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INTRODUCTION

The constitutional revolution of the New Deal era was neither swift nor the calculated response of embattled jurists to the external pressures of politics and culture. More evolutionary than revolutionary, the transformation of the Supreme Court's constitutional jurisprudence of economic liberty occurred in an incremental manner that was non-linear in both its chronology and scope. Although external matters such as the appointment of more progressive Justices between 1925 and 1941, in addition to the catalytic effect of the Great Depression, were significant elements in this jurisprudential change, the Court's adoption of a more deferential approach towards public regulation of private economic affairs[1] was primarily the product of a series of internal doctrinal developments. Over the last quarter of a century historians and legal scholars have debated both the nature of this jurisprudential shift and its rationale. In an effort to deconstruct, or perhaps reconstruct, what happened nearly seventy-five years ago, they have also examined in some depth the characteristics of *Lochner* era police powers jurisprudence.[2]

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1 *See, e.g.*, W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 381 (1937) (upholding a minimum wage regulation as a reasonable exercise of state police powers); *see also* United States v. Carolene Prods., 304 U.S. 144, 152–53 & n.4 (1938) (noting the Court's deference to economic regulations).

2 There were actually three *Lochner* eras, so named because of the pervasive influence of *Lochner v. New York*, 198 U.S. 45 (1905). The initial *Lochner* era was from 1897, when the Court formally recognized substantive due process, through the first decade of the twentieth century; the second, from 1911–1923; and the third, from 1923 through the mid-1930s when an emerging slim majority of the Justices signaled a willingness to depart from the Lochnerian premise. *See* David G. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 10 (2003). However, the period before *Lochner*, from 1870–1908, is also highly relevant, as the doctrines of

Not surprisingly, a broad range of explanations has emerged with no real unifying theory about why or how the Supreme Court altered its views about public control of private economic activity.[3] There even persists some disagreement about the actual timing of this change.[4]

Interestingly, the role that legal classicism itself played in the transformation of the Court's constitutional jurisprudence has been somewhat overlooked. Notwithstanding classical legal thought's obvious contribution to this jurisprudential change with the erosion of its principles as jurists struggled to apply its tenets to the problems of the New Deal era—a subject that has logically concerned many scholars[5]—there has been relatively little attention afforded to the manner in which some aspects of legal classicism actually helped facilitate the jurisprudential shift. This shift was one that displaced a structure of thought and set of ideologies that pervaded constitutional law throughout the late nineteenth and early twentieth centuries. By the end of the 1930s, a divided Court adopted a more flexible and pragmatic approach towards assessing the constitutional limits of public regulation of private economic activity, one that featured a conscious effort to apply the Constitution to changing economic conditions and balanced public power and private rights. Yet this transformation in part was shaped by the persistent influence of legal classicism, as the Justices grappled with the parameters of local economic regulation during a period that challenged their assumptions about the role of judicial review and the nature of constitutional limitations. Consideration of the interplay between legal classicism and the emergence of New Deal constitutional adaptivity on the Supreme Court underscores the evolutionary nature of this jurisprudential shift and its essentially internal characteristics.

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substantive due process, liberty of contract, dual federalism, and the dichotomy between private rights and public control emerged.

3 *See, e.g.*, BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998) (tracing the evolutionary aspects of the New Deal constitutional transformation); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE (1993) (emphasizing the persistence of factional aversion in late nineteenth and early twentieth-century constitutional thought); WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1995) (attributing the shift in the Hughes Court's constitutional jurisprudence to external political factors).

4 *See generally* CUSHMAN, *supra* note 3 (noting incremental change); GILLMAN, *supra* note 3 (more abrupt change); BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 255–382 (1998) (discussing the catalysts of the New Deal revolution). An intriguing observation is that the New Deal revolution did not end until the resolution of the incorporation controversies of the 1940s. *See generally* Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 FORDHAM L. REV. 459 (2001) (exploring the birth and evolution of the Incorporation Doctrine).

5 *See, e.g.*, CUSHMAN, *supra* note 3; GILLMAN, *supra* note 3; G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2000). For a more orthodox view of this transition, see ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 67–120 (3d rev. ed. 2000) (discussing the rise and decline in the influence of laissez-faire economics on constitutional adjudication).

This Article explores how some of the salient characteristics of classical legal thought influenced the evolution of the Supreme Court's constitutional jurisprudence during the New Deal era. It focuses upon the Court's jurisprudence of economic liberty in the context of substantive due process. Though a similar pattern of evolution occurred in the Court's Commerce Clause jurisprudence, examination of this area of constitutional development is beyond the scope of this Article. Part I provides an overview of legal classicism and its influence upon late nineteenth and early twentieth-century constitutional law. The next Part examines the paradox of legal classicism and its eventual decline. The final Part analyzes the interplay between legal classicism and the evolution of New Deal constitutionalism.

I. The Edifice of Classical Legal Thought

Throughout the late nineteenth and well into the twentieth century, constitutional law derived much of its analytical and interpretative framework from classical legal thought. Reflective of the notion that "law was derived from universal principles of justice and moral order,"[6] legal classicism functioned more as a highly conceptual structure of thought than a unified set of principles, in which abstraction rather than factual context informed adjudication. Essentially a bundle of complementary concepts,[7] legal classicism reflected a largely static view of the law in which jurists viewed themselves as umpires who used abstract principles to adumbrate the boundaries of power.[8] Through deductive reasoning, and with an avowed eschewal of policymaking, classical jurists sought to apply the law, which they found, rather than made, in an objective and seemingly neutral manner.[9] "Impartial administration of fixed rules"[10] rather than personal judicial discretion were the lodestones of classical adjudication.

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6 William M. Wiecek, The Lost World of Classical Legal Thought: Law and Ideology in America, 1886–1937, at 12 (1998). Notwithstanding the paramount importance legal classicists afforded to inalienable rights to pursue life, liberty, and property, theirs was not a jurisprudence entirely grounded upon natural law, which by the late nineteenth century had assumed a role more of rhetorical than practical importance in adjudication. *See* Samuel R. Olken, *Justice George Sutherland and Economic Liberty: Constitutional Conservatism and the Problem of Factions*, 6 Wm. & Mary Bill Rts. J. 1, 34 (1997); Stephen A. Siegel, *Historism in Late Nineteenth-Century Constitutional Thought*, 1990 Wis. L. Rev. 1431, 1540–44 (arguing that historical consciousness, custom, and common law methodology characterized *Lochner* era police constitutional jurisprudence rather than juridical reliance upon natural rights and natural law).

7 *See* Wiecek, *supra* note 6, at 4–14 (summarizing the essential characteristics of classical legal thought).

8 *See* Duncan Kennedy, The Rise & Fall of Classical Legal Thought 39 (2006).

9 *See id.* at 39 (describing classical judges as "umpires"); Wiecek, *supra* note 6, at 7, 12–13; Barry Cushman, *The Structure of Classical Public Law*, 75 U. Chi. L. Rev. 1917, 1929 (2008) (reviewing Kennedy, *supra* note 8).

10 *See* Wiecek, *supra* note 6, at 13.

A. Formalism

The manner in which jurists trained in classical legal thought decided cases revealed the insular nature of an integrated system of thought which emphasized the primacy of rules and precedent and regarded non-legal data as irrelevant to the task of resolving legal disputes. A prime characteristic of legal classicism was the extent to which its adherents employed a categorical mode of analysis in support of formal, abstract concepts such as liberty of contract and dual federalism.

Formalism, with its attendant categories of distinction, allowed classical jurists to distinguish between permissible and impermissible types of economic regulation in order to preserve individual liberty. For example, the Court's insistence, despite economic facts to the contrary, that industrial production[11] and agricultural cultivation[12] preceded commerce manifested the formalistic concept of interstate commerce that characterized the Court's Commerce Clause jurisprudence for nearly fifty years in the late nineteenth century. Formalism also marked the Court's sterile analysis of the Fourteenth Amendment in the *Civil Rights Cases*[13] as well as in *Plessy v. Ferguson.*[14] Judicial formalism also had the effect of reinforcing another aspect of classical legal thought: the notion of dual federalism, which both limited the regulatory authority of the federal government[15] and preserved the residual authority of the states to regulate local matters within their presumed police powers to protect public health, safety, morals, and welfare.[16]

Through the prism of legal classicism, jurists interpreted the Constitution and applied its provisions to disputes over the scope of governmental authority to regulate private economic affairs. Wary of the tyranny of democratic majorities and skeptical of political factions, classical jurists insisted upon differentiating between the public and private spheres and viewed themselves as guardians of private property and contract rights from the vicissitudes of class legislation.[17] An abiding concern with the neutrality of governmental regulation permeated classical legal thought during the late nineteenth and early twentieth centuries and suffused constitutional doc-

11 *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251 (1918) (holding that manufacturing precedes commerce); United States v. E.C. Knight Co., 156 U.S. 1 (1895) (same).

12 *See, e.g.*, United States v. Butler, 297 U.S. 1 (1936) (holding that agricultural production is not commerce).

13 109 U.S. 3 (1883) (ruling that private race discrimination did not violate the Thirteenth Amendment prohibition of slavery nor constituted impermissible state action under the Fourteenth Amendment).

14 163 U.S. 537 (1896) (limiting the scope of the Fourteenth Amendment to matters of political equality as opposed to civil rights while implying the concept of separate but equal for accommodations between black and white persons).

15 *See, e.g.*, *E.C. Knight Co.*, 156 U.S. at 1 (invalidating the application of the Sherman Antitrust Act to the industrial process of sugar refineries).

16 *See, e.g.*, *Dagenhart*, 247 U.S. at 251 (explaining that the regulation of the hours and wages of local workers fell within the Tenth Amendment reserved police powers of the states).

17 *See* WHITE, *supra* note 5, at 36–37, 96, 168–69, 225–27, 253–56.

trines such as liberty of contract, the affectation doctrine, and other aspects of substantive due process.[18]

B. Factional Aversion in Historical Perspective

Aversion to political factions occupied a central role in classical legal thought, which emphasized the cardinal democratic value of equal operation of the law.[19] Aware of the vulnerability of private commercial interests in a democratic republic,[20] the constitutional Framers and early interpreters of the Constitution understood its structural and substantive components as essential to thwart the perils of class, or partial, laws enacted to promote the interests of some to the detriment of the public welfare.[21] This commitment to preserving private economic rights from arbitrary and unreasonable public incursion had long been a staple of Anglo-American constitutional thought. Eighteenth-century British Whig political reformers perceived class, or partial, legislation as detrimental to the public welfare,[22] and James Madison[23] and Alexander Hamilton[24] expressed similar sentiments in *The Federalist Papers*.

Factional aversion also influenced American constitutional law. Chief Justice John Marshall's Contract Clause decisions of the early nineteenth century set forth the notion of vested rights as a means of curbing the noxious influence of political factions[25] and the role of the federal judiciary in protecting private economic rights from political factions.[26] Marshall's successor, Roger B. Taney, also was apprehensive about class legislation. In *Charles*

18 *See* CUSHMAN, *supra* note 3, at 6, 86–88. *See generally* GILLMAN, *supra* note 3 (discussing the pervasive influence of factional aversion upon *Lochner* era police powers jurisprudence).

19 *See generally* GILLMAN, *supra* note 3 (discussing factional aversion).

20 *See* Samuel R. Olken, *The Business of Expression: Economic Liberty, Political Factions and the Forgotten First Amendment Legacy of Justice George Sutherland*, 10 WM. & MARY BILL RTS. J. 249, 270 (2002); Olken, *supra* note 6, at 11–13.

21 *See generally* GILLMAN, *supra* note 3; JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 3–7, 17–25, 32, 153, 161, 208, 211 (1990).

22 *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 53–65 (1969).

23 *See generally* THE FEDERALIST NO. 10 (James Madison) (discussing the problem of factions in a democratic republic).

24 *See generally* THE FEDERALIST NO. 78 (Alexander Hamilton) (discussing judicial review as a way to limit the political branches).

25 *See, e.g.*, Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 332–58 (1827) (Marshall, C.J., dissenting) (contending a New York law that authorized prospective modification of debts unconstitutionally impaired contract rights); Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 590, 592 (1819) (applying the Contract Clause to corporate charters); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 185, 197–98 (1819) (invalidating New York debtor relief legislation that retrospectively altered contract obligations); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 128–29 (1810) (invalidating legislative revocation of land grants).

26 *See Fletcher*, 10 U.S. (6 Cranch) at 138 (interpreting the Contract Clause as a means to "shield . . . property from the effects of those sudden and strong passions to which men are exposed").

River Bridge,[27] for instance, Taney, a Jacksonian Democrat,[28] refused to read an implied monopoly into a corporate charter of a bridge company and upheld a state's subsequent charter of another bridge.[29] Rejecting the claim that a political faction sought to divest the original proprietor of its vested rights through class legislation that created a second, competing bridge,[30] Taney explained that the resulting economic competition actually promoted the public welfare.[31]

Thereafter, Thomas Cooley, a Michigan law professor and a justice on that state's supreme court, explained in his influential treatise, *Constitutional Limitations*, that partial laws, which he also referred to as class legislation, offended the notion of due process because they represented an illegitimate and unreasonable effort by the legislature to bestow benefits on one group at the expense of others.[32] Like Taney, Cooley, also a Jacksonian Democrat, was solicitous of the equal operation of the law,[33] and his exposition of the constitutional boundaries of local police powers reflected the classical legal preoccupation with distinguishing between private economic affairs and public control. His views also influenced the late nineteenth-century emergence of substantive due process as a constitutional method of protecting private economic activities from regulation deemed arbitrary and unreasonable.

Legal classicists understood the Constitution as a set of limitations upon governmental authority to preserve individual liberty,[34] particularly the freedom to enter into contracts and to engage in lawful commercial enterprise. In general, theirs was a laissez-faire constitutionalism[35] which presumed little governmental intervention into private economic affairs, save for the necessity to prevent fraud and other harms.[36] Partial laws that had the effect of

27 Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837).

28 *See* Olken, *supra* note 6, at 17–20 (discussing Jacksonian Democracy and the Taney Court).

29 *See Charles River Bridge*, 36 U.S. (11 Pet.) at 548–52.

30 *See id.* at 444–61 (argument of Dutton, counsel for plaintiffs in error); *see also id.* at 608–45 (Story, J., dissenting).

31 *See Charles River Bridge*, 36 U.S. (11 Pet.) at 552–53.

32 *See* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 3, 35–37, 54–55, 389–94 (Boston, Little, Brown & Co. 1868); *see also* People *ex rel.* Detroit & Howell R.R. Co. v. Twp. Bd., 20 Mich. 452, 486–87 (1870).

33 *See* Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 J. AM. HIST. 751, 752, 755–57, 759–64, 766–67, 770–71 (1967) (discussing Cooley's concerns about class legislation).

34 *See* WIECEK, *supra* note 6, at 10; *see also* Samuel R. Olken, *Justice Sutherland Reconsidered*, 62 VAND. L. REV. 639, 655–78 (2009) (putting in historical perspective the constitutional conservatism of Justice George Sutherland).

35 *See* Michael Les Benedict, *Laissez-Faire and Economic Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 291–98 (1985) (differentiating laissez-faire constitutionalism, which did not necessarily reflect a predominant concern with economic theory, from laissez-faire economic theory).

36 *See, e.g.*, McLean v. Arkansas, 211 U.S. 539, 548–50 (1909) (reasoning that a law proscribing payment of coal miners upon the basis of the coal extracted before screening

benefitting some groups at the expense of others, and thus fostering unequal treatment, offended the classical notion of governmental neutrality. Throughout the *Lochner* era, jurists remained keenly aware of the problems political factions posed to the security of private economic interests in a democratic republic. While factional aversion may not have necessarily functioned as the sole basis of the era's constitutional jurisprudence of economic liberty, it certainly influenced the perceptions of jurists confronted with the task of assessing the permissible limits of public regulation. Although the Supreme Court upheld the vast majority of economic regulations it considered during the late nineteenth and early twentieth centuries,[37] in part because they did not involve unreasonable partial laws,[38] those that the Court struck down often represented illegitimate class legislation.[39] The Court's preoccupation with political factions actually preceded the *Lochner* era and reflected a traditional objective of protecting private economic rights from the tyranny of democratic majorities.

Within this context, classical jurists fashioned certain doctrines to guide their resolution of constitutional problems arising from public regulation of private economic activity. The distinction between private businesses and those affected with a public interest, as well as liberty of contract, were complementary concepts that illustrated the formalism of classical legal thought and its penchant for categorization. Against the backdrop of factional aversion, Supreme Court Justices applied these doctrines to the issues arising from public control of private economic affairs. Often, classical devotion to neutrality influenced how members of the Court perceived incursions upon private economic activity and contractual freedom.

C. The Dichotomy of Private Economic Rights and Public Control

Another pervasive theme of late nineteenth and early twentieth-century constitutional jurisprudence of economic liberty was the public-private distinction in which jurists differentiated between private entities and those subject to public economic regulation. First articulated by Chief Justice Waite in *Munn v. Illinois*,[40] in which the Supreme Court upheld a state's power to

helped prevent fraudulent business practices); Knoxville Iron Co. v. Harbison, 183 U.S. 13, 17–19, 21 (1901) (upholding a law requiring coal mine operators to pay coal miners on basis of coal presented).

37 *See* Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943, 944–45 & n.11 (1927) (analyzing economic liberty cases between 1868 and 1927); Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Progressive Protective Legislation in the Progressive Era*, 1983 Y.B. SUP. CT. HIST. SOC'Y 53 (noting the Court's validation of most economic regulations).

38 *See, e.g.*, Barbier v. Connolly, 113 U.S. 27, 30–32 (1885) (upholding as a reasonable exercise of state police powers a law that prohibited late night washing and ironing in public laundries). Justice Field, writing for the Court, specifically distinguished this law from illegitimate class legislation. *Id.* at 32.

39 *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905) (invalidating maximum hours regulation).

40 94 U.S. 113 (1877).

prescribe the rates of a privately owned and operated grain elevator,[41] this doctrine authorized public regulation of private businesses affected with a public interest such as utilities and railroads, as well as private economic enterprise that amounted to a monopoly or otherwise involved a significant public interest. Private businesses affected with a public interest were therefore subject to reasonable public regulation,[42] but those that lacked this element could presumably operate beyond the parameters of public control.[43] Justices often invoked this distinction to limit the scope of public regulatory authority in cases involving rates[44] and prices,[45] the conduct of businesses,[46] and governmental regulations of the conditions,[47] wages,[48] and hours of employment.[49] For instance, one reason six Justices of the Court struck down a law in *Lochner v. New York*[50] that limited the number of hours bakers could work was because the legislation interfered with a private business not affected with a public interest.[51] After *Lochner*, the Court appeared to be more flexible and pragmatic in its application of the public-private dichotomy, as it upheld regulations of the hours of women,[52] and a spate of laws concerning governmental control over railroads[53] and other businesses deemed integral to the public welfare.[54]

However, in the 1920s, the Taft Court, perhaps in an attempt to restore a measure of normalcy to this area of constitutional inquiry,[55] applied a particularly rigid notion of the affectation doctrine. In *Charles Wolff Packing Co. v.*

41 *Id.* at 130–32.

42 *See, e.g.*, German Alliance Ins. Co. v. Kansas, 233 U.S. 389, 389–90 (1914) (sustaining regulation of fire insurance business).

43 *See, e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262, 277 (1932) (characterizing the manufacture, sale, and distribution of ice as an ordinary, private business); Coppage v. Kansas, 236 U.S. 1 (1915) (invalidating laws that restricted employers from refusing to hire union employees); Adair v. United States, 208 U.S. 161 (1908) (same).

44 *See, e.g.*, Ribnik v. McBride, 277 U.S. 350, 357 (1928) (invalidating regulation of insurance broker commissions).

45 *See, e.g.*, Tyson & Brother–United Theatre Ticket Offices, Inc. v. Banton, 273 U.S. 418, 429, 440 (1927) (invalidating regulation of resale ticket prices).

46 *See, e.g.*, Burns Baking Co. v. Bryan, 264 U.S. 504, 513, 517 (1924) (invalidating a law proscribing the size of loaves of bread for sale).

47 *See, e.g.*, Chi., Burlington & Quincy R.R. v. McGuire, 219 U.S. 549, 569–73 (1911) (upholding regulation of working conditions); *see also* Lochner v. New York, 198 U.S. 45, 61–62 (1905).

48 *See, e.g.*, Adkins v. Children's Hosp., 261 U.S. 525, 560, 562 (1923) (invalidating minimum wage legislation).

49 *See, e.g.*, *Lochner*, 198 U.S. at 53 (invalidating maximum hours regulation).

50 *Id.*

51 *See id.* at 53, 64.

52 *See, e.g.*, Bunting v. Oregon, 243 U.S. 426, 428–29, 435–36 (1917) (upholding Oregon legislation limiting the hours of employment for both men and women); Muller v. Oregon, 208 U.S. 412, 422–23 (1908) (sustaining regulation of hours for women).

53 *See, e.g.*, Wilson v. New, 243 U.S. 332, 340 (1917).

54 *See* Block v. Hirsch, 256 U.S. 135, 155 (1921).

55 *See* Robert C. Post, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 B.U. L. REV. 1489, 1496 (1998).

Court of Industrial Relations,[56] Chief Justice William Howard Taft explained a private business could be subject to legitimate public regulation if it: a) operated by virtue of a public privilege such as a railroad or utility; b) served a traditional public function such as an inn or other place of public accommodation; or c) was no longer purely private by virtue of its devotion to public use.[57] However, Taft's conception of this third criterion was fairly narrow, as it appeared to focus on monopolistic behavior,[58] whereas in *Munn*, the Court ruled that a private entity could become over time sufficiently affected with a public interest, regardless of whether it exerted a monopolistic effect.[59] In *Munn*, monopolistic behavior was not the sole factor, yet Taft had assumed it could be and thus restricted significantly the scope of this third category.[60]

In *Jay Burns Baking Co. v. Bryan*,[61] the Taft Court reiterated its constrained concept of a business affected with a public interest when it invalidated a Nebraska law prescribing maximum weights of loaves of bread sold in stores, notwithstanding the state's argument that the regulation was a legitimate exercise of its local police powers to avert consumer fraud.[62] Three cases at the end of the decade further exemplified the Taft Court's strict construction of the affectation doctrine. Justice George Sutherland, a former student of Thomas Cooley and a devout legal classicist,[63] authored the Court's decisions. In all three, he invoked the private and ordinary nature of the businesses involved. In *Ribnik v. McBride*,[64] Sutherland concluded that a New Jersey law regulating employment agency fees infringed upon the contractual freedom of a private company.[65] In *Tyson & Brother–United Theatre Ticket Offices, Inc. v. Banton*,[66] Sutherland perceived no public interest arising from the resale of theatre tickets that justified local regulation of their prices,[67] and in *Williams v. Standard Oil Co.*,[68] he characterized the retail sale of gasoline as a private commercial endeavor not ordinarily subject to public control.[69] Sutherland's formalism in these opinions, which also reflected his

56 262 U.S. 522 (1923).

57 *See id.* at 535.

58 *See id.* at 536–43 (expressing skepticism about the necessity for the Kansas legislature to regulate the wages of meat processers without a clear demonstration of the public's dependence upon that business for the supply of meat).

59 *See* Munn v. Illinois, 94 U.S. 113, 132–33 (1877).

60 *See* Post, *supra* note 55, at 1505–07 (commenting that the Taft Court's vague statements about the public-private distinction undermined the utility of the affectation doctrine and revealed its formalistic adherence to mechanical jurisprudence).

61 264 U.S. 504 (1924).

62 *See id.* at 509 (summarizing the argument from the brief for the defendants in error and argued by Lloyd Dort, Nebraska's Assistant Attorney General).

63 *See* Olken, *supra* note 34, at 656, 660–72, 674–78 (discussing Sutherland's conservative constitutionalism); Olken, *supra* note 6, at 22, 36–49, 51–73 (same).

64 277 U.S. 350 (1928).

65 *See id.* at 356–57.

66 273 U.S. 418 (1927).

67 *See id.* at 430, 440–42, 444–45.

68 278 U.S. 235 (1929).

69 *See id.* at 239–40.

concern with factions,[70] illustrates the interplay between these concepts, as he perceived that these cases involved arbitrary and unreasonable government intervention into the private economic affairs of some groups for the benefit of others without legitimate reasons.[71] In the 1930s the tide would turn, but not without a dogged fight from the Court's legal classicists.

D. Liberty of Contract

Another doctrine favored by legal classicists was liberty of contract, a formalistic and abstract concept that presumed equality existed in the bargaining positions of employers and employees and reflected a longstanding notion that individuals possessed the freedom to pursue a lawful occupation on the same basis as other persons.[72] Reflective of the classical belief in the autonomy of individuals to act in accord with their free will, it presumed persons entered into contracts voluntarily and that government interference with this relationship was generally unnecessary absent fraud, duress, or illegality. Implicitly mentioned in Adam Smith's eighteenth-century economic tract *The Wealth of Nations* as "[t]he property which every man has in his own labor,"[73] the concept of liberty of contract also had origins in the free labor ideology of the antebellum abolitionists.[74] On the Supreme Court, Justice Field initially advanced this doctrine in his own opinions, as opposed to those for the Court, as a shield against partial laws he thought restricted the freedom of individuals and businesses to pursue lawful economic activities on equal terms with others.[75] From Field's perspective, and those of other members of the Court who eventually adopted his view, liberty of contract was both a liberty interest and a property right in that individuals had a property interest in their labor and the freedom to engage in commercial relationships.[76]

By the end of the nineteenth century, the Supreme Court accepted liberty of contract as a viable theory of constitutional restriction upon local economic regulation of hours, wages, and other conditions of employment. In

70 For articles discussing the role of factional aversion in Sutherland's constitutional jurisprudence, see Olken, *supra* note 34, at 663–65, 667–77, and Olken, *supra* note 20, at 258–69, 275–81, 289–92, 296–98, 324–27.

71 *See* Olken, *supra* note 6, at 76–77; *see also* New State Ice Co. v. Liebmann, 285 U.S. 262, 271–80 (1932) (Sutherland, J.).

72 *See, e.g.*, Butchers' Union Co. v. Crescent City Co., 111 U.S. 746, 757 (1884) (Field, J., concurring).

73 Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 110 at n.* (1873) (Field, J., dissenting) ("The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable." (quoting ADAM SMITH, THE WEALTH OF NATIONS, bk. 1, ch. 10, pt. 2 (1776))).

74 *See* Charles W. McCurdy, *The "Liberty of Contract" Regime in American Law*, *in* THE STATE AND FREEDOM OF CONTRACT 161, 167–71 (Harry N. Scheiber ed., 1998); Olken, *supra* note 34, at 657 & n.70.

75 *See Butchers' Union Co.*, 111 U.S. (16 Wall.) at 758–59 (Field, J., concurring); *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 87–89, 93, 101–02, 105–07 (Field, J., dissenting).

76 *See* Olken, *supra* note 6, at 26–29 (discussing Sutherland's cases and ideology).

Allgeyer v. Louisiana,[77] the Court essentially read liberty of contract into the Due Process Clause of the Fourteenth Amendment when it ruled a state lacked the constitutional authority to prohibit insurers within the state from entering into contracts outside of the state.[78] The marriage of liberty of contract and due process afforded classical jurists the opportunity to constrain the scope of state police powers while adhering to the sterile fiction of equality in the bargaining positions of employers and employees.

Lochner v. New York[79] illustrates the formalism of this doctrine and the extent to which some classical jurists ignored economic and scientific realities in protecting private businesses from public regulation deemed arbitrary and unreasonable class legislation. Justice Peckham's opinion for the Court was a model of classical formalism in that it focused on the freedom of bakers to toil long hours in bakeries[80] in excess of local restrictions enacted to promote public health, safety, morals, or welfare, notwithstanding considerable evidence that the bakers lacked true autonomy in the bargaining process and worked long hours to the detriment of their physical health.[81] Notably, Peckham concluded his opinion with the wary observation that legislative attempts to regulate the terms and conditions of employment signified a pernicious form of class legislation against which the judiciary should interpose the constitutional protection of due process.[82]

In subsequent cases, the Court, without rejecting the underlying premise of *Lochner*, nevertheless limited its precedential application, as it upheld restrictions upon the hours of employment for women[83] and various regulations concerning the manner of payment[84] and industrial conditions.[85] That the Court differentiated between *Lochner* and these other situations suggests the extent to which *Lochner* era jurists were willing to apply a categorical methodology under which they often drew fine line distinctions in the service of fealty to legal abstraction. Ultimately, this approach would lead to the unraveling of legal classicism as a constitutional framework, but for nearly three decades after *Lochner*, liberty of contract persisted as a viable formalistic

77 165 U.S. 578 (1897).

78 *See id.* at 591–92.

79 198 U.S. 45 (1905).

80 *See id.* at 53, 56–57, 61–64.

81 *See id.* at 70–72 (Harlan, J., dissenting).

82 *See id.* at 59 (majority opinion) (asking "are we all . . . at the mercy of legislative majorities?"); *see also id.* at 63 (articulating "a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare").

83 *See, e.g.*, Bosley v. McLaughlin, 236 U.S. 385 (1915) (upholding proscription of maximum hours for female hospital workers).

84 *See, e.g.*, McLean v. Arkansas, 211 U.S. 539 (1909) (upholding an Arkansas statute requiring pre-screening measurement of coal for workers' wages).

85 *See, e.g.*, Chi., Burlington & Quincy R.R. v. McGuire, 219 U.S. 549 (1911) (upholding a state law prohibiting the use of employment contracts that limited employer liability for employee injuries); *see also Lochner*, 198 U.S. at 61–62 (indicating that New York's regulation of the sanitation, plumbing, and ventilation of bakeries was a legitimate exercise of local police powers).

doctrine that underscored both a longstanding tradition of factional aversion and an abiding willingness to draw a sharp distinction between private rights and public control.

Justice Sutherland's opinions for the Court in *Adkins v. Children's Hospital*[86] and *New State Ice Co. v. Liebmann*[87] demonstrate the persistent appeal liberty of contract held for the more conservative members of the Court in the 1920s and into the 1930s. In *Adkins*, Sutherland noted the presumption in favor of liberty of contract[88] and explained that a law prescribing a minimum wage for women not only was unnecessary given the recent passage of the Nineteenth Amendment,[89] but that it unfairly constrained the employer's contractual freedom by requiring it to pay for services regardless of their actual economic value.[90] From Sutherland's perspective this was arbitrary and unreasonable class legislation that violated due process.[91] In *New State Ice Co.*, Sutherland similarly invoked liberty of contract to invalidate an Oklahoma law he regarded as an illegitimate attempt to restrict access to the local ice market through the imposition of a state-fostered monopoly.[92] Both decisions, like Peckham's in *Lochner*, underscore how liberty of contract reflected classical legal traits and provided a formalistic means for some Justices to interpret open-ended constitutional provisions such as the Due Process Clause as a limitation upon public control of private economic affairs.

E. Substantive Due Process and the Emergence of the Lochner *Era*

By the end of the nineteenth century, the Supreme Court broadly construed the Due Process Clause of the Fourteenth Amendment to include a substantive component. This interpretive approach, which later became known as substantive due process, eventually incorporated classical concepts such as the public-private distinction and liberty of contract as a means of providing content to an open-ended constitutional provision. The Justices employed substantive due process as a limitation upon the scope of governmental authority to control private economic affairs and even some non-economic private activities as well.[93] Classical jurists on the Court broadly

86 261 U.S. 525 (1923).

87 285 U.S. 262 (1932).

88 *See Adkins*, 261 U.S. at 546 ("[F]reedom of contract is, nevertheless, the general rule and restraint the exception . . . .").

89 *See id.* at 553.

90 *See id.* at 557–58.

91 *See id.* at 554, 556–61.

92 *See New State Ice Co.*, 285 U.S. at 279.

93 *See, e.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (invalidating an Oregon law that restricted parents from sending their children to parochial schools); Meyer v. Nebraska, 262 U.S. 390 (1923) (ruling unconstitutional a Nebraska law that forbade the teaching of German in public schools). Justice James McReynolds authored both opinions, which construed broadly the liberty interests protected by the Due Process Clause of the Fourteenth Amendment and suggested that liberty means more than freedom from personal constraint. It also encompasses liberty of contract, the freedom to marry, raise children, etc. *See id.* at 399. Years later, the Court used a similarly broad concept of liberty

interpreted notions of liberty and property to include both tangible and intangible interests such as freedom of contract and the right of autonomous individuals and businesses to engage in lawful economic pursuits relatively free from arbitrary public control. Indeed, this was the point Justice Field made in both his *Munn v. Illinois*[94] dissent and his concurring opinion in *Butchers' Union Co. v. Crescent City Co.*,[95] wherein he emphasized the paramount importance of using the Due Process Clause of the Fourteenth Amendment as a means of protecting the autonomy of individuals to enter into contracts without unreasonable incursion from the state.[96] By infusing the constitutional phrase "due process of law" with classical doctrines that sharply differentiated between the private and public spheres and were solicitous of personal autonomy, a majority of *Lochner* era Supreme Court Justices devised a highly categorical and formalistic jurisprudence from which they limned the parameters of permissible economic regulation. Throughout the *Lochner* era, a majority of the Court insisted that the exercise of local police powers fit squarely within one of the prescribed categories of public health, safety, morals, or welfare,[97] items which the Court's classical jurists often interpreted narrowly and rigidly in order to preserve private economic enterprise from legislation they deemed arbitrary and unreasonable.[98]

One significant aspect of due process analysis was close judicial scrutiny of the substance of economic regulations. As Justice McReynolds remarked in *Fairmont Creamery Co. v. Minnesota*,[99] an integral aspect of judicial review in police powers cases involved "[l]ooking through form to substance."[100] Years earlier, Justice Harlan, writing for the Court in *Mugler v. Kansas*,[101] wherein the Court sustained a state ban on the sale and manufacture of alcohol, explained that "courts are not bound by mere forms . . . [but] are at liberty—

to find an implied right of decisional privacy in cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Roe v. Wade*, 410 U.S. 113 (1973), and, more recently, in *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). Notwithstanding Justice Douglas's attempt to avoid drawing a connection between the broad concept of liberty used by *Lochner* era Justices and the modern Court's similarly expansive notion of liberty, albeit in a non-economic context, *see Griswold*, 381 U.S. at 482, there is a fairly direct link between how classical jurists viewed the liberty clause of the Fourteenth Amendment and the modern Supreme Court's fundamental rights jurisprudence. *See* Bernstein, *supra* note 2, at 52–58.

94 94 U.S. 113, 137–54 (1877) (Field, J., dissenting).

95 111 U.S. 746, 756–58 (1884) (Field, J., concurring).

96 *See id.*

97 *See generally* GILLMAN, *supra* note 3 (discussing the pattern of *Lochner* era police powers jurisprudence). For example, in *Lochner*, the Court invalidated the maximum hours regulation because it only bore a remote relationship to public health, safety, morals, or welfare. *See* Lochner v. New York, 198 U.S. 45, 57–59 (1905).

98 *See* Olken, *supra* note 34, at 655–60, 665–78; Olken, *supra* note 20, at 272–81, 296–98, 300–06.

99 274 U.S. 1 (1927) (invalidating a law that prohibited differential geographical pricing of dairy items).

100 *Id.* at 9.

101 123 U.S. 623 (1887).

indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority."[102] Even before the Court formally recognized liberty of contract as a component of due process, some Justices readily asserted their prerogative to consider the substantive facets of the police powers regulations they analyzed. In his dissenting opinion in *Powell v. Pennsylvania*,[103] a case in which the Court upheld the authority of a state to regulate oleomargarine, Justice Field cautioned that

> [i]f the courts could not . . . examine . . . the real character of the act, but must accept the declaration of the legislature as conclusive, the most valued rights of the citizen would be subject to the arbitrary control of a temporary majority . . . instead of being protected by the guarantees of the Constitution.[104]

Field's skepticism about legislative declarations revealed the classical preoccupation with political factions and the *Lochner* era assumption that the Justices should function as guardians of private economic rights from the tyranny of democratic majorities.[105] For Field and the Court's other legal classicists, incorporation of notions of contractual liberty and the public-private distinction into the concept of due process was essential to protect private rights—both economic and non-economic—from legislative majorities controlled by political factions. Field's view of due process as a substantive constitutional limitation, expressed initially in both dissenting and concurring opinions, by the end of the nineteenth century was endorsed by most of the Court's members and would continue to influence constitutional jurisprudence into the dawn of the New Deal era. Indeed, in 1923 Justice McReynolds evoked Field's concept of substantive due process in *Meyer v. Nebraska*,[106] when he observed that "[d]etermination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts."[107]

II. The Paradox of Legal Classicism and Its Eventual Decline

Interestingly, by interpreting due process broadly as a substantive limitation of public regulatory authority, classical jurists both undermined the arid formalism of classical constitutional adjudication and rendered it vulnerable to criticism. Perhaps the central paradox of legal classicism was that its constitutional adjudication became suffused with policy to the extent that its critics attributed the Court's categorical police powers jurisprudence and exaltation of contractual liberty to the socioeconomic preferences of the Jus-

102 *Id.* at 661.

103 127 U.S. 678 (1888).

104 *Id.* at 696–97 (Field, J., dissenting).

105 *See* GILLMAN, *supra* note 3, at 22 (discussing factional aversion and judicial review); WHITE, *supra* note 5, at 96 (discussing the guardian theory of judicial review).

106 262 U.S. 390 (1923).

107 *Id.* at 400 (citing Lawton v. Steele, 152 U.S. 133, 137 (1894)).

tices.[108] Classical jurists who proclaimed to merely apply the law to the facts and to function as umpires in constitutional disputes really made policy decisions in stark contrast with the purported restraint of mechanical jurisprudence. In particular, by using theories such as liberty of contract and the affectation doctrine to provide content to the notion of due process, classical Justices actually engaged in policymaking. While it was ostensibly formalistic in nature, late nineteenth and early twentieth-century constitutional jurisprudence was far from static, as Supreme Court Justices went to considerable lengths to fashion razor thin distinctions between permissible and impermissible methods of economic regulation, all the while adhering to the seemingly formalistic concepts of liberty of contract and the public-private distinction.

A. Mechanical Jurisprudence and the Guise of Formalism

The Court's application of liberty of contact to problems arising from increased public regulation of private businesses and individuals during the pre–New Deal era exemplifies how classical jurists used formalist theory to sanctify private contracts and individual economic autonomy. In *Lochner v. New York*,[109] Justice Peckham characterized a local limitation of the number of hours bakers could toil as illegitimate class legislation that did not bear a close and direct relationship with public health, safety, morals, or welfare.[110] Barely disguising his personal distaste for the law, Peckham commented that

> [s]tatutes . . . limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power.[111]

Peckham also expressed doubt about "the soundness of the views"[112] advanced by the law and questioned whether ordinary occupations and individuals could be "at the mercy of legislative majorities."[113] Significantly, nowhere in his opinion did Peckham consider the disparity in the bargaining positions between employers and employees that may have necessitated this government regulation. Nor did he consider the public interest that inhered in seemingly private contracts. Nor, for the most part, did other classical jurists who invoked liberty of contract as a constitutional talisman against public regulation of wages, hours, and conditions of employment address these questions. Although the Court appeared to limit the scope of this infa-

108 *See, e.g.*, Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). Holmes noted the case was "decided upon an economic theory" and that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." *Id.* Admonishing the majority, he commented that "a constitution is not intended to embody a particular economic theory, whether of paternalism . . . or of *laissez faire*." *Id.*

109 *Id.*

110 *See id.* at 56–59, 63–64.

111 *Id.* at 61.

112 *Id.*

113 *Id.* at 59.

mous decision for several years, arguably the manner in which it did so reveals a different type of policymaking, as the Court applied exceptions to the otherwise formal doctrine of liberty of contract to uphold laws that restricted the hours of women laborers[114] and those engaged in ultra-hazardous occupations.[115] The paternalistic tendencies of otherwise formalist jurists may explain in large part the *Lochner* Court's willingness to uphold regulations that restricted the number of hours women could work in ordinary occupations.[116] Moreover, judicial deference to legislation regulating certain dangerous industries, as well as aspects of employment that did not go to the heart of contractual liberty, demonstrates in retrospect the selective dexterity of an otherwise formalistic jurisprudence. It also shows judicial calculation that laws prescribing the manner and method of payment[117] and industrial conditions[118] did not represent illegitimate class legislation. These matters, in essence, represented policy concerns ostensibly in conflict with the strict application of mechanical jurisprudence espoused by an earlier generation of classical jurists such as Justice Brewer, who declared jurists "make no laws, . . . establish no policy, [and] never enter into the domain of popular action."[119]

Justice Sutherland reprised the formalism of liberty of contract in *Adkins v. Children's Hospital*,[120] when he stated that while freedom of contract was not absolute it was "nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."[121] Aside from the factional aversion that suffused Sutherland's opinion for the Court,[122] the for-

114 *See, e.g.*, Bosley v. McLaughlin, 236 U.S. 385 (1915) (sustaining a law that restricted women from working more than eight hours a day or forty-eight hours a week in hospitals); Muller v. Oregon, 208 U.S. 412 (1908) (upholding a law limiting women to ten hour workdays); *see also* Bunting v. Oregon, 243 U.S. 426 (1917) (sustaining a regulation of hours for all workers regardless of gender).

115 *See* Holden v. Hardy, 169 U.S. 366, 366 (1898) (upholding a Utah law limiting the number of hours worked by miners and smelters). *Lochner* differentiated this decision, noting the Utah law in *Hardy* applied equally to all classes of workers who toiled in mines and smelters. *See Lochner*, 198 U.S. at 54–55.

116 *See* 2 MELVIN I. UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 623–25 (3d ed. 2011); *see, e.g.*, Radice v. New York, 264 U.S. 292 (1924) (upholding a restriction of hours for female employees).

117 McClean v. Arkansas, 211 U.S. 539, 552 (1909) (upholding an Arkansas law regulating the manner and method of payment of miners' wages).

118 *See, e.g.*, Chi., Burlington & Quincy R.R. v. McGuire, 219 U.S. 549 (1911) (sustaining regulation of working conditions for railroad workers).

119 David J. Brewer, *The Nation's Safeguard*, 16 PROC. N.Y. ST. B. ASS'N 37, 46 (1893).

120 261 U.S. 525 (1923).

121 *Id.* at 546.

122 *See id.* at 554–57, 559 (characterizing the wage regulation as illegitimate class legislation). Sutherland concluded the District of Columbia Minimum Wage Law Act of Sept. 19, 1918, ch. 174, 40 Stat. 960 (amended 1966), was "the product of a naked, arbitrary exercise of power." *Id.* at 559.

mer student of Thomas Cooley[123] also took great pains to express his moral disregard of wage legislation, observing that in the District of Columbia law, "[t]he moral requirement implicit in every contract of employment . . . that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored."[124] For Sutherland and other classical jurists one peril of governmental intervention in private economic affairs was that it threatened the strength of the individual and thus weakened the fabric of democracy,[125] and Sutherland often imbued his opinions pertaining to economic regulation with a moral fervor not unlike that which colored his handiwork in *Adkins*.[126] Sutherland reiterated these views throughout the 1920s on behalf of a majority of the Taft Court,[127] and into the 1930s in melancholy and acidic dissents critical of the Hughes Court's more flexible and pragmatic application of constitutional provisions to changing economic conditions.[128]

Similarly, the Taft Court's narrow construction of the affectation doctrine demonstrated how classical jurists used the public-private distinction to augment the concept of due process as a limitation upon local regulatory authority. In *Charles Wolff Packing Co. v. Court of Industrial Relations*,[129] Taft exalted the autonomy of private businesses and advanced the legal fiction of persons free to pursue "ordinary occupations" beyond the control of meddle-

123 Sutherland studied constitutional law at the University of Michigan under Cooley in 1882. *See* Olken, *supra* note 34, at 656–57 (discussing Cooley and his influence on Sutherland).

124 *Adkins*, 261 U.S. at 558.

125 Sutherland explained:

> To sustain the individual freedom of action contemplated by the Constitution, is not to strike down the common good but to exalt it; for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members.

Id. at 561; *see also* Olken, *supra* note 6, at 37–42 (discussing Sutherland's concept of individualism).

126 *See, e.g.*, W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 406–10 (1937) (Sutherland, J., dissenting) (criticizing the Court's deferential stance towards legislation he considered an arbitrary and unreasonable incursion upon individuals' freedom to enter into contracts); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 465, 472–73, 483 (1934) (Sutherland, J., dissenting) (rejecting the notion of constitutional adaptivity and invoking the sanctity of contract obligations); New State Ice Co. v. Liebmann, 285 U.S. 262, 279–80 (1932) (rejecting judicial deference to experimental legislation that impaired contractual liberty); Frost & Frost Trucking Co. v. R.R. Comm'n, 271 U.S. 583, 592–93 (1926) (discussing the unfairness of a California law that required private automobiles for hire to obtain certificates of public convenience).

127 *See, e.g.*, Williams v. Standard Oil Co., 278 U.S. 235 (1929) (invalidating retail gas price regulation); Ribnik v. McBride, 277 U.S. 350 (1928) (invalidating rate regulation); Tyson & Brother–United Theatre Ticket Offices, Inc. v. Banton, 273 U.S. 418 (1927) (invalidating regulation of resale ticket prices).

128 *See, e.g.*, *W. Coast Hotel Co.*, 300 U.S. at 400–14 (Sutherland, J., dissenting); *Blaisdell*, 290 U.S. at 448–83 (Sutherland, J., dissenting).

129 262 U.S. 522 (1923).

some legislatures.[130] In so doing, Taft sought to insulate private economic activity from public control, and to perhaps even restore a sense of normalcy to a constitutional jurisprudence which he and some other members of his Court regarded as a tad too deferential to government during the Progressive era and the First World War.[131] Taft's close friend and colleague, Justice Sutherland, also appeared preoccupied with concerns collateral to the mechanical application of legal precedent to factual disputes. In a series of cases involving local regulation of retail commercial activities,[132] Sutherland imbued his constitutional adjudication with concerns about political factions[133] and the correlative moral imperative of preserving the sanctity of private economic freedom.[134]

Regardless of whether one attributes to classical jurists a motivation to perpetuate natural rights,[135] Social Darwinism,[136] or laissez-faire economics[137]—reasons proffered by historians in the not too distant past—or, alternatively, considers their conservatism as a reflection of factional aversion[138] or libertarian ideals[139]—perspectives advanced by a more recent generation of scholars—in retrospect, it becomes fairly obvious that a majority of

130 *See id.* at 537, 539–40.

131 *See* Post, *supra* note 55, at 1496.

132 *See, e.g.*, *Williams*, 278 U.S. at 235 (invalidating regulation of retail gas prices); *Ribnik*, 277 U.S. at 350 (invalidating rate regulation of insurance commissions); *Tyson*, 273 U.S. 418 (invalidating regulation of resale ticket prices).

133 *See* Olken, *supra* note 20, at 275–81, 296–98, 300–06, 322–26.

134 *See* Adkins v. Children's Hosp., 261 U.S. 525, 558 (1923).

135 *See, e.g.*, HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS 30–32 (1994). *But see*, Olken, *supra* note 6, at 4–7 (criticizing Arkes's premise); Olken, *supra* note 34, at 652 (same).

136 *See, e.g.*, Frank R. Strong, *The Economic Philosophy of* Lochner*: Emergence, Embrasure and Emasculation*, 15 ARIZ. L. REV. 419, 425–28 (1973) (discussing how laissez-faire economics and Social Darwinism influenced jurists). *But see* Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 418–20 (1988) (explaining how *Lochner* era jurists relied more on laissez-faire economics than Social Darwinism).

137 *See, e.g.*, CLYDE E. JACOBS, LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS M. COOLEY, CHRISTOPHER G. TIEDEMAN, AND JOHN F. DILLON UPON AMERICAN CONSTITUTIONAL LAW 160–67 (1954) (asserting that *Lochner* era jurists employed laissez-faire economics to protect the property interests of an elite class); BENJAMIN R. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT (1942) (explaining how laissez-faire economics and Social Darwinism influenced Supreme Court constitutional jurisprudence). *But see* GILLMAN, *supra* note 3, at 10 (criticizing this assumption and advancing the alternative notion of factional aversion).

138 *See generally* GILLMAN, *supra* note 3, at 10 ("Specifically, it is my contention that the decisions and opinions that emerged from state and federal courts during the *Lochner* era represented a serious, principled effort to maintain one of the central distinctions in nineteenth-century constitutional law—the distinction between valid economic regulation, on the one hand, and invalid 'class' legislation, on the other—during a period of unprecedented class conflict.").

139 *See generally* Bernstein, *supra* note 2, at 49–50 (suggesting that libertarian ideas, which had been supported by the Taft Court, lost support by the time of and during the Great Depression).

Supreme Court Justices during the late nineteenth and early twentieth centuries engaged in some form of policymaking under the auspices of a seemingly mechanical approach towards constitutional adjudication. Both the inconsistency of these approaches and the inadequacy of classical notions to address changing economic conditions during the Depression of the 1930s undermined the continued relevance of legal classicism and contributed to the evolutionary force of adaptivity in the Supreme Court's constitutional jurisprudence of economic liberty.

B. The Decline of Legal Classicism

Even at the height of its influence upon constitutional law, cracks began to emerge in the edifice of legal classicism, as critics both within the Court and external to it questioned the premises of classical doctrines such as liberty of contract and the viability of the public-private distinction as a constitutional norm. Justice Holmes's wry observation in his *Lochner* dissent that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics"[140] and that "a constitution is not intended to embody a particular economic theory"[141] implied that the *Lochner* majority read its own socioeconomic theories into the Constitution when it invalidated a New York maximum hours regulation as an arbitrary and unreasonable exercise of police powers in contravention of due process.[142] Similarly, in *Adkins v. Children's Hospital*,[143] Holmes ridiculed Sutherland's assumption that liberty of contract was in essence a constitutional fundamental right subject to regulation in only the most limited of circumstances.[144] In the 1920s and in the 1930s other Justices echoed Holmes's sentiments: Justices Harlan Stone,[145] Louis Brandeis,[146] Benjamin Cardozo,[147] and eventually even Charles Evans

140 Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

141 *Id.*

142 *Id.* at 56–58, 64 (majority opinion).

143 261 U.S. 525 (1923).

144 *Id.* at 568 (Holmes, J., dissenting); *see also id.* at 562–67 (Taft, C.J., dissenting) ("The right of the legislature under the Fifth and Fourteenth Amendments to limit the hours of employment on the score of the health of the employee, it seems to me, has been firmly established.").

145 *See, e.g.*, Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587, 632–35 (1936) (Stone, J., dissenting) (noting the "grim irony" of freedom of contract and the paramount public interest in regulating employment relations); *see also* Ribnik v. McBride, 277 U.S. 350, 360–64, 369–70, 374 (1928) (Stone, J., dissenting) (criticizing formalistic distinctions that ignore economic realities).

146 *See, e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262, 301–04 (1932) (Brandeis, J., dissenting) (explaining that the ice business is sufficiently affected with a public interest that it warrants extensive public regulation); O'Gorman & Young, Inc. v. Hartford Fire Ins. Co., 282 U.S. 251, 255–58 (1931) (sustaining New Jersey's regulation of insurance broker commission rates).

147 *See, e.g.*, BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 82 (1921) (referring to the public interest in private contracts); *see also* BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 81–108 (1924).

Hughes,[148] who succeeded William Howard Taft as Chief Justice, and Owen Roberts,[149] also, at one time or another, questioned the continued relevance of the classical model of constitutional jurisprudence.

Roscoe Pound, the Dean of Harvard Law School and an influential proponent of sociological jurisprudence,[150] was an early critic of the Court's formalism in *Lochner* and other cases. Pound accused the Court of engaging in a mechanical jurisprudence—he used the term in a pejorative sense in contrast to the way in which classical jurists themselves understood that term—that largely ignored the factual context of cases in favor of a formal, almost reflexive adherence to legal precedent.[151] Pound urged the Justices to reassess the theoretical premise of liberty of contract and noted the classical doctrine's failure to account for the inherent disparity in the bargaining process between employers and employees.[152] In the 1920s, Legal Realists at Columbia and other elite law schools slightly recast Pound's points and questioned the relevance of classical legal doctrines and theories that appeared ill-suited for resolving modern constitutional disputes arising from the need for increased economic regulation of private economic affairs and the growing public interest in private economic relationships.[153]

Perhaps the most significant reason for the decline of legal classicism as a constitutional construct emanated from the inherent nature of its structure. Formalistic and highly categorical in its application of abstract concepts such as liberty of contract to the problems of economic regulation,[154] by the

148 *See, e.g.*, W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding Washington state minimum wage regulation); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) (sustaining Minnesota Mortgage Moratorium Law).

149 *See, e.g.*, Nebbia v. New York, 291 U.S. 502 (1934) (upholding a New York regulation of milk prices as a reasonable exercise of state police powers).

150 Sociological jurisprudence emphasized the sociological and economic context of judicial decisions. *See* Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence* (pt. III), 25 HARV. L. REV. 489, 512–16 (1912). *See generally* Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence* (pt. I), 24 HARV. L. REV. 591 (1911) (discussing the various "[s]chools of [j]urists and [m]ethods of [j]urisprudence"); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence* (pt. II), 25 HARV. L. REV. 140 (1911) (same).

151 *See* Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 454, 457–58, 461–64, 480–81 (1909) [hereinafter Pound, *Liberty of Contract*] (criticizing the doctrine of liberty of contract and judges' lack of pragmatism); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 617–19 (1908).

152 *See* Pound, *Liberty of Contract*, *supra* note 151, at 454.

153 *See, e.g.*, MORRIS R. COHEN, LAW AND THE SOCIAL ORDER 78–79 (1933) (asserting that a public interest inheres in private contracts).

154 *See* G. Edward White, *Constitutional Change and the New Deal: The Internalist/Externalist Debate*, 110 AM. HIST. REV. 1094, 1108 (2005) (discussing the unwieldiness of classical doctrine); *see also* WIECEK, *supra* note 6, at 248–51. William Wiecek observes that: "[C]lassical [legal] thought contained within itself the potential for its own disintegration. . . . [D]ivorced from social and economic reality, rapt in contemplation of its own internal symmetry and conformity." *Id.* at 206. Legal classicism's assumption about the inherent equality in the bargaining process and its internal doctrinal contradictions about the nature of judicial review and the relationship between governmental authority and private economic affairs made it increasingly irrelevant as an ideological construct and under-

dawn of the New Deal era legal classicism was rendered largely inadequate as a mechanism for dealing with the problems of the Depression. Indeed, throughout the 1930s within the Supreme Court the Justices grappled with how to apply classical notions to changing economic circumstances. As a slender majority of the Court adopted a more flexible method of constitutional interpretation to address the pressing constitutional issues presented by the Depression, the inherent flaws of classical constitutional adjudication emerged in ways that both frustrated members of the Court and made clear how unfeasible its assumptions were about the relationship between government and private economic affairs.

Chief Justice Charles Evans Hughes sought to bridge the chasm within the Court between the Four Horsemen—Sutherland, McReynolds, Butler, and Van Devanter—holdovers from the Taft Court and classical stalwarts, and the more progressive Justices such as Brandeis, Cardozo, and Stone, each of whom was anxious to leave behind the constraints of legal classicism and adapt the Constitution to changing economic circumstances in ways that more flexibly and pragmatically balanced power and private rights. Hughes's criticisms of classical legal precedent revealed the perception by some, both within the Court and outside of it, that the hoary classical structure of constitutional thought, with its emphasis upon abstraction and its penchant for rigid classification, was unsuitable as a constitutional norm for the modern economy of the 1930s.

In *Home Building & Loan Ass'n v. Blaisdell*,[155] the Chief Justice demonstrated a willingness to balance private contract rights with public power.[156] Hughes avoided a formalistic interpretation of the Contracts Clause and upheld the Minnesota Mortgage Moratorium Law that extended the equitable period of redemption for mortgagors in ways that modified the underlying contract.[157] Repeatedly throughout his opinion for a divided Court, Hughes emphasized the public interest in private contracts and the need to reconcile private rights with the reasonable exercise of local police powers.[158] Hughes admonished the dissenters that the Contracts Clause "is not

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mined its utility as a means for assessing the constitutional limits of public economic regulation. *Id.* at 249. Ill-suited to address the new kinds of problems arising from the changing socioeconomic conditions of the early twentieth century, it proved less agile in its application than the emerging notion of constitutional adaptivity favored by Legal Realists and judicial pragmatists.

155 290 U.S. 398 (1934).

156 *See id.* at 434–35, 437, 439, 442–44. Hughes noted the "growing appreciation of public needs and . . . the necessity of finding ground for a rational compromise between individual rights and public welfare." *Id.* at 442. Hughes also said that "the reservation of the reasonable exercise of the protective power of the State is read into all contracts." *Id.* at 444.

157 *See id.* at 424–25, 444–47.

158 *See id.* at 434–35, 437, 439, 443–44. Hughes remarked: "Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." *Id.* at 435.

an absolute [prohibition] and is not to be read with literal exactness like a mathematical formula."[159] The Chief Justice explained that the state retained the power to modify contracts in the public interest,[160] and in a passage notable for its trenchant criticism of mechanical jurisprudence and formalism, he wryly observed: "The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while[ ]—a government which retains adequate authority to secure the peace and good order of society."[161]

Three years later, in *West Coast Hotel Co. v. Parrish*,[162] in which the Court overruled *Adkins* and limited the scope of liberty of contract as a restraint upon local police powers,[163] Hughes reiterated his qualms about the viability of the classical legal model of constitutional thought. In *West Coast Hotel*, the Chief Justice noted that "[t]he Constitution does not speak of freedom of contract."[164] Hughes then explained that "the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people."[165] Departing somewhat from the mechanistic approach of legal classicism, the Chief Justice said: "Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."[166]

A year earlier an identical issue pertaining to the constitutionality of minimum wage regulation came before the Court in *Morehead v. New York ex rel. Tipaldo*.[167] Apparently, counsel for the state had not formally requested the Court to overrule *Adkins*, a procedural oversight which persuaded a narrow majority of the Justices to invalidate a New York minimum wage law as an infringement of liberty of contract in order to avoid rendering a decision in conflict with *Adkins*.[168] This mechanistic and highly formalistic approach illustrates the dissonance that had emerged by the 1930s between economic reality and a constitutional jurisprudence that reflected classical methodology. Whereas in *Morehead*, the Court essentially tied itself up in knots in an

159 *Id.* at 428.

160 *See id.* at 434–35, 437, 439, 442–44. Hughes specifically mentioned the "principle of harmonizing the constitutional prohibition with the necessary residuum of state power." *Id.* at 435.

161 *Id.* at 435.

162 300 U.S. 379 (1937).

163 *See id.* at 391–92, 397–400.

164 *Id.* at 391.

165 *Id.*

166 *Id.*

167 298 U.S. 587 (1936).

168 *See id.* at 603–04, 617–18 (explaining the precedential value of *Adkins*); Brief for Petitioner at 588–94, *Morehead*, 298 U.S. 587 (No. 838) (argument of Henry Epstein, Solicitor General of New York, distinguishing the New York minimum wage law from the Washington, D.C. law voided in *Adkins*); CUSHMAN, *supra* note 3, at 92–104 (discussing Roberts, Hughes, *Morehead*, and *West Coast Hotel Co.*).

unpersuasive attempt to reconcile the outcome of the case with classical precedent—an effort that produced much opprobrium and damaged considerably the Court's public image[169]—the following year in *West Coast Hotel*, the Court appeared to switch course and in so doing jettison liberty of contract, a staple of classical constitutional thought, as an impenetrable shield against local police powers.[170] Hughes's consternation about the events in *Morehead*[171] and his realization about the limited viability of legal classicism in this context surfaced in his *West Coast Hotel* opinion.

Similarly, Hughes emphasized the limitations of legal classicism as a constitutional construct in *NLRB v. Jones & Laughlin Steel Corp.*,[172] when in a phrase evocative of an earlier critic of legal classicism, Oliver Wendell Holmes, he noted that "commerce itself is a practical conception"[173] and also suggested that the Court's slavish devotion to the direct-indirect Commerce Clause test made little sense given the realities of the 1930s economy.[174] Hughes declined to follow classical precedent that had distinguished between manufacturing and commerce[175] and instead reprised his own close and substantial relationship test from many years before[176] to sustain the application of the National Labor Relations Act to the manufacturing activities at a Pennsylvania steel mill.[177] Hughes's opinion in this case and in four other Commerce Clause decisions[178] announced that same April 1937 day

169 *See* CUSHMAN, *supra* note 3, at 92–105 (assessing the Court's 1936–1937 stance in minimum wage cases).

170 *See supra* notes 162–66 and accompanying text.

171 *See* CUSHMAN, *supra* note 3, at 92–105.

172 301 U.S. 1 (1937).

173 *Id.* at 41–42; *see also* Swift & Co. v. United States, 196 U.S. 375, 398 (1905) (Holmes, J., noting that "commerce among the States is not a technical legal conception, but a practical one").

174 *See Jones & Laughlin Steel Corp.*, 301 U.S. at 34–37, 40–43 (discussing the integrated activities of a steel company threatened by labor unrest and its potential adverse effect upon interstate commerce).

175 *Id.* at 34–41. *But see* Carter v. Carter Coal Co., 298 U.S. 238, 299–301 (1936) (declaring that commodities produced or manufactured within a state are not subject to federal regulation under the Commerce Clause, even if the commodities are intended to be sold or transported outside the state); Hammer v. Dagenhart, 247 U.S. 251, 253 (1918) ("No prohibitions are extended to manufacturers of goods as such, although they may intend subsequently to ship in interstate commerce."); United States v. E.C. Knight Co., 156 U.S. 1, 16–17 (1895) (finding manufacturing only had an indirect effect upon interstate commerce).

176 *See* Houston, E. & W. Tex. Ry. v. United States (*Shreveport Rate Cases*), 234 U.S. 342, 351–53 (1914) (holding that discriminatory intrastate rail rates had a close and substantial relationship with interstate commerce, which Congress may regulate under its Commerce Clause power).

177 *See Jones & Laughlin Steel Corp.*, 301 U.S. at 37–43.

178 NLRB v. Fruehauf Trailer Co., 301 U.S. 49 (1937); NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937); Associated Press v. NLRB, 301 U.S. 103 (1937); Wash., Va. & Md. Coach Co. v. NLRB, 301 U.S. 142 (1937) (all upholding the application of the National Labor Relations Act to intrastate activities of private companies engaged in interstate commerce). For an excellent analysis of the evolution of the Court's Commerce

illustrate not only his willingness to question some core tenets of legal classicism, such as formalism and dual federalism, but also at least four other Justices' recognition of the limitations of classical legal thought as a mode of constitutional adjudication.

III. The Interplay of Legal Classicism and New Deal Constitutional Progressivism

Notwithstanding the Court's apparent departure from the formalism of classical legal thought in the 1930s in favor of an approach that emphasized relatively flexible constitutional interpretation and increased deference to legislative findings, some vestiges of legal classicism remained relevant and in fact influenced the evolutionary nature of the transformation in the Court's constitutional jurisprudence of economic liberty. Indeed, the persistence of some classical legal principles in constitutional adjudication helped shape both the structure and pace of the Supreme Court's jurisprudential transformation during the New Deal era as it shifted from a conservative guardian approach towards judicial review to one that featured a willingness to adapt the Constitution to changing economic conditions and more flexibly balance public power and private rights. The transformation in the Court's jurisprudence of economic liberty was incremental, and to the extent that it was primarily a product of internal factors rather than external ones, the shift from formalism to pragmatism occurred largely because of legal classicism rather than in spite of it.

A. The Persistent Influence of the Public-Private Dichotomy

By the end of the 1930s, the Supreme Court had discarded its formalistic adherence to the distinction between the private and public spheres. Instead, it acknowledged the growing public interest in private economic affairs occasioned by the events of the Depression and adopted a more flexible and pragmatic interpretation of constitutional limitations of governmental authority, characterized by an increased judicial deference to legislative findings of fact and economic policy. Though the Court appeared to abandon the affectation doctrine it had often employed rigidly throughout the 1920s, the Justices did not altogether forsake the public-private dichotomy. This staple of classical legal thought continued to influence the jurisprudential debate within the Court over the nature of judicial review and the parameters of permissible economic regulation such that both classical and progressive jurists to one extent or another invoked vestiges of the affectation doctrine in their arguments.

Even as a majority of the Court adhered to a formalistic application of the affectation doctrine throughout the 1920s, some of its members expressed grave concerns about its utility, given the presence in several

Clause jurisprudence, see CUSHMAN, *supra* note 3, at 139–207. Cushman's analysis bolsters the conclusion that Hughes stretched classical Commerce Clause principles in ways that fostered the evolutionary application of new concepts.

industries of unfair competitive practices that undermined the presumed equality of the bargaining process between employees and their employers and adversely affected the public welfare. Justice Harlan F. Stone, who had joined the Court two years after Chief Justice Taft issued his narrow formulation of the affectation doctrine in *Charles Wolff Packing Co. v. Court of Industrial Relations*,[179] emerged in the late 1920s as a cogent critic of Taft's formulaic approach.[180] In a pair of dissents, he applied broadly the concept of a private business affected with a public interest. Interestingly, while Stone sought to refute the Court's formalistic logic in cases that invalidated legislative attempts to prescribe rates charged by private ticket brokers and employment agencies, he did not necessarily reject altogether the public-private distinction, as he urged the Court to show more deference towards local efforts to protect the paramount public interest from unfair competition arising from selfish private business practices. In *Tyson & Brother–United Theatre Ticket Offices, Inc. v. Banton*,[181] Stone chastised the Court for its fealty to classical notions of private economic autonomy and remarked that "[t]he phrase 'business affected with a public interest' seems to me to be too vague and illusory."[182] He further opined that this category—an essential attribute of legal classicism's limited recognition of local economic regulation—was neither "complete [n]or fixed"[183] and that new types of businesses previously not considered public in nature could now be deemed public.[184] Rather than abandon the hoary public-private distinction, Stone intended to chip away at the edifice of its formalism and expand the category of private businesses subject to public regulation. For Stone the public imperative of fair competition required regulation of ticket prices sold by brokers who monopolized the market and tried to charge exorbitant fees.[185]

Similarly, in *Ribnik v. McBride*,[186] Stone observed that the paramount public concern with employment agencies that took advantage of unemployed persons seeking work by charging them excessive fees necessitated

179 262 U.S. 522, 538 (1923) (reasoning that public interest is established by the "indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation").

180 *See* Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. Rev. 881, 958, 968–73 (2005) (observing that the dissents of Stone and Brandeis actually used the affectation doctrine to demonstrate the validity of public regulation of otherwise private businesses). Cushman's extensive research on the structure of the New Deal "revolution" supports the thesis that the late 1920s Court's more progressive members used the language of legal classicism while applying its standards in a more flexible and deferential manner. *Id.* at 910–12. The originality of this observation lies with Professor Cushman; my own premise about the interplay between legal classicism and the evolution of New Deal constitutionalism merely applies the Cushman thesis in a broader context.

181 273 U.S. 418 (1927).

182 *Id.* at 451 (Stone, J., dissenting).

183 *Id.*

184 *See id.*

185 *See id.* at 449–52. Stone also urged judicial deference to the legislative findings. *See id.* at 453–54.

186 277 U.S. 350 (1928).

state regulation of the rates charged by these agencies.[187] Inclusion of this type of commercial enterprise within the class of businesses affected with a public interest, Stone reasoned, was an essential means of permitting the state to address a widespread economic problem and redress, in part, the inherent inequality of the bargaining positions between those seeking work and employment agencies.[188] Although Stone refused to differentiate between the government's power to regulate the use of property and prices, a distinction at the core of the classical public-private dichotomy, as in *Tyson*,[189] he did not go so far as to urge the complete abandonment of the affectation doctrine; instead, he suggested a more flexible application of its tenets.[190]

Justice Brandeis also advanced a broad view of the public interest in regulating private economic activity. In *O'Gorman & Young, Inc. v. Hartford Fire Insurance Co.*,[191] his opinion for a divided Court upheld the authority of New Jersey to regulate the commissions of insurance agents as a reasonable means of preserving the financial stability of insurers upon whom the public depended for fire insurance.[192] Brandeis, like Stone, presumed the constitutionality of such legislation,[193] a position at odds with the dissenters who differentiated between insurance rates as matters of public concern and the compensation of insurance agents they considered within the private discretion of insurance companies.[194]

The following year, the Court, in another five-to-four decision, appeared to reverse course and revive the classical distinction between the public and private spheres when in *New State Ice Co. v. Liebmann*,[195] it invalidated an

187 *Id.* at 360, 364–72 (Stone, J., dissenting).

188 *See id.* at 360–61, 369. Urging deference to the legislature, Stone said: "There may be reasonable differences of opinion as to the wisdom of the solution here attempted. . . . But a choice between them involves a step from the judicial to the legislative field." *Id.* at 375.

189 *See Tyson*, 273 U.S. at 451 (Stone, J., dissenting) ("The constitutional theory that prices normally may not be regulated rests upon the assumption that the public interest and private right are both adequately protected when there is 'free' competition among buyers and sellers, and that in such a state of economic society, the interference with so important an incident of the ownership of private property as price fixing is not justified and hence is a taking of property without due process of law.").

190 *Ribnik*, 277 U.S. at 374 (Stone, J., dissenting) ("To say that there is constitutional power to regulate a business or a particular use of property because of the public interest in the welfare of a class peculiarly affected, and to deny such power to regulate price for the accomplishment of the same end, when that alone appears to be an appropriate and effective remedy, is to make a distinction based on no real economic difference, and for which I can find no warrant in the Constitution itself nor any justification in the opinions of this Court.").

191 282 U.S. 251 (1931).

192 *See id.* at 257–58.

193 *See id.* (concluding that the "presumption of constitutionality must prevail" where there are no facts in the record that warrant overturning it).

194 *See id.* at 266–70 (Van Devanter, J., dissenting).

195 285 U.S. 262 (1932).

Oklahoma statute that prescribed relatively strict standards for the manufacture, sale, and distribution of ice.[196] Justice Sutherland, on behalf of the Court, reasoned that the law, which in effect limited access to the ice market to a few companies, was illegitimate class legislation that restricted liberty of contract for those who sought to pursue an ordinary calling—one not suffused with a public interest under the affectation doctrine.[197] Not surprisingly, Brandeis dissented and once again expressed a flexible notion of a business affected with a public interest.[198] Insofar as Brandeis set forth a broad conception of public power exercised by the state as a laboratory of democracy,[199] his dissent did not completely jettison the classical public-private dichotomy. In fact, Brandeis emphasized the importance of ice to the general public and analogized the ice industry to a public utility.[200] In so doing, the longtime critic of classical formalism appeared to recognize the strong appeal the traditional framework of the affectation doctrine held on his brethren. Rather than try to persuade them to forsake it altogether, Brandeis sought to justify regulation of the ice business within the public-private dichotomy while hoping to loosen its ideological constraints upon local experimentation.

In 1934, the Court in yet another five-to-four decision appeared to endorse the Stone-Brandeis approach towards public regulation of private economic activity. In *Nebbia v. New York*,[201] the Court upheld, as a reasonable exercise of state police powers, a New York law that prescribed a minimum price for the sale of milk.[202] Justice Roberts, who wrote the Court's opinion, characterized the law as a temporary measure intended to redress an emergency caused by an oversupply of milk that demoralized the market and resulted in unfair economic competition among retailers.[203] Rejecting the notion that the sale of milk was an ordinary private business, Roberts noted the extensive public regulation to which those in the milk industry were already subject[204] and found that "the paramount interests of the community"[205] in curbing injurious commercial practices and assuring a safe and reasonable supply of milk to consumers outweighed the private rights of a

196 *Id.* at 271–72 (describing the statute's requirements, which included a requirement that any applicant for a license prove "the necessity for a supply of ice at the place where it is sought to establish the business").

197 *See id.* at 277–79.

198 *See id.* at 291–92, 301–04 (Brandeis, J., dissenting) (arguing that there is not a distinct category of businesses affected with a public interest, but rather that the "State's power extends to every regulation of any business reasonably required and appropriate for the public protection").

199 *See id.* at 311.

200 *See id.* at 301–04.

201 291 U.S. 502 (1934).

202 *See id.* at 530–39.

203 *Id.* at 515, 517, 530, 538–39.

204 *Id.* at 521, 530.

205 *Id.* at 525.

milk retailer to undercharge his customers.[206] Though Roberts acknowledged the inherent conflict between private rights and public regulation[207]—a tension at the core of the classical public-private dichotomy—he sustained the authority of the state to regulate a business that was neither a public utility nor monopoly, nor otherwise derived its existence from public grants or privileges.[208] Instead, Roberts reasoned that the sale of milk, regardless of its private nature, implicated a significant community interest that warranted public control.[209] He also noted "that the private character of a business does not necessarily remove it from the realm of regulation of charges or prices,"[210] a position much more consistent with the Stone-Brandeis application of the affectation doctrine than former Chief Justice Taft's rendition of it in *Wolff*.

In a passage frequently regarded by scholars as evidence of the Court's "abandonment"[211] of the classical distinction between private rights and public power, Roberts commented "that there is no closed class or category of businesses affected with a public interest"[212] and that the phrase "affected with a public interest" is an imprecise means of delineating the boundaries of permissible public regulation of private enterprise.[213] Accordingly, he sustained the milk price regulation as a reasonable exercise of state police powers and refused to question the wisdom of the economic policy that prompted this legislation.[214] Given the deference the Court afforded the state[215] and Roberts's flexible interpretation of the affectation doctrine, it is not surprising that many scholars consider *Nebbia* a transformative decision,[216] one that marked the Court's exodus from the strictures of legal classicism and its shift from guardian judicial review in this area toward a flexible and pragmatic jurisprudence of constitutional adaptivity.

Yet, notwithstanding the importance of this case as an evolutionary link in the Court's jurisprudential shift during the 1930s, it may be more accurate to view Roberts's opinion as an example of the interplay between legal classi-

206 *Id.* at 525, 535–39.

207 *See id.* at 524.

208 *See id.* at 531–38.

209 *See id.* at 525, 529–39.

210 *Id.* at 535.

211 *See, e.g.*, CUSHMAN, *supra* note 3, at 78–83 (arguing that Roberts's *Nebbia* opinion "[took] the revolutionary step of abandoning the public/private distinction as an analytic category in price regulation cases"); *see also* White, *supra* note 154, at 1099 (concluding that *Nebbia* abandoned the distinction "that businesses 'affected with a public interest' could be regulated more extensively than could those that were 'private'").

212 *Nebbia*, 291 U.S. at 536.

213 *See id.*

214 *See id.* at 537–38.

215 *See id.* at 537–39 ("[A] state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose.").

216 *See, e.g.*, CUSHMAN, *supra* note 3, at 7, 79–82 (describing the "revolutionary" nature of the opinion); White, *supra* note 154, at 1099–1103 (defending the transformative value of the *Nebbia* decision).

cism and the jurisprudential theory of constitutional adaptivity that eventually supplanted it. Put another way, the constitutional revolution of the 1930s did not start with *Nebbia*, nor did Roberts's apparent "abandonment" of the classical public-private dichotomy end the jurisprudential struggle within the Court. Rather, the manner in which Roberts constructed his opinion suggests that aspects of legal classicism both helped to shape the debate and influenced the pace of change. Although Roberts certainly appears to have expanded the concept of a private business affected with a public interest, he also acknowledged elsewhere in his opinion that the determination of which private businesses are subject to public regulation depends upon the facts of each case[217] and thus may have qualified his otherwise broad statement about there no longer being a closed category of businesses affected with a public interest.[218]

In this regard, Roberts's expansive interpretation of the affectation doctrine seems less bold and indicates a juridical approach more minimalist than revolutionary. His emphasis upon the public interest in the retail milk business was hardly novel, given the extensive regulations[219] that already governed the industry. Nor did the Court overrule *Wolff* or other cases from the 1920s that strictly construed the affectation doctrine. Rather than jettison the classical apparatus for differentiating between the public and private spheres, Roberts appears to have suggested a means for applying its categories broadly to make the distinction more viable under changing economic circumstances.

Roberts's explanation of how retailers who sold milk below prescribed rates threatened the public welfare with their unfair competitive practices illustrates the extent to which he framed his argument within a classical perspective. The public interest in regulation of milk prices, Roberts reasoned, was justified, in part, by the classical precept against the use of private property in ways detrimental to others.[220] Retailers who undersold their competitors hurt dairy farmers, demoralized the market, and jeopardized public health interest in having a reliable supply of safe milk.[221] In an effort to persuade the Court's conservative skeptics, Roberts argued that price regulation was necessary in order to preserve the industry from its destructive tendencies. Accordingly, the New York law was a reasonable means of promoting the public welfare and not illegitimate class legislation.[222]

Even if *Nebbia* did not signal the Court's virtual abandonment of the public-private distinction, it weakened it considerably with its flexible inter-

217 *Nebbia*, 291 U.S. at 536.

218 Alternatively, this statement could also exemplify Roberts's refusal to cast his analysis in the abstract formality of legal classicism in which Justices often invoked general principles and ostensibly applied them to the facts of a case in a mechanical fashion.

219 *See Nebbia*, 291 U.S. at 521 ("Save the conduct of railroads, no business has been so thoroughly regimented and regulated by the State of New York as the milk industry.").

220 *See id.* at 520–21, 523, 538–39.

221 *Id.* at 517, 530, 538.

222 *See id.* at 537–39.

pretation of the affectation doctrine and language about the need for judicial deference on issues of economic regulation. Roberts's opinion exemplifies the interplay between legal classicism and the emerging constitutional adaptivity of the 1930s. The former shaped the latter as the progressive and centrist members of the Hughes Court moved towards a more deferential jurisprudence of economic liberty. That the public-private distinction continued to inform Supreme Court opinions after *Nebbia* underscores the incremental nature of this change, as well as the deep division within the Court over the scope of permissible public control over private economic affairs. Yet both proponents of the emergent living constitutional theory and adherents of the classical notion of guardian judicial review continued to frame their debate with this distinction in mind.

In *Morehead v. New York ex rel. Tipaldo*,[223] a deeply divided Court reversed course, as Justice Roberts joined the four *Nebbia* dissenters in a decision that invalidated a state minimum wage regulation that restricted the contractual liberty of private employers engaged in ordinary business not affected with a public interest.[224] In refraining from overruling *Adkins*,[225] whose formalistic logic reflected the classical distaste for subjecting private businesses to public control, the Court avoided applying *Nebbia*'s logic to wage regulation and revived, albeit temporarily, the hoary public-private distinction. Had Roberts really intended to abandon the public-private dichotomy, or more precisely, had he understood his decision in that case as having that practical effect, perhaps he may have overcome his procedural concerns about overruling *Adkins* in the absence of a formal request to do so by counsel[226] and become the fifth and pivotal vote for sustaining the New York law as a reasonable police powers measure to promote a paramount public interest. The substantive dissonance between Roberts's positions in these cases suggests his reticence about disregarding completely the classical affectation doctrine.

Legal classicism, with its formalistic logic and categorical reasoning, continued to influence a majority of the Justices in 1936. Implicitly, Justice Butler noted the parallel between the affectation doctrine and liberty of contract and cited *Wolff* and other classical precedent.[227] Moreover, the majority's refusal to consider overruling *Adkins* reflected classical mechanical thought:

223 298 U.S. 587 (1936).

224 *See id.* at 604, 608–13, 617–18 (applying the principles of *Adkins* and by inference rejecting the notion that a pervasive public interest warranted minimum wage regulation of private female employees).

225 Adkins v. Children's Hosp., 261 U.S. 525, 550–54 (1923) (noting the numerous cases that upheld a state's regulation of contracts made by private businesses before concluding that "[i]f . . . in the light furnished by the foregoing exceptions to the general rule forbidding legislative interference with freedom of contract, we examine and analyze the statute in question, we shall see that it differs from them in every material respect").

226 *See* CUSHMAN, *supra* note 3, at 92–104 (discussing Roberts's dilemma in *Morehead*).

227 *Morehead*, 298 U.S. at 617 (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Charles Wolff Packing Co. v. Court of Indus. Relations, 262 U.S. 522, 534 (1923); Ribnik v. McBride, 277 U.S. 350, 356 (1928)). The Court also invoked the authority of *Adkins*. *See id.*

because the state had not asked the Court to overrule *Adkins*, the Court would not do so.[228] Legal classicism also influenced how the dissenting Justices in *Morehead* tried to persuade their brethren to adopt a more deferential approach towards local economic regulation while adapting the Constitution to changing economic circumstances. Stone noted the paramount public interest in women's welfare,[229] and Hughes, in language that anticipated his *West Coast Hotel* opinion the following year, warned against the use of liberty of contract in ways that "could . . . override all public interests and thus in the end destroy the very freedom of opportunity which it is designed to safeguard."[230] In these ways the influence of legal classicism persisted in the evolution of the Court's jurisprudence.

B. Constitutional Adaptivity and Changing Economic Circumstances

As the Supreme Court assessed the scope of public regulation of private economic activities throughout the 1930s, it confronted issues arising from the application of the Constitution to changing economic conditions. Aside from its widespread adverse socioeconomic effects, the Depression had also altered significantly perceptions about the role of government in private economic affairs. Classical laissez-faire notions about the sanctity of private rights and concomitant skepticism about public regulation conflicted with the economic realities of the Depression. Ideological divisions within the Hughes Court intensified, as some of the Justices questioned the premises of legal classicism while others staunchly defended its tenets. A transformation of the Court's jurisprudence of economic liberty occurred when a bare majority of the Justices substituted a more deferential and flexible notion of constitutional adaptivity for the classical concept of guardian review. As with the Court's shift in its Commerce Clause jurisprudence, this change was incremental and reflected the persistent influence of legal classicism. Two cases illustrate this pattern of change and demonstrate the interplay between legal classicism and the evolution of constitutional adaptivity.

In *Home Building & Loan Ass'n v. Blaisdell*,[231] the Court upheld the Minnesota Mortgage Moratorium Law as a reasonable exercise of state police powers during an economic emergency.[232] Chief Justice Hughes, writing for a sharply divided Court, found that the law, which extended the period of equitable redemption for mortgagors, did not violate the Contract Clause prohibition against impairment of contract obligations because it kept intact the underlying mortgage debt.[233] Relying upon a line of precedent in which the Court had distinguished between laws that altered contract rights and

228 *Id.* at 603–05, 618.

229 *Id.* at 632–35 (Stone, J., dissenting).

230 *Id.* at 627 (Hughes, C.J., dissenting); *see supra* notes 162–66 and accompanying text.

231 290 U.S. 398 (1934).

232 *See id.* at 444–48.

233 *See id.* at 424, 445–46 (explaining that the law did not discharge the outstanding indebtedness, but instead afforded the mortgagors a temporary remedy so long as they continued to pay rent).

obligations from those that merely modified contract remedies,[234] Hughes reconciled the constitutional limitations of the Contract Clause with the Depression era imperative of local police powers. Accordingly, he eschewed a literal interpretation of the Contract Clause in favor of a flexible approach that reconciled private contract rights with public control. Rather than adhere to the strict classical distinction between the public and private spheres, Hughes noted "a growing appreciation of public needs and of the necessity . . . for a rational compromise between individual rights and public welfare."[235] Drawing upon the observations of Justices Cardozo and Stone, each of whom criticized Hughes's initial draft opinion as overly cautious and dry, and instead advocated judicial deference towards an increased public interest in private contracts,[236] the Chief Justice emphasized "the use of reasonable means to safeguard the economic structure upon which the good of all depends."[237]

The Court's decision to sustain the authority of Minnesota to alter private mortgage agreements during an economic emergency rankled its more devoted legal classicists who perceived in the ruling the seeds of constitutional disaster. Insisting that the Constitution "does not mean one thing at one time and an entirely different thing at another time,"[238] Justice Sutherland invoked the historical context of the Contract Clause and explained that its limitation of state authority reflected the Framers' apprehension of debtor relief legislation.[239] Sutherland regarded the mortgage relief law as illegitimate class legislation and admonished the Court for its flexible approach towards constitutional interpretation during an economic emergency.[240] For Sutherland, "[i]f the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned."[241]

In response to this classical perspective, one that reflected traditional factional aversion and the prerogative of guardian judicial review, Hughes,

234 *See id.* at 428–42 (discussing the rights-remedies distinction in Contract Clause jurisprudence); *see also* Samuel R. Olken, *Charles Evans Hughes and the* Blaisdell *Decision: A Historical Study of Contract Clause Jurisprudence*, 72 OR. L. REV. 513, 522–51 (1993) (discussing the Court's pre-*Blaisdell* Contract Clause jurisprudence).

235 *Blaisdell*, 290 U.S. at 442.

236 *See* Olken, *supra* note 234, at 584–85, 590–91 (discussing how Justices Stone and Cardozo suggested Hughes alter his draft opinion to emphasize flexible interpretation of the Contract Clause and the public interest in private contracts).

237 *Blaisdell*, 290 U.S. at 442.

238 *Id.* at 449 (Sutherland, J., dissenting). Sensing in Hughes's constitutional adaptivity and its premise of a living constitution a direct threat to legal classicism, Sutherland demonstrated the originalism of classical guardian judicial review when he warned: "The whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent, of its framers and the people who adopted it." *Id.* at 453.

239 *See id.* at 453, 465, 472.

240 *See id.* at 450–53. Sutherland expressed concern about the stability of constitutional principles, *see id.* at 449, and rejected the notion that the meaning of the Constitution, particularly its limitations, changed over time. *See id.* at 450–53.

241 *Id.* at 483.

with the aid and encouragement of Cardozo and Stone, asserted the need for a pragmatic and flexible method of constitutional interpretation that sought to reconcile the language of the Contract Clause with the modern context of its operation. Observing that its "prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula,"[242] Hughes rebuked the dissenters for their formalistic approach. Rejecting their premise that the meaning of the Contract Clause had not changed since 1787, Hughes refused to "draw a fine distinction between the intended meaning of the words of the Constitution and their intended application."[243] Instead, he opted for a more instrumental path, one which "sought to prevent the perversion of the clause through its use as an instrument to throttle the capacity of the states to protect their fundamental interests."[244] Accordingly, Hughes, in a departure from legal classicism, advocated an application of the Constitution to changing economic circumstances and concluded that "the reservation of the reasonable exercise of the protective power of the State is read into all contracts."[245] For emphasis, Hughes reiterated John Marshall's cogent observation that "'[w]e must never forget that it is a *constitution* we are expounding.'"[246]

In essence, Hughes invoked the doctrine of changing circumstances as a justification for interpreting broadly the Contract Clause and for adopting a more contextual approach to its application than Sutherland. Notwithstanding the opinion's rejection of various classical premises, it still bore the influence of legal classicism in the manner in which Hughes justified his conclusions. Notwithstanding its progressive impulse, the decision is fairly cautious and solicitous of private rights.[247] Indeed, both Stone and Cardozo criticized Hughes's initial draft opinion as too tentative and urged him to place more emphasis upon the public interest in private contracts and the flaws of a constrained, originalist interpretation of the Contract Clause.[248] Moreover, Hughes's multiple references to the temporary duration of the mortgage moratorium and his characterization of it as an emergency measure reveal the conservative facets of the final opinion.

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242 *Id.* at 428 (majority opinion).

243 *Id.* at 443.

244 *Id.* at 444.

245 *Id.* In a passage that criticized the classical premise about the primacy of private economic interests and the strict classical distinction between the public and private spheres, Hughes observed that "the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends." *Id.* at 442.

246 *Id.* at 443 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819)).

247 *See id.* at 425, 444–47 (explaining the temporary duration of the statute and that it preserves the underlying mortgage indebtedness while enabling the mortgagors to maintain a possessory interest upon the payment of rent).

248 *See id.* at 429–34 (discussing the historical development of the Contract Clause); *see also* Olken, *supra* note 234, at 584–85, 590–91 (discussing how Justices Stone and Cardozo suggested Hughes alter his draft opinion to emphasize flexible interpretation of the Contract Clause and the public interest in private contracts).

Hughes crafted a historicist opinion that used precedent rather than policy to place the mortgage moratorium act within a recognized tradition of government regulation during times of emergency[249] and relied on a series of cases that differentiated between contract rights and remedies.[250] A pragmatic jurist rather than an ideologue, Hughes sought to reconcile traditional Contract Clause jurisprudence with changing economic conditions. Accordingly, he observed that "[t]his principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court."[251] Hughes also stressed that the act benefited the public welfare without divesting mortgagees of their private rights[252] and thus was dissimilar to factional class legislation, a point that both acknowledged the classical preoccupation with factions while suggesting its inadequate bearing on the case. His remark that "[t]he policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while[ ]—a government which retains adequate authority to secure the peace and good order of society"[253] reveals these dual aspects of Hughes's opinion. Ever mindful of classical concerns with the sanctity of private rights, Hughes realized that guardian judicial review, with its emphasis upon strictly construing constitutional limitations—in essence, a negative view of the Constitution—might actually impede the security of private rights in the long run. Accordingly, he sought to nudge the Court towards a more deferential standard of review in which the Justices would apply the Constitution to changing economic conditions.

Similarly, the Chief Justice's opinion in *West Coast Hotel Co. v. Parrish*[254] illustrates how he used the concept of changing economic circumstances to justify the Court's departure from its classical protection of contractual liberty. In *West Coast Hotel*, the Court sustained, as a reasonable exercise of police powers, a Washington state minimum wage law for women and narrowed considerably the scope of liberty of contract.[255] It overruled *Adkins* and rejected the classical premise that liberty of contract outweighed the public interest in fair wages.[256] Hughes, who had dissented the year before in *Morehead*, invoked the Depression era context as a reason for the Court's

249 *See Blaisdell*, 290 U.S. at 439–42; *see, e.g.*, Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922) (upholding rent relief laws against Contract Clause challenges); Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921) (same); Block v. Hirsh, 256 U.S. 135 (1921) (same).

250 *See, e.g.*, Bronson v. Kinzie, 42 U.S. (1 How.) 311 (1843) (invalidating Illinois mortgage relief legislation but recognizing the authority of the state to modify contract remedies in ways that do not impair contract obligations); *see also* Olken, *supra* note 234, at 532–51 (discussing the rights-remedies distinction in Contract Clause jurisprudence).

251 *Blaisdell*, 290 U.S. at 435.

252 *See id.* at 425, 444–47.

253 *Id.* at 435.

254 300 U.S. 379 (1937).

255 *See id.* at 391–95, 400.

256 *See id.* at 398–400.

application of the changing circumstances doctrine and its deference towards public regulation of private employment relationships.[257] Yet, as constitutional historian Barry Cushman has aptly observed, what Hughes did in this case was not all that revolutionary in that he essentially reconciled the Court's emerging recognition of the broad public interest in private economic activities with "the police power categories under which legislation restricting freedom of contract had been sustained."[258] Much of his reasoning reflected what he said in *Blaisdell*, as well as Roberts's views in *Nebbia*; as the Chief Justice of a deeply divided Court, he crafted a fairly cautious opinion that chiseled away at the edifice of legal classicism. Insofar as he asserted a deferential jurisprudential stance towards local governmental authority, Hughes continued to view the issue of minimum wage legislation from the classical perspective of neutrality.[259] Indeed, Hughes's point that the proscription of a minimum wage for women did not represent illegitimate class legislation that burdened their employers[260] indicates the extent to which the classical aversion to factions permeated his thought and affected others on the Court, including, of course, the dissenters, who viewed any minimum wage law as arbitrary and unreasonable class legislation.[261]

Rather than issue a bold declaration about the Court's willingness to adapt the Constitution to changing economic conditions, Hughes preferred to ground his argument in precedent, much as he did in *Blaisdell*. Thus, the Chief Justice showed how previous cases that sustained maximum hours for women,[262] as well as those which upheld restrictions of liberty of contract in the context of unfair economic competition[263] and working conditions,[264] undermined the classical abhorrence of governmental intervention into private contractual affairs. Hughes's extensive use of precedent exemplifies his historicist approach, one that used a common law method of constitutional interpretation to demonstrate the limitations of classical thought in a world in which changing economic conditions had altered the relationship between private business and the public welfare, as well as belied the abstract

257 *See id.* at 390, 398–400.

258 CUSHMAN, *supra* note 3, at 86.

259 *See id.* at 88.

260 *See W. Coast Hotel Co.*, 300 U.S. at 396–99 (analogizing the regulation of wages for women to the regulation of maximum hours for women as a means of protecting them from exploitation and promoting the public welfare).

261 *See id.* at 406–11 (Sutherland, J., dissenting).

262 *See id.* at 394 (majority opinion) (citing Muller v. Oregon, 208 U.S. 412 (1908) (sustaining regulation of hours for women)); *id.* at 397 (citing Radice v. New York, 264 U.S. 292 (1924) (same)).

263 *See id.* at 397–98 (citing O'Gorman & Young, Inc. v. Hartford Fire Ins. Co., 282 U.S. 251 (1931) (upholding a statute concerning insurance rates); Nebbia v. New York, 291 U.S. 502 (1934) (sustaining a statute regulating retail milk prices)).

264 *See id.* at 392–94 (citing Chi., Burlington & Quincy R.R. Co. v. McGuire, 219 U.S. 549 (1909) (sustaining a statute related to working conditions); Holden v. Hardy, 169 U.S. 366 (1898) (examining a statute that regulated miners' hours)).

equality thought to inhere in the bargaining positions of employers and employees.

Hughes's opinion was not per se revolutionary, but rather occupies a prominent link in the Court's evolution from traditional guardian review of public regulation of private enterprise to a more pragmatic approach that emphasized constitutional adaptivity and deference towards public regulation. In this regard, the structure of Hughes's opinion resembles his *Blaisdell* opinion in that he wended his argument through mounds of precedent en route to a conclusion whose logic appeared to emanate from the precedent itself rather than from some novel concept of public welfare or constitutional interpretation.

The crescendo of Hughes's opinion was the connection he forged between inadequate, or unfair, wages and women's welfare, a link that Hughes pressed to demonstrate the public interest in private contracts (similar to what Roberts did in *Nebbia* with his point about unfair competition and the public welfare).[265] Hughes also asserted that employers who underpaid their employees impaired the public interest. Not only did their refusal to pay adequate wages reveal the inherent disparity in the bargaining process, an inequity exacerbated by the changing economic conditions that had undermined the widespread pre-Depression economic prosperity of the *Lochner* era, but it also represented a pernicious form of exploitation as the "community . . . in effect [provided] a subsidy for unconscionable employers."[266] In the absence of wages by which they could support themselves, some employees had to receive public relief in order to augment their meager incomes. For Hughes this signified a flaw in classical assumptions about liberty of contract. His observation of the selfish disregard of some private employers for the public welfare therefore marked an attempt by the pragmatic and shrewd Chief Justice to base his conclusion on the logic of classical aversion to political factions. Minimum wage legislation for women, Hughes reasoned, actually would bestow benefits on the public at large and would not divest private businesses of their economic liberty.[267]

In essence, then, Hughes's invocation of the changed circumstances rationale in *Blaisdell* and *West Coast Hotel* to justify the Court's deference to public regulatory authority may not have been as radical a departure from legal classicism as commonly perceived by scholars and even the members of his Court in dissent. What Hughes did was explain, in common law terms, why the Court could no longer employ the rigid and formalistic constitutional interpretation characteristic of classical legal thought. In these cases, and in Commerce Clause decisions such as *Jones & Laughlin*[268] and *Darby*,[269] a detailed discussion of which is beyond the scope of this Article, the Hughes

265 *See id.* at 398–99.

266 *Id.* at 399.

267 *See id.* at 391–92, 398–400.

268 NLRB v. Jones & Laughlin Steel Corp. (*Labor Board Cases*), 301 U.S. 1 (1937) (Hughes, C.J.).

269 United States v. Darby, 312 U.S. 100 (1941) (Stone, J.).

Court justified its departure from Lochnerian judicial review and its emphasis upon formalism and mechanical jurisprudence. Significantly, Hughes himself articulated this jurisprudential shift in traditional terms, averting to legal classicism's public-private dichotomy and—in particular—its aversion to class legislation.[270] In essence, Hughes stretched classical legal tenets to the breaking point and in so doing paved the transition to what would eventually be a formal break from the classical legal tradition. Therein are the evolutionary aspects of *Blaisdell*, *West Coast Hotel*, and the other key economic liberty decisions of the Hughes Court, as well as its seminal Commerce Clause ones. The cautious and at times meticulous methodology of the Hughes Court was historicist in its emphasis on precedent and its incremental approach towards constitutional change. Moreover, the non-linear pattern of change and its gradual tempo reveal the interplay of legal classicism and New Deal constitutionalism.

C. Reasons for the Persistence of Legal Classicism

To appreciate how legal classicism helped shape the Court's transformation of its jurisprudence of economic liberty, one must consider reasons for its persistence throughout the 1930s. Trained in the law by legal classicists such as Thomas Cooley and Christopher Columbus Langdell, both the lawyers who argued cases before the Supreme Court and the Justices themselves would have been hard pressed to shed completely their classical understanding of constitutional law and the judicial function,[271] particularly given the prominent role of stare decisis in constitutional adjudication. Moreover, for much of the *Lochner* era a plethora of jobs existed and wages continued to rise,[272] thus making it counterintuitive to question classical doctrines such as liberty of contract and its premise of equality in the bargaining process.

However, the most significant reason for the persistence of legal classicism throughout the 1930s was the divisions that existed within the Supreme Court between the more progressive jurists, those in the center, and those in the conservative wing of the Court. This internal split within the Court made

270 In contrast, Justice Sutherland's dissent in *West Coast Hotel Co.* reprised his *Blaisdell* dissent, as well as the logic from his *Adkins* opinion. Sutherland rejected the premise of a living constitution and the notion that changing economic conditions warranted a flexible and pragmatic application of constitutional limitations. *See W. Coast Hotel Co.*, 300 U.S. at 402–03 (Sutherland, J., dissenting). Wary of the Court's deference to state economic regulation, Sutherland reminded his brethren of their constitutional duty to interpret the law and not make it. *Id.* at 403–05. Broadly construing the Due Process Clause of the Fourteenth Amendment to protect contractual liberty from illegitimate class legislation, *id.* at 406–13, Sutherland refused to concede any ground to Hughes, even as the Court signaled its approval of the *Nebbia* rationale and the marked shift in its jurisprudence of economic liberty.

271 *See* CUSHMAN, *supra* note 3, at 216; *see also* WHITE, *supra* note 5, at 174–75, 180, 183 (discussing the influence of Langdell's pedagogical approach); WIECEK, *supra* note 6, at 4–5, 80–81, 80–94, 101, 104–05 (discussing Langdell's influence); Olken, *supra* note 34, at 663 (discussing Cooley's influence upon Justice Sutherland).

272 *See* CUSHMAN, *supra* note 3, at 116.

it difficult for a clear and consistent majority to take hold. Narrow factual distinctions between cases affected the arguments before the Court and provided the context in which a single vote could decide a case. Indeed, virtually all of the major economic liberty cases of the decade were decided by a majority of a single vote.

The pragmatic Chief Justice Hughes was not an ideologue, but rather a moderate compared to Brandeis, Cardozo, or Stone, Justices who comprised the Court's more progressive segment and urged the Court to adapt the Constitution to changing economic conditions. Roberts, like Hughes, occupied the Court's ideological middle, and was even more cautious and modest in his approach to constitutional change than Hughes. And then there were the Four Horsemen: Sutherland, McReynolds, Butler, and Van Devanter, stalwart proponents of legal classicism who perceived themselves as guardians of a conservative judicial tradition that viewed the Constitution as a set of negative limitations to preserve individual liberty from political factions and the vicissitudes of democratic majorities. Their consistent opposition to increased public regulation of private economic affairs and fervent criticism of the emergent living constitutional theory made it virtually impossible for the Hughes Court to make a clear break from the classical model of constitutional adjudication. Indeed, it was not until their number dwindled at decade's end that the Court could more unequivocally reject the premise of legal classicism in its jurisprudence of economic liberty.

D. Ironical Contributions of Taft and Sutherland

Interestingly, however, it may have been some of the more devout legal classicists on the Court in the 1920s who ironically contributed to the eventual jurisprudential shift that occurred by the end of the 1930s. For example, at the behest of Chief Justice Taft, Congress enacted the Judiciary Act of 1925, which eliminated appeal as a matter of right to the Supreme Court. Concerned about the Court's lengthy backlog of cases, Taft, together with Van Devanter, Sutherland, and McReynolds, worked closely with Congress in drafting legislation that limited appellants' access to the Court and made certiorari the principle vehicle of Court review. This gave the Court more discretionary control over its appellate docket and enabled it within a few years to reduce significantly the number of cases it heard.[273] However, it is unclear whether Taft realized the unintended consequences of this act. For in making the Court's caseload more manageable, it also afforded the Justices increased opportunity to delve more deeply into the issues of the cases, and in particular their policies, something that would seemingly conflict with the classical concept of mechanical jurisprudence. Rather than simply apply precedent to facts, which was the hallmark of classical adjudication, the Justices after 1925 could indulge in the more controversial task of assessing constitutional policy raised by the cases. Indeed, reading some of the opinions

273 *See* Proceedings in Memory of Mr. Justice Van Devanter, 316 U.S. v, xii–xiv (1942) (discussing the Judiciary Act of 1925 and its effects).

of Brandeis, Hughes, Roberts, and even Sutherland throughout the 1930s one detects a considerable infusion of policy in their analyses of public economic regulation, judicial review, and matters of constitutional interpretation.

Another irony is that Sutherland himself, often considered an unmitigated opponent of constitutional adaptivity—at least by the tone of his trenchant dissents—invoked the concept of adapting the Constitution to changing economic conditions in the 1920s. In *Village of Euclid v. Ambler Realty Co.*,[274] Sutherland, in an opinion for a divided Court that upheld a zoning ordinance as a reasonable exercise of local police powers,[275] explained that "while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet . . . new and different conditions."[276] Although Sutherland did not imply that the meaning of constitutional provisions change over time—a stance he rejected in his *Blaisdell*[277] and *West Coast Hotel Co.* dissents[278]—he conceded the need for "elasticity . . . not to the *meaning*, but to the *application* of constitutional principles."[279] His deference to the zoning experts who advocated a restriction upon the use of residential property also contrasted with his attitude towards other forms of economic regulation.[280] Whereas Sutherland often characterized governmental efforts to regulate private economic activity as illegitimate class legislation,[281] he shrewdly perceived that the *Euclid* zoning regulation enhanced private property values in ways beneficial to the public.[282] A decade later, the Court, in opinions by Roberts and Hughes, would invoke this theme in cases involving state regulation of private economic affairs.

274 272 U.S. 365 (1926).

275 *See id.* at 390, 397.

276 *Id.* at 387.

277 Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 449, 451–52, 465, 483 (1934) (Sutherland, J., dissenting).

278 W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 401–04 (1937) (Sutherland, J., dissenting).

279 *Euclid*, 272 U.S. at 387.

280 *See id.* at 394–97.

281 *See* Olken, *supra* note 6, at 35, 59, 61, 88.

282 *See Euclid*, 272 U.S. at 394–96. Sutherland initially thought the ordinance was unconstitutional, but changed his mind after rehearing the case. *See* Alfred McCormack, *A Law Clerk's Recollections*, 46 COLUM. L. REV. 710, 712 (1946) (explaining how Justice Stone persuaded him to acquiesce in granting rehearing); *see also* Gorieb v. Fox, 274 U.S. 603, 608–10 (1927) (Sutherland, J.) (citing changing economic conditions in sustaining a Virginia zoning ordinance); Zahn v. Bd. of Pub. Works, 274 U.S. 325 (1927) (Sutherland, J.) (sustaining Los Angeles's ban of commercial buildings in a residential area). *But see* Nectow v. City of Cambridge, 277 U.S. 183 (1928) (Sutherland, J.) (finding a zoning ordinance that restricted a landowner from using his property for industrial purposes did not significantly promote public welfare).

E. Historicism and Constitutional Change

The fundamental conservative nature of constitutional adjudication also may explain the persistence of legal classicism and its interplay with the theory of a living constitution that emerged as a dominant norm on the Hughes Court by the end of the 1930s. The term "conservative" in this context refers not to a political or legal outcome, but rather to the evolutionary and incremental structure of constitutional change as viewed from the perspective of judicial precedent.[283] The Justices on the Hughes Court—including Brandeis, Cardozo, and Stone—were not all that radical in their substantive views, values, or methodology, yet over time a majority gravitated toward a more deferential standard of judicial review that recognized the public interest in private economic affairs. Though the Four Horsemen were perhaps more consistent in their approach towards assessing the constitutional limits of public economic regulation than their more celebrated brethren, all the Justices shared an abiding concern for institutional legitimacy and understood the significance of precedent in constitutional interpretation. Perhaps this explains why, even in dissent, Justices Stone and Brandeis relied on precedent to demonstrate the Court's erroneous conclusions about the public-private distinction and, conversely, why Justices Sutherland and McReynolds also used precedent to bolster their logic. In this regard, common law constitutional interpretation was the method by which the Justices construed the Constitution.[284] Characterized by its emphasis upon legal precedent and custom, this interpretive construct, then as now,[285] sought to reconcile the past with the present in assessing the parameters of permissible public regulation of private economic affairs. The Justices' disagreements over the nature of judicial review reflected longstanding variant interpretations over the role of constitutional law in a democratic society. Indeed, John Marshall had employed a form of constitutional adaptivity in the early years of the republic,[286] as had Roger B. Taney[287] and other Supreme Court Justices in subsequent decades. Sutherland's insistence upon strict construction also reflected a persistent strain in American jurisprudence. What is so fascinating about the New Deal era is the manner in which these arguments resur-

283 In this regard, the historicism of late nineteenth and early twentieth-century constitutional thought is highly relevant. Historicism refers to historical consciousness or sensitivity and was an important facet of *Lochner* era constitutional jurisprudence. Factional aversion, solicitude for private rights, and customary differentiation between the public and private spheres were principal components of jurists' historicism. *See* Olken, *supra* note 6, at 73–81; Siegel, *supra* note 6, at 1540–44 (discussing historicism and *Lochner* era constitutional jurisprudence).

284 *See* Olken, *supra* note 6, at 73–79 (discussing Justice Sutherland's historicism).

285 For an excellent discussion of modern common law constitutional interpretation, see David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

286 *See* Samuel R. Olken, *Chief Justice John Marshall and the Course of American Constitutional History*, 33 J. MARSHALL L. REV. 743, 763–67 (2000).

287 *See, e.g.*, Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837) (strictly construing a legislative charter to promote economic competition).

faced and how even in its decline legal classicism managed to affect the nature and pace of the jurisprudential shift.

Moreover, the intrinsic characteristic of "revolutions" in American constitutional history[288] suggests that their incremental nature permits considerable interplay between emerging theories of constitutional interpretation or change and the ones they eventually displace.[289] Given the prominent role of stare decisis and the prevalence of the common law method of constitutional adjudication, changes in constitutional jurisprudence are more evolutionary than revolutionary. This was certainly true of the transformation that occurred in the Court's jurisprudence of economic liberty during the 1930s, as the Justices of a divided Court grappled with not only the parameters of permissible public economic regulation, but also more fundamentally with the nature of judicial review during a period of profound socioeconomic change. Perhaps Holmes's metaphor for the common law[290] best explains the manner in which vestiges of legal classicism influenced the manner and tempo of constitutional change. As a snake sloughs off its old skin while it dons a new one, so the Hughes Court shed its heavy classical firmament in favor of a lighter, more flexible approach towards public economic regulation.

Conclusion

One of the enduring shibboleths of constitutional history is that the Four Horsemen of the Apocalypse, Sutherland, McReynolds, Van Devanter, and Butler, along with Chief Justice Taft in the 1920s, were so steadfast in their opposition to the constitutional adaptivity employed by their more progressive colleagues on the Court, such as Hughes, Stone, Brandeis, and Cardozo, that they stopped at no end to thwart the constitutional transformation of the New Deal. Moreover, pursuant to the conventional narrative, so unsuccessful were the Four Horsemen and their classically conservative cohorts in their venture that by the late 1930s the constitutional progressive wing of the Court had vanquished completely the influence of classical legal thought in public law. Notwithstanding the allure of this story, the structure

288 *See* Arthur Bestor, *The American Civil War as a Constitutional Crisis*, 69 Am. Hist. Rev. 327 (1964) (explaining the confluence of factors that led to the Civil War). For an interesting discourse on the nature of historical change, see Leo Tolstoy, *Second Epilogue to* War and Peace (Nathan Haskell Dole trans., Thomas Y. Crowell & Co. 1889) (1868) (recognizing how a confluence of factors effects historical change rather than merely discrete events or singular personalities). *See generally* Thomas S. Kuhn, The Structure of Scientific Revolutions (4th ed. 2012) (discussing the incremental nature of ideological revolutions).

289 *See* Samuel R. Olken, *Historical Revisionism and Constitutional Change: Understanding the New Deal Court*, 88 Va. L. Rev. 265, 274–76 (2002) (reviewing White, *supra* note 5).

290 *See* Oliver Wendell Holmes, Jr., The Common Law 36 (Little, Brown & Co. 1923) (1881). Holmes wrote that the law "is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off." *Id.*

of the so-called constitutional revolution of the 1930s reveals a much more nuanced and complex picture, for the interplay between the classical and progressive jurists on the Hughes Court demonstrates that classical legal notions persisted well into the 1930s and exerted a configurative effect upon the constitutional transformation of this period.