might have been referring to any of a number of failures on the part of the Justice Department, but one was almost certainly on his mind. That very month Congress was framing the Bituminous Coal Act that Hughes and his Court would ultimately uphold. In 1935 a subcommittee of the House Ways and Means Committee had asked Attorney General Homer Cummings to appear and offer his views concerning the Guffey Coal Act's constitutionality.¹⁸⁹ Lawyers in his Justice Department had been convinced that the labor provisions were unconstitutional,¹⁹⁰ and had reportedly told him so before his appearance.¹⁹¹ But Cummings had refused to offer Congress an opinion on the bill's constitutionality. Instead he had advised the subcommittee "to push [the bill] through and leave the question to the courts."¹⁹² For Hughes, this episode was no doubt emblematic of the early New Deal. In his eyes, the Attorney General's office had not given the administration and Congress the constitutional counsel they needed, but had left that important task to the Court instead. In his State of the Union address in January of 1937, Roosevelt had said, "The judicial branch . . . also is asked by the people to do its part in making democracy successful."¹⁹³ In Hughes' view, the judicial branch had been doing its part and more.

Every first year law student learns that constitutional law is not only about the permissible ends of government; it is also about the means by which such ends may be attained. Yet our conventional renderings of the Hughes Court obscure this important distinction, portraying the constitutional disputes of the New Deal era as disagreements principally about ends. In suppressing this elementary distinction between the legitimate objectives of government and the manner in which those objectives may be achieved, we have lost sight of the distinctively consultative role played by the Court during Hughes' unique tenure. If we will only remember what we have always known,

and what so many in the Congress of the 1930s clearly understood, we will see that the Supreme Court under the chief justiceship of Charles Evans Hughes faced the economic and political crises of the 1930s neither on four feet nor on three, but instead firmly on two.

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Endnotes

¹ Joseph Alsop & Turner Catledge, *The 168 Days* 16, 155 (1938); Leonard Baker, *Back to Back: The Duel Between F.D.R. and the Supreme Court* 110 (1967); Merlo J. Pusey, *Charles Evans Hughes* 733 (1951); Burton K. Wheeler, *Yankee From the West* 330 (1962).

² See William R. Casto, *The Supreme Court in the Early Republic* 77-81 (1995).

³ Wheeler, *supra* note 1, at 330.

⁴ Alsop & Catledge, *supra* note 1, at 16.

⁵ *Id.* For the suggestion of one New Dealer that the Court ought to be required to give Congress advisory opinions, see remarks of Rep. Monaghan, 79 *Cong. Rec.* 7150, 74th Cong. 1st Sess. (May 8, 1935).

⁶ F. Carlisle Roberts, "The New Frazier-Lemke Act—Its Provisions, Its Constitutionality," 22 *A.B.A. J.* 15 (1936). See, e.g., John Hanna, "Agriculture and the Bankruptcy Act," 19 *Minn. L. Rev.* 1, 28-32 (1934); John F. Reinhardt, "The New Frazier-Lemke Amendment," 4 *Kan. City L. Rev.* 19 (1935); R. O. Williams, "The Frazier-Lemke Law," 13 *Neb. L. B.* 481, 490-91 (1935); Note, "Bankruptcy: Federal Farm Mortgage Relief under the Bankruptcy Act," 21 *Corn. L. Rev.* 171, 171-72 (1935). For predictions that the first Act would be held unconstitutional, see, e.g., Note, "Relief of Distressed Farmers Under the Frazier-Lemke Act?" 3 *G.W. L. Rev.* 86, 95-96 (1934); Note, "Bankruptcy—Validity of Frazier-Lemke Act," 29 *Ill. L. Rev.* 645, 653 (1935). John Hanna, "The Frazier-Lemke Amendments to Section 75 of the Bankruptcy Act," 20 *A.B.A. J.* 687, 689 (1934) and Reuben G. Hunt, "Land Titles as Affected by Bankruptcy," 20 *A.B.A. J.* 719, 722 (1934), suggested the Act's constitutionality was open to serious question.

⁷ Roberts, *supra* note 6.

⁸ "Bankruptcy: Federal Farm Mortgage Relief under the Bankruptcy Act," *supra* note 6, at 173.

⁹ "Relief of Distressed Farmers Under the Frazier-Lemke Act?," *supra* note 6, at 87.

¹⁰ "The Frazier-Lemke Amendments to Section 75 of the Bankruptcy Act," *supra* note 6, at 689. See also, Roberts *supra* note 6, at 15 ("an outstanding example of ill-conceived legislation").

¹¹ "Relief of Distressed Farmers Under the Frazier-Lemke Act?," *supra* note 6, at 87. See also "Bankruptcy: Federal Farm Mortgage Relief under the Bankruptcy Act," *supra* note 6, at 174.

¹² "Relief of Distressed Farmers Under the Frazier-Lemke Act?," *supra* note 6, at 87.

¹³ *Id.*

¹⁴ "Bankruptcy: Federal Farm Mortgage Relief Under the Bankruptcy Act," *supra* note 6, at 173.

¹⁵ *The New York Times*, July 1, 1934, at 21, quoted in "Bankruptcy: Federal Farm Mortgage Relief Under the Bankruptcy Act," *supra* note 6, at 173, n. 22. See Note, "The New Frazier-Lemke Act: A Study," 37 *Colum. L. Rev.* 1092, 1094 (1937).

¹⁶ 295 U.S. 555 (1935).

¹⁷ See Lewis J. Paper, *Brandeis* 350 (1983); Melvin J. Urofsky, *Louis D. Brandeis and the Progressive Tradition* 162 (Oscar Handlin ed., 1981).

¹⁸ Those were:

1. The right to retain the lien until the indebtedness thereby secured is paid.

2. The right to realize upon the security by a judicial public sale.

3. The right to determine when such sale shall be held, subject only to the discretion of the court.

4. The right to protect its [the mortgagee's] interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale or by taking the property itself.

5. The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt." 295 U.S. at 594-95.

¹⁹ "Bankruptcy: Federal Farm Mortgage Relief under the Bankruptcy Act," *supra* note 6, at 173.

²⁰ Richard D. Friedman, *Charles Evans Hughes as Chief Justice, 1930-1941: The Complexities of Moderation* 231 (unpublished D. Phil. diss., Oxford University, 1978).

²¹ See "The New Frazier-Lemke Act: A Study," *supra* note 15, at 1095-96.

²² S. 3002, 74th Cong. 1st Sess. (1935) was introduced June 3, 1935, 79 *Cong. Rec.* 8666, 74th Cong. 1st Sess. (1935); S. Rep. No. 985, 74th Cong. 1st Sess. (1935) was submitted July 1, 1935, 79 *Cong. Rec.* 10463. A comparable bill, H. R. 8728, 74th Cong. 1st Sess. (1935) was introduced in the House June 29, 79 *Cong. Rec.* 10458, and reported with amendments August 16, 1935, H. Rep. No. 1808 74th Cong. 1st Sess., 79 *Cong. Rec.* 13494. H.R. 8728 was tabled and the Senate bill, as amended, was passed in lieu thereof, 79 *Cong. Rec.* 14334. The Senate subsequently concurred in the House amendments. *Id.* at 13233-34.

²³ "Bankruptcy: Federal Farm Mortgage Relief under the Bankruptcy Act," *supra* note 6, at 173-74.

²⁴ William A. Reppy, Comment, "Constitutional Law—Bankruptcy—Frazier-Lemke Amendment," 10 *So. Cal. L. Rev.* 474, 476 (1937). See also Roberts, *supra* note 6. "The constitutionality of this Act, because of the fate of its predecessor, was the paramount consideration during its progress through Congress," one commentator pointed out. "Bankruptcy: Federal Farm Mortgage Relief Under the Bankruptcy Act," *supra* note 6, at 176. The new Act was passed "after extensive hearings," Roberts *supra* note 6, at 15, and "[t]he Judiciary Committee of the Senate. . . including some of the most able lawyers in the upper house on constitutional questions, was unanimously in favor of the bill." "Bank-

ruptcy: Federal Farm Relief Under the Bankruptcy Act," *supra* note 6, at 176, n. 39. The report of the Senate Judiciary Committee began by stating that "This bill has for its object . . . the rewriting of subsection(s), which has been held unconstitutional, so as to conform to the decision of the Supreme Court." S. Rep. No. 985, 74th Cong. 1st Sess. at 1 (1935). "We feel that all the provisions in the rewritten subsection(s) have been approved in principle in numerous decisions by the Supreme Court." *Id.* at 3. The balance of the report detailed how objectionable provisions had been either omitted entirely, *id.* at 4, or modified so as to resemble provisions that the Supreme Court had previously approved in other bankruptcy cases, *id.* at 5-7. H. Rep. No. 1808, 74th Cong. 1st Sess. (1935), which accompanied H.R. 8728, 74th Cong. 1st Sess. (1935), the House version of the bill, was virtually identical to the Senate report.

²⁵ Asked by Senator McKellar whether the Judiciary Committee was satisfied that the bill would pass constitutional muster, Senator Pat McCarran assured him, "I can only affirm our faith in its constitutionality. . . We sought, and the author of the bill sought, to relieve the bill of those provisions which had been declared to be unconstitutional by the Supreme Court . . . if any bill can be enacted which will be constitutional it will be a bill along these particular lines . . . The committee has studied the question carefully, and has inserted in the bill a number of amendments seeking to have it conform to what we believe to be constitutional requirements. . . I believe we have obviated the features which might verge upon unconstitutionality." 79 *Cong. Rec.* 11971, 74th Cong. 1st Sess. (July 29, 1935). See also 79 *Cong. Rec.* 13411, 74th Cong. 1st Sess. (August 16, 1935) ("Mr. Robinson: The pending bill is intended to correct the features of that act which were held to be unconstitutional"); *id.* ("Mr. Borah: The pending bill is designed to, and it is believed it does, avoid the unconstitutional features which were in that law"); *id.* at 13632 ("Mr. Borah: The purpose of the bill is to avoid the objectionable features of the former act as they were denounced by the Supreme Court." Borah then explained how the new bill did so); *id.* at 13633 (Sen. Borah and Sen. Frazier explain to Sen. Hastings, to Hastings' satisfaction, why discretion vested in the court to order a sale of the property earlier than 3 years from the date of bankruptcy rescued the Act from a constitutional difficulty that plagued the earlier act); *id.* at 13640 (Sen. Robinson concurs in Borah's and Frazier's explanation to Hastings); *id.* at 13831 ("Mr. Lloyd: Mr. Speaker, this is a bill that has been rewritten by the Committee on the Judiciary as a substitute for the bill that the Supreme Court declared unconstitutional. The committee has given very careful consideration to the bill. We have in no way reduced the security of the mortgagee. We have left his security intact, but we have made it possible for the bankruptcy court to retain jurisdiction for a period not to exceed 3 years. It is the feeling of the committee that if the farmers have a breathing spell they will be able to work out their own salvation. The bill we passed last year was declared unconstitutional on the ground that it impaired the security of the mortgagee"; *id.* at 14331 ("Mr. Lemke: All this bill does is to comply with the decision of the Supreme Court, giving the farmer an opportunity to get a breathing spell after he goes into bankruptcy"); *id.* at 14332 ("Mr. Greever: Does

the gentleman feel that the constitutional feature that was decided by the Supreme Court is now fully cured? Mr. Lemke: I agree with the members of the Senate Judiciary Committee that, with the amendment that Mr. Sumners will offer, there will be no constitutional question about the bill.

Mr. Klobb: . . . Is the gentleman now satisfied in his own mind that this bill will pass the constitutional test? Mr. Lemke: Yes; I am satisfied that this bill now complies with the language of the Supreme Court decision . . . We have complied with the decision. . . ."; *id.* at 14333 ("Mr. McCormack: It is the gentleman's opinion that this bill as now drafted comes within the constitutional powers of the Congress? Mr. Sumners: As I explained, that opinion is drawn largely from the unanimous opinion of the members of the Committee on the Judiciary, who have more carefully examined it, but from the examination which I have made, which is rather casual, I did not observe anything, if this amendment is adopted, which would make me apprehensive as to its constitutionality"); See Note, "Bankruptcy—The Frazier-Lemke Act," 22 *Va. L. Rev.* 218, 219 (1935).

⁷⁹ 79 *Cong. Rec.* 11971, 74th Cong. 1st Sess. (July 29, 1935). Ashurst added, "I emphasize the fact that the Judiciary Committee examined many authorities, and the committee carefully considered this bill. . . . I believe the learned members of the Judiciary Committee have done a good work on this bill. If it be within the power of Congress to pass a law upon the subject, I believe this bill will meet the objections of the Supreme Court. . . . if Congress can constitutionally pass such a law at all it would be similar to this one." *Id.*

⁸⁰ Asked by Senator Copeland whether "this bill, in the form in which it is now presented to us, is likely to run the gauntlet of the courts and to be declared valid legislation?" Senator Borah responded that "that was the conclusion which was reached by the Judiciary Committee, including myself. The Judiciary Committee devoted their effort to working out the measure so as to bring it within the Constitution and obviate the objections made by the Court to the previous act. I do not think there was any disagreement in the Judiciary Committee that we had finally framed such a measure. It is my opinion that it will run the gauntlet of the courts . . . in my opinion, this bill is constitutional." Copeland then asked Borah whether he had taken "an opposite view regarding the original Frazier-Lemke Act?" Borah responded that he had "opposed that measure here on the floor, as the RECORD will show. . . . For the reason that I thought it was unconstitutional." Copeland replied, "At least, though, it appealed to the Senator's heart and he would have been glad to support it if he had thought it to be constitutional?" To this Borah responded: "I would have been anxious to see the measure passed if I had thought it would have been able to escape the constitutional objection." *Id.* at 13642.

⁸¹ Several Senators objected to a provision in the Senate bill that would have limited the right of the mortgagee to bid on the property at auction on the ground that it "would invalidate this measure if it were retained." *Id.* at 13634 (objection of Sen. Robinson); see also *id.* at 13413 (objection of Sen. Robinson); *id.* at

13632-33 (objections of Sen. Robinson and Sen. Logan); *id.* at 13641 (objection of Sen. Tydings). Senator Frazier was way ahead of them, and announced his intention to offer an amendment striking the objectionable provision, which had already been removed from the House version by the House Judiciary Committee. Senator Borah concurred, saying "I do not wish to urge it [the provision objected to], if it be regarded of doubtful validity," *id.* at 13633, and the objectionable provision was excised by amendment. *Id.* at 13643-44. See also *id.* (Borah and Ashurst assure Logan that the objectionable provision will be taken out of the bill); *id.* at 13641 (Borah informs Tydings of the agreement to strike the provision). Senator Robinson also objected to a proposed "provision which I think will cause the raising of another constitutional question on this bill" and would "endanger the validity of the proposed act." *Id.* at 13641. See also *id.* at 13634-36, 13640-41. Senator Ashurst agreed to its exclusion, and the amendment that would have included the objectionable provision was defeated. *Id.* at 13643. In the House Representative Sumners sought further to secure the Act's constitutional foundation, offering an amendment, promptly agreed to, securing to the mortgagee the right to have foreclosure on the property if the debt was not paid in full. *Id.* at 14332-33.

⁸² When the bill was introduced in the House, congressman Lemke announced, "This bill was very carefully considered by a subcommittee of the Committee on the Judiciary of both the House and the Senate, and by the full Committee on the Judiciary of both the House and the Senate, and last Monday it was passed after an hour and a half discussion on the question of its constitutionality, without a dissenting vote, in the United States Senate." *Id.* at 14332. In a concluding defense of the bill's constitutionality Sumners maintained that "although there was doubt with reference to the first bill[,] I understand from my colleagues on the committee there is not now any doubt as to the constitutionality of this bill. . . ." *Id.* at 14333. The bill was then passed by a voice vote. The *Cornell Law Review* observed that "the lack of opposition in both chambers seems to indicate that the legislators were satisfied with the present Act," and that "the consensus of Congressional opinion seems to be that the rights of the creditor have been fully protected. . . ." "Bankruptcy: Federal Farm Mortgage Relief Under the Bankruptcy Act," *supra* note 6, at 174, 176.

⁸³ Comment, "Constitutional Law—Fifth Amendment—Invalidity of Frazier-Lemke Amendment to the Bankruptcy Act," 35 *Colum. L. Rev.* 1136, 1138 (1935). Reaching the same conclusion were Note, "Constitutionality of the New Frazier-Lemke Amendment to the Bankruptcy Act," 4 *G.W. L. Rev.* 105, 114 (1935); "Bankruptcy: Federal Farm Mortgage Relief Under the Bankruptcy Act," *supra* note 6, at 171, 176; Rufus K. Breihan, "The New Frazier-Lemke Amendment," 41 *Com. L. J.* 152 (1936); Note, "Constitutional Law—Due Process—Validity of Amended Frazier-Lemke Amendment to Bankruptcy Act," 84 *U. Pa. L. Rev.* 545, 546-47 (1936).

Not all commentators were so optimistic. See, e.g., Roberts, *supra* note 6; Note, "Constitutional

Law—Bankruptcy—Validity of Amended Frazier-Lemke Farm Mortgage Moratorium Law," 13 *N.Y.U. L. Q.* 465 (1936); John Hanna, "New Frazier-Lemke Act," 1 *Mo. L. Rev.* 1 (1936); Reinhardt, *supra* note 6, at 21, 29.

The majority of the lower federal courts hearing challenges to the revised act held it unconstitutional. See Comment, "Constitutional Law—Bankruptcy—Frazier-Lemke Amendment," 10 *So. Cal. L. Rev.* 474, 476 (1937). For comments criticizing these decisions as resting on a misunderstanding of the *Radford* opinion, see Note, "Constitutional Law—Due Process—Validity of Amended Frazier-Lemke Amendment to Bankruptcy Act," 84 *U. Pa. L. Rev.* 545, 546 (1936); Note, "Bankruptcy—Frazier-Lemke Act—Due Process—Full Faith and Credit," 4 *G. W. L. Rev.* 525, 526 (1936); Note, "Bankruptcy—Constitutionality of the New Frazier-Lemke Act," 30 *Ill. L. Rev.* 794, 795 (1936); "The New Frazier-Lemke Act: A Study," *supra* note 15, at 1096; Note, "Constitutional Law—Due Process and the Frazier-Lemke Acts," 35 *Mich. L. Rev.* 1130, 1134-35 (1937). See also *Wright v. Vinton Branch Bank*, 300 U.S. 440, 457 (1937).

³¹ 300 U.S. 440 (1937).

³² Brief on Behalf of Robert Page Wright, p. 2. "When the Supreme Court held the original Frazier-Lemke Act unconstitutional in [*Radford*]," the brief explained,

the present act was introduced in both the Senate and the House. It was referred to the Judiciary Committees of the Senate and the House and both of these Committees referred it to Subcommittees for study and consideration with the purpose of complying with the court's decision.

The author of the bill was called in by both of the Subcommittees. The Act was then carefully considered sentence by sentence, section by section, with the decision of the Supreme Court so as to comply with that decision. Many changes were made by the Subcommittees.

After the Subcommittees had finished their work the bill was reintroduced with the changes and amendments made by the Subcommittees and then was brought up before the Committees of the Whole of both the Senate and the House. There again the bill was gone over sentence by sentence, paragraph by paragraph and section by section, carefully considered and compared with the decision of the Supreme Court, and further amendments made.

The bill was then brought up on the floor of the Senate and the House and further debated with a view of having it comply with the decision of the Supreme Court and was finally passed . . . without a dissenting vote in either House.

Id. at 9 (emphasis in original). This theme was again emphasized at oral argument, 300 U.S. at 443. See "Constitutional Law—Due Process and the Frazier-Lemke Acts," *supra* note 30, at 1136 n.31.

³³ Brief on Behalf of Robert Page Wright, at 3-6.

³⁴ *Id.* at 10-11. At argument Wright's counsel main-

tained: "There is nothing novel in the new Act. It simply applies well established principles of bankruptcy law to agriculture. This may appear novel, but there is no provision of the Act which the bankruptcy courts have not already passed upon." 300 U.S. at 443.

Compare the Brief in Response to Petition for Writ of Certiorari, at 11: "Respondent respectfully submits that a study of the present act, and of the opinion of this Honorable Court in the *Radford* case, and of the first Frazier-Lemke Act, that was by that case held unconstitutional, will disclose a studied effort by the draftsmen of the present act to give an appearance of compliance with the *Radford* decision, while at the same time it takes away from the creditor the same substantive right in specific property that was illegally to be accomplished by the first Frazier-Lemke Act."

³⁵ 300 U.S. at 456-57.

³⁶ *Id.* at 464 n.9.

³⁷ *Id.* at 458 n.2.

³⁸ *Id.* at 470.

³⁹ *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

⁴⁰ *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937); *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49 (1937); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

⁴¹ *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937); *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937).

⁴² Comment, "Constitutional Law—Frazier-Lemke Act—Judicial Discretion as Affecting Validity," 37 *Colum. L. Rev.* 1005, 1006 (1937). See also "Constitutional Law—Due Process and the Frazier-Lemke Acts," *supra* note 30, at 1135-36 ("perhaps the most significant conclusions to be drawn about the recent decisions of the Supreme Court in the *Radford* and *Wright* cases and the history of the two acts are . . . that hastily drafted, more or less ill-considered legislation (as to means) will not survive the test of due process, while carefully worked out and planned statutes on the same subject and accomplishing substantially the same objects will").

⁴³ 48 Stat. 195, 200 (1933).

⁴⁴ *Panama Refining Co. v. Ryan*, 293 U.S. 388, 405-12 (1935).

⁴⁵ 293 U.S. at 410. The response to this embarrassment was the establishment of the *Federal Register*, in which such orders would thenceforth be officially published. Schlesinger, *The Age of Roosevelt: The Politics of Upheaval*, 254-55 (1960).

⁴⁶ Harold L. Ickes, *The Secret Diary of Harold L. Ickes*, 247 (1953).

⁴⁷ 293 U.S. at 430.

⁴⁸ *Id.* at 421-30. "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion

would be but a futility. But the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained." *Id.* at 421.

⁴⁹ "There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited." *Id.* at 430.

⁵⁰ *Id.* at 415. Referring to Section 1 of the Act, which set forth the Act's policy in general terms, Hughes wrote, "This general outline of policy contains nothing as to the circumstances or conditions in which transportation of petroleum or petroleum products should be prohibited,—nothing as to the policy of prohibiting, or not prohibiting, the transportation of production exceeding what the States allow. The general policy declared is 'to remove obstructions to the free flow of interstate and foreign commerce.' As to production, the section lays down no policy of limitation." *Id.* at 417-18. "The Congress did not undertake to say that the transportation of 'hot oil' was injurious. The Congress did not say that transportation of that oil was 'unfair competition.' The Congress did not declare in what circumstances that transportation should be forbidden, or require the President to make any determination of any facts or circumstances. Among the numerous and diverse objectives broadly stated, the President was not required to choose. The President was not required to ascertain and proclaim the conditions prevailing in the industry which made the prohibition necessary. The Congress left the matter to the President without standard or rule, to be dealt with as he pleased. The effort by ingenious and diligent construction to supply a criterion still permits such a breadth of authorized action as essentially to commit to the President the functions of a legislature rather than those of an executive or administrative officer executing a declared legislative policy. We find nothing in section 1 which limits or controls the authority conferred by section 9(c)." *Id.* at 418-19. Nor could any of the Act's other sections "be deemed to prescribe any limitation of the grant of authority in section 9(c)." *Id.* at 419-20.

"If section 9(c) were held valid, it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its law-making function. The reasoning of the many decisions we have reviewed would be made vacuous and their distinctions nugatory. Instead of performing its law-making function, the Congress could at will and as to such subjects as it chose transfer that function to the President or other officer or to an administrative body. The question is not of the intrinsic importance of the particular statute before us, but of the constitutional processes of legislation which are an essential part of our system of government." *Id.* at 430. See Roy G. Tulane, "Constitutional Law—The Oil Control Provisions of the N.I.R.A.," 10 *Wisc. L. Rev.* 301, 304-05 (1935).

⁵¹ *Id.* at 426.

⁵² *Id.* at 430, (quoting *Hampton & Co. v. United States*, 276 U.S. 394, 409-11 (1928)). The opinion went on to identify "another objection to the validity of the

prohibition laid down by the Executive Order under section 9(c). The Executive Order contains no finding, no statement of the grounds of the President's action in enacting the prohibition. Both section 9(c) and the Executive Order are in notable contrast with historic practice, . . . by which declarations of policy are made by the Congress and delegations are within the framework of that policy and have relation to facts and conditions to be found and stated by the President in the appropriate exercise of delegated authority. If it could be said that from the four corners of the statute any possible inference could be drawn of particular circumstances or conditions which were to govern the exercise of the authority conferred, the President could not act validly without having regard to those circumstances and conditions. And findings by him as to the existence of the required basis of his action would be necessary to sustain that action, for otherwise the case would still be one of an unfettered discretion as to the qualification of authority would be ineffectual. . . . To hold that [the President] is free to select as he chooses from the many and various objects generally described in the first section, and then to act without making any finding with respect to any object that he does select, and the circumstances properly related to that object, would be in effect to make the conditions inoperative and to invest him with an uncontrolled legislative power." 293 U.S. at 431-32. Indeed, such findings were mandated by the requirements of the Fifth Amendment: "if the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determinations of fact, those determinations must be shown." *Id.* at 432.

⁵³ Comment, "Constitutional Law—Delegation of Legislative Powers—National Industrial Recovery Act," 8 *So. Cal. L. Rev.* 226, 229 (1935). See also Charles K. Burdick, "Constitutional Aspects of the New Deal in the United States," 13 *Can. B. Rev.* 699, 710 (1935) ("the particular situation. . . can be met easily by a more definite congressional declaration of policy and purpose to control the President's future exercise of discretion"); Carl H. Baesler, "A Suggested Classification of the Decisions on Delegation of Legislative Power," 15 *B. U. L. Rev.* 507, 529 (1935) ("If a standard—a reasonable one—had been provided it is fair to assume that a contrary result would have been reached").

⁵⁴ "Section 9(c) of the National Industrial Act could have been reenacted by the use of the same language that was in the original act with probably 10 to 20 words additional to bring it within the rule laid down by the Supreme Court." 79 *Cong. Rec.* 2135-36, 74th Cong 1st Sess. (February 18, 1935).

⁵⁵ Joseph H. Mueller, "Constitutional Law—Delegation of Legislative Power—National Industrial Recovery Act," 23 *Ill. B. J.* 269, 270 (1935), (citing Theodore W. Cousins, "The Delegation of Federal Legislative Power to Executive Officials," 33 *Mich. L. Rev.* 512, 544 (1935) ("those who look to the Supreme Court for protection against extensive delegations to the

Executive should not take too much confidence from this decision. No substantial barrier to delegation is raised by the *Panama Refining Co.* case. A standard must be set, but previous cases teach how vague such a standard may be.

. . . The Court has indeed set a limit, but it is formal rather than substantial and the slightest care in bill drafting will avoid infringing it. All in all, we may conclude that the case changes nothing and that its importance can very easily be exaggerated"). See also Note, "Delegation of Power by Congress," 48 *Harv. L. Rev.* 798, 806 (1935) ("the new requirement [of a finding] may accomplish no more than to add a formality to the issuance of an executive order").

⁵⁴ Franklin D. Roosevelt, Remarks at Press Conference (Jan. 9, 1935) quoted in Schlesinger, *supra* note 45, at 255. "[T]he mistakes involved seemed easily remediable, and the administration took the adverse decision philosophically." *Id.* William Swindler agreed: "careless draftsmanship. . . proved to be the crux of the matter, and the optimists among the Presidential advisers professed to see no serious threat to their general statutory program emerging. . . . In the 'hot oil' decision. . . the optimists took heart from the fact that the point was a procedural one which could be remedied by statute. . . ." Swindler, *Court and Constitution in the Twentieth Century: The New Legality, 1932-1968* 33 (1970).

⁵⁵ Jckes, *supra* note 46, at 273.

⁵⁶ S. 1190, 74th Cong. 1st Sess. (1935), introduced at 79 *Cong. Rec.* 632, 74th Cong. 1st Sess. (January 18, 1935). The Committee on Mines and Mining reported the bill back favorably the same day. *Id.* at 649. The two-and-one-half page report, which consisted principally of quotations from the *Panama Refining* opinion, characterized the new bill as "a substantial but somewhat elaborated reenactment of section 9(c) of the National Industrial Recovery Act. . . ." See S. Rep. No. 14, 74th Cong. 1st Sess. I (1935). The report of the House Committee on Interstate and Foreign Commerce, issued on Valentine's Day, explained what had been wrong with section 9(c) and how the new bill repaired the problem.

Section 9(c) did not declare anything to be illegal until the President should so declare. In making such declaration, the Congress, in the opinion of the Supreme Court, did not require the President to adhere to any legislative policy, or to follow any standard laid down by it, or in fact to be guided by any rule. No particular circumstances, or conditions were set forth as a prerequisite [sic] to the President's declaration. The Supreme Court construed this action by Congress to be an invalid delegation of authority.

In S. 1190, as amended, Congress declares in no uncertain terms that such shipments, or transportation, in interstate commerce as defined therein, is prohibited, and violations of such Federal law is [sic] punishable in the manner prescribed. Immediately upon the passage of this act, therefore, shipments in interstate commerce of petroleum and petroleum products, as defined, become a violation of the law and there is no delega-

tion of authority to the President to determine anything before such law would become operative.

H. Rep. No. 148, 74th Cong. 1st Sess., at 3-4 (1935); see Comment, "Interstate Regulation of 'Hot Oil,'" 23 *Geo. L. J.* 487, 492-94 (1935).

⁵⁹ In the *Hot Oil Cases*, Connally remarked on the floor, "The Supreme Court held—and I think properly so—that the Congress did not possess the power to delegate authority to the President to put the prohibition in effect or not in effect as he might determine. . . . The Court indicated, in harmony with other decisions heretofore made, that had the Congress set up a standard or a measure by which the President could determine when and when not the shipment of oil should be prohibited the act would probably have been held valid." 79 *Cong. Rec.* 693-94, 74th Cong. 1st Sess. (January 21, 1935).

⁶⁰ As Connally explained it, "In the first section of the bill there is a declaration of the policy of the Congress. One of the suggestions in the decision of the Supreme Court was that Congress had not declared any particular policy but had merely delegated its authority to the President. The declaration of policy here is that in order to remove the burden of interference with interstate commerce by contraband oil, and in order to cooperate with the various states to that end, the Congress prohibits the interstate shipment of oil and oil products when the particular oil has been produced or refined or handled in violation of some State law or some valid regulation or order of the State commission. . . . Section 2 then absolutely prohibits the shipment in interstate or foreign commerce of oil produced in violation of state law or regulations." *Id.*

⁶¹ *Id.* See also remarks of Sen. Connally, *id.* at 753; remarks of Rep. Dies, *id.* at 2124; remarks of Rep. Wolverton, *id.* at 2135-36; remarks of Rep. Dempsey, *id.* at 2150. Senators King and Borah raised delegation objections to Section 3 of the bill, which authorized the President or his duly designated agent or agency to make such rules and regulations as might be found necessary or appropriate to effectuate the purposes of the act. *Id.* at 762. Connally responded that this sort of delegation had been repeatedly upheld by the Court, citing as an example *United States v. Grimaud*, 220 U.S. 506, in which the Secretary of Agriculture had been given very broad power to make rules and regulations with respect to the forest reserve. 79 *Cong. Rec.* 763, 74th Cong. 1st Sess. (January 22, 1935). Borah responded: "Yes; I know the Supreme Court has upheld in some instances these regulations, under certain circumstances, but I invite the Senator's attention to the fact that when these cases were first presented to the Supreme Court of the United States, rules and regulations, the violation of which constituted a crime, were held invalid. The Court modified its position upon the question. I venture to say that if we continue to make these rules and regulations by the thousands and thousands, the violations of which constitute a crime, the Supreme Court will go back some of these days to the very sound and safe rule which it announced in the beginning when it first dealt with the question. There may come a time, as in the decision in the oil case,

when the Court will conclude a danger point has been reached." *Id.* at 763-64. Connally replied, saying, "In a large measure I agree with the Senator in the idea that it is rather drastic to authorize any department to make rules and regulations punishable by fine or imprisonment, but the principle has been established and followed over and over again. Under this particular measure, of course, the Department cannot prescribe any rule beyond the scope of the direct authority which the Congress grants." *Id.* at 764. See also the colloquy between Rep. Disney and Rep. Cole of Maryland, *id.* at 2146.

⁶³ *Id.* at 764; *id.* at 2150. Hughes' specific advice on how to frame a constitutional delegation was not wasted. Section 4 of the Connally Act provided that "Whenever the President finds that the amount of petroleum and petroleum products moving in interstate commerce is so limited as to be the cause, in whole or in part, of a lack of parity between supply . . . and consumptive demand . . . resulting in an undue burden on or restriction of interstate commerce in petroleum or petroleum products, he shall by proclamation declare such finding, and thereupon the provisions of section 3 [prohibiting interstate shipment of "hot oil"] shall be inoperative until such time as the President shall find and by proclamation declare that the conditions which gave rise to the suspension of the operation of the provisions of such section no longer exist." c. 18, section 4, 49 Stat. 30 (1935). As Representative Charles Wolverton observed, "The House committee . . . has placed in this bill something of a safety valve, in that the President is authorized and empowered to suspend the act if it should appear that the limitation or control of production of crude oil was detrimental to the national interest. If that provision had not been placed in this bill, it would have left the entire matter to the judgment of an oil producing state as to what quantity of crude oil should go into interstate commerce. . . . [The bill as amended] has not left it entirely to the State to determine, without regard to the rights of the consuming public, how much oil shall go into interstate commerce. Provision has been made that whenever the President finds there is such a limitation of production as might be harmful to the consuming public he can act to suspend the provisions of this bill. Thus there is a safety valve provided in this bill. . . ." *id.* at 2136. The House report explained the manner in which the proviso had circumscribed the President's discretion in compliance with the *Panama Refining* decision—"The committees inserted the proviso found in the bill, which does not arbitrarily delegate to the President the power to declare the law to be inoperative in his sole discretion, but only when he finds that the circumstances exist which are set forth in the statute. Congress says to the President in effect in the language of the amendment—

You are permitted to declare the existence of the facts by which this law shall be inoperative whenever you find that the supply of petroleum and the products thereof, moving in interstate commerce, is so limited as to cause in whole or in part a lack of parity between supply, including imports, and demand, including exports, resulting in an undue bur-

den on, or restriction of, interstate commerce in petroleum and the products thereof.

Under this language the President, we assume, will require a factual basis for his finding, that factual finding being addressed to what limitation there is upon the supply moving in interstate commerce and whether there is a lack of parity between such supply and demand. This is a definite requirement, a statement of circumstances and the imposition of conditions, all of which must be determined before the President can act. This power in the President presupposes a definite finding and a statement of the facts for the President's action before any such action is taken." H. Rep. No. 148, 74th Cong. 1st Sess., at 4 (1935). See also H. Rep. 2155, 74th Cong. 1st Sess., at 5 (1935). There are no reported cases challenging the validity of section 4.

⁶⁴ Comment, "Constitutional Law—Delegation of Legislative Authority," 1 *Mo. L. Rev.* 68, 70 (1936). See also Isador Loeb, "Constitutional Interpretation in a Transitional Period," 21 *St. Louis L. Rev.* 95, 102 (1936).

⁶⁵ Note, "Constitutional Law—Delegation of Legislative Powers—'Hot Oil'—NIRA," 3 *G.W. L. Rev.* 391, 392-93 (1935).

⁶⁶ Note, "Delegation of Legislative Powers to the Executive—the NIRA Oil Case," 2 *U. Chi. L. Rev.* 632, 636 (1935). For other optimistic assessments of the Act's chances before the Court, see Note, "Constitutional Law—Delegation of Powers—Validity of Act of Congress Conferring Discretionary Authority Upon the President," 12 *N.Y.U. L. Q. Rev.* 520, 522 (1935); George K. Ray & Harvey Wienke, "Hot Oil on Uncharted Seas of Delegated Powers," 29 *Ill. L. Rev.* 1021, 1034-35 (1935); Comment, "Interstate Regulation of 'Hot Oil,'" 23 *Geo. L. J.* 487, 494 (1935).

⁶⁷ See *Genecov v. Federal Petroleum Board*, 146 F. 2d 596 (5th Cir., 1944); *The President of the United States v. Skeen*, 118 F. 2d 58 (5th Cir., 1941); *Hurley v. Federal Tender Board No. 1*, 108 F. 2d 574 (5th Cir., 1939); *Griswold v. The President of the United States*, 82 F. 2d 922 (5th Cir., 1936); *President of the United States v. Artex Refineries Sales Corp.*, 11 F. Supp. 189 (S.D. Tex., 1935).

⁶⁸ *United States v. Powers*, 307 U.S. 214 (1939).

⁶⁹ Ch. 824, 49 Stat. 991, 995-1001, section 4, part II (1925) (repealed 1937, as noted in 15 U.S.C. sections 801-827).

⁷⁰ *Id.* at 1001-02, section 4, part III.

⁷¹ See Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* 159-61 (1998).

⁷² 298 U.S. 238 (1936).

⁷³ *Id.* at 312-16.

⁷⁴ *Id.* at 317-24 (separate opinion of Hughes, C.J.).

⁷⁵ *Id.* at 324 (Cardozo, J., dissenting). Cardozo maintained that "the suits are premature in so far as they seek a judicial declaration as to the validity or invalidity of the regulations in respect of labor," and accordingly did not consider the validity of those provisions.

⁷⁶ *Id.*

⁷⁷ *Id.* at 336.

⁷⁸ See Comment, "Constitutional Law—The Guffey Coal Act Decision and the Future for Federal Price

Regulation," 16 *Ore. L. Rev.* 67, 79 (1936) (noting that "by stabilizing [through price regulation] an industry in desperate economic plight and placing it in a position where it can afford to pay decent wages to labor, Congress may avert much of the damage to the public welfare from labor difficulties, and much of the need for direct regulation of wages, hours, and other labor conditions, which cannot be constitutionally imposed, in the opinion of the Supreme Court at the present time"). See also Comment, "The Bituminous Coal Act of 1937," 25 *Geo. L. J.* 986, 989 (1937); H. Rep. No. 294, 75th Cong. 1st Sess., at 2 (1937) ("It is the opinion of the committee that the stabilization of prices which the bill seeks to effect and the resulting guarantee to operators of a fair price for their coal will go a long way toward stabilization of labor conditions in the industry and toward the guarantee to the miners of satisfactory working conditions and a living wage").

⁷⁷ See "Constitutional Law—The Guffey Coal Act Decision," *supra* note 76, at 67, 71-79; Note, "The Final Phase of the Schechter Episode: *Carter v. Carter Coal Co.*," 5 *Brooklyn L. Rev.* 454, 469-70 (1936); Comment, "The Bituminous Coal Conservation Act of 1937," *supra* note 76, at 992-93.

⁷⁸ 50 Stat. 72 (1937).

⁷⁹ See S. Rep. No. 252, 75th Cong. 1st Sess., at 4-5 (1937); H. Rep. No. 294, 75th Cong. 1st Sess., at 11-14 (1937); remarks of Rep. Dirksen, 81 *Cong. Rec.* 2120, 75th Cong. 1st Sess. (1937); remarks of Sen. Guffey, *id.* at 2950-52; remarks of Sen. Borah, *id.* at 2956; remarks of Sen. Neely, *id.*; remarks of Rep. Vinson, *id.* at 2033-34, 2036-38; remarks of Rep. Jenkins, *id.* at 2041-42.

⁸⁰ See, e.g., *Nebbia v. New York*, 291 U.S. 502, 539 (1934) (McReynolds, J., dissenting).

⁸¹ 291 U.S. 502 (1934); H. Rep. No. 294, 11 75th Cong. 1st Sess. (1937); remarks of Rep. Guffey, 81 *Cong. Rec.* 2953, 75th Cong. 1st Sess. (1937); remarks of Rep. Vinson, *id.* at 2030, 2034, 2038-39; remarks of Rep. Jenkins, *id.* at 2042.

⁸² *Id.* at 2039. See also Comment, "Constitutional Law—Bituminous Coal Conservation Act of 1935—Congressional Power Under the Commerce Clause to Regulate Labor Conditions in Local Industry and Fix the Price of Sales in Interstate Commerce," 34 *Mich. L. Rev.* 1167, 1178-79 (1936) (suggesting that *Nebbia* provided authority for federal regulation of the price of coal sold in interstate commerce); "Constitutional Law—The Guffey Coal Act Decision," *supra* note 76, at 76-79.

⁸³ See, e.g., remarks of Rep. Jenkins, 81 *Cong. Rec.* 2041, 75th Cong. 1st Sess. (March 9, 1937).

⁸⁴ Ralph Baker, *The National Bituminous Coal Commission* 66 (1941). See remarks of Rep. Jenkins, 81 *Cong. Rec.* 2044, 75th Cong. 1st Sess. (March 9, 1937); remarks of Rep. Casey, *id.* at 2047.

⁸⁵ See Cushman, *supra* note 70, at 195.

⁸⁶ 81 *Cong. Rec.* 2952, 75th Cong. 1st Sess. (1937).

⁸⁷ *Id.* at 2032.

⁸⁸ *Sunshine Anthracite Coal v. Adkins*, 310 U.S. 381, 396-97 (1940).

⁸⁹ Act of June 27, 1934, c. 868, 48 Stat. 1283.

⁹⁰ "The fact that the compulsory scheme is novel is, of course, no evidence of unconstitutionality. Even should we consider the Act unwise and prejudicial to

both public and private interest, if it be fairly within delegated power our obligation is to sustain it. On the other hand, though we should think the measure embodies a valuable social plan and be in entire sympathy with its purpose and intended results, if the provisions go beyond the boundaries of constitutional power we must so declare." 295 U.S. at 346.

⁹¹ *Id.* at 348-57.

⁹² *Id.* at 362.

⁹³ "Classes of persons held to be improperly brought within the range of the Act could be eliminated. Criticisms of the basis of payments, of the conditions prescribed for the receipt of benefits, and of the requirements of contributions, could be met. Even in place of a unitary retirement system another sort of plan could be worked out." *Id.* at 375.

⁹⁴ *Id.* at 375.

⁹⁵ *Id.* at 374-75.

⁹⁶ See, e.g., Comment, "Constitutional Law—Railroad Retirement Act," 4 *Fordham L. Rev.* 498, 499, 501 (1935); Comment, "Constitutional Law—Due Process—Interstate Commerce—Power of Congress to Provide for Compulsory Retirement and Pension System for Carriers," 20 *Minn. L. Rev.* 49, 55-56 (1935); Comment, "The Railroad Retirement Acts," 10 *St. John's L. Rev.* 53, 58-59 (1935); Comment, "Constitutional Law—Railroad Retirement Acts," 25 *Geo. L. J.* 161, 173 (1936); Comment, "Constitutional Law—The Railroad Retirement Act—Interstate Commerce—Due Process," 33 *Mich. L. Rev.* 1214, 1220 (1935); Bruce R. Trimble, "The Judicial Treatment of the New Deal," 4 *Kan. City L. Rev.* 104, 107 (1936). See also "Radio Address of Hon. John A. Martin, of Colorado, on March 6, 1937," reprinted in 81 *Cong. Rec. Appendix* 435-37, 75th Cong. 1st Sess. (1937); Samuel Hendel, *Charles Evans Hughes and the Supreme Court* 231-32 (1951); William E. Leuchtenburg, *The Supreme Court Reborn* 46-47 (1995).

⁹⁷ Ralph F. Fuchs, "Judicial Method and the Constitutionality of the N.I.R.A.," 20 *St. Louis L. Rev.* 199, 209 n.34 (1935) (emphasis mine). See also Comment, "Constitutional Law—Unconstitutionality of the Railroad Retirement Act—Limitation on Power of Congress Over the Instrumentalities of Interstate Commerce," 35 *Colum. L. Rev.* 932, 933 (1935) (suggesting that the powers to tax and spend were "broader in scope than the commerce power," and might therefore permit congressional legislation creating a pension system for railway employees).

⁹⁸ *Id.*

⁹⁹ See Note, "Constitutional Law—Railroad Retirement Acts," *supra* note 96, at 165-66, 170.

¹⁰⁰ Asked by Senator Duffy whether the revised Railroad Retirement Act met the objections raised by the Court in *Alton*, Senator Wagner responded that *Alton* "was based upon the ground that we had no authority, under the power to regulate interstate commerce, to retire old railway employees. . . . Under this bill. . . we are proceeding on an entirely different theory, namely, the power of Congress to impose taxes." 79 *Cong. Rec.* 13646, 74th Cong. 1st Sess. (August 19, 1935). In the House, Rep. Monaghan pointed out that Roberts' *Alton* opinion had held "that the power 'to regulate

commerce' did not carry with it the power to provide pensions. He did not say we could not pay an annuity out of the Treasury of the United States. [That] is the theory of this bill." *Id.* at 13671.

¹⁰¹ 49 Stat. 967 (1935).

¹⁰² 49 Stat. 974 (1935).

¹⁰³ It all began when Senator Hastings asked why the provisions imposing the taxes and the provisions authorizing the appropriations were not all in one bill, as they were in the Social Security Act. Senator Wagner responded cryptically that it was "a matter of procedure." Senator Robinson came to Wagner's rescue, explaining that "Normally the Committee on Interstate Commerce has jurisdiction of railroad pension legislation. Always the Finance Committee has jurisdiction of tax legislation. In the case of the social-security bill, it was my personal thought that it would be better to separate the legislation, to have the administrative and other provisions in one measure, and the tax provision in a separate measure; but that course was not followed. In the case of the railroad pensions, that course is being followed, and I believe it is the best practice." 79 *Cong. Rec.* 13646, 74th Cong. 1st Sess. (1935).

Hastings was not satisfied. "May I inquire," he inquired, "whether there is any objection to adding a new title to this bill, including the tax, instead of passing a separate bill?" "Yes; there is a valid objection," Robinson responded. "[T]he Senate has no power to originate a revenue measure, and the body at the other end of the Capitol probably would take the view that we were originating a revenue measure if we put into this bill a provision for the tax to which the Senator is referring." "May I inquire . . . why it was that the House made these two separate bills?" Hastings persisted. "There was no reason why the House could not add the taxing feature to the bill. Why did they not make it in one bill?" "That is the business of the House," was Wagner's curt if somewhat juvenile response. *Id.* at 13647.

Robinson's tactic was to return to the theme of committee jurisdiction. "Mr. President," he explained, "it may or may not have been due to my own suggestion. I felt then and still feel that the committee which has jurisdiction of the legislation to provide for pensions, to work out the administrative features, is a different committee from that which has the tax-raising authority, and I think the course that has been pursued is the better course. Our committee formulated the legislation—a committee which is familiar with the subject matter of this bill. The taxing committee, the Ways and Means Committee, is composed of men of eminence and of ability; nevertheless they have not made the studies and do not possess the knowledge of this particular subject which is essential to proper formulation of the legislation. So I think the course which the House has pursued is a good one. I am perfectly willing, if the Senator thinks otherwise, to have him get them to reverse their action if he can do so." *Id.*

Wagner had by this point caught on to Robinson's strategy, and now chimed in: "Mr. President, let me say, in line with the suggestion of the Senator from Arkansas, that like the Interstate Commerce Com-

mittee of the Senate, the Interstate Commerce Committee of the House last year devoted several months to the study of this whole subject. Hearings covered a period of at least one month. Experts upon this question, those representing the railroad point of view and those representing the employees' point of view, were heard. In view of this long study, it would seem a ludicrous procedure to send the measure deliberately to another committee which would have to begin the hearings all over again and study the question *de novo*." *Id.*

Robinson then laid bare the issue Hastings had been sniffing around. "I assure the Senator from Delaware that the course which has been pursued does not involve any legerdemain, if that is what the Senator is intimating." "I am glad the Senator assures me of that," Hastings replied, "because I am very suspicious of it. . . . In this case a very clever thing has been done, by design or otherwise, which is to separate the granting of a pension from the levying of the tax. . . . I say that that in my judgment makes very much more certain the constitutionality of the two acts, but I say in doing it Senators are violating the spirit of the Constitution, and what I am trying to find out is whether or not it has been done deliberately and for the purpose of making more certain the constitutionality of these two bills." *Id.*

Wagner stuck with Robinson's game plan, insisting, "I know of no such deliberate design. I think a very clear and persuasive explanation was made as to why the two bills went to the separate committees." But Robinson, seeing a forensic opportunity where Wagner did not, had shifted ground.

"If the Senator from Delaware is in sympathy with railroad pension legislation, if he believes that it ought to be enacted, he certainly cannot object to any course the Congress might decide to take which would tend to sustain the legislation after it had been passed," he contended. "There is nothing wrong, there is nothing immoral, and there is nothing treacherous in separating the two subjects. They ought to be separated for the reasons which I gave a few moments ago." Here he rejoined Wagner. "One committee is familiar with the subject matter of one phase of the legislation; another committee is familiar with the subject matter of the tax legislation. Yet the Senator from Delaware is suspicious that there is something wrong with the policy of passing two bills—one as a tax bill. We seldom put tax legislation in the bills we enact for the expenditure of money. It was the consistent course which was pursued." *Id.* at 13647-48.

Here Senator Borah drove home Robinson's defense of separating the bills as a constitutional strategy. "I understand the question which is raised here is to what the effect constitutionally will be by reason of providing the two measures," he observed. "Suppose. . . the legislation is brought within the Constitution by reason of that fact, is it not our duty to do that very thing?" At this point Wagner again caught up to his colleagues, half admitting what he had denied a moment earlier. "That is what the Senator from Arkansas suggested," he agreed, "and I tried to suggest that if we are friends of this measure and anxious to provide a pension for the employees, if the Senator is right, that is the very course which we ought to pursue." *Id.* at 13648.

There followed a colloquy among Senators Wagner, Fletcher, and Barkley, in which it was made clear that the pensions were to be paid out of the Treasury "out of any funds not otherwise appropriated," and that while the tax "has been figured out so as to conform to the actuarial requirements" of the pension legislation, there was a "theoretical relationship between the two" bills, "but not a direct connection." *Id.* 13648-49. For a similar discussion in the House, *see id.* at 13670-71 (remarks of Mr. Hollister). This prompted Senator Tydings to launch the second offensive against the proponents' constitutional strategy. Throughout the discussion that followed, Tydings never once let on that his suggestion, if adopted, might compromise the constitutional strategy that lay behind the separation of the bills. Nevertheless, it clearly would have tended to do so.

Tydings' suggestion was to earmark the tax and pay its proceeds into a separate fund rather than mixing them in with the general revenue. "I should much rather have this fund segregated and the retirement benefits paid out of such fund than have the Treasury of the United States, without any limitation whatsoever, become the source from which these payments are to be made," said Tydings. "I believe it is extremely bad policy to have the Federal Government made the bank to pay pensions of this character. . . ." *Id.* at 13649.

Wagner sought to fend him off by vouching for the plan's actuarial integrity. "The calculations are definitely made; they are predictable as to the amount which will be required in order to secure a solvent fund for the payment of these pensions; and a sufficient tax is imposed to secure that fund. So whether it be segregated or put into the general fund of the Treasury is really a very minor matter." *Id.*

If it was such a minor matter, Tydings replied, "I take it the Senator would have no particular objection to segregating these funds under the Railroad Retirement Board?" Wagner hedged, professing solicitude for employees of the Treasury Department: "I should want to consult the Treasury authorities. I think perhaps such segregation would impose upon the Treasury Department unnecessary bookkeeping and unnecessary work. It is a matter that I do not regard as very important, so long as the calculations are definitely made, and that can be done." Tydings then expressed his wish that Wagner "at the very first opportunity. . . consult the Treasury about the advisability of having these moneys segregated into a separate fund," to which Wagner responded, "Very well." "I am certain," Tydings persisted, "if the bill were now so worded that it would attract support which otherwise might not be present. I think some Senators feel that a matter that is extraneous to the Government such as these funds, only being administered by the Government, ought not to be confused with the general revenues of the Government." *Id.*

Here Wagner became conciliatory. "I may say that the Senator raises a question really worth while," he conceded. "Under this bill a commission is to be appointed to make an investigation of all the matters that relate to this whole subject. . . . The commission may, among other things, study the very question which the Senator has raised. Furthermore, the commission is to report to the Congress on January 1 next, which will be 3 months prior to the effective

date of this particular act; so that ample time will be afforded to study that very question." *Id.*

Not quite satisfied, Tydings replied: "Even so, if I may so ask the Senator, I request that he ascertain if the Treasury would look with favor upon it; and if the Treasury should look with favor upon it and the author of the bill should do so, I should like to see such a provision incorporated into the law. If subsequently after the examination shall have been made, he should find that the money should be covered into the general fund for one reason or another, that would be a different thing. I do not like to start the bill out in that form if it can be avoided." At this point Wagner asked to be let off the hook. "At this late date," he replied to Tydings, "I hope the Senator will not press the suggestion, because the commission will be in a position to study the question and to report to us before any tax is imposed in accordance with the design of this bill." *Id.*

Tydings did not press the suggestion, but Hastings rejoined the colloquy to suggest that segregation of the funds rather than payment of the pensions out of the Treasury would be fatal to the scheme's constitutionality. Wagner attempted to cut Hastings short. "There is no need of going into that; I know the Senator's point of view from the standpoint of the law upon this subject; but there is no need of our pursuing it any further. The courts will finally have to speak upon that question." *Id.* at 13649-50.

But Hastings had to have the last words, and they dripped with barely concealed sarcasm and disdain. "Mr. President, I think this method of legislating is establishing an exceedingly bad precedent. I was delighted to hear the Senator from New York [Mr. WAGNER] suggest that it was not designedly done. I had the distinct impression that the Social Security Act, as to the constitutionality of which many of us had serious doubt, was divided into separate titles because the fear was existent that if the fund were segregated, as the Senator from Maryland [Mr. TYDINGS] suggested he would like to see done, there would be very grave danger of the act being declared to be unconstitutional. . . . when I found in these two bills that the two proposals are separated entirely, I reached the conclusion that some smart person had probably thought he would be able to circumvent the Constitution in that way. I was not certain and I am not now certain whether the Supreme Court may take the two acts together in order to determine whether both or either may be constitutional.

"As an illustration, when we pass the second bill providing for a tax upon railroads, there is no doubt that nothing in that measure will show the purpose for which the tax is levied. The Federal Government may take it, may pay the pensions due the World War veterans, may use it for relief, may use it to assist the farmers, may use it as the Federal Government may use any other part of the general fund which comes into the Federal Treasury. That is undoubtedly true. There is no earmark to the taxation. . . . But the query I have in mind is whether or not the Supreme Court may look at the two acts and determine that the tax was levied for a purpose.

"I do not raise the objection here for any other reason than to caution the Senate against this kind of legislation which separates a tax bill from the purpose of the tax itself. I think unless we can combine the

two, and safely combine the two, we ought not to enact it at all. I am not in favor of circumventing the spirit of the Constitution in any way. We have developed new and important minds recently. They have new ideas. It seems to me that this is one idea which they might be able to 'put over.' I am glad, in view of that thought, to hear the Senator from New York [Mr. WAGNER] say it was not done designedly, that it was not for any such purpose as that.

"With that statement in the record I assume the Supreme Court, when they come to consider one of these acts, will feel justified in considering both of them and reading the record in order to ascertain whether or not we have done a lawful thing." *Id.* at 13652.

In the House, Rep. Merritt echoed Hastings' objections. "Mr. Speaker, I do not propose to make any general speech or argument against this bill, but I think the Members of the House, if they do not appreciate already what it is proposed to do, should have it called to their attention. What we are doing today is to re-enact a part of a bill which has already been declared unconstitutional. The way it is proposed to avoid the decision of the Supreme Court is to divide the bill into two bills, and pass this bill, which gives the people who are affected by it, a general claim on the United States Treasury; and then this afternoon to pass an appropriation bill to cover the supposed expense which will be incurred by this pension bill." *Id.* at 13673. *See also* remarks of Rep. Hollister, *id.* at 13671.

¹⁰⁴ *Alton R. Co. v. Railroad Retirement Board*, 16 F. Supp. 955 (Dist. D.C., 1936).

¹⁰⁵ *Id.* at 956-57.

¹⁰⁶ "The two taken together so dovetail into one another as to create a complete system, substantially the same as that created by the Railroad Retirement Act of 1934. . . . The provisions of the two acts in question are so interrelated and interdependent that each is a necessary part of one entire scheme. This is not only apparent from the terms of the acts themselves, but is shown by their legislative history. It was clearly the intention of Congress that the pension system created by the Retirement Act should be supported by the taxes levied upon the carriers and their employees." *Id.* at 956. "In the case at bar. . . the interlocking and interdependent provisions of the two acts and their legislative history do show an attempt to accomplish under certain of its powers an end which has been held to be unconstitutional." *Id.* at 957. "[F]rom what has been said it necessarily follows that the two acts are inseparable parts of a whole, that Congress would not have enacted one without the other, that the taxes levied under the tax act are the contributions required under the act of 1934. . . . This being true, it is clear that under the views of the Supreme Court in the *Alton* case the taxing act transcends the powers of Congress. The pension system so created is substantially the same as that created by the act of 1934, and, apart from its unconstitutionality as a whole, subject to the same objections in certain particulars as those pointed out by the Supreme Court in that case." *Id.* at 958. The court identified some of those particulars *id.* at 959.

The court rejected the claim that the two acts had to be considered entirely separately because "the funds arising from the taxing act are not 'ear marked,' not kept as a separate fund for the payment of pensions provided for in

the Retirement Act. . . . [T]he purpose of Congress in passing [the Taxing Act] is clearly as shown . . . to provide funds for pensions . . . and not to provide for the expenses of the government." That being so, "it would seem to be immaterial whether the funds raised by the tax act are to be segregated in the Treasury; that would be a mere matter of bookkeeping, and would not affect the right of the taxpayer." *Id.* at 957.

Several commentators had predicted this fate for the 1935 pension legislation. *See, e.g.,* "Constitutional Law—Railroad Retirement Act," *supra* note 96, at 499, 501; "Constitutional Law—Due Process—Interstate Commerce—Power of Congress to Provide for Compulsory Retirement and Pension System for Carriers," *supra* note 96, at 55-56; "The Railroad Retirement Acts," *supra* note 96, at 58-59; "Constitutional Law—Railroad Retirement Acts," *supra* note 96, at 173.

¹⁰⁷ This is reported in *B. & O. R. Co. v. Magruder*, 77 F. Supp. 156, 156-57 (D. Md., 1948).

¹⁰⁸ As Rep. Lea, Chairman of the House Committee on Interstate and Foreign Commerce explained in introducing the Railroad Retirement Act, "Representatives of the 21 standard railway employees' organizations representing substantially all railway employees on class 1 railroads participated in the negotiations. Railway management representing 98 1/2 percent of the total mileage of class 1 railways of the United States participated in the negotiations. Class 1 railroads, as the membership of the House is aware, embrace every railroad whose annual income is over \$1,000,000.

"Members of the Federal Railroad Retirement Board participated with representatives of the management and men in these conferences. Finally an agreement was reached, the substance of which was embodied in a bill brought before the Interstate and Foreign Commerce Committee of the House. As a result of the hearings and further consideration of that measure by our committee a number of changes were made which were approved by these two groups and embodied in the bill now presented to the House." 81 *Cong. Rec.* 6080-81, 75th Cong. 1st Sess. (June 21, 1937). The Committee Reports similarly noted that "The pending bill has received the endorsement of both the labor organizations and the carriers, expressed in hearings before the committee." H. Rep. No. 1071, 75th Cong. 1st Sess., at 2 (1937). *See also* S. Rep. No. 818, 75th Cong. 1st Sess., at 2 (1937), which adopted the House report as its own.

As Representative Doughton explained, "The matter was given long and painstaking consideration, and was thoroughly discussed with the employers, the employees, and representatives of the Treasury Department. After long and deliberate consideration the measure now has unanimous support. It is agreed to by those who will pay the tax, it is acceptable to the Treasury of the United States, and it has the unanimous support of the Committee on Ways and Means." 81 *Cong. Rec.* 6302, 75th Cong. 1st Sess. (June 24, 1937). "Representatives of the railroad men, represented by Mr. George Harrison, president of the 21 brotherhoods, came before our committee," noted Representative Jenkins, "and indicated that they favored this legislation. The railroad executives, represented by Mr. Fletcher, a capable and able representative, stated that

they, too, were in favor of this legislation." *Id.* at 6303. Representative Wolverton reported that the District Court's injunction "prompted the President to suggest to representatives of railroad labor organizations and railroad management that an effort be made to work out between them a retirement plan which would be mutually satisfactory.

"In accordance with the suggestion of the President, a committee was appointed by the Association of American Railroads to confer with a committee appointed by the Railway Labor Executives Association, representing the employees. As a result of the conferences held by these two representative groups the plan of retirement was agreed upon and is embodied in amendments to the existing law. The bill now before the House . . . represents that plan as agreed upon by the carriers and their employees and approved by the Committee on Interstate and Foreign Commerce after careful study and extensive hearings. The enactment of this bill in its present form has been agreed upon by all the interested parties." The bill "represents absolute and complete unanimity of thought and desire between management and men. There is no feature of this bill that presents any controversy or disagreement as between these two parties. Every provision has the support of both without any reservation on the part of either. It represents a unified effort to produce legislation that will be satisfactory and mutually beneficial, and comes before the House with the united support of railroad management and all the standard brotherhoods." *Id.* at 6084-85. *See also id.* at 6302 (remarks of Rep. Snell); *id.* at 6085-86 (remarks of Rep. Martin of Colorado); *id.* at 6087 (remarks of Rep. Mapes); *id.* at 6087-88 (remarks of Rep. Cole of Maryland); *id.* at 6089 (remarks of Rep. Mead); *id.* at 6092 (remarks of Rep. Rayburn); *id.* at 6222 (remarks of Sen. Wagner); *id.* at 6224 (remarks of Sen. Wheeler); *id.* at 6227 (remarks of Sen. Barkley).

Sponsors also explained the constitutional theory of the plan, and the reasons why it was being enacted as two bills rather than one. Representative Jenkins explained that "It was thought advisable to divide these bills and permit the bill providing the amount the railroads should pay and the manner of payment and all incidents thereto to be considered by the Ways and Means Committee, which of right should consider it. And it was also thought advisable that another bill should be introduced providing who should be entitled to draw this pension and how much each class should draw, and also to provide what age men should be required or be eligible to draw the pension." *Id.* at 6091.

In the Senate, Senator Davis explained that "The measure now before us is not predicated upon the power to regulate commerce, but upon two separate and distinct powers vested by the Constitution in Congress, neither of which was involved in the case holding the Retirement Act of 1934 to be void.

"The measure now before us is predicated upon the right of Congress to appropriate money. Section 12 authorizes an appropriation for the purposes of the bill out of the Treasury of the United States. This appropriation is not payable out of any particular fund, nor out of any money earmarked for that purpose." *Id.* at 6227. *See also id.* at 6303 (remarks of Rep. Jenkins).

In the House there was a mild reprise of the colloquy Senators Wagner, Robinson, Hastings, and Tydings had held in the Senate two years earlier. Representa-

tive Fish asked: "Is any of this money earmarked for this purpose when it goes into the Treasury?"

Representative Fred Vinson replied that it was not. "This is a taxing bill that produces revenue collected by the Bureau of Internal Revenue. The revenues go directly into the Federal Treasury, the general fund of the Treasury." Fish responded, "I simply want to ask the gentleman if there is any reason why this money should not be earmarked for this specific purpose."

Vinson replied that "So far as this act is concerned, the act covers the money into the Treasury of the United States. Congress has the power to appropriate this money just as they appropriate all other money that goes into the general fund of the Treasury."

This was unresponsive, and Fish told Vinson so. "But the gentleman has not answered my question. Why should it not be earmarked?"

The future Chief Justice answered: "Because, from the beginning of our Government, until now, as I am informed, the policy of the Treasury has never been to earmark money coming into the general fund of the Treasury . . ." But "What about the Congress?" retorted Fish. "Cannot Congress do that?" Here Vinson was finally forthcoming: "I recall one instance when the Congress attempted to collect taxes for a special purpose, which may be characterized as earmarking—it was the Agricultural Adjustment Act. The processing taxes were held by the Supreme Court to be an exaction which, under the act, did not go into the general fund of the Treasury, but were used for a specific purpose which the Supreme Court held to be beyond congressional power. I am certain that my friend from New York will recognize that a recurrence of that sort of thing is not desirable. So I repeat that this act is what it says it is—the Carriers Taxing Act of 1937—a revenue bill in which the revenue will be collected by the Bureau of Internal Revenue, as other taxes are collected, and they will become part and parcel of the general fund of the Treasury of the United States." *Id.* at 6303-4.

If Mr. Fish thought that such a recurrence would have been desirable, he did not say so. Debate concluded and the bill was passed without a record vote. *Id.* at 6304. The bill passed the Senate without debate and without a record vote. *Id.* at 6345.

Remarks of Sen. Davis, *id.* at 6227. This echoed the encomiums of the Committee Reports, which stated: "we wish to commend both the carriers and the employees upon the great ability they have shown to adjust matters of this sort through normal process of collective bargaining. The agreement as to this measure constitutes a landmark in the history of industrial relations in this country." H. Rep. No. 1071, 75th Cong. 1st Sess., at 2 (1937); *see also* S. Rep. No. 818, 75th Cong. 1st Sess., at 2 (1937). Chairman Lea echoed these views on the floor of the House: "This is the most far-reaching agreement ever entered into between capital and labor in this or any other country." 81 Cong. Rec. 6081, 75th Cong. 1st Sess. (June 21, 1937); *see also* remarks of Sen. Wagner, *id.* at 6222. For further praise of the agreement, *see* remarks of Rep. Wolverton, *id.* at 6085; remarks of Rep. Martin of Colorado, *id.* at 6086; remarks of Rep. Mapes, *id.* at 6087; remarks of Rep. Cole of Maryland, *id.* at 6088; remarks of Rep. Mead, *id.* at 6089-90; remarks of Rep. Rayburn, *id.*

at 6092; remarks of Sen. Clark, *id.* at 6222-23.

¹¹⁰ Ch. 3-47, 44 Stat. 577 (1926).

¹¹¹ *Texas & New Orleans Railroad Co. v. Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548 (1930) (Justice McReynolds did not participate). See also *Virginian Railway Co. v. System Federation*, No. 40, 300 U.S. 515 (1937) (unanimously upholding 1934 amendments to the Act); *Washington, Virginia & Maryland Coach Co. v. NLRB*, 301 U.S. 142 (1937) (unanimously upholding application of National Labor Relations Act to interstate bus company); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding application of NLRA to steel manufacturer); *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49 (1937) (upholding application of NLRA to trailer manufacturer); *Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937) (upholding application of NLRA to clothing manufacturer); *Associated Press v. NLRB*, 301 U.S. 103 (1937) (upholding application of NLRA to wire service company).

¹¹² Chairman Lea stated that "It is the belief of the committee that this act, and particularly its substantial features, will be held constitutional should the Supreme Court be called upon for its decision." 81 *Cong. Rec.* 6081, 75th Cong. 1st Sess. (June 21, 1937). See also *id.* at 6302 (Rep. Doughton professes faith in constitutionality of Carrier Taxing Act and Railroad Retirement Act of 1937); *id.* at 6090-91 (Rep. Jenkins professes belief in constitutionality of Railroad Retirement Act of 1937); *id.* at 6093 (Rep. Crosser professes faith in constitutionality of Railroad Retirement Act of 1937); *id.* at 6222 (Sen. Wagner expresses confidence in the constitutionality of the 1935 Acts and of the Railroad Retirement Act of 1937); *id.* at 6087 (Rep. Cole of Maryland professes faith in the constitutionality of the 1935 Acts); *id.* at 6092 (Rep. Rayburn does the same); *id.* at 6093 (Rep. Crosser does the same).

¹¹³ *Id.* at 6081.

¹¹⁴ *Id.* at 6087. This was repeated several times on the floor. Chairman Lea reported that "The two great groups entering into agreement resulting in this legislation have agreed not to contest it." *Id.* at 6081. Rep. Wolverton reported that "It has been agreed by each of the parties that they will upon its enactment support and defend its provisions." *Id.* at 6085. In the Senate Wagner reported that "the railroads agreed with the representatives of the workers that if this measure were enacted they would not test its constitutionality, but accept it as law of the land." *Id.* at 6222. See also remarks of Sen. Wheeler, *id.* 6224-25 (suggesting that a stockholder or small railroad might nevertheless bring a contest); remarks of Rep. Lea, *id.* at 6081 (hinting at the same). For fear that floor amendments would unravel the deal between the railroads and the unions, the Senate decisively rejected two amendments offered by Wheeler. See *id.* at 6224-27.

Rep. Mapes added: "It is further understood that any suit or suits now pending in court to test the constitutionality of the existing railroad retirement law will be withdrawn." *Id.* at 6087; see also remarks of Rep. Wolverton, *id.* at 6085. Because the 1937 Act expressly repealed the 1935 Act, the Court of Appeals directed the District Court to dismiss the *Alton* suit on the grounds that it had become moot. Thus the 1935 Act was never challenged before the Supreme Court. See *B. & O. R. Co. v. Magruder*, 77 F. Supp. 156, 157 (D. Md., 1948).

¹¹⁵ In *California v. Laimer*, 305 U.S. 255 (1938), the state

sought an injunction against collection of the tax from its own State Belt Railroad. The Court appears to have been unsure exactly what the bill claimed. As Justice Brandeis put it, "The bill asserts, apparently, that as a matter of statutory construction, the federal [retirement] system is not applicable to the employees of the State Belt Railroad; and apparently that if construed as applicable to them, the legislation is unconstitutional." *Id.* at 257. The state's theory was that application of the Carrier Taxing Act to the State Belt Railroad would constitute taxation of a state instrumentality in violation of the principle of intergovernmental tax immunity. See Brief on Motion for Leave to File Bill of Complaint, 6, 20-21; Motion for Leave to File and Brief of Complainant State of California in Support of Motion for Leave to File Bill of Complaint, 5-20, 28-29, 44-45; Supplemental Brief of Complainant State of California on Defendants' Motion to Dismiss Bill of Complaint, 10-18. In this last document, filed after doubt was cast on the intergovernmental immunity claim by the Court's decision in *Helvering v. Gerhardt*, 304 U.S. 405 (1938), the state also contended that the 1937 acts were generally unconstitutional. *Id.* at 18-21. The relief prayed for, however, was not that the federal railroad retirement act legislation be declared unconstitutional. It was instead more modestly that it "be declared inapplicable to the State Belt Railroad." 305 U.S. at 258. Because the Court dismissed the bill as without equity, the opinion reached neither the statutory nor the constitutional issue. The state again sought exemption from the Carrier Taxing Act under the principle of intergovernmental immunity, again without success, in *State of California v. Anglim*, 37 F. Supp. 663 (N.D. Cal., 1941), *aff'd.*, *State of California v. Anglim*, 129 F.2d 455, 459 (9th Cir., 1942), *cert. den.*, 317 U.S. 669 (1942). In two cases lower courts held parties exempt from the Carrier Taxing Act as a matter of statutory construction. See *Ocean S.S. Co. of Savannah v. Allen*, 36 F. Supp. 851 (M.D. Ga., 1941), *aff'd.*, 123 F.2d 469 (5th Cir., 1941); *New England Freight Handling Co. v. Hassett*, 33 F. Supp. 610 (D. Mass., 1940). See Robert Stern, "The Commerce Clause and The National Economy, 1933-1946," 59 *Harv. L. Rev.* 645, 693 (1946) (reporting that the "validity" of the revised retirement program "has never been challenged").

¹¹⁶ See 45 U.S.C. 231 et seq.; 26 U.S.C. 3221-3232.

¹¹⁷ 262 U.S. 447 (1923).

¹¹⁸ Act of Nov. 23, 1921, c. 135, 42 Stat. 224.

¹¹⁹ 262 U.S. at 487. For other Taft Court era cases rebuffing challenges to federal spending on the basis of *Mellon's* taxpayer standing doctrine, see, e.g., *Elliott v. White*, 23 F.2d 997 (1928) (rejecting petition for injunction to prohibit appropriations for salaries for federal chaplains); *Whelless v. Mellon*, 10 F.2d 893 (1926) (rejecting suit to enjoin enforcement of act providing for adjusted compensation for war veterans).

¹²⁰ Edward S. Corwin, *Twilight of the Supreme Court* 176 (1934).

¹²¹ See Samuel J. Konefsky, Chief Justice Stone and the Supreme Court 102 n.11 (1945); Carl Swisher, *American Constitutional Development* 838 (2d ed. 1954); Dean Alfange, *The Supreme Court and the National Will* 178-80, 205 (1937).

¹²² Benjamin F. Wright, *The Growth of American Constitutional Law* 184 (1942).

¹²³ *Id.* at 183.

¹²⁴ See *Alabama Power Co. v. Ickes*, 302 U.S. 464, 478-79

(1938); *Duke Power v. Greenwood County*, 302 U.S. 485 (1938); *California Water Serv. v. Redding*, 304 U.S. 252 (1938); *City of Allagan v. Consumers' Power Co.*, 71 F. 2d 477, 480 (6th Cir., 1934), *cert. denied*, 293 U.S. 586 (1934); *Central Illinois Pub. Serv. Co. v. City of Bushnell*, 109 F. 2d 26, 29 (7th Cir., 1940); *Duke Power Co. v. Greenwood County*, 91 F. 2d 665, 676 (4th Cir., 1937); *Greenwood County v. Duke Power*, 81 F. 2d 986, 997 (4th Cir., 1936); *Arkansas-Mo. Power Co. v. City of Kennett*, 78 F. 2d 911, 914 (8th Cir., 1935); *Iowa S. Util. Co. v. Town of Lamoni*, 11 F. Supp. 581, 585 (S.D. Iowa, 1935); *Missouri Power & Light Co. v. City of La Plata*, 10 F. Supp. 653 (E.D. Mo., 1935); *Missouri Utilities Co. v. City of California*, 8 F. Supp. 454, 464 (W.D. Mo., 1934). See also *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940) (relying on *Mellon* in denying standing to challenge determination made under Public Contracts Act); *Graff v. Town of Seward*, 9 Alaska 205 (1937) (denying plaintiff standing to challenge Public Works Administration).

Mellon's broader justiciability doctrine was also invoked by the lower courts in repulsing attacks on the National Labor Relations Act, see *Bethlehem Shipbuilding Corp. v. Nylander*, 14 F. Supp. 201, 207 (S.D. Cal., 1936); *Ohio Custom Garment Co. v. Lind*, 13 F. Supp. 533, 536 (S.D. Ohio, 1936); the second *Frazier-Lemke Act*, see *In re Chilton*, 16 F. Supp. 14, 16 (D. Col., 1936); *In re Paul*, 13 F. Supp. 645, 647 (S.D. Iowa, 1936); the Emergency Relief Appropriation Act of 1935, see *Barnidge v. United States*, 101 F. 2d 295, 298 (8th Cir., 1939); the Securities and Exchange Commission, see *Detroit Edison Co. v. Securities & Exchange Commission*, 119 F. 2d 730, 740 (6th Cir., 1941); certain provisions of the amended Agricultural Adjustment Act, see *Wallace v. Ganley*, 95 F. 2d 364, 366 (D.C. Cir., 1938); and the Tennessee Valley Authority, see *Frahn v. Tennessee Valley Authority*, 41 F. Supp. 83, 84, 86 (N.D. Ala., 1941); *Tennessee Valley Authority v. Ashwander*, 78 F. 2d 578, 583 (5th Cir., 1935); see also *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118, 137 (1939); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936).

¹²⁵ 48 Stat. 22, 23 (1933).

¹²⁶ 48 Stat. 257, 258 (1933).

¹²⁷ 49 Stat. 1, 4 (1935).

¹²⁸ 49 Stat. 1363, 1364 (1936).

¹²⁹ 49 Stat. 1597, 1608 (1936). As Carl Swisher put it, "Congress . . . continued to make appropriations of this kind, largely immune from judicial scrutiny," Swisher, *supra* note 121 at 838-39. The Supreme Court and the lower federal courts also rejected challenges to the Home Owners' Loan Corporation on standing grounds. See *Kay v. United States*, 303 U.S. 1 (1938). See also *Pittman v. Home Owners' Loan Corp.*, 308 U.S. 21 (1939) (assuming constitutionality of *Home Owners' Loan Corp.*); *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 492 (1939) (assuming constitutionality of *Home Owners' Loan Corp.*); *United States v. Hill*, 90 F.2d 573 (3d Cir., 1937), *cert. den.*, 302 U.S. 736 (1937), *reh'g den.* 302 U.S. 779 (1937) (upholding constitutionality of *Home Owner's Loan Corporation*). The Federal Emergency Relief Act, 48 Stat. 55, 56 (1933), was subjected to an unsuccessful "collateral attack" in *Langer v. United States*, 76 F. 2d 817, 824-25 (8th Cir., 1935), where the court upheld the Act as a legitimate exercise of Congress's power to appropriate money for the general

welfare. In any event, the court held, citing *Massachusetts v. Mellon*, 262 U.S. 447 (1923), *Frothingham's* companion case, "no personal right of any appellant is infringed," and even if the Act constituted an invasion of state power "still only an abstract question of political constitutional law would be presented, with which the courts are not concerned." *Id.* at 825.

¹³⁰ Act of May 12, 1933, ch. 25, 48 Stat. 31.

¹³¹ *Id.*, section 8(1).

¹³² Arthur M. Schlesinger, Jr., *The Age of Roosevelt: The Coming of the New Deal* 97 (1959).

¹³³ In a 1932 campaign speech Roosevelt argued that any farm plan "must finance itself. Agriculture has at no time sought and does not now seek any such access to the public treasury as was provided by the futile and costly attempts at price stabilization by the Federal Farm Board. It seeks only equality of opportunity with tariff-protected industry." Raymond Moley, *The First New Deal* 250 (1966).

¹³⁴ Act of May 12, 1933, ch. 25, Sections 9, 12, 48 Stat. 31.

¹³⁵ *United States v. Butler*, 297 U.S. 1, 57-61 (1936). The dissent did not take issue with the majority on the question of standing. See 297 U.S. at 78 (Stone, J., dissenting). See also Alfange, *supra* note 121, at 184, 187-88.

¹³⁶ 297 U.S. 1 (1936).

¹³⁷ *Id.* at 68. Kelly and Harbison reported "a rumor given wide credence in Washington" that "asserted that Chief Justice Hughes had at first believed the statute constitutional, but that he had ultimately voted with the majority only because he thought another 5-to-4 decision would seriously damage the Court's prestige." Alfred H. Kelly, et al., *The American Constitution: Its Origins and Development* 750 (4th ed. 1970). Harold Ickes' diary reveals that Homer Cummings repeated this gossip at a Cabinet meeting in early 1936. Ickes, *supra* note 46, at 535-36.

¹³⁸ Alfange, *supra* note 121, at 180-81. See *F. G. Vogt & Sons, Inc. v. Rothensies*, 11 F. Supp. 225, 226 (E.D. Pa., 1935).

¹³⁹ 49 Stat. 1148 (1936).

¹⁴⁰ See Swisher, *supra* note 121, at 902; Frank B. Freidel, *Franklin D. Roosevelt: A Rendezvous With Destiny* 234 (1990); Stern, *supra* note 115, at 689-90; Richard Kirkendall, "The New Deal and Agriculture," in Braeman, Bremner & Brody, eds., *The New Deal: The National Level* 94 (1975).

¹⁴¹ 80 Cong. Rec. 1778, 74th Cong. 2nd Sess. (February 11, 1936).

¹⁴² See Note, "Soil Conservation and Domestic Allotment Act," 24 *Geo. L. J.* 962, 965-67 (1936).

¹⁴³ Stern, *supra* note 115, at 689-90. Arthur Schlesinger reports that Secretary of Agriculture Henry Wallace "was aware in 1935 that AAA, in its original form, was beginning to play out. Acreage reduction was breaking down in certain areas, partly because too many of the farmers (as in wheat) were staying outside the system, partly because increases in productivity nullified the effect of reducing acreage. . . . Wallace, as he told Henry Morgenthau on a walk to work on a fall morning in 1935, would be glad enough to have the processing tax declared unconstitutional, so that AAA would thereafter get its money from the general tax funds. It was clear to him, and even clearer to Howard R. Tolley, head of the Program Planning Division, that AAA would have to evolve in new directions." Schlesinger,

supra note 132, at 82.

¹⁴² 52 Stat. 31 (1938).

¹⁴³ See Cushman, *supra* note 70, at 191-92, 196-97.

¹⁴⁴ 297 U.S. at 63-64.

¹⁴⁵ See ch. 86, 42 Stat. 187 (1921) (amended by the Grain Futures Act, ch. 369, 42 Stat. 998 (1922)) (codified as amended at 7 U.S.C. section 1-26 (1992)).

¹⁴⁶ 259 U.S. 44 (1922).

¹⁴⁷ *Id.* at 66-68.

¹⁴⁸ *Id.* at 68-69.

¹⁴⁹ *Id.* at 69.

¹⁵⁰ See Act of Aug. 15, 1921, ch. 64, 42 Stat. 159 (1921) (current version at 7 U.S.C. section 181-229 (1992)).

¹⁵¹ See *Stafford v. Wallace*, 258 U.S. 495 (1922).

¹⁵² See ch. 369, 42 Stat. 998 (1922) (amended by the Commodity Exchange Act, ch. 545, 49 Stat. 1491 (1936)) (codified as amended at 7 U.S.C. section 1-26 (1992)).

¹⁵³ 262 U.S. 1 (1923).

¹⁵⁴ 82 Cong. Rec. 341, 75th Cong. 2nd Sess. (1937).

¹⁵⁵ *Id.* at 340-41. Pope agreed with Senator McKellar that Congress ought to "make perfectly clear to the Court . . . what Congress had in mind by stating the purpose of the bill on its face," predicting that every member would see the importance of the bill's legislative findings concerning the effect of unregulated agricultural marketing on interstate commerce "when the Court comes to pass upon the constitutionality of the pending measure." *Id.* at 341.

¹⁵⁶ *Id.* at 341.

¹⁵⁷ 307 U.S. 38 (1939).

¹⁵⁸ Brief for the United States at 110 (citations omitted).

¹⁵⁹ 307 U.S. at 47.

¹⁶⁰ Robert Jackson, *The Struggle for Judicial Supremacy* 238 (1941). See also Swisher, *supra* note 121, at 957; Comment, "Interstate Commerce—Federal Regulation of Tobacco Marketing Held Constitutional," 52 *Harv. L. Rev.* 1364 (1939).

¹⁶¹ 273 U.S. 12 (1927).

¹⁶² Among them were NRA head General Hugh Johnson, NRA counsel Donald Richberg, and Commissioner of Statistics Isador Lubin. Bruce A. Murphy, *The Brandeis/Frankfurter Connection* 167 (1982).

¹⁶³ Also in attendance were presidential aide Tommy Corcoran, Senator Robert Wagner, and Charles Wyzanski, the talented young Labor Department Solicitor who would ultimately defend the Social Security Act before the Court. *Id.* at 168.

¹⁶⁴ See Murphy, *supra* note 164, at 165-69; see also Elizabeth Brandeis Raushenbush to LDB, Sept. 30, 1933; EBR to LDB, Sept. 24, 1933; Lincoln Filene to LDB, Dec. 26, 1933; W. L. Stoddard to LDB, Dec. 27, 1933; W. L. Stoddard to Lincoln Filene, Dec. 27, 1933; Tom Corcoran to Paul Raushenbush, Jan. 26, 1934; Paul Raushenbush to Tom Corcoran, Jan. 26, 1934 (Brandeis Papers, University of Louisville, microform).

¹⁶⁷ Murphy, *supra* note 164, at 169; EBR to LDB, Feb. 5, 1934; Beulah Amidon to EBR, Feb. 6, 1934; A.J. Altmeyer to EBR, Feb. 9, 1934; EBR to LDB, Feb. 10, 1934; EBR to LDB, Feb. 12, 1934; EBR to LDB, Feb. 15, 1934 (Brandeis papers, University of Louisville, microform).

¹⁶⁸ Murphy, *supra* note 164, at 169-75; FDR to FF, June 11, 1934, in *Roosevelt and Frankfurter: Their Correspondence, 1928-1945* 122-23 (Max Freedman, annot. 1968); Tom Corcoran and Ben Cohen to FF, June 18, 1934, *id.* at 123-26. See also Schlesinger, *supra* note 132, at 301-03, 305-06; Joseph P. Iash, *Dealers and Dreamers* 244-45 (1988); William E. Leuchtenburg, *Franklin D. Roosevelt and the New Deal* 130 (1963).

¹⁶⁹ Murphy, *supra* note 164, at 176-77.

¹⁷⁰ *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

¹⁷¹ *Id.* at 591-92.

¹⁷² 301 U.S. at 598 (McReynolds, J., dissenting); 301 U.S. at 616 (Butler, J., dissenting).

¹⁷³ *Id.* at 609 (Sutherland, J., dissenting).

¹⁷⁴ See George Sutherland to Richard R. Lyman, Jan. 21, 1938; George Sutherland to Mr. Preston (initials unknown), Jan. 18, 1938; George Sutherland to Nicholas Murray Butler, Jan. 12, 1938, Box 6, Sutherland MSS, J.C.

¹⁷⁵ Alsop & Catledge, *supra* note 1, at 206; Pusey, *supra* note 1, at 760.

¹⁷⁶ "I agree that the payroll tax levied is an excise within the power of Congress; that the devotion of not more than 90% of it to the credit of employers in states which require the payment of a similar tax under so-called unemployment-tax laws is not an unconstitutional use of the proceeds of the federal tax; that the provision making the adoption by the state of an unemployment law of a specified character a condition precedent to the credit of the tax does not render the law invalid." 301 U.S. at 609-10 (Sutherland, J., dissenting).

¹⁷⁷ *Id.* at 613-14.

¹⁷⁸ 301 U.S. at 615-16 (Sutherland, J., dissenting).

¹⁷⁹ *Id.*; *Helvering v. Davis*, 301 U.S. 619 (1937).

¹⁸⁰ *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937).

¹⁸¹ *Id.* at 527 (McReynolds, J., dissenting).

¹⁸² *Id.*

¹⁸³ *Id.* at 527-30.

¹⁸⁴ *Id.* at 530.

¹⁸⁵ *Id.* at 530-31.

¹⁸⁶ *Id.* at 531.

¹⁸⁷ Murphy, *supra* note 164, at 93-96.

¹⁸⁸ Wheeler, *supra* note 1, at 329.

¹⁸⁹ Baker, *supra* note 84, at 49-50.

¹⁹⁰ Peter H. Irons, *The New Deal Lawyers* 248 (1982).

¹⁹¹ Baker, *supra* note 84, at 50 (citing *The New York Times*, July 6, 1935, at 2).

¹⁹² *Id.*

¹⁹³ *The New York Times*, Jan. 7, 1937, p. 1.