REEXAMINING THE "CONSTITUTIONAL REVOLUTION OF 1937": EVOLUTION, REVOLUTION, OR RESTORATION AND THE "FALL" OF ECONOMIC DUE PROCESS

by

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Dedicated with love and appreciation to my family.

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The University of Texas at Dallas, 2019

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The familiar story of President Roosevelt's triumphant victory over the Supreme Court in the Spring of 1937 has become legend. In this story, the threat posed by the President's "court-packing" plan caused the Supreme Court to capitulate to his political will and reverse the principal tenets of its prior constitutional doctrine. The traditional account has been widely accepted for decades, despite serious doubts about its accuracy. In the 1990s, revisionist legal scholars began to publish new theories of the "revolution" rooted in the development of constitutional doctrine. These theories posited that the dramatic legal transformations of the New Deal era were the result of gradual changes in legal doctrine, not a sudden reversal in response to political pressure. Further, some theories place the crucial shift in constitutional law not in the Spring of 1937, but three years earlier in the case of *Nebbia v. New York*, 1934. In *Nebbia,* the Court abandoned a judicial doctrine that spelled the end of economic due process in the federal courts. This opened the door for state supreme courts to fashion independent decisions on economic due process issues based on their state's constitutions.

This dissertation is designed to use state economic due process decisions of the era as a unique prism for "revisiting" the story of the New Deal "constitutional revolution." These decisions will be examined within the confines of revisionist legal theory to determine whether these state court decisions support an "evolutionary" explanation of the New Deal "revolution." The "evolutionary" concept proposed in this study recognizes the dramatic legal transformations of the New Deal era as the product of gradual changes in judicial thinking and broadly embraces the evolving legal development in the state courts of the era as part of the New Deal "transformation."

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THE "CONSTITUTIONAL REVOLUTION OF 1937"

1.1 Introduction

The traditional story of the "Constitutional Revolution of 1937" is an account of President Roosevelt's political triumph over an obstructionist Supreme Court. Frustrated by the Supreme Court's resistance to his New Deal legislation and buoyed by his landslide victory in the 1936 election, Roosevelt devised a plan to increase the size of the Court and "pack" it with Justices amenable to his legislative goals. Shortly after the "court packing" plan was announced, the Supreme Court issued its opinion in the landmark case of *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). Justice Roberts, who had voted against upholding similar legislation just one year earlier, sided with the majority in upholding Washington's minimum wage law for women. In his opinion, Chief Justice Hughes denied the due process claims levied, clearly pronouncing that the "liberty of contract" was not protected by the Constitution. Not only did this case proclaim the demise of substantive due process for economic matters (hereinafter, "economic due process"), it also "marked" a dramatic change in the Court's attitude toward stronger government. This changed attitude resulted in the Court's approval of significant New Deal legislation in the following months (See Leuchtenburg 1995).

The most intriguing question in this story has always been: Why did the Supreme Court suddenly change direction? The standard answer has been that the Court's changed position in the Spring of 1937 stemmed from the political threats posed by the introduction of President Roosevelt's "court-packing" plan. This led to the famous expression the "switch in time that saved nine." Many people are not aware of any other explanation for the "switch," as this story

or something similar has been told and retold in books and textbooks for decades (See Leuchtenburg 1995; Cushman 1998).

Although these events occurred over eighty years ago, their impact on the structure of American law still resonates today. At its core, the "constitutional crisis" of the New Deal represents a confluence of factors that tested a crucial precept in legal thought: the complex relationship between law and politics. This relationship is as important today as it has ever been. Perhaps, this explains the continuing "obsession" of scholars with the subject. The New Deal and its "constitutional revolution" provide an opportunity to study the "synergy of law and politics during one of the most pivotal moments in American history" (Kalman 1999, 2187).

Over the years, scholars in history, political science, and law have presented more sophisticated and nuanced accounts that provide alternative theories to explain the dramatic changes in constitutional law that occurred in the 1930s. Of particular interest are the works of revisionist scholars who contend that the constitutional changes of the New Deal are best explained as the culmination of gradual shifts in judicial thinking over a long period of time, not as radical responses to political pressure (Cushman 1998; Friedman 1994). The revisionist theory of Barry Cushman is unique in that he presents a new candidate, the case of *Nebbia v. New York,* 291 U.S. 502 (1934), as the starting point for the "constitutional revolution." Cushman argues that the Supreme Court's abandonment of the public/private distinction in *Nebbia* was the key to dramatic changes in both the areas of economic due process and commerce clause doctrine (Cushman 1998). As for the "pivotal" case of *West Coast Hotel,* these scholars maintain that the decision was simply a "corollary" to *Nebbia* that extended its logic to the "liberty of contract" (Cushman 1998; Friedman 1994).

The consensus among Supreme Court scholars is that these decisions, whether alone or in combination, marked the "demise" of economic due process. As the Supreme Court ceased to engage in a meaningful review of economic legislation (see *United States v. Carolene Products Co.*, 304 U.S. 144 (1938)), the constitutional fate of state economic legislation was largely in the hands of the state supreme courts. Many state supreme courts used this shift in power to craft their state's own economic due process jurisprudence, independent and often contrary to the federal approach.

My dissertation is designed to use state economic due process decisions of the era as a unique prism for "revisiting" the story of the New Deal "constitutional revolution." The decisions selected will be examined within the context of revisionist legal theory, with particular emphasis on the idea that *Nebbia* represents a significant shift in the Court's due process jurisprudence. The principal objective of the study will be to determine whether these state court decisions support an "evolutionary" explanation of the New Deal "revolution." By "evolutionary," I mean an explanation that recognizes the dramatic legal transformations of the New Deal era as the product of gradual changes in judicial thinking, not as sudden responses to political pressure. This approach encompasses not only legal development in the federal courts, but also the evolving legal development in the state courts as part of the New Deal "transformation."

Chapter 1 presents two competing accounts of the "Constitutional Revolution of 1937." The first is the conventional political account; the other is based on the work of revisionist legal scholars. I will also discuss in more detail the two Supreme Court opinions that are central to this study: *Nebbia* and *West Coast Hotel*. Chapter 2 is devoted to the examination of state milk

control statutes enacted between 1933 and 1942 and the similarities between the statutes. Chapter 3 presents my examination and analysis of the principal state supreme court cases involving the constitutionality of price-fixing in the milk industry. In Chapter 4, a comparative set of cases will be examined involving price control laws for barbers. Chapter 5 concludes with a discussion of the difficulties inherent in analyzing the judicial changes of the New Deal era. It will discuss the aggregate effect of the changes to economic due process put in motion by *Nebbia*. The chapter closes with questions about further research in the area of state constitutional development.

1.2 Review of the Traditional Account

The debate among scholars who study the "1937 Revolution" is customarily divided along two lines: externalists and internalists. Externalists use outside factors, such as politics or economic conditions, to explain changes in judicial doctrine. Internalists look to factors internal to the legal environment to explain doctrinal development, such as the role of precedent or other legal principles that may have affected the judges' decisions (Tushnet 1999). To an internalist/legal scholar, law is seen as a "mode of intellectual discourse having its own internal dynamic" (Cushman 1998, 4-5).

In the years that followed the New Deal, and "for several scholarly generations thereafter," politicians and scholars generally accepted "one of the common externalist accounts" (Tushnet 1999, 1075). Historians have presented "two simple externalist accounts" to explain the "revolution" in constitutional law during this period. One is focused on the "switch in time" purportedly caused by the announcement of Roosevelt's "court-packing" plan. The other is based on the idea that Roosevelt's repeated electoral victories pressured the Court to dramatically alter its constitutional perspective (the "election returns" theory) (Tushnet 1999, 1063). More

sophisticated externalist accounts, such as that of noted New Deal scholar, William Leuchtenburg, present the "switch" within a broader cluster of cases and political events, such as the long and acrimonious battle over the "court-packing plan" (Leuchtenburg 1995).

The first simple externalist account, the "switch in time," is narrowly focused on the "dramatic change" in Justice Owen Roberts' voting patterns in two very similar minimum wage cases: *Morehead v. ex rel Tipaldo*, 298 U.S. 587 (1936) and *West Coast Hotel v. Parrish* (1937). In *Tipaldo,* Justice Roberts had voted with the majority in striking down a New York minimum wage statute for women. The majority opinion (which he joined without comment) exalted the virtues of the "liberty of contract" doctrine. Less than a year later, Justice Roberts joined the majority opinion in *West Coast Hotel*, announcing the death of that very same doctrine. In the "switch in time" account, this sudden change of heart was caused by Roberts' fear of Roosevelt's "court packing" plan (Tushnet 1999, 1063).

On its face, this theory is simple and direct, but, in fact, it is based on a misinterpretation of the chronology of events surrounding the decision. The Supreme Court, absent one member, had voted on *West Coast Hotel* in December 1936, approximately six weeks prior to the unveiling of Roosevelt's "court-packing" plan in February 1937. At the December 19th conference, four Justices--Brandeis, Cardozo, Hughes and Roberts--voted to uphold Washington's state minimum-wage law. Four Justices--Sutherland, Van Devanter, Butler, and McReynolds-- voted against upholding the law. Justice Stone, who was ill, did not participate in the December vote, but was known to support upholding the Washington law. As it stood the tie vote was sufficient to allow the Washington law to stand, but Chief Justices Hughes wanted the decision to be rendered by a "full court." When Justice Stone returned to the Court, he cast his

vote as expected in favor of upholding the Washington law. The Chief Justice now had a clear majority, but by this time, the President had already announced his "court-packing" plan. Trying to avoid the appearance that the Court had capitulated to political pressure, Chief Justice Hughes further delayed the announcement of the decision until March 1937. Ironically, this did little to influence public perception. Many contemporary commentators concluded that the Court had "given in" to Roosevelt's threats, leading one journalist to coin the now-familiar phrase, "the switch in time that saved nine" (Cushman 1998, 11-28).

The "switch in time" concept has had tremendous staying power; even "able" constitutional scholars have presumed its validity. According to Leuchtenburg, there is "considerable misunderstanding about the "switch in time," despite the fact that the "timing" issue has been resolved for many decades (Leuchtenburg 1995, 216 n.17). On this point, Leuchtenburg wrote:

> There has been a good deal of speculation about why Roberts joined the liberal majority. It is clear that Roosevelt's court message was not responsible, for the minimum-wage decision was reached before the President sent his message, although it was not handed down until afterwards (1963, citing Pusey (1951)).

The second of the two "simple" historical accounts, or the "election results" theory, is more difficult to disprove. In this account, the Court is supposed to have changed direction in response to Roosevelt's landslide victory in the 1936 presidential election. This theory holds that the members of the Court "consciously or unconsciously, respond to …. political developments, perhaps because at some level they know that their power ultimately depends on support from the elected branches" (Tushnet 1999, 1063). In the 1934 mid-term elections, the Democratic Party, largely buoyed by Roosevelt's popularity, had achieved major successes. The Democratic Party now held sixty-five percent of the seats in the House and had won "better than a two-thirds

majority [in the Senate], the greatest margin either party ever held in the history of the upper house" (Leuchtenburg 1963, 116). In the 1936 presidential election Roosevelt won the presidency "by the most sweeping electoral margin of any candidate since James Monroe." Roosevelt had carried every state but Maine and Vermont (Leuchtenburg 1963, 195). Historians have argued that the Justices were so affected by the political pressure generated by Roosevelt's repeated successes that they dramatically altered constitutional doctrine in favor of the New Deal and its philosophy (Tushnet 1999).

The power of the "elections account" has been challenged by scholars on both sides of the internalist/externalist debate. Despite Roosevelt's "stunning popularity," as evidenced in the 1934 elections, "the Court struck its heaviest blows against the New Deal in 1935-1936…." (Parrish 2002, 183). If the Court did not change direction in response to the Democratic electoral successes in 1934, why would it suddenly change direction in response to the 1936 election? (Kalman 1999, 2172). The power of the "elections theory" is further complicated by the fact that the Court continued to approve New Deal legislation even after the Democratic Party lost seats in Congress after the 1938 elections (See Parrish 2002, 183). A more in-depth analysis of the "elections account" by both historians and legal scholars raises even more questions. These scholars agree that reforming the Supreme Court was not part of Roosevelt's 1936 campaign (Leuchtenburg 1995; Kalman 1999; Cushman 1998; Friedman 1994). Even though reforming the Supreme Court appeared in the rhetoric of Roosevelt's opponents, the President decided not to make "Court reform" an official part of *his* campaign agenda. This muddles the question of whether the election results were indeed a "mandate" for Roosevelt to "reform" the Supreme Court. What the 1936 results undoubtedly showed was that most Americans wanted to continue

Roosevelt's leadership. Whether this approval extended to the dramatic restructuring of the Supreme Court proposed by Roosevelt is less certain (See Kalman 2005, 1076). What mattered to Roosevelt was his belief that the people wanted him to "fix" the Supreme Court and "court-packing" was his intended vehicle for change (Leuchtenburg 1963).

A description of the "political account" would not be complete without reviewing relevant parts of the highly influential externalist account presented by William Leuchtenburg. Leuchtenburg's work convinced a generation of scholars to accept the idea that political pressure caused the Supreme Court to suddenly change course in the Spring of 1937. Roosevelt's "court-packing plan" and the ensuing "court-packing battle" are central components of his theory. In it, the political storm surrounding the 1936 elections and the continuing threat of the "court-packing" plan in Congress caused the Court to change course in the Spring of 1937 (Kalman 2005). Buoyed by his landslide election in 1936, Roosevelt introduced his plan to reform the federal judiciary on February 9, 1937. About six weeks later, on March 29, 1937, the Supreme Court "dramatically altered American jurisprudence" by upholding the constitutionality of a state minimum-wage law. This began what Leuchtenburg has called "an astonishing about-face" for the Supreme Court (1995, 216). In April 1937, the Court "surprised friend and foe by sustaining the Administration in all five cases" involving the Wagner Act[1] (1995, 217). According to Leuchtenburg, the Wagner Act decisions displayed the Court's willingness to recognize a

[1] *National Labor Relations Board v. Jones & Laughlin Steel Corp*, 301 U.S. 1 (1937); *Washington, VA & MD. Coach Co. v. NLRB*, 301 U.S. 142 (1937); *Associated Press v. NLRB*, 301 U.S. 103 (1937); *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937); *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49 (1937))

broader power for Congress under the Commerce Clause. The following month the Supreme Court upheld all of the Social Security cases put before it.[2] Thus ended the "Spring of 1937," a period when "the Court began a revolution in jurisprudence that ended, it appeared forever, the reign of laissez faire and legitimated the arrival of the Leviathan state" (Leuchtenburg 1995, 236).

1.3 Alternative Explanations: Revisionist Theories of Cushman and Friedman

Despite the entrenchment of the conventional account, a growing number of constitutional scholars have made significant strides in "revisiting" the legal and political history of what is arguably the most important transformation in constitutional jurisprudence in the 20th century (Cushman 1998; Friedman 1994). These include such legal scholars as Barry Cushman and Richard Friedman. One of the most prolific scholars working in this area is Barry Cushman, whose revisionist interpretation of the "constitutional crisis" explores an alternative theory of constitutional development. Similarly, Richard Friedman, also a New Deal legal scholar, proposes another alternative theory principally based on judicial interpretation. Historian Lara Kalman has praised both Cushman and Friedman for reconstructing the era's constitutional jurisprudence: "As brilliantly as any formalist Harvard law professor at the turn of the century, they have reconciled cases that once seemed irreconcilable" (Kalman 1999, 2186).

Both Friedman and Cushman want to provide a more complete explanation for the legal changes that occurred during the New Deal period, one that incorporates legal history and

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[2] The Social Security Act cases were as follows: *Steward Machine Co. v. Davis, 301 U.S. 548 (1937); Helvering v. Davis, 301 U.S. 619 (1937); and Carmichael v. Southern Coal Coke & Co., 301 U.S. 495 (1937).*

analysis as an important part of the equation. Revisionist scholars of the New Deal era emphasize how courts are unique institutions in the governmental structure (Parrish 2002). In this sense, the institution of the courts not only constrain actions, but also "prescribe actions, construct motives, and assert legitimacy" (Gillman 1997, 8). Accordingly, both Cushman and Friedman construct their principal theories through the analysis and synthesis of key legal opinions and doctrines.

At the center of Cushman's thesis is a 1934 Supreme Court decision involving a price-fixing law for milk, *Nebbia v. New York.* Cushman argues that the Court's decision in *Nebbia* marked a critical shift in its treatment of government regulation. In *Nebbia*, the Supreme Court abandoned the traditional test used to determine whether a private business could be regulated – the "public interest" test. By doing so, the Court eliminated a crucial piece of doctrinal structure—the careful line of separation between the public and the private in terms of permissible government regulation. This line of demarcation, or the "public/private distinction," allowed the regulation of private businesses shown to be "affected with a public interest" in ways deemed impermissible for other businesses. This included the right for the government to fix prices. Over the course of many years, the Supreme Court had gradually expanded the categories of "businesses affected with a public interest," so that by the time *Nebbia* was decided it was hard for judges to draw clear boundaries between the public and private spheres. *Nebbia* effectively destroyed the category altogether, saying that the term "affected with a public interest" is the equivalent of "subject to the exercise of the police power." Cushman argues that this opened the door for the Court to uphold all regulation "within the police power" of the state, including economic regulations like price-fixing and the minimum wage. Thus, he maintains that

the Court's decision in *West Coast Hotel* was not the beginning of a "constitutional revolution," but rather the logical extension of the principles set forth in *Nebbia* (Cushman 1998).

Like Cushman, Richard Friedman's theory also questions the conventional account and proposes an alternative theory principally based on the study of Supreme Court opinions and legal doctrines. Friedman discusses the doctrinal preferences expressed by individual Justices in different opinions and the internal consistencies that link these decisions over time. He also poses questions, or "thought experiments," that challenge the significance of events in relation to important Supreme Court decisions. For Friedman, the changes in constitutional doctrine that occurred over the New Deal period are best described as a "transformation," not a "revolution" (1994).

With respect to *Nebbia* and *West Coast Hotel*, Friedman and Cushman are in substantial agreement. Like Cushman, Friedman sees *Nebbia* as an important decision, even characterizing it as one of three "thunderbolts" delivered by the Supreme Court from 1934 to 1935 (1994, 1892-93). He concludes that in *Nebbia* Justice Roberts used a "broader brush" to reshape existing doctrine. Friedman states that "Roberts' language was not limited to the context of price regulation but addressed the whole doctrine of substantive due process" (1994, 1919). Agreeing with Cushman, Friedman reemphasizes that *Nebbia*'s abandonment of the public/private distinction "makes it 'a milestone in American constitutional development'" (Friedman 1994, 1922, quoting Cushman 1992, 129-30). As for *West Coast Hotel,* Friedman agrees with Cushman that the doctrinal significance of the case is limited. *Nebbia* had already imposed a "reasonableness" standard on the "the entire doctrine of substantive due process." Friedman

determines that *West Coast Hotel* is "really a corollary of *Nebbia* " that served to confirm its application to the doctrine of "freedom of contract" (Friedman 1994, 1938).

1.4 The Troublesome *Tipaldo*: The Question of Continuity Between *Nebbia* and *West Coast Hotel*

An important component of this study involves the consideration of revisionist legal theory as it relates to the Supreme Court decisions of *Nebbia* and *West Coast Hotel*. In the theories proposed by both Cushman and Friedman, *Nebbia* represents a dramatic shift in Supreme Court doctrine, and its doctrinal significance far exceeds that of *West Coast Hotel*. For Cushman, *Nebbia* is the "linchpin" for the "revolution." *West Coast Hotel,* the traditional marker for the "constitutional revolution," is simply an expansion of *Nebbia*. But in between the two lies the "troublesome" case of *Tipaldo*. Examining these three cases and the relationship between them will highlight important aspects of the "evolutionary story."

Nebbia v. New York, the New York "Milk Case"

In 1933, the New York legislature enacted a statute that imposed price controls on the sale of milk. The statute provided for the creation of a Milk Control Board ("Milk Board") with the authority to fix the minimum and maximum retail prices that sellers could charge for milk in certain areas of the state. Grocery store owner, Leo Nebbia, was found guilty of selling milk below the minimum price set by the Milk Board. On appeal, New York's highest court upheld the constitutionality of the milk law. Its decision was based on the conclusion that the dairy industry fell within the category of businesses "affected by a public interest." *People v. Nebbia*, 186 N.E. 694 (1933).

In the Supreme Court, Nebbia challenged the New York "milk law" as unconstitutional under the equal protection and due process clauses of the Fifth and the Fourteenth Amendments.

Justice Roberts delivered the opinion of the Court. To begin, Roberts examined the New York legislature's stated justification for the statute and the conditions in the fluid milk industry that would support the legislature's passage of price controls. Roberts then addressed Nebbia's claims under both the equal protection and due process clauses of the Fourteenth Amendment. The Court found Nebbia's equal protection claim to be without merit. While conceding that the dairy industry was neither a public utility nor a monopoly, Roberts declared that there is nothing in the Constitution that prohibits states from regulating prices if the public welfare requires it. The Court stated:

> The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells…. (291 U.S. 502, 533-534 (1934)).

Contrary to the appellant's assertions, the Court stated that the application of price-fixing laws was not limited to businesses with specific characteristics. Rather, the phrase "'affected with a public interest' was the equivalent of 'subject to the exercise of the police power'…" On this issue, the court stated:

> [I]t is clear that there is no closed class or category of businesses affected with a public interest, and the function of the courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory (505).

Under this new standard the question was no longer what kind of business was involved, or whether the regulation involved price controls, but whether the legislative policy conformed to the requirements of due process. In this case, the Court found that the New York statute controlling dairy prices was neither "arbitrary, discriminatory, or demonstrably irrelevant" to the

state's legitimate purposes, nor was it an "unwarranted interference with individual liberty" (536-540).

Morehead v. New York ex rel. Tipaldo, 298 U.S. 235 (1936)

In 1936, the Court decided a minimum-wage case that would escalate the rising controversy over its attitude toward government regulation of private interests. This conflict principally stemmed from its decisions striking key parts of the New Deal in 1935 and 1936. The *Tipaldo* decision seemed to provide support for arguments that Justice Roberts, and to a more limited extent, Justice Hughes, had dramatically "switched" their judicial positions in the Spring of 1937 due to political pressure. As Cushman relates, *Tipaldo* would be the proverbial "fly in the ointment" (Cushman 1998, 52).

The *Tipaldo* case arose out of a challenge to the constitutionality of a New York state minimum wage law for women. The New York Court of Appeals had ruled the statute unconstitutional based on the material similarity of the New York law to the one held unconstitutional in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923). This decision was appealed to the United States Supreme Court. On June 1, 1936, a majority of the Court, including Justice Roberts, decided not to overrule the decision of the New York Court of Appeals. The majority opinion was written by Justice Butler who began with a recitation of the narrow confines of the Court's purview:

> The *Adkins* Case, unless distinguishable, requires affirmance of the judgment below. The petitioners for the writ sought review upon the ground that this case is distinguishable from that one. No application has been made for reconsideration of the constitutional question there decided (298 U.S. 587, 590).

In a footnote, the Court further explained the restrictions of its decision. It stated that the principles of the *Adkins* case had not been challenged by the petitioners. The Court thus

"confine[d] itself to the ground upon which the writ was asked or granted" (604-605). After finding that the New York law was indistinguishable from the one at issue in the *Adkins* case, the remainder of the opinion praised the principles set forth in that case, and its application of the "liberty of contract" doctrine to minimum-wage statutes. It concluded that the New York minimum-wage law violated the due process clause of the 14th Amendment (614- 618).

According to later accounts by Justice Roberts and his supporters, the narrow procedural ground set forth in the first part of the *Tipaldo* opinion was the basis for Robert's agreement to join the majority. In a memorandum written in 1945 at the behest of Justice Frankfurter, Roberts asserted that he was ready to consider whether *Adkins* should be overruled in the *Tipaldo* case and would have done so had the question been properly raised. But he was not willing to accept a "disingenuous" argument in order to distinguish the cases and ultimately voted to uphold the New York Court of Appeals' ruling (Frankfurter 1955). In *West Coast Hotel,* Chief Justice Hughes prominently acknowledged the "procedural problem" in *Tipaldo* (380). Ultimately, it is impossible to know why, or whether, Justice Roberts changed his judicial position from *Tipaldo* to *West Coast Hotel* (Cushman 1998).

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

This minimum wage case has long been identified as the "benchmark" for the "Constitutional Revolution of 1937." It is also said to signal the "demise" of substantive due process in economic matters. *West Coast Hotel* originated as a suit by an employee to recover wages owed under the Washington state minimum wage law for women and minors. The woman's employer, West Coast Hotel Company, challenged the constitutionality of the Washington statute as a violation of due process under the Fourteenth Amendment of the U.S.

Constitution. The hotel argued that the law was unconstitutional according to the precedent set in *Adkins* (1923). The employee sought to distinguish the law by arguing that the hotel business was "affected with a public interest" (381).

The opinion of the Court was delivered by Chief Justices Hughes. He began with a discussion of the Court's previous opinion in *Tipaldo* (1936). Hughes stated that in *Tipaldo* "the only question before [the Court] was whether the *Adkins* case was distinguishable; reconsideration of that decision had not been sought" (389). In this case, however, the Washington Supreme Court upheld the minimum wage statute, not finding the ruling in *Adkins* "determinative." Given this ruling and the importance of the question in the present economy, the Court found it "imperative" to reconsider its decision in *Adkins* (389-390).

After examining several cases involving minimum wage laws, Hughes concluded that in each case the statute at issue had been attacked under the due process clause for depriving the parties at issue of their freedom of contract. Hughes continued:

> What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty … 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 (391).

The Court upheld the Washington minimum wage law for women, and explicitly overruled *Adkins*.

CHAPTER 2

ECONOMIC DUE PROCESS AND STATE PRICE CONTROL LEGISLATION

2.1 Introduction

For most scholars of American constitutional law, the United States Supreme Court is the primary, and generally only, court studied. Yet, many of the nation's most important Supreme Court decisions originate from appeals from the state's highest courts. In this study I shift the conventional paradigm to focus on the actions of the states' highest courts at an important juncture in history—the Great Depression---and to analyze the development of constitutional law within that scope.

The analytical framework of my study centers around two New Deal-era Supreme Court cases: *Nebbia v. New York* and *West Coast Hotel v. Parrish*. Each case involved a state law fixing minimum prices for either goods or services, and the Court upheld each law against constitutional challenges based on the due process clauses of the 5th and 14th amendments. In *Nebbia*, the state law at issue authorized the fixing of milk prices in order to "stabilize" the dairy industry. In *West Coast Hotel*, the state law at issue was a minimum wage statute for women and children. At the heart of each case was a statute passed by a state legislature, purportedly in furtherance of the state's legitimate objectives. In order to understand a statute and the problems it has been designed to remedy; it is important to situate the law within its proper historical context (Hutt 1995). The laws in both *Nebbia* and *West Coast Hotel* were passed in the midst of the Great Depression, a time of great social, economic, and political turmoil. During this period, state legislatures passed a flurry of statutes designed to reshape private economic activity, often pushing the limits of what had theretofore been considered permissible.

2.2 A History of the Milk Control Laws

The case in *Nebbia* involved the New York Milk Control Act, one of the first state milk control laws enacted during the Great Depression. Passage of the New York law in 1933 closely followed the enactment of the Agricultural Adjustment Act (AAA) by Congress, a key piece of economic legislation in the New Deal. Congress passed the AAA as a means to combat the serious crisis existing in the nation's agricultural markets. Agriculture, particularly in the South, had been experiencing serious economic problems since the end of World War I. The agricultural situation became only more desperate when the national economy slipped into the Great Depression (Bartlett 1965, 1-2; Kennedy 1990, 17-18, 200-01).

In some parts of the country, depressed agricultural prices resulted in the loss of small farms due to foreclosure. Tensions mounted as farmers pushed back, threatening local officials, turning over milk vats, blocking roads and bridges, and joining the call for "holidays" and for "strikes" (Kennedy 1990, 195-96). The perishable nature of milk made the dairy industry particularly vulnerable to fluctuating market conditions and the violence and disruption which seemed to accompany this instability (Bartlett 1965, 1).

Both federal and state governments sought "to bring order out of chaos" by passing legislation designed to stabilize agricultural markets. At the federal level, Congress empowered the Secretary of Agriculture to develop "marketing agreements with producers and distributors," which included market quotas, producer prices, and minimum prices for wholesale and retail sellers. With respect to retail milk prices, the federal government soon found enforcement at the interstate level to be too difficult. Within a year the federal government ceased regulating retail

milk prices and shifted to regulating the prices distributors paid to milk producers in interstate commerce (Bartlett 1965, 1).

At the same time, many state legislatures passed laws to achieve the same objectives intra-state. By the end of the 1930s, over half of the states had enacted laws that enabled the control of milk prices. Most of these laws were first passed between 1933-35; the remainder were enacted in 1937 and 1939. Many of the laws were intended to be temporary; some were never activated. Some were renewed; some simply lapsed. By the middle of 1943, the federal government had frozen the price for almost all commodities as part of wartime controls, thus suspending any further legislative action on milk prices (Bartlett 1965, 2).

2.3 The Statutory Landscape: An Overview and Comparison of State Milk Control Laws

2.3.1 Overview

One of the great difficulties in studying state legal development on a nationwide scale is finding or compiling a collection of material that fits the appropriate time and topical constraints of the proposed study. For this dissertation, I have used the Marketing Laws Survey, Volumes II and VI (MLS 1940; MLS 1943) as a principal resource. The Marketing Laws Survey is a richly detailed compendium of legal and statutory data prepared by the federal government during the New Deal period. I have supplemented this material with information gleaned from other sources, including court opinions, historical accounts, journal articles and searches of legal databases. According to my research, twenty-six states had passed at least one law authorizing price fixing for milk by the end of 1942 (MLS 1940; Bartlett 1965). In these states, approximately one-half of the statutes were declared constitutional on due process grounds before 1942. The remainder were either declared unconstitutional or their constitutionality had

not been determined by that time. Figure 1 is a map of the forty-eight states comprising the United States as of 1942, colored to represent the twenty-six states that had passed at least one milk control law in the period between 1933 and 1942. States having milk price control laws that were constitutional at any time before 1942 are represented in purple. States having milk laws that were deemed unconstitutional before the end of 1942 are represented in gold. If the constitutional status of the state statute as of 1942 is undetermined, the state will be shaded grey.

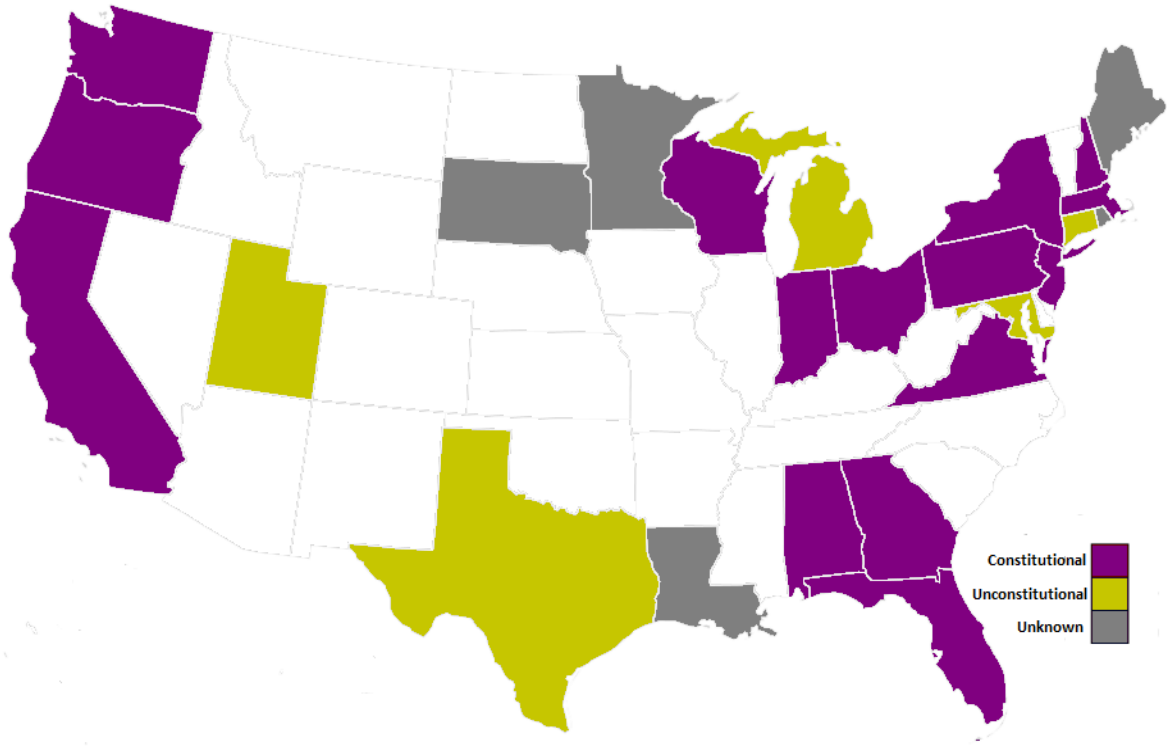

Figure 1. States Passing Milk Control Laws and Constitutional Status: 1933-1942

2.3.2 Comparison of State Milk Control Laws

For the purpose of comparing "milk control" statutes, I have restricted my examination to the "statutory summaries" found in Volume II of the MLS. Each of these "summaries" includes a restatement of the relevant language of the "milk control" portions of the state statute. The MLS summaries cover milk control statutes from twenty-one states. In general, these summaries reflect the law in effect at the time the data was collected. It should be noted that this version may not be the first law passed, or the one discussed in the case analyses. On the whole, my research and the nature of the summaries leads me to conclude that they accurately represent the most important elements of the state milk laws during this period.

My initial observation is that the statutes have many similarities but are not identical. Given the historical and political conditions surrounding the passage of these laws, it is not surprising to see these similarities, particularly in those statutes enacted in the initial period—1933-1935. These similarities could have resulted from the federal government's efforts under the AAA (1933) to pass concurrent state legislation or were simply the product of legislatures transforming another state's legislation into their own. My analysis of the MLS statutory summaries covers four principal areas: (1) the authority of the Milk Board or Commission; (2) the "triggering" point for the initiation of regulation; (3) the method of enforcement; and (4) the "conditions" to be used in setting a fair price.

Most states created an administrative entity, either a Milk Control Board or Commission, and vested it with substantial authority over the milk industry. In general, the members of the Milk Board were appointed by the governor. The Milk Board had power over licensing, setting

milk prices, and enforcing its orders. In some states theses powers were vested in the state's Secretary of Agriculture.

One of the most intriguing differences in the states' "milk laws" was the way in which each state decided that milk controls should be initiated. In eleven states, the decision to act was left to the discretion of the Milk Board. In other states, however, the state milk board could not consider regulatory action, including price controls, unless milk industry participants within the specified area had agreed that action was needed. Most states required at least a majority of the milk industry's agreement to initiate action. At the other end of the spectrum, Massachusetts' law only required the assent of twenty-five percent of industry participants. Finally, many states allowed the Milk Board to adopt the provisions of a written agreement among a specified number of milk industry participants.

Once a state Milk Board had issued an order fixing prices for milk products, it needed ways to be able to enforce it. To that end, almost all state milk laws gave the Milk Board at least two powerful tools: the ability to control the licensing status of milk industry participants, and the authority to impose criminal penalties on violators. Those who violated the orders of the Milk Board could be charged with a misdemeanor, punishable by a fine and/or jail time. In approximately half of the states, the Milk Board had discretion to determine the amount of any fine. In the remaining states, the law prescribed a statutory minimum and/or maximum fine for a single offense. The ultimate power of the Milk Board, however, was its ability to revoke or suspend licenses. With this, the Milk board could sound the "death knell" on a dairy business.

Most state milk laws required the Milk Board to hold a public hearing before issuing an order fixing a minimum price for milk products. In addition, the Milk Board was to follow

certain guidelines in setting the minimum price. These statutory guidelines, as well as procedures like public hearings, served a vital constitutional purpose—establishing a solid basis for validating the law as a proper delegation of legislative authority. Based on my review of "milk law" cases in this study, almost all the milk statutes that were declared unconstitutional involved an invalid delegation of legislative authority.

Each state legislature set its own guidelines for setting minimum prices, and some states were considerably more specific than others. Generally, state legislatures would declare that the Milk Board should be "just and reasonable" and have ample regard for the public welfare. At the same time, the Board must set a price that is high enough to provide a "reasonable return" for the producer/seller (E.g.; Georgia, Florida, Louisiana, and Michigan). Several states included "considerations" that promoted broader legislative policy objectives, such as safeguarding consumer purchasing power (New York, California, and Connecticut); protecting children's welfare (Pennsylvania); and maintaining adequate wages and safe conditions for workers (Georgia and Florida).

Did price-fixing represent an "ideal" solution for everyone affected? It would be difficult to imagine how it could, given the competing interests of consumers and sellers. In theory, the "minimum price" was supposed to reflect a careful balancing of these competing interests, setting the final price at a point where the consumer's ability to pay and the producer/distributor's ability to sustain an adequate supply of milk intersect. But the principal objective behind the "milk laws" was the stabilization of the state's milk industry.

The table below (Table 1) lists the twenty-one states whose milk control laws were "summarized" in Volume II of the Marketing Laws Survey. The relevant date or dates on which these laws were passed or amended is also included. The "statutory summaries" found in the MLS, Volume II are the basis for my analysis in the preceding section.

Table 1. State Milk Control Laws Represented in MLS Summaries by State and Year

State	Year, Amended		State	Year, Amended
AL	1935		NJ	1935
CA	1935, 1937		NY	1933
CT	1933		OR	1933
FL	1935. 1940		PA	1935
GA	1937		RI	1935
IN	1935		SD	1935
LA	1939		UT	1937
MA	1934,1937,1939		VA	1933
MI	1939		VT	1933
MT	1935		WI	1935
NH	1937, 1939			

2.4 Substantive Due Process: A Historical Perspective

All of the principal state supreme court decisions reviewed in this study involve substantive due process claims under the state and/or federal constitution. This section will provide an overview of important concepts and cases in the area of substantive due process and economic rights. This overview will serve as an aid in understanding the reasoning of the state courts in economic due process cases. This will be followed by a section devoted to Supreme Court cases on price-fixing.

Since before the Founding, states have been the cornerstone of economic and social regulation, and state constitutions have provided the basis for protecting individual rights. Over the years judicial rules and standards were developed to determine whether the police power of the state had been properly used. These rules and standards formed what has become known as the "police powers doctrine," a doctrine that incorporated the Jacksonian principles of "market liberty" and "political equality" (Gillman 1993, 33). As the concept of due process developed, the protected right included not only the right of bodily freedom, but also the freedom for a person to use his talents in any lawful means, "'to live and work where he will, to earn his livelihood in any lawful callings, and to pursue any lawful trade….'" (Galie 1988, 78 (quoting *In re Jacobs*, 98 N.Y.98 (1885)). These freedoms were part of the "property and economic rights" that Americans saw as essential to liberty and worthy of constitutional protection. The importance of these "doctrines of vested rights and economic due process" should not be understated; they were designed to protect liberties imbedded in "the constitutional and political tradition of the United States" (Galie 1988, 78).

By the end of the nineteenth century, the United States Supreme Court had adopted the doctrine of "liberty of contract." The first application of that doctrine to the states occurred in *Allgeyer v. Louisiana*, 165 U.S. 785 (1897). Over the next few decades, the Supreme Court used substantive due process to invalidate almost two hundred state and federal laws restricting economic rights. But, overall, the Court sustained more of the challenged laws than it invalidated. (Note, "Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered." 1990, 1365-1366). The laws that were declared invalid may be placed into one of three categories: "measures designed to remedy perceived inequalities in bargaining power between employer and employee; measures directly regulating the manufacture, pricing, and marketing of goods and services; and measures limiting access to particular businesses or occupations" (1366n.23).

Of the Supreme Court decisions declaring a state law invalid, one would become infamous: *Lochner v. New York*, 198 U.S. 45 (1905). In *Lochner*, the Court declared a New York statute setting the maximum hours for bakers unconstitutional. The state argued that the law was within the proper scope of the state's police powers as it was designed to protect the health of the bakers. The Court rejected the state's argument, saying that the law did not have a sufficiently close relationship to the public health or welfare. It was a labor law outside the realm of the state's police power. As such, the law violated the parties' "liberty of contract" by restricting the ability of the parties to contract freely over the conditions of employment. A "stinging dissent" was penned by Justice Holmes who accused the majority of simply reading a form of "laissez-faire" capitalism into the Constitution. Over the years, Holmes' dissent became the "dominant"

view espoused by academics and judges, casting *Lochner* as an example of improper activist behavior by the Supreme Court (Galie 1988).

Prior to the changes of the 1930s, the doctrine of substantive due process in economic matters could best be described as interrelated but stratified. Although the decisions shared overarching themes, such as the principle of neutrality and the protection of health and public welfare, the decisions were often based on categorical assumptions and particularized standards (Cushman 1998). To fully present and analyze all of the Supreme Court's decisions on economic due process is beyond the scope of this inquiry. Rather, I have selected a series of cases showing the development of the Supreme Court's doctrine with respect to price fixing, the issue presented in both *Nebbia* and *West Coast Hotel.*

Although jurisprudence on the legality of government regulation of private business has existed as part of the common law for centuries, the question of state regulation of prices as a violation of due process garnered national attention in the landmark case of *Munn v. Illinois,* 94 U.S. 113 (1877). In 1871, the state of Illinois passed a statute to regulate public warehouses and the warehousing and inspection of grain. Munn & Scott, proprietors of a Chicago grain warehouse, were found guilty of charging rates above those set by the state (117-118). On appeal to the United States Supreme Court, Munn & Scott argued that the Illinois statute was unconstitutional under both the interstate commerce clause and the due process clause of the federal constitution. Chief Justice Waite delivered the opinion of the Court. To begin, the Court recognized the "inherent" power of the state to prescribe laws for the conduct of persons and businesses as necessary for the public good. Using this power, the state could, under certain

circumstances, fix the "maximum charge for services rendered, accommodations furnished, and articles sold," without depriving anyone of their private property (125).

Chief Justice Waite then recounted the development of the legal principles that would allow some private businesses to be regulated, and others not. Here he cited extensively to the seventeenth century legal treatises of England's Lord Chief Justice Hale for the principle that "when private property is 'affected with a public interest, it ceases to be *juris privati* only.'" Chief Justice Waite stated:

> Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When therefore one devotes his property to a use in which the public has an interest, he in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has created (126).

Waite examined this concept -- "affectation with a public interest" -- in great detail. Adopting this principle, Waite stated that the only question left to be determined was whether Munn & Scott's warehouse business fits within its scope (130). On this issue the Court emphasized the large volume of grain stored in the Chicago warehouses and the importance of the grain warehouse industry as a "'gateway of commerce'" for grain producers. Waite also pointed to the "virtual monopoly" that the nine businesses in control of the Chicago warehouses had in fixing the prices for access to these vital storage facilities. The Court concluded:

> [I]t is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartmen, or the hackney coachmen, pursues 'a sort of public office,' these plaintiffs in error do not….Certainly, if any business can be clothed 'with a public interest, and ceases to *be juris privati* only,' this has been (131-133).

Ultimately, the Supreme Court would trace all of its price-fixing decisions to the *proper* operation of the principle expounded in *Munn v. Illinois* (See *Nebbia, 1934*). Whether the

Court's characterization of its "return" to *Munn* was accurate or not, it was the lens through which the Supreme Court intended for its jurisprudence to be seen. Imbued with such importance, Waite's opinion has raised an intriguing question: What did Lord Hale really mean when he referred to the legal treatment of "businesses affected with a public interest"?

This question was addressed in an article by Walton Hale Hamilton, a prominent Yale law professor (1930). Professor Hamilton confirmed Waite's assertion that the origin of the phrase could be attributed to Sir Matthew Hale, Chief Justice of Great Britain in the seventeenth century. Beyond that affirmation, Hamilton presented a history that seems at odds with Waite's conceptualization. He pointed out that although Justice Hale used the phrase "affected with a public interest," it was in the context of the rates charged by ports and wharves, not the conduct of all businesses in general. Rather, at the time Justice Hale was writing, it was common for all types of businesses to be subject to extensive government regulation, including the setting of rates and prices. Hamilton stated that the "principle" recognized two centuries later by American courts had been transformed into something quite different –as a defense against government regulation in a rapidly evolving industrial world (Hamilton 1930).

This "defense" became a staple of American law in the nineteenth and early-twentieth century. Using the "public interest" test, courts could protect private property rights from unwarranted encroachment by the government. A law within the proper scope of the state's police power would serve a legitimate public purpose and would not favor one group at the expense of another. The latter concept has been called the "principle of neutrality" (See Cushman 1998, 90). Going forward, it is evident that these principles played an important role in many of the state supreme court decisions examined in this study.

The next relevant case selected for discussion was decided over fifty years later at the start of the "Roaring Twenties." The *Adkins* case emerged in a time of relative affluence and rapidly changing social and political attitudes, all of which were reflected in the Court's opinion. *Adkins*, 1923, involved a due process challenge to a minimum-wage statute for women in the District of Columbia. The Children's Hospital attacked the statute as "an unconstitutional interference with the freedom of contract." The Supreme Court acknowledged that "the right to contract" was a well-recognized component of the individual liberties protected by the Fifth Amendment. Even so, the freedom of contract was not absolute, and could be limited in certain instances. The court then identified four types of statutes where the Court had found exceptional circumstances to exist: (1) those fixing rates on a business affected by a public interest; (2) those involving public works contracts; (3) those providing for manner, method, and time of paying wages; and (4) those restricting the hours of work (545-546).

Although the Court had found the control of women's work hours constitutional in *Muller v. Oregon*, 208 U.S. 421 (1905), it declined to apply the same rule for women's wages as it did for hours. The Court pointed to the "revolution" in the status of women, most notably apparent in the recent passage of the Nineteenth Amendment. With "the ancient inequality of the sexes" diminishing, the Court saw no sufficient reason to establish protective legislation for women, unless it was based on physical differences or conditions "detrimental to health." A minimum-wage statute did not satisfy this standard. The Court stated: "It is simply and exclusively a price-fixing law, confined to adult women …. who are as capable of contracting for themselves as men" (546).

The Court also stated that the standard for fixing the minimum wage was vague and inadequate, having "no relation to the capacity or earning power of the employee," or to the hours of work. It relied on the agency's opinion as to what a woman needed for her subsistence, "to keep her in health and preserve her morals." The Court stated that it was not possible to standardize the relationship between a woman's wages and her morals. As a way of preserving morals, this standard lacks a "reasonable basis" (555-556). What the Court found most bothersome about this statute was the fact that it required the employers to make payments for a purpose that had "no causal connection" to the business—the livelihood of the employee. If an employer paid a fair price for the employee's services, even if that wage did not sufficiently support the employee, the employer was not the cause of her poverty. The Court then stated:

> *In principle, there can be no difference between the case of selling labor and the case of selling goods.* If one goes to the butcher, the baker, or grocer to buy food, he is morally entitled to obtain the worth of his money; but he is not entitled to more. If what he gets is worth what he pays, he is not justified in demanding more, simply because he needs more…. (558-559) (emphasis added).

Although the Court acknowledged that individual liberty must "yield to the common good," this minimum wage statute had pushed too far. The Court held that the act was an "arbitrary restraint" of personal liberty and was invalid under the due process clause of the Fifth Amendment (561-62).

This decision would play an important role in the adjudication of economic regulations for over a decade. *Adkins* became the principal source of legal authority not just for minimum wage cases, but also for other types of economic regulation (Sigler 1951, 248). The latter was made possible by the Court's reasoning in *Adkins* on the classification of minimum wage laws. In *Adkins*, the Court refused to place the D.C. minimum wage statute in the same category as

other "labor" laws it had approved, such as the hours restrictions in *Muller*. Instead, the Court reasoned that the statute was "simply and exclusively a price-fixing law…." (561). Using this line of reasoning, *Adkins* provided authority for rejecting all types of price-fixing statutes whether connected to the "minimum wage" or not.

Wolff Packing v. Court of Industrial Relations of the State of Kansas, 262 U.S. 522 (1923).

That same year, 1923, the Supreme Court, now headed by former President William Howard Taft, was asked to decide the validity of a 1920 Kansas statute involving the authority of the state's "Industrial Court" to settle wage and other employment disputes in five types of businesses deemed to be "affected with a public interest." In 1921, a union complaint was filed in the Industrial Court against the Wolff Packing Company with respect to the wages paid by the company. The Industrial Court ordered the company to raise wages and limit hours; this order was upheld by the Kansas Supreme Court. The Wolff Packing Company appealed to the United States Supreme Court, arguing that the Kansas Industrial Court Act violated its due process protections under the Fourteenth Amendment. Citing *Adkins*, 1923, the Court stated that the legislature may not restrict the employer or employee's liberty to contract freely absent "exceptional circumstances" (534). Acknowledging the difficulty courts had in identifying businesses "affected with a public interest", Taft described three categories under which such businesses should fit. Taft's three categories follow:

1) businesses operating by "public grant of privilege" which impose an affirmative duty to render a public service; e.g., public utilities, railroads, or common carriers;
2) occupations historically recognized as serving the public interest; e.g., inn keepers, cab companies, and gristmills; and
3) those businesses "not public at their inception" but whose operations are now so "devot[ed]…to a public use" that the public has gained an interest in them (535-536).

The third category was the largest and the most indeterminate. It covered a broad spectrum of businesses ranging from grain warehouses (*Munn, 1877)* to insurance companies (*German Alliance Ins. Co. v. Lewis,* 233 U.S. 389 (1914). According to the Court, what the businesses in the last category had in common was the "indispensable nature of the service" and the possibility that the public might be subject to exorbitant or arbitrary charges absent government regulation. Further, the Court stated:

> It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator, or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation… (537).

Overall, Taft's categories had limited effect. As Hamilton concluded, Taft's efforts to give "the indefinite phrase a definite criterion" "fall just short of being useful" (Hamilton 1930, 1099-1100). The classifications still provided no real definition of what it meant to be "affected with a public interest," nor any real guidance for either the courts or the legislatures (1101).

Over the next decade, the Supreme Court issued rulings on substantive due process questions with mixed outcomes. As previously discussed, overall, the Court upheld more due process challenges than it struck. Indeed, it is fair to say that the doctrine of substantive due process was seriously compromised before the Supreme Court's decision in *Nebbia* (Cushman 1998). Even so, the Court's decision in *Adkins* continued to shadow the Supreme Court after *Nebbia*, most notably in the *Tipaldo* case. Here the majority of the Court extolled the virtues of *Adkins* and the "liberty of contract" doctrine. With *West Coast Hotel* the lingering presence of *Adkins* was permanently removed from Supreme Court doctrine (Cushman 1998, 84-105).

After *West Coast Hotel,* the Supreme Court did not strike down any other state economic regulations on due process grounds. However, this did not mean that economic due process cases ceased to be heard in the Supreme Court. Even though the principles of *Nebbia* and *West Coast Hotel* were firmly in place, the Supreme Court still faced the process of cleaning up the contradictory jurisprudence it had created. This meant that the Court would have to overturn conflicting precedents on a case-by-case basis. In 1941, the Court had to reconsider its prior precedent on employment agency fees in the case of *Olsen v. Nebraska*, 313 U.S. 236 (1941). Olsen involved a constitutional challenge to a Nebraska state law fixing the maximum amount of fees charged by an employment agency. Relying on the Supreme Court's 1928 decision in *Ribnik v. McBride*, 277 U.S. 350, the Nebraska Supreme Court held that the law was unconstitutional (240).

The *Olsen* opinion began with a ready conclusion that the Nebraska statute did not violate the defendant's due process rights. Justice Douglas then recounted in detail the progression of cases that showed why *Ribnik* was no longer "controlling authority." (243-244). Here the Court characterized its case history as a "drift" away from the restrictive principles set forth in *Ribnik*. As the Court related its own history, all of its decisions since 1928, save two, had favored an "increasingly wider scope" for the price-fixing powers of government (244). These decisions involved statutes that fixed or limited prices or wages in a variety of industries and circumstances, including: the commissions of stockyard agents (*Tagg Bros.,* 1930); the commissions of fire insurance agents (*O'Gorman*, 1931); retail milk prices (*Nebbia*, 1934); minimum wages for women and minors (*West Coast Hotel,* 1937); tobacco warehouse charges (*Townsend*, 1937); coal prices (*Sunshine Coal,* 1940); and the federal minimum wage law

(*Darby*, 1941). Justice Douglas stated that these cases are much more than "scattered examples of constitutionally permissible price-fixing schemes"; they demonstrate "a basic departure from the philosophy and approach" of *Ribnik.* In that case, the Court's decision rested on the principle that, absent an emergency, legislative price-fixing was only constitutional if the business to be regulated was "affected with a public interest." This "test" of constitutionality was no longer viable, having been "discarded" by the Court in *Nebbia.* Once this test had been eliminated, *Ribnik* ceased to be good law (313 U.S. 236, 244-46).

Note how Justice Douglas framed the Court's constitutional history over the past decade—as a "*drift*" towards an ever-widening scope of approval for economic legislation. To say that the Court was "*drifting*" implies a type of jurisprudence that is even less directed than a slowly progressing evolution of constitutional doctrine. This characterization seems out-of-sync with the tumultuous intellectual and political conflict surrounding the proper limits of economic legislation present in the 1930s. Although it appears that the Court was indulging in its own revisionism, the decisions cited by Douglas *do* progress forward in favor of allowing legislatures more leeway in regulating "private business." Moreover, Douglas emphasized that together these cases represented a "basic departure" from the constitutional test used in *Ribnik* – whether the business was one "affected with a public interest." In other words, even if the decisions were meandering, *the end result was a fundamental change* in the way the Court decided the constitutional issue.

When did this fundamental change occur? Justice Douglas placed *Nebbia v. New York* at the center of the "departure." The Court stated that *Nebbia* "discards" the test of "affected with a public interest" (313 U.S. 236, 245). Douglas' use of the word "discard" is significant in two

ways. First, it demonstrates how little regard the Court now has for the "public interest" test. Second, it shows the Court's recognition that the *Nebbia* decision eliminated a dubious constitutional test that blocked "reasonable" economic legislation, both state and federal. By placing *Nebbia* at the center of a fundamental change in the court's jurisprudence, the *Olsen* Court recognized its importance to constitutional development.

CHAPTER 3

STATE MILK CASES AFTER *NEBBIA*: 1934-1942

3.1 Introduction

The state milk control laws of the early 1930s posed potentially difficult challenges for the state courts. Before the Supreme Court's 1934 decision in *Nebbia*, legislation involving price-fixing was constitutional only if the business regulated was "affected with a public interest" and price-fixing was the necessary remedy. Even though the Supreme Court had "loosened" the rigid categories of "public interest" doctrine over the years, lower courts would be wary of expanding the type of businesses that were "affected with a public interest." But New York's highest court took that chance in *People v. Nebbia, 186 N.E. 694 (1933)*, holding that New York's milk control law was constitutional. In reaching its decision, the New York court pushed the boundaries of the public interest doctrine, finding the dairy industry to be a business "affected with a public interest," and upholding the use of price-fixing as an appropriate remedy. This decision was appealed to the United States Supreme Court, and the New York law would be the first state milk price control law contested before that Court.

To uphold the New York statute, the Supreme Court could have used the traditional test, expanding the category of businesses "affected with a public interest" to include the New York dairy industry. It had expanded the "public interest" category many times before (See *O'Gorman & Young, Ins. v. Hartford Ins. Co.*, 282 U.S. 251 (1931); *German Alliance,* 1914; Hamilton 1930, 1099). But the Supreme Court did not take this course. Instead, it changed the "playing field" altogether, abandoning the public/private distinction and crafting a new standard for the evaluation of economic regulation. In short, the *Nebbia* Court chose to effect "a revolution in due

process jurisprudence" (Cushman 1998). The changes introduced by *Nebbi*a would make it far easier for state courts to uphold social and economic regulation. Still, the question remained: Would the state courts follow *Nebbia's* lead? In other words, how deep did *Nebbia's* "revolution" go?

The traditional approach to studying lower appellate court decisions as a part of constitutional development focuses on the extent to which these courts follow the United States Supreme Court. Essentially, scholars are interested in seeing how the broad legal declarations of the Supreme Court were implemented by the lower courts (See Denniston 2014, 12). Roberts' opinion in *Nebbia* declared broad, new principles that would shake the foundations of economic due process. Thus, the traditional approach suits this study, particularly since *Nebbia* introduced a new standard for judging the constitutionality of economic statutes. The extent to which the state courts follow *Nebbia*'s lead will be the principal focus of my analysis of the state milk control cases. *Nebbia* and *West Coast Hotel* will be considered as a unit whenever a state court discussed either or both cases.

Assessing the impact of these decisions on constitutional jurisprudence cannot be determined by simply looking at case outcomes. Indeed, any outcome could be deceiving if the state supreme court misconstrued *Nebbia*. This is particularly true where the state supreme court has upheld the state law but has retained the old "public interest" test. Whatever the outcome of the state case, the best evidence of *Nebbia's* power and influence lies within the text of the opinion. That is why my analysis rests principally on an exhaustive examination of the state court opinions selected for this study. The cases selected here reflect the same or similar issues the Supreme Court faced in making its landmark decision in *Nebbia*: a constitutional challenge to

a state statute authorizing the fixing of prices for milk ("state milk control law"). In all but a few of the principal cases, the state's highest court ruled that the milk law did not violate the due process clause of the federal or state constitution.

3.2 Navigating the Dual Constitutional System

In most of the cases reviewed, due process claims were made under both the state and federal constitutions. When state and federal constitutional questions intersect, what basic principles govern the relationship? Three principles have been identified by Tarr and Porter (1987, 8). The first involves the supremacy of federal law over state law. So long as the federal law is valid, the supremacy clause of the federal Constitution ensures that federal law will prevail in any conflict between state and federal law. The second principle recognizes the authority of each court system to interpret its own law. The third principle involves "state autonomy": when issues of both state and federal law are raised, a state supreme court's ruling will not be reviewed by the U.S. Supreme Court if the decision is based on "independent and adequate state grounds." *Fox Film Corp. v. Muller*, 296 U.S. 207 (1934). This concept is consistent with the long-established principle that a state's highest court is the final arbiter of the meaning of its own constitution (Beavers and Emmert 2000, 2).

Following these principles, any examination of the "milk cases" involves a two-part inquiry. Where a federal constitutional right has been invoked, the state supreme court must follow the decisions of the United States Supreme Court. Where a state constitutional right has been invoked, the state supreme court has more freedom in reaching its decision. As the governing voice on the meaning of the state's constitution, the state supreme court will have considerable leeway in interpreting any state constitutional issue. In deliberating the state

constitutional issue, the state supreme court may draw from multiple sources, including the state constitution, the court's own precedents, decisions from sister states, and the opinions of the United States Supreme Court.

Although state supreme courts often consider the decisions of the U.S. Supreme Court to be "highly persuasive" on similar state issues, they are not bound by them. Conversely, the state supreme court's own precedents are binding under the doctrine of *stare decisis.* In truth, not all precedents, whether "binding" or not, have the same value. Those precedents that garner the most respect would be ones considered "leading," "established," "judicially affirmed," and "approved by legal academics." Weak precedent would include a decision made by a strongly divided Court or missing a particular justice, one that had a poorly crafted opinion, or one where an "affirmative" divided opinion existed. Moreover, the state supreme court could choose to diffuse the precedent by distinguishing it, or by "conscious judicial oversight" (Note, "The Attitude of Lower Courts to Changing Precedents." 1941, 1448).

Many state supreme courts also looked to the decisions of sister states for guidance. Given the "linguistic similarities in the constitutions of the various states" and the "linguistic similarities" in the statutes, it was no surprise to find state supreme courts closely examining analogous cases in other states (Tarr and Porter 1987, 9). Indeed, it seems evident from examining the milk law statutes and the state milk law cases that many state legislatures modeled their statutes after existing laws in other states. This made other state supreme court decisions particularly persuasive, especially if the law's provenance could be traced to the New York Milk Control Act already approved by the United States Supreme Court in *Nebbia*.

3.3 The "Milk Cases": Analysis

3.3.1 Introduction

Between 1934 and 1942, twenty-six states passed at least one law designed to control the price of milk. These laws represented the efforts of over one-half the state legislatures in the country, and the constitutionality of over half of these laws would be challenged in the state courts. After the Supreme Court's decision in *Nebbia,* the state courts were no longer bound to follow the traditional "public interest" test in assessing the constitutionality of a milk control law. *Nebbia* had "discarded" the public/private distinction, along with the "taboos" associated with price-fixing. So long as the law was "reasonable," and not "arbitrary or capricious," the federal constitution was satisfied. In reaching this result, the Supreme Court had made a very significant, if not "revolutionary," shift in its due process jurisprudence. In fact, it can be persuasively argued that *Nebbia* dealt a "death blow" to the Court's doctrine of economic due process (See Cushman 1998; Friedman 1994).

Now each state court would have to decide on its own how to handle the constitutional question. Would the state court follow *Nebbia's* lead and discard the "public interest" test? Would it ignore the changes wrought by *Nebbia* and make its decision based on "traditional" due process concepts? Or perhaps, the state court would fashion a solution somewhere in the middle. The key point is that the state court would have to act based on its own interpretation of its state constitution. That independence, made possible by *Nebbia's* retreat from the restrictive concepts of "traditional" due process, was a feature of every opinion that will be reviewed in this chapter.

Table 2 represents an extensive compilation of data derived from my analysis of state case opinions and state laws, data from the Marketing Laws Survey, milk reports, and journal articles. The extensive collection of cases on milk control laws in *Mississippi Milk Comm'n v. Vance*, 129 So.2d 642 (Miss. 1961) was particularly helpful. The table is divided into six columns. The first column lists the abbreviated name of a state having a milk control law before the end of 1942. The second column shows the date the original "milk law" statute was passed. If the date is marked with an asterisk, price-fixing provisions for milk were passed in a later session. The third column gives the brief name of the principal constitutional case and the fourth column the year in which the case was decided. The fifth column highlights the version of the statute addressed in that case. The last column indicates whether the constitutionality of the statute had been decided before the end of 1942.

Not counting New York, twenty-five states are listed as having enacted statutes that would allow the price-fixing of milk before the close of 1942. Challenges were raised with respect to the constitutionality of these laws in twenty states. All but two of the cases were decided by the respective states' highest tribunal. Of the state courts that made a definitive ruling, fifteen statutes were found to be constitutional. Only five state milk control statutes were rejected as unconstitutional. All but one of these five statutes were rejected by the courts as an unconstitutional delegation of legislative authority. (See 3.3.3, *infra*).

Table 2. Principal Cases on Constitutionality of State Milk Control Laws After *Nebbia*: 1934-1942

State	Original Statute	Case Name	Case Decided	Statute Year	Constitutional/ Unconstitutional
CA	1933*	Jersey Maid	1939	1937	C
CT	1933*	Stoddard	1940	1937	U
FLA	1933*	Miami Home	1936	1935	C
NJ	1933	Newark Milk	1933	1933	C
Ohio	1933	Clover Meadow#	1934	1933	C
OR	1933	Farmer's Union	1939	1937	C
VT	1933	Auclair	1939	1937	C
WI	1933*	Lincoln Dairy	1936	1935	C
MA	1934	Gosselin's Dairy	1938	1934	C
PA	1934	Rohrer	1936	1934	C
RI	1934				No case.
TX	1934	State v. Hall #	1934	1934	U
VA	1934	Reynolds	1934, 1935	1933	U/C
WA	1933	Griffiths	1935	1933	U
AL	1935	Franklin	1936	1935	C
IN	1935	Albert	1936	1935	C
MAINE	1935				No case.
MD	1935	Maryland Milk	1936	1935	U
MN	1935				No case
NH	1935	Opinion of the Justices	1937	1935	C
SD	1935				No case
GA	1937	Bohannon	1938	1937	C
UT	1937	Rowell	1940	1937	U
LA	1939				No case.
MI	1939	Johnson	1940	1939	U
Legend	*Price-fixing provisions in subsequent version	#Intermediate Appeals Court			Source: Compilation of data from state case opinions, milk control laws, Marketing Laws Survey, reports, and journal articles.

3.3.2 State Milk Laws Found Constitutional

VIRGINIA

The Two Sides of *Reynolds v. Virginia*

The "revolutionary principles" of *Nebbia* were soon tested by the highest courts of several states. One of the first to render an opinion was the Supreme Court of Appeals of Virginia. In November 1934, the Virginia Supreme Court issued a split decision holding Virginia's milk control act to be unconstitutional. *Reynolds, et.al. v. Milk Commission of Va.,* 177 S. E. 44 (1934). The majority of justices, four to two, found the state's milk law to be in violation of the due process provisions of the Virginia Constitution. Rejecting the new concepts set forth in *Nebbia*, the majority decided to retain a categorical and restrictive expression of the "affected with a public interest" test for state constitutional claims. The reasoning behind the majority's decision mirrored the "old-line" views expressed by the dissent in *Nebbia*. Indeed, the justices themselves recognized this, stating that:

> [we] are told that these views are antiquated, outmoded, unsuited to the more abundant life that lies before us, and should be filed away in some impossible museum of loyalties. But they are of ancient origin and have hitherto met every test, theoretical and pragmatic. They are written into our Constitution and are not to be put away by construction. They have in 'high cabal made us what we are. (177 S.E. 44, 53).

As might be expected, this decision generated considerable controversy. A scathing critique of the opinion soon appeared in an article published just two months later in the Virginia Law Review. The article presented a forceful argument that the majority's reasoning was deeply flawed, including its approach to United States Supreme Court authority on price-fixing. The author stated that, although the Virginia court cited numerous Supreme Court opinions as authority, it had just "cherry-picked" which cases to follow. He concluded that the Virginia

court's use of the Virginia constitution as the reason for its decision was "a mere makeweight for overruling the *Nebbia* case. It is something new in the doctrine of *stare decisis* to follow a chain of authority only omitting the first, middle, and last two cases expounding it" (Note, "Constitutional Law: Price Fixing in Milk Industry Contrary to Virginia Constitution." 1935, 338).

Not long after this article was published, the *Reynolds* case again appeared before the Virginia Supreme Court on rehearing. This time the Court reached a different result, adopting Justice Gregory's dissenting opinion in the first case as its majority opinion. *Reynolds, et. al.. v. Milk Comm'n.*, 179 S.E. 507 (1935). In this opinion, the Court succinctly defined the principal question at issue: whether the 1934 Milk Act violated due process protections in either the Virginia or federal constitutions. If the Virginia milk control law was substantially similar to the New York law considered by the Supreme Court in *Nebbia*, then that decision was binding on the federal constitutional question. Further, if the Act did not violate the federal constitution, then it did not violate the Virginia constitution. After a careful examination of the Virginia law, the Virginia Supreme Court agreed with the lower court that the New York and Virginia laws had "no substantial differences" for the purpose of constitutional analysis. The court also noted that in the statute the legislature had "declared the milk industry of the state to be affected with a public interest" and nothing had been presented to dispute this. Citing three Supreme Court cases ending with *Nebbia*, the Virginia court concluded that there was sufficient precedent to uphold the use of price-fixing as a regulatory tool in the Virginia milk law (507).

On the other hand, the Virginia court was not ready to adopt the more expansive views set forth in the federal case. Rather, the court stated that "it [was] not necessary for this court to

apply the principle in its broadest aspect, nor [was] it necessary to commit the court to the proposition that the state ha[d] the power to control private businesses unless it [was] affected with a public interest" (508). Although the court acknowledged that *Nebbia* was a "landmark" case in the law of state business regulation, it concluded that applying Justice Roberts' "new test" extended "farther than it [was] necessary for us to go in the case at bar" (508).

As previously noted, *Reynolds* was one of the first milk law cases decided by a state supreme court after *Nebbia*. Given the "newness" of *Nebbia* as well as its departure from the traditional "public interest" test, it is not surprising that the Virginia court's final opinion in *Reynolds* was a cautious one. While not denying the importance or authority of *Nebbia,* the court viewed this case through a narrower lens—the milk industry was "affected with a public interest" and price-fixing was a reasonable means of regulating the milk supply. The Virginia Court appeared to have loosened the rigid categories of the old "public interest" test without abolishing it and had accepted price-fixing as a valid remedy to accomplish the desired result under the circumstances. Indeed, this was similar to the reasoning used by Justice Pound in *People v. Nebbia* (1933), the case upon which the Supreme Court's decision in *Nebbia* was based. By not aligning itself too closely with *Nebbia,* the Virginia court created more space for it to define the boundaries of what would be acceptable economic regulation under the Virginia constitution.

<u>NEW JERSEY: Equivalent Due Process Restrictions</u>

State Board of Milk Control v. Newark Milk Co., 179 A. 116 (1935)

Shortly after the Virginia Supreme Court rendered its final decision in *Reynolds*, the New Jersey Supreme Court issued its opinion in a case involving New Jersey's milk statute, *State Board of Milk Control v. Newark Milk Co.*, 179 A. 116 (1935). Like New York and Virginia, the

New Jersey legislature passed a statute regulating the state's milk industry in 1933. Invoking the state's police power, the legislature declared that the law was an "'emergency law, necessary for the immediate preservation of the public peace, health and safety'….[resulting from the] 'unfair, unjust, destructive and demoralizing practices'" that exist with respect to the state's milk industry (119). To address these concerns, the law authorized the creation of a milk control board tasked with regulating the state's milk industry. Some of the milk control board's duties included issuing licenses, promulgating regulations, performing needed investigations, and the fixing of "'the price to be paid to the producer and to be charged to the consumer...'" (119).

Pursuant to this law, the New Jersey Milk Control Board issued an order fixing minimum prices for fluid milk in June 1933. Appellants, milk distributors based in New Jersey, violated that order by selling milk to retailers under the prescribed minimum price and the New Jersey Milk Control Board obtained an injunction against these sales (120-121). The milk distributors argued that the New Jersey milk law violated the due process clauses of both the New Jersey and the United States' constitutions. Their principal arguments were as follows: 1) the milk industry was not affected with a public interest, and 2) there was no authority for the legislature to pass a law regulating the price of milk, thus depriving them of their property without due process of law. The New Jersey Supreme Court responded firmly, stating that the United States' Supreme Court had recently "disposed of" this issue in *Nebbia v. New York*, a case approving a New York law "in principle not unlike" that of New Jersey (122-123).

The appellants argued that the Supreme Court's approval in *Nebbia* was based on the Fourteenth Amendment and was thus not binding on an interpretation of the New Jersey Constitution. Although the court recognized this as true, it found that the due process clauses of

both the New Jersey Constitution and the Fourteenth Amendment were similarly employed. The court then declared that the analysis in *Nebbia* was a "sound interpretation of the [state] constitutional provision" (124).

Citing numerous precedents, the New Jersey Court acknowledged that individual personal and property rights "must yield to the common good and general welfare." Like Justice Roberts in *Nebbia*, the court supported the central idea that "[c]ircumstances may so change in time or so differ in space as to clothe with a public interest what at other times or in other places would be a matter of purely private concern" (124). The New Jersey Court concluded that the actions of the legislature were "predicated on an immediate danger to the public health," and were "reasonable and appropriate" (124).

The New Jersey case represented a strong and positive use of *Nebbia*'s central principles. The New Jersey court found *Nebbia* to be in accordance with its own recent decisions on the scope of the police power, using language similar to that of Justice Roberts in *Nebbia*. Further, the New Jersey Court equated the state constitution's due process clause with that of the federal Constitution. With this foundation, the court was able to declare that *Nebbia*, a case that was only binding on federal law, was also *dispositive* of the state due process claims. In this case the state supreme court determined that the state due process protections at issue were no more restrictive than their federal counterparts (123).

Here it is possible to draw a valuable contrast between the Virginia Court's interpretation of that state's due process clause in *Reynolds*, 1935. In both the New Jersey and Virginia cases, the state's due process provision was seen as virtually identical to that of the federal constitution. However, the Virginia Court used a more restrictive test to assess the milk control act's validity

under the state constitution. By doing this, the Virginia Court distanced itself from the broad legislative freedom allowed by *Nebbia*, whereas the New Jersey Court seemed to embrace that freedom.

WISCONSIN: "A Great and Pressing Need"- The Meaning of "Emergency"

Finnegan v. Lincoln Dairy Company, 265 N.W. 197 (1936)

By the 1930s, Wisconsin was the nation's leading dairy state, "outrank[ing] all other states in dairy production" (*Wisconsin Dairying* 1931). Given the importance of the dairy industry to the economy of the state, its preservation in the face of economic decline was of the utmost importance to a great many people. In response to these concerns, the Wisconsin legislature passed a "milk control" law in 1935. The constitutionality of this law was challenged the following year in the case of *Lincoln Dairy*. Before the Wisconsin court could reach the principal issues in the case, it had to clarify the inconsistent "emergency" language in the state's milk control law. The Wisconsin Court flatly rejected the contention that the term "emergency" should be read in a "narrow or limited sense as meaning an uncommon, sudden unexpected happening which presents a sudden and unexpected occasion for action" (265 N.W. 197, 199). Looking at the section as a whole, and in light of the legislature's purpose, the Court was confident that the word "emergency" was intended to have a much broader meaning.

The Wisconsin Court presented a disarmingly honest, and therefore, particularly instructive analysis of the concept of "emergency." It stated:

> No doubt the term 'emergency' has been subjected to great strain during recent years. If it does not cover a multitude of sins, it certainly answers a multitude of purposes….[W]e are unable to discover that the term ... means more than that if a state of affairs exists which requires action to the end that the evils complained of may be remedied, an emergency exists, and the commission is authorized to proceed….

> …. [T]he legislature's statement "that an emergency exists is merely another way of stating the existence of a great and pressing need." (265 N.W. 197, 200, quoting its decision in *Hanauer v. Republic Building Co.*, 255 N.W. 136, 139, 256 N.W. 784)

In passing this statute the Wisconsin legislature declared that certain conditions involving the production, distribution, and sale of dairy products in the state were "detrimental to the public welfare, health, and morals." These conditions set forth a "sufficient basis" for exercising the police power. The manner in which this power was exercised "may be affected by the existence of a so-called emergency…" But the existence of the emergency does not create the power. In this case, the Milk Commission determined that the requisite detrimental conditions existed in the Milwaukee market and acted "within its power to make a just and reasonable order to effectuate the legislative purpose" (200-01).

Most of the milk control statutes, including the New York statute upon which *Nebbia* is based, contain language about the existing economic "emergency" in the state. If the legislature predicates the exercise of its authority on the existence of a public emergency, how does this affect the constitutional validity of its actions? In such cases, courts generally refer to what is known as the "emergency doctrine." The accepted statement of this doctrine was set forth in another Depression-era case, *Home Building and Loan Association v. Blaisdell,* 290 U.S. 398 (1934).

In *Blaisdell*, the United States Supreme Court upheld a Minnesota law authorizing restrictions on the foreclosure process against the constitutional claims raised by affected financial institutions. In the majority opinion authored by Chief Justice Hughes, the Court stated: "While an emergency does not create power, emergency may furnish the occasion for the exercise of power" (426). The key was to determine whether the actions taken were a reasonable

exercise of the state's police power. Factors considered by the Court included: the severity of the economic crisis, the limited scope of the law, and the limited lifespan of the statute. In light of these considerations, the Court found that the Minnesota law did not overstep the state's constitutional boundaries (444-47).

How does the fact that a statute was passed based on "emergency" conditions affect the precedential value of a case determining its constitutional validity? More importantly, how does this relate to the Supreme Court's decision in *Nebbia*? The principal question lies in whether the fact of an "emergency" undermines the strength of the precedent, and to what degree. If the Supreme Court's approval of price-fixing in *Nebbia* was predicated on the existence of an "emergency" in New York, its broader application would be diminished. In the "milk control" cases studied, this issue was not particularly problematic as most of the early state milk control laws make reference to an "existing emergency" and were usually temporary. A fair reading of the *Nebbia* opinion dispels the idea that its decision was "predicated" on the existence of an "emergency." It is difficult to see how the Court's sweeping declarations eradicating the public/private distinction and imposing a test of reasonableness on economic regulations could be perceived as having such a limited scope (See Polikoff 1940, 945).

Moreover, *Lincoln Dairy* provides another way of conceptualizing the use of the term "emergency." Using the Wisconsin Supreme Court's definition, the term "emergency" would cease to have such an extraordinary and chaotic meaning. An "emergency" would include that state of affairs which the legislature has found detrimental to the public welfare, not just unexpected events requiring extraordinary attention. This definition of emergency dovetails nicely with *Nebbia's* standard of reasonableness.

INDIANA

Albert v. Milk Control Board, 200 N.E. 688 (1936)

In 1936, the Indiana Supreme Court issued its opinion in *Albert v. Milk Control Board*, 200 N.E. 688. The case was a consolidated proceeding involving two businessmen who had engaged in the production and distribution of milk products without a license. The Milk Control Board sued to enjoin the milk producer/distributors from operating without a license, and to collect monetary penalties from them as provided by law. Promulgated in 1935, the Indiana Milk Act created the state Milk Board and gave it the power to regulate the milk industry, including the power to fix the prices of milk (689-90). The appellants raised several objections to the law's constitutionality. Their principal argument rested on the idea that the milk industry was a private concern and was not within those categories of businesses considered to be "affected with a public interest." The Court dismissed this argument, declaring that Indiana had long held a legitimate state interest in regulating the milk industry in order to protect the public's health and welfare. Quoting *Nebbia*, the Court reaffirmed the principle that individual rights were not "absolute" and must yield to the state's right to regulate in the public interest (691). On the question of price control, the Indiana Court reiterated one of *Nebbia's* core principles: There was "no closed class or category" of businesses subject to state regulation. The legislature was free to take action against any company, using any means designed to protect the public interest, including price-fixing. The only strictures were those imposed by the state and federal constitutions: The means must be designed to remedy a matter within the state's power to protect the public interest. The act that authorized the Milk Board to fix prices fell well within these

constitutional limitations. On this issue, the Court quoted approvingly from the Supreme Court's opinion in *Nebbia*, as well as the New York Supreme Court's opinion on the case (695-96).

In addition, the Court compared the Indiana Milk Control Act to similar acts passed in sister states: New York and New Jersey. The Court stated that the milk control act in New York had been upheld as constitutional by the U.S. Supreme Court in *Nebbia,* and the New Jersey act had been upheld by that state's supreme court in *Newark Milk.* Agreeing with these decisions, the Indiana Court held that the Milk Act did not violate any state or federal constitutional provision questioned in this case (698-99).

The *Albert* opinion presents an opportunity to examine the extent to which sister states dialogue. Dialogue between "sister states" has long been an integral part of state judicial decision-making. State courts routinely look to the decisions of other state courts for guidance or support, particularly when a similar statute has been challenged (Denniston 2014, 15-18). In the course of this study, I have observed that almost all of the state supreme courts reviewed other state opinions on the price fixing issue. Some courts conducted a thorough review; others were more cursory. In many cases, the court indicated that the out-of-state decision(s) affected its own decision (See Tarr and Porter 2007).

The influence of the sister-state's opinion may extend beyond specific legal concepts. In the "milk law" cases, I observed that over time state courts began to "recognize" the existence of certain "crucial facts" more easily. Because few state legislatures conducted extensive fact-finding investigations, these state courts appear to have "learned" this important information from sister-state opinions. One possible example of this is in *Newark Milk*, 1935. Here the New Jersey Supreme Court used the geographical proximity of New York to presume that the

conditions existing there were similar to those in New Jersey (179 A. 116, 118). Over several years, many state courts "recognized" at least some of the following facts as true: 1) the Great Depression created serious economic difficulties; 2) fluid milk was a unique commodity peculiarly susceptible to economic vagaries; 3) a functional milk industry was important to the state; and 4) milk was an important part of a family's nutrition, particularly for children. By "recognizing" a combination of these facts, state supreme courts could construct a rich background to support their approval of milk price controls.

In *Albert*, the Indiana Supreme Court readily adopted the idea that ensuring the public's milk supply was vitally important. The Court went so far as to say that it was a matter of "common knowledge" that maintaining an adequate and wholesome milk supply was a matter "affected by a public interest" and that it was directly connected to the public welfare. Further, the Court declared that it was "judicially known that milk … [was] a food absolutely essential… to sustain life," and that disrupting the milk supply, even for a short period, might result in a "dire calamity" (691). This last statement elevated the status of milk and the consequences of interrupting its continuous supply to a matter of "judicial knowledge."

Generally, the sphere of "judicial knowledge" is reserved for facts that are widely known or easily verifiable; in modern parlance, these would be facts that are "not the subject of reasonable dispute" (Fed. R. Evid. 201). Most of the opinions reviewed in this study used the term "judicial notice" or "judicial knowledge" in varying degrees; whether some of these "facts" would have been considered subject to "reasonable dispute" is unclear. The Indiana court, on the other hand, stretched the limits of what might be considered "judicial knowledge."

PENNSYLVANIA: Historical Declarations of Property Rights

Rohrer v. Milk Control Board, 186 A. 336 (1936)

This case involved a constitutional challenge to the Pennsylvania Milk Control Act of 1934. In one of the state's intermediate courts of appeal, the majority declared the milk control act to be unconstitutional. However, the appellate court considered the issue so important that it was certified immediately to the Pennsylvania Supreme Court. The Supreme Court of Pennsylvania reversed the ruling of the intermediate appellate court, adopting the dissenting opinion of Judge Keller (359). From the outset, the opinion conveyed a clear and forceful support of *Nebbia.* The court stated that *Nebbia* "settles, beyond *question*, that our Milk Control Act does not violate the 'Due Process' clause of the Fourteenth Amendment to the Federal Constitution" (337).

Although *Nebbia* settled the federal constitutional question, it did not dispose of the questions raised with respect to the state *constitution*. The court examined the Pennsylvania constitution and could find no express prohibition against the legislature's actions. Instead, the case had to rest on the idea of implied rights, stemming from declarations in the Pennsylvania Constitution concerning the right to enjoy and possess property (338).

The court's analysis of this issue was reminiscent of Chief Justice Waite's historical analysis in *Munn v. Illinois*, 94 U.S. 113 (1876). Reaching back into Pennsylvania's long legal history, the Court cited examples of regulatory laws passed in close proximity to the creation of Pennsylvania's Constitution and its Declaration of Rights in 1776. For example, in 1778, an act was passed that regulated the price of at least eighteen staple commodities, including flour and corn. After considering the array of businesses regulated by the state over time, including

"*bakers*, *millers*, wharfingers, and innkeepers," the court declared that "a statute regulating the modern milk industry" did not violate the Pennsylvania Constitution (339). The court found that the milk industry was subject to this type of regulation given "the fact that it is a unique and basic industry, absolutely necessary for the health and well-being of the whole people." The court also found that there were sufficient grounds "for the enactment of the statute in the depressed condition of the productive end of the [dairy] industry…" (339).

Throughout this opinion Judge Keller demonstrated a thorough grasp of the need for regulations to change with changing conditions, as well as the proliferation of regulation in modern times (339-340). The opinion also displayed the substantial influence of Justice Roberts' opinion in *Nebbia*. The court frequently made favorable comparisons and references to the *Nebbia* decision throughout its opinion. At one point over two pages of the opinion were devoted to direct quotes from *Nebbia* (341-343). Although Judge Keller did examine the guarantees of the state and federal constitutions independently, his own reasoning and citations to *Nebbia* signaled early on that the Pennsylvania court would be in line with Roberts' opinion.

<u>ALABAMA: A More Restrictive Standard</u>

Franklin v. State ex rel. Alabama State Bd. of Milk, 169 So. 2d 295 (1936)

In this case the Alabama State Milk Control Board sought an injunction against a store owner to prevent him from continuing to sell milk below the minimum price set by the Board for the Birmingham area. The store owner objected, claiming that the Alabama Milk Act violated both the federal and state constitutions. The Alabama Milk Act was passed by the legislature as an emergency measure in 1935. The court stated that: "the mudsill question" to be determined is whether or not the enactment was a reasonable exercise of the police power of the state...." The

court declared that the boundaries of the state's police power were undefined and were "coextensive" with safeguarding the public interest. With respect to the appellant's claims under the federal constitution, the court concluded that these had "been foreclosed, or concluded" by the Supreme Court in *Nebbia* (297-299).

The court then considered the appellant's state constitutional claims. Although the store owner challenged numerous constitutional provisions, the principal question was whether or not the legislature had the power to enact a price-fixing law in order to regulate the milk industry. Citing *Nebbia*, the court pronounced the milk industry to be a "business affected with a public interest, which is tantamount to saying, 'subject to the exercise of the police power,' and to regulation and control, even to the extent of fixing prices" (299).

The Alabama Court then cited a number of cases from various jurisdictions that had approved similar milk statutes, including New York, New Jersey, Indiana, and Virginia. In particular, the court included an extensive quote from Justice Pound's opinion in *People v. Nebbia, 1933,* that recounted the diverse array of private enterprises the United States Supreme Court had found to be a proper subject of price-fixing regulation. These cases included the following: property rents, workmen's compensation, municipal contract wages, sugar bounties, and the rates of grain elevators and cotton gins (300). In this opinion, the Alabama Supreme Court seemed to have a firm grasp of *Nebbia's* essential principles. Further, the court cited with approval that part of the New York opinion that illustrated the broad scope of businesses that might be regulated in the public interest. Even so, just one year later, the Alabama Court rejected the use of *Nebbia* to support the regulation of barbershop prices in *City of Mobile v. Rouse*, 173 So. 254 (1937).

What insights can be drawn from examining these two opinions? Each comes from the same court and is rendered close in time to the other, but the conclusions reached appear inconsistent. Indeed, if *Rouse* is read before *Franklin*, it would be easy to infer that the Alabama court had dismissed the *Nebbia* decision for all purposes. Yet, the *Franklin* opinion demonstrated that this was not the case. In *Franklin*, the Alabama Court not only followed the *Nebbia* decision, but also included a laundry list of businesses where price-fixing regulations had been upheld. How can the two cases be reconciled?

Alabama is not alone among the states whose high courts delivered differing opinions on the issue of price control. The reason for this apparent "conflict" could be the result of a number of factors; factors that range from a proper legal distinction to a deliberate effort to provide state constitutional protection for traditional economic rights. With respect to *Franklin and Rouse,* the differing outcomes were explained many years later in another Alabama Supreme Court case, *Mount Royal Towers, Inc. v. Alabama Bd. of Health*, 388 So.2d 1209 (1980). Before the court in *Mount Royal Towers* articulated its new "balancing test" for due process cases, it described the current standard of review used in Alabama economic due process cases. This standard of review was used in both *Franklin,* 1936*,* and in *Rouse,* 1937. The court stated that this standard of review was "more restrictive than the 'arbitrary and capricious' standard set forth in *Nebbia*" (1212-1213). Essentially, the Alabama standard was a modified version of the "affected with a public interest" test, adopting the legislative deference of *Nebbia* only if the business or practice at issue was "affected with a public interest." If not, the court took "a more interventionist stance" and the economic regulation was subject to heightened review. This explained the results

in *Franklin* and *Rouse*; the milk industry was "affected with a public interest," whereas the barber industry was not. (1212-1214).

The Alabama Court stated that it was "not alone among the states in exercising a more rigorous judicial scrutiny of state economic regulations." It also noted that "the development of independent approaches to substantive due process in the states" has been viewed as a positive trend by some commentators (1213) (See Hetherington 1958). Of the numerous reasons referenced by the Alabama Court in support of an independent state approach, I would like to emphasize two that seem to be of particular importance to this study. The first is the ability of a state court to invalidate legislation that is the product of "economic interest groups" unconcerned with the best interests of the public. Many of the opinions in this study expressed concern about preserving "neutrality." The second is the idea that "heightened scrutiny" may be "entirely consonant" with the requirements of the state's constitution to protect individual liberties against government encroachment. Although the vigor with which state courts continue to protect economic rights has waxed and waned over time, the constitutional potential for the protection of individual rights likely remains. [3]

[3] In fact, state supreme courts have been encouraged to protect certain "fundamental rights" under their state constitutions. (See Brennan, J. 1977) However, the concept of expanding the protection of individual economic rights has not been met with "enthusiasm" (See Galie 1988, 77). Although the current status of state economic due process is outside the scope of my study, my research has uncovered conflicting opinions on both current and past trends (See Sanders 2000).

FLORIDA

Miami Home Milk Producers Ass'n v. Milk Control Board, 169 So. 541 (1936)

In this case an association of milk producers in Miami challenged the constitutionality of a 1935 Florida statute governing the actions of the state Milk Control Board. The milk producers sought to reverse a lower court decision enjoining the producers from selling milk at prices below the minimum set by the Milk Control Board. The Association alleged that the price fixing provisions of the 1935 statute violated "the due process and equal protection clauses" of the federal constitution and similar provisions in the Florida constitution (541).

The Florida Court stated that the milk control law involved in this case was modeled on the New York milk law at issue in *Nebbia v. New York*, 1934. This law was upheld as constitutional by both New York's highest court and by the United States Supreme Court. The Florida Court stated that the Supreme Court's decision in *Nebbia* controlled its decision on the federal due process and equal protection claims. Accordingly, the court held that the Florida statute did not violate the U.S. Constitution (543-44).

The court then turned to the producers' claims under the state constitution. At the outset the Florida Supreme Court stated that, although the decisions of the U.S. Supreme Court were not binding on state constitutional claims, "the decisions of that able and eminent tribunal on [analogous] questions…. have always been considered as strongly persuasive and usually followed" (544). On the questions presented by this case, the court stated that the subject of regulating the milk industry had been ably discussed in the *Nebbia* opinion, as well as other state opinions on similar statutes. The court then quoted *Nebbia* at some length, ending with the conclusion that the Florida milk control statute did not violate the Florida constitution (547).

Miami Home presents a situation that is more or less the reverse of the Alabama cases. In *Miami Home* one of the cases relied on by the milk producers was a recent decision of the Florida Supreme Court on price-fixing in barbershops, *State ex rel. Fulton v. Ives,* 167 So. 394 (1936). *Ives* involved a challenge to the constitutionality of the Florida Barber Board Act, which allowed the Board to set minimum prices for a barber's services. In that case, the court held that the statute violated both the state and federal constitutions. The court in *Miami Home* did not find that case to be on point even though both involved price-fixing and both considered *Nebbia*. The court found that the *Nebbia* decision had been properly "differentiated" in *Ives*: "There we were dealing with an act regulating a comparatively small group of our population, not a basic or paramount industry, and with the price to be charged by barbers for their personal services, not as here, with the price of an essential commodity of almost universal consumption"(547).

Again, we see a state court that had recognized and approvingly cited the basic principles of *Nebbia* but was not ready to apply these principles liberally. The broad outlines of the traditional "public interest" standard is evident in the "differentiating" characteristics outlined by the court in *Miami Home*. The business to be regulated must have an extraordinary character, involve an "essential commodity" and affect a large population.

MASSACHUSETTS

Milk Control Board v. Gosselin's Dairy, Inc., 16 N.E. 2d 641 (1938)

In this case the Massachusetts Milk Control Board sought to enjoin a milk dealer from selling milk to a U.S. veterans' hospital at a price below the minimum set by the Board. The court stated that the state's milk control statute was "of the same general class as those held constitutional" by the U.S. Supreme Court in *Nebbia* and *Highland Farms v. Agnew*, 300 U.S.

608 (1937). However, the dealer did not contest the constitutionality of the Milk Control Act "in general," so the court was free to assume the law to be valid for the purposes of this case (642). The court could find no reason why sales to an entity operated by the federal government within the state of Massachusetts would be exempt from the minimum prices set by the Board. The Massachusetts dealer must obey Massachusetts' law. The court held that Gosselin's Dairy would be permanently enjoined from selling milk to the veterans' hospital below the set minimum price (643-644).

Although the Massachusetts Supreme Court did not rule on the constitutionality of the state's Milk Control Act, it found that the statute belonged to the same class as those found constitutional under the authority of *Nebbia*. In this case, the court's *dicta* were significant because it signaled the court's general approval of the state Milk Control Act. Bolstering this conclusion is the fact that no other high court rulings could be found that directly involved the Milk Act's constitutionality for the period of this study.

GEORGIA

Bohannon v. Duncan, 196 S.E. 897 (Ga. 1938)

From the outset, this case presented an element that was unique among the state milk cases studied. Here the constitutional challenge was brought by "milk consumers," rather than commercial members of the dairy industry, such as producers or distributors of milk. In March of 1937, the Georgia legislature passed an act to regulate the distribution and sale of milk within the state. This group of milk consumers "attack[ed] the act as preventing their purchase of milk at uncontrolled prices in the open market…" (898). They alleged that this was a violation of the due process and equal protection clauses of the federal and state constitutions. The Georgia Supreme

Court principally relied on the United States' Supreme Court's decision in *Nebbia*. The Georgia Court declared that *Nebbia* was "controlling" on federal constitutional issues, and was "strongly persuasive" on similar provisions in the state constitution. The Georgia Supreme Court adopted the standard set forth in *Nebbia* to assess the constitutionality of the state's milk act. Quoting *Nebbia*, the court stated that the Georgia legislature may regulate any "business 'affected with a public interest,' which was the equivalent of saying 'subject to the exercise of the police power' where, as here, such regulation was not 'unreasonable, arbitrary, **….** capricious, [or discriminatory], and the means selected …. have a real and substantial relation to the object sought to be obtained." This would include the right to set minimum and maximum prices for the sale or purchase of dairy products. According to these standards, the Georgia court declared the state's milk act to be constitutional. The fact that the complainants were consumers rather than members of the dairy industry was irrelevant (898-899).

Shortly thereafter the same court considered another case challenging the constitutionality of the Georgia milk control law, *Holcombe v. Georgia Milk Producers Confederation*, 3 S.E.2d 705 (Ga. 1939). One of the many claims in the case was that the legislative findings and declarations regarding the state of the milk industry were untrue at the time of enactment. The Confederation argued that this violated both the due process and equal protection clauses of the federal and state constitutions (711-12). After closely examining the statute, the Georgia Court rejected these claims, and upheld the constitutionality of the milk law. In reaching its decision on this issue, the court in *Holcombe*, just as it had in *Bohannon*, followed the principles set forth in *Nebbia,* and showed deference to the legislature in fashioning economic legislation (715-18).

Yet, just over a decade later, the Georgia Supreme Court reverted to the standards rejected by *Nebbia* and struck down the milk control act in effect at that time. In *Harris v. Duncan*, 67 S.E.2d 692 (1951), the court stated that the court was not bound by its prior rulings because they were not "full-bench decisions." Further, the court declared that it was not bound by any other state or federal decision, including *Nebbia,* when construing the Georgia state constitution (693). Instead, the court adopted the "old" method of assessing the constitutionality of a price-fixing statute: whether the business or property was "affected with a public interest." Citing with approval the dissenting opinion of Justice McReynolds' in *Nebbia*, the court declared the milk industry to be devoid of the characteristics necessary to be "affected with a public interest" because it was not "devoted to a public use" (694). At least in Georgia, the old concept of "liberty of contract" was revived, despite its supposed death almost twenty years before.

CALIFORNIA

Jersey Maid Milk Products Co. v. Brock, 91 P.2d 577 (Cal. 1939).

This case involved a challenge to the California Milk Stabilization Act of 1937. Under the 1937 Amendment, the director of Agriculture was allowed to set minimum wholesale and retail prices for fluid milk and fluid cream in Los Angeles county. None of the actions of the director were contested. The sole issue presented by the appeal was whether the Milk Stabilization Act was constitutional under both the federal and state constitutions (586).

The first constitutional argument raised was whether the statute violated the due process clause of the federal constitution because "the milk industry is not clothed with a public interest and, therefore, the legislature is powerless to regulate it under the police power of the state" (587). Note how the "clothed with a public interest" argument was still being raised almost five

years after the *Nebbia* decision, and two years after the "dramatic shift" in constitutional opinion purportedly wrought by the "constitutional revolution of 1937."

The dogged persistence of lawyers' pursuing obsolete theories is particularly interesting in California, given the California Supreme Court's support of *Nebbia* in three previous cases unrelated to the control of milk. That fact alone is highly unusual. In my research, the California Supreme Court was the only state supreme court during the 1930s to have used *Nebbia* in support of non-milk regulations[4] before using it in a "milk case." Given the nature of the statute involved in the *Jersey Maid* case, the California Supreme Court found *Nebbia* particularly persuasive. The court stated: "We have followed the *Nebbia* case in our previous decisions, and the principles of law therein announced must be held to be firmly and finally established in this state" (587).

Another significant aspect of this decision was the explicit rejection by the California Supreme Court of any limitation of *Nebbia*'s principles to statutes of a "temporary nature." Amici argued that *Nebbia* should be distinguished because it involved a New York act of a "temporary duration," whereas the California act was indefinite. The California Court failed to see how this difference in duration could "in any way divest the legislature of its power to protect an industry from a perilous condition which is permanent in character" (587). The court further found that *Nebbia* "settles many of the general principles applicable to and governing the power of the legislature to enact regulatory legislation…." (588). Together these statements

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[4] These cases were: *Max Factor v. Kunsman*, 55 P. 2d 446, 456 (1936)(upholding resale price maintenance); *Agricultural Prorate Com. v. Superior Court*, 55 P.2d 495 (1936); and *Wholesale Tobacco Dealers Bureau, Inc.. v. National Candy & Tobacco Co.*, 82 P.2d 3 (1938) (upholding unfair sales practices act).

appear to capture what *Nebbia* could become: a standard of reasonableness for determining whether regulatory action by a state was appropriate.

VERMONT

State v. Auclair, 4 A.2d 107 (1939)

This case presented a challenge to the constitutionality of the Vermont Milk Control Act of 1937 by an unlicensed seller of milk. In language similar to that used in the laws of Pennsylvania and other states, the Vermont legislature passed a statute regulating the state's milk industry. The statute created a milk control board with the power to oversee "the distribution and sale of milk within the state." The law imbued the milk board with substantial authority, including the specific power to issue licenses to milk distributors and to fix the minimum or maximum prices to be paid to producers by distributors, as well as the price to be charged to consumers by distributors (4 A.2d 107, 110-111).

Using *Nebbia* as its principal authority, the Vermont Supreme Court declared the law valid under the due process provisions of both the federal and state constitutions. In order to be constitutional, the court stated that the *Nebbia* standard required the legislature's action to be within the scope of its police power authority and that it must not be unreasonable. The Vermont Court held that the legislature's actions fell within its duty to protect the public welfare and were reasonable measures in light of the dangers posed by business practices that threaten an "essential article of food" (111-112). Further, the fact that an administrative entity was charged with determining the price that would be imposed did not invalidate the law. The legislature had provided a list of elements that the Board must consider in determining a "just and reasonable"

price for milk. The presence of statutory guidelines negated the argument that the price set by the Board was simply arbitrary (112).

OREGON

State ex rel. Van Winkle v. Farmer's Union Co-op Creamery, 84 P.2d 471 (Ore.1938)

Oregon's original milk control act was passed in 1933 in conjunction with the federal Agricultural Adjustment Act. The constitutionality of this Oregon Act, as amended in 1935, was challenged in *State ex rel. Van Winkle v. Fred Meyer, Inc.*, 49 P.2d 1140 (1935). In that case the Oregon Supreme Court ruled that the Act was unconstitutional for two principal reasons: 1) it unlawfully delegated the state's legislative power; and 2) the legislature lacked the power to fix prices on ice cream because "farming" was not a "business affected with a public interest." On the latter ground, a dissenting justice cited *Nebbia*, as well as the Virginia case of *Reynolds,* 1935, to indicate that the fixing of milk prices was within a state's police power (1144-47).

By 1938, however, the majority of the Oregon Supreme Court had altered its perception and adopted the *Nebbia* decision as an integral part of its opinion in *State ex rel. Van Winkle v. Farmers Union Co-operative Creamery*, 84 P.2d 471. In 1937 the Oregon legislature supplemented the state's milk act by placing *all* milk and cream under the control of the state milk board created by the original 1933 Act. The 1937 established "official grades and standards of quality" for commercial milk and cream and stated that each grade would be assigned a specified price differential. Farmer's Union argued that the legislature's actions were unconstitutional under both the Oregon and federal constitutions (472-74).

With respect to both the issues of due process and the police power of the state, the Oregon court quoted extensively from *Nebbia* and other state and federal decisions following its

principles (474-76). Before making its final decision, the Oregon Court once again quoted *Nebbia*, stating that the constitutionality of the "legislature's decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect" (476). The court stated that not only was the legislature's action not arbitrary or capricious, but also it had the tendency to actually improve the quality of butter and cream in the state. Accordingly, all of the Farmer's Union's claims were denied (477-78).

3.3.3 State Opinions Declaring Milk Control Laws Unconstitutional

The following section will discuss those cases in which the state's milk control act was declared unconstitutional. In all the cases reviewed on milk control and price-fixing, the most consistent constitutional challenges involved two principal issues: the violation of due process and the unlawful delegation of power. Often, both issues were raised in the same case, giving the state supreme court the opportunity to rule on them together. In some cases, the claimants included only one of these issues in their constitutional challenge. If the court found either claim to be valid, then it struck the act as unconstitutional. Among the cases in this study, those that have held the state's milk control act to be unconstitutional have done so based on a determination that the law was an unlawful delegation of legislative power.

As a general rule, a legislature may not delegate its legislative powers to another branch of government, except under specific "limitations and exceptions." Determining whether the legislature has properly delegated its authority requires the analysis of several elements: 1) whether a definite policy for implementation exists; 2) whether there is adequate guidance and direction; and 3) whether the act contains sufficient safeguards to prevent abuse (16A Am. Jur.

2d, *Constitutional Law* § 386 (2017)). The rule of law in this area has been well-settled, but its application has produced many variations. Some courts have insisted that this type of law must contain definite rules and guidelines for the public officials; other courts have been less strict. (92 A.L.R. 400 (II) (a) (1934)). The milk control cases reviewed in this study have shown a similar variation in judicial interpretation of this rule. While some courts have required a high degree of specificity, others have been more moderate, and still others have not insisted on much more than a policy goal and loose guidelines. The following section will discuss those cases in which the state's milk control act was declared unconstitutional as an unlawful delegation of legislative authority.

UTAH

Rowell v. State Board of Agriculture, 99 P. 2d 1 (1940)

This case involved a challenge to the Milk Control Act of Utah. Here the State Board of Agriculture had established a marketing area in Salt Lake City, along with an administrative agency to supervise the area. The Board had issued orders setting the prices to be paid to producers, distributors, and retail consumers in the Salt Lake area. Rowell disputed the Agency's authority to censure them, raising statutory and constitutional objections. Among these claims, Rowell argued that the Act's price-fixing provisions violated state and federal due process provisions. The Act was also said to confer an unconstitutional delegation of legislative and judicial power to the State Board of Agriculture and the Salt Lake administrative agency (2-3).

The Utah Supreme Court first considered whether the provisions of the statute that dealt with the fixing of prices and the control of surplus milk were improper delegations of legislative power. Noting the "utter barrenness" of the statute, the court declared that both provisions lacked

the "guideposts" and "standards" that were necessary for a legislature to lawfully delegate its power. Accordingly, the challenged provisions were held unconstitutional as an unlawful delegation of power (3).

CONNECTICUT

State v. Stoddard, 13 A. 2d 586 (1940)

This case involved a challenge to the Connecticut Milk Control Act of 1935, as amended in 1937. Under the statute, an appointed official, the "milk administrator," had the authority to set the minimum prices for milk that dealers must pay to producers and that dealers must charge to consumers. In 1938, Stoddard, a milk dealer, was charged with violating the act by selling milk to consumers at a price below the minimum set by the milk administrator for the "Hartford Area." Stoddard's principal complaint was that the statute improperly delegated legislative power in violation of the federal and state constitutions (586-87). In this case the defendant did not contest the validity of the price-fixing provisions of the statute. Rather, the defendant conceded that the legislature had the authority to regulate milk sales. The court declared that the constitutionality of this type of milk control statute had been "definitely settled" by *Nebbia* and other related cases (587-88).

The court then considered the determinative question: whether the legislature's authority had been properly delegated to the milk administrator. In order to be constitutional, the legislature must have specified the power to be delegated "with reasonable clarity" and within appropriate limits. The court compared the statute to those of several other states, including New York, New Jersey, Virginia and California (588-90). In comparison to those statutes, the court stated that the original 1935 milk control act was "manifestly" lacking in specificity with respect

to the price-fixing provisions (588-90). The 1937 amendment at issue in this case did not remedy this problem, even though it added more detailed requirements to the statute. The court held that the price-fixing provisions improperly delegated the legislature's power, and the section was unconstitutional under the Connecticut Constitution. Accordingly, the defendant's claims under the federal constitution did not need to be addressed (590-91).

MARYLAND

Maryland Co-op Milk Producers v. Miller, 182 A. 432 (Md. 1936)

In this case a group of Maryland milk producers challenged the constitutionality of the Maryland Milk Control Law, Chapter 310 of the Acts of 1935. The court stated that it would not decide whether the Act violated property and contract rights under either the federal or state constitutions (436). Rather, the only question to be considered was whether the legislature had properly delegated its power to the Milk Control Commission. In the statute the Milk Commission did not have the authority to act until a certain portion of an area to be defined by the Commission had voted that appropriate regulation was necessary. After examining the statutes of several other states, the court determined that the Commission's authority had been improperly delegated. Under the law the Commission's authority to act relied on a "double contingency"—the Commission's declaration of a "voting area" and a vote of approval from that area. The court concluded: "The delegation with which we are concerned… is not to the voter of a political subdivision of a prescribed locality, but to an indefinite portion of producer, consumer, and distribution classes in areas having no legislative prescription" (435). As such, the milk law was invalid as an improper delegation of authority.

WASHINGTON

Griffiths, et. al. v. Robinson, 43 P. 2d 977 (Wash. 1935)

This case involved a constitutional challenge to the Washington Agricultural Adjustment Act of 1933. This state statute was passed in conjunction with the National Agricultural Adjustment Act. Pursuant to federal policy, states were encouraged to pass legislation that adopted national codes of fair competition as the standard of conduct for the state. The Washington Act did precisely that in Section 4. In section 7 the legislature also adopted the administrative structure of the federal act, giving broad discretionary powers to the director of agriculture. Using this authority, the director of agriculture issued a number of orders governing milk sales and distribution in the Seattle area, including a schedule of prices for milk (977-978).

Several members of the milk industry sued to have the Act declared unconstitutional under Washington law. They argued, *inter alia*, that the Act violated due process and was an unlawful delegation of legislative authority. The court found that the legislature's delegation of power was "nebulous" and "indefinite," and therefore, void (979). The crux of the problem lay in the broad, sweeping powers given to the secretary of agriculture. In making its decision, the Washington Court cited two federal decisions rejecting broad grants of authority to the President, *Panama Refining Co. v. Ryan, 293 U.S. 388* (1935) and the lower court decision in *Schechter Poultry.* (*United States v. Schechter Poultry,* 8 F. Supp. 136 (D.C. 1934)).

In this case, the court's interpretation of *Nebbia* and its application to the milk industry was strained. First, the court recognized that this type of statute was within the state's police power and "that milk is one of the "basic agricultural commodities of the state, affected with a public interest." Then, it denied that milk was the type of commodity that was "paramount" as

had been the case in the New York statute considered in *Nebbia* (979). In this court's view, *Nebbia*'s influence was restricted to states where milk was especially important.

MICHIGAN

Johnson v. Michigan Milk Marketing Board, 295 N.W. 346 (1940)

This case involved a challenge to the constitutionality of the Michigan Milk Marketing Act of 1939. Appellant Johnson objected to various orders of the Michigan Milk Marketing Board fixing the minimum price of milk products sold in the "Detroit Milk Marketing Area." Johnson's company was one of the largest milk distributors in the Detroit area. On appeal he raised numerous constitutional objections to the law, including two federal and state due process claims related to the board's price-fixing orders and a claim directed at the composition of the Milk Marketing Board. Of these, the Michigan Supreme Court stated that its constitutional decision would be based solely "upon the single question of the composition of the Board" as a matter of due process (351). Under the Michigan law, the Board was to be composed of five members: the commissioner of agriculture and four members appointed by the governor. Of these four members, three members were to be selected from the dairy industry, and one was to be a disinterested consumer. The court objected to the fact that the law required the appointment of a Board where a majority of the members had a "direct pecuniary interest" in the matters decided by them. These provisions ensured that the composition of the Board would not be "impartial" (351). The court concluded that a Board composed in this way could not conduct the type of impartial hearing "which satisfies the requirements of due process" and held the statute unconstitutional under the Michigan constitution (352).

3.3.4 Summary Analysis of the State Milk Control Cases

In this chapter cases from twenty-three states were examined to assess the court's treatment of price-fixing provisions in the respective state milk control laws. The principal objective of this part of the study was to assess the impact of *Nebbia* (and *West Coast Hotel)* on state supreme courts with respect to due process challenges raised in milk control laws. Many of the cases selected were cases of "first impression" for the state supreme courts; in other words, this would be the court's first opportunity to rule on the constitutionality of the state's milk control law. In some states, the case reviewed was the best expression of the state law's constitutionality. Ultimately, almost all state supreme courts treated the statutes favorably, upholding the laws under both the state and federal constitutions.

What do these favorable outcomes mean in terms of *Nebbia*'s influence? This is a more complicated question; one that requires "unpacking" some of *Nebbia*'s core principles. At the heart of the *Nebbia* opinion was the Court's abandonment of the public/private distinction. In doing so, the Court eliminated the "public interest" test traditionally used to assess the constitutionality of price-fixing regulations. This freed the courts from having to navigate the rigid, confusing categories separating public from private businesses. *Nebbia* equated the old requirement that a business must be "affected with a public interest" to what the legislature deems is in the public interest. So long as the legislature's actions were reasonable, and not demonstrably arbitrary, the law would be constitutional. Broadly construed, the principles of *Nebbia* could be applied to all forms of economic regulation. Under this new standard of review, the constitutionality of a regulatory statute would rest on the reasonableness of the legislature's actions, not on the wisdom of its policies.

Given the normally cautious nature of judicial institutions, it is not surprising to find that the "broad" reading of *Nebbia* was not readily adopted by most state courts. One of the first state supreme courts to consider *Nebbia* in the context of its state milk control law was Virginia. Although the Virginia court approved of the state's milk law using *Nebbia*, the court pointedly stated that it did not need to go as far as the *Nebbia* court to uphold the milk law. Most state supreme courts chose to limit their opinions in a similar fashion. On the other hand, at least one state's supreme court, California, did indicate its support for applying the *Nebbia* standard to all types of all economic regulations (See *Jersey Maid*, 1940).

As previously noted, most of the "milk cases" involved claims under both the state and federal constitutions. State supreme courts that addressed the federal due process issue recognized the mandatory authority of the Supreme Court over such claims. In this regard, some state supreme courts broadly declared that *Nebbia* had "disposed" of the federal issue. The tenor of the state courts' response to *Nebbia's* effect on a state constitutional claim varied. At one end of the spectrum were cases where the state supreme court addressed the constitutionality of its state milk control law largely by reference to *Nebbia.* At the other were a few cases that either rejected or obscured the principles of *Nebbia*. Most of the cases were somewhere in the middle, finding *Nebbia* "highly persuasive," but engaging in a separate, more "traditional" analysis of the state constitutional claim.

At first glance these "middle opinions" do not appear particularly distinctive. Each decision agreed with the conclusion in *Nebbia*: state laws that fixed the price of milk were constitutional. Despite this uniformity of result, the state supreme courts varied in their commitment to *Nebbia*'s principles. These courts approached the state constitutional issue along

two basic lines: either a modified version of the "public interest" test or a restricted version of *Nebbia*'s reasonableness standard. In cases where the court seemed to follow a modified "public interest" test, the state court tended to emphasize how the Court in *Nebbia* employed more flexibility in determining what businesses were "affected by a public interest." This allowed the court to "expand" its definition of "public interest" to include the dairy industry because of its size or its importance to the state, as well as the large number of people that would be affected by the state's policy. Based on the example of Alabama, a given state's version of the modified "public interest" standard could have its own unique features. In other cases, the state court expressed a willingness to accept certain legislative measures, so long as the law was reasonable, with the standard for "reasonableness" determined by the individual state court.

Another way that *Nebbia* influenced the reasoning of the state courts was more indirect and somewhat circular. As previously noted, an important part of the state supreme court's analysis involved the comparison of the state milk control laws with those in "sister states." If the other state's law was substantially similar and had been upheld, the examining court could use the case to bolster its decision on constitutionality. The state supreme courts were particularly interested in discovering how closely their law matched the New York law declared constitutional in *Nebbia*. If the two statutes had enough similarities, the state supreme court could use the statute approved in *Nebbia* as another "anchor" to declare its own "milk law" constitutional.

Overall, the influence of *Nebbia* was clearly evident in the "milk control" cases. Most state courts validating milk price control laws either relied on the *Nebbia* opinion or discussed it approvingly. The Supreme Court's opinion in *West Coast Hotel* usually received scant, if any,

attention. As a matter of legal reasoning, this is not unexpected. The facts in *Nebbia* made it a closer match for the milk law cases than *West Coast Hotel*. Looking at the state milk law cases only, *Nebbia* was very successful in opening up the states to price regulations for milk. Whether the broader principles in *Nebbia or West Coast Hotel* could be extended to other economic areas was a more difficult prospect.

CHAPTER 4

EXPANDING NEBBIA

4.1 Introduction

The principal objective at this point in the study is to assess the impact of *Nebbia* and *West Coast Hotel* on state supreme court decisions in an area outside of milk control laws. The paucity of state decisions on universal minimum wage laws during the study period precluded that subject from consideration. For purposes of consistency, I have chosen a category of decisions from the MLS that has enough similarities for comparison, as well as significant differences for contrast. This category involves laws that allow price-fixing for personal services in the barber trade enacted between 1934 and 1942 (See MLS Vol. II).

During the 1930s, state legislatures enacted a flurry of laws regulating an increasing number of businesses and occupations. This pattern of rapid legislative activity was noted in *Rohrer, 1936*, the Pennsylvania milk case. Here the court remarked:

> *Since then we have regulated and licensed so many businesses and professions that it is difficult for the average lawyer—let alone a layman—to keep up with them*, and none of them surpasses, if it equals, in importance to public health and well-being the business of producing and supplying milk and dairy products to the public. Accountants, architects, beauty culturists, dentists, engineers, midwives, nurses, pharmacists, physicians and surgeons, plumbers, real estate brokers, undertakers, veterinarians, are all required to license, or registered, after examination, before they can lawfully practice their professions or pursue their business, respectively, and *their liberty of contract, as respects the employment of their services, is correspondingly limited and circumscribed* (186 A. 336, 341) (emphasis added).

As the Pennsylvania court acknowledged, state laws that regulated or licensed persons in the professions or trades necessarily impinged on their "liberty of contract." A person who wanted to engage in one of the covered occupations could not provide services without complying with the

requirements of the law. For the most part, these requirements were limited to qualifications and licensing. In a few areas, such as dry cleaning and the barber industry, state legislatures also imposed price controls (MLS Vol. VI).

How do these three seemingly disparate topic areas intersect? The most obvious point of intersection is the presence of legislative price-fixing. *Nebbia* involves minimum prices for milk; *West Coast Hotel* involves minimum wages; and the "barber law" cases involve minimum fees for specialized services. As early as 1923 in *Adkins*, the Supreme Court specifically equated fixing minimum prices with fixing minimum wages. The question then becomes whether there is a real distinction between a law that controls the prices an individual tradesman can charge and a law that sets the minimum wage for the individual in particular jobs. The "barbershop cases" demonstrate how the lines of demarcation can be blurred. If the state regulates the minimum fee that a barber may charge, is that not the equivalent of setting his minimum wage? In the 1930s, many barbers worked by themselves, often in their own shops. For those barbers, "prices and wages [were] almost synonymous" (Note, "Barber and Beauty Parlor Legislation: Constitutionality." 1940, 941). At the very least price fixing was designed to ensure what I would call "minimum income." This term seems more accurate than "minimum wage" for sole proprietors and owners of small shops, but the meaning of the term is substantially the same.

Table 3 is a compilation of data derived from state barber price fixing laws; state court opinions on these; the MLS; journal articles; and the American Law Reports (Hall 1973). The table represents barber laws from fourteen states enacted between 1933 and 1942. The cases listed involve constitutional challenges to the price fixing provisions of the law, and the year of the statute considered in the case. All but one of the states entertained challenges to the state's

barber laws. Of the state courts that made a definitive ruling, only four "barber laws" were found to be constitutional; nine were declared unconstitutional. Table 3 lists the states having "barber laws" at any time before 1942, as well as the year the original milk control statute was passed. If a decision on the constitutionality of the "barber law" was rendered before the end of 1942, the name of the case, the year of the law considered, and the case's outcome are also displayed.

Table 3. State "Barber Laws" and the Constitutionality of Price-fixing

State	Statute Year	Case Name	Year	Constitutionality
Alabama	**1935**	**Rouse**	**1936**	**U**
Arkansas	**1941**	**Noble**	**1942**	**U**
Arizona	**1936, 1937**			**No case.**
California	**1937**	**Kazas**	**1937**	**U**
Florida	**1935** **1941**	**Ives** **Mcrae**	**1936** **1942**	**U** **C* [See text]**
Indiana	**1941**	**Cloud**	**1942**	**U**
Iowa	**1935**	**Duncan**	**1936**	**U**
Louisiana	**1937**	**Parker**	**1938**	**U/C**
Minnesota	**1937**	**McMasters**	**1939**	**C**
Montana	**1935, 1939**			**No case**
New Mexico	**1937**	**Arnold**	**1941**	**U**
Oklahoma	**1936**	**Herrin**	**1938**	**C**
-Supreme Court	**1937** **1937**	**Jarvis** **Vandervort**	**1939** **1939**	**C** **C**
-Crim. Appeals	**1937** **1937**	**Herrin** **Sparks**	**1939** **1941**	**C** **C**
Tennessee	**1939**	**Greeson**	**1939**	**U**
Wisconsin	**1935** **1939**	**Fasekas** **Neveau**	**1936** **1940**	**U** **U**

4.2 The Early Cases: After Nebbia--Before *West Coast Hotel*

All the barber cases decided before *West Coast Hotel* declared the state's barber price fixing statute to be unconstitutional. Over time these early decisions would be discussed, distinguished, agreed with and rejected by numerous state courts in later opinions. The general consensus was that the "early" decisions had relied on *Adkins* as their principal authority, although the language used in some of the opinions does not make that conclusion particularly clear. Because the Supreme Court expressly overruled *Adkins* in *West Coast Hotel*, further reliance on these "early cases" would not be expected (See, e.g., *Ives*). Yet, the Supreme Court's rejection of "traditional" concepts and principles in both *Nebbia* and *West Coast Hotel* had a mixed effect on the state judiciary. Some state courts responded positively to the Supreme Court's new standards; others did not, clinging to "traditional" principles in making their decisions.

In the "early cases," those decided after *Nebbia* but before *West Coast Hotel*, the state court's decision was strongly affected by its interpretation of *Nebbia* and/or *Adkins*. One of the earliest cases to consider a barber price fixing law after *Nebbia* was *Duncan v. City of Des Moines*, 268 N.W. 547 (Iowa 1936). In this case, the court viewed the matter as a question of the barber's "liberty of contract" and completely ignored the *Nebbia* decision. Rather, the court grounded its decision in the principles of *Adkins* and *Tipaldo*. Using the traditional "public interest" test for price fixing, the Iowa Supreme Court found that the barber industry was not "affected with a public interest" and ruled that the statute violated both the state and federal constitutions (549-551).

That same year the Wisconsin Supreme Court also considered a claim involving the state's "barber law" in *State v. Fasekas*, 269 N.W. 700 (1936). In this case the court did not rule on the constitutionality of the state barber law because the issue had not been properly raised on appeal. Instead, the court's ruling was based on the inherent power of the state to make laws against unfair competition or unfair trade practices. The court found that the price schedule at issue did not relate to unfair competition or unfair trade practices and could not be sustained on that basis (704-705). The more curious part of this opinion involved the Wisconsin Court's failure to recognize *Nebbia* in its discussion of price-fixing cases. Only *Tipaldo*, 1936, and *Adkins*, 1923, were considered by the Wisconsin court, even though the same court had approved of state milk controls in *Lincoln Dairy*, 1936.

A few years later the Wisconsin court was able to address the constitutionality of the state's barber law in *State v. Neveau*, 294 N.W. 796 (1940). Pursuant to the state's unfair trade act, the state trade commissioner promulgated standards for the practice of the barber trade that included price-fixing. Noting the comprehensiveness of the trade standard, the court stated that "it does everything, perhaps more, than the legislature can do" (807). To illustrate this the Court pointed to the "known" fact that the "minimum price" set by the commissioner was, in fact, the "maximum price" for services in the trade. The Court noted that it was common practice for barbers to offer different classes of service at different prices. This standard mandated that only one class of service could be offered, the more "elaborate" and expensive service. The Court concluded that the creation of only one class of barber service did not "eliminate" an unfair trade practice as required by the law. Overall, the Court concluded that the "barber code" was unconstitutional as "an unwarranted exercise of legislative power..." (807-808).

The Alabama Supreme Court reached a similar conclusion in *City of Mobile v.* Rouse, 173 So. 266 (1937). In *Rouse*, the constitutionality of a barber law passed by the City of Mobile was challenged as a violation of economic due process. The municipal regulation at issue was passed under an Alabama statute that allowed municipalities to regulate businesses. Among other things, the statute allowed these municipal governing bodies to set the minimum fees charged by barbers for their services. The Alabama court distinguished its prior approval of milk price controls in *Franklin* by saying that the barber trade, unlike the milk industry, was not a business "affected with a public interest." As such, the court ruled that the price fixing provision violated the constitution (267).

Nowhere in the *Rouse* opinion did the Alabama Court cite the *Adkins* decision. Even so, at least one state supreme court readily assumed that *Rouse* was an *Adkins*-based decision (See *Miami Home*, 1936). Although this appears to be a logical assumption, later decisions of the Alabama court disprove its accuracy (See *Mount Royal Towers,* 1980). After the *Adkins* precedent was eliminated in *West Coast Hotel,* the Alabama Supreme Court did not change its position. Five years later, the court applied the same logic to declare a similar municipal regulation unconstitutional in *Lisenba v. Griffin*, 242 Ala. 679, 682 (1942).

Another early decision on the constitutionality of barber price fixing laws was the Florida case of *State ex rel. Fulton v. Ives*, 167 So. 394 (1936). Although the legal landscape on price fixing in Florida would soon change, the opinion in this case remained an important reference for other state courts assessing the constitutionality of their state's barber law. In *Ives*, the Florida court recognized the *Nebbia* decision, but narrowed the application of its principles. The court determined that *Nebbia* only applied if the business at issue was of "paramount importance" to

the state, and its regulation was "intimately connected" to the welfare of the public or to the state's prosperity. The court determined that the barber trade did not meet that high standard. Suspicious of the legislature's motives, the court also found that the act was a piece of "socialistic leveling of merit or capacity … inconsistent with" American values (401-402). Accordingly, the Florida court declared that the price fixing provisions at issue were invalid; they were designed not for the public welfare, but rather, to ensure the prosperity of the average barber (402-404). As would soon be revealed, *Ives* was just the first in a series of fluctuating opinions about the constitutionality of price control laws in Florida.

4.3 After *West Coast Hotel*: Constitutional Barber Laws

In March of 1937, the Supreme Court announced its decision in *West Coast Hotel*. This decision not only affirmed the principles of *Nebbia*, but also directly overruled *Adkins* and disavowed the "liberty of contract" doctrine. Despite its later prominence as the traditional start of the "Constitutional Revolution of 1937," *West Coast Hotel* did not have a uniformly "revolutionary" impact on state courts. Those courts that declared the barber laws constitutional tended to rely on both *Nebbia* and *West Coast Hotel* in their decisions. Those courts that declared the statutes unconstitutional were likely to "gloss over" the impact of either decision, even reverting to old Supreme Court decisions and seemingly disavowed principles for guidance. In truth, it seemed that some state courts were not just "misinterpreting" *Nebbia* or *West Coast Hotel*; they were staging a "counterrevolution" (See Note, "Counterrevolution in State Constitutional Law." 1963, 320-21, 330).

As previously noted, the Florida Supreme Court's attitude towards price fixing fluctuated markedly over a fairly short period. In *Miami Home*, 1936, the state supreme court held that a

statute allowing for the control of milk prices was constitutional. That year the same court held that the price fixing provisions of the state's barber law were unconstitutional in *Ives*. Two years later the Florida Supreme Court changed its position on price fixing with respect to another service trade, dry cleaning and laundry. In *Miami Laundry Co. v. Florida Dry Cleaning & Laundry Bd.*, 183 So. 759 (1938), the Florida Supreme Court adopted an approach consistent with *Nebbia* and *Parrish*. With respect to the complainants' argument that the barber trade was not "affected with a public interest," the court stated:

> There is no magic in the phrase "affected with a public interest". Any business is affected by a public interest when it reaches such proportions that the interest of the public demands that it be reasonably regulated to conserve the rights of the public and when this point is reached, the liberty of contract must necessarily be restricted (760).

Based on this concept, any business may be regulated if conditions exist that threaten the public interest. The court found that such conditions did exist and upheld the law as constitutional. The opinion accompanying the denial of the petition for rehearing described the court's reasoning for changing its position in *Ives*. Here the court identified *Ives* as a decision based on *Adkins*. Since *Adkins* had been overruled, the rationale behind the *Ives* decision had collapsed (763-764).

In 1941, the Florida legislature enacted another statute that involved price fixing for barbers. The constitutionality of this law was challenged in *McRae v. Robbins*, 9 So.2d 284 (1942). In this case, however, the constitutional grounds on which the court based its decision were not state or federal due process rights, but rather, a section of the Florida Constitution giving specific powers to the legislature. Under this section, the legislature had the authority to pass laws preventing abuses and excessive charges in businesses performing public services.

This act classified the barber industry as being "affected with a public interest." Because of this classification, the Florida court determined that the legislature had the power to "enact reasonable regulations for barber shops …" and held the act to be constitutional (287-289). (But cf. *Robbins v. Webb's Cut-rate Drug Co.*, 16 So.2d 121(1943) (declaring Barber Code void as invalid delegation of legislative power).

The Louisiana Supreme Court also experienced a "difference of opinion" among its members before ultimately deciding that the state's barber law was constitutional. In 1938 the Louisiana Supreme Court was faced with a due process challenge to the state's 1936 barber law in *State Board of Barber Examiners of Louisiana v. Parker*, 182 So. 485 (1938). The first time the law was considered, a panel of the Louisiana Supreme Court deemed it unconstitutional. Although the panel acknowledged the *Nebbia* decision, it did not follow it. Rather, the court recognized the barber trade as "affected with a public interest," but only in the area of public health or safety. This aspect of the barber trade was already governed by a comprehensive system of laws that were "perfectly" adequate for guarding the public's health. Therefore, the court determined that the barber law was enacted "under the guise" of exercising the state's legitimate interest in protecting the public health and welfare. Unlike the New York law considered in *Nebbia*, Louisiana's barber statute, was based on mere "'conjecture,'" not "hard facts." Accordingly, the court held the barber price fixing law to be unconstitutional (490-491). Three members of the panel dissented, and two filed strong dissenting opinions.

A rehearing on the case was soon granted, and the result this time would be very different. Sitting *en banc*, the Louisiana Supreme Court began by reviewing the statute's legislative declarations. Here the legislature found that unfair competition had caused the prices

for barber services to decline to such an extent that the average barber could not "maintain reasonably safe and healthful barbering services to the public." In light of this, the Louisiana Supreme Court found that barbering was "a business affecting the public health, safety and welfare," and that regulating the barber trade was a proper exercise of the state's police power (503-505). Further, the court determined that setting minimum fees for barbers had a "real and substantial relation" to the public health and welfare, just like the price fixing laws had to the milk industry in *Nebbia*. Because the state and federal due process provisions were "identical," the court concluded that the price fixing statute did not violate either the state or federal constitution (510).

Whether or not the legislature had other motives, principally economic, for passing this legislation were not discussed by the court. On that issue an author in the 1939 Louisiana Law Review lamented the fact that the statute's economic motives were not considered in this case. The author remarked that if the decision had been based on the right of a legislature to use price fixing as a means "to ameliorate economic conditions," it would have been "momentous." (Hebert, P., et. al., 1939, 389).

About the same time as the *Parker* decision was rendered, the Oklahoma Supreme Court was considering the constitutionality of its own state's very similar barber law. In *Herrin v. Arnold*, 82 P.2d 977 (1938), the Oklahoma court began by observing that the Louisiana and Oklahoma statutes were almost identical. Reviewing state cases before *Nebbia*, the court found that these "early cases" had relied on *Adkins*, now overruled. The Oklahoma court explained how *Adkins* had been used as a "guidepost" for deciding all types of price fixing cases, and how that role had changed with the advent of *Nebbia* and *West Coast Hotel*. The court found "in the

Nebbia case and in other cases, "a tendency to change the direction; and in the *West Coast Hotel* Case… [the Supreme Court] turned the signpost completely round" (981). This change in direction confirmed that the limits on the police power were "plastic in their nature" and would expand to meet the changing conditions of an increasingly complex society (982). Using *Nebbia* as its new "guide," the court found that the statute showed a reasonable relationship between the need to control prices and the ability of the average barber to meet necessary health requirements. As such, the Oklahoma statute did not violate either the state or federal constitution (984).

The Oklahoma Supreme Court revisited the constitutionality of the state's "barber law" many times in the next few years with the same result. In two cases later that year, *Jarvis v. State Bd. of Barber Examiners*, 83 P. 2d 560 (1938) and *Vandervort v. Keen*, 85 P.2d 405 (1938), the Oklahoma Supreme Court declared the state's barber law to be constitutional, affirming its prior opinion in *Herrin*. The Oklahoma Court of Criminal Appeals, the state's highest criminal court, considered the constitutionality of the state's barber law the following year in *Ex parte Herrin,* 93 P.2d 21 (Okla. Crim. App. 1939), a decision later followed in *Sparks v. State*, 115 P. 2d 277 (Okla. Crim. App. 1941).

In *Ex Parte Herrin,* 1939*,* the same person who had lost his civil appeal the previous year in *Herrin*, 1938, tried to gain his freedom by again attacking the constitutionality of Oklahoma's barber statute. After carefully considering the price control issue, the Oklahoma Court of Criminal Appeals agreed with the decision of the Oklahoma Supreme Court in *Herrin*, 1938. In doing so, the court declared that the principles of *Nebbia* and *West Coast Hotel* were

"convincing" on the constitutionality of the Oklahoma barber law (93 P.2d 21, 30). At the close of the opinion, the court stated:

> We are firmly of the opinion that if the Legislature … has the right to regulate the barber industry … in the interest of public health …, and to establish standards of fitness to engage in the profession under the exercise of the police power, then it has the power ... to fix and determine the minimum prices which may be charged by those engaged in the barber business … so that the public may be served by barbers who are not only skilled, but free from contagious disease, and that while so conducting their business in compliance with the laws of the state, *they may at the same time be afforded a fair return on their investment and their labor* (39). (emphasis added)

Note the italicized portion of the court's decision. According to this court, the state's police power extended not only to measures designed to protect the public health, but also to the economic welfare of individual barbers. Here the Oklahoma court broached the difficult question presented by the barber laws: whether laws designed to benefit the economic condition of small groups were within the proper scope of the state's police power. In both *Parker* and in *Herrin*, the state supreme court tied its decision to the "public health" reasons proffered by the legislature. Various authors have pointed to the tendency of state courts to find laws that have a genuine relationship to "health" constitutional (See, e.g., Sigler 1951). But where the statute appeared to promote one group's economic advantage, the state court's response was more unpredictable.

One state supreme court that did not conform to this general trend was Minnesota. In *State v. McMasters*, 283 N.W. 767 (1939), the Minnesota Supreme Court made a frank assessment of the legislature's real motives in enacting the state's barber law. The court stated: "The main objective, somewhat disguised, is the welfare of the trade rendering the services. The public interest, if any, is indirect and incidental" (770). Here the Minnesota court did what the

Louisiana and Oklahoma civil courts would not: openly acknowledge the economic disadvantage that the legislation was designed to ameliorate. Even though the true effect on the welfare of the general public would be "incidental," the Minnesota court, following the principles of *Nebbia* and *West Coast Hotel*, held that the statute did not violate the due process clause of either the state or federal constitution (770).

The decision in *McMasters* was reviewed in another "barbershop case," *Arnold v. Board of Barber Examiners*, 109 P.2d 779 (1941). In *Arnold*, the New Mexico Supreme Court observed that the state legislature had grounded the statute in the protection of the public health and had established a connection between destructive price competition and the inability of barbers to maintain the necessary safeguards for health under such conditions. Given the "wide latitude" state legislatures have to determine what needs of the public should be addressed and in what manner, the court recognized that these bodies "must inevitably tread close to the line which marks the zone between lawful and illegal exercise of the police power" (787). In this case the court found that the legislature did not overstep its boundaries, and thus, the law violated no federal or state constitutional provision (787).

4.4 Cases Holding Barber Laws Unconstitutional

Shortly after *West Coast Hotel* was decided, a California appellate court considered the constitutionality of a barber price fixing statute in *Ex parte Kazas*, 70 P.2d 962 (1937). Although *Kazas* was not a California Supreme Court case, the case was cited often as favorable authority by the supreme courts of other states and was later expressly approved by the California Supreme Court in *State Board of Dry Cleaners v. Thrifty-D-Lux Cleaners*, 254 P. 2d 29 (Cal. 1955). In *Kazas*, the court identified the "one constant principle" it believed had emerged from

the police power cases— "that the regulated trade must affect the prosperity of a large part of the members of the body politic" (967). The court used this "constant principle" to distinguish both *Nebbia* and *West Coast Hotel*, stating that each case involved the regulation of businesses where a large number of people would be affected. Thus defined, the "general welfare" did not benefit from a law regulating the fees of barbers (968-969). The real purpose of the legislation was to protect "the prosperity of the barber class sufficient to maintain the average barber and his family 'properly'…." (969, quoting *Ives*). The court concluded that the barber law violated both the federal and state constitutions (970).

Two years later the Tennessee Supreme Court considered a constitutional challenge to the barber law of that state in the case of *State v. Greeson*, 124 S.W.2d 253 (1939). From the beginning, the Tennessee court defined this as a "liberty of contract" case and sought to bolster its position with "outmoded" Supreme Court cases, "barber cases" decided before *West Coast Hotel,* and dissenting opinions from cases decided after it. Although the Tennessee court acknowledged that *West Coast Hotel* expressly overruled *Adkins*, it glossed over the Supreme Court's renunciation of the "liberty of contract" doctrine in that case. Instead, the Tennessee court chose to distinguish *West Coast Hotel* as a case involving wages, not fees. To distinguish *Nebbia*, the court drew a negative comparison between the potentially "disastrous" effects on the public welfare posed by a collapse in the dairy industry and the negligible effects posed by not regulating fees in the barbering trade (257-58).

The most interesting aspect of the *Greeson* opinion was its lengthy quotes from *Lochner*, 1917, extolling the virtues of the "liberty of contract" doctrine. Citing *Lochner*, the court stated that if this type of statute was valid, then there would be no limit on the exercise of the police

power. Ultimately, "the liberty of the individual and the right to contract" would no longer exist. Accordingly, the court held that the price fixing provisions of the statute were unconstitutional (257-258).

A few years later the Arkansas supreme court considered a constitutional challenge to its state's barber law in *Noble v. Davis,* 161 S.W.2d 189 (1942). In this case the Arkansas Supreme Court started with a direct attack on the statute's real objectives. The court not only questioned the act's declaration of purpose, but also derided the legislature's pronouncement, stating that it was the "declaration of a non-existent fact" (191). The court doubted that this type of act could possibly have a substantial connection with the protection of the public health and welfare. The court stated:

> How can the price a barber charges for a haircut or shave, or the commission the owner pays the barbers, or the hour the shop opens or closes affect the public safety, health, welfare, or prosperity? Such connection is visionary and not real (192).

Having given little deference to the legislature's stated objectives, the Arkansas court rejected the concept of price fixing as a legitimate use of the police power in this case. For its reasoning, the court relied on the "*Lochnerian"* opinion in *Greeson*, quoting it extensively (191-192). The court concluded that the act violated *both* the state and federal constitutions. But just to be certain it would not be overruled, the Arkansas court added a "cautionary proviso": even if the statute did not violate the U.S. Constitution, then it "certainly" violated the Arkansas constitution (192).

That same year, the Indiana Supreme Court considered a constitutional challenge to the state's barber law in *State v. Cloud*, 44 N.E.2d 972 (1942). This law included provisions for the setting of barbershop hours and for the fixing of minimum fees for barber services. The Indiana

Supreme Court dismissed all the state court decisions upholding barber price-fixing laws as disingenuous because they relied on a dubious "relationship between prices and health." Rather, the Indiana court concluded that these state courts were really trying to follow, or "anticipate the "drift'' towards greater legislative deference outlined in *Olsen,* 1941. The Indiana court was very critical of the way in which Justice Douglas characterized the Supreme Court's judicial philosophy, particularly in the context of purely economic statutes. Instead, the Indiana court favored jurisprudence where "constitutional safeguards for individual rights and liberties" were protected (977-978).

The Indiana court's disdain for the Supreme Court continued in its treatment of the opinion in *Nebbia,*1935. Although the Indiana court acknowledged the decision's validity, it refused to accept that any new standard had been established by *Nebbia*. The Indiana court flatly rejected the idea that *Nebbia* marked a turning point for the adjudication of price-fixing legislation. The court stated: "While the police power was there exercised in a new way, we do not regard the decision as a departure from old principles" (978). The court argued that *Nebbia* as well as its own decision in *Albert* conformed to the traditional "public interest" standard. Because the dairy industry was vital to the welfare of the entire public, it was a business "affected with a public interest" and could be regulated. Barber laws, on the other hand, were not. As such, the Indiana statute was unconstitutional (977-78).

4.5 Summary Analysis of Barber Laws

The "barbershop cases" represent a microcosm of the issues and conflicts surrounding the application of new or revised principles to the concept of legislative price fixing. The principal division, of course, was how the court interpreted *Nebbia*, 1934, and to a lesser extent, *West*

Coast Hotel, 1937. Use of the traditional "public interest" test resulted in the law being found unconstitutional; use of a more lenient *Nebbia* standard resulted in the law being found constitutional. Many years after the period of this study states continued to use one of the two tests— "public interest" or "police powers" (*Nebbia*)—to determine the constitutionality of a state's "barber law" (Trimble 1955, 381-82).

In cases where the price fixing statute was declared unconstitutional, the state court found some way to distinguish, limit, or even ignore, the Supreme Court's holding in *Nebbia*. To distinguish *Nebbia* the state court generally pointed to two factual differences between the milk industry and the barber trade. One, the barber trade, unlike the milk industry, was not "vital" to the state. Two, controlling the fees of barbers, unlike controlling the price of milk, did not affect a large number of people. In sum, price controls were only appropriate where the "public welfare," *writ large*, was at risk. Moreover, the courts looked unfavorably on the legislature's attempt to assist a group (barbers) attain a "minimum income," suggesting the traditional judicial concern for "neutrality." The reasoning of the state courts indicated that traditional "public interest" concepts were being employed. The Indiana Supreme Court handled the issue somewhat differently. It stated that the Supreme Court's decision in *Nebbia* had made no change to the traditional "public interest" test.

Figure 2 is a comparison of the number of constitutional and unconstitutional cases on either milk laws or barber laws during the relevant period. The chart shows the significant imbalance between the outcome of the cases. Most of the milk laws were found constitutional, whereas the direct opposite is true for the barber laws.

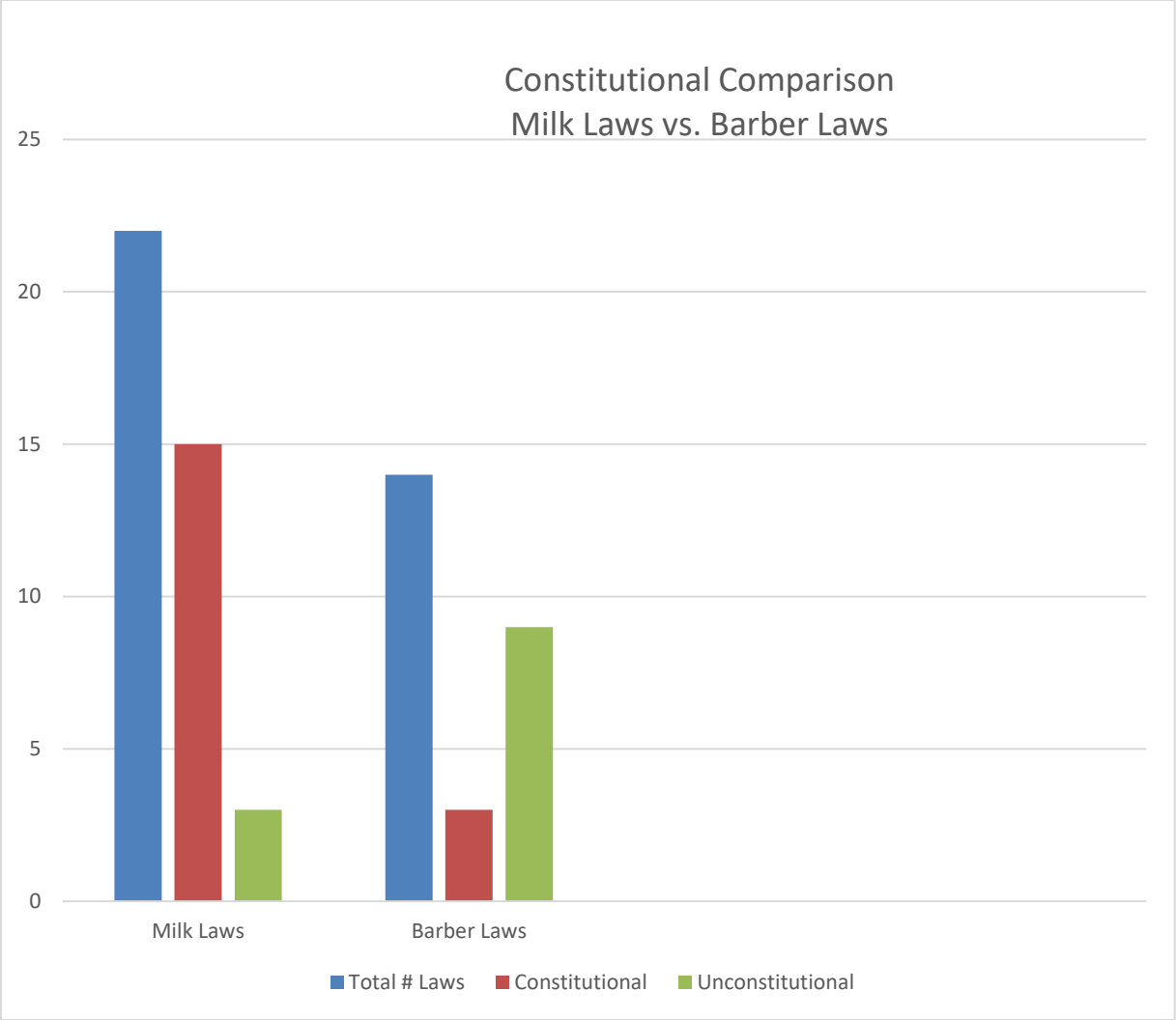

Figure 2. Constitutional Comparison: Milk Laws vs. Barber Laws

CHAPTER 5

CONCLUSION: EVOLUTION, REVOLUTION, OR RESTORATION?

There is little dispute that the decade marked by the Great Depression saw a dramatic transformation in constitutional law that changed the landscape of American government at both the federal and state level. Explaining these changes, however, is still a subject of scholarly debate almost a century later. Perhaps the most difficult aspect of evaluating this transformation lies in seeing past the "traditional" accounts that have become part of our legal and political history. Overcoming this narrow view requires an approach that is open to understanding the multi-dimensional aspects of this important question.

Generally, scholarship on the constitutional changes of the New Deal era has been divided into two groups: externalists and internalists. An externalist relies on political and historical events as agents of change, whereas an internalist looks to factors internal to the legal system. In recent years, however, scholars on both sides have (rightly) argued that this is an unnecessary distinction. It is rare that important occurrences will lend themselves to an "either/or" explanation. That can certainly be said of the "Constitutional Revolution of 1937." As is often said, judges do not live in a "vacuum." Outside influences may affect a judge's mindset, even indirectly. However, without an adequate analysis of cases and doctrine, any account of the New Deal "revolution" is incomplete. Revisionist legal scholars, like Barry Cushman and Richard Friedman, have made great strides in opening up the legal and intellectual history of that period, so much so that some externalist historians have amended their view of the "constitutional crisis" to include the consideration of its legal components (See Kalman, 1999).

At this point we return to the most important—and provocative—question asked by revisionist scholars: is the "Constitutional Revolution of 1937" really a "revolution" at all? Or is it best explained as the culmination of gradual shifts in judicial thinking over a long period of time – an "evolution" of ideas rather than a direct response to political pressure? To test this thesis, I have employed an unorthodox mode of constitutional study—using the decisions of the state supreme courts to examine the impact of a milestone Supreme Court decision, *Nebbia v. New York*, 1934, on the process of constitutional change and development in the New Deal era.

This study began with a basic assumption grounded in Cushman's revisionist legal theory but limited to the area of substantive due process. The assumption was that the critical doctrinal shift that marked the Court's "constitutional transformation" in economic due process occurred in *Nebbia,* not *West Coast Hotel.* Restricting the study to the due process "revolution" made it possible to examine the impact of these decisions in a comparable environment—state constitutional opinions on state price fixing laws. State supreme court decisions on price-fixing were examined in two areas, milk pricing and barber fees. As expected, the influence of *Nebbia* was most significant in the state "milk law" decisions. Most state courts recognized that *Nebbia* represented an important change in the Supreme Court's constitutional position on the economic regulation of private businesses. For most state courts, the Supreme Court had "settled" the federal constitutional question in *Nebbia*. The final decision would depend on the state court's interpretation of the "due process" provisions of their state's constitution. The pressing question was whether and to what extent the state court would apply *Nebbia* to the state's milk control law. A few state courts were willing to make the Supreme Court's analysis their own with little hesitation. Most were more circumspect and crafted an opinion that demonstrated their judicial

independence. In these opinions, it was apparent that the state courts were persuaded that the "milk control" laws should be constitutional but were not sure how much of *Nebbia* they wanted to adopt.

The results in the "barber cases" were quite different. Most of the state supreme courts that considered a constitutional challenge to the state's barber law held the law to be invalid. In these cases, the court found that the law impinged on the parties' "freedom of contract" or other liberty interest. In support of this position, some courts argued that the price-fixing provisions of the barber law could be distinguished from those of *Nebbia* based on the small size of the group affected or the fact that the barber industry was not "vital" to the public welfare. In addition, some courts clearly rejected the idea that "price-fixing" could be used to ameliorate "economic disadvantages." In essence, these state courts were using a form of the traditional "public interest test" as the standard of review in price-fixing cases. On the other hand, several of the "constitutional cases" appear to have adopted the broad deference to the legislature set forth in *Nebbia*.

How can the differences among these decisions be explained? It is possible that some state courts misunderstood *Nebbia* or *West Coast Hotel,* or were reticent to acknowledge such dramatic changes in doctrine. In the "milk law" decisions, there is also a sense that some state courts are using the facts behind *Nebbia* as a means of determining "reasonableness." Perhaps these are partial answers. Yet, the decisions in the barber cases suggest a more plausible answer. Instead of meeting its celebrated "demise" in the "constitutional revolution," economic due process survived in the state courts. As the Supreme Court retreated from the field of economic due process, many state courts took the opportunity to enhance the protection of individual property rights using the

authority of their state constitutions. Studies of state economic due process indicate that the tendency towards greater constitutional protection at the state level continued in some states for decades, so much so that at times it has been referred to as a "counterrevolution." (See Note, "Counterrevolution in State Constitutional Law." 1963, 320-21, 330). [5]

Although this judicial resurgence of economic due process may be surprising to some, it would seem to be a natural consequence of the New Deal "transformation." Gardbaum (1997) argues that most accounts portray the states as losing power in favor of the national government and the commerce power, when in fact, "the net effect of the New Deal era" was to restore the states to their "traditional position" of power (487). One important component of this "restoration" involved the New Deal Court's abandonment of economic due process. Since the *Lochner* era, the doctrine of economic due process had played a major role in constraining the actions of the states. Once the federal restraints were gone, state legislatures were free to enact the kind of economic and social regulations that had been blocked or discouraged for decades (490). At the same time, state courts were now free to block this legislation using the due process provisions of their *state constitutions.*

Revolution. Evolution. Restoration. The intersection of these three concepts underlies the crux of my dissertation: the relationship between the "constitutional revolution," the New Deal "transformation," and the "restoration" of power to the states in the New Deal era. Using an unconventional platform, I have gathered support for a more complete explanation for the dramatic constitutional changes to economic due process that occurred during this period. This

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[5] The present status of state economic due process is unclear. See discussion & text accompanying footnote 3.

explanation rejects the concept of a "1937 Revolution," and rests on the gradual development of laws and ideas, rather than sudden responses to political pressure. Although this development may have been punctuated by "thunderbolts" of extraordinary cases, its essence and character are more "evolutionary" than "revolutionary." Finally, by using state decisions as part of my analytical framework, I have included the development of state constitutional law within the broader scope of American constitutional development during this period of "restoration."

As a closing comment, I would like to suggest future avenues for study. The first, and most underrepresented, is that involving the constitutional development of the states. The second is the exploration of ways that the research of federal and state constitutional issues can be productively pursued together. Although the study of fifty state courts can seem overwhelming, knowledge of our state constitutions and state supreme courts is an important part of building a complete picture of American constitutional development.

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