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Abstract

Until the last quarter of the twentieth century it was a commonplace that the various expressions of economic substantive due process we associate with the so-called "Lochner Era" were animated by laissez-faire economics and Social Darwinism. More recent assessments have persuasively rejected this view, observing that the Court as a whole and the justices individually voted to uphold many more instances of government regulation of the economy than they voted to invalidate, and that the closest thing to a Social Darwinist that the Court had to offer was Justice Holmes, on whose polemical dissent in Lochner the conventional wisdom had been based. Since the 1970s, revisionist scholars have come instead to see these doctrines as expressions of what Professor Howard Gillman has called a "principle of neutrality." That master principle was grounded in such antebellum ideological concerns as the aversion to factional politics and the Jacksonian revulsion against special privilege, and was best understood as prohibiting what was at the time called "class legislation" or "special legislation" or "partial legislation" – legislation that could not be deemed public-regarding because it singled out particular groups for unjustified special benefits or burdens.

On this view economic substantive due process was concerned primarily with formal equality; but a number of revisionists recognized, as the doctrine of "liberty of contract" would suggest, that such an explanation was incomplete. These scholars understood that the Court's due process jurisprudence also was devoted to the protection of liberty, especially so in the context of employment; and they traced that feature of substantive due process to the anti-slavery free labor ideology of the antebellum Republican Party that informed such Reconstruction landmarks as the 13th and 14th Amendments and the Civil Rights Act of 1866. At the center of that ideology lay the conviction that the essential characteristic distinguishing the free man from the slave was self-ownership, and particularly ownership of one's own labor. Self-ownership entailed the right to dispose of one's labor on the terms of one's choosing, and regulations of that right that could not be justified as preventing fraud or protecting public health, safety, or morals were mere "meddlesome interferences" with a fundamental liberty of free men.

On this account, free labor ideology in the post-bellum period operated as a source of rights, restraining the state from interfering with individual liberty. Advocates of prison labor reform, by contrast, were more interested in exploring the implications of free labor ideology as a source of state power to restrict rights of property and contract. Throughout the 19th century, organized workers agitated for the reform of the system of convict labor, contending that goods manufactured with cheap prison labor competed unfairly with goods produced in the private economy and thereby depressed wages. They viewed convict labor as a species of slave labor that threatened to degrade free laborers,

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impeding their capacity to acquire capital and to enjoy the upward social mobility that free labor ideology promised to industrious, disciplined workmen. The State of New York became a national leader in this reform effort. The legislature abolished various objectionable forms of convict labor, and prohibited the sale of goods manufactured in its prisons on the private market. Convict-made goods produced in other states and shipped into New York, however, continued to compete with products produced by free labor in New York, and the New York statutes regulating the sale of these out-of-state goods raised contentious issues under both the Dormant Commerce Clause and the Fourteenth Amendment. As Professor William E. Nelson has argued, late nineteenth century jurists viewed the inherent individual right to freedom of contract as embracing "the right to use and dispose of property." "Every man...had a 'natural right to sell or keep his commodities as best suit[ed] his own purpose.'" "The right to use and dispose of property was viewed as a necessary consequence of the right to acquire and hold it." The question presented under the Fourteenth Amendment was whether New York's efforts to protect its free laborers deprived the owner and seller of convict-made goods of property rights without due process or denied him equal protection of the laws. Put another way, the question was whether free labor ideology operated not only as a shield but also as a sword, underwriting police power regulation of private property. This essay, prepared in Professor Nelson's honor, explores the manner in which the courts of his native New York struggled uneasily with that question for two decades, and the way in which it was ultimately resolved in favor of the free labor interest by United States Supreme Court Justices deeply invested in economic substantive due process.

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Forthcoming in *Making Legal History: Essays on the Interpretation of Legal History in Honor of William E. Nelson*, ed. R.B. Bernstein and Daniel J. Hulsebosch (New York University Press, 2012).

Professor William E. Nelson was among the first scholars to identify the connections between antebellum free labor ideology and late 19th and early 20th century substantive due process. The article in which he did so was published in the *Harvard Law Review* in January of 1974, back when Nelson was still a young Assistant Professor of Law at the University of Pennsylvania. Professor Nelson showed that the antebellum period's "jurisprudence of antislavery" was characterized by recognition of rights of property and contract, and of the rights to free trade and to immunity from class legislation, as among "the core rights to which all men were inherently entitled."[1] He went on to elaborate the ways in which antislavery jurists ascending to the bench in the postbellum era brought these ideas to bear in their interpretations of Section One of the Fourteenth Amendment, with such doctrines as liberty of contract and the prohibition on class legislation.[2]

With an observation that he would later elaborate in illuminating detail in his prize-winning book on the Fourteenth Amendment,[3] however, Professor Nelson warned that "human rights concepts . . . are of no help in deciding the great mass of cases in which two or more possible results are equally consistent with men's enjoyment of their 'natural rights.'"[4] This essay brings that insight into the ambiguities of the Fourteenth Amendment to bear on a central issue confronting liberal reformers in the late 19th and early 20th centuries: convict labor. Throughout the 19th century, organized workers had agitated for reform of the system of prison

labor, contending that prison-made goods competed unfairly with goods produced in the private economy. They viewed convict labor as a species of slave labor that threatened to degrade free laborers, impeding their capacity to acquire capital and to enjoy the upward social mobility that free labor ideology promised to industrious, disciplined workmen. Professor Nelson's native New York became a leader in this reform effort. The legislature abolished various objectionable forms of convict labor, and prohibited the sale of goods manufactured in its prisons on the private market. Convict-made goods produced in other states, however, continued to offer competition with products produced by free labor in New York, and the New York statutes regulating the sale of these out-of-state goods raised contentious issues under both the Dormant Commerce Clause and the Fourteenth Amendment. As Professor Nelson pointed out in his 1974 article, late-nineteenth century jurists viewed the inherent right of freedom of contract as embracing "the right to use and dispose of property." "Every man . . . had a 'natural right to sell or keep his commodities as best suit[ed] his own purpose.'" "[T]he right to use and dispose of property was viewed as a necessary consequence of the right to acquire and hold it."[5] The question presented under the Fourteenth Amendment was whether New York's effort to protect its free laborers deprived the owner of convict-made goods of property rights without due process or denied him equal protection of the laws. Put another way, the question was whether free labor ideology operated not only as a source of rights, protecting the individual from interferences with his Fourteenth Amendment liberty and property interests, but also as a source of power, underwriting state regulation of privately-owned goods. That question ultimately would be answered in the affirmative, but only after a half-century of contentious debate over the ambiguous legacy of free labor ideology.

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Throughout the 19th century, New York State had been a national leader in the effort to reform state penitentiaries.[6] As one scholar has put it, "Pre-eminent among the northern industrial states, New York conducted more investigations, tried more laws, and expended more effort in the pursuit of a solution to the competition of convict labor than any other."[7] "Situated at the center of much of labor's political agitation, this state experienced from the first the full gamut of forces playing around the problem. It devised the legislation that formed the basis for much of the discussion and practice of its neighbors in succeeding years."[8] The principal target of labor leaders and prison reformers was the contract labor system, under which private employers would provide machinery and supervise inmates in the production of goods to be sold on the open market. Workers "continually denounced the system as unfair competition and an affront to their dignity as free laborers."[9] By the decade of the 1880s, this campaign began to bear fruit. As *The Nation* would later recount the story, in 1883,

> the professional friends of labor started the cry that this contract convict labor was injuring honest workingmen by reducing the price of commodities, and consequently reducing wages. It was an old cry revived in new form. . . . It was made in the Legislature of 1883, when the fear of the labor vote was especially aggravated, and the result was that a bill was passed providing for submitting to the people the question of abolishing the system.[10]

In what the New York Commissioner of Labor described as "the largest vote total recorded in

New York history on ‘any proposition ever submitted to the people of the State,’” voters favored abolition by a margin of 405,882 to 266,966.[11] In the spring of 1884 the state legislature complied with this mandate by enacting a statute prohibiting the renewal of existing contracts. Superintendent of Prisons Isaac V. Baker, Jr. was instructed henceforth to operate the prisons on the “public account” system, under which goods produced by inmates would be sold on the open market only by the state on its own account.[12]

As the existing contracts expired, however, the wardens found themselves deprived of the staff, machinery, raw materials, and capital necessary to make the transition. As a consequence, “unemployment in the prisons soared.”[13] The situation at Auburn was “desperate,” while the warden at Elmira “was almost at his wit’s end.”[14] In 1886, the legislature responded by permitting employment of convicts under both the public account and the “piece-price” system, under which private employers would provide machinery and raw materials, but the inmates would manufacture products under the direction and supervision of prison officials rather than private parties.[15] In 1888 the legislature disregarded the advice of the Prison Labor Commission and again shifted gears with the enactment of the Yates Law, which prohibited both contract labor and piece-price arrangements, and abolished “all manufacture that used motive-power machinery. Only production by hand labor was allowed, and then only for the use of state institutions.” The Yates Law, as one scholar observed, “succeeded in disjointing” the State’s “entire prison system.” “Immediately the recent surpluses were exchanged for enormous deficits….”[16] The legislature quickly backtracked the following year by enacting the Fassett Law, which prohibited contract labor but authorized use of both the piece-price and public account systems. The statute further limited the number of prisoners working in any particular

industry to five percent of the number of free workers in the state working in that industry.[17]

In 1894, with the country in the grip of a severe economic downturn, the voters of New York adopted an amendment to the state constitution mandating the “state-use” system of convict labor. Under the terms of the amendment, the state was forbidden after January 1, 1897 to hire out the labor of its convicts to private parties, and goods made by convicts in state institutions could be disposed of only to the state and its political subdivisions, and not placed on the private market.[18] No one doubted that the state possessed the authority so to restrict the sale of goods produced in its own prisons. Whether New York could regulate the private market in goods produced in the prisons of other states and then shipped into the Empire State, however, was another matter. In *Leisy v. Hardin*, decided in 1890, the U.S. Supreme Court had held that the dormant Commerce Clause prohibited states from regulating the sale of alcohol shipped into a dry state from a wet state, so long as the booze remained in its original package.[19] Congress lifted this dormant Commerce Clause disability with the Wilson Act the following year.[20] The statute, which allowed state regulatory authority to attach to liquor in its original package upon arrival and delivery in the state of destination, was upheld by the Supreme Court *In re Rahrer*.[21] Reformers recognized a cognate problem with respect to convict-made goods, and the success of this strategy of “divesting” liquor of its interstate character prompted a decades-long effort to secure a comparable bill for the products of prison labor.

In fact, federal efforts to regulate interstate commerce in prison-made goods had begun in 1888. In March of that year the Court had handed down a decision foreshadowing *Leisy*,[22] and that May Missouri Representative John Joseph O’Neill introduced “A bill to protect free labor and the industries in which it is employed from the injurious effects of convict labor by confining

the sale of goods, wares, and merchandise manufactured by convict labor to the State in which they are produced."[23] In other words, the bill forbade interstate shipment of prison-made products. The bill never came to a vote, but the remarks of New York Republican Stephen V. White during the floor debates foreshadowed the difficulties that members of the State's judiciary would experience when grappling with the constitutional issues presented by statutes regulating the sale of convict-made goods. White professed deep sympathy with the objective of protecting "American free labor from competition with foreign pauper and domestic convict labor." But he was convinced that the O'Neill bill was unconstitutional. "The State which properly punishes its criminals can properly employ them at labor, and the product of that labor is property of equal dignity and consideration under the Constitution with any other product of man's labor," White argued.

> If Congress, under its authority to regulate commerce between the States, can prevent all commerce between the States in the product of prison labor, it can prevent all commerce in the product of our farm labor or that of our paid operators in factories. If the proposition were before us to prevent absolutely the shipment of wheat from one State to another, or of cotton goods from one State to another, I believe we would all agree that we did not have such power of prohibition under the power of regulation of commerce.

If Congress could "prohibit goods manufactured by one establishment from transshipment we can in like manner prohibit goods from all establishments." White believed that "adequate relief" could "be had through the action of the States, whose Legislatures have undoubted right to direct

that their own convict labor should not be permitted to compete with American labor." But he regretfully concluded that the O'Neill bill was "unconstitutional because it prevents commerce instead of regulating it, and because it takes lawful property from its owner without due process of law."[24] Dealers in convict-made merchandise acquired lawful property rights in those goods, and the protection of the interests of free labor did not justify governmental abridgement of those rights.

A similar question would come to the New York Court of Appeals in 1898. In 1896 the New York legislature enacted a statute making it a misdemeanor to sell or expose for sale goods made in any prison without attaching to them a label disclosing them to be "Convict-Made," and revealing the name of the prison in which they had been produced.[25] The state regime thus prohibited the sale of convict-made goods produced in New York, and required the labeling of convict-made goods produced outside the state. One Hawkins was charged with offering for sale a scrub brush produced in an Ohio prison without the label required by the statute. In October of 1898 a sharply divided New York Court of Appeals held that the statute violated the dormant Commerce Clause.[26] Three of the court's seven judges dissented from the judgment: Republicans Edward T. Bartlett and Albert Haight, and Chief Judge and future Democratic presidential nominee Alton B. Parker. Bartlett authored a lengthy dissent; Parker added a brief memorandum concurring with Bartlett.

Bartlett contended that the statute did not violate the Commerce Clause because it was a legitimate exercise of the state's police power "to promote the public welfare and prosperity" by implementing "the deliberate policy of this state that free labor shall be protected from disastrous competition with the convict system, which pays to the workman no wages, and therefore finds

little difficulty in supplanting the wage earner in the public markets." It was "self-evident that the protection of free labor from competition with convict-made goods in our domestic markets" would "promote the public welfare and prosperity." A statute that had as its "purpose, in pursuance of an enlightened public policy, to promote and protect the interests of free labor as against convict labor," was surely not "beyond the power of a sovereign state to enact." It was "most fitting," Bartlett concluded, "that the state should protect its citizens, and the interests of free labor."[27]

The opinion for the majority was written by Democrat Dennis O'Brien, who maintained that the statute was "in conflict with the commerce clause of the federal constitution."[28] This judgment confirmed that of a 4-1 decision of the Appellate Division's Third Department, which had concluded that the statute could not "be sustained as a valid exercise of the police power of the state," and therefore "must be condemned as a violation" of "the interstate commerce provision of the national constitution."[29] Much of Republican Justice John R. Putnam's reasoning for the Appellate Division would be echoed in O'Brien's opinion. Putnam explained that it had not been alleged in the indictment "that the brush was not a good one; was not the same, in all regards, as that made by other than convict labor."[30] Nor was it "claimed to have been an inferior or deceptive article." It was "an ordinary merchantable scrub brush."[31] It was not an article "clearly injurious to the lives, health, or welfare of the people."[32] Such a "merchantable article"[33] was "an article of commerce,"[34] and "the police power of a state only extends to property which does not belong to commerce."[35] Because Hawkins' scrub brush was not an outlaw of commerce, the "burden" placed upon its sale by the New York statute offended the dormant Commerce Clause.[36]

O'Brien followed Putnam in rejecting the claim that the statute constituted a legitimate exercise of the state's police power. It was "not claimed that there is any difference in the quality of this scrubbing brush when compared with one of the same grade or character made outside the prisons." Nor was there any "pretense that the act was passed to suppress any fraudulent practice." The sole "purpose of the law was to promote the welfare of the laboring classes by suppressing, in some measure, the sale of prison-made goods."[37] O'Brien insisted that protecting the interests of free laborers in New York was not a police power objective that could justify the statute's regulation of interstate commerce. New York could not "by hostile legislation drive the cheaper-made goods out of its markets, even though such legislation would increase the wages of its own workmen. Trade and commerce between the states must be left free."[38] "A citizen of this state who happens to buy goods made in a prison in Ohio has the right to put them upon the market here on their own merits," O'Brien insisted, "and if this right is restricted by penal law, while the same goods made in factories are untouched, such a law is a restriction upon the freedom of commerce, and the objection to it is not removed by the fact that it may have been enacted in the guise of a police regulation."[39]

This holding that the labeling regulation was not within the state's police power to enact might be taken to have implications for its status under the Fourteenth Amendment. In its discussion of the dormant Commerce Clause issue, the Appellate Division had occasionally made brief statements suggesting that Fourteenth Amendment concerns were implicated.[40] That court had opined that Hawkins' "merchantable scrub brush" was "property owned by the defendant, and which he had a right to own, possess, and dispose of without any restrictions whatever."[41] The court had rested its decision on the dormant Commerce Clause alone, but its

language suggested the possibility that its judgment might also rest on the Due Process Clause.

But the fact that a police power rationale did not pass muster under the dormant Commerce Clause did not necessarily imply that it would not suffice to support state regulation under the Fourteenth Amendment. *Leisy* prohibited regulation of sales of out-of-state liquor in its original package, but the states clearly possessed power to prohibit the sale of alcohol over which they had jurisdiction.[42] Similarly, *Schollenberger v. Pennsylvania*[43] held that the dormant Commerce Clause prevented the state from regulating original-package sales of oleomargarine, but the state was otherwise free to prohibit local sales of the product.[44] The Court of Appeals' holding under the dormant Commerce Clause therefore left open the question of whether the statute requiring that convict-made goods be labeled would be constitutional were the dormant Commerce Clause disability removed by congressional action, or were the prison-made product no longer in its original package.

It was to this question that O'Brien next turned. O'Brien concluded that the New York labeling statute deprived Hawkins of his property without due process of law. "The scrubbing brush in question was beyond all doubt an article of property in which the defendant could lawfully deal," O'Brien insisted. Yet the statute forbade him to sell it "except upon the condition that he shall attach to it a badge of inferiority which diminishes the value and impairs its selling qualities." "A law which interferes with the property by depriving the owner of the profitable and free use of it, or hampers him in the application of it for the purposes of trade or commerce, or imposes conditions upon the right to hold or sell it, may seriously impair its value, against which the Constitution is a protection." It was not "essential to the public welfare" that purchasers be informed of "the origin of every article of property which is the subject of sale, trade, or

commerce." And even if it were, such a law "could be effective only when applied to all property alike, and not limited to articles made in certain places and by a certain class of workmen." There was "nothing in the character or effect of prison labor to justify" legislation requiring the owner of a prison-made scrubbing brush "to label it with the history of its origin and to indicate the place where it was made and the class of workmen that produced it."[45]

The statute was thus simply an effort "to regulate the price of labor" by depressing the market demand for goods "made by one class of workmen" – convict laborers – and thereby to enhance "the price of goods made by another class." O'Brien asserted that no court had ever invoked the police power to justify such a statute, and with good reason. For if "the wages of labor in a few factories producing goods such as are also made in prisons may be regulated by the police power," then there was "no reason why that power may not be used to regulate the rewards of labor in any other field of human exertion." O'Brien proceeded to spin out a parade of objectionable class legislation that might follow:

> Why not give the workman who has a large family to support some advantage over the one who has no family at all? Why not give to the old and feeble a helping hand by legislation against the competition of the young and the strong? Why not give to the women, the weaker sex, who are often the victims of improvidence and want, a preference by statute over the men? Why confine such legislation to scrubbing brushes and like articles made in prisons, when multitudes of men engaged in farming, mercantile pursuits, and almost every vocation in life are struggling against competition?

If the New York labeling statute were a valid exercise of the police power, O'Brien could see no reason why the legislature might not "interfere" in each of these instances "to help those who need help at the expense of those who do not."[46] O'Brien concluded that the merchant or dealer "may buy his goods where he can obtain them to his best advantage." Any "restriction upon his freedom of action in this respect by State law" was "an invasion of his right of liberty." The statute interfered with "the right to acquire, possess, and dispose of property and with the liberty of the individuals to earn a living" by dealing in convict-made goods.[47]

O'Brien's opinion thus expressly embraced the view that the application of New York's labeling statute to prison-made goods produced outside the state deprived their owner of liberty and property without due process. But no other member of the Court of Appeals joined that portion of O'Brien's opinion. Chief Judge Parker and Judges Bartlett and Haight regarded the statute as "well within the police power of the state,"[48] while Judges Gray, Martin, and Vann concurred in the judgment solely "upon the ground that the statute conflicts with and is repugnant to the commerce clause of the federal constitution."[49] Six of the seven judges of the New York Court of Appeals either expressly rejected or refused to embrace O'Brien's view on the due process issue.

The New York appellate courts would not revisit this issue until 1910. *People ex rel. Phillips v. Raynes*[50] involved a statute requiring anyone displaying convict-made goods for sale to pay an annual license fee of five hundred dollars, and to display that license prominently in his place of business.[51] The statute did not implicate the dormant Commerce Clause because the goods in question had lost their character as interstate commerce and become part of the general merchandise of the state.[52] The sole question considered by the court, therefore, was whether the

license tax violated the Fourteenth Amendment.

Republican Attorney General Edward R. O'Malley defended the statute as a legitimate exercise of the state's police power and the classification as reasonable.[53] O'Malley emphasized that O'Brien had been the only member of the *Hawkins* court to embrace the view that the labeling statute there involved violated the Fourteenth Amendment, and much of his brief amounted to a rebuttal of that portion of O'Brien's opinion.[54] The history of New York legislation regulating convict labor demonstrated "a long-continued recognition by the legislature and the people of the State that a clear distinction exists economically between goods made by convicts and those manufactured by free labor and in free institutions." Convict-made goods were "dangerous to the free manufacture of similar goods." They differed from goods manufactured by free labor "not merely in that they have a different origin," but more "fundamentally in that they are virtually a product of slave labor." Therefore, "under the police power of the State the dealing in such goods should be limited and restricted for the protection of the labor of our free citizens and the capital invested in our free industries."[55] This was necessary "to promote the public welfare and prosperity" and to protect "free labor and free capital from unfair," "ruinous competition" with cheaply-manufactured prison goods.[56] It was also necessary to protect the consuming public, many of whom "prefer to buy goods made by free labor and would not purchase prison-made goods if they knew where they were made."[57] The statute's protection was therefore "not merely to the laboring classes, but to the entire community, by protecting both the manufacturing industries and the wage earners." It was "not an effort to suppress the price of a certain class of labor, but to prevent goods made by convict or slave labor from competing on unequal terms without disclosing their origin." The statute sought only to

compel convict-made goods “to stand before the community on their own merits and with their origin disclosed and to prevent dealers in them from having an undue advantage over dealers in free-made goods.”[58] It was “proper” to distinguish between “dealers in these two classes of goods and compel those handling the products of the degraded labor to pay a license fee not charged to other dealers.” The cost of producing such goods was lower, and their profitability accordingly higher, so that imposing a greater burden of taxation on them was “fair.”[59] The “danger” to “welfare of the State latent” in prison-made goods was enough “to warrant singling them out from other classes either for police regulation or for taxation.”[60]

In an opinion affirmed per curiam by the Court of Appeals later that year, a unanimous five-judge panel of the Appellate Division’s First Department rejected O’Malley’s argument at every turn. Republican Justice John Proctor Clarke wrote on behalf of Presiding Justice George L. Ingraham and Justice Francis M. Scott, both Democrats, as well as fellow Republican Justices Frank C. Laughlin and Nathan L. Miller. Clarke observed that the “obvious purpose” of the statute, “writ so plain that all may read,” was “to prohibit by onerous and exasperating restrictions . . . the buying and selling within this state of convict-made goods.” But setting this aside and treating the statute “purely as a revenue or tax law,” the court found that its classification was “unreasonable and capricious.” “That classification is based upon the origin of the goods dealt in, without regard to the quality or character or nature of the goods themselves.” If such classification were valid, the court asked, what was to prevent the legislature from requiring a license to sell goods made in a factory employing union labor, or employing nonunion labor? Why not “single out for license dealers in goods made in shops employing members of certain races, religions, or political parties?”[61]

The *Raynes* court did not consider or pass on whether New York's requirement that convict-made goods be labeled was a legitimate exercise of the state's police power. But the decision did focus on the licensing statute's discrimination between goods made by convicts and goods made by free labor, rather than on the evenhandedness of its treatment of convict-made goods produced both within and without the state. This discrimination based on the good's origin or mode of production, the court held, constituted an arbitrary classification, no different constitutionally from discriminations based on race or religion. Even were Congress to enact a Wilson Act for convict-made goods, the opinion suggested, the singling out of prison-made products for adverse treatment would violate the Fourteenth Amendment.

Congressional efforts to pass a divesting statute for prison-made products would continue without success for nearly two decades after *Raynes* was decided. In the 70th Congress, however, a bill sponsored by Missouri Democrat Harry B. Hawes in the Senate and Ohio Republican John G. Cooper in the House would be enacted. The New York legislature transmitted to Congress a communication urging the bill's passage,[62] and at the request of Perry S. Newell, Secretary of the Association of Cotton Textile Merchants of New York, the New York law firm of Breed, Abbott & Morgan prepared a brief presented to the Senate supporting the bill's constitutionality.[63] New York members speaking in favor of the bill on the floors of the House and Senate included Republican Representative Bertrand Snell,[64] and Democratic Representative Meyer Jacobstein,[65] and Democratic Senator Robert Wagner.[66] And Republican New York Attorney General Albert C. Ottinger filed a statement in support of the bill that largely copied O'Malley's brief in the *Raynes* litigation nearly twenty years earlier. Ottinger acknowledged the Fourteenth Amendment obstacle that *Raynes* presented even were Congress to enact the Hawes-Cooper bill. But he

nevertheless urged passage with the observation that "[t]he extension of the principles of the police power, according to the adjudications of our court of appeals during the last 20 years, has been marked," and it was "possible that more weight would be given to [O'Malley's] argument if the case were tried to-day."[67]

Ottinger's characterization of the trajectory of New York jurisprudence is corroborated by Professor Nelson's magisterial study of the subject in *The Legalist Reformation*. "Even in the nineteenth century," he reports, "the courts had construed the police power expansively. But as the center of gravity on the Court of Appeals began to shift" from property-oriented conservatives "toward reformers in the mid-1920s, the judges authored increasingly sweeping statements about its breadth." The police power, wrote Judge Cuthbert W. Pound for a unanimous court in 1930, was "'the least limitable of the powers of government,'" extending "to all the great public needs."[68] During this period, as Professor Nelson relates, the Court of Appeals found less persuasive "constitutional claims about private property and the limited nature of the police power," and became increasingly receptive to legislative measures designed to "prevent exploitation" and "achieve social justice."[69]

This was particularly so with respect to what we might call the constitutional law of competitive injury. Exemplary of this transformation was the 1933 case of *People v. Nebbia.*[70] The case involved the constitutionality of a New York statute setting minimum prices for the sale of milk within the state. The legislative findings and statement of policy accompanying the statute's regulatory measures referred to "unfair, unjust, destructive, demoralizing and uneconomic trade practices . . . carried on in the production, sale and distribution of milk" in the state, which called for an "exercise of the police power" to "protect" the "public welfare."

Oversupply led distributors to offer farmers prices below those at which milk could profitably be produced. The farmer was unable to protect himself against these "exactions," and minimum price regulation was necessary "to keep open the stream of milk flowing from the farm to the city and to guard the farmer from substantial loss."[71]

The Court of Appeals upheld the statute by a vote of 5-1.[72] Chief Judge Pound wrote for the majority that "[d]oubtless the statute before us would be condemned by an earlier generation as a temerarious interference with the rights of property and contract," citing the Supreme Court's opinion in *Lochner v. New York*. "But we must not fail to consider," he continued, "that constitutional law is a progressive science; that statutes aiming to establish a standard of social justice, to conform the law to the accepted standards of the community . . . by fixing living standards of prices for the producer, are to be interpreted with that degree of liberality which is essential to the attainment of the end in view." The Due Process Clause did not leave milk producers "unprotected from oppression." The legislature possessed the power to ensure that "a fair return may be obtained by the producer and a vital industry preserved from destruction."[73]

Though the Hawes-Cooper Act was enacted in 1929, its terms provided that it would take effect in January of 1934. In the meantime several states, including New York, enacted statutes prohibiting the sale of convict-made goods on the private market within the state after the effective date of the Act. On January 5, 1934 the New York Supreme Court in Albany County ruled in an action to restrain enforcement of the Hawes-Cooper Act and New York's statute.[74] The case was argued before Justice John T. Loughran, who had served on the trial bench for three years, and within a matter of months would be elevated by Governor Herbert Lehman to the State's Court of Appeals to fill a vacancy created by the resignation of Henry T. Kellogg.

Loughran would go on to win election to a full fourteen-year term in November of 1934, and Governor Thomas Dewey would appoint him Chief Judge of that Court upon the death of Irving Lehman in 1945. Loughran ran unopposed for that office in 1946, and served as Chief Judge until his death in 1953. In short, he participated in or presided over many of the changes in New York jurisprudence that Professor Nelson describes in *The Legalist Reformation*.

Loughran rejected the contention that the New York convict-labor law was "obnoxious to the due process clause." The statute declared it to be the policy of the state "to protect free labor from the unjust competition of convict labor." It was "sound to keep convicts at work," but the products of free labor had to be "marketed at a profit." If there were a "conflict between these objectives, the choice was for the legislature." Loughran pointed out that in *Hawkins* Judge O'Brien had been alone in taking the position that the labeling statute amounted to a denial of due process, and he brushed *Raynes* aside with only a brief mention. The requested relief was therefore denied.[75]

Two years later, Loughran would again support the use of the police power to prevent "unjust competition" in the labor market. Along with Judge Crouch, Loughran would join Judge Irving Lehman's dissent from the majority opinion invalidating New York's minimum wage statute for women in *People ex rel. Tipaldo v. Morehead*. Lehman observed that the legislature had found that "the constant lowering of wages by unscrupulous employers constitutes a serious form of unfair competition against other employers, reduces the purchasing power of the workers and threatens the stability of industry." These "evils of oppressive, unreasonable and unfair wages" were "such as to render imperative the exercise of the police power of the state." Such unscrupulous employers, Lehman argued, forced "more scrupulous employers" to lower their

wages. The legislature could "restrain" such "injurious," "unfair," "unjust" practices "in the interest of proper competition." The "vicious result of oppressive wages" paid to "cheap labor" extended "throughout the industry" in question "and in lesser degree even beyond the industry." "Just as experience has shown that, in a community where peonage or slavery exists, free labor cannot flourish, so in an industry, or even community, where oppressive wages are paid to those deficient in bargaining power, it is not unreasonable to believe that such wages affect indirectly but nevertheless very substantially the wages of all others."[76] Here, in a nutshell, was the argument against sale on the open market of convict-made goods; and that argument would be echoed the following year when President Franklin Roosevelt called on Congress to enact the Fair Labor Standards Act in order "to protect the fundamental interests of free labor and a free people."[77]

But one did not have to share Roosevelt's and Loughran's views on the constitutionality of the minimum wage to agree with them about the validity of state laws prohibiting open market sale of prison-made products. The day before the New York Court of Appeals decided *Tipaldo*, the Supreme Court of the United States ruled in a case challenging the constitutionality of the Hawes-Cooper Act and an Ohio statute prohibiting open-market sale of convict-made goods. The Court unanimously upheld both the federal statute and the Ohio law.[78] The opinion was written by Justice George Sutherland, who is often remembered as one of the conservative Four Horsemen, and as a leading proponent of substantive due process. And not without good reason. He had stood foursquare behind the right to liberty of contract when writing the majority opinion invalidating a minimum wage law for women in the 1923 case of *Adkins v. Children's Hospital*,[79] and he would continue to adhere to the views he had expressed there until the end of

his career.[80] He had authored a series of decisions invalidating price-regulation measures in the 1920s,[81] and he had dissented when the Court affirmed the New York Court of Appeals' decision in *Nebbia*.[82] He would vote to strike down several New Deal initiatives during the Depression decade.[83] But Sutherland was not a dogmatic apostle of laissez-faire. Over the course of his tenure on the Court he, like his fellow Horsemen, voted to uphold many more police power regulations than is often recognized.[84] As a member of the Utah legislature and a United States Senator he had supported several pieces of progressive labor legislation,[85] including the Seamen's Act of 1915, which liberated sailors in the merchant marine from various degrading and unfree conditions of service. Samuel Gompers later praised the "exceptional" assistance Sutherland rendered in the enactment of that legislation, and Seamen's Union president Andrew Furuseth acclaimed him as "a lover of freedom, and man who understands thoroughly what freedom means, and a man who, in the protection of freedom to all men, regardless of their station in life, may be trusted and relied upon under all possible conditions."[86]

Sutherland's opinion dismissed the contention that the Ohio law deprived dealers on prison-made goods of their property without due process. Ohio's view that "the sale of convict-made goods in competition with the products of free labor is an evil" found "ample support in fact and in the similar legislation of a preponderant number of the other states." Acts of Congress relating to the subject, Sutherland pointed out, also recognized "the evil." The importation of the products of convict labor had been prohibited, and the federal prisons operated on the state-use principle. Such legislation proceeded "upon the view that free labor, properly compensated, cannot compete successfully with the enforced and unpaid or underpaid convict labor of the prison." A state "basing its legislation upon that conception" had "the right and power, so far as

the Federal Constitution is concerned, by nondiscriminating legislation, to preserve its policy from impairment or defeat, by any means appropriate to the end and not inconsistent with that instrument." And because the Hawes-Cooper Act divested convict-made goods of their interstate character upon arrival and delivery in the state of destination, the Ohio law was "equally unassailable" on dormant Commerce Clause grounds.[87]

The final episode in the constitutional battle over the regulation of convict-made goods would come the following year. In 1935 Congress had enacted the Ashurst-Sumners Act, which prohibited the interstate shipment or transportation of prison-made products into any state where the goods were intended to be received, possessed, sold, or used in violation of the law of the jurisdiction of destination.[88] The bill was modeled on the Webb-Kenyon Act of 1913, which had imposed a similar scheme of regulation on the interstate shipment of alcohol,[89] and which the Court had sustained against constitutional challenge in the 1917 case of *Clark Distilling v. Western Maryland Ry. Co*.[90] The Ashurst-Sumners bill was signed into law by former New York Governor and now President Franklin Roosevelt, who had long been a supporter of prison reform at the state and national levels.[91] The Supreme Court would hear a challenge to the statute in *Kentucky Whip & Collar Co. v. Illinois Central Railroad Co.*[92] New York authorities took a keen interest in the case, and the State's Attorney General, John Bennett, Jr. filed an amicus brief in support of the Act. Bennett's brief placed great emphasis on the power of Congress and the states "to protect free labor from unjust and ruinous competition." It was "a function of government to preserve the freedom of labor," and to prevent "the crushing of free labor in industry." The labor that produced convict-made goods was not free labor, and there was in such labor "no inherent rights of men which are subject to the normal protection of the Constitution." The Due Process

Clauses did not "preserve for the convict any liberty to contract, or any right of property in his labor or the products of his labor." Accordingly, "other persons" could not "contract with the convict for his labor and thereby acquire rights of property." It was "just as proper for Congress to protect free labor against the interstate transportation of convict-made goods" as it was "to protect free labor against the flooding in from abroad of the products of slave labor." Because convict labor was used "to destroy the property of free men in their labor" and "the property of others in the products of free labor," Congress could "protect interstate commerce in the products of free labor from the demoralizing influence of the competitive products of convict labor."[93]

The Court's unanimous opinion upholding the Act[94] was handed down in early January of 1937, less than three months before a sharply divided Court would uphold Washington State's minimum wage statute for women in *West Coast Hotel v. Parrish*.[95] The author of the opinions in both of these cases was Chief Justice Charles Evans Hughes, who had been the progressive Republican Governor of New York and a proponent of penal reform in 1910 when *Raynes* was decided.[96] His opinion surveyed the Court's decisions upholding prohibitions on interstate shipment, reiterating the established principle that Congress could prohibit the use of interstate commerce as "'an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other states from the state of origin.'" Hughes rejected as "inadmissible" the contention that the Act was invalid because the goods in questions were "useful and harmless articles." The liquor cases established that booze was a legitimate article of commerce – indeed, this was why it had enjoyed the protection of the dormant Commerce Clause. But because of "the effects ascribed to the traffic in intoxicating liquors," the states could exercise their police power to restrict or prohibit internal commerce in them without violating the Due Process

Clause, and the same was true of convict-made goods. Though the “subject of the prohibited traffic” and “the effects of the traffic” in the liquor cases were “different,” “the underlying principle” was “the same.” The “pertinent point” was that Congress could prevent interstate commerce from being used to frustrate the enforcement of valid exercises of the state’s police power.[97]

Finally, Hughes found in the Act “nothing arbitrary or capricious” that would bring its provisions “into collision with the requirements of due process of law.” The Chief Justice noted that congressional hearings held had over many years “thoroughly revealed the evils attending the sale of such goods, in the open market, in competition with goods manufactured and produced by free labor.” In exercising the commerce power Congress was “as free as the states to recognize the fundamental interests of free labor.”[98]

As Professor Rebecca McLennan has observed, these decisions “sealed the fate of profit-driven prison industries in the United States.”[99] State legislatures were quick to react to the opportunities the decisions presented. By the end of the year only ten states “containing a combined population only slightly in excess of that of the State of New York” permitted “the unrestricted sale of imported convict made goods.”[100] “Under these conditions,” McLennan reports, “the interstate market in prison-made goods disappeared in a matter of a few years,” and “the country’s remaining prison industries went into rapid decline.”[101]

In the wake of congressional enactment of the Hawes-Cooper Act, an article in *Business Week* had anticipated this result. The author observed that the law would “affect prisons in nearly all states that now permit their products to be sold in the open market because almost all goods of that nature are sold through New York City. And New York State has a ‘state use’ law,

permitting the sale of prison products only for government use."[102] On this view, the campaign to forbid the open market sale of convict-made goods in New York was tantamount to a movement to prohibit their sale nationwide.

More than a quarter-century ago Professor William Forbath demonstrated that antebellum free labor ideology left an ambiguous legacy, strands of which were capable of nurturing and sustaining visions of the social order offering alternatives to the industrial capitalism that emerged from the Gilded Age. That ambiguity, Forbath argued, was ultimately resolved in favor of recognition of a right to pursue a lawful calling and enjoy its market-determined rewards, rather than the labor movement's aspiration to a right to be protected from the functionally compulsory sale of one's labor into a system of dependent industrial "wage slavery."[103] The story of convict labor reform in New York reminds us that the Fourteenth Amendment's ambiguous protections of liberty and property also left open how many questions of law and policy would be resolved *within* that system of industrial capitalism. Throughout this period, free labor ideology suffused conceptions of both constitutional right and state power in the domain of political economy. For a season, that ideology was a powerful force underwriting constitutional restrictions on government's regulatory competence. But all the while that multivalent constellation of ideas also supplied a reservoir of state authority to order our economic relations. It would take decades of political, legal, and intellectual struggle over the prison labor question, in New York and elsewhere, before the underlying constitutional issue would be definitively resolved in favor of the interests of free laborers. And the fact that it was resolved unanimously by Supreme Court justices otherwise deeply divided on questions of constitutional political economy, and just as the Court was pronouncing the last rites for the doctrine of liberty of

contract, serves to highlight the richness and complexity of the ambiguities of free labor that Professor Nelson identified back in 1974.

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1. William E. Nelson, "The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America," *Harvard Law Review* 87 (1974): 537-38; William E. Nelson, *The Roots of American Bureaucracy, 1830-1900* (1982), 52. Other scholars would later build upon and elaborate this insight. Among the most prominent examples are Charles W. McCurdy, "Roots of 'Liberty of Contract' Reconsidered: Major Premises in the Law of Employment, 1867-1937," *Yearbook of the Supreme Court Historical Society* 1984 (1984): 20; William E. Forbath, "The Ambiguities of Free Labor: Labor and Law in the Gilded Age," *Wisconsin Law Review* 1985 (1985): 772-800; Charles W. McCurdy, "The 'Liberty of Contract' Regime in American Law," in *The State and Freedom of Contract*, ed. Harry N. Scheiber (1998), 167-97.

2. Nelson, "The Impact of the Antislavery Movement," 550-57; Nelson, *The Roots of American Bureaucracy*, 133-38.

3. William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (1988).

4. Nelson, "The Impact of the Antislavery Movement," 559-60. *See also* Nelson, *The Roots of American Bureaucracy*, 67 ("Concepts of human rights . . . are of little help in deciding the great mass of cases in which two or more possible results are equally consistent with the enjoyment of 'natural rights'").

5. Nelson, "The Impact of the Antislavery Movement," 556. *See also* Nelson, *The Roots of American Bureaucracy*, 138.

6. Rebecca M. McLennan, *The Crisis of Imprisonment: Protest, Politics, and the Making of the American Penal State, 1776-1941* (2008); Philip Klein, *Prison Methods in New York State* (1920).

7. Glen A. Gildemeister, *Prison Labor and Convict Competition With Free Workers in Industrializing America, 1840-1890* (1987), 236.

8. Blake McKelvey, *American Prisons: A Study in American Social History Prior to 1915* (1936), 97.

9. Brian Greenberg, *Worker and Community: Response to Industrialization in a Nineteenth-Century American City, Albany, New York, 1850-1884* (1985), 143.

10. "An Expensive Blunder," *The Nation*, March 5, 1885, 194-95.

11. Gildemeister, *Prison Labor*, 239. *The Nation* would point out that although the proposition attracted the support of a majority of those voting on the issue, a significant portion of those voting in the 1883 election did not vote on the proposition. The editors therefore argued that "[l]ess than a majority of all persons voting favored the change, and it is entirely probable that many thousands of those favoring it had no intelligent idea of what they were doing." "An Expensive Blunder," 194-95.

12. Gildemeister, *Prison Labor*, 222, 239; Laws of New York, 1884, ch. 21; Klein, *Prison Methods*, 259.

13. Gildemeister, *Prison Labor*, 240.

14. McKelvey, *American Prisons*, 98.

15. Klein, *Prison Methods*, 259; Laws of New York, 1886, ch. 432; McKelvey, *American Prisons*, 98.

16. Klein, *Prison Methods*, 260; Laws of New York, 1888, ch. 586; McKelvey, *American Prisons*, 97- 99.

17. Klein, *Prison Methods*, 260; Laws of New York, 1889, ch. 382, sections 97, 102, 105; McKelvey, *American Prisons*, 99.

18. N.Y. CONST. of 1894, art. III, § 29; McKelvey, *American Prisons*, 99; Klein, *Prison Methods*, 261-62; Gildemeister, *Prison Labor*, 242; E.T. Hiller, "Development of the Systems of Control of Convict Labor in the United States," *Journal of the American Institute of Criminal Law and Criminology* 5 (1915): 262; John Mitchell, "The Wage-Earner and the Prison Worker," *Annals of the American Academy of Political and Social Science* 46 (1913): 12; E. Stagg Whitin, "Trade Unions and Prison Labor," *Case and Comment* 19 (1912): 243 ("labor forced" state-use "from the reluctant New York State Constitutional Convention in 1894"); Collis Lovely, "The Union Man and the Prisoner," in *The Prison and the Prisoner*, ed. Julia Jaffray (1917), 171-72. For a favorable assessment of the Fassett Law and a skeptical appraisal of the 1894 amendment, see W. P. Prentice, "The New Constitution of New York in Relation to Prison Labor," *Albany Law Journal* 52 (1895): 216.

19. 135 U.S. 100 (1890).

20. 26 Stat. 313 (1890).

21. 140 U.S. 545 (1891).

22. *Bowman v. Chicago & Northwestern Railway Co.*, 125 U.S. 465 (1888).

23. H.R. 8716, 50th Cong.,1st Sess. (1888), 19 CONG. REC. 2262.

24. 19 CONG. REC. 4528 (1888).

25. Laws of New York, 1896, ch. 931. The preceding year the New York Supreme Court had invalidated under the dormant commerce clause an 1894 labeling statute that applied only to convict-made goods produced in other states. *People v. Hawkins*, 32 N.Y.S. 524 (1895), invalidating Laws of New York, 1894, ch. 698. The first such labeling law was enacted in 1887. Laws of New York, 1887, ch. 323. McLennan, *Crisis of Imprisonment*, 188.

26. *People v. Hawkins*, 51 N.E. 257, 266 (N.Y. 1898).

27. *Id.* at 264.

28. *Id.* at 261.

29. *People v. Hawkins*, 47 N.Y.S. 56, 57 (1897). The sole dissenter was Democratic Presiding Justice Alton Parker. The majority opinion was joined by Democratic Justice D. Cady Herrick and Republican Justices Judson S. Landon and Milton H. Merwin.

30. *Id.* at 57.

31. *Id.* at 60.

32. *Id.* at 60.

33. *Id.* at 57.

34. *Id.* at 57, 60.

35. *Id.* at 61.

36. *Id.* at 58-60.

37. 51 N.E. at 258.

38. *Id.* at 261-62.

39. *Id.* at 262.

40. In *People v. Hawkins*, 32 N.Y.S. 524, 525 (1895), the Supreme Court reported that "the learned trial judge in the court below" had invalidated the discriminatory 1894 labeling statute in part on the ground that "it operated upon property owned at the time it took effect as well as property thereafter acquired, and thus constituted an unlawful interference with vested rights."

41. 47 N.Y.S. 60.

42. *Mugler v. Kansas*, 123 U.S. 623 (1887).

43. 171 U.S. 1 (1898).

44. *Powell v. Pennsylvania*, 127 U.S. 678 (1888).

45. 51 N.E. 258-60.

46. 51 N.E. 258-59.

47. 51 N.E. 259-60.

48. 51 N.E. 261.

49. *Id.*

50. 120 N.Y.S. 1053 (App. Div. 1910), *aff'd per curiam*, 198 N.Y. 539 (1910).

51. Laws of New York, 1909, ch. 36.

52. 120 N.Y.S. at 1056-57.

53. The brief is reproduced in *Hearing on H.R. 12000, 12001, and 21322, Competition of Penal Labor Before Subcomm. No.4 of the H. Comm. on Labor*, 61st Cong. 104-15 (1910).

54. *Id.* at 109, 111-13.

55. *Id.* at 106-07.

56. *Id.* at 109-10.

57. *Id.* at 111.

58. *Id.* at 112.

59. *Id.* at 107, 115.

60. *Id.* at 114.

61. 120 N.Y.S. at 1057-58.

62. 69 CONG. REC. 4373 (1928).

63. 70 CONG. REC. 668 (1928).

64. 69 CONG. REC. 8636-38 (1928).

65. 69 CONG. REC. 4373, 8749 (1928).

66. 70 CONG. REC. 860 (1928).

67. 70 CONG. REC. 668-69 (1928).

68. William E. Nelson, *The Legalist Reformation: Law, Politics, and Ideology in New York, 1920-1908* (2000), 63, quoting *People v. Perretta*, 253 N.Y. 305, 309 (1930).

69. Nelson, *The Legalist Reformation*, 21.

70. 262 N.Y. 259, 186 N.E. 694 (1933).

71. 186 N.E. at 695-98.

72. The majority opinion of now-Chief Judge Pound was joined by Judges Crane, Lehman, Hubbs, and Crouch. Judge Kellogg did not participate. The sole dissenter was Judge John F. O'Brien, son of Judge Denis O'Brien, the author of *Hawkins*.

73. 186 N.E. at 699.

74. Laws of New York, 1930, ch. 136.

75. *Greenthal v. Bennett* (N.Y. Sup. Ct., Albany County, 1934). The text of the opinion is reproduced in Memorandum of New York State, Amicus Curiae, and Motion for Leave to File, Whitfield v. Ohio, 14-15. The court, per Justice Christopher J. Heffernan, issued findings of fact and conclusions of law and entered judgment dismissing the complaint on the merits on August 22, 1934. *Id.* at 7-12.

76. 270 N.Y. 233, 200 N.E. 799, 804-05 (1936).

77. Message From the President of the United States Transmitting a Recommendation that the Congress Enact Legislation "Further to Help Those Who Toil in Factory and on Farm," 75th Cong., 1st Sess., H.R. DOC. NO. 255 (1937).

78. *Whitfield v. Ohio*, 297 U.S. 431 (1936). Justices Van Devanter, McReynolds, and Stone concurred in the result.

79. 261 U.S. 525 (1923). The majority of the New York Court of Appeals had felt bound by *Adkins* in *Tipaldo*. 270 N.Y. 233, 200 N.E. 799, 800-01 (1936).

80. See *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) (Sutherland joins majority opinion invalidating New York minimum wage law); *West Coast Hotel v. Parrish*, 300 U.S. 379, 400 (1937) (Sutherland dissents from opinion upholding Washington State minimum wage law).

81. *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929); *Ribnik v. McBride*, 277 U.S. 350 (1928); *Tyson & Bro. v. Banton*, 273 U.S. 418 (1927).

82. *Nebbia v. New York*, 291 U.S. 502, 539 (1934).

83. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 76 (Sutherland joins McReynolds dissent from opinion upholding National Labor Relations Act); *Carter v. Carter Coal Co.*, 298

U.S. 238 (1936) (invaliding Bituminous Coal Conservation Act of 1935); *Railroad Retirement Board v. Alton*, 295 U.S. 330 (1935) (invalidating Railway Pension Act of 1934).

84. See Barry Cushman, "The Secret Lives of the Four Horsemen," *Virginia Law Review* 83 (1997): 566-67, 570-71.

85. These included the eight-hour law for miners that was later upheld by the Supreme Court in *Holden v. Hardy*; the Employer's Liability Act; and the eight-hour day for laborers employed by the United States. Sutherland also chaired the special commission that prepared a federal workmen's compensation bill, for which he was a strong advocate. Joel Paschal, "Mr. Justice Sutherland," in *Mr. Justice*, eds. Dunham and Kurland (1964), 222; Joel Paschal, *Mr. Justice Sutherland: A Man Against the State* (1951), 36, 41, 56, 63, 65-73, 235; Harold M. Stephens, "Mr. Justice Sutherland," *American Bar Association Journal* 31 (1951): 446.

86. Joel Paschal, *Mr. Justice Sutherland: A Man Against the State*, 72, 97.

87. Joel Paschal, *Mr. Justice Sutherland: A Man Against the State,* 439-40.

88. 49 Stat. 494 (1935).

89. 39 Stat. 699 (1913).

90. 242 U.S. 311 (1917).

91. McLennan, *Crisis of Imprisonment*, 420-21, 454, 456-57.

92. 299 U.S. 334 (1937).

93. Brief for the State of New York, 18, 21-22.

94. Justice Stone did not participate. 299 U.S. at 353.

95. 300 U.S. 379 (1937).

96. Merlo J. Pusey, *Charles Evans Hughes* (1951), 181-258; McLennan, *Crisis of Imprisonment*, 420.

97. 299 U.S. at 346-51.

98. *Id.* at 352.

99. McLennan, *Crisis of Imprisonment*, 465.

100. J.A.C. Grant, "Interstate Traffic in Convict-Made Goods," *Journal of the American Institute of Criminal Law and Criminology* 28 (1938): 857. The states were Alabama, Delaware, Florida, Missouri, Nevada, North Dakota, South Carolina, Vermont, West Virginia, and Wyoming. "State Laws Regulating Sale of Prison-Made Goods," *Monthly Labor Review* 45 (1937): 1424.

101. McLennan, *Crisis of Imprisonment*, 461.

102. *Business Week*, October 12, 1929, 11.

103. Forbath, "The Ambiguities of Free Labor," 767.