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TRIANGULATING LAW AND POLITICAL- ECONOMIC DEVELOPMENT

Jonathan Chausovsky*

JAMES ELY, JR., *THE CONTRACT CLAUSE: A CONSTITUTIONAL HISTORY* (UNIVERSITY PRESS OF KANSAS 2016). PP. 384. HARDCOVER \$45.00.

JOHN A. FLITER, *CHILD LABOR IN AMERICA: THE EPIC STRUGGLE TO PROTECT CHILDREN* (UNIVERSITY PRESS OF KANSAS 2018). PP. 328. HARDCOVER \$50.00. PAPERBACK \$24.95.

ERIC LOMAZOFF, *RECONSTRUCTING THE NATIONAL BANK CONTROVERSY: POLITICS AND LAW IN THE EARLY AMERICAN REPUBLIC* (UNIVERSITY OF CHICAGO PRESS 2018). PP. 256. HARDCOVER \$90.00. PAPERBACK \$30.00.

Contractual rights, money and banking, and labor are surely central to the myriad of ways in which law can intersect with political development. The three books here each take up one of these elements in very different ways.¹ Each covers different ranges of history: Eric Lomazoff looks primarily at the early national era up through Andrew Jackson's veto of the rechartering bill of the Bank of the United States in 1832; James Ely's narrative on the Contract Clause spans the entire history of the Constitution; and John Fliter's focus on child labor primarily takes place during the Progressive Era and the New Deal. The resolution of these issues at given moments in time sets the stage for conflict at a later time. The resulting conflict sometimes is over the same issue and sometimes sets the stage for conflict in a tangential issue area. Though the issues are fundamentally economic, eventually, social issues are implicated—and in case of child labor, indicated directly. The sum allows us to triangulate the complexity of elements in law and political economy that can drive policy change. There is no grand unified theory here: these books are very different, and that variety provides its own richness.

The place of *McCulloch v. Maryland*² is well entrenched in American political historiography and doctrinal development, and one might expect there would be little new

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1. JAMES ELY, JR., *THE CONTRACT CLAUSE: A CONSTITUTIONAL HISTORY* (2016); JOHN A. FLITER, *CHILD LABOR IN AMERICA: THE EPIC STRUGGLE TO PROTECT CHILDREN* (2018); ERIC LOMAZOFF, *RECONSTRUCTING THE NATIONAL BANK CONTROVERSY: POLITICS AND LAW IN THE EARLY AMERICAN REPUBLIC* (2018).

2. 17 U.S. 316 (1819).

to learn. But Eric Lomazoff does just that by identifying the dog that did not bark: the Coinage Clause. When teaching *McCulloch*, some of my students have suggested this clause could justify the requisite Congressional power; I have typically responded by observing that no key actor used it in 1791, the year the First Bank was established, nor in 1819, when *McCulloch* was decided. After all, at the time, the concept of a central bank as a regulator of the money supply was poorly understood. *Reconstructing the National Bank Controversy* explodes this notion.

Lomazoff presents a series of stylized vignettes to several chapters that capture the central elements of conventional understandings. Though this might turn off some readers, I find it effective. He has a good mind for disaggregating conceptual distinctions. For example, he distinguishes three distinct standards of necessity used in the debates on the First Bank. The first is functional necessity, which is the classic debate over whether “necessary” means “absolutely necessary,” or merely “useful.”³ The second is a federal understanding: was a state-based alternative available?⁴ The third standard concerns whether this is a power typically exercised by other sovereign governments.⁵ Even if the Bank survived the first standard, it could fail on the second, should other banks exist. Notably, Lomazoff claims that opponents did not coalesce around one single objection; Representative Michael Jenifer Stone of Maryland, for one, argued the bank must satisfy all three standards.⁶ In 1791, no arguments addressed the Coinage Clause nor a monetary function.

In the succeeding years, multiple branches of the National Bank were created, as were many state-chartered banks. An open question in 1791 was whether two note-creating banks could coexist in the same city. By the end of the decade, it was clear they could; each accepted the others notes and settled accounts regularly. The Federal Bank, being larger, usually held credit for state bank notes after settlement. It used this leverage to regulate credit creation: if a state bank exceeded a reasonable multiple, the Federal Bank could present its notes for redemption. This tended to constrict excessive state bank lending. Lomazoff draws on Streeck and Thelen to characterize this as institutional drift—an institution taking on a crucial function distinct from the original purpose.⁷ Circumstance and luck appear to have played a role in the Bank’s behavior: it did not act as a predator. Lomazoff credits its twenty-year, time-limited charter combined with two related factors. First, excessively limiting local banks would be “political suicide,” in that it would have engendered political opposition to a recharter.⁸ Second, the Bank’s monetary function was made apparent from economic events.⁹

3. LOMAZOFF, *supra* note 1, at 25, 27.

4. *Id.* at 20.

5. *Id.*

6. *Id.* at 25.

7. *Id.* at 30; see also WOLFGANG STREECK & KATHLEEN THELEN, *Introduction: Institutional Change in Advanced Political Economies*, in *BEYOND CONTINUITY: INSTITUTIONAL CHANGE IN ADVANCED POLITICAL ECONOMIES* 1, 26 (Wolfgang Streeck & Kathleen Thelen eds., 2005).

8. LOMAZOFF, *supra* note 1, at 60.

9. *Id.* at 64. This was also an age of insider lending, done in part as a means of credit monitoring. See NAOMI R. LAMOREAUX, *INSIDER LENDING: BANKS, PERSONAL CONNECTIONS, AND ECONOMIC DEVELOPMENT* (1983). It is also in an age where the person and the office were not necessarily separated. See, e.g., BRIAN PHILLIPS MURPHY, *BUILDING THE EMPIRE STATE: POLITICAL ECONOMY IN THE EARLY REPUBLIC* (2015).

Lomazoff productively directs substantial attention to the recharter battles of 1811, 1815, and 1816. By 1811, Jeffersonians were divided: some adopted the functionalist argument that there was no enumerated power that justified a bank, and others articulated the federal argument, pointing to existing state banks.¹⁰ Recharter supporters noted the bank had gained legitimacy by its existence over twenty years; new branches added during Jefferson's presidency further supported its constitutionality. Other supporters noted its monetary regulatory function. Interestingly, Henry Clay claimed this regulatory power was itself not enumerated and was therefore unconstitutional.¹¹ With a split Jeffersonian-Republican coalition, the recharter failed.¹²

The War of 1812 placed immense stress on Government finances.¹³ State banks suspended specie payments during wartime and delayed resumption. This resulted in excessive note circulation, overextended lending, and inflation. To reenact a bank, members of Congress needed to either revise their views or find a new justification for one. Following a rejection of a new charter in 1815, Secretary of the Treasury Alexander J. Dallas in 1816 predicated the bank not on the power to borrow, but on the Coinage Clause.¹⁴ The constitutional question concerned whether this referred only to physical coins, or to a broader definition of money. Lomazoff argues the 1816 legislation was a compromise that allowed a Republican coalition to finesse its divide on the Sweeping Clause.¹⁵

When this charter was challenged in *McCulloch v. Maryland*,¹⁶ there was no discussion of the Coinage Clause nor an account of the bank as a monetary actor.¹⁷ Yet, in 1819, the 1816 debates were recent history. Lomazoff notes also that Maryland's purpose in enacting a tax was to raise revenue, and wonders why Maryland did not simply concede the constitutionality of the bank—thus rendering the first part of John Marshall's opinion unnecessary. Lomazoff suggests that perhaps it was Marshall himself who raised this question, but he does not have direct evidence, and does not pursue it further.¹⁸ But, arguably, the misdirection by Marshall in *McCulloch* approaches that in *Marbury v. Madison*.¹⁹

Members of Congress did refer to the coinage argument in the late 1820s. Albert Gallatin was recruited to write an article justifying the bank based on the power to regulate the currency in the recharter episode of 1832. And, President Andrew Jackson addressed the Coinage Clause argument in his veto message, claiming the regulatory power could not be delegated to a corporation—identifying the problem as delegation, not existence of

10. LOMAZOFF, *supra* note 1, at 78–79.

11. *Id.* at 89.

12. *Id.* at 94.

13. *Id.* at 100.

14. *Id.* at 112–13; *see also* U.S. CONST. art. I, § 8, cl. 5.

15. LOMAZOFF, *supra* note 1, at 112. He leaves open the question of Madison's view of the Coinage Clause argument.

16. *Id.* at 126.

17. *Id.* at 130.

18. *Id.* at 124–25, 128, 133. This is a good example of where Lomazoff follows his evidence as far as it goes, but no further.

19. 5 U.S. 137 (1803); *see* Sanford Levinson, *Why I Do Not Teach Marbury (Except to Eastern Europeans), and Why You Shouldn't Either*, 38 WAKE FOREST L. REV. 553 (2003).

Congressional authority.²⁰ Jackson, thus, did accept the monetary power in principle.

Lomazoff concludes by trying to connect the 1816 justification for the Bank to the logic used for the creation of the Federal Reserve in 1913, as well as more recent justifications. He notes that Justice Strong, in *Knox v. Lee*,²¹ declined to specifically overrule Justice Chase's decision in *Hepburn v. Griswold*²² that the Coinage Clause only referred to actual metal coins. He suggests that Strong could have done so, and speculates that Strong could have had Clay and Calhoun in mind—but this is only thinly supported by evidence offered.²³

Reconstructing the National Bank Controversy is thought provoking (though at times a bit more contentious than seems necessary).²⁴ The constitutional question of whether to read the Coinage Clause narrowly, as physical coins only, or broadly to include all forms of money implies economic learning. How should advances in economic theory impact the interpretation of the Coinage Clause? Should it change when political actors implement theoretical developments? After all, for decades after, many prominent Americans thought of specie as being “real,” ranging, at least, from Thomas Hart Benton during antebellum years, to Ron Paul in a colloquy with Ben Bernanke in 2011.²⁵

Bray Hammond, commenting on the development of a fractional reserve ratio of five-to-one (five dollars lent out for each dollar in specie), stated: “I doubt if one banker in four clearly understood what he was doing and what made it sound and proper.”²⁶ According to Hammond, when the continued existence of the bank was debated, neither John Adams nor Thomas Jefferson thought it was legitimate. Hammond suggests that even Hamilton did not think it was legitimate in 1791, when the Bank was debated. But Lomazoff shows that fractional reserve banking flourished in the 1790s—even if people did not understand the what level of reserve ratio was required to establish a stable monetary system. Richard Sylla et al. demonstrate Hamilton directed monetary actions in the panic of 1792.²⁷ In the financial wake of the War of 1812, and in debates in 1816, it is clear that many legislators recognized the monetary regulatory function.

Lomazoff characterizes *McCulloch* as an example of departmentalism.²⁸ But this seems to ignore the last two sentences of that decision's first paragraph, where Justice Marshall declares: “[A]nd if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the constitution of our country

20. LOMAZOFF, *supra* note 1, at 142, 151, 153.

21. 79 U.S. 457 (1871).

22. 75 U.S. 603 (1869).

23. LOMAZOFF, *supra* note 1, at 161–64. Given that elsewhere Lomazoff is careful not to exceed his evidence, the speculation here is striking.

24. For example, Lomazoff speculates that Jerry Mashaw, in not mentioning Jackson's delegation argument must likely have read an edited version of Jackson's veto message; perhaps, or perhaps not. *See id.* at 154 (referring to JERRY MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST 100 YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012)).

25. On Benton, see BRAY HAMMOND, *BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR* 341 (1957); Daniel Indiviglio, *Bernanke to Ron Paul: Gold Isn't Money*, ATLANTIC (July 13, 2011), <https://www.theatlantic.com/business/archive/2011/07/bernanke-to-ron-paul-gold-isnt-money/241903/>.

26. HAMMOND, *surpa* note 25, at 275.

27. *See* Richard Sylla, Robert E. Wright & David J. Cowen, *Alexander Hamilton, Central Banker: Crisis Management During the U.S. Financial Panic of 1792*, 83 BUS. HIST. REV. 61 (2009).

28. LOMAZOFF, *supra* note 1, at 130–31.

devolved this important duty.”²⁹ It is ambiguous as to whether this statement exemplifies mere judicial review, where the judiciary has authority when a dispute comes before it, or whether it exemplifies what Keith Whittington terms judicial supremacy—that not only must the Supreme Court decide on constitutionality, but the other governmental branches are then bound to follow its interpretation.³⁰ Mere judicial review is consistent with departmentalism, judicial supremacy certainly is not. To me, *McCulloch* seems ambiguous on this point (though tending towards the latter). Regardless, Justice Marshall’s (purposeful?) omission of the Coinage Clause is significant.

James Ely, Jr.’s *The Contract Clause* spans the entire history of the Constitution with a singular doctrinal focus. A similar effort has apparently not been taken up since Benjamin F. Wright’s 1938 analysis.³¹ The legal history provided is both detailed and extensive, exploring the vast permutations of the clause’s applications. The chapters are organized by chronological time period, and sections within each chapter concern areas of dispute that often recur in multiple chapters. Examples include Public Contracts, Bankruptcy Laws, and Judicial Impairments. Ely argues, contra to Wright, that the founding generation intended the Contract Clause to apply to contracts where the state is a party, as well as those between private parties.³² While evidence from the Philadelphia Convention as to the purposes of the clause is thin, he provides some evidence that state contracts were meant to be included.

The Marshall Era evidences strengthened use of the clause. The analysis of *Fletcher v. Peck*,³³ for example, centers not on judicial review of state legislation, but whether contracts where the state is a party are covered by the clause.³⁴ The *Trustees of Dartmouth College v. Woodward* case, striking down a state law altering the college charter, is characterized as upholding contemporary perspectives, although treating charitable corporate charters as contracts.³⁵ More interesting is action in the states. A debt relief law in North Carolina asserted the importance of enforcing contractual obligations, while at the same time distinguishing the right from the remedy. Yet, the delays inherent in the judicial process served to provide temporary relief for debtors to reorganize their affairs.³⁶ This would recur, in other times and circumstances.

The Taney period is portrayed as substantially continuing the Marshall Court doctrine. The *Charles River Bridge* decision,³⁷ that state-granted contracts did not extend to implicit features, modified *Dartmouth College* and sought to minimize monopoly rights, but it maintained the preferred position of contracts. Yet the Contract Clause did not take precedence over the power of eminent domain; a state could, with just compensation,

29. *McCulloch v. Maryland*, 17 U.S. 316, 401 (1819).

30. KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* xi (2007).

31. See BENJAMIN F. WRIGHT, JR., *THE CONTRACT CLAUSE OF THE CONSTITUTION* (1938).

32. ELY, *supra* note 1, at 18–22.

33. 10 U.S. 87, 137 (1810).

34. ELY, *supra* note 1, at 32–35.

35. *Id.* at 36–39; *Dartmouth College v. Woodward*, 17 U.S. 518 (1819).

36. ELY, *supra* note 1, at 43–44.

37. *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837). This decision ruled that the state could build a competing bridge irrespective of an existing state grant for a bridge over the same river.

abrogate a contractual grant.³⁸ So too for police powers.³⁹ But a state could issue tax exemptions that would bind future legislatures—with three Southern Justices objecting strenuously, fearing apparently for states rights.⁴⁰ So there were serious conceptual tensions in which state sovereign powers could not be bargained away via contracts made by the state and state sovereign power which could. One significant difference between Marshall and Taney concerned the relation of a contractual right and its remedy: Marshall conceived of them as distinct, while Taney conceived of right and remedy as intrinsically connected.⁴¹ But the question is whether parties in advance might reasonably anticipate whether remedy might be altered later. In *Bronson v. Kinzie*,⁴² the Taney Court ruled that a legislature could bind its successors in some areas; this strengthened the rights of those with state contracts. But during financial panics, some state-level courts granted the validity of debt relief laws, contra to Supreme Court rulings.⁴³

Civil War and Reconstruction inevitably raised questions related to times of war. Were wartime debts contracted with Confederate currency satisfied if paid with notes that had since become severely devalued? Could equity as a principle prevail over the strict terms of the contracts? Were debts that were contracted for slaves but not paid valid in the wake of the Thirteenth Amendment?⁴⁴ Does the immorality of slavery, now abolished, impact prior slave purchase contracts, where a creditor makes a claim for the sale? These questions vexed the courts. The answers provide an interesting gloss on the “meeting of the minds” theory of contract—here the meeting of the minds did not control the outcome, yet this was well before Holmes made his contribution to contract theory where he criticized the “meeting of the minds” conception. Holmes instead advocated objective standards.⁴⁵

A gradual decline and then precipitous fall followed. During the Gilded Age, the artificiality of the distinction between right and remedy was increasingly recognized. Eliminating debtor’s jail might have weakened the chances of a creditor recouping their loss, but society and the courts considered the practice archaic.⁴⁶ Debt relief measures were enacted during economic downturns, designed particularly to alleviate those in distressed rural communities.⁴⁷ Whether corporate charters should be characterized as contracts was disputed,⁴⁸ and railroad rates, even if publicly contracted, were subject to succeeding regulations.⁴⁹ Justice Shiraz wrote for a unanimous Court that contracts made for public purposes, pursuant to a legislative act, were subject to revision. A subsequent

38. ELY, *supra* note 1, at 76–77.

39. *Id.* at 77–78.

40. *Id.* at 82–85.

41. *Id.* at 88.

42. 42 U.S. 311 (1843).

43. ELY, *supra* note 1, at 89–93.

44. *Id.* at 113–14.

45. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: THE CRISIS OF LEGAL ORTHODOXY* 35–38 (1992); see also Oliver Wendell Holmes, *The Path of the Law*, in *COLLECTED LEGAL PAPERS* 167, 181 (Harcourt, Brace & Howe Inc. 1920).

46. ELY, *supra* note 1, at 149.

47. *Id.* at 151–52.

48. *Id.* at 152–55.

49. *Id.* at 155–57.

legislature could change the terms of the law without violating the Contract Clause.⁵⁰ Elements of public policy exposed stresses on distinctions between policies that could infringe on the Contract Clause right, and those that could not. Thus debts could be discharged under bankruptcy law, and police powers could be upheld against claims that the exertion of the power reduced contracted property values.⁵¹ By the end of the Gilded Age, the Due Process Clause was increasingly supplanting the Contract Clause as protection for economic rights.

Even prior to the New Deal, new economic developments led to increasing stress on a strict construction of the Clause. For example, rent controls in Washington, D.C. and New York City during World War I led to questions of what constitutes an emergency, and whether courts could review legislative decisions to declare an emergency.⁵² But *Home Building & Loan Ass'n v. Blaisdell* was the watershed moment, with Chief Justice Hughes providing rationales for allowing legislative moratoriums on mortgage contracts.⁵³ Certainly the New Deal financial crisis was an emergency, and that declaration by Hughes might have indicated some limitations. But by the early 1940s, Justice Frankfurter declared that the exertion of state police power could be implied for all contracts, thus permitting legislatures to do what they wanted, as opposed to emphasizing the sanctity of contracts as the basis of a free society.⁵⁴

Ely provides an extensive history of private Contract Clause disputes over debt relief laws, dating to at least the 1807 economic stress, with more following the War of 1812.⁵⁵ When analyzing *Blaisdell*, he critiques the New Deal Court's use of balancing tests, rather than absolute prohibition of contracts. However, he does not place the use of balancing tests in context; Morton Horwitz identifies Holmes as providing the first theoretical justification for use of a balancing test in his 1894 essay "Privilege, Malice, and Intent."⁵⁶ Ely does not wrestle with this legacy. Further, by the Great Depression, the economy was vastly more interconnected than before, and economic theory had advanced substantially. While the Marginal Revolution of the 1870s could support a strict interpretation of the Contract Clause, Keynes' *General Theory* and Schumpeter's *History of Economic Analysis* suggest substantially more room for governmental intervention, particularly in a crisis. And a strict Coasean view merely need adopt Frankfurter's view that the possibility of government intervention can be implied for all contracts. The lack of perfectly clear and stable property rights may reduce overall social output, but it is the world of politics that impinges on it.⁵⁷ Or to put it another way, the "need for speed" that Howard Schweber

50. *Id.* at 164.

51. ELY, *supra* note 1, at 162.

52. *Id.* at 198.

53. 209 U.S. 398 (1934).

54. ELY, *supra* note 1, at 232–33. The relevant opinion was *E. N.Y. Savings Bank v. Hahn*, 326 U.S. 230 (1945).

55. ELY, *supra* note 1, at 43.

56. HORWITZ, *supra* note 45, at 131; Oliver Wendell Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 5 (1894).

57. On marginalism, see R.D. COLLISON BLACK, A.W. COATS & CRAWFORD D.W. BLACK, *THE MARGINAL REVOLUTION IN ECONOMICS: INTERPRETATION AND EVALUATION* (1973); JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY* (1964); JOSEPH A. SCHUMPETER, *HISTORY OF ECONOMIC ANALYSIS* (1996); Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937).

identifies during the period of railroad expansion provided the sort of economic impetus for legal alteration of property rights, Contract Clause or not.⁵⁸ And Coase did not care what the law was, only that it was clear and stable. Given the Schumpeterian creative destruction process of new industries supplanting existing businesses, a regulatory role for the state could help smooth the transition. If so, then Frankfurter's assertion that government action can be implied for all contracts provides a solution: the role of government is expected, and the resulting property rights regime sufficiently clear and stable enough to satisfy that Coasean imperative.

While Ely laments the demise of the Contract Clause during the New Deal, John Fliter celebrates the demise of the worst forms of child labor in that same time period. The landmark cases of *Hammer v. Dagenhart*⁵⁹ and *United States v. Darby*⁶⁰ bracket one of the seminal conflicts in American constitutional development concerning the powers of the Federal Government: *Hammer* struck down a child labor law, and was expressly overturned in *Darby*. An effort seeking to glean the essence of the political disputes over the labor issues from within the four corners of the United States Reports leads to a truncated understanding. Fliter's *Child Labor in America* provides a corrective.

He begins depicting the child labor problem as it developed in the first industrial revolution, starting with the decline of the guild system. Child labor for some families was an economic good. Children worked in jobs requiring manual dexterity, such as textiles, and in dangerous conditions, such as coal mines. Many became poisoned from arsenic, nicotine, or coal dust and worked extremely long hours. In the late 1800s, piecework performed in tenements of urban areas by parents and children added a new dimension to the child labor problem.

Few states enacted child labor laws. The patchwork of state labor bureaus produced uneven record gathering, inspection, and enforcement. In many Southern states laws were nonexistent. The federal government haltingly began to investigate conditions, including an 1892 investigation of the sweating system. The 1898 Industrial Commission report identified evidence of widespread child labor and found little justification for it. A review of state laws found state labor laws did work in the states that enacted them and also connected child education needs to the child labor problem.⁶¹

The National Child Labor Committee (NCLC) was formed in 1904. It initially focused on information gathering, public education, and state-level action, including mandatory education. Indiana Senator Albert Beverage was the principle legislative sponsor for a federal child labor law. His first bill proposed a ban on interstate shipment of goods made with child labor; this ostensibly would fall under the Interstate Commerce Clause and was consistent with *Champion v. Ames*.⁶² It would be a model for the bill that was enacted a decade later. President Roosevelt committed only to an investigative bureau, while opponents feared loss of state autonomy.

58. HOWARD SCHWEBER, *THE CREATION OF AMERICAN COMMON LAW, 1850–1880: TECHNOLOGY, POLITICS, AND THE CONSTRUCTION OF CITIZENSHIP* (2004).

59. 247 U.S. 251 (1918).

60. 312 U.S. 100 (1941).

61. FLITER, *supra* note 1, at 35–36.

62. *Id.* at 58–65; *Champion v. Ames*, 188 U.S. 321 (1903).

The Keating-Owen Act of 1916 adopted much of Beveridge's proposed content.⁶³ This led to the *Hammer v. Dagenhart* drama, where the Supreme Court ruled the Act exceeded congressional power. Fliter effectively narrates the legal arguments surrounding the apparent inconsistencies in Due Process and Commerce Clause jurisprudence at the time. Activists were confident that the moral and health concerns of children could justify the exemption of child labor from the Due Process doctrine that privileged contractual liberty. But of course *Hammer* ruled that since the articles made by children were harmless, the morality-based exceptions did not apply. This is well known. But Fliter provides evidence that the Keating-Owen Act actually did reduce incidences of child labor, only to increase again following *Hammer*.⁶⁴ State laws continued to vary, and states with lax laws did attract employers seeking low-wage labor.

After this defeat, advocates shifted their tactics to the Taxation Clause, by taxing the profits of firms using children fourteen years or younger. This seemed more likely to survive judicial review in light of *McCray v. United States*,⁶⁵ which upheld a tax on oleomargarine. Opponents in the Senate filled the Congressional Record in anticipation of a legal challenge; they asserted that tax revenue was pretextual and that the act would regulate areas properly left to states. Nonetheless, it was enacted and also was effective in reducing employment of children.⁶⁶ Opponents brought test cases before sympathetic Federal Judge James Boyd in North Carolina—the same judge who struck down the Keating-Owen Act. On appeal, the Supreme Court struck it down, with Chief Justice Taft distinguishing this issue from other permitted federal taxes (such as on phosphorous matches and narcotics).⁶⁷

Stymied again, child advocates sought to amend the Constitution to allow Congress to regulate child labor. One constitutional issue concerned language. An early version used “employment,” but because some children work with parents off the payroll, advocates favored the word “labor.”⁶⁸ But this caused concern because it seemed to include work done on a farm. A second issue concerned whether concurrent state power should be included in the text. A proposal for ratification by state conventions failed.⁶⁹ The Child Labor Amendment then passed both Houses overwhelmingly; it did not include an expiration date.

Interest groups mobilized on both sides for state ratification debates. Opponents claimed that these were socialist ideas that would lead to federal encroachment and the destruction of parental authority. The Catholic Church came out against it, seeing it as a vehicle that, combined with education laws, would weaken Catholic schools and parental authority. It received nearly unanimous defeat in Southern states. But it also failed spectacularly in an advisory referendum in Massachusetts, and then in the New York State Legislature.⁷⁰ A renewed effort to ratify the Amendment came during the Great

63. FLITER, *supra* note 1, at 86–87; Keating-Owens Act, ch. 432, 39 Stat. 675 (1916).

64. *Id.* at 95–96.

65. 195 U.S. 27 (1904).

66. FLITER, *supra* note 1, at 101–06.

67. *Id.* at 114–17; *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

68. FLITER, *supra* note 1, at 139–40.

69. *Id.* at 140.

70. *Id.* at 150–54.

Depression. Fourteen states ratified the Amendment in 1933, and several states passed more restrictive child labor laws.⁷¹

The National Industrial Recovery Act (NIRA) included codes for labor that restricted child labor. Franklin Delano Roosevelt issued a blanket code effective to end of 1933, limiting work to those at least sixteen years old, with some minor exceptions. The effect was significant: over 100,000 children “lost” work as a result.⁷² Success of the codes slowed momentum for Child Labor Amendment.

After *A.L.A. Schechter Poultry Corp. v. United States*⁷³ invalidated NIRA, the incidence of child labor again increased. This in turn led to renewed efforts to ratify the Child Labor Amendment. By late 1930s, twenty-eight states had ratified the Child Labor Amendment, still short of the thirty-six needed.⁷⁴ It is one of six constitutional amendments approved by Congress that remains “out there” unratified. There were concerns “that the Supreme Court might hold that the Amendment was not ratified in a reasonable amount of time”⁷⁵—an interesting episode in light of the Twenty-Seventh Amendment’s unusual 201-year path to ratification. Kentucky and Kansas each ratified it in the 1930s, reversing earlier rejections. This led to litigation and a ruling that the earlier rejections had no legal significance.

The 1937 “Switch in Time” clearly provided the federal government authority to regulate. Despite this, the Fair Labor Standards Act (FLSA) that would implement some regulations was hotly contested and revised multiple times. The FLSA moved out of the House Rules Committee only with a discharge petition. It was initially defeated on the floor of the House (a first for FDR), before being resurrected in shorter form. It was enacted, but only after another discharge petition got it to the floor of the House.⁷⁶ This was the law upheld in *United States v. Darby* and which explicitly overruled *Hammer v. Dagenhart*.

Each of these monographs depicts economic learning and the impact on law. Early Americans learned about the monetary function, mid-century Americans discovered the challenge of displacement by more advanced technological developments, and child labor advocates learned that state-based regulations did not work in an increasingly interconnected world. The triangulation of these narratives can serve as a sort of substitute for overarching theories of political economic development. The turn of the century economist Edwin R.A. Seligman noted that, for all its flaws, Marx presented the first theory of historical development.⁷⁷ In that approach, the economic base determines much of the societal superstructure. While over-determined, there is something in the core of economic changes that impact other changes. Other attempts to provide a comprehensive developmental logic, such as critical realignment theory, have unsurprisingly fallen

71. *Id.* at 158–59.

72. *Id.* at 161–62.

73. 295 U.S. 495 (1935).

74. FLITER, *supra* note 1, at 185.

75. *Id.* at 180.

76. *Id.* at 200–04.

77. EDWIN R.A. SELIGMAN, *THE ECONOMIC INTERPRETATION OF HISTORY* 26–27 (2d ed. 1907); *see also* WILLIAM H. SHAW, *MARX’S THEORY OF HISTORY* (1978).

short.⁷⁸ Whether intending to do so or not, each of these works sheds light on ways in which the thickening of the political and economic universe was filtered through legal structures. And a fair reading allows us to recognize the inevitable tension in the change.

The intersection in some instances is direct. The *Legal Tender Cases*, for example, are significant for Ely because they explore how stresses on complications with contracts, and political-economic predilections of the Justices, most notably Justice Chase, impact contract doctrine. For Lomazoff, the significance is the extent to which the Coinage Clause debates from 1816 and 1832 managed to find their way into the consciousness of the Justices. The episodes serve different purposes, and the divergent purposes have distinct implications for economic policy in each work. Some caution and humility seems warranted as a result. Different authors identify different stress points, even within the same legal opinion. Each follows the logic to its logical conclusion. But the different foci of the authors suggest multifaceted sets of implications, whereby the researcher's perspective drives the conclusion.

Emergencies, unsurprisingly, impact each narrative, whether financial stress of the War of 1812, of contracts made in confederate dollars during the Civil War, or child labor in the Great Depression. The latter provides both a death knell for the Contract Clause, while simultaneously providing opportunity for progress on child labor legislation. The same New Deal that eviscerated the Contract Clause empowered government to implement the culmination of a decades-long movement to eradicate child labor. Each work identifies the many veto points, complicated processes, and obstacles to enacting significant social legislation in the United States. One author gnashes his teeth, while the others celebrate, but for very different reasons. Would it have been possible to have federal authority of child labor without limiting the reach of the Contract Clause?

Reading these books in tandem suggests a vibrancy for exploring the intersection of economic developments and law, and they suggest a myriad on multidirectional interactions and effects. The scholarly triangulation process, of course, requires a multitude of such monographs read by a single observer. The hope is that eventually the sum is even greater than the parts.

78. See generally, e.g., THE END OF REALIGNMENT? INTERPRETING AMERICAN ELECTORAL ERAS (Byron E. Shafer ed., 1991); DAVID R. MAYHEW, ELECTORAL REALIGNMENTS: A CRITIQUE OF AN AMERICAN GENRE (2002). Stephen Skowronek's theory on presidential regimes wraps developmental logic within a political regime structure. STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: PRESIDENTIAL LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH (1993). Bruce Ackerman's theory of constitutional moments arguably is consonant with realignment theory but does place constitutional conflict at the center. BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).