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BEYOND CASES: RECONSIDERING JUDICIAL REVIEW

JANET S. LINDGREN*

The continuing power of cases to confine the questions in law and to limit the imagination that answers them is not easily broken. Legal scholarship and law school curricula have proven remarkably resilient to criticism that pushes beyond cases.¹ The tenacity of the commitment to cases in mainstream scholarship and teaching lies in the fact that cases are an integral part of a larger commitment to liberal legal theory and the rationalization of a rule of law that it requires.² Judicial opinions are a natural resource within that enter-

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1. By "legal scholarship" I mean to refer to "the mainstream elite scholarship of this country, the work of the acknowledged intellectual leaders of the profession." Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017, 1018 (1981) [hereinafter cited as Gordon, *Historicism*]. Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205, 1207 & n.13 (1981) examined "the body of work now accepted as legal scholarship," by looking at signed nonstudent writing in the law reviews of the "relatively elite schools in the hierarchy of legal education."

The preference for cases is apparent in the relative inattention, in both scholarship and education, to legislation—an obvious and clearly "legal" source. Relative inattention continues despite the fact that "[s]tatutory law is now the preponderant component of law-embodied public policy." Hurst, Book Review, 67 MINN. L. REV. 536 (1982). Statutory law is in fact "a pervasive element of twentieth century legal order in the United States." W. HURST, *DEALING WITH STATUTES* 1 (1982). The preponderance of legislation is often noted with hostility. See G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); G. GILMORE, *THE AGES OF AMERICAN LAW* 95 (1977).

The push beyond cases has come from various authors. Those who have been particularly important to my own understanding include Willard Hurst and Stewart Macaulay, both of whom were my teachers, and Robert W. Gordon who was my colleague at Buffalo. See e.g. Gordon, *Historicism*, *supra* this note; Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW & SOC'Y REV. 9 (1975); Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine*, *The Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051 (1966); S. Macaulay, *Law and Social Science—Is there any There There?* Mitchell Lecture, SUNY at Buffalo Law School (Apr. 7, 1983); W. HURST, *DEALING WITH STATUTES*, *supra* this note; W. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956) [hereinafter cited as W. HURST, *LAW AND THE CONDITIONS OF FREEDOM*]; Hurst, Book Review, *supra* this note.

2. R. UNGER, *KNOWLEDGE AND POLITICS* *passim*, especially at 67-103 (1975); Gordon, *Historicism*, *supra* note 1, at 1018-19; Horwitz, *The Historical Contingency of the Role of History*, 90 YALE L.J. 1057 (1981); Tushnet, *supra* note 1, at 1206-07.

prise because their function is to rationalize judicial choice.³ The current critique of mainstream scholarship and teaching tends to strike first at the underlying theory. If these critics can change the theory and thus the questions, the range of resources relevant to the inquiry will change as well. The result will be a move beyond cases. I start at the other end, countering a case-based view of an area of law with an analysis based on resources beyond cases. My hope is that, if what readers find in my work is inconsistent with the assumptions they bring to their own work, they may reconsider the theory that informs those assumptions and change the questions they ask.

The stubborn preference for work confined by cases goes beyond their compatibility with dominant legal theory. It may in some small part be the inheritance of a time when judicial decisions dominated the legal landscape.⁴ More importantly, the preference may be for the complete, bounded and ordered universe for inquiry that the common law provides.⁵ Within that universe, cases serve all needs. They provide the categories of thought, the terms of discourse and thus the questions; they serve as the evidence for answering the questions they define as important; they reassure, by their declarations, that what appears in cases reflects or will reflect the world beyond cases.⁶ Boundaries make thought manageable, if not easy—an attraction that should not be underestimated. Finally, the role that cases have played perpetuates recourse to cases. Cases dominate the education of most recruits who begin to research and teach law⁷ and mark those who work beyond cases as outsiders.⁸

3. Kairys, *Introduction, THE POLITICS OF LAW, A PROGRESSIVE CRITIQUE* 3 (D. Kairys ed. 1982). While I argue that the structure imposed by cases remains at the core of legal scholarship and legal education, we may well disagree about the strength and extent of its hold. The hold may always have been weaker in some areas or the critics stronger.

4. The extent to which statutes were subordinate to common law in the early years of the republic may be overestimated by scholars used to working from cases. G. CALABRESI, *supra* note 1, at 183 n.1 (accompanying ch. 1, "Choking on Statutes").

5. The universe is carefully indexed as well, and thus seems to allow easy access to its substance. By comparison to West's rational ordering of the legal universe, legislation is an often unpredictable agglomeration of material.

6. Gordon, *Historicism*, *supra* note 1; and Kairys, *supra* note 3, at 4.

7. Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 *YALE L.J.* 1063, 1105-06 (1981) turns to our "professionalization and profession" to explain why constitutional scholarship is so case centered. Legal scholars, who were once law students, were almost certainly introduced to the law through the opinions of appellate courts. For the most part, that practice still continues. Mastery of the judicial opinion identifies one as an initiate. Mastery, once achieved, is not likely to be lightly surrendered, particularly when that which has been mastered appears orderly and rational. Those same scholars are likely to have clerked for judges. As clerks, they then shared in "the power of judicial decision" and "aspir[ed] to our adopted fathers' seats." *Id.* at 1106.

8. The perception of being defined as an outsider is painfully clear in Tushnet, *supra* note 1, at 1207 & n.14.

Saying that the security and familiarity of cases reinforce the inclination to work within cases will not eliminate the urge for security and familiarity. Articulating this may, however, help a reader understand why the boundary marked by cases often feels more like a cliff than a fence.

The study of judicial review presented here is both an argument for different questions in constitutional law and an example supporting the more general proposition that cases continue to control our inquiries. On both levels, a division of labor should be understood. I do not expect a careful study of due process judicial review in New York in the fifty years between 1870 and 1920 to dismantle the prevailing understanding of judicial review, much less constructs in other areas that are built out of cases. I do expect to facilitate doubt about such constructs—to encourage questions that do not accept the assumptions in the cases and that look beyond the cases for the answers. I turn to constitutional law, hoping others will question the extent to which cases confine the important issues and the possible answers in other areas.

I. CASE CONSTRUCTS IN CONSTITUTIONAL LAW: THE OPPOSITION OF COURT AND LEGISLATURE

It is understood in the literature on judicial review that in declaring statutes unconstitutional the courts act in opposition to the will of a formally representative legislature. This understanding grows out of the judicial negation of legislative choice and survives because the opinions that negate the statutes are also the basis for inquiry about the process. In those opinions the judges write as if the process of determining constitutional content necessarily ends with judicial review; working within those opinions constitutional scholars struggle to reconcile constitutional adjudication and democratic theory. The relationship between court and legislature looks very different when inquiry is taken beyond cases to subsequent legislation and social context; as the relationship between court and legislature changes, so do the important questions.

Evidence of what is “understood” about judicial review can be hard to come by—premises have a way of disappearing from discussion and thus from scrutiny. Fortunately, those who attempt comprehensive theories within an area find it necessary to unearth basic assumptions as they identify the settled ground on which they can

build. In their theories of judicial review, Ely and Choper present the opposition of court and legislature and the dominance of the courts within that opposition as settled.⁹ They see the relation of court and legislature in a democracy as the central problem in constitutional adjudication, and their theories are meant to resolve it. Ely is clearest about the problem:

When a court invalidates an act of the political branches on constitutional grounds . . . it is overruling their judgment, and normally doing so in a way that is not subject to "correction" by the ordinary lawmaking process. Thus the central function, and it is at the same time the central problem, of judicial review: a body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they'd like.¹⁰

That message is not much softened by the fact that, years later, the court may change its position.¹¹

Judicial opposition to legislative choice is not particularly problematic when judicial choices closely reflect choices built into the terms of the Constitution for then it can be translated into the opposition of legislature and constitution.¹² It is when the judges invalidate legislative choices under open-ended constitutional provisions that judicial opposition to legislative choice is assumed to create problems in a democracy.¹³ Then the choices of elected, and thus

9. J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 132 (1980); J. ELY, *DEMOCRACY AND DISTRUST; A THEORY OF JUDICIAL REVIEW* 4-5 (1980).

10. J. ELY, *supra* note 9. *Accord* J. CHOPER, *supra* note 9, at 129-33. *See, e.g.*, G. CALABRESI, *supra* note 1, at 4.

11. The study presented here is of decisions made under substantive due process doctrine. The courts eventually changed their treatment of due process claims, but not before most of the interactions traced here had already occurred. The one interaction that reflected a change in the underlying legal rule involved the substantial repassage in 1913 of an 1899 statute prohibiting women's night work. *See infra* notes 129-35 and accompanying text.

There is, of course, always the possibility of constitutional amendment, but that does not seem to be considered part of the ordinary lawmaking process. The possibility of constitutional amendment has not diminished the dilemma of judicial opposition to legislative choice.

12. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 *STAN. L. REV.* 843, 844 (1978).

13. Two symposia and numerous other articles have focused on this issue since the publication of J. ELY's book, *supra* note 9. *Symposium: Constitutional Adjudication and Democratic Theory*, 56 *N.Y.U. L. REV.* 259 (1981) (Estreicher, *Review Essay, Platonic Guardians of Democracy: John Hart Ely's Role for the Supreme Court in the Constitution's Open Texture*, *supra* this note, at 547 n.4, gathers a large number of articles written on this subject); *Symposium: Judicial Review versus Democracy*, 42 *OHIO ST. L.J.* 1 (1981). Richards, *Introduction to Symposium: Constitutional Adjudication and Democratic Theory*, 56 *N.Y.U. L. REV.* 276, 276 (1981) sees "a major renaissance of serious constitutional theory, which must be seen in the perspective of a rebirth of interest in political theory and moral philosophy." Wellington, *The Nature of Judicial Review*, 91 *YALE L.J.* 486, 486-87 (1982) observes that "the attempt to find a justification for judicial review is again engaging the attention of several of our prominent constitutional scholars, even as it did an earlier generation some twenty years ago."

formally representative, legislators are opposed by choices left largely open by the Constitution and made by judges who are seldom considered representative, even when elected.¹⁴ A legacy of judicial domination survives the reconciliations that may occur when the same judges change their minds, or the membership of the court eventually changes.¹⁵

The assumption that the process of constitutional choice necessarily stops with judicial review is shared by writers who assign the courts a special protective role because of that assumption and by those who strain to limit the choices of the courts because of doubts about the legitimacy of judicial choice.¹⁶ Scholars in both camps accept the assumption because both sides practice scholarship within the confines of judicial opinions.¹⁷ The result is constitutional inquiry largely limited to the opinions of the judges who decide the cases, to the lives of those judges, and to the history of notable cases. The tone of the opinions and the reactions of litigants reinforce those

14. The fact that New York's judges were elected for terms of 14 years in at least the highest court, does not seem to have tempered the assumption that the New York courts acted in opposition to the will of the people. D. EATON, *SHOULD JUDGES BE ELECTED? OR THE EXPERIMENT OF AN ELECTIVE JUDICIARY IN NEW YORK* 38-43 (1873) surveys the reason why the people will not use elections of judges to express their will effectively.

15. *E.g.*, as described in Brest, *supra* note 7, at 1085-86.

16. The former tend toward arguments that are not closely tied to the language of the Constitution; the latter tend toward arguments based on textual interpretation of the written Constitution. Thomas Grey sketched this basic division between "interpretivism" and "noninterpretivism" in Grey, *Do We Have an Unwritten Constitution?*, 27 *STAN. L. REV.* 703 (1975). The division has served as the basic framework for discussion since. It is usefully restated by Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 *N.Y.U. L. REV.* 278, 278-80 (1981) and by J. ELY, *supra* note 9, at 1-2.

17. The prevalence of scholarly concern with judges prevailing in their opposition to legislative choice is in sharp contrast to the rare willingness to recognize areas in which the opposition is not problematic. Three authors reduce the area in which the opposition of judicial and legislative choice needs to be addressed and suggest why judicial decisions that are final are not particularly troublesome. Gibbons, *Keynote Address*, 56 *N.Y.U. L. REV.* 266, 266 (1981) notes that, "[i]f we eliminate statutory supremacy, the commerce clause, and interstate umpiring from our discussion, the area of potential dispute over the black art of judicial review is considerably narrowed."

Perry, *supra* note 16, bases his functional justification for review in human rights cases, which goes beyond purported interpretation of constitutional provisions, on a dialogue between court and legislature. In his view, the courts provide a moral critique and the possibility of moral growth beyond established moral conventions: "The relation between noninterpretative review and electorally accountable policymaking is dialectical." *Id.* at 307. Protection from judicial fallibility lies, he suggests, in the legislature's ability to limit the court's jurisdiction. *Id.* at 331.

Wellington, *supra* note 13, at 504-08, challenges the finality of all but "the most substantive of constitutional cases." He minimizes the problem of finality in those by adding that, "[i]n the most substantive of constitutional cases there is always doubt about finality at the time of decision because there is always the possibility of judicial mistake and the inevitability of social change." *Id.* at 508.

limits. The opinions, written to counter the legislature's choice, often scorn that choice: "No one will have the temerity to suggest that this drastic and cumbersome statute is not in restraint of the rights of 'liberty' and 'property'. . . ." ¹⁸ The initial reaction of proponents of a statute declared unconstitutional is likely to confirm the sense that the process of constitutional choice ends with judicial review. That reaction can be harsh given the frustration of immediate goals and the fear that both the immediate goal and the broader plan are forever lost. ¹⁹ Respecting the boundaries of the written opinion, scholars have not often gone on to ask what happened next. ²⁰

18. *Wright v. Hart*, 182 N.Y. 330, 335, 75 N.E. 404, 406 (1905). The tendency to take at face value what appears in judicial opinions is apparent in what Benjamin Twiss calls "lawyer's history. . . . [I]t proceeds, generally speaking, on the assumption that anything said in a judicial decision which it is convenient to treat as authentic fact is authentic fact, whatever a competent historical scholar might have to say about the matter." B. TWISS, *LAWYERS AND THE CONSTITUTION* 147 (1962).

19. The anger was there in the period studied. Labor demonstrated. *Notes of Current Topics: Labor and the Judiciary*, 42 AM. L. REV. 598 (1908). Reformers condemned. F. KELLEY, *SOME ETHICAL GAINS THROUGH LEGISLATION* 231 (1905). Some lawyers roundly criticized the courts. A.H.R., *Coram non iudice. Arousing the Public Mind Against the Judicial Prerogative to Determine the Constitutionality of Legislation*, 75 CENT. L.J. 229 (1912); McDonough, *The Courts and the Constitution*, 84 CENT. L.J. 321, 322 (1917); P. Tecumseh Sherman, *Col. Roosevelt and Court Decisions*, in BETTS-ROOSEVELT LETTERS—A SPIRITED DISCUSSION 93 (1912). The question here is not the existence of anger or the reasons for it, but what scholars have made of it.

20. This single-minded concentration on the judicial opinion as both the object of criticism and the source of information about the consequences of the opinion is epitomized by O. FIELD, *JUDICIAL REVIEW OF LEGISLATION IN TEN SELECTED STATES* (1943) and Field, *Unconstitutional Legislation by Congress*, 39 AM. POL. SCI. REV. 54 (1945). The Works Project Administration, the Graduate School Research Fund of Indiana University, the Social Science Research Council and the Graduate School of the University of Minnesota all helped support the state study. Field and his staff carefully combed all cases from each of 10 states to find the decisions of unconstitutionality: "Over two millions of pages were examined in the course of the project." O. FIELD, *supra* this note, at 7. A questionnaire with 43 items was to have been prepared for each case that held legislation unconstitutional. *Id.* at 5-7. Of the 43 questions, all but three were to be answered from the opinion itself. Number 27 asked whether the case had been overruled by any later case and sent the researcher to Shepard's citator. Question 25 asked: "Was any other law on this subject enacted in the following ten years? Check session laws of state," and number 26 followed up with: "Does it seem to relate to parties or decision in this case?"

In his description of their findings, Field tells us about the incidence of judicial review, the parties in these cases, the forms of action used, the length of time between enactment of a statute and its invalidation, the constitutional provisions relied on, the appearance of dissenting opinions, the length of the judicial opinions and the rate of judicial reversal. Nowhere does the discussion even edge toward the possibility that the legislature may have responded to a judicial decision of unconstitutionality. It is as though questions 25 and 26 had never been asked. In all probability they were never answered on the questionnaire, for given the comprehensiveness of the report an answer, whether affirmative or negative, would have been tallied.

The Field study is revealing not only as an example of case-confined vision but also because it purports to expand on the usual study of cases: "Emphasis should be placed, here,

The common law nature of scholarship insulates the assumption that the process of constitutional choice necessarily ends when the courts oppose legislative choice.²¹ Accepted wisdom within an area is built incrementally. Participation within an area of scholarship requires sharing some settled ground; debate is over unsettled questions at the margins.²² The accumulation of scholarly writing on judicial review that assumes that the courts prevail when they oppose legislative choice is enormous, and the reputation of the builders is often substantial. Their understanding that the constitutional ultimatums of judges oppose and control the choices of elected officials has made the legitimacy of judicial choice their major concern.²³ There have been reminders that this core assumption

on the fact that this is not a study of legal rules or principles as such. It is a fact-study, as the modernists sometimes term this type of analysis." *Id.* at 10. In that expansive mood, the work still stayed firmly bounded by the judicial opinion.

21. The tendency of judges to stress prior similar decisions to justify their choices gives the impression that the choice being justified is a common one. Repetition of assertions about the opposition of court and legislature likewise helps produce the "common understanding" I am describing. Charles Warren in Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294 (1913), recognized that "[t]here is grave danger that through constant iteration the truth of this charge [of judicial oligarchy and judicial usurpation] will be assumed, and that the discussion will be confined to the form of remedy needed." *Id.* at 294.

22. Parker, *The Past of Constitutional Theory—and its Future*, 42 OHIO ST. L.J. 223 (1981) calls for constitutional scholars in the "generation of the 1960's" to set their own terms for constitutional discourse:

My appeal is this: Our elders have brought constitutional theory to a crossroads. Out of their experience of life in our polity, they have conceived the problems of its constitution in their own way. As a generation, we have had a rather different experience of life in our polity. Therefore, it is given to us to conceive the problems of its constitution in a new way.

Id. at 223. Perry, *supra* note 16, seems to do that for he clearly works from core assumptions that are not standard—i.e., judicial review is "an enterprise designed to enable the American polity to live out its commitment to an ever deepening moral understanding and to political practices that harmonize with that understanding." *Id.* at 294. Brest, *supra* note 7, at 1063, describes the whole controversy "over the . . . legitimacy of normative constitutional scholarship [as] essentially incoherent and unresolvable." He briefly suggests "some alternative strategies." *Id.* at 1109.

23. "[T]he search for some coherent foundation for rights analysis, particularly for judicial review, has been the preoccupation of modern constitutional law theorists." Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE*, *supra* note 3, at 34.

Grey, *supra* note 16, at 716, describes the use of "unwritten constitutional law" in the late nineteenth century as "protecting 'liberty of contract' against labor regulation, and restraining taxation and the regulation of prices charged by private business. The reaction to this tendency marked the beginning of sustained intellectual and political attack on the whole concept of unwritten constitutional principles." *Id.* Belz surveys the attackers in detail in Belz, *The Realist Critique of Constitutionalism in the Era of Reform*, 15 AM. J. LEGAL HIST. 288 (1971). He notes that, "[t]he burden of the constitutional realist critique was that courts usurped the power of popularly elected legislatures in their irresponsible exercise of the review function." *Id.* at 290.

may be in error, but the reminders have been tentative and more often from disciplines other than law.²⁴ The reminders have not been sufficient to reshape the questions for constitutional scholarship.

Those who venture beyond the pages of the opinions face relatively unfamiliar ground, but the consequences of the move are significant. This study of the relationship of court and legislature in determining constitutional content goes beyond the judicial review opinions. Substantive due process opinions from New York at the turn of the century were selected as a starting point because they seemed particularly likely to *confirm* the usual understanding of court opposed to legislature, with the courts winning. Finding and then following each of those decisions establishes that for New York, between 1870 and 1920, the common understanding about judicial review is wrong. During this period it was the interaction between New York's courts and legislature—not judicial ultimatum—that determined constitutional content, and within that interaction it

Levy, *Judicial Review, History and Democracy: An Introduction*, in JUDICIAL REVIEW AND THE SUPREME COURT (L. Levy ed. 1967) traces the argument that judicial review is consistent with a democratic form of government, *id.* at 24-42; and the argument that it is contrary to democratic government, *id.* at 12-24. He describes the case for the democratic character of judicial review as "certainly a compelling one—although not a convincing one." *Id.* at 24. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952) takes the distinctly minority position that legitimacy is not a problem: "[D]emocracies need not elect all the officers who exercise crucial authority in the name of the voters." *Id.* at 197.

24. Hurst, *Review and the Distribution of National Powers*, in E. CAHN, SUPREME COURT AND SUPREME LAW 140, 146-47, 152 (1954) observes that:

[T]he main thing that strikes the eye is how few the instances [of judicial invalidation of statutes] are in relation to the great volume of congressional legislation, and secondly what a rag bag of miscellaneous items they are, the bulk of them obviously of secondary importance.

As one looks at the responses . . . of the past seventy-five years, it is hard to list examples of any strongly desired action which was not taken because of barriers assumed to exist in judicial doctrine.

H. COMMAGER, MAJORITY RULE AND MINORITY RIGHTS 47 (1943) asserts that:

It is safe to say that had there never been an instance of judicial nullification of a congressional act, our constitutional system would be essentially the same as it is today. For most of the judicial nullifications of federal legislation have been cancelled out by amendment, by new—and more acceptable—legislation, or, more frequently, by judicial reversal.

Dahl, *Decisionmaking in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 291 (1957) concludes, after detailed study of federal legislation that, "the elaborate 'democratic' rationalizations of the Court's defenders and the hostility of its 'democratic' critics are largely irrelevant, for lawmaking majorities generally have had their way." See also W.C. GILBERT, PROVISIONS OF FEDERAL LAW HELD UNCONSTITUTIONAL BY THE SUPREME COURT OF THE UNITED STATES, 87-95, 135-37 (1936); M. NELSON, A STUDY OF JUDICIAL REVIEW IN VIRGINIA 1878-1928 (1947); Brown, *Due Process, Police Power and the Supreme Court*, 40 HARV. L. REV. 943 (1927).

was the legislature, so often pictured at the mercy of the courts, that tended to dominate.

If this interaction is repeated elsewhere, we need to determine its contours and its contribution to theories of constitutional choice. To the extent we can shake the assumption that the process of constitutional choice necessarily ends when the courts oppose legislative choice, we can move from endless arguments about the legitimacy of judicial choice in a democracy to thinking more about, and arguing more about, the competing values that underlie constitutional choice.

II. QUESTIONING CASE CONSTRUCTS: DUE PROCESS JUDICIAL REVIEW IN NEW YORK, 1870-1920

Generalization will not do in questioning the common wisdom that the process of constitutional choice ends when the courts oppose legislative choice. Detail is needed to persuade that this assumption of opposition must be rethought. That detail is provided in this article for judicial review in New York in the years between 1870 and 1920. The possibility that the interaction found there between court and legislature was real, but an aberration, is twice minimized: first, by choosing to work with substantive due process cases, where the assumption of opposition is particularly strong, and second, by establishing that interaction in these cases continued an existing relationship of interaction between court and legislature.

A. Setting the Study

The common understanding about the exercise of judicial review in the period 1870-1920 has been, and continues to be, that it was substantial, destructive, political and final—"a massive judicial entry into the socioeconomic scene,"²⁵ a "carnival of unconstitutionality,"²⁶ personal judicial preference for laissez-faire capitalism imposed under constitutional provisions too broad to constrain choice.²⁷ "The courts . . . invalidated or emasculated almost all forms of federal social legislation between 1885 and 1935. . . . [It

25. A. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895*, at 2 (1969).

26. Pound, *The Growth of Administrative Justice*, 2 WIS. L. REV. 327 (1922-24).

27. A member of the Cigar Makers' International Union No. 27 in Brooklyn captured the political nature of the court decisions: "Everything is unconstitutional that will mitigate the burden of life to the wage-worker." BUREAU OF LABOR STATISTICS, *THIRTEENTH ANNUAL REPORT FOR 1895*, at 342 (1896).

was] the fifty years' massacre."²⁸ It was "the most controversial phase in our history of unwritten constitutional law."²⁹ These are the years in which this study is set.

Judges at the turn of the century fashioned the guarantee that no state shall "deprive any person of life, liberty, or property without due process of law"³⁰ into a judicial review of the substance of legislative choice.³¹ The judges of that period are credited with constructing barriers to legislative reform out of the due process clause—barriers that held, at least until the judges chose to remove them.³² "[I]t was a fortunate and relatively innocuous piece of reform legislation that was able to run the gauntlet of the due process clause."³³ It is due process decisions that are studied here.

State courts led in the development of substantive due process doctrine,³⁴ and among those courts New York's are considered pre-eminent in setting their own preferences over those of the legislature.³⁵ "Of the state courts which influenced the development of constitutional laissez-faire during the last thirty years of the nineteenth century none was more important than the New York Court of Appeals."³⁶ New York is the site of this study.

28. Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 244-45 (1950).

29. Grey, *supra* note 16, at 716.

30. U.S. CONST. amend. XIV.

31. The courts decided "the just exactions and demands of the state." *Bertholf v. O'Reilly*, 74 N.Y. 509, 515 (1878).

Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health.

In re Jacobs, 98 N.Y. 98, 110 (1885).

32. Cushman, *The Social and Economic Interpretation of the Fourteenth Amendment*, 20 MICH. L. REV. 737 (1922) reflects the common assumption about the division of labor between court and legislature: "On this question of opinion [of the arbitrariness of workmen's compensation or minimum wage laws] the legislature in enacting the law has the first word, while the courts in deciding whether the law is constitutional have the last word." *Id.* at 738.

33. R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 50 (1941). He characterizes the Supreme Court "at the threshold of the New Deal . . . as a Supreme Censor of legislation." *Id.* at 70. See also Cushman, *supra* note 32, who characterizes the period as one in which the courts "ruthlessly overrode the determinations of the legislature that social and economic conditions justified and demanded legislative regulation." *Id.* at 753.

34. C. JACOBS, *LAW WRITERS AND THE COURTS* 92-93 (1954); Haines, *Implied Limitations on Legislatures*, 3 TEX. L. REV. 1, 19 (1924).

35. A. PAUL, *supra* note 25, at 99-100; Corwin, *The Extension of Judicial Review in New York: 1783-1905*, 15 MICH. L. REV. 281 (1917).

36. C. JACOBS, *supra* note 34, at 42.

B. Connecting the Study: Prior Interactions

The nature of the problems of a period influences the sort of legislation required and in turn the task of the courts in evaluating its constitutionality. Legislators and judges in 1870 through 1920 shared with businessmen, laborers, immigrants and reformers the experience of often dismaying change. This was a period of increasing industrialization, increasingly urban populations and increasing fluctuations in economic cycles. Even the nature of sin was changing.³⁷ As Willard Hurst put it, "events ran away with us after 1870. . . ."³⁸ Certainty, security and familiarity were in relatively short supply, though, to obtain these, businesses organized and combined and laborers formed unions. Robert Wiebe describes the time as "a search for order."³⁹ The legislature increasingly moved away from special legislation toward general legislation,⁴⁰ and the courts in turn moved from reviewing the form of special legislation toward evaluating the content of general legislation.⁴¹ The form of the statutes changed the nature of the questions for the courts, but the existence of interaction between court and legislature in determining constitutionally acceptable solutions did not change.

The ad hoc solutions found in the private or local bills so familiar at the beginning of this period were inadequate to meet increasingly complex problems. New York's legislature, for example, attempted through special legislation to salvage various railroad, street car, elevated and subway lines that had earlier been chartered by private bill, but found itself no closer to the coherent transportation network that was needed.⁴² This failure warned of the pitfalls

37. E. ROSS, *SIN AND SOCIETY, AN ANALYSIS OF LATTER DAY INIQUITY* (1907).

38. W. HURST, *LAW AND THE CONDITIONS OF FREEDOM*, *supra* note 1, at 84.

39. R. WIERE, *THE SEARCH FOR ORDER 1877-1920* (1967).

40. W. HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 66 (1950).

41. See *infra* note 53. In determining whether a statute was special, the judges asked questions quite similar to those asked in determining whether a statute deprived a party of property without due process of law. There was such a deprivation when a statute was passed for the benefit of special classes rather than for the public. See *Lawton v. Steele*, 152 U.S. 133, 137 (1894) ("To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; . . ."); *Colon v. Lisk*, 153 N.Y. 138, 47 N.E. 302 (1897).

42. These statutes illustrate the range of transportation problems for which solutions were attempted by special legislation. In passing Act of June 22, 1880, ch. 577, 1880 N.Y. Laws 866 (declared unconstitutional in *Farnham v. Benedict*, 107 N.Y. 159, 13 N.E. 784 (1887)), the legislature attempted to release the Attica and Arcade Railroad Company from the forfeiture of its charter for failing to begin construction and to expend 10% of its capital within five years. Act of Apr. 19, 1870, ch. 282, 1870 N.Y. Laws 634 (declared unconstitutional in *People ex rel. Dunkirk, W. & P.R.R. v. Batchellor*, 53 N.Y. 128 (1873)) replaced a

of using special legislation to solve general problems. The 1874 New York Constitution reinforced the message by prohibiting special legislation on a long list of subjects. These included, "[g]ranting to any private corporation, association or individual any exclusive privilege, immunity or franchise whatever."⁴³ The legislature was instructed instead to "pass general laws providing for the cases enumerated in this section, and for all other cases which in its judgment, may be provided for by general laws."⁴⁴ Private and local bills, when appropriate, still could not embrace more than one subject, which had to be expressed in the title.⁴⁵

Nearly half the statutes declared unconstitutional between 1870 and 1885 failed because they were not in proper form for special legislation or because they were special legislation on a topic that had to be treated generally. When statutes were invalidated on these grounds, the New York constitution literally invited legislative response.

The resulting interaction between court and legislature is apparent in their initial exchange on the subject of tenement manufacture. A statute passed in 1883 was local to New York City and prohibited in its first section, "[t]he manufacture of cigars, or preparation of tobacco in any form, in any rooms or apartments which, in the City of New York, are used as dwellings, for the purpose of living, sleeping or doing any household work. . . ."⁴⁶ The second section prohibited dwelling in "any section of any floor in any tenement house in the City of New York, in which the manufacture of cigars or the preparation of tobacco is carried on. . . ."⁴⁷ The

statute that made it legal for the supervisor of any town through which the Dunkirk, Warren and Pittsburgh Railroad ran to borrow or to bond up to a certain amount once the owners of half the value of property in town consented, with a statute that required the supervisor to do so. Act of May 2, 1878, ch. 206, 1878 N.Y. Laws 264 (declared unconstitutional in *In re Brooklyn, W. & N. R.R.*, 75 N.Y. 335 (1878)) amended an earlier statute to give the Brooklyn, Winfield and Newtown Railroad Company five years from the date of the second act to begin construction.

43. N.Y. CONST. of 1846 art. III, § 18 (1874). Field, *The New York Session Laws of 1892*, 47 ALB. L.J. 90, 90 (1893) read this constitutional provision to "indicate the desire of the people to drive special and local legislation from the Senate and Assembly." He decried not only the economic cost of this sort of legislating (at an average cost of \$734 per statute) but also the potential social cost. "[An endless maze of regulations] would be socialism, not intermittent but perpetual." *Id.* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 305 (1973) describes similar provisions in the constitutions of other states and attributes these restrictions on legislative power to "fear of gross economic power, so gross it could buy and sell an upper and lower house."

44. N.Y. CONST. of 1846 art. III, § 18 (1874).

45. N.Y. CONST. of 1846 art. III, § 16.

46. Act of Mar. 12, 1883, ch. 93, 1883 N.Y. Laws 79.

47. *Id.*

title did not mention the second provision, the prohibition on dwelling in a tenement in which cigars were manufactured.⁴⁸ The title described the Act only as one "to improve the public health in the City of New York by prohibiting the manufacture of cigars and preparation of tobacco in any form in the tenement-houses of said city."⁴⁹ The New York Court of Appeals held the statute unconstitutional because "[t]he citizens of New York, jealous of interference with their homes, reading the title of this bill, would be deceived, misled, and thrown off their guard."⁵⁰ The legislature responded the following year by passing a cigarmaking statute that was general in form. It applied to cities having "over five hundred thousand inhabitants,"⁵¹ and thus avoided the technical title requirements for special legislation on which its predecessor had foundered. The limitations of the statute were extended to Brooklyn, the only other city of that size. The statute inched toward the constitutionally preferred generality.⁵²

Throughout this period, the mix of special and general legislation continued to shift toward generality. This growing body of general laws produced a constitutional exchange between legislature and court that went beyond questions of form. The dialogue changed from one predominantly about the adequacy of the generality of legislation to one about the appropriate content of formally general legislation. Thus, after 1896, only a few statutes were held unconstitutional on the grounds that they were special legislation either on prohibited topics or in improper form.⁵³ The legislature and the courts had turned their attention to questions of the proper

48. *Id.*

49. *Id.*

50. *In re Paul*, 94 N.Y. 496, 505 (1884).

51. Act of May 12, 1884, ch. 272, 1884 N.Y. Laws 335.

52. See *In re Henneberger*, 155 N.Y. 420, 50 N.E. 61 (1898), for a discussion of legislation that was general in form but local in fact. C. JACOBS, *supra* note 34, describes courts engaging in "minute analyses of challenged statutes in order to discover their partial character although the laws were, on their face, general. In such a way the judiciary acquired additional power as the supervisor of relations between the state and the private economy." *Id.* at 44.

53. The following table shows the proportion of statutes declared unconstitutional because they were not in proper form for special legislation on a topic that had to be treated generally:

1870-1874	9 of 30
1875-1879	10 of 17
1880-1884	8 of 17
1885-1889	7 of 20
1890-1894	5 of 33
1895-1899	4 of 42
1900-1904	8 of 60

content of general legislation—determining, for example, the appropriate limitations on occupations in dwellings. In so doing, they continued the already familiar pattern of legislative choice, judicial decision and legislative response. The details of that interaction follow.

C. Developing Categories

The constitutional guarantee that no person shall be deprived of life, liberty or property without due process is said to have functioned during this period as “the principal guarantee of corporate capitalism and private economic power.”⁵⁴ It could serve the function of protecting against legislative interference because its open texture left the judges free to transform its guarantee into a judicial review of the substance of legislative choice. In their due process opinions, the judges fed the notion that resort to this guarantee was frequent: “This species of legislation has been so often condemned by this and other courts as to render any further discussion of its impropriety and invalidity wholly unnecessary.”⁵⁵ These decisions fueled debate at the time about the proper limits on judicial choice in a democracy and serve as a backdrop as that debate continues.

In fact, this “principal guarantee” was not often invoked by the judges. In the fifty years between 1870 and 1920 the New York courts invalidated twenty-seven statutes on twenty-four subjects on the basis of the due process clause.⁵⁶ The first three decisions came

The derivation of the cases counted here is described *infra* note 56. The extent of change will be obvious to anyone willing to compare a volume of state session laws from around 1870 with another after 1900. While “the total of special laws was markedly less than in the mid-nineteenth century,” W. Hurst, *supra* note 40, at 66, notes that special laws still constituted a drain on legislative time and energy.

54. C. JACOBS, *supra* note 34, at 24.

55. *Colon v. Lisk*, 153 N.Y. 188, 198, 47 N.E. 302, 305 (1897).

56. The cases counted were drawn from Corwin, *supra* note 35, and F. SMITH, *JUDICIAL REVIEW OF LEGISLATION IN NEW YORK, 1906-1938* (1952). Each of these authors explains in detail how he derived his lists, which totaled over 300 decisions. There were 31 decisions about 27 statutes on 24 subjects based at least in part on the due process clause. I will discuss 14 of those subjects in detail. Five subjects that parallel subjects fully discussed are left to footnotes. I have concluded in the case of five statutes that no legislative response could have been expected, for a variety of reasons: (1) *The legislature had already repealed the statute declared unconstitutional.* Act of Mar. 19, 1901, ch. 128, 1901 N.Y. Laws 312, declared unconstitutional in *Fisher Co. v. Woods*, 187 N.Y. 90, 79 N.E. 836 (1907). (2) *A different and more stringent statutory scheme was already in place when the forerunner was declared unconstitutional.* Act of May 27, 1896, ch. 931, 1896 N.Y. Laws 1005, declared unconstitutional in *People v. Hawkins*, 157 N.Y. 1, 11, 51 N.E. 257, 266 (1898) after it had been incorporated into Act of May 13, 1897, chs. 415 & 416, 1897 N.Y. Laws 461. (3) *The federal commerce clause was also a basis for decision and inhibited re passage.* Act of Apr. 25, 1895, ch. 413, 1895 N.Y. Laws 263, substantially reenacted in Act of May 13, 1897, ch. 415, 1897 N.Y. Laws 461, declared unconstitu-

in 1885, 1887 and 1888; the remainder came in the sixteen years between 1895 and 1912. The statutes invalidated ranged from an act establishing a workers' compensation scheme⁵⁷ to one lowering the acetic acid requirement for cider vinegar made by a farmer in New York from apples grown on his own land.⁵⁸

When the courts did intervene with a decision that a statute offended the requirements of due process, that decision became part of a process of choice that had begun in the legislature and that continued past the judicial decision. The following accounts of that process, of which the opinions are but a piece, confirm that the relationship between court and legislature was one of continuing interaction. These accounts both suggest the categories that help explain that interaction and resist easy categorization. I use categories that help explain the nature of the interaction I have found before suggesting themes that may cut across those categories.

Since the clear message from pursuing each of these stories was that continued interaction between court and legislature was the norm, I started there and began dividing by the form of interaction. This involved asking what happened to the legislature's initial choice after each statute had been declared unconstitutional. Was it repeated by the legislature, accomplished by constitutional amendment, approximated by competition or defeated by the courts? Once the stories were thus divided, the task was to move beyond description—to explain why disparate issues elicited similar forms of interaction. Four different sorts of interaction required explanation.

Statutes in the first group were proposed by established and well-organized interest groups to protect property and propriety from ongoing practices. Those who feared that these statutes—regu-

tional in *People ex rel. Treat v. Coler*, 166 N.Y. 144, 59 N.E. 776 (1901). Act of May 14, 1894, ch. 698, 1894 N.Y. Laws 1744, declared unconstitutional in *People v. Hawkins*, 85 Hun. 43, 32 N.Y.S. 524 (1895). (4) *The state constitution was being amended to eliminate the problems*. Act of Apr. 26, 1895, ch. 417, 1895 N.Y. Laws 266, declared unconstitutional in *Wilson v. United Traction Co.*, 72 A.D. 233, 76 N.Y.S. 203 (N.Y. App. Div. 1902).

Warren, *supra* note 21, does a similar counting for the United States Supreme Court and concludes that, "[t]he National Supreme Court, so far from being reactionary, has been steady and consistent in upholding all State legislation of a progressive type." *Id.* at 295. He lists by subject the statutes that have been upheld. Brown, *supra* note 24, at 944, identifies 180 due process cases before the Supreme Court between 1868 and 1920. In only 13 were the statutes at issue invalidated. However, from 1920-1927, 15 of 53 were invalidated.

57. Act of May 24, 1910, ch. 352, 1910 N.Y. Laws 625, declared unconstitutional in *Ives v. South Buffalo Ry.*, 201 N.Y. 271, 94 N.E. 431 (1911).

58. Act of Apr. 10, 1893, ch. 338, 1893 N.Y. Laws 655, as amended by Act of Apr. 10, 1901, ch. 308, 1901 N.Y. Laws 813, declared unconstitutional in *People v. Windholz*, 92 A.D. 569, 86 N.Y.S. 1015 (N.Y. App. Div. 1904).

lating bulk sales, prohibiting liquor in dance academies and penalizing theft of cultivated oysters—would interfere with other property interests argued in the abstract and without the force of organization. Without effective opposition each of these statutes was promptly passed again, and that was the end of the matter.

In passing statutes in the second group, the legislature determined highly disputed values involving the relation of labor and capital. Both labor unions and businesses were organized and vocal. In rejecting the resolution of serious dispute within the legislature, the courts effectively required that the strength and representativeness of the legislature's initial choice be confirmed by constitutional amendment. These disputes were far too public for proponents to expect that the statute could simply be repassed. The initial resolution in the legislature, however, seems to have required sufficiently strong proponents or enough compromise that the necessary amendments—on workers' compensation and the eight-hour day—were readily accomplished.

In passing statutes in the third group, the legislature made choices about market practices in a highly competitive milieu. The initial legislative choice established or prohibited a competitive practice that either held after the statute was found unconstitutional or became a factor that influenced the choices of competitors. The ultimate competitive arrangement — for railroad mileage books, trading stamps and premiums — approximated the legislature's initial choice.

Statutes in the fourth group, regulating admission to certain occupations, could be accepted uncritically by the legislature; the statutes plausibly furthered the public welfare, and the regulatory schemes they created could be financed and operated without further legislative attention. The anticompetitive consequences of the statutes became apparent when persons subsequently excluded from the occupations challenged the statutes. The litigation effectively destroyed the basis for the legislature's initial choice and the legislature left it at that.

These explanations are detailed in the discussion that follows. Underlying the detail is continued, though varied, interaction between court and legislature. The legislature's initial choice, rather than being negated by the courts, continued to play a significant role in each of the first three groups. Only the final group might seem to show the court prevailing in its opposition to legislative choice. Still, if the initial legislative choices in that group were as casual and uncritical as they seem to have been, it is hardly surprising that the

legislature did nothing more once the courts provided reason to be critical.

1. REPETITION OF LEGISLATIVE CHOICE

In the first group, the legislature protected values that were relatively undisputed in public discourse from ongoing practices that were fully detailed by respectable and organized proponents of the statutes. The legislature was not thereafter swayed by a judge's warnings, in declaring the statute unconstitutional, that other, equally established, values *might* be jeopardized by the statute.⁵⁹ Both the judge and the opponents of the statute were forced to argue hypothetical abuses because the statute had only just created the purported danger. Under these circumstances, the "unconstitutional statute" was simply passed again, and that was the end of the matter. Either the opponents accepted their relative ineffectiveness or time showed that the dangers attributed to the statute were illusory. Thus, a Bulk Sales Act survived to prevent fraud; the prohibition on serving liquor in dance academies reappeared to help ensure propriety; and statutes prohibiting theft maintained the right to property in cultivated oysters.

The Bulk Sales Act is the most familiar of the three. It rested on considerable evidence of fraudulent sales that was marshaled by the men in the credit departments of corporations supplying small businesses: "[W]hen a dealer has reached a point in his business career where he cannot go on owing to the claims of creditors, the temptation is strong and the practice common of making a fraudulent sale. Fraud works in secret, and the bargain is closed and the purchaser in possession before the creditors know anything about it."⁶⁰

59. See *infra* notes 81-84 and accompanying text.

60. *Wright v. Hart*, 182 N.Y. 330, 346, 75 N.E. 404, 410 (1905) (Vann, J., dissenting). A fraudulent bulk sale was alleged to have occurred in 1914, when the New York Bulk Sales Act was in effect. Since the Act's procedures were not followed, the complaint provides a fair picture of practice before the passage of the Act:

[David Klein] . . . was and still is a creditor of Sirrontis Maravelas and Nicholas Varounes on account of goods and merchandise sold . . . for the sum of Two Hundred Seventy-six 92/100 (\$276.92) Dollars.

[P]rior to the 24th day of September . . . The said Sirrontis Maravelas and Nicholas Varounes were conducting a lunch room and restaurant business at No. 95 Court Street, in the Borough of Brooklyn, City of New York.

[O]n or about the 24th day of September, . . . Sirrontis Maravelas and Nicholas Varounes sold and transferred, and [Peter Maravelas] purchased said restaurant business together with the goods, wares, merchandise and fixtures thereof in bulk, by a bill of sale . . . filed . . . in the office of the Register of the County of Kings on the 28th day of September, . . . said bill of sale being numbered 40531.

Record on Appeal at 3-5, *Klein v. Maravelas*, 219 N.Y. 383, 114 N.E. 809 (1916).

The National Association of Credit Men crusaded for the Bulk Sales Act, which passed in New York in 1902.⁶¹ Justice Werner disparagingly called this campaign one of those "organized crusades upon legislatures by the advocates and supporters of special classes."⁶² The statute required notice to each of the bulk seller's creditors, at least five days before sale, of "the stated cost price of merchandise to be sold and of the price proposed to be paid therefore by the purchaser."⁶³ Notice was to dispel the secrecy and thus the fraud.

In holding the Bulk Sales Act unconstitutional, the New York Court of Appeals evidenced concern for the property rights of honest merchants that equaled the legislature's concern for the property

The National Association of Credit Men and its local New York branches suspected that fraud went beyond "previously honest debtors tempted into such acts of dishonesty by their necessities and the hopelessness of their situation. . . ." Brief on Behalf of Intervenors, N.Y. Credit Men's Association at 3, *Klein v. Maravelas*, 219 N.Y. 383, 114 N.E. 809 (1916). Both creditors and neighborhood businesses were thought to suffer when schemers "set up a business in a community, establish a line of credit, suddenly increase the stock by large purchases, and then sell out to a confederate, who holds a sacrifice sale, the original debtor meanwhile having absconded." *Id.*

61. Act of Apr. 11, 1902, ch. 528, 1902 N.Y. Laws 1294, amended by Act of May 3, 1904, ch. 569, 1904 N.Y. Laws 1385. New York's statute was one of 20 passed in the states between 1900 and 1905—a piece of information supplied to Justice Werner by Justice Bartlett. Justice Werner was not persuaded by the argument of strength in numbers: "Statutes that are passed *pro bono publico* rarely sweep the country with such irresistible momentum, while much fantastic legislation has resulted from . . . the advocates and supporters of special classes." *Wright v. Hart*, 182 N.Y. 330, 343, 75 N.E. 404, 409 (1905).

62. *Wright v. Hart*, 182 N.Y. 330, 343, 75 N.E. 404, 409 (1905). See also NATIONAL CREDIT MEN'S ASS'N, LAWS REGULATING THE SALE OF STOCKS OF GOODS IN BULK 5 (1905). There were parallel campaigns in this period of frequent business failure. The merchants of New York City and of the state generally sought to make easier the prosecution of purchasers who used false statements of business condition to obtain goods on credit. Letter from William Travers Jerome, District Attorney of New York County to Cuthbert W. Pound, Counsel to the Governor (May 9, 1905) accompanying T. Jerome, *Brief on the Bill to Amend Section 544 of the Penal Code in Relation to Credit Statements*, Act of May 18, 1905, ch. 556, 1905 N.Y. Laws 1233 (bill jacket). Civil remedies were thought ineffective: "[T]he worst that can happen [with a civil remedy] is that [the purchaser on credit] fails to get away with all his plunder. The only effective remedy lies in provisions of the criminal law which make the risk of this sort of crime too great, and thus prevent its commission." *Id.* at 3. The usual lack of evidence of fraud, however, made criminal prosecution difficult. The bill provided that:

[W]hen property is purchased by aid of a written statement of the purchaser's means or ability to pay, and the statements shall show that the purchaser conducts a specified kind of business and keeps books of account, if at the expiration of the term of credit he fails to pay, he shall, during 90 days thereafter, submit his books to the examination of the persons of whom the credit was obtained. . . .

Memorandum by Cuthbert W. Pound, Counsel to the Governor, Act of May 18, 1905, ch. 556, 1905 N.Y. Laws 1233 (bill jacket) (May 18, 1905). Bill jackets and veto jackets, which contain an assortment of communications to the governor on bills that have passed the legislature, are available for 1905, and from 1926 to date.

63. Act of Apr. 11, 1902, ch. 528, § 1, 1902 N.Y. Laws 1249.

rights of creditors. Honest merchants, who had every right to sell their property in bulk, might be inhibited by the Act's procedural requirements.⁶⁴ "[T]he inventory may have to be duplicated by the hundreds or thousands and sent to creditors scattered over all portions of the globe;"⁶⁵ "[i]n case of creditors so far removed as to be beyond the reach of the registered mail, personal service only would answer the requirements of the statute."⁶⁶ The remedy was thought to be too drastic an imposition if the creditors' fears were no more than "the fitful prejudices of the hour."⁶⁷

The proponents of the Bulk Sales Act responded with alacrity. As one commentator observed, "[c]reditors are not only a very persistent class of our population but one also very ingenious in their methods of enforcing their rights."⁶⁸ There was no coherent group of regular or potential sellers or buyers of businesses in bulk to support the court's speculation about procedural horrors. The court's hypotheticals about injury to the property rights of sellers remained abstract, as opposed to the ongoing fraud documented by the creditmen. Nor was there a way, within the framing values of honesty and property, to give effect to the sympathy for the debtor that sometimes surfaced.⁶⁹ A bulk sales act "similar in essentials to the one condemned in 1905"⁷⁰ was passed within a year. "In details it may be distinguished from the earlier one, but the details are in real-

64. *Wright v. Hart*, 182 N.Y. 330, 75 N.E. 404 (1905). The close division of judges on the New York Court of Appeals regarding the constitutionality of the Bulk Sales Act reflected the division among courts across the country—"about an equal number of courts holding to each side." Note, *In How Far May Acts of the Legislature be Made Contingent Upon Being Accepted by Popular Vote Without Violating the Principle That Legislative Power Cannot be Delegated*, 61 CENT. L.J. 3, 9 (1906).

65. *Wright v. Hart*, 182 N.Y. 330, 340, 75 N.E. 404, 408 (1905).

66. *Id.* at 345, 75 N.E. at 409.

67. Justice Cardozo writing for the majority in *Klein v. Maravelas*, 219 N.Y. 383, 385, 114 N.E. 809, 810 (1916).

68. Note, *Constitutionality of Legislation Prohibiting the Sale of Merchandise in Bulk*, 59 CENT. L.J. 114 (1904). The Note examines the passage of the Bulk Sales Acts and includes an excerpt from "the report of the legislative committee at the recent convention in New York City of the National Association of Credit Men on July 15, 1905." *Id.* at 115.

69. "Whenever the poor debtor has discovered a byway by which to evade the pressing exactions and hot pursuit of his creditor, the latter immediately proceeds to obstruct the new byway by some statute contrived in some fertile legal brain and thus destroy its efficacy as a means of escape to the beleaguered debtor." *Id.* at 114.

70. The description is from the case holding the statute constitutional, *Klein v. Maravelas*, 219 N.Y. 383, 387, 114 N.E. 809, 810 (1916). The record includes a chart detailing the differences between the first statute and the second. The second statute can be found at Act of Apr. 23, 1914, ch. 507, 1914 N.Y. Laws 2017.

ity trifling."⁷¹ Governor Higgins agreed and vetoed the bill,⁷² but Governor Hughes signed the same bill when it was passed yet again in 1907.⁷³ The court said no more until it decided in 1916 that this virtually identical statute was constitutional.⁷⁴

The pattern holds. Like the credit men, the proponents of the regulation of dance academies gave substance to a threat to values that were largely undisputed in public discourse. This time the values at stake were sobriety and propriety. These values were imposed on the immigrants who used the dance academies as an entrance to an American social life and as a major form of entertainment.⁷⁵ The Women's City Club investigated the operation of these "unguarded entrances to the pitfalls of city life."⁷⁶ The Juvenile Protection Association considered them "our most popular recreation controlled by the liquor interests."⁷⁷ The legislature responded by requiring a license and prohibiting the sale or service of liquor "in any public dancing academy, or in any room connected therewith or on the same floor of the building."⁷⁸ Four months after the statute had

71. *Klein v. Maravelas*, 219 N.Y. at 385, 114 N.E. at 810.

72. PUBLIC PAPERS OF FRANK W. HIGGINS, GOVERNOR, 1906, at 99 (1907). "The changes in phraseology do not meet the main objection of the court that such enactments cannot be regarded as a valid exercise of the police power of the State." *Id.*

73. Act of July 24, 1907, ch. 722, 1907 N.Y. Laws 1683.

74. When challenged under the state constitution in 1916, the 1907 statute was upheld. *Klein v. Maravelas*, 219 N.Y. 383, 114 N.E. 809 (1916). By that point, experience had negated the hypotheticals: "At the time of our decision in *Wright v. Hart*, such laws were new and strange . . . the fact is that they have come to stay. . . . Back of this legislation . . . there must have been a real need. We can see this now even though it may have been obscure before." *Id.* at 385-86, 114 N.E. at 811. The United States Supreme Court had already upheld the Bulk Sales Act against federal constitutional challenge. *Kidd, Dater & Price Co. v. Musselman Grocery Co.*, 217 U.S. 461 (1910); *Lemieux v. Young*, 211 U.S. 489 (1908).

75. Direct evidence about the movement for dance hall regulation in New York in 1909 is scant. A pamphlet distributed by the Juvenile Protection Association—L. BOWDEN, OUR MOST POPULAR RECREATION CONTROLLED BY THE LIQUOR INTERESTS: A STUDY OF PUBLIC DANCE HALLS (1917)—describes Chicago 15 years later. However, Moskowitz, *Forward* to M. LAMBEN, REPORT OF THE ADVISORY DANCE HALL COMMITTEE OF THE WOMEN'S CITY CLUB AND THE CITY RECREATION COMMITTEE (1924) refers to a 1909 survey: "As a result of the investigation in 1909, the first law licensing and regulating dance halls was passed." *Id.* at vii. Turner, *The Daughters of the Poor*, 34 McCLOURE'S 45 (1909) describes the dancing academies as the chief recruiting ground for procuring girls for the white slave trade.

76. Moskowitz, *supra* note 75, at vii.

77. L. BOWDEN, *supra* note 75, at 1.

78. Act of May 19, 1909, ch. 400, 1909 N.Y. Laws 862, 864. The designation of "dance academy" is not contrary to this working class, largely immigrant, sketch. As Justice Vann observed in *People ex rel. Duryea v. Wilber*, 198 N.Y. 1, 11, 90 N.E. 1140, 1143 (1910) (Vann, J., dissenting): "The word 'academy,' as used in the statute, has greater dignity than its definition, for it may be simply one room, but it must be a place, and it may be a large place, where dancing is taught, after public advertisement, to all who are willing to pay for the privilege." Concern about prostitution in this setting, though the statutes did not directly address it,

been declared unconstitutional,⁷⁹ the legislature expanded it to include public dance halls as well as dance academies.⁸⁰

The uneven match of legislative detail and judicial hypothetical appears again in the controversy over cultivated oyster beds. The property interests of oyster farmers were set against the property interests of boat owners. The statute made boats subject to forfeiture if used to interfere with oyster beds, even if they were used without the owner's knowledge.⁸¹ The court's argument about property interests was abstract because "the question [of constitutionality] is to be determined not by what has been done under [the statute] in any particular instance, but by what may be done under and by virtue of its authority."⁸² The boat owner's argument about other possible legislative interferences with property was likewise hypothetical:

The legislature might as well have declared that any horse and wagon or other vessel used in carting or conveying oysters to market which have been stolen shall be forfeited or go still further and direct that any oyster or chop house selling oysters that may have been illegally removed from an oyster bed shall be forfeited.⁸³

Concern about theft of cultivated oysters, detailed by the oyster farmers who had supported the initial statute, prevailed over the

confirms the less than refined nature of some academies. Inspector No. I, in *M. LAMBEN, supra* note 75, at 25, relayed the report of the boy in charge of the checkroom—"[t]hat there is a small percentage of the girls, several of them hired instructors in the place, who are commercial prostitutes." *Id.*

79. *People ex rel. Duryea v. Wilber*, 198 N.Y. 1, 11, 90 N.E. 1140, 1143 (1910).

80. Act of June 20, 1910, ch. 547, 1910 N.Y. Laws 1243. The opinion in *People ex rel. Duryea v. Wilber*, 198 N.Y. 1, 90 N.E. 1140 (1910), is a thorough mix of due process and equal protection arguments. First Justice Chase made clear that, "a license is not required for the rooms or places in which dancing is taught in the City of New York to preserve public health and safety." *Id.* at 9, 90 N.E. at 1142. Justice Chase evaluated the next argument—that a license was needed because of the tendency to attract a crowd. He noted that the statute failed to require the same of dance halls where instruction is not given. In concluding that the license requirement was an unreasonable imposition, Justice Chase nonetheless suggested that the proponents would be in a better position to defend the statute if they could expand the licensing requirement. Because there is the possibility of correction by expansion, decisions that are essentially based on the finding of a denial of equal protection have been described as less destructive than those based on a denial of due process. *See Railway Express Agency v. New York*, 336 U.S. 106, 111 (1949) (Jackson, J., concurring).

81. Act of Apr. 23, 1896, ch. 383, 1896 N.Y. Laws 367 provided for the forfeiture of a boat used to "interfere with, take, disturb or carry away the oysters of another lawfully planted or cultivated in any of the waters of the state."

82. *Colon v. Lisk*, 153 N.Y. 188, 194, 47 N.E. 302, 303 (1897). There is no indication in the summaries of argument by counsel or in the opinion that this was a boat owner who claimed no knowledge of his boat's use.

83. Plaintiff's Brief in Support of Demurrer to Answer at 10, Record on Appeal, *Colon v. Lisk*, 153 N.Y. 188, 47 N.E. 302 (1897). Kranz recounts protracted struggles involving the

hypotheticals that the boat owners had offered. This statute also soon reappeared among the session laws.⁸⁴

The National Association of Credit Men, members of the Women's City Club and oyster farmers gave substance to threats to values of honesty, property and propriety that were not easily disputed. Their organized voice, their appeal to established values and their depiction of existing problems prevailed over the potential dangers to property argued by one seller of a business in bulk, one owner of a dance academy, one boat owner and several judges. The initial statutes were repeated.⁸⁵

2. CONFIRMATION OF LEGISLATIVE CHOICE

When the legislature made a choice between highly disputed values, with ardent and organized proponents on each side, the statute represented the resolution of sharp conflict, rather than a one-sided imposition. Choices about the relation of labor and capital produced these disputes, though the opposition was not always between employee and employer. In rejecting the results of pitched legislative battle, the courts effectively required confirmation by constitutional amendment of the strength and representativeness of the legislature's initial choice.⁸⁶ That confirmation came quickly for workers' compensation and for the eight-hour day on public works.

An understanding of the relation of labor unions and employers during this period is important in evaluating the initial battles and the rapid move to constitutional amendment. A shift in the fighting issues between labor and employers reflected the fact that labor had gained the power to dispute traditional employer assumptions. The fighting issue shifted over the years from yellow dog contract to open shop. Yellow dog or iron clad contracts between employer and

cultivated oyster in M. KRANZ, *PIONEERING IN CONSERVATION: A HISTORY OF THE CONSERVATION MOVEMENT IN NEW YORK STATE 1865-1903* (1961).

84. Act of Feb. 19, 1900, ch. 20, § 124, 1900 N.Y. Laws 22, 45-47. In *Colon v. Lisk*, 153 N.Y. 188, 47 N.E. 302 (1897), Justice Martin, speaking for the court, held Act of Apr. 23, 1896, ch. 383, 1896 N.Y. Laws 367 unconstitutional both because there was no provision for a jury in the forfeiture proceeding and because it constituted a denial of due process of law: "Its sole purpose was to regulate private interests and enforce public rights." *Id.* at 198, 47 N.E. at 305. The 1900 statute did provide for jury trial, but the regulation remained basically the same.

85. The treatment of women's night work followed this pattern once basic principles about labor had been settled by constitutional amendment. See *infra* notes 131-35 and accompanying text.

86. The belief that you cannot just re-pass a statute already held unconstitutional may have had enough currency with legislators that repassage only worked when no effective voice reminded them that they were doing just that.

employee forbid the employee to become a member of any labor organization.⁸⁷ An 1887 statute in New York forbade the yellow dog contract as a condition of employment.⁸⁸ The power of the Knights of Labor in that year may help explain the passage of the statute, but the brief period of the Knights' strength only emphasized the otherwise tenuous beginnings of the labor organization movement.⁸⁹ Twenty years later the statute was declared unconstitutional, because it interfered with "[t]he free and untrammelled right to contract. . . ."⁹⁰ That decision produced no immediate legislation reinstating the legislature's initial choice, for in the years between the passage of the statute and the decision about its constitutionality the struggle between labor and employers had shifted away from individual promises about union membership.⁹¹

Unions had grown rapidly in New York since 1887, especially in

87. Variations in the content of such contracts are described by Witte, "Yellow Dog" Contracts, 6 WIS. L. REV. 21 (1930) and H. MILLIS & R. MONTGOMERY, ORGANIZED LABOR 512-13 (1945). The 1904 contract between H. Marcus Skirt Co. and Hyman Scheinbaum, the basis for the prosecution in *People v. Marcus*, 185 N.Y. 257, 260, 77 N.E. 1073, 1073 (1906), illustrates the form and the sort of sanctions in yellow dog contracts:

"Party of the first part agrees to employ party of the second part as a piece worker, and party of the first part agrees to pay for all finished work only on each and every Tuesday. Party of the second part hereby agrees not to belong to any labor union or to take part in any strike against party of the first part, and to work as an individual in the open shop of party of the first part.

"Party of the second part further agrees that in the event of not complying with all the articles herein mentioned to forfeit to the party of the first part his money due for all work unpaid.

"Party of the second part also agrees to deposit \$1.00 each week, which will be deducted from his salary until the amount reaches ten dollars; same to be held as a forfeit in the event of his not complying with all the above stipulations.

"H. Marcus Skirt Company agrees to keep party of the second part employed so long as he proves satisfactory."

Id.

88. Act of June 24, 1887, ch. 688, 1887 N.Y. Laws 897.

89. See G. GROAT, TRADE UNIONS AND THE LAW IN NEW YORK, (Studies in History, Economics and Public Law No. 3, 1905); N. WARE, THE LABOR MOVEMENT IN THE UNITED STATES 1860-1895 (1919), especially as to the Knights of Labor.

90. *People v. Marcus*, 185 N.Y. 257, 259, 77 N.E. 1073, 1073 (1906).

91. Witte, *supra* note 87, at 28, describes labor's position:

A generation ago, labor interested itself in the enactment of laws prohibiting discrimination against workmen for union membership, but it has long since become reconciled to the decisions holding such laws to be unconstitutional. It concedes the employers' right to discriminate against union members, and even to exact promises from their employes not to join a union. While it is free to counter such anti-union policies by its own organizing campaigns, it does not complain, but it regards as unfair a court order which forbids its fighting back.

Pressure for a legislative response would have confronted additional obstacles. In *Adair v. United States*, 208 U.S. 161 (1908), the Supreme Court held unconstitutional the Erdman Act, which made it unlawful for an interstate carrier to discharge an employee because of membership in a labor union. In *Coppage v. Kansas*, 236 U.S. 1 (1915), the Court decided that

1899 through 1903.⁹² They were beginning to be incorporated into the legal structure by statutes that authorized them to organize as corporations,⁹³ that permitted them to acquire, construct and maintain buildings or halls for their use,⁹⁴ and that protected labor meetings from fraudulent representatives.⁹⁵ The existence of unions and some of their methods had been recognized by the courts.⁹⁶ The strength of employers had likewise increased: "[T]he trend of industrial development had increased the power of the employers to oppose the unions. In all industries business was conducted on a larger scale than heretofore; in many, trusts had been formed. . . . Furthermore, in many leading industries employers' associations had been formed, whose members could be relied upon to stand together in dealing with the labor problem."⁹⁷

Equivalent power of labor unions and employers is suggested by paired statutes from 1904 and 1905. The first penalized "[a] person who gives or offers to give any money or other things of value to any duly appointed representative of a labor organization with intent to influence him in respect to any of his acts, decisions, or other duties as such representative, or to induce him to prevent or cause a strike by the employees of any person or corporation. . . ."⁹⁸ The second penalized anyone who "gives, offers or promises to an agent, employee or servant, any gift or gratuity whatever, without the knowledge and consent of the principal, employer or master of such

an employer had a constitutional right to require that his employees sign an antiunion contract.

92. G. GROAT, *supra* note 89. NEW YORK STATE LABOR DEP'T; *Labor Organization in 1906*, SIXTH ANNUAL REPORT (1905-06), in BUREAU OF LABOR STATISTICS, TWENTY FOURTH ANNUAL REPORT 51 (1906).

93. Act of May 8, 1895, ch. 559, 1895 N.Y. Laws 329.

94. Act of May 23, 1895, ch. 713, 1895 N.Y. Laws 471.

95. Act of Apr. 30, 1898, ch. 671, 1898 N.Y. Laws 1547.

96. *Jacobs v. Cohen*, 183 N.Y. 207, 212, 76 N.E. 5, 7 (1905), within limits described in *Curran v. Galen*, 152 N.Y. 33, 46 N.E. 297 (1897); *National Protective Ass'n v. Cumming*, 170 N.Y. 315, 321, 63 N.E. 369, 369 (1902). Accompanying recognition of union power was some concern for the unions' irregular suspension of the rights of the individual members. *Corregan v. Hay*, 94 A.D. 71, 87 N.Y.S. 956 (N.Y. App. Div. 1904); BUREAU OF LABOR STATISTICS, 6 BULLETIN 292, 293 (1904); 1 NEW YORK STATE DEP'T OF LABOR, SECOND ANNUAL REPORT 31-32 (1901-02). That concern is also reflected in a law that sought to protect National Guardsmen from being expelled from their unions, described in Note, *The New York Statute to Protect Militiamen From Discrimination by Labor Unions or Employers*, 37 AM. L. REV. 427 (1903).

97. F. STOCKTON, *THE CLOSED SHOP IN AMERICAN TRADE UNIONS* 44 (Johns Hopkins University Studies in Historical and Political Science ser. 29, No. 3, 1911). The "Citizens' Alliances" organized to promote the open shop: "By 1906 practically every city of importance had its [Citizen's] Alliance. In many of the larger cities general employers' associations also were formed. . . ." *Id.* at 46.

98. Act of May 9, 1904, ch. 659, 1904 N.Y. Laws 1655.

agent, employee or servant, with intent to influence his action in relation to his principal's, employer's or master's business. . . ."⁹⁹ Beneath the even-handed legislative treatment of employer and employee evidenced by these statutes, labor still struggled to gain the strength that would make it fully equal in power.

By 1906, increased union strength meant that the employer's struggle was more often with unions for control of the workplace and less often with individual employees over their union connections.¹⁰⁰ The Declaration of Labor Principles adopted in 1904 by the National Association of Manufacturers assured that, "[t]he National Association of Manufacturers is not opposed to organization of labor as such. . . ."¹⁰¹ "[T]he most ardent unionist will likewise

99. Act of Apr. 5, 1905, ch. 136, 1905 N.Y. Laws 225. The bill jacket contains a letter from F.S. Allyn, a waiter in New York City, who had read that the bill would prohibit tipping. He describes employment as a waiter and the importance of tips and concludes:

I do not ask you to take my word for the facts which I have mentioned, but I do ask you to look them up for yourself, and I do ask that instead of making slaves of us, if you can not better our position don't do any thing [sic] which will make it worse. Above all be warned by one who is near the bottom of the stream, don't make to [sic] many socialists [sic]. Take my word for it the stream is strong and is steadily rising, and it will require good judgement, Equality and justice to stem it.

Letter from F.S. Allyn (Mar. 23, 1905), 1905 N.Y. Laws 225 (bill jacket).

100. Yellow dog contracts would still sometimes be used. M. DUBOFSKY, *WHEN WORKERS ORGANIZE* 138 (1968) reports that in 1916 when Amalgamated was organizing New York City subway workers, the IRT began circulating among its employees an individual labor contract that forbade the signer to join any labor organization not recognized by the employer. All workers who signed were promised immediate wage increases. Yellow dog contracts, however, were no longer a particularly useful tool. This was partly because they had come to be largely ignored and partly because the fight had changed:

During the last decade of the 19th century and the opening years of the twentieth, the individual, anti-union promise declined in importance as an instrument in labor warfare. Its novelty had worn off, workmen no longer felt themselves morally bound to live up to it, and union organizers, of course, wholly disregarded it.

J. SEIDMAN, *THE YELLOW DOG CONTRACT* 18 (Johns Hopkins University Studies in Historical and Political Science, ser. 50, No. 4, 1932). Yellow dog contracts did come to be widely used "at the growing points of union organization and where attempts were made to initiate collective bargaining" after the United States Supreme Court decided in *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917) that they were an adequate basis for an injunction against union organizing. H. MILLIS & R. MONTGOMERY, *supra* note 87, at 512.

At that point, however, the New York courts completely destroyed the value of yellow dog contracts to nonunion employers by holding that such contracts were "a mere understanding, lacking the essential elements of contracts, consideration." Witte, *supra* note 87, at 26, describes this in detail. This approach did not require repudiation of any of the cases holding anti-yellow dog statutes to be unconstitutional. This approach also left undisturbed the Supreme Court's conclusion in *Hitchman Coal* that an injunction was available against a third party who induced the breach of a contract. Act of Jan. 25, 1935, ch. 11, 1935 N.Y. Laws 19, again declared yellow dog contracts void.

101. Declaration of Labor Principles, adopted at Pittsburgh, Pennsylvania (May 17, 1904), reprinted in National Ass'n of Manufacturers, *Where do You Stand?* (Nov. 1, 1907). See also Note, *Contracts of Labor Unions in New York*, 5 COLUM. L. REV. 239 (1905).

concede the *right* of the employer to engage non-union workmen if he chooses. . . ."¹⁰² The larger issue, control of the workplace, eclipsed the included question of the individual's freedom to join a union: "So far has the organization of the wage-workers proceeded, and likewise the counter combination of the employers, that the gravest of social problems has been narrowed down to . . . the problem of the 'open' and 'closed' shop."¹⁰³ Employers, who disclaimed any intention of fighting unions as such, met demands for the closed shop with counterresistance: "Proprietors are organizing unions to resist it, and non-union laborers are beginning to organize such unions. . . . It is the case of strike meeting strike, lockout against strike, boycott against boycott, fighting the devil with fire."¹⁰⁴ It was in this context, with effective organization on all sides, that constitutional amendment served to resolve other issues between labor and employers.

Limitation of hours of labor was one of these issues, between forces that had come to take each other's power seriously. Labor unions were agreed on the goal, if not always on how it should be achieved.¹⁰⁵ "The eight-hour day is one of the most important articles in the creed of organized labor. . . . [T]he policy will be pushed to the end, by trade agreements when possible, by legislation when practicable and by strikes when necessary."¹⁰⁶ Employers did not respond to the eight-hour issue with the passion they had exhibited for the open shop, but many did continue to insist that hours should be determined by business convenience and by competition for the

102. White, *The Issue of the Open and Closed Shop*, 180 N. AM. REV. 28, 32 (1905) (emphasis added).

103. *Id.* at 28. White attempts at length to resolve this problem, concluding that, "[t]he task of each side is to prevent the other from making unfair use of its power, not to seek to protect itself from oppression by curtailing the liberty of the other." *Id.* at 35.

104. Note, *Points Relating to Union Labor, Strikes, Etc.*, 37 AM. L. REV. 422, 423-24 (1903).

105. Some of the businesses that voluntarily worked an eight-hour day also would have favored legislation to force their competitors to follow the same practice.

106. Groat, *The Eight Hour and Prevailing Rate Movement in New York*, 21 POL. SCI. Q. 414, 428 (1906). The first legislative program of the Workingmen's Assembly in 1867 included this demand, and, with the subsequently added demand for wages at the "prevailing rate," it has "been repeated in every program since." *Id.* at 415. It was necessary that a prevailing rate law be combined with the limitation to eight-hour workdays to maintain the daily wage "in the face of attempts by contractors to cut it down one-fifth whenever forced to reduce the hours of labor from ten to eight a day." BUREAU OF LABOR STATISTICS, TWENTY THIRD ANNUAL REPORT FOR 1905, at xv, in NEW YORK STATE LABOR DEP'T, ANNUAL REPORT (1905-06) I. YELLOWITZ, LABOR AND THE PROGRESSIVE MOVEMENT IN NEW YORK STATE 1897-1916, at 22-39 (1965) describes labor's lobbying groups and their work for the eight-hour day.

supply of labor.¹⁰⁷

Some union members opposed governmental regulation of working conditions through statute. They wanted labor to advance its interests independently by organizing.¹⁰⁸ Those within the unions who were willing to resort to legislation prevailed,¹⁰⁹ but relatively little could be accomplished by legislation until the principle was established that the hours of labor for a healthy, competent male of age could be limited by law.¹¹⁰ That principle had not yet been established; statutory limitations on hours had only been granted, grudgingly, on the basis of "disabilities," such as sex or age.¹¹¹ Passage of a statute limiting employment on public works to eight hours at prevailing rates was intended by labor to establish that principle.¹¹² It was to provide a basis for "the movement for a shorter work-day among workmen not employed on public

107. M. GREEN, *THE NATIONAL CIVIC FEDERATION AND THE AMERICAN LABOR MOVEMENT 1900-1925*, at 93 (1956); and A. STEIGERWALT, *THE NATIONAL ASSOCIATION OF MANUFACTURERS: ORGANIZATION AND POLICIES, 1895-1914*, at 207 (1952) report the opposition of the National Association of Manufacturers. The National Civic Federation apparently did not actively oppose the eight-hour day, but it was not an issue on which they were able to obtain agreement from their labor and business members. See G. JENSEN, *THE NATIONAL CIVIC FEDERATION: AMERICAN BUSINESS IN AN AGE OF SOCIAL CHANGE AND SOCIAL REFORM, 1900-1910*, at 130 (1956).

108. J. WEINSTEIN, *THE CORPORATE IDEAL IN THE LIBERAL STATE 1900-1918*, at 44 (1968). M. GREEN, *supra* note 107, at 192-94 describes this position and Gompers' move away from it. *Id.* at 194. 2 Y. KAPP, ELEANOR MARX 390 (1976) describes the work in England of The Legal Eight Hours and International Labor League and the opposition to them from the antiparlamentarians who opposed resorting to legislation.

109. The primary alternative was to accomplish more limited hours by direct labor pressure. That had proved successful for cigarmakers, carpenters, masons, and others, but "the trades sufficiently skilled to build up strong organizations include only a minority of the working people. In many cases, therefore, it will be necessary to invoke the power of the community, vested in the government, to complete the work of the labor organization." New York State Bureau of Labor Statistics, *Methods of Obtaining the Eight Hour Day*, EIGHTEENTH ANNUAL REPORT 83, 83 (1900).

110. The eight-hour day was first embodied in a statute in 1867 with the provision that, "[e]ight hours of labor, between the rising and setting of the sun, shall be deemed and held to be a legal day's work, in all cases of labor and service by the day. . . ." Act of May 9, 1867, ch. 856, 1867 N.Y. Laws 2138. The statute, however, allowed for "contract or agreement to the contrary." *Id.* Thereafter labor sought to implement the eight-hour standard. Success was limited: special statutes for well-organized trades were necessarily partial and efforts to induce all laborers to refuse to work longer than eight hours would have required organization beyond the capacity of the organized labor movement. Groat, *supra* note 106, at 427.

111. For a history of the regulation of hours generally, see Brandeis, *Labor Legislation*, in 3 J. COMMONS, *HISTORY OF LABOR IN THE UNITED STATES, 1896-1932* (1935).

112. Act of May 13, 1897, ch. 415, § 3, 1897 N.Y. Laws 461, 462 (as amended by Act of Apr. 1, 1899, ch. 192, 1899 N.Y. Laws 350 and Act of May 12, 1899, ch. 567, 1899 N.Y. Laws 1172).

works,"¹¹³ at the same time that it protected public workers.¹¹⁴

Contractors tended to ignore the statute,¹¹⁵ and, piecemeal, it was declared unconstitutional.¹¹⁶ By 1904, it was a nullity.¹¹⁷ The principle, however, remained crucial to labor unions, and by the time the statute had failed, they were in a position to press for a constitutional amendment to confirm the legislature's initial choice regarding hours on public works: "Other important measures were for the time laid aside. All [labor] organizations were interested."¹¹⁸ The necessary legislation for amendment was twice passed and ratified.¹¹⁹ A statute limiting hours on public works was again passed

113. 1 BUREAU OF LABOR STATISTICS, BULLETIN 83 (June 1899). It was for that very reason that the National Association of Manufacturers so bitterly fought a similar federal bill, NATIONAL ASS'N OF MFRS., EIGHT HOURS BY ACT OF CONGRESS: ARBITRARY, NEEDLESS, DESTRUCTIVE, DANGEROUS (1904).

114. The number of laborers in the direct employ of the state was relatively small, so the struggle for eight-hour workdays on public works centered largely on contract work. In 1900, the Attorney General held that the Albany Municipal Gas Company, which had the contract for lighting the capitol, violated the statute by requiring its employees to work a twelve-hour day. The courts disagreed: "The law, as interpreted by the courts, must therefore be taken to apply not to the commodities supplied to the State but to work done for the State by contract, and the definition of the term 'work' would seem to embrace little beyond construction work." New York State Bureau of Labor Statistics, *supra* note 109, at 92 (emphasis supplied).

115. Groat, *supra* note 106, at 419.

116. The prevailing rate provision was declared unconstitutional in *People ex rel. Rodgers v. Coler*, 166 N.Y. 1, 59 N.E. 716 (1901). This decision raised questions about the constitutionality of the eight-hour clause:

The reason for failure in bringing many contractors to trial was the difficulty in securing a true bill from a grand jury. The theory underlying the two clauses was the same, they insisted, and if one clause was unconstitutional the other must be. Upon request from the grand jury for instructions upon the point the court replied: "That law, I think, when the test comes, will be declared unconstitutional . . . and if such a case comes before you I would advise you to refuse to indict because any indictment here brought would be set aside by this court." Such was the feeling before the matter was brought to final issue, and because of it several indictments were dismissed.

Groat, *supra* note 106, at 421.

117. *People ex rel. Cossey v. Grout*, 179 N.Y. 417, 72 N.E. 464 (1904); *People v. Orange County Rd. Constr. Co.*, 175 N.Y. 84, 67 N.E. 129 (1903). The Labor Department pointed out that "[o]ne of the grounds—perhaps the chief ultimate reason—on which the prevailing rate of wages law is declared unconstitutional is that in prescribing a minimum compensation for its employees the State may increase the cost of its work, and hence also the burdens of taxation upon its citizens." 3 BUREAU OF LABOR STATISTICS, BULLETIN 5 (Mar. 1901). It provided the information to show that ultimately the measure did not cost the taxpayers. *Id.*

118. Groat, *supra* note 106, at 428. See also S. SEABURY, A REVIEW OF THE LABOR LAWS RELATIVE TO THE RATE OF WAGES AND THE HOURS OF LABOR IN THE STATE OF NEW YORK (1901).

119. N.Y. CONST. art. XII, § 1 (current version at N.Y. CONST. art. XIII, § 14).

and was promptly held constitutional.¹²⁰

The principle involved in the fight for compulsory workers' compensation¹²¹ was likewise fundamental and highly disputed: "The [workers' compensation] statute, judged by our common law standards, is plainly revolutionary."¹²² The 1910 scheme was held unconstitutional in 1911.¹²³ In 1913, a constitutional amendment was ratified, an extraordinary session of the legislature was called,

120. Act of May 19, 1906, ch. 506, 1906 N.Y. Laws 1394, limited labor on public works to eight hours except in emergencies and was affirmed in *People ex rel. Williams Eng'g & Contracting Co. v. Metz*, 193 N.Y. 148, 85 N.E. 1070 (1908).

121. Business members of the National Civic Federation, a tripartite organization of business, labor and the public, were active in obtaining workers' compensation schemes in New York and across the country—initially against labor opposition. Their reasoning was that a compensation plan was efficient. It would "reduce the need for independent political action by labor, as well as the appeal of unionism. . . ." J. WEINSTEIN, *supra* note 108, at 47. P. Tecumseh Sherman, former Commissioner of Labor in New York State, made the efficiency arguments in Sherman, *The Efficient Enforcement of Labor Legislation*, 2 PROCEEDINGS OF THE ACADEMY OF POLITICAL SCIENCE IN THE CITY OF NEW YORK 101, 104 (1911). Bauer, *New York Workmen's Compensation Act Unconstitutional*, 1 AM. ECON. REV. 634, 635-36 (1911), explained the ways in which the statute had been designed not to impose on businesses in competition with businesses in other states that might not have workers' compensation and how costs to employers could easily have been shifted to the public in general: "No hardships were aimed at employers, and probably no serious ones would have been sustained." *Id.* at 636.

After thorough study in 1910, the National Association of Manufacturers supported workers' compensation because "it would be useless 'to oppose it' and . . . it would not be enough to be 'neutral.'" J. WEINSTEIN, *supra* note 108, at 256. See also M. GREEN, *supra* note 107, at 248.

Employers thought that the statute avoided a particular inefficiency—the passage of broader employer liability statutes. William J. Moran expressed the fear of "wide open" common law liability in Views of Legal Committee on Compensation for Industrial Accidents and Their Prevention, of the National Civil Federation, Concerning Effect of Decision of the Court of Appeals of the State of New York upon the Compulsory Compensation Principle in its Relation to Uniform State Legislation, Executive Committee Meeting, in New York City (Mar. 28, 1911) [hereinafter cited as Views of Legal Committee]: "Progressively burdensome Employers' Liability laws are infinitely more unjust, alike to employe and employer, than a reasonable compulsory compensation law." *Id.* at 8. Address by W. Emmet, The Workmen's Compensation Situation in New York State, Meeting of the National Convention of Insurance Commissioners, Burlington, Vt. 4 (Aug. 1, 1913), confirmed this fear: "Some of the advocates of the Bayne-Sullivan bill stated very frankly that they were not so much interested in establishing the principle of compensation in New York as in enlarging the common law liability of non-assenting employers." See also A. STEIGERWALT, *supra* note 107, at 257.

Labor's early opposition to compensation legislation was based on the realization that compensation laws "would pension off the worker during his period of disability at something less than his regular wages," while eliminating the increasingly available possibility of high awards from sympathetic jurors. J. WEINSTEIN, *supra* note 108, at 43. Moreover, "state provision of guildlike pensions and other welfare benefits would reduce the craftsman's loyalty to the union." *Id.* at 44. Nonetheless, labor eventually joined in the debate about the proper form and financing of workmen's compensation.

122. Justice Werner in *Ives v. South Buffalo Ry.*, 201 N.Y. 271, 285, 94 N.E. 431, 436 (1911), regarding Act of June 25, 1910, ch. 674, 1910 N.Y. Laws 1945.

123. *Ives v. South Buffalo Ry.*, 201 N.Y. 271, 94 N.E. 431 (1911).

and a compulsory compensation plan was in place in six days.¹²⁴ The story is fully told elsewhere.¹²⁵

Constitutional amendment helped settle more than the specific choice involved and thereby provided a basis for resolving other labor issues without resort to amendment. In 1895, a statute that limited employment on public works to United States citizens and gave a preference to citizens of New York was held unconstitutional.¹²⁶ The limitation reappeared in 1902.¹²⁷ Its constitutionality was affirmed in 1915 on the basis, among others, of the constitutional provision that supported the limitation to eight hours on public works.¹²⁸

As some principles of the relationship between capital and labor began to be settled by constitutional amendment, arguments for and against labor legislation increasingly could be factual. Due process doctrine began to shift toward judicial evaluation of the factual basis for legislative choice.¹²⁹ Labor legislation that had been declared unconstitutional could be reinforced and repassed after additional factual inquiry.¹³⁰ This shift from extensive argument about

124. Acts of Dec. 16, 1913 and Jan. 8, 1914, ch. 816, 1913 N.Y. Laws 2977, repassed as Act of Mar. 16, 1914, ch. 41, 1914 N.Y. Laws 216, and held constitutional in *Jensen v. Southern Pac. Co.*, 215 N.Y. 514, 109 N.E. 600 (1915). Speech by Frank Hasbrouck, Superintendent of Insurance of New York State, *The Workman's Compensation Situation in New York State*, National Convention of Insurance Commissioners, Asheville, N.C. (Sept. 17, 1914) describes the process in detail.

125. J. WEINSTEIN, *supra* note 108; Devine, *Compensation Bills at Albany*, 29 SURV. 722, 722-24 (1913); Seager, *The Compensation Amendment to the New York Constitution*, 2 PROCEEDINGS OF THE ACADEMY OF POLITICAL SCIENCE IN THE CITY OF NEW YORK 75-79 (1911); Views of Legal Committee, *supra* note 121; Wesser, *Conflict and Compromise: the Workmen's Compensation Movement in New York 1890's-1913*, 12 LAB. HIST. 345 (1971).

126. Act of May 10, 1894, ch. 622, 1894 N.Y. Laws 1569 (amending ch. 385, 1870 N.Y. Laws 919). *People v. Warren*, 13 Misc. 615, 34 N.Y.S. 942 (N.Y. Sup. Ct. 1895).

127. Act of Apr. 10, 1902, ch. 454, 1902 N.Y. Laws 1098.

128. *People v. Crane*, 214 N.Y. 154, 171, 108 N.E. 427, 433 (1915).

The legislature is now empowered by the constitution to fix the wages and salaries of all employees upon the public works. This authority embraces the direct increase of expense by increasing salaries beyond the minimum fixed by competition. It must also embrace the indirect increase of expense by regulations of employment tending to diminish competition.

The constitutionality of this statute was likewise affirmed in *Heim v. McCall*, 214 N.Y. 629, 108 N.E. 1095 (1915) (mem. op.), *aff'd*, 239 U.S. 175 (1915).

129. *Muller v. Oregon*, 208 U.S. 412 (1908).

130. In New York, such factual arguments on labor questions would have been facilitated by the abundant supply of readily accessible data. The Factory Investigating Commission was created by the legislature in Act of June 30, 1911, ch. 561, 1911 N.Y. Laws 1269 after the Triangle Waist Company fire. It was assigned to investigate "the existing conditions under which manufacture is carried on. . . ." *Id.* § 1. "In the first two years alone the commission held more than 50 public hearings, examined approximately 500 witnesses, and took over 7,000 pages of testimony." C. BEYER, *HISTORY OF LABOR LEGISLATION FOR WOMEN IN THREE STATES* 79 (U.S. Dep't of Labor Women's Bureau Bulletin No. 66, 1929). The commis-

principles to extensive argument about facts was apparent in the treatment of the two New York statutes prohibiting women's night work.¹³¹ The first was declared unconstitutional in 1907¹³² on the basis of largely abstract arguments about denials of privileges and freedom of contract.¹³³ The second was passed in 1913 at the behest

sion continued its work for four years and produced a final report to the legislature in 11 volumes. The report of the commission supported 36 new labor statutes in three years. The legislation passed is partly described in Brandeis, *supra* note 111, at 478. Beyer characterized this as "the golden era in remedial factory legislation' in the State of New York." C. BEYER, *supra* this note, at 79.

131. The first provision regarding night work was in 1889 and applied to men under 18 and women under 21 who worked in factories. Act of June 15, 1889, ch. 560, 1889 N.Y. Laws 752. Women under 21 constituted 70% of that work force. Brandeis, *supra* note 111, at 469. Act of Apr. 1, 1899, ch. 192, 1899 N.Y. Laws 350, 352-53, extended the limitation on night work in factories to all women, irrespective of age. C. BEYER, *supra* note 130, at 104, states that:

At the time there was little discussion of the merits or demerits of the prohibition of night work as such for adult women. This prohibition was part and parcel of the hours legislation for younger women and minors and was applied to adult women, first, to aid enforcement and, second, to give these women the same legal protection afforded to women under 21.

It appears that the statute was largely ignored and not enforced because of a fear that it might be tested and found unconstitutional. 1 NEW YORK STATE FACTORY INVESTIGATING COMM'N, SECOND REPORT 211 (1913) [hereinafter cited as FACTORY INVESTIGATING COMM'N]. "The enforcement of the night work law remained more or less of a dead-letter for the following seven years." C. BEYER, *supra* note 130, at 104. "The constitutionality of the factory night-work law was always a question in the minds of the enforcing officials. They allowed violations to go unnoticed rather than run the risk of having a test case." *Id.* When a test case seemed inevitable, it was suggested the statute be revised so that the protection of younger women could be preserved. This was done in 1907 when the Court of Special Sessions declared the statute unconstitutional. The bill passed before the Court of Appeals declared the original law limiting night work to all women unconstitutional in *People v. Williams*, 189 N.Y. 131, 81 N.E. 778 (1907). The governor signed the bill after that decision.

132. *People v. Williams*, 189 N.Y. 131, 81 N.E. 778 (1907) (Act of Apr. 15, 1903, ch. 184, § 2, 1903 N.Y. Laws 437, 439 was declared unconstitutional. This statute was virtually identical to Act of Apr. 1, 1899, ch. 192, 1899 N.Y. Laws 350, 352-53, regarding night work by women. Both statutes amended the New York labor law, Act of May 13, 1897, ch. 415, § 77, 1897 N.Y. Laws 461, 478-79.). The judge found "nothing in the language of that section which suggests the purpose of promoting health except as it might be inferred that for a woman to work during the forbidden hours of night would be unhealthful." *Id.* at 134, 81 N.E. at 779. The consequences of the decision were apparently great, though short lived:

The public press misconstrued [the] decision and announced that the short hours law for women was wiped out by the courts. The Department of Labor tried to make it clear that this was not the case, but in spite of all its efforts the law limiting daily and weekly hours was utterly disregarded. There was no use in taking violations to the Courts, for the decision in the *Williams* case made the constitutionality of all labor legislation for women doubtful—judges were loathe to convict even in clear cases.

Demoralization of the laws continued until 1908.

C. BEYER, *supra* note 130, at 76.

133. The attorney general, defending the statute, did claim that, "[t]he universal experience of laborers is that night labor is detrimental to health. Night is the natural time for rest and rest procured during the day is usually broken and unsatisfactory in its character." However, he offered no support for that assertion. Appellant's Brief at 4, Record on Appeal, *People*

of the Factory Investigating Commission, following its study of women working the night shift in a cordage factory.¹³⁴ Subsequent arguments about the statute were intensely factual and the court explicitly relied on the second statute's factual basis in declaring it constitutional.¹³⁵ As factual basis became more central to judicial evaluation, interaction between court and legislature became simpler and more like the routine of invalidation and repassage that characterized the first group.

Pitched battles in the legislature regarding the relation of labor and capital were replayed as issues of constitutional amendment. Because the initial battles over workers' compensation and the eight-hour day were fought with powerful and organized proponents on each side, the campaign for the passage of legislation was much like the campaign for a constitutional amendment. The amendment

v. Williams, 189 N.Y. 131, 81 N.E. 778 (1907). The defendant's attorney assumed the facts he needed for his argument: "Would not ten hours of labor by women during the day, standing for long periods on their feet, have the same general result as the same conditions at night? . . . The Attorney-General's argument, if logically pursued, would justify a statute forbidding all female labor in factories day or night." Respondent's Brief at 9, Record on Appeal, *People v. Williams*, 189 N.Y. 131, 81 N.E. 778 (1907).

134. Act of Mar. 15, 1913, ch. 83, 1913 N.Y. Laws 150. The commission thought the new statute could be constitutional given "the existence of many facts of common knowledge regarding the necessity for the prohibition of night work on physical, moral and administrative grounds. . . ." 1 FACTORY INVESTIGATING COMM'N, *supra* note 131, at 204. The "facts of common knowledge" included the commission's own cordage factory study, which established that of 100 women working the night shift, 75 were mothers whose chief reason for working from 7:00 p.m. to 5:30 a.m. was to be able to care for their children during the day. 2 FACTORY INVESTIGATION COMM'N, *supra* note 131, at 439-58. "The women with families averaged about 4 1/2 hours sleep a day." *Id.* at 453. In addition to the danger to these particular women, the commission found that, "the provision of legal closing and opening hours is the only effective method of enforcing the [more general] limitation of hours [for women]." 1 FACTORY INVESTIGATING COMM'N, *supra* note 131, at 212.

135. When the second night-work statute was challenged, Goldmark and Brandeis submitted a 529 page "Summary of Facts of Knowledge." Record on Appeal, *People v. Charles Schweinler Press*, 214 N.Y. 395, 108 N.E. 639 (1915). Abram Elkus, Robert Wagner and Bernard Shientag, in the Brief Submitted on Behalf of the New York State Factory Investigating Commission as *Amicus Curiae*, summarized the findings of the New York State Factory Investigating Commission, which had proposed the statute. *Id.* The district attorney joined by summarizing the facts from the Factory Investigating Commission's Report and the "Summary of Facts of Knowledge" and by using these facts in his argument. *Id.* So did the opponents of the statute who pointed out factual weaknesses in the labor argument. J. BAER, *THE CHAINS OF PROTECTION: THE JUDICIAL RESPONSE TO WOMEN'S LABOR LEGISLATION 80-81* (1978). In deciding that the statute was now acceptable, the court gave "serious consideration and great weight to the fact that the present legislation is based upon and sustained by an investigation by the legislature deliberately and carefully made through an agency of its own creation." *People v. Charles Schweinler Press*, 214 N.Y. 395, 412, 108 N.E. 639, 644 (1915). The court also suggested that the lawyers who defended the first statute had failed "adequately to fortify and press upon our attention the constitutionality of the former law as a health and police measure and to sustain its constitutionality by reference to proper facts and circumstances." *Id.* at 411, 108 N.E. at 644.

fight may even have been easier for, though the requirements for amendment were more demanding, the compromises that had produced the initial legislation had already diminished opposition. Once the courts rejected the legislature's result, proponents did not seem to have difficulty getting the legislature's initial choice confirmed by constitutional amendment. The understandings thereby built into the constitution made it easier for the legislature to reinforce and repeat other labor legislation.

3. APPROXIMATION OF LEGISLATIVE CHOICE

New York's legislature attempted to structure the market to preserve effective competition. Certain market practices were required; others were prohibited. Competitors were remarkably adaptable;¹³⁶ in the time between passage and invalidation, legislative solutions became real factors in their calculations. Required marketing techniques, like railroad mileage books, came to be expected by the public. Prohibitions, like those on trading stamps and premiums, warned that there were costs to the trade as practiced that could not be counted on to disappear with the statute. After each statute was held unconstitutional, competitors approximated the legislature's initial choice.

Approximation of the legislature's choice was easiest and quickest when legislation imposed a market practice—that practice promptly became part of the structure of competition. Once implemented, a legislatively mandated practice would survive judicial invalidation if no competitor was prepared to take the risk of being the first to move back to business as it had been conducted before the statute. The New York requirement that railroads issue twenty-dollar mileage books for one thousand miles of travel¹³⁷ was declared

136. Business methods, especially in the retail trade, were markedly in flux at the turn of the century. A. CHANDLER, *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* (1977); S. HABER, *EFFICIENCY AND UPLIFT: SCIENTIFIC MANAGEMENT IN THE PROGRESSIVE ERA 1890-1920* (1964); Rubinow, *Premiums in Retail Trade*, 13 J. POL. ECON. 574 (1905). Studies of retailing and "how to do it" books on retailing were plentiful around 1900. E. CALKINS & R. HOLDEN, *MODERN ADVERTISING* (1905); G. MCLEAN, *HOW TO DO BUSINESS* (1890).

137. Act of June 15, 1895, ch. 1027, 1895 N.Y. Laws 961. The legislative history was stipulated in *Return on Appeal from Judgment and Order of Affirmance at 22, Beardsley v. New York, L. E. & W. R.R.*, 162 N.Y. 230, 56 N.E. 488 (1900):

It is further stipulated to be a fact that the Commercial Travelers' Association, the members of which had been, prior to March 15th, 1895, in the habit of using one thousand mile inileage books for transportation over all the lines of railroad of the defendant from New York to Chicago, caused to be introduced in the Legislature of the State of New York the act now known as Chapter 1027 of the Laws of 1895,

unconstitutional in 1900. The court saw the statute as "an arbitrary enactment in favor of the persons . . . [who were able or willing to purchase one-thousand-mile tickets] who, in the legislative judgment, should be carried at less expense than the other members of the community."¹³⁸ The New York requirement, however, lived on, given life after unconstitutionality by railroad competition. So the Public Services Commission concluded from its hearings on passenger rates in 1907: "First, the representatives of the railroads were unanimous that the mileage book was to them a very unsatisfactory form in which to sell transportation; second, no railroad was willing to abandon it or had under consideration the subject of abandoning it."¹³⁹ The use of mileage books was "practically universal."¹⁴⁰ The

and declared upon the hearing before the committees of the legislature, through their representative, Mr. H.M. Glenn, who was a member of the said Commercial Travelers' Association and also a member of the Assembly, that said act was suggested and asked to be passed for the purpose of restoring the practice which the defendants and other similar corporations had voluntarily instituted and subsequently terminated, of using thousand-mile books, good over their entire lines, and that their purpose was to compel the defendant, and also similar companies, to issue such mileage books, entitling the holders thereof to travel one thousand miles over such lines of railroad, whether in the State of New York or elsewhere.

138. *Beardsley v. New York, L. E. & W. R.R.*, 162 N.Y. 230, 233, 56 N.E. 488, 489 (1900) (quoting Justice Peckham in *Lake Shore & M. S. Ry. v. Smith*, 173 U.S. 684 (1899)). The New York court felt that a recent decision of the United States Supreme Court on a similar Michigan statute controlled: "It is not necessary nor would it be profitable for us to review the discussion or argument by which the result was reached." *Id.* Among the lower courts, the statute had been found unconstitutional in *Watson v. Delaware, L. & W. R.R.*, 32 Misc. 311, 66 N.Y.S. 798 (1900) and constitutional in *Dillon v. Erie R.R.*, 19 Misc. 116, 43 N.Y.S. 320 (1897).

139. 1 NEW YORK PUBLIC SERVICES COMM'N, SECOND DISTRICT, FIRST ANNUAL REPORT FOR THE SIX MONTHS ENDING DEC. 31, 1907, N.Y. SEN. DOC. NO. 585, at 40 (1908) [hereinafter cited as FIRST ANNUAL REPORT]. See generally *id.* at 36-50. The proposal to require mileage books was part of a public demand, or at least an expectation, of a fare of two cents a mile. The legislature passed such an act, A. B. No. 2269, in 1907 but Governor Hughes returned it without approval because "[t]he passage of the bill was not preceded by legislative investigation or suitable inquiry under the authority of the State [and] [s]uch a body [which can investigate and make appropriate orders] has been created in this State through the Public Service Commissions Law recently enacted." PUBLIC PAPERS OF CHARLES E. HUGHES, GOVERNOR, 1907, at 88 (1908).

The Public Services Commission, in its subsequent investigation, found the extensive use of mileage books at two cents a mile relevant to what the railroads could afford generally: "[T]here is no such distinction between transportation by means of a mileage book and that by means of an ordinary ticket as to justify the conclusion that transportation by ticket cannot be afforded at the same price as by mileage book." 1 FIRST ANNUAL REPORT, *supra* this note, at 50. The two cent fare had occasionally been imposed on a particular road or portion of a road. See H. APHORP, THE TWO CENT RAILROAD FARE (1892-97).

The commission's report implies that the books had been in use continually since the time they were unwillingly introduced by the railroad. Obtaining real compliance from the railroads in the first few years was difficult, and the Board of Railroad Commissioners received numerous complaints. See 1 NEW YORK PUBLIC SERVICES COMM'N, THIRTEENTH ANNUAL REPORT FOR 1895, 2 N.Y. SEN. DOC. NO. 10, PT. 1, at xxxi (1896); 1 NEW YORK PUBLIC

railroads “encouraged and propose[d] to perpetuate it.”¹⁴¹ Competition maintained the legislature’s choice of market structure.

When the legislature initially prohibited marketing practices, the statute carried the worrisome message that these practices were bad for competition. Judicial invalidation of these prohibitions stayed the urgency of the message but not its import. The message from the statutes contributed to the subsequent choices of participants to restructure these practices. Restructuring helped produce the competition the legislature wanted. When the legislature acted again, it was to reinforce these changes or to regulate portions of the problem that competitors could not reach. This was a more complicated process than when competition maintained the legislatively required practice of issuing mileage books. Approximations of the legislature’s prohibitions took some time.

New York’s legislature persistently sent the message that the trade in trading stamps hindered competition.¹⁴² Sperry and Hutchinson (S & H) led in responding to that message. It was Sperry and Hutchinson who, in 1896, had first made a business of trading stamps, separating the production and redemption of trading stamps from the manufacture and selling of goods.¹⁴³ From the first, S & H billed its product, “the little green stamp,” as a means of competition. The chicanery of the numerous imitators who quickly materialized endangered the claim that trading stamps furthered competition. Stamp companies would sell supplies of stamps in an area until the books began to come in, and then they would move to new territory;¹⁴⁴ independent stamp salesmen would promise a merchant exclusive rights in his neighborhood without having the capacity to bind the stamp company.¹⁴⁵ These would later be described as the “wildcat days.”¹⁴⁶ In addition, the newness and complexity of the scheme made it hard for merchants and customers

SERVICES COMM’N, FOURTEENTH ANNUAL REPORT FOR 1896, 2 N.Y. SEN. DOC. NO. 10, PT. 1, at xvii (1897); and 1 NEW YORK PUBLIC SERVICES COMM’N, SIXTEENTH ANNUAL REPORT FOR 1898, 2 N.Y. SEN. DOC. NO. 1, at 227 (1898).

140. 1 FIRST ANNUAL REPORT, *supra* note 139, at 39.

141. *Id.* at 41.

142. Act of May 5, 1900, ch. 768, 1900 N.Y. LAWS 1633; Act of May 9, 1904, ch. 657, 1904 N.Y. LAWS 1651.

143. Vrendenburg, *From Stamp to Major Industry*, in *TRADING STAMP PRACTICE AND POLICY* 4 (A. Haring & W. Yoder eds. 1958). The editors obtained their information from interviews with various executives associated with the trading stamp industry. *See also* Clapp, *Trading Stamps*, 23 OHIO ST. L.J. 35 (1962).

144. Vrendenburg, *supra* note 143, at 4.

145. ANTI-STAMPER ASS’N OF N.Y., ANTI-STAMPER 6-7 (1904).

146. F. WAGGONER, *PREMIUM ADVERTISING AS A SELLING FORCE* 96 (1939). Waggoner summarizes: “[B]ecause they [the stamps] were a new salesbuilding force, and marvelously

to evaluate the sales pitch. Customers were vulnerable to that "common weakness of human nature, the eager desire to get something for nothing."¹⁴⁷ The New York legislature attempted to solve these problems in 1900 by outlawing trading stamps.¹⁴⁸

Dissatisfaction with the trade in trading stamps did not end with the court of appeals decision that the 1900 statute was "not a lawful exercise of the police power of the Legislature. . . ."¹⁴⁹ A formal resolution in 1904 by the Niagara Falls Central Labor Council, the Building Trades Council and the Retail Clerk's Protective Union, reflects this continuing discontent:

WHEREAS, The Trading Stamp system has been introduced in this city to the detriment of the merchants and to the wage earners especially, and

WHEREAS, The said Trading Stamp companies are a lot of outside monopolies who came here at the solicitation of a few to extract money from the merchant at the expense of the consumers with the pretense of giving them something for nothing, and

WHEREAS, The public and wage earners especially of this city are tired of being the tools of a lot of grafters; now therefore, be it RESOLVED, That this Central Labor Council in regular session assembled on this 21st day of January, 1904, stamp its disapproval at this mode of fleecing the public under the guise of charity.

RESOLVED, That this council send a copy of this resolution to Hon. John H. Leggett and ask him to use his best influence to have laws passed at Albany to abolish this evil.¹⁵⁰

"[P]rohibitory legislation has run its course . . . ," warned Sperry and Hutchinson, "[but a] new phase of the situation is now claiming our attention, to-wit, regulation of business by laws which are an

successful, there was too great a temptation to use them with almost reckless abandon." *Id.* at 95.

147. ANTI-STAMPER ASS'N OF N.Y., *supra* note 145, at 3.

148. Act of May 5, 1900, ch. 768, 1900 N.Y. Laws 1633. It became a misdemeanor to issue trading stamps or to present them to customers. There was an exception for tickets, coupons or other vouchers issued with goods by the manufacturer of goods and redeemable by him.

149. *People ex rel. Madden v. Dycker*, 72 A.D. 308, 317 (N.Y. App. Div. 1902).

150. ANTI-STAMPER ASS'N OF N.Y., *supra* note 145, at 9. The alternative to legislation was self-help, which the Niagara Falls merchants are reported to have used: "[E]arly in February the Niagara Falls Merchants' Exchange voted to throw out the stamps on March 7 'in the interest of the people at large.'" *Id.*

The New York City Federation of Women's Clubs, meeting at the Hotel Astor on October 29, 1915, adopted a contrary resolution:

WHEREAS: A very large number of women procure comforts and furnishings for their homes through the use of trading stamps and coupons, which are given with purchases of standard articles by manufacturers, and on purchases in their stores by retailers, and it has been shown that these tokens aid the women in the home, by offering a definite profit-sharing plan; that these tokens are given without raising the cost or lowering the quality of the goods sold, and

indirect prohibition. . . . [W]e venture to suggest that . . . this power of regulation, like charity, is often used as a cloak for a commission of a multitude of sins."¹⁵¹ Sperry and Hutchinson was right about the imminence of indirect prohibition. A statute passed in New York in 1904 required the stamp companies to print the redeemable value on the face of the stamp and to redeem the stamps in money "at the option of the holder . . . [when stamps are] presented for redemption in number or quantity aggregating in money value not less than five cents in each lot."¹⁵² If the company failed to redeem in money, the merchant was required to do so.¹⁵³ The statute effectively eliminated the certainty of profit from premiums purchased in bulk and gave value to less than completed books of stamps. New York's courts and legislature may well have agreed that the purpose of the statute was to eliminate the stamp companies, for redemption in merchandise is "[t]he rock on which the system is built,"¹⁵⁴ and unredeemed stamps provided an economic

WHEREAS: An effort is being made by some to influence retailers and manufacturers to abandon the giving of these trading stamps and coupons,

THEREFORE BE IT RESOLVED: That we urge all club members and other women to take definite and immediate action to prevent the discontinuance of the giving of such trading stamps and coupons, because of the hardship it would entail on those families least able to be deprived of such comforts and furnishings.

Reported in 1 THE SPERRY MAG. 20 (No. 6, 1915). The state of trading stamps was different by 1915, but so were the classes from which these two groups drew their members.

151. *Correspondence*, 58 CENT. L.J. 355 (1904).

152. Act of May 9, 1904, ch. 657, 1904 N.Y. Laws 1651.

153. *Id.*

154. *People ex rel. Appel v. Zimmerman*, 102 A.D. 103, 109 (N.Y. App. Div. 1905). In theory the trading stamp scheme, and thus the legislature's restriction, worked as follows. The merchants were to get more business. As Sperry and Hutchinson explained in their stamp books, "the merchants make no advance in the price of their goods, and have so contracted with this company, but, on the contrary, the increase of trade secured by them by this plan will enable them to sell closer than ever before." *People ex rel. Madden v. Dycker*, 72 A.D. 308, 311 (N.Y. App. Div. 1902). For the same price, the customer was to get a valuable premium—a discount for paying cash. See F. WAGGONER, *supra* note 146, at 96. The stamp company was to make money because it was able to buy the premiums in bulk and therefore at a reduced rate. *People ex rel. Appel v. Zimmerman*, 102 A.D. at 109 (N.Y. App. Div. 1905).

In practice, the merchant lost any competitive advantage as soon as stamps were widely given. ANTI-STAMPER ASS'N OF N.Y., *supra* note 145, at 5. It is likely that the customer paid a higher price. As the Anti-Stamper Association put it: "The Trading Stamp Company plucks one of two geese—the dealer or the public, and the dealer is not goose enough to stand plucking very long." *Id.* The Anti-Stamper Association worked to educate about the fraud of trading stamps, and by 1904 antistamp organizations had been formed in 28 New York cities and towns. As to the value of premiums purchased in bulk, the Merchant's Association of New York investigated and found more than economies of scale: "[V]alues placed upon the merchandise for which the stamps may be exchanged is so enormously inflated that in many cases it runs from 500 to 1,000 per cent above the actual market prices of the articles given." *Quoted in* ANTI-STAMPER ASS'N OF N.Y., *supra* note 145, at 9.

cushion for the companies.¹⁵⁵ The statute, effectively another prohibition, was also held unconstitutional.¹⁵⁶

Under judicial reprieve, the major stamp companies helped reclaim the trading stamp as a competitive device. Ironically, this was accomplished with the elimination of most of the competing stamp companies. Reduction ensured that not every retailer had access to stamps, for with uniform use among retailers competitive advantage was largely lost.¹⁵⁷ "Those [stamp companies] that remained were the far-seeing and conservative ones who were responsible for having safely steered the business on its legitimate course. . . ."¹⁵⁸ Sperry and Hutchinson began to dominate the field and tried to identify the virtue of fair and even-handed competition with the virtues of the home: "Frankly we are trying to lift the organization to higher and better things, to make it more useful, more effectual as a trade medium which ties up business and the home as no other agency has done, or can do."¹⁵⁹ The New York legislature's reaction by 1908 was to rely on the stability of the once-outlawed stamp com-

155. The Anti-Stamper Association reported that "one of the principal Trading Stamp get-rich-quick concerns [claimed] that within fourteen months from the time the company was organized it made a cash profit of \$650,000 on unredeemed stamps alone." ANTI-STAMPER ASS'N OF N.Y., *supra* note 145, at 6. Editorially it added, "If that isn't bunco game, what is it?" *Id.*

156. *People ex rel. Appel v. Zimmerman*, 102 A.D. 103 (N.Y. App. Div. 1905).

157. F. WAGGONER, *supra* note 146, at 95; Rubinow, *supra* note 136, at 583.

158. F. WAGGONER, *supra* note 146, at 96:

During this period of stress [when legislatures were attacking the stamp companies] most of the trading stamp companies identified with what might be called the 'wild-cat days' passed out of the picture. Those that remained were the far-seeing and conservative ones who were responsible for having safely steered the business on its legitimate course, and reinstated it to where it has recently been hailed as one of the important stabilizers of retail prices and selling policies.

The possibility of other than legal solutions is suggested by C. S. Duncan, *The Economics and Legality of Premium Giving*, 24 J. POL. ECON. 921, 950 (1916).

I did not find direct evidence of the role that Sperry & Hutchinson Co. played other than their own claim, but it does seem clear that they would have been in a position to wield considerable influence. In 1915-16, the company published the Sperry Magazine, with "clean, moral readable tales," solutions for home problems, regular articles on fashions, children, and the movies. 1 THE SPERRY MAG. 1 (No. 1, 1915). "The Little Green Stamp" intruded gently from time to time in stories and in monthly editorials. 1 THE SPERRY MAG. 1 (No. 7, 1916). The magazine reflected what was already a trading stamp empire, "the greatest largest premium organization in the world," 1 THE SPERRY MAG. 19 (No. 1, 1915); it advertised "Branches Everywhere in the United States." 1 THE SPERRY MAG. 32 (Nos. 2 & 3, 1915). By their own estimate, they distributed annually merchandise valued at close to \$5,000,000. 1 THE SPERRY MAG. 20 (No. 4, 1915). The following year it was valued at \$6,000,000. 1 THE SPERRY MAG. 21 (No. 7, 1916). "In the past fifteen years the Sperry system actually has placed in the American home merchandise the retail value of which is conservatively estimated at \$50,000,000." 1 THE SPERRY MAG. 1 (No. 4, 1916). This was big business and remained big business within the industry.

159. 1 THE SPERRY MAG. 1 (No. 2, 1915).

panies. The legislature enacted a statute requiring only that the merchant giving stamps obtain the consent of the company that issued the stamps and that was responsible for their redemption.¹⁶⁰

160. Act of May 20, 1908, ch. 428, 1908 N.Y. Laws 1221. A somewhat similar role was likely played by the established ticket brokers when their trade was threatened. Theft of transportation tickets and fraud in ticket sales paralleled the problem of "the wild cat days" in the trading stamp industry. See *People ex rel. Tyroler v. Warden of Prison*, 157 N.Y. 116, 51 N.E. 1006 (1898) (Martin, J., dissenting). Newspaper accounts of thefts are gathered in *The Business of Railway Ticket Scalping in the United States Being Unnecessary, Illegal and Demoralizing, and Leading to Frauds upon Travelers to Daily Violations of the Interstate Commerce Law, Should not the Public and the Railways Join in its Suppression?* (undated pamphlet); Central Anti Ticket-Scalping Committee, *Museum of Ticket Scalping Iniquity* (undated).

The New York legislation took the form of a prohibition on all ticket brokerage, with an exception for agents authorized by the transporting companies and working out of offices at settled addresses. Act of May 18, 1897, ch. 506, 1897 N.Y. Laws 637. The 1897 statute was held unconstitutional in 1898. *People ex rel. Tyroler v. Warden of Prison*, 157 N.Y. 116, 51 N.E. 1006 (1898). It cut too broadly, prohibiting honest as well as fraudulent sales. It turned over "to the transportation companies the selection of those who are hereafter to be permitted to sell tickets." *Id.* at 122, 51 N.E. at 1008. A 1901 revised statute diminished slightly the benefits bestowed on those who became the agents of a line, Act of May 2, 1901, ch. 639, 1901 N.Y. Laws 1531, but the prohibition on the rest of the sellers cut just as broadly. The change was not enough to save this statute from a similar fate. It was declared unconstitutional the same year it was passed. *People ex rel. Weil v. Hagan*, 35 Misc. 155, 71 N.Y.S. 461 (N.Y. Sup. Ct. 1901), *People ex rel. Fleischman v. Caldwell*, 168 N.Y. 671, *aff'g*, 64 A.D. 46 (N.Y. App. Div. 1901).

One must piece together rather imaginatively the role that established ticket brokers played in resolving the problems that evoked these two statutes. It is clear that, like Sperry Hutchinson, the American Ticket Brokers Association represented the elite of the business. The membership of the association consisted of 416 firms and individuals in 1893. 15 PROCEEDINGS OF THE FIFTEENTH ANNUAL CONVENTION OF THE AMERICAN TICKET BROKERS ASSOCIATION (Apr. 26-28, 1893) (Chicago) [hereinafter cited as PROCEEDINGS]. That group limited its membership to "men of character and means" who did not seek to enter fields that were already occupied. *Id.* at 6. According to an estimate in REPORT OF THE COMMISSION OF IMMIGRATION OF THE STATE OF NEW YORK, 7 N.Y. SEN. DOC. NO. 29, at 40 (1909) [hereinafter cited as REPORT]: "For two hundred or three hundred authorized agents for whom the [steamship] companies stand sponsors, there are probably three thousand peddlers or runners who sell tickets for cash or on the instalment [sic] plan, on push-carts, in tenements and shops." As early as 1893, the American Ticket Brokers Association was fighting legislation that would affect their members by prohibiting or limiting brokerage in transportation tickets. PROCEEDINGS, *supra* this note, at 7. The association, in addition to fighting hostile legislation, policed its members, proposed arbitration to settle disputes between members, and claimed to be conservative in granting memberships, apparently at high fees. PROCEEDINGS, *supra* this note, at 8, 16 & 22.

Once the statute that would have left their futures in New York to the transportation companies was defeated, association members could turn from that fight to another. This involved eliminating or at least discrediting brokers who catered to the same trade as they, but who engaged in practices that threatened the general reputation of ticket brokers. Transportation lines may have complemented efforts of established brokers by authorizing greater numbers of agents and providing some supervision over them. Increased importance in being an authorized agent is suggested by a 1907 statute that made it a misdemeanor (and on second violation a felony) to "advertise or hold oneself out" as the agent of any line unless so authorized by the company. Act of June 21, 1907, ch. 546, § 616, 1907 N.Y. Laws 1147.

Legislative concern for effective competition was particularly likely to surface regarding the sale of food. The small profit margin that was standard in food sales accentuated failures in competition, and concern for public health provided a ready rationalization for legislative action.¹⁶¹ A statute passed in 1887 prohibited the distribution of premiums as part of a transaction in food.¹⁶² This time the threatening competitor ultimately followed the legislature's direction, while those who were threatened later adopted the practice they had opposed. To understand the reversal, one must look behind the general prohibition of the 1887 statute.¹⁶³

Neither accurate information about authorization nor the elimination of big-time, but disreputable, brokers would have been much help to the poor and the immigrant. A poor person would not have had the option to use information about the authority of a ticket broker if only the peddlers allowed installment purchases. Cf. REPORT, *supra* this note, at 40. Ethnic ties, shared language and availability in the community would often have carried greatest weight with the immigrant. The brokers of steamship tickets, whose primary clients were immigrants, attracted further legislative attention. As with trading stamps, the legislature attended to remaining details regarding brokerage of steamship tickets.

The Immigration Commission's review in 1909 of the plight of immigrants trying to obtain valid steamship tickets for foreign countries indicated that conditions were improved after 1907. "This is partly due to the few incoming aliens and to a great reduction in the sale of prepaid tickets. The number of agents issuing personal orders has been reduced, and there is generally more care in the conduct of the business by peddlers." REPORT, *supra* this note, at 43. On the other hand, the complaints of immigrants to the Legal Aid Bureau at the Educational Alliance in 1908 confirmed that, indeed, "there [were] still grave irregularities. . . ." REPORT, *supra* this note, at 41. The remaining legislation on ticket brokerage tracked the problems reported by the Immigration Commission. Licenses to sell transportation tickets or orders for transportation to or from foreign countries were required for all but authorized agents of the relevant line. A bond of \$2000 and a fee of \$25 payable annually were conditions to becoming licensed. Act of May 23, 1910, ch. 349, 1910 N.Y. Laws 622. The Comptroller issued 10 licenses in 1910 and began an investigation to determine whether unlicensed sellers were still operating. ANNUAL REPORT OF THE COMPTROLLER FOR 1910, 3 N.Y. ASSEMBLY DOC. NO. 10, at 62 (1911). A prohibition on advertising or holding oneself out "as authorized or entitled to sell steamship tickets without first having procured a license" was added in 1911 by Act of June 30, 1911, ch. 578, 1911 N.Y. Laws 1334.

161. The argument against the distribution of premiums with sales of food was cast in terms of health, but doing so required some straining. Judge Peckham summarized the argument made to him in *People v. Gillson*, 109 N.Y. 389, 403, 17 N.E. 343, 348 (1888):

The reasoning of counsel for the People is based upon the theory that no one will sell, as a matter of permanent business, an article at a price below what it costs him to procure it, and if he sells his coffee (in this instance), as low as the price thereof with other dealers, when he adds a gift at the time of sale, he thereby reduces his profits below that of his competitor, and in order to prevent such a loss he will necessarily and inevitably sell an inferior or adulterated article.

162. Act of June 24, 1887, ch. 691, 1387 N.Y. Laws 898.

163. Behind the general prohibition of the statute one finds the Great Atlantic and Pacific Tea Company. Surely others eventually presented a similar threat, but it was A&P that was consistently attacked in *The American Grocer*, and the constitutionality of the statute was tested on the basis of a purchase from A&P. In Bullock, *The Early History of the Great Atlantic & Pacific Tea Company*, 11 HARV. BUS. REV. 289 (Mar.-Apr. 1933) [hereinafter cited as Bullock I], Roy Bullock describes the difficulties of doing research on businesses in general

The retail trade in groceries in the 1880's was "quite atomistic"¹⁶⁴ in structure. Grocery stores were relatively small and defined their clientele by neighborhood. The chain grocery store or supermarket, which could purchase a range of groceries in bulk, was not yet on the scene. The grocery trade in the neighborhood store was characterized by a low profit margin on most items, with a long profit on tea and coffee.¹⁶⁵ The structure of competition between grocers within a neighborhood, according to grocery lore, was set by certain commodities: "Any grocer will tell you that the three basic commodities in his store are eggs, butter, and coffee. If the eggs are good and the butter is good and, above all, if the coffee is good, the customers will return for more. And they will take the canned soup and the noodles with them."¹⁶⁶

The Great Atlantic and Pacific Tea Company (A&P) operated outside that structure when it bought in bulk and eliminated the middleman.¹⁶⁷ A&P first competed for coffee and tea sales through its mail order club plans and then increasingly through its chain stores, which may have numbered as many as 135 by 1885.¹⁶⁸ In addition to buying coffee and tea in bulk, A&P had begun to buy premiums in bulk. Chromo and chinaware were the lure to customers at what came to be termed "gift tea stores."¹⁶⁹

and of working on A&P in particular. The problem with A&P was compounded by the fact that the partnership that controlled the company between 1878 and 1901 was particularly hesitant to put things in writing. Even the partnership agreement was oral. See Bullock, *A History of the Great Atlantic & Pacific Tea Company since 1878*, 12 HARV. BUS. REV. 59, 61, 63 (Sept.-Oct. 1933) [hereinafter cited as Bullock II].

164. J. BAIN, *INDUSTRIAL ORGANIZATION* 441 (1959); Cf. Rubinow, *supra* note 136, at 582.

165. 2 J. REES, *THE GROCERY TRADE - IT'S HISTORY AND ROMANCE* 242 (1910); Bullock I, *supra* note 163, at 295.

166. *FORTUNE'S FAVORITES: PORTRAITS OF SOME AMERICAN CORPORATIONS* 155, 156 (1931).

167. 10 *HARPERS WEEKLY* 687 (Oct. 27, 1866) (advertisement for A&P):

The proprietors became fully convinced, several years ago, that the consumers of Tea and Coffee were paying too many and too large profits on these articles of everyday consumption, and therefore organized THE GREAT AMERICAN TEA COMPANY to do away, as far as possible, with these enormous drains upon the Consumers, and to supply them with these necessaries at the smallest possible price.

...

We propose to do away with all these various profits and brokerages, cartages, storages, cooperages, and waste, with the exception of a small commission paid for purchasing to our correspondents in China and Japan, one cartage, and a small profit to ourselves—which, on our large sales, will amply pay us.

168. Bullock II, *supra* note 163, at 61.

169. As described in Bullock II, *supra* note 163, at 60. The date is set in "the 1860's" in *Boom in Premiums*, BUS. WK., May 14, 1958, at 27-28. Bullock II, *supra* note 163, at 60, seems to date the practice in the 1870's, drawing, e.g., on advertisements such as that in The N.Y. Tribune, Dec. 22, 1871, at 8. See also *Biggest Family Business*, 7 *FORTUNE* 53, 55 (Mar.

A&P's market claim was brought home to the consumer by heavy advertising in periodicals.¹⁷⁰ It was brought home to the neighborhood grocer with particular force when, in the 1880's, A&P began employing peddlers in wagons to solicit orders door to door in towns throughout the country.¹⁷¹ The peddlers, who so effectively carried A&P's message, also began to carry more than just coffee and tea. In 1884, sugar was advertised at cost.¹⁷² "Pure Elgin Creamery Butter" and "A&P Baking Powder" were added by 1890.¹⁷³ "We got into the grocery business gradually"¹⁷⁴ —but surely in time to compound the threat created by the appearance of the peddlers.¹⁷⁵ Other tea and coffee companies followed suit,¹⁷⁶ but, of these, A&P enjoyed the particular enmity of grocers who considered it an ethical and economic affront to the honest neighborhood grocer.¹⁷⁷

Something more than honest competition was required to remove the affront that A&P constituted, for A&P and the then standard neighborhood grocery were structured so differently that the grocer could not compete with the combination of bulk purchases and premiums. Accordingly, "the honest wholesale and retail trade of the state had to ask for the relief the bill [prohibiting the giving of premiums in the sale of food] afforded."¹⁷⁸ The relief sought was from a practice that A&P had pioneered and that it might have been

1933). Bullock II, *supra* note 163, at 64, reports that "[t]he giving of premiums [by A&P] had grown so that in 1900 the annual outlay for gifts to customers amounted to \$450,000. . . ."

170. Bullock I, *supra* note 163, at 292.

171. *Id.*, at 295.

172. CLEVELAND DIRECTORY Co., CLEVELAND DIRECTORY 244 (1884).

173. HOLBROOK'S NEWARK CITY AND BUSINESS DIRECTORY 501 (1890).

174. Bullock II, *supra* note 163, at 62, drawing on the testimony of John A. Hartford, President of the Great Atlantic & Pacific Tea Company, in his testimony in the case of *United States v. Swift & Co.*, 286 U.S. 106 (1932).

175. The expanded line was carried by the peddlers and was also available in the stores. Bullock II, *supra* note 163, at 62, draws on HOLBROOK'S NEWARK CITY AND BUSINESS DIRECTORY 501 (1891) for "[a]n advertisement of 1890 [which] states that a list of grocery items including Thea-Nectar, A&P Baking Powder and Eight O'Clock Breakfast Coffee were 'For Sale at all our Stores and From our Wagons.'" *Id.*

176. Bullock II, *supra* note 163, at 62; *Boom in Premiums*, *supra* note 169, at 27.

177. Bullock I, *supra* note 163, at 293-96. "The Great American Tea Company, although thoroughly hated, had become a national institution." *Id.* at 294. The *American Grocer* began a series of attacks on the company within a year of its founding in 1869. *Id.* at 293.

178. Respondent's Brief at 27, Record on Appeal, *People v. Gillson*, 109 N.Y. 389, 17 N.E. 343 (1888).

expected to expand.¹⁷⁹ A&P promptly initiated a test case.¹⁸⁰ In holding the statute unconstitutional, the New York Court of Appeals determined that the parties would have to resolve this dispute in the market as it existed or change the market if they could. Grocers tried giving premiums, but did not find that practice effective against A&P, which could order its premiums as well as its groceries in bulk.¹⁸¹

The competition that the legislature had tried to impose was ultimately ensured, not by the grocers, but by A&P and by the appearance of trading stamps. A&P completed its expansion into a full line of groceries. This made the range of purchasing to be rewarded with premiums the same for A&P and for the neighborhood grocery store.¹⁸² Trading stamps appeared and eliminated much of the disparity between the premiums that A&P and the neighborhood grocer could give.¹⁸³ By changing its own structure, A&P helped produce the equivalence in competitive position that the original statute had sought, though this equivalence was manifested by everyone, rather than no one, giving premiums.

To reclaim a special competitive position, A&P, and others like it, eventually shifted to the "no frills" store—no deliveries, no charges and *no premiums*.¹⁸⁴ The chain stores grounded their mar-

179. Respondent's Brief constructs a hypothetical in which 'A' sells wholesome "pure coffee, tea, saleratus or baking powder [which] could not compete with the adulterated and short rate product of 'B', that gave the consumer a watch or a silver spoon, or a complete dinner set with every purchase. . . ." *Id.* at 20.

180. The prosecution that led to the statute being declared unconstitutional involved the sale of two pounds of coffee by Hugh Gillson at the salesroom of the Great Atlantic & Pacific Tea Company, 11 North Pearl Street, in Albany. "[T]he business sign read 'Great Atlantic and Pacific Tea Company'; the other sign read 'Try our 8 o'clock breakfast coffee, checks given away with this coffee.'" Redirect Examination of Eugene Rest, the prosecuting witness, Record on Appeal, *People v. Gillson*, 109 N.Y. 389, 396, 17 N.E. 343, 344-45 (1888). The witness added, "I did not buy this coffee for my own use. I bought it to make a case against the tea companies." *Id.*

181. Rubinow, *supra* note 136, at 581-86.

182. W. MUELLER & L. GARIOAN, CHANGES IN MARKET STRUCTURE OF GROCERY RETAILING 16 (1961) assert that A&P "by 1865 had added a line of groceries." *Id.* Most writers date the move somewhat later. See *supra* note 169, for a 1890 description. Bullock II, *supra* note 163, at 65, describes a photograph of the interior of the A&P store at 1205 Market Street in Philadelphia, printed in 7 TEA & COFFEE TRADE J. 15 (Nov. 1904), showing an extensive display of packaged grocery items. By 1910, *The American Grocer*, in giving examples of price cutting, listed an extensive A&P inventory of packaged products and canned goods. 83 AM. GROCER, Jan. 5, 1910, at 10; 83 AM. GROCER, Jan. 8, 1910, at 10.

183. H. FOX, THE ECONOMICS OF TRADING STAMPS 34 (1968). Rubinow, *supra* note 136, at 583-84, describes the advantage that businesses who could purchase very large numbers of stamps still held.

184. In 1912 or 1913, at the peak of premium popularity, A&P developed the "economy store." FORTUNE'S FAVORITES, *supra* note 166, at 151; M. ADELMAN, A&P: A STUDY IN PRICE-COST BEHAVIOR AND PUBLIC POLICY (1959); see also *Biggest Family Business*, *supra* note 169.

keting squarely on their bulk purchasing power.¹⁸⁵ Thus, having already helped produce the competition the statute had tried to impose, A&P approximated the form of the original statute by not giving premiums. Ironically, it was the neighborhood grocers who, for some years, remained caught by the consumers' expectation that premiums would be given.¹⁸⁶

Businesses in competition responded to statutes at levels apart from constitutionality; they read a statute for what it might tell about the calculus of competition. Once established, a viable competitive practice continued even when no longer statutorily required. Statutory prohibition of competitive practices, despite subsequent invalidation, raised doubts about the ultimate competitive value of the practice and provided the occasion for leaders in the practice to restructure the market. In so doing, they tended to conform the facts toward the legislature's original design.

4. INVALIDATION OF THE BASIS FOR LEGISLATIVE CHOICE

Legislative decisionmaking could be somewhat casual and uncritical when a proposal was offered for the good of the public, aroused no opposition, and required neither legislative supervision nor public funding. This was the case in New York with statutes limiting entry into a variety of occupations. When the courts declared those statutes unconstitutional, they destroyed the factual assumptions on which the legislature's initial choice had been made. Whether these instances constitute real opposition of court and legislature depends on whether the statute could have survived serious legislative scrutiny when it was proposed.¹⁸⁷

In New York, the courts invalidated at least some of the occu-

In 1915, 554 of 938 A&P stores were run on the "economy plan." Bullock II, *supra* note 163, at 66.

185. Thus, for the chain stores, the issue became "Chain Store v. Manufacturer or Chain Store v. Wholesaler"—no longer chain store v. independent. FORTUNE'S FAVORITES, *supra* note 166, at 146.

186. Bullock II, *supra* note 163, at 66.

187. Lawrence Friedman, *Freedom of Contract and Occupational Licensing 1890-1910: A Legal and Social Study*, 53 CALIF. L. REV. 487 (1965) wrote "a legal and social study" of occupational licensing in an effort "to arrive at a better understanding of judicial review of economic and social legislation during the critical period between 1890 and 1910." *Id.* at 487. He was "in search of a general theory." *Id.* at 525. Friedman chose occupational licensing cases, because they were not so fraught with high emotion and therefore might provide "a kind of control group of decisions to test our explanations of the behavior of the judges in matters of high constitutional controversy." *Id.* at 489. In his attempt to generalize from occupational licensing, Friedman chose the only group of cases, at least in New York, in which the courts thoroughly prevailed for a significant period in constitutional choices made under open-ended provisions.

pational protections that had been obtained by horseshoers, undertakers, plumbers and insurance brokers.¹⁸⁸ Horseshoers and undertakers had obtained the legislative requirement of a license, to be granted to future applicants only after an examination and a substantial apprenticeship with a licensed member. The legislature empowered examining boards, consisting largely of practicing members of the occupation, to administer the scheme.¹⁸⁹ Plumbers had obtained these provisions and the additional requirement that "every member of a co-partnership shall have been registered. . . ."¹⁹⁰ Insurance brokers were able to have the required licenses limited to those persons who made insurance brokerage their principal business.¹⁹¹

Those seeking protection for their occupations first had to overcome legislative disinterest. "In New York the committee in charge of the first [horseshoers] bill submitted to the legislature, were told to go home and pave the way for the future craft."¹⁹² Disinterest

188. Similarly, a statute protecting New York farmers was declared unconstitutional in *People v. Windholz*, 92 A.D. 569 (N.Y. App. Div. 1904), an action against a nonfarmer. The statute provided New York farmers with a more favorable standard for determining adulteration of cider vinegar made "exclusively from apples grown on [their own] land. . . ." Act of Apr. 10, 1893, ch. 338, 1893 N.Y. Laws 655, as amended by Act of Apr. 10, 1901, ch. 308, 1901 N.Y. Laws 813.

189. Act of May 13, 1897, ch. 415, § 180, 1897 N.Y. Laws 461, 498. That statute regarding horseshoers applied only to cities of the first and second class. It was extended throughout the state by Act of May 10, 1899, ch. 558, 1899 N.Y. Laws 1145. Embalmers had been licensed since 1898. Success on the examination was the only requirement for licensing. Act of Apr. 26, 1898, ch. 555, 1898 N.Y. Laws 299, amended by Act of Apr. 17, 1899, ch. 324, 1899 N.Y. Laws 701, to extend the time for those already practicing to register. There was never any difficulty with the constitutionality of that provision. In 1904, however, the statute was amended to require undertakers to be licensed. To qualify, the candidate had to be licensed as an embalmer and to have been "employed as an assistant to a licensed undertaker continuously for a period of at least three years." Act of Apr. 29, 1904, ch. 498, 1904 N.Y. Laws 1260, amended by Act of May 19, 1905, ch. 572, 1905 N.Y. Laws 1267, to extend the time for practicing undertakers to register. To meet constitutional objections, the apprenticeship was diminished to two years and the examination was separated from that for embalmers.

190. Act of May 21, 1896, ch. 803, 1896 N.Y. Laws 1053. The original licensing requirement had been upheld in *People ex rel. Nechamcus v. Warden*, 144 N.Y. 529, 39 N.E. 686 (1895).

191. An insurance broker was required to apply for a certificate of authority from the superintendent of insurance. Act of July 24, 1911, ch. 748, 1911 N.Y. Laws 2008, as amended by Act of Feb. 7, 1912, ch. 1, 1912 N.Y. Laws 1. The application had to set forth that "the applicant is engaged or intends to engage in good faith, principally in the insurance business or that he intends to conduct such business with a real estate agency or real estate brokerage business. . . ." Act of Feb. 7, 1912, ch. 1, § 142(d), 1912 N.Y. Laws 1. This amendment had changed the requirement from being engaged "principally in the insurance brokerage business" to being engaged "principally in the insurance business." Act of Feb. 7, 1912, ch. 1, § 142(d), 1912 N.Y. Laws 1.

192. Buckley, "Legislation"—*How Best to Obtain It*, REPORT OF THE EIGHTH ANNUAL CONVENTION OF THE NATIONAL BLACKSMITHS' AND WELDERS' ASSOCIATION 70 (1899).

was countered by facts, conveyed by a "horseshoer educator."¹⁹³ Both the public and the legislature were to be educated:

[I]f we awaken the people as to the depths which it is necessary to descend for a complete discharge of the obligations resting on the scientific horseshoer, if we would show that the ignorant and incompetent of the trade refused to take notice of the studies opened to them thus leaving the line of demarcation a plain one, then the people would know wherein our basis of justice lay and would undoubtedly give their support to the demands that we would make. . . . We constantly awaited on the selected representatives of the state, showed them wherein the justice of our plaint lay, led them into the intricacies of our art and enveloped them with a sense of the wrong that we suffered as workers at the hands of the unscrupulous and incompetent.¹⁹⁴

No one offered the legislature a different set of facts. Grandfather clauses ensured the licensing of all contemporary practitioners; the group that would suffer exclusion under the apprenticeship requirements did not yet exist.¹⁹⁵

Horseshoers' claims that restrictive licensing was "destined to bring gladness to the horse and benefit to humanity"¹⁹⁶ may have raised the necessary legislative interest to pass the bill, but those claims hardly raised legislative interest to the level of searching criticism. Legislators did not seem to be making any real commitment, for in passing the statute they were incurring no continuing responsibility. Once in place, the licensing scheme was financed from application fees and run by members of the occupation.¹⁹⁷

The "education" came unstuck when contrary sets of facts were presented to the courts by persons thereafter excluded from practice. Edward J. Harrison could not become a licensed undertaker, nor could Samuel Beattie be a licensed horseshoer, unless a licensed member of the respective trade agreed to take each as an apprentice.¹⁹⁸ Robert Schnaier could not recover for plumbing work per-

193. *Id.* at 70.

194. *Id.* at 71, 73. This description is of the efforts of the National Blacksmiths' and Welders' Association with the Michigan legislature. Buckley suggests that "[a] professor of law is, to my mind, the proper person to entrust with the work [of drafting a bill], the cost of service being first obtained." *Id.* at 72.

195. *E.g.*, Act of May 19, 1905, ch. 572, 1905 N.Y. Laws 1267.

196. Buckley, *supra* note 192, at 73.

197. *E.g.*, Act of May 12, 1899, ch. 558, §§ 181-183, 1899 N.Y. Laws 1145.

198. The 1904 statute was declared unconstitutional in *People v. Ringe*, 197 N.Y. 143, 90 N.E. 451 (1910). Act of July 28, 1911, ch. 841, 1911 N.Y. Laws 2856, required undertakers to have a license if they wanted to practice as "certified undertaker[s]." *Id.* All undertakers currently practicing could be so certified. Thereafter aspiring certified undertakers had to serve as an apprentice or assistant to an undertaker "for at least two years in the aggregate." *Id.* The statute was amended by Act of Mar. 11, 1913, ch. 71, 1913 N.Y. Laws 122, to provide for separate embalming and undertaking examinations. An apprenticeship, though only two

formed because his partner, whose "duties as a member of the firm were confined *exclusively* to attending to the financial affairs of the firm and keeping the books,"¹⁹⁹ was not licensed as a plumber.²⁰⁰ William Hauser, who was a lawyer and also was certified as a "first class broker" by the New York Fire Insurance Exchange, could not obtain a certificate of authority under provisions that required full time work in brokerage and thus could not collect his commissions.²⁰¹ Each argued to the courts that these statutory protections were anticompetitive, and the courts declared each statute unconstitutional.²⁰² With the facts in on both sides, the judicial decisions

years in the aggregate, was also required in every instance. The 1913 statute was held unconstitutional in *People v. Harrison*, 170 A.D. 802, 808 (N.Y. App. Div. 1915), because "[t]he statute still requires that the requisite skill and knowledge *shall be obtained in a particular manner, . . .*" *Id.* (emphasis in original). The horseshoeing statute was held unconstitutional in *People v. Beattie*, 96 A.D. 383 (N.Y. App. Div. 1904).

199. *Schnaier v. Navarre Hotel & Importation Co.*, 182 N.Y. 83, 83, 74 N.E. 561, 561 (1905) (emphasis added). Judge Gray concurred in the result, but questioned whether the statute required that reading. The court, in *Milton Schnaier & Co. v. Grigsby*, 132 A.D. 854 (N.Y. App. Div. 1909), construed the statute so as to hold it constitutional.

200. *See supra* note 199.

201. *Hauser v. North British & Mercantile Ins. Co.*, 206 N.Y. 455, 458, 100 N.E. 52, 52 (1912). The "first class broker's certificate [from New York Fire Insurance Exchange] entitled him to receive commissions, or brokerage, as a fire insurance broker, to be paid by the members of the exchange, of which defendant was one, upon his placing insurance with them." *Id.*

202. As Justice Chase observed in *People v. Ringe*, 197 N.Y. 143, 151, 90 N.E. 451, 454 (1910):

We cannot refrain from the thought that the act in question [requiring aspiring undertakers to be apprenticed to a licensed undertaker] was conceived and promulgated in the interests of those then engaged in the undertaking business and that the relation which the business bears to the general health, morals and welfare of the state had much less influence upon its originators than the prospective monopoly that could be exercised with the aid of its provisions.

His suspicion may have been reinforced by the choice of the New York State Undertakers Association to submit a brief in support of the statute.

Justice Chase's suspicion is also reinforced by details of the passage of similar statutes. The defendant plumbing firm in *Schnaier v. Navarre Hotel & Importation Co.*, 182 N.Y. 83, 74 N.E. 561 (1905), argued that:

The effect of the laws of 1896 [requiring all members of a partnership that did plumbing work to be licensed] will necessarily be to partially destroy the plumbing business. It will tend to create a greater monopoly in this line of business than the legislators intended. It would place a premium upon licensed plumbers who are fortunate enough to have capital at their command. This, of necessity, would prevent and practically deprive the poor licensed plumber from engaging in that business, more especially in these days when trades and businesses can only be profitably carried on with large capital at the command of the business.

Defendant's Brief at 25, *Schnaier v. Navarre Hotel & Importation Co.*, 182 N.Y. 83, 74 N.E. 561 (1905). The Insurance Brokers' Association of the City of New York declared itself, "vitaly interested [in the appeal of *Hauser v. North British & Mercantile Ins. Co.*, 206 N.Y. 455, 100 N.E. 52 (1912)] in the determination of the questions involved in this action [against an insurance broker who also worked as a lawyer]. . . ." Brief Submitted on Behalf of Insurance Brokers' Ass'n of The City of New York, at 1, *Hauser v. North British & Mercantile Ins. Co.*,

invalidating these sorts of protections were the last words to be heard—and this time the last that were uttered.²⁰³

D. Crossing Categories

Categories are necessary to make sense of a mass of detail. Efforts to identify similarities within categories and differences among them help generate explanations. Having moved from the relatively ready categories of the common law to the complex and unfamiliar ground beyond cases, I expected difficulty in developing categories that would readily account for all that I had found. I was not disappointed. The issue of tenement manufacture, which earlier served to show the shift from special toward general legislation,²⁰⁴ stubbornly combines all the configurations of issues that were carefully separated into the four categories of interaction in the preceding section. Thus tenement manufacture provides both a review of those categories and the impetus to move beyond them.²⁰⁵

206 N.Y. 455, 100 N.E. 52 (1912). The trial judge in *People v. Windholz*, 92 A.D. 569 (N.Y. App. Div. 1904) asked, "Why was this provision [setting a lower adulteration standard for the cider vinegar of New York farmers] placed there?" *Id.* Defendant's attorney replied, "Because they couldn't pass the act without the farmer vote." *Id.* By contrast the Central Law Journal was inclined to treat such legislation as "sumptuary or paternalistic legislation attempting to regulate the details of purely private matters." *Unconstitutional Regulation of Trades*, 60 CENT. L.J. 101, 103 (1905).

203. In Act of May 27, 1913, ch. 754, 1913 N.Y. Laws 1890, the legislature passed what was described by the court in *Gottesman v. Barer*, 89 Misc. 440, 152 N.Y.S. 128 (1915), as "a substantial reenactment of Laws [of] 1896, Ch. 803" which had been taken to require all members of a plumbing partnership to be licensed. *Id.* at 442, 152 N.Y.S. at 129. However, the constitutional problem was skirted by the addition of two references to "performing" work, §§ 415(a) & 416(a); and by providing that one could register without being a licensed plumber. However, only a licensed plumber could obtain a *certificate* of registration. See *Fredericks v. Lederer*, 126 Misc. 184, 212 N.Y.S. 614 (Sup. Ct. 1925).

204. See *supra* notes 37-54 and accompanying text.

205. A similar review can be accomplished using the controversy over the sale of margarine. Health concerns surfaced readily. Carbonates of potash, soda, or ammonia, and sulphuric, nitric, benzoic, and salicylic acids were used in rendering oleo oil. E. WIEST, *THE BUTTER INDUSTRY IN THE UNITED STATES, AN ECONOMIC STUDY OF BUTTER AND OLEO MARGARINE* 219-23 (Studies in History, Economics and Public Law No. 165, 1916). Manufacturers of oleomargarine had occasion to deny to the New York Committee on Public Health that they used fats from diseased animals. *Id.* at 227.

Though the division may not have reflected reality, butter tended to be thought of as an agricultural product and the making of oleomargarine as an industry. W. PABST, *BUTTER AND OLEOMARGARINE: AN ANALYSIS OF COMPETING COMMODITIES* 28 (Studies in History, Economics and Public Law No. 427, 1937). "Thousands of small independent manufacturers were engaged in buttermaking [almost exclusively on the farms], and they felt their livelihood was threatened by the rise of margarine. For this was not only an industrial product; the main part of it soon began to come from large slaughterhouses, from 'big business.'" J. VAN STUYVENBERG, *MARGARINE: AN ECONOMIC, SOCIAL AND SCIENTIFIC HISTORY 1869-1969*, at 283 (1969). The intensity of the battles between producers of butter and margarine were not

The tenement manufacture statute that was held unconstitutional had been plain enough: "The manufacture of cigars in any tenement house is prohibited. . . ." ²⁰⁶ The opinion of the court of appeals was equally clear: "What does this act attempt to do? In form, it makes it a crime for a cigarmaker in New York and Brooklyn . . . to carry on a perfectly lawful trade in his home." ²⁰⁷ There

unlike those over the eight-hour day. But unlike the eight-hour day, which was vital to a broad range of the population, the choice between butter and margarine was not so fundamental that it elicited such a clear-cut resolution.

Access to the market was the overriding issue. Margarine was a new product on the market, having been developed in France in 1867, E. WIEST, *supra* this note, at 214. It provided a substitute for butter at about half the price. *People v. Marx*, 99 N.Y. 377, 381, 2 N.E. 29, 30 (1885). The first effort to limit the sale of margarine by requiring it to be labeled as such, Act of June 5, 1877, ch. 415, 1877 N.Y. Laws 441; Act of May 27, 1880, ch. 439, 1880 N.Y. Laws 639; Act of May 30, 1882, ch. 238, 1882 N.Y. Laws 291, was replaced in 1884 by a prohibition on the manufacture of "any article designed to take the place of butter or cheese produced from pure, unadulterated milk or cream. . . ." Act of Apr. 24, 1884, ch. 202, 1884 N.Y. Laws 255. A year later, the legislature prohibited manufacture "in imitation or semblance of natural butter or cheese," Act of Apr. 30, 1885, ch. 183, 1885 N.Y. Laws 338, and combined it with the prohibition on items "designed to take the place of natural butter or cheese." *Id.* The 1885 understudy was barely in place before the 1884 prohibition was held unconstitutional. *People v. Marx*, 99 N.Y. 377, 885, 2 N.E. 29, 34 (1885). By the time the constitutionality of the 1885 prohibition of imitation was confirmed in 1887, *People v. Arensburg*, 105 N.Y. 123, 11 N.E. 277 (1887), that statute had been tightened to prevent a seller's escape by the claim that he thought he was selling fine creamery butter, Act of June 4, 1886, ch. 557, § 7, 1886 N.Y. Laws 780, and its prohibition had been extended to the furnishing of prohibited items in bakeries, hotels, taverns, boardinghouses, restaurants, saloons, lunch counters or places of public entertainment. Act of June 16, 1887, ch. 583, 1887 N.Y. Laws 794. In 1893, a prohibition was added on coloring "for the purpose or with the effect of imparting thereto . . . any shade of yellow butter or cheese." Act of Apr. 10, 1893, ch. 338, 1893 N.Y. Laws 655. Other gaps in the prohibition of the imitation of butter were eliminated in an elaborated statute in 1902.

Dairy farmers' traditional occupational identity may have helped ensure their initial solidarity in fighting margarine. Some strains on that solidarity seem to have been produced by the competing needs of distinguishing butter from margarine while matching (or at least approaching) its price and shelf life. C. Simmonds reports in Simmonds, *The Adulteration of Butter*, 73 NATURE 466, 466 (1906) that "[d]uring the past few years much unscrupulous ingenuity has been applied to the sophistication of butter. . . . Considerable profits are alleged to be made, and it is therefore not surprising that the traffic has flourished in spite of all attempts at suppression." Suppression in New York took the form of statutes prohibiting, *inter alia*, use of most preservatives in butter (and the mixing of animal fats with milk in making butter). Act of Apr. 10 1893, ch. 338, 1893 N.Y. Laws 655, as amended by Act of Apr. 19, 1900, ch. 534, 1900 N.Y. Laws 1245. Simmonds, *supra* this note, describes in detail the latter process and the difficulty of detecting it.

The statute's prohibition on preservatives in butter was held unconstitutional in *People v. Biesecker*, 169 N.Y. 53, 61 N.E. 990 (1901). The tension just described within the dairy industry was increasing as consumption and acceptance of margarine increased and may help explain why the prohibition on preservatives did not reappear in the session laws.

206. Act of May 12, 1884, ch. 272, 1884 N.Y. Laws 335. There were some exceptions in the statute. Violation constituted a misdemeanor punishable by a fine of \$10-\$100 and by imprisonment for from ten days to six months.

207. *In re Jacobs*, 98 N.Y. 98 (1885). C. JACOBS, *supra* note 34, at 51, characterizes the opinion as "one of the most extreme judicial statements of laissez faire. . . ." *Id.* He adds

the clarity ends.

Progressive reformers saw the underlying problems of tenement manufacture as child labor and unhealthy working conditions. The latter endangered consumers of tenement-made goods as well as the occupants of the tenements.²⁰⁸ These reformers considered child welfare and cleanliness to be settled values like honesty in bulk sales or sobriety in dance halls. For them the answer to the problems of tenement manufacture lay in prohibiting all such manufacture.²⁰⁹ Those who held a contrary view could not match the established voice of these reformers.²¹⁰ Tenement workers, for example, while opposed to the economic impositions on them, sometimes preferred work at home. It gave women, who were the bulk of tenement laborers, needed work even though they had to care for young children. It coincided with preindustrial modes of work, allowing some personal control of pace, schedule and associates.²¹¹ But these workers, neither organized nor influential, were in no better position to detail

that it is perhaps for that reason that the opinion "acquired in later years a certain preeminence in the world of citation." *Id.* B. TWISS, *supra* note 18, at 99-109, details the argument of the case and confirms its prominence: the "decision was cited thereafter probably more than any other single state decision in practically every case where state power over individual liberty and property rights was challenged." *Id.* at 99.

208. R. LUBOV, *THE PROGRESSIVES AND THE SLUMS: TENEMENT HOUSE REFORM IN NEW YORK CITY 1890-1917* (1962); Sergeant, *Toilers in the Tenements, Where the Beautiful Things of the Great Shops are Made*, 35 *MCCLURE'S MAG.* 231 (July 1910); Van Kleeck, *Child Labor in New York City Tenements*, *CHARITIES AND THE COMMONS* 1405 (Jan. 18, 1908).

209. Van Kleeck, *supra* note 208, at 1420, argues that "[t]he nature of this system of industry is such that its evils are its essence. . . . To abolish the evils means to abolish the system; to 'regulate' the system means nothing." However, this manufacture was not prohibited; licenses were required instead. "Under the terms of a decision which was rendered some years ago by the Court of Appeals . . . , it is impossible to prevent the making of clothing or other articles by families in their living apartments, and the Factory Law was framed so as not to clash with this view of our highest court." *EIGHTH ANNUAL REPORT OF THE FACTORY INSPECTOR OF THE STATE OF NEW YORK FOR 1893*, at 11 (1894). White, *Effects of New York Sweat Shop Law*, 18 *GUNTON'S MAG.* 345 (1900) must have been unaware of this permit scheme for family manufacture, for he suggests that, "[t]his decision [Jacobs] for a time baffled every attempt to bring the home shops under the authority of the factory inspector, until the way was pointed out by the Massachusetts licensing law of 1898." *Id.* at 347-48.

210. One of the reformers, Florence Kelley, had served "as special agent for the Bureau of Labor Statistics of Illinois for an investigation of the needle-trades in the tenements of Chicago . . . ; as Chief Inspector of Factories of that state . . . ; as agent in charge of the Chicago division of the investigation of the 'Slums of Great Cities' for the Department of Labor at Washington; and as Secretary of the National Consumers League from 1899. . . ." *Preface to F. KELLEY, SOME ETHICAL GAINS THROUGH LEGISLATION* (1905).

211. H. GUTMAN, *WORK, CULTURE AND SOCIETY IN INDUSTRIALIZING AMERICA, ESSAYS IN AMERICAN WORKING CLASS AND SOCIAL HISTORY* (1976). I am exploring this further in research funded by the American Council of Learned Societies.

that preference than they would have been to argue the benefits of dance hall entertainment.

Labor unions and management disagreed about the process of subcontracting in tenement manufacture. Cigarmaking and other manufacture increasingly came into the tenements through a contractor or subcontractor who set the piecework wage and provided materials. This process of subcontracting, often through several levels, was described by labor unions as "the process of grinding the faces of the poor."²¹² While tenement manufacture might occur in, and help produce, unhealthy work places, it was, in their eyes, particularly characterized by progressively lowered payment to the worker for the amount of work done.²¹³ Limitations on this process of contracting, like an imposed eight-hour day or compensation without proof of fault, would have been a highly disputed change in the legal construct of freedom of contract.

Among cigar manufacturers, the issue was competition. The use made of tenement labor varied by the structure of a manufacturer's operation. Some manufacturers worked without established factories and entirely by subcontracting.²¹⁴ They were dependent on home workers in the same way that trading stamp companies depended on the survival of their product. Those manufacturers with factories who did some subcontracting could accommodate a statutory prohibition on tenement manufacture by moving all work into an existing or expanded factory.²¹⁵ Once accommodation occurred, the continued existence of the statute, like that requiring the sale of

212. Speech by New York Deputy Inspector McKay, in EIGHTH ANNUAL REPORT OF THE FACTORY INSPECTOR, *supra* note 209, at 789. The functioning of the process is described in that report. *Id.* at 11. It is reported that, "[t]heir [tenement manufacture workers] pay has been cut from twenty to forty per cent and the difficulty of keeping soul and body together upon the now meagre returns for their labor can be readily imagined." *Id.* at 66. The problem continued the following year: "The continued depression in business, extensive and protracted strikes, lockouts, and perhaps, other causes, demoralized the clothing trade to such an extent that constant and unremitting vigilance was required to check violations of the law." NINTH ANNUAL REPORT OF THE FACTORY INSPECTOR OF THE STATE OF NEW YORK FOR 1894, at 16 (1895). *See also* ELEVENTH ANNUAL REPORT OF THE FACTORY INSPECTOR OF THE STATE OF NEW YORK FOR 1896, at 24 (1897).

213. NINTH ANNUAL REPORT OF THE FACTORY INSPECTOR OF THE STATE OF NEW YORK, *supra* note 212, at 876:

The contractors, naturally, in order to keep up, if possible, to the figure of profit they have set as the least amount which they must clear up as the result of a week's work, turn to the workman and cut the price paid to him, or if the contractor, as is often the custom, sublets the work to another less favored individual he extracts, in advance the amount which as a broker he claims to be his due. It needs no elaboration to show what would be the result of this system of cut and slash.

214. K. BRAUN, UNION MANAGEMENT CO-OPERATION—EXPERIENCE IN THE CLOTHING INDUSTRY 31 (1947).

215. White, *supra* note 209, at 347, describes indirect effects of inspection:

mileage books, would become largely irrelevant.

Cigarmakers who rolled and shaped their product by hand were the elite within their occupation.²¹⁶ With the introduction of molds, the handworkers faced increasing competition from the often unskilled tenement workers.²¹⁷ In its fight to limit or control mechanization, the cigarmakers' union considered the tenement workers beyond its reach²¹⁸ and attempted to exclude them from the occupation through statutory prohibition.²¹⁹ This prohibition on tenement cigarmaking would have given skilled cigarmakers some of the same protection that horseshoers, plumbers, undertakers and insurance brokers sought to obtain by restrictive licensing.

In trying, without success, to resolve the dilemmas posed by tenement manufacture, the legislature transformed the issue into one that was more manageable and less volatile. Through successive efforts it created an elaborate administrative structure around the court's decision that prohibition of tenement manufacture was unconstitutional.²²⁰ Tenement manufacture could be limited, if not

[I]t is by making it inconvenient for a manufacturer to resort to the indirect or contract method, and uncomfortable for those employed in it, that the system would in time be discarded altogether, and the work done in regular shops which could readily be brought under the supervision of the factory inspectors and within the influence of the trade unions.

216. I. YELLOWITZ, *INDUSTRIALIZATION AND THE AMERICAN LABOR MOVEMENT 1850-1900*, at 64 (1977).

217. *Id.* at 65-71.

218. The Factory Inspector in his EIGHTH ANNUAL REPORT, *supra* note 209, at 66, noted the absence of organization in explaining that the tenement workers would be unable to force the piece price up after the depression ended.

219. *Tenement-House Cigar Making in New York City*, THIRTEENTH ANNUAL REPORT OF THE NEW YORK STATE BUREAU OF LABOR FOR 1895, at 545-62 (1896). There is ample evidence that the Cigar Makers' International Union pressed for the 1884 statute that was found unconstitutional, as did the Tobacco Journal, the House Owners' Association of the Tenth, Eleventh and Seventeenth Wards, the German-American Citizens' Association of the Tenth Assembly District, the Taxpayers' Central Committee of New York, and several physicians. *Id.* One commentator suggested that "[i]t was a reproach to our legislation that such oppression could be exerted by the power of a few trade monopolists." 31 ALB. L.J. 82, 82 (1885).

220. After *Jacobs*, manufacture in tenement dwellings was again prohibited, "except by the immediate members of the family living therein." Act of May 17, 1892, ch. 655, § 1 & ch. 673, § 13, 1892 N.Y. Laws 1212. As to family workshops, the statute required that, "every such workshop shall be kept in a cleanly state." *Id.* Enforcement of that provision required the cooperation of the Factory Inspector and the Board of Health and could only be accomplished indirectly given *Jacobs*. The family working in its tenement apartment was required to give the Board of Health the basic information it needed: "[T]he location of the workshop, the nature of the work there carried on, and the number of persons therein employed." Act of May 17, 1892, ch. 655, § 1, 1892 N.Y. Laws 1212. Other sources were also tapped for information. Anyone giving out uncompleted work was required to keep "a written register of the name and addresses of all persons to whom such work is given to be made, or with whom they have contracted to do the same." Act of Mar. 22, 1893, ch. 173, 1893 N.Y. Laws 298. Every owner

eliminated, within this scheme, but only if the licensing requirements were strictly enforced.²²¹ A complex choice among conflicting values was thereby transformed into the rather more remote question of agency funding—just as discussion of the conflicting values that underlay constitutional choice has been transformed into a debate about the relative institutional position of court and legislature.

III. NEW CONSTRUCTION: BUILDING BEYOND CASES

The interaction between court and legislature in determining the contours of constitutional guarantees was substantial and complex—for a state, at a time, on an issue about which the assumption of the finality of judicial choice is particularly strong. In New York, there was neither a “fifty years massacre”²²² nor a “carnival of unconstitutionality.”²²³ Instead, between 1870 and 1920, there was

of a tenement “shall file in the Department of Health . . . the number of families occupying each apartment, and the trades or occupations carried on therein.” Act of Mar. 25, 1887, ch. 84, § 654, 1887 N.Y. Laws 94.

The Board of Health was directed to grant permits “to persons having been found worthy upon inspection . . .,” Act of Mar. 28, 1887, ch. 87, 1887 N.Y. Laws 103; but the family was not required to obtain a permit. Rather, any person who had goods manufactured in family shops that did not have a permit was a misdemeanor and subject to a fine of from \$100 to \$500 and imprisonment of 30 days to six months. Anyone who knowingly sold such items or exhibited them for sale was subject to the same penalties. *Id.* § 8. After 1899, the owners of tenements were held to violate the statute unless, after notification, they “cause unlawful manufacture to be discontinued within thirty days or faithfully prosecute proceedings for the dispossession of the occupant.” Act of Apr. 1, 1899, ch. 191, § 105, 1899 N.Y. Laws 345, 346.

Persons or firms hiring labor for work in tenements were required to obtain a permit from the factory inspector that would indicate, from inspection, the number of persons who might be employed. The permit might “be revoked at any time the health of the community or of those employed therein may require it. . . .” Act of May 18, 1892, ch. 673, § 13, 1892 N.Y. Laws 1372, 1377.

Although the Board of Health and the Factory Inspector cooperated in policing dwelling manufacture, THIRTEENTH ANNUAL REPORT OF THE FACTORY INSPECTOR OF THE STATE OF NEW YORK FOR 1898, at 785 (1899), the complexity of the scheme may have meant that home shops were less effectively regulated than nondwelling shops until the two schemes were combined by Act of Apr. 1, 1899, ch. 191, § 100, 1899 N.Y. Laws 345, 346.

Additional items of manufacture were brought into this regulatory scheme as they appeared in the tenements, but Van Kleeck, *supra* note 208, at 1416, claimed that “[t]he licensing system has not succeeded in keeping pace with the extent of home work, even in naming the articles made in tenement homes.” *Id.*

221. F. KELLEY, *supra* note 210, argued that they could not be enforced—“partial restrictions . . . are in the nature of the case non-enforceable.” *Id.* at 209. “By adopting these partial prohibitions, while denying to the purchasers and the workers the protection of a complete prohibition of all manufacture in the tenements, the state has instilled into the minds of its industrially weaker citizens a sense of confusion mixed with contempt for the law.” *Id.* at 236. See also Van Kleeck, *supra* note 208.

222. Cohen, *supra* note 28, at 245.

223. Pound, *supra* note 26. See *supra* notes 25-29 and accompanying text.

steady, rather undramatic interaction between court and legislature, with consistency in the variation of pattern and circumstance. The judges had, not the final word, but the ability to insist that a dialogue on constitutionality continue past the legislators' choices. What is to be done with what I have found?

First, test the conclusions—in other states, at other times, and in the federal courts. There is reason to believe that New York is representative²²⁴ and reason to test that belief. Existing work provides the basis for further studies.²²⁵

Second, develop the categories that explain what happened. The small sample from New York is an adequate basis for raising doubts about inquiry confined by cases and about the assumption in constitutional law that the process of constitutional choice necessarily ends when the courts oppose legislative choice. I hesitate, however, to base elaborate explanations, much less theories, of the interaction between court and legislature on it. Instead, having already organized the New York material by form of interaction, I want to note three other themes that run through the same material—organization,²²⁶ competition,²²⁷ and limitation by the prevailing terms of public discourse.²²⁸ These suggest different categories and thus different explanations that might be developed in further studies.

Third, use the findings. They suggest that theories might be developed that legitimate judicial choice by its involvement with,

224. See *supra* notes 34-36 and accompanying text.

225. See *supra* note 24.

226. The degree to which proponents and opponents of various solutions were organized seems to have been relevant across the categories, though with varying effect. The proponents of repeated legislation, like the National Association of Credit Men and members of the Women's City Club, were able to get the legislation repassed when there was no effectively organized voice in opposition. Disputes among relatively highly organized unions and employers produced constitutional amendments. Organizations such as the Association of Retail Grocers and the Retail Clerk's Protective Association who opposed premiums and trading stamps obtained statutes that leaders in the relevant trades approximated. Entry into certain occupations was restricted by statute only so long as the organization that obtained the statute seemed to represent all practitioners.

227. Competition is significant in three of the categories. Concerns with effective competition caused businesses to approximate the requirements of statutes governing market practices. Restrictions on access to occupations would have limited competition within the occupation. The labor statutes can be thought of as attempts to limit the consequences of competition for jobs—working longer than eight hours a day and in the face of likely injury.

228. Accepted values, common in public discourse, framed all but the labor issues. Interests in property were raised by both sides in arguments about the statutes that were ultimately repeated. Although they disagreed on how to achieve it, both proponents and opponents of the statutes regulating market practices argued in terms of effective competition. The effort to limit access to occupations worked so long as the claim held that the limitation promoted the "public welfare." By contrast, the goals of the labor statutes could be accomplished only with constitutional amendments resolving highly disputed values.

rather than its separation from, legislative choice.²²⁹ These theories might free scholarly energy for more attention to the competing values that are the subject of constitutional choice.²³⁰ The study suggests that there are opportunities to participate in setting values within the Constitution. The existence of interaction between court and legislature means that constitutional choice is worked at over time, yet often within our time, and fed by experience.²³¹ We need not confine our efforts to after-the-fact review of judicial opinions that are the final word nor to arguments about the proper limits on the final choices of judges.

Finally, face the conflict between case-based understandings

229. G. CALABRESI, *supra* note 1, at 166 & n.3, argues that "dialogue [between court and legislature to ask or force the legislature to define the old rule or reaffirm the new] is of a piece and performs the same function in legitimating judicial power as the incremental nature of case-by-case adjudication performed at common law."

When a focus on judicial opinion is maintained, the questions might become ones about the symbolic aspects of judicial review—about the judicial opinion as a form of political discourse. Griffiths, *Is Law Important?* 54 N.Y.U. L. REV. 339 (1979); Leff, *Law and*, 87 YALE L.J. 989, 1006-08 (1978).

230. See Parker, *supra* note 22; Perry, *supra* note 22.

231. Lawyers from the period and a current judge remind us of the possibility and importance of participation. William Dameron Guthrie and Elihu Root coolly appraised constitutional decisions from earlier in this period as they fought late in it against intense criticism of the constitutional choices of the courts. Guthrie argued for "fairness and temperance in discussing the decisions of our courts and for the imperative necessity of founding these discussions upon the truth." Address by William Guthrie, Pennsylvania State Bar Association, Eighteenth Annual Meeting, Cape May, N.J. (June 25, 1912), in W. GUTHRIE, *MAGNA CARTA AND OTHER ADDRESSES* 69 (1916). It was clear to these two lawyers that although judicial decisions about the constitutionality of statutes sounded like the final word, they did not have to be the final word.

When a court of last resort has said the law is thus and so, and the law as so declared bars the way of some popular movement, the true remedy is, not to threaten the court with extinction or its members with punishment unless they will decide against their convictions; but it is to set the lawmaking body in operation to change the law, and if a majority of the people wish the law changed it will be done.

Presidential Address by Elihu Root, New York State Bar Association, Annual Meeting, New York City (Jan. 19, 1912), in *ADDRESSES ON GOVERNMENT AND CITIZENSHIP BY ELIHU ROOT* 451 (R. Bacon & J. Scott eds. 1916). Their views were colored by the fact that each of these men seem firmly to have believed that the interests of all classes could be reconciled.

Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971), after acknowledging that "constitutional adjudication may properly proceed somewhat as does common law adjudication," describes the role he sees for law professors:

Perhaps the most important function of law professors, besides teaching, is to help the courts in this creative process. If it is proper for the Court to make fundamental value choices to protect our constitutional rights and liberties, then it is self-defeating to say that if the justices cannot come up with a perfectly reasoned general opinion *now*, then they should abstain from decision altogether.

Id. at 778-79. Brest, *supra* note 7, at 1109, hopes for "citizen participation in the community's public discourse and responsibility to shape its values and structures," but sees that as first requiring "a genuine reconstruction of society."

and work beyond cases. The results of this study are inconsistent with the case-based assumptions usually brought to constitutional law scholarship. Other studies that work beyond cases are likely to produce similar conflicts. These conflicts can be met either by challenging the studies or by accepting the conclusions of the studies and reconsidering case-based assumptions and the theories that inform them. At the least neither of these alternatives ignores or avoids the conflict. Ironically, avoiding the conflict may be made easier by the presence in law schools of the very people who can help us work beyond cases. Increasingly law schools have become the academic homes for historians, sociologists, anthropologists, psychologists, philosophers. Because their training is "beyond cases," they constitute a valuable resource for any of us moving in that direction. Ideally we will learn from them and rely on them. The danger, however, is that the need for work beyond cases will be acknowledged but left to them on the basis of their expertise, our fear or everyone's inertia.