"Charting the Course of Commerce Clause Challenge (Symposium: The Commerce Clause: Past, Present, and Future)"

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Charting the Course of Commerce Clause Challenge

Richard D. Friedman*

Recognizing Barry Cushman’s formidable skills in both research and argument, and his enormous wealth of knowledge, I have long known that I would much rather be on the same side of an issue with him than on the opposite side. And I am glad that we have been on the same side of an important issue, for both of us doubt that Franklin Roosevelt’s Court-packing plan had much to do with the constitutional transformation of the 1930s. But now I have expressed disagreement with some propositions he has asserted, and I have made some assertions with which he disagrees, he has responded, and I will reply. In view of the fact that Professor Cushman’s “brief comment”¹ is more than half again as long as my initial article,² I am afraid that this essay will also be longer than that initial article. Having just spent far more on an addition to our house than we spent on the house itself, I will not complain.

Let me say right off: Professor Cushman’s comment makes some excellent points. It has caused me to reassess and modify some assertions I made in my article and some assumptions I had held too easily for a long time. At the same time, for all the archness of his tone and intensity of his comment he does little or nothing to challenge the basic thesis of my article, that though Congress’s power under the Commerce Clause developed enormously in the first half of the twentieth century there were no major discontinuities in the doctrine. Indeed, so far as I understand it, he is in broad agreement with this thesis, at least

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up to 1941.³ And, as I will show below, some of his points actually strengthen my thesis. Most of his comments are addressed to particular assertions that I made along the way, often drawing on an earlier article,⁴ in trying to explain how constitutional doctrine changed. Although he has caused me to modify—and, I hope, refine and improve—my account in some particulars, I continue to believe the account is basically solid.

Especially given the extreme time pressure under which I am writing this reply, I cannot hope to respond to every point and implication of Professor Cushman's comment; I have had to pick my points.⁵ Because I am replying to selected points in a comment that itself challenges selected points in my article, this essay may have a scattershot quality. Accordingly, I will give a brief overview of part of our disagreement. I regard the climactic moment in the development of Commerce Clause doctrine in the New Deal to be the Supreme Court's decision in NLRB v. Jones & Laughlin Steel Corp.,⁶ in which Chief Justice Hughes, writing for a majority of the Supreme Court, established that Congress may regulate productive activities, so long as they have a sufficient relationship to interstate commerce, without having to show the intent of the persons regulated to interfere with commerce. Hughes's opinion altered previous doctrine, but it was consistent with, and a natural outgrowth of, basic principles that he had previously articulated. Later decisions, notably United States v. Darby⁷ and Wickard v. Filburn,⁸ extended Jones & Laughlin—Darby, decided shortly before Hughes's retirement, pushed the doctrine out about as far as Hughes cared to take it—but built on the framework it had laid out. Professor Cushman, as I understand it, sees Jones & Laughlin as an application (though not explicit) of, or at least motivated by, the

³. See Cushman, Continuity and Change, supra note 1, at 1009 (stating "we agree that the development of Commerce Clause doctrine between 1890 and World War II was marked by less discontinuity than is sometimes recognized").


⁵. I will be happy to communicate with anyone interested in knowing the extent to which I agree or disagree with any points to which I do not reply here. I can be contacted at: rdfrdman@umich.edu.

⁶. 301 U.S. 1 (1937).

⁷. 312 U.S. 100 (1941).

“stream of consciousness” doctrine. I believe he regards *Darby* and *Wickard* as the more significant developments, though with respect to *Darby* he appears to regard only the application of general principles to the case, and not Justice Stone’s articulation of those principles, as particularly significant.

In Part I of this essay, I address Professor Cushman’s criticism of my discussion of the nineteenth-century precedents. In Part II, I discuss three strands of early twentieth-century doctrine. In explaining *Jones & Laughlin*, I give less weight than does Professor Cushman to either the overthrow in *Nebbia v. New York* of the “affected with a public interest” doctrine or to the “stream of commerce” theory. And I give more weight than he does to the doctrine of the *Shreveport Rate Cases* as later re-fashioned in *Stafford v. Wallace*. Finally in Part III, I discuss five crucial New Deal cases.

I. THE NINETEENTH-CENTURY PRECEDENTS

Professor Cushman begins his chain of disagreements with me with my discussion of the nineteenth-century precedents. I contended that in *Gibbons v. Ogden* John Marshall suggested, albeit ambiguously, that “Congress may regulate a matter that is not itself commerce, even though it may be characterized as an ‘internal’ concern of a state, if it affects other states in a sufficient way.” Professor Cushman says he does not believe “that there is anything in *Gibbons* that authorizes this inference.” But I pointed to the famous passage in which Marshall distinguishes between “the external concerns of the nation, and... those internal concerns which affect the States generally,” as to which federal power may be applied, and “those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.”

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10. 234 U.S. 342 (1914).
11. 258 U.S. 495 (1922).
13. Friedman, Sometimes-Bumpy Stream, supra note 2, at 984.
14. Cushman, Continuity and Change, supra note 1, at 1010.
15. Friedman, Sometimes-Bumpy Stream, supra note 2, at 983-84 (quoting 22 U.S. (9 Wheat.) at 195).
is true, as Professor Cushman says, that given the factual setting of Gibbons there was no need for Marshall to discuss what, other than "commerce," the Commerce Clause might authorize Congress to regulate. But necessity did not always confine Marshall: he did include this passage, and the implication certainly seems to be that a critical factor in determining the reach of federal power is the effect of the activity that Congress seeks to regulate.

Professor Cushman contends that my "formulation succeeds in accommodating nearly two centuries of precedents only by retreating to a level of generality at which the claim is so uncontroversial as to be unilluminating."\(^{16}\) I showed that Marshall suggested, and later cases made clear, that Congress is not limited to regulating commerce itself, and that Congress can regulate matters that are not commerce so long as they have the requisite effect on commerce. I do not understand Professor Cushman to deny that this was orthodox law by the middle of the nineteenth century. But he contends—and I do not disagree—that the doctrine was not controversial and that it did not determine results in twentieth-century cases; he asks, after describing an opinion by Justice Story that I quoted, "Should we conclude from this that Story and his colleagues would have voted with the majority in NLRB v Jones & Laughlin Steel Corp., or in United States v. Darby, or in Wickard v. Filburn?"\(^{17}\) Of course, I suggest no such conclusion. I fear my position is sufficiently vulnerable to misunderstanding that I had better try to explain it again.

I do not contend that the proposition that Congress's power to regulate commerce extends to matters that are not in themselves commerce but that sufficiently affect commerce was controversial when it was established, or indeed at any later time. I do not know to what extent the absence of controversy on this point in Supreme Court decisions is attributable to the tendency of justices at the time to suppress dissent and to what extent it was attributable to their agreement that the proposition was sensible, or at least to their lack of disagreement with it. I do contend that there was an alternative way to read the language of the

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16. Cushman, Continuity and Change, supra note 1, at 1011.
17. Id. at 1012 (footnotes omitted).
Commerce Clause—as limiting Congress to regulating matters that were themselves commerce—and that this alternative was rejected well before the end of the nineteenth century.

Professor Cushman plainly does not disagree that the alternative was rejected. Perhaps he disagrees that the alternative was intellectually plausible at all. But even if it was not—I believe it was, but I do not feel strongly on the point—it does not undercut my thesis. I have argued that the development of Commerce Clause doctrine has been devoid of major discontinuities. I believe that the adoption of the effects doctrine was the first step in the “sometimes-bumpy stream” that culminated in the New Deal cases. If the effects doctrine was essentially pre-ordained—by the language or structure of the Constitution, or by the lack of any viable alternative, or by whatever—it would simply mean that the first part of the stream was even smoother (or perhaps shorter or less interesting) than I have suggested.

Now, of course, I do not contend that one who adopted the principles adopted in cases such as *United States v. Coombs*[^18] and *The Daniel Ball*[^19] thereby took a position that preordained the New Deal cases. The whole point of my article was that Commerce Clause doctrine changed enormously over time but in generally small steps. I do believe that a series of forces made it especially likely that, once the Court adopted the effects principle, the doctrine would change in the direction eventually achieved by the New Deal cases.[^20] But between the earlier cases and the later ones lie the significant developments of several decades.

II. THREE STRANDS OF DOCTRINE

A. The “Affected With a Public Interest” Doctrine

Professor Cushman invests *Nebbia v. New York*[^21] with enormous significance. I agree that it is a case of great impor-

[^19]: 77 U.S. (10 Wall.) 557 (1871).
[^20]: Had the Court not adopted that principle, the eventual outcome may have been much the same, but presumably by a different—and much less continuous—course, perhaps involving a constitutional amendment.
tance, but not to the extent that Professor Cushman does; I do not believe that the advances in Commerce Clause doctrine depended on the decision in *Nebbia*, though they may well have depended on the type of thinking that underlay *Nebbia*. I said in a footnote in my article that *NLRB v. Jones & Laughlin Steel Corp.*[^22] “did not depend on the overthrow, in [*Nebbia*] of the ‘affected with a public interest’ doctrine; neither *Nebbia* nor that doctrine were cited in the majority opinion or in the dissent in *Jones & Laughlin*, which was not a price-regulating case.”[^23] Professor Cushman disagrees at some length. I am not sure the matter has any substantial bearing on the principal thesis of my article, concerning the development of Commerce Clause doctrine. But it has significance of its own, and so I will reply.

Professor Cushman says that I err in assuming “that the affected with a public interest doctrine applied only to price-regulation cases.”[^24] I did not assume that. The term “affected with a public interest” had different meanings in different contexts. Although some judicial expressions seem to assume that businesses that were not characterized in this way could not be subjected to regulation at all, the more realistic view was that expressed by Chief Justice Taft in *Charles Wolff Packing Co. v. Court of Industrial Relations*:[^25]

> All business is subject to some kinds of public regulation, but when the public becomes so peculiarly dependent upon a particular business that one engaging therein subjects himself to a more intimate public regulation is only to be determined by the process of exclusion and inclusion, and to gradual establishment of a line of distinction.[^26]

Moreover, Taft indicated, characterization as a business clothed with a public interest was not a binary matter:

> The extent to which an inn or a cab system may be regulated may differ widely from that allowable as to a railroad

[^22]: 301 U.S. 1 (1937).
[^23]: Friedman, *Sometimes-Bumpy Stream*, supra note 2, at 988 n.25 (citation omitted).
[^24]: Cushman, *Continuity and Change*, supra note 1, at 1019.
[^26]: *Id.* at 538-39. An earlier passage in Taft’s opinion suggested that when a private business was not affected with a public interest it enjoyed “freedom from regulation,” *id.* at 536, but the formulation quoted in the text is, as Robert Post has noted, the more careful one. Robert C. Post, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 B.U. L. Rev. 1489, 1517 (1998).
or other common carrier. . . . The extent to which regulation may reasonably go varies with different kinds of business. The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of such character that only the first is permissible, while [with respect to another] . . . both come within the public concern and power of regulation.  

When the Court in this era dealt with attempts to regulate prices, including wages, it considered whether the particular industry should be considered affected with a public interest, and in this context the term was given a very restrictive meaning. In other contexts, where due process challenges to regulations or taxes were raised, the Court usually asked the broader question whether the statute was unreasonable or arbitrary; sometimes the Justices used the term "arbitrary or capricious." 

In *Nebbia*, Justice Roberts's opinion for the majority reviewed at great length the breadth of regulation that was permissible for the general welfare. It then rejected the principle "that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells." The standard governing the validity of price regulation—and, he maintained, the standard that had governed the determination of whether a given industry was affected with a public interest—was the ordinary one of due process, whether the laws were "arbitrary in their operation and effect." 

Now, let us look at the labor cases that preceded *Jones & Laughlin*. The two principal cases invalidating statutes that pro-

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28. *See*, e.g., Ribnik v. McBride, 277 U.S. 350, 355 (1928); Tyson & Bros. v. Banton, 273 U.S. 418 (1927); Adkins v. Children's Hosp., 261 U.S. 525 (1923). I believe that Professor Cushman overstates the narrowness of the category. Compare to his discussion at Cushman, *Continuity and Change*, supra note 1, at 1017-18, the more expansive and loose description in *Tyson & Bros.*, 273 U.S. at 430, which, like *Wolff Packing*, 262 U.S. at 538, admits considerable difficulty in defining the term. But the category was certainly narrow.
32. *Id.* at 532.
33. *Id.* at 537.
hibited "yellow dog" contracts, *Adair v. United States*\(^\text{34}\) and *Coppage v. Kansas*,\(^\text{35}\) both involved railroads. That the business involved in these cases was the classic one deemed "affected with a public interest" did not save the statutes; the majority of the Court in each case held that the statute violated the freedom of contract of the parties to the contract. Hughes dissented in *Coppage*, which was decided during his first judicial tenure. Shortly after he became Chief Justice, he had a chance to revisit the issue, in *Texas & New Orleans Railroad Co. v. Brotherhood of Railway and Steamship Clerks*\(^\text{36}\). That case involved a provision of the Railway Labor Act of 1926 that, without terms prohibiting contracts of any form, forbade covered employers to interfere with employees’ self-organization or designation of representatives. For a unanimous Court (McReynolds not participating), Hughes spoke favorably about Congress’s power to "safeguard" the employees’ right of collective action. He held that *Adair* and *Coppage* were “inapplicable” because “[t]he statute is not aimed at [the] right of the employers [to select or discharge employees] but at the interference with the right of employees to have representatives of their own choosing.”\(^\text{37}\) This, as Professor Cushman has written, “was a distinction that could be remembered just long enough to be stated once.”\(^\text{38}\)

I think it could not be surprising, then, that in *Jones & Laughlin*, confronting a statute that had a broader scope than that of the Railway Labor Act but that protected associational rights in a similar way, Hughes spoke of the employees having a “fundamental right” to organize,\(^\text{39}\) or that he rejected the employers’ reliance on *Adair* and *Coppage* with little more than a citation to *Texas & New Orleans*,\(^\text{40}\) or that he characterized the regulation in traditional terms as not being “arbitrary or capricious.”\(^\text{41}\) Had he regarded the doctrinal transformation achieved by *Nebbia* as a critical element in the case, whether to the out-

\(^{34}\) 208 U.S. 161 (1908).

\(^{35}\) 236 U.S. 1.

\(^{36}\) 281 U.S. 548 (1930).

\(^{37}\) *Id.* at 571.

\(^{38}\) BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT 126 (1998) [hereinafter CUSHMAN, RETHINKING].

\(^{39}\) 301 U.S. at 33.

\(^{40}\) *Id.* at 45.

\(^{41}\) *Id.* at 44.
come or to the mode of analysis, one would have expected him to cite the case.\textsuperscript{42} That is not to deny that a justice who rejected the principle of \textit{Nebbia}—who regarded governmental power over price regulation and other limited matters as confined to a closed set of businesses affected with a public interest—and who further regarded a prohibition of interference with associational rights as one of those limited matters, would reject the expansion of \textit{Texas & New Orleans} to an industry he did not consider affected with a public interest; that is, I suppose, almost tautologically true.\textsuperscript{43} But the Justices who formed the majority in \textit{Jones & Laughlin} did not fit this description, and I believe the actual articulation in \textit{Nebbia} reflected rather than transformed their thinking.\textsuperscript{44}

To put the point simply, suppose that the Court decided \textit{Jones & Laughlin} before, rather than after, \textit{Nebbia}. There is no reason to suppose that Hughes’s opinion in \textit{Jones & Laughlin} would have been written any differently. At the same time, I readily acknowledge that any Justice who, in this thought experiment, joined the majority in \textit{Jones & Laughlin} would be logically expected to join the majority in the hypothetical later-

\textsuperscript{42} He cited \textit{Nebbia} repeatedly in his dissent in \textit{Morehead v. New York ex rel. Tipaldo}, 298 U.S. 587 (1936) (Hughes, J., dissenting), and, two weeks before \textit{Jones & Laughlin}, in his majority opinion in \textit{West Coast Hotel Co. v. Parrish}, 300 U.S. 379 (1937). Both cases involved wage regulation, a form of price regulation.

\textsuperscript{43} Thus, the four conservative members of the Court objected to the expansion. As Professor Cushman points out, the dissent by Justice McReynolds, joined by the other three, distinguished \textit{Texas & New Orleans} as limited to common carriers. \textit{Jones & Laughlin}, 301 U.S. at 101 (McReynolds, J., dissenting). Given that the dissent relied on \textit{Adair} and \textit{Coppage}, which also involved common carriers, and made no attempt to distinguish them from \textit{Texas & New Orleans}, it seems virtually to reject that case. Perhaps a sense of comity caused the other three Justices to go along with McReynolds’s dissent without objecting to this treatment of a precedent in which they had joined. Correspondingly, as Professor Cushman points out, neither McReynolds nor any of the other three objected to the application of the National Labor Relations Act to an interstate coach carrier, in \textit{Washington, Virginia & Maryland Coach Co. v. NLRB}, 301 U.S. 142 (1937); here it may have been McReynolds who chose not to break the lockstep. The chain of decisions still leaves at least Justice Van Devanter something of a mystery, because he had voted with the majority in \textit{Coppage}.

\textsuperscript{44} Note, for example, Justice Stone’s dissent, joined by Justices Holmes and Brandeis, in \textit{Ribnik v. McBride}, 277 U.S. at 359 (Stone, J., dissenting), and Brandeis’s opinion for the majority—the same majority as in \textit{Nebbia}, except for the inclusion of Holmes rather than his successor Cardozo—in \textit{O’Gorman & Young v. Hartford Fire Insurance Co.}, 282 U.S. 251(1931). Both, I believe, go far in the direction of \textit{Nebbia}.
decided Nebbia. I therefore doubt that there is a large difference between Professor Cushman and me on this matter.

B. The Stream of Commerce

Professor Cushman contends that I understated the strength of the “stream of commerce” doctrine as it stood on the threshold of the New Deal cases. He may be right. If he is, this only strengthens my thesis that the development of Commerce Clause doctrine has not been marked by major discontinuities. At the same time, I continue to believe the “stream of commerce” doctrine did not have as much force as Professor Cushman contends, or the power he attributes to it for explaining the Supreme Court’s willingness to uphold the application of the National Labor Relations Act (“NLRA” or “Wagner Act”) in Jones & Laughlin and its companion cases.

Professor Cushman relies on Stafford v. Wallace,45 as did the Government in Jones & Laughlin. For now, I will consider Stafford in the way that it has usually been understood, as a “stream of commerce” case; in Section C, I will address another aspect of the case. Professor Cushman is correct that the case was useful for the Government in Jones & Laughlin, for it spoke about the “flow of live stock... through the great stockyards and slaughtering centers” on the borders of the West and Southwest, a flow that began with livestock and ended with “meat products or stock for feeding and fattening.”46

But notice several points. First, though the statute, the Packers and Stockyards Act, 1921,47 regulated meat packers, it did not, as I understand it, regulate their productive activity. Rather, it regulated transactions by them that were deemed to be in commerce.

Second, Taft gave no indication that it would be permissible for Congress to regulate a productive process in which goods came to rest and were materially transformed. On the contrary, he emphasized continuity:

The stockyards are not a place of rest or final destination. Thousands of head of live stock arrive daily by carloads.

45. 258 U.S. 495 (1922).
46. Id. at 514, 516.
47. Packers and Stockyards Act, ch. 64, 42 Stat. 159 (1921).
and trainload lots, and must be promptly sold and disposed of and moved out to give place to the constantly flowing traffic that presses behind. The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East, and from one state to another. Such transactions cannot be separated from the movement to which they contribute, and necessarily take on its character. . . . The sales are not, in this aspect, merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but, on the contrary, being indispensable to, its continuity.48

Third, later cases read Stafford with this emphasis on continuity, and not as a production case. For example, Industrial Ass'n v. United States49 concerned an agreement restraining trade in building materials. Among the materials covered was plaster that had come from out of state. Nevertheless, the Court held that because the agreement covered only plaster that "previously had been brought into the state and commingled with the common mass of local property," its "interstate commercial status had ended."50 The case was therefore "utterly unlike" Swift & Co. v. United States51 and Stafford. In Swift, "the only interruption of the interstate transit of live stock" was "that necessary to find a purchaser at the stockyards" and in Stafford, "which likewise dealt with the interstate shipment and sale of live stock," the stockyards, were "described, not as a place of rest or final destination, but as 'a throat through which the current flows,' and the sale as only an incident which does not stop the flow but merely changes the private interest in the subject of the current without interfering with its continuity."52 It is true, as Professor Cushman points out, that in Industrial Ass'n there was no further interstate movement contemplated after production, but that does not nullify the fact that the Court treated Swift and Stafford as cases depending on continuity. And certainly

48. Stafford, 258 U.S. at 515-16.
49. 268 U.S. 64 (1925).
50. Id. at 78-79.
51. 196 U.S. 375 (1905).
52. 268 U.S. at 78-79.
Carter v. Carter Coal Co., 53 treated the cases that way, saying, "The sales [in Swift and Stafford] which ensued merely changed the private interest in the subject of the current without interfering with its continuity." 54

Fourth, consider Professor Cushman’s contention that "lawyers for the NLRB were confident that the stream of commerce doctrine could be employed to uphold application of the Wagner Act to manufacturing concerns that took in raw materials from outside the state and then shipped finished products in interstate commerce," and that this confidence "formed the basis of the NLRB’s litigation strategy in selecting appropriate test cases." 55 It appears to me that Peter Irons’s account, on which Professor Cushman relies, cuts the other way. According to Irons, an NLRB memo identified various considerations governing the selection of test cases. One of these was the type of industry. The best type of industry was one in which most of the employees were actually engaged in interstate commerce, such as trucking and bus lines. As Irons reports:

The “next best” industries identified in the memo were those in which the employees worked on products in the “current” of commerce, which came into and emerged from a state “essentially unchanged in character.” This category would include stockyards, meatpackers, and grain elevators, defense of congressional regulatory power would rest on such expansive commerce clause cases as Stafford v. Wallace and Chicago Board of Trade v. Olsen, which dealt with just these industries. Following these as the “third best” category were those manufacturing industries constituting the bulk of the Board’s jurisdiction, those in which “a substantial part of the raw materials flow from other states into the manufacturing plant and a substantial part of the resulting products flow out from the plant to other states. The more important the industry to the national economy, and the more dispersed its collection and distribution of goods, the better; autos, steel, textile, and rubber “are the best of this class,” followed by clothing, metal fabrication, chemical, paper, and similar industries. 56
These “third best” industries, among which particularly attractive candidates were the productive industries involved in the cases brought to the Supreme Court, were therefore regarded as quite distinct from “stream of commerce” industries, regulation of which would be supported by cases like *Stafford.*

Finally, so far as I am aware, no judge that considered the applicability of the NLRA to productive industries indicated that it should be upheld on the basis of the “stream of commerce” theory. Several lower courts considered the argument, and each rejected it with dispatch. The cases included ones in which inputs came to the manufacturing plant from other states and finished products were sold to other states. In such a case, there were two streams of commerce, one ending at the manufacturing plant, the other beginning after manufacture, but production was a part of neither. The cases emphasize transformation of the materials and interruption of transit.

57. After the decision in *Carter Coal*, which Irons reports as having a “devastating” effect on NLRB lawyers, the Board instructed its regional directors to discourage cases involving manufacturing concerns. *Id.* at 252. But Charles Fahy, general counsel to the Board, favored a strategy in which the Board would “present a ‘package’ of cases testing the broadest range of the Board’s powers,” rather than approaching the Court first with the strongest case on the interstate commerce question, and the package that he initially proposed to the Board closely resembled the one that eventually reached the Court. *Id.* at 267.

58. See Foster Bros. Mfg. Co. v. NLRB, 85 F.2d 984 (4th Cir. 1936); Bendix Products Corp. v. Beman, 14 F. Supp. 58 (N.D. Ill. 1936); Stout v. Pratt, 12 F. Supp. 864 (W.D. Mo. 1935), aff’d, 85 F.2d 172 (8th Cir. 1936); United States v. Weirton Steel, 10 F. Supp. 55 (D. Del. 1935). *Bethlehem Shipbuilding Corp. v. Meyers*, 15 F. Supp. 915 (D. Mass. 1936), and perhaps other cases as well, presumably also fits this description. Though the *Bethlehem* court noted that the company “fabricates substantially all materials used in the building of vessels,” *id.* at 916, I assume that many of the raw materials came from outside Massachusetts, the state of its plant. Both *Bethlehem* and *Bendix* cited *Arkadelphia Milling Co. v. St. Louis Southwestern Railway Co.*, 249 U.S. 134 (1919), in support of their conclusion that the productive activities were not in the stream of commerce. Professor Cushman takes me to task for relying on *Arkadelphia*, a Dormant Commerce Clause case that involved manufacture of raw materials that had not yet moved in interstate commerce. Without reviewing the argument in detail, I believe that the citation of *Arkadelphia* in *Carter Coal*, 298 U.S. at 306, suggests that the factors I have emphasized—transformation of the product and a considerable interruption in transit—were, in the contemporary view, inconsistent with the stream of commerce. And the citation of *Arkadelphia* by these two lower courts appears to bear me out.

59. The response of the court in *Stout* to the “stream” argument is indicative:

The contention is untenable and may be disposed of in a paragraph. That is not a stream of commerce which begins in Kansas with the purchase of wheat in that state for transportation to a Missouri mill, which is interrupted by the delivery of the wheat at the Missouri mill where flour is manufactured from the wheat, and which ends in Iowa with the sale and delivery there of flour, a new product, a
And in the Supreme Court, the "stream of commerce" argument failed to persuade any of the conservative foursome, including Van Devanter, who had joined Taft in *Stafford*, or Butler, who was not on the Court for *Stafford* but joined in *Board of Trade v. Olsen*.\(^6^1\) Hughes’s opinion for the majority, after summarizing the argument on both sides, explicitly refused to place the decision on "stream of commerce" grounds, saying that "[t]he instances in which that metaphor has been used are but particular, and not exclusive, illustrations"\(^6^2\) of congressional power: "The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a ‘flow’ of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources."\(^6^3\) Nevertheless, Professor Cushman believes the "stream of commerce" theory likely accounts for Justice Roberts’s joining the majority, and he seems at least to entertain the possibility that

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60. See, e.g., *Weirton Steel*, 10 F. Supp. at 90 ("No ore, coal, limestone, or scrap iron is shipped out into interstate commerce. What is shipped out are things entirely different from the raw materials shipped in. The finished products are produced by extended manufacturing operations involving mechanical, chemical, and electrolytic processes."); *Bendix*, 14 F. Supp. at 65 ("We do not find . . . raw materials being gathered together, some from within and some from without the state, and by the application of a large amount of labor, of relatively great value as compared with the value of the raw materials, converted into finished products, consisting of complicated mechanisms . . . .")

61. 262 U.S. 1 (1923). Thus, they disappointed Charles Fahy, who apparently had hoped that those earlier votes presaged votes to uphold the NLRA. CUSHMAN, RETHINKING, supra note 38, at 165. We have here a warning against putting too much weight on the hopes and wishful thinking of advocates.


63. Id.
“stream of commerce” thinking accounted for Hughes’s vote as well. I believe that Hughes should be taken at his word, especially given that the following year, in Santa Cruz Fruit Packing Co. v. NLRB, responding to the argument that productive activity (here not involving the use of raw materials imported from other states) was not part of the stream of commerce, he repeated the key language from Jones & Laughlin—the stream of commerce is only a metaphor, a particular and non-exclusive illustration of the power of Congress to protect commerce from whatever source. As for Justice Roberts, given that he concurred silently in Carter Coal, Jones & Laughlin, and Santa Cruz, inference is more difficult. Professor Cushman has articulated a logically coherent view reconciling his votes in the three cases. I suppose it is possible that Roberts navigated this path, though it would mean that in the latter two cases his vote was determined by factors that were distinctly at odds with the opinions he was joining (not an impossibility). But just because one can articulate a coherent view that would reconcile Roberts’s votes does not mean that Roberts actually took that view. He may have had some other view that, at least to him, appeared coherent. And, as I think most probable, he may have changed his view. Certainly at some point Roberts became willing to act on a theory broader than the “stream of commerce” rationale, and I think the most probable time is when he signed onto a major opinion expressly disclaiming reliance on that rationale.

64. If this is not so with respect to Hughes, I am not sure how Professor Cushman accounts for Hughes’s conduct. He says that he believes that Hughes’s stance in Carter on the labor provisions, which he regards as being indistinguishable from that of the majority, is consistent with his position in Jones & Laughlin, but the “stream of commerce” theory is, so far as I understand it, the only basis that he offers to reconcile the two.
65. 303 U.S. 453 (1938).
66. Id. at 464.
67. See CUSHMAN, RETHINKING, supra note 38, at 183. Professor Cushman says that the activities involved in Santa Cruz were not really productive, and I have no reason to doubt him—but certainly Hughes’s opinion treated them as if they were.
68. In Friedman, Switching Time, supra note 4, at 1968 n.393, I discuss two grounds, in addition to the “stream of commerce” theory, that were offered to distinguish Jones & Laughlin from Carter Coal. Paul Freund regarded one of them as plausibly explaining Hughes’s votes.
69. I do not think much reliance should be placed on the numerous expressions that Professor Cushman has assembled describing Jones & Laughlin with the term “stream of commerce” or similar language. This includes Roberts’s own statement, made in 1949 and quoted by Professor Cushman in Rethinking the New Deal Court, that a strike localized in a
C. Shreveport and Stafford

Professor Cushman believes I over-read *The Shreveport Rate Cases*.

I relied on Justice Hughes’s opinion for the Court primarily as demonstrating that congressional regulation of an intrastate matter could be justified by an economic effect that the matter had on interstate commerce, or on its regulation. My use of the term economic effect was rather loose. I probably should define it to mean an effect that is neither physical nor intended, for running alongside *Shreveport* was the general doctrine that Congress could regulate matters that were not commerce but that had a “direct effect” on commerce. Traditionally, such matters were typically physical obstructions, but there was also a well-established line of cases, which arose frequently with respect to the Sherman Act, that even disputes in productive industries could be reached if the effect on interstate commerce was “direct,” direct being a synonym in this context for “intended.”

In describing *Shreveport*, I quoted the key passage in which Hughes discusses the scope of federal power, but did not emphasize—as Professor Cushman does, and as I should have done—that it addresses the extent to which Congress may regulate the intrastate operations of “interstate carriers”; on its face, the opinion said nothing about congressional power over intrastate matters other than the activities of interstate carriers, which were the entities involved in the case. Outside that context, it

given community may interfere with “the flow of goods to and from that community."

*CUSHMAN, RETHINKING*, *supra* note 38, at 173. It is easy to slip into terms like these even when referring to the effect that activity not deemed to be in commerce has in obstructing commerce. *Jones & Laughlin* was very clear that it was based on the perception that the regulated activities obstructed commerce, not on the perception that those activities were so much a part of the flow of commerce that they should be deemed to be in commerce. And in case there was confusion, *Santa Cruz* repeated the point.

70. 234 U.S. 342 (1914).

71. *See, e.g.*, United Leather Workers Int’l Union, Local 66 v. Herkert & Meisel Trunk Co., 265 U.S. 457 (1924) Specifically the Court stated,

It is only when the intent or the necessary effect upon such commerce in the article is to enable those preventing the manufacture to monopolize its supply or control its price, or discriminate as between its would-be purchasers, that the unlawful interference with its manufacture can be said directly to burden interstate commerce.

*Id.* at 471.
left standing the traditional doctrine, based on physical and intended effects.

This is a fair point. Note at the outset that it does not substantially alter my thesis about the relatively continuous development of Commerce Clause doctrine. As I said in my article, Shreveport was an advance over prior cases in allowing an economic impact on commerce to justify a regulation of intrastate matters, but it was an advance that fit well with those cases. That the advance was, on its face, limited to the operations of interstate carriers emphasizes the continuity of Shreveport with the prior cases. Looking forward, the same fact also emphasizes that there was a significant step to be taken between Shreveport and the New Deal cases that allowed Congress to regulate intrastate activities in general because of their impact on commerce. But of course, that point fits perfectly well with my thesis. I have presented Jones & Laughlin as applying Shreveport-style thinking to productive industries. I have not suggested that Jones & Laughlin was not an advance in Commerce Clause doctrine—indeed, I regard it as more of an advance than Professor Cushman does—but only that it was a natural development of well-established doctrine.

But, given that the language of Shreveport was limited to interstate carriers, of what possible significance can it be in explaining Jones & Laughlin? I think the key is that the doctrinal lines that emerge—that Congress may regulate the intrastate operations of interstate carriers if they have a substantial impact on interstate commerce, including an economic one, but that Congress can regulate other intrastate matters only if they have a physical or intended impact—are rather frail. That does not mean that a justice could not adhere to those lines, and perhaps the conservative Justices—including Justice Van Devanter, who as Professor Cushman points out, joined the majority in Shreveport and was one of the dissenters in Jones & Laughlin—continued to do so. But clearly such doctrinal lines would be under great pressure. Given that economic impact of intrastate operations on interstate commerce justifies congressional regulation in the context of interstate carriers, and given that Congress may protect interstate commerce “whatever may be the source
of the dangers which threaten it,"\textsuperscript{72} it is not a giant leap to say that intrastate activities other than operations of interstate carriers that affect interstate commerce substantially are subject to congressional regulation, even though the impact is neither physical nor intended.

Professor Cushman contends that the tension between these doctrines was managed for decades. It is accurate enough to say that the statements of general doctrine remained stable for some time, but as Professor Cushman himself says, doctrine can be stated in an innocuous way to paper over critical difficulties.\textsuperscript{73} Intent being difficult to define with precision and difficult to determine, I believe that standard was highly manipulable.\textsuperscript{74} Sometimes, as Professor Cushman now emphasizes, intent was not found,\textsuperscript{75} and sometimes, as he has also emphasized, it was.\textsuperscript{76} He has shown very well that the standard was not applied with a bias against labor unions to anywhere near the extent that has sometimes been thought,\textsuperscript{77} but that does not mean that the standard was predictable or coherent. If the impact of an activity on interstate commerce was great, why should the intent of those whose activities were in question be the measure of federal power?

What I am suggesting is that the doctrinal lines governing congressional power outside the context of interstate carriers were under pressure, both from their own limitations and from their juxtaposition next to the more flexible standards governing carriers. Over time, therefore, it would appear likely that

\begin{itemize}
\item \textsuperscript{72} \textit{Carter Coal}, 298 U.S. at 317 (Hughes, J., separate opinion).
\item \textsuperscript{73} Cushman, \textit{Continuity and Change, supra} note 1, at 1048.
\item \textsuperscript{74} \textit{See, e.g.}, Levering \& Garrigues Co. v. Morrin, 289 U.S. 103, 107 (1933) (finding that a boycott of a company engaged in fabrication of steel for interstate shipment had "a purely local aim"); Coronado Coal Co. v. United Mine Workers, 268 U.S. 295, 310 (1925) (holding that a mere reduction in the supply of an article to be shipped in interstate commerce by prevention of production is ordinarily remote obstruction, but when intent is to restrain or control supply or price in interstate markets, then there is a direct violation).
\item \textsuperscript{75} Cushman, \textit{Continuity and Change, supra} note 1, at 1038.
\item \textsuperscript{76} \textit{See, e.g.}, Barry Cushman, \textit{A Stream of Legal Consciousness: The Current of Commerce Doctrine from Swift to Jones \& Laughlin}, 61 \textit{FORDHAM L. REV.} 105, 148 (1992) (noting that "the Sherman Act had been consistently and successfully applied to the conduct of employees engaged in production where it had been shown that such conduct was intended to restrain or control the supply of a product entering and moving in interstate commerce").
\item \textsuperscript{77} Barry Cushman, \textit{Formalism and Realism in Commerce Clause Jurisprudence}, 67 \textit{U. CHI. L. REV.} 1089, 1097-99 (2000) [hereinafter Cushman, \textit{Formalism and Realism}].
\end{itemize}
Shreveport-style thinking would expand beyond the realm of carriers, so that Congress could regulate practices other than the activities of carriers that had a sufficient (however characterized) impact on commerce, even of an economic nature. And I believe that Stafford advanced the process.\(^{78}\)

I have discussed Stafford, in accordance with the usual treatment, as a “stream of commerce” opinion. But Robert Post has recently made an important argument that casts a different light on it. “Although Stafford is sometimes seen as merely an extension of the ‘current of commerce’ approach of Swift & Co. v. United States,” Professor Post writes, “in fact it marked a significant departure from Swift.”\(^{79}\) While Swift concerned the intent of individuals, he points out, Stafford involved the facial validity of a statute. Taft wrote that the reasonable fear by Congress of a recurrent injury to commerce from action that would be lawful and affect only intrastate commerce when considered alone could serve “the same purpose as the intent charged in the Swift indictment to bring acts of a similar character into the current of interstate commerce for federal restraint.”\(^{80}\) And then, in terms that were much quoted later and that departed from “stream of commerce” language, he went on to emphasize the importance of recurrence, and of Congress’s power to determine that a recurrent burden justifies legislative action:

> Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce, is within the regulatory power of Congress under the commerce clause, and it is primarily for

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78. Professor Cushman says that I treat Shreveport in a way that is “not historical in nature” because “[t]he historical question is not whether we can interpret the opinion in [a given] way, but whether the opinion was so understood at the time,” which I take to mean the time that it was written. Cushman, Continuity and Change, supra note 1, at 1016. But I do not think this argument pays full heed to what I was trying to accomplish in my article. My main theme was the incremental steps by which Commerce Clause doctrine has developed. If a case was taken to mean something more some years after it was written than it was understood to say when it was written, then that may be just the type of incremental change I was discussing. And I believe that this, in essence, is eventually what happened to Shreveport.


80. Stafford, 258 U.S. at 521.
Congress to consider and decide the fact of the danger and
meet it.81

Thus, says Professor Post, Stafford "was a significant departure
from the sensibility of E.C. Knight" in that it authorized con-
gressional regulation of matters that had previously been consid-
ered within state control, and that it deferred to Congress as to
when such regulation was justified.82 If Professor Post is right,
and it appears to me that he probably is, then the principal thesis
of my paper, concerning the absence of major discontinuities in
Commerce Clause doctrine, is strengthened. And beyond that, it
is notable that in this part of his argument Taft relies on, among
other cases, Shreveport and the Minnesota Rate Cases83 a con-
solidated case decided the year before Shreveport in which
Hughes, in the course of upholding state rate regulations and or-
ders, went rather out of his way to speak expansively about the
power of Congress to control intrastate transactions when such
control is incidental to the effective government of interstate
commerce with which such transactions have become "inter-
woven."84 To be sure, Stafford, like Shreveport, involved an in-
dustry that was considered to be "affected with a public inter-
est," and Professor Cushman seems correct that this was a
significant factor governing decisions of the Taft era.85 But
Taft's statement of Congress's ability to prevent obstructions to
interstate commerce by regulating intrastate matters was stated
without qualification, not in such a way as to indicate a limita-
tion to such industries, and clearly was not limited to interstate
 carriers. Thus, it appears that Stafford represents an expansion
of Shreveport-type thinking.86 Moreover, it suggested an extent

81. Id.
82. Post, supra note 79, at 1558.
83. 230 U.S. 352 (1913).
84. Id. at 399, quoted in Stafford, 258 U.S. at 522. Referring shortly after Hughes's
retirement as Chief Justice about the assertion of federal power in the Jones & Laughlin
case, the Attorney General, Francis Biddle, wrote that "this was not new ground for the
author of the Minnesota Rates Cases." Foreword, 41 COLUM. L. REV. 1157, 1157-58
(1941).
85. See generally Robert C. Post, Defending the Lifeworld: Substantive Due Process
86. I am not sure on what basis Professor Cushman puts Stafford aside in claiming
that "every case following [Shreveport]... up to the mid-1930s involved regulation of... railroads," Cushman, Formalism and Realism, supra note 77, at 1130-31, a claim that he
repeats in his comment on my article. Cushman, Continuity and Change, supra note 1, at
of deference to Congress that was not apparent in *Shreveport*. As one might expect, the passage quoted above became a favorite one for New Deal lawyers to quote—and in *Jones & Laughlin*, Hughes quoted it as well.

*Stafford* co-existed for a time with the doctrine established in antitrust cases that activities related to production could not be regulated unless the impact on commerce was intended. But if such activities were recurrent and threatened to obstruct interstate commerce, why could Congress not reach them without a showing of intent to harm commerce?

### III. THE NEW DEAL CASES

#### A. *Schechter Poultry Corp. v. United States*\(^{87}\)

In my article, I said that in *Schechter*, "Cardozo’s concurrence, joined by Stone, indicated no significant disagreement with Hughes’s majority opinion, though Hughes (presumably to accommodate the Court’s conservative foursome) used the old-fashioned direct-indirect language and Cardozo emphasized that the matter was one of degree."\(^{88}\) Professor Cushman’s reply persuades me that I should have dropped the adjective old-fashioned and that I should have dropped, or at least softened, the parenthetical clause and the similar reference later on to Hughes having "used categorical language, probably to keep the conservatives in line."\(^{89}\) As Professor Cushman emphasizes, the Court had not yet given general applicability to the “close and substantial” language of *The Shreveport Rate Cases*.\(^{90}\) But there was nothing in Hughes’s opinion that was inconsistent with the idea that the determination was a matter of degree. There was nothing akin, for example, to Sutherland’s statement in *Carter v.*

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89. *Id* at 996.
90. 234 U.S. 342 (1914).
Carter Coal Co.\(^9\)\(^1\) that "the matter of degree has no bearing upon
the question here."\(^9\)\(^2\) Cardozo, as I have said, treated his concur-
rence as consistent with Hughes's opinion,\(^9\)\(^3\) and even while
emphasizing the matter of degree, articulated his test in terms of
the hard words "immediacy" and "directness."\(^9\)\(^4\) And when in
\textit{NLRB v. Jones & Laughlin Steel Corp.}\(^9\)\(^5\) Hughes himself as-
serted that "[t]he question is necessarily one of degree,"\(^9\)\(^6\) he did
so without casting doubt on \textit{Schechter}; indeed, he cited
\textit{Schechter} in the same paragraph.

I find it entirely plausible that Hughes would have pre-
ferred to include some language in his \textit{Schechter} opinion that
spoke of the matter as one of degree, but that in the end he did
not do so out of deference to the conservatives. We know from
\textit{Jones & Laughlin} that, at least two years later, Hughes looked
on the matter as one of degree, and we know from \textit{Carter Coal}
that the conservatives did not. Professor Cushman is probably
right that Hughes had nothing to fear from the conservatives in
this case, though I am less certain than he.\(^9\)\(^7\) But even apart
from this possibility, it was Hughes's practice to accept sugges-
tions on language from his colleagues to accommodate them,
even when he preferred his own phrasing.\(^9\)\(^8\) If Hughes had spo-

\(^9\)\(^1\) 298 U.S. 238 (1936).
\(^9\)\(^2\) Id. at 308 (1936). Hughes did say that the direct-indirect distinction "is clear in
principle," but in the same sentence he said that "[t]he precise line can be drawn only as
individual cases arise." \textit{Schechter}, 295 U.S. at 546.
\(^9\)\(^3\) "As to this feature of the case, little can be added to the opinion of the court." \textit{Schechter}, 295 U.S. at 554 (Cardozo, J., concurring).
\(^9\)\(^4\) "To find immediacy or directness here is to find it almost everywhere." Id. (Car-
dozo, J., concurring). Cardozo further finessed the issue in his dissent in \textit{Carter Coal}. 298
U.S. at 327-28 (Cardozo, J., dissenting).
\(^9\)\(^5\) 301 U.S. 1 (1937).
\(^9\)\(^6\) Id. at 37.
\(^9\)\(^7\) I do not find it implausible that Hughes feared the possibility of the conservatives
gaining the vote of Justice Roberts to hold the wage and hour provisions of the code invalid
under the Due Process Clause of the Fifth Amendment, an issue that Hughes explicitly de-
notwithstanding, Roberts continued to give considerable teeth to due process with respect
to economic regulation. Friedman, \textit{Switching Time}, supra note 4, at 1929.
\(^9\)\(^8\) Many years ago, addressing Hughes's style generally, I wrote that Hughes was
willing to amend his own language, sometimes even at the expense of strict co-
herence, when necessary to gain consensus. In one case, for example, he
changed a phrasing that he thought gave "the true milk of the word," because
Frankfurter found it objectionable. Like Holmes, he said, he was amenable to
being "reasonably raped." "You are generous," Frankfurter responded, "in
ken in terms of degree, some of the conservatives almost cer-
tainly would have objected, and in all probability Hughes would have relented.

B. *Carter v. Carter Coal Co.*

I referred to Hughes's separate opinion in *Carter Coal* as "cryptic" and "mysterious."\(^{99}\) Professor Cushman rejects these characterizations. I do not disagree particularly with his assertion that the opinion was "a clear, straightforward statement of orthodox doctrine."\(^{100}\) And yet I believe my description holds. Perhaps that appears paradoxical; unfortunately, my explanation requires some length.

*Carter Coal* involved challenges to the Bituminous Coal Conservation Act of 1935. The Act imposed a heavy sales tax on bituminous coal but rebated ninety percent of it to operators who accepted a code to be drawn from statutory specifications by a national commission. One portion of the code governed labor matters. It guaranteed the right to organize and bargain collectively. One of the labor provisions, Part III(g), allowed representatives of specified percentages of operators and of miners to negotiate wage and hours standards binding on all code members. Another portion of the code, the marketing provisions, provided for the regulation of prices of bituminous coal and prohibited unfair methods of competition. Congress recognized that the labor provisions were especially vulnerable constitu-

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99. 298 U.S. 238.
100. Friedman, *Sometimes-Bumpy Stream*, supra note 2, at 994, 995. At one point, I also referred to it as a concurrence; at most it was a partial concurrence.
102. Professor Cushman criticizes me for shrugging *Carter Coal* aside without "undertaking any sustained effort to explain it." *Id.* at 1037. But I did undertake such an effort in my 1994 article. Friedman, *Switching Time*, supra note 4, at 1962-66. I did not deem it necessary to repeat the discussion in my article for this Symposium, and stated my conclusion with explicit references to that portion of the earlier article. Friedman, *Sometimes-Bumpy Stream*, supra note 2, at 995 & nn.56-57. Professor Cushman having caused me to rethink the matter, I now include a further discussion, basically consistent with but somewhat moderated from the prior one.
tionally, and so it included an explicit severability clause, providing that the invalidation of any part of the statute would leave the rest unaffected.

For the majority, Justice Sutherland held at length that the labor provisions were not authorized by the Commerce Clause. He then added more briefly that Part III(g) was an improper form of delegation violative of due process. And then, in what appears to be have been a ploy to gain Roberts's vote, he held that notwithstanding the severability clause, the statute was inseverable, thus holding it unconstitutional in its entirety without considering the merits of the marketing provisions. Justice Cardozo, joined by Justices Brandeis and Stone, dissented, saying that the Court's opinion "begins at the wrong end." The marketing provisions were constitutional, he concluded, and they were clearly severable from the labor provisions. Thus, the operators were under a duty to come under the code or pay the penalty if they refused. Given this, and the fact that there was no threat of enforcement of the labor provisions, or even any apparent violation of them—"the complainants have been crying before they are really hurt," he said—the suit was premature so far as the labor provisions were concerned, and Cardozo carefully avoided expressing an opinion on their validity.

Now let us examine Hughes's opinion. He begins with a paragraph expressing agreement with the majority on some preliminary points, and also on the propositions that "production—in this case mining—which precedes commerce is not itself commerce" and that the power to regulate interstate commerce "is not a power to regulate industry within the State." Nothing particularly surprising there. His second paragraph does not purport to be reciting agreements with the majority. The first two sentences, citing two important railroad cases, convey a tone and substance altogether absent from Sutherland's opinion: Congress has the power to protect commerce from injury, whatever the source of dangers, and it can provide for the peaceful

103. *Carter Coal*, 298 U.S. at 310-12.
104. *Id.* at 341 (Cardozo, J., dissenting).
105. *Id.* (Cardozo, J., dissenting).
106. *Id.* at 317 (Hughes, J., separate opinion).
107. *Id.* (Hughes, J., separate opinion) (citing Mondou v. New York, New Haven & Hartford R.R. Co. (Second Employers' Liability Cases), 223 U.S. 1 (1912)).
CHARTING THE COURSE

settlement of disputes that threaten the orderly conduct of interstate commerce. Then comes a "but," though as Professor Cushman says it is an orthodox one—Congress may not use this power as a "pretext" to regulate activities that affect interstate commerce only indirectly, for otherwise, "the multitude of indirect effects" would give Congress the ability to "assume control of virtually all the activities of the people to the subversion of the fundamental principle of the Constitution." Having set up standard doctrine on both sides, he then concludes his discussion of the labor provisions—except for Part III(g)—with this assertion:

If the people desire to give Congress the power to regulate industries within the State, and the relations of employers and employees in those industries, they are at liberty to declare their will in the appropriate manner, but it is not for the Court to amend the Constitution by judicial decision.

Is that statement an expression of an opinion that the regulations at issue in the case are unconstitutional? Perhaps, but it is not entirely clear, certainly not as clear as a forthright assertion in the form, "I conclude that this statute is invalid . . . ." The two clauses of Hughes’s sentence can each be read to assert truisms, that the people can achieve the result they want and that the Court cannot amend the Constitution. But even if Hughes’s statement is read as the equivalent of the forthright assertion, it is missing a "because" clause. Having set up the general principles, he does not explain why, at the end of the day, the statute at hand falls short constitutionally. Is it that although the statute provides for the peaceful settlement of disputes threatening commerce, the effect here—or of any statute regulating labor relations in productive industry—is deemed indirect, and if so why? If there is a per se rule, how does that square with the fact that in some cases, where intent to obstruct commerce had been found, the impact on commerce of labor disputes in production was deemed direct. Is the explanation for unavailability rather that the statute here should not be deemed to provide for the

109. Id. at 317-18 (Hughes, J., separate opinion).
110. Id. at 318 (Hughes, J., separate opinion).
peaceful settlement of disputes threatening commerce, but instead to use that purpose only as a pretext for a general regulation of labor relations in bituminous coal mining? Are we to conclude that Hughes means only to be adopting the reasoning of the majority, even though Hughes had asserted critical pro-Government propositions that were not to be found in the majority opinion (and even though, with respect to the question of degree, Hughes expressed himself in flat opposition only a year later)?

In the third paragraph, concentrating on Part III(g), Hughes returns to explicit agreement with the majority. And now, in contrast to the prior paragraph, he is forthright about the bottom line, concluding that Part III(g) is "invalid upon three counts",\(^1\) I think it is clear that he detested Part III(g).\(^2\) Two of his grounds turn out to be an elaboration of the delegation argument made by the majority—Hughes separates out the propositions that the provision is improper delegation and that it violates due process because it gives some parties the power to make rules for others not party to their agreement. Relative to the whole discussion of the labor provisions, Hughes focuses on these arguments much more than does the majority. His third ground, stated without elaboration, is that Part III(g) "goes beyond any proper measure of protection of interstate commerce and attempts a broad regulation of industry within the State."\(^3\)

Hughes then goes on to argue, as did Cardozo, that the marketing provisions are valid and that the two sets of provisions are severable. Given this agreement, one might have expected him to follow Cardozo's line and conclude that he needed only to address the marketing provisions, which were enough to support the duty to come within the code or pay the penalty,

\(^{111}\) Id. (Hughes, J., separate opinion).

\(^{112}\) Hughes had developed the delegation doctrine in Panama Refining Co. v. Ryan, 293 U.S. 388 (1935), and in Schechter. Two days after the Carter Coal decision, Justice Brandeis said of Hughes to Felix Frankfurter: "He is crazy about 'confiscation.' He has a mania on the subject—driven by fear and that blinds his judgment, so that his very considerable brains are not at work." Memorandum of Conversation with Brandeis (May 20, 1936) (Felix Frankfurter MSS, Box 38, on-file with Manuscript Division, Library of Congress). Very likely Brandeis was referring to Hughes's objection to the procedures allowed by Part III(g), which Hughes might have thought were effectively confiscatory. If Brandeis was not thinking about this, I am not sure why he expressed himself in this way at that time.

\(^{113}\) Carter Coal, 298 U.S. at 318-19 (Hughes, J., separate opinion).
treating the validity of the labor provisions as premature. Obviously, he did not do so. But neither did he challenge Cardozo’s argument on this score.  

In short, Hughes’s discussion of the Commerce Clause implications of the labor provisions offers language that is less than transparent for a vote that was not necessary to determine the outcome of the case and on an issue that, so far as appears, he need not have even addressed.

Now let us consider how Hughes treated Carter Coal afterwards. In Jones & Laughlin, as I have said, he made a pronouncement flatly inconsistent with Carter Coal’s crucial assertion that the test of congressional power was not a matter of degree; the question, he said, was “necessarily one of degree.” Moreover, compare his treatment of Schechter and Carter Coal. He distinguished Schechter, albeit rather conclusorily, by saying that there the Court found the effect so remote as to be beyond federal power, and that if immediacy or directness were found there it would be found almost everywhere. Hughes could have dealt with Carter Coal in similarly conclusory terms if he had been so inclined. Or he could have adopted any of the several grounds of distinction offered by the Government, including the “stream of commerce” argument. He did not do so. Rather, he said that Carter Coal was not controlling because there

the Court was of the opinion that the provisions of the statute relating to production were invalid upon several grounds,—that there was improper delegation of legislative power, and that the requirements not only went beyond any

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114. He did say at the outset of the opinion that “in view of the question whether any part of the act could be sustained, the suits were not premature,” id. at 317, but this conclusion was perfectly consistent with Cardozo’s argument. See id. at 339 (Cardozo, J., concurring) (arguing that if the Act were completely invalid, the operators might “resist the onslaught of the collector as the aggression of a trespasser,” but given that the validity of the price provisions rendered “unreal” the “hypothesis of complete invalidity,” there was no need to reach the question of the validity of the labor provisions).

115. Jones & Laughlin, 301 U.S. at 37.

116. Id. at 40-41.

117. See Friedman, Switching Time, supra note 4, at 1968-69 n.393.

118. Even in conference, Hughes apparently found no need to distinguish Carter Coal. Id. at 1965 n.381.
sustainable measure of protection of interstate commerce but were also inconsistent with due process.¹¹⁹

In other words, what Carter Coal said about the commerce power should not be taken seriously because it said other things as well. This treatment quite clearly cut the legs out from under Carter Coal¹²⁰ and four years later, as I will show below, Hughes joined without difficulty in administering the final blow to the case.¹²¹ Note further that Hughes’s description of Carter Coal is a misstatement of the case. The delegation and due process points—treated as parts of a whole by Sutherland’s majority opinion and separated out only by Hughes—were applicable only to Part III(g); the commerce question was essential for the holding that the other labor provisions were unconstitutional. It is only in Hughes’s opinion, and only if it is read in the rather odd way that I have suggested is plausible, as not expressing an ultimate opinion on the validity of the labor provisions other than Part III(g), that the commerce issue is not critical to a declaration of invalidity. It is as though, in preparing his description of Carter Coal in Jones & Laughlin, Hughes turned back not to the majority opinion but only to the third paragraph of his separate opinion.

¹¹⁹. Jones & Laughlin, 301 U.S. at 41.
¹²⁰. Professor Cushman attributes considerable significance to the fact that, according to him, seven cases continued to treat Carter Coal as if it were good law even after Jones & Laughlin was decided. CUSHMAN, RETHINKING, supra note 38, at 180 n.14. One of the seven cases he cites does not in fact mention Carter Coal. See United States v. F.W. Darby Co., 32 F. Supp. 734 (S.D. Ga. 1940). Another, decided only a week after Jones & Laughlin, does not cite that case. See Currin v. Wallace, 19 F. Supp. 211 (E.D. N.C. 1937). Some of the cases cited Carter Coal just for bland propositions. One, noted by Professor Cushman, actually seems to have relied on it, but it does not consider the effect of Jones & Laughlin on it. Another, Moore v. Chicago Mercantile Exchange, 90 F.2d 735 (7th Cir. 1937), does conclude that Carter Coal survives Jones & Laughlin, but it does not rely on Carter Coal and, like all the other cases, it does not deal with Hughes’s language addressing Carter Coal. Nor does it suggest that the cases are distinguishable on the basis of their different postures under the “stream of commerce” doctrine. Given the hesitation of lower courts to treat a Supreme Court decision as overruled until the Court itself flatly says something to that effect, I do not think these few cases are particularly significant. Professor Cushman also cites seven cases that he says implicitly suggest or explicitly state that Jones & Laughlin overruled Carter Coal. CUSHMAN, RETHINKING, supra note 38, at 180 n.13.
¹²¹. See infra notes 138-57 and accompanying text. I do not mean that United States v. Darby, 312 U.S. 100 (1941), the case that achieved this result, posed no difficulties for Hughes—it clearly did—but only that this aspect of Darby did not.
And so Hughes promptly walked away from *Carter Coal*. The power and majesty, even passion, of his opinion in *Jones & Laughlin*, and the forceful manner in which he delivered it orally, 122 confirm that it expressed his deeply held views; Professor Cushman and I are agreed at least that it did not reflect a switch caused by political factors. All of this leaves me wondering why the man who wrote as he did in *Jones & Laughlin* also wrote the unusual separate opinion in *Carter Coal* less than a year before. I have thought that the motivation for the Commerce Clause discussion may have been to ask the public to consider changing the Constitution rather than blame the Court if it did not like the Court’s decisions—that the culmination of his general discussion of the labor provisions may indeed have been more a public plea than a statement of legal conclusion. Hughes had made at least one such suggestion in the past, 123 and the statement in *Carter Coal* got some public notice. 124 But I readily acknowledge that this hypothesis is speculative. 125

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123. *Id.* at 1962-63.
125. Whatever Hughes thought of the *Carter Coal* majority’s Commerce Clause discussion, I am sure he did not feel it was as intolerable as the same Justices’ decisions in *Morehead v. New York* ex rel. *Tipaldo*, 298 U.S. 587 (1936), or *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935), or for that matter their decision on the severability issue in *Carter Coal*. Accordingly, he was less likely than in those cases to write a “blistering dissent[].” Cushman, *Continuity and Change*, supra note 1, at 1034.

Professor Cushman discusses *United States v. Butler*, 298 U.S. 1 (1936), which I did not address, in which Hughes voted with Roberts and the conservatives to invalidate the Agricultural Adjustment Act of 1933. I have no doubt that Hughes regarded the Act as an unconstitutional form of regulation, but the Government, as Professor Cushman notes, did not defend the statute under the Commerce Clause. I agree with his suspicion that such an argument, made in 1936, would have failed. As the NLRB lawyers perceived, some productive industries were more attractive candidates than others for pioneering arguments based on effects on commerce. *See supra* notes 55-57 and accompanying text. The Court, per Roberts, with the concurrence of Hughes and over the dissents of the two remaining conservatives, upheld the Agricultural Adjustment Act of 1938 under a commerce-based argument. *Mulford v. Smith*, 307 U.S. 38 (1939). That Act purported to regulate marketing rather than production, and this was the basis of Roberts’s opinion; the dissenters were probably right at least to the extent that, given that farmers raise tobacco, the crop involved there, only for sale, the Act had the effect of limiting production.
Much of my prior discussion has looked ahead to Jones & Laughlin; I have discussed Professor Cushman’s explanation for the case, and I have looked at the treatment in it of Carter Coal. Now I will give my own assessment of it.

I stated in my article that Jones & Laughlin “was what one would have expected had Carter Coal not been decided the year before, or at least if Schechter and Carter Coal had not been decided in the two preceding years.” I probably should have moderated the statement: Under the hypothetical assumptions, the Jones & Laughlin decision probably would not have appeared particularly surprising. I am hypothetically assuming Carter Coal away because it seems to me clearly in conflict with the Jones & Laughlin opinion. I need not so definitely assume Schechter away because though Schechter pointed in the other direction from Jones & Laughlin it was a different case, and it certainly was perceived as different by a majority of the Court.

Even without relying on these assumptions, Professor Cushman does not believe that the result in Jones & Laughlin was very surprising, but he relies on the “stream of commerce” argument I have discussed above. He disagrees with my argument, which is based on a combination of the sensibility behind Shreveport and the portion of Stafford v. Wallace that followed Shreveport together with a recognition that production can have a substantial impact on commerce.

Stafford, I have argued above, loosened the limitations on Shreveport. If activities related to production had a significant and predictable effect in restraining commerce, then it would appear reasonable to hold that Congress could regulate those activities in protecting commerce.

In Appalachian Coals, Inc. v. United States, Hughes had written: “When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of

126. 301 U.S. 1.
127. Friedman, Sometimes-Bumpy Stream, supra note 2, at 996.
128. Cushman, Continuity and Change, supra note 1, at 1037-38.
129. 258 U.S. 495 (1922).
130. 288 U.S. 344 (1933).
CHARTING THE COURSE

As Professor Cushman says, this passage was not written in support of an exercise of federal power; indeed, Hughes offered it in support of a cartel’s antitrust defense. But it reflects a belief that production and commerce are tightly linked.

Professor Cushman makes an interesting argument. Three of the four conservatives had concurred in Appalachian Coals. (McReynolds, the old trust-buster, dissented.) They had also signed on to the Shreveport doctrine; indeed, Justice Van Devanter had been on the Court, and in the majority, in Shreveport itself. If I believe that Shreveport and Appalachian Coals together suggest Hughes’s support for the Government in Jones & Laughlin, why do I not say the same about these three? And, a related argument, if I believe that Jones & Laughlin did not represent a sharp break for Hughes, why do I not say the same thing about Roberts, for their records, according to Professor Cushman, were similar in material respects. I have a few responses.

First, with respect to the “wells of commerce” passage in Appalachian Coals, to the extent it has significance it is not as a statement of doctrine, but as a reflection of the sensibility of the author. That another Justice concurred in an opinion having this language means very little.

Second, and more significantly, I believe that Hughes’s prior record was in fact significantly different in material respects from those of the conservative four and of Roberts. As compared to them, he was far more likely to support the validity of governmental regulations, specifically regulations of labor relations. He was more likely to support the exercise of federal power under the Commerce Clause, and specifically to protect

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131. Id. at 372.
132. Cushman, Continuity and Change, supra note 1, at 1036.
133. The statement was invoked by Cardozo in Carter Coal in support of the exercise of federal power. 298 U.S. at 331.
134. E.g., Coppage v. Kansas, 236 U.S. 1 (1915) (Van Devanter in majority, Hughes in minority); Morehead, 298 U.S. 587 (Roberts and the conservative four forming majority, Hughes in dissent).
135. See Alton, 295 U.S. 330 (Roberts and the conservative four forming majority, Hughes in dissent); Tex. & Pacific Ry. Co. v. United States, 289 U.S. 627 (1933). Professor Cushman is correct that Texas & Pacific is not a constitutional case, but it “severely restricted the Interstate Commerce Commission’s power to protect local ports against discrimination by carriers.” Friedman, Switching Time, supra note 4, at 1968.
commerce by attempts to ensure labor peace.\textsuperscript{136} It is true enough, as Professor Cushman argues, that these cases raise significantly different issues from those present in \textit{Jones & Laughlin}. But there tends to be a rather strong correlation of thought on issues like these; I imagine that Professor Cushman, who has written with great force about the necessity of recognizing "an integrated web of constitutional thought,"\textsuperscript{137} agrees. And, moreover, even on the particular issue of Congress's power to regulate labor relations in productive industries, I believe that there is a significant difference in prior record: Roberts and the conservative four were in the majority in \textit{Carter Coal} while Hughes wrote a separate opinion that, whatever its motivation, was notably different in substance and tone in its discussion of the labor issues other than Part III(g).

Finally, at least with respect to the question of Hughes versus the conservatives, it is ultimately not particularly important whether there was a differential in their prior records making a vote for the Government in \textit{Jones & Laughlin} probable. In any event, Hughes came out for the Government and the conservatives did not. I have not argued that the development of \textit{Shreveport}-style thinking, even together with recognition of the link between production and commerce, \textit{mandated} support for the Government on the Commerce Clause issue. One could still cling to the doctrinal categories and conclude that productive activities could not be regulated by Congress absent an intent by the regulated parties to impair interstate commerce. And so the conservatives did. Hughes did not, and refusal to do so was a natural development for someone of his views. Apparently no one in the courtroom when he delivered his opinion could doubt his deep sincerity.

\noindent \textbf{D. United States v. Darby}\textsuperscript{138}

Professor Cushman's discussion of \textit{Darby} is devoted almost entirely to the question of Hughes's attitude towards the case; he believes that I "underestimate[] the severity of

\begin{itemize}
  \item \textsuperscript{136} \textit{See Alton}, 295 U.S. 330.
  \item \textsuperscript{137} \textit{Cushman, Rethinking}, \textit{supra} note 38, at 6.
  \item \textsuperscript{138} 312 U.S. 100.
\end{itemize}
Hughes's struggle.\textsuperscript{139} He says "it would be a mistake to conclude that the Commerce Clause issue did not trouble him deeply."\textsuperscript{140} I agree with the latter point; I suggested no such conclusion. In my article, I said explicitly that Hughes found the case difficult,\textsuperscript{141} a conclusion consistent with my discussion of the case in 1994, in which, as Professor Cushman notes, I speculated that had the membership of the Court not changed since the spring of 1937 the case might have been decided against the Government.

So this may appear to be a tempest in a teapot, but without the turbulence. Nevertheless, I believe that trying to understand Hughes's attitude in \textit{Darby} is important because he was such a crucial player in the Commerce Clause cases of the 1930s, and \textit{Darby} may shed light on his role in those cases. Hughes found \textit{Darby} difficult in part because the statute could be construed to reach matters that had little impact on interstate commerce; hence the "'little man with [a] mill'" comment quoted by Professor Cushman.\textsuperscript{142} He was particularly concerned by the fact that the statute reached employers engaged "in the production of goods for commerce," but without defining the term.\textsuperscript{143} According to Justice Murphy, the Chief Justice posed the following as the first question raised by the case: "Is the statute too indefinite to permit criminal prosecution and that is because of lack of proper definition of \textit{for} production. How could an employer be advised. Would an employer know he was subjected to the act?"\textsuperscript{144} But Hughes never expressed any doubt about the basic structure of the law as it had been developed in \textit{Jones & Laughlin} and subsequent cases. On the contrary, he set forth the doctrine in presenting the case at conference, explaining that while production is not commerce it can have a sufficiently close impact on commerce to justify congressional regulation.

\begin{itemize}
  \item \textsuperscript{139} Cushman, Continuity and Change, supra note 1, at 1046.
  \item \textsuperscript{140} \textit{Id.}
  \item \textsuperscript{141} Friedman, Sometimes-Bumpy Stream, supra note 2, at 999-1000.
  \item \textsuperscript{142} Cushman, Continuity and Change, supra note 1, at 1047 (quoting Conference Notes, No. 82, \textit{United States v. Darby} (Jan. 4, 1941) (Frank Murphy MSS, Reel 123, Bentley Historical Library, Ann Arbor, Michigan)).
  \item \textsuperscript{143} Conference Notes, No. 82, \textit{United States v. Darby} (Dec. 21, 1940) (Frank Murphy MSS, Reel 123, Bentley Historical Library, Ann Arbor, Michigan).
  \item \textsuperscript{144} \textit{Id.}
\end{itemize}
Hughes passed when it came time to vote on *Darby*, but after Stone circulated his draft opinion, Hughes sent him a letter, the first sentence of which I quoted in my article: "'You have written a strong opinion, again setting forth with suitable elaboration the general principles which we have held should govern the exercise of the commerce power.'"145 This suggests not only Hughes's agreement with the theoretical basis of the opinion but his sense that it did not represent a dramatic shift from prior law. Professor Cushman regards this letter as of relatively little importance, because "'general principles' do not decide concrete cases. . . . The Court could achieve consensus on the general principles of Commerce Clause jurisprudence only by papering over abiding differences concerning the proper scope of their application."146 I do not fully agree with the apparent implication of this argument. Of course, application is crucial, but statements of general principles are important in setting out doctrine, and lower courts pay attention to what the Supreme Court says as well as what it does. Part of what appears to me to be an "elaboration" of "general principles" in Stone's opinion is the passage in which, after stating that suppression of the production of goods made for commerce under substandard conditions is a valid means of protecting commerce, he says: "So far as *Carter v. Carter Coal Co.* is inconsistent with this conclusion, its doctrine is limited in principle by the decisions under the Sherman Act and the National Labor Relations Act, which we have cited and which we follow."147 Hughes posed no objection to this coup de grace to *Carter Coal*. He was clear as to what still bothered him about the case:

Of course, there is much that could be said with respect to the indefiniteness of the present statute, as a criminal statute, because of the failure of Congress to define the phrase "production for commerce". Congress gives a sweeping definition of "production" and of "goods" but not of "production for commerce."

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146. Cushman, *Continuity and Change*, supra note 1, at 1048.

147. *Darby*, 312 U.S. at 123 (citation omitted).
In attempting to give some appropriate content to this loose phrase, I think that the test should be as objective as possible and should not be centered on the mere intent or expectation of the employer apart from the usual and normal course of business of actual transactions. And Hughes’s suggestions were all directed toward that end. In three places, he wanted to see the phrase “according to the normal course of his business” to characterize the shipment in commerce of the producer’s goods. (In one place, this was a replacement for “in the normal course of his business,” which he regarded as not as sharp; in the other two places, it appears that the phrase was an addition.) Stone accepted these suggestions. Hughes also proposed deletion of a clause indicating that the statute would apply “although, through the exigencies of the business, the goods may not thereafter actually enter interstate commerce.” That clause, he said, “starts a line of inquiry which is not necessary to suggest in the present case.” This proposal Stone did not accept, though he softened it slightly by inserting “all of” before “the goods.” This incomplete response may account in large part for Hughes’s tepid acceptance of the opinion: “I will go along with this.”

Hughes raised no further objections to the opinion. He did say, “Even with the best possible test, the statute is a highly unsatisfactory one, but as it is a border line case I should prefer not to write.” One way to read this sentence is to this effect: “Even if we read the best possible test into the statute, the fact that we have to work so hard to do so makes the statute highly

149. Darby, 312 U.S. at 112, 117, 118.
150. Hughes’s Letter, supra note 145.
151. Id.
152. Darby, 312 U.S. at 118.
153. Hughes’s return of Stone’s draft opinion of United States v. Darby (Feb. 3, 1941) (Harlan Fiske Stone MSS, Box 66, on file with Manuscript Division, Library of Congress). Professor Cushman says he is “inclined to place very little weight” on Hughes’s cheerful acceptance of Stone’s opinion in Darby’s companion case, a civil one. Cushman, Continuity and Change, supra note 1, at 1048 n.248. For the reasons he states I agree that not much weight can be put on this, but I think it is worth something. Hughes did not need to do anything but say he agreed. If he were as close to the edge with respect to the companion as he was with respect to Darby, he may not have been inclined to be as affirmative as he was.
154. Hughes’s Letter, supra note 145.
unsatisfactory, and that makes the case a close one.” An alternative reading would be: “Even if the statute articulated the best possible standard, it would be broader than I think appropriate and that (together with the fact that it is not in fact so articulate) makes this a close case.” Perhaps the second reading is plausible (though I wonder; if Hughes found the statute “highly unsatisfactory” in that it was constitutionally overbroad, and terribly vague as well, one would not think he would regard the case a borderline one in which he was ultimately willing to join in upholding the statute), but I think the first more likely captures the essence of Hughes’s thinking. On the first reading, Hughes would readily accept a well-drafted statute that reached production only when the goods moved in interstate commerce “according to the normal course of business,” and so adhered to what he regarded as an appropriate constitutional standard. On the second reading, even such a statute would create a difficult constitutional issue for him—but not so much as to make the case worse than a “border line” one or to cause him to vote to invalidate the statute.

In sum: Of course, Hughes found Darby troubling. The statute was so vague that unless subjected to a limiting instruction it would reach beyond what he considered to be Congress’s constitutional reach, and the necessity for that exercise left him especially uneasy in a criminal case. The best construction seems to be that he would have had little or no trouble with a statute that was explicitly limited in scope to those producers whose goods moved in interstate commerce according to the normal course of business. Even if this last assertion is not true, he would have regarded such a statute as posing no worse than a close case in which ultimately he sided with the Government. He was perfectly comfortable with the theoretical discussion in the opinion, including the explicit vitiation of Carter Coal.\textsuperscript{155}

Notice further that this entire matter of Hughes’s attitude towards the case leaves completely unaffected the principal thesis of my article. Darby did not represent a major discontinuity in Commerce Clause doctrine. Indeed, in his comment, Profes-

\textsuperscript{155} I say “including” because I think the discussion of Carter Coal is included in Hughes’s approving remarks concerning Stone’s discussion of “general principles.” But even if I am wrong about that, I believe it is clear that Hughes had no difficulty with the dispatch of Carter Coal.
sor Cushman disclaims any contention that Stone's discussion of "general principles" reflected a major change; rather, he regards this discussion as "innocuous."\(^{156}\)

Hughes, one of the two most conservative members of the Court, did not regard the case as a major doctrinal change; on the contrary, so far as expressions of doctrine were concerned, he regarded the case as a "suitable elaboration" of what had come before. At worst, he found that the reach of the statute brought the case close to the constitutional edge. The other relatively (and generally more) conservative member of the Court, Roberts, did not find the case particularly troubling at all. The decision advanced the doctrine, no doubt, but it was not a bolt from the blue.\(^{157}\)

**E. Wickard v. Filburn**\(^{158}\)

Professor Cushman disagrees with my assertion about *Wickard* that "[g]iven the apparent effect of farm-consumed wheat, the case was actually a rather easy one conceptually."\(^{159}\) He says, "The intracurial record amply demonstrates that the Justices did not experience *Wickard* as an easy case."\(^{160}\) I agree completely with that contention; simply from the fact that the Court ordered reargument of the case, one would infer this to be true, and the matter is strongly confirmed by the fascinating "intracurial record" that Professor Cushman has skillfully assembled and presented. I did not say that the Justices experienced the case as easy, for that is plainly not so. I did not even say that the case was easy, for I said that it "presented a significant problem of proof."\(^{161}\) It was only *given* what I regard as a reasonable conclusion on the factual issue that I characterized *Wickard* as a rather easy case conceptually. But I presented my point rather loosely, so I will try again.

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156. Cushman, *Continuity and Change*, supra note 1, at 1048.
157. Professor Cushman gives very little weight to the fact that Justice Douglas's clerk thought the statute was constitutional and not much to the fact that one of the lower court decisions on the Act had upheld it. *Id.* at 1048 n.248. I cited these factors only to support my view that the outcome of *Darby* was not revolutionary.
158. 317 U.S. 111 (1942).
Once one characterizes the impact of farm-consumed wheat on the price of wheat as substantial, the conclusion that Congress may include wheat consumed on the farm in an allotment strikes me as pretty straightforward: Congress may regulate any matter that has a substantial effect on interstate commerce, and if the consumption of wheat on the farm has such an impact, so be it. I suspect most constitutional law teachers have found, as I have, that students resist the idea that the power over interstate commerce can extend to regulate activities confined to a farm, and similar resistance to that idea may have accounted in part for the Court's hesitation in the case. But if one considers that the chief alternative to consumption of home-grown wheat is probably purchase on the market, the idea becomes easier to accept. Characterize it as you will; perhaps "rather easy" is too strong, but in any event the argument did not require daring leaps from pre-existing law.

Reaching the conclusion that the effect of farm-consumed wheat was substantial appears to have been difficult for the Court. As Professor Cushman shows, at one point the Court nearly remanded for further findings on the matter. Eventually, the Court decided merely to hold reargument, and Justice Jackson especially pondered the underlying question—which remains a contentious one—of the extent to which the Court should defer to what Congress found, or could have found, with respect to the extent of the impact of the regulated activity on commerce. The reargument was limited to the question of whether the statute "so far as it deals with wheat consumed on the farm of the producer is within the power of Congress to regulate interstate commerce."162 I suspect the order was motivated in large part by a desire to get counsel for the Government to focus more closely on the issue, which had been treated as of secondary importance in the original briefs.163 The Government responded with what appears to me to be a convincing showing that the effect of farm-consumed wheat was substantial. Justice Jackson eventually wrote for a unanimous Court, "The record leaves us in no doubt that Congress may properly have consid-

162. CUSHMAN, RETHINKING, supra note 38, at 214.
163. The briefs are reprinted in 39 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 308 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS].
ered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.”¹⁶⁴ I believe that the Court would have been amply justified in dropping the phrase “that Congress may properly have considered” from this sentence. But, as Professor Cushman confirms, this expression of deference to Congress was hardly unprecedented.¹⁶⁵

Professor Cushman relies greatly on Jackson’s extrajudicial musings, which are fascinating and revealing. I pointed to Jackson’s tendency to second-guess himself, to revel in the fluidity of his thinking. And indeed, he reflected this tendency in his consideration of Wickard, saying, “If a completely baffled mind can be called an open one, mine is.”¹⁶⁶ Perhaps he became not only clearer but certain and fixed in his thought by the time the case was decided, but I doubt it. The more significant point, though, is that there is no justification for concluding that the more dramatic assertions by Jackson of what Commerce Clause doctrine had become represented the views of the Court as to the doctrine it actually enunciated in Wickard. Professor Cushman quotes a letter in which, after decision of the case, Jackson said, “If we were to be brutally frank... I suspect that what we would say is that in any case where Congress thinks that there is an effect on intrastate commerce, the Court will accept that judgment.”¹⁶⁷ But of course Jackson did not contend that the Court had been brutally frank in this way, and it had not been. In the actual opinion that Jackson wrote for the Court, the Court indicated considerable, but not total, deference to Congress. And in stating the substantive test, it adhered to what had become the standard doctrine of the Commerce Clause, saying that

¹⁶⁴. Wickard, 317 U.S. at 129.
¹⁶⁵. Cushman, Continuity and Change, supra note 1, at 1013 n.26 (quoting Stafford, 258 U.S. at 521). Nor, for that matter, was it entirely clear. Earlier in the opinion Jackson stated that local activity not regarded as commerce may be reached by Congress “if it exerts a substantial effect on interstate commerce.” Wickard, 317 U.S. at 125. That language suggests a standard to be judicially applied. Nevertheless, the ultimate holding seems to rely on deference to Congress.
¹⁶⁷. Letter from Robert Jackson to Sherman Minton (Dec. 21, 1942) (Robert Jackson MSS, Box 125, on file with Manuscript Division, Library of Congress), quoted in CUSHMAN, RETHINKING, supra note 38, at 221.
"even if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce."\textsuperscript{168} Professor Cushman says that neither this language nor the opinion’s other references to substantiality constitutes a requirement of substantiality;\textsuperscript{169} he reads it as stating a sufficient but not necessary condition for the exercise of federal regulation. That is a logically nice argument, but it seems overly nice to me; \textit{Wickard} did not suggest a way that an effect on commerce that was less than substantial (as determined however appropriate) could support congressional regulation, and so far as I know no subsequent Court has ever indicated that there is such a way.\textsuperscript{170}

It is easy enough to agree with Justice Jackson’s perception that Congress was no longer effectively restrained by the limitations on the Commerce Clause; once the substantive standard is articulated in soft terms such as “substantial,” and the Court largely defers to Congress in determining whether the standard is met, the power cannot be easily confined. Thus, I argued in my article that the culmination reached by \textit{Wickard}—Professor Cushman and I agree that it is a culmination—reflected an equilibrium that held for more than half a century. I suggested that the forces pulling the doctrine to that equilibrium still are powerful, and so the equilibrium point may remain. But this does not gainsay another point I made in my article, that by continuing to speak in terms of a substantial effect on commerce, and by leaving the matter of deference less than absolute, and less than absolutely clear, \textit{Wickard} left room for maneuver for later justices inclined to cut back on the doctrine.

\textsuperscript{168}. \textit{Wickard}, 317 U.S. at 125.
\textsuperscript{169}. Cushman, \textit{Continuity and Change}, supra note 1, at 1052.
\textsuperscript{170}. Though it makes the sufficient-necessary argument, I read Professor Cushman’s book as drawing the distinction I make here—that the substantive test remained substantiality, but the Court deferred to Congress in determining whether that standard was satisfied. CUSHMAN, \textit{RETHINKING}, supra note 38, at 219-20 (stating that in Jackson’s opinion “the sole relevant issue was whether the effect exerted was in the aggregate ‘substantial.’ . . . The record that Jackson and his colleagues had considered utterly inadequate for a \textit{judicial} determination of the substantiality of the effect was perfectly adequate for a \textit{legislative} determination of the substantiality of that effect”).
IV. CONCLUSION

I always learn from Barry Cushman, and in this case I have learned not only from what he has written but from the extra thought and extra work his comment has induced. In the end, though, he has challenged the thesis of my initial contribution to this Symposium little if at all, and indeed I think it is stronger. So far as the question of how and why the Hughes Court transformed constitutional doctrine is concerned, I have been compelled to rethink numerous matters, but my basic account remains the same: *NLRB v. Jones & Laughlin Steel Corp.* was the big moment, it was not a “stream of commerce” case, and Hughes’s opinion was a natural outgrowth of his previously held views. His opinion in *Carter v. Carter Coal Co.* remains something of a mystery, as does Justice Roberts’s.

That brings me to one closing thought: I am afraid that, given my disagreements with Professor Cushman, readers who believe that there must be an overtly political explanation for the Supreme Court’s decisions in the spring of 1937 must be chortling. If the two of us cannot agree on why Hughes and Roberts

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171. I do find Professor Cushman’s complaint, on which he “hesitate[s] to place too much emphasis,” about my “historical method”—my perceived over-reliance on Supreme Court opinions, see Cushman, *Continuity and Change,* supra note 1, at 1054, 1053—to be completely gratuitous, for several reasons. My initial contribution to this Symposium is, as Professor Cushman acknowledges, “a relatively brief overview of doctrinal development.” *Id.* at 1054. Both points are significant. Not only is that article slender as compared to other work that he and I have both done, but its focus is on the continuity of doctrine, trying principally to demonstrate that it existed rather than to explain what motivated the Court or individual justices in particular cases. Doctrine is expressed in the opinions of the Court, and so in that article they are, appropriately I believe, my primary focus. Even so, my use in that article of other types of sources of the kinds described by Professor Cushman is, I think, far more than trivial. In some cases, I rely on such sources directly. In some, I rely on Cushman’s account of such sources, which I assume he regards as not a bad research method in a work of this nature. And in some, I rely on portions of my 1994 article, see Friedman, *Switching Time,* supra note 4, that were very heavily dependent on such sources; this includes one passage in which Professor Cushman says that I shrug aside Hughes’s *Carter Coal* opinion without explanation, but in which actually I refer explicitly to the argument made in the earlier article. See Friedman, *Sometimes-Bumpy Stream,* supra note 2, at 995 & nn.56-57. Indeed, *Switching Time* and its companion piece, Richard D. Friedman, *A Reaffirmation: The Authenticity of the Roberts Memorandum, or Felix the Non-Forger,* 142 U. Pa. L. Rev. 1895 (1994), fully reflect the kind of research Professor Cushman recommends, as he must know.

End of gripe. Back to high-minded academic civility.

172. 301 U.S. 1 (1937).

acted as they did, it apparently makes more likely the hypothesis that political pressure accounted for their behavior. But that would be the wrong inference. The strongest reason for rejecting the overt political explanation is that there is no support for it other than a brief and not unprecedented flurry of liberal decisions while the Court-packing plan was pending. Trying to reconstruct the thought processes of independent-minded Justices several decades after the fact is not an easy task. Even if, as is possible, we never have a full and fully persuasive account, that would not mean that Hughes and Roberts adopted the positions they did because of political pressure.