

# THE JURISPRUDENCE OF THE HUGHES COURT: THE RECENT LITERATURE

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FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR, MARIAN C. MCKENNA (Fordham University Press 2002); THE HUGHES COURT: JUSTICES, RULINGS, AND LEGACY, MICHAEL E. PARRISH (ABA-CLIO 2002); THE CHIEF JUSTICESHIP OF CHARLES EVANS HUGHES, 1930–1941, WILLIAM G. ROSS (University of South Carolina Press 2007); BACKLASH: THE KILLING OF THE NEW DEAL, ROBERT SHOGAN & IVAN R. DEE (2006); FDR V. THE CONSTITUTION: THE COURT-PACKING FIGHT AND THE TRIUMPH OF DEMOCRACY, BURT SOLOMON (Walker & Company 2009).

The literature on the Supreme Court under the Chief Justiceship of Charles Evans Hughes and the tumultuous events surrounding the struggle over President Franklin D. Roosevelt's (FDR's) Court-packing plan in 1937 is vast and varied. The five recent monograph-length studies reviewed in this Article to varying degrees build upon, synthesize, and offer original contributions to that considerable body of scholarship. It is both difficult and hazardous to generalize about such a substantial corpus of scholarly work, but the antecedent literature has been grouped roughly into two types of accounts: "externalist" and "internalist."<sup>1</sup> Externalist accounts tend to see a rather sharp break in constitutional doctrine in the spring of 1937, and attribute

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1 For an instructive overview of the literature's development, see G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 13–32 (2000). For classics of the externalist literature, see EDWARD S. CORWIN, *COURT OVER CONSTITUTION* (1938); EDWARD S. CORWIN, *CONSTITUTIONAL REVOLUTION, LTD.* (1941); ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* (1941); WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN* (1995); ALPHEUS THOMAS MASON, *HARLAN FISKE STONE* (1956); ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* (1960); PAUL L. MURPHY, *THE CONSTITUTION IN CRISIS TIMES* (1972); BENJAMIN F. WRIGHT, *THE GROWTH OF AMERICAN CONSTITUTIONAL LAW* (1942). For contributions to the internalist literature, see, for example, BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* (1998); WHITE, *supra*; Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891 (1994).

that sudden change to the influence of exogenous factors such as the threat of the Court-packing plan or the impression made on the Justices by FDR's landslide re-election in 1936.<sup>2</sup> Internalist accounts tend to see the change in constitutional doctrine as more gradual and spread out over a longer period of time, and to emphasize the importance of presidential appointments to the Court in pushing doctrinal development along or in new directions. Such accounts attribute the greater success of later New Deal initiatives before the Court to legal factors such as improved constitutional conceptualization at the stages of legislative drafting, test case selection, and briefing and argument. Externalist accounts tend to view the constitutional doctrine of the period as more open-textured and attribute the selection among available doctrines (and thus case outcomes) to the political, economic, and social preferences or ideological commitments of the Justices. Internalist accounts tend to note evidence and patterns of judicial performance that are incompatible with this view, and instead tend to see the Justices as experiencing constitutional doctrine as an independent constraint on their extra-legal preferences. Externalist accounts tend to present the Justices as the moving parts in the story, and the relevant changes as the changes in the Justices' positions. Internalist accounts tend, by contrast, to emphasize adaptations by Congress and administration lawyers—made in light of the Court's decisions invalidating portions of the early New Deal—that enabled them to accommodate their regulatory objectives within the Court's evolving body of doctrine.

I want to underscore, as have scholars with perspectives as diverse as those of Professors Richard Friedman,<sup>3</sup> Laura Kalman,<sup>4</sup> Mark Tushnet,<sup>5</sup> and G. Edward White,<sup>6</sup> that this rough taxonomy can be misunderstood, and can obscure important commonalities. These terms are not best understood as denoting a stark, mutually exclusive dichotomy. Instead, they are best understood as locating explanations along a spectrum, with externalists attributing less importance to internal legal factors, and internalists ascribing less importance to certain exogenous, extralegal factors. Externalists do not deny that legal ideas sometimes operated as constraints on judicial behavior, and internalists do not deny that some external factors were sometimes relevant to constitutional adjudication. The disputed terrain is over which factors were relevant, how much constraint and how much influence each of these factors brought to bear on the Justices, and the relationships among those factors.

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2 This paragraph and the next draw upon this author's previous work. See Barry Cushman, *The Man on the Flying Trapeze*, 15 U. PA. J. CONST. L. 183, 211–12 (2012) (reviewing JEFF SHESOL, *SUPREME POWER* (2010)).

3 See Richard D. Friedman, . . . *A Rendezvous with Kreplach: Putting the New Deal Court in Context*, 5 GREEN BAG 2D 453, 455 (2002) (reviewing WHITE, *supra* note 1).

4 See Laura Kalman, *The Constitution, the Supreme Court, and the New Deal*, 110 AM. HIST. REV. 1052, 1074–75 (2005).

5 See Mark Tushnet, *The New Deal Constitutional Revolution: Law, Politics, or What?*, 66 U. CHI. L. REV. 1061, 1062 (1999) (reviewing CUSHMAN, *supra* note 1).

6 See G. Edward White, *Constitutional Change and the New Deal: The Internalist/Externalist Debate*, 110 AM. HIST. REV. 1094 (2005).

For example, in my own “internalist” work, I have incorporated a range of factors external to the law into my efforts to explain constitutional development in this period: free labor ideology;<sup>7</sup> changes in unemployment and understandings of its causes;<sup>8</sup> changes in the structure of the labor market;<sup>9</sup> changes in cultural perceptions of and self-conceptions of portions of the labor movement;<sup>10</sup> reactions to the experience of the World War and its aftermath;<sup>11</sup> the onset of an economic depression;<sup>12</sup> developments in economic integration;<sup>13</sup> the wave of sit-down strikes in 1936 and 1937;<sup>14</sup> and personnel changes on the Court, which are due to presidential appointments made for political reasons and as a result of political victories in presidential elections.<sup>15</sup> At the same time, I have attempted to show the ways in which law shaped and channeled political activity into prescribed legal forms, and how such political activity, so channeled, reconfigured the legal landscape from the inside.<sup>16</sup> The debates among internalists and externalists therefore are not about *whether* law is related to politics and other aspects of social experience. Everyone agrees that it is. The debate is instead about *how* law was related to such variables in a particular chapter in American legal and constitutional history.

It is thus a mistake to see internalist accounts as resting upon a theory of law that posits the autonomy of law from politics. To be sure, some Marxist and Critical Legal scholars have remarked upon the “relative autonomy” of law from politics,<sup>17</sup> and their views have been influential in the development

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7 See CUSHMAN, *supra* note 1, at 6, 90, 107, 139.

8 See *id.* at 90–91, 116–17.

9 See *id.*

10 See *id.* at 115, 120–21.

11 See *id.* at 119–20, 123–24.

12 See *id.* at 90–91, 117.

13 See *id.* at 217–21.

14 See *id.* at 168, 237 n.156.

15 See *id.* at 208, 224–25.

16 See *id.* at 7, 133, 162–207. See generally Barry Cushman, *The Hughes Court and Constitutional Consultation*, 23 J. SUP. CT. HIST. 79 (1998) (discussing instances in which the Hughes Court cooperated with the political branches to formulate solutions for the economic crisis of the 1930s).

17 See, e.g., EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL* 25 (1974) (“[T]he fashionable relegation of law to the rank of a superstructural and derivative phenomenon obscures the degree of autonomy it creates for itself.”); E.P. THOMPSON, *WHIGS AND HUNTERS* 262 (1975) (arguing that the law is “something more” than “a pliant medium to be twisted this way and that by whichever interests already possess effective power,” but instead “has its own characteristics, its own independent history and logic of evolution”); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 101 (1984) (“[L]egal forms and practices don’t shift with every realignment of the balance of political forces. They tend to become embedded in ‘relatively autonomous’ structures that transcend and, to some extent, help to shape the content of the immediate self-interest of social groups.”); Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940*, 3 RES. L. & SOC. 3, 4–5 (1980) (urging recognition of “the existence of legal consciousness as an entity with a measure of autonomy” and defining “legal consciousness” as “a set of concepts and intellectual operations that evolves according to a pattern of its

of some internalist thinking.<sup>18</sup> But it would be an error to view the internalist project as an effort to defend the normative or jurisprudential tenets of, say, the Legal Process School.<sup>19</sup> Internalism is not inherently a normative or jurisprudential position—it is instead an historiographical approach. Indeed, to the extent that it has any jurisprudential association, internalism may be best understood as a species of legal realism that emphasizes an often-neglected social fact about the past: that at least some, if not most Justices have experienced legal ideas and legal materials as restraints on the implementation of their own policy preferences through judicial action.

Let me illustrate this phenomenon with a few examples from the period. One commonly associates the divergence of judicial action from policy preferences with Justice Holmes, who believed that a good deal of the social legislation he voted to uphold was humbug.<sup>20</sup> But there are many other instances of such role differentiation among Justices who served on the Court during the *Lochner* and New Deal eras. For example, when future Justice Edward Douglas White was representing Louisiana in the United States Senate in 1892, he delivered a lengthy speech in opposition to the “Hatch Anti-Option Bill.”<sup>21</sup> That bill would have imposed prohibitively high excise taxes on options contracts concerning certain enumerated agricultural commodities.<sup>22</sup> During that speech Senator White maintained that the 1886 federal statute imposing an excise tax of two cents per pound on colored oleomargarine<sup>23</sup> had been “objectively” constitutional, as on its face it appeared to be

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own . . . [and] the body of ideas through which lawyers experience legal issues,” which “exercises an influence on results distinguishable from those of political power and economic interest”). Professor Gordon maintains that, as a result of this “relative autonomy,” legal forms and practices can’t be explained completely by reference to external political/social/economic factors. Gordon, *supra*, at 101. “To some extent they are independent variables in social experience and therefore they require study elaborating their peculiar internal structures . . .” *Id.*; see also MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at xiii (1977) (considering law as “autonomous”); MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 249–51 (1987) (detailing the “relative autonomy” of law); Gordon, *supra*, at 88–90 (explaining the “disengagement” of law and politics); Mark V. Tushnet, *Perspectives on the Development of American Law: A Critical Review of Friedman’s “A History of American Law,”* 1977 *Wis. L. Rev.* 81, 83 (book review) (criticizing Friedman’s “pluralist, materialist perspective”). Marxist and Critical Legal scholars are not alone in embracing such ideas. See, e.g., FREDERIC WILLIAM MAITLAND, *ENGLISH LAW AND THE RENAISSANCE* 18 (1901) (“[T]aught law is tough law.”); ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 82 (1938) (meditating on the “[t]enacity of a taught legal tradition”).

18 See CUSHMAN, *supra* note 1, at 40–41.

19 See, e.g., Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 *YALE L.J.* 2165, 2189 (1999) (suggesting such a connection).

20 This and the following four paragraphs draw on this author’s previous work. See Barry Cushman, *The Structure of Classical Public Law*, 75 *U. CHI. L. REV.* 1917, 1920–24 (2008) (reviewing DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* (2006)).

21 See 23 *CONG. REC.* 6513–20 (1892).

22 See *id.* at 5071.

23 Oleomargarine Act of 1886, ch. 840, 24 *Stat.* 209, 210.

designed to raise revenue, but “subjectively unconstitutional,” because it was in fact designed not to raise revenue but instead to regulate a matter reserved to the several states.<sup>24</sup> White insisted that as a Senator he “would not vote for a dishonest bill raising revenue,” but conceded that if he were “a judge and the bill came to me, then having passed out of this sphere and into another sphere where motives could not enter, I should say the sole question presented to me was, does it raise revenue on its face, and, if so, I would hold it constitutional.”<sup>25</sup>

White passed into that other sphere in 1894, when he was appointed to the Supreme Court by President Cleveland. In 1902, Congress amended the 1886 statute to raise the excise on colored oleomargarine from two to ten cents per pound.<sup>26</sup> The 1886 bill, in its original form, similarly had imposed a ten cent per pound excise,<sup>27</sup> a tax White had characterized as “prohibitive” in the Anti-Option Bill debate.<sup>28</sup> The constitutionality of the amended statute was challenged in *McCray v. United States*.<sup>29</sup> As he had suggested he would on the Senate floor in 1892, now-Justice White wrote for the majority upholding the tax. In an opinion laced with expressions of concern over the possibility of “judicial usurpation” eliminating “the entire distinction between the legislative, judicial and executive departments of the government, upon which our system is founded,”<sup>30</sup> White rejected the contention “that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.”<sup>31</sup> Though White believed that the statute was subjectively unconstitutional, and would have voted against it for that reason as a Senator, his conception of the judicial role prevented him from vindicating that conviction in his capacity as a Justice.

Consider next an instance involving Justice Mahlon Pitney. Section 10 of the Erdman Act of 1898 prohibited interstate carriers from requiring their employees, or any person seeking employment, as a condition of employment to enter into an agreement not to become or remain a member of a labor organization (a so-called “yellow-dog contract”).<sup>32</sup> That section further prohibited carriers from threatening any employee with loss of employment or discriminating against any employee because of his union membership.<sup>33</sup> During the debates on the bill, no member of either house of Congress suggested that this provision was unconstitutional,<sup>34</sup> and Pitney, who was then a

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24 23 CONG. REC. 6518 (1892).

25 *Id.* at 6519.

26 Oleomargarine Act of 1902, ch. 784, 32 Stat. 193, 194.

27 17 CONG. REC. 4911 (1886).

28 23 CONG. REC. 6518 (1892).

29 195 U.S. 27 (1904).

30 *Id.* at 54.

31 *Id.* at 56.

32 Erdman Act of 1898, ch. 370, § 10, 30 Stat. 424, 428.

33 *Id.*

34 For the legislative history, see S. REP. NO. 55-591, at 1-4 (1898); H. REP. NO. 55-454, at 1-3 (1898); 31 CONG. REC. 74-5566 (1897-1898).

Representative from New Jersey, voted to enact the bill.<sup>35</sup> In 1908, the Supreme Court invalidated section 10 as an infringement of the liberty of contract guaranteed by the Fifth Amendment in *Adair v. United States*.<sup>36</sup> Pitney was appointed to the Supreme Court by President Taft in 1912. In 1915, the Court heard *Coppage v. Kansas*, which reviewed the conviction of a supervisor for the St. Louis and San Francisco Railway Company for violating a Kansas statute prohibiting employers from requiring their employees to sign yellow-dog contracts.<sup>37</sup> Now-Justice Pitney wrote the majority opinion holding that *Coppage* “cannot be distinguished from *Adair v. United States*,” and that the Kansas statute therefore deprived employer and employee of the liberty of contract protected by the Fourteenth Amendment.<sup>38</sup>

The case of *United Mine Workers v. Coronado Coal Co.*<sup>39</sup> is particularly revealing. The Court had established in *United States v. E.C. Knight Co.*<sup>40</sup> that the federal commerce power, and hence the Sherman Antitrust Act, did not reach corporate consolidation in the manufacturing sector in the absence of a showing of intent to restrain interstate commerce.<sup>41</sup> Subsequent cases demonstrated that the same limiting principle also covered attempts to use the Sherman Act to enjoin or penalize labor strikes, boycotts, and disturbances at manufacturing establishments.<sup>42</sup> *Coronado Coal* was such a case. The Court unanimously reversed the Sherman Act judgment against the union that the company had secured below, holding that “[c]oal mining is not interstate commerce, and the power of Congress does not extend to its regulation as such.”<sup>43</sup> Yet Chief Justice Taft’s opinion for the Court made no effort to conceal his discomfort with the result he understood the law to require. “The circumstances,” Taft wrote, which had involved both homicide and arson committed by union members, “are such as to awaken regret that, in our view of the federal jurisdiction, we cannot affirm the judgment.”<sup>44</sup> Justice Day wrote on his return of Taft’s circulated opinion, “I agree, and regret that this gross outrage by the local union cannot be reached by federal

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35 31 CONG. REC. 5053 (1898).

36 208 U.S. 161, 172 (1908).

37 236 U.S. 1 (1915).

38 *Id.* at 6–7, 13.

39 259 U.S. 344 (1922).

40 156 U.S. 1 (1895).

41 *See id.* at 17 (noting that an indirect effect on commerce “was not enough to entitle complainants to a decree”).

42 *See, e.g.,* *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 107 (1933) (finding that the aim of a labor strike among New York steelworkers was “not for the purpose of affecting the sale or transit of materials in interstate commerce”); *United Leather Workers v. Herkert & Meisel Trunk Co.*, 265 U.S. 457, 471 (1924) (finding that a leatherworking union’s picketing campaign was an “indirect and remote obstruction” to interstate commerce).

43 *Coronado Coal*, 259 U.S. at 407.

44 *Id.* at 413.

authority.”<sup>45</sup> Justice McReynolds, on his return, wrote, “I am sorry you can’t make the scoundrels pay.”<sup>46</sup> Justice Pitney quipped, “Too true to be good.”<sup>47</sup>

Such instances were commonplace during the New Deal. Justices Stone and Brandeis each disapproved of the first Agricultural Adjustment Act (AAA),<sup>48</sup> yet they voted to uphold it.<sup>49</sup> Stone’s policy preferences ran against both the Railroad Retirement Act of 1934<sup>50</sup> and the administration’s legislation abrogating the gold clause,<sup>51</sup> yet he voted to uphold each statute.<sup>52</sup> Similarly, Brandeis opposed the gold clause legislation yet voted to uphold it;<sup>53</sup>

45 William Howard Taft, 1922 Pres. Papers, Reel 615.

46 *Id.*

47 *Id.*

48 Pub. L. No. 73-10, 48 Stat. 31 (1933). For the Justices’ disapproval of the Act, see PETER H. IRONS, *THE NEW DEAL LAWYERS* 140 (1982) (describing the report of Thomas Reed Powell to Felix Frankfurter in November of 1933 that Brandeis was “very strongly opposed” to much of the AAA); MASON, *supra* note 1, at 416 (quoting a letter dated January 9, 1936 from Stone to Charles C. Burlingham in which Stone insisted, “You do not dislike the AAA any more than I do”); MARIAN C. MCKENNA, *FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR* 128 (2002) (noting that “Justice Stone disliked the AAA and said he would not have voted for it” and that “Justice Brandeis also disliked the AAA”); BRUCE ALLEN MURPHY, *THE BRANDEIS/FRANKFURTER CONNECTION* 139–43 (1982) (“Brandeis formulated a powerful argument against what he viewed as the bigness of the AAA.”); LEWIS J. PAPER, *BRANDEIS* 345–47 (1983) (noting that Brandeis “repeatedly warned” members of the Agricultural Adjustment Administration “that they were going down the wrong path”); MELVIN I. UROFSKY, *LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION* 162 (1981) (reporting that Brandeis wrote to his daughter in April of 1934 that he saw “little to be joyous about in the new Deal measures most talked about; NRA and AAA seem to be going from bad to worse”); Allison Dunham, *Mr. Chief Justice Stone*, in *MR. JUSTICE* 229, 231 (Allison Dunham & Phillip B. Kurland eds., 1964) (“Stone regarded [the AAA] as so bad that, even four years later when I first came to know him, he would talk about it in scathing terms.”).

49 See *United States v. Butler*, 297 U.S. 1, 78–88 (1936) (Stone, J., dissenting) (arguing that the AAA should be upheld as a lawful exercise of congressional taxing power).

50 Pub. L. No. 73-485, 48 Stat. 1283 (1934).

51 H.R.J. Res. 192, 73d Cong., 48 Stat. 112 (1933) (containing what is known as the gold clause legislation). For details of Stone’s policy preferences concerning these laws, see MASON, *supra* note 1, at 393 (quoting a May 9, 1935 letter from Stone to Felix Frankfurter: “If I had been a member of Congress . . . I am certain I should have voted against [the Railroad Retirement Act]”); *id.* at 390 (noting that Stone was “sorely troubled” by the abrogation of the gold clause); Dunham, *supra* note 48, at 231 (reporting that Stone was “so incensed” that “he proposed never again to purchase government bonds”).

52 See *R.R. Ret. Bd. v. Alton R.R.*, 295 U.S. 330, 392 (1935) (Hughes, C.J., dissenting) (noting Justice Stone’s vote to uphold the Railroad Retirement Act); *Nortz v. United States*, 294 U.S. 317, 330 (1935) (upholding the gold clause legislation); *Norman v. Balt. & Ohio R.R.*, 294 U.S. 240, 316 (1935) (upholding the gold clause legislation).

53 See PAPER, *supra* note 48, at 346 (“Brandeis put aside his personal feelings and supported the majority decision that left the government’s policy intact.”); Interview by William J. Marshall with Paul A. Freund (Oct. 18, 1982) (noting that Brandeis joined the majority opinion upholding the constitutionality of the gold clause “without enthusiasm”), available at [http://nyx.uky.edu/oh/render.php?cachefile=1982OH138\\_Reed18\\_Freund.xml](http://nyx.uky.edu/oh/render.php?cachefile=1982OH138_Reed18_Freund.xml).

and though he strongly supported the objectives of the Frazier-Lemke Farm Debt Relief Act of 1934,<sup>54</sup> he wrote the unanimous opinion striking it down.<sup>55</sup> Roosevelt's Secretary of the Interior, Harold Ickes, recorded in his diary that he had spoken with Justice Roberts at a dinner party shortly after the Court had rendered its eight-to-one decision in *Panama Refining Co. v. Ryan*<sup>56</sup> (the "Hot Oil Case") invalidating certain provisions of the National Industrial Recovery Act (NIRA). Ickes's diary reveals that on that occasion Justice Roberts (who had voted with the majority) "assured me that he is entirely sympathetic with what we are trying to do in the oil matter and that he hoped we would pass a statute that would enable us to carry out our policy."<sup>57</sup>

These examples offer a corrective to suggestions that there was always a plausible legal theory available to sustain any result in a constitutional case that came before the Court, and therefore the Justices must have resorted to some extra-legal consideration to select from among the available legal theories.<sup>58</sup> It is true that, in any case that was presented to the Court, there were losing arguments that one of the litigants thought sufficiently plausible to warrant the financing of appellate litigation. In cases in which the Court reversed a lower court, there were in addition other judges who were persuaded by the legal arguments of the losing party. And in cases involving a grant of certiorari, which became increasingly common after 1925, there were at least four Justices who believed that the case was worth hearing. But the fact that other legal thinkers regarded a legal argument as respectable or even persuasive by no means implies that any particular Justice, after developing views concerning constitutional law and the role of the judiciary over the course of a long professional career, found himself in intellectual equipoise as between the legal arguments offered in a particular case. Indeed, the fact that Justices with such divergent views on issues of social policy so frequently reached unanimous decisions<sup>59</sup> belies the notion that they experienced the applicable law as so radically indeterminate.

The illustrations that I have offered are especially revealing in this regard because, with the exception of *Coronado Coal* and *Radford*, each of these cases was decided by a divided Court. It was not merely the case that a

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54 Pub. L. No. 73-486, 48 Stat. 1289 (1934).

55 See *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601-02 (1935) (holding that the Act violated the Fifth Amendment by taking private property without just compensation); PAPER, *supra* note 48, at 350 (noting that despite Brandeis's sympathy toward providing debt relief for farmers, he "could not get around the fact that [the Act] simply cut off the rights of the person holding the mortgage").

56 293 U.S. 388 (1935).

57 1 HAROLD L. ICKES, *THE SECRET DIARY OF HAROLD L. ICKES* 273 (1953).

58 For a collection of a multitude of cases in which "conservative" Justices voted for "liberal" outcomes, see Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559 (1997).

59 Eighty-five percent of the cases the Court adjudicated between 1930 and 1934 were decided by a unanimous vote. See WILLIAM G. ROSS, *THE CHIEF JUSTICESHIP OF CHARLES EVAN HUGHES, 1930-1941*, at 54 (2007).



legal argument congruent with the Justice's policy preferences had been made by one of the litigants; in these cases, that argument had been accepted by one or more colleagues on the Court. And yet in each of these cases the Justice in question resisted the temptation to join colleagues who were voting his policy preferences because he experienced the constraint of a legal idea.<sup>60</sup>

The balance of this Article is devoted, after a fashion, to an exploration of the extent to which the recent literature on the Hughes Court seeks to incorporate the internal point of view. In Part I, I seek to identify the historiographical premises undergirding each author's treatment of the subject. In Part II, I explore how those historiographical premises are reflected in each author's treatment of the substantive development of constitutional doctrine during the period. In Part III, I examine the ways in which those historiographical premises inform each author's analysis of the causal forces driving that doctrinal development. Part IV concludes.

## I. THE HISTORIOGRAPHICAL POSTURE

### A. *Shogan and Solomon*

The foundational premise of Mr. Solomon's account of the Hughes Court is that this is most emphatically not a story about law. Mr. Solomon's understanding of the judicial process is one in which a Justice is nearly always confronted with precedents adequate to support any result in the case before him, and that the Justice therefore must decide the case on the basis of criteria external to the law. As Mr. Solomon puts it, "A judge typically had precedent to rely on, yet that was only the beginning of the path toward a decision. As Cardozo had once explained, a judge's initial choice was whether to invoke precedent or to ignore it, if departing from precedent was necessary to satisfy society's needs."<sup>61</sup> Even "a judge who determined to follow precedent often faced a choice of precedents, each credible on its face, requiring decisions about which to apply and which to pass by. The outcome was ordinarily far from obvious, as the frequency of the Court's split decisions suggested."<sup>62</sup>

"Over the years," he continues, "introspective jurists have reached a strikingly similar conclusion describing a process that has little to do with the intellect."<sup>63</sup> In support of this he quotes Judge Posner as saying "[t]here is nothing on which to draw to decide constitutional cases of any novelty other than discretionary judgment,"<sup>64</sup> and as "marveling at 'the essentially personal, subjective, and indeed arbitrary character of most [Justices'] constitutional decisions.'"<sup>65</sup> And what is it that informs this discretionary judgment?

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60 For elaboration of this point, see Cushman, *supra* note 20, at 1924–27.

61 BURT SOLOMON, *FDR v. THE CONSTITUTION* 213 (2009).

62 *Id.*

63 *Id.*

64 *Id.*

65 *Id.* (alteration in original).

Typically, Mr. Solomon tells us, “it is life experience that has seemed to shape a justice’s philosophy of the law.”<sup>66</sup>

“The words of the Constitution are so unrestricted by their intrinsic meaning or by their history or by tradition or by prior decisions,” [Felix] Frankfurter [once] explained, “that they leave the individual justice free, if indeed, they do not compel him, to gather meaning not from reading the Constitution but from reading life.”<sup>67</sup>

Such a life-informed “ideology, really—of the law” provided a Justice with a “short cut” to a judicial result.<sup>68</sup> So, for example, it was “John Marshall’s presence at Valley Forge in the desperate winter of 1777–78, as General Washington begged the states to rescue his ragged army because the Continental Congress lacked the authority to compel them[ that] made him a believer in a strong central government.”<sup>69</sup> “Oliver Wendell Holmes had placed his faith in elected legislatures . . . .”<sup>70</sup> And as a result of “[l]iving on the frontier,” the Four Horsemen “trusted in laissez-faire and perceived it as woven into the Constitution.”<sup>71</sup>

For both Mr. Solomon and Mr. Shogan, therefore, the constitutional clash of the New Deal was essentially a contest between two competing schools of political economy: laissez-faire and the national welfare state. Constitutional doctrine was simply the idiom in which these ideological views were expressed, and the terms in which they were debated. Mr. Solomon’s account of American constitutional history is an exemplar of unreconstructed Progressive historiography, in which judges wielded doctrines in the service of their extra-legal preferences. “In the 1880s and 1890s,” he relates, “federal judges began to overturn hundreds of state laws, those that controlled railroad rates and the like, and by century’s end the High Court was doing the same. With pride of purpose, the justices struck down the laws they did not like.”<sup>72</sup> Mr. Solomon includes on this list the federal income tax invalidated in *Pollock v. Farmers’ Loan & Trust Co.*<sup>73</sup> in 1895 and “the child labor law in 1913.”<sup>74</sup> One assumes that here he means the Court’s 1918 decision in *Hammer v. Dagenhart*<sup>75</sup> invalidating the Keating-Owen Child Labor Law of 1916,<sup>76</sup> for the Court actually upheld the Illinois Child Labor Law against a constitutional challenge in 1913.<sup>77</sup> But it was the Court’s 1905 decision in *Lochner v. New York*,<sup>78</sup> which involved a “contortion of the Fourteenth

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66 *Id.*

67 *Id.*

68 *Id.*

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.* at 44.

73 157 U.S. 429 (1895).

74 SOLOMON, *supra* note 61, at 44.

75 247 U.S. 251 (1918).

76 Pub. L. No. 64-249, 39 Stat. 675 (1916).

77 *See Sturges & Burn Mfg. Co. v. Beauchamp*, 231 U.S. 320, 325–26 (1913).

78 198 U.S. 45 (1905) (invalidating a maximum-hour law for bakers).

Amendment,” that truly initiated an “era of laissez-faire jurisprudence, in which it was no longer considered the proper business of government to tell business what to do unless it involved a state’s narrowly defined ‘police power’ to assure its citizens’ safety and health.”<sup>79</sup> “During [Theodore Roosevelt’s] presidency,” we learn, “the Court’s *Lochner* decision locked the nation into supporting laissez-faire policies.”<sup>80</sup> In doing this, the Court “was only embodying the ethos of the age, reflecting what the body politic seemed to want. Decades of Republican presidents who believed in laissez-faire had assured this by appointing justices who accepted the principles of capitalism as their own. They obeyed the wisdom” proffered by Finley Peter Dunne’s fictional Mr. Dooley that “‘th’ Supreme Court follows th’ illicition returns.’”<sup>81</sup>

And so, Mr. Solomon tells us,

The Court made itself into the champion—indeed, the protector—of laissez-faire. The justices’ approach to the Constitution was more than a passive matter of interpretation. They saw in the Constitution what they wanted to see. They believed in a world in which property was sacrosanct, economic regulation was taboo, and the survival of the fittest—social Darwinism—was a nation’s natural route to prosperity and power.<sup>82</sup>

“Having openly taken sides, the Court laid the legal foundations that established laissez-faire as the nation’s guiding doctrine—treating Adam Smith’s economic views, a later justice would write, ‘as though the Framers had enshrined them in the Constitution.’”<sup>83</sup> During the 1920s, Chief Justice William Howard Taft “and his majority of conservatives treated property rights as beyond the reach of democracy’s experimentation.”<sup>84</sup> “[O]n the bench, Taft was unabashed in taking property’s side.”<sup>85</sup> And perhaps inadvertently, Mr. Solomon appears to suggest that there was even something faintly fascist about all of this. The new Supreme Court building, designed under Taft and completed under Hughes, “employed a special police force answering only to the Court. Alone among the lawmen in Washington, its members sported a Sam Browne belt, with its leather shoulder strap, such as Hitler favored.”<sup>86</sup>

Mr. Shogan similarly sees the Court’s decisions as giving “tangible expression” to “America’s middle-class tradition with its inherent respect for property, attachment to the established order of things, and mistrust of government.”<sup>87</sup> The Justices’ “deep-rooted devotion to laissez-faire economic

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79 SOLOMON, *supra* note 61, at 43. Curiously, Mr. Solomon counts as other manifestations of “laissez-faire jurisprudence” the Court’s decisions in the *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873), and *Plessy v. Ferguson*, 163 U.S. 537 (1896), both of which actually upheld Louisiana statutes against charges that they violated the Fourteenth Amendment. See SOLOMON, *supra* note 61, at 43.

80 SOLOMON, *supra* note 61, at 133.

81 *Id.* at 43–44.

82 *Id.* at 44.

83 *Id.*

84 *Id.*

85 *Id.* at 147.

86 *Id.* at 45.

87 ROBERT SHOGAN, *BACKLASH: THE KILLING OF THE NEW DEAL* 9 (2006).

doctrines” was “troubling,” even “threatening to the president” “in the face of the New Deal’s penchant for economic planning.”<sup>88</sup> “The role of the Supreme Court in defending the supremacy of individualism and of free enterprise, in the face of grave inequities, had made the Court the natural enemy of the New Deal.”<sup>89</sup>

For Mr. Solomon, then, the central question presented in the great constitutional cases litigated before the Hughes Court was whether this *laissez-faire*, Social Darwinist, property-protective ideology would continue to reign. As he puts it,

Something . . . of grave importance was at stake—the sort of nation that the world’s oldest constitutional democracy was to become. Would it remain the land of *laissez-faire*, in which the corporate interest was treated as tantamount to the national interest, or should the national government be allowed to champion the majority’s needs? Which would rule: property, or, as in the opening words of the Constitution, ‘We, the People’?<sup>90</sup>

The conceptualization of the conflict in these terms leads both Mr. Solomon and Mr. Shogan persistently to categorize the Justices’ decisions in the terminology of political taxonomy. They were either “liberal” or “conservative.”<sup>91</sup> “The justices,” Mr. Solomon tells us,

had formed themselves into two competing cliques that began as ideological in nature and then became personal. The three reliably liberal justices—Brandeis, Stone, and Cardozo—often left the courtroom together, in smiling conversation, and they met every week at Brandeis’s apartment on Friday afternoon to prepare for the Saturday conference.<sup>92</sup>

On the other hand, “[t]wo of the steadiest conservatives, Van Devanter and Pierce Butler, liked to share a round of golf on Sundays at Burning Tree Country Club, past the Maryland line. And all four of them, including James McReynolds, ordinarily rode together home from the Court in Justice Sutherland’s machine.”<sup>93</sup> Mr. Shogan also views Brandeis, Stone, and Cardozo as

88 *Id.* at 9, 13.

89 *Id.* at 9.

90 SOLOMON, *supra* note 61, at 6.

91 *E.g., id.* at 45, 49, 51, 53, 69, 79, 81, 157, 158, 160, 201.

92 *Id.* at 49.

93 *Id.* There is reason to doubt claims that the Four Horsemen and the Three Musketiers held such meetings to coordinate strategy. See Joseph L. Rauh, Jr. et al., *A Personal View of Justice Benjamin N. Cardozo: Recollections of Four Cardozo Law Clerks*, 1 CARDOZO L. REV. 5, 9 (1979) (noting that Joseph L. Rauh, Jr. claimed such caucuses took place). Cardozo’s clerks for the 1933, 1934, and 1935 terms, Ambrose Doskow and Alan Stroock, maintained that to the best of their knowledge there was no such liberal caucus during their tenures. See *id.* at 18, 21. Similarly, the memoir of John Knox, McReynolds’s clerk during the 1936 term, does not support Rauh’s recollection, *id.* at 9, that the Four Horsemen held regular caucuses as they drove to and from the Court building on argument and conference days. See, e.g., JOHN KNOX, *THE FORGOTTEN MEMOIR OF JOHN KNOX* 92–93, 115, 145, 151, 179, 205, 221 (Dennis J. Hutchinson & David J. Garrow eds., 2002) (describing instances in which Justice McReynolds drove to the Court either alone, with Knox, or perhaps with his messenger, Harry Parker).

“liberals,” while “the Four Horsemen of Reaction” were “conservatives.”<sup>94</sup> Stone was “the least dependably liberal of the liberals,”<sup>95</sup> while Cardozo “defended New Deal measures as vigorously as the Four Horsemen attacked them.”<sup>96</sup>

Mr. Solomon portrays McReynolds as “an unbending conservative,”<sup>97</sup> while Mr. Shogan casts him as the “archest of the archconservatives.”<sup>98</sup> Butler shared McReynolds’s “judicial philosophy,” Mr. Shogan tells us, “and to a degree his personal predilections.”<sup>99</sup> And “Justice Butler’s performance matched expectations. He was, as Justice Holmes termed him, a ‘monolith’ in his opposition to any regulation of business.”<sup>100</sup> Interestingly, Mr. Solomon characterizes Butler as “the Court’s only Catholic—in every way a conservative.”<sup>101</sup> Van Devanter and Sutherland were “similarly dedicated to the sanctity of free-market economics,” Mr. Shogan explains.<sup>102</sup> Van Devanter “believed in property rights, private enterprise, and the principle of the less government, the better.”<sup>103</sup> His “subtle skills as a negotiator eased the path to conservative rulings.”<sup>104</sup> Mr. Solomon agrees that “[l]iving on the frontier shaped the Four Horsemen’s faith in *laissez-faire*.”<sup>105</sup> He argues that Van Devanter’s “values were largely rooted in the past, faithful to a frontiersman’s *laissez-faire*”<sup>106</sup> and adds that Sutherland was a “devotee” of “social Darwinism.”<sup>107</sup> “Early on,” Mr. Shogan relates,

[Sutherland] came to believe that the U.S. Constitution was divinely inspired and that government power must be severely restricted to preserve individual liberty and economic expansion. As U.S. Senator from Utah he modified his conservative instincts enough to back Theodore Roosevelt’s economic reforms, but he opposed the constitutional amendment establishing the federal income tax.<sup>108</sup>

He was known for his “dedication to conservatism. He fought the New Deal every step of the way, claiming that only ‘self-denial and painful effort’ could solve the problems of the depression.”<sup>109</sup> On Mr. Solomon’s analysis, Van Devanter, Sutherland, and Butler “had found their fortunes on the western frontier, not as rugged individualists but as lawyers for the railroads or other

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94 SHOGAN, *supra* note 87, at 24, 163, 165.

95 *Id.* at 166.

96 *Id.* at 165.

97 SOLOMON, *supra* note 61, at 157.

98 SHOGAN, *supra* note 87, at 77.

99 *Id.* at 163.

100 *Id.* at 164.

101 SOLOMON, *supra* note 61, at 81.

102 SHOGAN, *supra* note 87, at 164.

103 *Id.*

104 *Id.*

105 SOLOMON, *supra* note 61, at 213.

106 *Id.* at 195.

107 *Id.* at 159.

108 SHOGAN, *supra* note 87, at 164–65.

109 *Id.* at 165.

corporations,"<sup>110</sup> while McReynolds, "to the Wilsonian progressives' horror, [had] revealed himself as business's dearest friend."<sup>111</sup> The Four Horsemen thus were "imbued with an unquestioned faith in laissez-faire economics,"<sup>112</sup> and together they comprised "the Court's laissez-faire bloc."<sup>113</sup> "The hostility between the liberals and the conservatives betrayed itself in open court whenever the justices wrestled over the constitutional provocations of the New Deal."<sup>114</sup>

"More or less in the center of the Court, along with the chief justice, was Justice Owen J. Roberts,"<sup>115</sup> whom Mr. Shogan reports was considered "more or less of a middle-of-the-roader."<sup>116</sup> He was "the Court's youngest member and the most ambiguous in ideological terms."<sup>117</sup> Along with Hughes "he shifted back and forth between the Four Horsemen of the right and the three liberals to establish the majority on any given case of importance."<sup>118</sup> Mr. Solomon regards Roberts as the "least reliable of the Court's conservatives,"<sup>119</sup> agreeing that of all of the Justices, he was "in his philosophy of jurisprudence, the least formed."<sup>120</sup> Roberts was, Mr. Solomon relates, "far from the most brilliant man on the Court . . . . He was an ordinary man, at best, among the justices."<sup>121</sup> He "had developed no original conception of the Constitution or even a consistent view of the law. He was known, above all, for inconsistency."<sup>122</sup> As a consequence, Roberts was "the Court's least predictable justice."<sup>123</sup> "[A]s to precisely what Roberts would support, in a particular case, no one could ever feel sure. Since joining the Court three months after Hughes, he had bounced back and forth between factions. Originally touted as a conservative, he had voted often with the liberals at first."<sup>124</sup> For instance,

[i]n the spring of 1934 he had heartened New Dealers with a breathtaking opinion in the precedent-shattering case of *Nebbia v. New York*,<sup>125</sup> which seemed to open the way for state legislators to regulate the economy on the public's behalf as they saw fit. But a year later he jumped to the conservatives' camp and joined in decimating the New Deal, and he had never both-

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110 SOLOMON, *supra* note 61, at 49.

111 *Id.* at 50.

112 *Id.* at 49.

113 *Id.* at 45.

114 *Id.* at 49.

115 SHOGAN, *supra* note 87, at 166.

116 *Id.* at 24.

117 *Id.* at 166.

118 *Id.*

119 SOLOMON, *supra* note 61, at 45.

120 *Id.* at 46.

121 *Id.* at 208.

122 *Id.*

123 *Id.* at 53.

124 *Id.*

125 291 U.S. 502, 536–39 (1934) (upholding state regulation of milk prices and no longer limiting price regulation to a narrow category of businesses "affected with a public interest").

ered to explain his shift.<sup>126</sup> His legal reasoning had proved wildly inconsistent, even within a single opinion.<sup>127</sup>

Mr. Solomon sees this apparently schizophrenic judicial performance as betraying a deep feature of Roberts's character:

He was a man of dueling impulses—comfortable in a tuxedo or wearing overalls, in the city or on the farm, who seemed to believe in just about everything, but in no one thing above all. He stalked moose in the Maine woods but refused to shoot them. He kept his own counsel, and nobody could quite figure him out.<sup>128</sup>

Mr. Solomon's understanding of Chief Justice Hughes's position on the Court is also entirely political, but not in the ideological sense. "Hughes had always been a political creature in a nonpolitical guise," he tells us.<sup>129</sup> "Probably better than anyone alive, Charles Evans Hughes understood that the Supreme Court had been a political institution from the first."<sup>130</sup> The Chief Justice "seemed to care less about a philosophy of jurisprudence or a particular constitutional worldview than about the institutional health of the Court."<sup>131</sup> He "had reason to worry" that if "the Court declined in the public's estimation, its chief justice would, too."<sup>132</sup> As Mr. Solomon puts it:

The Supreme Court was in a fix of its own making. Its steadfast and heartfelt refusal over so many years to understand the world from the vantage point of the laborer or the farmer or anyone who lacked leverage in a ruthless marketplace had not mattered very much while prosperity reigned. But now that the nation was deep into the Depression, if the Court was seen to be blocking the people's will, it endangered its standing with the public. This mattered to Hughes, if not to the rest of the Court.<sup>133</sup>

As the Chief Justice understood, "[i]n a constitutional system of checks and balances, an extended reign of unpopularity will bring down the people's wrath, even upon an unelected branch of government. The Court's inveterate divisiveness carried a similar risk, at least in the chief justice's mind."<sup>134</sup> Accordingly, "Hughes hated dissents."<sup>135</sup>

[H]e seemed to believe that the Court's best hope for restoring its moral authority with the public—and assuring his own reputation—was by issuing unanimous, or at least lopsided, decisions. No politically-minded man

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126 See SOLOMON, *supra* note 61, at 210 ("[Roberts] had indeed switched—and not once, but twice, first when he abandoned the liberal interpretation he had proclaimed in his 1934 *Nebbia* decision to join the Court's conservatives, then again in forsaking the conservatives by reversing himself on the minimum wage.").

127 *Id.* at 53 (footnotes added).

128 *Id.*

129 *Id.* at 148.

130 *Id.* at 147.

131 *Id.* at 52.

132 *Id.* at 52–53.

133 *Id.* at 47.

134 *Id.*

135 *Id.*

wanted to be part of an institution that the public disrespected, much less occupy its center seat. Yet a Court exposed as a nakedly political institution would subject itself to the checks and balances that the Constitution reserved for any branch of government that overreached.<sup>136</sup>

As a result, “[w]ith rare exceptions, whatever Roberts did, Hughes felt compelled to support in the name of consensus.”<sup>137</sup>

Regrettably, a review of Mr. Solomon’s references suggests that his basis for reaching each of these judgments about the Chief Justice is almost entirely conjectural and rests on little if any hard evidence. A review of his bibliography similarly reveals him to be innocent of recent scholarly work impugning such cartoonish characterizations of the Four Horsemen.<sup>138</sup> Mr. Solomon also appears to have overlooked the substantial literature impeaching portraits of the Four Horsemen, and the Court more generally, as implementing through its decisions policies of laissez-faire economics and Social Darwinism.<sup>139</sup>

136 *Id.*

137 *Id.* at 53.

138 See, e.g., Cushman, *supra* note 58; Samuel R. Olken, *Justice George Sutherland and Economic Liberty: Constitutional Conservatism and the Problem of Factions*, 6 WM. & MARY BILL RTS. J. 1 (1997).

139 See, e.g., OWEN M. FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910*, at 156, 160 (1993) (discussing the Court’s efforts to limit legislative redistribution through the requirement that laws be “universal” or “neutral” in their application); HOWARD GILLMAN, *THE CONSTITUTION BESIEGED 10* (1993) (examining the influence of the principle of neutrality on the *Lochner* Court’s Fourteenth Amendment jurisprudence); HORWITZ, *supra* note 17, at 19–31 (analyzing *Lochner* and pre-*Lochner* police powers decisions in light of the nineteenth-century liberal conception of “the neutral state”); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 298, 304–31 (1985) (contending that the Supreme Court’s development of due process doctrine should be understood, in part, as an effort to protect traditional notions of liberty); David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 1–9 (2003) (relating reasons for scholarly rejection of the laissez-faire and Social Darwinism accounts); Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881 (2005) (reviewing several of the previous theories on the 1920’s Court’s jurisprudence); William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 771–72 (arguing that the development of constitutional labor regulation during the Gilded Age was the product of competing visions of republicanism); John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 504 (1997) (examining the original meaning of “due process”); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897*, 61 J. AM. HIST. 970, 971–73 (1975) (discussing Justice Field’s attempts to formulate “immutable rules” to distinguish between regulation and confiscation when examining the limits of states’ police powers); Stephen A. Siegel, *Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187, 189–92 (1984) (discussing the distinction between privilege and property in the context of liberal and conservative reactions to the changing economic environment of the early twentieth century); Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 878–89 (1987) (discussing the legacy of the *Lochner* Court’s view of “neutrality”).



B. *Ross*

Professor Ross similarly engages in the problematic, reductive characterization of the Justices as “liberal” or “conservative.”<sup>140</sup> He often places these terms in quotation marks, though it is never entirely clear precisely what the quotation marks are intended to convey. One gathers from the context that it is not irony. Instead, Professor Ross appears to wish the reader to infer that the terms have connotations that may oversimplify and mislead. For example, he tells us that the “conservative” Four Horsemen shared the “political outlook,” “attitudes,” and “antiregulatory predilections” “of their clients, mostly corporations that often sought to circumvent, circumscribe, or nullify federal and state regulatory legislation.”<sup>141</sup> At the same time, however, unlike Mssrs. Solomon and Shogan, he recognizes that “they more often than not voted to uphold the constitutionality of regulatory legislation.”<sup>142</sup> Yet this awareness does not prevent Professor Ross from allowing his terminology occasionally to lead him down the same primrose path that has seduced Mssrs. Solomon and Shogan. For example, he casts Justice Holmes as a “liberal” who could be found “consistently voting to uphold regulatory legislation that he privately disparaged as a ‘humbug.’”<sup>143</sup> And yet the record is replete with examples of Holmes and his fellow “liberal” Justice Brandeis, whom Professor Ross describes more cautiously,<sup>144</sup> voting to invalidate economic legislation.<sup>145</sup> Similarly, like Mssrs. Solomon and Shogan, Professor

140 Ross, *supra* note 59, at xvii, 20, 23, 24, 26, 30, 33, 35, 101, 141 (using phrases such as “liberal bloc,” “a spate of liberal decisions,” “conservative majority,” and “liberal majority” (internal quotation marks omitted)).

141 *Id.* at 21.

142 *Id.*

143 *Id.* at 24.

144 See *id.* at 26 (“Brandeis voted more often to sustain economic regulation than did most of his brethren.”).

145 For just a few examples of cases involving due process and/or the Contracts Clause, see *Thompson v. Consol. Gas Utils. Corp.*, 300 U.S. 55 (1937) (Brandeis, J.); *Treigle v. Acme Homestead Ass’n*, 297 U.S. 189 (1936) (Brandeis, J.); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (Brandeis, J.); *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1935) (Brandeis, J.); *W.B. Worthen Co. v. Thomas*, 292 U.S. 426 (1934) (Brandeis, J.); *Smith v. Cahoon*, 283 U.S. 553 (1931) (Holmes & Brandeis, JJ.); *W. & Atl. R.R. v. Henderson*, 279 U.S. 639 (1929) (Holmes & Brandeis, JJ.); *Manley v. Georgia*, 279 U.S. 1 (1929) (Holmes & Brandeis, JJ.); *Washington ex rel Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928) (Holmes & Brandeis, JJ.); *Williams v. Standard Oil Co. of La.*, 278 U.S. 235, 245 (1928) (Brandeis, J., concurring); *Standard Pipe Line Co. v. Miller Cnty. Highway & Bridge Dist.*, 277 U.S. 160 (1928) (Holmes & Brandeis, JJ.); *Rd. Improvement Dist. No. 1 v. Mo. Pac. R.R.*, 274 U.S. 188 (1927) (Holmes & Brandeis, JJ.); *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926) (Holmes & Brandeis, JJ.); *Charles Wolff Packing Co. v. Court of Indus. Relations*, 267 U.S. 552 (1925) (Holmes & Brandeis, JJ.); *Mich. Pub. Utils. Comm’n v. Duke*, 266 U.S. 570 (1925) (Holmes & Brandeis, JJ.); *Dorchy v. Kansas*, 264 U.S. 286 (1924) (Holmes & Brandeis, JJ.); *Charles Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522 (1923) (Holmes & Brandeis, JJ.); *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346 (1922) (Holmes & Brandeis, JJ.); *Brooks-Scanlon Co. v. R.R. Comm’n*, 251 U.S. 396 (1920) (Holmes & Brandeis, JJ.); *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252

Ross has Hughes “moving back and forth between the Court’s factions,”<sup>146</sup> yet he recognizes that Hughes and Roberts were “much too complex to fit simple and standard generalizations, and much of the apparent inconsistency about [which] many of their liberal critics complained stemmed from their fidelity to precedent, their commitment to deciding each case on its own special facts, and their refusal to wed themselves to ideology.”<sup>147</sup> He notes Hughes’s disdain for the application of conventional political labels to judges, and appears to agree with the Chief Justice that “[s]uch characterizations are not infrequently used to foster prejudices and they serve as a very poor substitute for intelligent criticism.”<sup>148</sup> Nevertheless, Professor Ross persists in employing such characterizations throughout the book.

In Professor Ross’s case, one suspects that this attitudinal undercurrent is in part a function of the sources upon which he relied in constructing his account. He obviously has worked hard at examining the Court’s decisions and the papers of the Justices. Moreover, he clearly has consulted some of the principal secondary works on the subject, though the literature is so vast that one could explore it more deeply. But his other primary source material from the period seems to consist principally of articles from contemporary popular periodicals like the *Literary Digest*, *The Nation*, *The New Republic*, *Commonweal*, and the like. The use of the legal periodical and treatise literature of the period is, at most, sparse. Nor is there much indication of how sophisticated legal thinkers in, say, the Justice Department, understood what was going on. This tends to bias the commentary toward the perceptions of observers without legal training, who thought about these events more in terms of their political valence than their legal significance. This may tend to reinforce Professor Ross’s own tendency to employ analytic categories such as “liberal,” “conservative,” “pro-regulatory,” and “anti-regulatory,” which often obscure more than they explain. Of course, the perceptions of such lay observers are hardly irrelevant to the story. But one would hope and expect that a book devoted to understanding the work of the Hughes Court would benefit from greater inclusion of the perspectives of contemporary legal commentators.

### C. Parrish

Professor Parrish, too, cannot completely resist the resort to political taxonomy in describing the Justices. He recognizes that “the Hughes Court jus-

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(1916) (Holmes, J.); *Myles Salt Co. v. Bd. of Comm’rs*, 239 U.S. 478 (1916) (Holmes, J.); *San Joaquin & Kings River Canal & Irrigation Co. v. Cnty. of Stanislaus*, 233 U.S. 454, 458–61 (1914) (Holmes, J.); *Chi., Milwaukee & St. Paul Ry. v. Polt*, 232 U.S. 165 (1914) (Holmes, J.); *Eubank v. City of Richmond*, 226 U.S. 137 (1912) (Holmes, J.); *Mo. Pac. Ry. v. Nebraska*, 217 U.S. 196 (1910) (Holmes, J.); *Louisville & Nashville R.R. v. Cent. Stock Yards Co.*, 212 U.S. 132 (1909) (Holmes, J.).

146 Ross, *supra* note 59, at 230.

147 *Id.* at 35.

148 *Id.* (alteration in original) (quoting *Chief Justice Hughes Addresses Judicial Conference of Fourth Circuit*, 18 A.B.A. J. 445, 447 (1932)).

tices did not always align themselves neatly along ‘liberal’ and ‘conservative’ lines in every important constitutional case,” yet he insists that “a number of generalizations can be made.”<sup>149</sup> He, too, divides the Court into two factions: the “conservative” Four Horsemen,<sup>150</sup> and the more “liberal” Holmes, Brandeis, Stone, and Cardozo.<sup>151</sup> These four, and later the Roosevelt appointees, were “willing to sanction a much expanded role for government at all levels[ and] asserted a far less imperial role for the judiciary in its relationship to the political branches” than did the conservatives.<sup>152</sup> The Four Horsemen, by contrast, “generally privileged judicial over legislative power and manifested a high degree of skepticism concerning the role of government.”<sup>153</sup> Like Msrs. Shogan and Solomon, Professor Parrish maintains that “McReynolds, Van Devanter, and Butler[ ] all . . . subscribed to the view that the Constitution mandated a particular economic philosophy, the one they shared that stressed minimal interference by government into economic relationships.”<sup>154</sup> Similarly, Van Devanter “viewed the Constitution as generally a restraint upon the power of the state, especially when it tread upon that sphere of private economic choice guarded by the Due Process Clause.”<sup>155</sup> McReynolds was “unshakable in his faith that the courts remained the ultimate repository of wisdom about both constitutional and policy matters.”<sup>156</sup> And “[i]n Butler’s jurisprudential world . . . the Constitution of the United States mandated an untrammelled marketplace, free of governmental regulation except for those economic entities such as utilities that fell within the narrow category of ‘businesses affected with a public interest.’”<sup>157</sup>

Professor Parrish also situates Hughes and Roberts between these two groups. They were “less bound by the conceptualism that shaped the outlook of a Sutherland or a Butler, [and therefore] displayed more frequent regard for the orientation of [the liberals], but also thirsted at times for the intellectual security afforded by the [Four Horsemen].”<sup>158</sup> Hughes and Roberts “defected sharply from the conservative block in 1934–1935” in *Home Building & Loan Ass’n v. Blaisdell*,<sup>159</sup> *Nebbia*, and the *Gold Clause Cases*.<sup>160</sup> “[B]y mid-decade,” however, “when New Deal statutes first came before the justices, Roberts drifted into the camp of the Court’s ultraconservative block in important cases that voided significant federal programs aimed at fighting

149 MICHAEL E. PARRISH, *THE HUGHES COURT* 40 (2002).

150 *Id.* at 28.

151 *Id.* at 75.

152 *Id.* at 41.

153 *Id.* at 40.

154 *Id.* at 87.

155 *Id.* at 60.

156 *Id.* at 69.

157 *Id.* at 83 (quoting *Nebbia v. New York*, 291 U.S. 502, 536 (1934)).

158 *Id.* at 41.

159 290 U.S. 398 (1934) (upholding Minnesota mortgage moratorium law).

160 PARRISH, *supra* note 149, at 28; *see 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).

the depression.”<sup>161</sup> It was only in 1937 that “Hughes and Roberts finally cast their lot permanently with Brandeis, Stone, and Cardozo.”<sup>162</sup>

At the same time, however, Professor Parrish recognizes that these characterizations are overstatements bordering on caricature. He reports that several New Deal initiatives were invalidated by unanimous or near-unanimous votes.<sup>163</sup> He notes that the “liberal” Brandeis personally disapproved of the NIRA,<sup>164</sup> and that both Brandeis and Stone held the AAA<sup>165</sup> and the administration’s gold policy in low esteem.<sup>166</sup> Moreover, unlike Msrs. Shogan and Solomon, he recognizes that “[d]espite historical legend, no rigid philosophy of laissez-faire dominated Sutherland’s approach to the issues of law and politics.”<sup>167</sup> Instead, “Sutherland displayed from the beginning of his public life a robust appreciation for utilizing government as an instrument of economic development.”<sup>168</sup> This appreciation was reflected in his support for free coinage of silver, grants of the power of eminent domain to mining companies and irrigation districts, high tariffs, a federal workmen’s compensation law, the Seamen’s Act, the Pure Food and Drugs Act, the Hepburn Rate Act, and women’s suffrage.<sup>169</sup> It was Sutherland, Professor Parrish observes, who wrote the majority opinion rejecting the constitutional challenge to a residential zoning ordinance in the landmark case of *Village of Euclid v. Ambler Realty Co.*<sup>170</sup> Sutherland was joined by each of his colleagues in leading cases such as *Frothingham v. Mellon*<sup>171</sup> and *Alabama Power Co. v. Ickes*,<sup>172</sup> which insulated federal spending grants from constitutional challenge under the taxpayer standing doctrine.<sup>173</sup> “[E]ven Butler and McReynolds found nothing constitutionally objectionable in key spending programs of the New Deal such as the Public Works Administration and the Home Owners’ Loan Corporation.”<sup>174</sup> Moreover, Van Devanter and Sutherland “sometimes broke ranks with their conservative brethren and voted with the Court’s more liberal justices on both economic issues as well as those touching civil liberties and civil rights.”<sup>175</sup> For example, they “joined Cardozo’s opinion upholding the old-age benefit provisions of the Social Security

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161 PARRISH, *supra* note 149, at 12.

162 *Id.* at 27.

163 *See id.* at 75.

164 Pub. L. No. 73-67, 48 Stat. 195 (1933).

165 Pub. L. No. 73-10, 48 Stat. 31 (1933).

166 PARRISH, *supra* note 149, at 71-72, 87.

167 *Id.* at 75.

168 *Id.*

169 *Id.* at 75-76.

170 *Id.* at 77-78; *see Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

171 262 U.S. 447, 479 (1923) (rejecting challenge to Sheppard-Towner Maternity Act of 1921).

172 302 U.S. 464, 473 (1938) (rejecting challenge to loan and grant agreements made by the Public Works Administration).

173 *See* PARRISH, *supra* note 149, at 77.

174 *Id.* at 27.

175 *Id.* at 75.

Act,<sup>176</sup> perhaps the premier symbol of the emerging New Deal welfare state.”<sup>177</sup> Professor Parrish concludes that “even [the Four Horsemen], usually branded as antigovernment reactionaries, voted to sustain more state and federal regulatory laws during the decade than they voted to strike down.”<sup>178</sup>

#### D. McKenna

Professor McKenna is alone among the authors under review in eschewing the use of political taxonomy to describe the Justices of the Hughes Court. She explicitly rejects “the conventional interpretation developed by generations of writers,” in which “[t]he justices are portrayed as old men bearing stereotyped labels.”<sup>179</sup> One objective of her book, she explains, is “to reinstate or restore the reputation of the individual justices on the New Deal Supreme Court.”<sup>180</sup> She argues that “[t]hey were unfairly maligned during their time by partisan supporters of the Roosevelt administration . . . , beginning with [Drew Pearson and Robert S. Allen’s] *The Nine Old Men*<sup>181</sup> . . . [and] perpetuated to a surprising extent in conventional interpretations appearing in books and articles ever since.”<sup>182</sup> Instead, Professor McKenna associates herself with Professor G. Edward White’s view that such pejorative assessments rest on the “‘triumphal’” conventional narrative’s “‘misconception’” of the Justices’ understandings of “‘the nature of law, the meaning of legal sources, and the role of the judge as a constitutional interpreter.’”<sup>183</sup>

As these remarks might suggest, Professor McKenna’s approach to the subject is largely internalist in nature. She insists that the constitutional crisis of the 1930s cannot be understood properly without attention to “the practices of the era’s legal and political elites in framing laws” and “to evolving legal ideas and practices as they became interwoven with the politics of the day.”<sup>184</sup> She correctly characterizes her book as a work of political history,<sup>185</sup> but nevertheless finds unsatisfactory explanations of events that are centered on “the interplay of politics, judicial intent, external events, and case outcomes.”<sup>186</sup> Instead, she insists that attention to issues of “statutory formulation, test-case fact patterns, and legal theories” is necessary for a fuller understanding of the subject.<sup>187</sup> “[T]he New Deal Court and its history can-

176 See *Helvering v. Davis*, 301 U.S. 619, 634 (1937).

177 PARRISH, *supra* note 149, at 27 (footnote added). He also notes that “[t]he largest funding agency of the Roosevelt years, the Reconstruction Finance Corporation, never suffered a constitutional setback.” *Id.*

178 *Id.*

179 MCKENNA, *supra* note 48, at xxiii.

180 *Id.* at xxv.

181 DREW PEARSON & ROBERT S. ALLEN, *THE NINE OLD MEN* (1936).

182 MCKENNA, *supra* note 48, at xxv (footnote added).

183 *Id.* at xxv–xxvi (quoting WHITE, *supra* note 1, at 300).

184 *Id.* at xxiv–xxv.

185 See *id.*

186 *Id.* at 25.

187 *Id.*

not be comprehended in purely political terms," she maintains; "an honest effort to delineate the various dimensions and subtleties of judicial behavior and the justices' jurisprudential positions, with a more respectful attitude toward their integrity, provides a better approach than that undertaken in past studies."<sup>188</sup> What is required, she argues, is an appreciation of how a system of constitutional thought "underwent gradual though not sweeping transformation during the first four decades of the twentieth century."<sup>189</sup>

## II. DOCTRINAL DEVELOPMENT

### A. *Shogan*

Mr. Shogan's account of the legal developments of the 1930s is strikingly spare, and unfortunately also frequently inaccurate. He maintains that in *West Coast Hotel Co. v. Parrish*<sup>190</sup> the Court "upheld a Washington state minimum-wage law not significantly different from the New York law it had held to be unconstitutional in the notorious *Morehead* ruling only nine months before."<sup>191</sup> In fact, in *Morehead v. New York ex rel. Tipaldo*<sup>192</sup> New York's attorneys had rested their entire argument on the distinction between the kind of statute enacted by Washington state and the kind enacted by New York.<sup>193</sup> Moreover, that distinction helps to account for why Chief Justice Hughes, in his dissenting opinion in *Tipaldo*, insisted that the New York statute, unlike the Washington statute involved in *West Coast Hotel*, could be upheld without overruling *Adkins v. Children's Hospital*.<sup>194</sup> Mr. Shogan asserts that in *Helvering v. Davis*,<sup>195</sup> which upheld the old-age pension provisions of the Social Security Act,<sup>196</sup> "the Court repudiated its prior dictum that the general welfare clause of the Constitution applies only to subjects specifically cited in the Constitution."<sup>197</sup> In fact, Justice Roberts's 1936 opinion in *United States v. Butler* had explicitly adopted the Hamiltonian interpretation of the clause in preference to the Madisonian construction,<sup>198</sup> and Justice Cardozo expressly relied upon that pronouncement in *Helvering*.<sup>199</sup>

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188 *Id.*

189 *Id.*

190 300 U.S. 379 (1937).

191 SHOGAN, *supra* note 87, at 185.

192 298 U.S. 587 (1936).

193 See Petition for Writ of Certiorari and Motion to Advance at 7-8, 13-14, *Tipaldo*, 298 U.S. 587 (No. 838); Appellant's Brief on the Law at 32-49, *Tipaldo*, 298 U.S. 587 (No. 838); CUSHMAN, *supra* note 1, at 96.

194 *Tipaldo*, 298 U.S. at 619 (Hughes, C.J., dissenting); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923).

195 301 U.S. 619 (1937).

196 *Id.* at 634, 646.

197 SHOGAN, *supra* note 87, at 204.

198 297 U.S. 1, 65-66 (1936).

199 301 U.S. at 640.

Mr. Shogan also maintains that in *Wright v. Vinton Branch of the Mountain Trust Bank*<sup>200</sup> “the Court rejected a challenge to the Federal Farm Bankruptcy Act, an almost identical revision of a law it had held unconstitutional on ‘Black Monday’ in 1935.”<sup>201</sup> In fact, the revised Act was far from identical. It had undergone significant revision in order to redress the five constitutional deficiencies identified by Justice Brandeis’s unanimous opinion in *Louisville Joint Stock Land Bank v. Radford*, which invalidated the Frazier-Lemke Farm Debt Relief Act of 1934.<sup>202</sup> Mr. Shogan maintains that the decisions in *Wright* and in the Court’s contemporaneous decision upholding the 1934 amendments to the Railway Labor Act<sup>203</sup> “were by 5 to 4, with Roberts’s vote enabling the defeat of the Four Horsemen who remained intractable in their opposition to the New Deal and all its works.”<sup>204</sup> In fact, both decisions were unanimous—the Four Horsemen were not nearly as intractable as Mr. Shogan suggests. Nor is he correct in his accounts of the votes in the Wagner Act and *Social Security Cases*.<sup>205</sup> The *Labor Board Cases*<sup>206</sup> were not all “rendered by 5-to-4 majorities that included the vote of Justice Roberts.”<sup>207</sup> The decision in *Washington, Maryland & Virginia Coach Co. v. NLRB*, which upheld application of the Wagner Act to an interstate bus company, was unanimous.<sup>208</sup> Nor did “the same 5-4 majority” give its “approval” to “the old-age pensions that were the heart” of the Social Security Act.<sup>209</sup> *Helvering* was decided by a vote of seven to two, with Justices Van Devanter and Sutherland joining the majority.<sup>210</sup> Each of these errors might have been avoided by simply reading the opinions in question.

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200 300 U.S. 440, 470 (1937) (upholding the Frazier-Lemke Act, Pub. L. No. 74-384, 49 Stat. 943-45 (1935)).

201 SHOGAN, *supra* note 87, at 186.

202 *Wright*, 300 U.S. at 456-59; *Louisville Joint Stock Bank v. Radford*, 295 U.S. 555, 594-95 (1935) (invalidating Frazier-Lemke Farm Debt Relief Act, Pub. L. No. 73-486, 48 Stat. 1289 (1934)); see Cushman, *supra* note 16, at 81-83.

203 *Virginian Ry. Co. v. Sys. Fed’n No. 40*, 300 U.S. 515, 563 (1937) (upholding Railway Labor Act, Pub. L. No. 73-442, 48 Stat. 1185 (1934)).

204 SHOGAN, *supra* note 87, at 186.

205 See CUSHMAN, *supra* note 1, at 4, 228 n.7 (referring to *Helvering v. Davis*, 301 U.S. 619 (1937), *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937), and *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937), as the “Social Security cases”).

206 The *Labor Board Cases* refers to five cases in which the Court upheld the constitutionality of application of the National Labor Relations Act to various enterprises. See *Washington, Va. & Md. Coach Co. v. NLRB*, 301 U.S. 142 (1937); *Associated Press v. NLRB*, 301 U.S. 103 (1937); *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937); *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49 (1937); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

207 SHOGAN, *supra* note 87, at 188.

208 301 U.S. at 147.

209 SHOGAN, *supra* note 87, at 203.

210 *Helvering*, 301 U.S. 619. Indeed, because these two Justices dissented separately from McReynolds and Butler in *Steward Machine Co.*, 301 U.S. at 609-16 (Sutherland, J., dissenting), objecting only to easily correctable administrative provisions of the law, that

In general, Mr. Shogan's account of the legal developments follows the conventional story line. Along with the other opinions handed down in the spring of 1937, the Court's decisions upholding the Wagner Act were "surprising"<sup>211</sup> and "stunning,"<sup>212</sup> "part of what would ultimately become clear as one of the most dramatic reversals in the Court's history."<sup>213</sup> In each of the *Labor Board Cases*, Mr. Shogan relates, "the Court based its decision on a remarkably generous view of the commerce clause."<sup>214</sup> This was an outcome, Mr. Shogan asserts, that was unanticipated by administration officials, particularly in view of the Court's decision in *Carter v. Carter Coal*<sup>215</sup> the preceding term.<sup>216</sup>

That outcome may have surprised some, but it certainly was not unanticipated by Charles Fahy, the general counsel of the National Labor Relations Board (NLRB) who had masterminded the litigation strategy in the *Labor Board Cases*. Despite the recent decision in *Carter Coal*, Fahy was confident that the Court would uphold the Wagner Act. Fahy insisted that the Act "should have been sustained on the basis of precedents," and was "not inclined to attribute the fact that it was sustained to anything but that it was believed to be constitutional."<sup>217</sup> Fahy was convinced that Hughes and Roberts would vote to uphold the Act and "encouraged his staff to prepare their arguments on the assumption that an unfavorable decision in *Carter* would not invalidate the Wagner Act."<sup>218</sup> Nor was the outcome unanticipated by NLRB Chairman Warren Madden, who confidently proclaimed that *Carter Coal* was easily distinguished, and that the Court's stream of commerce precedents made it "obvious" that "[t]he Constitution and the statute give the Labor Board jurisdiction over" the situations presented in the *Labor Board Cases*.<sup>219</sup> Neither was it unanticipated by Solicitor General Stanley Reed, who wrote to Attorney General Homer Cummings: "I do not see any clear inconsistency between Wagner on the one hand and the Guffey or N.R.A. decision

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decision upholding the unemployment compensation provisions of the Act might also be better understood as decided by a vote of seven to two.

211 SHOGAN, *supra* note 87, at 184, 186.

212 *Id.* at 187.

213 *Id.* at 184-85.

214 *Id.* at 187.

215 298 U.S. 238, 316 (1936) (invalidating the Bituminous Coal Conservation Act of 1935, Pub. L. No. 74-402, 49 Stat. 991).

216 SHOGAN, *supra* note 87, at 187 ("Understandably New Dealers had viewed the Wagner Act's fate before the Court with trepidation. Attorney General Cummings confided to his diary that he considered the act to be 'of rather doubtful constitutionality.' Tom Corcoran had been telling friends that the most he hoped for was to get two justices on his side.").

217 CHARLES A. LEONARD, A SEARCH FOR A JUDICIAL PHILOSOPHY: MR. JUSTICE ROBERTS AND THE CONSTITUTIONAL REVOLUTION OF 1937, at 109 (1971) (quoting from author interview with Charles Fahy, April 8, 1963).

218 IRONS, *supra* note 48, at 268.

219 3 U.S.L.W. 1041, 1041-42 (1936).



on the other.”<sup>220</sup> Nor did it come as a surprise to the many legal commentators who regarded the *Labor Board Cases* as consistent with the Court’s precedents, nor to the many lower federal judges of both political parties who continued to believe that *Carter Coal* remained good law.<sup>221</sup> In short, Mr. Shogan’s discussion of the Court’s decisions is plagued by numerous unfortunate misstatements and oversights.

### B. *Solomon*

Because Mr. Solomon sees constitutional law as almost entirely epiphenomenal—as simply the expression of conservative or liberal preferences regarding political economy—his treatment of doctrinal development is exceptionally thin. In a chapter entitled “The Conservative Court,” Mr. Solomon explains that the animating forces behind the Court’s decisions in 1935 and 1936 were those of politics and personality.<sup>222</sup> Roberts’s wife Elsie “disliked the New Deal, and Roberts had come to oppose it as well. His traditionalist upbringing had taught him that every man ought to make his own way in life.”<sup>223</sup> He told a group of Boy Scout leaders in 1936 that “the Depression had made people ‘soft,’” and worried that many Americans now harbored “the idea that if they leaned hard enough on the government, it would support them.”<sup>224</sup> Privately, he believed that “the Roosevelt administration was grabbing the country’s resources ‘and plunging them down the sewer.’”<sup>225</sup> Worse yet, Roberts had become ensnared in the toils of the Four Horsemen.

On the bench, Roberts was often seen to share a chuckle with Pierce Butler, the conservative in the adjacent seat and a frequent visitor to Roberts at home. He had also drawn close to the unsociable McReynolds, who was genial to the few people he liked; the two of them, along with Sutherland, had formed a club of sorts.<sup>226</sup>

Princeton political scientist and administration advisor Edward Corwin “felt certain that Roberts had fallen ‘much under Justice Sutherland’s influence.’”<sup>227</sup> And notwithstanding his wife’s opposition to any idea of the Justice leaving the bench, Mr. Solomon believes that Roberts’s judicial behavior may have been influenced by presidential ambitions. His name “had bubbled up as a Republican presidential dark horse before the party’s 1928 and 1932 national conventions, and he was considered a long shot for 1936.”<sup>228</sup>

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220 LEUCHTENBURG, *supra* note 1, at 318–19 n.100 (quoting Memorandum from Stanley Reed, Solicitor General, to the Attorney General, National Archives, Washington, D.C., Dep’t of Justice 114–15 (Apr. 22, 1937)).

221 See CUSHMAN, *supra* note 1, at 177–80.

222 SOLOMON, *supra* note 61, at 68–83.

223 *Id.* at 70–71.

224 *Id.* at 71.

225 *Id.*

226 *Id.* at 70.

227 *Id.*

228 *Id.*

It was for these reasons, Mr. Solomon maintains, that “in the spring of 1935, the Court’s swing vote swung to the conservatives’ side.”<sup>229</sup>

At the same time, Mr. Solomon does occasionally appear to recognize that personal preferences and ambitions cannot explain each and every judicial vote. He observes that Justice Stone, who voted to uphold the AAA in *United States v. Butler*, wrote to his sons, “‘I haven’t very much confidence in the A.A.A.’”<sup>230</sup> He also notes that Stone, who voted in *Railroad Retirement Board v. Alton Railroad Co.*<sup>231</sup> to uphold most of the Railroad Retirement Act of 1934,<sup>232</sup> wrote privately that the law “‘was a bad one, and if I had been a member of Congress I am certain I should have voted against it.’”<sup>233</sup> Like Stone, Mr. Solomon concedes that the Act was, as President Roosevelt admitted, “‘crudely drawn’ and in need of a future Congress’s ministrations,” though he does not appear to regard that fact as providing sufficient justification for Roberts’s opinion declaring the statute unconstitutional.<sup>234</sup>

For the most part, however, Mr. Solomon’s story is one in which “the Court’s conservatives . . . kept dealing the New Deal a thrashing.”<sup>235</sup> They failed to embrace the New Dealers’ “commonsense understanding of interstate commerce, one that counted factories, mines, and railroads as inherently involved in the movement of goods across state lines, with an impact on the national interest.”<sup>236</sup> Instead, the Court’s decisions in 1935 and 1936 “determined the federal government lacked the constitutional authority to protect the health and well-being of its most vulnerable workers.”<sup>237</sup> With the decision in *Tipaldo* invalidating the New York minimum wage law for women, the Court similarly barred the state governments from protecting such workers.<sup>238</sup> “If Congress had so little power to correct the injustices of Darwinian commerce,” Mr. Solomon asserts, then “clearly the Social Security bill that was still mired in Congress”—which was an exercise of the powers to tax and spend rather than of the power to regulate interstate commerce—“would die at the hands of the Court, should it ever be enacted.”<sup>239</sup> By the summer of 1936, “[d]espite the millions of unemployed and the persistence of bread lines and hunger, the Supreme Court had decided that no government, on any level, had the power to address the citizens’ most wrenching needs. No matter what the people wanted or who they elected, they were on their own.”<sup>240</sup>

229 *Id.* at 71.

230 *Id.* at 79; see *United States v. Butler*, 297 U.S. 1 (1936).

231 295 U.S. 330 (1935).

232 Pub. L. No. 73-485, 48 Stat. 1283 (1934).

233 SOLOMON, *supra* note 61, at 70.

234 *Id.* at 69.

235 *Id.* at 81.

236 *Id.* at 69.

237 *Id.* at 82.

238 *Id.*

239 *Id.* at 69.

240 *Id.* at 82–83.

With all due respect, this is an assertion of stunning inaccuracy. The Court had not held that government lacked the constitutional authority to protect the most vulnerable. Far from it. In *Nebbia*, the Court had held that government could engage in virtually unfettered price regulation in order to address the citizens' most wrenching needs. In *Blaisdell*, the Court had held that the state could significantly modify the contractual rights of mortgagees in order to meet other citizens' most wrenching needs. In the *Gold Clause Cases*, the Court had permitted the federal government to revise the contractual rights of millions of creditors in order to meet other citizens' most wrenching needs. In *Ashwander v. Tennessee Valley Authority*,<sup>241</sup> the Court had permitted the Tennessee Valley Authority to sell electricity to consumers in competition with private power companies in order to meet citizens' most wrenching needs.<sup>242</sup> And the taxpayer standing doctrine championed by Sutherland and his fellow Horsemen in *Frothingham v. Mellon* insulated billions of dollars in public relief and public works expenditures from judicial review.<sup>243</sup> The minimum wage, as desirable as it may have been, was far from the only way in which government sought to and succeeded in addressing the citizens' most wrenching needs. Moreover, as Homer Cummings told FDR in late May of 1936, both the AAA and the Guffey Coal Act struck down in *Carter Coal* were being redrafted based on different doctrinal theories more likely to withstand constitutional attack.<sup>244</sup> And notwithstanding the Court's *Alton* decision striking down the Railroad Retirement Act of 1934, Roosevelt and others believed that the Social Security Act was "safe because lawmakers, with the Court very much in mind, had rested the bill on the government's taxing power rather than the commerce power."<sup>245</sup> Decisions striking down earlier statutes did not foreclose the ends sought by those measures; they only foreclosed achieving those ends through the particular means that legislators had selected.

Mr. Solomon takes up the 1937 decisions in a chapter entitled "A Switch in Time,"<sup>246</sup> signaling his view that those decisions constituted watershed departures from prior constitutional doctrine. Like Mr. Shogan, Mr. Solomon maintains that the law involved in *West Coast Hotel* "was strikingly similar to the New York law that the Court had struck down, to such public disgust, just ten months earlier."<sup>247</sup> *Tipaldo*, he insists, had involved "an almost identical law."<sup>248</sup> Hughes's decision upholding the law was, on Mr. Solomon's account, entirely political. "In Hughes's mind, apparently, the case did not involve legal principles or even the intent of the Constitution, but matters

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241 297 U.S. 288 (1936).

242 *Id.* at 340.

243 WRIGHT, *supra* note 1, at 183–84.

244 Homer Cummings Diary, May 19, 1936, University of Virginia Special Collections.

245 SHESOL, *supra* note 2, at 119.

246 SOLOMON, *supra* note 61, at 155.

247 *Id.* at 156.

248 *Id.* at 159.

more temporal . . .”<sup>249</sup> Yet for political reasons it was necessary to proceed gingerly. “Hughes cared deeply about the stability of the law, as a bulwark of the judiciary’s standing with the people,” Mr. Solomon explains, and therefore “he had no wish to scuttle the liberty of contract.”<sup>250</sup> “But he had every intention of limiting it.”<sup>251</sup> In doing so, he relied upon the principle, “invoked more often than obeyed, of judicial self-restraint.”<sup>252</sup> “This was not the first time the Court’s majority had accorded such deference to legislators’ judgment. If the chief justice’s reasoning sounded familiar, it was meant to. It echoed Justice Roberts’s reasoning in the *Nebbia* case . . .”<sup>253</sup> Indeed, “Hughes persisted in quoting from Roberts’s ruling—three times—in making his case.”<sup>254</sup> “‘Our conclusion,’ the chief justice boomed, his eyes flashing, ‘is that the case of *Adkins v. Children’s Hospital* should be, and it is, overruled.’”<sup>255</sup> Overlooking an enormous number of social welfare measures that had escaped judicial invalidation, Mr. Solomon concludes that *West Coast Hotel* meant that “[a]t last, it seemed, state legislatures possessed the authority to regulate business to help society’s needy.”<sup>256</sup> He then follows this with the doctrinal non sequitur, “and presumably the federal government could do the same.”<sup>257</sup>

Like Mr. Shogan, Mr. Solomon unfortunately has not become sufficiently familiar with the *United States Reports* to describe accurately the Court’s output. “Before the day’s session ended,” he reports, “the justices had announced four other decisions that allowed the government to protect the weak against the strong.”<sup>258</sup> “Of the day’s five rulings, one had been unanimous but the other four were decided by the narrowest of margins—in each case, the same five justices prevailing over the Four Horsemen.”<sup>259</sup> That report might have some surface plausibility to one who categorizes the Justices using a crude political taxonomy, and Mr. Solomon does not make clear which cases he regards as “allowing the government to protect the weak against the strong.” But no matter which cases he intends to describe, there is no way that his description can even remotely approach accuracy. Setting aside decisions per curiam, none of which reflect any dissenting votes,<sup>260</sup> on March 29, 1937, the Court handed down seventeen opinions including *West*

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249 *Id.* at 157.

250 *Id.* at 158.

251 *Id.*

252 *Id.*

253 *Id.*

254 *Id.*

255 *Id.* (quoting *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937)).

256 *Id.* at 160.

257 *Id.*

258 *Id.*

259 *Id.*

260 *See* Decisions Per Curiam, Etc., from February 1, Through April 11, 1937, 300 U.S. 635, 635–46 (1937).

*Coast Hotel*. Thirteen of those were unanimous,<sup>261</sup> including the decisions upholding the revised Frazier-Lemke Farm Debt Relief Act<sup>262</sup> and the 1934 amendments to the Railway Labor Act.<sup>263</sup> One case was decided by a vote of six to two, with Chief Justice Hughes and Justice Cardozo dissenting and Justice Stone not participating;<sup>264</sup> another was decided by a vote of seven to two, with Justices McReynolds and Butler dissenting.<sup>265</sup> The only case other than *West Coast Hotel* decided by a vote of five to four was *Highland Farms Dairy, Inc. v. Agnew*, in which the Four Horsemen dissented in part.<sup>266</sup> It is hard to understand how Mr. Solomon could have arrived at such a wildly inaccurate report. Such easily avoidable factual errors both draw upon and reinforce Mr. Solomon's regrettably cartoonish understanding of the Four Horsemen, just as they contribute to an exaggerated impression of the level of dissensus on the Hughes Court.

Yet even after *West Coast Hotel*, Mr. Solomon maintains, it was not clear "whether Roberts had truly switched." After all, "[a] justice who had changed his mind could easily change it again."<sup>267</sup> That issue would be resolved only when Roberts voted to uphold the National Labor Relations Act and the Social Security Act. The obstacle to upholding the former, in Mr. Solomon's view, was the Court's historically pinched view of the scope of the commerce power. "Since 1895," he writes,

as the industrial trusts created a national economy—and over and over again in the decades since, in striking down a succession of progressive laws—the Court had consistently protected the burgeoning businesses by distinguishing between a "direct" and an "indirect" role in interstate commerce, excluding the latter from Congress's potentially heavy hand.<sup>268</sup>

This characterization of the Court's Commerce Clause jurisprudence overlooks three important facts. First, it neglects the significant number of instances in which the Court upheld prosecutions of or civil enforcement actions against businesses under the antitrust acts.<sup>269</sup> Second, it fails to take

261 See *Brown v. O'Keefe*, 300 U.S. 598 (1937); *Martin v. Nat'l Sur. Co.*, 300 U.S. 588 (1937); *United States v. Norris*, 300 U.S. 564 (1937); *Sonzinsky v. United States*, 300 U.S. 506 (1937); *United States v. Madigan*, 300 U.S. 500 (1937); *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481 (1937) (Roberts, J., took no part in the decision); *Am. Propeller & Mfg. Co. v. United States*, 300 U.S. 475 (1937); *Atchison, Topeka & Santa Fe Ry. Co. v. Scarlett*, 300 U.S. 471 (1937); *Stroehmann v. Mut. Life Ins. Co. of N.Y.*, 300 U.S. 435 (1937); *Gen. Baking Co. v. Harr*, 300 U.S. 433 (1937); *Matos v. Alonso Hermanos*, 300 U.S. 429 (1937).

262 *Wright v. Vinton Branch of the Mountain Trust Bank*, 300 U.S. 440 (1937).

263 *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515 (1937).

264 *Dugas v. Am. Sur. Co.*, 300 U.S. 414, 429 (1937).

265 *Henneford v. Silas Mason Co.*, 300 U.S. 577, 588 (1937).

266 300 U.S. 608, 617 (1937).

267 SOLOMON, *supra* note 61, at 162.

268 *Id.* at 181.

269 See, e.g., *Hill v. United States ex rel. Weiner*, 300 U.S. 105, 108 (1937) (upholding punishment for contempt under Clayton Act); *IBM v. United States*, 298 U.S. 131, 140 (1936) (enjoining certain tying clauses as Clayton Act violations); *Sugar Inst., Inc. v. United States*, 297 U.S. 553, 605 (1936) (finding that activities of trade association violate

into account instances in which the distinction between direct and indirect effects on interstate commerce shielded labor unions from liability under the Sherman Act.<sup>270</sup> And third, it takes no notice of the instances in which the Court upheld congressional regulation of business under the principal doc-

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the Sherman Act); *Ind. Farmer's Guide Publ'g Co. v. Prairie Farmer Publ'g Co.*, 293 U.S. 268, 280 (1934) (reversing directed verdict for antitrust defendant); *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 437 (1932) (finding Sherman Act violation); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 567 (1931) (affirming judgment for antitrust plaintiff); *United States v. First Nat'l Pictures, Inc.*, 282 U.S. 44, 55 (1930) (finding Sherman Act violation); *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30, 44 (1930) (finding Sherman Act violation); *George Van Camp & Sons Co. v. Am. Can Co.*, 278 U.S. 245, 254 (1929) (finding Clayton Act violation); *United States v. Goldman*, 277 U.S. 229, 239 (1928) (reversing dismissal of criminal contempt proceedings against defendants charged with violating an injunction enforcing the Sherman Act); *Brown v. United States*, 276 U.S. 134, 145 (1928) (upholding criminal contempt conviction of Sherman Act defendant who refused to comply with a subpoena *duces tecum*); *United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927) (finding Sherman Act violation); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 407 (1927) (upholding Sherman Act conviction); *Eastman Kodak Co. v. S. Photo Materials Co.*, 273 U.S. 359, 379 (1927) (affirming damage award judgment against Eastman Kodak for antitrust violation); *United States v. Brims*, 272 U.S. 549, 553 (1926) (finding Sherman Act violation); *United States v. Am. Linseed Oil Co.*, 262 U.S. 371, 390 (1923) (finding Sherman Act violation); *Hart v. B.F. Keith Vaudeville Exch.*, 262 U.S. 271, 273 (1923) (reversing dismissal of antitrust suit); *Charles A. Ramsay Co. v. Associated Bill Posters*, 260 U.S. 501, 512 (1923) (finding Sherman Act violation); *United Shoe Mach. Corp. v. United States*, 258 U.S. 451, 465 (1922) (finding Clayton Act violation); *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 357 (1922) (finding Clayton Act violation); *Am. Column & Lumber Co. v. United States*, 257 U.S. 377, 412 (1921) (affirming Sherman Act conviction); *Sampliner v. Motion Picture Patents Co.*, 254 U.S. 233, 240 (1920) (reversing judgment directing verdict for Sherman Act defendant); *United States v. A. Schrader's Son, Inc.*, 252 U.S. 85, 100 (1920) (reversing judgment sustaining demurrer to indictment for violation of the Sherman Act); *Thomsen v. Cayser*, 243 U.S. 66, 89 (1917) (affirming judgment for Sherman Act plaintiff); *E. States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600, 614 (1914) (affirming order enjoining trade association from engaging in activities violative of the Sherman Act); *Straus & Straus v. Am. Publishers' Ass'n*, 231 U.S. 222, 237 (1913) (reversing judgment for Sherman Act defendant); *United States v. Pac. & Arctic Ry. & Navigation Co.*, 228 U.S. 87, 108 (1913) (reversing judgment sustaining demurrer to Sherman Act indictment); *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 52 (1912) (finding Sherman Act violation); *United States v. Am. Tobacco Co.*, 221 U.S. 106, 187 (1911) (dissolving unlawful combination); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 79 (1911) (dissolving unlawful combination); *Dr. Miles Med. Co. v. John D. Park & Sons*, 220 U.S. 373, 409 (1911) (invalidating resale price maintenance scheme under Sherman Act); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 248 (1899) (upholding Sherman Act conviction). For additional examples of federal regulation of business upheld by the Court between 1911 and 1937, see Cushman, *supra* note 58, at 567, 619-30.

<sup>270</sup> *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 108 (1933); *United Leather Workers Int'l Union v. Herkert & Meisel Trunk Co.*, 265 U.S. 457, 461 (1924); *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 408 (1922).

trinal theory advanced by government lawyers defending the Wagner Act, namely, the stream of commerce doctrine.<sup>271</sup>

But for Mr. Solomon, who seems to believe that the period's constitutional law was all basically just politics under another name, and that the pre-New Deal Court was all about defending a regime of laissez-faire, none of this is relevant. The complexity of the Court's established Commerce Clause jurisprudence, the resources that body of doctrine made available to government lawyers seeking to sustain New Deal legislation, and the skill with which those lawyers selected promising test cases and briefed and argued them do not engage his interest or attention. Instead, he directs our attention to the fact that the wily Chief Justice Hughes was only mildly inconvenienced by the professional requirement that he concoct "an ingenious, convoluted argument" in which the Court "abandoned its precedent in substance, though keeping the form of it intact—evidence, again, of Hughes's legal canniness and his political guile."<sup>272</sup> Overlooking the fact that Hughes also had voted in *Carter Coal* to invalidate the Guffey Coal Act's labor regulation provisions, Mr. Solomon concludes that Hughes's crafty opinion endeavored to "spare" Roberts, who had joined the *Carter Coal* majority, the "embarrassment" of appearing to "shatter" a precedent to which he had so recently subscribed.<sup>273</sup> But to Mr. Solomon, it is clear that Roberts "once again . . . had switched sides."<sup>274</sup>

For Mr. Solomon, the final confirmation of the switch came with the decisions upholding the Social Security Act in May of 1937. "As the climax, in upholding the Social Security Act, the Court had unleashed the power of the national government to tax and spend for the purpose of furthering the general welfare."<sup>275</sup> Mr. Solomon views this as the outcome of a "judicial deal" that the farsighted Hughes had struck with Roberts when the Court had invalidated the AAA in January of 1936.<sup>276</sup> Ever since that time, Mr. Solomon reports, "the rumor had persisted that Hughes had jumped sides at the last minute, granting the conservatives a comfortable majority and the prestige of having lured the chief justice to their side. Now it was evident what Hughes would have traded for his vote."<sup>277</sup> Hughes had persuaded Roberts to include in the *Butler* opinion a passage endorsing Alexander Hamilton's expansive construction of the federal government's power to spend under the General Welfare Clause, "specifically endorsing Hamilton's vision of the Constitution as the template for a strong and active central government."<sup>278</sup>

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271 *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420 (1930); *Chi. Bd. of Trade v. Olsen*, 262 U.S. 1, 34 (1923); *Stafford v. Wallace*, 258 U.S. 495, 519 (1922); *Swift & Co. v. United States*, 196 U.S. 375, 397 (1905); see CUSHMAN, *supra* note 1, at 144–54, 162–68; IRONS, *supra* note 48, at 240–43, 252–53, 268.

272 SOLOMON, *supra* note 61, at 181.

273 *Id.* at 182.

274 *Id.*

275 *Id.* at 256.

276 *Id.* at 207.

277 *Id.*

278 *Id.*

“At the time, it had seemed an odd sidelight to the AAA’s death, but just sixteen months later, it came to the fore” in Justice Cardozo’s opinions upholding the Social Security Act.<sup>279</sup> “Though his fingerprints were hidden at the time, Charles Evans Hughes had laid the groundwork.”<sup>280</sup> For Cardozo “had been wily enough to rest his decision on Justice Roberts’s own Hamiltonian handiwork, and he succeeded.”<sup>281</sup> “The chief justice, playing a game of judicial chess, had evidently been thinking a few moves ahead. His earlier maneuver has now placed the king—the president and his judicial ambitions—into check.”<sup>282</sup>

There are at least three difficulties with this account. First, Justice Stone reported that when Hughes presented the *Butler* case to the conference following oral argument, he denounced the AAA as an unconstitutional “regulation of agriculture within the states and an invasion of the reserved powers of the states,” and argued further that it also violated the nondelegation doctrine.<sup>283</sup> There is no evidence to support the rumor that Hughes changed his vote. He was in the majority from the beginning. Second, the fact that the Court had adopted the Hamiltonian construction of the General Welfare Clause in *Butler* makes it difficult to understand how the reliance upon that construction in the *Social Security Cases* constituted any sort of “switch.” Mr. Solomon recognizes that Justices Van Devanter and Sutherland joined the majority in the opinion upholding the old-age pension provisions of the Act.<sup>284</sup> And indeed, those Justices also agreed with the majority on the central taxing and spending power issues in the decision upholding the Act’s unemployment compensation provisions.<sup>285</sup> Yet Mr. Solomon insists that in the old-age pension case those two Justices, who had dissented in *West Coast Hotel* and in four of the five Wagner Act Cases,<sup>286</sup> “had switched sides.”<sup>287</sup> He does not entertain the possibility that they, like Hughes and Roberts, might have regarded their votes in *Butler* and in the *Social Security Cases* as entirely consistent.

Third, the Justices actually had “unleashed the power of the national government to tax and spend for the purpose of furthering the general welfare” much earlier, in the 1923 decision of *Frothingham v. Mellon*.<sup>288</sup> Writing for a unanimous bench including each of the Four Horsemen, Justice Suther-

279 *Id.*

280 *Id.* at 206.

281 *Id.* at 207.

282 *Id.*

283 Memorandum Re: No. 401, United States v. Butler (Feb. 4, 1936) (Harlan Fiske Stone MSS, Box 62, on file with Manuscript Division, Library of Congress).

284 *Helvering v. Davis*, 301 U.S. 619 (1937).

285 *Steward Mach. Co. v. Davis*, 301 U.S. 548, 609–10 (1937) (Sutherland & Van Devanter, JJ., dissenting).

286 *Associated Press v. NLRB*, 301 U.S. 103, 133 (1937) (Sutherland, Van Devanter, McReynolds, & Butler, JJ., dissenting); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 76 (1937) (McReynolds, Van Devanter, Sutherland, & Butler, JJ., dissenting).

287 SOLOMON, *supra* note 61, at 207.

288 *Id.* at 256.



land had held that taxpayers did not have standing to challenge the constitutionality of congressional expenditures made from general revenue.<sup>289</sup> The AAA had been vulnerable to challenge because its acreage reduction payments to farmers were financed by an earmarked excise tax on processors. But so long as the expenditures were drawn from the government's general revenue, they were beyond constitutional challenge and could continue unhindered by judicial review.<sup>290</sup> After the AAA was declared unconstitutional, the government continued to make payments under existing acreage reduction contracts from general revenue, which no one had standing to challenge.<sup>291</sup> Congress continued its agricultural program by quickly enacting the Soil Conservation and Domestic Allotment Act, which authorized payment to farmers to reduce acreage devoted to "soil-depleting" crops.<sup>292</sup> These payments were to be made from general revenue, and thus also were immune from constitutional attack.<sup>293</sup>

Moreover, throughout Hughes's tenure as Chief Justice, the Supreme Court and the lower federal courts repeatedly invoked the *Mellon* doctrine in rejecting constitutional attacks on loans and grants made by the Public Works Administration (PWA).<sup>294</sup> Undoubtedly because the *Mellon* doctrine posed such an insuperable obstacle to securing judicial review, a vast array of New Deal spending programs, all financed from general revenue, never underwent constitutional challenge. Examples include the Civilian Conservation Corps,<sup>295</sup> the Farm Credit Act,<sup>296</sup> the Reconstruction Finance Corporation,<sup>297</sup> the Rural Electrification Administration Act,<sup>298</sup> and the Emergency Relief Appropriation Act of 1936.<sup>299</sup> Indeed, the most significant

289 *Frothingham v. Mellon*, 262 U.S. 447 (1923).

290 See DEAN ALFANGE, *THE SUPREME COURT AND THE NATIONAL WILL* 178–80, 205 (1937); EDWARD S. CORWIN, *THE TWILIGHT OF THE SUPREME COURT* 176 (1934); SAMUEL J. KONEFSKY, *CHIEF JUSTICE STONE AND THE SUPREME COURT* 102 n.11 (1945); CARL BRENT SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT* 838 (2d ed. 1954).

291 ALFANGE, *supra* note 290, at 180–81; cf. SOLOMON, *supra* note 61, at 110–11 (“[The Court’s] decisions striking down New Deal legislation . . . deprived millions of Americans of tangible dollars and self-respect, starting with three million farmers who received checks from the AAA.”).

292 Pub. L. No. 74-461, 49 Stat. 1148 (1936).

293 FRANK FREIDEL, *FRANKLIN D. ROOSEVELT* 191–92 (1990); SWISHER, *supra* note 290, at 902; Richard S. Kirkendall, *The New Deal and Agriculture*, in 1 *THE NEW DEAL* 84, 94 (John Braeman et al. eds., 1975); Robert Stern, *The Commerce Clause and the National Economy, 1933–1946*, 59 *HARV. L. REV.* 645, 689–90 (1946); Note, *Soil Conservation and Domestic Allotment Act*, 24 *GEO L.J.* 962, 965–67 (1936).

294 See Cushman, *supra* note 16, at 92.

295 Civilian Conservation Corps Reforestation Relief Act, Pub. L. No. 73-5, 48 Stat. 22, 23 (1933).

296 Pub. L. No. 73-75, 48 Stat. 257, 258 (1933).

297 Reconstruction Finance Corporation Extension Act, Pub. L. No. 74-1, 49 Stat. 1, 4 (1935).

298 Pub. L. No. 74-605, 49 Stat. 1363, 1364 (1936).

299 First Deficiency Appropriation Act, Fiscal Year 1936, Pub. L. No. 74-739, 49 Stat. 1597, 1608.

thing about the Hughes Court's much-discussed spending power jurisprudence is how little it actually mattered in light of the taxpayer standing doctrine. Mr. Solomon's claim that the Court's spending power jurisprudence had prevented federal appropriations to aid the needy, and that the spending power was liberated from such hidebound restraints only by the decisions in the *Social Security Cases*, rests on an unfortunately inadequate understanding of contemporary constitutional doctrine.

But because he does not appear to understand the way in which the Court's spending power jurisprudence actually functioned, Mr. Solomon regards the *Social Security Cases* as granting to "Congress, whenever it deemed wise, the power to ease Americans' suffering."<sup>300</sup> At long last, "the government had been granted the right to take the side of the people."<sup>301</sup> But of course the federal government had been using its spending power to ease suffering "without judicial let or hindrance"<sup>302</sup> by the Court throughout the Depression decade, and indeed throughout the Nation's history.<sup>303</sup> Were one to believe, as Mr. Solomon avers, that the Court's constitutional jurisprudence before 1937 is best understood as the judicial enforcement of a "laissez-faire" economic policy that was blind to "reality,"<sup>304</sup> one would quite understandably regard the decisions of 1937 as representing a "most consequential shift,"<sup>305</sup> a "change[ ] of heart," and a "constitutional revolution."<sup>306</sup> Mr. Solomon recognizes that the Due Process Clause, the Commerce Clause, and the General Welfare Clause are "three distinct constitutional clauses, each with its own interpretive history and abstruse arguments. Strictly speaking, none of them had anything to do with the others."<sup>307</sup> Yet he cannot resist the conclusion that the "almost simultaneous[ ]" "change[s] in interpretation" of these provisions, by which "all three long-standing premises of constitutional theory had been abandoned," "surely . . . was more than coincidence." Taken together, these decisions signified a "reversal of attitude about the Constitution—about its purpose in American life, about the duty of law in achieving justice"<sup>308</sup>—a term Mr. Solomon uses frequently but never defines.

But such an understanding is far too simplistic and schematic. It underappreciates the extent to which the Court for many years had interpreted both the Commerce Clause and the Due Process Clauses to permit substantial regulation of the economy.<sup>309</sup> It fails to recognize adequately the extent to which Hughes and Roberts continued throughout their careers to regard

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300 SOLOMON, *supra* note 61, at 206.

301 *Id.* at 208.

302 CORWIN, *supra* note 290, at 176.

303 See generally MICHELE LANDIS DAUBER, *THE SYMPATHETIC STATE* (2013).

304 SOLOMON, *supra* note 61, at 256.

305 *Id.* at 208.

306 *Id.* at 206.

307 *Id.*

308 *Id.*

309 See, e.g., Barry Cushman, *Lost Fidelities*, 41 WM. & MARY L. REV. 95, 100–05 (1999) ("As several scholars have taught us, the number of cases in which the Justices of this era

the Fifth and Fourteenth Amendments as placing significant restraints on government's regulatory authority.<sup>310</sup> It underestimates the extent to which several of the Justices, including some Roosevelt appointees, continued to believe into the early 1940s that there were meaningful, judicially enforceable limits on the commerce power.<sup>311</sup> And it completely misconceives the way that the congressional spending power actually had worked on the ground. The Court's doctrine was far more complex, the changes in it were far more incremental, and its evolution was spread out over a much longer period of time than Mr. Solomon's reductive account would lead the reader to believe.

### C. Ross

Professor Ross's account of the development of constitutional doctrine under Hughes is for the most part well informed, careful, and judicious. He recognizes that "[r]ather than an instinctive bias in opposition to business regulation, the Court's willingness to second-guess legislatures and administrative agencies may have been a natural response to the constitutional uncertainties created by unprecedented governmental intervention in economic affairs."<sup>312</sup> He appreciates the fact that the Court's decision in *Blaisdell* did not, as many contemporary liberals hoped and conservatives feared, remove the Contract Clause as a constitutional restraint on state legislative authority.<sup>313</sup> Indeed, the often-overlooked fact that in three decisions rendered in 1935 and 1936 the Court unanimously invalidated statutes under that Clause made its continuing vitality abundantly clear.<sup>314</sup> Moreover, Professor Ross emphasizes that it is important to recognize, as some recent commentators have failed to do, that much of the New Deal presented "'totally different constitutional problems'"<sup>315</sup> from those presented in *Nebbia* and *Blaisdell*, and that decisions invalidating subsequent federal legislation did not involve a retreat from the positions the majority had staked out in those cases.

Indeed, Professor Ross insists that

[t]he actual holdings of the Court's 1935–1936 decisions . . . did not wreak as much devastation upon the New Deal as is often supposed. The Court invalidated only 11 of the 2,669 statutes signed by Roosevelt during his first

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invalidated economic regulation simply pales in comparison to the number of such statutes they sustained.").

310 See Cushman, *supra* note 139, at 982–98.

311 See CUSHMAN, *supra* note 1, at 208–24.

312 Ross, *supra* note 59, at 41.

313 *Id.* at 53.

314 See *Treigle v. Acme Homestead Ass'n*, 297 U.S. 189 (1936); *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1935); *W.B. Worthen Co. v. Thomas*, 292 U.S. 426 (1934).

315 Ross, *supra* note 59, at 53 (quoting Case Comment, *Constitutional Law—Contracts Clause—Mortgage Moratorium—Extension of Period of Redemption*, 34 COLUM. L. REV. 361, 362 (1934)).

term, albeit all of the statutes that the Court nullified were high-profile laws.<sup>316</sup>

Title I of the NIRA, invalidated in *A.L.A. Schechter Poultry Corp. v. United States*,<sup>317</sup> “already had become a political embarrassment to the administration and . . . was facing congressional termination even before the Court invalidated it.”<sup>318</sup> The Frazier-Lemke Farm Debt Relief Act “was not actually part of the New Deal, and the Municipal Bankruptcy Act had little practical significance.”<sup>319</sup> “Moreover,” Professor Ross points out, “several of the statutes, particularly NIRA, suffered from such serious constitutional infirmities that even those justices who were ordinarily the most receptive toward regulatory legislation joined in opinions striking them down.”<sup>320</sup> It was “[o]nly invalidation of the statutes regulating agriculture and coal mining and providing pensions to railroad workers [that] seriously impeded recovery and reform efforts, and even these decisions were rendered moot after 1937, when the Court upheld similar statutes that remedied the constitutional infirmities about which the Court had complained.”<sup>321</sup> As Professor Ross understands, the Court’s decisions in 1935 and 1936 did not erect insuperable obstacles to reform in these areas, but instead channeled congressional efforts into achieving those desired ends through means that were consistent with prevailing constitutional doctrine.<sup>322</sup>

The earliest example of this came with the Court’s first decision invalidating a New Deal measure—*Panama Refining Co. v. Ryan*,<sup>323</sup> which invalidated the NIRA’s petroleum code on nondelegation grounds.<sup>324</sup> As Professor Ross reports,

[T]he case humiliated the administration because it graphically illustrated the chaotic administrative methods about which the New Deal’s critics had so bitterly complained. During oral argument, Assistant Attorney General Harold M. Stephens revealed that the government had indicted and jailed violators of the . . . code for a year before discovering that the code inadvertently lacked a penal section. Under questioning from astonished justices, Stephens also admitted that there was no general publication of executive

316 *Id.* at 59.

317 295 U.S. 495 (1935).

318 Ross, *supra* note 59, at 59.

319 *Id.*

320 *Id.*

321 *Id.*

322 See generally Cushman, *supra* note 16. For this reason it is odd to see Professor Ross later arguing that before 1937, “[t]he persistent threat of judicial nullification chilled efforts to enact state and federal reform legislation”—a claim in support of which he presents no evidence. Ross, *supra* note 59, at 249. In view of the evidence that he does produce, it might be more accurate to say instead that the persistent threat of judicial nullification *shaped* efforts to enact state and federal reform legislation—that reformers knew that if they wished to attain their objectives, they needed to be attentive to the constraints imposed by contemporary constitutional doctrine.

323 293 U.S. 388 (1935).

324 *Id.* at 433.

orders prohibiting the transportation of "hot oil" and that they would be "rather difficult" to obtain.<sup>325</sup>

Even Justice Cardozo, who filed a lone dissent from the majority's opinion, "rebuked the administration for its slipshod practices."<sup>326</sup> Later that year, "after the House Judiciary Committee condemned the 'utter chaos' with which administrative rules were promulgated, Congress created the Federal Register for publication of all administrative rules having the force of law."<sup>327</sup> And yet, as Professor Ross observes, this poorly drafted and badly administered measure "could be cured by statute,"<sup>328</sup> and indeed, it was. Within six weeks of the *Panama Refining* decision Congress had replaced the NIRA's Hot Oil regulation with the Connally Act, which the lower federal courts uniformly sustained and the Supreme Court unanimously upheld.<sup>329</sup>

Professor Ross maintains that in *Schechter* the Court "restrictively interpreted the commerce clause,"<sup>330</sup> exhibiting a "cramped vision of commerce."<sup>331</sup> Yet he appears to mean by this only that it appears restrictive or cramped in retrospect, not that it was more restrictive or cramped than it had been previously. For as he recognizes, "the Court's interpretation of the commerce clause in *Schechter* was not inconsistent with established doctrine."<sup>332</sup> At the time, such an interpretation was thoroughly conventional. Professor Ross also astutely observes that the Court's rejection of the emergency argument in *Schechter* was not inconsistent with its prior adoption in *Blaisdell*, because the former concerned the reach of the commerce power while the latter involved the scope of the police power.<sup>333</sup> In fact, Professor Ross notes, "*Schechter* had little practical impact because NIRA had become such an embarrassment to the Roosevelt administration that Congress probably would not have renewed the statute when its initial term expired during the summer of 1935."<sup>334</sup> The NIRA "tended to discourage competition," and "there was a growing consensus that its maze of bureaucratic regulations was hindering rather than promoting economic recovery."<sup>335</sup> "Moreover, many New Dealers and other advocates of economic regulation of business were uncomfortable with NIRA's corporatism, distrustful of its regulation of business by business. Others, sharing Brandeis's longstanding misgivings about centralization, preferred more regulation at the state level."<sup>336</sup> Indeed, even after the Court's decisions on "Black Monday" striking down the NIRA and the Frazier-Lemke Farm Debt Relief Act, a Gallup poll showed only thirty-one

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325 Ross, *supra* note 59, at 60–61.

326 *Id.* at 61.

327 *Id.*

328 *Id.* at 60.

329 See MCKENNA, *supra* note 48, at 46–47; Cushman, *supra* note 16, at 86.

330 ROSS, *supra* note 59, at 67.

331 *Id.* at 59.

332 *Id.* at 68.

333 *Id.*

334 *Id.* at 69.

335 *Id.*

336 *Id.*

percent of those polled favoring limitations on the Court's power to invalidate congressional legislation, with fifty-three percent opposed.<sup>337</sup>

Unlike Messrs. Shogan and Solomon, Professor Ross also is alert to the wide latitude that Congress enjoyed throughout the 1930s under the Court's demure approach to questions involving federal expenditures. As he puts it, "many New Deal measures prior to 1937 survived constitutional scrutiny by default because they were not subject to lawsuits contesting their legality."<sup>338</sup> "[H]istorians often overlook the fact that the Court never reviewed the constitutionality of several important New Deal measures because they were so clearly within congressional power to appropriate funds for the general welfare that even diehard conservatives shrunk from challenging them."<sup>339</sup> For example, "no significant legal opposition was mounted against the PWA and the WPA [Works Progress Administration], which provided jobs for millions of Americans in a vast array of projects."<sup>340</sup> "Also escaping legal challenge were the CCC [Civilian Conservation Corps], which employed hundreds of thousands of youths on soil conservation projects, and the Home Owners' Loan Corporation, which helped refinance home mortgages."<sup>341</sup> Moreover, the Court's rejection of a constitutional challenge to the Tennessee Valley Authority, taken together with decisions upholding several state laws, suggests to Professor Ross "that the Court's adverse reactions to the New Deal laws were based on adherence to well-established legal doctrines rather than on implacable hostility toward regulation."<sup>342</sup> Indeed, the continuity in the standard of review and its application "between the Court's decisions on state legislation before 1935 and its decisions during 1935 and 1936" similarly leads Professor Ross to conclude "that the Court's antipathy toward New Deal legislation did not represent any sudden lurch to the political Right."<sup>343</sup>

Thus, with respect to the "'revolutionary' Hughes Court decisions," Professor Ross maintains, "the Court's change of course was not nearly as abrupt as it appeared."<sup>344</sup> He does not regard the decisions in the *Social Security Cases* as involving particularly remarkable doctrinal developments. He notes that the Court upheld the old-age pension provisions of the federal statute by a vote of seven to two, with Van Devanter and Sutherland joining the majority.<sup>345</sup> He correctly observes that these two Justices dissented from the opinion upholding the Act's unemployment compensation provision on "narrow grounds," agreeing that "Congress had the power to levy the tax and that the tax did not unduly coerce the states."<sup>346</sup> Instead, "they objected to the stat-

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337 *Id.* at 72.

338 *Id.* at 82.

339 *Id.*

340 *Id.*

341 *Id.*

342 *Id.* at 84.

343 *Id.*

344 *Id.* at 167.

345 *Id.* at 129.

346 *Id.*

ute only to the extent that it interfered with the states' power to administer [their] own unemployment compensation fund[s]."<sup>347</sup> And in dissenting from the opinion upholding Alabama's state unemployment compensation statute, "Sutherland, Butler, and Van Devanter agreed that the state's objective was constitutional, objecting only on technical grounds to the statute's provision for pooling of the funds of different industries."<sup>348</sup> Professor Ross similarly draws attention to the "broad interpretation of the federal taxing and spending powers"<sup>349</sup> on display in a 1938 Sutherland opinion unanimously rejecting challenges by private utility companies to loans made by the PWA to municipalities to support development of electric power.<sup>350</sup> "Sutherland's approval of the PWA loans," he maintains, "was consistent with his authorship" of the *Mellon* decision upholding federal grants-in-aid in 1923, and also with his vote to uphold the Social Security Act.<sup>351</sup> Quoting Professor Parrish with approval, Professor Ross concludes, "'With his consistent endorsement of Congress's spending power via the grant-in-aid, soon to become the most powerful engine of expanding federal authority, Justice Sutherland, otherwise the nemesis of big government, could lay claim to sponsoring the luxurious growth of the post-World War II welfare state.'"<sup>352</sup>

Professor Ross offers a similarly measured assessment of developments in Commerce Clause jurisprudence. He sees the opinions upholding the application of the National Labor Relations Act to the manufacturing enterprises there involved as elaborations of the "stream of commerce" doctrine established by cases handed down between 1905 and 1930.<sup>353</sup> He cautions against the inference that the decisions upholding the Act signaled a strong shift in "attitude" toward labor on the part of the Justices in the majority. After surveying a series of important labor law cases handed down in 1940 and 1941 in which Hughes and Roberts dissented from pro-labor opinions written and joined by Roosevelt appointees, he concludes that "[t]he dissents of Hughes and Roberts in so many of these labor cases provides [sic] support for the thesis that they did not 'switch' sides or undergo any metamorphosis in 1937 or afterward." Instead, "[l]abor's victories in the Court appear to have resulted more from changes in the Court's personnel than from any 'revolution.'"<sup>354</sup>

Professor Ross also cautions against the idea that with the 1937 decisions the Court was abandoning the idea of judicially enforced limitations on the commerce power. He reminds us that Hughes had warned in his opinion in *NLRB v. Jones & Laughlin Steel Corp.*<sup>355</sup> that

347 *Id.*

348 *Id.* at 130.

349 *Id.* at 161.

350 *Ala. Power Co. v. Ickes*, 302 U.S. 464, 485 (1938).

351 Ross, *supra* note 59, at 160.

352 *Id.* (quoting PARRISH, *supra* note 149, at 77).

353 *Id.* at 122 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41 (1937)).

354 *Id.* at 146.

355 301 U.S. 1.

the scope of the commerce power “must be considered in the light of our dual system of government and may not be so extended as to embrace effects upon interstate commerce so indirect and remote that to embrace them . . . would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.”<sup>356</sup>

For example, Professor Ross observes, in *Erie Railroad Co. v. Tompkins*<sup>357</sup> Justice Brandeis wrote for the majority that “Congress has no power to declare substantive rules of common law applicable in a State.”<sup>358</sup> “In expounding this theory of federalism and congressional power,” notes Professor Ross, “Brandeis implicitly rejected the possibility that the commerce clause might permit Congress to authorize the federal courts to craft rules of common law in diversity litigation.”<sup>359</sup> Indeed, Professor Ross insists that *Erie* “implicitly invoked the Tenth Amendment by alleging that *Swift* permitted federal courts to invade rights that ‘are reserved by the Constitution to the several States.’”<sup>360</sup> Clearly, the commerce power was still far from plenary in 1938. Similarly, Professor Ross maintains that the Court’s labor decisions in the late 1930s and 1940s “continue[d] to acknowledge the practical realities of a national labor market while remaining sensitive to the exigencies of federalism.”<sup>361</sup> He is cognizant of the fact that much of the early New Deal failed to pass constitutional muster because it directly regulated *production*, while much of the later New Deal, which instead astutely sought to regulate interstate *marketing* in such troubled sectors as energy and agriculture, survived constitutional challenge for that very reason.<sup>362</sup> And he correctly points out that it was not until the 1941 decision in *United States v. Darby*<sup>363</sup> that the Court effectively overruled *Carter Coal*.<sup>364</sup>

Professor Ross’s account of substantive due process also demonstrates prudent judgment.<sup>365</sup> He quite properly recognizes that the decision

356 Ross, *supra* note 59, at 147 (quoting *Jones & Laughlin Steel Corp.*, 301 U.S. at 37).

357 304 U.S. 64 (1938).

358 *Id.* at 78.

359 Ross, *supra* note 59, at 169.

360 *Id.* (quoting *Erie*, 304 U.S. at 80).

361 *Id.* at 147.

362 *Id.* at 152–54.

363 312 U.S. 100 (1941).

364 *Id.* at 123.

365 There is, however, the arguable exception of his treatment of *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935), in which Professor Ross breaks with his general narrative equanimity to criticize Justice Roberts’s majority opinion as “contemptuous” and “always unmistakably sarcastic.” Ross, *supra* note 59, at 64. Professor Ross overlooks the fact that the dissenting opinion of Chief Justice Hughes, which was joined by Justices Brandeis, Stone, and Cardozo, agreed with Roberts “that the requirement that the carriers shall pay retiring allowances to [all workers in service one year prior to the enactment, although they might never be re-employed] is arbitrary and beyond the power of Congress,” that is, that it violated the Due Process Clause of the Fifth Amendment. *R.R. Ret. Bd.*, 295 U.S. at 389 (Hughes, C.J., dissenting). Professor Ross asserts that “Roberts’s opinion [for the Court]”—and by implication, this passage from Hughes’s dissent—“was a classic specimen of substantive due process, for it unabashedly substituted the Court’s own



upholding Washington state's minimum wage statute for women in *West Coast Hotel Co. v. Parrish* was a "watershed" in that it overruled *Adkins v. Children's Hospital*, a decision with "immense practical and symbolic significance" that was one of the last remaining high-profile precedents from the so-called *Lochner* era. At the same time, Professor Ross understands that, as a doctrinal matter, Hughes's opinion for the majority "was not itself revolutionary."<sup>366</sup> The Chief Justice there employed fairly conventional police power analysis in upholding the statute, analysis of the very sort that his predecessor William Howard Taft had employed when dissenting from the majority opinion in *Adkins* in 1923. As Professor Ross observes, Hughes's "heavy reliance upon the state's interest in protecting the health of women did not foreclose the Court from invoking liberty of contract in other cases."<sup>367</sup> At the same time, Professor Ross recognizes that Hughes and Roberts continued even after *West Coast Hotel* to invoke the Due Process, Equal Protection, and Privileges or Immunities Clauses to invalidate regulatory legislation, in precisely the same ways that they had in cases decided in 1935 and 1936.<sup>368</sup> As he puts it, "Hughes and Roberts were found in dissent in some important cases . . . for they never were willing to defer to Congress so thoroughly as some of their brethren."<sup>369</sup> In sum, Professor Ross concludes, "the voting patterns and doctrinal beliefs of the justices did not change as much during 1937 as the actual outcome of the Court's decisions might suggest."<sup>370</sup>

It is therefore quite curious to find Professor Ross periodically offering evaluations of the Court's performance that seem to be entirely at odds with the assessments I have just reviewed. For example, after arguing that the deference accorded to the legislature in *West Coast Hotel* was entirely continuous with what the Court had said and done in *O'Gorman & Young, Inc. v. Hartford Fire Insurance Co.*<sup>371</sup> in 1931 and *Nebbia* in 1934, he claims that "[t]he Court's decision in *West Coast Hotel* signaled the Court's abandonment after 1937 of the Fifth and Fourteenth Amendments as grounds for nullifying economic regulatory legislation."<sup>372</sup> To see why this is such an odd assertion, consider three contemporaneous cases in which the Hughes Court invalidated an economic regulation on the ground that it violated the Fourteenth

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assessment of the law's justification for those of Congress." Ross, *supra* note 59, at 64. If by this he means that the Court undertook an independent inquiry into the statute's constitutionality, this is true not only of substantive due process, but of all judicial review. If he means to suggest that in all substantive due process cases the Court substituted its policy judgments for those of the legislature, then his understanding of the doctrine diverges significantly from the revisionist consensus that has emerged among constitutional historians since the 1970s. See, e.g., GILLMAN, *supra* note 139.

366 Ross, *supra* note 59, at 119.

367 *Id.*

368 See *id.* at 153.

369 *Id.* at 166–67.

370 *Id.* at 135.

371 282 U.S. 251, 258 (1931) (upholding state regulation of commissions paid to agents selling fire insurance).

372 Ross, *supra* note 59, at 141.

Amendment. First, less than two months before *West Coast Hotel* was announced, the Court in *Thompson v. Consolidated Gas Utilities Corp.* unanimously invalidated a natural gas proration order issued by the Texas Railroad Commission on the ground that it deprived some owners of their property without due process.<sup>373</sup> Moreover, it is clear that Hughes and Roberts did not regard their votes in *West Coast Hotel* as a repudiation of *Thompson*, for they dissented when *Thompson* was effectively overruled in 1940.<sup>374</sup> Second, on May 24, the very day that the *Social Security Cases* were handed down, Hughes joined the Four Horsemen in invalidating on equal protection grounds a Georgia statute regulating stock insurance companies less favorably than it did mutual insurance companies.<sup>375</sup> How, one wonders, is this consistent with the claim that in *West Coast Hotel* Hughes was signaling that he would never again vote to nullify another economic regulation on Fourteenth Amendment grounds? Third, as Professor Ross briefly notes, “the Court invoked substantive due process early in 1938 to strike down a California tax on a Connecticut insurance contract.”<sup>376</sup> That opinion was written by Justice Stone, and was joined by all of the other remaining members of the *West Coast Hotel* majority who participated in the decision—Hughes, Brandeis, and Roberts. The lone dissenting vote was cast by the sole Roosevelt appointee, Justice Hugo Black.<sup>377</sup> Are we to understand this as evidence of backsliding by these Justices from the commitments that they had made in *West Coast Hotel* never again to vote to nullify economic legislation on Fifth or Fourteenth Amendment grounds? Or is it possible instead that Professor Ross has exaggerated the commitments that *West Coast Hotel* entailed?

Moreover, as Professor Ross recognizes, Hughes and Roberts “continued in some cases to deny the constitutionality of economic legislation”<sup>378</sup> under the Fifth and Fourteenth Amendments.<sup>379</sup> Internal Court documents reveal that as late as 1939, Roberts continued to believe that *Alton* had been correctly decided,<sup>380</sup> and this is corroborated by the inclusion of a favorable citation to *Alton* in Justice Stone’s opinion in *United States v. Carolene Products*

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373 *Thompson v. Consol. Gas Utils. Corp.*, 300 U.S. 55, 81 (1937).

374 *See R.R. Comm’n of Tex. v. Rowan & Nichols Oil Co.*, 310 U.S. 573, 584–85 (1940) (Roberts, J., dissenting).

375 *Hartford Steam Boiler Inspection & Ins. Co. v. Harrison*, 301 U.S. 459 (1937).

376 Ross, *supra* note 59, at 141.

377 *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 82 (1938) (Cardozo, J., took no part in the decision).

378 Ross, *supra* note 59, at 142.

379 *See, e.g., United States v. Willow River Power Co.*, 324 U.S. 499, 511–15 (1945) (Roberts, J. & Stone, C.J., dissenting); *United States v. Commodore Park, Inc.*, 324 U.S. 386, 393 (1945) (Roberts, J., dissenting); *Charleston Fed. Sav. & Loan Ass’n v. Alderson*, 324 U.S. 182, 192–93 (1945) (Roberts, J., dissenting); *Madden v. Kentucky*, 309 U.S. 83, 93–94 (1940) (Roberts, J., dissenting); *United States v. Rock Royal Coop., Inc.*, 307 U.S. 533, 583–87 (1939) (Roberts, J. & Hughes, C.J., dissenting); Cushman, *supra* note 309, at 136–41; Cushman, *supra* note 139, at 984–95.

380 *See Cushman, supra* note 139, at 991–92.

*Co.*<sup>381</sup> Indeed, Justice Black refused to join the famous Part “Third” of that opinion precisely because it reserved to the Court the power to invalidate economic regulations on Fifth and Fourteenth Amendment grounds.<sup>382</sup> None of this is consistent with the claim that the members of the *West Coast Hotel* majority were signaling “the Court’s abandonment after 1937 of the Fifth and Fourteenth Amendments as grounds for nullifying economic regulatory legislation.”<sup>383</sup>

Similarly puzzling in light of his account of the Social Security and Commerce Clause cases is Professor Ross’s assertion that “[t]he Hughes Court’s unwavering deference to Congress in a long line of important decisions during the spring of 1937 provided powerful evidence of a profound shift in the Court’s direction.”<sup>384</sup> Consider the other 1937 cases involving the exercise of federal power. *Virginian Railway Co. v. Federation* unanimously upheld the 1934 amendments to the Railway Labor Act.<sup>385</sup> *Wright v. Vinton Branch of the Mountain Trust Bank* unanimously upheld the revised Frazier-Lemke Farm Debt Relief Act.<sup>386</sup> *Washington, Virginia & Maryland Coach Co. v. NLRB* unanimously upheld the application of the National Labor Relations Act to an interstate bus company.<sup>387</sup> *Sonzinsky v. United States* unanimously upheld a stiff federal excise tax on certain firearms.<sup>388</sup> Each of these opinions was joined by all of the Four Horsemen, who did not hesitate to dissent from such landmark decisions as *West Coast Hotel*, four of the five cases involving the National Labor Relations Act, and one or more of the *Social Security Cases*. In view of their willingness to dissent in such high-profile cases, it is hard to understand how they could have joined such unanimous opinions for any reason other than that they regarded the statutes involved as constitutional. And if such decisions did not constitute a “profound shift” on the part of the Four Horsemen, then it is difficult to understand how they could have constituted such a shift for Hughes and Roberts, or for the Court as a whole.

This point can be extended. Recall that the vote to uphold the old-age provisions of the Social Security Act was seven to two, with Van Devanter and Sutherland joining the majority. Recall also that those two Justices dissented from the opinion upholding the unemployment insurance provisions of the Act on “surprisingly narrow grounds,”<sup>389</sup> making the decision there very nearly seven to two.<sup>390</sup> Finally, recall that in the case of *Associated Press v.*

381 304 U.S. 144, 154 (1938); see Cushman, *supra* note 309, at 132–35; Cushman, *supra* note 139, at 994.

382 See Cushman, *supra* note 309, at 134–35; Cushman, *supra* note 139, at 994–95.

383 Ross, *supra* note 59, at 141.

384 *Id.*

385 *Virginian Ry. Co. v. Sys. Fed’n No. 40*, 300 U.S. 515, 563 (1937).

386 300 U.S. 440, 470 (1937).

387 301 U.S. 142, 147 (1937).

388 300 U.S. 506, 514 (1937).

389 Ross, *supra* note 59, at 129.

390 Earlier in the narrative Professor Ross contends that *Alton* “clouded the constitutionality of the Social Security Act . . . which contained provisions closely resembling those in the railroad statute.” *Id.* at 64. It is not clear to which provisions of the Social Security

NLRB, the Four Horsemen dissented solely on the grounds that application of the NLRA to the AP violated the First Amendment, and not on Commerce Clause grounds.<sup>391</sup> If one or more of the Four Horsemen did not doubt that these statutes fell within the scope of Congress's enumerated powers, one wonders, then why should it be surprising that Hughes and Roberts also believed that they were constitutional?

In fact, Professor Ross appears to believe that this "profound shift" began even before the spring of 1937:

The Court's opinions during the two months after the election seemed to give credence to the fictional Mr. Dooley's famous observation that the Court "follows the 'lition returns." During this period, the Court sustained a major state insurance unemployment law, expanded the scope of the commerce clause, broadened the reach of civil liberties, upheld a key provision of the federal bankruptcy law, construed the federal taxing power in a manner that facilitated the Roosevelt administration's fiscal policy, and broadly construed the president's power over foreign relations.<sup>392</sup>

"In their totality,"<sup>393</sup> Professor Ross concludes, this "spate of 'liberal' decisions"<sup>394</sup> "seemed to many Americans to signal a change of direction by the Court."<sup>395</sup>

Here again, the perception that the Justices had changed direction seems untenable, because nearly all of the cases Professor Ross enlists in support of this claim were decided by unanimous or near-unanimous votes. The unemployment insurance case was decided by an equally divided Court,<sup>396</sup>

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Act Professor Ross refers, nor in what ways the provisions of the 1934 Railroad Retirement Act "closely resembled" those provisions. But if the resemblance was as close as Professor Ross suggests, one has to wonder why Sutherland and Van Devanter joined the majority to uphold the Act's old-age pension provisions in *Helvering v. Davis*, 301 U.S. 619 (1937); why they concurred in most of what Cardozo wrote in upholding the unemployment insurance provisions in *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); and why the dissenting Justices in the *Social Security Cases* never even mentioned *Alton* in their opinions.

391 301 U.S. 103, 133 (1937) (Sutherland, J., dissenting).

392 Ross, *supra* note 59, at 97.

393 *Id.*

394 *Id.* at 101.

395 *Id.* at 97. In an article published two years before his book appeared, Professor Ross put forward a different view of these decisions:

A careful analysis of these "forgotten" decisions indicates that this so-called revolution, or "switch," was not merely an abrupt response to external factors, and that the Court's hostility toward regulatory legislation during 1935-36 was anomalous. Since such an analysis of these decisions suggests that the Court was not directly influenced by the threat of Court-curbing in the wake of either the 1936 election or Roosevelt's Court-packing plan, the "forgotten" decisions provide support for the thesis that the "judicial revolution" was more the product of jurisprudential evolution than political pressure.

William G. Ross, *When Did the "Switch in Time" Actually Occur?: Re-discovering the Supreme Court's "Forgotten" Decisions of 1936-1937*, 37 ARIZ. ST. L.J. 1153, 1220 (2005).

396 *W.H.H. Chamberlin, Inc. v. Andrews*, 299 U.S. 515 (1936) (per curiam).

but the Commerce Clause,<sup>397</sup> civil liberties,<sup>398</sup> bankruptcy,<sup>399</sup> and taxing power<sup>400</sup> cases Professor Ross discusses were all decided without a dissenting vote, and the foreign relations power case was decided by a vote of eight to one.<sup>401</sup> Professor Ross observes that “[t]he Court’s validation of economic regulations during the winter of 1936–1937 was perceived by some as indications that at least Hughes and Roberts feared that Roosevelt’s landslide would embolden the president to curb the Court,”<sup>402</sup> but the unanimity of so many of these decisions makes this perception difficult to credit. McReynolds and others of the Four Horsemen dissented in the most high-profile cases that the administration cared the most about (e.g., the *Labor Board Cases*, the *Social Security Cases*, and *West Coast Hotel*). In light of their performances in such landmark cases, it is hard to believe that the Four Horsemen voted to sustain the legislation involved in these lower-profile cases only because they feared that Roosevelt would try to curb the Court. And if that supposition is not reasonable with respect to the Four Horsemen, it is difficult to see why would it be reasonable with respect to Hughes and Roberts, who were already much more likely than the Four Horsemen to sustain economic legislation. Again, one is led to the conclusion that the Justices genuinely believed that these measures they upheld in the winter of 1936–1937 were actually constitutional. Where, one is left to ask, is the evidence to support the claim that the Court’s “unwavering deference to Congress in a long line of important decisions in the spring of 1937 provided powerful evidence of a profound shift in the Court’s direction”?<sup>403</sup>

Professor Ross appears to believe that the string of government victories alone supplies such powerful evidence. But the fact that the government happens to win a series of cases does not necessarily mean that the Court has changed its “attitude” toward the type of legislation in question. It may simply reflect the fact that the legal details of the cases and statutes that have

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397 *Ky. Whip & Collar Co. v. Ill. Cent. R.R.*, 299 U.S. 334 (1937). The decision upheld a federal statute prohibiting interstate shipment of convict-made goods into states banning the sale of such products. *Id.* at 353. Professor Ross appears to believe that the decision was inconsistent with both *Carter Coal* and *Hammer v. Dagenhart*. Ross, *supra* note 59, at 98–99. This was not the view taken by the Four Horsemen, who joined *Kentucky Whip* and yet continued to think that *Carter Coal* and *Hammer* were still good law. See *Mulford v. Smith*, 307 U.S. 38, 53, 55–56 (1939) (Butler & McReynolds, JJ., dissenting); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 76, 96, 99 (1937) (McReynolds, Van Devanter, Sutherland, & Butler, JJ., dissenting). Many commentators and lower federal judges shared this view. See CUSHMAN, *supra* note 1, at 177–82. Indeed, in the preceding year all Four Horsemen had joined in upholding a federal statute divesting convict-made goods of their interstate character upon arrival in a destination state, thereby allowing local law prohibiting the sale of such goods to apply, freed from the constraints imposed by the dormant Commerce Clause. See *Whitfield v. Ohio*, 297 U.S. 431 (1936).

398 *DeJonge v. Oregon*, 299 U.S. 353 (1937).

399 *Kuehner v. Irving Trust*, 299 U.S. 445 (1937).

400 *United States v. Hudson*, 299 U.S. 498 (1937).

401 *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

402 Ross, *supra* note 59, at 101.

403 *Id.* at 141.

come before the Court are materially different from those that the Court has addressed previously. Consider, for example, the Frazier-Lemke Farm Debt Relief Act of 1934. In 1935, Justice Brandeis wrote for a unanimous Court that five of the statute's provisions deprived mortgage creditors of their property without due process.<sup>404</sup> Working from the blueprint set out in Brandeis's opinion, Congress quickly enacted a revised statute that was widely recognized as remedying the defects the Court had identified in the early version.<sup>405</sup> Indeed, as Professor Ross reports, *The Nation* observed that the Court's unanimous decision upholding the revised statute in 1937<sup>406</sup> was "not especially remarkable" because "Congress in redrafting the Frazier-Lemke Act had worked so 'laboriously to the meet the court's objections' in its 1935 decision."<sup>407</sup> Yet Professor Ross maintains that in the 1937 decision the Court "appeared to reverse itself" by unanimously upholding the revised measure, "which was nearly identical to the legislation that the Court unanimously had struck down two years earlier."<sup>408</sup> But it is clear that the statutes were far from identical, and the unanimity of the two decisions with no intervening personnel changes casts grave doubt on the contention that there was any reversal of position involved.

How does someone of Professor Ross's obvious knowledge and ability fall into such difficulties? One can only speculate, but I want to suggest that the difficulty is traceable to the attitudinal presuppositions with which he starts and the related political taxonomy through which he initially sets out to understand the Justices. It flows from a determination, which he sometimes resists, to attempt to understand the performance of the Justices through analytic dichotomies like "liberal" and "conservative." On such an account, the Justices are the moving parts of the story. If they invalidate a regulation, they are being "conservative"; if they later uphold a comparable measure, they have "switched" to being "liberal." This mode of analysis is not peculiar to Professor Ross's discussion of 1937—it makes appearances at other points in the narrative as well. For example, he characterizes a series of decisions upholding various state and federal economic regulations between 1930 and 1932 as evidence of "the Court's renewed receptivity toward economic regulation"<sup>409</sup> and its "growing deference to state economic regulation."<sup>410</sup> The Court, on this account, was becoming more "liberal." Yet like many of the decisions that Professor Ross believes constitute the evidence of a "profound shift" in 1937, many of the cases Professor Ross discusses in support of this thesis also were decided by unanimous votes.<sup>411</sup> These government victories

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404 *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 594–95 (1935).

405 See *Cushman*, *supra* note 16, at 81–83.

406 See *Wright v. Vinton Branch of the Mountain Trust Bank*, 300 U.S. 440 (1937).

407 Ross, *supra* note 59, at 121.

408 *Id.* at 120.

409 *Id.* at 31.

410 *Id.* at 34.

411 See, e.g., *Spores v. Binford*, 286 U.S. 374 (1932); *Hodge Drive-It-Yourself Co. v. Cincinnati*, 284 U.S. 335 (1932); *Willcuts v. Bunn*, 282 U.S. 216 (1931); *Staten Island Rapid*

weren't eked out by narrow margins—they commanded the support of all of the Justices. Are we to understand that the Four Horsemen, in voting to sustain such legislation, were becoming more “liberal,” more “receptive” to economic regulation than they had been previously? Their continued resistance to certain types of regulation throughout this period makes that highly doubtful; and if that is not the best account of the reasons for the Four Horsemen's votes in these decisions, then there is no reason to believe that it is the best account of the Court's behavior as a whole. There is no good reason to think that the Justices voted to uphold these statutes for any reason other than that they thought that the measures were constitutional. Indeed, as Professor Ross himself points out, eighty-five percent of the cases the Court decided between 1930 and 1934 were unanimous. Only three percent were decided by a margin of only one vote.<sup>412</sup> The notion that the Four Horsemen ever set a face of flint to all forms of economic regulation is nothing more than a myth. Throughout their careers they voted to uphold many, many economic regulations—it was not necessary that they “change” or “shift” in order to do so.<sup>413</sup> Unless we are to posit that all of the Justices were subject to extreme degrees of vicissitude, a model that envisions the Justices constantly vacillating between “liberal” and “conservative” postures can account for the behavior of none of the Hughes Court Justices. For throughout their careers, all of the Justices were on such an account both liberal and conservative. It is only through sensitivity to the legal details of cases and statutes, which Professor Ross demonstrates often but not consistently, that we are enabled to see the performances of the Justices as anything other than ultimately mystifying, inscrutable, and chaotic.

#### D. Parrish

Professor Parrish distances himself from “traditional accounts” that “emphasize the importance of 1937 and argue that the Hughes Court executed a sudden constitutional revolution, an abrupt departure from earlier rulings when it came under intense political pressure from Roosevelt and Congress.”<sup>414</sup> Instead, he clearly associates himself with “[r]evisionist interpretations” that “stress a more gradual constitutional evolution during the decade, one with doctrinal roots that reached back to the jurisprudence of

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Transit Ry. v. Phoenix Indem. Co., 281 U.S. 98 (1930); Cochran v. La. State Bd. of Educ., 281 U.S. 370 (1930); Corp. Comm'n of Okla. v. Lowe, 281 U.S. 431 (1930); Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930); United States v. First Nat'l Pictures, Inc., 282 U.S. 44 (1930); Tex. & New Orleans R.R. v. Bhd. of Ry. & S.S. Clerks, 281 U.S. 548 (1930) (McReynolds, J., took no part in the decision); Ross, *supra* note 59, at 31–32, 43.

412 Ross, *supra* note 59, at 54 (“[O]nly 25 of the 798 cases adjudicated by the Court during the 1930 through 1934 terms were decided by a margin of one vote. Some 85 percent of the decisions during these five terms were unanimous.”).

413 See Cushman, *supra* note 58, at 566–71, 605–36.

414 PARRISH, *supra* note 149, at 23.

the Taft and White eras.”<sup>415</sup> He maintains that “[t]he year 1937, dominated by the ‘Court-packing’ fight and the Court’s endorsement of critical New Deal reforms, has loomed so large in histories of the era that it has tended to oversimplify the convoluted course of constitutional development during the decade,”<sup>416</sup> and urges greater attention to “the internal dynamics of legal reasoning and the more astute lawyering of the Roosevelt administration and its allies after 1935.”<sup>417</sup> He rejects the contentions of scholars such as Edward Corwin and Bruce Ackerman that American constitutional law underwent a “sea change” during Hughes’s tenure.<sup>418</sup> While he recognizes that decisions such as *Nebbia*, *West Coast Hotel*, and *Jones & Laughlin* “formally emancipated both state and federal governmental authority from constitutional constraints that had limited their regulatory functions over the previous half century,” he insists that those constraints “had been weakened significantly during the progressive movement prior to World War I and even during the years of so-called constitutional fundamentalism under Chief Justice Taft. The depression decade,” on this view, “provided the occasion for their final interment through a slow ritual that might have been shortened had the Court not been often sharply divided and, like most courts, unwilling to break too suddenly from the doctrinal grooves laid down in the past.”<sup>419</sup> “In short, the Hughes Court finally confirmed the revolution in the relationship between the state and the American economy, one made ad hoc, piece by piece, at least since the eras of Theodore Roosevelt and Woodrow Wilson.”<sup>420</sup> “American constitutional law,” he concludes, “has been one long, winding river of development. So, too, with Hughes and his brethren. The road to *West Coast Hotel*, *Jones & Laughlin*, or *Herndon v. Lowry* had been mapped, however faintly, by those jurists who came before them.”<sup>421</sup>

Professor Parrish recognizes the important role that the narrow category of “‘businesses affected with a public interest’” played in limiting government power to regulate wages and prices before 1934.<sup>422</sup>

Marshaling a slim majority of five, the Hughes Court methodically chipped away at this inherited due process limitation beginning in 1931 with

415 *Id.*

416 *Id.* at 27.

417 *Id.* at 23.

418 *Id.* at 127. At another point, however, he writes:

A legal historian can plausibly argue that America’s constitutional world underwent a . . . fundamental transformation during the years of Hughes’s tenure as chief justice, sometime between 1934 and 1938 “or thereabouts.” These middle years of the Great Depression, punctuated by Roosevelt’s abortive court-packing proposal, provided a series of Supreme Court rulings that simultaneously emancipated government to manage the nation’s economy and enlarge greatly the scope of basic civil liberties . . . .

*Id.* at 177.

419 *Id.* at 127.

420 *Id.* at 127–28.

421 *Id.* at 177.

422 *Id.* at 152 (quoting *Nebbia v. New York*, 201 U.S. 502, 536 (1934)).



*O’Gorman & Young v. Hartford Fire Insurance Co.*, which sustained a legislative regulation of the commissions paid to insurance agents by their companies. *Nebbia* three years later effectively eliminated “business affected with a public interest” as a due process barrier to price regulations mandated by the state . . . .<sup>423</sup>

“The Four Horsemen, who dissented [in *Nebbia*], rightly regarded this judicial innovation as one that opened wide the doors to legislative control of the economy. *Blaisdell* and *Nebbia*, it can be argued, represented a significant shift in constitutional doctrine equal to any that came later.”<sup>424</sup> For *Nebbia* “ultimately laid the foundation for the successful defense of state and federal minimum wage legislation,”<sup>425</sup> “and the walls came tumbling down on minimum wage statutes with *West Coast Hotel v. Parrish* (1937), despite the brief procedural detour taken in *Morehead v. New York ex rel. Tipaldo* (1936).”<sup>426</sup>

With respect to developments in the Court’s federalism jurisprudence, Professor Parrish emphasizes the importance of the doctrinal categories the Hughes Court Justices inherited, and the inattentiveness of early New Deal lawyers to the restraints those categories imposed. “From the perspective of most justices who served on the Court in the first four decades of the twentieth century,” Professor Parrish tells us:

[T]he distinction between commerce on the one hand and production/manufacturing on the other played a fundamental role in their conception of American federalism. That federalism, most assumed, had been enshrined in the Tenth Amendment, which cabined the scope of national jurisdiction and preserved the autonomy of the states. They could not imagine a constitutional world influenced by macroeconomic theory, where even the most localized forms of behavior by businessmen, financiers, or farmers could be conceptually linked to national commerce among the states.<sup>427</sup>

Similar to the situation they faced with respect to the states’ police power and the Fourteenth Amendment, the Hughes justices inherited a series of precedents that both limited and expanded the scope of Congress’s

423 *Id.*

424 *Id.* at 28. I believe that Professor Parrish is mistaken in his assertion that Justice Roberts’s majority opinion saw him “[t]emporarily resurrecting the public/private distinction he had cast overboard with respect to state regulation in *Nebbia*,” and that his analysis departed “fundamentally from the Court’s historic Commerce Clause jurisprudence touching the railroad industry.” *Id.* at 29; see Cushman, *supra* note 2, at 242, 247–48. However, Professor Parrish astutely observes that the dissenting Chief Justice Hughes also “found other provisions in the statute to be violations of due process,” and that “[a]s Hughes suggested in his dissent in *Alton*, Congress later in the decade proved capable of rewriting a railroad pension law that enjoyed the support of management and the unions and remained immune to similar due process challenges.” PARRISH, *supra* note 149, at 98.

425 PARRISH, *supra* note 149, at 66.

426 *Id.* at 152. Professor Parrish also rightly observes that *West Coast Hotel* did not signal Hughes’s and Roberts’s complete abandonment of the view that the Due Process Clause imposed limitations on state and federal regulatory power, as their dissents in *Railroad Commission v. Rowan & Nichols Oil Co.*, 310 U.S. 573, 585 (1940), made clear. PARRISH, *supra* note 149, at 99.

427 PARRISH, *supra* note 149, at 97.

authority under Article I, conceptual categories that often baffled lay observers because of their apparent contradictions.<sup>428</sup>

It was “[t]he failure of lawyers in the early years of the New Deal to fully appreciate these inherited conceptual categories” that “accounted in large measure for their lack of success before Hughes and his brethren.”<sup>429</sup> This assessment was shared by Justice Brandeis, “who remarked to Frankfurter in the summer of 1933: ‘Our Court will apparently be confronted, in a time of greatest need of help, with a Department of Justice as incompetent as was that of Mitchell Palmer.’”<sup>430</sup> “Unwilling to accept any responsibility for the fate of these statutes, even when their judicial allies joined the majority, the New Dealers simply blamed the Court for the constitutional impasse that seemed to have developed by 1937.”<sup>431</sup>

Professor Parrish asserts that “[n]o member of the Hughes Court broke entirely free of these conceptual categories when considering the scope of Congress’s authority to regulate commerce among the states, although Stone and Cardozo came the closest to doing so.”<sup>432</sup> It was Cardozo’s “pragmatic, flexible approach to issues arising under the commerce power” articulated in his *Schechter* concurrence that “laid the foundation for the more expansive doctrines that emerged in *Jones & Laughlin*” and later cases.<sup>433</sup> Indeed, he cautions against exaggeration of the discontinuity between *Jones & Laughlin* and the cases that preceded that decision. “Invoking many prior rulings that had located federal jurisdiction within a so-called stream of commerce or current of commerce,” Professor Parrish explains,

Hughes turned back the argument that the steelmakers’ local labor conflict lay beyond the control of Congress . . . . Without overruling them, Hughes forcefully distinguished both *Schechter* and *Carter Coal* as irrelevant to the present case because neither presented an issue of obstructing or burdening interstate commerce. In *Schechter* interstate commerce had ended at the kosher plant. In *Carter Coal* it had not yet begun.<sup>434</sup>

Accordingly, Hughes did not

have to bend his jurisprudential principles very far in order to sustain the jurisdiction of the National Labor Relations Board in *Jones & Laughlin*. . . . Even in *Carter Coal*, Hughes had left himself an exit when it came to the scope of the commerce power, enough wiggle room to sustain Congress

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428 *Id.* at 158.

429 *Id.* at 97.

430 *Id.* at 97–98. According to Professor Parrish, “The administration’s simple failure to publish its ‘hot oil’ regulations in 1933 confirmed this judgment.” *Id.* at 98.

431 *Id.* at 158 (“They did not immediately see that short-term defeats often contained the doctrinal seeds of major victories such as occurred in *United States v. Butler* (1936), which invalidated the AAA, but also yoked Congress’s taxing and spending powers to the General Welfare Clause with language broad enough to encompass an extraordinary range of future federal initiatives, including Social Security.”).

432 *Id.* at 97.

433 *Id.* at 109.

434 *Id.* at 36.

when the appropriate facts presented themselves, as they did in 1937 thanks to the careful selection of cases and litigation strategy by administration lawyers. *Jones & Laughlin* bore slight resemblance to the *Schechter Brothers*.<sup>435</sup>

Similarly, Roberts's votes in the *Labor Board Cases* "present few [ ] interpretative problems," for "nothing said about the distinction between 'commerce' and 'production' with respect to coal mining excluded the application of another time-honored concept, a 'current of commerce,' to steel producers or companies manufacturing clothing and trailers."<sup>436</sup>

"Nonetheless," Professor Parrish maintains,

*Jones & Laughlin* involved a big step for Hughes and the majority, because the cases that employed the metaphors of "obstruction," "interference," or "burden" to sustain the commerce power had arisen usually in relation to the railroad industry and/or economic activities that involved rates, prices, or buying and selling, not industrial manufacturing, mining, or agriculture per se.<sup>437</sup>

This may understate the significance of Chief Justice Taft's opinion in *Stafford v. Wallace*, in which he upheld federal regulation of prices charged for the agricultural activities of housing, feeding, and watering livestock in major stockyards, and wrote of the federally regulable stream of commerce flowing through "slaughtering centers" engaged in acts of production.<sup>438</sup> It may also overlook earlier decisions holding that the Sherman Act could reach local activities of production undertaken with the intent to restrain interstate commerce.<sup>439</sup> But Professor Parrish recognizes that, even after *Jones & Laughlin*, "[t]he line of cases that stressed a distinction between 'production' or 'manufacturing' and 'commerce' as well as those that emphasized 'direct' as opposed to 'indirect' effects, still retained their vitality."<sup>440</sup> It was only in *Darby* that Hughes "[r]eluctantly . . . went along with this near coup de grace to the venerable distinction between 'commerce' and 'production', something he had studiously avoided in 1937."<sup>441</sup> The "inherited intellectual framework of Commerce Clause analysis" continued to exercise "a powerful influence on virtually all of the justices, wholly apart from external political and economic pressures or the addition of new members [of the

435 *Id.* at 39.

436 *Id.* Professor Parrish similarly sees no significant difficulty in accounting for Roberts's votes in *United States v. Butler* and the *Social Security Cases*, for "Cardozo relied on *Butler's* sweeping conception of 'the general welfare' as the foundation of his opinion in *Helvering v. Davis*." *Id.*

437 *Id.* at 160.

438 258 U.S. 495, 514 (1922).

439 See, e.g., *Local 167, Int'l Bhd. of Teamsters v. United States*, 291 U.S. 293 (1934); *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n*, 274 U.S. 37 (1927); *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295 (1925); *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911); *Loewe v. Lawlor*, 208 U.S. 274 (1908).

440 PARRISH, *supra* note 149, at 160.

441 *Id.* at 40.

Court].”<sup>442</sup> In particular, both Hughes and Roberts “had great difficulty accepting Stone’s opinion in *Darby Lumber* (1941), which sustained the authority of Congress to regulate ‘production for commerce.’”<sup>443</sup>

Yet Professor Parrish does not contend that these inherited categories left the Justices with no room for maneuver. Instead, he believes that the Court’s decisions reflect an ongoing struggle over how best to understand the deeper import of the American Constitution. “By the 1930s the Supreme Court had established several competing and often conflicting lines of precedent that gave the justices a range of choices when they confronted constitutional questions of federal and state power to regulate economic and social life,”<sup>444</sup> he writes. “The Hughes Court inherited a range of doctrines touching basic issues of federalism and the American economy notable for their complexity, nuance, and contradiction. These circumstances left the justices with unusual opportunity for choice in a political environment generating new demands for national action.”<sup>445</sup> Those choices would be informed by basic views about the Constitution—was it fundamentally a limiting, or instead an empowering, document? “Depending upon how an individual justice answered that fundamental question, he would adopt a broad or narrow conception of the government’s role with respect to taxation, spending, the regulation of commerce, and the police power.”<sup>446</sup> For example, did one apply the distinction between production and commerce when analyzing congressional power to regulate interstate commerce, or did one invoke the stream of commerce metaphor? Did one construe the category of businesses affected with a public interest broadly or narrowly? “Faced with the historic choice of whether the Constitution was a document of limitations or a charter of powers, the Hughes Court ultimately opted for the latter when it came to the scope of federal authority over the nation’s basic economic arrangements.”<sup>447</sup>

This account may overstate the extent to which any Justice, having made prior jurisprudential commitments, enjoyed such a psychological experience of liberty to choose among doctrines in any given case. But it does provide a framework for understanding the reactions of those who observed and were often frustrated or mystified by the Court’s decisions. For as Professor Parrish explains, this perception that the Hughes Court Justices were essentially free to rule as they liked “exposed them to criticism on the grounds of judicial subjectivity and arbitrariness.”<sup>448</sup> “[T]he road to *Darby* and federal supremacy over the basic rules of the national marketplace had been a bumpy and twisting one for the Hughes Court prior to 1937, a journey that inspired pungent criticism and helped to provoke the confrontation with the

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442 *Id.* at 160.

443 *Id.*

444 *Id.* at 40.

445 *Id.* at 145.

446 *Id.* at 40.

447 *Id.* at 158.

448 *Id.* at 145.

president and Congress.”<sup>449</sup> “The road to that final destination in 1941 seemed to many contemporaries one of twists and turns, the view certainly of President Roosevelt and the New Dealers, who bridled at the decisions that struck down their initial recovery measures.”<sup>450</sup>

### E. McKenna

Professor McKenna recognizes that 1937 witnessed substantial development in the Court’s constitutional doctrine, but she resists the contention that these developments constituted a sudden discontinuity.<sup>451</sup> Instead, she maintains that “the changes that occurred in American constitutional jurisprudence stretched over a much longer period than three short months in 1937.”<sup>452</sup> Because much of Professor McKenna’s discussion of doctrinal development is inextricably tied to her analysis of issues of causation, I defer review of most of her treatment of the cases to that later section of this Article. But there are a couple of doctrinal points that merit mention at this juncture.

First, Professor McKenna suggests that *Alton*’s “extremely narrow construction of Congress’s commerce power” marked “any future pension law unconstitutional.”<sup>453</sup> This, however, is mistaken. As Professor Ralph Fuchs suggested in a law review article published shortly after the decision, Congress could fund pensions for railroad retirees out of general revenue and thereby insulate those payments from challenge under the taxpayer standing doctrine.<sup>454</sup> Congress followed this plan with the Railroad Retirement Act of 1937, which remains with us in modified form to this day.<sup>455</sup>

Second, Professor McKenna also suggests that *Alton* “signaled forebodings of what the Court’s attitude would be toward”<sup>456</sup> the Social Security legislation then making its way through congressional committees. An editorial in *Business Week* predicted that the Court would “‘smash any social security legislation that may be passed by Congress,’”<sup>457</sup> Democratic Senator William King of Utah thought that portions of the statute were “flatly unconstitutional,” and Homer Cummings expressed his concern over the Act’s prospects to Roosevelt in a memorandum written the day after *Alton* was handed down.<sup>458</sup> On the other hand, Professor McKenna observes that “Senator Borah disagreed, joining those who argued that the *Alton* decision was not going to ‘put up any bars for the social security legislation,’” and that

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449 *Id.* at 146.

450 *Id.* at 158.

451 MCKENNA, *supra* note 48, at xxiv.

452 *Id.*

453 *Id.* at 70.

454 Ralph F. Fuchs, *Judicial Method and the Constitutionality of the N.I.R.A.*, 20 ST. LOUIS L. REV. 199, 209 n.34 (1935).

455 Cushman, *supra* note 16, at 90–91.

456 MCKENNA, *supra* note 48, at 70.

457 *Id.* (quoting *5 to 4 Against*, BUSINESS WEEK, May 11, 1935, at 7–8).

458 *Id.* at 71.

"[a]dministration lawyers agreed with him. In their opinion, the railway decision was no blanket injunction against all social legislation."<sup>459</sup> At hearings held before the Senate Finance Committee, Assistant Attorney General Angus MacLean assured the Senators "that the railway pension decision would not have the effect of upsetting the social security program because the new bill was being framed on constitutional grounds different from those in the invalidated railroad pension law."<sup>460</sup> "Speaking for himself and the Justice Department, MacLean asserted that the opinion in the Railroad Retirement Act case was not decisive in its bearing on the social security legislation, and not directly authoritative, because the two dealt with entirely different constitutional questions."<sup>461</sup> As it would turn out, Borah and MacLean would be proved correct, and by a vote of seven to two.

### III. CAUSATION

#### A. *Shogan*

Mr. Shogan ascribes the Court's decisions in the spring of 1937 entirely to political motives. He recognizes that Roberts voted in conference to uphold the minimum wage law challenged in *West Coast Hotel* weeks before the Court-packing plan was announced, and therefore his vote could not have been a direct reaction to the President's proposal. Instead, Mr. Shogan observes that Roberts's "turnabout had come after Roosevelt's thunderous reelection victory, and when many believed some sort of presidential move against the Court was in the cards."<sup>462</sup> He casts a skeptical eye at the "tortured legal reasoning" Roberts's later memorandum offered as an explanation for his behavior in the minimum wage cases, suggesting instead that the Justice "acted out of political motivation."<sup>463</sup> "Indeed," he argues, "the Wagner Act decisions reinforced the belief that the underlying cause for the Court's turnabout was not some sudden enlightenment but rather an effort by Hughes, abetted by Roberts, to undermine support for the Court-packing scheme."<sup>464</sup> "Hughes, who as chief justice was well positioned to carry out such manipulation," had conspired with Roberts "in order to frustrate Roosevelt's plans for revision of the Court."<sup>465</sup>

#### B. *Solomon*

Mr. Solomon's analysis of the reasons underlying the votes of Hughes and Roberts in the spring of 1937 rests on a good degree of conjecture, some of it remarkably confident in view of the evidence offered to support it. His

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459 *Id.* at 70.

460 *Id.*

461 *Id.* at 71.

462 SHOGAN, *supra* note 87, at 186.

463 *Id.*

464 *Id.* at 188.

465 *Id.* at 186.

account of Hughes's thought processes appears in a single paragraph utterly devoid of any supporting reference:

In Hughes's mind, because the Court had taken sides against the people, it had sunk to its low standing in the public's eye—self-inflicted wounds, as he liked to say. If he hoped to restore the Court's reputation, and thereby to protect it from further harm, he felt it had to do the people's bidding—to follow, at least in a rough way, the election returns. Otherwise the president would surely succeed in expanding the Court, and forever after the justices would have reason to worry about the president and the election returns.<sup>466</sup>

There is, to my knowledge, no evidence for any of this. Moreover, the claims that the Court had “taken sides against the people” and “sunk” to “low standing in the public's eye” are belied by a wealth of published, contemporary polling data gathered by George Gallup and Elmo Roper. For example, Mr. Solomon claims that “Roberts's opinion that abolished the AAA sparked outrage all over the country,”<sup>467</sup> and yet a Gallup poll published the week that *Butler* was decided showed public opposition to the AAA running at 59–41%.<sup>468</sup> A Gallup poll taken one week before *Schechter* was handed down showed that 62% of the public opposed the NIRA.<sup>469</sup> The polling data do not speak as directly to public views about other decisions, but “[i]n the autumn of 1935 . . . only 31% of those polled said that they would ‘favor limiting the power’” of the Court to declare congressional acts unconstitutional,<sup>470</sup> and by December of 1936 this number had risen only to 41%.<sup>471</sup> In a *Fortune* survey published in April of 1936, nearly twice as many respondents thought that the Court had “protected people against rash legislation” as thought that the Court had “stood in the way of the people's will.”<sup>472</sup> The magazine's editors remarked that

New Dealers wishing to curtail the power of the Court by constitutional amendment would apparently have a long handicap of established opinion to overcome. . . . [S]upposing that the President were to consider basing his campaign upon an attack on the Supreme Court, he would conclude that there is political dynamite in appealing to the nation to curtail the powers of the Court.<sup>473</sup>

And neither Roosevelt's initial Court bill nor the substitute bill introduced in the Senate that July ever commanded the support of a majority of the Ameri-

466 SOLOMON, *supra* note 61, at 147–48.

467 *Id.* at 80.

468 Barry Cushman, *Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s*, 50 *BUFF. L. REV.* 7, 36 (2002).

469 *Id.* at 33.

470 *Id.* at 67.

471 *Id.* at 68. However, 59% of respondents to this poll did indicate a preference that the Court be “more liberal in reviewing New Deal measures.” *Id.*

472 *Id.* at 67 (internal quotation marks omitted). A *Fortune* survey published in July of 1937 produced similar results. *Id.* at 70.

473 *Id.* at 67–68 (internal quotation marks omitted).

can people.<sup>474</sup> Such data offer substantial reasons to question Mr. Solomon's assertions concerning the interior life of the Chief Justice.

Mr. Solomon concludes that "Roberts's reason—or reasons—for switching sides on the minimum wage for women was to become a historical mystery, one destined never to be unambiguously resolved."<sup>475</sup> His efforts to solve this mystery consider and ultimately reject a series of possible explanations. First, he affirms the common understanding that "it was indisputable, as a simple matter of timing, that the Court-packing plan had made no impact at all on Roberts's reversal on the minimum wage. His conversion, though announced in March 1937, had already occurred by December 1936" when Roberts voted to uphold the Washington minimum wage law in the Justices' conference.<sup>476</sup> Mr. Solomon then entertains the possibility that Roberts switched in response to Roosevelt's landslide election in 1936, but it is difficult to understand how that victory could have supplied any important information concerning popular views on the minimum wage; both the Republican platform and the Party's standard-bearer Alf Landon explicitly endorsed such legislation.<sup>477</sup> The decision in *West Coast Hotel* would have "followed the election returns" even if Landon had won in November.<sup>478</sup> Indeed, Mr. Solomon goes on to suggest that Roberts "may have changed his mind even earlier, before the election," when he voted in conference on October 10, 1936, to hear the appeal in *West Coast Hotel*.<sup>479</sup>

Mr. Solomon speculates that Roberts

also might have been embarrassed by the derision he took in the law journals, including the University of Pennsylvania's, for his convoluted reasoning in striking down the AAA and also for providing the fifth and decisive vote in striking down New York's minimum wage for women. A scholar who surveyed law journals found that eight of the nine that ventured an opinion on the *Tipaldo* decision jeered.<sup>480</sup>

But if external criticism prompted Roberts's change of vote, the effect must have been cumulative. For he responded to the criticism of his opinion striking down the AAA by voting later in the year to invalidate both the Guffey Coal Act and the New York minimum wage law. If he was as sensitive to scholarly criticism as Mr. Solomon suggests, one has to wonder why this sensitivity was not manifested earlier and more uniformly.

Mr. Solomon similarly rejects the contention that Roberts switched in the minimum wage cases because he was, as Senator Sherman Minton and others alleged, "just listening to the wee small voice of the chief justice that

474 *Id.* at 68 n.339.

475 SOLOMON, *supra* note 61, at 210.

476 *Id.*

477 CUSHMAN, *supra* note 1, at 25–28.

478 SOLOMON, *supra* note 61, at 211.

479 *Id.* Mr. Solomon also suggests briefly that in June, when *Tipaldo* was handed down, Roberts may have harbored hopes that he would be the Republican presidential nominee. By the fall, however, this was no longer the case. *Id.* at 212.

480 *Id.*



was talking politics to him.’”<sup>481</sup> Mr. Solomon recognizes that “the two justices were close.”<sup>482</sup> Roberts looked up to Hughes as a father or older brother, and regarded the chief justice as “[i]n most ways . . . the greatest man I have ever known.”<sup>483</sup> Nevertheless, Mr. Solomon regards it as “unlikely that Hughes had openly coerced his younger brother on the bench. For one thing,” he points out,

the Baptist preacher’s son made a point of never discussing the outcome of cases beyond the Court’s conference room. “Chief Justice Hughes was a stickler for proprieties,” Roberts said later. “He neither leaned on anyone else for advice nor did he proffer advice or assistance to any of us, but left each of us to form his own conclusions.”<sup>484</sup>

Instead, Mr. Solomon concludes that “[t]here was every reason to think that Roberts had changed his mind on his own. Since joining the Court, he had been his own man.” For example, he wrote dissenting opinions “far more often than Hughes did.”<sup>485</sup> Yet his votes in 1937 were not driven by jurisprudential convictions, because “Owen Roberts’s life had dictated no overarching philosophy of the law. . . . He was a problem solver by nature, captivated more by a pattern of facts than by a conceptual framework.”<sup>486</sup> Instead, he was “untheoretical.” “Indeed,” Mr. Solomon maintains, “his theoretical inconsistency was the essence of who he was. . . . Dogma contradicted his nature; he had learned to see life from vantage points other than his own.”<sup>487</sup> He was “‘a conservative with liberal tendencies.’”<sup>488</sup> His “idealism had a practical cast.”<sup>489</sup> As Erwin Griswold put it, Roberts displayed “‘a very considerable flexibility of mind.’”<sup>490</sup>

As these remarks suggest, Mr. Solomon believes that the explanation for Roberts’s behavior lies not in judicial philosophy, but instead in the Justice’s life experience and personal temperament. In a chapter entitled “A Good Man’s Mind,”<sup>491</sup> Mr. Solomon argues that Roberts was “refreshingly naïve,” “intellectually honest, personally tolerant, essentially a simple man—a good man.”<sup>492</sup> “He was a conventional man who believed in the conventional things.”<sup>493</sup> “Roberts was a man who went to church, donated to charity, and involved himself in the community, working for the Boy Scouts though he had no son.”<sup>494</sup> Tellingly, “when he drove his automobile he tended to strad-

481 *Id.* at 211.

482 *Id.*

483 *Id.*

484 *Id.* at 212.

485 *Id.*

486 *Id.* at 213–14.

487 *Id.* at 214.

488 *Id.*

489 *Id.* at 215.

490 *Id.* at 214.

491 *Id.* at 209.

492 *Id.* at 214.

493 *Id.*

494 *Id.* at 215.

dle the center line.”<sup>495</sup> He “had seen different sides of life, and he had liked them all. As a lawyer, he had represented big corporations, and he had fought against them. He believed in property rights and in human rights.”<sup>496</sup> He was a “denizen of Rittenhouse Square who liked to think of himself as a farmer.”<sup>497</sup> “On his farm he favored a khaki shirt, breeches, and a battered straw hat.”<sup>498</sup>

His neighbors in Pennsylvania thought of him as “a humble, calm, everyday person.” In Washington, he was too thrifty ever to take a taxi or to let the electric lights burn unnecessarily at home, yet he gave the most generous tip of any justice—twenty-five cents—to the Supreme Court barber.<sup>499</sup>

And “[t]he justice who rode the trolley to work had never separated himself from the reality around him. . . . [H]e felt comfortable in the twentieth century, rooted in the real world. By temperament, he was willing to accept the changes that the new century, and its hard times, required.”<sup>500</sup>

Mr. Solomon is confident that this good man had changed his mind, but he is more circumspect in discussing the potential reasons for the change. Instead, he explores a number of possibilities. As Mr. Solomon puts it, Roberts had “evidently reached” the decision “to accept the changes that the new century, and its hard times, required . . . sometime during the summer or fall of 1936, and there may have been no single event that changed his mind.”<sup>501</sup> Perhaps, he suggests, it was the outbreak of the Spanish Civil War. Perhaps it was Somoza’s ouster of democratically elected President Adolfo Diaz in Nicaragua. Perhaps it was Hitler’s proclamation that Max Schmeling’s victory over Joe Louis at Yankee Stadium was evidence of white supremacy, and the approbation that Der Führer seemed to enjoy among a number of prominent Americans. All of these events showed that a “nation’s stability was not to be assumed. [In the United States], across the land, amid the foreclosures, the bankruptcies, the persistent unemployment—the social fabric continued to unravel.”<sup>502</sup>

On Mr. Solomon’s account, a particularly telling episode occurred no more than a dozen miles from Roberts’s Pennsylvania farm a week before he voted to note probable jurisdiction in *West Coast Hotel*.

As the customers arrived at Pratt Dutton’s Chester County farm for an auction of his possessions—to satisfy his \$75 debt to the bank—the elderly farmer opened fire from his barn, killing a neighbor and wounding three others. The anguish of the Depression on deadly display was front-page news in Philadelphia and New York. Had Roberts not voted to abolish the

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495 *Id.*

496 *Id.* at 214.

497 *Id.*

498 *Id.* at 215.

499 *Id.*

500 *Id.*

501 *Id.*

502 *Id.*

AAA's agricultural subsidies, farmer Dutton might have been \$75 richer, and his neighbor Atlee Jackson might not have died.<sup>503</sup>

This rather macabre attempt to trace the cause of Mr. Jackson's tragic death back to Justice Roberts is difficult to credit. First, as *The New York Times* story to which Mr. Solomon cites makes clear, Mr. Dutton was a dairy farmer whose herd had been destroyed when his cattle failed to pass a sanitation test three months earlier, in July of 1936. There is nothing in the article to suggest that Mr. Dutton's financial difficulties stemmed from the Court's decision invalidating the AAA's processing tax.<sup>504</sup> *The Philadelphia Inquirer's* coverage similarly observed that Mr. Dutton's debts had piled up since he had lost his herd, and that he had gotten into trouble with the authorities for continuing to sell the milk of his two surviving cows without a license. The article further states that Dutton was an eccentric who lived alone and had no known relatives. Again, there was nothing to suggest that the *Butler* decision had anything to do with Mr. Dutton's financial worries.<sup>505</sup> Second, Roberts and his colleagues did not vote to abolish the AAA's agricultural subsidies. They voted instead to invalidate the processing tax by which those subsidies were financed. After the processing tax was struck down, however, the government continued to make and farmers continued to receive the payments promised under the AAA's 1936 acreage reduction contracts, but now with appropriations drawn from general revenue rather than from a fund financed by an earmarked tax. Under the taxpayer standing doctrine, such appropriations were immune to constitutional challenge.<sup>506</sup> Moreover, within two months of the *Butler* decision Congress had enacted the Soil Conservation and Domestic Allotment Act, under which farmers were paid from general revenue to shift acreage from soil-depleting surplus crops to soil-building crops such as grasses and legumes.<sup>507</sup> Unless Mr. Dutton's case was somehow unusual, Roberts's opinion striking down the AAA's processing tax had no direct bearing on his financial condition.

The broader point again bears emphasis. Mr. Solomon introduces this anecdote with the observation that "John Maynard Keynes preached that an economic depression could be sidestepped."<sup>508</sup> The inference to be drawn, presumably, is that the Court was somehow interfering with the government's efforts to engage in the spending necessary to do so. But as I have pointed out above, the taxpayer standing doctrine immunized from judicial review the many New Deal spending programs financed from general revenue. The Court's justiciability doctrine freed the political branches to engage in the

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503 *Id.* at 216.

504 *See Pennsylvania Farmer Kills 1, Wounds 3 in Battle over Auction for \$75 Debt*, N.Y. TIMES, Oct. 3, 1936, at 1.

505 *See 1 Slain, 3 Shot as Farmer and Posse Battle*, PHILA. INQUIRER, Oct. 3, 1936, at 1.

506 ALFANGE, *supra* note 290, at 180–81; *see also* F.G. Vogt & Sons, Inc. v. Rothensies, 11 F. Supp. 225, 226 (E.D. Pa. 1935) (discussing the taxpayer standing doctrine).

507 Cushman, *supra* note 16, at 92–93.

508 SOLOMON, *supra* note 61, at 215.

very sort of Keynesian experimentation that Mr. Solomon appears to believe the Court was obstructing.

To his credit, Mr. Solomon does not try to pin Roberts's alleged switch entirely on the tragic murder of Atlee Jackson. Instead he attributes the putative alteration of view to Roberts's sudden realization that

[t]he economy had changed—the world had changed—in ways that the Founding Fathers could never have fathomed. Yet they had been wise enough, Roberts had begun to believe, to have provided for that. “We live today under a very different system from that contemplated by those who drafted our Constitution,” he explained in a law review article after retiring from the Court. “A great virtue of the Constitution is the breadth and generality of its language. Its phrases left latitude of action and room for interpretation to meet changing conditions.” He was persuading himself in 1936 and 1937 of the need for a living Constitution. In his seventh year on the Court, a lawyer's lawyer was becoming a justice.<sup>509</sup>

Some may bristle at the notion that a “lawyer's lawyer” is necessarily an originalist, or that a “justice” must be a living constitutionalist. But it is not plausible that until the summer of 1936 Roberts was not alert to the fact that there had been significant changes in the national economy between the 1780s and the Great Depression. Surely he recognized that much in 1935 and 1936 as well. And the idea that Roberts had no appreciation for the virtues of an evolving constitutional “common law” until the summer of 1936 is quite difficult to reconcile, for example, with his landmark decision jettisoning the category of business affected with a public interest from due process doctrine in *Nebbia v. New York*, or with his concurrence in Chief Justice Hughes's opinion upholding the Minnesota Mortgage Moratorium in *Home Building & Loan Ass'n v. Blaisdell*. In fact, in the lecture to which Mr. Solomon refers, Roberts pointed out that the Court had begun to recognize the need for federal regulation of some local activities early in the twentieth century,<sup>510</sup> and Roberts himself joined opinions applying such doctrines well before 1937.<sup>511</sup> Indeed, in that same lecture Roberts referred to one such doctrine in explaining the theory upon which the Wagner Act had been enacted and sustained. That statute, he explained,

premises its provisions upon the proposition that industrial conflicts interfere with and limit interstate transportation and commerce. Albeit a strike is localized in a given community, the flow of goods to and from that community is interfered with. The interference may be so great as to be a matter of national concern.<sup>512</sup>

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509 *Id.* at 216 (quoting Owen J. Roberts, *American Constitutional Government; The Blueprint and the Structure*, 29 B.U. L. REV. 1, 27 (1949)).

510 See Roberts, *supra* note 509, at 24–25; see also OWEN J. ROBERTS, THE COURT AND THE CONSTITUTION 40–46 (1951).

511 See, e.g., *Ohio v. United States*, 292 U.S. 498 (1934); *Florida v. United States*, 292 U.S. 1 (1934); *United States v. Louisiana*, 290 U.S. 70 (1933).

512 Roberts, *supra* note 509, at 25.

The doctrine to which Roberts alluded was the stream of commerce doctrine, the theory on which the government lawyers had relied in defending the Wagner Act before the Court.<sup>513</sup> Though Mr. Solomon is confident that “Roberts had switched” between *Carter Coal* and the *Labor Board Cases*,<sup>514</sup> Charles Fahy, Warren Madden, Stanley Reed, and many legal commentators and lower federal judges disagreed.<sup>515</sup>

But Mr. Solomon does not claim simply that Roberts became a living constitutionalist. He insists that Roberts became almost indifferent to law. “He had come to believe, in effect, that the job of a Supreme Court justice was to administer justice, not the law. His evolving approach to the purpose of the law was a matter of character more than of jurisprudence.”<sup>516</sup> Mr. Solomon contends that in his 1951 Oliver Wendell Holmes Lectures at Harvard, Roberts “explained his reasoning in the Wagner Act cases.”<sup>517</sup> Mr. Solomon displays his impatience with the discussion of legal doctrine when he reports that, at the conclusion of “a ponderous lecture,” Roberts remarked,

The continual expansion of federal power with consequent contraction of state powers probably has been inevitable. The founders of the Republic envisaged no such economic and other expansion as the nation has experienced. Looking back, it is difficult to see how the Court could have resisted the popular urge for uniform standards throughout the country—for what in effect was a unified economy.<sup>518</sup>

“That last, passively constructed sentence,” Mr. Solomon maintains, “explained his U-turn. Two factors had moved him in 1937. One was reality—*what in effect was a unified economy*. The other was democracy—*the popular urge*, the people’s will. He said not a word about the law.”<sup>519</sup> Roberts “had begun his tenure on the bench trying to hew to the particulars of the law, but he learned to rely on his own evolving judgment of the realities of American life and of the citizenry’s needs.”<sup>520</sup>

Mr. Solomon notes that “Roberts’s explanation for his actions did not end there. He acknowledged that relying on the commerce clause, say, or the general welfare clause ‘to reach a result never contemplated when the Constitution was adopted, was a subterfuge.’”<sup>521</sup> But Roberts

had accepted such a sophistry to avert a deeper danger to the American system of government. “An insistence by the Court on holding federal power to what seemed its appropriate orbit when the Constitution was adopted,” he said, “might have resulted in even more radical changes in our

513 See CUSHMAN, *supra* note 1, at 164–68.

514 SOLOMON, *supra* note 61, at 216.

515 See *supra* notes 217–21 and accompanying text.

516 SOLOMON, *supra* note 61, at 272–73.

517 *Id.* at 216.

518 *Id.* at 217 (internal quotation marks omitted).

519 *Id.*

520 *Id.* at 272.

521 *Id.* at 217.

dual structure than those which have been gradually accomplished through the extension of the limited jurisdiction conferred on the federal government.”<sup>522</sup>

Roberts “had switched sides, that is, to save the American system of federalism, to prevent the central government from assuming full power, as in Europe. By giving a little, he could avert something worse.”<sup>523</sup> His goal was “to assure a working democracy, safe from the desperation of its people and the ambitions of its leaders. And, in fact, he had done just that.”<sup>524</sup> He recognized that “[t]he truly conservative position was to bend with the times.”<sup>525</sup> Thus, Roberts’s “indifference to principle was his strength.”<sup>526</sup> Mr. Solomon quotes with approval the assessment of McReynolds clerk John Knox, who wrote in his memoir:

Owen J. Roberts was impartial after he became aware of the need for social change . . . . Roberts literally saved the Supreme Court of the United States from being wrecked by the more conservative justices. His contribution, therefore, was of immense significance, and his importance as a justice during the 1930s can scarcely be exaggerated.<sup>527</sup>

Thus, in Mr. Solomon’s view, Roberts abandoned “law” in favor of “justice,” “property”<sup>528</sup> in favor of “the people’s will,” and “principle” in favor of “pragmatism”<sup>529</sup> in order to avoid the specter of radical change and a descent into fascism or worse. But there are numerous difficulties with this account. First, in the passage of Roberts’s lecture from which Mr. Solomon quotes, the former Justice does not purport to be explaining his own actions. He was instead explaining a long series of doctrinal developments that had begun in the nineteenth century and proceeded, as Roberts stated in the passage quoted by Mr. Solomon, “continual[ly]” and “gradually.” Second, Roberts had not insisted “on holding federal power to what seemed its appropriate orbit when the Constitution was adopted.”<sup>530</sup> He had recognized the need for doctrinal development taking into account social change well before 1936.<sup>531</sup> Third, Roberts did not become completely deferential to the political branches after 1936—he persisted in voting to invalidate or limit the reach of New Deal initiatives.<sup>532</sup> And fourth, Roberts did not abandon his

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522 *Id.*

523 *Id.*

524 *Id.*

525 *Id.*

526 *Id.* at 272.

527 *Id.* (internal quotation marks omitted).

528 *Id.* at 217.

529 *Id.* at 272.

530 *Id.* at 217.

531 *See supra* text accompanying notes 510–11.

532 *See* *Borden Co. v. Borella*, 325 U.S. 679, 685–86 (1945) (Stone, C.J., & Roberts, J., dissenting from opinion holding company covered by FLSA); *10 E. 40th St. Bldg., Inc. v. Callus*, 325 U.S. 578 (1945) (Roberts, J., joining opinion holding company not covered by FLSA); *W. Union Tel. Co. v. Lenroot*, 323 U.S. 490 (1945) (Roberts, J., joining opinion holding company not covered by FLSA); *Bowles v. Willingham*, 321 U.S. 503, 529 (1944)

solicitude for the rights of property in favor of unwavering support for legislation embodying popular urges. Throughout the remainder of his career, Roberts would continue to vote to invalidate federal and state regulations of the economy on the grounds that they violated the Takings<sup>533</sup> or Due Process Clauses<sup>534</sup> of the Fifth Amendment, or the Due Process,<sup>535</sup> Equal Protection,<sup>536</sup> or Privileges or Immunities<sup>537</sup> Clauses of the Fourteenth Amendment.

Finally, the timing of what Mr. Solomon characterizes as Justice Roberts's change of mind might quite reasonably arouse the suspicion of those inclined to more explicitly political explanations of the Court's behavior. What an interesting coincidence, one might observe, that Justice Roberts awoke to the changing nature of the American economy and the need for a living Constitution precisely at the time when President Roosevelt threatened to pack the Court. Mr. Solomon emphasizes that "Justice Roberts had

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(Stone, C.J. & Roberts, J., dissenting from opinion rejecting non-delegation challenge to Emergency Price Control Act of 1942); *Yakus v. United States*, 321 U.S. 414, 448 (1944) (Roberts, J., dissenting from opinion rejecting non-delegation challenge to Emergency Price Control Act of 1942); *McLeod v. Threlkeld*, 319 U.S. 491 (1943) (Roberts, J., joining opinion holding company not covered by FLSA); *Overstreet v. N. Shore Corp.*, 318 U.S. 125, 133 (1943) (Roberts & Jackson, JJ., dissenting from opinion holding company covered by FLSA); *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 584 (1942) (Roberts, J., dissenting from opinion holding company covered by FLSA); *A.B. Kirschbaum v. Walling*, 316 U.S. 517, 527 (1942) (Roberts, J., dissenting from opinion holding company covered by FLSA); *Warren-Bradshaw Drilling Co. v. Hall*, 317 U.S. 88, 93–95 (1942) (Roberts, J., dissenting from opinion holding company covered by FLSA); *H.P. Hood & Sons v. United States*, 307 U.S. 588, 583 (1939) (Roberts, J., dissenting from opinion rejecting non-delegation challenge to Agricultural Marketing Agreement Act of 1937).

533 See *United States v. Willow River Power Co.*, 324 U.S. 499, 511–15 (1945) (Stone, C.J. & Roberts, J., dissenting from opinion holding that government action reducing the flow of water available to an electrical power plant did not constitute a taking requiring compensation under the Fifth Amendment); *United States v. Commodore Park, Inc.*, 324 U.S. 386, 393 (1945) (Roberts, J., dissenting from opinion holding that the Fifth Amendment did not require compensation of riparian landowner whose property was reduced in market value but not invaded by government dredging operation).

534 See *United States v. Rock Royal Coop, Inc.*, 307 U.S. 533, 583–87 (1939) (Hughes, C.J. & Roberts, J., dissenting from opinion upholding against a due process challenge an order issued by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937).

535 See *R.R. Comm'n v. Rowan & Nichols Oil Co.*, 310 U.S. 573, 584–85 (1940) (Hughes, C.J. & Roberts, J., dissenting from opinion holding that oil proration order of Texas Railroad Commission did not deprive the company of its property without due process); *Thompson v. Consol. Gas Utils. Corp.*, 300 U.S. 55 (1937) (Hughes, C.J., & Roberts, J., joining opinion invalidating gas proration order of Texas Railroad Commission on the ground that it deprived the company of its property without due process).

536 See *Charleston Fed. Sav. & Loan Ass'n v. Alderson*, 324 U.S. 182, 192–93 (1945) (Roberts, J., dissenting from opinion upholding tax assessments against equal protection challenge).

537 See *Madden v. Kentucky*, 309 U.S. 83, 93–94 (1940) (Roberts, J., dissenting from opinion upholding state tax against equal protection and privileges or immunities challenges).

switched his vote on the minimum wage even before the president had announced, or even settled on, his plan to expand the Court.”<sup>538</sup> At the same time, however, he concedes that

the justice’s subsequent changes of heart took place after the president had launched his assault on the Court, after the constitutional stalemate had jeopardized any solution to an economic crisis, [and] after the Chief Justice had begun to fear for the future of his beloved institution and had surely shared his worries with his friends. Owen Roberts could well have kept such things in mind.<sup>539</sup>

Mr. Solomon presents no evidence that the Chief Justice shared any such worries with any of his friends, but he is convinced that the causes for Roberts’s change, whatever they might have been, were external to the law itself.

### C. Ross

Professor Ross’s analysis of the causes of the Court’s decisions in 1937 considers both internal and external factors, but does not clearly settle on any one explanation. He is ultimately inconclusive about the reasons for Roberts’s change in the minimum wage cases. He points out the difficulties with the memorandum that Roberts produced at Frankfurter’s request in 1945, and concludes that, taken alone, the memo does not provide a satisfactory explanation of Roberts’s behavior.<sup>540</sup> At the same time, however, Professor Ross seriously entertains the possibility that *Tipaldo* might have been decided differently had the Hughes Court been less formal and more communicative. That scenario suggests that Roberts was, as many readers of his *Nebbia* opinion believed, prepared to overrule *Adkins* in 1936, but that he did not believe that the New York statute could be sustained without overruling *Adkins*. As the opinions in *Tipaldo* indicate, Hughes was prepared to uphold the New York statute by distinguishing it from the statute invalidated in *Adkins*, but he was not prepared to join an opinion overruling *Adkins*. Because there was no majority for overruling *Adkins*, Roberts joined the majority opinion following that precedent, just as *Adkins* dissenters Holmes, Taft, and Sanford, and later Justice Stone had done in two cases striking down state minimum wage laws in the 1920s.<sup>541</sup> “Unwilling to tolerate the inconsistency of upholding both the New York law and *Adkins*, Roberts was willing to join the Four Horsemen in an opinion that was narrowly based on the *Adkins* precedent.”<sup>542</sup> But Hughes might have “persuaded Roberts to vote to sustain the New York minimum wage statute if Hughes had understood that Roberts’s objection was based upon his belief that the Court could not uphold the New York statute without rejecting *Adkins* and if Hughes had

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538 SOLOMON, *supra* note 61, at 256.

539 *Id.* at 256–57.

540 ROSS, *supra* note 59, at 125–27.

541 See *Donham v. West-Nelson Mfg. Co.*, 273 U.S. 657 (1927) (per curiam); *Murphy v. Sardell*, 269 U.S. 530 (1925) (per curiam).

542 ROSS, *supra* note 59, at 126 n.165.



been willing to overturn *Adkins*,” as he would the next year in *West Coast Hotel*, “rather than distinguishing it.”<sup>543</sup>

In support of this hypothesis, Professor Ross reminds us that many of the Hughes Court Justices, including the Chief, did not work in the new Supreme Court building, but instead continued their practices of working from their homes. Perhaps, he suggests, “Hughes might have convinced Roberts to vote to sustain the New York minimum wage law in *Tipaldo* if Hughes and Roberts had spent more time in the Court building.”<sup>544</sup> Professor Ross suggests that, in the case of *Tipaldo*, this lack of frequent interaction may have been compounded by Hughes’s personal style as Chief. “Hughes might have had more success in influencing Roberts,” Professor Ross observes,

if he had not disdained personal appeals to his brethren. As Merlo J. Pusey explained, Hughes did not “solicit support for his views outside the conference. He had only contempt for the kind of chief who would take a judge aside and say, ‘Can’t you see the tight spot we’re in; you’ve got to help us out.’”<sup>545</sup>

Professor Ross suggests that “Hughes’s refusal to lobby his brethren may have represented more of a defect of leadership than a virtue,” for his “failure to communicate with Roberts in *Tipaldo* might have deprived him of an opportunity to convince Roberts to vote to sustain the constitutionality of the New York minimum wage law.”<sup>546</sup> This, Professor Ross concludes, “surely would have spared the Court and the nation much anguish.”<sup>547</sup>

More generally, Professor Ross observes that “[t]he amenability of Hughes and Roberts to economic regulatory legislation clearly had origins independent of the political pressures of the New Deal era, for the Hughes Court from its beginning was more deferential to such laws than the Taft Court had been.” This change was “clearly evident in numerous decisions during the first five years of Hughes’s chief justiceship.”<sup>548</sup> The Hughes Court’s “infamous hostility toward regulatory legislation,” he points out, “manifest[ed] itself only through a period of a year and a half during 1935 and 1936.”<sup>549</sup> Hughes, who was “an old-fashioned progressive,” and Roberts, who was “a patrician with liberal instincts,” were “generally inclined to favor economic regulatory legislation and were not inherently hostile toward the New Deal’s reformist spirit. Like many progressives, however, they were alarmed that the Roosevelt administration’s programs disrupted the delicate balances of federalism and separation of powers.”<sup>550</sup> “Even members [of] the Court’s liberal bloc shared these concerns to one degree or another, for

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543 *Id.* at 232 n.87.

544 *Id.* at 227–28.

545 *Id.* at 232 (quoting MERLO J. PUSEY, 2 CHARLES EVANS HUGHES 676 (1951)).

546 *Id.*

547 *Id.*

548 *Id.* at 244.

549 *Id.*

550 *Id.*

*Schechter Poultry* and *Radford* were decided by unanimous votes, whereas only Cardozo dissented in *Panama Refining*.<sup>551</sup> Professor Ross further maintains that it

is likewise possible to attribute the Court's invalidation of some New Deal legislation, particularly the National Industrial Recovery Act, to hasty and inept statutory drafting and poor presentation of arguments to the Court, factors that in several decisions helped to convince even members of the Supreme Court's liberal bloc of the unconstitutionality of some New Deal nostrums.<sup>552</sup>

Moreover, the "justices were hardly alone, for public opinion surveys indicate that substantial numbers of Americans remained skeptical about economic regulation even at the high water mark of the New Deal, despite the Democratic triumph in the 1936 presidential and congressional elections."<sup>553</sup> "It therefore may make more sense," Professor Ross concludes,

to attribute the triumph of the regulatory state to a "congressional revolution" rather than to a "judicial revolution" insofar as Congress during the so-called Second New Deal crafted legislation that the Court was able to uphold within the framework of existing doctrines, at least when the Court applied such doctrines more expansively and consistently.<sup>554</sup>

"In contrast with the clear influence of such internal factors," Professor Ross notes, "the extent to which the constant specter of Court curbing influenced the Hughes Court's decisions is more problematical."<sup>555</sup> Yet despite this recognition, Professor Ross maintains an equivocal posture toward the causal efficacy of the Court-packing threat. At some points, he suggests that "growing public impatience with the Court and increasing demands for curbs on its power"<sup>556</sup> might have influenced the votes of Hughes and Roberts. "Despite the absence of any 'smoking gun,'" Professor Ross contends, "it is not implausible to believe that the specter of Court curbing influenced at least Roberts in some decisions."<sup>557</sup> Indeed, he maintains that "it is possible that Roberts, and perhaps even Hughes, allowed the threat of Court packing to influence at least one or some of their votes in 1937—Roberts's vote in [*West Coast Hotel*] is the most obvious possibility."<sup>558</sup>

It has long been known that Roberts cast his vote in *West Coast Hotel* in conference on December 19, 1936, more than six weeks before the Court-packing plan was known to any but the closest advisors to the President.<sup>559</sup> For this reason *West Coast Hotel* is generally regarded to be the least likely

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551 *Id.*

552 *Id.* at 244–45.

553 *Id.* at 245.

554 *Id.* at 246.

555 *Id.*

556 *Id.* at 94.

557 *Id.* at 247.

558 *Id.* at 135.

559 See THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 311–12 (David J. Danelski & Joseph S. Tulchin eds., 1973); PUSEY, *supra* note 545, at 757; Memorandum

decision to have been influenced by the threat of the Court-packing plan.<sup>560</sup> Indeed, Professor Ross recognizes that FDR avoided making the Court an issue in the 1936 campaign.<sup>561</sup> Yet he urges that “[d]espite Roosevelt’s discreet silence about the Court during the election campaign, the Democratic landslide . . . generated widespread expectations that Roosevelt would propose some type of measure to circumvent the judicial impasse. Only the form of the measure remained uncertain.”<sup>562</sup> “[T]he November 1936 election had made some type of Court-curbing legislation almost certain, even though the form that it took generated widespread surprise.”<sup>563</sup>

It is difficult to discern the basis for this belief. If something resembling Roosevelt’s proposal was so transparently inevitable after the election, one has to wonder why it came as such a shock to Democratic leaders on the Hill and to other observers around the country. (Indeed, it turns out that such *legislation* was not inevitable, as neither the President’s proposal nor its revised version secured congressional approval.) Moreover, as Professor Ross has discussed in his fine book, *A Muted Fury*, hundreds of similar proposals had been introduced in Congress in the preceding two sessions<sup>564</sup> without producing any discernible effect on the Court’s performance.<sup>565</sup>

Perhaps for these reasons, Professor Ross ultimately backs away from the Court-packing story and turns instead to an explanation grounded in a more generalized public pressure for constitutional change. “Although it is possible that Roberts, and perhaps even Hughes, allowed the threat of Court-packing to influence at least one or some of their votes in 1937,” he concludes, “it is more likely that public antagonism toward the Court’s decisions influenced these and perhaps other justices<sup>566</sup> in a more subtle and less overtly political manner.”<sup>567</sup> Here Professor Ross follows some recent political science literature reflecting on the relationship between the judiciary and public opinion. One such study finds that, “given the institutional constraints imposed on the Court, the Justices cannot effectuate their own policy and institutional goals

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from Owen J. Roberts to Felix Frankfurter (Nov. 9, 1945), *printed in* Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311, 314–15 (1955).

560 See, e.g., 1 ALFRED KELLY, WINFRED HARBISON & HERMAN BELZ, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 488 (7th ed. 1991); WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932–1940*, at 236 n.20 (1963).

561 ROSS, *supra* note 59, at 94–95.

562 *Id.* at 96.

563 *Id.* at 126.

564 See WILLIAM G. ROSS, *A MUTED FURY* 298 (1994); see also CUSHMAN, *supra* note 1, at 12 (“The recent history of legislative attempts to control judicial behavior was not one from which Roosevelt could draw much encouragement.”).

565 See CUSHMAN, *supra* note 1, at 12; RONALD L. FEINMAN, *TWILIGHT OF PROGRESSIVISM: THE WESTERN REPUBLICAN SENATORS AND THE NEW DEAL* 121 (1981); LEUCHTENBURG, *supra* note 1, at 94; MASON, *supra* note 1, at 426; William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt’s “Court-Packing” Plan*, 1966 SUP. CT. REV. 347, 373.

566 It is not clear what “other justices” might have been so influenced, nor from what one might infer such influence.

567 ROSS, *supra* note 59, at 135 (footnote added).

without taking account of the goals and likely actions of the members of the other branches.”<sup>568</sup> Another concludes that “public opinion can and does influence the decisions of individual justices whether by stimulating changes in judicial attitudes or by shaping their subjective norms.”<sup>569</sup> Still another suggests that the Court “particularly needs to be responsive to public opinion because it relies ‘on political leaders for the implementation of its decisions.’”<sup>570</sup> The Supreme Court, Professor Ross concludes, “has an institutional stake in remaining attentive to public opinion, particularly congressional opinion, insofar as criticism of its decisions and movements to curtail its powers ‘can diminish the public respect which is so critical to the maintenance of its powers.’”<sup>571</sup>

These “strategic” or “attitudinal” analyses are formulated as general, universal, and trans-temporal propositions about “the way that judges behave.” They do not purport to derive from a study of the Hughes Court Justices, and yet Professor Ross suggests that we ascribe these characteristics to Hughes and Roberts based on the apparent behavior of other Justices at other times. This might be more persuasive had Professor Ross adduced evidence that that any of the Justices of this particular Court were in fact influenced by public opinion, or that there was any demonstrated risk that political leaders would not implement the Court’s decisions, or that the Justices expressed concern about this possibility. But Professor Ross has offered no such evidence.

Most importantly, Professor Ross has not demonstrated that the Hughes Court was ever significantly out of line with public opinion, and therefore needed to change course in order to ensure “public respect.” Indeed, having floated this possibility, Professor Ross again steps away from a full embrace of it. In the book’s concluding pages, Professor Ross remarks upon the “general concurrence between the Court’s decisions and the popular will.”<sup>572</sup> And indeed, as I have indicated above, the contemporary polling data bear out the claim that there was such a general concurrence. It is difficult to understand how Hughes and Roberts might have been reacting to “public antagonism” when by and large the public was not antagonistic toward the Court.

The polling data similarly complicate another possibility entertained by Professor Ross: “Because Hughes and Roberts . . . so often teetered between the Court’s competing factions, even a mere glance at the election returns

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568 *Id.* (quoting Lee Epstein et al., *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583, 585 (2001) (internal quotation marks omitted)).

569 *Id.* (quoting William Mishler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective*, 58 J. POL. 169, 198 (1996) (internal quotation marks omitted)).

570 *Id.* (quoting Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369, 382 (1992)).

571 Ross, *supra* note 59, at 135 (quoting William G. Ross, *The Resilience of Marbury v. Madison: Why Judicial Review Has Survived So Many Attacks*, 38 WAKE FOREST L. REV. 733, 769 (2003)).

572 *Id.* at 248.

might have sufficed to tilt them over to the proregulatory side.”<sup>573</sup> Let us unpack the difficulties with this hypothesis. First, as indicated above, Hughes and Roberts continued to cast votes on the “anti-regulatory side” in 1937 and thereafter. Each of them voted to invalidate a Texas oil proration regulation on February 1.<sup>574</sup> Indeed, the unanimity of that opinion suggests that the election returns were not sufficient even to tilt Brandeis, Stone, and Cardozo over to the “pro-regulatory side.” That same day Roberts delivered an opinion striking down certain fees imposed on railroads by the Washington State Department of Public Works;<sup>575</sup> on May 24, Hughes voted to invalidate a Georgia statute regulating insurance companies;<sup>576</sup> and both of these Justices continued after 1937 to invalidate various state and federal programs of economic regulation. In none of these instances were the Justices “tilted over” to “the pro-regulatory side.”

Second, if one is to posit the election returns as an influence on the judicial behavior of Hughes and Roberts, then one needs to account for their reactions to the results of other elections as well. The Democrats won a stunning victory in the off-year elections of 1934, picking up thirteen seats in the House and nine in the Senate. The results gave the Democrats a supermajority in both houses of Congress. Veteran *New York Times* reporter Arthur Krock wrote that the New Deal had won “the most overwhelming victory in the history of American politics.”<sup>577</sup> William Allen White read the election results to mean that the President had “been all but crowned by the people.”<sup>578</sup> William Randolph Hearst remarked that there had been “no such popular endorsement since the days of Thomas Jefferson and Andrew Jackson.”<sup>579</sup> William Swindler concluded that the Congress elected in 1934 was “unmistakably returned by the voters to continue the program Roosevelt had inaugurated.”<sup>580</sup> And how did Hughes and Roberts respond to this overwhelming electoral triumph? By invalidating the administration’s Hot Oil program in *Panama Refining*, the NIRA in *Schechter*, the Frazier-Lemke Farm Debt Relief Act in *Radford*, the AAA in *Butler*, the Guffey Coal Act in *Carter Coal*, and, in the case of Roberts, the New York minimum wage statute in *Tipaldo*. These decisions similarly raise difficulties for the contention that Hughes and Roberts appreciated the need to remain “attentive” to “congressional opinion.”<sup>581</sup>

Now consider the responses of Hughes and Roberts to the results of the 1938 election. In late 1937 and 1938, as the nation’s economy fell again into recession, Roosevelt’s personal popularity continued to slip. The President

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573 *Id.* at 247.

574 *Thompson v. Consol. Gas Utils. Corp.*, 300 U.S. 55 (1937).

575 *Great N. Ry. Co. v. Washington*, 300 U.S. 154 (1937).

576 *Hartford Steam Boiler Inspection & Ins. Co. v. Harrison*, 301 U.S. 459 (1937).

577 CUSHMAN, *supra* note 1, at 26.

578 *Id.*

579 *Id.*

580 *Id.*

581 *Id.*

was facing resistance to his program in an increasingly recalcitrant Congress, and he accordingly waged a campaign against anti-New Deal Senators and Congressmen in the Democratic primaries.<sup>582</sup> This campaign was largely unsuccessful, and the failure of this attempted purge was exacerbated by the outcome of the fall elections. The Republicans picked up eighty-one seats in the House, eight seats in the Senate, and eight governorships.<sup>583</sup> Newspaper columnists wrote that the electorate had lost confidence in Roosevelt and the New Deal, and that the President could not be elected to a third term even if he wanted to. The new Congress proceeded to “dismantle the New Deal” by cutting taxes, slashing relief appropriations, and killing Roosevelt appointments.<sup>584</sup> And how did Hughes and Roberts respond to this electoral setback for the Democrats? By voting to uphold the Tobacco Inspection Act<sup>585</sup> in *Currin v. Wallace*,<sup>586</sup> the Agricultural Adjustment Act of 1938<sup>587</sup> in *Mulford v. Smith*,<sup>588</sup> the Bituminous Coal Act of 1937<sup>589</sup> in *Sunshine Anthracite Coal Co. v. Adkins*,<sup>590</sup> and to extend the reach of the National Labor Relations Act in *Consolidated Edison Co. v. NLRB*<sup>591</sup> and *NLRB v. Fainblatt*.<sup>592</sup> At the same time, of course, they continued to cast votes against state and federal regulatory legislation in other cases. With respect to Hughes and Roberts, there is simply no clear pattern of judicial response to electoral outcomes.<sup>593</sup>

Third, it is not clear what Hughes and Roberts might have gleaned from their glance at the election results that would have been relevant to the resolution of the cases handed down in the spring of 1937. In 1936 the Republican Party had nominated Progressive Governor Alf Landon of Kansas, who supported much of the New Deal and criticized it principally for “its administrative inefficiency and its fiscal deficits.”<sup>594</sup> In the national radio broadcast inaugurating his campaign in January of 1936, Landon proclaimed himself a “constitutional liberal.”<sup>595</sup> At the same time, Roosevelt refused to make the Court or the Constitution a campaign issue. Instead, his platform pledged the administration to tackle the nation’s economic problems “‘through legislation within the Constitution,’” or, if that could not be accomplished,

582 *Id.* at 30–31.

583 *Id.* at 31.

584 *Id.* at 30–31.

585 Pub. L. No. 74-314, 49 Stat. 731 (1935).

586 306 U.S. 1, 19 (1939).

587 Pub. L. No. 75-430, 52 Stat. 31.

588 307 U.S. 38, 51 (1939).

589 Pub. L. No. 75-48, 50 Stat. 72.

590 310 U.S. 381, 404 (1940).

591 305 U.S. 197, 239 (1938).

592 306 U.S. 601, 609 (1939).

593 Nor, obviously, do these electoral outcomes appear to have affected the Four Horsemen, whose judicial behavior likewise fails to follow any clear pattern of response.

594 CUSHMAN, *supra* note 1, at 27.

595 *Id.*

through a “‘clarifying amendment.’”<sup>596</sup> Though Landon occasionally remarked that the Court had held unconstitutional several New Deal measures, he did not associate himself with the positions that the Court had taken in these cases. Instead, he ran on a platform that generally called for national solutions to economic problems.<sup>597</sup> The election was not framed as a constitutional referendum.

On the specific issues that would come before the Court during the 1936 term, there was little difference between the candidates. Both Landon and the Republican platform endorsed minimum wages for women and children.<sup>598</sup> The election results could provide the Justices with no additional information concerning popular attitudes toward the minimum wage, because it was already abundantly clear that both parties and both candidates supported it. As for the Wagner Act, Roosevelt initially had opposed it and spoke in its support only after it had passed the Senate by a lopsided margin and its passage in the House was assured. The Republican platform, meanwhile, pledged the Party “‘to protect the right of labor to organize and bargain collectively through representatives of its own choosing without interference from any source.’”<sup>599</sup> Similarly, Landon’s acceptance speech promised both full protection for the right of labor to organize and government mediation of disputes between management and labor. Landon continued to adhere to those positions throughout the campaign. As with the minimum wage, it is not clear how consulting the election returns would have helped inform the Justices whether there was popular support for national collective bargaining legislation. Again, both parties favored it.<sup>600</sup>

The case of Social Security is more complicated. As Governor, Landon supported the unemployment compensation features of the Social Security Act and resisted Virginia Democratic Senator Harry Byrd’s efforts to enlist his opposition to the statute.<sup>601</sup> At the Republican National Convention Landon promised to continue federal unemployment grants, and on the campaign trail he repeated the Republican platform pledges to assist the needy, blind, and disabled, and to promote child welfare.<sup>602</sup> Landon favored old-age pensions in principle, but he was critical of various features of the Act’s approach to providing those stipends, and clearly contemplated at least a significant revision of that portion of the statute.<sup>603</sup> At the same time, however, three times as many Republicans had voted for the Act as had opposed it, and the Party’s platform declared that “[s]ociety has an obligation to promote the security of the people, by affording some measure of protection against invol-

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596 *Id.* at 12–14, 27 (quoting DONALD BRUCE JOHNSON & KIRK H. PORTER, NATIONAL PARTY PLATFORMS, 1840–1972, at 362 (1973)).

597 *Id.* at 27.

598 *Id.*

599 *Id.* (quoting JOHNSON & PORTER, *supra* note 596, at 367).

600 *Id.* at 27–28.

601 *Id.* at 28.

602 *Id.*

603 *Id.*

untary unemployment and dependency in old age.”<sup>604</sup> The platform proposed, and Landon defended, a federal-state cooperative system of old-age pensions financed on a pay-as-you-go basis from the proceeds of a federal tax widely distributed.<sup>605</sup> The platform also called for state-level experimentation with various types of unemployment compensation programs. This was hardly an ideological crusade against a federal program of social security.<sup>606</sup>

As it turns out, however, the *Social Security Cases* are the decisions least susceptible to an electoral explanation. As Professor Ross correctly observes, Van Devanter and Sutherland joined the majority in *Helvering v. Davis*; they agreed with the bulk of the majority opinion in *Steward Machine*, objecting only “on surprisingly narrow grounds” to easily correctable provisions of the statute; and in *Carmichael v. Southern Coal & Coke Co.*<sup>607</sup> they and Butler offered an advisory opinion that Wisconsin’s unemployment compensation statute was a model of constitutionality.<sup>608</sup> It does not seem plausible to assert that they took these positions in the *Social Security Cases* because of the 1936 election or the Court bill, because they had flouted those pressures by dissenting in *West Coast Hotel* and *Jones & Laughlin*.<sup>609</sup> If those pressures were not necessary to secure the approval of Van Devanter and Sutherland to the Social Security Act, then why should we think that they were necessary to secure the approval of Hughes and Roberts?

Indeed, as their voting patterns illustrate, attempts to account for the behavior of Hughes and Roberts—and, indeed, of their colleagues on the Court—with categories such as “pro-regulatory” or “anti-regulatory” simply are not workable. This sort of characterization of their jurisprudence is just implausibly thin and provides almost no illumination. Such categories do not help to clarify what, on their terms, would appear to be significant irregularities in the trajectory of judicial performance. They do not help to explain why, at a particular point in time, the government prevails in some cases and not in others. Such a model treats the Justices as the relevant moving parts, shifting erratically back and forth between “pro-regulatory” and “anti-regulatory” “stances.” We might say that Van Devanter and Sutherland were “anti-regulatory” in opposing the minimum wage<sup>610</sup> and farm price supports,<sup>611</sup> but “pro-regulatory” in upholding the Social Security Act,<sup>612</sup> the Railway Labor Act,<sup>613</sup> and the National Labor Relations Act.<sup>614</sup> We might also

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604 *Id.* at 29.

605 *Id.*

606 *See id.* at 28–29.

607 301 U.S. 495 (1937) (upholding Alabama’s unemployment compensation statute).

608 *Id.* at 527, 530 (Sutherland, Van Devanter, & Butler, JJ., dissenting).

609 *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 76 (1937) (McReynolds, Van Devanter, Sutherland, & Butler, JJ., dissenting); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (Sutherland, Van Devanter, McReynolds, & Butler, JJ., dissenting).

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

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

612 *See Helvering v. Davis*, 301 U.S. 619 (1937).

613 *See Virginian Ry. Co. v. Sys. Fed’n No. 40*, 300 U.S. 515 (1937).

614 *Washington, Va. & Md. Coach Co. v. NLRB*, 301 U.S. 142 (1937).



observe that Brandeis, Stone, and Cardozo were “pro-regulatory” in *Butler* and *Carter Coal*, but “anti-regulatory” in *Schechter* and *Radford*. All of that is true, but it is also not very informative. In order to develop a deeper understanding of the pattern of judicial behavior, we must recognize the need to take into account as an independent variable the constitutionally relevant differences among cases and statutes brought before the Court.

The use of analytic categories such as “pro-regulatory” and “anti-regulatory” tends to diminish, if it does not disregard, the importance of these differences. In doing so, it suggests that the only real question was whether the Justices were “for regulation” or “against” it. And it makes lawyerly efforts to draft statutes designed to comply with the requirements of constitutional doctrine, and to craft legal arguments couched in terms of such doctrine, look like silly and irrelevant wastes of time and effort. Professor Ross is far too sophisticated to believe that this is the case, and yet in places his embrace of such relatively unsophisticated terminology pushes his analysis in that direction.

Having explored the unpersuasive electoral explanation for the Court’s behavior, Professor Ross turns to another alternative. “Because Supreme Court justices are influenced by many of the same forces as other citizens,” he writes, “it is not surprising that the tragedy of the Great Depression may have affected the attitudes of Hughes Court justices in the same manner as this catastrophe influenced the thinking of many other Americans.”<sup>615</sup> The difficulty with this explanation is that the tragedy of the Great Depression was already longstanding and abundantly evident by 1935. If that were the key to understanding the behavior of the Justices, one has to wonder why they didn’t acquiesce in the New Deal all along. Is it plausible to think that Hughes and Roberts recognized the need for mortgage moratorium relief in 1934 (*Blaisdell*), then failed to appreciate the need for farm debt relief in 1935 (*Radford*), but then awakened to that need in 1937 (*Wright*)? Is it possible that they just didn’t get the Hot Oil problem six years into the Great Depression in 1935 (*Panama Refining*), but did by 1939 (*United States v. Powers*)?<sup>616</sup> That in 1936 they didn’t understand the need to aid farmers who had been struggling for decades (*Butler*), but that they did three short years later (*Mulford*)? That Roberts didn’t see the need to regulate the price of coal in 1936 (*Carter Coal*), but did in 1940 (*Sunshine*)? And if Hughes and Roberts did come to understand the compelling need for more state and federal regulatory legislation, then one has to wonder why they continued to vote to invalidate so much of it even after 1936. It doesn’t appear that one can easily explain the pattern of their judicial behavior by reference to the tragedy of the Great Depression.

Perhaps in light of these difficulties, Professor Ross modifies this thesis in an important way on the very next page:

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615 Ross, *supra* note 59, at 247.

616 307 U.S. 214 (1939).

Although it is possible that the Court's greater receptivity to economic regulatory legislation reflected fears of at least Hughes and Roberts that the Court would lose some of its power or legitimacy, it is perhaps more likely that the ravages of the Great Depression helped to convince Hughes and Roberts, like millions of their fellow Americans, that there was a compelling need for more state and federal economic regulation *and that it was possible to remove existing constitutional impediments to such laws largely within the framework of existing doctrines.*<sup>617</sup>

It is not entirely clear what is meant by this suggestion, but it points us to an important observation about the comparative constitutional fates of early and later New Deal initiatives that Professor Ross makes just a few pages earlier. In the wake of their losses before the Court in 1935 and 1936, Congress came to recognize that most of what it wished to accomplish to address the tragedy of the Great Depression could be accomplished within the framework of existing doctrines, and crafted statutes accordingly.<sup>618</sup>

But there is more to the story, and Professor Ross goes on to explore another extremely important factor in the New Deal constitutional saga. "Ultimately," Professor Ross concludes, "New Deal legislation survived judicial review not because of the threat of Court packing, but because death and resignations produced numerous vacancies that Roosevelt was able to fill with Justices who did not disappoint him";<sup>619</sup> "not so much because Hughes and Roberts became wholehearted converts to a theory of judicial restraint in economic cases, but rather because the numerous justices appointed by Roosevelt formed a permanent liberal majority."<sup>620</sup> "Although many justices have disappointed the presidents who have appointed them, every justice appointed by Roosevelt was deferential toward economic regulatory legislation and protective of personal liberties. Roosevelt therefore won his confrontation with the Court through the appointment process even though his Court-packing plan failed."<sup>621</sup>

This is an essential point, and yet we must be careful to distinguish what it can from what it cannot help to explain. True, one cannot account for revolutionary cases like *Darby* and *Wickard v. Filburn*<sup>622</sup> without reference to changes in personnel. At the same time, however, there were other decisions in the late 1930s and early in the 1940s, such as *Sunshine Anthracite Coal, Mulford*, and *Powers*, where the government's success before the Court was due not to changes in personnel, but instead simply to careful statutory revision producing measures that could withstand challenge under established doctrine. Similarly, the Roosevelt appointments cannot explain the Court's performance in cases decided before there were any deaths or resignations. They don't explain the unanimous 1937 decisions in *Wright v. Vinton Branch*

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617 Ross, *supra* note 59, at 248 (emphasis added).

618 *Id.* at 246.

619 *Id.* at 136.

620 *Id.* at 249.

621 *Id.* at 140.

622 317 U.S. 111 (1942).

of the *Mountain Trust Bank, Virginian Railway, and Washington, Virginia, & Maryland Coach*. They don't explain the closely divided decisions in *Chamberlin v. Andrews*,<sup>623</sup> *West Coast Hotel*, or the other *Labor Board Cases*.<sup>624</sup> They do not explain the outcomes and the divisions in *Carmichael* and the *Social Security Cases*. And they do not explain *Nebbia*, *Blaisdell*, the *Gold Clause Cases*, or *Ashwander*. The changes in personnel that help to explain some of these closely divided cases are the resignation and death of Chief Justice Taft and Justice Sanford, and President Hoover's replacement of them with Hughes and Roberts in 1930. Nevertheless, one cannot adequately account for the performance of the various Justices in these various decisions without discussing in some detail the salient legal differences among the various cases and statutes in question. Judicial personnel matters deeply, but as Professor Ross recognizes, with respect to the Hughes Court, it is only a part of the story.

In the end, one leaves Professor Ross's causal analysis with a sense of a lack of historiographical coherence. He has considered a variety of potential causal factors, but has not configured them into an integrated explanation that helps the reader to make sense of the Court's pattern of behavior. In the conclusion, for example, Professor Ross calls attention to the following causal variables: Hughes's judicial statesmanship, the political and jurisprudential dispositions of Hughes and Roberts, internal legal factors, public opinion, the 1936 election, the ravages of the Great Depression, Hughes's "keen political instincts" and "'highly developed ear for the aspirations of the American people,'"<sup>625</sup> and Roosevelt's judicial appointments. It is not made clear, however, how these factors were related to one another, what the relative importance of each of them might have been, and how those factors that might appear to be in tension or in conflict with one another might have been reconciled. Professor Ross's consideration has informed the reader's own evaluation of these questions, but ultimately we are left to speculate.

#### D. Parrish

Professor Parrish largely rejects the notion that external political events played a significant role in determining the outcomes of cases decided by the Court in 1937. He is disinclined to attribute causal significance to the Court-packing plan, which "had little chance of adoption from the beginning, a fact not lost upon the chief justice and his colleagues."<sup>626</sup> Moreover, he points out, Roberts "voted to uphold the Washington [minimum wage] law several months prior to FDR's announcement of his Court-packing plan."<sup>627</sup> "The

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623 *W.H.H. Chamberlin, Inc. v. Andrews*, 299 U.S. 515 (1936) (per curiam) (upholding New York unemployment compensation statute by an equally divided vote, with Justice Stone not participating).

624 *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937); *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49 (1937); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

625 Ross, *supra* note 59, at 248–49.

626 PARRISH, *supra* note 149, at 26.

627 *Id.* at 103.

‘court-packing’ measure, therefore, can be ruled out as a decisive variable” in the minimum wage cases.<sup>628</sup> “Nor,” in Professor Parrish’s view, “does the 1936 election appear to have been a critical turning point.”<sup>629</sup> He notes that “following large Democratic gains in 1934, the Court struck its heaviest blows against the New Deal in 1935–1936, while in the wake of the 1938 congressional returns that reduced FDR’s support in the House and Senate, the Court continued to endorse the last reforms of the New Deal.”<sup>630</sup> The Justices, Professor Parrish concludes, do not appear to have been influenced by the election returns.

Instead, Professor Parrish is inclined to attribute much of the constitutional change of the New Deal period to changes in Court personnel brought about by presidential appointments. He notes that in 1929 Chief Justice Taft “feared for the future of the Court and the Constitution” because he distrusted President Hoover as “‘a Progressive’” who, if given the opportunity to appoint Justices to the Court, “‘would put in some rather extreme destroyers of the Constitution.’”<sup>631</sup> “Discounting Taft’s hyperbole,” Professor Parrish maintains, “his prediction proved more than accurate about the new president and his three appointments over the next three years—Hughes, Roberts, and Cardozo.”<sup>632</sup> Indeed, Professor Parrish insists that “Hoover’s three appointments, far more than Roosevelt’s after 1937, changed fundamentally the Court’s jurisprudence in the decade of depression.”<sup>633</sup> And though he discounts the likelihood that the election returns affected the votes of sitting Justices, he recognizes that “the electoral victories of FDR and the Democrats in 1936 and 1940 made possible the creation of a ‘Roosevelt Court’ that codified and extended the constitutional changes wrought earlier.”<sup>634</sup> “The arrival of Roosevelt justices beginning in 1937 secured both the triumph of the New Deal in the Hughes Court and of judicial restraint as its guiding ideological orientation.”<sup>635</sup>

Professor Parrish rejects the contention that Justice Roberts voted to uphold the minimum wage law in *West Coast Hotel* because Hughes cajoled him into doing so.<sup>636</sup> Like Professor Ross, he notes that “[p]ersonal relations among the justices on the Hughes Court impressed many observers as

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628 *Id.* at 38.

629 *Id.*

630 *Id.* at 183.

631 *Id.* at 90.

632 *Id.*

633 *Id.* at 91.

634 *Id.* at 183.

635 *Id.* at 47.

636 For treatments advancing this hypothesis, see JAMES F. SIMON, *FDR AND CHIEF JUSTICE HUGHES* 300 (2012); William E. Leuchtenburg, *Charles Evans Hughes: The Center Holds*, 83 N.C. L. REV. 1187, 1198–1200 (2005); William E. Leuchtenburg, *Comment on Laura Kalman’s Article*, 110 AM. HIST. REV. 1081, 1089–90 (2005). For more doubtful assessments of this claim, see PUSEY, *supra* note 545, at 675–76, 768; Barry Cushman, *The Hughes-Roberts Visit*, 15 GREEN BAG 2D 125 (2012).

very formal,”<sup>637</sup> and that “[o]utside the formal conferences, the austere Hughes eschewed ad hoc discussions with other members of the Court, a posture of rigorous independence that forestalled politicking for votes.”<sup>638</sup> Indeed, Professor Parrish suggests that this feature of the Hughes Court’s culture “may account for the absence of serious dialogue between the austere chief justice and his younger colleague,”<sup>639</sup> “and may have contributed to misunderstandings in critical situations such as the minimum wage case, *Morehead v. New York ex rel. Tipaldo*, in 1936.”<sup>640</sup> As Professor Parrish explains, in *Tipaldo*,

lawyers representing New York, calculating the odds against them, attempted to distinguish their statute from the federal law struck down in *Adkins*. That approach found favor with Hughes, who dissented in *Tipaldo* because it permitted him to reaffirm support for a minimum wage law without overturning the *Adkins* precedent, a course he often found unpalatable.<sup>641</sup>

At that time Hughes “may have hesitated to confront Sutherland and overrule *Adkins*,”<sup>642</sup> though Felix Frankfurter later maintained that Roberts was prepared to uphold the New York statute and overrule *Adkins* if there were five votes to do so.<sup>643</sup> But Hughes insisted on upholding the New York statute without overruling *Adkins*—something that Roberts did not believe could be done—and so Roberts voted to affirm *Adkins* on the basis of stare decisis.<sup>644</sup> Yet “[f]ive months later in *West Coast Hotel*, Hughes did not hesitate to inter *Adkins*.” “What changed the chief justice’s mind?”<sup>645</sup> Professor Parrish regards it as “plausible” that Hughes, who was “[n]ever wedded to the abstraction of freedom of contract,” “may have misunderstood Roberts’s willingness to overrule *Adkins*” in *Tipaldo*, “but finally grasped the situation” in *West Coast Hotel*.<sup>646</sup> Had Hughes’s punctilious formality not precluded an informal conversation with Roberts about their respective positions, Professor Parrish suggests, “fruitful collaboration and compromise” might have prevented the *Tipaldo* debacle.<sup>647</sup> Thus, “[i]f Roberts was the key to Hughes’s vote or visa versa, the failure of the two justices to effectively communicate in 1936 may account for the outcome that led most contemporaries to assert

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637 PARRISH, *supra* note 149, at 39.

638 *Id.* at 93.

639 *Id.* at 39.

640 *Id.* at 93.

641 *Id.* at 94.

642 *Id.* at 104.

643 Frankfurter, *supra* note 559, at 314.

644 Letter from Felix Frankfurter to Paul Freund (October 18, 1953), *microformed on* Felix Frankfurter Papers, Harvard Law School Library, Part III, Reel 15 (Univ. Publ’ns Am., Inc.), *quoted in* Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 633 n.78 (1994); *see also* CUSHMAN, *supra* note 1, at 92–104 (discussing the basis of Roberts’s vote in *Tipaldo*).

645 PARRISH, *supra* note 149, at 104.

646 *Id.*

647 *Id.*

that in the minimum wage decisions there had been a ‘switch in time that saved nine.’”<sup>648</sup>

Professor Parrish recognizes that this explanation rests on informed conjecture, and is therefore willing to entertain “other possibilities.”<sup>649</sup> He suggests that “[t]he storm of criticism against the Court that followed *Tipaldo*, including a rebuke from former President Hoover” may have induced the Chief Justice to overrule *Adkins* once “it became clear that four others were prepared to cut the Gordian knot.”<sup>650</sup> As for Roberts, Professor Parrish suggests that he may simply have “changed his mind about minimum wage legislation,” or he may have “remained confused and conflicted about the issue.”<sup>651</sup> The truth, he concludes, “may never be known.”<sup>652</sup>

As for the more general issue of the causes of the Court’s decisions in the spring of 1937, Professor Parrish strikes a balanced, if similarly inconclusive, pose. He maintains that the dedication of “pre-Hughes era Courts to a strict laissez-faire interpretation of the Constitution has often been grossly exaggerated,” and that as a consequence “the major decisions of the Hughes Court touching upon issues of government’s relationship to the economy had deep, if usually contested, roots in the doctrinal past of the Fuller, White, and Taft Courts.”<sup>653</sup> Sophisticated New Deal lawyers “correctly perceived the many doctrinal openings created for their programs during the earlier progressive years and attempted to drive their innovative laws through them.”<sup>654</sup> But what these lawyers “saw as a wide tunnel, many of the justices on the Hughes Court saw as only the eye of a needle that required careful jurisprudential threading.”<sup>655</sup> Courts, Professor Parrish quite properly reminds us, “remain different from other institutions in our governmental structure, decisively so when it comes to the claims and constraints of the past.”<sup>656</sup>

At the same time, Professor Parrish insists that “even within the conservative constitutional tradition inherited from the Fuller-White-Taft years, room had been made for choice, opportunity for affirming the powers of government, as well as for denying those powers.”<sup>657</sup> On the Hughes Court, “[a] majority of the justices often opted for the doctrines that constrained rather than emancipated government’s role in the economy.”<sup>658</sup> Professor Parrish does not undertake any sustained effort to determine the extent to which the Justices actually experienced the doctrine as presenting them with a range of

648 *Id.* at 38–39.

649 *Id.* at 104.

650 *Id.* at 94.

651 *Id.* at 104. Professor Parrish also suggests that Roberts may have “felt the pressure of Roosevelt’s reelection,” *id.* at 104, though this is curious in view of his earlier rejection of the view that the 1936 election was “a critical turning point.” *Id.* at 38.

652 *Id.* at 104.

653 *Id.* at 178.

654 *Id.*

655 *Id.*

656 *Id.*

657 *Id.*

658 *Id.*

respectable options in any given case. But he concludes that the “more cautious lawyering practiced by the New Dealers after 1933–1934” conspired with a “series of external events between 1934 and 1937—rising Democratic majorities in Congress, Roosevelt’s decisive reelection, mounting evidence of real class warfare”—to tip “the constitutional balance toward emancipation.”<sup>659</sup> “The world beyond the closed chambers of the Supreme Court,” Professor Parrish maintains, “does make a difference in judicial behavior”—though it is noteworthy that the evidence he offers in support of this claim is an anecdote involving the later behavior of some Roosevelt appointees rather than anything involving the Justices of the early Hughes Court.<sup>660</sup>

Even here, however, Professor Parrish recognizes that questions of timing and comparative causal significance linger. For example, he asks, did the “widespread disorders arising from the sit-down strikes weigh upon the justices who decided *Jones & Laughlin* in 1937? No doubt yes, but how decisive were those events when assessed against the inherited Commerce Clause jurisprudence, the particular facts of the NLRB cases, and the arguments advanced by government attorneys?”<sup>661</sup> “Did the real constitutional switch take place in 1934 with *Nebbia*?”<sup>662</sup> Or did it “come later in 1937 with [*West Coast Hotel Co. v.*] *Parrish* and *Jones & Laughlin*? Did Roberts and Hughes trim their constitutional principles to fit new circumstances or did the New Dealers trim theirs?”<sup>663</sup> “That these issues will never be resolved to the satisfaction of every scholar appears assured,” Professor Parrish concludes, “because we have no historical method for reading the minds of individual justices in 1934–1937.”<sup>664</sup>

### E. McKenna

In her preface, Professor McKenna informs the reader that her study “refutes earlier claims of a linkage between Roosevelt’s reelection victory in 1936, his judicial reorganization bill, and the ‘1937 constitutional revolution.’”<sup>665</sup> She resists previous studies that “tried to establish a direct link” between these events.<sup>666</sup> She insists that “[t]he election of 1936 had no bearing on the decisions reached by the justices in subsequent cases coming before them for review,” pointing out that “[t]he midterm elections of 1934 were almost as one-sided as that in 1936, but after them the Court showed no hesitation in invalidating New Deal legislation. Contrary to Mr. Dooley’s statement, the Supreme Court did not ‘follow the election returns.’”<sup>667</sup>

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659 *Id.*

660 *Id.* at 178–79.

661 *Id.* at 179.

662 *Id.* at 178.

663 *Id.*

664 *Id.*

665 MCKENNA, *supra* note 48, at xx.

666 *Id.* at xxiii.

667 *Id.* at xxii. She also suggests that the 1936 election did not present a stark choice between constitutional visions, noting that “Landon opened his campaign for the presi-

Nor, she maintains, did the legal developments of 1937 result “from the ‘fear of God’ that Roosevelt’s court bill put in the hearts of the sitting justices.”<sup>668</sup> *West Coast Hotel* was actually voted on in conference nearly two months before Roosevelt unveiled his Court plan,<sup>669</sup> and in his *Autobiographical Notes*, Chief Justice Hughes rejected as “utterly baseless” the contention that he voted to uphold the Washington minimum wage statute and the National Labor Relations Act for the purpose of defeating the President’s proposal.<sup>670</sup> Indeed, Professor McKenna believes that Roosevelt’s plan “had no chance of passing,” because “[t]he original proposal could not command a majority in the Senate” and “House leaders refused to take it up.”<sup>671</sup> Thus, she maintains, for the Justices “the outcome was never in doubt.”<sup>672</sup> She views it as “likely that the Supreme Court lineup in the post-March 1937 cases would have occurred as it did without FDR’s Court-packing challenge.”<sup>673</sup> The notion “that the Court, led by an able chief justice, had reversed itself on a number of important constitutional issues mainly out of fear that Roosevelt would succeed in ramming his bill through Congress” is thus in Professor McKenna’s view a “fiction” that was “created by the administration, its supporters, and generations of liberal interpreters.”<sup>674</sup>

Thus, Professor McKenna devotes at least as much of her attention to understanding why the Court struck down New Deal legislation in 1935 and 1936 as she does to explaining why the Court upheld challenged legislation in 1937. As she puts it, she sets out to explain “why FDR and the Court got so out of joint.”<sup>675</sup> She argues that “it would be virtually impossible to understand the friction that developed” and “why the Court’s decision making took the form it did” without “a firm grasp of the test cases,” “their fact patterns,” “the legal theories that then prevailed,” and “their influence on the doctrinal categories in the constitutional consciousness of the individual justices.”<sup>676</sup> And she insists that “FDR and his key advisers were no innocent bystanders”

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dency with a national radio broadcast in which he proclaimed himself a ‘constitutional liberal.’” *Id.* at 224.

668 *Id.* at xxiii.

669 *Id.* at xxii, 536.

670 *Id.* at 437.

671 *Id.* at 562.

672 *Id.* at 536. I would not put the point so strongly. The evidence does not support the claim that the outcome was never in doubt, nor that the Justices never doubted what the outcome would be. However, I do believe that the formidable political and parliamentary obstacles the bill faced in the House and Senate gave the Justices “ample reason to be confident that constitutional capitulation was not necessary to avert the Court-packing threat. Certainly they had reason to doubt that immediate, total, and unconditional surrender was required.” CUSHMAN, *supra* note 1, at 25 (footnote omitted); *see also* Barry Cushman, *Court-Packing and Compromise*, 29 CONST. COMMENT. 1 (2013); Barry Cushman, *The Court-Packing Plan as Symptom, Casualty, and Cause of Gridlock*, 88 NOTRE DAME L. REV. 2089 (2013).

673 MCKENNA, *supra* note 48, at xxii.

674 *Id.* at 536.

675 *Id.* at xxi.

676 *Id.*



in the constitutional crisis that developed.<sup>677</sup> “By taking a blithe approach to sloppy bill drafting and a peculiar kind of ‘wink and nod’ attitude toward the Constitution,” she argues, “Roosevelt and his subordinates played a central role in precipitating the crisis.”<sup>678</sup> Thus, Professor McKenna attributes the unhappy constitutional fate of much of the early New Deal to poor legal representation from the Justice Department and deficient constitutional lawyering at the statutory drafting stage.

Roosevelt’s difficulties with the Department of Justice began even before he took the oath of office. It took him nearly a month to persuade Montana’s Senator Thomas Walsh to accept the nomination for the post of Attorney General. Unfortunately, Senator Walsh then died unexpectedly of a heart attack just two days before the inauguration.<sup>679</sup> Homer Cummings had been campaigning for the post since shortly after the election, and Roosevelt was ultimately persuaded to appoint him on a temporary basis until a suitable permanent appointee could be found. Cummings was a longtime party operative who enjoyed the support of a number of Senators and cabinet officials, but others, like Montana’s Senator Burton Wheeler, did not believe that he was up to the job.<sup>680</sup> What started as a stopgap appointment of a few weeks turned into six fateful years at the helm of the Department of Justice.<sup>681</sup>

Roosevelt faced similar difficulties in appointing a Solicitor General. His first choice for the office was Felix Frankfurter, about whom Cummings publicly professed an enthusiasm that he did not actually harbor. After thinking it over and consulting with Justices Brandeis and Cardozo, however, Frankfurter declined the position in a blunt communication that caused an annoyed Roosevelt to denounce him privately as “an independent pig.”<sup>682</sup> Professor McKenna reports that Frankfurter and Brandeis, who “were already showing dissatisfaction with the administration of the Justice Department,” wanted Roosevelt to appoint Dean Acheson, a former Brandeis clerk and a partner with the Washington law firm of Covington & Burling, to the office that Frankfurter had rejected.<sup>683</sup> “Frankfurter forcefully argued his case with Roosevelt, but when FDR approached Cummings the reaction was immediate, violent, and adverse.”<sup>684</sup> Acheson reported in his memoirs that

he yearned to be solicitor general, but Cummings bore a personal grudge against him because Acheson’s father, the Episcopal bishop of Cummings’s Connecticut diocese in 1929, disapproved of his multiple marriages, frowned on his divorce of his second wife, and denied the complicity of the church in

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677 *Id.*

678 *Id.*

679 *Id.* at 3.

680 Mr. Shogan reports that Tommy Corcoran and Ben Cohen regarded Cummings with “undisguised intellectual disdain.” SHOGAN, *supra* note 87, at 74–75.

681 See MCKENNA, *supra* note 48, at 2–11.

682 *Id.* at 12–13.

683 *Id.* at 13.

684 *Id.*

his marriage to Cecilia Waterbury, the daughter of a prominent Darien, Connecticut, businessman.<sup>685</sup>

Cummings refused to accept Acheson, causing a frustrated Roosevelt to throw up his hands and exclaim, “Well for God’s sake, get me somebody.”<sup>686</sup>

The “nonentity” ultimately selected for the post “was James Crawford Biggs, a sixty-year-old North Carolina trial lawyer and judge who landed the job because no other candidates were actively in the field.”<sup>687</sup> “From the outset,” Professor McKenna relates, “Biggs seemed bewildered by his new responsibilities,” for which he was “unfit.”<sup>688</sup> He “lost ten of the seventeen cases tried in his first fifteen months in office. He was amiable, kindly, honest, and courtly, but just plain unqualified for the job.”<sup>689</sup> One of the Justices “referred to him as ‘Serjeant Buzfuz’ after a character in Charles Dickens’s *The Pickwick Papers*.”<sup>690</sup> On one occasion, Chief Justice Hughes rebuked Biggs in open court: “‘Mr. Solicitor General, you have talked forty-five minutes already. You had better take the next fifteen minutes telling us what you want this court to do.’”<sup>691</sup> Biggs was, “as Paul Freund put it, a jury lawyer” who “was known for making rather emotional arguments” to the Court.<sup>692</sup> He “had not had experience with federal law, including constitutional law, nor was his strength in appellate advocacy.”<sup>693</sup> Freund “thought the government was not getting the kind of representation it needed; nor was the Court getting the kind of help it needed.”<sup>694</sup>

The unfortunate Mr. Biggs was only the tip of the iceberg. Jerome Frank later reported that “‘most of the lawyers we encountered in the Department of Justice were not very good in those days.’”<sup>695</sup> Thomas Emerson similarly remarked:

The Department of Justice was then at its lowest ebb of any time during the New Deal period in terms of the capacity of its personnel. Under Homer Cummings, it was a patronage agency. The lawyers, at least the ones we dealt with, were very limited in their abilities, highly political in their backgrounds, and hardly interested or capable of carrying on an effective enforcement program . . . .<sup>696</sup>

“Complaints about Cummings’s staffing of the Justice Department with second-rate political appointments,” reports Professor McKenna, “came from

685 *Id.*

686 *Id.* at 14.

687 *Id.*

688 *Id.*

689 *Id.*

690 *Id.*

691 *Id.*

692 *Id.* at 14 n.27.

693 *Id.*

694 *Id.*

695 *Id.* at 127.

696 *Id.* at 84.

all quarters. Formerly the department had been steeped in a tradition that excluded appointment of party hacks. But as a faithful party man, Cummings was an easy target for Postmaster General Farley, who came close to wrecking the department by loading it up with ‘deserving Democrats.’<sup>697</sup> One Washington observer remarked that “‘Mr. Cummings’ appointments make sad reading . . . [T]hey were wholly inadequate as individuals, and a terrible crew to unload on a Department that was soon to be confronted with some of the most complicated legal cases ever tried in the history of the government.’”<sup>698</sup> Secretary of the Interior Harold Ickes likewise complained that the Justice Department “‘was simply loaded with political appointees,’” and that “‘hardly anyone has any respect for the standing and ability of the lawyers over there.’”<sup>699</sup>

In June of 1934, “the justices conveyed word to the president that Biggs should be kept from arguing in their court if the administration wanted to win any more cases before it. Justice Brandeis complained to Frankfurter that Biggs was giving a ‘bad impression.’”<sup>700</sup> Thomas Emerson, who lived with Justice Cardozo’s clerk, Ambrose Doskow, “heard constant reports from him that members of the Supreme Court were extremely dissatisfied with the government’s arguments in the cases.”<sup>701</sup> Justice Stone wrote to Frankfurter of his concerns about the performance of the Solicitor General’s office, and Frankfurter relayed those concerns to Roosevelt.<sup>702</sup> And yet no action was taken. The “obviously incompetent” Biggs remained in office for two years, “by the end of which much damage was done.”<sup>703</sup> It was not until after a long conversation with Roosevelt in December of 1934 that Frankfurter could report that “‘[t]he President now thoroughly understands the weaknesses of the [Justice] Department.’”<sup>704</sup>

The problems with the Justice Department did not stop with subpar oral advocacy. Wyoming Democratic Senator Joseph O’Mahoney thought that Cummings was also “chiefly responsible for failing to give adequate attention to the selection and cultivation of promising test cases and for failing to see to it that the legal arguments offered in their defense were ably framed and felicitously presented.”<sup>705</sup> Similarly, in October of 1935 the editors of *The New Republic* attributed much of the New Deal’s constitutional trouble to the fact that

in the past it had been the business of government counsel to choose good cases, get them before the courts without delays that implied a lack of confidence, argue them properly, and, if the record permitted, make the

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697 *Id.* at 15.

698 *Id.*

699 *Id.* at 15–16.

700 *Id.* at 15.

701 *Id.* at 84 n.23.

702 *Id.* at 15.

703 *Id.* at 16.

704 *Id.*

705 *Id.* at 25.

Supreme Court realize that an adverse decision on constitutionality would put an end to government activity approved by both houses of Congress, the president, and the public. Few if any of these requirements had been met in the presentation of the recent New Deal cases, especially *Schechter*.<sup>706</sup>

Lastly, as Professor McKenna argues, the Department did not do enough to ensure that the laws prepared by administration staffers were drafted to weather constitutional challenges. “Little was heard of the Constitution as the vast New Deal juggernaut got under way,” she reports.<sup>707</sup> “Doubts about the constitutionality of New Deal programs were hesitantly expressed by a few, including some of those involved in the legislative drafting process, but most were confident that the crisis would be over before the Supreme Court was given an opportunity to act.”<sup>708</sup> Robert Jackson observed that “New Dealers were inclined to ignore the problem of constitutionality.”<sup>709</sup> As a consequence, sophisticated government lawyers like Stanley Reed, Charles Wyzanski, and Jerome Frank harbored “doubts” and “deep misgivings” about the constitutionality of some New Deal programs.<sup>710</sup>

Professor McKenna and others lay much of the blame for this at the feet of the Justice Department. “As part of the executive branch,”<sup>711</sup> she argues, the Justice Department lawyers should have been prepared to take part in drafting New Deal legislation, but they did not. Cummings’s greatest failing was his deliberate choice to exert little if any influence on White House staffers and others in drafting laws, or in trying to prevent passage of hastily or poorly drafted laws.<sup>712</sup>

Similarly, Senator O’Mahoney, “a strong New Deal Democrat,” believed that “many of the problems of constitutionality arose simply because legislation was so poorly drafted. In his opinion, the Justice Department did not do its homework.”<sup>713</sup> For example, administration critics attributed the *Panama Refining* decision “to the infirmities of the NIRA and its attempted delegation, the result of hasty and sloppy draftsmanship.”<sup>714</sup> Indeed, the President himself “came close to admitting guilt on the charge of sloppy draftsmanship when he characterized the decision as simply requiring that the New Deal effect its policies with the ‘correct language’ and looked ahead to ‘a dozen or one hundred other cases where the language isn’t correct yet.’”<sup>715</sup> Even at the time, however, criticism of such inattention to constitutional limitations was growing. In the wake of the *Panama Refining* decision the editors of the *New York Herald Tribune* wrote, “‘In the skylarking days of 1933–34, the happy

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706 *Id.* at 187.

707 *Id.* at 26.

708 *Id.* at 26–27.

709 *Id.* at 27.

710 *Id.* at 20–21.

711 *Id.* at 24.

712 *Id.*

713 *Id.* at 24–25.

714 *Id.* at 46.

715 *Id.*

administrators of the New Deal brushed aside the Supreme Court as they brushed aside Congress and the Constitution. . . . The President paid perfunctory lip service to the nation's charter of liberty."<sup>716</sup>

Justice Department lawyers worried that that such criticism would intensify after the Court ruled in favor of the government in *Ashwander* in early 1936. That eight-to-one decision offered "proof" that the Justices were "not totally unwilling to go along with the administration's recovery efforts."<sup>717</sup> "The TVA ruling . . . did serious damage to the argument that everything New Dealers were litigating would be declared invalid."<sup>718</sup> *Ashwander's* significance "was captured by constitutional historian Carl Brent Swisher," who wrote that the decision "constituted 'an embarrassment for the administration.' It signaled that the Court had not set out maliciously to batter every major feature of the New Deal program and that New Deal legislation might be upheld if it could be brought within traditional lines of constitutional interpretation."<sup>719</sup> Taking into consideration other regulatory victories the Court handed down before the 1936 election or the introduction of the Court-packing plan—decisions upholding the Railway Labor Act, the administration's monetary policy, the Minnesota Mortgage Moratorium Law, and commodity price regulation—Professor McKenna finds it difficult to contest Swisher's conclusion that "'[i]n spite of the conviction of many administration leaders that the Court had set out deliberately to sabotage their program, the line-up of decisions conveyed the suggestion that it was the program and not the Court that was wrong."<sup>720</sup> Indeed, a Justice Department memorandum prepared in the wake of the decision observed that "'the public will again consider the Court fair to the Administration because of the TVA case,'" and worried that "'[t]he bad lawyer criticism is an active and politically dangerous criticism which is being taken up even by the Administration's friends."<sup>721</sup>

Professor McKenna concludes this overview by noting that in March of 1937, Senator Burton Wheeler had

a long conversation with the Chief Justice. Hughes mused openly on what might have been the story of the New Deal's legislation of the past few years if, as he put it, "we had an Attorney General in whom the . . . Court had confidence." "As it was," Hughes continued, "the laws have been poorly drafted, the briefs have been badly drawn and the arguments have been poorly presented. We've had to be not only the Court but we've had to do the work that should have been done by the Attorney General."<sup>722</sup>

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716 *Id.* at 47.

717 *Id.* at 193.

718 *Id.*

719 *Id.* at 192.

720 *Id.* (quoting SWISHER, *supra* note 290, at 938).

721 *Id.* at 196.

722 *Id.* at 24.

Hughes was telling Wheeler “that the justices often could find no means of upholding legislation that was so poorly drafted.”<sup>723</sup>

Professor McKenna illustrates these larger themes with a series of examples involving major New Deal programs. She relates that the doubts that some in the administration had about the NIRA’s constitutionality “were set aside in favor of bold action.”<sup>724</sup> The NIRA went into effect despite warnings and objections from Wyzanski, Frankfurter, Brandeis, and others. Jerome Frank, the AAA’s general counsel, complained that National Recovery Administration (NRA) legal counsel Donald Richberg “never gave an opinion on anything.”<sup>725</sup> According to Frank, “[t]hose NRA codes went through without ever having any lawyer” opine on their validity.<sup>726</sup> “‘That was one reason,’ Frank maintained, ‘for the debacle later.’”<sup>727</sup>

The NRA was unpopular even among friends of the New Deal. It wasn’t long before “[l]abor and industry were in open conflict,” “small businesses were being done in by the giants,” and “the cumbersome, complex, confused recovery machinery was creaking at the joints.”<sup>728</sup> “For more than a year, Brandeis repeatedly reminded Hugh Johnson that ‘frankly he was a’gin the Experiment.’”<sup>729</sup> Borah bluntly told him, “‘Hugh, your codes stink.’”<sup>730</sup> Before the end of 1933, the NRA’s Compliance Division “was swamped with a backlog of more than ten thousand complaints of code violations.”<sup>731</sup> Yet neither Johnson nor Richberg “had any enthusiasm for litigation as an enforcement mechanism,”<sup>732</sup> and

NRA and Justice Department lawyers evaded prosecuting violations and risking a constitutional test in the courts. “One of the deepest weaknesses of the administration in Washington, ever since the Agricultural Act and the Recovery Act went into effect,” noted a liberal journal, “has arisen from its fears that these laws, or parts of them, would be declared unconstitutional if allowed to be tested in the courts.”<sup>733</sup>

Harold Ickes urged Johnson to take legal action seeking a favorable ruling from the Court, but Richberg and his aides balked at the suggestion.<sup>734</sup>

As a result, “[l]ingering doubts about constitutionality hanging over the NRA hampered enforcement.”<sup>735</sup> Roosevelt appointed members to the first National Labor Board (NLB) to adjudicate charges of noncompliance with the statute’s labor provisions, “[b]ut when it came to enforcing decisions of

723 *Id.*

724 *Id.* at 82.

725 *Id.* at 81.

726 *Id.*

727 *Id.*

728 *Id.* at 82.

729 *Id.* at 81.

730 *Id.*

731 *Id.* at 82.

732 *Id.*

733 *Id.* at 82–83.

734 *Id.* at 83.

735 *Id.*

the NLB, the Justice Department was slow to move.”<sup>736</sup> A witness testifying before the Senate Interstate Commerce Committee called the statute “‘a failure and a flop,’” and four of the Committee’s Democrats concurred.<sup>737</sup> It had become clear “that the entire NRA might be toppled, either by Congress’s allowing it to expire or through defeat in the courts.”<sup>738</sup> NRA lawyer Thomas Emerson “summed up the frustrations of his and other agencies when he complained that Justice Department lawyers had done nothing except lose cases.”<sup>739</sup> Francis Biddle later reminded members of the Senate Labor Committee “that in almost two years the Justice Department had brought suit in only two cases of the two dozen in which he had sought litigation on section 7a. ‘It is hardly necessary to labor the point,’” he remarked, “‘that such delays as this amount to a complete nullification of the law.’”<sup>740</sup>

U.S. Attorneys prosecuting code violators felt abandoned when higher officials refused to appeal adverse decisions. One attorney announced publicly that he would take no more NRA cases to a grand jury until the Supreme Court ruled on the validity of the entire program. “The sheer weight of cases and pressures for a definitive decision on the act’s constitutionality was driving the program toward a Supreme Court challenge,”<sup>741</sup> and “[a]fter a series of reverses in district courts in Florida and Delaware, Cummings announced that all decisions adverse to the NRA would be appealed to the Supreme Court.”<sup>742</sup>

The leading candidate for such a test case was *United States v. Belcher*, which challenged the NRA’s lumber code.<sup>743</sup> That code set the maximum workweek at forty hours and established a minimum wage of twenty-four cents an hour. William E. Belcher, who owned several sawmills in the soft pine region of central Alabama, openly defied these provisions.<sup>744</sup> He complained to the code authorities that compliance would force him to lay off somewhere between 300 and 500 workers. In August of 1934 he was charged with paying his employees seven cents an hour and working them for up to forty-eight hours per week.<sup>745</sup> The trial judge granted Belcher’s demurrer to the indictment on the grounds that the NIRA unlawfully delegated legislative power, that the lumber code was not authorized by Congress’s power to regulate interstate commerce, and that it denied to Belcher due process of law. “Shortly thereafter, Belcher’s counsel and U.S. attorney Jim Smith, on receiving permission from his superiors, . . . requested the dismissal of *Belcher*,

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736 *Id.*

737 *Id.* at 84.

738 *Id.*

739 *Id.*

740 *Id.* at 85 (quoting IRONS, *supra* note 48, at 228, 324 n.6).

741 *Id.*

742 *Id.* at 84.

743 *Id.* at 85.

744 *Id.*

745 *Id.* at 85–86.

owing to the absence of a full trial court record and the need to revise provisions of the lumber code.”<sup>746</sup> That request was granted on April 4, 1935.<sup>747</sup>

The dismissal “came as a shock to Congress, the press, and the public.”<sup>748</sup> “NRA lawyers assigned to preparing the briefs and arguments were described as ‘heartbroken.’ *The New York Times* scorned the move and the ‘unconvincing reasons’ announced for it.”<sup>749</sup> The *Times* editors opined that the dismissal “left the NRA ‘at sea’ and gave the impression that the government feared a test case.”<sup>750</sup> They charged that “[t]he Roosevelt administration is now in the indefensible position of urging Congress to extend with slight modifications an act the constitutionality of which it is deliberately refusing to test.”<sup>751</sup> Similarly, *The Washington Post* reported that “the administration was afraid to ‘face the music’ and contended that dismissing the case was tacit acceptance of the lower court’s opinion that the NIRA and its lumber code were unconstitutional.”<sup>752</sup> The lumber code authorities “saw no further point in trying to enforce the regulations, and within three days they discharged most of their employees.”<sup>753</sup>

The dismissal of *Belcher* predictably “was followed by a new wave of code violations. Industrialists in every field argued that if the administration could so easily sidestep a test of the codes’ constitutionality, there was no reason why businesses large or small should be required to obey them.”<sup>754</sup> The NRA’s Compliance Division now had a “backlog of about eighteen thousand cases of wages and hours violations and another four thousand cases of unfair trade practices,” all of which awaited action.<sup>755</sup> But the enforcement office “made it known that unless there was a test of the law’s constitutionality, its work would be futile.”<sup>756</sup>

Just days before the *Belcher* dismissal, the Second Circuit had upheld portions of the conviction of the Schechter Brothers Poultry Corporation for violation of provisions of the New York Live Poultry Code, while ruling against the government on other issues.<sup>757</sup> Richberg and Blackwell Smith favored an expedited appeal to the Supreme Court. Frankfurter and Tommy Corcoran, by contrast, were “reluctant to use this case to test the NIRA and favored delay.”<sup>758</sup> The Frankfurter cohort “believed there would be no chance of securing approval of the NIRA until it went back to Congress for

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746 *Id.* at 86, 88.

747 *Id.* at 88.

748 *Id.*

749 *Id.*

750 *Id.*

751 *Id.* (internal quotation marks omitted).

752 *Id.*

753 *Id.*

754 *Id.*

755 *Id.* at 88–89.

756 *Id.* at 89.

757 *Id.* at 90–91.

758 *Id.* at 91.



extensive revisions.”<sup>759</sup> Frankfurter predicted “that an immediate court test would prove disastrous.”<sup>760</sup> Justice Department lawyers “were also unhappy with *Schechter* as a test case.”<sup>761</sup> The claim that federal regulation of Joe Schechter’s modest kosher poultry operation was necessary for the health of the national economy seemed to them “ridiculous.”<sup>762</sup> The Live Poultry Code’s detailed provisions regulating selection of chickens from coops “were hardly calculated to electrify any court to the need for federal regulations.”<sup>763</sup> Moreover, sending Schechter and his brothers to prison “for violations of a system ignored by big business magnates was not a welcome prospect and was bound to grate on humanitarian sensibilities.”<sup>764</sup>

On April 3, Richberg sent the vacationing President a radiogram arguing that public opinion about the *Belcher* dismissal was “‘very unfavorable throughout the U.S.,’” with the result that enforcement of the codes was “‘generally impossible.’”<sup>765</sup> He urged that “[p]rompt action will reverse general retreat and strengthen entire situation. . . . Otherwise, present discouragement will probably destroy industrial program.”<sup>766</sup> Corcoran countered with his own radiogram, but to no avail. Solicitor General Stanley Reed reminded Roosevelt “how hard it would be in a case involving New York poultry dealers to show that their wages and hours affected interstate commerce,” telling him, “[t]his is the most difficult type of labor provision to maintain.”<sup>767</sup> But he did not succeed in dissuading the President. On April 4, Cummings announced to the press that the government would appeal the *Schechter* case to the Supreme Court, and the appeal was filed a week later. On April 15 the Supreme Court granted certiorari, and oral argument was set for May 2. Smith and Richberg “had won their battle in spite of the formidable opposition from Frankfurter, Corcoran, and Reed, but the tactical victory saddled them with what Smith described as ‘the weakest possible case.’”<sup>768</sup>

Reed and Richberg had a difficult time at oral argument, particularly on the issue of whether the Schechters’ activities had a sufficient effect on interstate commerce. As Frankfurter and Corcoran had anticipated, the government lost the case by the lopsided vote of nine to zero.<sup>769</sup> Two years later, veteran *New York Times* reporter Arthur Krock “expressed amazement that ‘as good a lawyer as Donald Richberg could ever have been willing to stake his

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759 *Id.*

760 *Id.*

761 *Id.*

762 *Id.* at 92.

763 *Id.*

764 *Id.*

765 *Id.*

766 *Id.*

767 *Id.* at 93.

768 *Id.* at 93–94 (quoting IRONS, *supra* note 48, at 85).

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

legal reputation on the assumption that the government would win so narrow a test.’<sup>770</sup>

Professor McKenna reports that in the drafting of the AAA, “[a]s with the NRA, the drafters framed legislation that rested on vague constitutional theories and imprecise legal foundations.”<sup>771</sup> “Less important pieces of New Deal legislation were framed more carefully and rested on sounder constitutional grounds . . . .”<sup>772</sup> AAA legal counsel Jerome Frank “found many sections of the statute unintelligible. He said Frederick Lee, Washington’s legislative counsel for the Farm Bureau Federation, was just ‘a sloppy draftsman.’”<sup>773</sup> Frank believed that provisions of the statute were “badly worded and had been clumsily handled in the drafting stage. When he questioned any one of the sixty lawyers on his staff about sections of the AAA, he found that ‘nobody could make head or tail of it. It was just absurdly incomprehensible.’”<sup>774</sup>

The bill’s drafters produced a plan similar to one that had been introduced in Congress by agrarian Republicans the previous year. Stanley Reed, then general counsel to the Federal Farm Bureau, had regarded that bill as unconstitutional.<sup>775</sup> The AAA, argues Professor McKenna, gave the federal government “unprecedented powers.”<sup>776</sup> It was “as sweeping and constitutionally unsound as the NRA.”<sup>777</sup> The statute’s coverage “was not limited to transactions in interstate commerce,” and it brought “every farmer-producer under federal regulation.”<sup>778</sup> The AAA thus was “constitutionally vulnerable from the outset.”<sup>779</sup> It showed “little concern either for constitutional limitations or the authority of the states.”<sup>780</sup> Professor McKenna notes that the statute’s shortcomings “could be fatal flaws in the eyes of many members of the federal judiciary, who shared few if any of the constitutional assumptions of the bill’s framers.”<sup>781</sup>

The time for debate over the AAA was limited to less than six hours in the House, but “constitutionalists in both houses found flaws in the measure’s largely unprecedented tax provisions.”<sup>782</sup> For instance, Pennsylvania Representative James Beck, the former Solicitor General, “delivered an impassioned speech in which he argued that the Constitution never vested in Congress any power over agriculture, a jurisdiction reserved to the states.”<sup>783</sup>

770 MCKENNA, *supra* note 48, at 94.

771 *Id.* at 119.

772 *Id.* at 121.

773 *Id.* at 124.

774 *Id.*

775 *Id.* at 120.

776 *Id.* at 124.

777 *Id.* at 121.

778 *Id.* at 123.

779 *Id.* at 121.

780 *Id.*

781 *Id.*

782 *Id.* at 121–22.

783 *Id.* at 122.

Pennsylvania's Republican Senator David A. Reed also "attacked the processing tax provision, arguing that strong constitutional precedents firmly established the rule that Congress cannot take from the pocket of *A* and put the proceeds into the pocket of *B*."<sup>784</sup> Reed reminded his colleagues that the Court had held in *Loan Ass'n v. Topeka*<sup>785</sup> that "use of public funds to aid private enterprise 'is no less a robbery because it is done under the forms of law and is called taxation.'"<sup>786</sup> This, Professor McKenna points out, "was the same point raised by Stanley Reed when the Domestic Allotment Plan was first introduced in Congress in 1932."<sup>787</sup> Such critics regarded the AAA's use of the taxing power as "the weakest constitutional foundation for such broad-based regulations."<sup>788</sup> Indeed, even Secretary of Agriculture Henry Wallace told a fellow cabinet member "that he wished the Court would go ahead and overturn the processing tax so that Congress would be forced to place the AAA on more secure footing—perhaps by drawing its funding from general tax revenues."<sup>789</sup>

Senator Reed "ventured the guess that not half a dozen senators believed the bill was constitutional. But it was much easier, he said, for his colleagues, faced with the clamor for farm relief and recovery, 'to shrug their shoulders and pass the responsibility on to the Supreme Court.'"<sup>790</sup> Arguing in support of the bill, Senator John Bankhead of Alabama "conceded that the processing tax issue introduced a serious question, but predicted that ultimately the Supreme Court would uphold the 'broad and plenary' powers exercised by Congress."<sup>791</sup> "In the rush to complete action on the bill before the end of the session," Professor McKenna concludes, "few lawmakers gave much thought to matters of constitutionality."<sup>792</sup>

The Act was greeted with a flurry of litigation in the lower federal courts. By September of 1935, more than a thousand challenges to the processing tax had been filed, resulting in the granting of over 500 temporary injunctions against its collection. In only a mere twenty-one cases had a petition for a temporary injunction been denied.<sup>793</sup> The case in which the Court would decide the constitutionality of the processing tax came out of Massachusetts. *United States v. Butler*<sup>794</sup> was a suit brought by the receivers of the bankrupt Hoosac Mills cotton processing company. The government had presented a claim to the receivers of the bankrupt company for payment of processing taxes on cotton. The receivers resisted all attempts to collect the taxes on the ground that they were intended to finance a program of agricultural regula-

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784 *Id.* at 123.

785 87 U.S. (20 Wall.) 655 (1874).

786 MCKENNA, *supra* note 48, at 123.

787 *Id.*

788 *Id.* at 127.

789 SHESOL, *supra* note 2, at 176.

790 MCKENNA, *supra* note 48, at 124.

791 *Id.*

792 *Id.* at 125.

793 *Id.* at 131 n.34.

794 297 U.S. 1 (1935).

tion that lay beyond congressional power.<sup>795</sup> “The federal district court in Boston upheld the taxes as valid and ordered them paid,” but the First Circuit reversed.<sup>796</sup> The Supreme Court heard oral argument in early December of 1935.<sup>797</sup>

Solicitor General Stanley Reed began the argument for the government, but he “appeared tense and grew ashen during his presentation. When the chief justice, McReynolds, and Van Devanter let loose with a barrage of stinging questions, Reed began to sway at the rostrum.”<sup>798</sup> Tommy Corcoran later recalled that Justice McReynolds “so viciously abused Reed that he became physically ill and was compelled to interrupt his argument.”<sup>799</sup> “I’m afraid I’m going to have to ask the Court’s indulgence,” he murmured as he sank into a chair.<sup>800</sup> The Court’s Deputy Marshal “rushed over to administer spirits of ammonia.”<sup>801</sup> By contrast, “[a]n eloquent presentation was made by George Wharton Pepper, the high-powered Philadelphia lawyer representing the cotton mills.”<sup>802</sup>

In a voice throbbing with emotion, he ended his peroration: “May it please your Honors, I am standing here today to plead the cause of the America I have loved, and I pray to Almighty God that not in my time may ‘the land of the regimented’ be accepted as a worthy substitute for the ‘land of the free.’”<sup>803</sup>

Professor McKenna reports that “[i]n conference, the chief justice at first seemed to favor upholding the AAA, but five justices were unalterably opposed to it and entertained not the slightest doubt about its unconstitutionality.”<sup>804</sup> She cites no source in support of this statement, and it is at odds with what Justice Stone recorded in a contemporaneous memorandum. In a document dated February 4, 1936, Stone reports that *Butler*

was argued on December 9th and 10th, 1935, and was brought up at conference by the Chief Justice the following Saturday. In presenting the case he recommended that the statute be overturned for improper delegation. . . . After a painful elaboration of these ideas he concluded by saying that if we were to come to the merits he thought that the A.A.A. was a regulation of agriculture within the states and an invasion of the reserved power of the states.<sup>805</sup>

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795 McKENNA, *supra* note 48, at 131.

796 *Id.* at 132.

797 *Id.*

798 *Id.*

799 *Id.*

800 *Id.*

801 *Id.*

802 *Id.*

803 *Id.*

804 *Id.*

805 Memorandum Re: No. 401, *United States v. Butler* (Feb. 4, 1936) (Harlan Fiske Stone MSS, Box 62, on file with Manuscript Division, Library of Congress).

Stone reports that none of the other Justices in the *Butler* majority were prepared to rest the case on the ground of excessive delegation, but that the Four Horsemen and Roberts agreed to rest it on the other ground suggested by the Chief Justice.<sup>806</sup> Professor McKenna claims (again without cited support) that Chief Justice Hughes took these positions only at a later conference,<sup>807</sup> but Stone's memo shows that the Chief Justice took them from the outset. Hughes did not change his vote in *Butler*.

Professor McKenna claims that the *Butler* ruling deprived the AAA of the "financial means to maintain crop restrictions through farm subsidies."<sup>808</sup> "In effect," she writes, "the decision crippled the AAA."<sup>809</sup> It is true that the government was now powerless to collect the processing taxes from which the acreage reduction payments were financed, but that did not prevent the government from continuing to make acreage reduction payments due under existing contracts. Such payments could be made out of general revenue, and were thus immune from constitutional challenge under the taxpayer standing doctrine of *Frothingham v. Mellon*.<sup>810</sup>

Thus, Professor McKenna relates that, at a private Washington dinner party, Justice Stone told guests that "after *Butler* he thought it would be very difficult for Congress to draft an alternative farm measure that would meet the objections of the Court majority."<sup>811</sup> But she recognizes that "Stone underestimated the tenacity of administration draftsmen. Guided by Secretary Wallace and other department officials, they set to work on a bill preserving as many features of the original farm bill as possible."<sup>812</sup> They quickly designed "a new program permitting the government to pay farmers benefits for reducing acreage in return for soil conservation. Within a short time, Wallace won approval for a new agricultural relief measure, the Soil Conservation and Domestic Allotment Act of 1936, which levied no taxes" that would provide an opening for a constitutional challenge.<sup>813</sup>

A similar dynamic would surface in the effort to address problems in the coal industry. Professor McKenna reports that Roosevelt "had nothing to do" with the drafting of the Guffey Coal Act of 1935, and "refused to commit himself" to the Act.<sup>814</sup> It was only when leaders of the United Mine Workers "threatened a nationwide strike if the Guffey bill did not pass" that FDR "halfheartedly endorsed it."<sup>815</sup> He "doubted that, if passed, it could withstand a constitutional test, but he put these doubts aside when faced with the threat of a crippling strike."<sup>816</sup> Justice Department lawyers also "considered the

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806 *Id.*

807 MCKENNA, *supra* note 48, at 132–33.

808 *Id.* at 139.

809 *Id.*

810 See ALFANGE, *supra* note 290, at 180–81.

811 MCKENNA, *supra* note 48, at 139.

812 *Id.* at 140.

813 *Id.*

814 *Id.* at 198.

815 *Id.*

816 *Id.*

Guffey Act unconstitutional, especially in the light of *Schechter*, and they told Cummings as much.”<sup>817</sup> Indeed, a Justice Department memo produced in the spring of 1936 stated that “‘the Government can feel very certain of losing the Guffey Act’” case.<sup>818</sup> Cummings wrote in his diary that he thought that the Act was “‘clearly unconstitutional.’”<sup>819</sup> When a subcommittee of the House Ways and Means Committee asked Cummings to testify concerning the bill’s constitutionality in the hearings on the bill in June of 1935, Cummings tried to avoid an appearance. As he wrote in his diary, he “‘could not give them much comfort on the constitutional features of the Act.’”<sup>820</sup> But the subcommittee chairman insisted that he appear, and “[i]n view of the precarious position of the bill, the president advised him to go before the committee.”<sup>821</sup> Cummings did appear, but he declined to offer an opinion on the bill’s constitutionality. Instead, he “divert[ed] attention to a line of cases that could be regarded as favorable to the principles involved in the bill and to another series that could be regarded as adverse.”<sup>822</sup> When pressed, Cummings stated that it would be “desirable . . . to approve the bill—to push it through and leave the question of constitutionality to the courts.”<sup>823</sup> Cummings argued that “even if the bill could not meet the constitutional test, there would likely be ‘further clarification’ by the Supreme Court of the range within which legislation on topics of this kind might safely be enacted.”<sup>824</sup> He testified that “the purpose was not to pass an unconstitutional bill, but to endeavor to ascertain the constitutional limits, if any, within which the government might effectively act.”<sup>825</sup>

On July 4, two days before Cummings gave his testimony, the subcommittee solicited the President’s view of the bill. Roosevelt responded on the date of Cummings’s appearance before the subcommittee with a letter to Chairman Samuel B. Hill drafted by Cummings and Stanley Reed. In the letter, Roosevelt maintained that “fierce competition, overexpansion, destructive price reductions, and labor strife” in the coal industry “were directly affecting interstate commerce, even though the mining of coal, if considered separate from its distribution, could be classified as an intrastate activity.”<sup>826</sup> The bill’s constitutionality “would depend on the final conclusion as to whether production conditions directly affected . . . or obstructed interstate commerce” in coal.<sup>827</sup> The “most controversial”<sup>828</sup> part of the letter was its conclusion:

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817 *Id.*

818 *Id.* at 195.

819 *Id.* at 198 n.53.

820 *Id.* at 198.

821 *Id.* at 199.

822 *Id.*

823 *Id.*

824 *Id.* at 199 n.54.

825 *Id.*

826 *Id.* at 199.

827 *Id.* at 199–200.

828 *Id.* at 200.

Manifestly, no one is in a position to give assurance that the proposed act will withstand constitutional tests for the simple fact is that you can get not 10 but 1,000 different legal opinions on the subject. But the situation is so urgent and the benefits of the legislation so evident that all doubts should be resolved in favor of the bill, leaving to the courts, in an orderly fashion, the ultimate question of constitutionality. A decision by the Supreme Court relative to this measure would be helpful as indicating with increasing clarity, the constitutional limits within which this Government must operate. . . . I hope your committee will not permit doubts as to constitutionality, however reasonable, to block the suggested legislation.<sup>829</sup>

This last sentence, the only one drafted by the President himself, “created an instantaneous furor. FDR was condemned in the press and by members of both parties in Congress.”<sup>830</sup> Roosevelt was accused of “deliberately flouting the Constitution and showing contempt for the Supreme Court.”<sup>831</sup> The letter, in short, “proved embarrassing” to the administration’s claims that it was trying to solve the nation’s economic problems through constitutional means.<sup>832</sup>

At the conclusion of the hearings on the Guffey coal bill, four of the subcommittee’s seven members believed that the bill was unconstitutional. The White House was able to persuade the subcommittee to report the measure to the full House Ways and Means Committee “‘without recommendation,’” but that was not the end of the struggle.<sup>833</sup> In the full committee, eight of the eighteen Democrats and six of the seven Republicans were opposed to the bill. After a series of secret meetings in which Democrats sought to obtain sufficient votes to secure a favorable report, the leadership finally succeeded. In a meeting held on August 12, the full committee voted the bill out favorably, “but only by the narrow margin of twelve to eleven,” and this was made possible only “by the expedient of persuading two members of the Democratic majority to withdraw their negative votes and merely answer ‘Present.’”<sup>834</sup>

Professor McKenna notes that the report of the committee’s minority “focused entirely on the bill’s unconstitutionality, arguing that stream of commerce cases like *Swift* . . . offered no precedent for the Guffey bill. In the business of mining coal, interstate commerce had not even commenced.”<sup>835</sup> The bill passed the Democrat-dominated House by a vote of 194 to 168. In the Senate, where the Democrats held sixty-nine of the ninety-six seats, the bill passed by the narrow margin of 45 to 37.<sup>836</sup> “Even with unrelenting

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829 *Id.* (quoting a letter from President Franklin Roosevelt to Representative Samuel B. Hill on July 6, 1935).

830 *Id.*

831 *Id.*

832 *Id.* at 201.

833 *Id.*

834 *Id.*

835 *Id.* at 201–02.

836 *Id.* at 202; *see also id.* at 202 n.62 (“In the Senate, twenty-four Democrats joined twelve Republicans and one Farmer-Laborite in opposition to the bill.”).

administration arm-twisting and open lobbying, substantial numbers of Democrats” who had “lingering doubts” about the bill’s constitutionality voted against passage.<sup>837</sup> Congressman Bertrand Snell of New York said that this was “‘the first time in the history of the country that the House passed a bill opposed by the subcommittee which wrote it, by the full committee which approved it, by the Rules Committee which brought it to the floor, and toward which the entire House organization was entirely indifferent.’”<sup>838</sup> In light of the large majorities by which the Wagner Act was passed, Professor McKenna observes that

it seems unlikely that the votes against the Guffey Act were motivated by any general animosity toward federal regulation of labor relations. Patently, many members of Congress sincerely doubted the act’s constitutionality. Their feelings were summed up by Senator Millard Tydings of Maryland, who gave this ominous forecast of the bill’s future: “Like an autumn flower it will be blown away by the first winter blast of the Court.”<sup>839</sup>

The labor provisions of the statute received a cool reception in the lower federal courts, with district court judges “issuing wholesale injunctions” against its enforcement.<sup>840</sup> Under these circumstances, Solicitor General Reed “pushed the *Carter* case up to the high bench.”<sup>841</sup> The Court’s majority invalidated the labor provisions and held that the price regulation provisions were inseparable and therefore must fall with the labor provisions.<sup>842</sup> But administration lawyers noted that the four dissenters had maintained that the price regulation provisions were separable and constitutional, and one of the Justices in the majority, Justice Roberts, was the author of *Nebbia*. They therefore concluded that a revised bill that dropped the labor provisions and simply regulated the price of coal could survive constitutional attack.<sup>843</sup> Such a statute was drafted and passed in 1937,<sup>844</sup> and was upheld in 1940 over the lone dissenting vote of Justice McReynolds.<sup>845</sup>

Thus, at a meeting between Roosevelt and Cummings “devoted to a post-mortem on the invalidated Guffey Coal Act, Cummings assured him that the substitute bill being drafted would likely be upheld by the Court in the light of the split opinion in *Carter*.”<sup>846</sup> Cummings “reminded the president that each adverse decision (e.g., the AAA and Guffey Coal Act rulings) left the door open to remedial legislation that was quickly drafted to meet the Court’s objections.”<sup>847</sup> In addition, the government “had been upheld in the

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837 *Id.* at 202.

838 *Id.*

839 *Id.*

840 *Id.* at 204.

841 *Id.* (emphasis added).

842 *Id.* at 206.

843 *Id.* at 209.

844 Bituminous Coal Act of 1937, Pub. L. No. 75-48, 50 Stat. 72.

845 *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940).

846 MCKENNA, *supra* note 48, at 225–26.

847 *Id.* at 226.



gold clause and TVA cases, and other New Deal measures had survived scrutiny.”<sup>848</sup> Moreover, the use of the spending power “in measures establishing the PWA and WPA had gone practically unchallenged. Cummings was confident that better-drafted legislation could withstand the constitutional test, even with the present Court.”<sup>849</sup> As Professor McKenna puts it, “New Dealers had been trying to conciliate the Court by drafting new statutes in conformity with its strictures.”<sup>850</sup>

Professor McKenna believes that this strategy worked. The Wagner Act, for example, was “[c]arefully crafted to withstand scrutiny by the Supreme Court,” and “established a substantial connection between the regulations it imposed and interstate commerce. Section I, outlining the policy behind the law, was rewritten after *Schechter* to specify the burden placed on interstate commerce by labor unrest.”<sup>851</sup> A number of administration officials, including Cummings, were doubtful that the Act could survive constitutional challenge in view of the Court’s decisions in *Schechter* and *Carter Coal*.<sup>852</sup> In retrospect, however, one can see that the more sanguine assessments of NLRB attorneys such as Charles Fahy and Warren Madden, who were much closer to the Wagner Act test cases, were considerably nearer to the mark. The Wagner Act was drafted and the test cases selected, briefed, and argued precisely so as to avoid the embarrassing fates of earlier New Deal initiatives.<sup>853</sup>

Similarly, Professor McKenna explains that the Court’s decisions upholding the Social Security Act were not surprising in light of the fact that several lower federal courts had “refused to restrain by injunctions the collection of Social Security taxes.”<sup>854</sup> Indeed, the challenge that first reached the Supreme Court was filed by the Steward Machine Company, “one of two hundred Alabama companies that had failed to obtain injunctions in the lower courts restraining the government from collecting the levies.”<sup>855</sup> Professor McKenna observes that

[i]n its permissive, rather vague interpretation of the term “general welfare,” *Steward* (and its companion case, *Helvering*) seemed to repudiate the *Butler* ruling’s view that Congress, while exercising its power to tax for the general welfare, is required by the Tenth Amendment to eschew regulation of matters historically controlled by the states.<sup>856</sup>

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848 *Id.*

849 *Id.*

850 *Id.* at 193.

851 *Id.* at 424.

852 *Id.* at 425.

853 See, e.g., IRONS, *supra* note 48, at 227, 240–43 (“Witt and his colleagues were guided in their search by a ‘master plan’ which specified in detail the types of test cases best suited for eventual submission to the Supreme Court. This long-range plan took shape even before the Wagner Act was signed . . .”).

854 MCKENNA, *supra* note 48, at 432–33.

855 *Id.* at 433.

856 *Id.* at 434.

But she then goes on to point out that the *Butler* majority “had in a general way favored the expansive general view” of the spending power, and that “the Social Security cases were much stronger ones for the government, or so they appeared, not only to Hughes and Roberts, but to Van Devanter and Sutherland as well,” who also “joined Cardozo’s majority in *Helvering* to uphold the old-age benefits of the [Social Security Act].”<sup>857</sup> Indeed, Van Devanter and Sutherland “also explicitly agreed with most of Cardozo’s analysis in *Steward* upholding the unemployment relief program,” dissenting only because they objected to the requirement that state unemployment funds be deposited with the federal government.<sup>858</sup> Just as an overwhelming majority of Republicans in Congress had voted in favor of the Social Security Act,<sup>859</sup> so a supermajority of the Justices believed that it was in its essential features a constitutional exercise of congressional power.

With respect to the minimum wage cases, Professor McKenna points out that in *Tipaldo*, “Henry Epstein, the state’s solicitor general, and Dean Acheson, arguing for the National Consumers’ League, tried to show that the state law was distinguishable from the D.C. statute invalidated in 1923, but their brief did not specifically ask the Court to overrule *Adkins*.”<sup>860</sup> Justices Stone, Brandeis, and Cardozo “considered *Adkins* bad law and wanted to overrule it,” she relates, but Justice Roberts insisted “that the Court ought not to reach out for issues that were not before it.”<sup>861</sup> Roberts “found the New York law indistinguishable from the one in *Adkins*,” and therefore refused to join Hughes’s opinion adhering to *Adkins* while distinguishing the New York law.<sup>862</sup> Justice Butler’s majority opinion thus was “at first based narrowly” on the lack of a constitutionally significant distinction between the statutes and the failure of the New York Attorney General to request that *Adkins* be overruled.<sup>863</sup> But “the circulation of a biting dissent by Justice Stone so infuriated” Butler “that he decided to broaden the opinion, moving from the technical point to a bold defense of freedom of contract as enunciated in *Adkins*.”<sup>864</sup> Thus, on Professor McKenna’s view, Roberts’s vote to strike down the minimum wage statute in *Tipaldo* was not an expression of his views on the merits, but instead an instance of adherence to a precedent where its authority had not been challenged directly, and where, due to the position of the Chief Justice, there was no majority for overruling it. She concludes of Roberts that “there is good reason to believe that his vote in *Parrish*, though not in *Tipaldo*, reflects [his] previously held substantive views.”<sup>865</sup> Though

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857 *Id.* at 435.

858 *Id.*

859 CUSHMAN, *supra* note 1, at 29. The Act passed the House by a vote of 372 to 33 and the Senate by a tally of 76 to 6. DEXTER PERKINS, *THE NEW AGE OF FRANKLIN ROOSEVELT* 33 (1957).

860 MCKENNA, *supra* note 48, at 211.

861 *Id.* at 211–12.

862 *Id.* at 212.

863 *Id.*

864 *Id.*

865 *Id.* at 437.

she recognizes that “[i]t may never be possible to explain with any degree of exactitude why Roberts voted as he did in these cases,” she concurs in Professor Laurence Tribe’s judgment that Roberts “was influenced neither by public reaction to the Supreme Court’s rulings of 1935–36 nor by the election returns of November 1936, and certainly not by the court-packing threat of February 1937.”<sup>866</sup>

### CONCLUSION

More than a decade ago Professor Richard Friedman, himself a distinguished student of the Hughes Court,<sup>867</sup> wrote, “[w]e should do away with the oft-used term ‘constitutional revolution of 1937.’”<sup>868</sup> Professor Friedman argued that the Court’s decisions in 1937 “had significant antecedents that long antedated the Court-packing plan,” and that there was “no persuasive evidence” that those decisions “were caused by the politics surrounding Roosevelt’s initiative.”<sup>869</sup> As the popular accounts authored by Mr. Shogan and Mr. Solomon demonstrate, we have not yet arrived at a point where it can be said that everyone has heeded Professor Friedman’s admonition. Particularly for journalists such as Mr. Shogan and Mr. Solomon, it is entirely understandable that they would cleave to an account that understands the behavior of the Justices in political terms, and sees their decisions as driven by forces external to the law. Long and successful careers in their chosen profession no doubt have outfitted them with well-developed views about the wellsprings of human behavior, and they might well be reluctant to devote the time and effort that would be necessary to master the details and nuances of the period’s constitutional doctrine.<sup>870</sup>

For many years most scholarly accounts of the period shared the presuppositions one finds in such popular accounts. The recent academic treatments by Professors McKenna, Parrish, and Ross, however, each engage in a considerably more sophisticated fashion with the internal, legal dimensions of the story. None of these three scholars ignores the political and social context in which the Court operated, of course, and none of them maintains that the Justices were hermetically insulated from broader social and cultural

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866 *Id.* at 436.

867 *See, e.g.*, Richard D. Friedman, *A Reaffirmation: The Authenticity of the Roberts Memorandum, or Felix the Non-Forger*, 142 U. PA. L. REV. 1985 (1994); Richard D. Friedman, *Chief Justice Hughes’ Letter on Court-Packing*, 22 J. SUP. CT. HIST. 76 (1997); Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891 (1994).

868 Friedman, *supra* note 3, at 454.

869 *Id.*

870 *See, e.g.*, Ranjit S. Dighe, Book Review, 9 ENTERPRISE & SOC’Y 383, 384 (2008) (“Shogan . . . brings a journalist’s sensibility to this book, eschewing historical debates.”); Michael E. Parrish, Book Review, 96 J. AM. HIST. 1229, 1230 (2010) (“Shogan does not address the rich outpouring of scholarship on the Charles Evans Hughes court and the New Deal generated over the past two decades that provides a far more nuanced view of the constitutional confrontation between the justices and the New Deal in 1935–1936.”).

developments. But each of them recognizes, to varying degrees, the necessity of engaging seriously with the internal dimensions of the legal world if we are to cultivate a richer understanding of the period. By helping to raise the level of legal sophistication with which academics analyze and evaluate the jurisprudence of the Hughes Court, each of these scholars has performed a valuable service.<sup>871</sup>

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871 For laudatory reviews of Professor McKenna's book, see, for example, Gary Dean Best, Book Review, 90 J. AM. HIST. 1511, 1511 (2004) ("McKenna's book, in short, is a model for all who will hereafter write about FDR and the New Deal."); Roy E. Brownell II, Book Review, 33 PRESIDENTIAL STUD. Q. 454, 456 (2003) ("Taken all in all, McKenna's thoroughness and her thoughtful reevaluation of the court-packing controversy should ensure that *Franklin Roosevelt and the Great Constitutional War* will become one of, if not the, standard texts in the field on this subject."); Kermit L. Hall, *A Nest of Furies*, 86 JUDICATURE 263, 263 (2003) ("McKenna has devoted a lifetime of research and reflection to the subject, and the result is a superb contribution to the literature.").