

THE COURT-PACKING PLAN AS SYMPTOM, CASUALTY, AND CAUSE OF GRIDLOCK

*Barry Cushman**

By the summer of 1936, President Franklin Roosevelt was convinced that the New Deal was the victim of gridlock. The problem, to be sure, was not in the Congress. During Roosevelt's first term the Democrats enjoyed commanding majorities in both the House and the Senate,¹ and most of the President's legislative agenda had been enacted with bi-partisan support and few dissenting votes.² The problem was instead with the federal judiciary, and more particularly, with the Supreme Court of the United States. Though the Court had narrowly upheld the Administration's monetary policy in the *Gold Clause Cases*³ early in 1935, it had also struck down the National Industrial Recovery Act's (NIRA) oil program on nondelegation grounds in the *Hot Oil Case*.⁴ Later that spring the Court held that the Railroad Retirement Act of 1934 did not pass constitutional muster.⁵ On what New Dealers called "Black Monday" in May of 1935, a unanimous Court finished off what remained of the NIRA in *Schechter Poultry*,⁶ struck down the Frazier-Lemke Farm Debt Relief Act,⁷ and held that the President did not have authority to remove a Commissioner of the Federal Trade Commission.⁸ In January of 1936, a divided Court invalidated the Agricultural Adjustment Act.⁹ A few months later, the Court pronounced the Guffey Coal Act unconstitutional.¹⁰ And

© 2013 Barry Cushman. Individuals and nonprofit institutions may reproduce and distribute copies of this Article in any format at or below cost, for educational purposes, so long as each copy identifies the author, provides a citation to the *Notre Dame Law Review*, and includes this provision in the copyright notice.

* John P. Murphy Foundation Professor of Law, University of Notre Dame. Thanks to Patty Cushman, Rick Garnett, and Randy Koziel for helpful comments.

1 See 2 CONGRESSIONAL QUARTERLY, GUIDE TO CONGRESS 1305 (6th ed. 2008).

2 See Barry Cushman, *The Limits of the New Deal Analogy*, 15 GREEN BAG 2D 139, 140–44 (2012).

3 *Perry v. United States*, 294 U.S. 330 (1935); *Nortz v. United States*, 294 U.S. 317 (1935); *Norman v. Balt. & Ohio R.R.*, 294 U.S. 240 (1935).

4 *Pan. Ref. Co. v. Ryan*, 293 U.S. 388 (1935).

5 See *R.R. Ret. Bd. v. Alton R.R.*, 295 U.S. 330 (1935).

6 *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

7 See *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

8 See *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

9 See *United States v. Butler*, 297 U.S. 1 (1936).

10 See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

although that spring saw the Tennessee Valley Authority survive a constitutional challenge,¹¹ in June the Court held that the State of New York did not have the power to prescribe minimum wages for women working in industry.¹² In the view of Roosevelt and of many others, a recalcitrant Court was preventing the country from achieving necessary recovery and reform.

The President saw this gridlock as the product of partisan divisions. In a campaign address at Baltimore, Maryland in October of 1932, candidate Roosevelt had observed that “[a]fter March 4, 1929, the Republican Party was in complete control of all branches of the [f]ederal [g]overnment—the [e]xecutive, the Senate, the House of Representatives[,] and, I might add for good measure, the Supreme Court as well.”¹³ The 1932 elections would place the legislative and executive branches in the control of the Democrats, but the lack of any vacancies during Roosevelt’s first term would prevent him from changing the complexion of the nation’s highest Court. And though he would greet some early judicial setbacks with aristocratic equanimity,¹⁴ the carnage of Black Monday would prompt him to chastise the Justices for their “‘horse and buggy interpretation’” of the Commerce Clause.¹⁵ The negative reaction to this criticism of the Court would lead Roosevelt to keep his own counsel on the issue in future public remarks.¹⁶ He studiously avoided raising the Court as an issue during the 1936 campaign.¹⁷ But privately, as Tommy Corcoran told Henry Hopkins, “the President was thoroughly aroused ‘and determined to prevent’ the Court from blocking what he believed to be the very fundamentals of our democracy.”¹⁸ As Professor Marian McKenna reports, Roosevelt was determined not to “permit the Supreme Court to wreck any more of his attempts to achieve reform and recovery.”¹⁹

11 See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288 (1936).

12 See *Morehead v. New York ex rel. Tiplado*, 298 U.S. 587 (1936).

13 Franklin D. Roosevelt, U.S. President, Campaign Address at Baltimore, Md. (Oct. 25, 1932), in 1 *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 831, 837 (1938).

14 In the wake of the *Hot Oil* decision in January of 1935, Roosevelt told reporters, “You and I know that in the long run there may be half a dozen more court decisions before they get the correct language, before they get things straightened out according to correct constitutional methods.” ARTHUR M. SCHLESINGER, JR., *THE POLITICS OF UPHEAVAL* 255 (1960).

15 MARIAN C. MCKENNA, *FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR* 113 (2002).

16 See *id.* at 114–15, 172–73; ROBERT SHOGAN, *BACKLASH: THE KILLING OF THE NEW DEAL* 20 (2006).

17 See MCKENNA, *supra* note 15, at 173, 223, 227, 263–64; WILLIAM G. ROSS, *THE CHIEF JUSTICESHIP OF CHARLES EVANS HUGHES, 1930–1941*, at 101 (2007); SHOGAN, *supra* note 16, at 25–27; BURT SOLOMON, *FDR v. THE CONSTITUTION* 85 (2009).

18 ROBERT E. SHERWOOD, *ROOSEVELT AND HOPKINS* 89 (1948).

19 MCKENNA, *supra* note 15, at 172.

R

R

R

Following his landslide re-election in November of 1936, the President began again to air his concerns about the Court.²⁰ In his Annual Message to Congress delivered on January 6, 1937,²¹ Roosevelt alluded to what he regarded as the Court's cramped construction of the Constitution, which was in his view frustrating the efforts of the Administration and Congress to alleviate public suffering. He asserted:

During the past year there has been a growing belief that there is little fault to be found with the Constitution of the United States as it stands today. The vital need is not an alteration of our fundamental law but an increasingly enlightened view with reference to it. Difficulties have grown out of its interpretation; but rightly considered, it can be used as an instrument of progress and not as a device for prevention of action.²²

It was "not to be assumed that there will be prolonged failure to bring legislative and judicial action into closer harmony. Means must be found," he insisted, "to adapt our legal forms and our judicial interpretation to the actual present national needs of the largest progressive democracy in the modern world."²³ After expressing confidence that the Executive and Legislative branches of the national government would "continue the task of making democracy succeed," the President remarked that "[t]he judicial branch also is asked by the people to do its part in making democracy successful."²⁴ At a dinner in March of 1937 celebrating the Democrats' overwhelming victories in the 1936 general election, FDR returned to his earlier equine theme, bemoaning the fact that the Supreme Court had stymied the New Deal at nearly every turn.²⁵ "I defy anyone to read the opinions concerning A.A.A., the Railroad Retirement Act, the National Recovery Act, the Guffey Coal Act[,] and the New York Minimum Wage Law," he challenged his audience, "and tell us exactly what, if anything, we can do for the industrial worker in this session of the Congress with any reasonable certainty that what we do will not be nullified as unconstitutional."²⁶ "For as yet there is no definite assurance that the three horse team of the American system of government will pull together."²⁷ The three horses to which the President referred, as he made clear in a nationally broadcast fireside chat five days later, were "the

20 See *id.* at 263 ("A seething rage had been building in Roosevelt for a long time. The November landslide had swollen an already substantial ego. He was more cocky, aggressive, vindictive, vengeful, and determined to punish those who had defied him.").

21 See 81 CONG. REC. 84 (1937).

22 *Id.* at 85.

23 *Id.*

24 *Id.* at 86.

25 See Franklin D. Roosevelt, U.S. President, Address at the Democratic Victory Dinner (Mar. 4, 1937), in 1937 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 113, 113 (1941) [hereinafter, Victory Dinner Address].

26 *Id.* at 119.

27 *Id.* at 116.

three branches of government—the Congress, the Executive[,] and the Courts.”²⁸ As he had put it at the victory dinner,

[i]f three well-matched horses are put to the task of ploughing up a field where the going is heavy, and the team of three pull as one, the field will be ploughed. If one horse lies down in the traces or plunges off in another direction, the field will not be ploughed.²⁹

The President lamented that “[t]wo of the horses are pulling in unison today; the third is not.”³⁰

The President and his advisors considered a variety of proposals to break this impasse. The 1936 Democratic Platform had pledged the Party to do so through “‘a clarifying amendment’” to the Constitution, should that prove necessary.³¹ This was a solution that Roosevelt had contemplated for some time,³² but one that he ultimately rejected.³³ The principal reason that he chose not to pursue this course, the President explained, was that it might too easily fall victim to the gridlock virtually encoded in the Constitution’s Article V amendment process.³⁴ There was nothing approaching consensus in the Congress on how such an amendment ought to be worded, and

[i]t would take months or years to [secure] substantial agreement upon the type and language of an amendment. It would [then] take months and years thereafter to get a two-thirds majority in favor of that amendment in *both* Houses of the Congress.

Then would come the long course of ratification by three-fourths of all the States. . . . [P]owerful economic interests [such as] . . . newspaper publishers, Chambers of Commerce, Bar Associations, [and] Manufacturers’ Associations

28 Franklin D. Roosevelt, U.S. President, A “Fireside Chat” Discussing the Plan for Reorganization of the Judiciary (Mar. 9, 1937), *in* 1937 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 122, 123–24 [hereinafter Fireside Chat].

29 Victory Dinner Address, *supra* note 25, at 116.

30 Fireside Chat, *supra* note 28, at 124.

31 SOLOMON, *supra* note 17, at 85; *see* NATIONAL PARTY PLATFORMS, 1840–1972, at 362 (Donald Bruce Johnson & Kirk H. Porter eds., 1973); SHOGAN, *supra* note 16, at 25–26.

32 *See* MCKENNA, *supra* note 15, at 114.

33 *See* JOSEPH ALSOP & TURNER CATLEDGE, THE 168 DAYS 28–29 (1938); LEONARD BAKER, BACK TO BACK 130 (1967); SHOGAN, *supra* note 16, at 119–20; William E. Leuchtenburg, *Franklin D. Roosevelt’s Supreme Court “Packing” Plan*, *in* ESSAYS ON THE NEW DEAL 69, 73 (Harold M. Hollingsworth & William F. Holmes eds., 1969).

34 In addition, Roosevelt and some of his advisors felt that the problem lay with the Court rather than the Constitution, and that amending the Constitution would appear to be conceding that cases invalidating New Deal measures had been correctly decided. *See* ALSOP & CATLEDGE, *supra* note 33, at 28; MCKENNA, *supra* note 15, at 114; William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt’s “Court-Packing” Plan*, 1966 SUP. CT. REV. 347, 386. FDR was also concerned that any such amendment, as well as any legislation enacted pursuant to it, would remain subject to review and interpretation by a hostile judiciary. *See* Alsop & Catledge, *supra* note 33, at 28; BAKER, *supra* note 33, at 131; Fireside Chat, *supra* note 28, at 132; Leuchtenburg, *supra* note 33, at 73.

R
R
R
R
R
R
R
R

would line up to oppose any such amendment, and would prevent it from being “ratified within anything like a reasonable time.”³⁵ Moreover, “thirteen States which contain only five percent of the voting population could block ratification even though the thirty-five States with ninety-five percent of the population are in favor of it.”³⁶ To embark upon “the time-consuming process of amendment” would be to fall into a trap set by the opponents of “social and economic legislation along modern lines.”³⁷

The President and his advisors therefore settled on the Court-packing plan, which would permit Roosevelt to appoint an additional justice for each sitting justice who had reached the age of seventy without retiring. Because there were at the time six Justices who had celebrated their seventieth birthdays, the bill would have permitted the President immediately to enlarge the Court’s membership from nine to fifteen. The proposal encountered fierce opposition in the press³⁸ and from a variety of organizations and interest groups.³⁹ Key New Deal constituencies, such as farm groups and organized labor, either opposed the plan or damned it with faint praise rather than delivering any substantial support.⁴⁰ Congressional offices were flooded with

35 Fireside Chat, *supra* note 28, at 131.

36 *Id.*

37 *Id.* at 131–32; see ALSOP & CATLEDGE, *supra* note 33, at 28–29; BAKER, *supra* note 33, at 130–31; Leuchtenburg, *supra* note 33, at 73; Leuchtenburg, *supra* note 34, at 360, 384–85; Letter from Franklin D. Roosevelt, President, U.S., to Felix Frankfurter, Justice, U.S. Supreme Court (Feb. 9, 1937), in ROOSEVELT AND FRANKFURTER 381, at 381–82 (Max Freedman ed., 1967). The Administration also considered bills that would have required a supermajority of the Court to invalidate legislation or would have restricted the Court’s appellate jurisdiction, but these proposals were ultimately found wanting. The former proposal was rejected, first, because it was of doubtful constitutionality and almost certainly would be voided by a Court jealous of its prestige, and second, because it would dilute the Court’s power to protect citizens from infringements of their civil liberties. The latter proposal was rejected principally because the lower federal courts, which had not been particularly hospitable to the New Deal, would still retain the power of judicial review. See ALSOP & CATLEDGE, *supra* note 33, at 29; Leuchtenburg, *supra* note 34, at 386–87; Letter from Franklin Roosevelt to Felix Frankfurter, *supra*, at 382.

38 See ALSOP & CATLEDGE, *supra* note 33, at 71–72; SHOGAN, *supra* note 16, at 122; SOLOMON, *supra* note 17, at 110, 113–14.

39 See ALSOP & CATLEDGE, *supra* note 33, at 73; MCKENNA, *supra* note 15, at 313–14; 2 MERLO J. PUSEY, CHARLES EVANS HUGHES 753 (1951); SOLOMON, *supra* note 17, at 110, 113–14, 166.

40 See ALSOP & CATLEDGE, *supra* note 33, at 59, 115–17, 164–76, 181; BAKER, *supra* note 33, at 86–88, 202–03; MCKENNA, *supra* note 15, at 381–83; 2 PUSEY, *supra* note 39, at 753; SHOGAN, *supra* note 16, at 210–11; SOLOMON, *supra* note 17, at 167–69. Shogan argues that the contemporary sit-down strikes and disapproval of Roosevelt’s handling of them undermined public support for organized labor and for the Court-packing proposal. See SHOGAN, *supra* note 16, at 154–55, 175, 209–10, 238–39; see also SOLOMON, *supra* note 17, at 135 (“Opinion polls showed that three fourths of Americans – and three out of five factory workers – opposed the sit-down strikes”).

R

R
R

R

R
R

R
R

R
R

R

mail that ran heavily against the plan,⁴¹ which never commanded the support of a majority in any of the public opinion polls taken by George Gallup and Elmo Roper throughout the struggle.⁴² Nevertheless, the 1936 elections had given the Democrats dominant supermajorities in both the House and the Senate, and this provided good reason to hope that the bill would be approved in roll call votes on the floors of those chambers.⁴³ But neither the President’s bill nor a later substitute proposal would ever come to such a vote. This fact can be attributed in large measure, I suggest, to two institutional features of Congress. The first is the committee system; the second is the Senate filibuster.

Roosevelt’s decision not to consult congressional leaders before announcing his proposal alienated many of the men on whose aid he would rely in shepherding the proposal through the national legislature.⁴⁴ Among these was House Judiciary Committee Chairman Hatton Sumners, a Texas Democrat. Sumners was of the view that the impasse could be broken were Justices Van Devanter and Sutherland to retire, and was confident that they could be induced to do so were Congress to enact adequate judicial pension legislation. He quickly rushed such a measure to passage in the House, and his bill had become law by March 1.⁴⁵ But Sumners was adamantly opposed to the Court-packing plan.⁴⁶ When the President announced his proposal on February 5, Sumners told his colleagues, “Boys, here’s where I cash in my chips.”⁴⁷ Within days of the bill’s introduction in the House, Sumners had assembled a comfortable majority of the Judiciary Committee in opposition to the measure,⁴⁸ which would enable him “to keep the bill bottled up in his committee all summer.”⁴⁹ As Professor McKenna explains, the bill “could be reported to the full House by the committee only if compelled to do so, either by a discharge petition signed by 218 members to relieve the committee of any further consideration of the measure or by a vote to suspend House rules, which required a two-thirds majority.”⁵⁰ Neither of these tactics

41 See ALSOP & CATLEDGE, *supra* note 33, at 70–71; MCKENNA, *supra* note 15, at 303–04; JAMES T. PATTERSON, CONGRESSIONAL CONSERVATISM AND THE NEW DEAL 87–88 (1967); SHOGAN, *supra* note 16, at 123; SOLOMON, *supra* note 17, at 112–13.

R

42 See SOLOMON, *supra* note 17, at 115, 184, 219–20; Barry Cushman, *Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s*, 50 BUFF. L. REV. 7, 68–70 (2002).

R

R

43 See ROSS, *supra* note 17, at 113; SOLOMON, *supra* note 17, at 111.

44 See MCKENNA, *supra* note 15, at 293–94, 317; 2 PUSEY, *supra* note 39, at 753; SHOGAN, *supra* note 16, at 119.

R

R

45 See ALSOP & CATLEDGE, *supra* note 33, at 77; MCKENNA, *supra* note 15, at 266, 301–02, 317, 335–37; SHOGAN, *supra* note 16, at 82–84, 123–24; SOLOMON, *supra* note 17, at 125–26.

R

R

46 See MCKENNA, *supra* note 15, at 314–16.

R

47 ALSOP & CATLEDGE, *supra* note 33, at 67; SHOGAN, *supra* note 16, at 121.

R

48 See MCKENNA, *supra* note 15, at 316; ALSOP & CATLEDGE, *supra* note 33, at 88; SHOGAN, *supra* note 16, at 123–24.

R

R

49 SHOGAN, *supra* note 16, at 124.

R

50 MCKENNA, *supra* note 15, at 316.

R

was considered wise by Sumners’s fellow Texas Democrat, House Majority Leader Sam Rayburn, nor were they supported by Speaker of the House William Bankhead,⁵¹ an Alabama Democrat who deeply resented the fact that Roosevelt had excluded him from discussions concerning the formulation of the plan.⁵² Were they to employ such tactics, they feared, “it would be at a cost of so much ill will that final passage in the House, after Senate action, would prove impossible. Chances for a victory in the Senate, given that body’s factions, would be seriously impaired, and possibly destroyed.”⁵³ They ultimately persuaded the President—after considerable effort—that the Senate should consider the bill first. This decision was formally announced on February 18—nearly two weeks after the bill was first introduced, and hearings were not to begin until March 8.⁵⁴

For proponents of the bill, “this was their first significant setback.”⁵⁵ The Administration would have preferred to proceed first in the House,⁵⁶ whose members faced re-election every two years and thus were “more dependent on presidential good graces”—and more amenable to White House pressure—than were their counterparts in the Senate. “The Senate, who individual members enjoyed much greater status and privilege, would be a tougher nut to crack.”⁵⁷ But the roadblock created by the opposition of Sumners and his colleagues on the House Judiciary Committee left the Administration with no alternative.⁵⁸ As Professor McKenna observes, the President “was powerless before the resistance he experienced from the Democratic House leaders.”⁵⁹

In the Senate, the Democrats held seventy-five of the ninety-six seats. Yet in mid-February, Roosevelt’s Secretary of the Treasury, Henry Morgenthau, gave the bill no more than a fifty-fifty chance of passage by that chamber.⁶⁰ Here again, the committee system posed a formidable obstacle. The Senate Judiciary Committee was chaired by Democrat Henry Fountain Ashurst of Arizona, who publicly supported the bill but was privately unenthusiastic about it. Ashurst took pride in claiming the title “Dean Emeritus of Inconsis-

51 See *id.*; ALSOP & CATLEDGE, *supra* note 33, at 88–89.

52 See MCKENNA, *supra* note 15, at 293.

53 *Id.* at 316 (footnote omitted).

54 See *id.* at 316; see also *id.* at 453 (“Bankhead and Rayburn listened patiently, but they then told FDR flat out they would have nothing to do with his proposal [to pry the bill out of committee through a discharge petition]. Rayburn was furious at this attempt ‘to make the House do the administration’s dirty work,’ as he put it, and in a needless battle.”).

55 SHOGAN, *supra* note 16, at 124.

56 See MCKENNA, *supra* note 15, at 314, 317.

57 SHOGAN, *supra* note 16, at 124. Indeed, Roosevelt’s efforts to use his patronage powers to induce individual Senators to support the plan were largely unsuccessful. *Id.* at 134–35.

58 See *id.* at 124; MCKENNA, *supra* note 15, at 316–17; see also SHOGAN, *supra* note 16, at 121 (Sumners’ opposition “laid the groundwork for a rebellion that would rock the Roosevelt presidency and the New Deal to its foundations”).

59 MCKENNA, *supra* note 15, at 453.

60 *Id.* at 330.

R

R

R

R

R

R

R

tency.”⁶¹ Months later, when a constituent congratulated him on his “heroic stand” on the Court-packing bill, Ashurst replied, “Which stand?”⁶² The White House was anxious to bring the bill to the floor as soon as possible, and asked Ashurst to agree to a time limit on the hearings of two weeks per side. But Ashurst and his colleagues on the Committee refused to comply.⁶³ Opposition Senators subjected Administration witnesses to “exhaustive questioning”—Roosevelt advisor Jim Farley denounced it as “heckling”—with the questioning consuming “as much time as actual testimony.”⁶⁴ At the end of two weeks of testimony, fewer than half the Administration’s witnesses had been heard. The opposition graciously suggested that the Administration take more time. But White House point men Tommy Corcoran and Joe Keenan suspected that the opposition was engaged in “a deliberate attempt to drag the hearings out.”⁶⁵ With help from Ashurst, who relished “conducting this clandestine campaign against the bill,” “the opposition was in effect conducting ‘a subterranean filibuster.’”⁶⁶ “An exasperated Corcoran therefore . . . decided to call no more witnesses.”⁶⁷

Yet this decision to close down the Administration’s case after two weeks of testimony did not prevent the opposition from dragging out the hearings indefinitely.⁶⁸ The opposition Senators responded by calling a parade of seventy witnesses.⁶⁹ Neither the Administration nor Committee members who favored the bill could persuade Chairman Ashurst to curtail the proceedings.⁷⁰ Hints even began to circulate that the bill “would never be brought out of the committee.”⁷¹ In Professor McKenna’s assessment, “[w]ily Chairman Ashurst’s delaying tactics were paying off. Covertly he was doing everything he could to defeat the bill . . .”⁷² “FDR’s own team was outsmarted by the friendly, smiling Senators [Nebraska Democrat Edward] Burke and Ashurst and an endless queue of witnesses.”⁷³

The hearings did not finally come to a close until April 23, by which time it was clear that the Committee would report the bill out unfavorably.⁷⁴ The Committee did not take its formal vote until May 18, when by a margin of 10-8 it recommended that the bill not pass and that an adverse report be prepared. A series of compromise proposals offered by the President’s allies

61 *Id.* at 396.

62 *Id.* at 364.

63 *See id.* at 364; SHOGAN, *supra* note 16, at 135; SOLOMON, *supra* note 17, at 141.

64 MCKENNA, *supra* note 15, at 363–64.

65 *Id.* at 364.

66 *Id.*

67 *Id.*; ALSOP & CATLEDGE, *supra* note 33, at 120–24; BAKER, *supra* note 33, at 149; SOLOMON, *supra* note 17, at 198.

68 *See* MCKENNA, *supra* note 15, at 363–65, 393.

69 *Id.* at 405.

70 *Id.* at 395; SOLOMON, *supra* note 17, at 198.

71 MCKENNA, *supra* note 15, at 395.

72 *Id.* at 443.

73 *Id.* at 365.

74 *See id.* at 405; BAKER, *supra* note 33, at 173.

R

R

R

R

R

R

R

R

were also rejected by a similar margin.⁷⁵ And the Committee did not file its blisteringly critical report until June 14, nearly two months after the conclusion of the hearings, and more than four months after the bill had first been introduced in the Senate.⁷⁶ In July of 1937 Attorney General Homer Cummings complained to his diary that

the set-up of the Judiciary Committee was known to be adverse from the beginning and, under the archaic procedure in the Senate, public measures are more or less at the mercy of the Committee to which they are submitted. The Senate Judiciary Committee exercised its power to the limit. It had public hearings unnecessarily drawn out and, after such hearings were closed, held the measure for weeks before reporting upon it. In the meantime the most terrific barrage of propoganda was let loose upon the administration, the President, and all of the friends of judicial reform. We stood up under this pretty well for quite a long while, but they had more money and more newspapers than we had.⁷⁷

On August 1, Cummings listed eleven “factors which tended to disintegrate our strength.”⁷⁸ The first factor listed was “[t]he long delay by the Senate Judiciary Committee in taking testimony and afterwards in filing a report.”⁷⁹

This use of the hearings “as a delaying tactic” was not merely an effort to postpone the inevitable.⁸⁰ Opposition Senators pushing floor consideration of the bill deeper into the session—into “late summer when everyone wanted to escape the heat of the capital”⁸¹—recognized that this would increase the likelihood that the measure could be blocked by a filibuster. They understood that “[t]ime was the enemy, not the ally, of the court bill.”⁸² Administration officials objected so strenuously to the delays because they knew that the sooner the bill came to the floor, the easier it would be to pass it. In fact, they had submitted the bill to Congress in early February precisely to avoid the danger of a filibuster late in the session.⁸³

Plans for such a filibuster had begun to crystallize as early as late February.⁸⁴ Under the rules then in force, a cloture motion required a two-thirds vote of the Senate, which meant that debate could be prolonged indefinitely

⁷⁵ See ALSOP & CATLEDGE, *supra* note 33, at 209; MCKENNA, *supra* note 15, at 460–61; SHOGAN, *supra* note 16, at 200; SOLOMON, *supra* note 17, at 198–99.

⁷⁶ See MCKENNA, *supra* note 15, at 480–87; ROSS, *supra* note 17, at 131–32; SHOGAN, *supra* note 16, at 206–07; SOLOMON, *supra* note 17, at 220.

⁷⁷ Diary of Homer Cummings (July 21, 1937) (on file with the University of Virginia Library).

⁷⁸ Diary of Homer Cummings (Aug. 1, 1937) (on file with the University of Virginia Library).

⁷⁹ *Id.*

⁸⁰ MCKENNA, *supra* note 15, at 406.

⁸¹ *Id.* at 442.

⁸² *Id.* at 406, 441–42.

⁸³ See *id.* at 364–65.

⁸⁴ See BAKER, *supra* note 33, at 68, 151–52; WALTER F. MURPHY, CONGRESS AND THE COURT 59 (1962); PATTERSON, *supra* note 41, at 94–95.

by the vote of thirty-three Senators.⁸⁵ On February 26, Republican Senator Arthur Capper of Kansas wrote to William Allen White, “I think the Roosevelt program in its present form is blocked. I feel quite certain we have enough votes to upset him.”⁸⁶ At about that time “[a]n opposition Democrat told [Idaho Republican Senator William] Borah that there were already forty-two [Senators] against the bill.”⁸⁷ Borah was making

plans to filibuster the Court bill to death if enough Democrats did not defect from Roosevelt. He would talk about constitutional law and history for a month if necessary. One of his associates declared many years later that Borah had planned to fight the Court bill with his voice until he fainted with exhaustion!⁸⁸

Journalists encountered Borah at his Senate desk preparing a filibuster speech as early as March 4.⁸⁹ On March 8, a prominent Republican wrote to William Allen White, “unless there is a change of attitude caused by the tremendous propaganda of the Administration, there are enough senators pledged to speak against the President’s proposal to prevent a vote upon it.”⁹⁰ On April 1, Democratic Senator Hugo Black of Alabama told Roosevelt “that the opposition was ‘most determined’ and would exercise every means of delay.”⁹¹ The following day, Democratic Senator Frederick Van Nuys of Indiana reported that “there were forty-two Senate votes against the proposal that could absolutely be counted on.”⁹² As the opposition continued to call witnesses before the Judiciary Committee, it was clear that

[e]nough senators were already pledged to speak against the measure to prevent a floor vote by talking it to death in a filibuster. Senate and House members alike were upset over the administration’s obsession with this bill, which was blocking consideration of all other legislation. It was believed that a filibuster at some stage in early summer could get rid of it.⁹³

As Professor McKenna explains:

A filibuster in the middle of a legislative session (i.e., in April or May) almost always blew itself out and was not to be feared, but a filibuster at the end of a legislative term was risky. If the Senate failed to vote on the court bill until late July or early August, politicians wanting to avoid committing themselves on the plan one way or another could simply move for an adjournment and

85 See BAKER, *supra* note 33, at 233; SOLOMON, *supra* note 17, at 220.

86 BAKER, *supra* note 33, at 191–92 (internal quotation marks omitted).

87 MCKENNA, *supra* note 15, at 341.

88 RONALD L. FEINMAN, TWILIGHT OF PROGRESSIVISM 128 (1981).

89 *Id.* at 131.

90 BAKER, *supra* note 33, at 151 (internal quotation marks omitted).

91 MCKENNA, *supra* note 15, at 386.

92 *Id.* at 395.

93 *Id.* at 406. Thus, James MacGregor Burns concluded that by April, the chances for the bill’s passage appeared to be almost nil. JAMES MACGREGOR BURNS, ROOSEVELT: THE LION AND THE FOX 302–03 (1956); see also MCKENNA, *supra* note 15, at 379 (citing BURNS, *supra*, at 302–03 for the same proposition).

R

R

R

R

R

R

go home. In fact, they would resemble wild horses stampeding in all directions if a motion to adjourn *sine die* were to be offered.⁹⁴

The opposition's numbers only grew over time. By mid-April, an informal poll of the Senate disclosed that a majority would vote against the bill.⁹⁵ By April 22, Democratic Senate Majority Leader Joe Robinson of Arkansas knew of at least forty-five senators committed to vote against the bill.⁹⁶ Before long that number had risen to forty-seven,⁹⁷ and by early May the opposition concluded that they commanded an absolute majority in the Senate.⁹⁸ Five more polls taken in May produced the same result.⁹⁹ From mid-April, Roosevelt advisors Tommy Corcoran, Benjamin Cohen, and Robert Jackson, who feared that the measure could not be passed during the current session of Congress, began to recommend that the President allow the bill to lay over to the next session.¹⁰⁰ Senate Majority Leader Robinson was more mindful of "the disruptive effect of letting legislation hang fire, risking loss of interest," and opposed such a delay.¹⁰¹ Instead, he and others began casting about for an alternative proposal that could elicit the support of a majority in the Senate.¹⁰²

The substitute that Roosevelt ultimately settled on would have permitted him to appoint an additional justice for each sitting justice who had reached the age of seventy-five without retiring, but at a rate of no more than one per year.¹⁰³ That plan was not unveiled by Robinson until July 1,¹⁰⁴ and debate on the substitute bill did not begin until July 6.¹⁰⁵ Robinson claimed to have enough votes to pass the bill by a narrow majority.¹⁰⁶ But newspaper mogul Frank Gannett "urged senators to filibuster the substitute," assuring them that "the American public will uphold you in a filibuster."¹⁰⁷ And Roosevelt's press secretary Steve Early wrote that he detected "signs and threats and declarations of a filibuster."¹⁰⁸ As opposition Senators continued for three days to question and bait and heckle proponents who held the floor, Robinson accused his opponents of conducting a filibuster without frankly admitting it.¹⁰⁹

94 McKENNA, *supra* note 15, at 441.

95 *Id.* at 420.

96 ALSOP & CATLEDGE, *supra* note 33, at 163.

97 Leuchtenburg, *supra* note 33, at 97.

98 ALSOP & CATLEDGE, *supra* note 33, at 201.

99 McKENNA, *supra* note 15, at 444, 450–52, 471; Leuchtenburg, *supra* note 33, at 100–01.

100 McKENNA, *supra* note 15, at 441–42; SOLOMON, *supra* note 17, at 190.

101 McKENNA, *supra* note 15, at 442.

102 *Id.* at 488–91; SHOGAN, *supra* note 16, at 204.

103 ROSS, *supra* note 17, at 132; SHOGAN, *supra* note 16, at 212–13.

104 SHOGAN, *supra* note 16, at 212–13.

105 McKENNA, *supra* note 15, at 496–98.

106 *Id.* at 495; SOLOMON, *supra* note 17, at 235.

107 McKENNA, *supra* note 15, at 493.

108 *Id.* at 499 n.85 (internal quotation marks omitted).

109 *Id.* at 499, 501.

R

R

R

R

R

R

R

R

R

R

R

R

R

Robinson knew that he did not have sufficient votes to invoke cloture, and expressed doubt over how long his support would hold in the face of a filibuster.¹¹⁰ Opposition leader Senator Burton Wheeler, the Montana Democrat, had threatened that “opponents of the Court’s expansion would filibuster all summer to block the addition of even two justices,”¹¹¹ and it looked like he had the horses to deliver on his promise. The opposition had lined up groups of five senators—“quints,” as they were called—to talk for twenty-four hours per quint, “to be relieved, if necessary, by a ‘reserve squad’ of experienced filibusterers.”¹¹² Nevada’s Democratic Senator Pat McCarran declared, “I will stand in the Senate until I drop.”¹¹³ In all there were between forty-two and forty-four senators lined up to speak against the measure. “At no time in the history of successful filibusters,” wrote Professor William Leuchtenburg, “could the foes of a piece of legislation count so many Senators in their ranks as were aligned against the Court bill . . .”¹¹⁴ About half of these senators had pledged to make two full-dress speeches not only against the bill itself, but also twice again on each of the 125 pesky amendments that the opposition had prepared to prolong the filibuster. These full-dress speeches could last for anywhere between two hours to two days each. The resulting oratory, according to one account, “might well have flowed on until the 1938 election.”¹¹⁵

Robinson responded by mobilizing a series of anti-filibuster tactics, imposing “long-neglected” Senate rules limiting floor debate.¹¹⁶ It was an unwritten rule of the Senate that its written rules were not to be strictly enforced, however, and lawmakers who had not experienced such enforcement for decades “fumed” and objected “vociferously.”¹¹⁷ Professor McKenna suggests that the tactics Robinson employed “probably lost votes for the

110 BAKER, *supra* note 33, at 233–34; SOLOMON, *supra* note 17, at 220, 235.

111 SOLOMON, *supra* note 17, at 187; ROSS, *supra* note 17, at 132.

112 JEFF SHESOL, SUPREME POWER 475 (2010).

113 *Id.*

114 William E. Leuchtenburg, *FDR’s Court-Packing Plan: A Second Life, A Second Death*, 1985 DUKE L.J. 673, 682; see ALSOP & CATLEDGE, *supra* note 33, at 246, 248; WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN 150–51 (1995).

115 ALSOP & CATLEDGE, *supra* note 33, at 246, 248, 250; see BAKER, *supra* note 33, at 233–35, 239, 246–47.

116 MCKENNA, *supra* note 15, at 501; see *id.* at 501–02.

Under the new regime, no one was allowed to interrupt a speaker who had the floor without his consent, and then only for a question. No other business could be conducted by anyone except by unanimous consent, and no senator could speak more than twice on the same subject on any one “legislative day.” The Senate was not allowed to adjourn, but went into recess each evening, thereby extending the same “legislative day” until there could be a vote on the measure being debated. Under this regimen, a “legislative day” could last for two weeks or longer, depending on a ruling from the chair. In the midst of the searing heat wave, Robinson even threatened to go into all-night sessions.

MCKENNA, *supra* note 15, at 501–02; see SHOGAN, *supra* note 16, at 214; SOLOMON, *supra* note 17, at 231–32.

117 MCKENNA, *supra* note 15, at, 502; see *id.* at 501–02.

R
R
R
R
R
R
R
R
R

bill.”¹¹⁸ Agitated by the unrelenting heat wave and the spectacle unfolding on the Senate floor, Senators on whose votes Robinson had counted began to slip away.¹¹⁹ Meanwhile over in the House, on July 13 Hatton Sumners delivered a speech to more than three hundred of his colleagues. “He stated flatly that his Judiciary Committee would not report out a court bill, even if the Senate passed one. He was applauded enthusiastically, and when the speech ended he received a standing ovation.”¹²⁰ This confirmed Vice-President John Nance Garner’s long-held view that the bill could not pass the House. “Sumners would bottle the bill up in his Judiciary Committee, and the House members did not appear very anxious to dislodge the bill from his grasp.”¹²¹ That very day, as Robinson was resting at home in bed, president pro tem of the Senate Key Pittman, another Nevada Democrat, defied the Majority Leader’s direct orders and issued a ruling from the chair permitting opposition Senators to speak twice on every new amendment, thereby facilitating the conduct of the opposition filibuster.¹²² Robinson was found dead in his apartment the following morning, and with him died any hope of passing the substitute bill.¹²³ But as Professor Michael Parrish observes, “FDR’s assault on the Court faced rough sledding in Congress even before the death of Majority Leader Joe Robinson.”¹²⁴ As another scholar has concluded:

Even had [Robinson] lived, the chances of success for the [substitute bill] were dubious. Opposition in the Senate showed no signs of melting away. And even if Robinson could prevent a filibuster and gain a majority, a hostile reception awaited the measure in the House, where Hatton Sumners would lead the welcoming committee.¹²⁵

Several historians have concluded that these institutional features of Congress were likely sufficient to prevent the bill’s ultimate passage. As Professor Lionel Patenaude wrote in 1970, “Sumners’[s] opposition was probably enough to insure [the bill’s] defeat.”¹²⁶ Similarly, Professor James Macgregor Burns concluded in 1956:

That the court bill probably never had a chance of passing seems now quite clear. Roosevelt’s original proposal evidently never commanded a majority in the Senate. In the House it would have run up against the unyielding Sumners, and then against a conservative Rules Committee capable of blocking the bill for weeks. From the start Democratic leaders in the House were worried about the bill’s prospects in that chamber. Robinson’s compromise plan might have gone through the Senate if he had lived. More likely,

118 *Id.* at 502.

119 *Id.* at 502–04; SHOGAN, *supra* note 16, at 215.

120 MCKENNA, *supra* note 15, at 504.

121 BAKER, *supra* note 33, at 218.

122 SHESOL, *supra* note 112, at 488.

123 MCKENNA, *supra* note 15, at 504–05.

124 MICHAEL E. PARRISH, *THE HUGHES COURT* 183 (2002).

125 SHOGAN, *supra* note 16, at 215.

126 Lionel V. Patenaude, *Garner, Sumners, and Connally: The Defeat of the Roosevelt Court Bill in 1937*, 74 *Sw. Hist. Q.* 36, 51 (1970).

though, it would have failed in the face of a dogged Senate filibuster, or later in the House.¹²⁷

In 1953, Professor E. Kimbark MacColl similarly surmised that “from the outset the original plan had little chance of success.”¹²⁸ More recently, Professor McKenna, in her exhaustive and illuminating treatment of the Court-packing fight, concludes by associating herself with

the conclusion drawn by James MacGregor Burns in 1956 and, before his death, by James Roosevelt, the president’s oldest son, who acted as his secretary throughout the entire court fight. They agree that the battle was lost before it began. In James Roosevelt’s words, the court bill was “dead on arrival.”¹²⁹

Professor McKenna believes that the bill “had no chance of passing. The original proposal could not command a majority in the Senate, and House leaders refused to take it up. All other eventualities, planned or unplanned,” Professor McKenna argues, “such as the Hughes letter, the Court’s opinions on the Wagner and Social Security Acts, Justice Van Devanter’s retirement, and Robinson’s demise, were but passing stages in the inevitable death of the plan, rather than causes of it.”¹³⁰ Professor William Ross similarly maintains that “[c]onsideration of the bill by the more conservative, independent, and leisurely Senate helped to ensure its defeat.”¹³¹ And Professor Parrish, who has spent decades studying the period, concludes that “Roosevelt’s plan, most scholars now agree, had little chance of adoption from the beginning, a fact not lost upon the chief justice and his colleagues.”¹³² In the view of these scholars, the Court-packing plan was largely a casualty of gridlock.

The Court-packing plan was not merely a symptom and a casualty of gridlock. It also proved to be a contributing cause of gridlock. In the summer of 1937, just as the Senate was repudiating the Court-packing bill, the national economy again slid into recession.¹³³ At the same time, congres-

127 BURNS, *supra* note 93, at 314.

128 E. Kimbark MacColl, *The Supreme Court and Public Opinion: A Study of the Court Fight of 1937*, at vi (1953) (unpublished Ph.D. dissertation, University of California at Los Angeles) (on file with Mudd Library, Princeton University).

129 MCKENNA, *supra* note 15, at 561–62.

130 *Id.* at 562.

131 ROSS, *supra* note 17, at 105.

132 PARRISH, *supra* note 124, at 26. These obstacles to the enactment of the Court-packing Plan are also among the reasons leading Professor McKenna to reject the contention that the President’s proposal influenced the Court’s decisions in the spring of 1937. See MCKENNA, *supra* note 15, at xx–xxv, 436–37, 536. See generally BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* (1998) (offering reasons to doubt the existence of such a causal connection); G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000) (arguing that the Court-packing plan was a symptom rather than a cause of jurisprudential change).

133 See WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932–1940*, at 243–44 (1963); PAUL CONKIN, *THE NEW DEAL* 92 (2d ed. 1975); FEINMAN,

R

R

R

R

R

sional anxiety over federal spending and Roosevelt’s handling of the sit-down strikes continued to mount,¹³⁴ and magnified the growing dissatisfaction of many Democrats with the direction of the New Deal. The Court-packing battle, which had certainly “‘created opposition’” to the President, also “‘provided a rallying point’” around which “‘latent opposition could coalesce.’”¹³⁵ Many conservative and moderate members of the President’s party, who had stood shoulder-to-shoulder with Republicans during the Court fight, now joined with their colleagues across the aisle to further cement a bi-partisan alliance devoted to the defense of their common vision of government against any additional encroachments by the New Dealers.¹³⁶ As Professor Leuchtenburg has observed, the Court fight “deeply divided the Democratic party,”¹³⁷ “produced divisions among reformers of many types,”¹³⁸ “undermined the bipartisan support for the New Deal,”¹³⁹ and thus “helped blunt the most important drive for social reform in American history.”¹⁴⁰ As Professor James Patterson put it, “The court plan undermined Roosevelt’s powerful senatorial coalition; it alienated many western progressives and moderate Democrats; it helped to unite Republicans and to transform their strategy; and it led [Senate] conservatives of both parties to begin to work together in a bipartisan fashion.”¹⁴¹ The aftermath of the Court fight also “witnessed the formation of an effective conservative bloc in the

supra note 88, at 142–43; PATTERSON, *supra* note 41, at 188–89; SHOGAN, *supra* note 16, at 223; SOLOMON, *supra* note 17, at 258–59.

134 See FEINMAN, *supra* note 88, at 136–37; LEUCHTENBURG, *supra* note 133, at 239–43, 250, 252; MCKENNA, *supra* note 15, at 330; PATTERSON, *supra* note 41, at 134–45.

135 LEUCHTENBURG, *supra* note 114, at 156 (quoting Robert J. Maddox, *Roosevelt vs. the Court*, AM. HIST. ILLUSTRATED, Nov. 1969, at 4, 10–11); see also MCKENNA, *supra* note 15, at 301 (“Republicans now had a focal point for effective opposition to a popular leader and dominant congressional majorities. The issue promised a resuscitated and more militant opposition in a Congress where Republicans were hopelessly outnumbered, and put new hope in members of their National Committee.”); PATTERSON, *supra* note 41, at 331–32 (“Roosevelt by no means ‘caused’ the conservative coalition, but with measures such as the court plan he hastened its development”); SHOGAN, *supra* note 16, at 238–39 (“[I]n the battle to change the Court, one Democratic senator after another who had stood with Roosevelt through his first term turned against him. The gravamen of their complaint was that the New Deal had gone far enough, and perhaps too far already. Now was the time to draw the line.”); SOLOMON, *supra* note 17, at 173 (“[B]y 1935 or thereabouts, conservatives in the South and elsewhere had begun to feel that the New Deal ‘had gone far enough—or too far,’ as a historian recounted—and they worried that an expanded Court would make everything worse, by ridding the New Deal of its last constraint.”).

136 See CONKIN, *supra* note 133, at 90 (“The Court fight wasted a congressional session, . . . divided the Democratic party, [and] gave the Republican party a new lease on life”); FEINMAN, *supra* note 88, at 136–44; LEUCHTENBURG, *supra* note 133, at 252–54; PATTERSON, *supra* note 41, at 128–39; ROSS, *supra* note 17, at 133.

137 LEUCHTENBURG, *supra* note 114, at 158.

138 *Id.* at 159.

139 *Id.* at 160.

140 *Id.* at 157.

141 PATTERSON, *supra* note 41, at 126. “Before the court issue Senate Republicans had been badly divided.” *Id.* at 99. “The court proposal, however, did what no Republican

R
R
R
R
R
R
R
R
R
R
R

House.”¹⁴² Republicans “of all economic and political shadings were now united, . . . and found an unexpectedly large number of Democratic defectors”¹⁴³—including “‘previously loyal moderate Democrats’”¹⁴⁴—“at their side.”¹⁴⁵

Thus, what had “‘begun as an incident between the White House and the judiciary . . . ended as a full-scale war between the executive and its former congressional partner in which the New Deal experiment . . . became the ultimate victim.’”¹⁴⁶ Once the Court fight had concluded, “a resentful Congress was in no mood to give the President what he wanted.”¹⁴⁷ For the remainder of the regular congressional session, “Roosevelt got almost nothing he asked.”¹⁴⁸ A frustrated President responded by calling the legislators into special session that November “to pass several items of ‘must’ legislation.”¹⁴⁹ But that session also proved to be “an almost total washout. Congress adjourned a few days before Christmas without passing a single bill the President requested”¹⁵⁰ “A year after his overwhelming triumph in the 1936 election,” Professor Leuchtenburg concludes, “Roosevelt appeared to be a thoroughly repudiated leader.”¹⁵¹

The next session was little better. Congress did pass a new Agricultural Adjustment Act in February,¹⁵² and in April approved some election-year spending for public works and other programs.¹⁵³ That summer, Congress finally enacted the Fair Labor Standards Act more than a year after the Administration had first introduced the bill in May of 1937. The bill underwent substantial revision before its final passage,¹⁵⁴ and followed a tortuous path through the House. It was pried out of the recalcitrant Rules Committee only by a discharge petition, was later recommitted to the Labor Committee, and was again brought to the floor only by yet another discharge

stratagem could have done; it united Senate Republicans for the first time in some three decades.” *Id.* at 101.

142 *Id.* at 166.

143 LEUCHTENBURG, *supra* note 114, at 157.

144 *Id.* at 158 (quoting PATTERSON, *supra* note 41, at 95).

145 *Id.* at 157.

146 *Id.* (quoting Torbjorn Sirevag, *Rooseveltian Ideas and the 1937 Court Fight: A Neglected Factor*, 33 *HISTORIAN* 578, 579 (1971)).

147 LEUCHTENBURG, *supra* note 133, at 250.

148 *Id.*

149 *Id.* at 251.

150 *Id.*

151 *Id.* Roosevelt-backed agricultural legislation, fair labor standards legislation, conservation legislation, and administrative reorganization all floundered in both the 1937 general and special sessions. DEXTER PERKINS, *THE NEW AGE OF FRANKLIN ROOSEVELT, 1932–45*, at 63 (1957); see FEINMAN, *supra* note 88, at 137–39; MCKENNA, *supra* note 15, at 442; SOLOMON, *supra* note 17, at 258; WILLIAM F. SWINDLER, *COURT AND CONSTITUTION IN THE TWENTIETH CENTURY* 122 (1970) (“Congress had declared its independence of the White House . . .”).

152 LEUCHTENBURG, *supra* note 133, at 255; FEINMAN, *supra* note 88, at 138–39.

153 LEUCHTENBURG, *supra* note 133, at 257; FEINMAN, *supra* note 88, at 143.

154 See PATTERSON, *supra* note 41, at 246; SHOGAN, *supra* note 16, at 211, 228.

R
R

R

R
R

R
R
R

petition.¹⁵⁵ But this would be the New Deal’s last major legislative achievement. That spring, for instance, the House manhandled Roosevelt’s executive reorganization bill. Democratic opponents of the measure “forced a reading of the entire [eighty-two]-page bill and created innumerable other parliamentary tangles. . . . The Rules Committee also refused to grant any limitation on debate,” and found support for its position in the broader House.¹⁵⁶ Ultimately, the House rejected the bill, with a stunning 108 Democrats voting against the measure.¹⁵⁷ The anti-New Deal coalition was further strengthened by the results of the 1938 mid-term elections, in which the Republicans gained eighty-one seats in the House and eight in the Senate.¹⁵⁸ Thereafter, “Congress began to handle [Roosevelt] more roughly . . . moving aggressively to dismantle the New Deal [by] slash[ing] relief appropriations, kill[ing] Roosevelt appointments, and . . . eliminat[ing] what was left of the undistributed-profits tax” it had gutted in the previous session.¹⁵⁹ The conservative coalition further obstructed other elements of the Roosevelt program, including initiatives in monetary policy,¹⁶⁰ government lending,¹⁶¹ and housing.¹⁶² Professor Alan Brinkley has aptly called this “The End of Reform.”¹⁶³

At the end of the contentious 1939 legislative session a frustrated Florida Democrat named Claude Pepper rose on the floor of the Senate to denounce “the unrighteous partnership of those who have been willing to scuttle the American Government and the American people . . . because they hate Roosevelt and what Roosevelt stands for.”¹⁶⁴ Pepper accused this “Machiavellian alliance”¹⁶⁵ “of a deliberate attempt to sabotage the first real effort

155 See 82 CONG. REC. 1386, 1389–90, 1835 (1937); 83 CONG. REC. 7275, 7278–79 (1938); FEINMAN, *supra* note 88, at 138; LEUCHTENBURG, *supra* note 133, at 261–63; FRANCES PERKINS, *THE ROOSEVELT I KNEW* 260, 263–64 (1946); Paul H. Douglas & Joseph Hackman, *The Fair Labor Standards Act of 1938: I, The Background and Legislative History of the Act*, 53 POL. SCI. Q. 491, 509, 511–12 (1938); John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 464, 471–72 (1939); *218 Sign Petition*, N.Y. TIMES, Dec. 3, 1937, at 1; Joseph Alsop & Robert Kintner, *Louisiana Switch Sank Wages Bill*, N.Y. TIMES, Dec. 22, 1937, at 20; *Rally Democrats Behind Wage Bill*, N.Y. TIMES, Nov. 30, 1937, at 9.

156 PATTERSON, *supra* note 41, at 225.

157 FEINMAN, *supra* note 88, at 139–42; LEUCHTENBURG, *supra* note 133, at 279; PATTERSON, *supra* note 41, at 226.

158 See FEINMAN, *supra* note 88, at 144; LEUCHTENBURG, *supra* note 133, at 271–72; PATTERSON, *supra* note 41, at 288–91.

159 LEUCHTENBURG, *supra* note 133, at 272–73; see PATTERSON, *supra* note 41, at 294–99, 302–08, 311, 327.

160 See PATTERSON, *supra* note 41, at 312–15.

161 See *id.* at 318–22.

162 See *id.* at 322.

163 ALAN BRINKLEY, *THE END OF REFORM* (1995); see *id.* at 3 (“Even Franklin Roosevelt must ultimately have realized, looking back on the frustrations of his second term as president, that by the end of 1937 the active phase of the New Deal had largely come to an end.” (emphasis omitted)).

164 84 CONG. REC. 11,165 (1939).

165 84 CONG. REC. 11,166 (1939).

R

R

R

R

R

R

R

R

ever made in this [n]ation to secure for the workers of America industrial democracy and economic emancipation.”¹⁶⁶ Pepper’s words were so bitter because he believed that this “‘designing alliance’” had been far too successful.¹⁶⁷ Moreover, such obstruction of the President’s domestic agenda would persist even after the United States entered the Second World War. As Professor Patterson reports, “[f]or the rest of his presidency Roosevelt would continue to encounter strong opposition from the conservative coalition in Congress.”¹⁶⁸ Indeed, Professor Leuchtenburg maintains that “for the next quarter of a century the advocates of social change would rarely win anything but minor successes in Congress. Years later, Henry Wallace reflected: ‘The whole New Deal really went up in smoke as a result of the Supreme Court fight.’”¹⁶⁹

Of course, not all of the species of “gridlock” that surrounded the crisis of the 1930s are alike, and some might be regarded as more troubling than others. Moreover, what some vilify as “gridlock” others may valorize as legitimate “process,” and the choice of characterization may often turn on whether one favors or opposes the objective that is frustrated. The Court-Packing crisis remains illuminating and resonant in part because it managed—in a single, high-profile episode—to bring into sharp relief the gridlock-related implications of a variety of the features of our system, ranging from judicial review to Article V to the congressional committee system to the Senate filibuster. Perhaps unsurprisingly, Chief Justice Hughes appears to have taken a more sanguine view of these features than did the impatient Claude Pepper. In a speech to Congress delivered in 1939, the very year of Pepper’s diatribe on the Senate floor, Hughes remarked, “If our checks and balances sometimes prevent the speedy action which is thought desirable, they also assure in the long run a more deliberate judgment. And what the people really want, they generally get.”¹⁷⁰

166 84 CONG. REC. 11,165 (1939).

167 84 CONG. REC. 11,165 (1939).

168 PATTERSON, *supra* note 41, at 337.

169 LEUCHTENBURG, *supra* note 114, at 158; *see also* SHOGAN, *supra* note 16, at 236 (“Roosevelt’s move against the Court also contributed to the far-reaching negative consequences which he did not anticipate and certainly did not want.”).

170 84 CONG. REC. 2249–50 (1939).